Palma v New York City Campaign Fin. Bd.
2006 NY Slip Op 30797(U)
October 20, 2006
Supreme Court, New York County
Docket Number: 114600/2005
Judge: Paul G. Feinman

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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ANNABEL PALMA and FRIENDS OF ANNABEL PALMA,

Plaintiffs,

against

NEW YORK CITY CAMPAIGN FINANCE BOARD,

Defendant.

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Index Number 114600/2005
Mot. Submit Date May 21, 2006
Mot. Seq. Nos. 003, 004
Cal. Nos. 13, 14

DECISION AND ORDER

For the Plaintiffs:
Jerry H. Goldfeder, Esq.
225 Broadway
New York NY 10007
212-962-4600

For the Defendant:
Daniel M. Abuhoff, Esq.
Debevoise & Plimpton LLP
919 Third Avenue
New York NY 10022
212-909-6000

Papers considered in review of these motions for a declaratory judgment and other relief, and cross-motion to dismiss amended complaint:

	Papers	Numbered
Seq. 001	Order to Show Cause, Appendix A, Exhibits	1-3
	Notice of Filing of Notice of Removal	4
Seq. 003	Notice of Motion	1
	Notice of Cross-Motion, Loprest Affirmation	2,3
	Def. Memo of Law	4
Seq. 004	Order to Show Cause	1
	Def. Memo of Law in Opp.	2
	Pl. Aff. in Opp.	3
	Pl. Memo of Law	4
	Def. Reply Memo of Law	5
	Loprest Reply Aff.	6

PAUL GEORGE FEINMAN, J.:

The motions and cross-motion bearing sequence numbers 003 and 004 are consolidated for purposes of decision.[1]

[1]This decision includes references to documents cited by the parties which were previously submitted in the motion papers designated as sequence 001.

003
004

INTRODUCTION

Plaintiff Annabel Palma is an elected member of the New York City Council from the 18th District in the Bronx, New York. Palma first ran for and was elected to office in 2003. Co-plaintiff "Friends of Annabel Palma" (hereinafter, the campaign) was the campaign committee which successfully helped elect Palma to the City Council. Defendant New York City Campaign Finance Board (the Board or CFB) administers the matching funds program available to New York City candidates running for election to the offices of mayor, comptroller, public advocate, borough president, and member of the City Council.

Palma, a former employee of New York's Health and Human Service Union, 1199/SEIU, AFL-CIO ("1199"), participated in the matching funds program in 2003 and ultimately received public matching funds totaling $93,750 (Loprest Aff. ¶ 17). As described more fully below, in the course of the oversight and audit by the Board's staff of the campaign's finances, the staff found activities by 1199 which suggested to them that the union was not acting independently from the campaign, had made in-kind contributions which were unreported in the campaign's disclosure statements, and had coordinated activities with the campaign on the days of the primary and general elections (Loprest Aff. ¶¶15, 18; Def. Memo in Opp. p. 7). On June 28, 2005, the Board issued its "Notice of Alleged Violations, Proposed Penalties and Opportunity to Respond" (the Notice) to which the campaign was to respond by a deadline which ultimately was extended until October 21, 2005 (Loprest Aff. ¶ 24), at which time this action was commenced.

Plaintiffs filed a summons and verified complaint on October 20, 2005 and moved by order to show cause for a temporary restraining order enjoining the Board from proceeding with its inquiry pending a hearing concerning the constitutionality of certain provisions on which the

Board was relying.[2] After a court conference, the motion was deemed withdrawn by decision and order on December 20, 2005, without prejudice to plaintiffs' filing a second amended complaint and a renewed request for preliminary injunctive relief. Defendant advised that it would likely issue a revised Notice, with both parties responding to the changes to the Board Rules resulting from the changes to the Administrative Code, as discussed more fully below (Def. Memo of Law in Opp. p. 4). Shortly thereafter, plaintiffs filed and served their second amended complaint, dated December 14, 2005. In addition, by notice of motion dated December 22, 2005 and filed on January 6, 2006, plaintiffs moved for various injunctive and declaratory relief.

On January 6, 2006, defendant served plaintiffs with a revised Notice of Alleged Violations. On January 13, 2006, defendant cross-moved to dismiss the amended complaint, based on lack of subject matter jurisdiction and failure to state a cause of action (CPLR 3211[a][2], [7]). Also on January 13, 2006, plaintiffs brought a second order to show cause seeking a temporary restraining order and other relief, including a stay of the upcoming deadlines for plaintiffs to respond to the amended Notice as well as meeting with the Board.

For the reasons set forth below, plaintiffs' motion bearing sequence number 003 and motion brought by order to show cause bearing sequence number 004 are denied and defendant's

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[2]Following the filing of the motion, defendant removed the action to federal court on October 28, 2885, based on plaintiff's claim of violations of federal constitution. While the case was pending in federal court, plaintiffs amended their complaint to assert New York State constitutional claims rather than federal claims, and the parties then stipulated to remand the action to Supreme Court. By order dated December 9, 2005, the action was restored to the court's calendar, and the parties were directed to appear for a conference on December 19, 2005. (Def. Memo of Law in Opp. p. 4).

cross motion to dismiss is denied.

THE NYC CAMPAIGN FINANCE BOARD AND ITS PROCEDURES

The New York City Campaign Finance Board is charged with administering the New York City Campaign Finance Act (NYC Admin. Code §§ 3-701 to 3-717; 3-801; N.Y. City Charter ch. 46, §§ 1051-1053, 1056-1057, hereinafter the Act) and the New York City Campaign Finance Board Rules (RCNY ch. 52, hereinafter the Rules).[3] Together they are known colloquially as the matching funds program. The Board is comprised of five members, two of whom are appointed by the Speaker of the City Council, two by the Mayor, and a Chair who is appointed by the Mayor after consultation with the Speaker (N.Y.C. Admin. Code § 3-708[1]). In addition to the Board members, there are staff members including an executive director and counsel, and legal and accounting staff whose duties include providing technical assistance to prospective and participating candidates so as to facilitate compliance with the requirements of the program (NYC Admin. Code § 3-708[4]).

The matching funds program, which is available to candidates running for many New York City offices, is a voluntary program. All candidates who choose to participate complete a certification form required under Rule 2-01 (NYC Admin. Code § 3-703[1][c]). The form requires that the candidate explicitly agree to abide by the Act and Rules and agree that the candidate, his or her campaign committee, and the campaign's treasurer "may be jointly and

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[3]The City Council of New York City established public funding of local elections in 1988 with the New York City Campaign Finance Act (N.Y.C. Local Law 8 [1988]). The Campaign Finance Board and its general powers were codified in the New York City Charter in the same year (see, N.Y.City Charter ch. 46). Defendant includes a copy of chapter 46 of the New York City Charter and the Rules of the Campaign Finance Board in its motion papers (see Loprest Aff. Ex. A, B).

severally liable for the repayment of public funds and/or civil penalties pursuant to Sections 3-710 and 3-711 of the Act." (But see, *New York City Campaign Finance Board v Perez*, NYLJ, May 16, 2005, p. 18, c. 3 [Sup. Ct., New York County] [Act does not impose obligation on the individual candidate to repay public funds for a failure of the campaign committee to file reports and accountings]). The participating candidate is obligated to maintain proper documentation, and must obtain and furnish to the CFB "any information it may request relating to his or her campaign expenditures or contributions and furnish such documentation and other proof of compliance . . . as may be requested" (NYC Admin. Code § 3-703[1][d]; Rule 4-01).

Once a candidate has been found qualified to participate in the matching funds program, the Finance Board requires him or her to comply with the detailed rules concerning campaign expenditures and contributions, report filing, and providing documentation and other information to verify compliance with the program (NYC Admin. Code § 3-701, et seq.; *see also* Rules 3-02 to 3-09). Based upon the candidate's documentation for each eligible contribution received, the Finance Board will provide public matching funds according to the formula set forth in the Act.[4]

Candidates participating in the matching funds program are required to document and disclose all campaign contributions, defined in the Rules as anything of value that is provided to a campaign, including in-kind donations of goods and services (Rule 1-04; NYC Admin. Code § 3-702[8]). However, the Campaign Finance Act excludes from the definition of "contribution" when "it is made, taken or performed by a person or political committee independent of the

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[4]For the 2003 election year, private contributions of up to $250 from individual New York City residents were matched at a rate of four dollars in public funds for every dollar in private contributions, up to $1,000 in public funds per contributor (N.Y.C. Admin. Code §3-705[2][a]).

candidate or his or her agents or political committees" (NYC Admin. Code § 3-702[8]). "In-kind contributions" include payments for anything of value made to or for any candidate or authorized committee, and compensation by any person other than an authorized committee for the personal services of another person which are rendered to a candidate or the candidate's campaign committee without charge (Rule 1-02 ["In-kind contribution"]; N.Y.C. Admin. Code § 3-702[8]). The definition excludes "personal services provided without compensation by individuals volunteering a portion or all of their time on behalf of a candidate or authorized committee." (Id.). The candidate is to document all expenditures, which includes disbursements, liabilities, and in-kind contributions received, with some expenditures subject to the limits of the Act or Rule 1-08(j)(1), and others exempt (Rule 1-08[a]).

In general, candidates may accept multiple contributions from a single source but may not accept a total amount from a single source in excess of the applicable contribution limit (Rule 1-04[c]).[5] A single source includes any person who or entity which maintains or controls another entity (Rule 1-04[h]).

Expenditures made by third parties who are independent of a campaign need not be reported by the campaign. An activity is independent, and not subject to limitations of the public financing program, if the candidate or the candidate's agents or political committee "did not authorize, request, suggest, foster or cooperate in any such activity" (N.Y.C. Admin. Code § 3-702[8]). In contrast, expenditures undertaken by a third party in cooperation with a candidate's campaign must be reported (Rule 2-02[c]). Failure to report such activity is considered a

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[5]For the 2003 election year, the maximum contribution by any single donor to a City Council candidate was $2,750 (N.Y.C. Admin. Code § 3-703[f]).

