**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,

ROSCOE B. MARSHALL, JR., individually and derivatively on behalf of THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,

Intervenor-Defendant, Cross Claimant, and Counter Claimant.

**Index No. 451625/2020**

**Hon. Joel M. Cohen**
**Part 3**

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE BY ROSCOE B. MARSHALL, JR.**

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## PRELIMINARY STATEMENT AND RELEVANT FACTS

The essence of the parties' arguments here can fairly be distilled to these: The Attorney General says the fiduciary failures of the Individual Defendants and the NRA Board are so egregious that it must be dissolved, with no regard for whether those responsible can be removed and the NRA rehabilitated. The Defendants say this case is merely a political attack on the NRA and its leadership, and that the NRA is just fine. Neither of these propositions is true.

The AG's allegations of the Individual Defendants' fiduciary breaches and mismanagement may well be true, but to uphold her dissolution claims based on this misconduct the Court would have to disregard New York's "adverse interest exception" as to corporate liability for executive misconduct. *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 466-468; 912 N.Y.S.2d 508, 519-520 (N.Y. 2010). The Court would also have to ignore, as the AG does, the ultimate tests for dissolution: 1) the "paramount issue" of why dissolution is beneficial to the NRA's members, and 2) whether the NRA is "no longer able to carry out its purposes". *Inzer v. W. Brighton Fire Dep't, Inc.*, 105 N.Y.S.3d 655, 658-659 (N.Y.App.Div. 2019), citing N–PCL §§ 1102(a)(2) and 1109(b)(2). The AG cannot meet her burden of proving these essential facts.

On the other hand, to rule for the Defendants merely requires that the Court hold its nose and swallow their claims that the NRA Board has investigated the Attorney General's allegations and found nothing wrong, disregarding abundant evidence of the Individual Defendants' serious breaches of duty and conflicts of interest, some of which is already before the Court.

Mr. Marshall's intervention as a Director under N–PCL § 720 will allow the interests of the NRA as an entity and those of its members to be represented by a party without any conflicts, whose sole aim is to see the NRA made whole and continue to fulfill its purposes.

The Court addressed many of the authorities and arguments for intervention here in

considering the motion to intervene by Frank Tait, Jr. and Mario Aguirre. With the benefit of the hearing held September 9, 2021 and the Court's written order of September, 10, 2021 on that motion, Mr. Marshall's counsel assume the Court does not need an exhaustive repetition of those arguments here. Accordingly Mr. Marshall adopts and incorporates all the submissions of Mr. Tait and Mr. Aguirre in support of intervention, and this memorandum will focus on his standing as a Director to assert derivative claims and to intervene as a result.

Mr. Marshall also incorporates the factual allegations of the AG's complaint as most recently amended (NYSCEF Doc. # 333) as to the Individual Defendants' breaches of duty; the factual allegations of his proposed Answer, Counterclaims and Crossclaims in Intervention; and his affidavit for a complete statement of the facts and law supporting his intervention.

Mr. Marshall's affidavit and exhibits lay out a detailed explanation of his concerns and those of other NRA members, former directors, and persons outside the NRA about the NRA's management by the Individual Defendants and current Board; the fact of numerous requests to the NRA Board from NRA members and former directors (including Mr. Marshall) to investigate and take action; and the Board's utter failure or refusal to do so. Mr. Marshall's affidavit and exhibits show five (5) specific demands he made on the NRA Board about these issues between March 15 and August 27 after becoming a director on January 19, 2021.

Mr. Marshall agrees with the Attorney General that the Board has simply "rubberstamped" the actions of Wayne LaPierre, the Brewer law firm, and other LaPierre cronies. As Mr. Marshall notes, the NRA Board has remained completely passive even after a senior bankruptcy judge dismissed the Ch. 11 filing and specifically stated his 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.*" NYSCEF Doc. # 360; Bankruptcy dismissal order, p. 37 (emphasis added).

