SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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ANTHONY GORDON and PAUL BRAITHWAITE,

Plaintiffs,

- v -

SHAUN FRANCOIS, President, Local 372, Board of Education Employees, American Federation of State, County and Municipal Employees, in his personal capacity; DAVID KEYE, Treasurer, Local 372, Board of Education Employees, American Federation of State, County and Municipal Employees in his personal capacity; ANTONIO JORDAN, Trustee, Local 372, Board of Education Employees, American Federation of State, County and Municipal Employees in his personal capacity; MAYRA VEGA, Trustee, Local 372, Board of Education Employees, American Federation of State, County and Municipal Employees in her personal capacity; WILLIE MITCHELL, Trustee, Local 372, Board of Education Employees, American Federation of State, County and Municipal Employees in his personal capacity; and LOCAL 372, BOARD OF EDUCATION EMPLOYEES, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,

Defendants.

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INDEX NO.	654437/2020
MOTION DATE	01/01/2020, 10/02/2020
MOTION SEQ. NO.	001 002

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 17, 18, 19, 21, 22, 24, 25, 26, 27, 28, 29, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49

were read on this motion by plaintiffs for PREL INJUNCTION/TEMP REST ORDR.

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 53, 54, 55, 56

were read on this motion by defendants to DISMISS.

Upon the foregoing documents, and after argument, the motion of plaintiffs Anthony Gordon and Paul Brathwaite[1] for an order restraining and enjoining defendants for the pendency

[1] The court understands from the filings that Mr. Brathwaite's name was misspelled as "Braithwaite" in the caption.

of this action (motion seq. no. 001) is granted to the extent set forth herein; and the motion of defendants Shaun Francois, David Keye, Antonio Jordan, Mayra Vega, Willie Mitchell, and Local 372, Board of Education Employees, American Federation of State, County and Municipal Employees to dismiss the verified complaint (motion seq. no. 002) is denied, in accord with the following memorandum. The motions are consolidated here for decision.

Background

This is an action for an accounting and breach of fiduciary duty commenced against officers and trustees of a local public employees' union. New York Board of Education Employees Local 372 ("Local 372") is a local union representing non-pedagogical employees at the New York City Department of Education (Verified Complaint ¶ 4).[2] Local 372 is affiliated with the American Federation of State, County and Municipal Employees ("AFSCME"), and is a constituent of AFSCME's administrative subdivision, District Council 37 ("DC 37") (*id.* ¶ 4). Plaintiffs Anthony Gordon and Paul Brathwaite are members of Local 372 (*id.* ¶ 2). Defendant Shaun Francois is the President of Local 372, a position he has held since July 2014 (*id.* ¶ 3). Defendant David Keye is the Secretary-Treasurer of Local 372, a position he has held since July 2014 (*id.* ¶ 5). Defendants Antonio Jordan, Mayra Vargas, and Willie Mitchell are Trustees of Local 372 (together, the "Trustees"), and have held their respective positions since at least 2017 (*id.* ¶ 6).

Plaintiffs allege that defendants have breached their fiduciary duties to Local 372 and violated the Local 372 Constitution by "overspending" the union's funds (*id.* ¶ 23) and by failing to make required financial disclosures to the union membership. Plaintiffs allege that, since his election as President of Local 372 in July 2014, Mr. Francois has "engaged in profligate

[2] Except as otherwise noted, the facts are set forth here as alleged in the verified complaint and are accepted as true for the purposes of this motion, as required on a motion to dismiss.

spending" of the union's funds on "his own and other staff salaries, and some on numerous junkets and trips, car services, and redecoration of the Union's offices," causing Local 372's net assets to decline from $15,267,943 in 2014 to $10,069,757 in 2018, as reported on the union's IRS Form 990 (*id.* ¶ 11). Plaintiffs allege that this was done "with the indulgence of" Mr. Keye and the defendant Trustees (*id.*). Plaintiffs also object to Local 372's purchase of an office condominium located at 20 West 33rd Street (the "office condominium") for $9,289,821, partially financed by a $5,000,000 mortgage (*id.* ¶ 12).

