SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM PART 3

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

Plaintiff,

- against -

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

Defendants.

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INDEX NO. 451625/20

60 Centre Street
New York, New York
February 15, 2022

BEFORE:

THE HON. JOEL M. COHEN, J.S.C.

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THE COURT: Let's start with appearances beginning with the plaintiff, Attorney General.

MR. THOMPSON: Stephen Thompson, on behalf of the plaintiff. Also appearing from our office are Emily Stern, Monica Connell and James Sheehan.

THE COURT: Good afternoon.

MS. EISENBERG: Svetlana Eisenberg, on behalf of the National Rifle Association of America.

MR. CORRELL: This is P. Kent Correll, for Wayne LaPierre.

MR. FLEMING: William Fleming, for John Frazer.

MR. FARBER: Good afternoon, Your Honor. Seth Farber, for Wilson Phillips. Mark Werbner also for Mr. Phillips is on as well.

MR. MCLISH: Good afternoon. Tom McLish, for defendant, Josh Powell. I believe that Mark MacDougall from our office is on as well.

THE COURT: All right, so let's get to it. We have one more introduction for the record. I was waiting for all of the current parties.

MR. MANDICH: For the intervenors, myself, Marc Mandich, George Douglas is also on the call, and I believe that Francois Blaudeau. If not, he's getting on as well now.

THE COURT: Obviously that was going to be my

next question. So, these were appearances for intervenors or proposed he intervenors. Why don't you do that one more time.

MR. MANDICH: It was Marc Mandich, that's myself. M A R C M A N D I C H. George Douglas, G E O R G E D O U G L A S. And George, I hope I got that right. And Francois Blaudeau, F R A N C I O S B L A U D E A U.

THE COURT: Thanks everyone. So, I would like to do the intervention motion first and, if possible, give you a decision on that or take it back under submission, one way or the other. Then go onto the discovery motion that was also made and deal with that separately.

So, let's begin with the motion to intervene. So, Mr. Douglas, Mr. Mandich or Mr. Blaudeau, whoever wants to take the lead. I obviously read the papers but if you want to go through the highlights, I would appreciate it.

MR. MANDICH: If it pleases the Court, I would be happy to start for intervenors. Also, if it pleases the Court, we kind of like to divide up the argument between us. I'm going to start with a couple of the legal issues, just a few points. Then George and Francois are going to address a little bit more the facts in detail.

In a slightly different context, although like I

was saying, we're in a slightly but very importantly different context or capacity with Mr. Marshall, a board member, seeking to intervene rather than simple members of the organization.

This I think takes care of the property interest aspect of Your Honor's last ruling as the protectable property interest. While I would have argued it's not required in the terms of a constitutionally protected property interest, that's not the test that was incorporated here. But that's obviated as the test for a board member is different under the statutory law.

So, that leaves a few of Your Honor's other concerns that I wanted to address briefly. Before I get there as well, I want to address just in broad scope, the pleadings in opposition seek to relitigate issues here. When we talk about intervention of right, we do have a test that the Court applies. There are elements, but each one of those elements is framed in a permissive sense, if you will. The question is whether the proposed intervenor's interest may be adversely affected or harmed if he's not present, and whether his interest may be inadequately protected by the current parties if he's absent.

Given the conflicts that we've alleged in detail, these are not, you know, perfunctory pleadings.

There is more than a genuine issue of fact as to whether or not self-dealing, self-interest and conflicts prevent both the current members of the board, the special litigation committee and their retained counsel from continuing to represent the members' interest. The importance of this can't be understated. If the real party in interest, the members, are not properly represented, that could annul this entire action on appeal as pari passu parties. The real parties in interest have a constitutional right to adequate representation and conflict free representation. This is not a matter that, this is not a matter that can be simply papered over by the NRA, it's entitled to jury consideration.

That leads to my other point that is also not directly addressed. I'm getting some feedback here. I'm hearing myself.

THE COURT: We're hearing you twice too.

MR. MANDICH: I'll try to continue and hopefully -- I don't hear myself any more, so that's good.

The second point before I get to Your Honor's concerns, the NRA does not have the power to revoke Mr. Marshall's standing by removing him as a board member. This is well drawn out in the case law and the practical implications and reasons are quite clear. This would put the NRA's current board, which are the people who are

currently being accused of violating their fiduciary duties, either directly or indirectly as parties in the litigation, it would put them in control of who can question them. It would put them in question of whistleblowers, which is obviously not something that the law wants.

THE COURT: You used a word, interesting word, and maybe this will be your colleagues who are doing this. But I think you said removed, that they removed or him or -- all I have in the record is that he stood for election and was not elected.

MR. MANDICH: Yes, Your Honor. Let me remove any confusion over the point by just retracting it. It is not necessary that we prove that there was some kind of wrongful removal for the purpose or intent of preventing him from intervening in this action.

THE COURT: In the Tenney case, which you lean on a lot, that's exactly what happened. They, the other board members of the wrongdoers in that case, you know, changed the mathematical formulas in a way that effectively, at least the Court assumed, that it was basically an ousting by the wrongdoers of the director who was the only one who was prepared to vindicate these rights. I haven't seen anything like that in this record other than that, you know, your client lost in 2020, was

appointed as a replacement in 2021 and then lost again in 2021. There is no affirmative misconduct -- I mean, there are some phrases in the brief like, well, of course he didn't win or something like that. But I didn't see any conduct as in the Tenney case.

