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.

Index No. 451625/2020

Hon. Joel M. Cohen

Part 3

Motion Sequence # 011

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

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INTRODUCTION

The NRA's five million members would be shocked to learn that the New York Attorney General can sue to dissolve the Association and distribute its assets (namely their dues and contributions built over decades) to other entities, without any notice to the members and no opportunity to contest this before the Court makes a finding as to dissolution. Yet, that is the AG's position.

The NRA's membership would likewise be incredulous to learn their interests are being defended by lawyers with conflicts of interest so egregious that a federal bankruptcy judge stated concerns about "*the manner and secrecy in which authority to file the* [Chapter 11] *case was obtained in the first place",* and if the case was re-filed *"this Court would immediately take up some of its concerns about disclosure, transparency, secrecy, conflicts of interest of officers and litigation counsel* [the Brewer firm], *and the unusual involvement of litigation counsel in the affairs of the NRA*...". Chapter 11 dismissal order, p. 37 (emphasis added); NYSCEF Doc. # 247, Ex. # 3 to Intervenors' Memorandum of Law.

Nevertheless the NRA's present counsel and individual Defendants say that no matter what conflicts of interest Brewer has, and no matter what oversight abdication by the NRA Board occurred, NRA members are "adequately represented" and have no standing to object or seek independent counsel for the Association.

The sum and substance of the present parties' message to the NRA's membership is "*even though the AG is trying to dissolve your Association, and even though the NRA's law firm, board and executives are deeply conflicted, none of you can do anything about it.*" That is not the law.

ARGUMENT AND APPLICABLE LAW

I. Intervenors have standing under CPLR § 1012(a) on several independent grounds.

A. *Standard of review*

The parties' oppositions are written as if supporting a motion to dismiss, but no such motion is before the Court and even if there was the Intervenors' submissions would defeat it.[1]

Standing to intervene requires no more than what CPLR § 1012(a) specifies; *i.e.*, a timely motion on any one of three grounds:

1) that a state statute confers an absolute right to intervene; or

2) that the parties' representation of the intervenor's interest is or may be inadequate and the intervenor is or may be bound by the judgment; or

3) that the action involves disposition or distribution of, or title or a claim for damages to property, and the intervenor may be affected adversely by the judgment.

When any of these grounds exist, the proposed intervenor has standing to intervene. The very language of § 1012(a) ["*or may be*"] refutes any claim that standing to intervene requires something more, and no party's submission here conclusively establishes that *any* of the Intevenors' proposed claims fail to state a cognizable legal theory as a matter of law.

[1] A motion to dismiss the pleading is afforded a liberal construction; the court accepts the facts alleged as true; and gives the pleader every possible favorable inference. The court determines only whether the facts alleged fit any cognizable legal theory, and dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 974, 638 N.E.2d 511, 513 (N.Y. 1994) (emphasis added; citations omitted).

B. Intervenors' proposed pleading asserts personal, class, and derivative grounds for intervention

The Intervenors' proposed Answer, Crossclaims and Counterclaims assert the following bases for intervention:

1. Federal and state due process principles require notice and a meaningful opportunity to contest the impairment of various constitutional rights of all NRA members.

2. N-PCL § 1104 requires notice to all NRA members now, before further proceedings of substance in this action.

3. None of the present parties or counsel can or will adequately represent the Intervenors and all other NRA members, either as to their personal rights or their interests as NRA members in reformation and continuity of the NRA as an entity.

4. The NRA as an entity cannot be adequately represented, nor can the rights of the NRA membership be adequately protected, by the NRA's present conflicted counsel.

5. The NRA's present board of directors has not and will not meet its fiduciary oversight responsibilities, and will not effectively assure litigation of this action by independent counsel to protect the NRA and the interests of its members.

6. The Attorney General will not adequately represent the interests of the NRA or its membership, whether personal or derivative. The AG's derivative claims are incomplete; her goal of dissolution is adverse to the NRA and its members; and she never explains how it is in the best interest of the NRA or its members to dissolve the NRA when it can be reformed.[2]

[2] For example, the AG cites *Matter of Inzer v. W. Brighton Fire Dep't, Inc.*, 173 A.D.3d 1826, 1828 (4th Dept. 2019) as upholding dissolution where the court properly considered the "paramount" issue of benefit to the members. But the AG fails to acknowledge the full holding of this case: to prevail

