New York County Clerk's Index No. 151950/21
Appellate Division–First Department Case No. 2022-02573

Court of Appeals

of the

State of New York

EDWIN AGRAMONTE, OMER OZCAN and RAPHAEL SEQUIERA,

Petitioners-Appellants,

– against –

LOCAL 461, DISTRICT COUNCIL 37 AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, by its President, Jason Velzaquez,

Defendants-Respondents.

MOTION FOR LEAVE TO APPEAL

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COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of the Application of

EDWIN AGRAMONTE, OMER OZCAN and RAPHAEL SEQUIERA,

Petitioners-Appellants,

For an Order Confirming an Arbitration Award Under Article 75 of the CPLR,

-against-

LOCAL 461, DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, by its President, JASON VELZAQUEZ,

Respondent-Respondent.

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(New York County Clerk's Index No. 151950/2021)

NOTICE OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

PLEASE TAKE NOTICE, that upon the affirmation of ARTHUR Z. SCHWARTZ dated November 18, 2022 and exhibits annexed thereto, including a Decision and Order of the Appellate Division, Second Department dated October 13, 2022 which, by its affirmance of an Order and Decision of the Supreme Court, New York County (Perry, J) dated February 1, 2022, granted Respondent-Respondent Local 461, District Council 37, American Federation of State County and Municipal Employees' Motion to Dismiss the Complaint, Petitioners-Appellants

Edwin Agramonte, Omer Ozcan and Raphael Sequiera will move this Court at the Courthouse, 20 Eagle Street, Albany, New York, 12207, on November 28, 2022 at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard, for an order granting leave to appeal to the Court of Appeals and for such other and additional relief as the Court may deem just and proper.

Dated: New York, New York
November 18, 2022

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COURT OF APPEALS
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In the Matter of the Application of

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(New York County Clerk's Index No. 151950/2021)

AFFIRMATION OF ARTHUR Z. SCHWARTZ IN SUPPORT OF MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

ARTHUR Z. SCHWARTZ, an attorney at law duly admitted to the Bar of the State of New York, and attorney for Appellant, declares, under penalty of perjury:

1. I am the lead attorney in this matter, and I am fully familiar with the facts and circumstances herein.

2. This appeal involves an expansion of this Court's decision in in *Martin v. Curran*, 303 NY 276 (1951), which, after over 100 years of New York

Courts playing a critical role in the protection of union members' rights during the union election process, has been used by the First Department to shut off equitable judicial remedies for union members whose rights have been violated during the course of a union election.

3. *Martin v. Curran* was decided in 1950 as a response to an effort to seek damages from a union for an article in the union newspaper which, allegedly, defamed a union member.

4. The *Martin* Court created a defense for unions, in cases involving intentional torts, drawn from Section 13 of the General Associations Law, holding that "suits against association officers, whether for breaches of agreements or for tortious wrongs, [are limited] to cases where the liability of every single member can be alleged and proven." Section 13 of the General Associations Law states, in relevant part: "An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally."

5. Subsequent to *Martin*, until now, despite the shift of most union democracy cases to the Federal Courts under the passage of the Labor

Management Reporting and Disclosure Act, 29 USC Sec. 401 *et seq*., union members have enforced, in the New York Courts, the rights granted to them by the union constitution and by-laws, including the right to stand for election to union office. See, *LaSonde v. Seabrook*, 89 A.D.3d 132, 137 (1st Dept. 2011); *Litwin v. Novak*, 9 A.D.2d 789 (2nd Dept. 1959); *Daley v. Stickel*, 6 A.D.2d 1 (3rd Dept. 1958); *Arnold v. District Council No. 9, Intern. Broth. of Painters and Allied Trades*, 97 Misc.2d 302 (Sup Ct, NY County 1977), reversed on other grounds, 61 A.D.2d 748 (1st Dept. 1978); *Mulligan v. Local 365, United Auto Workers,* 1978 WL 26575, at *1 (Sup. Court NY County, Dec. 01, 1978); *Beiso v. Robilotto*, 26 Misc. 2d 137 (Sup. Court Albany Cty 1960); *Maineculf v. Robinson*, 19 Misc. 2d 230 (Sup. Ct. Kings County 1958); *Caliendo v. McFarland*, 13 Misc 2d 183 (Sup. Ct. N.Y. County 1958); *Braithwaite v. Francois*, 2021 NY Slip Op 30690 NY County March 2, 2021 (Appendix A); *Noe v. Local 983 Motor Vehicle Operators Union*, 2022 WL 2101600 (Sup Cy. NY County May 18, 2022); and see *International Association of Machinists v. Gonzales*, 356 U.S. 617, 618-619 (1958); *Libutti v. Di Brizzi,* 343 F.2d 460 (2nd Cir.,1965); *see also* Summers, *Judicial Regulation of Union Elections*, 70 Yale L.J. 1221, 1231-1233.

6. The assertion that a union cannot be sued, even for injunctive relief addressed to violations of a union members' right, under the law set forth above unless every member ratifies the union's actions is misplaced. This Court's reading

of the General Associations Law in *Martin v. Curran* are properly applied, at best, to common law intentional torts (they don't even apply, for reasons which are unclear, to negligence claims, see *Palladino v. CNY Centro*, 23 N.Y.3d 140, 152 (2014), *Torres v. Lacey*, 3 A.D.2d 998 (1st Dept. 1957); *Salemeh v. Toussaint*, 29 A.D.3d 411, 412 (1st Dept. 2006); *Piniewski v. Panepinto*, 267 A.D.2d 1087 (4th Dept. 1999) (negligent appointment and retention of an employee)) . This Court did extend Martin to a suit involving the breach of a contract by a union, in *Palladino v. CNY Centro, Inc*. 23 N.Y.3d 140 (2014) (where this Court acknowledged that "the *Martin* rule has been criticized as essentially granting unions complete immunity from suit in state court. *Id.* at 148.) But this Court, in fact, has recognized that in the realm of internal union affairs, *Martin,* as a matter of public policy, does not bar suit.

7. The controlling Court of Appeals case, we submit, is *Madden v. Atkins,* 4 N.Y.2d 283, 294–96 (1958). *Madden* involved the expulsion of a union member from a union, which was challenged as violative of the union constitution. The expelled member sought reinstatement, and damages against the union. The Appellate Division (Second Department) granted the injunctive relief ("It is therefore our conclusion that the expelled appellants are entitled to judgment directing that they be reinstated as members of Local and that all rights as

members thereof be restored to them"), but found that *Martin* barred the award of damages. See *Madden v. Atkins*, 4 A.D.2d 1, 18 (2nd Dept. 1957).

8. This Court, in *Madden v. Atkins*, 4 N.Y.2d 283 (1958), affirmed the propriety of granting injunctive relief (which is all that the Petitioner-Respondents sought here), and reversed on the First Department on damages—**allowing a damage claim to be brought**. *Madden v. Atkins,* 4 N.Y.2d 283, 294–96 (1958). What this Court said is particularly germane to the conclusion reached by Judge Perry in this case, and explains why, as we point out above and below, there have been dozens of cases like *this case* in the 64 years since *Madden*:

> The Appellate Division was of the view, however, that the precedents forbade an action against the union for damages, unless the proof established an authorization or ratification of the expulsion by all of the members and thereby rendered each and every one of them responsible for the wrong committed. While we have held that to be the law where damages are sought against an unincorporated union on account of a libel (see *Martin v. Curran*, 303 N. Y. 276), the rule is otherwise in cases of wrongful expulsion.
>
> Upon analysis, the decisions sustain the right of one wrongfully expelled to recover damages from the union, for what amounts to a breach of contract (see, e.g., *Polin v. Kaplan*, 257 N. Y. 277, 281-282, *supra*), even though only a portion of its membership may have favored, or voted for, the action taken. In some cases, it is true, on the evidence adduced, it has been held that there was no liability (see *Glauber v. Patof*, 294 N. Y. 583, 584; *Browne v. Hibbets*, 290 N. Y. 459, 467, *supra*.; *Havens v. King*, 221 App. Div. 475, 481-482, affd. *sub nom. Havens v. Dodge*, 250 N. Y. 617, *supra*), but in others

this court has unequivocally decided that, if damages are proved, the union is liable notwithstanding the fact that all of its members had not actually participated in or approved the expulsion. (See, e.g., *Blek v. Wilson*, 262 N. Y. 253, 255, remittitur amended and a new trial ordered on the question of damages 262 N. Y. 694; *Polin v. Kaplan*, 257 N. Y. 277, 286, *supra*, motion for reargument denied 257 N. Y. 579; *Shapiro v. Gehlman*, 244 App. Div. 238, 243, mod. on other grounds *sub nom. Shapiro v. Brennan*, 269 N. Y. 517; see, also, *Real v. Curran,*285 App. Div. 552, 553; *Brooks v. Engar*, 259 App. Div. 333, 334, appeal dismissed 284 N. Y. 767.) *Polin v. Kaplan* (257 N. Y. 277, *supra*) is illustrative of the cases in which the union has been held responsible for damages. An officer of the local had presented charges against the plaintiffs at a regular meeting of the membership; the union's executive board reported its findings and judgment to a regular meeting of the membership; and the members at that meeting voted to approve and confirm the board's determination that the plaintiffs be expelled. On such facts, and those in the case before us are indistinguishable, this court decided that the plaintiffs were entitled to recover for wages lost as a result of the union's action in wrongfully expelling them and, indeed, the court denied a reargument sought solely on the ground that damages could not be awarded against the union (257 N. Y. 579). And, in *Blek v. Wilson* (262 N. Y. 253, 255; 262 N. Y. 694, *supra*,) where the plaintiff was unjustly suspended by vote, not of the membership, but of the executive board, we similarly held that the union was responsible for damages, if any, suffered by the plaintiff.

In short, the principle to be educed from the decisions involving wrongful expulsion is this: Where it is brought about by action on the part of the membership, at a meeting or otherwise, in accordance with the union constitution, the act of expulsion will be regarded as the act of the union for which damages may be recovered from union funds. Where, however, proof of such union

> action is lacking, the claim for damages against the organization must fail.
>
> *Martin v. Curran* (303 N. Y. 276, *supra*), upon which the defendants principally rely, is quite different from the present case. That was an action seeking damages from the union for an alleged libel published in a union publication. The complaint was dismissed for failure to allege that the libel had been authorized by the union membership. There was no occasion to consider the nature of the proof that would warrant a finding that the libel was an act of the union rather than that of the individuals who composed it. For the wrongs complained of in the case before us, the requisite participation of the membership was sufficiently shown to justify liability against the organization, even though not against the individual members.
>
> It is certainly not too much to expect that a labor union, of all organizations, should not deprive its members of their jobs or of job opportunities without proof, fairly raised and fairly heard, of substantial wrongdoing. Nor, as the cases earlier cited recognize (e.g., *Polin v. Kaplan*, 257 N. Y. 277, *supra.; Blek v. Wilson*, 262 N. Y. 253, *supra*), is it too much to require the union to assume responsibility for the wrongful expulsion of a member by a number less than all where the membership has expressly provided for such a delegation of disciplinary power. By sanctioning the delegation of authority, the membership subjects the funds of the union to liability for the abuse of such power by those entrusted with it.
>
> As is manifest and as already remarked, a contrary result would have far-reaching consequences. **If one wrongfully expelled has no redress for damage suffered, little more is needed to stifle all criticism within the union. (**Emphasis added)

Madden v. Atkins, 4 N.Y.2d 283, 294–96 (1958).

9. The last phrase we cite is particularly compelling, because unless public sector union members, who are not covered by the Federal Labor Management Reporting and Disclosure Act, have recourse to the courts to address union elections, those elections are subject to the whims and fancies of union officers seeking to keep themselves in power. And unlike the Court of Appeals' recent ruling in *Palladino v. CNY Centro, Inc,* 23 N.Y.3d 140 (N.Y. 2014), which is addressed to duty of fair representation claims, there is no N.Y. Public Relations Board (PERB) jurisdiction over union elections (just as it has no jurisdiction over union discipline cases).

10. The import of *Madden* is not only that suits for injunctive relief for violations of the union constitution are allowed post-*Martin*, but that suits for damages caused by union officers to whom official duties are delegated (such as the Election Committee here) are allowed.

11. The decision below says that members whose rights are violated during a union election have no judicial remedy. This is a decision which carries *Martin* one step too far, and which this Court needs to address lest union members, who cannot litigate breaches of local union constitutions in Federal Court, *Murdock v. American Maritime Officers Union National Executive Board*, 2022 WL 2714005, at *5 (S.D.Fla., 2022) (but can litigate breach of national union's constitution in Federal Court, *Wooddell v. International Broth. of Elec. Workers,*

Local 71, 502 U.S. 93, 95 (U.S. Ohio, 1991)), under the First Department's decision can have their rights to fair union elections stepped on by their local union officers without remedy.

12. This affirmation is submitted in support of Petitioners-Appellants' Motion for Leave to Appeal addressed to this improvident expansion of the General Associations Law and *Martin v. Curran*, which expansion would leave union members whose rights are being violated with no remedy. In fact, if the leadership of a union decided to cancel all elections called for in a union constitution, the decision below would allow that leadership to stay in office for life. The decision, if allowed to stand, will deny union members the right, exercised for the past 90 years, in line with *Polin v. Kaplan*, 257 NY. 277 (1931) (where this court held that union constitutions were a contract between the member and the union, enforceable by union members in the State of New York), to challenge corrupt union leaders in court.

STATEMENT OF ISSUES PRESENTED

A. Are New York State Courts barred by *Section 13 of the General Associations Law* from hearing cases brought by union members, seeking injunctive relief addressed to a union election, arising from an alleged violation of the union constitution?

The Appellate Division ruled that such lawsuits are barred. Appellants urge this Court to reverse.

B. Are New York State Courts barred by the Court of Appeals Decision on *Martin v. Curran* from hearing cases brought by union members, seeking injunctive relief addressed to a union election, arising from an alleged violation of the union constitution?

The Appellate Division ruled that such lawsuits are barred. Appellants urge this Court to reverse.

JURISDICTIONAL STATEMENT

13. Jurisdiction of this Court is predicated on CPLR § 5602(a)(1)(i). This is an appeal in an action originating in the Supreme Court, dismissed on a Motion to Dismiss. The Appellate Division's Decision and Order is a final determination as it affirmed the Supreme Court dismissal. There is no appeal as of right in this instance.

THE COURSE OF PROCEEDINGS BELOW

14. On February 25, 2021, on the eve of the Local 461 nominations meeting, Petitioner-Appellants filed an Article 78 Petition seeking to restrain that meeting from occurring. Because the matter required a judge before the morning and none was assigned, the matter was temporarily assigned to Judge Dakota Ramsuer, who held a hearing on the morning of the election and denied a

Temporary Restraining Order and a Preliminary Injunction (Exh. 1), finding that Petitioners had a post-election remedy at the U.S. Labor Department and therefore did not suffer irreparable injury.

15. On March 2, 2021 Judge Franc Perry, who was assigned to the case, granted a Temporary Restraining Order (Exh. 2), which he later vacated because of Judge Ramseur's order (Exh. 3).

