SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, COMMERCIAL DIVISION

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff,

v.

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,

Defendants,

FRANCIS TAIT, JR., and MARIO AGUIRRE, individually and derivatively on behalf of THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,

Intervenors-Defendants, Cross Claimants, and Counter Claimants

Index No. 451625/2020

Hon. Joel M. Cohen

Part 3

Memorandum Of Law In Support Of Motion To Intervene By Francis Tait And Mario Aguirre

ORAL ARGUMENT REQUESTED

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PRELIMINARY STATEMENT AND RELEVANT FACTS

Intervenors-Defendants Frank Tait, Jr. and Mario Aguirre ("Intervenors") respectfully submit this memorandum in support of their Motion to Intervene. Intervenors incorporate herein the factual allegations of the Attorney General's complaint as to the individual defendants' alleged breaches of duty; the factual allegations of Intervenors' proposed Answer, Counterclaims and Crossclaims in Intervention; the November 11, 2020 letter from their counsel to the Court (NYSCEF Doc. # 155-1); the parties' responses to this letter (NYSCEF Doc. # 172-178); the November 23 letter from Intervenors' counsel to the Court which does not appear in the NYSCEF file but which is attached hereto as Exhibit # 1; and their respective Affidavits for a complete statement of the facts and law supporting intervention.

The Attorney General's Complaint (NYSCEF Doc. # 1 and 11) runs to 164 pages with 18 causes of action, and in summary alleges:

a. That the National Rifle Association ("NRA") has been a New York not-for-profit, charitable membership corporation for 149 years, and "is legally required to serve the interests of its membership and advance its charitable mission." (¶ 1).

b. That the individual defendants LaPierre, Frazer, Phillips and Powell committed numerous breaches of their fiduciary duties to the NRA, exploiting their positions for personal gain. These include excessive compensation; excessive and unreasonable expenses for personal travel; contracts with relatives and friends in violation of the NRA's corporate contacting and conflict-of-interest policies; excessive consulting, advertising and legal fees billed to the NRA without proper review or audit of their reasonableness, including some pass-through arrangements under which "millions of dollars" in travel and entertainment expenses of NRA executives (including LaPierre and Powell) were billed to the NRA by a vendor; and various

failures to administer the NRA's property and assets with due care. (*See e.g.*, ¶ 1, 8, 9, 140, 601).

c. That the individual defendants "instituted a culture of self-dealing, mismanagement, and negligent oversight at the NRA" and that the "culture of noncompliance and disregard for the internal controls was evident within the NRA Audit Committee, which similarly failed to fulfill its obligation to oversee internal controls." (¶ 139, 476).

d. That defendant LaPierre" effectively dominates and controls the [NRA] Board of Directors as a whole through his control of business, patronage and special payment opportunities for board members", and that the Board "passively rubberstamped" decisions of the individual defendants in their positions as NRA executives. (¶ 412, 663).

e. That the NRA Board of Directors as a whole was lax in its oversight of the individual defendants' performance of their official duties. (¶ 11, 411, 476).

f. That directors or members in control of the NRA have "looted or wasted the corporation assets" and "have operated the NRA solely for their personal benefit." (¶ 12, 578).

g. That as a result of the individual defendants' breaches of duty and the NRA Board's domination by LaPierre, the NRA has suffered diversion of "millions of dollars away from the charitable mission, imposing substantial reductions in its expenditures for core program services, including gun safety, education, training, member services and public affairs." (¶ 2).

h. That as a result of the actions of the individual defendants and other unnamed executives and board members, the NRA should be dissolved and "its remaining assets and any future assets be applied to charitable uses consistent with the mission set forth in the NRA's certificate of incorporation." (¶ Prayer For Relief, ¶ A).

The Intervenors are both members of the NRA, and they agree with the Attorney General that if her allegations against defendants LaPierre, Frazer, Phillips and Powell are proven then

the NRA is due restitution and damages from them as may be established at the trial.[1] However, Intervenors strongly oppose the Attorney General's demand for dissolution. This would effectively distribute all funds recovered for the NRA to other unrelated charities rather than using those funds to continue the NRA's mission and programs for its millions of members.

As shown below and stated in their proposed Answer and Affidavits, the Intervenors seek to protect their rights as individuals and as NRA members under the U.S. and New York constitutions as well as applicable New York statutes.

ARGUMENT AND APPLICABLE LAW

I. Intervenors have the right to intervene under CPLR § 1012(a)(1).

CPLR § 1012(a) provides for intervention as a matter of right by a timely motion on any one of three grounds: 1) When a state statute confers an absolute right to intervene; or 2) when the representation of a person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment; or 3) when the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the person may be affected adversely by the judgment.

