



RUSH TO JUDGMENT

**The New York State Board of Elections' Hasty Decision To Repeal Enforcement
of State Law In Response To
McCutcheon et al. v. Federal Election Commission and
*New York Progress and Protection PAC v. James A. Walsh, et al.***

A Policy Paper By

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Summary:

The New York State Board of Elections recently announced it would no longer enforce current state Election Law limits that cap the aggregate amount of money an individual or Limited Liability Company (LLC) may donate to political committees. The Board asserted that its action was compelled by the U.S. Supreme Court decision *McCutcheon et al. v. Federal Election Commission* and the Federal District Court in Manhattan's decision in *New York Progress and Protection PAC v. James A. Walsh, et al.*¹

However, neither of these cases addressed challenges to aggregate limits on donations made directly to state- or local-level candidates. The Board made this decision without holding any public hearings and without any meaningful public discussion. It did not release any legal analysis in support of its position.

This hasty decision is in keeping with other actions by the Board to allow LLCs to be considered as individual contributors instead of corporate donors, as well as its incredibly lax interpretation of state restrictions on candidates' personal use of campaign contributions.

This policy paper reviews the impact of the state's longstanding aggregate limits law, the two recent federal court decisions, and the applicability of those decisions to New York law. In summary, we believe that at a minimum the Board acted prematurely and should have elicited public comment, and that its decision may not only have been hasty, but rash as well.

Finding: The *McCutcheon* decision does not necessarily apply to states' election laws generally and it is an open question if the record relied upon and the reasoning employed in that decision are applicable to New York State law specifically.

Finding: The Supreme Court's *McCutcheon* decision rejected the findings of the U.S. District Court for the District of Columbia. The lower court had upheld and defended the existence of federal aggregate limits due to their ability to prevent candidates from circumventing contribution limits through the use of transfers or coordinated expenditures. The Supreme Court justified its *McCutcheon*, in part, by claiming that an overreliance on transfers or coordinated expenditures was unlikely. The Court's review of the record in that case and its reasoning does not apply to New York, however. The experience in New York State is that transfers and coordinated expenditures are not minor factors or hypothetical events in legislative elections, but the source of the vast majority of funds in races for competitive seats. Thus, it would be hasty to assume that the *McCutcheon* decision is applicable to decisions concerning elections in New York.

Finding: On April 24, 2014 the Federal District Court in Manhattan found in *New York Progress and Protection PAC v. James A. Walsh, et al.* that New York's aggregate limits do not apply to contributions made to independent expenditure committees. This decision had no impact on contributions *made directly to candidates*. Accordingly it cannot be used to justify a decision like the Board's.

Finding: The impact of the State Board of Elections' decision on campaign finance practices is quite limited. New York State law is riddled with loopholes and exceptions that ensure that many donors are easily able to circumvent the \$150,000 aggregate limit; the Board's decision will do little to change that. For example, individuals who control multiple LLCs are able to avoid this limit by donating through each

¹ Associated Press, "State board says campaign donor limit unenforceable," *The Wall Street Journal*, 27 May 2014, <http://online.wsj.com/article/APb97be1a647424326bd21987ab5790bfb.html>.

of them. In addition, donations to housekeeping committees do not count toward this aggregate limit, allowing many individuals to give significantly more than \$150,000.

However, the Board's hasty decision highlights an ongoing weakness: namely that it has been too quick to act – and often with negative consequences – without publicly soliciting outside comments.

Additionally, and perhaps most significantly, this decision by the board establishes a precedent that will leave New York's campaign finance system in worse shape. This would not be the first decision by the board that would dilute the state's election law. LLCs are treated as individuals solely due to an opinion from the board that differed from those arrived at by other campaign finance oversight entities, such as the FEC. Housekeeping committees are allowed to circumvent prohibitions on their involvement in campaigns due to nonexistent oversight. More than anything, the Board's most recent decision highlights how this entity tasked with overseeing campaign finance law frequently does little but makes it worse.