16. After Petitioners-Appellants completed their post-election internal union appeals, and appealed to the U.S. Department of Labor (which declined jurisdiction over a public sector union), the Appellants filed an Amended Petition (Exh. 4) seeking to have the Supreme Court overturn the results of the election. Respondents-Respondents moved to dismiss that Amended Petition.

17. On February 1, 2022, the Supreme Court issued a Decision and Order (Exh. 5), granting the Motion to Dismiss and denying the relief requested in the Amended Petition.

18. A timely notice of appeal to the Appellate Division First Department was filed on March 1, 2022.

19. The Appellate Division First Department issued a unanimous decision on October 13, 2022, (Exh. 6) affirming the decision of the Supreme Court. The Court held that:

> Supreme Court correctly granted the union's motion to dismiss the amended petition. The petition, which

> interposed claims alleging breach of contract and violation of the common law of elections in New York, failed to plead "that each individual union member authorized or ratified the [allegedly] unlawful actions" (*Charter Communications, Inc. v. Local Union No. 3*, 166 A.D.3d 468, 469 [1st Dept 2018], citing *Martin v. Curran*, 303 NY 276 [1951]). Moreover, the law is well settled that suits for breaches of agreements or for tortious wrongs against officers of unincorporated associations, including unions, are limited to situations in which "the individual liability of every single member can be alleged and proven" (*Martin*, 303 NY at 282; see General Associations Law § 13; *Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140, 147-148 [2014]; *Catania v. Liriano*, 203 A.D.3d 422, 423 [1st Dept 2022], *appeal dismissed* 38 N.Y.3d 1049 [2022]).

20. Notice of Entry was served on October 19, 2022 (Exh. 7).

21. This Motion is timely filed.

STATEMENT OF FACTS

22. Given that the decision below was on a Motion to Dismiss, this Statement of Facts is drawn from the Amended Petition (Exh. 4) and the supporting affirmations filed in the Supreme Court.

23. Petitioners, Edwin Agramonte, Omer Ozcan, and Raphael Sequiera, are members of Local 461. Local 461 is affiliated with the American Federation of State, County and Municipal Employees (hereinafter "AFSCME") and is a constituent of AFSCME's administrative subdivision, District Council 37 (hereinafter "DC 37"). Local 461 has its offices at 55 Broad Street, New York, New York. Local 461 is governed by its Constitution, and the Constitution of

AFSCME, the relevant portions of which are annexed to the Petition as Exhibits B1 (Membership), B-2 (Model Local Constitution), and B-3 (Election Code). Petitioner Agramonte is a year-round lifeguard who was nominated to run for President of Local 461, and Sequiera and Ozcan have worked for decades as seasonal lifeguards and were nominated to run for other offices.

24. Defendant Jason Velzaquez was, at the time the last Local 461 election was conducted, allegedly, the President of Local 461. In October 2020 Local 461's parent union, AFSCME, removed Franklyn Paige, who had been President for 25 years, upon charges brought by Petitioners Ozcan and Sequiera, because he had not held membership meetings for many years. Velzaquez was Vice President but deferred taking the office of President, so the Local 461 Board elected Cynthia Valle as President. Shortly after being elected, Ms. Valle left employment as a lifeguard, and in an alleged vote by the remaining six officers and Executive Board Members, Mr. Velzaquez became President. Velzaquez was sued in his official capacity pursuant to the General Obligations Law.

25. Local 461 represents all non-supervisory lifeguards employed by the NYC Parks Department. Around 30 are employed year-round at various City Pools that are open year-round. The remainder work at pools and beaches open in the late Spring (approximately Memorial Day) through Labor Day, approximately 1,150 people.

26. Seasonal lifeguards have priority in being called back for the subsequent season, as long as they pass a swim test, and many Local 461 members have worked as lifeguards for 10-20 years. All these lifeguards work under terms contained in a collective bargaining agreement negotiated by Local 461, and which is supposed to be ratified by the members of Local 461.

27. Under the recently removed 25-year President of Local 461, Franklyn Paige, members who worked seasonally were not allowed to play any role in the local. They have never been allowed to vote in elections, vote on collective bargaining agreements, or run for office.

28. The Local 461 Constitution at Article IV contains the following provisions concerning membership:

> **Section 1.** Eligibility. All lifeguard personnel employed by the New York City Department of Parks, except supervisors are eligible for membership in this local union subject to the requirements set forth in the Constitution of the International Union.
>
> **Section 4.** Membership dues shall be payable monthly in advance to the local secretary-treasurer and in any event shall be paid not later than the 15th day of the month in which they become due. Any member who fails to pay dues by the 15th day of the month in which they become due shall be considered delinquent, and upon failure to pay dues for two successive months shall stand suspended. Provided, however, that any person who is paying his dues through a system of regular payroll deduction shall for so long as he continues to pay through such deduction method, be considered in good standing.

29. The AFSCME Constitution[1] also contains language relevant to membership, at Article III:

> **Section 5.** If a member remains eligible for membership and pays dues by the 15th day, or such other day specified in the local union constitution, of the month in which they become due, that individual shall be considered in good standing; provided however, a member who pays dues through a system of regular payroll deduction, bank draft, or similar system, shall be considered in good standing for so long as the member continues to pay dues through such deduction method. Any member who fails to pay dues by the day of the month in which they become due shall be considered delinquent, and upon failure to pay dues for two consecutive months shall lose their good standing status and stand suspended.
>
> **Section 9.** When a member is unemployed, on leave for military service, or on unpaid leave for more than twenty days in any calendar month, such member shall, upon request, be entitled to credit for membership dues for the period of unemployment, military service, or unpaid leave but not to exceed six months within any twelve-month period.

30. Under Article IV of the Local 461 Constitution, the following provisions also apply:

> **Section 1.** Officers. The officers of the local union shall be a president, a vice-president, a secretary-treasurer, and five (5) executive board members. These eight (8) persons shall constitute the executive board of the local.

[1] AFSCME (American Federation of State, County and Municipal Employees) is the parent union to Local 461.

Section 2. Terms of office. All officers and members of the board shall serve in office for a term of three years commencing with the 1994 election.

Section 4. Nominations. Nominations of office shall be made at a regular or special meeting of the local. At least fifteen (15) days' advance notice shall be given the membership prior to the nominations meeting. A nominating committee may be appointed or elected to make nominations but whether or not such a nominating committee is used, nominations shall be permitted from the floor. All regular elections shall be held in the month of February. Nominations and elections may be held at the same meeting provided the notice sent fifteen (15) days' in advance clearly states the intention to hold both nominations and elections on the same date.

Section 5. Eligibility for Office.

(a) To be eligible for office (other than that of the president), a member must be in good standing for one year immediately preceding the election. For a member who is transferred into this local from another AFSCME local, this requirement shall be satisfied if such member's combined membership in good standing in both locals is one year at the time of the election and the majority of the entire year has been in membership status in Local 461.

(b) To be eligible for the office of president, a member must be in good standing for three years immediately preceding the election. For a member who is transferred into this local from another AFSCME local, this requirement shall be satisfied if such member's combined membership in good standing in both locals is three years at the time of the election and the majority of the entire three years has been in membership status in Local 461. However, in addition to the three-year membership requirement, to be eligible for office of the president, the member must have spent the entire

previous year as a member in good standing in Local 461 and not any other AFSCME local. ·

Section 6

(a) Prior to nominations, the president shall appoint an election committee and one member of the committee to serve as its chairperson.

(b) A member of the election committee who accepts a nomination for officer must relinquish his/her committee post. The committee will be responsible for ascertaining the eligibility of all candidates for office in this local.

(c) The election committee shall be responsible for the conduct of the election as well as any run-offs that may ensue.

(d) The election committee shall prepare a final report for the membership upon completion of the electoral process. Upon acceptance of the committee's report by the membership, the committee may be discharged by the president.

Section 7. Integrity of the Electoral Process. All elections in this local union shall be conducted by secret ballot vote and afford all eligible members a reasonable opportunity to participate (vote).

Section 8. Adherence to Elections Process. All matters concerning local union nominations and elections shall at all times be subject to the provisions of Appendix D entitled Elections Code of the International Union Constitution and the elections Manual published by the International.

Section 10. Eligibility to Vote. To be eligible to vote in the local election, a member must be in good standing at the date of the election.

31. Although the Local 461 Constitution calls for elections in February, they have never been heard in February. The available information shows as follows:

a. 2018 Election – Nominations meeting scheduled for June 4, 2018 at 10 a.m. (during a workday). Minutes show no opposition, and the nominees were declared elected.

b. 2012 Election – Nominations meeting May 9, 2012 at 11 a.m. Election Notice: May 10, 2012, 11 a.m. and 2 p.m.

c. 2009 Election – Nominations meeting April 30, 2019.

d. 2006 Election – Nominations noticed for May 5, 2006 at noon. Election noticed for May 11, 2006.

e. 2003 Election – Nominations noticed for May 7, 2003.

32. The last election, in 2018, which was an election by acclamation, without notice to the seasonal members, was held on June 4, 2018. The terms of office of these officers would, by past practice, end sometime in June 2021.

33. After Franklyn Paige was removed from office, in October 2021, Plaintiff's Counsel, Arthur Schwartz, spent time trying to figure out who was running Local 461, which led to several phone conversations with Robin Roach, DC 37's General Counsel.[2]

[2] DC37 (District Council 37) is the regional body of AFSCME with which Local 461 is

34. On January 6, 2021, Schwartz wrote to Roach, advising her that for 25 years Local 461 had elections in May or June, and stated that he was concerned that there might me an election planned for February 2021, and that he was concerned about an effort to deny the seasonal lifeguards their right to vote or run for office. Ms. Roach wrote back on January 22, 2021 and asked Schwartz for the legal basis for his demand that there be elections in June.

35. Schwartz wrote back that same day and laid out the last 18 years of Local 461 elections which attached the notices of election going back to 2003. Schwartz explained that Article 9 Section III of the AFSCME Constitution allowed laid-off members to stay in good standing without paying dues for six months. He further explained that in December of each year the seasonal lifeguards received their vacation pay, and that dues were always taken out, which would start a new six-month period running.

36. On February 5, 2021, Schwartz sent Ms. Roach an email about how Franklyn Paige was telling members that there would be an election right after he got reinstated by the AFSCME Judicial Panel at their appeal hearing set for February 24, 2021. He asked her to clarify the situation.

37. On February 11, 2021, Respondent Velzaquez caused a Notice of a Nominations Meeting to be sent out to the 30 year-round members of Local 461.

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affiliated.

That meeting was to be held via Ring Central, a video conferencing platform which allows up to 200 people to participate in a phone call, on February 25, 2021 at 10:00 a.m., during the workday of most members. The next day, Velzaquez mailed out a Notice of an Election Meeting, to be held in person, starting at 10:00 a.m. on February 26, 2021. The Notices did not indicate that an Election Committee had been appointed, as required by the AFSCME Election Code at Section 2B, and the Local Constitution at Article VI Section 6. In 2018, one person announced that he was the Election Committee and ran the Election Meeting. The Notices were not sent out 15 days in advance, as required by the AFSCME Election Code at Section 2D, and the Local Constitution at Article VI Section 4.

38. More importantly, the Notice was not sent to 1,170 of the 1,200 members of Local 461. Those 1,170 members were paid wages in September 2020 and received their annual vacation payout in November and December 2020. No dues were "due" during the month of October 2020 since no wages were paid, and because the seasonals are on dues checkoff, the City of New York is responsible for deducting dues, as they have in the past, from vacation pay. Many of these members, including Petitioners Ozcan and Sequiera, have sought to maintain their membership, but have no way to formally express that desire to Local 461's leadership, which has no office.

39. On February 11, 2021, Schwartz emailed Attorney Roach again and advised her that some members had received a late notice of nominations for February 25, 2021.

40. On February 16, 2021, Schwartz wrote to Robin Roach again and attached an email decision by the AFSCME Judicial Panel Chair in July 2020, which permitted the filing of charges against former President Paige by Petitioners Ozcan and Sequiera in January 2020. *Abelson stated that AFSCME recognized seasonal employees' membership rights during their "hiatus period."* On February 19, 2021, Attorney Roach emailed Schwartz and stated that she would pass his email on to the Local 461 Election Committee.

41. Prior to February 25, 2021, several Local 461 seasonals wrote to DC 37 Executive Director Henry Garrido (in the absence of any means to contact the Local 461 Election Committee) asking that their six-month layoff rights be honored at the February 25 Nominations meeting and at the February 25 election meeting. On the morning of February 25, 2021, Attorney Roach emailed Schwartz stating that the emails from the seasonals had been "passed on to the local leadership to be addressed" and that the local "would be in touch with the individual lifeguards."

42. In fact, no one contacted any seasonals about their rights. In no other local of AFSCME do seasonal employees, who are on layoff, have to formally

request that they maintain their membership during the six months set forth in Article III, Section 9 of the AFSCME Constitution, which states that an unemployed member is entitled to credit for six months dues within any six month period, upon request.

43. On February 25, 2021, Petitioner Agramonte attended the video-conferenced nominations meeting of Local 461. The other Petitioners registered for the meeting but were not sent a link to attend. The meeting was chaired by year-round lifeguard Joshua Frias, who declared: "I am the Election Committee." Agramonte nominated himself for President and a full slate of other officers and Board members, all of whom are seasonal members, and all of whom communicated a desire to have the six-month grace period in the AFSCME Constitution extended to them, to the extent a request was needed. Even before he completed reading his list of nominees, former/removed President Paige interrupted him and challenged, on unstated grounds, the eligibility of Petitioner Agramonte and his entire slate. The "Election Committee" caucused with counsel for DC 37, and returned and adjourned the meeting.

44. Later on, on February 25, 2021, the Election Committee ruled that the only proper nominee nominated by Petitioner Agramonte who could run for office was Petitioner Agramonte. The next day, in-person voting occurred.

Approximately 22 members voted. Agramonte, who was in the Dominican Republic, was not able to cast a ballot.

45. Subsequent to the election, Petitioners filed a timely appeal with the Election Committee of Local 461. That appeal was denied in an unwritten oral decision announced on April 1, 2021. Subsequently, Petitioner Agramonte filed an appeal with the AFSCME Judicial Panel, which denied his appeal. He appealed to the U.S. Department of Labor about just the Presidential elections, since the position of delegate (which the President serves as automatically) was an election covered by the LMRDA. The U.S. Labor Department did not agree and dismissed the appeal.

THIS CASE MERITS REVIEW BY THIS COURT

46. As we discuss above, if the decision below is allowed to stand, union members alleging violations of the Local Union's Constitution will have no judicial remedy to address even the most blatant violations of that union constitution. This could not have been the intent of this Court when it barred suits for damages in which unions were defendants in *Martin v. Curran.*

47. Up until the decision below, under New York law, a union member could enforce, in the courts, the rights granted to her by the union constitution and by-laws, including the right to stand for election to union office, the right to vote in a union election, the right to attend union meetings, etc.