The Intervenors meet each of these conditions, and their motion is timely. The Court has not ruled on any substantive or procedural issues other than denying transfer of venue (NYSCEF Doc. # 210; Jan. 21, 2021) and no discovery has been conducted yet. In fact the Intervenors were ready to file their motion on January 15, 2021 when the Defendant LaPierre and the Brewer

[1] As their proposed Answer states, Intervenors recognize and appreciate that the Attorney General's action seeks to hold the individual NRA executive defendants accountable because the NRA Board of Directors has failed to do so, and that but for this action it is unlikely that any meaningful change in the NRA's governance would occur due to Wayne LaPierre's control of it. To the extent possible Intervenors seek to work with the Attorney General in reforming the NRA's leadership on behalf of all rank-and-file NRA members, while opposing those demands of the Attorney General that are not in the best interest of the NRA or its membership as well as recovering all funds wrongfully paid to third parties that the AG has not sued in this case.

firm filed the NRA's Chapter 11 bankruptcy case.[2] The automatic stay of Bankr. Code § 362 barred Intervenors from filing their motion while that proceeding was pending.

Intervention is "liberally allowed", permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action." *Yuppie Puppy Pet Products, Inc. v. St. Smart Realty, LLC*, 906 N.Y.S.2d 231, 235; 77 A.D.3d 197, 201 (N.Y. App. Div. 2010), citing *Nicholson v. KeySpan Corp.*, 14 Misc.3d 1236[A], 2007 WL 641168 [Sup. Ct. Suffolk County 2007]. "Distinctions between intervention as of right and discretionary intervention are no longer sharply applied", *Yuppie Puppy*, *supra*, 77 A.D.3d at 201, citing Siegel, *N.Y. Practice*, § 178 at 307 [4th ed.] and *Berkoski v. Board of Trustees of Incorporated Village of Southampton*, 67 A.D.3d 840, 843, 889 N.Y.S.2d 623 (2009).

Berkoski held that under "liberal rules of construction", whether intervention is sought as a matter of right under CPLR § 1012(a), or as a matter of discretion under CPLR § 1013 "is of little practical significance", and "intervention should be permitted where the intervenor has a real and substantial interest in the outcome of the proceedings." 67 A.D.3d at 843, 889 N.Y.S.2d 623, citing *Perl v. Aspromonte Realty Corp.*, 143 A.D.2d 824, 825 [1988]; *Matter of Bernstein v Feiner*, 43 A.D.3d 1161, 1162 [2007]; *Sieger v Sieger*, 297 A.D.2d 33, 36; 747 N.Y.S.2d 102 (N.Y. App. Div. 2002); *County of Westchester v Department of Health of State of N.Y.*, 229

[2] According to a sitting NRA Board member, Judge Phillip Journey, the NRA's Chapter 11 filing was not disclosed to the NRA's Board of Directors before it was filed. See Exhibit # 2 attached, "Motion For Appointment Of Examiner", filed as Doc. # 114 in the Ch. 11 case, No. 21-30085, ND Bankr. Texas. The filing therefore should be viewed as the adventure of LaPierre and Brewer, not the NRA itself.

The Ch. 11 case was dismissed on May 11, 2021 as not filed in good faith. (Doc. # 740, p. 2, 33, 37).A copy of the dismissal order is attached hereto as Exhibit # 3. Judge Hale said that he was troubled by "*the manner and secrecy in which authority to file the case was obtained in the first place*", and that if the case were to be re-filed *"this Court would immediately take up some of its concerns about disclosure, transparency, secrecy, conflicts of interest of officers and litigation counsel, and the unusual involvement of litigation counsel in the affairs of the NRA, which could cause the appointment of a trustee out of a concern that the NRA could not fulfill the fiduciary duty required by the Bankruptcy Code for a debtor in possession.*" Bankruptcy dismissal order, p. 37 (emphasis added).

A.D.2d 460, 461 [1996]; and *PlantechHous. v Conlan*, 74 A.D.2d 920, 920-921 [1980].

"It is axiomatic that the potentially binding nature of the judgment on the proposed intervenor is the most heavily weighted factor in determining whether to permit intervention." *Yuppie Puppy*, *supra*, 77 A.D.3d at 202, citing *Vantage Petroleum v. Board of Assessment Review of Town of Babylon*, 61 N.Y.2d 695, 698, 472 N.Y.S.2d 603, 460 N.E.2d 1088 (1984) (whether a proposed intervenor "will be bound by the judgment within the meaning of [CPLR 1012(a)(2)] is determined by its res judicata effect.") 77 A.D.3d at 202.

Intervention is also proper even if an intervenor's interest is only partially aligned with another party where that party cannot fully represent the intervenor's interest. *Roman Catholic Diocese of Brooklyn v. Christ the King Reg'l High Sch.*, 164 A.D.3d 1394, 84 N.Y.S.3d 182, 184-185 (N.Y. App. Div. 2018), citing *Mauro v. Atlas Park, LLC*, 99 A.D.3d 872, 951 N.Y.S.2d 915; *Berkoski v. Board of Trustees of Inc. Vil. of Southampton*, 67 A.D.3d at 843–844, 889 N.Y.S.2d 623; *Matter of Bernstein v. Feiner*, 43 A.D.3d 1161 1162, 842 N.Y.S.2d 556.