It is clear that the NRA's Board has not and will not fulfill its fiduciary duties to the NRA and its members. As Mr. Marshall says, these issues have been raised many times in the last several years by intelligent and serious people but the Board has steadfastly refused to objectively investigate and analyze them, or to take any action against the Individual Defendants.

Therefore it will do no good to merely remove the Defendants LaPierre and Frazer, because this would leave the same passive Board in place that has allowed the misconduct that brought the NRA to where it is today. Only a new and independent NRA Board elected by the membership and free from Defendant LaPierre's influence and control can effectively hire new executive leadership to oversee the NRA's rehabilitation.

This can be achieved with a minimal burden on the Court by the appointment of a temporary Receiver under N-PCL § 1111.[1] A Receiver would have the authority to hire independent accountants, attorneys and other professionals for an accounting of the numerous dealings on which the AG's action is based, and to pursue recovery of all funds or other assets found to be misspent or "looted and wasted" as the AG has alleged.[2] The AG suggested this course of action in her Motion To Dismiss Or Appoint Trustee in the Ch. 11 bankruptcy case.[3]

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[1] This section provides that "*At any stage* of an action or special proceeding under this article, the court may, in its discretion, make all such orders as it may deem proper in connection with preserving the property and carrying on the business of the corporation, *including the appointment and removal of a receiver under article 12 (Receivership), who may be a director, officer or member of the corporation*." (Emphasis added).

[2] See N-PCL § 1203(b), "The court may confer upon a temporary receiver the powers, and subject the temporary receiver to the duties of a permanent receiver, or so much thereof as it deems proper."

[3] See NYSCEF Doc. # 324, pp. 15-33.

As a current Director of the NRA Mr. Marshall is uniquely qualified to assert the derivative claims in his proposed Answer, Counterclaims and Crossclaims and he has the statutory standing to do so under N-PCL § 720. With his business management background and independence from the Individual Defendants and current NRA Board, Mr. Marshall is also well qualified to act as a temporary Receiver for an accounting and a new member election of an independent Board of Directors.

As his proposed Answer says, Mr. Marshall recognizes and appreciates that without this action no meaningful change in the NRA's governance will likely occur due to Defendant LaPierre's total control of the executive leadership and his dominance of the Board. To the extent possible Mr. Marshall will work with the Attorney General to reform the NRA's leadership for the benefit of all rank-and-file NRA members. Mr. Marshall will pursue recovery of all NRA funds wrongfully paid to the third parties implicated but not sued by the AG, while vigorously opposing the AG's dissolution claim.[4]

Lastly, as Mr. Marshall's affidavit notes, meaningful reform requires both removal of the Individual Defendants as officers and executives of the NRA and election of a new Board of Directors that will properly oversee the NRA. To accomplish this Mr. Marshall will ask the Court to appoint a temporary Receiver to manage the day-to-day business of the NRA until a new Board can be elected and hire new executive management. This will allow the NRA to be rehabilitated and continue serving its members and the public interest as well.

[4] The AG's dissolution claim is at best premature. If the NRA can be reformed and rehabilitated with a new Board and executive leadership then New York law bars dissolution. See e.g., *Siegel v. Eisner*, 2020 NY Slip Op 32555(U) (N.Y. Sup. Ct. 2020) (dissolution under the N-PCL is granted only when the object of a corporation's existence cannot be attained, and the "prime inquiry is whether judicially-imposed death will be beneficial to the stockholders or members and not injurious to the public. Additional authorities are discussed hereafter.

## ARGUMENT AND APPLICABLE LAW

### I. Marshall is a Director of the NRA, with the right to assert derivative claims on behalf of the NRA and its members under N-PCL § 720.

N-PCL § 720(a) provides that a derivative action in the name and right of a non-profit corporation may be brought against one or more directors, officers, or key persons of the corporation

> (1) To compel the defendant to account for his official conduct in the following cases:
>
> (A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.
>
> (B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.
>
> (2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness.
>
> (3) To enjoin a proposed unlawful conveyance, assignment or transfer of corporate assets, where there are reasonable grounds for belief that it will be made.