48. But the Supreme Court below stated that it is "well settled that claims against unions and their representatives [cannot be brought] when petitioners failed to sufficiently plead that members of the union had authorized or ratified the conduct," citing this Court's decision in *Palladino v. CNY Centro Inc.,* 23 N.Y.3d 140 (2014). But the Appellate Division concurred, adding *Catania v. Liriano*, 203 A.D.3d 442 (1st Dept. 2022) (a tort case) to the mix. None of the cases cited by either court involved claims for breach of the union constitution by union officials, in the course of union elections or otherwise. As we stated above, Appellants submit the controlling Court of Appeals case is *Madden v. Atkins,* 4 N.Y.2d 283, 294–96 (1958). The import of *Madden* is that suits for injunctive relief for violations of the union constitution are allowed post-*Martin*, as are suits for damages caused by union officers to whom official duties are delegated (such as the Election Committee here) are allowed. (We do not address the damages issue here.)

49. Since *Martin*, there have been scores of cases where relief has been granted to plaintiff members seeking to address union constitutional requirements. Under the First Department ruling, every one of these cases was wrongly decided because in no case did the court have a right to grant relief under *Martin*. Consider the following:

a. *Ballas v. McKiernan,* 35 N.Y.2d 14, 20–21 (1974):

> [W]e hold that by constitutional provision the union may not in the guise of an asserted contractual restriction foreclose the individual members from the exercise of their legitimate right to freedom of choice of their bargaining agent. If the relationship between the union and its members be recognized as including in addition to contractual rights, substantial fiduciary obligations on the part of the union to its members (*Bradley v. O'Hare*, 11 A.D.2d 15, 202 N.Y.S.2d 141),

b. *LaSonde v. Seabrook*, 89 A.D.3d 132, 137 (1 Dept. 2011):

> The right of union members to secure the union's compliance with its constitution and bylaws is thus enforceable in the courts of this state through an article 78 proceeding (*Allen v. New York City Tr. Auth.,* 109 Misc.2d 178, 182–183, 439 N.Y.S.2d 811 [Sup. Ct. Kings County, 1981], citing *Caliendo v. McFarland,* 13 Misc.2d 183, 188, 175 N.Y.S.2d 869 [Sup. Ct. New York County, 1958]).
>
> Generally, a court considering the validity of actions taken by a union official must determine whether said actions are authorized under the union's constitution or bylaws (*Allen,* 109 Misc.2d 178 at 184, 439 N.Y.S.2d 811). In so doing, the court must assess the union official's claim that his or her actions are authorized under the constitution or bylaws by (1) independently reviewing the constitution or bylaws "in accordance with the general rules of construction appertaining to contracts" and (2) determining whether the union official's interpretation is a reasonable interpretation of the constitution or bylaws (*id.*).

c. *Bidnick v. Grand Lodge of Free & Accepted Masons of State of New York*, 159 A.D.3d 787 (2nd Dept. 2018):

> Moreover, the *Martin* rule does not preclude breach of contract causes of action against unincorporated associations and their officers acting in their representative capacities based on an allegedly wrongful expulsion from the association (*see Madden v. Atkins,* 4 N.Y.2d 283, 174 N.Y.S.2d 633, 151 N.E.2d 73; *see also Palladino v. CNY Centro, Inc.,* 23 N.Y.3d 140, 989 N.Y.S.2d 438, 12 N.E.3d 436). Here, the complaint, liberally construed in favor of the plaintiff, makes out a cause of action alleging breach of contract (*see Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17), based on the plaintiff's allegedly wrongful expulsion from the Grand Lodge (*see generally Polin v. Kaplan,* 257 N.Y. 277, 281, 177 N.E. 833; *Caposella v. Pinto,* 265 A.D.2d 362, 696 N.Y.S.2d 493).

d. *Ballas v. McKiernan*, 41 A.D.2d 131, 133 (2nd Dept. 1973):

> A union's constitution and by-laws constitute a contract between the union and its members and define not only their relationship but also the privileges secured and the duties assumed by those who become members, unless contrary to public policy (*Fritsch v. Rarback*, 199 Misc. 356; *Lowe v. Feldman*, 11 Misc. 2d 8, affd. 6 A D 2d 684);

e. *French v. Caputo,* 19 A.D.2d 594 (1st Dept. 1963):

> "It is true that the trial board was not constituted as the constitution of the Council provides; and although the method adopted was not unfair to respondents, the decision of the Trial Term could be sustained on this ground."

f. *Maraia v. Valentine*, 21 A.D.3d 934 (2nd Dept. 2005)

g. *Litwin v. Novak*, 9 A.D.2d 789 (2d Dept. 1959),

h. *Fittipaldi v. Legassie*, 7 A.D.2d 521 (4th Dept. 1959)

i. *Lowe v. Feldman,* 168 N.Y.S.2d 674, 680 (Sup Ct, NY Cnty 1957) 11 Misc.2d 8, *affd*, 6 A.D.2d 684 (1st Dept. 1958);

> The constitution and by-laws of a union constitute a binding contract defining the relation of the union and its members, and the rights of the members (*Fritsch v. Rarback*, 199 Misc. 356, 98 N.Y.S.2d 748, 752 (top)), unless contrary to law or against public policy. *11 *Ames v. Dubinsky*, Sup., 70 N.Y.S.2d 706. A labor contract is not exempt from the operation of the law of contracts, which applies to all agreements (*Triboro Coach Corp. v. New York State Labor Relations Board*, Sup., 22 N.Y.S.2d 1013, affirmed 261 App.Div. 636, 27 N.Y.S.2d 83, affirmed 286 N.Y. 314), and the fact that one of the parties is a labor union, does not change legal principles relative to contracts. *Greater City Master Plumbers Ass'n v. Kahme,* 6 N.Y.S.2d 589, 591.

j. *Ball v. Bonnano,* 1999 WL 1337173, at *1:

> "[i]t is well settled that if the action of the union is without jurisdiction, or is without notice or authority or not in compliance with the rules or constitutional provisions, or is void for any reason, the obligation to appeal within the union is not imposed, but the complaining member may resort directly to the courts" (*Bingham v. Bessler,* 10 A.D.2d 345, 199 N.Y.S.2d 681, *affd.* 9 N.Y.2d 1000, 218 N.Y.S.2d 70, quoting *Tesoriero v. Miller,* 274 App.Div. 670, 672, 88 N.Y.S.2d 87; *Rodier v. Huddell,* 232 App.Div. 531, 250 N.Y.S. 336).

k. *Scarlino v. Fathi*,. 957 N.Y.S.2d 565, 570, 38 Misc. 3d 883, 888–89 (Sup Ct, NY Cnty 2012).*Mulligan v. Local 365, United Auto Workers,* 1978 WL 26575, at *1 (Supr Ct NY County, Dec. 01, 1978); *Beiso v. Robilotto*, 26 Misc. 2d 137 (Supr. Court Albany Cty 1960); *Maineculf v. Robinson*, 19 Misc. 2d 230 (Supr. Ct. Kings County 1958); *Braithwite v. Francois*, 2021 NY Slip Opinion 30690(U) (Nock, J); *Allen v. New York City Tr. Auth.,* 109 Misc.2d 178 (Sup. Ct. Kings County, 1981): *Caliendo v. McFarland,* 13 Misc.2d 183, 188 (Sup. Ct. New York County, 1958) ('The right of members to secure compliance with the union's constitution and by-laws is an enforceable one to which the protection and aid of the Courts may be invoked'); *Smith v. Snell*, 1978 WL 18230, at *2 (Sup Ct, Nov. 30, 1978); *Buscarello v. Guglielmelli*, 44 Misc.2d 1041 (Sup. Ct. Kings County, 1964).

50. *Martin v. Curran*, and its progeny, including the Court of Appeals' 2014 decision in *Palladino v. CNY Centro, Inc.*, 23 N.Y.3d 140 (2014), are cases about union "liability," i.e., they address the question of whether the union treasury can be targeted in a lawsuit. Lawsuits, in fact successful lawsuits, about union elections continue to be litigated post *Charter Communications* and *Palladino.*

51. The Appellate Division, here, ignored scores of post *Martin* cases where courts have enforced the terms of union constitutions, as either involving

union discipline, or because they *only* involved relief granted at the Supreme Court level.

52. The New York Courts have historically played a critical role in policing union elections.

53. That critical role was outlined in a 1958 law review article titled *Judicial Regulation of Union Elections*, 70 Yale L. J. 1221, written by Clyde Summers, who a year later was counsel to the Congressional Committees which drafted the Federal Labor Management Reporting and Disclosure Act (LMRDA), the Federal law regulating unions. That law allowed pre-election litigation enforcing the terms of union constitutions in state courts. See 29 USC Section 483.

54. The article was wholly about judicial regulation of union elections in New York. Professor Summers talks about why such supervision is important:

> Union elections are the main nerve centers of union democracy, for it is through the officers that the will of the members is translated into effective action. The basic governing body of the international union is the convention, itself a delegate body of elected representatives. It meets only briefly every two, three or four years; can at best decide only immediate issues or map broad policies; and must in turn place major governing responsibility in the international officers. Local unions must also rely heavily on representative government—"town meeting" democracy has limited usefulness. Many contain hundreds or even thousands of members, often scattered over a wide geographical area; meetings are infrequent and fragmentary; and the day-by-day decisions which fill out the body of union policy must be made by the officers.

> Protection of union democracy requires, therefore, protection of the election process through which members select those who are to act on their behalf. The freedom to criticize union officers gains force when they are subject to being replaced; advocacy of new policies by union members is implemented by electing sympathetic officers; and the right to organize opposition groups bears fruit in the election contest.
>
> Judicial involvement in union elections is not new, for state courts have often been called upon to protect the process prior to the election or to set aside an unfair election after it was held. The experience thus gained can provide helpful guides in building the new body of federal substantive law, both by suggesting constructive solutions and warning of hidden pitfalls. Study of state court decisions may be directly relevant in two particular respects. First, the principal articulated standard applied by state courts has been that a union in conducting an election must comply with its own constitution and by-laws. This standard has been incorporated into the federal statute and made a part of federal substantive law. State court decisions show how these union provisions may be interpreted and applied. Second, state courts continue to have an active role under Title IV, for prior to the election, suits may be brought in the state courts to enforce the union's constitution and probably other standards prescribed by the title. In adjudicating those cases, state courts may tend to carry over old rules and attitudes and continue to apply familiar remedies.

Professor Summers then continues,

> The purpose here is to explore the experience of state courts in supervising union elections by studying in depth the cases of one state, New York.
>
> Traditional doctrine declares that courts will not intervene in the internal affairs of voluntary associations except to protect property rights. This doctrine, however, has not hindered the New York courts from intervening

in union elections. The accordion term "property" has proven sufficiently expansive to include both the interest of the candidate in holding the office, and the interest of the members that the elected officers serve their terms. To the argument that union members had no property right in the election of officers, the court in *Dusing v. Nuzzo* [177 Misc. 35] responded: The right to membership in a union is empty if the corresponding right to an election guaranteed with equal solemnity in the fundamental law of the union is denied. If a member has a "property right" in his position on the roster, I think he has an equally enforceable right in the election of men who will represent him in dealing with his economic security and collective bargaining where that right exists by virtue of express contract in the language of a union constitution. Where an election is required by the law of a union, the member denied the right to participate is denied a substantial right which is neither nebulous nor ephemeral. The court then issued a detailed order compelling the union to hold a long overdue election. The New York courts have manifested a willingness not only to require an election to be held, but have at various times intervened at every stage in the election process. Thus, the courts have enjoined the holding of an election because the election district was improperly drawn, there was not adequate notice of the nomination meeting, and members were intimidated from making nominations. The names of candidates improperly stricken from the ballot have been ordered restored, equal access to the union newspaper and membership list required, and holding the election without proper notice prohibited. The courts have reviewed the qualifications of candidates elected, scrutinized the rulings on challenged ballots, and even determined the existence of locals from which delegates purposed to come. If the court finds the election valid it will enjoin the holding of a new one to upset it. In these cases, the courts affirmatively intervened to regulate the election process, but even when relief has been denied it has not been for lack of a justiciable interest, but because the court found that the

> plaintiff's case lacked merit or that he had failed to exhaust his internal remedies.

55. The last paragraph we cite is heavily footnoted with decisions, pre and post *Martin*, where Courts intervene both before and after union elections

56. The circumstances in union election cases are exactly the same as the reason the Court of Appeals gave in carving out the exceptions it did in *Madden*:

> As is manifest and as already remarked, a contrary result would have far-reaching consequences. If one wrongfully expelled has no redress for damage suffered, little more is needed to stifle all criticism within the union**.**

57. In intentional tort cases, there is still a union official who can be sued for the tort. In duty of fair representation cases, the *Palladino* decision points out that the employee has a remedy through the Public Employment Relations Board. But if the courts cannot intervene to prevent union elections which have been run improperly—union democracy in all unions will be stifled.

CONCLUSION

For the reasons set forth above, this Court should grant leave to appeal this important question of union members' rights.

Dated: November 18, 2022

Arthur Z. Schwartz

ARTHUR Z. SCHWARTZ
Advocates for Justice,
Chartered Attorneys

Exhibit 1

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR **PART** IAS MOTION 23EFM
Justice

----------X

EDWIN AGRAMONTE, OMER OZCAN, RAPHAEL SEQUIERA

Plaintiff,

- v -

LOCAL 461, DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, BY ITS PRESIDENT, JASON VELZAQUEZ,

Defendant.

----------X

INDEX NO. 151950/2021

MOTION DATE 01/01/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 37, 38, 39
were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

Petitioners, members of New York City Lifeguards Union Local 461 of the American Federation of State, County and Municipal Employees (Local 461), a local union affiliated with the American Federation of State, County and Municipal Employees (AFSCME), and an affiliate of AFSCME's administrative subdivision, District Council 37 (DC37), initiated the instant proceeding seeking a permanent injunction restraining respondents from, among other things, "failing to conduct an Officer and Executive Board election open to all NYC Parks Department lifeguards who paid membership dues between June 1, 2020 and August 31, 2020" (NYSCEF # 1, petition at 9). Petitioners now move by order to show cause pursuant to CPLR 6301 and CPLR 7805 for a temporary restraining order enjoining respondents from conducting the election scheduled for February 26, 2021. Respondents oppose the petition. After oral argument on February 26, 2021, the court denied the order to show cause (NYSCEF # 35, interim order).

BACKGROUND

At issue in this petition is whether the president of Local 461 improperly sought to preclude a vast majority of its membership from the local union's election on February 26, 2021. Local 461 consists of approximately 1,200 members, including 1,150 seasonal members and 30-50 year-round members. According to petitioners, on February 11, 2021, the president of Local 461, respondent Jason Velzaquez (Velzaquez), informed the year-round members of Local 461's upcoming elections (*id.* at ¶ 14). Petitioners further claim that on February 12, 2021, Velzaquez sent out another notice of an election meeting (*id.*). Petitioners assert that the notices were only sent to the year-round members and failed to include the seasonal members (*id.*). The petition alleges that the election violates, among others, sections 1, 4, and 6, Article IV of Local 461's

Constitution and Article III of AFSCME's Constitution, on the bases that the seasonal members should have been included as voting members.

