

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

PEOPLE OF THE STATE OF NEW YORK, BY  
LETITIA JAMES, ATTORNEY GENERAL OF  
THE STATE OF NEW YORK,

Plaintiff,

v.

THE NATIONAL RIFLE ASSOCIATION OF  
AMERICA, INC., WAYNE LAPIERRE,  
WILSON PHILLIPS, JOHN FRAZER, and  
JOSHUA POWELL,

Defendants,

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

Intervenor-Defendant,  
Cross Claimant, and  
Counter Claimant.

**Index No. 451625/2020**

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

**Motion Seq. # 019**

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

**Oral Argument Requested**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES . . . . .	ii
INTRODUCTION . . . . .	1
ARGUMENT AND APPLICABLE LAW . . . . .	3
I. Mr. Marshall has standing to intervene personally and as a director.	3
A. Mr. Marshall’s allegations and the standard of review.	3
B. The form of a civil action does not determine the right to intervene.	5
C. The “interests” supporting intervention under CPLR §§ 1012 and 1013 are far broader than a “property interest”.	5
D. Mr. Marshall has standing to intervene personally.	7
E. Mr. Marshall has standing to intervene as a director.	8
II. The business judgment rule does not insulate the Defendants here. Any other demand on the NRA Board would have been futile, and LaPierre’s control of the NRA assures that any “democratic traditions” and “robust rights to be heard” are a joke.	9
III. Mr. Marshall’s motion to intervene is timely, and the Defendants have not demonstrated any prejudice from intervention.	11
CONCLUSION . . . . .	12
CERTIFICATE OF WORD COUNT . . . . .	13

**TABLE OF AUTHORITIES**

CASES	PAGE
<i>Adams v. City of New York</i> , . . . . . No. 160662/2020, 2021 N.Y. Slip. Op. 30251(U) (N.Y. Sup. Ct. 2021)	6
<i>Alco Gravure, Inc. v Knapp Foundation</i> , . . . . . 64 N.Y.2d 458, 479 N.E.2d 752 (N.Y. 1985)	7
<i>Am. Farm Bureau Fed’n v. U.S. E.P.A.</i> , . . . . . 278 F.R.D. 98 (M.D. Pa. 2011)	6

<i>Amalgamated Bank v. Helmsley-Spear, Inc.</i> , . . . . .	11
37 Misc.3d 1229, 964 N.Y.S.2d 57, 2012 N.Y. Slip Op. 52225 (N.Y. Sup. Ct. 2012)	
<i>Amfesco Indus., Inc. v. Greenblatt</i> , . . . . .	10
172 A.D.2d 261, 568 N.Y.S.2d 593 (1991)	
<i>Bank of New York Mellon Trust Co. v. Pinto</i> , . . . . .	9
No. 17195/10, 2016 NY Slip Op 32536(U) (Sup. Ct. 2016)	
<i>Browning Sch. v. New York City Conciliation &amp; Appeals Bd.</i> , . . . . .	9
122 Misc. 2d 124, 470 N.Y.S.2d 74 (Sup. Ct. 1983)	
<i>Christa McAuliffe Intermediate Sch. PTO, Inc. v. de Blasio</i> , . . . . .	7
2020 WL 1432213 (S.D.N.Y. 2020)	
<i>Claremont E. 12, LLC v. 189 Avec Moi LLC</i> , . . . . .	9
21 Misc. 3d 1140(A), 875 N.Y.S.2d 819, 2008 NY Slip Op 52431(U) (Sup. Ct. 2008)	
<i>CMS Life Ins. Opp.Fund, L.P. v. Progressive Capital Sol.</i> , . . . . .	11
LLC, 2014 NY Slip Op 30592 at p. 5 (N.Y. Sup. Ct. 2014)	
<i>Consumers Union of U.S., Inc. v. State</i> , . . . . .	7
840 N.E.2d 68, 5 N.Y.3d 327, 806 N.Y.S.2d 99 (N.Y. 2005)	
<i>Hansberry v. Lee</i> , . . . . .	7
311 U.S. 32, 61 S. Ct. 115, 85 L. Ed. 22 (1940)	
<i>HSBC Bank USA, N.A. v. Jae Bok Choi</i> , . . . . .	9
44 Misc. 3d 1202(A), 997 N.Y.S.2d 98 (Sup. Ct. 2014)	
<i>In re Petroleum Research Fund</i> , . . . . .	6
3 Misc. 2d 790, 791, 155 N.Y.S.2d 911, 913 (Sup. Ct. 1956)	
<i>Kirschner v. KPMG LLP</i> , . . . . .	2
15 N.Y.3d 446, 938 N.E.2d 941, 912 N.Y.S.2d 508 (2010)	
<i>Leon v. Martinez</i> , . . . . .	5
84 N.Y.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511 (N.Y. 1994)	
<i>NAACP v. Alabama ex rel. Patterson</i> , . . . . .	3
357 U.S. 449, 460, 466 (1958)	