No party here has shown, nor could they, that Intervenors have no bona fide interest in one or more of the issues in this action. For example, it is beyond dispute that dissolution would abolish the NRA members' First Amendment rights to freedom of speech and association in the NRA, thus giving them a "real and substantial interest" in the outcome of this action that justifies intervention. See *Berkoski v. Board of Trustees*, 67 A.D.3d 840, 843, 889 N.Y.S.2d 623 (2009) (impact on free speech rights of day laborers to seek employment in a public park was sufficiently substantial to justify intervention). The First Amendment rights of all 5 million NRA members to associate in the NRA are equally deserving of protection.[3]

C. Due Process Requires Granting Intervention

No party to this action even attempts to address Intervenors' federal and state due process grounds, although these were discussed at length in their Memorandum Supporting Intervention (NYSCEF Doc. # 244, p. 8-11).[4]

The AG's interests are adverse to Intervenors and all other NRA members regarding dissolution. The individual Defendants and NRA's present counsel are likewise adverse, or likely to be so, due to their conflicts of interest. Representatives whose substantial interests are not the same as those they represent cannot afford the protection to absent parties that due process requires, and may engage in "fraudulent and collusive sacrifice of the rights of absent parties." *Hansberry v. Lee*, 311 U.S. 32, 45 (1940); *see also Taylor v. Sturgell*, 553 U.S. 880,

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on dissolution the AG must show the corporation is "no longer able to carry out its purposes" (N–PCL § 1102) and show that dissolution would be beneficial to the members under § 1109.

[3] S*ee e.g., Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968), "We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States."

[4] The due process issues were also outlined by Intervenors' counsel in a letter to the Court dated Nov. 23, 2020 and copied to all parties' counsel. *See* NYSCEF Doc. # 245.

900 (2008) (A party's representation of nonparties is inadequate unless her interests align with the nonparties, citing *Hansberry*, *supra*, 311 U.S. at 43), and *Richards v. Jefferson County*, 517 U.S. 793, 801 (1996) (representation of absent parties is inadequate if representative's interests conflict with those absent; citing *Hansberry*, 311 U.S. at 42-43).

The constitutionally protected associational interests of the NRA's membership threatened in this action would be enough without more to justify intervention and notice to all members.[5] In *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 795, 800 (1983) the United States Supreme Court said:

> In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), this Court recognized that *prior to an action which will affect an interest in life, liberty, or property protected by the Due Process Clause of the Fourteenth Amendment*, a State must provide "notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.
> (462 U.S. at 795; emphasis added).

The context of this holding makes clear that "any party" means anyone whose interest in life, liberty, or property may be affected by the proceeding whether they are a party of record or not. As the Court said in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004):

> For more than a century the central meaning of procedural due process has been clear: `Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *It is equally fundamental that the right to notice and an opportunity to be heard `must be granted at a meaningful time and in a meaningful manner*.' *These essential constitutional promises may not be eroded.*

542 U.S. at 533, citing *Fuentes v. Shevin*, 407 U. S. 67, 80 (1972) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233 (1864); *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965) (other citations omitted; emphasis added).

[5] N-PCL § 1104 provides for the notice that *Mullane v. Central Hanover* and *Mennonite Board* require: "Upon the presentation of such a petition, the court shall make an order requiring the corporation a*nd all persons interested in the corporation to show cause before it* ...why the corporation should not be dissolved." (Emphasis added). The right to contest dissolution necessarily implies meaningful participation as a party by intervention.

These rights to notice and a hearing are absolute, and do not depend upon the merits of a claimant's substantive assertions. *Carey v. Piphus*, 435 U.S. 247, 266 (1978), citing *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971) and *Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 171-172 (1951).

Equally important, and contrary to the assertions of the NRA's conflicted present counsel, this standard does not change if the action is characterized as *in rem* rather than personal.[6] *Mennonite Board* forecloses this argument, as the Appellate Division noted in *County of Orange v. Goldman*, 87 N.Y.S.3d 262 (N.Y. App. Div. 2018):

> [T]he United States Supreme Court has explicitly rejected the fiction that an *in rem* proceeding is not asserted against any individuals... The United States Supreme Court's case law has thus 'required the State to make efforts to provide actual notice to all interested parties comparable to the efforts that were previously required only in *in personam* actions'...

87 N.Y.S.3d at 270, citing *Shaffer v. Heitner*, 433 U.S. 186, 216 (1977); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796 n 3 (1983); and *Schroeder v. City of New York*, 371 U.S. 208, 213 (1962).

