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 Seq. # 011

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

ORAL ARGUMENT REQUESTED

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THE COURT SHOULD GRANT REARGUMENT
OF THE MOTION TO INTERVENE

Intervenor-Defendants Frank Tait, Jr. and Mario Aguirre ("Intervenors") respectfully ask the Court to reconsider its September 10, 2021 order denying intervention, and grant reargument of their Motion to Intervene pursuant to CPLR R2221, on the grounds that the Court overlooked or misapprehended the following matters of fact and law.

I. The Intervenors Have Alleged Substantial Interests and Inadequate Representation

In summary the Intervenors alleged that as to the Attorney General's action:

a) Her demand for the NRA's dissolution threatened their liberty interests of free speech and association as well as their interests in having the NRA's assets continue to be held for the use and benefit of themselves and all other NRA members whose dues and contributions built it;

b) That dissolution was unjustified on the face of the AG's complaint because all the acts alleged as a basis for dissolution were also alleged to have been done by one or more of the Individual Defendants "solely for their personal benefit", adversely to the NRA and its members, and therefore could not be charged against the NRA as grounds for dissolution;

c) That the AG's derivative claims purportedly on behalf of the NRA were incomplete because she did not seek recovery from numerous third parties who were the beneficiaries of the Individual Defendants' various breaches of duty her complaint enumerated; and

d) That the AG was therefore adverse to the interests of the Intervenors and all other NRA members and so could not adequately represent their interests.

As to the Individual Defendants, the Intervenors alleged that none of the Defendants would or could adequately represent the interests of the NRA as an entity, or the interests of the Intervenors and other NRA members, because:

a) The Individual Defendants were certainly not going to pursue their own removal or any claims against themselves for restitution and damages on behalf of the NRA, or against third parties who were alleged to be the beneficiaries of their alleged breaches of duty;

b) That the NRA as an entity would not pursue removal of the Individual Defendants or derivative claims against them because it was controlled by Defendant LaPierre and advised by the Brewer firm, which had clear, substantial and irreconcilable conflicts between its duty to LaPierre as an individual and its duty to the NRA as an entity;

c) That because of its conflicts the Brewer firm could not independently advise and represent the NRA; and

d) Because all the Individual Defendants and the Brewer firm were conflicted, inadequate representation of the Intervenors and all other NRA members was a threshold due process issue.

II. The Nature Of This Case Does Not Affect Intervention

The Court's September 9, 2021 decision (Certified transcript filed as NYSCEF Doc. # 395, hereafter "TR") began:

> "This case is, first and foremost, a law enforcement matter. ... This case is about whether the management has acted inappropriately and whether, in an extreme case, the Association has acted in a way that should deprive it of the right to continue as a New York not-for-profit entity. ... Generally, shareholders or members of companies do not have a right to intervene as separate parties in a law enforcement action, no matter how great their financial or emotional or associational interest is in the entity.
> (TR 45)

This reasoning would make every judicial dissolution action by an AG immune from intervention by interested persons, because every such action is a "law enforcement matter." No party to this action argued for this proposition or cited any authorities that would support it and the Court's oral decision and written order do not cite any. Further, CPLR §§ 1012 and 1013 have no exception for an AG's supervisory or "law enforcement" actions, whether for judicial

dissolution or otherwise, and these sections do not differentiate between "plenary" and "hybrid" actions. § 1012(a)(2) requires only that an intervenor allege an interest that will not be, or may not be, adequately represented by the existing parties, and that the intervenor will be, or may be, bound by the judgment. If 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, intervention of right is allowed by § 1012(a)(3).

III. Intervenors Allege Legally Protectable Interests Justifying Intervention

In its September 9, 2021 decision the Court said,

> The point is that your clients are not parties. They do not, as far as I understand it, have a property right in any of the NRA's assets. (TR 18)
>
> [T]he members do not have individual financial or property interests in the NRA's assets. So, the vast majority of the due process cases that the Intervenors cite are off point. I think maybe with that exception, they involve personal rights, property rights, liberty rights, but not what we have at issue here. (TR 46)