MR. MANDICH: Your Honor, I would argue that that wasn't in it.

Go ahead, Francois.

THE COURT: Mr. Blaudeau.

MR. BLAUDEAU: A couple of points. Francois Blaudeau talking. Rocky was the first alternate on the board when several board members resigned because of concerns with their ability to uphold their fiduciary responsibilities to the members, based on actions that were going on with LaPierre and the general counsel at the time. Rocky ascended based on his position as first alternate. Upon taking the board seat he was one of three to four board members that, once he got his bearings on about what was going on with the NRA at the director level, he became very concerned, and was one of three or four directors that raised persistent concerns. In fact, as we'll talk later, he then raised those concerns during the bankruptcy hearings as well.

Now, this concept of sitting for reelection, we would submit to the Court, challenged what you said and

say, that the selection of who gets to be voted on for the board is a process that, in a large way, is controlled by the existing board and by the executive counsel of the NRA. So I just wanted to make that point.

If you looked at the pleadings from the NRA, they indicate there somehow that Rocky was not elected to his board position, which is kind of, kind of a misrepresentation of the facts. He was the first alternate as far as votes that he had gotten at the prior election, and that's what allowed him to ascend to that seat once a seat had become open. So that was kind of a misrepresentation.

I would just caution the Court from believing that everything was kosher and the kind of democracy that the NRA submits to the Court, based on what we know not only from the history having to do with the blowups that occurred in 2018 and 2019, but what we actually know from the bankruptcy hearings and from what people on the record said about the process, makes the belief now that if you read the response from the NRA, you would think that they were the most democratic organization in America. That everything in how they elected board members and how they conducted their business was absolutely democratic and a hundred percent valid.

THE COURT: What is there, I'm trying to look at

what's in the record, that's all I have to work from. What is there in the record that would suggest some sort of tactical ouster as opposed to sort of the normal operation of board elections?

MR. BLAUDEAU: Well, I think if you look at the record from the bankruptcy hearing and the fact that --

THE COURT: I'm talking about the record that's in front of me on this motion in this court now.

MR. BLAUDEAU: Okay. Well, I don't think that there has been any. There is nothing in front of the Court specific to any claim that the NRA board purposefully forced Rocky out of his position to be reelected to the board. So you don't have that in the record now. But if you take the basis of what the attorney general has filed, and you take the ruling and the order that the bankruptcy judge put out, and you take a look at as a whole, this Court can't just stick its head in the sand and not be aware of the fact that all of this stuff is going on. I mean, I would say this, were we down in Alabama you would be smelling the stink at the next county over.

This board has not worked as it should. The whole -- if this Court needed any evidence about what was going on with this board, the fact that they filed the bankruptcy in Texas and the fact that the head bankruptcy

judge in the State of Texas, who is a well-known jurist nationally, said that they did it in bad faith, should be enough to let this Court understand that what's going on over there is not kosher, it's not right.

THE COURT: I'm not going to -- I don't want to get into that fact question. But what I'm getting at, just to put the cards on the table, because you have a situation where he was a board member when this motion for intervention was filed but is not now. So the only case that's been cited to me that would permit a former board member to continue to bring claims, essentially derivative claims, on behalf of the company, is this Tenney case which had a very important difference, which is by ousting the director in Tenney, the wrongdoing directors got rid of the only -- rid of the case entirely. Got rid of the claim itself, because there was no one else to bring it.

Here the same statute that permits a director to bring a claim, permits the attorney general to bring a claim. At least with respect to all of the claims that you're bringing against essentially the management. The rationale for permitting a former director, which was at issue in Tenney, just is not here. Where, you know, the attorney general, I think it is fair to say, has been vigorously pursuing the portion of your client's proposed claims that lineup with her claims, I think that your

cross-claims. So it's different. You do have that hurdle where the only ground really that distinguishes this intervention from the last one, and it's an important ground, is that there is a director. I think if he was a current director that would be a fairly strong argument, if you put aside timeliness and other things, but he's not.

MR. BLAUDEAU: I would say this, Judge, and I understand the point that you're making. But I would say this, as a director, at the time that this malfeasance was going on, Rocky has a fiduciary responsibility to the members. He also has some potential liability as a director at the time this was going on, because of the failure of the board and he was a board member. So his motion to intervene now I think could be construed by the Court as an attempt to set that record straight and should, and for the sense of him being able to step in in a situation where he has liability because he was a board member, and he's asking in order to intervene to be able to say, hey, I did raise the flag, I did do this. And if you look at the testimony that occurred at the bankruptcy hearing, there were other board members that also raised this issue.

Now go ahead, Marc. I'm sorry. Go ahead and finish.

- J L M -

MR. MANDICH: I just wanted to address your concern about the Tenney case. Respectfully, I think that Your Honor's reading of the Tenney case is far more narrow than the case seems to intend. The ultimate ruling is that you don't lose your standing when you had it when the action was filed, if you're later no longer a board member, board member removed.

THE COURT: It said -- go ahead.

MR. MANDICH: I think in the Court's reasoning they also took -- I'm not going to say that.

THE COURT: Is it your position that it is a black letter rule that as a matter of law, a director can always continue after they lose their seat, or isn't it really that it was on those facts the rule of automatic disqualification shouldn't apply, which is the way that I read it.