Additionally, plaintiffs allege that defendants have failed to make certain financial disclosures to the union membership, as required by Local 372's Constitution, the Bill of Rights of Union Members, and AFSCME's Financial Standards Code (*id.* ¶¶ 14-16). Plaintiffs contend that "the monthly financial reports given to the Executive Board [of Local 372] have the barest of details"; that no report was given at the meeting where the office condominium purchase was reported to membership; and that the annual audit "has never been presented to a Membership Meeting, and is not attached to the minutes of those meetings" (*id.* ¶ 16). Plaintiffs plead that Mr. Gordon attempted to review Local 372's financial records in 2016 and 2017, but "was given extremely limited access" (*id.* ¶ 17). Mr. Gordon then brought charges against Mr. Francois "within the AFSCME Judicial procedure" pursuant to the AFSCME constitution (*id.*).[3] The majority of Gordon's charges in that proceeding were dismissed on the stated basis that he did not carry his burden of proof; but Gordon asserts in this action that he was handicapped in that proceeding on account of his inability to gain access to Local 372's financial records (*id.*). In short, plaintiffs allege that "[a]s a result of the individual defendants' breach of their fiduciary

[3] The term "Judicial" procedure refers to an internal union administrative procedure characterized as such in Article X of the AFSCME Constitution.

duties, and the secretive manner in which records were kept, defendants have caused Local 372 to lose in excess of $10 million" (*id.* ¶ 21).

The verified complaint interposes a cause of action sounding in breach of contract for breach of the Local 372 Constitution and a cause of action for breach of fiduciary duty for "[t]he failure of the Defendants to act in a prudent manner, both by overspending, and then by purchase of a 9.2 million dollar office at a time when the union's net assets were barely more than that sum" (*id.* ¶ 22-23). Plaintiffs also seek a temporary restraining order, preliminary injunction, and permanent injunction, restraining and enjoining defendants from preventing plaintiffs from examining Local 372's books and records, including all check ledgers, credit card reports, and audits, prior to the mailing of ballots in a forthcoming Local 372 election of officers and delegates, and seeking $10,000,000 in restitution of Local 372's funds (*id.* [prayer for relief] ¶¶ 1-2). Finally, plaintiffs seek to enjoin the individual defendants from utilizing union funds or union counsel to defend this lawsuit.

This action was commenced concurrently with an action regarding the forthcoming Local 372 election, captioned *Paul Braithwaite and Anthony Gordon against Shaun Francois, as President of New York City Board of Education Employees Local 372, American Federation of State, County and Municipal Employees, and Yvette Elliott, or her successor in office, as Chairperson of the Election Committee of The New York City Board of Education Employees Local 372, American Federation of State County and Municipal Employees,* New York County index Number 654162/2020 (the "Related Action"). In the Related Action, plaintiffs seek a stay and other relief in connection with Local 372's upcoming election for officers and union delegates to DC 37. At commencement, plaintiffs moved by order to show cause in both actions for temporary restraining orders staying the upcoming election pending the outcome of each

case. The order to show cause in the Related Action, which includes a temporary restraining order that restrained defendants from mailing a ballot to the members of Local 372 for the election of officers and delegates, was signed and entered on September 2, 2020, and that stay remains in effect.[4]

By Notice of Removal (28 USC 1441 [c] [1] [A]), defendants caused this action to be removed to U.S. District Court, S.D.N.Y. (*see*, NYSCEF Doc. No. 20). That notice specifically relied upon federal law through its reference to "a claim arising under the Constitution, laws, or treaties of the United States" and its citation to "Title IV of the Labor-Management Reporting and Disclosure Act (29 U.S.C. §482(a)-(c); ('LMRDA'))" (NYSCEF Doc. No. 20 ¶¶ 1-2) and its further citation to federal case law, *i.e.*, *Brown v Sambrotto* (523 F Supp 127 [SDNY 1981], *appeal dismissed* 685 F2d 423 [1982]) (NYSCEF Doc. No. 20 ¶ 2; *see also, id.*, ¶¶ 11, 16 [making further reference to federal law]).

By order dated September 25, 2020, the U.S. District Court remanded this action to this court (*see*, NYSCEF Doc. No. 23).

Defendants move to dismiss the complaint in this action on the grounds that Plaintiffs are precluded from bringing this action because they failed to exhaust all administrative remedies; that Plaintiffs have failed to state a cause of action; and that they have failed to demonstrate their entitlement to injunctive relief.