DISCUSSION

A party establishes its entitlement to a preliminary injunction by demonstrating (1) a probability of success on the merits, (2) danger of irreparable harm in the absence of an injunction, and (3) a balance of the equities in its favor (*see* CPLR 6301; *Aetna Ins. Co. v Capasso,* 75 NY2d 860, 862 [1990]; *Doe v Axelrod,* 73 NY2d 748, 750 [1988]). Where petitioners have an adequate remedy at law and there is no threat of irreparable harm, injunctive relief is properly denied (*see AQ Asset Mgmt. LLC v Levine*, 111 AD3d 245, 259 [1st Dept 2013]; *Chicago Research & Trading v New York Futures Exch., Inc.*, 84 AD2d 413, 416 [1st Dept 1982]). Further, preliminary injunctions are drastic remedies, substantially limiting the nonmovant's rights, and are awarded in special circumstances (*see 1234 Broadway LLC v W. Side SRO Law Project*, 86 AD3d 18, 23 [1st Dept 2011]).

Here, petitioners have an adequate remedy at law, and thus cannot establish that they will be irreparably harmed in the absence of a preliminary injunction. Specifically, as argued by respondents, the election for the presidency of Local 461 is subject to Title IV of the Labor Management Reporting and Disclosure Act (LMRDA), 29 USC §§ 481 *et seq.*

Under Title IV, while union locals that represent public employees are generally not covered by the LMRDA, an exception exists concerning the election for union officers:

> "[i]n the case of a national, international or intermediate labor organization composed both of government locals and non-government or mixed locals, the parent organization as well as its mixed and non-government locals would be 'labor organizations' and subject to the Act. In such case, the locals which are composed entirely of government employees would not be subject to the Act, although elections in which they participate for national officers or delegates would be so subject."

(29 CFR 451.3[a][4]; *see* 29 CFR 452.12 ["The (election) requirements would not apply to locals composed entirely of government employees not covered by the Act, except requirements apply with respect to the election of officers of a parent organization which is subject to those requirements or the election of delegates to a convention of such parent organization, or to an intermediate body to which the requirements apply"]; *Murray v Amalgamated Transit Union*, 206 F Supp 3d 202, 205 [DDC], *amended in part on other grounds*, 220 F Supp 3d 72 [DDC 2016], and *affd*, 719 F Appx 5 [US App DC 2018]; *Averhart v. Commc'ns Workers of Am.*, US Dist Ct, NJ, May 9, 2016 ["when a public sector-only union like Local 1033 conducts an election for delegates to a parent union's convention, and that parent union *is* covered by the LMRDA because it has public and private sector workers . . . , then the LMRDA's procedural requirements for electing delegates applies"] [emphasis in original], *affd and remanded*, 688 F Appx 158 [3d Cir 2017]).

Further, "Title IV of the LMRDA specifically regulates the conduct of elections for union officers" (*Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers v Crowley*, 467 US 526, 539 [1984]). In *Crowley*, the United States Supreme Court explained that:

> "Any union member who alleges a violation [[[of Title IV] may initiate the enforcement procedure. He must first exhaust any internal remedies available under the constitution and bylaws of his union. Then he may file a complaint with the Secretary of Labor, who 'shall investigate' the complaint. Finally, if the Secretary finds probable cause to believe a violation has occurred, he 'shall ... bring a civil action against the labor organization' in federal district court, to set aside the election if it has already been held, and to direct and supervise a new election."

(*Crowley* at 539-540, quoting *Trbovich v Mine Workers*, 404 US 528, 531 [1972]).

Here, petitioners do not dispute that the president of Local 461 "shall be a delegate to all conferences and conventions," including Local 461's parent union, DC37, or that DC37 is not subject to LMRDA. Instead, petitioners argue, without any support, that "[a]ll Local [461] members are public employees," and thus not subject to LMRDA (NYSCEF # 19 at ¶ 20). Petitioners further fail to address the circumstance where, as here, the election concerns the election of a delegate to a parent organization which is subject to LMRDA. Thus, since the LMRDA provides for post-election remedies, including overturning an improperly held election, petitioners fail to demonstrate irreparable harm. As petitioners fail to demonstrate that they would suffer irreparable harm if a preliminary injunction is not granted, the court need not address the other elements of a preliminary injunction (*see Zodkevitch v Feibush*, 49 AD3d 424, 425 [1st Dept 2008] [where plaintiffs failed to make a clear showing that they would suffer irreparable injury unless appellant were directed to place the funds in escrow, the court need not pass on whether plaintiffs established a likelihood of success on the merits and a balancing of the equities in their favor]).

Accordingly, it is hereby

ORDERED that petitioners' order to show cause pursuant to CPLR 6301 and CPLR 7805 for temporary restraints pending final determination of this action is denied; and it is further

ORDERED that petitioners shall furnish a copy of this decision and order with notice of entry upon all parties within fourteen (14) days of entry.

This constitutes the decision and order of the Court.

3/2/2021
DATE

DAKOTA D. RAMSEUR, J.S.C.

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

Exhibit 2

E

At IAS Part 23 of the Supreme Court of the State of New York, County of New York, located at 80 Centre Street New York, New York, this 2 day of ~~February~~ MARCH 2021

PRESENT: ~~BEFORE:~~ W. FRANC PERRY
Justice

MS#001: art 78

Index No. 151950/21

In the Matter of

EDWIN AGRAMONTE, OMER OZCAN and RAPHAEL SEQUIERA,

Petitioners,

-v-

LOCAL 461, DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, by its President, JOSE VELZAQUEZ

Respondent,

ORDER TO SHOW CAUSE FOR PRELIMINARY INJUNCTION AND STAY

Upon the Verified Petition, verified on February 25, 2021, and the affirmation of Arthur Z. Schwartz, dated February 25, 2021, and good cause being shown therein, LET Respondent Local 461 of the American Federation of State County and Municipal Employees (hereinafter "Local 461") ~~is hereby.~~ OR ITS COUNSEL

~~ORDERED~~ TO SHOW CAUSE, on the 17 day of March 2021, at 12:00 PM o'clock in the _____noon, at the Supreme Court of the State of New York, located 80 CENTRE STREET ~~at~~ _____, New York, New York, ~~Courtroom~~ PART 23, or by video-conference, on a link to be provided by the Court, why this Court should not enter an order, pursuant to CPLR 6301 and CPLR 7805, pending final determination of this action, .

A) restraining and enjoining Respondent, its officers, agents, and attorneys

from failing to conduct an Officer and Executive Board election open to all NYC Parks Department lifeguards who paid membership dues between June 1, 2020 and August 31, 2020;

B) restraining and enjoining Respondent, its officers, agents, and attorneys from failing to mail out ballots for an Officer and Executive Board election, to all NYC Parks Department lifeguards who paid membership dues between June 1, 2020 and August 31, 2020, and from failing to include the slate nominated by Petitioner Edwin Agramonte on that ballot.

C) appointing an Election Monitor to conduct the Officer and Executive Board election of Local 461; and it is further

ORDERED that Respondent, its officers, agents, and attorneys are enjoined and restrained, pending the hearing of this motion, from conducting an Officer and Executive Board election in Local 461;

JSC

ORDERED that service of this Order and the Petition upon which it is based shall be made upon Respondent by email and by overnight mail or parcel service to its attorneys, Richard J. Washington at 100 Church Street, New York, NY, and Robin Roach, at 55 Water Street, New York, N.Y. on or before ~~February~~ March 9th, 2021, which service shall be considered sufficient; and it is further

ORDERED that Respondents' Opposition Papers, if any, shall be filed on or before March 16, 2021.

ENTER:

ORAL ARGUMENT DIRECTED

J.S.C.

JSC

HON. W. FRANC PERRY, III
J.S.C.

Exhibit 3

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.W. FRANC PERRY, J.S.C. PART 23

INDEX NO.151950/21

EDWIN AGRAMONTE, et al.,
Petitioners,
- v -
LOCAL 461, et al.,
Respondents.

MOT. DATE 3/2/21

MOT. SEQ. NO. 001

The following papers were read on this motion to/for preliminary injunction

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	ECFS DOC No(s). 1
Notice of Cross-Motion/Answering Affidavits — Exhibits	ECFS DOC No(s).
Replying Affidavits	ECFS DOC No(s).

This Court hereby withdraws its Order dated March 2, 2021 in relation to the above captioned matter.

This is the Decision and Order of the Court.

Dated: 3/10/21

HON.W. FRANC PERRY, J.S.C.

1. Check one: ☐ CASE DISPOSED X☐ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☐ GRANTED IN PART X☐ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

Exhibit 4

SUPREME COURT OF THE OF NEW YORK
COUNTY OF NEW YORK

----------X

In the Matter of

EDWIN AGRAMONTE, OMER OZCAN, RAPHAEL SEQUIERA,

Petitioners,

-v-

Index No. 151950/2021

FIRST AMENDED VERIFIED PETITION

LOCAL 461, DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, by its President, JASON VELZAQUEZ,

Respondent,

----------X

Petitioners, by their undersigned attorneys, as and for their First Amended Verified Petition, allege as follows:

INTRODUCTION

1. This is an action seeking injunctive relief addressing the unlawful conduct an election in a local public employees' union. Petitioners allege that the officer election which has been conducted in violation of the local union's constitution and in a manner which undercuts the basic ability of members to get a fair election, a fundamental right under New York law.

2. Under New York law, a union member may enforce in the Courts the rights. granted to her by the union constitution and by-laws, including the right to stand for election to union office. *Mulligan v Local 365, United Auto Workers,* 1978 WL 26575, at *1 (Sup. Ct NY County, Dec. 01, 1978); *Beiso v. Robilotto*, 26 Misc. 2d 137 (Supr. Court Albany Cty 1960); *Maine Culf v. Robinson*, 19 Misc. 2d 230 (Supr. Ct. Kings County 1958); *Libutti v. Di Brizzi,* 343 F.2d 460 (2nd Cir.,1965,) A union's interpretation of its own constitution is entitled to some deference, "unless that interpretation is patently unreasonable" or implausible. *Hughes v. Bricklayers and Allied*

Craftworkers Local No. 45, 386 F.3d at 106; *White v. White Rose Food,* 237 F.3d 174, 182 n. 10 (2d Cir.2001); *Commer v. McEntee,* 145 F.Supp.2d at 340. While a court must be similarly cautious of involvement in union elections and internal disputes over union leadership. *Commer v. McEntee,* 145 F.Supp.2d at 335, 338; *Craig v. Boudrot,* 40 F.Supp.2d 494, 500 (S.D.N.Y.1999); *Mason Tenders Local Union 59 v. Laborers' Intern. Union of North America,* 924 F.Supp. 528, 543 (S.D.N.Y.1996); *Felton v. Ullman,* 629 F.Supp. at 254, caution is "not synonymous with ... paralysis." **569 *Craig v. Boudrot,* 40 F.Supp.2d at 500; *Ball v. Bonnano,* 1999 WL 1337173, at *1 (Sup.Ct. Kings Co. Oct. 25, 1999). The fact that a constitutional requirement in question involves a union election does not in itself suggest that judicial vigilance is unwarranted. *Craig v. Boudrot,* 40 F.Supp.2d at 500; *Ball v. Bonnano,* 1999 WL 1337173, at *1. *See Felton v. Ullman,* 629 F.Supp. at 252; Scarlino v Fathi, 957 N.Y.S.2d 565, 568–69, 38 Misc. 3d 883, (Sup Ct NY County 2012), reversed on other grounds, 107 Ad3d 514 (1st Dept 2013).

3. New York City Lifeguards Union Local 461 is a 1,200 member union representing lifeguards employed by the NYC Parks Department. It is a union with a long history of corruption, See *Boss of the Beach* New York Magazine June 20, 2020, https://nymag.com/intelligencer/2020/06/peter-stein-nyc-lifeguards.html, essentially a small group of year-round lifeguards controlling the jobs of the 1200 lifeguards who work in the summer months, using thuggery and manipulation of union elections. Local 461 is now running a snap election and doing it in a manner which cuts out all but a small group of members, perhaps 50 in all, out of the union's 1200 member corps, from running for office or voting in the election.

PARTIES

4. The Petitioners, Edwin Agramonte, Omer Ozcan, and Raphael Sequiera are members of New York City Lifeguards Union Local 461 of the American Federation of State, County and Municipal Employees (hereinafter "Local 461"). Local 461 is affiliated with the American Federation of State, County and Municipal Employees (hereinafter "AFSCME") and is a constituent of AFSCME's administrative subdivision, District Council 37 (hereinafter "DC 37"). Local 461 has its offices at 55 Broad Street, New York, New York. Local 461is governed by its Constitution (annexed as to the Petition as Exhibit A), and the Constitution of AFSCME, the relevant portions of which are annexed to the Petition as Exhibits B1 (Membership), B-2 (Local Constitution) and B-3 (Election Code). Petitioner Agramonte is a year-round lifeguard who was nominated to run for President of Local 461, and Sequiera and Ozcan have worked for decades as seasonal lifeguards, and were nominated to run for other offices.

5. Defendant Jason Velzaquez was, at the time the last Local 461 election was conducted, allegedly, the President of Local 461. In October 2020 Local 461's parent union, AFSCME, removed Franklyn Paige, who had been President for 25 years, upon charges brought by Petitioners Ozcan and Sequiera, because he had not held membership meetings. (See Exhibit C). Velzaquez was Vice President but deferred taking the office of President, so the Local 461 Board elected Cynthia Valle as President. Shortly after being elected Ms. Valle left employment as a lifeguard, and in an alleged vote by the remaining 6 officers and Executive Board Members, Mr. Velzaquez became President. Velzaquez is sued in his official capacity pursuant to the General Obligations Law.

FACTS RELEVANT TO ALL CLAIMS

6. Local 461 represents all non-supervisory employed by the NYC Parks Department. Between 30 and 50 are employed year-round at various City Pools that are open year-round. The remainder work at pools and beaches opens in the late Spring (approximately Memorial Day) and Labor Day, approximately 1150 people.

7. Seasonal lifeguards have priority in being called back for the subsequent season, as long as they pass a swim test, and many Local 461 m3mb3rs have worked as lifeguards for 10-20 years. All these lifeguards work under terms contained in a collective bargaining agreement negotiated by Local 461, and which is supposed to be ratified by the members of Local 461.

8. Under the recently removed 25 year President of Local 461, Franklyn Paige, members who worked seasonally were not allowed to play any role in the local. They have never been allowed to vote in elections, vote on collective bargaining agreements, or run for office.

9. The Local 461 Constitution at Article IV contains the following provisions concerning membership:

> Section 1. Eligibility. All lifeguard personnel employed by the New York City y Department of Parks, except supervisors are eligible for membership in this local union subject to the requirements set forth in the Constitution of the International Union.
>
> Section 4. Membership dues shall be payable monthly in advance to the local secretary-treasurer and in any event shall be paid not later than the 15th day of the month in which they become due. Any member who fails to pay dues by the 15th day of the month in which they become due shall be considered delinquent, and upon failure to pay dues for two successive months shall stand suspended. Provided, however, that any person who is paying his dues through a system of regular payroll deduction shall for so long as he continues to pay through such deduction method, be considered in good standing.

10. The AFSCME Constitution also contains language relevant to membership, at Article III:

Section 5. If a member remains eligible for membership and pays dues by the 15th day, or such other day specified in the local union constitution, of the month in which they become due, that individual shall be considered in good standing; provided however, a member who pays dues through a system of regular payroll deduction, bank draft, or similar system, shall be considered in good standing for so long as the member continues to pay dues through such deduction method. Any member who fails to pay dues by the day of the month in which they become due shall be considered delinquent, and upon failure to pay dues for two consecutive months shall lose their good standing status and stand suspended.