"fundamental breach of the obligations affirmed and accepted by the participant" for which the candidate will be required to forfeit all public funds previously received for the election at issue and shall "be subject to such civil and criminal sanctions as are applicable under section 3-711 of the Code and other applicable law." (Rule 2-02).

The Finance Board is authorized to promulgate rules defining infractions, and the definitions "shall include, but not be limited to, failures to comply with the provisions of [the Act] or the rules" (NYC Admin. Code § 3-710.5). It is empowered to "investigate all matters relating to the performance of its functions and any other matter relating to the proper administration of [the Act] and . . . shall have the power to require the attendance and examine and take the testimony under oath of such persons as it shall deem necessary and to require the production of books, accounts, papers and other evidence relative to such investigation" (NYC Admin. Code §§ 3-708[5]; 3-710[1]). An investigation may include field investigations, desk and field audits, issuance of subpoenae, document requests and interrogatories, taking sworn testimony, and "other methods of information gathering" (Rule 7-01[f]). Where the Finance Board has reason to believe that a participating candidate has violated one or more rules, it will notify the candidate by mail so as to allow him or her to contest the findings, or to include additional information, either in person or through submission of documents and written materials, after which the Board renders a determination and assesses any penalties (NYC Admin. Code § 3-710.5; Rule 7-02[c]). Pursuant to Rule 7-02(f), the Board may also hold a formal hearing which is conducted under the rules set forth in section 1046 of the New York City

Charter ("CAPA").[6] Where appropriate, the Finance Board may fine a candidate up to $10,000 for each violation of the Act or Rules (NYC Admin. Code § 3-711). In addition, the Board "shall publicize, as it deems appropriate," the names of candidates who violate any of the provisions of the Act (NYC Admin. Code § 708-6; NYC Charter § 1052[a][6]).

FACTUAL AND PROCEDURAL BACKGROUND

1. Pre-election

Palma submitted her certification form to the Board on June 2, 2003, designating the Friends of Annabel Palma as her campaign committee to receive public matching funds (Loprest Aff. Ex. D). In July 2003, the Board staff conducted a routine audit of the campaign's disclosure statements, at which time it "observed an unusually high percentage of contributions from individuals who reported 1199 SEIU as their employer, or who appeared to be members of 1199 SEIU," as well as campaign literature "apparently paid for by 1199 SEIU," all of which suggested to the staff that 1199 was not acting independently of the campaign but had made in-kind contributions to the campaign which had not been reported in the campaign's required financial disclosure statements (Loprest Aff. ¶ 15).

According to defendant, there followed a series of communications between the Board and the campaign, and on August 14, 2003, Palma and her campaign's attorney, and the attorney and a representative for 1199 appeared before the Board to address its concerns about the relationship, if any, between the campaign and 1199 (Loprest Aff. ¶ 16). The copy of the transcription of the hearing, while fragmentary, shows that the Board members questioned the

[6]Alternatively, the Board or the City may choose to commence a civil action (Rule 7-02[f]).

witnesses about both the printing and dissemination of a campaign flyer by 1199 and 1199's activities on behalf of Palma, including allowing her to solicit voters and money at a three-day conference held by the union (Loprest Aff. Ex. E, transcript). One of the documents prepared at that time was an August 13, 2003 affirmation by Jennifer Cunningham, an attorney and the executive director of the SEIU New York State Council responsible for coordinating the political and legislative program for 1119, the Council's affiliate (Exhibits to Palma Aff. Ex. N, Cunningham Aff. ¶ 2). According to Cunningham, Palma's campaign "generated an extraordinary amount of support from her former colleagues and fellow union members," and therefore the union "engaged in an independent effort to educate and mobilize the several thousand 1199 SEIU members who live in the 18th Council District," including through mailings, phone calls, worksite contact, voter registration, and solicitation of contributions (Exhibits to Palma Aff. Ex. N, Cunningham Aff. ¶¶ 4-5). Cunningham explained that she, not the Palma campaign, was responsible in June 2003 for the design, production, and distribution of a flyer designed to encourage 1199 staff and members to donate to the Palma campaign (Exhibits to Palma Aff. Ex. N, Cunningham Aff. ¶ 8). Cunningham stated that Palma spoke and solicited support "for less than 10 minutes" on one day of the three-day 1199 retreat in early July 2003, but that the purpose of the retreat was to discuss the union's federal political program and "other issues of concern," and the Palma campaign had no involvement in the planning, agenda, or production of the retreat or in the decision to invite her to speak (Exhibits to Palma Aff. Ex. N, Cunningham Aff. ¶ 8). Cunningham also set forth the union's position that it has the right to encourage its members to participate in all aspects of electoral activities, including making voluntary contributions, and that these communications with its members were not made in

coordination with the Palma campaign and should not be imputed to the campaign or deemed a contribution to the campaign (Exhibits to Palma Aff. Ex. N, Cunningham Aff. ¶ 9).

After the August 14 hearing, the Board agreed to issue public funds to the Palma campaign, although it withheld $5,000 pending further investigation (Loprest Aff. ¶ 16).[7]

As part of its continuing investigation, three Finance Board attorneys, Sue Ellen Dodell, Beth Rotman, and Jordan Stern, made visits to the Palma campaign headquarters and five visits to polling sites on September 9, 2003, the day of the primary election (Loprest Aff. ¶18). At least one of the attorneys made a similar visit on the day of the November general election, and on both days they "observed widespread signs of coordination between 1199 SEIU and the campaign" which raised questions of "improper coordination" between the two entities (Loprest Aff. ¶18).

On November 5, 2003, Board attorney Amy Loprest wrote to the campaign that the Board "expect[ed] from the Palma campaign a legal memorandum . . . on the subject of the law on 'independent' and 'coordinated' expenditures," and that a "discussion of the policies implicated both by First Amendment concerns about independent spending and concerns for maintaining an even playing field as contemplated by te New York City Campaign Finance Program would be most helpful." (Exhibits to Palma Aff. Ex. K, Letter from Loprest to Williams]). The campaign submitted a legal brief on about January 4, 2004, concerning "independent and coordinated expenditures," which sought to address three questions: (1) whether the 1199 endorsement communication was an independent expenditure pursuant to Rule 1-08(f); (2) whether the

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[7]The Board authorized additional matching funds on September 5, 2003 (Loprest Aff. ¶ 17).

campaign's election day activities were conducted in full compliance with the rules, and (3) whether independent spending by labor unions is at odds with the rules for maintaining an even playing field (Exhibits to Palma Aff. Ex. J).

2. Post-election; Draft Audit Report

Thirteen months later, on February 22, 2005, the Board issued a draft audit report of the findings and management observations resulting from its post-election audit of the Palma campaign (Loprest Aff. Ex. F [hereinafter Draft Audit Report]). The letter accompanying the report, signed by Julius Peele, Director of Auditing and Accounting, indicated that the Board's staff had made certain preliminary findings of non-compliance with the Campaign Finance Act and Rules which required a written response, while other findings and violations previously noted during the pre-election period, described in the Management Observations, did not require further action (Loprest Aff. Ex. F, Peele letter p. 1). Peele's letter explained that the Board staff would review the campaign's response and then issue a final report (Loprest Aff. Ex. F, Peele letter p. 2). It also noted that the Board staff "had determined that the campaign may be required to repay $90,028 for failure to sufficiently document qualified expenditures" (Loprest Aff. Ex. F, Peele letter p. 2).

The draft report covered the period from January 12, 2003 through January 11, 2004, and included a review of the campaign's bank statements from June 18, 2003 through the present (Draft Audit Report p. 2). The Management Observations noted three specific contributions which were deemed improper and that there was "apparent coordinated activity" with third parties, "including 1199 SEIU," which the Board was continuing to investigate (Exhibits to Palma Aff. Ex. L, p. 3). The draft report explicitly "does not discuss issues or potential

violations related to the Suspected Coordinated Activity," and instructed that "in responding to this draft audit report, no response from the Campaign regarding Suspected Coordinated Activity is sought or required," as the Board would pose any specific questions "at the appropriate time." (Exhibits to Palma Aff. Ex. L, p. 4). It also noted that after the investigation was concluded, the Audit Unit might refer the matter of suspected coordinated activity to the Board's Legal Unit. (Exhibits to Palma Aff. Ex. L, p. 4).

The draft audit report listed ten separate findings, nine of which required a response. For the findings requiring a response, recommendations were provided for the types of documents and proof that the campaign could submit to rebut the inference of possible violations. The descriptions for each finding also referred to the pertinent parts of the Administrative Code and the Rules, and appended exhibits containing specific documents at issue. Thus, for instance, Finding 2 noted 28 instances where the campaign exceeded the single source contribution limit, citing the pertinent part of the Act and the Rule defining "single source," and specifically pointed to the section of the Rule concerning creditors who extend credit beyond 90 days, who are then considered to have made a contribution equal in value to the credit extended unless they have made a commercially reasonable attempt to collect the debt (Rule 1-04[g][4], [5]). The appended exhibit number 1 to the draft report noted 24 contributions from various branches of SEIU, totaling $45,073, five contributions from a particular corporation and its owner totaling $28,875, and four contributions from another individual totaling $5,620 (Draft Audit Rep. pp. 6-7). Other findings in the draft audit report included that goods and services may have been provided to the campaign and not reported (Draft Audit Rep. pp. 7-8 [Finding 3]), that the campaign had not reported expenditures totaling more than $5,000 in the aggregate made to two vendors to the

campaign who subcontracted for work on behalf of the campaign (Draft Audit Rep. pp. 9 [Finding 5]), and that the campaign had insufficiently documented expenditures totaling nearly $90,000, as set forth as exhibit IV appended to the draft audit report, even after the Board requested in April 20, 2004, that it provide documentation for a sample of expenditures to demonstrate that the public funds received were used for qualified expenditures (Draft Audit Rep. pp. 14-15 [Finding 9]).[8]

Prior to responding to the draft audit report, plaintiffs' attorney on March 15, 2005, wrote to the Board staff concerning its several requests to schedule a deposition of Palma in order to investigate pre-election coordinated activity; a deposition was at that time scheduled for March 22, 2005 (Draft Audit Report p. 3, para. B).[9] The six-and-a-half-page letter set forth the various reasons why Palma was unwilling to appear for the deposition (Exhibits to Palma Aff. Ex. Q). These reasons included that the service of the subpoena was improper, the subpoena was insufficiently detailed as to what issues would be at issue at the deposition, did not fairly

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[8]Other findings that required a response from the campaign involved the untimely filing of one disclosure statement (Finding 4), five instances of post-election expenditures which needed better documentation (Finding 6), discrepancies between amounts reported by the campaign as disbursements and the amounts debited by the campaign's bank during the same period, a missing bank statement, failure to report some transactions and reporting other transactions that do not appear on relevant bank statements (Finding 7), failure to timely report two contributions received within two weeks of the election from a single source exceeding $1,000 (Finding 8), and failure to provide when requested the supporting documentation for two checks (Finding 10).