On a motion to dismiss brought under CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citations omitted]). "Whether a

[4] The decision and order of this court in the Related Action, of even date herewith, is docketed in said action. Familiarity therewith will be presumed.

plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 38 [2018]), but a pleading consisting of "bare legal conclusions" is insufficient (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied sub nom Spiegel v Rowland*, 552 US 1257 [2008]) and "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Discussion

A. Statute of Limitations

As a threshold matter, defendants assert that the case should be dismissed because plaintiffs' claim for breach of fiduciary duty is barred by a three-year statute of limitations, while plaintiffs contend that a six-year statute of limitations applies. "New York law does not provide any single limitations period for breach of fiduciary duty claims" (*Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003]). Rather, the applicable statute of limitations for breach of fiduciary duty depends on the substantive remedy sought (*Cusimano v Schnurr*, 137 AD3d 527, 529 [1st Dept 2016]). "Where the relief sought is equitable in nature, the six-year limitations period of CPLR 213(1) applies, but if the claim is for monetary relief, a three-year limitations applies" (*id.*). In this matter, plaintiffs seek both equitable and monetary relief. Specifically, the complaint seeks an injunction that would allow them to "examine Local 372's books and records, including all check ledgers, credit card reports, and audits, prior to the to the mailing of ballots in the upcoming Local 372 officer election" and they also seek to "[r]equire defendants to pay Local 372 $10 million in restitution for their mis-expenditure of Local 372's money and their failure to exercise prudent judgment" (Verified Complaint [prayer for relief] ¶¶ 1-2).

The case of *Spitzer v Schussel* (7 Misc 3d 171 [Sup Ct NY County 2005] [Richter, J.]) is particularly instructive in situations such as this where there is "a mix of both equitable and monetary remedies" sought on a claim for breach of fiduciary duty (*id.*, at 173). In that case, the New York State Attorney General commenced an action against the Board of Directors of a not-for-profit corporation, alleging that a member of the board had breached his fiduciary duty of loyalty and care by engaging in numerous self-dealing transactions and that the remaining defendant board members had breached their fiduciary duties by failing to prevent the misconduct. The Attorney General sought relief in the form of an accounting and other equitable relief in addition to monetary damages, but the court held that "the gravamen of the complaint is equitable in nature" and "[t]he money damages are merely meant to make the nonprofit organization whole, and thus are akin to an equitable remedy" (*id.*, at 173-174). Such is the case in the matter presently before this court. Although the complaint seeks monetary damages, the gravamen of the complaint is equitable in nature and the monetary damages sought are in the form of restitution of funds to the union, which is akin to an equitable remedy (*see also, DiBartolo v Battery Place Assocs.*, 84 AD3d 474, 476 [1st Dept 2011] ["'where suits alleging a breach of fiduciary duty seek *only money* damages, . . . a three-year statute of limitations applies'"]). Therefore, it is the holding of this court that the applicable statute of limitations is six-years and the plaintiffs' claim for breach of fiduciary duty is not time-barred on account of the presence of a monetary component as a part of the overall requested relief which is, substantially, equitable in nature.

B. Failure to Exhaust Administrative Remedies

Defendants also move to dismiss the complaint on the stated grounds that plaintiffs are precluded from bringing this action because they did not exhaust all internal union remedies

prior to bringing this action. Plaintiffs contend that they did exhaust all remedies in their prior interactions with the union; that the pursuit of further internal remedies would be futile; and that exhaustion of administrative remedies is not required because they will suffer irreparable harm if they are not permitted to examine the books and records of Local 372 prior to the upcoming election of officers and delegates.

The record indicates that plaintiffs, unrepresented at the time, did their best to exhaust AFSCME's internal judicial procedure, as outlined at length in Mr. Gordon's affidavit (*see*, NYSCEF Doc No 40, *passim*), but to no avail. Gordon further attests that AFSCME told him that it had no authority to investigate a breach of fiduciary duty in a local union, leaving Gordon in a position of having to substantiate his charges of malfeasance without the practical ability to gain access to Local 372's financial records. As Gordon attests:

> [E]very time I go to the union office I am allowed to see (not copy) summary documents, listing some expenditures, but never given the right to look at any ledgers, much less primary documents. My visits are limited to 30-40 minutes. I am told "the Finance Committee approved this," but I am never given copies of Finance Committee minutes.