MR. MANDICH: Your Honor, I think that on the facts an automatic disqualification should not occur under that case, both when there is some relation or evidence that there was wrongful removal. But also because of the practical concern that when the case is filed, you know, a case can last years and typically does. Board positions typically last only a year. They are elected annually in many or probably most companies. So just as a practical matter, to have one board member no longer allowed in suit

or in court because he no longer holds his seat, wouldn't make practical sense. That's the point, Your Honor.

THE COURT: You're clearly right -- and Mr. Douglas had his hand up; I'll turn to him in a second.

You're clearly right, even if you don't have Tenney. Because certainly with the Tenney case there are clearly situations where it makes more sense from the perspective of permitting the corporation's interests to be represented to permit a continuity of the case once it is rightfully brought. I agree with you on that.

It's just we have a purer situation here where these claims are going forward, the exact claims, frankly, at least on your cross-claims are going forward anyway.

So, Mr. Douglas, you still have your hand up. Did you want to say something?

MR. DOUGLAS: Yes, Your Honor. Thank you. Let me put my hand down here, if I'm doing that right. Are you hearing me?

Justice Cohen, two things. First off, although Tenney obviously dealt with a situation where the board member was tactically removed, as you said, the case itself is pretty black letter. I'm looking at a copy of it. In there the Court says, that the right which he, that is the director, seeks to vindicate in each cause of action, is the right of the corporation to the faithful

services of its directors. And quite obviously, this right is, 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.

In other words, it is, as you said, black letter. It's still good law. It hasn't been cited that much. But then, I would also like to point out to the Court that our claims are derivative claims, are not congruent or exactly congruent with the attorney general's. Because notably absent from the attorney general's derivative claims are any claims against the numerous people named in the complaint who are alleged to have received improper payments by virtue of the malfeasance of Mr. LaPierre and Mr. Frazer and Powell and Phillips. So that is -- we're not attempting to duplicate or Mr. Marshall is not asking to duplicate the attorney general's derivative claims.

Mr. Marshall is asking to bring claims, which if you read the complaint and you take those allegations as true, are substantial. One of those claims, which the attorney general repeatedly alludes to, or one of those potential claims, is a claim for who knows how many millions of dollars billed by the Brewer firm to the NRA under a contract that was never approved by the board or

the audit committee, at least at the time that it was made. That according to exhibits in the record does not meet the standards for -- does not comply with NRA contract policy. It doesn't meet the standards, the industry standards that you would normally expect to see for billings of this size. The last number that I saw, that the attorney general alleged in billings was $75 million in legal fees, okay?

It is difficult for me and maybe others in the case to imagine how there is $75 million of legal work in this case and the others that the NRA is presently involved in. That, you know, perhaps those can be defended. But as we pointed out to the Court originally before we ever filed for intervention with Mr. Tait and Mr. Marshall, the billings that were identified in the Oliver North indemnity action, which I believe Your Honor handled, would require seven lawyers working ten hours a day, seven days a week, 30 days a month without a break, every day and billing a thousand dollars an hour. So, that is one of the potential derivative claims, but there are others.

The AG has not taken any action to allege or attempt to recover, as far as we can tell, any of that money. As far as we can tell, given the AG's lack of interest in that, it would be perfectly okay with the

attorney general if the NRA just continued to bleed money through legal expenses, and thereby accomplishing it's ultimate goal of having the NRA in such a weakened financial condition that dissolution is the ultimate result.

So, you know, I would just say that we're not, our claims are not, to circle back to the point I was making, our claims are not duplicative of the attorney general's.

THE COURT: I think that you make a good point. But the claim, the derivative claim that you have asserted or proposed to assert, let's say that one for legal fees, there is nothing in this action, if you're correct, that it doesn't overlap, that would prohibit -- that would resolve that claim adversely one way or the other. In other words, that kind of claim could be brought somewhere else in some other action, it doesn't have to be -- intervention is typically when your rights are going to be adjudicated here and you want to not be disadvantaged. It sounds like that last piece what you're talking about is, somebody could bring a derivative action in some other court seeking to assert that claim and it's not being adjudicated here, it could be adjudicated in some other case.

MR. DOUGLAS: May I argue with you for a minute?

THE COURT: Sure, that's what you're paid for.

MR. DOUGLAS: I wish I was getting paid. But right now let me just say that I don't know that that claim could be brought anywhere else.

First of all, if the NRA is dissolved there is, you know, there is no derivative claims left. In the course of dissolution, the Court would be, you know, lining up, winding up and the attorney general would be winding up the various claims. If you looked at it like a bankruptcy estate, you would be looking at the claims of other interested party. So, if that -- well, unless you say, assuming for the sake of discussion that we did not intervene, that no such claims were brought and that Mr. Marshall or someone else who finally wakes up on the board files a derivative claim in some other venue, the first argument that will be met with is, you're in the wrong courthouse, you need to be in the attorney general's case.

THE COURT: Can someone address -- I appreciate that, Mr. Douglas; I understand the point.

MR. DOUGLAS: I will go mute.

THE COURT: Timeliness. I want to make sure that we hit two more points and then I want to go to the other parties.

The timeliness is an issue and the other is the claims against the attorney general. I've been focusing

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for now up to the cross-claims.

MR. DOUGLAS: I'll speak to timeliness.

MR. MANDICH: Before we move on, one more.