<i>New Mexico Off-Highway Vehicle All. v. U.S. Forest Serv.</i> , . . . . .	6
540 F. App'x 877 (10th Cir. 2013)	
<i>Richards v. Jefferson Cty., Ala.</i> , . . . . .	8
517 U.S. 793, 116 S. Ct. 1761, 135 L. Ed. 2d 76 (1996)	
<i>S.H. &amp; Helen R. Scheuer Fam. Found., Inc. v. 61 Assocs.</i> , . . . . .	10
179 A.D.2d 65, 582 N.Y.S.2d 662 (1992)	
<i>Simpson v. Berkley Owner's Corp.</i> , . . . . .	10
213 A.D.2d 207, 623 N.Y.S.2d 583 (1995)	
<i>Tenney v. Rosenthal</i> , . . . . .	8
6 N.Y.2d 204, 189 N.Y.S.2d 158, 160 N.E.2d 463 (1959)	
<i>Williams v. Rhodes</i> , . . . . .	3
393 U.S. 23 (1968)	
<i>Wolf v. Rand</i> , . . . . .	10
258 A.D.2d 401, 685 N.Y.S.2d 708 (1999)	
<i>Yin Shin Leung Charitable Found. v. Seng</i> , . . . . .	10
177 A.D.3d 463, 113 N.Y.S.3d 46 (2019)	
<i>Yuppie Puppy Pet Products, Inc. v. St. Smart Realty, LLC</i> , . . . . .	11
906 N.Y.S.2d 231, 235; 77 A.D.3d 197 (N.Y. App. Div. 2010)	

#### STATUTORY PROVISIONS

CPLR § 1012 . . . . .	5, 7
CPLR § 1013 . . . . .	5, 7
N-PCL § 1101(a) . . . . .	5

## INTRODUCTION

The overarching fact in this case is that every present party is seriously conflicted in one way or another as to the interests of NRA members, and no party can adequately represent them:

- The Attorney General seeks to completely abolish the NRA, not rehabilitate it.
- The Individual Defendants are charged with egregious breaches of fiduciary duty that continue to this day.<sup>1</sup> Their potential personal liability inevitably creates an incentive to minimize or avoid that liability by settlement at the expense of the NRA members.
- NRA's counsel has represented Defendant LaPierre personally while simultaneously representing the NRA, and according to the AG, has received nearly \$75 million in legal fees the AG alleges were improperly authorized and paid between March 2018 and December 2020.<sup>2</sup> The AG has not demanded review or recovery of any of these fees, and the Individual Defendants and the Brewer firm surely will not do so.
- The NRA's Board, though not a party, is alleged to be a "rubber-stamp for LaPierre."<sup>3</sup>

Fundamental due process principles demand that the members be allowed to defend their interests in this action by intervention.

The AG alleges the Individual Defendants acted solely for their personal benefit with no meaningful oversight by the NRA Board, and that their actions cost the NRA millions of dollars

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<sup>1</sup> See e.g., AG's Amended Complaint, NYSCEF Doc. # 333, ¶ 580, alleging that since this action was filed "... *the NRA, LaPierre, and Frazer have continued the same course of misconduct in violation of New York law, IRS requirements for exempt organizations, NRA bylaws, and internal policies and procedures without objection from the NRA Board*", and this has "*continued unabated*." (Emphasis added).

