Motion Sequence 011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OFNEWYORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK	§	
Plaintiff,	§	**INDEX NO. 451625/2020**
v.	§	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	
Defendants.	§	

MEMORANDUM OF LAW OF THE NATIONAL RIFLE ASSOCIATION
IN OPPOSITION TO MOTION TO INTERVENE

William A. Brewer, III
Sarah B. Rogers
Mordecai Geisler
BREWER, ATTORNEYS & COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

ATTORNEYS FOR DEFENDANT
THE NATIONAL RIFLE ASSOCIATION

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I.
PRELIMINARY STATEMENT AND BACKGROUND

The New York Attorney General (the "NYAG") commenced this action (the "Action") against the National Rifle Association of America (the "NRA" or the "Association") and four individual defendants, who are current or former employees of the Association, by the filing of a Summons and Complaint on August 6, 2020. Francis Tait and Mario Aguirre (the "Movants") attest that they are lifetime members of the NRA. By Notice of Motion, dated June 7, 2021 (Dkt. No. 243), Movants seek to intervene in this Action pursuant to CPLR 1012(a) and 1013 (the "Motion to Intervene"). Movants have failed to establish entitlement to intervention as of right under CPLR 1012(a) or to permissive intervention under CPLR 1013.

First, Movants lack standing. Movants fail to plead the threshold requirement of N-PCL § 623(a), which provides that in order to establish standing to assert a claim on behalf of a not-for-profit charitable corporation, such as the Association, a member of the corporation must represent 5% or more of any class of the members of the corporation. Movants also fail to adequately allege that they made the requisite demand upon the NRA's Board of Directors, as required by N-PCL § 623(c). Instead, Movants assert in conclusory fashion that such a demand would have been futile, which is insufficient under N-PCL § 623(c).

Second, the Motion is untimely. Movants filed the Motion ten months after this Action was commenced, and fail to adequately explain their delay given that they were aware of the commencement of the Action in August 2020. In fact, their counsel wrote to the Court requesting that notice be given to NRA members in November 2020.

Third, there is no statute that confers upon Movants a right to intervene. Movants' reliance upon N-PCL § 1104 is misplaced, as that section neither concerns, nor authorizes,

intervention as a party to a plenary action such as this Action that has been commenced by the NYAG.

Fourth, Movants fail to meet their burden to establish a cognizable interest in this Action sufficient to support intervention. Instead, they allege inchoate interests in the NRA's assets, as well as general constitutional interests shared by all of the Association's members. Movants fail to establish a direct interest in the NRA's assets. While they share a general interest in the outcome of the Action, as do all of the NRA's members, it is the Association that has standing to vindicate its members' rights in this Action.

Fifth, Movants' alleged interests are adequately represented in this Action by the NRA and the NYAG. Movants' proposed Answer and counterclaims are perfunctory and repetitive of the NRA's. Further, Movants fail to show that with regard to their proposed cross-claims against the individual defendants, they will not be adequately represented by the NRA. Movants fail to establish a conflict between the Association's chosen law firm, Brewer, Attorneys and Counselors ("BAC") and defendant Wayne LaPierre, the Association's Executive Vice President and CEO. BAC has never represented LaPierre in this Action. Moreover, the NRA's Board of Directors established a Special Litigation Committee (the "SLC") to oversee the handling of this Action. The SLC and the full Board specifically decided to continue BAC's representation of the Association. LaPierre and the only other defendant still employed by the NRA, General Counsel John Frazer, have recused themselves in favor of the SLC, which is advised by the Board's independent attorney. The Association is entitled to rely upon the SLC in its management of this litigation. To the extent Movants believe their purported interests are not adequately represented by the NYAG, their speculation that the NYAG would inadequately fulfill its role is insufficient to support intervention.

Finally, Movants will not be precluded by principles of *res judicata* as a result of any judgments rendered in this Action, were Movants to assert a direct claim in the future.

For the reasons set forth below, the Motion should be denied.

II.
ARGUMENTS AND AUTHORITIES

A. Movants Lack Standing to Intervene

Standing "is a threshold determination."[1] Therefore, a proposed intervenor has the burden to establish standing to assert his purported claims should he be granted intervention under CPLR 1012 or 1013.[2] "Logically the result could hardly be otherwise, for it would make little sense to permit intervention only to hold that as to the intervenor the complaint had to be dismissed because he lacked standing."[3]

1. Movants Fail to Establish the 5% Member Threshold Required by N-PCL § 623(a)

N-PCL § 623(a) provides, in relevant part, that with respect to a not-for-profit corporation, "[a]n action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor by five percent or more of any class of members."[4] Thus, a member of a not-for-profit corporation "lack[s] standing to prosecute [a] claim" when he does "not represent 5% or more of any class of members of the corporation."[5]

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[1] *Socy. of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769 (1991).

[2] *See In re Rapoport*, 91 A.D.3d 509, 510 (1st Dep't 2012) (affirming denial of motion to intervene when "the Movants have no standing to intervene"); *In re Village of Sloatsburg*, 17 N.Y.S.3d 386, 48 Misc.3d 1206(A), *2 (Sup. Ct. Rockland Cnty. 2015) (citing *Socy. of Plastics Indus.* and denying intervention because movants "lack[ed] the requisite standing to present the claims contained in their proposed pleading").