(NYSCEF Doc No 40 ¶ 3.) This attestation correlates to the verified complaint's allegation about being afforded very limited access to union records, and that "he was not shown the audits, or ledgers that would explain what all the expenses were about" (Verified Complaint ¶ 17).

In terms of Gordon's efforts to raise his issues through internal union channels, he notes the following:

- On February 14, 2017, Gordon wrote to AFSCME President Lee Saunders about what he felt was an inordinately massive expenditure of union funds, as well as what he felt was the practical impossibility to gain access to information (*see*, NYSCEF Doc No 43).
- On March 22, 2017, John English, the New York Field Services Director for AFSCME, responded to Gordon (*see*, NYSCEF Doc No 44), stating that AFSCME had "no

authority" to "conduct an investigation into either a local union or its officers." Mr. English's recommendation was for Gordon to "exercise your rights under Article X of the [AFSCME] Constitution if you feel it appropriate" (*id.*).[5]

- Gordon sent a lengthy reply to Mr. English (NYSCEF Doc No 45), and, thereafter, on March 27, 2017, Gordon, along with six co-members, filed 18 charges with Local 372, in accord with AFSCME Field Services Director English's recommendation to follow that procedural route (*see*, NYSCEF Doc No 46 [First Complaint and Charges]). Neither Gordon or any of the other complainants were represented by counsel, although the union *was* (*see*, NYSCEF Doc No 40 ¶ 6).
- On May 8, 2017, Gordon, along with co-members, filed a second set of charges – 17 charges (*see*, NYSCEF Doc No 47 [Second Complaint and Charges]) asserting more allegations, relating to the union's creation of a Finance Committee and challenging President Francois' freedom to spend sums, without approval, up to $25,000. Neither Gordon or any of the other complainants were represented by counsel, although the union *was* (*see*, NYSCEF Doc No 40 ¶ 6).
- Gordon attests that on the day of the union's internal administrative hearing on the above charges, he was furnished documents which he had never seen before, which fall into the categories of documents he had been trying to gain access to for periods of time prior to the hearing, such as audits for years 2014 through 2016 (NYSCEF Doc. Nos. 25-27), and

[5] Article X of the AFSCME Constitution, titled "Judicial Procedure," enables union members to file charges against members or staff employees of the union. Section 2 recognizes, as grounds for such filing, improper use of union funds, among other grounds (*see*, NYSCEF Doc No 50 in the Related Action [*Braithwaite v Francois*, index No. 654162/2020], and referenced as Exhibit 2 in NYSCEF Doc No 35 in this action).

that he was examined at the hearing about information he had not been given access to (*see*, NYSCEF Doc. No. 40 ¶ 6).

- The "Judicial Panel" of Local 372 issued decisions, under cover of its chairperson, substantially dismissing all the charges (NYSCEF Doc. Nos. 16, 38). Gordon had written a lengthy letter to the Judicial Panel Chairperson (NYSCEF Doc. No. 48) complaining of what he felt were procedural irregularities. To quote Gordon, "I cannot imagine anything more that I or Plaintiff Brathwaite could do to exhaust internal union procedures . . . ." (NYSCEF Doc. No. 40 ¶ 7).

Defendants dispute the notion that plaintiffs have done all they can to exhaust internal administrative avenues with regard to their efforts to gain access to the materials they seek. However, courts have held that the need to exhaust internal union remedies is not absolutely applicable in all circumstances. In *Maineculf v Robinson* (19 Misc 2d 230 [Sup Ct Kings County 1958], the court addressed just such an issue – also involving a pre-election context, as in this case – in the following manner, stating:

> We are now brought to the main question involved, that is whether plaintiffs . . . have exhausted their remedies within the union so that they are now free to resort to the courts in order to obtain relief, and if they have not exhausted their remedies would they be inadequate or require plaintiffs "to make continued futile efforts beyond a reasonable time within which to obtain relief" (*Browne v. Hibbets*, 290 N.Y. 459, 466; *Madden v. Atkins*, 4 AD2d 1.) Defendants assert that the order of the president of the local and the decision of the president of the union should have, under article XIX of the constitution, been appealed to the district council of the union, and, failing to secure a favorable decision, then to the executive council and then to the national convention. . . . "Further, insofar as appeals to National's executive committee and to the national convention are concerned, it appears without question that such appeals would not be resolved within a reasonable time". **The date of election herein has been set by the union for February 1, 1958. It is thus apparent that to require the plaintiffs to complete the cycle, as indicated in the union's constitution, would deprive them of their rights which the constitution attempts to protect.** Under such circumstances, the court assumes jurisdiction of this matter, and, grants the motion in all respects.