The action may be brought by the attorney general, the corporation, or in the right of the corporation by "a director or officer of the corporation", § 720(b)(1), and the complaint "shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reason for not making such efforts." N-PCL § 720 (c).

Mr. Marshall's affidavit and proposed Answer with Counterclaims and Crossclaims explains his previous efforts as a sitting NRA Director to have the NRA Board investigate and act on the AG's allegations of fiduciary breaches, conflicts of interest and other wrongful conduct by the Individual Defendants. Mr. Marshall's affidavit shows five separate instances when he has called the Board's attention to the issues from which this action arises:

1. A March 15, 2021 email to the NRA Board regarding NRA mismanagement and the need for a special meeting to address the failure of NRA controls and the Attorney General's

claims (Ex. E);

2. A March 17, 2021 email to the Board urging the Board to support a motion for examiner in the Ch. 11 bankruptcy case in order to "confirm or deny the allegations swirling around the association regarding the many accusations regarding mismanagement, fraud, and malfeasance" (Ex. F);

3. A March 18, 2021 email to the NRA Board regarding the Brewer firm's conflict of interest and attorney fees charged to the NRA (Ex. I);

4. A July 1, 2021 email to the NRA Board regarding oversight and fiduciary duties, and calling for a special meeting of the Board to address these issues (Ex. J); and

5. An August 27, 2021 email to the NRA Board regarding withholding of information from Board members and the need for the Board to regain control of the NRA (Ex. K).

As Mr. Marshall's affidavit explains, the NRA Board was completely unresponsive to his efforts and took no action to address any of his requests. Mr. Marshall also explains that it is clear from the inaction of the Board's "special litigation committee" ("SLC") that this committee is just another rubber-stamp subset of the NRA Board that is subservient to Defendant LaPierre and the Brewer law firm. The SLC is composed of NRA directors who as Board members are themselves alleged by the Attorney General to have breached their fiduciary oversight duties, and therefore they cannot be disinterested or objective in evaluating the AG's claims or Mr. Marshall's demands. As his affidavit says, the clearest evidence of this is that

a) despite the obvious conflicts of interest of Wayne LaPierre, John Frazer and the Brewer firm in this case from the beginning, the SLC never hired or consulted independent counsel;

b) the SLC approved the NRA's Ch. 11 bankruptcy filing in early January 2021 although it knew (or should have known) this was a violation of the NRA Bylaws (Article VI, Sec. 2) that

specifically require Board approval for such a major action or "reorganization";

c) although the members of the SLC were present and voted at the Board's March 28, 2021 meeting there is no indication in the minutes that the SLC recommended independent legal advice, or for that matter, any other investigation of the Attorney General's allegations; and

d) that despite the serious concerns expressed by a neutral, objective senior federal bankruptcy judge (Hon. Harlin Hale) in the May, 11, 2021 order dismissing the Ch. 11 case (NYSCEF Doc. # 365), the SLC has done nothing to investigate those concerns, and control of this case remains with Wayne LaPierre and the Brewer firm to this very day.

No properly functioning board of directors operating in good faith and acting with the care of an ordinarily prudent person in similar circumstances could possibly overlook the fiduciary breaches and conflicts of interest alleged in the complaint and described in Mr. Marshall's affidavit. His lack of success in spurring the Board to action confirms, if it was not already clear, that neither the Board nor its "Special Litigation Committee" will act, and that the entrenched NRA power structure will fight to the death of the NRA itself rather than relinquish control of it.

**II. Marshall has the right to intervene under CPLR § 1012(a)(2) and (3).**

CPLR § 1012(a) provides for intervention as a matter of right upon a timely motion:

> 1. when a statute of the state confers an absolute right to intervene; or
>
> 2. when the representation of the 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.
>
> (Emphasis added).