MR. BLAUDEAU: Let Marc answer that.

MR. MANDICH: I'll let you take the timeliness issue. I want to make one more point about intervention, Your Honor.

It's the case with I believe most, if not all, intervention claims that they can be brought elsewhere. The point of intervention is that, for practical reasons, a common question of law and fact are, because the interests of the party may be harmed in the current litigation, like George has alluded to. If the entity is dissolved it makes sense for it to go into a particular forum by way of intervention.

THE COURT: That's the permissive intervention.

MR. MANDICH: Well, with intervention of right you still, as a nonparty to the suit, are entitled to, as a plaintiff, to pick your forum, wherever you want to go. It's usually not the case that even if it's an of right, I believe that you're forced into a certain forum with your intervention. You could always go file in another court. It makes sense here with the common questions and with the fact that Mr. Marshall will be harmed if this litigation proceeds and his interests are not adequately represented

here, that it makes sense for him to file here and to be allowed in this case as opposed to filing elsewhere and starting a new litigation track elsewhere.

THE COURT: My point was only that the claim Mr. Douglas was discussing was currently not being adjudicated here one way or the other.

So, timeliness and the counterclaims.

MR. DOUGLAS: Sure, I'll speak to that, Your Honor. First of all, Mr. Marshall, as his affidavit points out, spent a good bit of time from the time that he went on the board to shortly before he hired us to intervene for him, trying to get the board to do something.

Now, this is the board that is alleged by the attorney general to be a do nothing board. Mr. Marshall went as long as he felt like he could, and then came to us. So, in that sense he was doing what normally he would expect a concerned director to do, that is to try to get the board to take some action. But with respect to the actual dates of filing, I'm not looking at it -- I believe that Mr. Marshall's motion to intervene was September the 23rd, I want to say somewhere in there, which was only three months after the bankruptcy termination if you count in the, letting the time for appeal of the bankruptcy dismissal run. And during all of that time suppose that

Mr. Marshall had filed the day after the bankruptcy was terminated? It is unlikely, given the history of where the case is today, where Your Honor is with discovery and so forth, that there would be any different result or any different situation here had Mr. Marshall filed then or later for that matter. We previously pointed out or told the Court that we were actually ready to file on behalf of Mr. Tait and Mr. Blier the week before the NRA filed their Chapter 11. We were literally going through the, have we got all the i's dotted and t's crossed. And that Monday morning or Tuesday morning, whatever day it was, and there is the headline, the NRA files Chapter 11.

So, even if we had filed for Mr. Marshall back then, of course he wasn't on the board then, but even if he had been and filed, the case would be, at least as far as I could tell, in no different posture with the Court, because the AG and the defendants are still fighting discovery wars. I don't mean it in a critical way, but it's really the case is not on a fast track. And Mr. Marshall's timing of his filing has not prejudiced anybody.

THE COURT: There is one legal issue there, that because this is a state regulatory action this was not subject to an automatic stay from the bankruptcy. That may not have been apparent to everyone, but that was

certainly, that was my finding. And that was --

MR. DOUGLAS: I would certainly agree that it wasn't as to the attorney general, it wasn't as to the attorney general. But our claims, we would have been making claims against the debtor's estate. The derivative claims are proper of the debtor's estate in Chapter 11, I guess in any other bankruptcy proceeding. And we --

MR. BLAUDEAU: Judge, this is Francois Blaudeau. We dealt with this issue at the last hearing. In your ruling, in your spoken word, you noted that you were not relying on this question of timeliness. I think that the reason, this is what you said, "As it turns out, at least in my opinion, there was no automatic stay. This Court never entered a stay. There is an exception from the automatic stay for actions by the state. But in any event, the case did go into somewhat of a hiatus while we waited for the Texas bankruptcy action to take place. So, I'm not going to rely on timeliness as an independent ground." That's what you said from the bench.

That hasn't changed. This intervention for Rocky -- in fact, we talked to the Court about that, that intervention. That we had a director at the time of the hearing when you said these words, and we filed this intervention a couple of weeks after that hearing.

So, I believe that in that instance, and I think

that the Court is right, regardless of whether that was an automatic stay or not, the effect of it was that there certainly was a stop in what went on, there was a pause. And we do believe that our intervention at this time based on where everything is, is timely. I just wanted to --

THE COURT: Let's move on from timeliness because I really want to get to the nature of the -- I'm not sure how to, exactly how to describe the counterclaim related intervention claims. The ones you have where you turn a bit and you're really focusing more on responding to the attorney general's claims and asserting defenses and the like.

The first thing is that those, as I read it, those are asserted as derivative -- the proposed intervention is in the name essentially of the NRA, am I right about -- they are not an individual claim by Mr. Marshall.

MR. DOUGLAS: That's correct, Your Honor. So that I think that the answer to that is that, yes, they are asserted on the behalf of the corporation. They, to the extent that they overlap what might be argued by the NRA, you know, no harm, no foul. But on the other hand, we still, the "we," the Court still has to deal with the conflict issue which, as you may recall, the U.S. Trustee in the Chapter 11 filed extensive objection to the --

denominated all of the blue firm conflicts and representing the NRA.

In one of the other things that, at least I have not seen in following any of the discovery, is has anyone on the other side asked any witness in any deposition, tell us how what these defendants are accused of doing benefited the NRA. In other words, tell us why the adverse exception, adverse interest exception, the KPG case, and you're familiar with that line of cases, tell us why that doesn't apply. Tell us how anything that you did benefited the NRA.