An intervenor's interest need not necessarily be direct or pecuniary, and need not be a "property right". If the intervenor "*would be indirectly affected by the litigation in a substantial manner, and his claim or defense with respect to the subject matter of the litigation has a question of law or fact in common therewith, he may be permitted to intervene*..." *Adams v. City of New York*, No. 160662/2020, 2021 WL 274716, at *2-4, 2021 N.Y. Slip. Op. 30251(U), p. 5-7 (N.Y. Sup. Ct. 2021) (citing *Cent. Westchester Humane Soc. v. Hilleboe*, 202 Misc. 873, 115 N.Y.S.2d 769 (Sup. Ct. 1952) (in turn citing *Sec. & Exch. Comm'n v U. S. Realty & Imp. Co*., 310 U.S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940), which construed Fed. R. Civ. P. 24; *In re Petroleum Rsch. Fund,* 3 Misc. 2d 790, 791, 155 N.Y.S.2d 911, 913 (Sup. Ct. 1956); and *Lipson v Nassau Cty.*, 35 Misc. 2d 787, 231 N.Y.S.2d 346 (Dist. Ct. 1962))).

In *Adams* several advocacy groups moved to intervene in a suit seeking to block the New

York City Board of Elections use of Ranked Choice Voting ("RCV") in City elections. The plaintiffs opposed intervention on the ground that the proposed intervenors had no direct or substantial interest in the proceeding because its outcome would not impact their ability to advocate; that they would not be bound by any judgment; and that in any event they were adequately represented by the City defendants. In addressing the requirements of CPLR §§ 1012 and 1013 the court discussed the history of intervention under New York law:

> CPLR 1012 and 1013 were derived from the old Civil Practice Act ("CPA") § 193-b that had been criticized as too limited, and that the First Department said that CPA § 193-b was modelled after rule 24 of the Federal Rules of Civil Procedure "*in an attempt to further broaden its scope and liberalize its application ... in the direction of its extension rather than its restriction*." …
>
> As CPLR §§ 1012 and 1013 are substantially similar to CPA § 193-b and Federal Rule 24, New York courts have similarly construed these provisions liberally. Thus, in *Yuppie Puppy Pet Prods., Inc. v Street Smart Realty, LLC*, 77 A.D.3d 197 [1st Dept 2010], the First Department held that "[i]ntervention is liberally allowed by courts, permitting persons to intervene in actions where they have a bona fide interest in an issue involved in that action." (See also *Teleprompter Manhattan CATV Corp. v State Bd. of Equalization and Assessment*, 34 A.D.2d 1033 [3d Dept 1970]).

Adams v. City of New York at slip op. 6-7.

This is not a new concept. As far back as 1944, in *Petroleum Research Fund*, 155 N.Y.S.2d at 915, the court said:

> [T]he history of intervention shows a trend in the direction of the extension of the remedy rather than restriction. See, *Rubin v. Irving Trust Co.*, Sup., 105 N.Y.S.2d 140. Under the liberal language of the present statute, it is not required that a proposed intervenor shall have a direct personal or pecuniary interest in the subject of the action. If he would be indirectly affected by the litigation in a substantial manner, and his claim or defense with respect to the subject-matter of the litigation has a question of law or fact in common therewith, it would seem that he may be permitted to intervene. See *Securities & Exchange Comm. v. United States Realty & Improvement Co.*, 310 U.S. 434, 459, 60 S.Ct. 1044, 84 L.Ed. 1293, construing similar language in rule 24 of the Federal Rules of Civil Procedure.

See also *Emerita Urban Renewal, LLC v. N.J. Court Servs., LLC*, No. 515517/2016, 2019

WL 688149 at *2-3, 2019 N.Y. Slip Op. 30374(U), p. 5 (N.Y. Sup. Ct. 2019) (intervention granted where intervenor's interest in the property was not the subject of the action but she might be adversely affected by a judgment against her husband's interest in property they both owned); *Capital Resources Co. v Prewitt*, 266 A.D.2d 176, 176-77, 697 N.Y.S.2d 320 (1999) (motion by defendant's former wife to intervene should have been granted where her half interest in property was not directly subject to plaintiff's mortgage, but she demonstrated a real and substantial interest in the outcome of the foreclosure action to warrant her intervention because plaintiff's ultimate goal was to force partition and sale of her home); *Myertin 30 Realty Dev. Corp. v. Oehler*, 82 A.D.2d 913, 440 N.Y.S.2d 688 (1981) (developer sought to compel a planning board and highway superintendent to sign final plans for proposed subdivision and declare a certain street was a town road to enable connection of a street to the development to it; owners of land bordering the street were entitled to intervene because the proceeding involved title to property and the landowners would be affected adversely by the judgment); *Levine v. Town of Oyster Bay*, 40 Misc. 2d 605, 243 N.Y.S.2d 656 (Sup. Ct. 1963) (purchaser of realty on condition that it be rezoned was sufficiently affected by an action to declare the zoning change void so as to be permitted to intervene therein).