[9]The Board initially requested that Palma appear for a deposition on September 7, 2004 (Loprest Aff. ¶ 20). After three adjournments requested by her attorney, the Board authorized the issuance of a court-ordered subpoena and plaintiff agreed to appear for a deposition in January 2005 (Loprest Aff. ¶ 20). Plaintiff's counsel canceled the deposition but subsequently agreed to a date in March 2005 (Loprest Aff. ¶20); however as noted above, he withdrew that agreement on March 15, 2005.

characterize her actions concerning the initial scheduling of the deposition, the Board staff had already conducted two public hearings concerning her campaign, and the Board did not appear to have a clear standard by which to evaluate coordinated activity.

Thereafter, on about June 6, 2005, the campaign mailed its seven-page response along with 27 pages of documents (Loprest Aff. Ex. G [hereinafter Campaign Response]). As concerned the 28 instances of excessive contributions, the Campaign Response explained that the various SEIU branches are independent, and each contributed no more than the legal limit (Campaign Response, p. 2). The Campaign Response indicated that the campaign does not believe it has the burden of proving that the entities are separate, "in the absence of any allegation or evidence to the contrary," and because it is a separate entity from the branches of the SEIU, cannot compel them to provide documentation (Campaign Response p. 3). It stated that certain of the monies were outstanding liabilities and not in-kind contributions (Campaign Response p. 3). It offered documents to show that subcontractors were not used (Campaign Response p. 4). It responded to Finding 9 concerning expenditures that were not documented, by including a list of payees and brief coded explanations (Campaign Response p. 6). As to Finding 3, it noted that although the draft described "in-kind contributions listed above," there was nothing listed, making it unclear as to what was at issue; the campaign also stated there were no in-kind contributions not reported (Campaign Response p.4).[10]

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[10]As concerns other findings, the Campaign Response noted that two contributions were returned (Campaign Response pp. 3-4), set forth explanations for five different expenses labeled as post-electoral expenses (Campaign Response p. 5), supplied the missing bank statement, and explained that several of the transactions listed but not present in the bank statements were outstanding debts which continue to be settled in an ongoing basis (Campaign Response pp. 5-6).

3. The Notice of Alleged Violations; Commencement of Action

On June 28, 2005, the Board issued its Notice of Alleged Violations, Proposed Penalties, and Opportunity to Respond (Exhibits to Palma Aff. Ex. A [hereinafter Notice). The Notice informed plaintiffs that the Board would meet on July 28, 2005 to "consider" a total of 13 alleged violations of the New York City Charter and the Campaign Finance Act made by the campaign. The first five alleged violations pertain to "apparently coordinated activity" between the campaign and 1199, and between the campaign and the Transport Workers Union (TWU), and include one claim of fraud and material misrepresentation by the campaign to the Board concerning its relationships with 1199 and TWU. These five charges are set forth in more detail in the four-page Appendix annexed to the Notice, along with five exhibits consisting of several pages of photocopies and documents. The eight additional alleged violations concern the failure of Palma to appear for a deposition; failure to account for fundraising activity; accepting a contribution from an unregistered political action committee; accepting and failing to report an in-kind, corporate contribution in the form of the cost of goods and services charged to the campaign by a particular company (Zambrana Productions); two separate allegations of accepting over-the-limit contributions from various affiliated entities; failure to file a statement on time; and improper reporting of disbursements. In addition, the Notice indicates that the Board will address the question of whether the campaign's certification would be revoked if the claims of coordinated activities and/or the failure of Palma to appear for a deposition are substantiated, which would require the campaign to return all matching funds distributed to it.

The Notice permits plaintiffs to submit a written response and request an appearance before the Board, and an extension of time to respond. The parties thereafter corresponded

extensively concerning plaintiffs' request for a six-month extension (Exhibits to Palma Aff. Ex. C, correspondence between Malloy and Goldfeder).[11] The Board ultimately granted an extension to October 21, 2005 for submission of the written responses, with the meeting before the Board to follow on November 16, 2005 (Exhibits to Palma Aff. Ex. B, letter Malloy to Goldfeder, Sept. 30, 2005).[12]

As described above, plaintiffs commenced this action on October 20, 2005 and moved by order to show cause for a temporary restraining order enjoining the Board from proceeding with its inquiry, after which the case was removed briefly to Federal district court.

4. Legislative Change

On November 17, 2005, the City Council of New York City approved legislation that amended the New York City Administrative Code's definition of campaign contributions (see Local Law No. 105 of 2005; Loprest Aff. ¶ 26; Ex. H). The amendment in part added language to Section 3-703 of the Code. That section concerns the various requirements a candidate must fulfill to be eligible for campaign matching funds. As set forth in subsection (f) of Section 3-

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[11]Plaintiffs argued, for instance, that to prepare their responses, they needed particular documents from the Board concerning its investigation, which they sought through the Freedom of Information Act, and which were initially redacted (see Exhibits to Palma Aff. Ex. G). Plaintiff's counsel sought unredacted documents, and by letter dated September 26, 2005, the CFB agreed to provide documents which revealed the names of the individuals interviewed by the Board (Exhibits to Palma Aff. Ex. H, I, correspondence between Goldfeder and Dodell).

[12]As set forth in the correspondence, plaintiffs sought the long extension so as to address the detailed allegations contained in the Notice and to accommodate the schedules of Palma, who was running for reelection in 2005, and her attorney who represented more than one candidate running for office. Although it did not fully grant plaintiffs' request, the Board apparently granted them more than the customary amount of time allowed for candidates to respond to a Notice of Alleged Violations (see in general, Exhibits to Palma Aff. Ex. C, correspondence between Malloy and Goldfeder).

703, neither a candidate nor the candidate's committee may accept,

> either directly or by transfer, any contribution or contributions from any one individual, partnership, political committee, employee organization or other entity for all covered elections held in the same calendar year in which he or she is a participating candidate . . . which in the aggregate . . . for member of the city council, shall exceed two thousand five hundred dollars. . . .

The 2005 amendment added the following language:

> for the purposes of this paragraph, contributions made by different labor organizations shall not be aggregated and shall not be subject to the contribution limit applicable to any one contributor that is set forth in this paragraph if those labor organizations make contributions from different accounts, maintain separate accounts with different signatories, do not share a majority of members of their governing boards, and do not share a majority of the officers of their governing boards.

(Local Law No. 105 of 2005; Loprest Aff. ¶ 26; Ex. H). Local Law 105 was effective upon enactment on December 16, 2005, and governed all proceedings then before the Board (see Local Law No. 105 of 2005; Loprest Aff. ¶ 26; Ex. H).

5. The Amended Complaint and Plaintiffs' Motion

Plaintiffs' Amended Complaint, dated December 14, 2005, includes 12 causes of action. The first and second seek a declaratory judgment that Rule 1-08(f), concerning "independent expenditures," violates due process, is inherently vague and ambiguous, and is unlawful and unconstitutional. The third and fourth seek a declaratory judgment that Rule 1-04(h), concerning "multiple contributions from a single source," no longer applies given the legislative change, and that defendant should be sanctioned for not withdrawing its allegations concerning aggregation of contributions. The fifth seeks a permanent injunction against defendant's enforcement of Rules 1-08(f) and 1-04(h) against any plaintiff. The sixth seeks a declaratory judgment nullifying the Notice in its entirety based on due process violations and the conduct of the Board's staff. The

seventh seeks a permanent injunction enjoining the Board's staff attorneys from any further adjudicatory role in the audit and decision-making of the Board. The eighth seeks to have the staff attorneys produced for depositions. The ninth seeks production of previously disclosed documents but without redactions. The tenth seeks to quash or modify the subpoena issued as to Palma. The eleventh seeks an order directing the Board to hold a formal hearing pursuant to CAPA. The twelfth seeks an order prohibiting the Board from deliberating in executive session in the presence of any of the staff attorneys or other staff who participated in the audit of the Palma campaign.

Plaintiffs filed the instant motion on January 6, 2006, seeking various relief, including nullifying the Notice, enjoining enforcement of Rule 1-08(f), disqualifying the Board's attorneys from further participation in the proceedings or directing their appearance for deposition by plaintiff, quashing or modifying a subpoena issued by the Board, and seeking changes in the Board's hearing procedures.

6. Amended Notice of Violations

On January 6, 2006, the Board issued an amended Notice of Violations which incorporated the above-mentioned changes to the Administrative Code (Loprest Aff. Ex. I, Malloy letter to Palma [hereinafter amended Notice]). The amended Notice describes the change to the law concerning the criteria for determining whether contributions by different labor organizations should be kept separate or aggregated for purposes of determining the amount of money a candidate can lawfully accept. It replaces the tenth and eleventh bulleted paragraphs in the original Notice with new descriptions of the alleged violations and possible civil penalties to accord with the Board's interpretation of the newly amended law. In sum, both paragraphs allege

that as the campaign received sums from various branches of certain unions, it must establish that the unions satisfy the four requirements of amended Rule 703(1)(f) in order that their contributions not be aggregated, and penalties of up to $250 and $5,000 respectively, will be assessed for receipt of over-the-limit contributions.