These authorities also refute the AG's claim that because this is a "plenary" action, no notice to NRA members is required before this Court makes a determination on dissolution. The AG concedes the NRA's members might be entitled to notice of this action "[a]fter the Court has determined that the Attorney General has satisfied the statutory basis for dissolution..." (NYSCEF Doc. # 176, p. 2-3), but notice to the members *after* the core issue has already been decided does not come at a meaningful time.[7] *Hamdi v. Rumsfeld, supra*.

The "*any*" and "*prior to*" of *Mullane v. Central Hanover* and *Mennonite Board* plainly

[6] Thus whether the NRA's members have a "property interest" is also irrelevant, as they most certainly have a substantial interest in the reformation and continuation of the NRA for their benefit.

[7] Not only is a court no longer neutral then, but the members would have been denied the opportunity to participate in discovery and pre-hearing briefing that may shape the court's decision, or make early objections on issues such as the conflicts of interest the NRA's counsel and Board have here.

mean any and prior to, which should end the discussion unless the Court is prepared to say that no NRA member has any constitutionally protected life, liberty, or property interest in his or her NRA membership. But that proposition is one that even the NRA's conflicted counsel will not assert, as their November 19 letter to the Court said: "*NRA members certainly have constitutional and public policy interests implicated by this case*". (NYSCEF Doc. # 177, p. 2).

Without present notice to all NRA members, the vast majority will never know their interests and the NRA's derivative claims against the individual defendants are either not being represented at all, or else represented by an Attorney General whose stated goal is abolition of the NRA and destruction of its members' interests, or else by deeply conflicted NRA counsel who are by definition are inadequate to represent them.[8]

In their Nov. 19, 2020 letter (NYSCEF Doc. # 177, p. 2) the NRA's counsel makes the preposterous argument that its members do not deserve *any* notice because they really are not "persons interested in the corporation", ignoring N-PCL § 102(a)(9), that a member of a non-profit corporation is "*... one having membership rights in a corporation in accordance with the provisions of its certificate of incorporation or by-laws*".[9] NRA counsel minimizes the members' rights, admitting they "certainly have constitutional and public policy interests" but claiming this case is "*in rem*" and the members' only right is the right to vote. This not only ignores their First Amendment speech and associational rights but is completely refuted by *County of Orange v. Goldman, supra.*

The Attorney General's contention that § 1104 notice is not required because this is a

[8] *Mullane v. Central Hanover Bank*, *supra* at 314, "the right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest"; *Taylor v. Sturgell*, supra, at 900 (representation of nonparties is inadequate unless representative's interests align with the nonparties, citing *Hansberry*, *supra*, 311 U.S. at 43).

[9] NRA members have such rights under Article III of the NRA's Bylaws. (Doc. # 3; Ex. 1 to the Complaint, p. 6-11).

"plenary action for dissolution, not a petition" is likewise refuted by the authorities above, and ignores the fact that the complaint is also a petition to enforce the rights of a director, officer or member under §§ 112(a)(7) and 1102(a)(2).[10] This triggers N-PCL § 112(a)(9), which provides that in such a proceeding "... *the attorney-general shall have the same status as such members, director or officer*". The "same status" necessarily includes § 1104's notice requirement,[11] but even if this was only a "plenary action" as the AG claims, due process still requires notice now.

D. The Intervenors Will, Or May Be, Bound By A Judgment Here

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 Pet Products, Inc. v. St. Smart Realty, LLC,* 906 N.Y.S.2d 231; 77 A.D.3d 197, 202 (N.Y. App. Div. 2010), citing *Vantage Petroleum v. Board of Assessment*, 61 N.Y.2d 695, 698, 472 N.Y.S.2d 603, 460 N.E.2d 1088 (1984) (whether an 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.

Intervenors, like all other NRA members, will plainly be bound by a judgment of dissolution that they cannot re-litigate. *Application of City of New York*, 2005 NY Slip Op. 52047 at p. 11 (N.Y. 2005), citing *Vantage Petroleum, supra* (Judgment on the merits by a court having jurisdiction is conclusive on the parties and those in privity with them as to fact and legal issues necessarily decided in the first action. Privity includes "those whose interests are represented by a party to the action"). The claim of NRA's present counsel that the Intervenors

[10] Amended Complaint (Doc. #11) ¶ 12; Second Cause of Action ¶ 576, 577; Eighteenth Cause of Action ¶ 647; and Prayer for Relief ¶ A and ¶ C.