Recommendation: That the State Board of Elections immediately convenes public hearings to solicit public input into the impact of the *McCutcheon* decision and its progeny on New York State law. Furthermore, we urge that relevant legislative committees also convene public hearings to look into the practices and decisions of the New York State Board of Elections.

Background: New York State's Limit on Individuals' Aggregate Campaign Contributions and the U.S. Supreme Court *McCutcheon* decision.

The U.S. Supreme Court decision in *McCutcheon et al. v. Federal Election Commission*² abolished aggregate limits on contributions to candidates for federal office.

The U.S. Supreme Court decision changed case law that had existed for decades. The 1976 decision in *Buckley v. Valeo* found that aggregate limits were “quite modest restraint(s)” that helped “prevent evasion of the \$1,000 contribution limit” by individuals sending money to other committees or political parties.³ This reasoning was upheld by the District Court for the District of Columbia when they heard *McCutcheon*. They pointed to the possibility of an individual evading contribution limits by sending checks to a committee that could make coordinated expenditures on the behalf of a candidate to whom the contributor had already given the maximum allowable amount. Due to this possibility, they claimed aggregate contribution limits and limits on donations to candidates were part of “a coherent system rather than merely a collection of individual limits stacking prophylaxis upon prophylaxis.”⁴

The Supreme Court's *McCutcheon* decision disputed these arguments, saying that a system of organized transfers was unlikely to happen. First, the justices in the majority argued that this mass coordination was unlikely. Additionally, they pointed to limits on coordinated party expenditures.⁵ A political party at the federal level can only spend \$46,600 on coordinated expenditures benefitting a congressional candidate in New York, for example.⁶ Thus, the Court claimed there were no significant public benefits to retaining these limits.

New York State's Aggregate \$150,000 Annual Campaign Contribution Limit

New York places an aggregate limit of \$150,000 on individual donors. Thus, for example, if a donor decides to contribute a total of \$100,000 to various legislative candidates, \$20,000 to a candidate for governor, \$20,000 to a party, and \$10,000 to a PAC, that donor would not allowed to contribute additional hard money for the remainder of the calendar year.

The New York State Board of Elections' Decision

In executive session following their 5/22 meeting, the Board of Elections decided the aggregate limit they were tasked to enforce was “unenforceable,” despite the fact that there have been no cases that have dealt with this issue in New York.⁷

³ *Buckley v. Valeo*, 424 U.S. 1 (1976) at page 38.

⁴ *McCutcheon et al. v. Federal Election Commission*, 572 U.S. (2014) at page 6-7.

⁵ *McCutcheon et al. v. Federal Election Commission*, 572 U.S. (2014) at page 26-27.

⁶ Limits for coordinated party expenditures can be found at http://www.fec.gov/info/charts_441ad_2013.shtml.

⁷ Associated Press, “State board says campaign donor limit unenforceable,” *The Wall Street Journal*, 27 May 2014, <http://online.wsj.com/article/APb97be1a647424326bd21987ab5790bfb.html>.

Finding: The *McCutcheon* Decision Does Not Apply to State Laws Generally And It Is An Open Question If The Logic Of That Decision Applies To New York State Specifically

The Federal District Court in Manhattan’s decision only dealt with contributions to Super PACs, and upheld limits on donations to candidates. *McCutcheon* only dealt with contributions to federal candidates. It seems extremely difficult to extrapolate the logic used in the latter decision to New York’s elections, as the style of fundraising is fundamentally different.

The Supreme Court argued in *McCutcheon* that transfers designed to circumvent contribution limits were unlikely. In New York, these transfers are a cornerstone of candidates’ fundraising strategies.

Most significantly, there are no limits on coordinated expenditures between candidates and parties in New York. This leads to a system in which competitive races are overwhelmingly funded by political parties. The following pages contain analyses that reveal New York’s system is fundamentally different from that which exists at the federal level.