[3] *Unitarian Universalist Church of Central Nassau v. Shorten*, 316 N.Y.S.2d 837, 64 Misc.2d 1027, 1029 (Sup. Ct. Nassau Cnty. 1970) (denying intervention for lack of standing).

[4] N-PCL § 623(a).

[5] *Bernbach v. Bonnie Briar Country Club*, 144 A.D.2d 610 (2d Dep't 1988); *see also Schaefer v. Chautauqua Escapes Association, Inc.*, 158 A.D.3d 1186 (4th Dep't 2018); *Pall v. McKenzie Homeowners' Ass'n, Inc.*, 121 A.D.3d 1446, 1447 (3d Dep't 2014); *Tae Hwa Yoon v. New York Hahn Wolee Church, Inc.*, 56 A.D.3d 752, 755 (2d Dep't 2008); *Segal v. Powers*, 687 N.Y.S.2d 589, 180 Misc.2d 57, 59 (Sup. Ct. N.Y. Cnty. 1999)

The purpose of the 5% standing requirement is "to prevent a not-for-profit corporation from having to incur legal expenses in defending litigation when there is not a showing that at the time of bringing the action there exists that minimum number of members supporting the suit."[6] This threshold is required no matter the size of the membership of the nonprofit organization.[7]

Here, the two Movants, who attest that they are Lifetime members of the NRA, have failed to even allege that they meet the five percent threshold under N-PCL § 623(a). Accordingly, Movants fail to establish standing to assert derivative claims and defenses on behalf of the NRA.[8] The Motion to Intervene must be denied on this ground alone.[9]

2. Movants Fail to Adequately Allege Compliance With N-PCL § 623(c)

N-PCL § 623(c) provides that in a purported derivative action brought with respect to a nonprofit corporation: "the complaint shall set forth with particularity the efforts of the plaintiff or plaintiffs to secure the initiation of such action by the board or the reason for not making such effort."[10] Allegations in this regard must be pled with sufficient specificity; conclusory allegations will not suffice.[11] Thus, a complaint must provide an "indication as to who made the

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(plaintiff's "failure to name in his pleading the persons who he asserts constitute 5% of the members of the Club warrants dismissal of the action since [plaintiff] has failed to adequately allege that he represents a sufficient number of members" to give him standing); *Romain v. Seabrook*, 2017 WL 6453326, *6 (S.D.N.Y 2017) (plaintiff members of labor union "lack standing to sue derivatively . . . [because] they have failed to adequately plead that they represent 'five percent or more' of [the union's] membership, as required by [N-PCL] Section 623(a)").

[6] *Segal*, 180 Misc.2d 57 at 59-60.

[7] *See Romain*, 2017 WL 6453326 at *8.

[8] *See Liu v. Four Brotherhoods Society*, 2017 WL 4773032 (Sup. Ct. N.Y. Cnty. 2017) (two members of nonprofit organization with more than 300 members "lacked standing to assert derivative causes of action against the society since N-PCL 623(a) only authorizes members constituting more than 5% of the membership to assert such causes of action").

[9] *See In re Rapoport*, 91 A.D.3d at 510; *In re Village of Sloatsburg*, 48 Misc.3d 1206(A) at *2; *Unitarian Universalist Church of Central Nassau*, 64 Misc.2d at 1029.

[10] N-PCL § 623(c).

[11] *Tae Hwa Yoon*, 56 A.D.3d at 752.

demands, when they were made, which Board members they were made to, the content of the demands or why the Board refused to take action."[12] Similarly, an assertion of futility must allege that "the directors are incapable of making an impartial decision as to whether to bring suit."[13]

Movants here concede they made no attempt to make any demand on the NRA's Board of Directors.[14] Instead, Movants allege that it would have been futile to make a demand on the Board because its "independence is compromised and the majority of members were complicit in the [sic.] much of the misconduct alleged herein, either actively or by their failure to exercise independent oversight."[15] Thus, they allege, the NRA "could not evaluate the truth and strength of its potential derivative claims independently," because doing so would "require the Board members to scrutinize their own misconduct."[16]

These conclusory allegations are plainly insufficient. For example, in *Tomczak v. Trepel*, the court held that the proposed derivative complaint was properly dismissed because the allegations failed to "set forth with particularity the efforts of ... plaintiffs to secure the initiation of [a derivative action] by the board [or] the reason for not making such effort" as required by N-PCL § 623(c).[17] The court found that "[a]lthough plaintiffs allege wrongdoing on the part of [defendant], he was only one member of the Board. There is no allegation of wrongdoing against the other Board members, who are not named as defendants."[18]

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[12] *Tomczak v. Trepel*, 283 A.D.2d 229, 230 (1st Dep't 2001).

[13] *BPS Lot 3, LLC v. Northwest Bay Partners, Ltd.*, 111 N.Y.S.3d 520, 61 Misc.3d 1219(A), *5 (Sup. Ct. Warren Cnty. 2018).

[14] Dkt. 249, Proposed Answer at ¶ 15.

[15] *Id*.

[16] *Id*. at ¶¶ 16-17.

[17] *Tomczak*, 283 A.D.2d at 229.

[18] *Id*. at 230.