*Inadequate Representation And The Requisite § 1012 "Interest"*

As an NRA Director with standing to sue under N–PCL § 720, Mr. Marshall plainly has the requisite "real and substantial interest" in this action to support his intervention as of right and as

a discretionary matter. The very existence of the NRA is at issue here, and Marshall's interests as a Director asserting derivative claims under § 720 will not – or at the very least *may not* – be adequately represented by any of the present parties:

- The Attorney General cannot adequately represent the NRA as an entity or Mr. Marshall and all other NRA members because her stated goal is a death sentence for the NRA by dissolution and distribution of its assets to other non-profits.
- The Individual Defendants certainly will not support their own removal, nor will they ever seek a judgment against themselves for restitution and damages to the NRA.
- The NRA's current law firm (Brewer) will certainly not advise the NRA to seek review of Brewer's fees, much less to demand repayment if found to be excessive.
- As long as the NRA is controlled by Defendant LaPierre and advised by the Brewer firm, the NRA as an entity will most certainly not seek removal of the Individual Defendants from their positions or their repayment of money allegedly misspent.
- While the NRA's current counsel has lodged arguments against the AG's dissolution of the NRA that echo some of Mr. Marshall's claims, because of their conflicts both the NRA's current leadership and its current counsel have relinquished the best defense the NRA has against dissolution—their own removal.
- Finally, the AG's Complaint alleges numerous payments, contracts and other benefits that the Individual Defendants improperly paid or arranged for third parties (including numerous references to potentially excessive legal fees charged by Brewer). But the AG has made no claim here for the NRA's recovery of these payments.

Thus no present party will adequate represent the interests of the NRA, Mr. Marshall, or the NRA's membership in this action.

The recent case of *In re Pofit*, 2020 NY Slip Op 50776 (N.Y. Sup. Ct. 2020) is analogous to this action. There a hospital corporation's Directors sought its judicial dissolution under N-PCL § 1102, alleging that the corporation's assets were insufficient to meet its liabilities and it could no longer carry out its purposes. But the Directors were also Trustees of the hospital's retirement plan which the Directors had terminated, and the Plan was owed $53 million by the corporation. The court said the Directors (in their capacity as Trustees) had an inherent conflict of interest from their fiduciary duty to the Plan participants while simultaneously defending their termination of the Plan to the detriment of its participants. As a result the Plan participants had standing to contest dissolution because they were adversely affected by its termination.

In the same way Mr. Marshall and all other NRA members will be adversely affected here whether the AG prevails and the NRA is abolished, or whether the Defendants prevail and the NRA continues to be the fiefdom of Wayne LaPierre and his favored friends. All the present parties are adverse to Mr. Marshall and the NRA's membership in one way or another, and cannot adequately represent their interests.

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 Southampton*, 67 A.D.3d 840, 843, 889 N.Y.S.2d 623 (2009); and *Matter of Bernstein v. Feiner*, 43 A.D.3d 1161 1162, 842 N.Y.S.2d 556. As shown above, Mr. Marshall's interest here is partially aligned with the Attorney General's as to removal of the Individual Defendants and recovery of damages from them, but adverse as to dissolution.

Because the present parties will not, or at the very least may not, adequately represent the

interests of the NRA or its members, Mr. Marshall has the necessary "bona fide" or "real and substantial" interest entitling him to intervention under CPLR § 1012(a)(2).

*Berkoski v. Board of Trustees*, *supra*, is also instructive on this. There the town sought a judgment that would have barred day laborers from assembling in a park to solicit employment. The appellate court reversed a denial of intervention by two day laborers, holding that their First Amendment right to assemble in a public place was sufficiently "real and substantial" to justify intervention as a matter of discretion under CPLR § 1013, citing *Matter of Bernstein v Feiner*, 43 A.D.3d 1161, 1162 [2007] and others. *Berkoski* noted that

> ... it has been held under liberal rules of construction that 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 that] 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, 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]; and others.

The *Berkoski* court properly recognized that the rights of just two people matter to the law, and the potential impairment of those rights is sufficiently "real and substantial" to support intervention. Surely Mr. Marshall's interests here are equally substantial, involving as they do the fiduciary breaches and other wrongs to the NRA and its members at issue in this action.