- 1) Legislative party committees spent over 80% of their hard money in the last election cycle directly on candidates.
- 2) Rather than being an uncommon occurrence, a large number of legislative candidates relied on financial support from the legislative party committees.
- 3) In New York, the parties that fund these committees raise much of their money from donors who have already given the maximum to candidates.
- 4) The existence of housekeeping committees means the extent of reliance on party money is even greater than is immediately clear.

McCutcheon found that aggregate limits did not play a sufficient enough role in limiting corruption to warrant the infringement on the first amendment imposed by these limits. This case was made by disputing the district court’s claims that there was a true risk of donors circumventing contribution limits through the use of transfers. As the following charts illustrate, this is not a risk in New York, but a reality.

1) Parties Spend Most of Their Resources Helping Candidates.

In the last election cycle, over 80% of the hard money spent by the four legislative party committees was either spent independently on their behalf or was transferred directly to their accounts.

*Total Amount of Transfers From Legislative Committee To Candidates,
Election Cycle 2012*

Conference	Total spent, 2012 election cycle	Transfers	Coordinated expenditures	Pct. On behalf candidates
NYS Democratic Assembly Campaign Committee	\$6,852,452.84	\$1,968,129.00	\$3,630,772.85	81.71%
NYS Democratic Senate Campaign Committee	\$4,776,366.29	\$413,000.00	\$2,246,471.55	55.68%
NYS Senate Republican Campaign Committee	\$10,352,096.45	\$4,045,824.69	\$5,417,355.30	91.41%
Republican Assembly Campaign Committee	\$2,744,958.99	\$802,450.50	\$1,545,763.52	85.55%
Total	\$24,725,874.57	\$7,229,404.19	\$12,840,363.22	81.17%

2) Parties' Spending Plays a Major Role in Numerous Campaigns

116 different candidates benefited from legislative parties' spending on their behalf. 71 of these candidates had parties spend more than the congressional coordinated expenditure limit of \$46,600 on their campaigns. In fourteen instances, the parties spent more than *five times* this congressional limit:

Fourteen Races in Which Legislative Committee Spent Five Times The Allowable Congressional Limit, Election Cycle 2012

Committee	Candidate	Coordinated Expenditures
NYS Senate Republican Campaign Committee	Bob Cohen	\$730,426.64
NYS Senate Republican Campaign Committee	Sean Hanna	\$677,432.34
NYS Senate Republican Campaign Committee	Eric Ulrich	\$577,405.09
NYS Democratic Senate Campaign Committee	George Latimer	\$438,730.97
NYS Democratic Senate Campaign Committee	Ted O'Brien	\$433,530.57
NYS Senate Republican Campaign Committee	George Amedore	\$400,962.78
NYS Democratic Senate Campaign Committee	Joe Addabbo	\$399,856.25
NYS Senate Republican Campaign Committee	Stephen Saland	\$386,349.00
NYS Senate Republican Campaign Committee	Greg Ball	\$361,119.95
NYS Senate Republican Campaign Committee	Phil Boyle	\$320,410.31
NYS Democratic Senate Campaign Committee	Cecilia Tkaczyk	\$303,043.44
NYS Senate Republican Campaign Committee	Kathy Marchione	\$285,089.27
NYS Senate Republican Campaign Committee	David Storobin	\$262,869.69
NYS Democratic Assembly Campaign Committee	Albert Stirpe	\$243,584.56

How significant is this money for the candidates who benefitted from it? An examination of the two candidates on whom each of the four conferences spent the most money reveals that in these instances, party money dominated. 70.73% of the money raised by these candidates, or spent in coordination with their campaigns, originated with contributions not raised by the candidate. There is a strong correlation between these eight candidates and the ones perceived as being the most competitive in the weeks before the 2012 election. The Supreme Court's argument rested on the claim that transfers and coordinated expenditures were negligible factors in federal races; these data reveal that in New York's competitive elections, transfers and coordinated expenditures were more than twice as significant as direct contributions.