As far as I can tell, nobody has done that and nobody will do it. Because, again, as far as I can tell, what has happened so far has been done for the protection of the NRA individual defendants in the case rather than the NRA as an entity. So, our derivative claims may overlap but they are filed by someone who does not have a conflict of interest, and litigated by counsel who do not, or proposed to be litigated by counsel who do not have a conflict of interest.

MR. BLAUDEAU: Francois Blaudeau. Ultimately at the end of the day, Judge, the hope or administration of the judicial process is to get to the truth of the matter, the ultimate truth of the matter. These are very serious accusations that were brought by the attorney general's

office against the leadership and executive leadership of the NRA. If they are true in any degree, they would disqualify these folks from running that organization.

I think that at the end of the day what the Court has to ask itself is, well, does the intervention by Mr. Marshall, does that add or assist the probability or the hope of getting to the truth of the matter. We believe that the record on its face suggests that to be yes. We believe that's what the Court, the bankruptcy Court's conclusion was as well. We believe, in summation, that it would be an injustice to allow these folks to continue to run this litigation with no objective, independent concern for the NRA itself. We think that at this point the Court only benefits from allowing this intervention.

If you don't allow the intervention, I think that the Court takes a risk, based on the facts at hand, that you're not going to get to the truth. I think that some of the discovery arguments you're going to be hearing today, as I've been following them, suggest that there is an even more difficulty getting to the truth of the matter. I think that as intervenors we can help with that.

THE COURT: Let me hear from the other defendants and the attorney general, starting with the

NRA.

MS. EISENBERG: I think that the Court is very clear that Mr. Marshall has not carried his burden on timeliness. He has not carried his burden on standing. He has not carried his burden on intervention, and either as a matter of law or as a matter of fact.

With regard to Tenney, which is what potentially makes this particular motion different from the one that Your Honor denied back in September, I think that Your Honor gave it a pretty generous reading in our view. We think it addresses a very narrow legal issue that's different from the one here. But even if legally Tenney applied, Your Honor is exactly right, the Court in Tenney makes very clear that the record there shows that there was interference and it minimized the particular directors' ability to get reelected.

Here, Mr. Marshall submitted an affidavit in support of his motion to intervene. Then he had another bite of the apple when he submitted a reply. We are here today hearing his attorney admit that there is nothing in the record that shows that he meets the Tenney standard. The law is very clear, and we start with section 722 (b) of the NPCL. It states that certain actions that are enumerated in section 728 (a) may be brought by either the attorney general or on behalf of the corporation by a

director, or in certain circumstances by members when it's compliant with section 623 (c). The reason that standing doesn't work here under section 623 is exactly the same as the reasons for which Your Honor denied Mr. Tait's and Mr. Aguirre's motion back in September.

In fact, I did not hear opposing counsel suggest that they're relying on that particular alternative standing argument. For that reason I won't address it either. But the text of the statute is actually quite important. What 722 says is that "An action may be brought in the right of the corporation by a director, and a director of the corporation." It's interesting because if you look at CPLR 304, that section specifies how an action can be brought. It states that an action is commenced by filing a summons and complaint or summons with notice in accordance with Rule 2102 of this chapter.

There are so many things about this statutory language I just read. First, it talks about a current director. The drafters of the NPCL knew how to refer to a former member or how to refer to certain rights that accrue because of someone's former status. Yet here they specifically chose a director of the corporation.

In addition, the drafters specifically speak about an action being brought. They are not speaking about a motion for leave to intervene. And the CPLR tells

us that a summons has to be filed. That's simply not something that has been done.

THE COURT: Let me interrupt you for a second here. First of all, the general rule on intervention is, if you prevail then the action is deemed to be as of the date you file the motion. So in terms of how that would lineup, I think obviously you have to move for intervention before you can file a complaint in intervention. But beyond that, Mr. Mandich made, I think made a practical point here. If you're right that every time that a director, let's say, a director legitimately brings a case, if a year goes by and there is a new election, how is there any continuity to the case? Wouldn't the company be able to every year just frustrate the case and have it start all over again, just because of the passage of time if the director, who happened to be the named plaintiff, didn't get elected? So, Tenney seems to speak about continuity as a way to avoid that risk.

MS. EISENBERG: Well, Tenney is distinguishable for a variety of different reasons. First, in Tenney an action was, in fact, properly brought. Here, even if the Court were to nunc pro tunc it, even if we think there is no authority for it, it would not be the same situation because what you have here is, what you have here is a person who is a director moving to intervene belatedly,

even though they could have done it months ago, and doing so just days before they cease serving as a director.

In addition, as Your Honor alluded to, this is not an action that will be abandoned if Mr. Marshall is not allowed to intervene. This action of the plaintiff is the New York Attorney General and the action will continue.

So, Tenney is distinguishable for these reasons, plus the fact that there simply is not any record that Mr. Marshall has made that suggests that Tenney applies. Obviously the Court raised the timeliness issue. We very much relate to that. There is no reason why Mr. Marshall could not have moved to intervene much earlier. At least as early as Mr. Tait and Mr. Aguirre. Respectfully, counsels' statements about when those two proposed intervenors' motion was ready to file has nothing to do with the clear delay that occurred in Mr. Marshall's case.