<sup>2</sup> See Amended Complaint, ¶¶ 494 and 578.f. The AG's allegations as to the potential excessiveness of these fees, together with the various exhibits showing previous requests for their review that the Board ignored, would be enough to conflict the Brewer firm here regardless of its dual representation of LaPierre.

<sup>3</sup> See e.g., Amended Complaint, ¶ 750.b: "The Board of Directors, including allegedly "independent directors" and the relevant committees of the Board, passively rubberstamped the decisions of the officer-defendants..."

diverted to them, millions more in potential tax penalties, and "tens of millions" in legal fees and costs of the Ch. 11 adventure. Then there are Brewer's fees of \$75 million in the last 3 years.

These alleged wrongs were clearly adverse to the NRA and its members, but even though the individuals allegedly acted to the NRA's detriment solely for their personal benefit the AG has demanded its dissolution rather than rehabilitation.<sup>4</sup> Dissolution would completely destroy the members' personal rights of free speech and association in the NRA, as well as their interests in the NRA's continuance for their benefit, but the AG says Mr. Marshall lacks standing because a) he has no "property interest" in the NRA; b) this case is a "regulatory enforcement action"; c) he cannot assert constitutional defenses against the AG here; and d) he has not shown inadequate representation of his interest by the NRA.

The NRA and Individual Defendants parrot the mantra that no member has standing and all are adequately represented, yet Defendant LaPierre still controls the NRA and is alleged to dominate the Board to this day, while the Brewer firm still represents the NRA though it may be liable to repay some or all of the \$75 million in fees it has been paid. No Defendant here will assert the "adverse interest" exception to corporate liability for executive misconduct because it would require them to allege they were faithless fiduciaries acting to the NRA's detriment.

Mr. Marshall and all other NRA members might well ask:

1. Where the AG has previously told this Court that "*The NRA Lacks Standing To Assert A Claim On Behalf Of Members For Violation Of Their Associational Rights*";<sup>5</sup> acknowledged "The Brewer firm's involvement here raises the specter of potential conflicts";<sup>6</sup>

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<sup>4</sup> The NRA cannot be charged with the Individual Defendants' wrongs under New York's "adverse interest" exception to corporate liability. *See e.g., Kirschner v. KPMG LLP*, 938 N.E.2d 941, 952-953; 15 N.Y.3d 446, 466-468; 912 N.Y.S.2d 508, 519-520 (N.Y. 2010).

<sup>5</sup> NYSCEF Doc. # 279 ; Sec. II, p. 20-22.

<sup>6</sup> NYSCEF Doc. # 324, AG's Chapter 11 Brief on Motion to Dismiss, p. 25 note 37.

and suggested Brewer's fees are excessive, can the AG now be heard to say that the NRA's members (including Mr. Marshall, Mr. Tait, and Mr. Aguirre) are adequately represented?

2. Where the AG does not represent the members' interests, and the Individual Defendants are alleged to have acted adversely to the NRA while the Board passively rubber-stamped what they did, and the NRA's present counsel is conflicted as shown above, how can any present party here adequately represent the membership?

3. Can the New York AG really demand the NRA's dissolution by a "regulatory enforcement action" that destroys the members' free speech and associational rights, and at the same time deny them any effective opportunity to defend those rights by intervention?

4. If the members' personal constitutional rights and interests in the NRA cannot be defended here, where do they go to do that?

5. Can the New York AG do indirectly through a "regulatory enforcement action" what she could not do directly, i.e., abolish the rights of all NRA members in their Association?

6. Is a direct "property interest" in the NRA really the *sine qua non* for an NRA member's standing to intervene here, where the rights threatened are personal to each member?<sup>7</sup>

**I. Mr. Marshall has standing to intervene personally and as a director.**

A. Mr. Marshall's allegations and the standard of review.

"It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. *NAACP v. Alabama ex rel.*

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<sup>7</sup> See 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.")