Top Candidates Who Relied For the Majority of Their Campaign Financial Support from Party Committees, Election Cycle 2012

Candidate	Supporting Conference	Transfers	Contributions	Party Expenditures	% of \$ from Transfers/Party Spending
Bob Cohen	SRCC	\$465,850.00	\$658,205.12	\$730,426.64	64.51%
Sean Hanna	SRCC	\$812,601.00	\$285,544.90	\$677,432.34	83.92%
George Latimer	DSCC	\$286,060.78	\$478,300.84	\$438,730.97	60.24%
Joe Addabbo	DSCC	\$33,505.44	\$372,295.00	\$399,856.25	53.79%
Albert Stirpe	DACC	\$286,400.00	\$97,221.61	\$243,584.56	84.50%
James Skoufis	DACC	\$191,938.00	\$82,080.91	\$220,553.86	83.40%
John Ceretto	RACC	\$160,115.00	\$64,643.55	\$99,918.59	80.09%
Robert Castelli	RACC	\$38,575.00	\$106,418.00	\$96,827.91	55.99%

Even if one were to discount the importance of coordinated party spending, it is clear these candidates relied heavily on transfers. A majority of the money going into these candidates' committees -- \$2.28 million of a total \$4.42 million -- came in the form of transfers from parties or other candidates' committees: *these candidates raised less money in the form of contributions than they did in direct transfers.*

3) The Sources of Political Parties' Money

Did these transfers help candidates circumvent contribution limits, which the Supreme Court claimed was unlikely to happen at the federal level? It is impossible to know if any donors to them explicitly pledged to follow up their donations with larger checks to the parties who would later transfer them money. There is, however, a significant overlap between contributors who donated at or near the maximum amounts to these candidates and also donated to the parties who spent on their behalves.

For example, in 2012, LAW PAC donated the maximum allowable amount (\$4,100) to both Assembly candidates Skoufis and Stirpe. They also gave \$92,300 to DACC, which, as mentioned above, funded these candidates. The Business Council gave \$10,300 to Bob Cohen on November 4, the same amount to Sean Hanna on November 1, and \$25,000 to the Senate Republican Campaign Committee on November 8. 1199/SEIU contributed \$10,300 to both Senators Addabbo (10/18) and Latimer (10/6), and then donated \$25,000 to DACC on 10/22.

The money that these parties transferred to or spent on behalf of candidates did not just come from donors who had already donated to these candidates, but from transfers from other candidates. The four legislative party committees reported receiving \$7,149,417.90 in transfers from 247 different committees in the 2011-12 election cycle. Most, if not all, of these committees received money from some of the same donors who contributed to the candidates the parties would spend on behalf of. In *McCutcheon*, the Supreme Court claimed a hypothetical scenario in which 50 committees worked in tandem to transfer money was implausible; in New York, that would be a significant decrease.

Once again, it is clear that the logic used to justify *McCutcheon* simply doesn't apply to New York's legislative elections. It would be difficult to apply the Supreme Court's findings about congressional races to assembly or senate elections. All of this underpins how rash the Board was in rushing to judgment.

4) Housekeeping Accounts

An additional way in which parties benefit candidates is through the use of housekeeping committees. Since this money is ostensibly not used for electoral purposes, parties are not required to disclose which candidates might have benefitted from its use. It has repeatedly been illustrated, however, that this money can directly benefit officeholders and help them circumvent contribution limits.

A notable instance of this came in 2012, when the Independence Party's housekeeping committee received \$464,000 from the Real Estate Board of New York and the Senate Republican Campaign Committee's housekeeping account. In the weeks before the election, this money was spent on "issue advocacy ads" which attacked Democratic candidates.⁸ Clearly, the difference between the election-related aims of parties' hard money and the non-election aims of their housekeeping accounts is negligible.