I would also like to talk about the fact that Mr. Marshall actually ran for office in the fall of 2021 at the annual members' meeting. There was an election. They are salaried officers at the NRA, including executive vice president, treasurer and secretary. Mr. Marshall actually was nominated off the floor, from the floor to run for executive vice president. He got two votes. He did not win but he ran. Under the Pokoiok case, and I

have the citation here, I think that also on top of lack of standing, raises issue about a potential conflict of interest that Mr. Marshall here might have. The citation is 2017 Westlaw 1347549.

On top of that, Mr. Marshall is asking the Court to dismantle altogether the current 76 member board which, by the way, was elected by more than 300,000 members. He's asking the Court to appoint him a receiver. It's not clear what standing he has to make that request. But having made that request and having asked for attorney's fees in every single cross-claim and counterclaim that he has asserted, I think that that also ought to give everyone pause about his clear conflict of interest.

Back to sort of the fundamental overarching principles. It's a separation of powers issue. The NPCL is a granular statute that specifies a lot of things, including who has standing to bring what actions. The statute is very clear that it has to be a current director. So, respectfully, by citing these nunc pro tunc cases --

THE COURT: The statute says it has to be brought by a director.

MS. EISENBERG: Right, exactly. What it says, an action must be brought. But even though on page nine of Mr. Marshall's reply brief counsel cites a number of

cases where Courts granted intervention motions and nunc pro tunc'd the pleading to the date of the motion, those cases are completely inapposite. There is -- neither one of those cases dealt with a situation where the timing of someone's standing was at issue like it is here.

So, back to the issue of burden. As the proposed intervenor it is Mr. Marshall who has the burden to come forward with the facts and the law, and the law simply does not support the outcome that he seeks.

THE COURT: Thank you. Any other defendants before we go to the Attorney General's office?

MR. CORRELL: Mr. Correll, for Mr. LaPierre. First of all, I just want to correct the record, I think that Ms. Eisenberg referred to section 722, it's actually 720.

MS. EISENBERG: Yes, thank you.

MR. CORRELL: Secondly, I think that we should take a step back, Your Honor, and look at the NPCL, remembering that it's a statute that was passed in 1969. The Tenney case was decided in I think 1959. It was addressing the old corporation code, some of which made its way into the Not-For-Profit Corporation Law, some of which didn't. As you may recall, because you have a motion pending before you to dismiss in part on the basis of Grasso, the Court of Appeals unanimously articulated a

bedrock principle that the legislature codified a comprehensive scheme for nonprofit corporations and their officers and directors in the NPLC, and had directly limited the scope of authority to bring actions against officers and directors of nonprofits, and created safe harbors for individuals who acted without knowledge of unlawfulness and in good faith.

The section 720 specifically delineates the authority of a director in terms of what he or she may do in the name of the corporation, and that is to bring an action. It doesn't say, it doesn't authorize intervention in an action by the attorney general. Actions by the attorneys general are governed in part by 720, but also by section 1112. That's where they say that the attorney general can maintain an action. And 720 also goes on to say that these -- the relief that can be sought under 720 can also be sought by the attorney general.

So, I would urge the Court to consider this motion in the context of Grasso and the statute and not as a routine intervention case that's governed only by the CPLR. In fact, I would argue that if you read the main language of 720, Mr. Marshall's authority was limited to bringing an action while he was a director. It cannot authorize him to seek intervention in a government enforcement action brought by the attorney general. It's

just not there as far as I can tell, and I've looked hard. There is no case in which any Court has ever authorized or found that a director of a nonprofit had authority to intervene in a government enforcement action by the attorney general. I think that that makes sense. I think that this was a considered judgment and policy decision by the legislature. I don't think that courts have the authority to expand that authority of the director to include motions to intervene in lieu of the filing -- the proper commencement of an action.

Now, in Tenney, the Court talked in terms of an action "Once properly initiated." And the question here is whether an action has been properly initiated by a director. And I don't think that it has. There has been no summons filed and no complaint filed. And I don't think that filing a motion for intervention, given the strict approach that the legislature took to delineating the authority of directors and the attorney general to bring actions, really works. So I just wanted to make that one point.

THE COURT: Thank you.

MR. CORRELL: In terms of timeliness, I think that it also relates to timeliness. Because Mr. Marshall, by the time that the bankruptcy proceedings were initiated, had a lot of information and he could have

filed it, a summons with notice to commence an action in New York, and he would have been within the parameters of section 720. For some reason he chose not to. We don't know why, but it doesn't really matter. In my view he had the option to do that and he didn't avail himself of the option. He cannot kind of jettison 720 and then revert to the CPLR, and then ask the Court to exercise its discretion under CPLR 2001 to ignore the fact that he didn't file the proper papers. He didn't file a summons with notice or a summons and complaint, which I believe is what was called for under 720. A couple of --

THE COURT: If you prevail on an intervention motion you file a complaint?

MR. CORRELL: Correct. But at that point he's not a director, so he's not bringing an action when he's a director. If you read Tenney closely they say, "Since 1924 the courts of the state have consistently held that while a director's right to bring the action does not exist after he has been defeated for reelection, the cause of action survives because it is brought for the benefit of the corporation."