Section 9. When a member is unemployed, on leave for military service, or on unpaid leave for more than twenty days in any calendar month, such member shall, upon request, be entitled to credit for membership dues for the period of unemployment, military service, or unpaid leave but not to exceed six months within any twelve-month period.

11. Under Article IV of the Local 461 Constitution, the following provisions apply:

Section 1. Officers. The officers of the local union shall bea president, a vice-president, a secretary-treasurer, and five (5) executive board members. These eight (8) persons shall .constitute the executive board of the local.

Section 2. Terms of office. All officers and members of the board shall serve in office for a term of three years commencing with the 1994 election.

Section 4. Nominations. Nominations of office shall be made at a regular or special meeting of the local. At least fifteen (15) days' advance notice shall be given the membership prior to the nominations meeting. A nominating committee may be appointed or elected to make nominations but whether or not such a nominating committee is used, nominations shall be permitted from the floor. All regular elections shall be held in themonth of February. Nominations and elections may be held at the same meeting provided the notice sent fifteen (15) days' in advance clearly states the intention to hold both nominations and electionson the same date.

Section 5. Eligibility for Office.

(a) To be eligible for office (other than that of the president), a member must be in good standing for one year immediately preceding the election. For a member who is transferred into this local from another AFSCME local, this requirement shall be satisfied if such member's combined membership in good standing in both locals is one year at the time of the election and the majority of the entire year has been in membership status in Local 461.

(b) To be eligible for the office of president, a member must be in good standing for three years immediately preceding the election. For a member who is transferred into this local from another AFSCME local, this requirement shall be satisfied if such member's combined membership in good standing in both locals is three years at the time of the election and the majority of the entire three years has been in membership status in Local 461. However, in addition to the three-year membership requirement, to be eligible for office of the president, the member must have spent the entire previous year as a member in good standing in Local 461 and not any other AFSCME local.

Section 6

(a) Prior to nominations, the president shall appoint an election committee and one member of the committee to serve as its chairperson.

(b) A member of the election committee who accepts a nomination for officer must relinquish his/her committee post. The committee will be responsible for ascertaining the eligibility of all candidates for office in this local.

(c) The election committee shall be responsible for the conductof the election as well as any run-offs that may ensue.

(d) The election committee shall prepare a final report for themembership upon completion of the electoral process. Upon acceptance of the committee's report by the membership, the committee may be discharged by the president.

Section 7 Integrity of the Electoral Process. All electionsin this local union shall be conducted by secret ballot vote and afford all eligible members a reasonable opportunity to participate (vote).

Section 8. Adherence to Elections Process. All matters concerning local union nominations and elections shall at all timesbe subject to the provisions of Appendix D entitled Elections Code of the International Union Constitution and the elections Manual published by the International.

Section 10. Eligibility to Vote. To be eligible to vote in the local election, a member must be in good standing at the date of the election.

12. Although the Local 461 Constitution calls for elections in February, they have never been heard in February. The available information shows as follows:

a. 2018 Election – Nominations meeting scheduled for June 4, 2018 at 10 a.m. (during a workday). Minutes show no opposition, and the nominees were declared elected. (See Petition Exhibit D)

b. 2012 Election – Nominations meeting May 9, 2012 at 11 a.m. Election Notice: May 10, 2012, 11 a.m. and 2 p.m. (See Petition Exhibit E)

c. 2009 Election – Nominations meeting April 30, 2019. (See Petition Exhibit F)

d. 2006 Election – Nominations noticed for May 5, 2006 at noon. Election noticed for May 11, 2006. (See Petition Exhibit G)

e. 2003 Election – Nominations noticed for May 7, 2003. (See Petition Exhibit H).

13. As Exhibit D shows, the last election, which was an election by acclamation, without notice to the seasonal members, was held on June 4, 2018. The terms of office of these officers would, by past practice, end sometime in June 2021.

14. On February 11, 2021, Respondent Velazquez caused a Notice of a Nominations Meeting to be sent out, upon information and belief, to the 30 -50 year round members of Local 461. That meeting was held via Ring Central, a video conferencing platform which allows up to 200 people to participate in a phone call, on February 25, 2021 at 10:00am, during the workday of most members. The Notice and the envelope to Petitioner Agramonte is annexed as Petition as Exhibit I. The next day Velazquez mailed out a Notice of an Election Meeting (Petition Exhibit J) , to be held in person, starting at 10:00 am on February 26, 2021. The Notices did not indicate that an Election Committee has been appointed, as required by the AFSCME Election Code at Section 2B, and the Local Constitution at Article VI Section 6. In 2018 one person announced that he was the Election Committee and ran the Election Meeting (see Petition Exhibit D). The Notices were not sent out 15

days in advance, as required by the AFSCME Election Code at Section 2D, and the Local Constitution at Article VI Section 4.

15. More importantly, the Notice was not sent to 1150 of the 1200 members of Local 461. Those 1150 members were paid wages in September 2020 and received their annual vacation payout in November and December 2020. No dues were "due" during the month of October 2020 since no wages were paid, and because the seasonals are on dues checkoff, the City of New York is responsible for deducting dues, as they have in the past, from vacation pay. Many of these members, including Petitioners Ozcan and Sequiera, have sought to maintain their membership, but have no way to formally express that desire to Local 461's leadership, which has no office. Efforts to do that through the Executive Director of DC37 have been rebuffed. See correspondence and email annexed to the Petition as Exhibit K. In no other local of AFSCME do seasonal employees, who are on layoff, have to formally request that they maintain their membership during the six months set forth in Article III, Section 9 of the AFSCME Constitution. More importantly, to allow 30 members to be the only voting members of a union whose membership swells to over 1200 people every summer, is fundamentally undemocratic.

16. On February 25, 2021 Petitioner Agramonte attended the video-conferenced nominations meeting of Local 461. The other Petitioners registered for the meeting but were not sent a link to attend. The meeting was chaired by year-round lifeguard Joshua Frias, who declared: "I am the Election Committee." Agramonte nominated himself for President and a full slate of other officers and Board members, all of whom are seasonal members, and all of whom communicated a desire to have the six-month grace period in the AFSCME Constitution extended to them, to the extent a request was needed. Even before he completed reading his list of nominees, former/removed President Paige interrupted him and challenged, on unstated grounds) the

eligibility of Petitioner Almonte and his entire slate. The "Election Committee" caucused with counsel for DC37, and returned, and adjourned the meeting.

17. Later on, on February 25, 2021, the "Election Committee ruled that the only nominee nominated by Petitioner Agramonte who could run for office was Plaintiff Agramonte. The next day in person voting occurred. Approximately 22 members voted. Agramonte, who was in the Dominican Republic, was not able to cast a ballot.

18. The manner in which the election was run violated both the letter and the spirit of the Local 461 Constitution. "It is well established that "[a] union's constitution and by-laws constitute a contract between the union and its members and define not only their relationship but also the privileges secured, and the duties assumed by those who become members, unless contrary to public policy" (*Ballas v. McKiernan,* 41 A.D.2d 131, 133, 341 N.Y.S.2d 520 [1973], *affd.* 35 N.Y.2d 14, 358 N.Y.S.2d 695, 315 N.E.2d 758 [1974]). The right of union members to secure the union's compliance with its constitution and bylaws is thus enforceable in the courts of this state through an article 78 proceeding (*Allen v. New York City Tr. Auth.,* 109 Misc.2d 178, 182–183, 439 N.Y.S.2d 811 [Sup. Ct. Kings County, 1981], citing *Caliendo v. McFarland,* 13 Misc.2d 183, 188, 175 N.Y.S.2d 869 [Sup. Ct. New York County, 1958])." *LaSonde v Seabrook*, 89 AD3d 132, 933 N.Y.S.2d 195, 199, (N.Y.A.D. 1 Dept., 2011).

19. "Generally, a court considering the validity of actions taken by a union official must determine whether said actions are authorized under the union's constitution or bylaws (*Allen,* 109 Misc.2d 178 at 184). In so doing, the court must assess the union official's claim that his or her actions are authorized under the constitution or bylaws by (1) independently reviewing the constitution or bylaws "in accordance with the general rules of construction appertaining to contracts" and (2) determining whether the union official's interpretation is a reasonable

interpretation of the constitution or bylaws (*id.*). In other words, the Court must review the union's interpretation of its constitution and bylaws for consistency with the principles of good faith and fair dealing."

20. As we illustrated above, the language of the AFSCME Constitution clearly gives laid off members membership rights without paying dues for six months. The circumstances described in the Petition, which Respondent does not contest, is that the seasonals here work from May until September, and get vacation payout checks in November and December of each year, from which dues are deducted. This patter allows them, even with a strict interpretation of the AFSCME Constitution, in membership year round. The opposite result, which has been tolerated for 30 years, is that 30-50 members elect the officers for 1200 members, vote on their contract, and collect those 1200 members' dues to do with as they please.

21. In early February 2021, a number of Local 461 seasonals sent communications to the local through District Counsel 37, requesting that their 6 month layoff rights be honored at the February 24 Nominations meeting and at the February 25 election meeting. That request was never responded to.

22. In fact, no one contacted any seasonals about their rights. Only that morning, when individual lifeguards attempted to log-in to the meeting was it made clear what the Local's position was: they had no rights.

23. There is no question here, that the hastily organized election of Local 461, and the failure to involve 1150 of the 1200 members who pay dues to the Local and work under the Local's contract with the City violated and is wholly contrary to their letter and the spirit of the Local 461 Constitution.

24. Subsequent to the Election Plaintiffs filed a timely appeal with the Election Committee of Local 461. That appeal was denied in an unwritten oral decision announced on April 1, 2021. Subsequently Petitioner Agramonte filed an appeal with the AFSCME Judicial Panel, which has scheduled a hearing on his appeal on May 6, 2021.

AS AND FOR A FIRST CAUSE OF ACTION

25. By acting as described above, Defendants have breached the Local 461Constitution, a breach of a contract between Local 461 and its members.

AS AND FOR A SECOND CAUSE OF ACTION

26. By acting as described above, Defendants have applied the terms of the Local 461 Constitution in a manner which is unreasonable and undemocratic, a violation of the common law of elections in New York.

IRREPARABLE INJURY

27. Should this Court fail to grant the injunctive relief requested by Petitioners, they, and the members of Local 461, who have already suffered irreparable injury, will continue to suffer irreparable injury.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray that the Court.

1. Enter an Order voiding the Febrauy26, 2021 election of Local 461.

2. Enter an order

A) restraining and enjoining Respondent, its officers, agents, and attorneys from failing to conduct a new Officer and Executive Board election open to all NYC Parks Department lifeguards who paid membership dues between June 1, 2020 and August 31, 2020;

B) restraining and enjoining Respondent, its officers, agents, and attorneys

from failing to mail out ballots for an Officer and Executive Board election, to all NYC Parks Department lifeguards who paid membership dues between June 1, 2020 and August 31, 2020, and from failing to include the slate nominated by Petitioner Edwin Agramonte on that ballot.

C) appointing an Election Monitor to conduct the Officer and Executive Board election of Local 461;

3. Award fees, costs, and whatever other relief is just and equitable.

Dated: New York, New York
April 27, 2021

ADVOCATES FOR JUSTICE CHARTERED ATTORNEYS
Attorneys for Petitioners

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VERIFICATION

Arthur Z. Schwartz, attorney for Petitioners, based on his own knowledge, verifies that he has read the foregoing Complaint and that it is true.

Dated: April 27, 2021

Arthur Schwartz

Exhibit 5

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. WILLIAM PERRY PART 23
Justice

----------X

EDWIN AGRAMONTE, OMER OZCAN, RAPHAEL SEQUIERA

Petitioner,

- v -

LOCAL 461, DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, BY ITS PRESIDENT, JASON VELZAQUEZ,

Respondent.

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INDEX NO. 151950/2021
MOTION DATE 06/25/2021
MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 58 were read on this motion to/for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 82, 83, 84, 85, 86, 87, 88, 89, 90 were read on this motion to/for DISMISS.

In this Article 78 proceeding, petitioners Edwin Agramonte (Agramonte), Omer Ozcan (Ozcan) and Raphael Sequiera (Sequiera) are seeking injunctive relief related to conduct that took place in the course of the election of officers held on February 26, 2021 for respondent Local 461, District Council 37, American Federation of State County and Municipal Employees (Local 461), by its President, Jason Velzaquez.[1] Among other requested relief, in the Amended Petition and motion sequence 002, petitioners are seeking to void the election results. In motion sequence 003, Respondent moves, pursuant to CPLR 3211 (a) (2) and (7), for an order dismissing the amended petition. The motions are consolidated for disposition. For the reasons

[1] Respondent notes that Jason Velasquez has been incorrectly identified in the caption as Velzaquez.

set forth below, respondent's motion is granted and motion sequence 002 is denied and the amended petition dismissed in its entirety.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioners are members of Local 461, a local union affiliated with the American Federation of State, County and Municipal Employees (AFSCME) that is a "constituent of AFSCME's administrative subdivision, District Council 37 (hereinafter 'DC 37')." NYSCEF Doc. No. 57, Amended Petition, ¶ 4. Local 461 represents approximately 1,200 New York City Department of Parks and Recreation employees in the Lifeguard title. The majority of Local 461's members are seasonal employees who work at the beaches and pools that are open from Memorial Day until Labor Day. Only 30 to 50 members are employed year-round. Agramonte is a year-round lifeguard, while Sequiera and Ozcan are seasonal lifeguards.

Relevant Procedural History Leading up to Local 461's February 26, 2021 Election

On February 11, 2021, Velasquez sent out "Notice of a Nominations Meeting." Petitioners claim that the seasonal members did not receive this notice. The meeting was scheduled online for February 25, 2021, with a video conferencing platform that could only accommodate 200 people. Velasquez also mailed out a Notice of an Election meeting, which notified those members that an election was scheduled to take place in person, on February 26, 2021.

Agramonte attended the video conference on February 25th and nominated himself for president. He also nominated seasonal employees, including Sequiera and Ozcan, for positions as board members and other officers. At the nomination meeting, Joshua Frias (Frias), the election committee chair, issued a determination that only Agramonte, as a year-round employee,

was eligible to for run for office. Sequira and Ozcan were advised that, as seasonal employees, they do not meet the qualifications to run for office. Frias stated the following, in relevant part:

> "The above-referenced Lifeguards are seasonal employees. Union records show that the typical Lifeguard Season runs from the end of May until on or about the first week of September. The 2020 Lifeguard Season began on or around July 2020, and concluded on or about Labor Day 2020. The above-referenced members, except Edwin Agramonte, served as seasonal Lifeguards during the 2020 season. Many of these members have requested dues credit under Article III, Section 9 of the AFSCME International Constitution. However, even if these members are entitled to the maximum amount of allowable dues credit of six months under the International Constitution, all the aforementioned members—except Edwin Agramonte—would still be unable to meet the qualifications to run for office under Article VI, Section 5 of the Local 461 Constitution, and are therefore ineligible."

NYSCEF Doc. No. 73 at 2.