⁸ Kenneth Lovett, "Independence Party Goes Along with GOP Scheme...", *New York Daily News*, March 4, 2013.

Do these committees help candidates circumvent contribution limits? Consider the New York State Democratic Committee’s housekeeping account, which spent millions of dollars in 2013 running television ads touting the successes of Governor Cuomo. Much of this money came from donors who had already contributed to the Governor’s reelection efforts. In several cases – a small sample of these is examined below – donors to the State Democrats had already met or brushed against either their contribution limits to Governor Cuomo or their aggregate limits for the year. By donating to a housekeeping committee, they were able to ignore these limits. It is clear that the housekeeping loophole means that neither contribution limits nor aggregate donation limits exist for politicians powerful enough to control party committees. An abolition of aggregate limits will only serve to increase the ways in which these politicians possess advantages their opponents do not.

Sample of Major Contributors to both Cuomo and the NYS Democratic Party’s Housekeeping Account

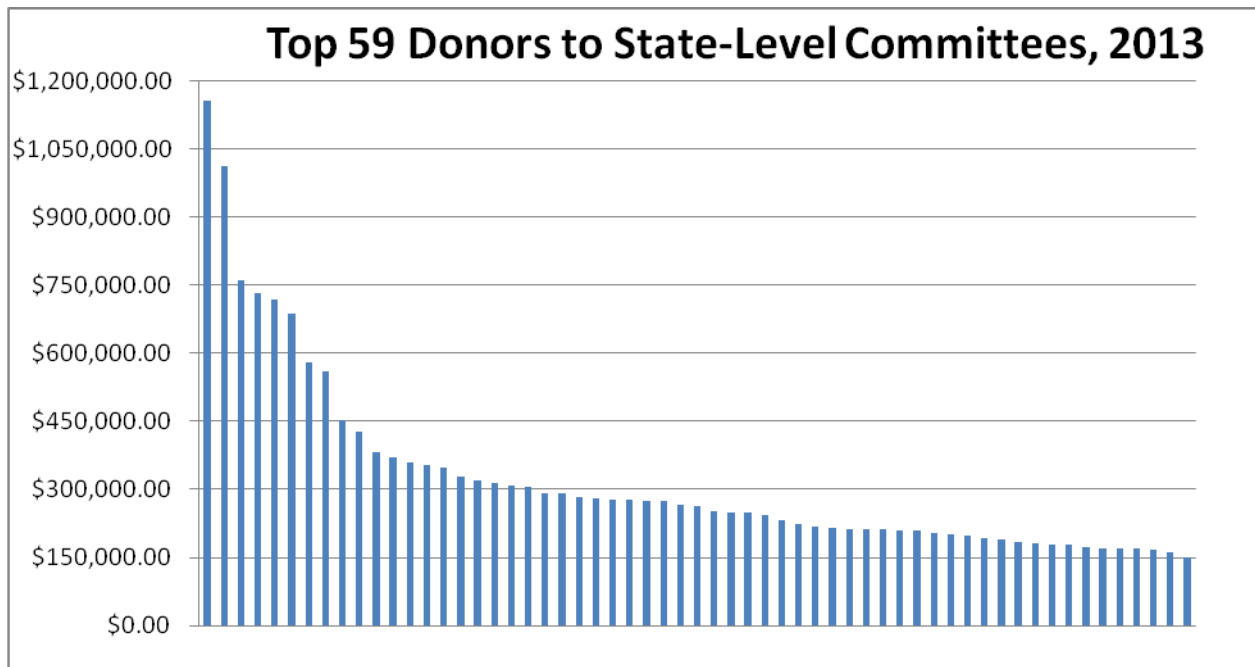
Donor	\$ to Cuomo	\$ to Dem HK
New Yorkers For Affordable Housing	\$60,000	\$125,000
Empire State Pride Agenda PAC	\$60,000	\$10,000
Sony Pictures Entertainment, Inc.	\$7,000	\$50,000
Parsons	\$2,500	\$25,000
Paramount Pictures Group	\$10,000	\$25,000
CBS Corporation	\$10,000	\$50,000
Time Warner NY Cable LLC	\$60,800	\$125,000
Barnett, Gary	\$50,000	\$100,000
Simons, James	\$50,000	\$1,000,000