Berkoski v. Board of Trustees, supra, also held that where a judgment would bar persons from exercising their First Amendment rights to freedom of assembly they have a "real and substantial interest" in the outcome of the action and should be allowed to intervene. 67 A.D.3d at 843, 889 N.Y.S.2d 623. (Proposed intervenors were two individual day laborers who would be permanently barred from assembling in a town park to solicit employment if the town's requested injunctive relief was granted.)

Members of a business entity who would be bound by a determination of whether the entity was wronged by a party have the right to intervene to protect their interest in that entity. Their interests are not adequately represented where the defendants' actions "allegedly included a variety of misdeeds that were not in the Partnership's interest" and a judgment for the defendants

would have substantially reduced the value of the intervenors' interests. *Hamilton Heights Cluster Assocs., L.P. v. Urban Green Mgmt., Inc.*, 2015 NY Slip Op 31209(U), p. 12-13 (N.Y. Sup. Ct. 2015), citing *276-8 Pizza Corp. v Free*, 118 A.D.3d 591, 592 (1st Dept 2014)(affirming Supreme Court order granting intervention under CPLR § 1013, as intervenor's claims and those in the main action had common questions of law and fact, and intervenor's participation in the lawsuit did not threaten to unduly delay or complicate the litigation.)

An inherent conflict of interest exists and justifies intervention where an existing party's duty to a corporation's members would require that party to oppose the very relief its pleadings request. *In re Pofit*, 2020 NY Slip Op 50776(U) (N.Y. Sup. Ct. 2020), Slip op. p. 5. (Trustees seeking dissolution of pension plan had inherent conflict of interest because as the corporation's directors they had terminated the plan to the detriment of the trust beneficiaries.)

Each of these grounds exists here.

A. The Intervenors have standing to intervene because N-PCL § 1104(a) gives the statutory right to be heard to "all persons interested in the corporation", including its members.

N-PCL § 1104(a) provides that on the filing of a judicial dissolution petition, the court "shall make an order requiring the corporation and all persons interested in the corporation to show cause before it...why the corporation should not be dissolved." § 1104(b) and (c) also require the show cause order be published and served on (i) the state tax commission, (ii) the corporation, (iii) each person named in the petition, and (iv) each "member, creditor or claimant" of the corporation whose addresses are known or with due diligence can be ascertained. The right to show cause necessarily implies status as a party with the right to be heard and intervene.

The Attorney General's response (Doc. # 176) to the November 11 letter to the Court from Intervenors' counsel (Doc. # 155-1) argues that § 1104 does not apply because this case was brought as a "plenary action", not a "petition" for judicial dissolution.

Whether this is a plenary action, a special proceeding, or a hybrid case is irrelevant. The Attorney General expressly elected to seek judicial dissolution under N-PCL § 112(a)(7). Complaint, Doc. # 1, 11; Second Cause of Action, ¶ 576; Eighteenth Cause of Action, ¶ 647, and Prayer For Relief ¶ A. This sub-section provides that whenever the Attorney General brings an action to enforce any right given under "this chapter" (the N-PCL) to members, a director or officer of a charitable corporation, then "*The attorney-general shall have the same status as such members, director or officer*." (Emphasis added). Therefore, because a member, director or officer can *only* seek judicial dissolution by a petition under N-PCL § 1102 (which the Attorney General's letter acknowledges as requiring § 1104 notice to the members), the AG must give the same notice as anyone else filing a § 1102 petition.

B. The Intervenors have real and substantial interests that will not, or may not, be adequately represented by the parties although they and all other NRA members will be bound by the judgment.

In addition to their statutory right to intervene under CPLR § 1012(a)(1), Intervenors meet the conditions of subparts § 1012(a)(2) and (a)(3) as well. Their motion is unquestionably timely. Except for transfer of venue (NYSCEF Doc. # 210; Jan. 21, 2021), no procedural or substantive issues have yet been ruled on and no discovery has been conducted. *See* *U.S. Bank Nat'l Ass'n v. Carrington*, 179 A.D.3d 743, 744; 113 N.Y.S.3d 558, 559 (N.Y. App. Div. 2020) (motion to intervene made less than five months after owner purchased premises and before an order of reference was issued was timely, citing *Roman Catholic Diocese of Brooklyn, N.Y. v. Christ the King Regional High School*, 164 A.D.3d at 1397, 84 N.Y.S.3d 182 and *ABM*

Resources Corp. v. Doraben, Inc., 89 A.D.3d 773, 774, 933 N.Y.S.2d 296, 2011 N.Y. Slip Op. 8103 (N.Y. App. Div. 2011).