Adams v. City of New York (slip op. p. 7) applied the familiar principles that "Intervention is liberally allowed by courts, permitting persons to intervene in actions where they have a *bona fide* interest in an issue involved in that action (quoting *Yuppie Puppy Pet Prods., Inc.*, 77 A.D.3d 197, 201: "[w]hether 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 since a timely motion for leave to intervene should be granted, in either event, where the intervenor has a real and substantial interest in the outcome of the proceedings" (quoting *Wells Fargo Bank, N.A. v.*

McLean, 70 A.D.3d 676, 677, 894 N.Y.S.2d 487 (2010)).

The *Adams* opinion then turned to ""the central issue of whether or not the Proposed Intervenors here have a real and substantial interest in this litigation." (Slip op. at pp. 8-13). The court noted that the intervenors alleged they represented "thousands of New York City voters whose ability to vote using the RCV in future NYC elections, including the February Special Election, will be directly impacted if Plaintiffs prevail in this litigation", and that "[t]his distinguishes Proposed Intervenors from the advocacy groups in ... *Berkoski* [*v. Bd. of Trustees of Inc. Vill. of Southampton*, 67 A.D.3d 840, 843, 889 N.Y.S.2d 623 (2009)] where the advocacy groups did not allege their members "would be directly impacted by the relief demanded by Plaintiffs" but were merely "interested" as activists and nothing more.[1]

The *Adams* court cited several federal cases as persuasive (slip op. p. 9-11), including *New Mexico Off-Highway Vehicle All. v. U.S. Forest Serv*., 540 F. App'x 877, 880 (10th Cir. 2013) (the intervenor environmental group's "staff, members, and volunteers regularly enjoy the forest for recreational and aesthetic reasons", and the existing parties could not adequately represent their interests because the plaintiffs sought opposite relief and the Forest Service could not "protect both the public's interests and the would-be intervenor's private interests").

Next the *Adams* court examined *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 278 F.R.D. 98 (M.D.Pa 2011), where the plaintiffs sought to vacate the EPA's total maximum daily load for the Chesapeake Bay (the "Bay"). Various environmental groups moved to intervene, including the Chesapeake Bay Foundation ("CBF"), a non-profit corporation dedicated to restoring and protecting the Bay and its tributaries. The Plaintiffs opposed CBF's motion on the ground that its

[1] Mr. Tait and Mr. Aguirre do make such allegations here, except they allege the NRA members who will – or may be – impacted by the outcome of this case number in the millions.

interests were merely "a general interest in environmental regulation." The *Am. Farm* court disagreed, holding that CBF had "an interest in efforts affecting the Bay, not only because the groups' individual members utilize the Bay and its tributaries for recreational and aesthetic purposes, but also because such efforts go to the core mission of the groups", and that the personal use and enjoyment of the Bay by the CBF's individual members demonstrated a legally protectable interest in the outcome of the action that justified intervention.

The *Adams* court also cited *Herdman v Town of Angelica*, 163 F.R.D. 180 (WDNY 1995) where a citizens' group was allowed to intervene in an action to oppose construction of new solid waste facilities where their interest was "in protecting the local environment and preserving property values" and having "lobbied actively" against the facilities.

Finally the *Adams* court cited *Christa McAulife Intermediate Sch. PTO, Inc. v De Blasio*, 2020 WL 1432213 (S.D.N.Y. 2020), wherein the plaintiffs who moved to intervene challenging changes in certain high school admission criteria based on "(i) an interest in increased access to educational opportunity, which is directly impacted by this challenge to the [revised Discovery program];" and (ii) "an interest "in preserving any amount of increased racial diversity and decreased racial isolation that the [revised Discovery program] promises to bring to the Specialized High Schools." The *McAuliffe* court held that these interests were "direct, substantial, and legally protectable."