[11] § 1104 makes no exception for the number of members of the corporation, nor do the many authorities requiring notice as a matter of due process. This section requires personal service on each member and confers standing as a matter of law by allowing "all persons interested in the corporation to show cause". This right to be heard is the personal statutory right of every "member" of a non-profit corporation faced with dissolution.

would not be bound by a judgment of dissolution here is simply wrong.

E. The Intervenors' Claims Are Not Duplicative

The Attorney General says the Intervenors "fail to allege how they would advance different arguments or facts against the Attorney General than those currently being litigated." (NYSCEF Doc. # 290, p. 4). This ignores the Intervenors' argument (NYSCEF Doc # 244 , pp. 6-7; 11-12) that all NRA members are entitled to present notice of this action, which is not being litigated by any of the parties, who in fact are trying to avoid it.

Likewise the AG makes no third-party claims on the NRA's behalf for the improper contracts, fee payments and excessive legal fees the Complaint alleges, even though they are said to be millions of dollars. *See* Ex. # 1 attached; AG's Motion to Dismiss Chapter 11; ¶¶ 5, 47, 49, 50.f, 54, 57, and 67 (alleging payments to the Brewer firm exceeding $38 million between March 2018 and December 2019).

Intervenors' Proposed Answer (¶ 10.e) also alleges the AG's derivative claims against the individual defendants are not truly made for the NRA as an entity because she seeks to dissolve the NRA and will give any recovery to other entities, rather than use it for the members' benefit.

The AG's opposition ignores an important counterclaim in ¶¶ 75-78 of Intervenors' Proposed Answer (NYSCEF Doc. # 249) that NRA's present counsel has not made. There are no objective standards in N-PCL Article 11 or other New York statutes and case law to define what "public policy" or "public interest" is, or what violations will support judicial dissolution action under § 1101, and without such criteria § 1101 violates the due process provisions of the 1st and 14th Amendments to the U.S. Constitution and Article I § 6 of the New York Constitution.

F. Representation Of The Intervenors And All Other NRA Members Is Inadequate

The AG's opposition says that "Proposed Intervenors cannot establish that their interests

regarding claims and defenses against the Attorney General are inadequately represented sufficient to justify intervention." This is a real stretch given that:

(a) Representation by conflicted counsel is inadequate by definition.

(b) The AG's Amended Complaint makes numerous allegations that the Brewer firm's hiring and billings were improper, or may have been. *See e.g.*, ¶¶ 454-475, NYSCEF Doc. # 11.

(c) Judge Hale's order dismissing the Chapter 11 case explicitly noted his concerns over Brewer's conflicts of interest and the "*unusual involvement of litigation counsel in the affairs of the NRA.*" (Ex. # 3 to Intervenors' Memorandum at p. 37; NYSCEF Doc. # 247).

(d) The U.S. Trustee filed a 34-page Objection to the Brewer firm as NRA counsel in the Chapter 11 case, noting Brewer's several conflicts of interest and failures to disclose all fees it charged the NRA (Ex. # 4 to Intervenors' Memorandum; NYSCEF Doc. # 248). At p. 4 the Trustee detailed Brewer's divided loyalties:

- Potential NRA claims against Brewer for fraudulent conveyance based on allegations of billing improprieties from a former NRA president, a First VP, four members of the NRA's Board of Directors, and this action by the AG.
- Brewer's conflicts between its interests and the NRA's here, and claims by former NRA president Oliver North that NRA leadership retaliated against him when he questioned Brewer's legal fees.
- Brewer's conflicts between the NRA's interests and Wayne LaPierre's, based on Brewer's representation of LaPierre and allegations that he stonewalled internal inquiries about Brewer's fees.
- Brewer's conflicts because William Brewer is married to the sister of Ackerman McQueen's CEO, and Ackerman is adverse to the NRA in at least three lawsuits

where Brewer represents the NRA.

The AG's Motion to Dismiss or Appoint a Trustee in the Chapter 11 case necessarily acknowledged that "The Brewer firm's involvement here raises the specter of potential conflicts as well" (Ex. # 2 hereto; p. 25, note 37), which were first noted in the Nov. 11, 2020 and Nov. 23, 2020 letters to the Court from Intervenors' counsel. (NYSCEF Doc. # 155-1 and # 245).

Lastly, the AG's argument that Intervenors are adequately represented as to their First Amendment rights is contrary to what she told this Court in her Motion to Dismiss the NRA's Counterclaims (NYSCEF Doc. # 279 ; Sec. II, p. 20-22): *"The NRA Lacks Standing To Assert A Claim On Behalf Of Members For Violation Of Their Associational Rights.*"

Additional issues of fact and/or law that cannot be resolved here are apparent from the pleadings and Intervenors' proposed Answer (NYSCEF Doc. # 249) and include:

1. Whether the conflicts of interest here are non-waivable, especially given the AG's allegations that the NRA Board is a "rubber stamp" for defendant LaPierre.