Likewise, in *Segal v. Powers*, the court dismissed the complaint brought by a member of a not-for-profit club purporting to assert derivative claims on behalf of the club alleging corporate waste against the club's officers. The plaintiff alleged that the club's president refused to initiate action by the board of directors, because one of the defendants was on the board.[19] The court dismissed the complaint for failure to satisfy the pleading requirements of § 623(c), finding that the board consisted of 22 members, only one of whom was a defendant, and there was no allegation of wrongdoing against any of the other board members, "nor any showing that a demand to the Board would be futile."[20]

Here, Movants fail to allege any facts justifying a claim of futility. The NRA's Board consists of 76 members.[21] No member of the Board is a defendant in this Action.[22] Movants do not identify *any* Board member who was allegedly "complicit" in wrongdoing, much less can they name 39 such members to constitute a majority of the Board. Movants' conclusory allegations are, therefore, insufficient to show that making a demand upon the Association's Board would have been futile.[23] Accordingly, Movants have failed to meet the threshold requirement of N-PCL § 623(c), and lack standing to assert derivative claims on behalf of the NRA. Lacking standing, Movants' Motion must be denied.

[19] *Segal*, 180 Misc.2d at 60.

[20] *Id*.

[21] *See* NRA Bylaws, dated as of October 24, 2020, Art. IV, § 1(a), a true copy of which is annexed to the accompanying Affirmation of Mordecai Geisler ("Geisler Aff.") at Exhibit 1.

[22] LaPierre and Frazer are ex officio Board members, with no right to vote. *See* NRA Bylaws, Art. V, § 2(h). Moreover, as discussed below at pp. 15 and 18, LaPierre and Frazer have recused themselves from handling this litigation for the Association.

[23] *See Tomczak*, 283 A.D.2d at 229; *Segal*, 180 Misc.2d at 60.

B. Movants Are Not Entitled to Intervention as of Right Under CPLR § 1012(a)

CPLR § 1012(a) permits a party to intervene as of right, upon a timely motion, when one of the following three conditions is met: (1) a statute of the state confers an absolute right to intervene; or (2) the representation of the intervenor's interest by the parties is or may be inadequate and the intervenor is or may be bound by the judgment; or (3) the action involves the disposition or distribution of, or the title or a claim for damages for injury to, property and the intervenor may be affected adversely by the judgment. CPLR § 1012(a). Movants have the burden to establish their right to intervene.[24]

1. Motion to Intervene is Untimely

As a threshold issue, Movants failed to file their Motion in a timely manner. Court have held that as little as a four-month delay is untimely as a matter of law.[25]

Movants' counsel, purporting to represent unidentified members of the NRA, filed letters with the Court in November 2020 to obtain notice in this Action.[26] Nevertheless, Movants failed to move for intervention until seven months later. On this ground alone, their Motion should be denied. But, in reality, Movants were aware of the facts of this Action as soon as the Action was commenced by the Attorney General in August 2020. Specifically, Movants attest they are lifetime NRA members, with "years of experience and familiarity with the NRA."[27] In addition, Tait, a Pennsylvania resident, ran unsuccessfully as a write-in candidate for the NRA Board of

[24] *See Romonoff Restaurant & Cabaret, Inc. v. World Wide Asset Management Corp.*, 273 A.D.2d 292, 293 (2d Dep't 2000).

[25] *See Castle Peak 2012-1 Loan Trust v. Sattar*, 140 A.D.3d 1107, 1108 (2d Dep't 2016) (intervenor moved four months after learning of pending foreclosure action); *Vacco v. Herrera*, 247 A.D.2d 608, 608-09 (2d Dep't 1998) (movants failed to move to intervene until seven months after being notified of the commencement of the action); *State of N.Y. v. Philip Morris Inc.*, 269 A.D.2d 268 (1st Dep't 2000) (movants waited eight months after becoming aware of underlying events).

[26] Dkt. 245.

[27] *See* Dkt. 260, Affidavit of Francis Tait at ¶¶ 2, 4; Dkt. 259, Affidavit of Mario Aguirre at ¶ 2.

Directors in 2019, and is seeking election again in 2021.[28] On his website promoting his candidacy, Tait features a "Blog," that includes an article, dated August 6, 2020, discussing the NYAG's commencement of this Action.[29] It is, therefore, beyond cavil that Movants were on notice of the commencement of the Action from the outset, 10 months before moving to intervene.[30]

The only excuse offered by Movants for their untimeliness is that they were "ready" to file on January 15, 2021, but were "barred" by the automatic stay while the NRA's bankruptcy case was pending.[31] In fact, a stay was never issued in this Action. Accordingly, the Motion is untimely and should be denied.

2. <u>There is No Statute that Confers Upon Movants a Right to Intervene</u>

Movants argue that N-PCL § 1104 provides a basis for intervention.[32] However, sections 1104(a)-(c), upon which Movants rely, on their face do not authorize intervention as a party to a plenary action such as this Action that has been commenced by the NYAG.

Rather, Article 11 of the N-PCL sets forth the means by which an involuntary dissolution action against a not-for-profit corporation may be commenced and conducted.[33] Upon the filing of a petition by members or directors of a not-for-profit corporation under section 1102, pursuant

[28] *See* http://taitnra.com/.

[29] http://taitnra.com/blog/ny-ag-sues-to-dissolve-nra/. A true copy of the August 6, 2020 article is annexed to the Geisler Aff. at Exhibit 2.