Mr. Tait and Mr. Aguirre respectfully state that the interests alleged in their proposed Answer, Crossclaims and Counterclaims are at least as strong and "legally protectable" as those in *Adams v. City of New York* and the cases that opinion very thoroughly analyzes. Dissolution would abolish the Intervenors' First Amendment rights to freedom of speech and association in the NRA, which is 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) where the impact on the free speech rights of day laborers to seek employment in a public park was held to be sufficiently substantial to justify intervention. Without minimizing those interests, the First Amendment rights of the Intervenors and millions of other NRA members to associate in the NRA are equally deserving of protection.

As a final note on these cases and standing under New York's liberally construed intervention statutes, these cases have two important common threads that this Court's denial of intervention misapprehends: (1) title to property or a direct financial interest is not a requirement for intervention; and (2) while many of these cases involved public interest groups or those whose interests could be said to apply generically to large categories of people, there was no mention of any legal basis for denying intervention simply because others with similar interests or claims to standing *might* follow suit.

Proposed Intervenors are mindful of the Court's need to manage its docket, but respectfully state (1) they have seen no case law suggesting a court can deny intervention simply because others might try to intervene on the same grounds in the future, and (2) *Adams* and the cases it cites contradict such a notion. While the Court is correct such is *possible*, later attempts at intervention must be judged on their own individual merits when they arise, and any *later* attempts would have to prove timeliness, etc. just as Proposed Intervenors here do. They would also have to show how their interests are not already adequately represented by Proposed Intervenors. And even if other interventions were subsequently filed, then as the Court has already suggested, an "organized process" can be fashioned for member-intervenor interests to be heard such that docket control and manageability of the case are maintained.

The one solution that clearly appears to be contrary to law is to avoid the very genuine

issue of whether the NRA's interests are adequately represented in this litigation simply because allowing the proposed intervention *might* be followed by one or more other intervention requests in the future. In fact, it is worth noting that a judgment rendered against the NRA while it is being represented by conflicted counsel would effectively be the same thing as a judgment against an unrepresented party. Such a finding could subject this entire proceeding to a finding on appeal that it was null and void from its very outset (*see* section below "NRA Counsel's Conflicts Are A Threshold Due Process Issue"). The rights of litigants to representation and a fair trial are paramount and should not be subordinated to case management concerns that may not arise at all.

IV. NRA Counsel's Conflicts Are A Threshold Due Process Issue

On the issue of the demonstrable conflicts of the NRA's present counsel the Court's September 9, 2021 decision said,

> Turning to the concerns about NRA's counsel raised by the Intervenors, it really in this setting is in the nature of a motion to disqualify, not a motion to intervene. That type of motion can only be brought by the law firm's current or former client.
> * * *
> I don't have an evidentiary basis at this point to conclude that the Special Litigation Committee set up by the NRA, which shares the Brewer firm, is incapable of determining who should represent the Association, and I'm not prepared to simply just accept conclusions that have been reached by others at the moment in this case.
> (TR 54).

However, this ruling does not address the due process issues resulting from Brewer's representation of the NRA, the Intervenors, and the NRA's millions of members. It is well settled law that representation by conflicted counsel is inadequate as a matter of law. See *Hansberry v. Lee*, 311 U.S. 32, 45, 61 S.Ct. 115, 85 L. Ed. 22 (1940) (representatives whose substantial interests are not the same as those whom they are deemed to represent does not afford the

protection to absent parties which due process requires, and presents opportunities for the fraudulent and collusive sacrifice of the rights of absent parties); *Taylor v. Sturgell*, 553 U.S. 880, 900, 128 S. Ct. 2161, 171 L. Ed. 2d 155 (2008) (A party's representation of nonparties is not adequate unless her interests are aligned with those of the nonparties, citing *Hansberry* at 43); and *Richards v. Jefferson County*, 517 U.S. 793, 801, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996) (representation of absent parties is not adequate where representatives' interests are in conflict with those absent, citing *Hansberry* at 42-43).