Lastly, intervention should be "liberally allowed by courts", permitting persons to intervene where they have a bona fide interest in one or more of the issues involved in an action. Moreover, distinctions between intervention as of right and discretionary intervention "are no longer sharply applied". *Yuppie Puppy Pet Products, Inc. v. St. Smart Realty, LLC*, 906 N.Y.S.2d 231, 235 (N.Y. App. Div. 2010), citing Siegel, *N.Y. Practice*, § 178 at 307 [4th ed.] and *Berkoski, supra*, 67 A.D.3d at 843.

*Any Judgment Here Will Potentially Bind Mr. Marshall*

The *Yuppie Puppy* court also noted it was "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." 77 A.D.3d at 202 (emphasis added), 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). The test is not whether the judgment will be binding on the intervenor but only whether it may be.

Although it may be possible to imagine some set of circumstances under which a judgment here might not be binding on Mr. Marshall's interest as an NRA Director, it is far more likely that a judgment will almost certainly be *res judicata* both as to Mr. Marshall and all other NRA members. For example, suppose that the Defendants somehow secure a judgment or verdict in their favor, and suppose that Mr. Marshall and/or other NRA directors brought a separate derivative action against the Individuals with allegations similar to those made here by the AG. Could anyone credibly argue that the judgment here would not bar the later action on grounds of *res judicata* or collateral estoppel by virtual representation?

The "may be" tests of CPLR § 1012(a)(2) for intervention due to inadequate representation and/or the potential of a binding judgment on the intervenor are plainly satisfied here.

*Timeliness And Undue Delay*

Mr. Marshall's motion is timely. The Court has not ruled on any substantive or procedural issues other than denying transfer of venue and motions to dismiss (NYSCEF Doc. # 210-215; Jan. 21, 2021) and denying intervention to Mr. Tait and Mr. Aguirre (NYSCEF Doc. # 340). In fact the AG only recently filed an Amended Complaint (NYSCEF Doc. # 333) that the Defendants answered only last week as well as responding with a new series of motions to

dismiss. See NYSCEF Doc. # 341-371.

Discovery is also bogged down, and according to the AG's September 21, 2021 letter to the Court (NYSCEF Doc. # 372) it is the NRA's refusal to produce documents since as far back as July 15, 2021 that has hindered the AG's preparation for scheduled depositions.

This delay only compounds the approximately 5-month delay in this action from the NRA's Ch. 11 filing. Contrary to arguments of NRA counsel against intervention by Mr. Tait and Mr. Aguirre, the Bankr. Code § 362(a) automatic stay did bar their proposed answer, counterclaims and crossclaims, and would have barred Mr. Marshall's proposed pleadings as well. This is for the simple reason that all derivative claims for restitution and damages were property of the NRA's bankruptcy estate as long as the Ch. 11 case was pending. The AG's January 20, 2021 letter to the Court (Doc. # 208-209, p. 3) carefully explained the government enforcement exception to the automatic stay, taking pains to point out that "*none of the Attorney General's claims involve any interest by the State of New York in property owned by the NRA*, but instead seek to enforce compliance with State law governing the administration of the NRA as a state-chartered charitable not-for-profit corporation", and that "*the Attorney General is not adjudicating private rights against the NRA* but is enforcing New York law designed to protect the public". (Emphasis added). This obviously would not be so as to Mr. Marshall.

Additionally Mr. Marshall's counsel entered into an agreement with counsel for all parties to share copies of documents and other discovery on behalf of Mr. Tait and Mr. Aguirre, and are perfectly willing to have the same agreement with respect to Mr. Marshall's participation.

Accordingly Mr. Marshall's intervention will not delay discovery, and certainly not unduly so. His affidavit shows good faith efforts to spark the NRA Board's action, and his motion is filed within 30 days of his realization in late August that these efforts would get no results.