After receiving this notification, in motion sequence 001, petitioners moved by order to show cause for a temporary restraining order enjoining respondent from conducting the election. After reviewing the papers and hearing oral argument, on February 26, 2021, Judge Dakota Ramseur denied the order show cause. In the written decision and order dated March 2, 2021, the court found that petitioners failed to demonstrate irreparable harm in the absence of an injunction. Specifically, "since the LMRDA (Labor Management Reporting and Disclosure Act) provides for post-election remedies, including overturning an improperly held election, petitioners fail to demonstrate irreparable harm." NYSCEF Doc. No. 65 at 3.

Local 461 subsequently conducted its election for officers on February 26, 2021. The Election Committee received 20 ballots. Agramonte was not elected President.

Instant Action

Petitioners now seek to void the February 26, 2021 election results. NYSCEF Doc. No. 58. As with the order to show cause for the temporary restraining order, petitioners argue that the election violated several provisions of AFSCME and Local 461's constitutions. NYSCEF

Doc. No. 59. To start, petitioners claim that, although the Local 461 Constitution sets forth that elections should take place in the month of February, prior elections have not taken place during that month. For instance, the election prior to the one held in February 2021 took place in June 2018. "The terms of office of these officers would, by past practice, end sometimes in June 2021." Amended petition, ¶ 13. In addition, the notices, which were only sent to the year-round members, did not "indicate that an Election Committee has been appointed, as required by the AFSCME Election Code at Section 2b, and the Local Constitution at Article VI Section 6." *Id.*, ¶ 14. The notices were also not sent out 15 days in advance, as required.

All lifeguard personnel employed by the NYC Department of Parks, except supervisors, are eligible for membership in the union. The constitution explains that membership dues are to be paid monthly and that a member who fails to pay monthly dues is considered delinquent, and loses their good standing status. AFSCME's Constitution has similar provisions.

While these provisions are in the Constitutions, there is also a dues waiver provision in the AFSCME Constitution, which allows members to retain membership status under certain circumstances without paying dues. The provision states the following:

> "When a member is unemployed, on leave for military service, or on unpaid leave for more than twenty days in any calendar month, such member shall, upon request, be entitled to credit for membership dues for the period of unemployment, military service, or unpaid leave but not to exceed six months within any twelve-month period."

Id., ¶ 10.

A member must be in good standing on the date of the election to be eligible to vote and must be in good standing for one year immediately preceding the date of the election to be able to run for office. The City of New York is responsible for deducting dues from the members' wages for the months that they are working. In brief, the 1,170 seasonal employees work May through September. They stop earning wages in October 2020. However, they get vacation

payout checks in November and December, from which dues are taken. Accordingly, given the above, as seasonal employees do not pay dues the months that they are not working, they lose their good standing status and are unable to vote or run for office. However, petitioners argue that "the language of [waiver provision in] the AFSCME Constitution clearly gives laid off members membership rights without paying dues for six months." *Id.*, ¶ 20.

Petitioners allege that, as seasonal employees, they have "never been allowed to vote in elections, vote on collective bargaining agreements, or run for office." Amended petition, ¶ 8. Ozcan and Sequiera requested to retain their membership during the off-season months, but had "no way to formally express that desire to Local 461's leadership, which has no office." *Id.*, ¶ 15. Other seasonal members also allegedly attempted to enforce their six-month layoff rights immediately prior to the election, but did not receive a response. Petitioners allege the following, in relevant part:

> "In no other local of AFSCME do seasonal employees, who are on layoff, have to formally request that they maintain their membership during the six months set forth in Article III, Section 9 of the AFSCME Constitution. More importantly, to allow 30 members to be the only voting members of a union whose membership swells to over 1200 people every summer, is fundamentally undemocratic."

Id.

After the election, on March 3, 2021, Agramonte filed an internal appeal with Local 461's Election Committee. In relevant part, Agramonte alleged that "[a]ll seasonal members, including a group I nominated for office, should have been allowed to run for office and vote in the election." NYSCEF Doc. No. 74 at 1. Agramonte explained that "[a]bout a dozen seasonals in Local 461 did ask for a waiver. They were not allowed to vote in the February 26, 2021 election." *Id.* He also noted that "[t]he election was moved to February, not because there was a concern for the Local Constitution, but because in May and June seasonals would be eligible to

vote." *Id.* After holding a hearing, the election committee denied Agramonte's appeal on April 1, 2021.

Agramonte subsequently filed an appeal on April 11, 2021 with AFSCME's Judicial Panel, where he similarly challenged the election results. In pertinent part, Agramonte alleged that the union unfairly refused to allow seasonal members to vote in the election or run for office. These members should have been granted waiver requests for the months that they were not working and did not pay dues. He further alleged that the election should have been conducted in May of June. A hearing was held on May 6, 2021. Agramonte was represented by counsel, testified, and had the other petitioners testify.

On May 14, 2021, the Judicial Panel issued a determination dismissing Agramonte's election protest in its entirety and confirming the results of the Local 461's February 26, 2021 election of officers and delegates. In pertinent part, the Judicial Panel rejected Agramonte's assertions that the seasonal lifeguards should have been eligible to vote or run in the election because they should be able to secure a waiver to be able to maintain their membership without paying dues for six months. The Panel stated that, to be eligible to run for office a member must be in good standing for one year immediately preceding the election. However, "[i]t is not possible for a seasonal member who works three full months and two partial months each year to maintain the status of a year in good standing even if they were granted the 6-month waiver as provided for under Article III, Section 9." NYSCEF Doc. No. 76 at 8. With respect to notification of a possible waiver, the Judicial Panel found that "it is not incumbent upon the Council, Local, or Election Committee to notify the members of their right to request the waiver, the Constitution is available on the web for members so that they may know their rights." *Id.* at 9.

With respect to the rights of the seasonal members, the Panel summarized:

> "The Constitution is clear, members are required to pay dues; it is through membership dues that rights are conferred. The seasonal lifeguards pay dues and are considered 'in good standing' during the months they pay dues. Through testimony it was established that the seasonal lifeguards last paid dues in November/December and would not resume paying dues until May/June. Brother Agramonte himself recognizes this in item 4 of his protest when he wrote 'in May and June the seasonal lifeguards would resume paying dues and would be eligible to vote.' In this instance, the seasonal lifeguards were not paying dues at the time of the election, nor did they meet the requirement of maintaining 'in good standing status for one year,' therefore they were not eligible to run for office nor vote during the February election."

Id. at 8-9.

The Panel also rejected Agramonte's claim that the election should have taken place in May or June. It stated that, pursuant to Local 461's Constitution, all regular elections are supposed to take place in February. It continued that "[p]ast practice cannot replace or supersede what is set forth in the Local Constitution." *Id.* at 10.[2]

Subsequent to Agramonte's internal appeal, petitioners filed this amended petition seeking to void the results of the February 26, 2021 election. Petitioners are seeking to have the court order that all lifeguards who paid membership dues between June 1, 2020 and August 31, 2020, be eligible to vote and run for office in that election. In the first cause of action,

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[2] The record also indicates that, in January 2020, Sequiera and Ozcan previously filed charges against Local 461's former president Franklin Paige (Paige), with AFSCME's Judicial Panel. Among other things, petitioners had alleged that Paige failed to notify them of membership meetings and also that he failed to hold these constitutionally-mandated meetings. Pursuant to a decision dated October 19, 2020, the Judicial Panel found that Paige was "guilty of violating Article X Section 2(A) for failing to hold the constitutionally mandated membership meetings, as required by the Local 461 Constitution Article V, Section 1, and for depriving the seasonal lifeguards the full rights of union membership, as required by Article IV, Sections 1 and 4 of the Local 461 constitution." NYSCEF Doc. No. 77 at 10. Among other penalties, Paige was removed as President.

petitioners allege that, by their actions, respondent has breached the Local 461 Constitution. The second cause of action states that respondent has "applied the terms of the Local 461 Constitution in a manner which is unreasonable and undemocratic, a violation of the common law of elections in New York." Amended petition, ¶ 26.

Respondent's Motion to Dismiss and Petitioners' Opposition

According to respondent, judicial interference into the union's affairs is unwarranted, as there was no fraud or substantial wrongdoing with the election. Local 461's Constitution provides that a member must be in good standing in order to vote in an election. To be in good standing, a member must pay monthly dues on time. "Local 461's Constitution does not contain a carveout relieving members engaged in seasonal employment from the obligation to pay dues." NYSCEF Doc. No. 79, respondent's memorandum of law in support at 2. Respondent argues that Local 461 "has done nothing but apply the plain language of its Constitution to conduct its election." *Id.* at 8.

Respondent further notes that Local 461's Election Committee and AFSCME's Judicial Panel dismissed these same election related complaints. It alleges that seasonal employees are not exempt from paying dues during the periods when they are not employed. Seasonal employees "can and must pay their dues by hand during such periods to avoid being deemed delinquent." *Id.* at 19. Further, "[p]etitioners do not allege anything that would have prevented them during the time they were in layoff status from continuing to pay dues by hand." *Id.* It also maintains that the Constitution is available online to advise members of their right to request a dues waiver. As the Judicial Panel previously concluded, Local 461 is not "under some affirmative obligation to advise the seasonal Lifeguards of their ability to request a dues waiver . . ." *Id.* Furthermore, even if the waiver was timely requested and granted, the seasonal

members still would not have been in good standing for one year immediately prior to the election. "This is because six months of credited dues, plus dues for the period July - September 2020 when the seasonal Lifeguards' dues were deducted from payroll, equals ten months (not twelve) of dues." *Id.* at 21.

Among other things, respondent also argues that, in an action against an unincorporated association like Local 461, petitioners must allege that each individual local 461 member "authorized or ratified" the conduct. This standard, set forth in *Martin v Curran* (303 NY276 [1951]), is applicable to breaches of agreements in addition to tortious wrongs.

In opposition, petitioners claim that the "election was run in an undemocratic manner, in violation the Local 461 Constitution and the New York State Common Law of Union Democracy." NYSCEF Doc. No. 85, Petitioners' memorandum of law in further support at 12. Petitioners claim that the AFSCME Constitution gives seasonal members membership rights without paying dues for six months and that respondent unreasonably applied the constitution to its election procedures. According to petitioners, "[t]here is no question here, that the hastily organized election of Local 461, and the failure to involve 1,170 of the 1,200 members who pay dues to the Local and work under the Local's contract with the City violated and is wholly contrary to their letter and the spirit of the Local 461 Constitution, and is about as 'unreasonable' as one can get." *Id.* at 15.

According to petitioners, as "[t]he principles of *Martin v Curran* apply to common law torts," it is inapplicable to cases alleging a violation of the union constitution. *Id.* at 21.

LMRDA

According to respondents, any post-election challenges are federal claims subject to Title IV of the Labor Management Reporting and Disclosure Act (LMRDA), 29 USC §§ 481 *et seq.*

"Because the February 26, 2021 Local 461 election for the office of President is subject to the LMRDA, the proper-and only-avenue for Petitioner Agramonte to purse his post-election challenges is through the administrative process laid out in Title IV of the LMRDA." NYSCEF Doc. No. 79, Respondents' memorandum of law in support at 11. They explain that a member may enforce his Title IV rights by first filing an internal appeal with the union. If the member's appeal is not satisfactory, the member may file a complaint with the US Department of Labor (DOL), who shall investigate the complaint.

As pertinent here, petitioners assert that they did file a complaint with the DOL, however the DOL rejected the complaint. The record indicates that Agramonte submitted a claim to the Office of Labor-Management Standards (OLMS) of the DOL seeking "to challenge [the] AFSCME Local 461 officer election conducted in 2021 . . . ." NYSCEF Doc. No. 84 at 1. Pursuant to an email dated July 13, 2021, the DOL advised Agramonte that, "[b]ecause AFSCME Local 461 represents public sector, non-federal employee [sic], it is not covered by either LMRDA or the CSRA . . .. "[T]he Department of Labor has no jurisdiction to accept and investigate your complaint." *Id.* The DOL advised petitioner, in relevant part:

> "The only way OLMS would have jurisdiction to investigate your complaint would be if you sought to challenge the election of Local 461's president as a delegate of AFSCME District Council 37 (DC 37) that is scheduled to be January 2022. The Department would have jurisdiction over your complaint (presumed that it was timely filed according to the LMRDA) as it relates to the local's president as a delegate of DC 37 only. If the Department investigated the complaint and found violations of the LMRDA in the DC 37 officer election, the remedy would only relate to that election. The Department does not have jurisdiction over Local 461 president position and therefore, any remedy effectuated by the Department would not involve the removal of the local's president."

Id. at 1-2.

DISCUSSION

Dismissal

"[O]n a motion to dismiss pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, facts as alleged in the complaint are accepted as true, plaintiffs are afforded the benefit of every possible favorable inference, and the motion court must only determine whether the facts as alleged fit within any cognizable legal theory." *D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 168 AD3d 505, 506 (1st Dept 2019). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted). CPLR § 3211 (a) (2) authorizes the Court to dismiss a cause of action where "the court has no jurisdiction of the subject matter of the cause of action."

As set forth below, the amended petition must be dismissed against respondent as a matter of law, as petitioners failed to sufficiently plead that the individual members of Local 461 authorized or ratified the purportedly unlawful conduct. In *Martin v Curran* (303 NY 276 [1951]), the Court of Appeals addressed the issue of maintaining an action against a union, which is an unincorporated association. Ultimately, the *Martin* Court concluded that, because a labor union is a voluntary unincorporated association, the plaintiff was required to plead and prove that each member of the union authorized or ratified the alleged wrongful conduct (hereinafter, the *Martin* Rule). After discussing the application of General Associations Law § 13, the Court held that "suits against association officers, whether for breaches of agreements or for tortious wrongs, [are limited] to cases where the individual liability of every single member can be alleged and proven." *Id.* at 282.

While not disputing the rule of law set forth in *Martin v Curran*, petitioners claim that it is not applicable herein. However, *Martin v Curran* is controlling and applicable to dismissal of breach of contract claims against unincorporated associations like Local 461. For example, the Court of Appeals recently acknowledged that "[t]he *Martin* rule has been criticized as essentially granting unions complete immunity from suit in state court." *Palladino v CNY Centro, Inc.*, 23 NY3d 140, 148 (2014). Nevertheless, the Court noted that "New York, meanwhile, is said to be in the company of a small minority of states that cling to the common-law requirement that the complaint allege that all of the individual members of the union authorized or ratified the conduct at issue." *Id.* at 148-149 (internal quotation marks and citation omitted). The Court in *Palladino* also recognized a narrow exception to *Martin*, stating that "*Martin* is inapplicable to a suit by a union member against a union arising from wrongful expulsion." *Id.* at 148. Another Court also recently cited *Martin v Curran*, and reiterated that "[a]ctions against unincorporated associations, whether for breaches of agreements or for tortious wrongs, are limited to cases where the individual liability of every single member can be alleged and proven." *Bidnick v Grand Lodge of Free & Accepted Masons of the State of N.Y.*, 159 AD3d 787, 789 (2d Dept 2018).