*Patterson*, 357 U.S. 449, 460, 466 (1958). Mr. Marshall's proposed pleadings allege threatened impairment of his personal rights as well as his derivative claims,<sup>8</sup> and he alleges the inadequate representation of his interests by the present parties with great specificity. See NYSCEF Doc. # 378, ¶ 20, alleging Defendant LaPierre's control of the NRA Board so that the NRA is not independent; the Brewer firm's conflicts that were significant enough to draw Judge Hale's criticism in the Chapter 11 case; and the Brewer firm's additional conflict from its previous and continuing relationship with Defendant Frazer, the NRA's General Counsel.<sup>9</sup>

Mr. Marshall further alleges in ¶ 20 that the Individual Defendants are (or may be) likely to subordinate their interests and the NRA's to their own interests in avoiding personal liability. They have an obvious personal incentive for a settlement in which the NRA paid fines and penalties for their alleged misconduct with minimal personal liability. Likewise, if Brewer's fees are found to be excessive and/or improperly authorized as the AG alleges, then Brewer has a similar incentive to recommend settlement at the expense of the NRA.

Thus no present party will – or at the very least, may not – adequately protect Marshall's personal rights and interests, whether constitutional or otherwise.

#### Standard of Review

Mr. Marshall's allegations must be taken as true. His evidentiary submissions go far

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<sup>8</sup> NYSCEF Doc. # 378, ¶ 11 (First and Fourteenth Amendment rights to freely associate with other NRA members and advance common interests and viewpoints); ¶ 14 (personal right as an NRA member to continuation of its programs for his use and benefit); and ¶ 17.g (personal rights to freedom of association, speech, and due process, and to prevent impairment of his NRA membership by dissolution based on alleged wrongful acts of the Individual Defendants acting adversely to the NRA).

<sup>9</sup> Mr. Frazer's affidavit submitted as NYSCEF Doc. # 254 was an exhibit in *People v. Ackerman McQueen and Nat'l Rifle Assn.*, NYSCEF Index # 451825/2019, Doc. # 26. In paragraph 2 Frazer says that as NRA's General Counsel he supervises outside counsel for the NRA in the *Ackerman* litigation and "inquiries" by the New York AG. As NRA's counsel in *Ackerman*, the Brewer firm is indisputably "supervised" by Frazer, giving rise to the same conflicts Brewer has from its relationship with LaPierre.

beyond “conclusory allegations” and are more than sufficient to support his intervention.

At this stage the Court must accept the facts Mr. Marshall alleges as true and give him the benefit of every possible favorable inference. The only question is whether the facts alleged fit within any cognizable legal theory, and must be accepted unless 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 (N.Y. 1994) (citations omitted).<sup>10</sup> No party’s submissions here establish any defense as a matter of law – all involve issues of fact.

B. The form of a civil action does not determine the right to intervene.

The AG argues, and this Court unfortunately ruled in the Tait/Aguirre intervention, that the right to intervene is different in a "regulatory enforcement action" than some other action. But CPLR § 103 provides “There is only one form of civil action”, and “*All civil judicial proceedings shall be prosecuted in the form of an action*, except where prosecution in the form of a special proceeding is authorized.” (Emphasis added).

CPLR §§ 1012 and 1013 apply to "any action", and neither section contains a “regulatory enforcement” exception. Here the AG elected to assert claims under N-PCL § 1101(a)(2),<sup>11</sup> and § 1101(a) provides that these claims are made by “an action”. The AG’s "law enforcement" distinction is an artificial one with no legal basis.

C. The “interests” supporting intervention under CPLR §§ 1012 and 1013 are far broader than a “property interest”.

The parties’ “property interest” argument against intervention is far too narrow. An intervenor’s interest need not be direct or pecuniary, and need not be a “property right”. If the

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<sup>10</sup> The AG cites the same standard in opposing dismissal of the Amended Complaint. NYSCEF Doc. # 404, p. 12.

<sup>11</sup> Amended Complaint, First Cause of Action, ¶ 647 et seq.

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 N.Y. Slip. Op. 30251(U), p. 5-7 (N.Y. Sup. Ct. 2021) (Emphasis added). *Adams* cites numerous cases for this holding, noting that as far back as 1944 in *Petroleum Research Fund*, 155 N.Y.S.2d 911, 915; 3 Misc.2d 790 (N.Y. Sup. Ct. 1944) the court said:

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.*

(Emphasis added; citations omitted).