The Intervenors' interests here will not, or may not, be adequately represented by any of the present parties: the Attorney General wants to abolish the NRA and give its assets away to other non-profits, and the individual defendants certainly do not support their own removal or being ordered to pay restitution to the NRA. Likewise, the NRA's current law firm is unlikely to advise the NRA to seek review of the firm's fees or repayment if excessive, and the NRA as an entity will most certainly not seek removal of the individual defendants from their positions or repayment of money misspent as long as the NRA is controlled by LaPierre and advised by the Brewer firm. Although the Attorney General has alluded to various potential third-party claims for improper contract and fee payments and potentially excessive legal fees, the Complaint makes no claim for any of these.

Even if N-PCL § 112(a)(7) did not grant a statutory right of intervention to members of a non-profit corporation, the NRA membership would nevertheless be entitled to notice on due process grounds as Intervenors' counsel pointed out in our November 23 letter to the Court (Exhibit # 1 hereto). Every one of the NRA's 5.5 million members is faced with the loss or abridgment of their individual constitutional rights by what the Attorney General proposes to do here; *i.e.*, to entirely abolish the NRA, take its nearly $200 million in assets from the members for whose benefit those assets exist, and hand the money to other unspecified entities. The Intervenors' interests here are therefore the same as all other NRA Annual and Life Members:

1. Requiring the Attorney General to give notice of this action to all NRA members in accordance with N-PCL § 1104(a).
2. Opposing the Attorney General's demand for dissolution.
3. Supporting removal of the individual defendants from their positions if the

Attorney General's claims are proven, and showing that the NRA can continue its core missions, programs and advocacy with new leadership.

4. Preserving their First Amendment rights to freedom of speech and freedom of association with the NRA, and the tangible value of their memberships which the Attorney General's demand for dissolution would obviously destroy.

5. Pursuing recovery of all misspent NRA funds, including any legal fees or other third-party payments found to be excessive or not properly authorized. The Attorney General has made no derivative or other claims for any such payments.

6. Retention by the NRA of all sums recovered for the use and benefit of its members to continue the NRA's programs and advocacy rather than being paid out to others in dissolution.

7. Assuring conflict-free representation for the NRA in this action.

The rights of all NRA members are threatened with impairment or destruction by this action and include at a minimum:

- Their individual and collective rights to freedom of speech and freedom of association to engage in "political speech" and viewpoint advocacy as NRA members (grudgingly acknowledged by NRA Counsel as "constitutional and public policy interests implicated by this case").[3]
- Their private property rights, individually and collectively, to have the NRA's assets held and used for their benefit as NRA members, and not to have such property effectively taken for public use by means of dissolution without compensation to the members.
- Their Fifth and Fourteenth Amendment due process rights to fair and adequate representation in any action affecting their life, liberty, or property interests, including

[3] See November 19 letter from NRA Counsel, p. 2, (NYSCEF Doc. # 177); *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968) (Freedom of association is protected from federal and state encroachment by the First and Fourteenth Amendments); and New York const. art. I, §§ 6, 8, 9, and 11.

derivative actions.[4]

- Their Fifth and Fourteenth Amendment due process rights against forfeiture of their memberships by State action, and the resulting destruction of their interests in the NRA, without notice and a meaningful opportunity to prepare and contest this action.
- Their individual and collective rights as NRA members under the 5th and 14th Amendments, U.S. Const. and New York Const. art. I §11, to the equal protection of laws, which bar the Attorney General from targeting the NRA for dissolution when similar alleged wrongs by other corporate executives would be handled administratively as to the tax and reporting issues alleged by the Attorney General, and left to the corporation's board and/or members as to derivative claims and other internal issues.[5]

All of these rights are fundamental under the U.S. and New York constitutions, yet the Attorney General proposes to litigate, obtain evidence, and seek a judicial determination that she has "satisfied the statutory basis for dissolution" *without any notice to the NRA's members until after that determination has been made*.[6]

A more flagrant disregard for due process can scarcely be imagined, and is utterly inconsistent with bedrock cases such as *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795, 800 (1983) and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct.

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[4] *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (representatives whose substantial interests are not the same as those they are deemed to represent cannot afford the protection to absent parties that due process requires, and presents opportunities for the "fraudulent and collusive sacrifice of the rights of absent parties"); *Taylor v. Sturgell*, 553 U.S. 880, 900 (2008) (A party's representation of nonparties is not adequate unless her interests are aligned with those of the nonparties, citing *Hansberry*, 311 U.S. at 43); *Richards v. Jefferson County*, 517 U.S. 793, 801 (1996) (representation of absent parties is not adequate where representatives' interests are in conflict with those absent, citing *Hansberry*, 311 U.S. at 42-43).