[30] LaPierre sent a letter to all NRA members discussing the commencement of the Action, which was widely circulated on the NRA's social media. *See* a true copy of the August 14, 2020 letter sent to NRA members, together with a true copy of the letter's posting on the NRA's Twitter account, dated August 15, 2020, annexed to the Geisler Aff. at Exhibit 3.

[31] Movants' Mem. at pp. 3-4.

[32] Movants' Mem. at pp. 6-7.

[33] *See, e.g., Westchester County S.P.C.C. v. Pisani*, 105 A.D.2d 793, 794, 481 N.Y.S.2d 735, 736 (2d Dep't 1984) ("an action for the involuntary judicial dissolution of a corporation formed pursuant to the Not-For-Profit Corporation Law can be maintained only by the Attorney-General (Not-For-Profit Corporation Law, § 1101), or upon specified conditions, ***by a certain number*** of members or directors of the corporation (Not-For-Profit Corporation Law, § 1102)") (emphasis added).

to section 1104(a), "the court makes an order requiring the corporation ***and*** all persons interested in the corporation to show cause before it . . . why the corporation should not be dissolved."[34]

Here, N-PCL § 1104 is not applicable because the NYAG has brought a plenary action under N-PCL § 1101 by service of a summons and complaint on the NRA. Clearly, section 1104(a) does not apply here where the NRA is *already* a party. In any case, section 1104(a) only provides the opportunity for the corporation itself and all interested persons to be heard as to why the corporation should not be dissolved. It is not an *intervention* statute, providing the right to intervene as a party to make claims, participate in discovery and exercise other concomitant rights. Movants cite no authority suggesting otherwise, and have not identified any statute enabling their intervention.

3. Movants Lack a Cognizable Interest in this Action

Movants argue that their interests in this action, are "the same as all other" NRA members, and purportedly consists of their: (a) individual and collective constitutional rights to freedom of speech and association; (b) private property rights, individually and collectively, to have the NRA's assets held and used for their benefit as members; and (c) due process rights to fair and adequate representation.[35] None of these purported interests are cognizable interests supporting intervention.

First, although all NRA members certainly have constitutional and public policy interests implicated by this case, corporate dissolutions are in rem proceedings, and the type of "interest" contemplated is a property interest.[36] The NRA acts as the steward of its assets in the interest of

[34] *See* N-PCL § 1104(a)(emphasis added); 15A N.Y. Jur. 2d Business Relationships § 1352.

[35] Movants' Mem. at pp. 9-10.

[36] *See Rigas v. Livingston*, 178 N.Y. 20, 24 (1904) (proceedings seeking dissolution of corporations "are in the nature of proceedings in rem"); *Knox v. Zarzeski*, 2006 WL 8461751, *6 (S.D.N.Y. 2006) ("the state court now has in rem jurisdiction over the corporation in the dissolution proceeding").

its members, but individual members do not possess property interests in those assets. The NRA's Bylaws create "classes" of members, only certain of which are entitled to rights beyond, *inter alia*, the right to attend Association meetings.[37] Even those members who are given substantive rights have only the right to vote[38]; however, no class of members has property rights in the NRA's assets.[39]

To the extent Movants rely on their individual Constitutional rights shared by all NRA members, it is the Association that has standing to represent its members' common interests affected by the NYAG's claims.[40] Movants seemingly contend that, were it otherwise, each of the NRA's approximately 5 million members would have standing to intervene in this Action, but fail to cite any authority to support such a proposition, which would, of course, effectively negate the standing threshold of N-PCL § 623(a). Because Movants have no legally cognizable interest in this Action, their Motion must be denied.

4. Movants are Adequately Represented in this Action

A moving party is entitled to intervene as of right only upon a showing that the representation of its interests by the parties is or may be inadequate.[41] Thus, courts will deny leave to intervene "if they deem further intervention unnecessary."[42]

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[37] *See generally*, NRA Bylaws, Art. III, § 6, Geisler Aff. at Exhibit 1.

[38] NRA Bylaws, Art. III, § 6(e).

[39] *See, e.g., Vacco*, 247 A.D.2d at 608 (proposed intervenors "failed to demonstrate that they had any real interest in the property which is the subject of this civil forfeiture action"); *Osman v. Sternberg*, 168 A.D.2d 490, 491 (2d Dep't 1990) (denying intervention in corporate dissolution proceeding when movants failed to show ownership interest in the corporation); *Oliveri v. Re*, 975 N.Y.S.2d 710, 40 Misc.3d 1206(A), *6 (Sup. Ct. Kings Cnty. 2013) (same).

[40] *See Rodden v. Axelrod*, 79 A.D.2d 29, 32 (3d Dep't 1981) ("the New York State Health Facilities Association had standing as a trade association to represent its members' common interests which were affected by the actions of the Commissioner of Health").

[41] CPLR 1012(a)(2); *Mavente v. Albany Medical Center Hosp.*, 126 A.D.3d 1090, 1091 (3d Dep't 2015).

[42] *Estate of Mayer*, 441 N.Y.S.2d 908, 910 (Surr. Ct. N.Y. Cnty. 1981).