In addition to the revisions of the two paragraphs, the amended Notice contains an additional alleged violation. The added alleged violation, including a possible penalty of $1,000, states that the campaign failed "to provide an adequate response to a finding about the apparent affiliation of the SEIU entities in the February 22, 2005 draft audit report," because although it "denied that the entities were affiliated," it "failed to provide any substantiation for the assertion." (Amended Notice, pp. 2-3). The other 11 allegations and possible penalties contained in the original Notice of June 25, 2005 remain, and the amended Notice states that written responses to the allegations contained in the original Notice and the amended Notice were to be submitted by January 26, 2006, after which a meeting of the Board would be held (Amended Notice p. 3).

7. Defendant's Cross-motion; Plaintiffs' Order to Show Cause

On January 13, 2006, defendant made the instant cross-motion to dismiss the amended complaint, based on lack of subject matter jurisdiction and failure to state a cause of action (CPLR 3211[a][2], [7]). The defendant has not yet interposed an answer.

Also on January 13, 2006, plaintiffs brought the instant order to show cause seeking a temporary restraining order and other relief, including enjoining defendant from taking any action concerning the Palma campaign and the 2003 election, and staying the deadlines for plaintiffs to respond to the amended Notice and the meeting before the Board. Plaintiffs

specifically seek to nullify the amended Notice on the ground that it both improperly contains new allegations and improperly makes a presumption of wrongdoing.

DISCUSSION

1. Legal Standards

To prevail on a motion for a preliminary injunction, the party seeking injunctive relief must demonstrate a likelihood of success on the merits, that it will suffer irreparable injury if the relief is not granted, and that the equities balance in its favor (*W.T. Grant v Srogi*, 52 NY2d 496, 517 [1981]). Preliminary injunctive relief will only be granted where the movant establishes a clear right to relief that is plain from the undisputed facts (*Hoeffner v John R. Frank, Inc.*, 302 AD2d 428, 429-430 [2d Dept. 2003]). Thus, a preliminary injunction should not normally be granted where there are disputed issues of fact (*see Lincoln Plaza Tenants Corp. v MDS Properties*, 169 AD2d 509 [1st Dept. 1991]). Here, plaintiffs seek, among other relief, a preliminary injunction to stop the Campaign Finance Board from further enforcement of Rule 1-08(f) against plaintiffs and all other plaintiffs, and a permanent injunction against enforcement of Rules 1-08(f) and 1-04(h), as well as enjoinment of the CFB attorneys from further appearing or participating in an investigatory or adjudicatory role in this proceeding.

Plaintiffs also move for declaratory relief concerning the constitutionality and enforcement of Rule 1-08(f), as well as a declaration that the Notice's allegations concerning violations of Rule 1-04(h) are null. A motion for a declaratory judgment seeks a judicial declaration of the rights of the parties for the purpose of guiding future conduct (*Lynch v Bailey*, 279 App. Div. 650, 650 [1st Dept. 1951], *aff'd* 304 N.Y. 669 [1952]). In order for the court to entertain such a motion, there must be a justiciable controversy (*New York State Bankers Assn.*,

Inc. v Wetzler, 81 NY2d 98 [1993]), meaning that there is a "present, rather than hypothetical, contingent or remote, prejudice to the plaintiff" (*Waterways Devel. Corp. v Lavalle*, 28 AD3d 539, 540 [2d Dept. 2006], citing *American Ins. Assn. v Chu*, 64 NY2d 379, 383, *cert denied* 474 U.S. 803 [1985]). In addition, the proceeding must be ripe for review (*Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, *cert denied* 479 U.S. 985 [1986]).

In order for an administrative action to be ripe for judicial review, the administrative action must generally be final and the anticipated harm caused by the action must be "direct and immediate" (*Weingarten v Lewisboro* 77 NY2d 926, 928 [1991]). If the agency has not issued a formal decision or there is no actual concrete impact, the courts "should avoid becoming entangled in abstract or hypothetical problems or interfering with administrative policies" (*De St. Aubin v Flacke*, 68 NY2d 66, 75 [1986] [citation omitted]). The purpose of the ripeness doctrine is to prevent dissipation of judicial resources and "'more importantly,'" to prevent "'devaluation of the force of judicial decrees which decide concrete disputes.'" (*Weingarten* at 928, quoting *Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988]).[13]

In *Church of St. Paul*, the Court of Appeals employed the two-part analysis devised by the United States Supreme Court in *Toilet Goods Assn. v Gardner*, 387 U.S. 158, 162 [1967]), to determine whether a pre-enforcement challenge to an administrative regulation was ripe for review. The analysis requires first that the court determine whether the issues are appropriate for

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[13]*Church of St. Paul* notes that ripeness differs from the requirement that administrative remedies must be exhausted before an action may be judicially reviewed. Ripeness "pertains to the administrative action which produces the alleged harm to plaintiff; the focus of the inquiry is on the finality and effect of the challenged action and whether harm from it might be prevented or cured by administrative means available to the plaintiff" (67 NY2d at 521).

judicial resolution and then the hardship to the parties if judicial relief is not granted (*Church of St. Paul*, at 519). The "appropriateness" inquiry looks at whether the administrative action is final and whether the controversy can be determined as a "'purely'" legal question (*Church of St. Paul* at 519, citations omitted). The "hardship" inquiry examines both the effect on the administrative agency and its program, and the "certainty and effect of harm claimed to be caused by the administrative action," in particular whether the harm is "'sufficiently direct and immediate'" (*Church of St. Paul* at 520, quoting *Abbott Labs. v Gardner*, 387 U.S. 136, 152 [1967]). If the anticipated harm is "insignificant, remote or contingent," the controversy is not ripe for review (*Church of St. Paul* at 520, citing *Matter of N.Y.S. Inspec., Sec. & Law Enforc. Empl. v Cuomo*, 64 NY2d 233, 240 [1984]). For example, a declaratory judgment action involving the constitutionality of a proposition on the ballot was dismissed as premature because it was possible that it would be defeated in the approaching election and not become law (*New York Pub. Int. Res. Group v Carey*, 42 NY2d 527, 530 [1977]). In contrast, where the plaintiffs, a cigarette maker and a retailer, sought declaratory and injunctive relief against a State tax authority, and the tax authority argued that the plaintiffs lacked standing as no enforcement action had been commenced against them, it was held that allegations of threats used by the tax authority to force retailers to stop participating in plaintiff's promotions was sufficient to establish a direct and immediate harm to make the matter ripe for review (*Lorillard Tobacco Co. v Roth*, 99 NY2d 316, 321 n.3 [2003]).

Where the legislature has conferred exclusive original jurisdiction on an administrative body, the court may not normally entertain a petition seeking relief prior to a final determination by that body (*see, Schulz v New York*, 86 NY2d 225, 232, *cert. denied* 516 U.S. 944 [1995]). In

general, "'one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law.'" (*Lehigh Portland Cement Co. v New York State Dept. of Envtl. Cons.*, 87 NY2d 136, 140-141 [1995], quoting *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). A "constitutional claim that may require the resolution of factual issues reviewable at the administrative level should initially be addressed to the administrative agency having responsibility so that the necessary factual record can be established" (*Schulz v New York*, 86 NY2d at 232 [citations omitted]). The mere assertion of a constitutional violation will not suffice to excuse a litigant from first pursuing administrative remedies that could provide the requested relief (*see, Schulz v New York*, 86 NY2d at 232 ; *Koultukis v Phillips*, 285 AD2d 433, 435 [1st Dept. 2001]).

A party need not exhaust administrative remedies, however, where it challenges an agency's action as beyond the grant of its power or when resort to an administrative remedy would be futile (*Lehigh Portland Cement Co.*, 87 NY2d at 140-141; *Watergate II Apts.*, 46 NY2d at 57). Additionally, a "'declaratory judgment action is preferred where the legality and construction of statutes, constitutional infirmities and the propriety of official acts are the points of inquiry and a decision will afford assistance to the municipality and its citizens.'" (*Zinder v Board of Assessors*, 66 Misc. 2d 150, 151 [Sup. Ct., Nassau County 1971], *aff'd* 38 AD2d 836 [2d Dept. 1972], quoting *Bradford v County of Suffolk*, 257 App. Div. 777 [2d Dept. 1939], *mod.* 283 N.Y. 503 [1940]).

Duly enacted statutes and regulations are generally presumed valid and there is a "'heavy burden'" on a party to show that a statute or regulation is facially invalid (*see Big Apple Food Vendors' Assn. v Street Vendor Rev. Bd.*, 90 NY2d 402, 408 [1997], citation omitted). There is

an "exceedingly strong presumption of constitutionality [which] applies not only to enactments of the Legislature but to ordinances of municipalities as well," and their unconstitutionality must be demonstrated beyond a reasonable doubt (*Lighthouse Shores, Inc. v Islip*, 41 NY2d 7, 11 [1976]). Where a plaintiff seeks facial invalidation of a statute, it must "initially overcome the presumption of constitutionality accorded to all enactments of a co-equal Branch of government" (*Cohen v State of New York*, 94 NY2d 1, 7-8 [1999], citing *Dunlea v Anderson,* 66 NY2d 265, 267-268 [1985]). A facial challenge requires the court to examine the words of the statute without reference to the defendant's conduct (*People v Stuart*, 100 NY2d 412, 421 [2003] [noting that the void for vagueness doctrine has been considered to both criminal and civil cases. *Id.* at 420, n. 7]). The plaintiff must show that there is no set of circumstances under which the regulation would be valid (*563 Grand Med. PC v New York State Ins. Dept.*, 5 Misc. 3d 952, 955 [Sup. Court, Kings County 2004], *aff'd, remitted* 24 AD3d 413 [2d Dept. 2005]). "In seeking facial nullification, the plaintiff bears the burden to demonstrate that 'in any degree and in every conceivable application,' the law suffers wholesale constitutional impairment" (*Cohen v State of New York*, 94 NY2d at 8, quoting *McGowan v Burstein,* 71 NY2d 729, 733 [1988]).