[5] *See e.g.*, Teddy Grant, *Letitia 'Tish' James on Becoming New York's Next Attorney General*, EBONY (October 31, 2018), https://www.ebony.com/news/letitia-tish-james-on-becoming-new-yorks-next-attorney-general/. Statements by a government official like those made by the Attorney General can be indicative of politically selective law enforcement in violation of the First Amendment. *See, e.g.*, *Bennett v. Hendrix*, 423 F.3d 1247, 1252 (11th Cir. 2005) (retaliation); *Zieper v. Metzinger*, 474 F.3d 60, 66 (2d Cir. 2007) (coercion); and *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 68, 72 (1963) (state censorship effectuated by "extralegal sanctions" and "thinly veiled threats").

[6] Attorney General's November 19 letter, p. 3 (Doc. # 176), "After the Court has determined that the Attorney General has satisfied the statutory basis for dissolution, then the interests of the members and the public in dissolving the NRA will be taken into account in accordance with N-PCL § 1109."

652, 657, 94 L.Ed. 865 (1950), holding that notice is required *prior to* an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment. Due process further requires that notice must be given "*at a meaningful time and in a meaningful manner." See e.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004), quoting *Fuentes v. Shevin*, 407 U. S. 67, 80 (1972) and *Baldwin v. Hale*, 1 Wall. 223, 233 (1864); and *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965). These are only a few of the numerous cases standing for this principle.

The NRA's members and other interested persons are entitled to a meaningful opportunity to gather and submit evidence against dissolution as well as in support of other claims they may wish to assert, and they will be denied that opportunity if notice is not given now. The right to follow and participate in discovery from the start is critically important here for several reasons.

First, the NRA membership (including the Intervenors) would be extremely interested in evidence establishing the Attorney General's claim that the individual defendants were acting "solely for their personal benefit" and thus adversely to the NRA and its members. This evidence would support the Intervenors' "adverse interest" argument that the alleged wrongful acts of the individual defendants cannot be attributed to the NRA as an entity and therefore cannot be considered as grounds for dissolution. *See e.g.*, *Kirschner v. KPMG LLP*, 938 N.E.2d 941, 952-953; 15 N.Y.3d 446, 466-468; 912 N.Y.S.2d 508, 519-520 (N.Y. 2010) ("The crucial distinction is between conduct that defrauds the corporation and conduct that defrauds others for the corporation's benefit.")

Second, the Intervenors and other NRA members would be very interested in gathering evidence to support potential claims against third parties for excessive payments authorized by one or more of the individual defendants that were not disclosed to or authorized by the NRA

Board. The Attorney General's Complaint alludes to many such deals but, although purporting to make derivative claims on behalf of the NRA, the Attorney General makes no claim against any of the third parties involved. *See e.g.*, Complaint (Doc. # 1 and 11), ¶¶ 9, 140, 166, 183, 203-205, 253-262, and 329-364. Similar allegations are made as to apparently excessive payments to NRA Board members in ¶¶ 365-395, and legal bills from Brewer Attorneys & Counselors in ¶¶ 454-462 and 558.f.[7]

Third, the Attorney General has not alleged that the NRA is incapable of continuing its core mission, programs and services if LaPierre and the other individual defendants are removed from their positions and new leadership is installed. In fact the Complaint ignores the safety, educational and training functions that the NRA continues to provide, and wrongly imputes the individual defendants' actions to the NRA as an entity while at the same time alleging these defendants acted solely for their own benefit and enrichment. The Complaint fails to allege any facts that would show why dissolution is better for the NRA's members or the public than removal of the individuals and election of new leaders for the NRA. This is likely because N-PCL § 1114 provides for discontinuance of an action for dissolution "at any stage" when the cause for dissolution either never existed or no longer exists. The Intervenors should be entitled to a meaningful opportunity to obtain evidence that there is no basis for dissolution and that the NRA can in fact continue its mission and core functions with new leadership.

Fourth, none of the present parties will pursue any of these potential claims. The

[7] A 2019 letter (Ex. # 4 to Doc. # 155-1) from the NRA's then-president and first vice president to its General Counsel and Audit Committee Chair detailed the Brewer firm's legal bills to NRA averaging "$97,787 per day, seven days a week, every day of every month" for the first quarter of 2019. This eye-popping amount would require 10 lawyers each billing at $1,000 an hour, and each averaging 9.7 hours a day, every day of the week, every week of the period in question. This letter also detailed previous requests for copies of Brewer legal bills and an independent audit and financial review that were apparently refused by the NRA's top executives.

individual defendants will not investigate any of the potential third-party claims for excessive or unauthorized payments they made because they would implicate themselves. The NRA under its current leadership will not do so because a) it is presently controlled by the individuals who would be implicated, and b) it is represented by the same law firm which billed the legal fees that would be questioned. For the same reason the NRA's present law firm will not investigate or litigate any such claims, and the Attorney General will not pursue these either as evidenced by the fact that she could have included them in the Complaint but did not.

Besides the potentially excessive legal bills from the Brewer firm, the Attorney General's Complaint recites a number of potentially excessive third-party contracts and fees that the individual Defendants allegedly paid improperly. However, none of these payments or third-parties are included in the derivative claims the Complaint makes on behalf of the NRA. The Intervenors seek to review all such payments and recover them for the benefit of the NRA's membership.