In *Estate of Mayer*, an owner of real property sought to intervene under CPLR 1012 and 1013 in a proceeding to determine whether a school was authorized under the terms of a will to sell real property which was bequeathed to it and adjacent to the intervenor's property.[43] The will provided that if the school did not accept the will's conditions, the property would revert to an actors' guild.[44] The guild was a party and opposed the sale.[45] The intervenor argued that the condition of his home relied upon the terms imposed by the will and he would be bound by a proceeding in which his interests were inadequately represented.[46] The Surrogate denied intervention, holding that the Attorney General was empowered to enforce the rights of charitable beneficiaries, and, "[t]o the extent that [intervenor's] interest is in determining the charitable intent of the decedent, his interest is represented by the Attorney General. To the extent that [intervenor's] interest is adverse to the Attorney General, his interest is represented by the Guild."[47] The Surrogate found that a "review of the answer submitted by the Guild and the proposed answer submitted by [intervenor] reveals no material difference between them."[48]

Similarly, in *Anschutz Exploration Corp. v. Town of Dryden*,[49] the petitioner, an owner of gas leases, sought a judgment against the respondent Town to invalidate a zoning ordinance prohibiting gas exploration.[50] An unincorporated association of individuals who were residents or landowners in the Town moved to intervene.[51] The court denied intervention, holding that the

[43] 441 N.Y.S.2d at 909.

[44] *Id*.

[45] *Id*. at 910.

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] 35 Misc.3d 450, 940 N.Y.S.2d 458 (Sup. Ct. Tompkins Cnty. 2012).

[50] 940 N.Y.S.2d at 461.

[51] *Id*. at 463.

Town was the proper party to defend the zoning ordinance and had capably advanced its position.[52] The court noted that the intervenors' submissions "do not materially add to the defense advanced by the Town."[53] The holdings of *Estate of Mayer* and *Anschutz Exploration Corp.* directly apply here.

a. Movants are Adequately Represented by the NRA

Movants' Proposed Answer is three paragraphs long in answer to the NYAG's 666 paragraph-long Complaint.[54] In those three paragraphs, Movants admit, *inter alia*, that the NYAG "has general supervisory powers over New York non-profit charitable corporations and their officers and directors" under the N-PCL and that the NYAG has alleged conduct by the individual defendants which would subject them to penalties or remedies as "sought by the Attorney General."[55] Movants deny broadly that dissolution of the NRA is an appropriate remedy.[56] It is thus evident on its face that Movants' cursory Proposed Answer responding to the NYAG's allegations add nothing to the NRA's defense against the NYAG's claims.[57]

In addition, Movants purport to assert four derivative cross-claims on behalf of the NRA. The first is a purported cross-claim on behalf of the NRA "against all defendants," requesting a declaratory judgment that "BAC is conflicted from representing the NRA" because of its alleged "dual representation" of the NRA and LaPierre, and that BAC should be enjoined from continued representation of the NRA.[58] The other three purported cross-claims are asserted

[52] *Id.*

[53] *Id.*

[54] *See* Dkt. No 249, Proposed Answer at ¶¶ 1-3.

[55] *See id.* at ¶ 1(d)-(e).

[56] *See id.* at ¶ 2(a)-(d).

[57] *Anschutz Exploration Corp.*, 940 N.Y.S.2d at 463; *Estate of Mayer*, 441 N.Y.S.2d at 910.

[58] *See* Dkt. No 249, Proposed Answer at ¶¶ 28-33.

against the individual defendants, requesting a declaratory judgment precluding indemnification and alleging breach of fiduciary duties and corporate waste.[59] Movants also purport to assert two counterclaims derivatively on behalf of the NRA and on behalf of themselves, against the NYAG for violations under the First and Fourteenth Amendments of the U.S. Constitution and similar claims under the New York Constitution—again, duplicative of the NRA's counterclaims against the NYAG.[60]

Movants argue that their interests will not, or may not be adequately represented by the NRA because they contend BAC "is unlikely to advise the NRA to seek review of the firm's fees," and the NRA will "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 BAC.[61] Movants' arguments are meritless.

First, Movants fail to acknowledge that only LaPierre and Frazer are still employed by the Association.[62] Furthermore, there is an established procedure within the Association for any voting member to petition the membership as a whole for removal of an officer or director of the NRA.[63] Neither Movant alleges that he attempted to follow such procedure. This Motion should not act as an end run around the Association's Bylaws. which are the contract among the members and which govern Movants' rights.

Second, it is axiomatic that "[a] party's entitlement to be represented in ongoing litigation by counsel of his [or her] own choosing is a valued right which should not be abridged absent a

[59] *See id.* at ¶¶ 34-56.

[60] *See id.* at ¶¶ 57-79; *see* Dkt. 230, NRA's Verified Answer and Counterclaims ("NRA Answer"), Counterclaims at ¶¶ 44-110.

[61] Movants' Mem.at p. 8.

[62] Phillips and Powell are no longer employed by the NRA. (Dkt. 230, NRA Answer at ¶ 9).

[63] *See* NRA Bylaws, Art. IX, "Removal of Association Officials by Recall," annexed to the Geisler Aff. at Exhibit 1.

clear showing that disqualification is warranted, and the movant bears the burden on the motion."[64] A party seeking to disqualify a law firm on the ground of conflict of interest has the burden of demonstrating: "(1) the existence of a prior attorney-client relationship between the moving party and opposing counsel, (2) that the matters involved in both representations are substantially related, and (3) that the interests of the present client and former client are materially adverse."[65] Movants have failed to establish any of the foregoing requirements.

i. Movants lack standing to move to disqualify BAC.