Finding: Loopholes in New York Election Law Allow Informed Donors to *Currently* Circumvent The State's \$150,000 Aggregate Limit

The abrogation of aggregate limits in New York was a rushed decision made behind closed doors by the board. However, the immediate impact of this decision is likely to be negligible. There are loopholes in the state's campaign finance system that *currently* allow educated donors to give more than \$150,000 in a calendar year. Most of these loopholes are due to decisions made by the board. When examined in tandem with their recent decision to stop enforcing aggregate contribution limits, they reiterate the need for a wholly new enforcement and regulatory agency.

Donors Already Bypass \$150,000 Limit

In 2013, 59 different donors went over the \$150,000 threshold giving to state-level candidates and parties alone. Many of these gave even more money when contributions to local committees are factored in.



Major Loophole #1: LLCs

The LLC loophole was created by the Board in 1996. While most businesses are limited to aggregate totals of \$5,000 in contributions in a year, these companies are treated as individuals, and have been subjected to the \$150,000 limit. In reality, their limits are significantly higher, since many individuals own dozens of them, each of which can give at this level.

For example, Leonard Litwin, the second largest donor of 2013, contributed \$1,013,200 to state-level candidates and parties. Of this money, only \$10,000 was donated by Litwin himself. The rest was made by 21 different LLCs which donated aggregate totals ranging from \$500 to \$119,000. If each of these entities and Litwin himself gave the \$150,000 aggregate limit, he could donate \$3.3 million in hard money in a calendar year. Past years' filings indicate that he does own additional holdings, meaning his actual individual donation limit is likely even higher.

2013 Donations by Leonard Litwin

Donor	Amount
56th Street Realty LLC	\$79,000.00
79th Street Realty LLC	\$93,000.00
80th Realty LLC	\$96,000.00
92nd Realty LLC	\$35,000.00
Arwin 74th St LC	\$119,000.00
Arwin 88th Street LLC	\$30,000.00
Barclay Street Realty LLC	\$69,000.00
Briar Hill Realty LLC	\$10,000.00
Columbus 60th Realty LLC	\$45,500.00
East 81st Realty LLC	\$2,500.00
East 46th Realty LLC	\$50,000.00
East 72nd Realty LLC	\$64,100.00
East 77th Realty LLC	\$62,500.00
East 81st Realty LLC	\$7,800.00
East 85th Realty LLC	\$77,500.00
East End Realty LLC	\$500.00
Liberty Street Realty LLC	\$32,800.00
River York Barclay LLC	\$42,500.00
River York Stratford LLC	\$32,500.00
Tribeca North End LLC	\$21,500.00
West 37th Street Parking LLC	\$32,500.00
Litwin, Leonard	\$10,000.00

Major Loophole #2: Housekeeping

Another method used to circumvent the \$150,000 aggregate contribution limit is by giving to housekeeping committees. The existence of housekeeping committees is part of the state's election law, but their importance has skyrocketed due to the complete failure of the board to investigate whether they have engaged in electoral activity. The State Democratic Committee alone received seven checks for more than the annual contribution limit.

Individual Donations In Excess Of The \$150,000 Aggregate Limit, 2013

Recipient	Donor	Amount
New York State Democratic Committee (Housekeeping)	Simons, James	\$1,000,000
New York State Democratic Committee (Housekeeping)	Brookfield Financial Prop L.P.	\$250,000
New York State Democratic Committee (Housekeeping)	Soros, George	\$250,000
New York State Democratic Committee (Housekeeping)	Soros, George	\$250,000
New York State Democratic Committee (Housekeeping)	Soros, George	\$250,000
New York State Democratic Committee (Housekeeping)	GNYHA Management Corp.	\$200,000
New York State Democratic Committee (Housekeeping)	Hospitals Insurance Company	\$200,000

Could any donor contribute more due to the Board’s decision?

