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

PEOPLE OF THE STATE OF NEWYORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,	§	
Plaintiff,	§	**INDEX NO. 451625/2020**
v.	§	**Hon. Joel M. Cohen**
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	**Part 3** **Motion Seq. # 020**
Defendants,	§	
FRANCIS TAIT, JR., and MARIO AGUIRRE, individually and derivatively on behalf of THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,	§	

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR REARGUMENT OF MOTION TO INTERVENE BY FRANCIS TAIT AND MARIO AGUIRRE AND IN SUPPORT OF DEFENDANT THE NATIONAL RIFLE ASSOCIATION'S CROSS-MOTION FOR SANCTIONS PURSUANT TO 22 NYCRR § 130-1.1

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I.
PRELIMINARY STATEMENT AND BACKGROUND

This Court properly rejected Frank Tait, Jr.'s and Mario Aguirre's ("Movants'") effort to intervene in the above-captioned action (the "Action") because they did not satisfy multiple, independent, threshold standing requirements. Nonetheless, Movants filed this motion pursuant to CPLR 2221 (the "Motion to Reargue") to reargue their unsuccessful, underlying motion to intervene (the "Motion to Intervene"). They do so without even addressing the multiple grounds for denying the Motion to Intervene and even though, in denying the Motion to Intervene, the Court neither overlooked nor misapprehended any issue of fact or law. The Court should deny the Motion and award sanctions pursuant to 22 NYCRR § 130-1.1 for the following reasons:

First, reargument is futile. The Court denied the Motion to Intervene because Movants fail to meet the threshold statutory requirements for intervention by right under CPLR 1012, or by discretion under CPLR 1013. As this Court held, Movants lack standing to bring their proposed claims. Yet, Movants utterly fail to address those dispositive rulings—much less demonstrate that, in issuing them, the Court overlooked or misapprehended any issue of fact or law.

Second, Movants ask the Court to again consider issues that were previously briefed by the parties and decided by the Court, including whether Movants have: (i) sufficient legally protectible interests to justify intervention; (ii) a right to intervene in a law enforcement action; (iii) a right to challenge the NRA's choice of counsel; and (iv) a right to advance arguments or facts against the New York Attorney General's claims in addition to those currently being advanced by the NRA. However, Movants do not cite any purportedly overlooked or misapprehended law or facts that warrant this Court revisiting these issues.

Third, sanctions in the form of an award of attorneys' fees reasonably expended by the National Rifle Association of America (the "NRA") opposing this Motion to Reargue are

warranted pursuant to 22 NYCRR § 130-1.1 because the motion "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law.

II.
ARGUMENTS AND AUTHORITIES

A. Legal Standard

A motion to reargue is "addressed to the discretion of the court, [and] is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law."[1] It is "not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented."[2] Thus, its "purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided."[3] A motion to reargue must be based solely upon the papers submitted in connection with the prior motion, and facts that could have been raised earlier may not be submitted or considered by the court.[4] Moreover, a party may not use a motion to reargue to advance a new theory of law or raise new questions not previously

[1] *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dep't 1979); *see also McGill v. Goldman*, 261 A.D.2d 593, 594 (2d Dep't 1999) ("A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law.") (internal citations omitted).

[2] *Amato v. Lord & Taylor, Inc.*, 10 A.D.3d 374, 375 (2d Dep't 2004) (collecting cases); *see also Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 A.D.3d 388 (2d Dep't 2005) (collecting cases).

[3] *Foley*, 68 A.D.2d at 567 (collecting cases).

[4] CPLR 2221(d)(2) ("A motion for leave to reargue … shall not include any matters of fact not offered on the prior motion … ."); *see also Grimm v. Bailey*, 105 A.D.3d 703, 704 (2d Dep't 2013) ("A motion for leave to reargue 'shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.'") (quoting CPLR 2221(d)(2)); *Ahmed v. Pannone*, 116 A.D.3d 802, 805 (2d Dep't 2014) (same).

advanced, but must demonstrate issues of fact or law that the court has misapprehended or overlooked.[5] Absent such a showing, the court must deny the motion.[6]

B. The Motion To Reargue Ignores Multiple, Independent, Threshold Grounds For Denying The Motion To Intervene And Therefore Should Be Denied As Futile

This Court denied the Movants' Motion to Intervene because the motion failed to satisfy multiple, independent, threshold standing requirements.[7] Movants do not contest the Court's rulings that the Motion to Intervene did not satisfy standing requirements. Rather, Movants seek reargument based on a combination of new and rehashed secondary arguments that, even if true (they are not), would not change the ultimate ruling that they had no standing to intervene.