2. Plaintiffs' Motions for Injunctive and Declaratory Relief

Plaintiffs' motions rely heavily on this court's reasoning in *Martinez 2001 and Miguel Martinez v New York City Campaign Finance Board* (2005 NY Slip Op.51454U; 9 Misc. 3d 1108A; 806 NYS2d 446 [Sup. Ct., New York County 2005] [hereinafter *Martinez*]) as to why the instant action is ripe for review and the court should find in plaintiffs' favor (see, Goldfeder Aff. in Opp. ¶¶ 14-23). In *Martinez*, this court held that the Notice at issue provided an insufficient description of ten of the eleven alleged campaign finance rule violations with which the

candidate and his political campaign were charged, and the matter was stayed pending the redrafting by the Board of those ten alleged violations so as to give the candidate and his campaign committee sufficient notice of the charges pending the hearing. *Martinez* held that a participant in the matching funds program does not lose his or her due process rights or potentially suffer unneeded ruination of a career, as "[f]undamental constitutional principles of fairness and due process must always trump creatures of statute." (*Martinez* at *16).

Here, plaintiffs argue in part that as in *Martinez,* they are faced with a Notice which sets forth charges that are so vague and unclear that they believe themselves unable to prepare an adequate defense. *Martinez* found that the Notice was overbroad and vague on several grounds, including that most of the alleged violations referred to Rules and sections of the Code in a manner that appeared overbroad and sometimes inapposite, while the documents offered as proof were not keyed to the specific violations. By contrast, the Notice here, even as admitted by plaintiffs' counsel, is "quite detailed in its allegations" (see Palma Aff. Ex. C, Goldfeder Letter to Malloy, July 6, 2005, p. 2). So too, the Rules and sections of the Act cited in each section appear relevant to the allegations set forth in the Notice. However, plaintiffs point in particular to the Notice's allegations of "apparently coordinated activity" and suggest that they are similar to the claim in the *Martinez* Notice of "unaccounted for coordinated activity" which was held to have provided insufficient notice as it failed to define the term, lacked clarity in describing the parties supposedly involved in the "coordinated" activity, and required the candidate and his campaign to understand the charge based on their knowledge of the activities among various particular individuals and entities.

To the extent that plaintiffs here argue that the Notice is insufficient, the controlling

standard is that of procedural due process (*Matter of 1133 Ave. of Ams. Corp. v Public Serv. Commn. of State of N.Y.*, 62 AD2d 787, 788 [3d Dept. 1978]). "It is axiomatic that due process precludes the deprivation of a person's substantial rights in an administrative proceeding because of uncharged misconduct . . . and it necessarily follows, therefore, that a respondent in such a proceeding is entitled to fair notice of the charges against him or her so that he or she may prepare and present an adequate defense and thereby have an opportunity to be heard" (*Block v Ambach* 73 NY2d 323, 332 [1989]).

The notice should be "'tailored, in light of the decision to be made," to "the capacities and circumstances of those who are to be heard'" (*Matter of 1133 Ave. of Ams. Corp.*, at 788 quoting *Mathews v Eldridge*, 424 U.S. 319, 348-349 [1976]; *see also, Matter of Keyspan Energy Serv., Inc. v Public Serv. Commn. of State of N.Y.*, 295 AD2d 859 [3d Dept. 2002]). The charges need be only "reasonably specific, in light of all the relevant circumstances" so as to put the party on notice of the charges against him or her and to allow for the preparation of an adequate defense (*Block* at 333). Due process requires that there be only "a reasonable degree of certainty" so that individuals of ordinary intelligence are not forced to guess at the meaning of statutory terms (*Foss v Rochester*, 65 NY2d 247, 253 [1985], citing *Connally v General Constr. Co.*, 269 U.S. 385, 391 [1926]). It is entirely improper for a party to be found guilty of uncharged conduct or not to receive notice of the charges (*Tartaglione v Board of Comm'rs*, 301 AD2d 655, 657 [2d Dept. 2003]).

In *Martinez*, the court was persuaded by plaintiffs' argument that they needed a more detailed and clear notice of the allegations because of the nature of the informal hearing at which they would have to respond to contents of the Notice. The *Martinez* plaintiffs argued that, unlike

a formal hearing conducted pursuant to City Administrative Procedure Act (NYC Charter § 1046[c]), which would allow the issuance by the candidates of subpoenae, and the ability to call witnesses, cross-examine opposing witnesses, and present oral and written arguments on the law and facts, the informal process employed by the Finance Board lacks these due process protections. Although defendant did not herein provide a detailed description of its notice and hearing procedure, in *Martinez* it described its hearings as "'non-adversarial proceeding[s]'" which are "'streamlined'" and "'flexible,'" although without a procedure for calling witnesses or for cross-examination (*Martinez*, *11, *12). Defendant also stated that campaign committees "'may present any and all arguments they have. . . including claims that they do not understand the charges, that the Notice violated their due process rights, or that they need additional time and information to prepare,' and may ask questions and challenge the factual underpinnings of the allegations, as well as respond to questions by the Board members" (*Martinez*, * 12). Unlike *Martinez,* where the entirety of the evidence tending to establish the violations was documentary, plaintiffs convincingly suggest that here there are witnesses whose statements to the staff attorneys helped them conclude that there was apparent coordinated activity. Moreover, plaintiffs argue that staff attorneys Dodell and Rotman, and former staff attorney Jordan, are themselves witnesses who plaintiffs have a right to question.

In addition, plaintiffs express concern with the related issue of what the Notice itself signifies. As it is entitled "Notice of Alleged Violations, Proposed Penalties and Opportunity to Respond," plaintiffs argue that it should represent the "final" findings from the Board in order to adequately satisfy due process by informing them of the charges at issue; in essence this notice should be the equivalent of an accusatory instrument (Pl. Memo of Law 1-6). However,

defendant contends that the Notice is not intended as a final pronouncement of charges, but is rather a "preliminary document serving to inform the Campaign of the allegations against them," allegations which the Board has "not even begun" to consider (Def. Memo in Opp. to Pl. Jan. 13, 2006 Mot., p. 7). The investigation, defendant asserts, is "ongoing." (Def. Memo of Law in Opp. p. 12). According to the campaign finance rules, after the Board conducts its investigation, it notifies the candidate's campaign by mail concerning possible violations and allows the candidate to submit additional information. "Prior to *a final finding* of violation or determination of civil penalty, *the participant shall be notified of an opportunity to contest the finding of violation and penalty before the Board*," and may submit additional information for consideration, after which the Board determines the amount of civil penalties for any violations it determines to have occurred (Rule 7-02[c], emphasis added).

At this juncture, although it is apparent that the Notice functions as more of an advisory document, it is premature to find that in this instance, it violates plaintiffs' due process rights. As such, dismissal of the Notice or the charges contained therein is not warranted. However, plaintiffs are free to bring the claim again, should there in fact be newly added charges at the time of the hearing for which they had no opportunity to prepare a defense.

The primary focus of plaintiffs' motions and the underlying complaint is defendant's reference to Rules 1-08(f) and 1-04(h), its allegations that the campaign engaged in "apparent coordinated activity" with 1199, in particular, and that the campaign allegedly received over-the-limit contributions from branches of the SEIU. Plaintiffs argue that Rule 1-08(f), which concerns independent expenditures and is cited in the Notice in the first section of allegations concerning apparent coordinated activity, is unconstitutionally vague and ambiguous because it offers no

objective standard by which a campaign can conduct its business or by which the Board can determine whether a campaign has violated the rule. They also argue that Rule 1-04(h), cited in the amended Notice concerning the allegations of over-the-limit contributions, is null as pertains to union contributions based on the 2005 change in the Administrative Code.

A. Rule 1-08(f)

Rule 1-08(f) concerns "independent expenditures." It sets forth five non-exclusive factors for determining whether an expenditure is independent. Secondly, it states that financing of the "dissemination, distribution, or republication of any broadcast or any written, graphic, or other form of campaign materials" is deemed an expenditure by the candidate, "unless this activity was not in any way undertaken, authorized, requested, suggested, fostered, or otherwise cooperated in by the candidate." (Rule 1-08[f][2]). The Rule discusses communications between "common agents" shared by parties and their nominees are discussed; it does not conclude that "all spending by the party's constituted committees and party committees in an election is an in-kind contribution to the nominee," and lists six types of expenditures which are not considered in-kind contributions to a candidate unless it is demonstrated that he or she "in some way cooperated in the expenditure and that the expenditure was intended to benefit" him or her. The Rule also sets forth three types of expenditures which are initially presumed to be in-kind contributions but which may be rebutted.

The first section of the Notice concerns "apparently coordinated activities."[14] There are five separate bulleted paragraphs. The first and third bulleted paragraphs allege apparent

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[14]This section of the Notice cites Rule 1-08(f), NYC Administrative Code §§ 3-702(8), 3-703(1)(d), (f),(g), and 3-703(6), and Board Rules 1-02, 1-04(f), (g), 1-08(a), (b).

coordinated activity. The first paragraph seeks a fine of possibly $10,000 for what "appears" to be "activity coordinated" with 1199, the costs of which were not properly compensated by the campaign to 1199. The paragraph describes the "1199 Activity" as comprised of three separate items: fundraising, campaign literature design and dissemination, and campaign activities on and before the primary election, as well as use of a mobile office on the days of the primary and general elections. It states that the campaign "appears" to have accepted an over-the-limit in-kind contribution from 1199 "equal to 1199's share of the costs of the 1199 Activity," and refers to the attached appendix for further elaboration (Exhibits to Palma Aff. Ex. A, Notice, p. 2). The third bulleted paragraph seeks a possible $1,000 fine for accepting an over-the-limit in-kind contribution from the Transport Workers Union Local 100, and describes the four activities at issue (the "TWU Activity") as the use of TWU vans, production and broadcast of a campaign song, recruitment of election day workers, and distribution of literature (Exhibits to Palma Aff. Ex. A, Notice, p. 2).[15] The second and fourth bulleted paragraphs seek $10,000 in fines for failure of the campaign to report the 1199 Activity and the TWU Activity.[16] The fifth bulleted paragraph seeks a possible $10,000 fine based on whether the Palma campaign made statements to the Board regarding its relationship with 1199 and TWU that were either fraudulent or material misrepresentations.