In other words, the action once properly initiated may not be defeated by the circumstances that the plaintiff loses or is ousted from his directorship. I think that the Court drew a very clear distinction between

a director who brings an action and is ousted or loses, and a director who has not brought an action and is ousted or loses. I think that that renders the subsidiary holding or the minor holding of Tenney inapplicable to these facts.

It's undisputed that Mr. Marshall did not bring an action while he was a director. Then the question is, whether bringing a motion while he's a director is sufficient to satisfy the Not-For-Profit Corporation Law. I urge the Court to find that it's not. And not just because there is no precedent for that, but it would be a very bad precedent to set. Because the Court would be essentially enlarging the authority of a director and extending it far beyond his term when he's no longer subject to personal liability for breach of fiduciary duty, and can use his former status to harass the people who didn't reelect him. So, I would urge the Court to consider that.

The other point I would urge the Court to consider is, Mr. Marshall applied for Mr. LaPierre's job. He wanted Mr. LaPierre's job. And for him to suggest that he could fairly and adequately represent the interests of the corporation when he had that personal interest, and when he's also seeking to be appointed as a receiver, which would benefit himself personally, that even under

the adequate representation analysis that one would apply, if you set aside all the other problems, I just don't think that Mr. Marshall qualified. I think that he has a disqualifying conflict of interest. Not just because, not the automatic disqualification that comes from not bringing an action while he's a director, but also the fact that he has expressed personal interest taking over Mr. LaPierre's job, and in the alternative being appointed receiver for the corporation.

So, I'll turn it back to Ms. Eisenberg and if she has any further thoughts based on what I've said, otherwise those are the points I wanted to make, Your Honor.

THE COURT: Just move on. If there is any other defendants other than that, I'll move onto the attorney general.

MR. THOMPSON: Thank you. Steven Thompson, for the attorney general. Just a few very brief points, Your Honor.

For the record, I can't say that I agree with Mr. Correll's interpretation of the Grasso, G R A S S O, for the our court reporter. But section 720 of the Non-For-Profit Corporations Law does specifically enumerate the causes of action that a director is entitled to bring derivatively on behalf of the corporation. And

none of them involve counterclaims, constitutional or otherwise, against the Attorney General's office. So, we believe that Mr. Marshall doesn't have standing to assert any claims derivatively or to assert the affirmative defenses that he's alleged and has proposed pleading.

Mr. Mandich briefly mentioned that he didn't think that the property interest found in section 1012 (a) 3 of the CPLR applied because of Mr. Marshall's status as a director. I'm not entirely sure what Mr. Mandich was referring to, because I don't believe there is an exception in the CPLR and Mr. Marshall has no more of a property interest in the NRA than any of its members or officers do. So, CPLR 1012 (a) 3 would not apply.

Then for all of the same reasons that Your Honor held intervention under 1012 (a) 2 was inappropriate with respect to the previous intervenors, that also applies here and Mr. Marshall has not made any new or different arguments that would bolster his claim. Unless Your Honor has any questions that --

THE COURT: That's fine. Just one real brief opportunity for the movants to reply, and then I'm going to take a short break.

MR. DOUGLAS: I'll take that, Your Honor. I believe that I can give you everything in a couple of minutes.

- J L M -

For the court reporter, this is George Douglas, if you're not getting an indication of that.

If Mr. Marshall does not raise the conflict of interest issue, who will do so? If Mr. Marshall does not assert the additional claims against the people who benefited from the alleged misconduct, who will do so? If Mr. Marshall does not raise the adverse interest exception as a defense to liability of the NRA as an entity, who will do so?

With respect to the conflict of interest issue about running for Mr. LaPierre's job. Mr. Marshall did what any other concerned person would do. He tried to change the system. That's another way you change the system is, you change the management. But he hardly did so because he needs the money. When or if they take Mr. Marshall's deposition, our opposition takes Mr. Marshall's deposition, they will find that he is well, he is well capable of paying the rent next month without having Mr. LaPierre's job.

With respect to the argument that this is a regulatory action, we dealt with that somewhat at the hearing, at the last hearing. This is not solely a regulatory action. I believe that we dealt with that and I've been trying to find in our pleadings where we discussed that. This is a hybrid action, it is something

more than a regulatory action. Therefore, Mr. Marshall has the right to intervene and ask -- he has no choice if he's going to seek injunctive relief against the AG's effort to dissolve the NRA, he has no choice but to phrase those either as counterclaims or as affirmative defenses.

THE COURT: Do you agree that the statute that permits a director to bring this claim, it permits a director to bring an action "Against one or more directors officers, or key persons of a corporation to procure" various forms of relief. So that the claims that you're to assert, whether they are called counterclaims or derivative or affirmative defenses, if that's even a thing, don't fit within that statutory agreed --

MR. DOUGLAS: They certainly don't fit within that. You obviously read that section of the statute. On the other hand, if Mr. Marshall is allowed to intervene as a director, and asserts the conflict of interest issues, the adverse interest exception, those are not strictly within 720. But nevertheless they are, whether he ultimately prevails, they are validly asserted on behalf of the NRA as an entity. What Mr. Marshall --

THE COURT: Meaning that he would be bringing those just as a member.

MR. DOUGLAS: No, he would be bringing those as a director at the time it was filed on behalf of the NRA

as a membership. I very much doubt that it is, that the NRA as an entity, I very much doubt that the legislature intended to restrict a director's ability to get complete relief for a corporate entity where it's not presently being sought or defended by those who are in control of it at the time.