The Court previously held that Movants failed to establish "that their intervention as independent parties is warranted, either as a matter of right or as a matter of discretion."[8] Specifically, the Court held that Movants had no right to intervene under CPLR 1012 or CPLR 1013 because they failed to meet the threshold requirement of Section 623(a) of the New York Not-for-Profit Corporation Law, which provides that in order to establish standing to assert a claim on behalf of a not-for-profit charitable corporation, a member of the corporation must represent 5% or more of any class of the members of the corporation.[9] Accordingly, the Court held that "the fact that the Proposed Intervenors [*i.e.*, Movants] lack standing to bring their derivative claims means I really don't have discretion to allow them to prosecute those claims."[10]

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[5] *See Hoffmann v. Debello-Teheny*, 27 A.D.3d 743 (2d Dep't 2006).

[6] *See Barrett v. Jeannot*, 18 A.D.3d 679 (2d Dep't 2005).

[7] *See* NYSCEF No. 395, September 9, 2021 Transcript of Hearing and Decision denying Motion to Intervene of Francis Tait, Jr. and Mario Aguirre, dated June 17, 2021 ("September 9 Decision") at 44:17-22.

[8] Id. at 46:23-25.

[9] Id. at 45:21-46:2; 50:18-17.

[10] Id. at 56:14-17.

Further, the Court held that the Motion to Intervene failed because "the Intervenors haven't complied with the demand requirement under the Not-For-Profit Corporation Law which states that in a derivative action, '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.'"[11] Therefore, the Court ruled, "[b]ecause the claim of demand futility lacks specificity, [Movants] have failed to satisfy the requirements of Section 623 and, therefore, lack[] standing to bring derivative claims."[12] Indeed, as the Court further held: "I just am not sure how you have standing to make [Movants' proposed derivative claims]."[13]

Here, Movants argue that they are asserting additional claims that are not duplicative of the NRA's claims against the Attorney General[14] but do involve common questions of law and fact justifying intervention here.[15] These arguments fail because inherent within them is a presumption that Movants have standing to assert the claims they propose to bring. It is, therefore, irrelevant that the Movants would purportedly seek to bring claims not already being pursued or that those hypothetical claims would involve common questions of law and fact; Movants have no standing to bring any such claims.

Dispositive of this Motion to Reargue, Movants do not contest any of the foregoing rulings.[16] Thus, the Motion to Reargue is futile, because in all events the underlying Motion to

[11] Id. at 51:18-24.

[12] Id. at 52:6-9.

[13] Id. at 19:1-2.

[14] Id. at pp. 10 – 12.

[15] Id. at pp. 12 – 13.

[16] While the Court did not deny the Motion to Intervene as untimely, it noted that "there's a decent argument that [the Motion to Intervene] is not timely;" underscoring the futility of this Motion to Reargue. *See*, September 9 Decision at 57:15. If the Court grants reargument, the NRA requests that the Court consider the un-timeliness of the Motion to Intervene as an independent ground for denying it.

Intervene would still fail for the foregoing, threshold reasons.[17] Accordingly, the Motion to Reargue must be denied.

C. The Motion to Reargue Should Be Denied Because the Court Has Not Misapprehended or Overlooked Any Law or Fact in Deciding the Issues Movants Seek to Reargue

In their Motion to Intervene, Movants alleged that their interests in this Action are inadequately represented.[18] Movants' championed this allegation at oral argument.[19] Nevertheless, the Court held that Movants "do not have individual financial or property interests in the NRA's assets"[20] and that they "have not established that their interests regarding claims or defenses against the AG are inadequately represented."[21] The Motion to Reargue does no more than summarize the factual arguments set forth in the failed Motion to Intervene, which the Court already considered and found meritless. Movants do not demonstrate that the Court misapprehended or overlooked any facts in connection with this issue and thus provide no grounds for reargument.