(*Maineculf, supra*, at 234 [emphasis added].)

The Court of Appeals in *Madden v Atkins* (4 NY2d 283 [1958]) stated the following regarding exhaustion of union administrative remedies:

> We may dispose of the defendants' initial contention, that the plaintiffs failed to exhaust their remedies within the framework of the union, without extended discussion. It is, of course, true that, where timely and adequate relief is provided, an aggrieved member must first exhaust that organization's remedies before seeking redress from a court. *See Havens v. Dodge*, 250 N.Y. 617; *Rubens v. Weber*, 237 App.Div. 15, 18-19. But, it is equally true, "the law does not require a man who has been left without means of subsistence through the wrongful action of the union **to make continued futile efforts beyond a reasonable time** within which to obtain relief." *Browne v. Hibbets*, 290 N.Y. 459, 466; *see, also, Polin v. Kaplan*, 257 N.Y. 277, 282; *People ex rel. Deverell v. Musical Mut. Protective Union*, 118 N.Y. 101, 108, 23 N.E. 129, 130. In other words, as this court explicitly held in *Browne v. Hibbets*, 290 N.Y. 459, 466, *supra*, "The obligation imposed upon a union member is no more than **to use all reasonable means** to make use of the remedies available to him within the union organization before resorting to the courts" and the failure of a union tribunal "to consider within a reasonable time the appeal * * * permits an application to the courts . . . ."

(*Madden, supra*, at 291 [emphasis added].)

The court also finds federal law on this issue to be pertinent given the fact that defendants had, of their own accord and at their own initiative, endeavored to remove this action to federal district court, as noted above (*see*, NYSCEF Doc. No. 20). Federal courts have similarly held that exhaustion of remedies within the union context is not absolutely applicable in all circumstances. As stated by the U.S. Court of Appeals for the Second Circuit in *Detroy v American Guild of Variety Artists* (286 F2d 75 [2d Cir], *cert denied* 366 US 929 [1961]):

> If we look to the substantial body of state law on the subject, we find that the general rule requiring exhaustion before resort to a court has been almost entirely swallowed up by exceptions phrased in broad terms. See Annotation 168 A.L.R. 1462 (1947); Summers, *Legal Limitations on Union Discipline*, 64 Harv.L.Rev. 1049, 1086-92 (1951). Rather than decide whether exhaustion is proper by determining whether the union's action can be characterized as "void" (e.g., *Tesoriero v. Miller*, 1949, 274 App.Div. 670) or as "affecting property rights" (e.g., *Local Union No. 65 of Amalgamated Sheet Metal Workers, etc. v. Nalty*, 6 Cir., 1925, 7 F.2d 100), **we believe it preferable to consider each case on its own facts**. . . .

> Taking due account of the declared policy favoring self-regulation by unions, we nonetheless hold that **where the internal union remedy is uncertain** . . . **and the injury to the union member immediate** and difficult to compensate by means of a subsequent money award, exhaustion of union remedies ought not to be required.

(*Detroy*, *supra*, at 81 [emphasis added]. *See also*, *Zaloga v Ruggiero*, 529 F Supp 443, 444 [SDNY 1982] ["any member of a labor organization 'may be required' to exhaust the internal union remedies, not that he 'must' or 'is required to' exhaust them."].)

The confluence of the foregoing state and federal cases tells us that in certain circumstances (including the pre-election need to obtain information relevant to campaign issues, as in this case), the luxury of extended time in which to prosecute administrative appeals, or in which to continue to press union officials for documents in repeated succession after being frustrated in such attempts (as alleged), strict adherence to internal administrative rules of procedure may be excused so that union members can seek court review and determination regarding the issues that are of great concern to them, such as the need for election-relevant information (as in this action) or declarations of rights concerning election-notice and balloting practice (as in the Related Action).