The NRA's interests here are adverse to all other parties, and its present counsel is irremediably conflicted. Intervention is critical to assuring the NRA of independent counsel.

The November 11 letter to the Court from Intervenors' counsel demonstrated significant conflicts of interest by the Brewer firm in representing the NRA here. The NRA and Mr. LaPierre replied to this letter stating that the Brewer firm had withdrawn from the *Ackerman* case and that Mr. LaPierre now has separate counsel, NYSCEF Doc. # 174 and 177). However, neither of these responses acknowledged that Brewer's withdrawal from the *Ackerman* case did not happen until *after* Intervenors' counsel sent their November 11, 2020 letter calling the conflict to the Court's attention. In fact para. 9 of the LaPierre affidavit (Doc. # 175) gives the impression this withdrawal occurred on or about August 9 when the Attorney General filed this

action, but the PACER docket report in *Ackerman* shows the Brewer firm did not withdraw until November 18, 2020. A copy of this report is Ex. # 1 to the Intervenors' November 23, 2020 letter attached as Exhibit # 1 hereto.[8]

Brewer's conflicts cannot be cured by withdrawal from the *Ackerman* litigation or Mr. LaPierre's alleged distancing from management of this case as NRA Executive Vice President. Brewer continues to represent the NRA on issues as to which the NRA is materially adverse to LaPierre; i.e., all the derivative claims stated in the complaint as well as the potential for claims of excessive legal bills from Brewer to the NRA. Brewer says the NRA and LaPierre have both consented after full disclosure, but the NRA membership has not consented, and it is the NRA membership for whom the NRA is supposed to exist and for whose benefit the derivative claims are ostensibly brought by the Attorney General. Because the NRA's interests are the same as the members' interests (or should be), there is an irrebuttable presumption of disqualification here resulting from (1) a prior attorney-client relationship between Brewer and LaPierre in the *Ackerman* and *Dell'Aquila* cases,[9] (2) where the matters involved in both were substantially related, and (3) the interests of the NRA and LaPierre are materially adverse here. *Janczewski v. Janczewski*, 169 A.D.3d 773, 774-775; 92 N.Y.S.3d 665 (N.Y. App. Div. 2019), citing *Gjoni v. Swan Club, Inc.*, 134 A.D.3d 896, 897, 21 N.Y.S.3d 341 [internal quotation marks omitted]; *Falk v. Chittenden*, 11 N.Y.3d 73, 78, 862 N.Y.S.2d 839, 893 N.E.2d 116, and *Tekni-Plex, Inc. v. Meyner & Landis*, 89 N.Y.2d 123, 131, 651 N.Y.S.2d 954, 674 N.E.2d 663). Doubts as to the existence of a conflict of interest are resolved in favor of disqualification in order to avoid even the appearance of impropriety. *Id.*, citing *Deerin v. Ocean Rich Foods, LLC*, 158 A.D.3d 603,

[8] This memorandum does not undertake to make a complete statement of all the facts and applicable law relating to Brewer's conflicts here. That will be done by a Motion to Disqualify. The purpose here is to demonstrate to the Court that significant conflicts exist and that the Intervenors have a legitimate and substantial interest in seeing that the NRA has independent counsel.

[9] See November 11 letter to the Court from Intervenors' counsel, NYSCEF Doc. # 155-1.

608, 71 N.Y.S.3d 123(N.Y. App. Div. 2018); *Matter of Fleet v. Pulsar Constr. Corp.*, 143 A.D.2d 187, 189, 531 N.Y.S.2d 635(N.Y. App. Div. 1988); *Gjoni v. Swan Club, Inc.*, 134 A.D.3d at 897, 21 N.Y.S.3d 341(N.Y. App. Div. 2015).

One example of such a conflict is that Brewer's duty to the NRA (and its members) would demand the disclosure and use of evidence tending to show LaPierre's culpability, while at the same time Brewer's duty to LaPierre would demand its suppression if at all possible. Thus one important objective of Intervenors here is to assure that the NRA as an entity has independent counsel, and that the NRA's conduct of this litigation is not be controlled by Wayne LaPierre or advised by the Brewer firm. *See e.g.*, *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (representatives whose substantial interests are not the same as those they are deemed to represent cannot afford the protection to absent parties that due process requires, presenting opportunities for the "fraudulent and collusive sacrifice of the rights of absent parties"); *Taylor v. Sturgell*, 553 U.S. 880, 900 (2008) (A party's representation of nonparties is not adequate unless her interests are aligned with those of the nonparties, citing *Hansberry*, 311 U.S. at 43); and *Richards v. Jefferson County*, 517 U.S. 793, 801 (1996) (representation of absent parties is not adequate where representatives' interests are in conflict with those absent, citing *Hansberry*, 311 U.S. at 42-43).[10] The very filing of this motion to intervene demonstrates that the interests of the current parties to this case are not aligned with those of the NRA's membership that the Attorney General and the Defendants claim to be representing.