Instead, Movants argue that "the nature of this case does not affect intervention."[22] Thus, Movants assert that this Court misapprehended the law by relying on a purported "absolute rule" that no shareholder or member of a company could ever intervene in a law enforcement matter.[23] Movants then contend that "[t]his reasoning would make every judicial dissolution action by an

[17] *See, e.g.*, *Rahman v. Bengal Poultry Inc*., 34 Misc.3d 1231(A) at *1 (Sup. Ct. Queens Cnty. Feb. 28, 2012) ("[T]he endeavor and effort of making a reargument motion is futile where the Court's original decision is comprehensive, and nothing new is advanced by counsel to support a reargument decision.").

[18] *See* NYSCEF No. 244, June 17, 2021 Motion to Intervene by Francis Tait, Jr. and Mario Aguirre ("Motion to Intervene") at pp. 1 – 2, 7-17.

[19] September 9 Decision at 5:12 – 14:2.

[20] *Id*. at 46:14-16; 55:14-56:5.

[21] *Id*. at 52:10-20.

[22] Motion to Reargue at p. 2.

[23] Id.

AG immune from intervention by interested persons."[24] They also argue that "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."[25] These arguments fail for the reasons set forth below.

1. The Court Did Not Overlook Issues of Fact or Law in Holding that Movants Lacked Legally Protectable Interests Justifying Intervention

Movants argue that they have sufficiently alleged legally protectable interests justifying intervention.[26] Specifically, they assert that the Court misapprehended the law because a "title to property or a direct financial interest is not a requirement for intervention" and there is no "legal basis for denying intervention simply because others with similar interests or claims to standing *might* follow suit."[27] As an initial matter, a motion for reargument must be "made on the papers submitted on the original motion . . . ."[28] Here, however, Movants advance an entirely new argument relying on a different set of cases which were not included in their Motion to Intervene, despite their having been readily available to Movants when the motion was filed. Accordingly, the Court should disregard these cases and new arguments based on them.[29]

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[24] Id.

[25] Id.

[26] Id. at pp. 3-9.

[27] Id. at p. 8 (emphasis added).

[28] *Philips v. Village of Oriskany*, 57 A.D.2d 110, 113 (4th Dep't 1977); *see also Brenner v. Sheraton Waikiki Hotel and Resort*, 37 Misc.3d 1219(A) at *1 (Sup. Ct. Nassau Cnty. Sep. 18, 2012) ("Further, a motion to reargue is based solely upon the papers submitted in connection with the prior motion.").

[29] *Adams v. City of New York*, 2021 WL 274716, at *4, 2021 N.Y. Slip. Op. 30251(U) (Sup. Ct. N.Y. Cnty. Jan. 27, 2021); *In re Petroleum Rsch. Fund*, 3 Misc. 2d 790, 791, (Sup. Ct. 1956); *Lipson v Nassau Cty.*, 35 Misc. 2d 787 (Dist. Ct. 1962); *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); *Capital Resources Co. v Prewitt*, 266 A.D.2d 176, 176-77 (1999); *Myertin 30 Realty Dev. Corp. v. Oehler*, 82 A.D.2d 913 (1981); *Levine v. Town of Oyster Bay*, 40 Misc. 2d 605 (Sup. Ct. 1963); *New Mexico Off-Highway Vehicle All. v. U.S. Forest Serv.*, 540 F. App'x 877, 880 (10th Cir. 2013); *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 278 F.R.D. 98 (M.D.Pa 2011); *Herdman v Town of Angelica*, 163 F.R.D. 180 (WDNY 1995); *Christa McAulife Intermediate Sch. PTO, Inc. v De Blasio*, 2020 WL 1432213 (S.D.N.Y. 2020).

In any case, Movants' new arguments are without merit. In the Motion to Intervene, the Movants specifically argued they had **a right** to intervene under CPLR 1012 because "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."[30] In contrast, Movants now argue that they "**may be** permitted to intervene" because "[a]n intervenor's interest need not necessarily be direct or pecuniary, and need not be a 'property right.'"[31] In support of this new argument, Movants rely upon cases not cited in their Motion to Intervene.[32] These cases focus on permissive intervention, as opposed to intervention as a matter of right. For example, in *Adams v. City of New York*, on which Movants rely most heavily, the proposed intervenors moved for permissive intervention under CPLR 1013 arguing that they had a "'real and substantial' interest in the outcome of the litigation.[33] The purported intervenors in *Adams* also sought, in the alternative, to intervene as of right under CPLR 1012 because "the existing defendants in [the] case do not fully represent their interests."[34] *Adams* is inapposite, because, unlike here, the proposed intervenors there did not lack standing to assert derivative claims.[35] Indeed, in none of Movants' newly cited cases did the court grant intervention where the proposed intervenors lacked standing to bring their proposed claims.[36] And, as *Adams* itself held, the distinction between intervention under CPLR

[30] Motion to Intervene at p. 3.