Subsequent to *Martin*, courts have routinely dismissed claims against unions and their representatives when petitioners failed to sufficiently plead that the members of the union had authorized or ratified the conduct. *See e.g. Cablevision Sys. Corp. v Communications Workers of Am. Dist.* 1, 131 AD3d 1087, 1087-1088 (2d Dept 2015) (internal citations omitted) (The Supreme Court properly applied the *Martin* rule in dismissing the complaint against the [union] defendants . . .. Contrary to the plaintiffs' contention, the *Martin* rule applies to claims for injunctive relief"); *see also Morton v Mulgrew,* 144 AD3d 447, 448 (1st Dept 2015) (internal

quotation marks and citations omitted) (Court rejected plaintiffs' argument that *Martin v Curran* was inapplicable when assessing the claim against the union, stating that plaintiffs were, "[c]ognizant of the obstacle to this suit presented by the *Martin* rule, which limit[s] such suits . . . to cases where the individual liability of every single member can be alleged and proven").

It is well settled that "[a] union's constitution and by-laws constitute a contract between the union and its members and define not only their relationship but also the privileges secured and the duties assumed by those who become members, unless contrary to public policy." *Matter of LaSonde v Seabrook*, 89 AD3d 312, 137 (1st Dept 2011) (internal quotation marks and citation omitted). Accordingly, as petitioners failed to plead that each union member authorized or ratified the election procedures that were purportedly breaches of the union constitution, the cause of action alleging breach of contract must be dismissed. *See e.g. Bidnick v Grand Lodge of Free & Accepted Masons of the State of N.Y.*, 159 AD3d at 789 (Court held that cause of action alleging defamation must be dismissed as "[h]ere, the plaintiff made no factual allegations in the complaint or in opposition to the motion to dismiss to indicate that all members of the Grand Lodge did in fact ratify the allegedly defamatory statements").

Obligations Under the Union Constitution

In the remaining cause of action, petitioners claim that the election was run in an undemocratic manner and that it violated the New York State common law of union democracy. It appears that petitioners' claims stem from an alleged breach of the union constitution, which, as discussed, is a claim precluded under the *Martin* rule. In any event, assuming arguendo, that the *Martin* rule would not preclude any additional assessment, the court finds that respondent applied the constitution in a reasonable manner, as the terms were applied as they were written.

"The right of union members to secure the union's compliance with its constitution and bylaws is thus enforceable in the courts of this state through an article 78 proceeding." *Matter of LaSonde v Seabrook*, 89 AD3d at 137. When assessing the union's actions, the court "must determine whether said actions are authorized under the union's constitution or bylaws." *Id.* (internal citation omitted). "[T]he court must . . . (1) independently review[] the constitution or bylaws in accordance with the general rules of construction appertaining to contracts and (2) determine[] whether the union official's interpretation is a reasonable interpretation of the constitution or bylaws." *Id.* at 137-138 (internal quotation marks and citation omitted).

Upon review of petitioners' claims, the court finds that the contested actions were authorized under the union's constitution and that the union applied the specific terms of the contract. For instance, the Local 461 Constitution states that elections are to be held in the month of February. The record indicates that the most current election was held during that month. The Constitution confers the rights of membership to paying members. It further provides that to be eligible to vote in the local election, the member must be in good standing, i.e. pay monthly dues, on the date of the election. Union dues are automatically taken out of wages. Here, Ozcan and Sequiera, as seasonal members, did not work in the month of February. As such, they did not pay dues in the month of February so they were not eligible to vote.

To run for office, a member must be in good standing for one year immediately preceding the election. Ozcan and Sequiera, as seasonal members, did not pay dues for several months of the year, so they lost their good standing status and were not eligible. Seasonal members are not exempt from paying dues if they wish to remain in good standing all year round. Respondents have noted that seasonal members can pay their monthly dues by hand even if they are not

working those months, however, none of them did so. As only members in good standing are advised of upcoming nominations and elections, these petitioners did not receive the notices.

The court recognizes the existence of the dues waiver provision in the AFSCME Constitution which allows a member, upon request, to "be entitled to credit for membership dues for the period of unemployment, military service, or unpaid leave but not to exceed six months within any twelve-month period." Amended petition, ¶ 10. At the outset, the AFSCME Constitution is made available online for all members to view. There is no constitutional requirement for the union to proactively advise members of the ability to request a waiver.

As set forth above, as noted by the Judicial Panel, even if petitioners paid dues only during the months they worked and then proactively requested a waiver, "[i]t is not possible for a seasonal member who works three full months and two partial months each year to maintain the status of a year in good standing even if they were granted the 6-month waiver . . .." Petitioners claim that, "the seasonals here work from May until September, and get vacation payout checks in November and December of each year, from which dues are deducted. This pattern allows them to keep membership in good standing year-round." NYSCEF Doc. No. 85, memorandum of law in further support at 15. According petitioners every possible favorable inference, even if they had requested and been granted a waiver, Sequiera and Ozcan would not meet the criteria for having good standing for one year immediately preceding the election because they did not pay dues by hand for the month of October 2020, when no wages were issued.

Petitioners argue that respondent could have taken the approach "empowering their seasonal members, but it chose not to." *Id.* They claim that failing to include 1,170 out of 1,200 members is "contrary to . . . the spirit of the Local 461 Constitution." *Id.* Although petitioners believe that respondent should have acted differently with respect to the seasonal members, there

is no indication that respondent's actions were unauthorized. Respondent applied the constitution in accordance with general contract rules, and, as the express language of the contract was followed, the interpretation was reasonable.

Additional Issues

The record indicates that, both before and after the election took place, petitioners filed internal appeals with the Local 461's Election Committee and AFSCME Judicial Panel. Petitioners had contested, in relevant part, the eligibility of seasonal members to vote and run in the February 26, 2021 election and the timing of that election. Accordingly, the court will not consider any new allegations with respect to the election, such as the timing of the mailing of the notices. *See e.g. Matter of Daniels v New York State Dept. of Disabled Am. Veterans*, 40 AD3d 219, 220 (1st Dept 2007) (internal quotation marks and citations omitted). ("It is well settled that when a nongovernmental entity . . . provides timely and adequate relief, an aggrieved member must first exhaust that organization's remedies before seeking redress from a court").

CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED that respondent Local 461, District Council 37, American Federation of State County and Municipal Employees, by its President, Jason Velzaquez's motion sequence 003, to dismiss the amended petition, is granted, and motion sequence 002 and the amended petition are denied and the proceeding is dismissed.

2/1/2022
DATE

WILLIAM PERRY, J.S.C.

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

Exhibit 6

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Kapnick, J.P., Webber, Oing, González, JJ.

16403 In the Matter of EDWIN AGRAMONTE et al.,
Petitioners-Appellants,

-against-

LOCAL 461, DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, by its President, JASON VELZAQUEZ,
Respondent-Respondent.

Index No. 151950/21
Case No. 2022-02573

Advocates for Justice, Chartered Attorneys, New York (Arthur Z. Schwartz of counsel), for appellants.

Cohen, Weiss and Simon LLP, New York (Hanan Kolko of counsel), for respondent.

Order and judgment (one paper) of the Supreme Court, New York County (William Perry, J.), entered on or about February 1, 2022, which, to the extent appealed from, granted the motion of respondent union to dismiss the amended petition seeking to annul an officer election conducted in February 2021 and to direct new elections, and dismissed the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Supreme Court correctly granted the union's motion to dismiss the amended petition. The petition, which interposed claims alleging breach of contract and violation of the common law of elections in New York, failed to plead "that each individual union member authorized or ratified the [allegedly] unlawful actions" (*Charter Communications, Inc. v Local Union No. 3*, 166 AD3d 468, 469 [1st Dept 2018], citing

Martin v Curran, 303 NY 276 [1951]). Moreover, the law is well settled that suits for breaches of agreements or for tortious wrongs against officers of unincorporated associations, including unions, are limited to situations in which "the individual liability of every single member can be alleged and proven" (*Martin*, 303 NY at 282; *see* General Associations Law § 13; *Palladino v CNY Centro, Inc.*, 23 NY3d 140, 147-148 [2014]; *Catania v Liriano*, 203 AD3d 422, 423 [1st Dept 2022], *appeal dismissed* 38 NY3d 1049 [2022]).

We have considered petitioners' remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: October 13, 2022

Susanna Molina Rojas
Clerk of the Court

Exhibit 7

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

EDWIN AGRAMONTE, OMER OZCAN, RAPHAEL SEQUIERA, Petitioners, - against - LOCAL 461, DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES, by its President, JASON VELZAQUEZ, Respondent.	Appellate Case No. 2022-02573 N.Y. Cty. Index 151950/2021 Hon. William Perry

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached is a true and correct copy of the decision in this matter, dated October 13, 2022, from the First Judicial Department unanimously affirming the February 1, 2022 Decision and Order from the Honorable William Perry. The October 13 decision was duly entered by the Clerk of the Court for the First Judicial Department on October 13, 2022.

Dated: New York, New York
October 19, 2022

Respectfully submitted,

/s/ Hanan B. Kolko

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Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Hanan B. Kolko, hereby certify that, on the 19th day of October 2022, a copy of the foregoing Notice of Entry was served electronically via the NYSCEF system and by mail upon:

Arthur A. Schwartz
Laine A. Armstrong
ADVOCATES FOR JUSTICE,
CHARTERED ATTORNEYS
225 Broadway, Suite 1902
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Attorneys for Petitioners

/s/ Hanan B. Kolko
Hanan B. Kolko

Exhibit 8

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

----------X

PAUL BRAITHWAITE and ANTHONY GORDON,

Plaintiffs,

- v -

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,

Defendants.

----------X

INDEX NO.	654162/2020
MOTION DATE	09/02/2020, 09/11/2020
MOTION SEQ. NO.	001 002

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 24, 25, 26, 28, 39, 41, 43, 44, 45, 51, 52

were read on this motion to/for STAY.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 29, 30, 31, 32, 33, 34, 35, 36, 37, 40

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and after argument, the motion of plaintiffs Paul Brathwaite[1] and Anthony Gordon for an order restraining and enjoining defendants for the pendency of this action (motion seq. no. 001) is granted to the extent set forth herein, and the motion of defendants Shaun Francois (as President of New York City Board of Education Employees Local 372, American Federation of State, County and Municipal Employees) and

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

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) (motion seq. no. 002) to dismiss the amended verified complaint is denied, in accord with the following memorandum. The motions are consolidated here for decision.

Background

This is an action seeking injunctive relief related to conduct of a local public employees' union. New York Board of Education Employees Local 372 ("Local 372") is a 22,000 member union representing non-pedagogical employees at the New York City Department of Education (Amended Verified Complaint ¶ 3).[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). The plaintiffs are members of Local 372. Defendant Shaun Francois is the President of Local 372 (*id.* ¶ 6).

Plaintiffs commenced this action for an injunction and related relief in connection with Local 372's election for officers and union delegates. Under the terms of the Local 372 Constitution (the "Constitution"), general elections are to be held every year in June (*id.* ¶ 7). Elections are by secret ballot, and only "members may vote" (*id.*). Elections are run in accordance with the AFSCME Election Code and the AFSCME Election Manual (*id.*). Under the Constitution, nominations for office are to be held at the May Membership Meeting, and the election is to take place at various poll sites around New York City on the date of the June Membership Meeting (*id.* ¶ 8). This leaves a 30-day period for nominated candidates to campaign among union members.

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

The Constitution provides for the election of the following positions with qualifications as set forth as follows:

Article VI
Local Union Officers, Local Union Trustees, Chapter Officers and Delegates

Section 1. The officers of this local shall be: president, executive vice-president, second vice president, two sergeant-at-arms, recording secretary, secretary-treasurer and two executive board members elected from each chapter, and these officers shall constitute the executive board of this union. Officers other than executive board members shall be elected for a three-year term and not more than four officers shall be elected from any one chapter.

Section 2. There shall be elected a minimum of three (3) members who shall serve as trustees. Trustees are not on the executive board of the local. The trustees shall be elected as follows: three (3) trustees shall be elected for a three (3) year term. Election for all three (3) trustees shall be conducted at the same day and time as the election for the officers of this local as indicated in Article Vll, Section 1, of this constitution.

. . . .

Section 4. Positions as delegates to District Council 37 and the central labor council shall be filled by election from among the officers or from rank-and-file members as the case may be. An officer shall not be disqualified from election as a delegate solely by reason of his/her position as officer.

Article Vll
Nominations and Elections

Section 4. To be eligible for office, a member must be in good standing with the local for one year immediately preceding the election and employed in those job classifications within the jurisdiction of the local for a period of twelve (12) consecutive months prior to the month of nomination. All officers of the local shall be considered as meeting the requirement of being employed in those job classifications within the jurisdiction of the local for the purposes of being eligible to run for local office.

. . . .

Section 6. All matters concerning nominations and elections shall be subject to the provisions of Appendix D, entitled Elections Code, of the International Constitution, and which is made a part of this constitution by reference.

(NYSCEF Doc. No. 5.)

Appendix D of the AFSCME Election Code states as follows:

> Section 2. Election of subordinate body officers.
>
> A. To be eligible for election, a nominee must be a member in good standing of the local union in which the nominee seeks office or of a local affiliated with the council in which the nominee seeks office, and must meet such other conditions as are stipulated in the constitution of the subordinate body.
>
> D. Not less than fifteen days prior to the holding of nominations for local union officers, a notice of the nominations and elections shall be mailed to each member at the member's last known home address.

(NYSCEF Doc. No. 7.)

In 2020, Local 372 ceased having membership meetings due to the COVID-19 pandemic (Amended Verified Complaint ¶ 13). Plaintiffs allege that, on an unknown date, Mr. Francois appointed an Election Committee to conduct a general election, and thereafter Ms. Elliott was appointed as Chair of the Elections Committee (*id.* ¶ 14). On or about August 15, 2020, a Notice of Nominations and Elections (the "Notice") was mailed to Local 372 members (*id.* ¶ 15; NYSCEF Doc. No. 17). The Notice announced that nominations for the election must be made by August 25, 2020, and that the attendant ballots would be mailed out "on or about" September 3, 2020, and tallied on September 29, 2020 (*id.* at 2, 4).

The Notice also contained provisions whereby members could submit a "slate" of candidates for nomination. These included the following relevant provisions:

> "Below is the list for all positions for Nominations and Election:
>
> • (1) PRESIDENT
> • (1) EXECUTIVE VICE PRESIDENT
> • (1) 2ND VICE PRESIDENT
> • (1) SECRETARY TREASURER
> • (1) RECORDING SECRETARY
> • (2) SERGEANT-AT-ARMS
> • (3) TRUSTEES
> • (25) DELEGATES TO DISTRICT COUNCIL 37*
>
> (* *Local 372 is entitled to 26 Delegates to District Council 37 and by the virtue of the position, the President will be an automatic Delegate*)"

(NYSCEF Doc. No. 17 at 1.)

> **"THE OFFICIAL NOMINATIONS FORM for the FULL SLATE which includes (1) President, (1) Executive Vice President, (1) 2nd Vice President, (1) Secretary-Treasurer, (1) Recording Secretary, (2) Sergeant at Arms, (3) Trustees and (25) Delegates to D.C. 37 positions as well as THE OFFICIAL NOMINATIONS FORM for INDEPENDENT CANDIDATE can be completed and submitted using one of the following 3 options:"**

(*Id.* at 2 [boldface and underscoring in original].)

> **". . . Please remember, in order to have a slate box on the ballot, each position must have an eligible candidate nominated."**

(*Id.* [boldface in original].)