Plaintiffs note that there is no explicit definition of "coordinated activity" set forth in the list of definitions provided in Rule 1-02, or in the Act, although there are two allegations of

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[15] Cited for both paragraphs are NYC Admin. Code §§ 3-703(3), 3-703(1)(f), 3-710.5, 3-711, and Board Rules 1-02, 1-04(f), 1-08(k).

[16] In addition to previously cited sections of the Code and Rules, these paragraphs cite Rules 1-08(g) and 3-03.

apparent violations of coordinated activity listed against them in the Notice, as well as two allegations of failing to report the coordinated activity and one allegation of fraud and material misrepresentation concerning the alleged coordinated activity. They argue that Rule 1-08(f) is "patently ambiguous" (Not. of Mot. Palma Aff. ¶ 28), addresses "improper coordination" only by implication, requires inference, and leaves too much room for discretionary policing by the Board. They contend that the Notice improperly concludes that there was alleged apparent coordinated activity because there were independent expenditures made by 1199 and TWU or because they inspired volunteer activity (Pl. Memo of Law, p. 12). They argue that the Rule fails to spell out what is proper versus improper coordination, and that it is not possible to understand when proper interaction becomes improper coordination (Not. of Mot. Palma Aff. ¶ 30). They suggest that if the Rule were not ambiguous, the Board would not have to couch the language of the Notice in terms of "apparent" coordination (Not. of Mot. Palma Aff. ¶ 29).

Plaintiffs further argue that they will be very much harmed if they are forced to proceed to a hearing before the Campaign Finance Board given the manner in which the investigation has been carried out and the vagueness of the charges against them. They believe that it is futile to pursue administrative remedies and therefore appropriate to seek judicial review. In particular, Palma avers that although she and her campaign have submitted verified letters and responses to the Board, appeared and testified at hearings concerning the lack of coordination with 1199 in her campaign, and submitted a legal memorandum at the request of the Board addressing the meaning of the laws and rules concerning "coordination," defendant has chosen to upgrade its allegations of "suspected coordinated activity," first described in the February 2005 Draft Audit Report, to "apparent coordination" in the June 28, 2005 Notice (Not. of Mot. Palma Aff. ¶¶ 24-

25, pp. 19-20 n. 3).[17] Palma has advised defendant "in numerous statements repeatedly" that her campaign was not involved in 1199's literature, and an 1199 official has submitted a sworn affidavit to the same effect (Ord. to Show Cause, Palma Aff. p. 32, citing Exhibit N included in Exhibits to Palma Aff.). She concludes from this history that although members of her campaign and officials from 1199 have told the Board that their activities were separate and independent, the Board did not believe them and continues not to believe them (Not. of Mot. Palma Aff. ¶ 35, p. 32). Additionally, her attorney affirms that the Board has in its files "unrefuted evidence," consisting of checks from the contributing locals that show different accounts and different signatories, and registration statements concerning the locals' governance, that establishes that the union locals are separate and distinct, but that defendant has chosen to "ignore the evidence in its possession and egregiously and erroneously allege[] that these locals were 'one big union,' demanding that Plaintiffs prove otherwise." (Ord. to Show Cause, Goldfeder Aff. ¶ 4).[18]

The issue of futility has been addressed on many occasions by the courts. For instance, in *G. Heileman Brewing Co., Inc. v New York State Liquor Auth.*, 237 AD2d 203 (1st Dept. 1997), it was held that in light of the agency's firm statement of policy, it would be futile and thus not required for the bottler-plaintiffs to resort to administrative remedies concerning whether they were prohibited from placing suggested retail price stickers on bottles of malt liquor. In *Brownley v Doar*, 11 Misc. 3d 615, 626 (Sup. Ct., NY County 2006), single mothers, who did

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[17]Palma notes that although defendant's position for quite some time was that it needed her deposition in order to make an assessment concerning the issue of possible coordinated activity, a staff attorney has affirmed in these motion papers that it no longer seeks her statement (Loprest Aff. ¶ 20).

[18]Defendant's attorney disputes the characterization of this documentation, creating an issue of fact (Def. Memo of Law in Opp. to Pl. Jan. 13, 2006 Mot. p. 8, n. 2).

not qualify for a rent supplement under a particular program, or who qualified for a supplement that was inadequate, sought a preliminary injunction to stay imminent eviction, claiming the current shelter allowance was inadequate to keep them and their children in their homes; the court held that since they had already been deemed ineligible for the particular rent program, exhaustion of administrative remedies would have been futile; moreover, administrative proceedings would have resulted in the dire result of eviction following summary proceedings in housing court (*see also, Herberg v Perales*, 180 AD2d 166, 169 [1st Dept. 1992] [futile for petitioner to pursue administrative remedies concerning denial of reimbursement by Medicaid for outlays of money, where hearing and ultimate decision-making repeatedly postponed; in addition, the matter did not present a substantive factual dispute between the parties but rather "purely the construction of the relevant statutory and regulatory framework," and exhaustion of administrative remedies was not mandated]; contrast, *Johnson v Office of Health Sys. Mgmt. of the N.Y.S Dept. of Health,* 251 AD2d 20 [1st Dept. 1998] [where petitioner failed to seek a fair hearing, as he had previously done with success, he had not exhausted administrative remedies, had not shown a firm agency policy, and the petition was premature]). Contrary to plaintiffs' arguments, defendant's past actions have not established a firm agency policy. Notably after its first series of interviews with Palma and the 1199 officials concerning possible ties between the campaign and the union, it *released* funds to the campaign, and released more funds at a later date, although it continued to raise questions. Therefore, plaintiffs' motion based on futility is unpersuasive.

Defendant contends that Rule 1-08(f) offers sufficiently clear guidelines for determining whether third-party activity is coordinated with a campaign or independent from it, including

specifics concerning dissemination of campaign materials, among other topics. It argues that the alleged joint preparation and distribution of campaign literature, fundraising, supervision of election day workers, and other activities involving the campaign and members of 1199 and TWU are violative of the clear guidelines of the Rule, citing *Matter of Choe v Aexlrod*, 141 AD2d 235, 239 (3d Dept. 1988), which rejected a challenge to a regulation on the grounds of vagueness where the regulation provided specific factors to be considered in assessing whether a violation had been made. Defendant further notes that the Board has also issued Advisory Opinions to offer additional guidance to participants concerning independent expenditures (Def. Memo of Law in Opp. to Pl. Mot. pp. 17-18 & n. 5).

Plaintiffs do not establish, as concerns Rule 1-08(f), that persons "of common intelligence must necessarily guess at what conduct is prohibited" (*Quintard Assoc. Ltd. v New York State Liquor Auth.*, 57 AD2d 462, 46 [4th Dept.], *lv denied* 42 NY2d 805 [1977]), such that there would be a finding that Rule 1-08(f) is void on its face. In addition, as set forth above, plaintiffs cannot establish at this juncture that Rule 1-08(f) is void for vagueness as to them. Many of their arguments concerning the ambiguity of the Notice concern the tenuousness of the nature of the evidence alleged against them, and are thus factual in nature. They must first pursue the hearing so as to resolve the factual issues reviewable by the Board and establish the necessary factual record (*see Schulz*, 86 NY2d at 232; *Church of St. Paul*, 67 NY2d at 520). Therefore the branches of plaintiffs' motion seeking a declaration that Rule 1-08(f) infringes upon plaintiffs' due process rights and its enforcement violates plaintiffs' due process rights are denied as premature. The branch of plaintiffs' motion seeking a temporary restraining order from further enforcement of Rule 1-08(f) is denied.

B. Rule 1-04(h)

Plaintiffs' original motion sought a declaration that the Rule 1-04(h) violations alleged by the Board in its June 28, 2005 Notice are a nullity under the new legislation enacted by the City. This branch of the motion was rendered academic with the filing of the amended Notice and plaintiffs' amended complaint. Thereafter, plaintiffs brought the instant order to show cause seeking to nullify the branches of the amended Notice or to strike the allegations that address union contributions which were the subject of Rule 1-04(h).

Rule 1-04(h) aggregates multiple contributions from a single source for purposes of determining compliance with the contribution limits. The change in 2005 to the Administrative Code discussed above explicitly provides that contributions from different labor organizations will not be aggregated if the organizations make contributions from different accounts, maintain separate accounts with different signatories, and do not share a majority of members of their governing boards and a majority of the officers of their governing boards.

The amended Notice of January 6, 2006, sets forth in the first two bulleted paragraphs (which should be understood as replacing the original the tenth and eleventh bulleted paragraphs of the June 25, 2005 Notice), the amendment to section 3-703(1)(f) of the Administrative Code which changed the criteria for determining whether contributions from different labor organizations are aggregated. The first (revised tenth) paragraph alleges over-the-limit contributions of $2,750 from two labor organizations and a possible $250 fine if the campaign does not demonstrate that two particular labor organizations which donated funds on June 19, 2003, satisfy the requirements of the amended statute; the amended Notice suggests that submission of the checks and the letterheads of the organizations would entirely satisfy the

requirements of the statute. The second (revised eleventh) bulleted paragraph alleges over-the-limit contributions of $20,025 from various SEIU entities around the country and a possible $5,000 fine unless the campaign demonstrates in a manner similar to that suggested in the revised tenth paragraph, that the SEIU entities are distinct organizations. For both paragraphs, the campaign is also directed to "provide any additional facts or legal arguments that it believes are relevant to the Board's determination how the provisions of Administrative Code § 3-703(1)(f) should apply to these contributions." Both paragraphs cite NYC Admin. Code §§ 3-702(8) and 3-703(1)(f).