[10]*See also In re Pofit*, 2020 NY Slip Op 50776(U) (N.Y. Sup. Ct. 2020), Slip op. p. 5. This opinion held that the beneficiaries of a pension plan had standing to appear and participate in a judicial dissolution proceeding as to the plan Trust. The court noted an inherent conflict of the plan's Trustees as to the interests of the plan participant since the Trustees were also the corporation's directors; had terminated the plan to the detriment of the trust beneficiaries; and could potentially be liable to account to the Trust for shortfalls in its funding.

In addition to Judge Hale's concerns as to Brewer's conflicts about the Brewer firm's conflicts of interest (see note 2, *supra*, at p. 4), the U.S. Bankruptcy Trustee was alarmed enough to file an objection to Brewer acting as counsel for the NRA in the Ch. 11 case. A copy of that objection (Doc. # 166, No. 21-30085, ND Bankr. Texas) is attached hereto as Exhibit # 4, and the following excerpts are particularly noteworthy since the U.S. Trustee was an objective party to the Ch. 11 case.

> Para. 41, p. 19:
>
> BAC does hold an interest adverse to the Debtors' estates, namely the estates may have fraudulent conveyance claims against BAC related to its pre-petition fees and potentially other claims related to the allegations asserted against BAC in the NYAG Action. In addition, BAC previously represented Mr. LaPierre, who is a co-defendant with the NRA in the NYAG Action. The complaint in that action alleges that Mr. LaPierre took extraordinary steps to prevent any audit of BAC's fees .... See NYAG Complaint, Ex. A, ¶ ¶ 463, 466.
>
> Para. 45, p. 20:
>
> Here, there is "an actual or potential dispute in which the estate is a rival claimant," namely potential causes of action held by the estate against BAC, including potential claims for fraudulent conveyance. West Delta Oil Co., 432 F.3d at 356. Therefore, the Debtors' Application to retain BAC should be denied, or at minimum an evidentiary hearing held to determine whether BAC received any payments from the Debtors that could give rise to a fraudulent conveyance claim.
>
> Para. 47, p. 22:
>
> BAC also is not disinterested for the separate reason that BAC "possess[es] a predisposition under circumstances that render such a bias against the estate." *West Delta Oil*, 432 F.3d at 356. This predisposition is due to BAC's longstanding relationship with Mr. LaPierre and the steps Mr. LaPierre is alleged to have taken to prevent any inquiries into BAC's fees within the NRA. Although it appears that BAC is not representing Mr. LaPierre in the NYAG Action, the relationship between BAC and Mr. LaPierre makes it highly unlikely that, as the NRA's counsel, BAC would investigate or advocate the NRA to pursue cross-claims the NRA may have against Mr. LaPierre based on the allegations against him in the NYAG Action.
>
> Para. 49, p. 23:

> The Debtors' estates need legal representation that is loyal solely to the Debtors' estates and not to any particular officer of the Debtors. This is especially true where, as here, the NRA seeks to employ BAC in the NYAG Action brought against the NRA and its officer, Mr. LaPierre, which include serious allegations of misconduct by Mr. LaPierre that could give rise to claims by the estates against him.
>
> Para. 55, p. 24-25:
>
> As detailed above, the complaint in the NYAG Action includes numerous allegations of BAC's wrongdoing. BAC, therefore, cannot satisfy the Fifth Circuit's requirement in West Delta Oil that it be "free of the slightest personal interest which might be reflected in their decisions concerning matters of the debtor's estate or which might impair the high degree of impartiality and detached judgment." *Id*. (Emphasis added). ... Independent counsel needs to be retained to represent NRA in the NYAG Action and the related actions to determine whether to bring third party claims against BAC.
>
> Para. 63, p. 27:
>
> BAC's employment does not satisfy the best interest requirement here. Based on the allegations in the NYAG Action, in the three years BAC has represented the NRA, the NRA has paid BAC $54 million in fees. It is not in the best interest of the estates to retain counsel whose fees and billing practices have raised concerns and requests for fee audits by many insiders, including the Dissident NRA President, the First Vice President, and four members of the NRA Board. *See* NYAG Complaint, Ex. A hereto, ¶¶ 454-474. Nor is it in the best interest of the estates to retain counsel against whom the estate may have significant fraudulent conveyance claims. It also cannot be in the estates' best interest to retain a law firm to represent them in litigation that alleges wrongdoing by that same law firm or whose loyalties may be divided between the NRA and its current CEO. Nor is it in the best interest of the estates to retain counsel whose brother-in-law is the CEO of a company that is adverse to the Debtors in multiple lawsuits and is their single-largest creditor.

The Brewer firm's conflicts here are clear, substantial, and beyond question.