> "To make a nomination, the nominator must be a member in good standing in Local 372. Self-nominations are permitted. Nominations for a group or slate of candidates are permitted. A group of candidates will only be designated a slate for purposes of having a slate voting box on the election ballot if the group has an eligible candidate for all of the offices and positions of **(1) President, (1) Executive Vice-President, (1) 2nd Vice President, (1) Secretary-Treasurer, (1) Recording Secretary, (2) Sergeant at Arms, (3) Trustees and (25) Delegates to District Council 37**. All other candidates will be considered as an Independent Candidate."

(*Id.* at 3 [boldface in original].)

> "The ballot will be designed to enable a member to have the option to vote for a full Slate of Candidates or for Independent Candidates. **Write-in ballots are not permitted."**

(*Id.* at 4 [boldface in original].)

After receiving the Notice, plaintiffs submitted a slate of candidates for nomination under the slate name "Team Quiet Storm" (Amended Verified Complaint ¶ 17). In addition to the other positions, the Team Quiet Storm slate included 25 candidates for the Delegate to District Council 37 position, one of whom was plaintiff Paul Brathwaite. Mr. Brathwaite was also submitted as a candidate for President. On August 28, 2020, Mr. Brathwaite received an unsigned letter from the Local 372 Election Council that advised that he would not receive a

slate box on the forthcoming ballot (*id.* ¶ 19; NYSCEF Doc. No. 20). The August 28, 2020, letter states the following:

> We regretfully inform you that you will not have a slate box for your column on the official ballot of Local 372's 2020 Officers and Delegates election. This decision was made based on you failing to submit full slate. By nominating yourself for both President and Delegate to District Council 37, you did not comply with the total Delegates required for D.C. 37. The President by the virtue of the position is an automatic candidate to D.C. 37. This was clearly indicated on the Nominations and Election notice it was mailed to all members in good standing.
>
> Please refer to the sections below from that notice:
>
> (** Local 372 is entitled to 26 Delegates to District Council 37 and by the virtue of the position, the President will be an automatic Delegate*)
>
> "Nominations for a group or slate of candidates are permitted. A group of candidates will only be designated a slate for purposes of having a slate voting box on the election ballot if the group has an eligible candidate for all of the offices and positions of **(1) President, (1) Executive Vice-President, (1) 2nd Vice President, (1) Secretary-Treasurer, (1) Recording Secretary, (2) Sergeant at Arms, (3) Trustees and (25) Delegates to District Council 37**. All other candidates will be considered as an Independent Candidate."

(NYSCEF Doc. No. 20 [boldface in original]). On August 29, 2020, plaintiff Anthony Gordon emailed the Election Committee to object to the decision and request that that Team Quiet Storm be reinstated (Amended Verified Complaint ¶ 19; NYSCEF Doc No 21). Mr. Gordon's email also noted that the 2017 election ballot included slates that included the same individual as a candidate for both President and Delegate to District Council 37 (NYSCEF Doc. No. 21). On Monday August 31, 2020, the Election Committee held a virtual meeting where the denial of a slate box for Team Quiet Storm was reaffirmed and Mr. Brathwaite received a sample ballot showing that he would not be running as part of a slate (Amended Verified Complaint ¶ 19; NYSCEF Doc. No. 22). Instead, the Team Quiet Storm candidates were listed in a column titled

"INDEPENDENT CANDIDATES FOR **TEAM QUIET STORM**" (NYSCEF Doc. No. 22 [boldface in original]).

Thereafter, plaintiffs commenced this action asserting causes of action for breach of the Local 372 Constitution (breach of contract) and breach of the ACSCME Constitution and Election Code. In additional to the foregoing allegations, plaintiffs' amended verified complaint also alleges that the abbreviated time frame of the election did not give them adequate time to campaign and that they were not provided the means to do a campaign mailing to union members, as provided for in the Notice and the Local 372 and AFSCME Constitutions (Amended Verified Complaint ¶ 21). Concurrent with commencement of the action, plaintiffs moved by order to show cause for a temporary restraining order, preliminary injunction, and permanent injunction, essentially restraining and enjoining defendants from conducting the Local 372 election unless and until the candidates have a reasonable time and opportunity to campaign, including the opportunity to do a mailing, and to ensure that the Team Quiet Storm slate is included on the ballot, and with Mr. Brathwaite listed thereon as a candidate for President and for District Council 37 Delegate. The order to show cause, 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 remains in effect.

Defendants move to dismiss the action on the asserted ground that plaintiffs are precluded from bringing this action because they have failed to exhaust all administrative remedies; that plaintiffs have failed to state a cause of action under the governing union rules and regulations; and that plaintiffs have failed to demonstrate their entitlement to injunctive relief. Plaintiffs oppose the motion to dismiss and assert that pursuit of administrative remedies would

have been futile and, therefore, was not required due to the abbreviated time frame of the nominations period.

Standard of Review

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]). Ambiguous allegations must be resolved in the plaintiff's favor (*see JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [citations omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*Cortlandt Street 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

Defendants move to dismiss on the asserted ground that plaintiffs are precluded from bringing this action because they have failed to exhaust all administrative remedies; that

plaintiffs have failed to state a cause of action under the governing union rules and regulations; and that plaintiffs have failed to demonstrate their entitlement to injunctive relief.

In general terms, a party objecting to an action taken by a union should exhaust internal administrative remedies before bringing his or her claims in court; but recognized exceptions to this rule include instances where timely and adequate relief is not available or where continued administrative efforts would be futile (*see, e.g., Madden v Atkins*, 4 NY2d 283 [1958]). Here, the Notice references an administrative remedy, as follows:

> The Election Committee will examine and determine the eligibility of all Nominators and Nominees, relative to their good standing following nominations. The Election Committee shall decide any challenges to the eligibility of a Nominee to run for office. A candidate may appeal the Election Committee's decision to AFSCME's Judicial Panel under Section 4 of Appendix D to AFSCME'S Constitution. Such appeal must be filed within ten (10) days of the committee' decision or forty (40) days after the challenge to a candidate's eligibility was filed, if no decision has been reached by the Judicial Panel, such an appeal will not be a basis for delaying the election.

(NYSCEF Doc. No. 17 at 3). The Local 372 Constitution (NYSCEF Doc. No. 13 § 6) and the AFSCME Local Union Election Manual (NYSCEF Doc. No. 16 at 11-12) also reference the AFSCME appeal process referenced in the Notice. The AFSCME appeal process provides, *inter alia*, that: "Any protestant or nominee adversely affected by a decision on a challenge or a protest may file a written appeal with the Judicial Panel within ten days of the subordinate body's decision, or, if no decision has been rendered, within forty days after filing the original protest with the subordinate body" (NYSCEF Doc. No. 15 § 4 [D]). That process further provides that: "If the investigation shows that there were violations which may have affected the outcome of the election, the election or any part thereof may be set aside and a new election held" (*id.*). Unsuccessful appeals

may be further appealed to the full "Judicial Panel" and then to the "International Convention" (*id.* § 4 [E], [F]).

Defendants allege that plaintiffs' counsel is familiar with the foregoing appeal process and has utilized in connection with several matters in the past. However, plaintiffs contend that the abbreviated time frame employed by defendants in this particular instance – just one week between the date for nominations and the mailing of ballots – did not provide a workable time frame for utilization of the formal appeal process and, furthermore, that being left off the ballot or being improperly listed on the ballot constitutes irreparable injury, even considering that the appeal process provides that the election may be set aside and a new election held in the event of a favorable appeal (*see*, NYSCEF Doc. No. 43 ¶¶ 13-18).

As palpably reasonable as plaintiffs' foregoing argument appears to be in the present circumstances (*see, Madden, supra*), there are additional, even more compelling, reasons justifying plaintiffs' position that they should not be relegated to the administrative process prescribed in the union materials. A careful reading of the administrative appeal process as described in the union's Notice reveals that it is limited to Election Committee determinations concerning "the *eligibility* of . . . Nominees, *relative to their good standing*" (NYSCEF Doc. No. 17 at 3 [emphasis added]). Here, defendants' decision to exclude the Team Quiet Storm slate was in no way predicated on ineligibility relative to any nominee's good standing, as they openly acknowledge in their August 28, 2020, letter rejecting the slate. That letter was specific in stating that "[t]his decision was made based on you failing to submit full slate" (NYSCEF Doc. No. 20). The asserted procedural defect of failing to submit a full slate is entirely distinct of the notion of *ineligibility* to run for the office in the first place, as amply divined from the union's

Notice, first making allowance for "a group or slate of candidates" (NYSCEF Doc. No. 17 at 3) – the focus of defendants' rejection letter (NYSCEF Doc. No. 20) – and then, requiring, as a distinct element, that such group or slate consist of "eligible candidate[s]" (NYSCEF Doc. No. 17 at 3). Defendants never asserted that plaintiffs are not eligible candidates, or that anyone on plaintiffs' slate of candidates, is not an eligible candidate – in good standing (*see,* NYSCEF Doc. No. 20. *See also*, NYSCEF Doc. No. 5 [Constitution] Article VII § 4 ["To be eligible for office, a member must be in good standing . . . ."]). Indeed, the Notice's stated procedure for administrative appeal (NYSCEF Doc. No. 17 at 3) makes specific and exclusive reference to the substantive element of nominee eligibility multiple times. Whereas the distinct technical element of insufficiency of number of candidates on a particular slate – the crux of this case, and the sole subject of defendants' rejection letter (NYSCEF Doc. No. 20) – is, on the other hand, never once identified in that process as a genre of determination subject to administrative appeal.

Thus, because of the nature of defendants' determination having no relation to candidate eligibility *per se*: that determination, by virtue of the union's own constitutional and notice materials, was not subject to administrative appeal. Plaintiffs were, therefore, free to commence this action.[3]

Defendants next argue that plaintiffs have failed to state a claim because the Notice clearly instructs potential nominees that they must include a slate of 25 delegates that does not

[3] A related action titled *Anthony Gordon and Paul Braithwaite v Shaun Francois, et al.* (index No. 654437/2020), presenting a different set of challenges relating, *inter alia*, to access to union books and records, is also pending before this court, and as to which a decision and order of this court of even date herewith has been issued. (Familiarity with said decision and order is presumed.) Said decision and order engages an alternative analysis which similarly concludes that exhaustion of administrative remedies, within the context of that action, was not necessary preparatory to commencement of that action. Although said analysis could equally apply here, the gist of the analysis set forth in *this* decision goes even further in light of the observed fact that the particular election-related materials unique to this particular action expressly limit the administrative appeal process to the issue of a nominee's substantive eligibility to run for office, and were not more broadly applicable to include the technical issue of sufficiency of the number of candidates on a submitted slate, which was the defendants' stated ground for rejection of plaintiffs' slate (*see*, NYSCEF Doc. No. 20).

include the nominee for President, and that plaintiffs have failed to demonstrate their entitlement to injunctive relief. This court disagrees. At the outset, the Notice states in ***six*** different places that the available positions include, and that a full slate of candidates requires, "(25) Delegates" to D.C. 37 of Local 372 (*see*, NYSCEF Doc. No. 17 at 1-4); but there is only one single solitary parenthetical note within the entire Notice indicating that "Local 372 is entitled to 26 Delegates to District Council 37 and by the virtue of the position, the President will be an automatic Delegate" (*id.* at 1). This was, in this court's view, woefully insufficient to put potential candidates on fair notice that they must nominate 26 individuals for the Delegate position, including the President, or 25 individuals, not including the President. And, drawing guidance from jurisprudence governing contract interpretation: to the definite extent that the Notice is embedded with such confusion – requiring union members to parse out and struggle to reconcile the six-versus-one iterations noted above – the consequence of that confusion is more justly borne by the drafter of the Notice, i.e., the union, not the union members who wish to participate in a fair, open, and democratically inclusive elective process (*see, e.g., 327 Realty, LLC v Nextel of N.Y., Inc.*, 150 AD3d 581 [1st Dept 2017]).

A motion for a preliminary injunction is appropriate where the movant shows a likelihood of success on the merits, irreparable harm absent the injunction, and a balancing of equities in favor of the injunction (*e.g., W.T. Grant Co. v Srogi*, 52 NY2d 496 [1981]).

As indicated in the above discussion, plaintiffs have, at the threshold level, demonstrated a likelihood of success on the merits of their assertions that: (i) the instant dispute is not subject to administrative appeal; and (ii) the nature and content of the union's Notice was such that a potential candidate or slate of candidates might very reasonably have misunderstood the requirements for nomination. Consequently, this court finds that plaintiffs have shown, at this

threshold level, a likelihood of success in this litigation. As for irreparable harm, there clearly *would* be such harm should the challenged electoral procedure be allowed to go forward without inclusion of the Team Quiet Storm slate. Were this court to allow the election to go forward without the slate, and then, at the conclusion of this case, order a whole new election, this would cause unbearable instability, as well as cost, for the union and all its members. And, finally, as to balancing of the equities: the equities of the union, which drafted the Notice and related constitutional documents, ought to give way to the rights of union members who desire to participate in what is supposed to be a fair and democratic process for elective governance over many fellow union members.

In conclusion, the cross-motion to dismiss is denied and the motion for a preliminary injunction is granted to the extent set forth in the sentences which now follow. When one examines the precise relief requested in the motion, one discovers that it seeks, in essence, the ultimate relief sought in the complaint; to wit, a stay of election "unless, the candidates have a reasonable time and opportunity to campaign, . . . and unless Plaintiffs' slate is allowed to run, on the ballot, as a slate" (Amended Verified Complaint at 10. *Compare id. with* Order to Show Cause [NYSCEF Doc. No. 28]). Because plaintiffs' motion was made within the procedural context of a motion for provisional relief, this court does not view itself authorized at this time to grant such ultimate relief, but is procedurally constrained to go no further than continuing the temporary restraining order found in the Order Show Cause, pending further order. That said, the court, at present, perceives of no issues of fact; viewing the matter, at present, as a question of law dependent on proper interpretation of the union's notices and governing documents. Therefore, counsel for the parties will be directed to participate in a teleconference to discuss the

possible saliency, at this time, of a timeframe for further briefing in the nature of a motion for summary judgment.

Accordingly, it is

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

ORDERED that plaintiffs' motion for a preliminary injunction is granted to the extent that the temporary restraint of election set forth in the Order to Show Cause herein (NYSCEF Doc. No. 28) is hereby extended pending further order of the court; and it is further

ORDERED that a remote video conference will be conducted – to be arranged by the court – at which counsel for the parties will appear, on April 13, 2021, at 10:00 a.m.

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		[X]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[ ] DENIED	[ ]	GRANTED IN PART	[X]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE

STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK)		**EXPRESS NEXT DAY AIR**

I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On November 18, 2022

deponent served the within: **MOTION FOR LEAVE TO APPEAL**

upon:

COHEN, WEISS AND SIMON
Attorneys for Respondent-Respondent
900 Third Avenue, Suite 2100
New York, New York 10011
(212) 563-4100
hkolko@cwsny.com

the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on 18th day of November 2022

MARIANNA BUFFOLINO
Notary Public State of New York
No. 01BU6285846
Qualified in Nassau County
Commission Expires July 15, 2025

Job# 316891