In addition to the adequate representation and potentially binding effect of a judgment tests of N-PCL §1012(a)(2), Mr. Marshall meets 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 Mr. Marshall, and held for their use and benefit. The fact that NRA members have no distributive rights in the NRA's assets does not alter the fact that they are the primary beneficiaries of the NRA and its continued existence. 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 Mr. Marshall's interest as a member (and all other NRA members) in the most adverse way possible by a corporate death sentence of dissolution.

Lastly, Mr. Marshall's intervention will not prejudice the substantial rights of any party because it will not unduly delay this action and no procedural or substantive rulings have been made that Mr. Marshall's intervention would change. *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).

**III. Marshall should be also be allowed to intervene under CPLR § 1013.**

CPLR § 1013 provides for discretionary intervention:

> Upon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact. In exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party.

As shown above Mr. Marshall's motion is timely and there is no question here of undue delay or prejudice to any party. His claims and defenses 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 the 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?

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?[5]

4. Is the Attorney General's demand for dissolution of the NRA in fact selective or targeted retaliation against the NRA's political views and legislative advocacy? If executives of the Metropolitan Museum of Art, Amnesty International, American Red Cross, or Planned Parenthood misappropriated funds from their organizations as the Individual Defendants are alleged to have done, would the Attorney General demand 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"

[5] This section provides in pertinent part, ""An action or special proceeding for the dissolution of a corporation may be discontinued at any stage when it is established that the cause for dissolution did not exist or no longer exists."

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; ...

The issues outlined above are illustrative of the fact and legal issues common to this action and Mr. Marshall's proposed pleadings. In *Berkoski v. Board of Trustees, supra,* the court also held that intervention should also have been allowed because the intervenors' claims had "...at least one common question of law raised by [the pleadings] and there has been no showing that intervention would cause undue delay."[6] 67 A.D.3d at 844, citing *St. Joseph's Hosp. Health Ctr. v Department of Health of State of N.Y.*, 224 A.D.2d 1008, 1009 (1996); *Empire State Assn. of Adult Homes v Perales*, 139 A.D.2d 41, 45 (1988); and *Matter of Village of Spring Val. v Village of Spring Val. Hous. Auth.*, 33 A.D.2d 1037 (1970).

## CONCLUSION

In *People v. James*, 2013 NY Slip Op 50508, 39 Misc.3d 1206, 971 N.Y.S.2d 73 (N.Y. Sup. Ct. 2013) the Attorney General brought an N-PCL action under §§ 717 and 720 alleging mismanagement and waste of the assets belonging to the National Arts Club. The defendant moved to dismiss, and the Supreme Court reiterated the standard of review:

> Accepting the facts as alleged in the complaint as true, and according plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit into any cognizable legal theory" (*Nonnon v. City of New York*, 9 NY3d 825 [2007]; *Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972 [1994] ), the Court finds that such allegations are sufficient to support claims of breach of fiduciary duty and waste, and for injunctive relief for which the Attorney General has standing...

[6] This plainly puts the burden on the party opposing intervention to show undue delay. As discussed above the Attorney General and the Defendants cannot complain of undue delay here.

This is the standard to be applied here, and Mr. Marshall's motion to intervene should be granted. As a Director he unquestionably has § 720 standing, and just as plainly has alleged facts that, if proven, entitle him to relief in the name and right of the NRA.

This memorandum does not undertake to reiterate the authorities previously submitted to the Court in the intervention papers of Mr. Tait and Mr. Aguirre. If the Defendants wish to contest any particular claims of Mr. Marshall's proposed pleadings then they may do so by motions to dismiss after his pleadings are filed, just as the NRA has most recently done as to the AG's last amended complaint. (See NYSCEF Doc. # 363-371).

The Court should grant Mr. Marshall's motion to intervene, both as of right and as a discretionary matter.

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 was prepared using Times New Roman 12-point typeface and contains 5,266 words, excluding the items specified by this rule. 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: September 24, 2021
New York, New York

*/s/ Taylor Bartlett*
Taylor Bartlett