The *Adams* court said the intervenors had a “real and substantial interest” because they represented “thousands of New York City voters” whose ability to vote would be directly impacted if the plaintiffs prevailed.<sup>12</sup> (Slip op. at pp. 8-13). *Adams* cited several federal cases as persuasive (slip op. p. 9-11), including *New Mexico Off-Highway Vehicle All. v. U.S. Forest Service*, 540 F. App'x 877, 880 (10th Cir. 2013) (intervenors “regularly enjoy the forest for recreational and aesthetic reasons”, and existing parties could not adequately represent them because plaintiffs sought opposite relief and the Forest Service could not “protect both the public's interests and the would-be intervenor's private interests”)<sup>13</sup>; *Am. Farm Bureau Fed'n v. U.S. E.P.A.*, 278 F.R.D. 98 (MD Pa. 2011) (personal enjoyment of the Chesapeake Bay by

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<sup>12</sup> Mr. Marshall alleges here that the NRA members who will, or may be, impacted by the outcome of this case number in the millions. Moreover, their interests are not indirect but direct; *i.e.*, their speech and association rights in the NRA no longer exist if it is dissolved.

<sup>13</sup> The burden of showing that existing representation may be inadequate is a minimal one for purposes of intervention. *Adams*, slip op. at 16, citing *New Mexico Off-Highway Vehicle All.*, 540 F. App'x at 880.

group's individual members was a legally protectable interest justifying intervention); and *Christa McAuliffe Intermediate Sch. PTO, Inc. v De Blasio*, 2020 WL 1432213 (S.D.N.Y. 2020) (changes in high school admission criteria were "direct, substantial, and legally protectable").

Also see *Consumers Union of U.S., Inc. v. State*, 840 N.E.2d 68, 80, 82; 5 N.Y.3d 327, 806 N.Y.S.2d 99 (N.Y. 2005), where the court said health plan subscribers had standing to challenge conversion of a non-profit to a for-profit in order to protect the not-for-profit's assets, citing *Alco Gravure, Inc. v Knapp Foundation*, 64 NY2d 458 (N.Y. 1985) (intervenors had standing because as employees "they remained the primary beneficiaries of the foundation's charitable purposes." This is precisely the case here, as the NRA's members are indisputably the primary beneficiaries of its assets and continued operation.

To summarize: (1) Title to property or a direct financial "property interest" is not a requirement for intervention under either CPLR § 1012 or § 1013, and (2) while many of the cases above involved intervenors with interests common to large numbers of people, none suggest intervention can be denied because others might seek intervention on the same grounds.

D. Mr. Marshall has standing to intervene personally.

Mr. Marshall, like Mr. Tate and Mr. Aguirre, alleges his personal constitutional rights are threatened here; that he is inadequately represented; that he will or may be bound by the judgment here; and that his claims and defenses have questions of law and fact common to those of the present parties. Because all present parties are conflicted in one way or another, none can fairly and adequately represent Mr. Marshall or the NRA's members and he is entitled to intervene to in order to defend his rights. See e.g., *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (representatives whose interests are not the same as those they claim to represent do not afford the protection to absent parties which due process requires, presenting opportunities for the

fraudulent and collusive sacrifice of the rights of absent parties); *Richards v. Jefferson County*, 517 U.S. 793, 801 (1996) (representation of absent parties is not adequate where representatives' interests are in conflict with those absent, citing *Hansberry*, 311 U.S. at 42-43).

E. Mr. Marshall has standing to intervene as a director.

The NRA says that because Mr. Marshall was not re-elected as a director he has no standing to assert derivative claims. Of course he wasn't re-elected. Why would a Board or nominating committee dominated by Defendant LaPierre and advised by the Brewer firm ever allow Mr. Marshall to be nominated again?