As discussed above, Movants lack standing to intervene altogether. Movants also specifically lack standing with respect to their purported cross-claim to disqualify BAC. A party moving for disqualification has standing for such a claim only if he is either a present or former client.[66] Accordingly, because Movants have never been BAC's clients, nor can BAC's representation of the NRA be imputed to Movants,[67] Movants lack standing to move for disqualification of the Association's chosen counsel.

ii. The NRA is entitled to rely, and has relied, upon the independent judgment of the Special Litigation Committee.

Furthermore, and fatal to their argument, Movants fail to acknowledge the existence of the SLC of the NRA Board of Directors, which, as the President of the Association, Carolyn Meadows, has attested was constituted at her direction after the NYAG commenced this

[64] *Olmoz v. Town of Fishkill*, 258 A.D.2d 447, 447 (2d Dep't 1999).

[65] *Mediaceja v. Davidov*, 119 A.D.3d 911, 911-912 (2d Dep't 2014).

[66] *See Reichenbaum v. Reichenbaum & Silberstein, P.C.*, 162 A.D.2d 599, 600 (2d Dep't 1990); *426 Realty Assocs. v. Lynch*, 2019 N.Y. Slip Op. 32936 (Sup. Ct. N.Y. Cnty. Oct. 4, 2019) (citing *Campbell v. McKeon*, 75 A.D.3d 479 (1st Dep't 2010)).

[67] *Campbell*, 75 A.D.3d at 480-81 ("A lawyer's representation of a business entity does not render the law firm counsel to an individual partner, officer, director or shareholder unless the law firm assumed an affirmative duty to represent that individual.").

Action.[68] The SLC consists of Ms. Meadows, who acts as Chair, NRA First Vice President Charles Cotton, and NRA Second Vice President Willes Lee.[69] The members of the SLC are independent and disinterested, and the NRA defers oversight of this litigation to the Committee.[70] The SLC's appointment in September 2020 was ratified by the Board on January 7, 2021, where it was resolved that each member of the SLC was "independent and disinterested."[71] The Board also resolved that the SLC would "exercise corporate authority on behalf of the NRA" with respect to, *inter alia*, this Action.[72] Furthermore, the SLC is advised by attorney William Davis, who was retained as independent counsel to the Board of Directors.[73] LaPierre and Frazer have recused themselves from participating in the Association's decisions regarding this Action.[74] President Meadows explained that the SLC was created on the advice of counsel to avoid even the appearance of any conflict because LaPierre and Frazer were named as individual defendants in this Action.[75] The SLC "firmly and unanimously" recommended that BAC continue to represent the NRA in this Action, and believes the NRA's interests would be "significantly impaired" if it were forced to retain new counsel, more than two years after BAC was specifically retained by the Association to handle this exact potential lawsuit.[76] With respect

[68] *See* Affidavit of Carolyn Meadows, sworn to on November 19, 2020 (the "Meadows Aff.") at ¶ 5, filed in this Action (at Dkt. 178). A true copy of the Meadows Aff. is annexed to the Geisler Aff. at Exhibit 4.

[69] Meadows Aff. at ¶ 5.

[70] *Id*. at ¶¶ 5-6.

[71] *See* Minutes of the Meeting of the Board of Directors of the NRA, dated January 7, 2021, at p. 5, a true copy of relevant excerpts of which are annexed to the Geisler Aff. at Exhibit 5.

[72] *Id.* at p. 6.

[73] Meadows Aff. at ¶ 6.

[74] *Id*.

[75] *See* Order Granting Motion to Dismiss, dated May 11, 2021 ("Bankr. Order"), at p. 7, issued in *In re National Rifle Association of America and Sea Girt LLC*, Case No. 21-30085 (Bankr. N.D. Tex.) (Dkt. 740), a true copy of which is annexed to the Geisler Aff. at Exhibit 6.

[76] Meadows Aff. at ¶¶ 4, 7.

to Movants' allegations that BAC's invoices were excessive or improperly vetted or approved,[77] President Meadows attested that she "carefully considered" such concerns, but, ultimately did not agree that they presented a concern.[78]

The NRA is entitled, as a matter of law, to rely on the independent judgment of the SLC regarding which defenses to assert in this Action, which, if any, claims to interpose, and which counsel it chooses to represent the Association. Indeed, "[i]nquiry into such matters would go to the very core of the business judgment made by the committee. To permit judicial probing of such issues would be to emasculate the business judgment doctrine as applied to the actions and determinations of the special litigation committee."[79]

iii. There is no conflict of interest in BAC's representation of the NRA.

Similarly unavailing is Movants' contention that BAC is conflicted by virtue of a prior joint representation of LaPierre in other matters.[80] Movants argue that BAC "continues to represent the NRA on issues as to which the NRA is materially adverse to LaPierre, and that while the NRA and LaPierre have both consented to BAC's representation of the NRA in this Action after full disclosure, 'the NRA membership has not consented.'"[81] Again, Movants cite

[77] Movants' Mem. at p. 12.

[78] Meadows Aff. at ¶ 8.