As just alluded to, it is important to note the specific factual context of this action. Plaintiffs are not seeking access to books and records for general informational purposes alone. They are doing so preparatory to an upcoming election for the union's officers and, significantly, within the context of an upcoming election which the Related Action criticizes as being tainted with several procedural irregularities.[6] Plaintiffs are seeking an opportunity to review the union's records for the specific and narrowly-tailored purpose of being able to prepare their election campaign (*see*, Verified Complaint ¶¶ 18-20). And it is for this specific reason that

[6] And it is for that precise reason why the determinations of the within decision and order are intended to be limited to the particular facts of this case – and not stated as general principles for universal application to fact patterns dissimilar to that of the instant action and Related Action.

plaintiffs and the members of the union would incur irreparable harm if competing candidates for that election who are presently incumbents in the offices that are the subjects of the election are left free to inhibit competing candidates' access to union records prior to election (*see, Schermerhorn v Local 100, Transport Workers Union of America*, 1995 WL 677092, at *10 [SDNY 1995] ["A court must consider whether the available procedures are adequate and reasonable in light of the facts of the particular case"] [referencing *Johnson v General Motors*, 641 F2d 1075, 1079 (2d Cir. 1981)], *affd* 91 F3d 316 [2d Cir 1996]).

Another pertinent case is that of *Spinowitz v Herrity* (672 F Supp 670 [EDNY 1987]), which declared as follows:

> Plaintiffs also satisfy the requirement of irreparable injury which must be met before a preliminary injunction can issue. All the plaintiffs are candidates for office in a union election. Ballots for the election will be mailed out November 16, 1987. Plaintiffs note, correctly, that if they do not gain access to the union records promptly, their purpose for seeking the records will be vitiated – they will be unable to prepare campaign materials informing the membership of the improprieties they hope to discover. . . .

(*Spinowitz, supra*, at 674.)

We echo the cautionary note stated by the court in *Spinowitz*: "[t]his Court's ruling in no way implies that there is any merit to the plaintiffs' underlying claims of wasteful expenditure by the union's current officers. If the defendants are correct that all the challenged expenses were appropriate, then the examination of the union records will verify those expenses" (*Spinowitz, supra*, at 672).

The Local 372 Constitution's Bill of Rights of Union Members expressly provides that "Members shall have the right to a full and clear accounting of all union funds at all levels. Such accounting shall include, **but not be limited to**, periodic reports to the membership by the appropriate fiscal officers and periodic audits by officers elected for that purpose or by independent auditors not otherwise connected with the union." (NYSCEF Doc. No. 11

[emphasis added].) Moreover, Article II, Section 3, of the AFSCME Financial Standards Code (NYSCEF Doc. No. 13) addresses in some detail the protocols for union officials when it comes to determinations and processes for union fund expenditures, as follows:

> Investments may be made if they are consistent with provisions of the constitution of the affiliate. The signers on the investment accounts should be the same officers who are authorized to sign checks. It is suggested that any investments with greater than federally issued limits or with other than federally insured institutions be closely monitored. Affiliates should establish an investment policy and this policy should be approved by the Executive Board. Officers and employees have a fiduciary responsibility to manage and invest union funds prudently, in accordance with the affiliate's constitution and established investment policies for the exclusive benefit of the affiliate and its members. Investments in instruments that have the potential for loss of principal (e.g. stocks) should be avoided. Great care should be taken when deciding where and how to invest union funds. Generally, the safest form of investments includes treasury bills, certificates of deposit, and notes and bonds of government agencies. Other forms of investments, such as money market accounts, can also be used, provided that risk to principal is minimal.

Thus, in a case such as this, where plaintiffs have described and explained various bases for their suspicions concerning the prudence of the union's financial management by incumbent candidates for election (*see*, Verified Complaint ¶¶ 10-13), and have complained of instances of restricted access to the union's financial records (*see*, Verified Complaint ¶¶ 16-17), and where they seek necessary information preparatory to an election which the Related Action alleges has been improperly handled, both in terms of notice to members and in terms of exclusion of the plaintiffs' proposed slate of candidates – this court finds that no sufficient grounds have been set forth to justify summary dismissal of the complaint,[7] and further finds that sufficient grounds have been made out to conclude that the requested injunctive relief is necessary to prevent irreparable harm in the form of an uninformed election which may not be consistent with