The Intervenors and all other NRA members will be bound by the judgment. A judgment for dissolution of the NRA in this action would bind the Intervenors and all other NRA members as surely as if they were named parties, destroying the rights and value of their memberships and effectively negating their First Amendment rights to freely associate with the NRA for education, safety instruction, training, instructor certification and viewpoint advocacy.

C. This action involves the disposition or distribution of, or the title or a claim for damages for injury to, the assets of the NRA. These assets are held for the use and benefit of all NRA members and will, or may be, affected adversely by the judgment here.

In addition to the adequate representation test of §1012(a)(2), Intervenors meet the disposition of property test in § 1012(a)(3). The NRA is a private association of individuals, and its assets are private property contributed and owned collectively by its members, including the Intervenors, and held for their use and benefit. A judgment of dissolution in this action would obviously dispose of these assets and property, and granting the Attorney General's demand for distribution of the NRA's assets to other charities would plainly affect the Intervenors and all other NRA members in the most adverse way possible. The affidavits of Intervenors unquestionably establish both the bona fide nature of their interests as well as the certainty that none of the present parties will adequately represent or protect those interests.

Lastly, intervention by Intervenors does not prejudice the substantial rights of any party. As noted earlier no procedural or substantive rulings have been made that would be affected by intervention. *See e.g.*, *U.S. Bank Nat'l Ass'n v. Carrington*, 179 A.D.3d 743, 744; 113 N.Y.S.3d 558, 559 (Mem.) (N.Y. App. Div. 2020) (Motion to intervene in foreclosure action was timely where filed before an order of reference was issued; citing *Roman Catholic Diocese of Brooklyn, N.Y. v. Christ the King Regional High Sch.*, 164 A.D.3d at 1397, 84 N.Y.S.3d 182 and *ABM Resources Corp. v. Doraben, Inc.*, 89 A.D.3d 773, 774, 933 N.Y.S.2d 29).

II. The Intervenors should also be granted intervention by permission under CPLR § 1013.

CPLR § 1013 allows for permissive intervention on a timely motion by any person in any action when a statute confers a right to intervene in the court's discretion or when the person's claim or defense and the main action have a common question of law or fact. This section also

provides that in exercising its discretion, the court must consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

As shown above this motion is timely and there is no question here of undue delay or prejudice to any party. The claims and defenses of Intervenors are based almost entirely on questions of law and fact common to this action and certain to be litigated. For example,

1. Did the individual defendants misappropriate NRA funds and otherwise breach their fiduciary duties to the NRA as the Attorney General alleges in the complaint?

2. If so, can those wrongful acts of the individual defendants be imputed to the NRA as an entity as grounds for its dissolution? In other words, can N-PCL § 1102(a)(2) be read so broadly that breaches of fiduciary duty by a non-profit corporation's executives, acting solely for their own personal benefit and against the best interests of the NRA's membership, are transformed into one or more of the grounds for dissolution in this subsection?

3. Would removal of the individual defendants from their positions and a judgment against them for misspent funds mean that the cause for dissolution did not exist or no longer exists, and the action should be discontinued as provided in N-PCL § 1114?

4. Is the Attorney General's demand for dissolution of the NRA in fact nothing more than selective or targeted retaliation against the NRA's political views and legislative advocacy? Put another way, if top executives of the Metropolitan Museum of Art, Amnesty International, the American Red Cross, or Planned Parenthood misappropriated funds of their respective organizations as the individual defendants are alleged to have done here, would the Attorney General be demanding dissolution rather than reformation?

5. Are the wrongful acts on which the Attorney General bases her demand for dissolution those of a few rogue executives, done without the knowledge or approval of the NRA's members

and to the detriment of the NRA membership at large, thus triggering the "adverse interest" defense against dissolution? *Kirschner v. KPMG LLP*, *supra.* Indeed the Attorney General plainly alleges such conduct throughout her complaint, beginning in ¶ 2 :

> For nearly three decades, Wayne LaPierre has served as the chief executive officer of the NRA and has exploited the organization for his financial benefit, and the benefit of a close circle of NRA staff, board members, and vendors. Contrary to his statutory duties of care, loyalty and obedience to the mission of the charity, LaPierre has undertaken a series of actions to consolidate his position; to exploit that position for his personal benefit and that of his family; ...

CONCLUSION

Intervenors have clearly demonstrated their entitlement to intervention here as of right and permissively. The Court should grant the motion to intervene.

Dated: June 17, 2021

Respectfully submitted,

/s/ Taylor Bartlett

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CERTIFICATE OF WORD COUNT

Pursuant to Commercial Division Rule 17, I certify that the foregoing MEMORANDUM OF LAW IN SUPPORT OF INTERVENTION, which was prepared using Times New Roman 12-point typeface, contains 6,987 words, excluding the caption and signature block. This certificate was prepared in reliance on the word-count function of the word processing system (Microsoft Word) used to prepare the document.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: June 17, 2021
New York, New York

/s/ Taylor Bartlett
_____
Taylor Bartlett