The Defendants can't have it both ways on this issue. If they say the NRA can adequately represent the interests of its members, then those members (including the Intervenors) are necessarily the "clients" of the Brewer firm (directly or indirectly), and the Intervenors are entitled to intervene and file a motion to disqualify the Brewer firm on the ground of their conflicts. On the other hand if the Defendants say that the Intervenors are not Brewer's clients then by definition the interests of the Intervenors and the NRA's membership are not adequately represented because all present parties (including the NRA Board, though not a party) are adverse (or alleged to have acted adversely) to the entire NRA membership.

V. The Intervenors Are Asserting Additional Claims That Are Not Duplicative

At TR 53 the Court said the Intervenors had not shown how they would advance different arguments or facts against the AG's claim than those currently being litigated by the NRA, and therefore had not established their interests regarding claims or defenses against the AG are inadequately represented. But the Intervenors have alleged and argued this as to several substantial issues. For example, the Intervenors would assert New York's "adverse interest" exception to corporate liability against the AG by showing that the Individual Defendants were acting solely for their own personal benefit and against the interest of the NRA. The NRA will

never do this as long as it is controlled by Defendant LaPierre and the Brewer law firm. See Proposed Answer, NYSCEF Doc. # 249, ¶ 9(c)(i) and ¶ 64, and Memorandum in Support of Intervention, Doc. # 244, p. 11, citing *Kirschner v. KPMG LLP*, 15 N.Y.3d 446,, 466-68, 938 N.E.2d 941, 952-53, 912 N.Y.S.2d 508, 519-20 (2010).

Likewise the Intervenors have alleged the AG's failure to pursue third-party claims on behalf of the NRA against the individuals and entities described in the AG's complaint who were beneficiaries of the Individual Defendants' breaches of duty. Although the AG details a number of improper contracts, fee payments and excessive legal fees the AG has not pursued recovery even though these improper payments are alleged to be in the millions of dollars. *See* Ex. # 1 to the Intervenors' Reply Memorandum (NYSCEF Doc. # 324, the AG's Motion to Dismiss NRA's 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).

The Intervenors' Proposed Answer (Doc. # 249, ¶ 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 prior opposition also ignored 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.

Moreover the burden of showing inadequate representation "is a minimal one for purposes of intervention." *Adams*, slip op. at p. 16, citing *New Mexico Off-Highway Vehicle All.*, 540 F. App'x at 880. *Adams* went on to point out that where a government agency may be placed in the position of defending both public and private interests, the burden of showing inadequacy of representation is satisfied (citing *New Mexico Off-Highway*) because the government's representation of the public interest generally cannot be assumed to be identical to the individual parochial interest of a particular member of the public merely because both entities occupy the same posture in the litigation. The *Adams* court noted the important point that a government agency's obligation is to represent the interests of the people, entities dedicated to particular interests (such as hunting and conservation) represent the interests of their members, thus representing the interests of the public, generally, do not adequately represent the interests of aspiring intervenors like those here. *Adams*, slip op. at p. 16-17 (citing *Friends of Animals v Kempthrone*, 452 F. Supp. 2d 64 (D.D.C. 2006)).

VI. Common Questions Of Law And Fact Justify Intervention Here

The claims and defenses of Intervenors are based almost entirely on questions of law and fact common to this action such as:

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

2. If so, can those wrongful acts be imputed to the NRA as an entity as grounds for its dissolution, such that breaches of fiduciary duty by a non-profit's executives who were 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. Are the wrongful acts on which the Attorney General bases her demand for

dissolution those of a few rogue executives, done without the knowledge or approval of the NRA's members and to the detriment of the NRA membership at large, thus triggering the "adverse interest" defense against dissolution? *Kirschner v. KPMG LLP, supra.*

4. Would removal of the individual defendants from their positions and a judgment against them for misspent funds mean that the cause for dissolution no longer exists, and the action should be discontinued as provided in N-PCL § 1114?

CONCLUSION

The Court should vacate its September 10, 2021 order and grant the motion of Mr. Tait and Mr. Aguirre to intervene.

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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 REARGUMENT was prepared using Times New Roman 12-point typeface and contains 4,163 words, excluding the caption and signature block. This certificate was prepared in reliance on the word-count function of the word processing system (Microsoft Word) used to prepare the document.

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

DATED: 10/8/2021
New York, New York

/s/ Taylor Bartlett
Taylor Bartlett