Nevertheless Mr. Marshall has standing to maintain his derivative claims for the reasons stated in *Tenney vs. Rosenthal*, 6 N.Y.2d 204, 189 N.Y.S.2d 158, 161-162, 166 (N.Y. 1959). There the Court of Appeals held that a director could continue to maintain an action brought by him while a director on behalf of the corporation even though he was defeated for re-election:

*The right which [the former director] seeks to vindicate in each cause of action is the right of the corporation to the faithful services of its directors in the management of its corporate affairs and, quite obviously, this right of the corporation, as well as the causes of action for the alleged breaches of duty by the defendant directors, survive unaffected by the fact that the plaintiff is no longer a director. ... Having concluded that the action has not abated, we are brought to the second certified question, which we interpret as posing the issue whether the plaintiff has standing to continue to prosecute the action now that he is no longer a director. Concededly, he had the legal capacity to bring the action, when he did, by virtue of the provisions of the statute (General Corporation Law, § 61), and we see no basis for holding that he lost that capacity or suffered a disqualification when he failed to be reelected as director.*

\* \* \*

*Strong reasons of policy dictate that, once he properly initiates an action on behalf of the corporation to vindicate its rights, a director should be privileged to see it through to conclusion. Other directors, themselves charged with fraud, misconduct or neglect, should not have the power to terminate the suit by effecting the ouster of the director-plaintiff.*

\* \* \*

*In sum, then, the action, properly commenced by the plaintiff when he was a director, may not be defeated, either on the theory of abatement or of lack of capacity to sue, by effecting the plaintiff's ouster as director. The plaintiff's*

*purpose and plan to bring to account those mismanaging the corporation may not be frustrated or interrupted by any such process.* The action is for the benefit of the corporation and ... should not be terminated 'on account of the mere fact that other directors succeed, by trick or otherwise, in defeating the plaintiff director for re-election. Such a construction of the statute would often render it practically ineffectual.

The Defendants' claim that Mr. Marshall's proposed pleadings were not actually "filed" is negated by a number of cases holding that an intervenor's proposed pleadings are deemed filed *nunc pro tunc* as of the date the motion to intervene was filed. *See e.g., Browning School v. New York City Conciliation and Appeals Bd.*, 470 N.Y.S.2d 74, 77; 122 Misc.2d 124 (N.Y. Sup. Ct. 1983) (intervention granted and proposed answer deemed served *nunc pro tunc*); *Claremont E. 12, LLC v. 189 Avec Moi LLC*, 2008 NY Slip Op 52431(U) (N.Y. Sup. Ct. 12/4/2008), 2008 NY Slip Op 52431 (N.Y. Sup. Ct. 2008) (intervention granted; summons and complaint deemed amended to add intervenor *nunc pro tunc*); and *Bank of N.Y. Mellon Trust Co. v. Pinto*, 2016 NY Slip Op 32536(U) (N.Y. Sup. Ct. 2016) (intervention granted; proposed answer deemed served *nunc pro tunc*). Also see *HSBC Bank USA, N.A. v. Jae Bok Choi*, 997 N.Y.S.2d 98(Table) (N.Y. Sup. Ct. 2014) (strong public policy to resolve disputes on the merits justified substitution of parties with proposed pleadings deemed served and filed *nunc pro tunc*).

**II. The business judgment rule does not insulate the Defendants here. Any other demand on the NRA Board would have been futile, and LaPierre's control of the NRA assures that any "democratic traditions" and "robust rights to be heard" are a joke.**

The AG's Amended Complaint (¶ 750) alleges an extensive list of reasons why *any* demand on the Board would have been futile: "*The Attorney General represents and avers that making demand upon the NRA Board for the initiation of an action by the Board for the benefit of the NRA would be futile, as that term is used in Section 623 of the N-PCL based upon the following facts...*", including the allegation in ¶ 750(b) that "*The Board of Directors, including*

*allegedly “independent directors” and the relevant committees of the Board, passively rubberstamped the decisions of the officer-defendants...”*. (Emphasis added). Although Mr. Marshall did in fact make the demands his exhibits show, if a demand on the Board would have been futile for the AG then quite obviously it would likewise have been futile for Mr. Marshall.

Because all Defendants are alleged to have acted with substantial conflicts of interest, and the NRA Board is alleged to have been derelict in its oversight duties as well as controlled by Defendant LaPierre, the business judgment rule offers no shelter to any of them here:

“Nor are respondents entitled as a matter of law to the protection of the business judgment rule with respect to the Cathay Import loan. *The transaction was affected by an inherent conflict of interest arising from respondents' control of the entities on either side; respondents failed to meet their burden to prove its fairness (see Wolf v Rand, 258 AD2d 401, 404 [1st Dept 1999])*.