While the previous pages only focus on donations to state-level candidates and parties, it is important to consider that the aggregate limit applies to donations to both state-level and local races.

14 different individuals or LLCs contributed exactly \$150,000 to candidates, PACs, or parties’ hard money accounts in calendar year 2013:

\$150,000 Donors to State and Local Candidates, 2013

Donor	Amount
7 World Trade Center Ii, LLC	\$150,000.00
Ags Ventures Ii, LLC	\$150,000.00
Bfp One Liberty Plaza Co., LLC	\$150,000.00
Brookfield Properties One Wfc Co., LLC	\$150,000.00
Bruce Kovner	\$150,000.00
Durst Square Partners	\$150,000.00
Emerald City Construction, LLC	\$150,000.00
Glenn Dubin	\$150,000.00
Hugo Neu Recycling LLC	\$150,000.00
Julia Koch	\$150,000.00
Prescon, LLC	\$150,000.00
SI Green Management, LLC	\$150,000.00
The Durst Company LLC	\$150,000.00
William Ackman	\$150,000.00

If the \$150,000 limit truly kept anybody from giving as much money as they would like, it would be one of these donors – presumably, somebody who has contributed \$100,000 would not have given \$160,000 if there was no aggregate limit.

When these fourteen contributors who have given \$150,000 are examined, however, it becomes clear that the limit had no effect. Most of them have a history of giving more than \$150,000 in a year; several of them did so in 2013 through the use of subsidiaries. It is impossible to identify a single donor to New York politicians whose contribution levels would likely be changed due to the abrogation of this limit.

Consider, for example, the donations listed above that were made by Durst Square Partners and the Durst Company LLC. Since this one entity made \$150,000 worth of contributions from two separate companies, it is clear they were not affected by the aggregate limit. The reality is they could have easily donated even more than this. The list of entities which the Durst Company has used to make contributions in recent years is so long that they could legally contribute nearly \$5 million in a year, 33 times the purported annual limit, even if these were their only holdings.

Several other donors on this list have similarly taken advantage of the LLC loophole.

- 7 World Trade Center II, LLC is owned by Silverstein Properties, which has made donations through many other LLCs over the years.

- AGS Ventrues II, LLC, is owned by the Related Companies, which once donated through ten different companies when bidding on rights to operate the state's racetracks in 2007.
- BFP One Liberty Plaza Co., LLC and Brookfield Properties One WFC Co., LLC, are both owned by Brookfield Properties, which regularly contributes through a variety of holdings.
- Emerald City Construction LLC and SL Green Management, LLC is owned by developer Stephen Green, who has a history of contributing through entities such as SLG Air LLC, EEMerge LLC, and Maritime Investment Company LLP.

Of course, any of these donors could have soared past the \$150,000 aggregate limit by contributing to housekeeping committees. From the list above, Bruce Kovner has proven to be a master of avoiding this limit through his exploitation of the housekeeping loophole. In 2012, for example, he contributed \$175,000 to the NYS Senate Republican Campaign Committee's housekeeping account while contributing \$110,000 to various other committees throughout the year.

Thus, it is impossible to identify a single donor who might give more money due to this decision by the Board of Elections. This is due to a history of decisions made by the Board which have created new loopholes in the state's campaign finance system. While the immediate effect of their decision is thus likely to be negligible, it does add a new layer to their history of regulatory neglect. It is clear that proposals to fix the state's campaign finance system must revamp the current structure of oversight and enforcement.

CONCLUSION

The State Board of Elections should immediately convene public hearings to solicit public input into the impact of the *McCutcheon* decision and its progeny on New York State law. Furthermore, we urge that relevant legislative committees also convene public hearings to look into the practices and decisions of the New York State Board of Elections.