[31] Motion at p. 3 (emphasis added); *see also* pp. 8-10.

[32] Id. at pp. 3-9.

[33] Id. 2021 WL 274716, at *4, 2021 N.Y. Slip. Op. 30251(U) (Sup. Ct. N.Y. Cnty. Jan. 27, 2021) (emphasis added).

[34] *Id.* at *4 (concerning various community groups' proposed motion to intervene on behalf of defendant voting authorities in support of those authorities' use of ranked choice voting in New York City elections).

[35] September 9 Decision at 56:12 – 17 ("The reasons for denying intervention as a matter of discretion overlap with the ones I've just described, in particular, the fact that the Proposed Intervenors lack standing to bring their derivative claims means I really don't have discretion to allow them to prosecute those claims.") (emphasis added).

[36] *See, e.g.*, *In re Petroleum Rsch. Fund*, 3 Misc. 2d 790, 791, 155 N.Y.S.2d 911, 913 (Sup. Ct. 1956); *Lipson v Nassau Cty.*, 35 Misc. 2d 787, 231 N.Y.S.2d 346 (Dist. Ct. 1962); *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); *Capital*

1012 and 1013 are in many aspects interchangeable; therefore, failure to satisfy one typically results in failure as to the other, as was the case with Movants' failed Motion to Intervene.[37]

Furthermore, Movants fail to identify any authority contradicting the Court's observation on the Motion to Intervene that Movants "do not cite any authority holding that the dissolution of an entity necessarily implicates the constitutional rights of the entity's members such that every member has the right to intervene."[38] The Court went on to note: "In fact, I've seen none."[39]

Finally, contrary to Movants' mischaracterization, the Court never held that there exists an absolute bar on intervention in a law enforcement matter. Rather, the Court stated that "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."[40] The Court added: "It is typically a matter between the law enforcer, here the Attorney General, the company and the Court."[41] And indeed, immediately after making that statement, the Court specifically noted "[a]s I'll discuss below the law does provide an avenue for NRA members to gather together as a group to sue management for harm to the company or to bring derivative claims generally on behalf of the company . . . ."[42] However, as the Court

Resources Co. v Prewitt, 266 A.D.2d 176, 176-77, 697 N.Y.S.2d 320 (1999); *Myertin 30 Realty Dev. Corp. v. Oehler*, 82 A.D.2d 913, 440 N.Y.S.2d 688 (1981); *Levine v. Town of Oyster Bay*, 40 Misc. 2d 605, 243 N.Y.S.2d 656 (Sup. Ct. 1963); *New Mexico Off-Highway Vehicle All. v. U.S. Forest Serv*., 540 F. App'x 877, 880 (10th Cir. 2013); *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 278 F.R.D. 98 (M.D.Pa 2011); *Herdman v Town of Angelica*, 163 F.R.D. 180 (WDNY 1995); *Christa McAulife Intermediate Sch. PTO, Inc. v De Blasio*, 2020 WL 1432213 (S.D.N.Y. 2020).

[37] *Adams v. City of New York*, 2021 WL 274716, at *4 ("over the years the '[d]istinctions between intervention as of right and discretionary intervention are no longer sharply applied'") (internal quotations and citations omitted).

[38] September 9 Decision at 53:12-16.

[39] Id.

[40] Id. at 45:10-15 (emphasis added).

[41] Id. at 45:10-15 (emphasis added).