2. Whether the Brewer firm previously represented the officers and Board responsible for "*decades of wrongdoing by entrenched leadership who corrupted the organization to protect their power and privilege, to the detriment of the organization's finances, mission and reputation*.. [and] *the diversion of millions of dollars away from the NRA's charitable mission for private benefit*". (AG Motion to Dismiss NRA Counterclaims; NYSCEF Doc. # 279 , p. 14).[12]

3. If so, whether the Brewer firm can now somehow be trusted to represent *only* the interests of the NRA as an entity and its members, including the Intervenors, cinsidering that the

[12] "[C]ounsel who are chosen by and represent officers charged with the misconduct, and who also represent the union, are not able to guide the litigation in the best interest of the union because of the conflict in counsel's loyalties. ... *the organization is entitled to an evaluation and representation of its institutional interests by independent counsel, unencumbered by potentially conflicting obligations to any defendant officer....*" *Intn'l. Brotherhood of Teamsters v. Hoffa*, 242 F.Supp. 246, 255-256 (D. D.C. 1965) (emphasis added), quoting *Milone v. English*, 306 F.2d 814 at 817 (1962).

Brewer firm only withdrew from representing defendant LaPierre *after* Intervenors' Nov. 11, 2020 letter noted its conflicts. NYSCEF Doc. # 245, p. 5. For all that appears Brewer would have continued its conflicted dual representation if the Court had not been alerted to it.

4. Whether the NRA Board's alleged abdication of its fiduciary oversight duties and virtually complete control by defendant LaPierre, if true, excuses any demand by Intervenors.[13]

5. Whether Intervenors must meet any membership percentage requirements to assert derivative claims on behalf of the NRA and its membership, where their representation is inadequate due to the AG's adverse interest and incomplete derivative claims, and the conflicts of the individual Defendants, NRA Board, and NRA counsel.[14]

There is ample evidence to support intervention (i.e. "standing") on grounds of inadequate representation. NRA counsel is seriously and irreparably conflicted and independent NRA counsel is required before this case proceeds.

G. The Motion To Intervene Is Timely

NRA counsel says the motion to intervene is untimely, which borders on the absurd.

First, from the filing of this action until dismissal of the Chapter 11 case on May 11, 2021 NRA counsel has done everything possible to delay the progress of this case, including the sham Chapter 11 case that took 4 of the 11 months since this action was filed.

Second, no rulings of substance have been made, except denial of a venue change.

Third, the Intervenors were ready to file their motion to intervene the week before the

[13] *See e.g.*, *McElrath v. Kalanick*, 224 A.3d 982, 991 (Del. 2020) (Demand excused if the board would not "impartially consider its merits without being influenced by improper considerations" or "properly [exercise] its independent and disinterested business judgment in responding to a demand."

[14] "The need for independent counsel is underscored by the duty of counsel for the corporation in a derivative action to safeguard the corporation's interest." *Messing v. FDI, Inc.*, 439 F.Supp. 776, 782 (D. N.J. 1977).

January 15, 2021 Chapter 11 filing, as is evident from their affidavits dated January 6th and January 8th, but their intervention was barred by the automatic stay of Bankruptcy Code § 362.

Fourth, the motion to intervene was filed June 17, 2021, one week before the Attorney General's motion to dismiss the NRA's counterclaims was due, so the Intervenors' motion cannot possible have delayed any progress in this action.

II. Permissive intervention under CPLR § 1013 is also appropriate.

Intervenors' Memorandum (NYSCEF Doc. # 244) detailed the main issues of law and fact common to this action and Intervenors' claims and defenses. Other related issues are apparent from what has been said above, and permissive intervention is more than justified on the submissions now before the Court.

CONCLUSION

The Court should grant the motion to intervene as of right and permissively.

Respectfully submitted,

/s/ Taylor Bartlett

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CERTIFICATE OF WORD COUNT

Pursuant to Commercial Division Rule 17, I certify that the foregoing REPLY MEMORANDUM OF LAW IN SUPPORT OF INTERVENTION, which was prepared using Times New Roman 12-point typeface, contains 4,198 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: July 20, 2021
New York, New York

/s/ Taylor Bartlett
_____
Taylor Bartlett