Plaintiffs contend that the amended Notice's requirement that plaintiffs establish that the various branches the unions which contributed to the Palma campaign are independent, misinterprets the intent of the regulation and improperly presumes affiliation. They argue that there is no presumption of coordination written into the language and the Board may not threaten "huge fines and penalties and findings of criminal conduct based upon a presumption of guilt." (Ord. to Show Cause, Goldfeder Aff. ¶ 9).[19] Plaintiffs suggest that defendant requests further facts and legal argument because it is unclear as to the meaning of the law and how it should be applied (Ord. to Show Cause, Goldfeder Aff. ¶ 14). In response, defendant asserts that there is no statutory presumption one way or another, but that based upon the materials submitted by the campaign, "it appeared that the Campaign had accepted contributions from a number of labor organizations that constitute a 'single source' for purposes of compliance with the contribution

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[19]Unlike *Martinez*, the Notice herein cites only generally to the Act's penalty section (§3-711). In *Martinez*, certain violations included explicit citations to subsection three which states that the furnishing of false information "shall be punishable as a class A misdemeanor in addition to any other penalty as may be provided under law." (NYC Admin. Code § 3-711[3]).

limits," a violation of the Act (Def. Memo of Law in Opp. p. 8). It explains that its request for additional facts or legal arguments is to allow plaintiffs an opportunity to present further arguments concerning their compliance with the Rules, and affords plaintiffs further due process protections (Def. Memo of Law in Opp. p 10.).

The amendment to the Administrative Code states that for purposes of contributions, those from labor organizations need not be aggregated when they adhere to four specified rules which when met will establish that the organizations are distinct and separate from each other. Given that a participant in the matching funds program is required to provide documents and materials to the CFB upon request, and that the Board is charged with the mandate of carrying out enforcement of the Campaign Finance Act, there is nothing untoward in its request that the campaign establish the contributions by the various branches of the SEIU are in compliance with Rule 1-04(h). Plaintiffs do not establish any violation of due process nor an improper application of a presumption in the Board's request which was made only after receipt and examination of documents provided from the campaign, and seeks to establish proof of compliance with the Act and Rules. Accordingly, to the extent plaintiffs seek injunctive relief as to enforcement of Rule 1-04(h), their motion is denied.

C. Other Relief Related to Board's Staff Attorneys

Plaintiffs also seek to nullify the Notice based on the allegedly improper manner in which the Board investigated, and is adjudicating and penalizing them, arguing that it employs legally deficient and improper procedures. They object to the manner in which the Board's staff attorneys appeared at the campaign headquarters on the days of the primary and general election, spoke with and questioned workers and volunteers concerning their activities and recorded their

observations (see Not. of Mot., Palam Aff. ¶¶ 47-50; and Palma Aff. Ex. G, Dodell Confid. Memo, Sept. 10, 2003; Rotman Confid. Memo, Sept. 12, 2003). They object to the manner in which defendant did and did not turn over documents requested under FOIL (see Palma Aff. Ex. H). They object that the same attorneys who investigated the campaign are also assisting in developing legal strategies and defending the Board in this litigation and they seek to prohibit them from appearing and functioning at any future hearing in this matter or having any role in the fact finders' determination.

None of these objections have sufficient foundation in the law to require nullifying the Notice.[20] Defendant is given powers to investigate and enforce the Campaign Finance Act, as described above, and the conduct described in the motion papers, although not always exemplary, does not rise to the level to require nullification of the Notice. As concerns the documents, plaintiffs argues that defendant took several weeks to produce the documents requested pursuant to FOIL, which were sought to enable them respond in part to the June 28, 2005 Notice; they were initially produced with redactions which, after discussion between the parties' attorneys, were reissued with previously redacted names included (See Palma Aff. Ex. E, H). Despite the fact that the Board may have produced materials which are technically "intra-agency" under FOIL (Palma Aff. Ex. H, Goldfeder Letter of Sept. 27, 2005 to Dodell), there is nothing in its conduct to warrant sanctions or nullifying the order.

As concerns the issue of dual roles in agencies, this court has previously noted that case

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[20] Specifically, it appears that attorney Stern may have misrepresented his identity or status. While perhaps warranting some other remedial sanction, it does not necessarily follow that the drastic remedy of striking the entire Notice is justified.

law has held that the combination of investigatory, prosecutory, and quasi-judicial functions in a single administrative agency does not violate due process (*Martinez*, *10, n. 12, citing *Matter of J. Beres & Sons Dairy, Inc. v Barber*, 75 AD2d 930 [3d Dept. 1980], *aff'd* 52 NY2d 1026 [1981]; *Komyathy v Board of Educ.*, 75 Misc. 2d 859, 865-866 [Sup. Ct., Dutchess County 1973]. *See, also, Withrow v Larkin*, 421 U.S.35, 46-55 [1975], *Matter of Warder v Board of Regents*, 53 NY2d 186, 197, *cert den* 454 U.S. 1125 [1981]). Plaintiffs argue that an individual having more than one function within an agency is a violation of due process, although without citing any case law. The "core guarantee" of due process is the presence of "an impartial decision maker," and there is no single standard to determine whether an administrative decision maker should disqualify him- or herself from a proceeding for lack of impartiality (*1616 Second Ave. Rest. v New York State Liquor Auth.*, 75 NY2d 158, 161 [1990]). The Court of Appeals has noted that "bias" includes "advance knowledge of facts, personal interest, animosity, favoritism and prejudgment," but that even when those elements are present, disqualification is most likely to be required where an administrator has a preconceived view of facts at issue in a specific case as opposed to prejudgment of general questions of law or policy (*1616 Second Ave. Rest.* at 162, citation omitted). Here, the staff attorneys admittedly functioned as agents of the Board by investigating on its behalf and continue presumably to participate in the proceeding in a legal capacity. However, the fact that they played multiple roles does not render their actions constitutionally infirm, even if the wiser course of conduct might be for the agency to re-organize itself into separate divisions corresponding to the investigatory and prosecutorial roles.

Plaintiffs seek several forms of relief in the alternative. They seek the depositions of staff attorneys Dodell and Rotman and former staff attorney Stern concerning their observations of

the Palma campaign on primary and election days in 2003 and as concerns a particular telephone conversation as described in the motion; disclosure of previously produced documents without redactions; an order directing the Board to conduct a formal procedure pursuant to Rule 7-02(f), rather than the informal hearing, and/or and order directing the Board to deliberate in open session at all times.[21]

Disciplinary Rule 5-102 prohibits a lawyer from acting as an advocate if he or she ought to be called as a witness in litigation (22 NYCRR 1200.21[a]). Plaintiffs argue that defendant's staff attorneys have violated the Disciplinary Rules by acting in dual roles as attorney and fact witness, citing *Novarro v Jomar Real Estate Corp.*, 230 AD2d 687, 688 (1st Dept. 1996) (attorney improperly represented defendants when found by referee to be an "integral participant in and witness to" alleged self-dealing of defendants). They argue they have the right to question Dodell, Rotman, and Stern concerning their observations and interviews and to find out to whom they spoke and for how long, their note-taking and note-transcription processes, what they inferred, and how they developed their suspicions, among other matters (Not. of Mot. Palma Aff. ¶¶ 59-60). In contrast, defendant contends that Dodell, Rotman, and Stern acted as investigators on behalf of the Board, and reported as agents rather than witnesses (Def. Memo in Opp. to Mot. for Decl. Rel., p. 26). It further argues that the Board has retained outside counsel for the proceeding (although Dodell's name appears on the Defendant's Memoranda of Law), and that neither Dodell nor Rotman should be prohibited from further participation as "[s]peculation about whether Board staff will be required to testify in this action is also wildly premature" (Def.

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[21]Plaintiffs' motions in the alternative to quash the subpoena served upon Palma or to modify it has been rendered academic by defendant's decision not to require her deposition.

Memo in Opp. to Mot. for Decl. Rel., p. 27). It citing *Matter of Moon v New York State Dept. of Soc. Services*, 207 AD2d 103, 105 (3d Dept. 1005), among others, for the proposition that depositions of agency officials are generally not authorized. It also argues that deposing Dodell and Rotman would "severely disrupt the Board's inquiry and turn the administrative review process on its head," citing the United States Supreme Court in *Village of Arlington Heights v Metropolitan Housing Development Corp.*, which held that putting decision makers on the stand is "'usually to be avoided'" (429 U.S. 252, 268 & n. 18 [1977] [quoting *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 420 [1971]). Here, where plaintiffs have received the notes and reports from the three attorneys concerning their activities on primary and election days (contained in Palma Aff. Ex. G), plaintiffs have been sufficiently apprised of their concerns as to the individuals spoken to by the attorneys and what was said, and the conclusions that were drawn by the attorneys from these conversations.

As concerns the branch of plaintiffs' motion concerning documents, defendant states that what remains redacted are the internal opinions and recommendations which are privileged as they contain mental impressions and conclusions by the Board attorneys concerning their investigation of the Palma campaign, and are "classic work product" shielded from disclosure pursuant to CPLR 3101(b). It argues that plaintiffs are not entitled to production of unredacted copies or of additional documents as their contents are intra-agency and privileged under FOIL (Pub. Off. L. § 87[2][g]) (Def. Memo in Opp. to Mot. for Decl. Rel., p. 24-25). Plaintiffs argue in essence that much of what has already been produced could have been withheld as privileged but was not, and so therefore the remainder should also be produced (Not. of Mot. Palma Aff. ¶ 65). They also argue that the redacted materials, some of which concern the photographer who

worked for both 1199 and the campaign, are "akin to *Brady* material," to which they are entitled so as to fully respond to the charges (Not. of Mot. Palma Aff. ¶ 66).

The Court of Appeals has held that agencies are required only to produce documents containing "factual data" or "objective information," and not "opinions and recommendations" (*Matter of New York Times v City of New York Fire Dept.*, 4 NY3d 477, 488 [2005]). Here, where defendant has produced documents and affirms that the remainder are privileged under FOIL (Def. Memo in Opp. to Mot. for Decl. Rel., pp. 24-25), the branch of the motion seeking their production must be denied.