[79] *Auerbach v. Bennett*, 47 N.Y.2d 619, 633-634, 419 N.Y.S.2d 920, 928 (1979) ("the business judgment rule applies where some directors are charged with wrongdoing, so long as the remaining directors making the decision are disinterested and independent" and "the determination of the special litigation committee forecloses further judicial inquiry" into the committee's decision that it would "not be in the best interests of the corporation to press claims against defendants"); *Pillartz v. Weissman*, Index No. 654401/2019, 2021 WL 2592672, *2 (Sup. Ct. N.Y. Cnty. June 24, 2021) (relying on *Auerbach*, holding that a special litigation committee "is entitled to deference," and "[d]eclining to pursue plaintiff's derivative claims, which belong to the company, is a valid exercise of business judgment") (citing *Matter of Comverse Tech., Inc. Derivative Litig.*, 56 AD3d 49, 53 (1st Dep't 2008)).

[80] Movants' Mem.at pp. 13-14.

[81] *Id*. at p. 12.

to no authority giving the Association's members standing to disqualify the Association's chosen counsel.

Significantly, BAC has never represented LaPierre in this Action. Rather, as conceded by Movants, LaPierre was for a time, beginning in 2019, represented by BAC in two proceedings, one of which has been dismissed.[82] Both the NRA and LaPierre agreed in his engagement letter that if a conflict arose, BAC would terminate its representation of LaPierre and continue to represent the NRA.[83] As LaPierre has attested, his concern was that BAC remain counsel to the Association, especially in connection with any disputes involving the NYAG, which is the reason BAC was retained in the first place.[84] During the NYAG's investigation, prior to commencement of the Action, BAC did represent LaPierre in connection with testimony given by him to the NYAG.[85] LaPierre again agreed that if the NYAG brought claims giving rise to a potential conflict between the NRA and LaPierre, BAC could terminate its representation of LaPierre and continue to represent the Association.[86] When the NYAG filed this Action, in an abundance of caution, and to avoid any appearance of impropriety, LaPierre retained separate counsel and terminated his attorney-client relationship with BAC.[87] LaPierre's counsel also replaced BAC in the other proceeding in which he is a third-party defendant.[88] Furthermore, LaPierre has attested that he recused himself from selecting or supervising the

[82] The two proceedings were: *Dell'Aquila v. LaPierre et al.*, Case No. 19-cv-00679 (M.D. Tenn.), and *Nat'l Rifle Ass'n of Am. v. Ackerman McQueen, Inc., et al.*, Case No. 19-cv-02074-G (N.D. Tex.). (*See* Affidavit of Wayne LaPierre, sworn to on November 19, 2020 (the "LaPierre Aff.") at ¶ 3, filed in this Action (at Dkt. 175). A true copy of the LaPierre Aff. is annexed to the Geisler Aff. at Exhibit 7. The *Dell'Aquila* action has been dismissed. (*Dell'Aquila*, Dkt. No. 73).

[83] LaPierre Aff. at ¶¶ 5-6.

[84] *Id*. at ¶¶ 4-5.

[85] *Id*. at ¶ 8.

[86] *Id*.

[87] *Id*. at ¶ 9.

[88] *Id*.

NRA's counsel, or directing the NRA's litigation strategy, in connection with this Action, which authority resides with the SLC.[89] Finally, LaPierre has consented to BAC's representation of the NRA, and has acknowledged that there may be claims and defenses available to the Association in this Action which situate the Association adversely to him individually, but that he defers to the SLC to act in the best interest of the NRA.[90] Such waivers of a conflict of interest preclude disqualification.[91]

Movants rely on statements made by the U.S. Trustee in the NRA's bankruptcy proceeding in opposition to BAC's then-application to represent the Association as its litigation counsel during bankruptcy.[92] That application was never fully submitted to the bankruptcy court, and was not decided. Nevertheless, in his Order dismissing the NRA's bankruptcy petition, Judge Hale specifically found that the NRA had undertaken a "course correction" since 2017, and that the Association's CFO had credibly testified that "the change that has occurred within the NRA over the past few years could not have occurred without the active support of LaPierre."[93] The court further found that "the NRA now understands the importance of compliance," and it "can pay its creditors, continue to fulfill its mission, continue to improve its governance and internal controls, [and] contest dissolution" in this Action."[94] The court made no

[89] *Id*. at ¶ 10.

[90] *Id*. at ¶ 11.

[91] *See Centennial Ins. Co. v. Apple Builders & Renovators, Inc.*, 60 A.D.3d 506 (1st Dep't 2009); *Schneider v. Saiber Schlesinger Satz & Goldstein, LLC*, 260 A.D.2d 321 (1st Dep't 1999).

[92] Movants' Mem. at pp. 16-17.

[93] *See* Geisler Aff., Exhibit 6, Bankr. Order at p. 35.

[94] *Id.*

finding that the NRA must find new counsel in this Action. Movants' effort to find significance from the U.S. Trustee's filing is misguided.[95]

Moreover, on March 28, 2021, after allegations of a conflict concerning BAC's former representation of LaPierre were aired in the bankruptcy proceeding, the NRA Board of Directors ratified BAC's continued representation of the Association as counsel in various litigation matters, including this Action.[96]

Accordingly, there is no conflict of interest between the NRA and LaPierre.[97] Movants have failed to show that they would not be adequately represented by the NRA in this Action.

b. Movants are Adequately Represented by the NYAG

Movants argue that they will not be adequately represented by the NYAG because although the NYAG "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."[98] Movants have cited to no authority for the proposition that they have standing to step into the shoes of the NYAG and assert claims on her behalf. Indeed, as conceded by Movants, the NYAG has general supervisory powers over non-profit charitable corporations and their officers and directors, and she has the authority to bring claims in that capacity. Movants'

[95] The U.S. Trustee stated that "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," including allegations of "wrongdoing." (*See* Movants' Mem. at pp. 16-17). The first part of that statement concerns a moot bankruptcy issue unrelated to this Action. The second part of the statement is factually inaccurate. The NYAG's Complaint does not assert claims against BAC, nor accuse BAC of "wrongdoing," contrary to the U.S. Trustee's mischaracterization.