*Yin Shin Leung Charitable Found. v. Seng*, 177 A.D.3d 463, 465; 113 N.Y.S.3d 46 (N.Y. App. Div. 2019) (Emphasis added).

Likewise in *Wolf v. Rand*, 685 N.Y.S.2d 708, 711; 258 A.D.2d 401 (N.Y. App. Div. 1999) the court said:

*[T]he business judgment rule does not protect corporate officials who engage in fraud or self-dealing (cf., Simpson v. Berkley Owner's Corp., 213 A.D.2d 207, 623 N.Y.S.2d 583) or corporate fiduciaries when they make decisions affected by inherent conflict of interest, the burden shifts to defendants to prove the fairness of the challenged acts (S.H. and Helen R. Scheuer Family Foundation v. 61 Associates, 179 A.D.2d 65, 69, 582 N.Y.S.2d 662; Amfesco Industries v. Greenblatt, 172 A.D.2d 261, 264, 568 N.Y.S.2d 593).*

(Emphasis added).

AG's Amended Complaint, NYSCEF Doc. # 333, ¶ 580, alleges that since this action was filed “... *the NRA, LaPierre, and Frazer have continued the same course of misconduct in violation of New York law, IRS requirements for exempt organizations, NRA bylaws, and internal policies and procedures without objection from the NRA Board*”, and this has “*continued unabated*.” (Emphasis added). When this allegation is taken as true, then every decision of the Defendants and the NRA Board as to the investigation and fairness of the

fiduciary breaches alleged in this case was necessarily affected by inherent conflicts of interest that make a mockery of the so-called “democratic governance” and “robust rights to be heard”.

**III. Mr. Marshall’s motion to intervene is timely, and the Defendants have not demonstrated any prejudice from intervention.**

The AG has not argued timeliness, but the NRA’s opposition says Mr. Marshall’s motion is “untimely as a matter of law.” In fact there is no such thing. Whether a motion to intervene is timely depends on the particular case – there are no “mere mechanical measurements of time”; rather, the courts consider “whether the delay in seeking intervention would cause a delay in resolution of the action or otherwise prejudice a party.” *Yuppie Puppy Pet Products, Inc. v. St. Smart Realty, LLC*, 906 N.Y.S.2d 231, 235; 77 A.D.3d 197 (N.Y. App. Div. 2010) (citations omitted).

Mr. Marshall’s memorandum notes the lack of any substantive rulings in this action; the delays resulting from the NRA’s discovery objections; and the discovery sharing agreement in place here. As a parties opposing intervention the Defendants had the burden of demonstrating how intervention is prejudicial to them or otherwise unreasonably delays the resolution of this action, which their opposing memoranda make absolutely no effort to do. *Yuppy Puppy, supra*. And see *CMS Life Ins. Opportunity Fund, L.P. v. Progressive Capital Solutions, LLC*, 2014 NY Slip Op 30592 at p. 5 (N.Y. Sup. Ct. 2014) (where action was “far from its ultimate resolution”, discovery was ongoing, and any prejudice could be limited by barring repeat of earlier discovery, plaintiffs opposing intervention failed to demonstrate prejudice). Where there is no showing of prejudice, intervention should be granted in keeping with New York’s policy “to allow matters to proceed to trial on the merits, whenever possible.” *Amalgamated Bank v. Helmsley-Spear, Inc.*, 37 Misc.3d 1229, 964 N.Y.S.2d 57, 2012 N.Y. Slip Op. 52225 (N.Y. Sup. Ct. 2012).

### CONCLUSION

The Court should grant Mr. Marshall's motion to intervene, both as of right under § 1012 and permissively under § 1013.

Respectfully submitted,

*/s/ Taylor Bartlett*

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**CERTIFICATE OF WORD COUNT**

Pursuant to Commercial Division Rule 17, I certify that the foregoing Memorandum Of Law In Support Of Intervention was prepared using Times New Roman 12-point typeface and contains 3,971 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: October 27, 2021  
New York, New York

*/s/ Taylor Bartlett*

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Taylor Bartlett