The last two branches of plaintiffs' motion seek a formal hearing pursuant to Rule 7-02(f) conducted according to the City Administrative and Procedure Act, rather than the informal hearing pursuant to Rule 7-02(c), and further requests all proceedings be held in open session. Both requests are intrusions into the functioning of the agency, and the court will only grant such relief when the movant has established it has a clear legal right to such relief (*Matter of Small v Moss*, 277 NY 501, 507 [1983][concerning Article 78 mandamus to compel]). Defendant argues that the City Charter does not require that CFB make its decisions on a record after a hearing, which would implicate CAPA, and that as long as there is notice and an opportunity for the party to refute the agency's findings, this satisfies the Rules as well as constitutional due process (Def. Memo in Opp to Mot. for Decl. Rel., p. 22, citing *Matter of Interstate Indus. Corp. v Murphy*, 1 AD3d 751, 753 (3rd Dept. 2003) (employing SAPA). In addition, it argues that the Open Meetings Law is not applicable to "judicial or quasi-judicial proceedings" (NY Pub. Off. Law § 108[1]). It asserts that in meetings where the purpose is to weigh the evidence previously presented to the board, an agency board is allowed to deliberate in a non-public executive session

(Def. Memo in Opp to Mot for Decl. Rel., p. 22-23, citing *Concerned Citizens Against Crossgates v Town of Guilderland Zoning Bd. of App.*, 91 AD2d 763 [3d Dept. 1982]). In addition, where there are confidential communications between the board and its counsel, such meetings are also exempt from the Open Meetings Law (Def. Memo in Opp. to Mot. for Decl. Rel., p. 23, citing *Matter of Young v Board of App. of Inc. Vill. of Garden City*, 194 AD2d 796, 798 [2d Dept. 1993]). Therefore, as the Board is not required by law to hold a formal hearing or to deliberate in open session, plaintiffs' motions seeking such must be denied.

D. New Allegation (Bullet Point 14)

The amended Notice adds a fourteenth bulleted paragraph which seeks a $1,000 penalty for the failure to provide an adequate response to a finding about the "apparent affiliation" of the SEIU entities in the February 22, 2005 draft audit report. It notes that the campaign failed to substantiate its claim that the entities were not affiliated.[22]

Plaintiffs seek to nullify the Notice or to sanction defendant, or to strike the fourteenth d bulleted paragraph of the amended Notice based on its being issued in violation of the agreement reached in open court that the amended Notice would solely address the change to the rule

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[22]It cites NYC Charter §§ 1052(a)(5), (8); NYC Admin. Code §§ 3-703(1)(d), (g), 3-711, and Board Rule 4-01(a).

NYC Charter § 1052(a)(5) sets forth the CFB's authority to investigate any matter relating to the "proper administration" of the matching funds program, including the power to require the attendance and examine and take the testimony under oath of persons it deems necessary, and to require the production of books, accounts and other evidence pertinent to such investigation.

Rule 4-01(a) concerns the general rule for keeping records so that the Board can verify the accuracy of disclosure statements and confirm matchable contributions; participants must maintain and may be required to produce copies of checks, bills, or other documentation and shall maintain clear and accurate records sufficient to show an audit trail, made contemporaneously.

concerning single source contributions, and because it improperly presumes that plaintiffs bear the burden of proof of absence of affiliation.

Defendant argues that the allegations are not "wholly new," but rather "nothing more than a restatement of certain factual allegations contained in the original Notice and contain[ing] no new factual allegations." (Def. Memo of Law in Opp. p.11). It further contends that it has "full discretion to amend or supplement the notice it provides participants by adding or deleting allegations of violation." (Def. Memo in Opp. to Pl. Jan. 13, 2006 Mot., p.12, n. 3). It points out that the language in the "new" allegation is nearly identical to that contained in the original eleventh bulleted paragraph (Def. Memo in Opp. to Pl. Jan. 13, 2006 Mot., p.12). The eleventh paragraph was amended to reflect the change to the single-source contribution rule, as discussed above, but language was lifted from the original paragraph and slightly rewritten to form this "new" fourteenth paragraph. Defendant also notes that the penalty was reduced from $5,000 to $1,000 and that no new allegations were included (Def. Memo in Opp. to Pl. Jan. 13, 2006 Mot., p.12).

Plaintiffs object strenuously that the attorneys had agreed nothing "new" would be added to the Notice. However, a fair reading of the amended Notice is that it is designed to re-draft the Notice to comply with the new legislation and incorporates allegations and statements from the initial Notice. It does not address conduct or contributions which were not previously at issue. The branches of plaintiffs' second motion which seek to nullify the amended Notice or seek sanctions based on the inclusion of a "new" allegation are thus denied.

E. Other Requested Relief

Plaintiffs seek sanctions for what they term the "require[ment]" imposed in the amended

Notice that they "rebut the CFB's presumption of wrongdoing." For the reasons discussed above in the section concerning Rule 1-04(h), this request is denied. Participants in the matching funds program are required to comply with the requests of the Board; the Board may properly seek further information or documentation in order to determine that a contribution or expenditure is permitted.

Plaintiffs seek to change the requirement that they provide a written response to the allegations as a condition precedent to appearing at a meeting, and substitute a new procedure that the Board would provide in writing, at the time it issues its Notice, a "full and comprehensive statement of allegations, the evidence upon which the allegations is based, and the names and business addresses of any persons who allegedly provided such alleged evidence" (Ord. to Show Cause [f], p. 3). They provide no authority for these fundamental alterations of the Board's procedure which are unlawful intrusions into the agency's administrative functioning. This branch of their motion is denied.

3. Defendant's Cross-Motion to Dismiss

Defendant argues that the action is premature, as the Board has made not yet made a determination as to whether plaintiffs violated any campaign finance laws, and that plaintiffs cannot demonstrate a likelihood of success on the merits. At this point, defendant has only given notice that there exist "apparent" violations to which plaintiffs have been invited to respond before the Board, after which the Board will consider the facts and issue a final decision. Plaintiffs have not yet had an opportunity to avail themselves of administrative means to forestall harm. Because there is no final determination concerning what if any violations were committed by plaintiffs and what if any fines must be paid, defendant asserts the matter is simply unripe for

review (Memo in Opp to Pl. Mot. for Decl. Relief, pp.11-12), and moreover, that the "Board's investigation is ongoing, and the outcome is unknown" (Memo in Opp to Pl. Mot. for Decl. Relief, p. 11). For these reasons, defendant argues that the complaint must be dismissed for failure to state a cause of action and for lack of subject matter jurisdiction (CPLR 3211[a][7] and [2]).

Defendant further argues that as concerns the challenge to the constitutionality of Rule 1-08(f), plaintiffs cannot establish that the Rule is unconstitutional as against them, at this juncture, given that there has been no administrative proceeding, and that they do not establish that it is facially unconstitutional for the legal arguments set forth above.

In addition, defendant argues that the various injunctive and declaratory relief that plaintiffs seek, including the disqualification of the staff attorneys, production of further documents, the procedure of the hearing, as well as an injunction from applying Rules 1-08(f) and 1-04(h) would, if granted, prevent it from completing its investigation and audit of the 2003 Palma campaign, and is improper because it would compel the manner in which the Board exercises its judgment and discretion in making its determinations (Memo in Opp to Pl. Mot. for Decl. Relief, p.13, citing *Frumoff v Wing*, 239 AD2d 216, 217 [1st Dept. 1997], citation omitted). In *Frumoff*, where two recipients of Social Security disability used their money to pay "loan sharks" rather than their rent and were ultimately evicted from their apartment after their application for emergency rent arrears was denied, and then lost the initial appeal of their application, after which they commenced an Article 78 petition to compel the agency to pay the rent arrears so that they could be restored to their apartment which had been left vacant, the Court held that the petitioners were required to go through the entire administrative appeals process and

could not properly seek to compel the agency to act in a particular manner when that act was "inherently discretionary." The Court noted that the proper procedure is for a party to establish the requisite proof at a hearing before the administrative agency presided over by an administrative officer having specialized expertise in the area, prior to seeking judicial review (*Frumoff*, 217-218).

Defendant also notes that there is no requirement that the strict rules of common-law pleading or evidence be applied in an administrative hearing (*Matter of Benjamin v State Liq. Auth.*, 13 NY2d 227, 231 [1963]).

In assessing a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs 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]; *Wiener v. Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998]). In a pre-answer motion to dismiss, the Court must accept as true the allegations in the complaint and any submissions in opposition to the motion. In order for a defendant to prevail, it must convince the court that nothing the plaintiff can reasonably be expected to prove would establish a valid claim (Siegel, New York Practice, § 265 [4th ed.]). Plaintiffs have set forth sufficient allegations, in particular as concerns the constitutionality of Rule 1-08(f), and the notice procedure adopted by defendant, to preclude the dismissal of the action. Accordingly, defendant's cross-motion to dismiss the complaint is denied.

CONCLUSION

Plaintiffs have not established that at this juncture they satisfy the requirements to obtain

a preliminary injunction. Their motions are therefore both denied in their entirety. Defendant's cross-motion to dismiss the complaint is denied. Defendant is directed to answer the amended complaint within twenty days of receipt of a copy of this order with Notice of Entry. It is

ORDERED that the branches of plaintiffs' motions which seek declaratory relief regarding the constitutionality of certain CFB rules are denied as premature inasmuch as the defendants have not yet answered; and it is further

ORDERED that the remaining branches of plaintiffs' two motions, including those seeking preliminary injunctive relief, are also denied

ORDERED that the cross-motion to dismiss the complaint is denied; and it is further

ORDERED that defendant is directed to serve an answer to the amended complaint within 20 days of service of a copy of this order with Notice of Entry.

This constitutes the decision and order of the court. The court has mailed copies of this decision to counsel.

Dated: October 20, 2006
New York, New York

J.S.C.