[42] Id. at 45:21-24 (emphasis added).

correctly noted, "there are specific requirements for that under New York law which are not met here, most importantly, that it be at least five percent of the membership."[43]

2. Movants' New Due Process Argument Lacks Merit

Movants argue that this Court failed to address due process issues resulting from purported conflicts allegedly arising from Brewer, Attorneys & Counselors ("BAC") representing the NRA.[44] Specifically, Movants contend that "it is well settled law that representation by conflicted counsel is inadequate as a matter of law."[45] This argument fails because it relies on a false premise—that BAC is conflicted. Indeed, as the Court previously noted, that premise was without evidence.[46] Movants have not identified—and cannot identify—any new facts that change that determination. Movants' related argument regarding whether NRA members are clients of BAC also fail, because the Court already decided that "[t]he attorney-client relationship between the Brewer firm and NRA can't be imputed to the NRA's membership writ large" and Movants cite to no law or fact the Court overlooked or misapprehended in rendering that correct determination.

D. <u>Sanctions Are Warranted Under 22 NYCRR § 130-1.1 Because Movants' Attempt to Reargue is Frivolous</u>

Pursuant to 22 NYCRR § 130-1.1 "[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court. . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous

[43] Id. at 45:21-46:2.

[44] Motion at pp. 9-10.

[45] Id. at p. 9.

[46] September 9 Decision at 55:1-7 ("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. At this point, I have no basis for adopting that concern.").

conduct."[47] Conduct is frivolous if "it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law"[48] or because "it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another."[49] "In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the (1) circumstances under which the conduct took place, . . . ; and (2) whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."[50] Sanctions are warranted with respect to meritless motions to reargue.[51]

Movants' original Motion to Intervene was fully briefed, extensively argued, and resulted in this Court issuing a detailed ruling denying the Motion to Intervene for multiple, independent, threshold reasons that Movants have never contested, and do not now contest. They moved to

[47] 22 NYCRR § 130-1.1(a).

[48] Id. at § 130-1.1(c)(1).

[49] Id. at § 130-1.1(c)(2).

[50] Id. at § 130-1.1(c)(3).

[51] *See, e.g.*, *Intercontinental Credit Corp. Div. of Pan American Trade Development Corp. v. Roth*, 78 N.Y.2d 306, 308 (1991) (imposing a $5,000 sanction for a frivolous motion to reargue); *207 Second Ave. Realty Corp. v. Salzman & Salzman*, 291 A.D.2d 243, 244 (1st Dep't 2002) (holding that a "sanction was properly imposed upon a finding that plaintiff's motion to reargue made frivolous legal assertions"); *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 31-32 (1st Dep't 1992) (upholding sanctions in connection with a motion to reargue when plaintiffs "moved to reargue, presenting no new facts and relying upon the same previously rejected arguments."); *Jones v. Camar Realty Corp.*, 167 A.D.2d 285, 286 (1st Dep't 1990), appeal dismissed, 77 N.Y.2d 939, *cert. denied sub nom. Hanft v. Camar Realty Corp.*, 502 U.S. 940 (upholding sanctions after finding "plaintiff's motion for reargument [to be] 'completely without merit in law or fact and [unsupportable] by a reasonable argument for an extension, modification or reversal of existing law'") (internal citations omitted); see also *Fern v. Brown, Harris, Stevens, Inc.*, 190 A.D.2d 515 (1st Dep't 1993) (upholding trial court award of sanctions with respect to a "meritless motion to reargue" because "the order, which incorporated by reference the transcript of the IAS Court's determination at oral argument, sufficiently set forth the reasons for the imposition of sanctions in accordance with 22 NYCRR §§ 130–1.1, and 130–1.2"); *Renke v. Kwiecinski*, 126 A.D.2d 961, 962-963 (2d Dep't 2015) ("The Supreme Court's determinations to impose sanctions on the defendant for frivolous conduct, and to enjoin her from filing any further motions [to renew or reargue], actions, or proceedings without prior written approval from the court, were not an improvident exercise of discretion under the circumstances.").

reargue despite acknowledging this Court's multiple, independent, grounds for denying their Motion to Intervene. Movants' filing of the Motion forced the NRA to spend significant time opposing it. Moreover, Movants' Motion to Reargue is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. Therefore, sanctions are warranted.

III.
CONCLUSION

For all the foregoing reasons, Francis Tait Jr. and Mario Aguirre's Motion to Reargue their unsuccessful Motion to Intervene should be denied in its entirety and an award of sanctions issued.

New York, New York
Dated: October 26, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, David J. Partida 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 Motion for Reargument of Motion To Intervene (Mot. Seq. 11) 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 3,900 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.

New York, New York
Dated: October 26, 2021

/s/*David J. Partida*
David J. Partida

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