[96] *See* Minutes of the Meeting of the Board of Directors of the NRA, dated March 28, 2021, at p. 3, a true copy of which is annexed to the Geisler Aff. at Exhibit 8. There was only one dissenting vote.

[97] Even in a situation where a potential conflict is found, the parties "should be permitted to express their position as to who the attorney will represent, or whether they would like to retain new counsel." *In re Jason C.*, 268 A.D.2d 587, 588 (2d Dep't 2000). The remedy should not be disqualification.

[98] Movants' Mem. at p. 8.

speculation that the NYAG may not adequately represent them is insufficient as a matter of law to support intervention.[99]

5. Movants' Potential Direct Claims Will Not be Precluded by Res Judicata

"[W]hether [a] movant will be bound by [a] judgment within the meaning of [CPLR 1012(a)(2)] is determined by its res judicata effect."[100] "Under res judicata, or claim preclusion, a valid final judgment bars future actions *between the same parties* on the same cause of action."[101] When a party in an earlier action lacks standing to bring a claim, dismissal of that claim "will not preclude a subsequent action where the party does have standing, even where both cases arise from the same nucleus of operative facts."[102]

Movants lack standing here. To the extent in the future they may have standing to bring direct claims against one of the parties in this Action or someone else, they would not be precluded from asserting those claims by the principle of *res judicata*. Accordingly, intervention must be denied.

C. Movants Are Not Entitled to Permissive Intervention Under CPLR 1013

Movants also request the Court's permission to intervene pursuant to CPLR 1013.[103] That section provides that a person "may be permitted to intervene in any action … when the

[99] *See Severino v. Brookset Housing Development Fund Corp.*, 71 A.D.3d 607, 608 (1st Dep't 2010) (motion to intervene denied when it did "no more than posit the possibility that . . . employer's counsel might not seek dismissal of the common-law indemnification claims"); *Mavente*, 126 A.D.3d at 1091 (holding "plaintiff is adequately representing the [movant's] interests, and any argument that plaintiff may not do so in the future is pure speculation").

[100] *Citizens Organized to Protect Environment ex rel. Brinkman v. Planning Bd. of the Town of Irondequoit*, 50 A.D.3d 1460, 1461 (4th Dep't 2008).

[101] *Amalgamated Bank v. Helmsley-Spear, Inc.*, 109 A.D.3d 418, 419 (1st Dep't 2013) (emphasis in original).

[102] *Avilon Automotive Group v. Leontiev*, 168 A.D.3d 78, 86 (1st Dep't 2019).

[103] Movants' Mem. at pp. 18-19.

person's claim or defense and the main action have a common question of law or fact."[104] Courts also must "consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party."[105] Intervention under section 1013 is a matter of the court's discretion.[106] Whether intervention is sought under CPLR 1012(a) or under CPLR 1013 "is of little practical significance."[107]

As discussed above, intervention pursuant to CPLR 1013 must be denied because Movants: (a) lack standing and (b) have no cognizable interest in the Action.[108]

Moreover, intervention should be denied pursuant to CPLR 1013 because it "would lead to duplicative discovery and motion practice, as the [Movants] and plaintiff could each separately seek demands and relief from the multiple defendants. This could also cause some prejudice to defendants, who would be required to respond to similar repetitive demands and motions, as well as the possibility of the [Movants] calling additional witnesses or even experts at trial . . . and 'inevitably complicates settlement negotiations.'"[109]

[104] CPLR § 1013; *Mavente*, 126 A.D.3d at 1091.

[105] *Id*.

[106] *Id*.

[107] *Sieger v. Sieger*, 297 A.D.2d 33, 36 (2d Dep't 2002) (affirming denial of intervention under CPLR 1013 because movant failed to demonstrate a "real and substantial interest" in the subject property).

[108] *See, e.g., Kenford Company Inc. v. County of Erie*, 96 A.D.2d 1134 (4th Dep't 1983) (affirming denial of intervention under CPLR 1012 and 1013 for lack of standing); *Sieger*, 297 A.D.2d at 36.

[109] *Mavente*, 126 A.D.3d at 1091.

III.
CONCLUSION

For all the foregoing reasons, the Motion to Intervene should be denied in its entirety.

Dated: July 9, 2021

Respectfully submitted,

By: /s/William A. Brewer III

William A. Brewer III
wab@brewerattorneys.com
Sarah B. Rogers
sbr@brewerattorneys.com
Mordecai Geisler
mxg@brewerattorneys.com

BREWER, ATTORNEYS & COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

ATTORNEYS FOR DEFENDANT
THE NATIONAL RIFLE ASSOCIATION

CERTIFICATE OF COMPLIANCE

I, William A. Brewer, III, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Memorandum of Law in Opposition to the Motion to Intervene (Mot. Seq. 011) complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the memorandum of law contains 6,992 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law and affirmation.

Dated: July 9, 2021
New York, New York

/s/William A. Brewer III
William A. Brewer III