[7] Defendants' attempt to secure dismissal based on factual assertions (*see*, NYSCEF Doc. No. 31 at 12 ["Union Books and Records Have Always been Readily Available to Plaintiffs"], 17 ["All of the expenditures plaintiffs point to . . . were authorized . . . ."], 20 ["In so far as the Trustees are concerned, . . . they have fulfilled their Constitutional obligations"]) runs afoul of the need to accept the allegations of the complaint as true on a motion to dismiss (*e.g.*, *Leon v Martinez*, 84 NY2d 83 [1994]).

members' rights to make an informed and democratic choice concerning their leadership and concerning the issues which such leadership will be responsible for.

C. Use of Union Funds and Union Counsel for the Defense of this Action

Plaintiffs seek an order precluding Local 372 from utilizing union funds to pay for legal representation in defense of the individual defendants in this action, and from utilizing union counsel for that purpose. While the caption refers to the individual defendants as being sued in their personal capacities, they are all officers or trustees of the union and are being sued herein for actions or omissions taken in connection with their official capacities as such.

Plaintiffs place heavy reliance on the case of *Tucker v Shaw* (378 F2d 304 [2d Cir 1967]) regarding "the issue of whether a union's regularly retained counsel should be allowed to represent some of its officers in a suit brought against them under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. Sec. 501(a), (b)." (*Id.*, at 305.) However, while the defendants herein are alleged to have breached their fiduciary duties, on account of imprudent union financial management, nothing in the complaint in this action approaches the types of allegations involved in *Tucker*, which related to outright misappropriation of union funds. One need only study the prayer for relief in this action to appreciate the difference between this action and *Tucker*. The primary demand for relief in this case is not even monetary. It is entirely equitable in its demand for an examination of books and records (*see*, NYSCEF Doc. No. 2 at 10). And even the secondary demand for relief, which does seek monetary restitution, speaks only in terms of a "failure to exercise prudent judgment" (*id.*). Such a demand recognizes that the real gravamen of this action is alleged mismanagement and malpractice by the individual defendants *qua* officeholders, irrespective of the "personal capacity" phraseology found in the caption.

The court notes, once more, that the strength of the complaint – at least, at this interlocutory stage – is its specific focus on the need for information to enable a proper and democratically informed election of officers.[8] This court has found, hereinabove, that there is sufficient merit, in this limited context, and given other circumstances noted above,[9] to direct that such informational access be afforded to the plaintiffs at this time. However, nothing contained in this decision and order can be construed as any finding at this time that the defendants have engaged in self-dealing or other improprieties rising to the level of the facts underlying the *Tucker* case.

Therefore, the court denies the application to preclude the defendants from utilizing union funds or union counsel in defense of this action.

Accordingly, it is

ORDERED that defendants' motion to dismiss the verified complaint is denied; and it is further

ORDERED that plaintiffs' motion for a preliminary injunction is granted as follows: (i) compelling defendants to permit full access to the plaintiffs and their agents to engage in an examination of the books and records of Local 372, including all general ledgers, check ledgers, payroll ledgers, and credit card invoices, relevant to the period during which any and all of the defendants held office in said local; and (ii) enjoining defendants from noticing its election of officers until further order of the court based on record examination status to be discussed at a videoconference to be convened by the court on April 13, 2021, at 10:00 a.m.; and it is further

[8] *See, supra*, note 6.
[9] The alleged problems encountered by plaintiffs during their quest for information, as well as the asserted indicia of incorrect pre-election procedures forming the gravamen of the Related Action.

ORDERED that plaintiffs' motion for a preliminary injunction to preclude defendants' utilization of union counsel, or to prevent the utilization of union funds for purposes of defense of this action, is denied.

This will constitute the decision and order of the court.

ENTER:

3/2/2021
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	☐	**CASE DISPOSED**		☒	**NON-FINAL DISPOSITION**		
	☐	**GRANTED**	☐ **DENIED**	☐	**GRANTED IN PART**	☒	**OTHER**
APPLICATION:	☐	**SETTLE ORDER**		☐	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐	**INCLUDES TRANSFER/REASSIGN**		☐	**FIDUCIARY APPOINTMENT**	☐	**REFERENCE**