THE COURT: There are different kinds of derivative claims. You know, a very common kind of derivative claim is for breach of fiduciary duty. And some insiders who, in fact, the nature of a derivative claim is you need to bring this claim because the insiders won't. So, that's exactly the kind of complaint where typically it's a claim against the insiders. But when you turn your claims toward an outside entity like the attorney general, that is typically the kind of situation where you would say, well, you know, the entity itself can bring that. The entity doesn't need help bringing claims or defenses against the attorney general. Your theory of the case is that the entity needs help getting relief from the insiders?

MR. DOUGLAS: Perhaps not help, just a different set of interests to pursue. I don't know how you, I don't want to split hairs.

THE COURT: Then we start getting into the too many cooks problem. Any member of directors and members

who might have had a different idea of how the NRA might litigate against the attorney general, that doesn't mean that all of them get a seat at the table as a party.

MR. DOUGLAS: Certainly. But, Your Honor, I guess what I would say would be, that if everything that has been said just now is so, at least as to what can be asserted by Mr. Marshall beyond the 720 claims, if that's so, the place to adjudicate those and decide them is on a proper motion to dismiss after Mr. Marshall has been granted intervention and his complaint filed. Those, again, as Mr. Mandich pointed out, what we have shown is that our interests or Mr. Marshall's interests may be affected.

Let me just, there were two other points I want to make. I don't want to belabor them but, again, with respect to everything everybody has just said, where is the prejudice in the timing of this? There is no prejudice to any party in the timing of this motion.

Lastly, with respect to, I believe that it was Mr. Correll said something about a director could make claims after he was or maintain claims after he was no longer subject to personal liability. The fact that he was no longer a director would not, as I understand the law, would not absolve him from liabilities that he incurred while he was a director. So that to me is sort

of a red herring argument. That's all I want to say. Thank you, Your Honor.

THE COURT: I'm going to take a short break and be back with you all in hopefully five to ten minutes. I also want to give Jack a chance to unwind a bit his fingers. It's particularly challenging, I hope that you all recognize, when there are that many different people speaking it creates a kind of dissonance on the court reporter and that he has been bravely fighting through. So, my appreciation to Jack.

So, stay on the line. Turn your mics and cameras off. See you shortly.

(Short recess taken)

THE COURT: Here is my decision on the motion to intervene. The motion for leave to intervene is denied. Before going through the specific reasons for the decision, I do want to acknowledge the points made forcefully and eloquently by the intervenor's counsel. That in some situations neither the AG nor the NRA management may align fully with the views of all NRA members and directors on the claims made in this case. On some issues the intervenor or the proposed intervenor applies to align with the AG against management, on others he aligns with management against the AG, and in some some cases suggests somewhat different kinds of claims.

DECISION

As I noted last year and in denying a request by two members to intervene, I do value the input of NRA stakeholders and have found intervenor's counsel to be extremely thoughtful about the issues presented here. And by some of the things that may have been said, I do not attribute any conflicting interest, adverse views as to this proposed intervenor or the other two, frankly, and think that they are expressly honestly held views. But that's a different matter than permitting those stakeholders to be made formal parties to the case, which is a matter of statute and the CPLR, as well as discretion as to the efficient operation of this case.

Let me go through the analysis beginning with timeliness. I do have some concern about timeliness. But having heard the arguments I'm not going to rely on that as an independent basis. I think that the intervenors make a good point that while the attorney general's action was likely not stayed by the bankruptcy, an attempt by a derivative plaintiff to bring a claim on behalf of an entity in bankruptcy might well not have been able to proceed. Therefore, I can see some rationale for not operating sooner. There is still the matter of a few months, why not at the same time as the other intervenors back last year. But in the end, I don't attribute any dilatory motives on the part of Mr. Marshall.

- J L M -

So, while I do think that it would be a bit distracting to add parties at this stage, if all of the other grounds for intervention were applicable, I don't think that timeliness would be a deciding factor. But what I think is the deciding factor is, that as a former NRA director Mr. Marshall lacks standing to bring derivative claims on behalf of NRA on the only statutory grounds that I think are available, which is under the Not-For-Profit Corporation Law section 720. He seeks to intervene based on a statute that permits a member of the board of directors of the Not-For-Profit, such as the NRA, to sue in the name of the corporation. Although he was a NRA director when he filed the motion to intervene on September 27, 2021, he is not one today. In fact, he, at the time he was filling a vacancy created when another director resigned in January of 2021, and failed in his bid for election to a board seat on October 2nd 2021, just a few days after this intervention motion was made.

It is true generally that a successful intervenor becomes a party for all purposes and the intervenor's claims will be deemed to have been interposed as of the filing date of the petition. That, of course, typically protects the intervenor against the running of the statute of limitations while the motion to intervene is being considered. But the question here instead is,

whether Mr. Marshall can continue to pursue a claim as a director long after he has ceased to be one, thereby no longer having the status that permitted him to bring the suit in the first place. The short answer in these circumstances is no.

So he relies exclusively on Tenney versus Rosenthal, or nearly exclusively. That's the main authority, 6 NY2d 204, Court of Appeals case from 1959, for the proposition that a former director does not lose standing to maintain a derivative action when he or she losings the board seat. But Tenney involved very different facts and does not, in my view, state the broad rule for which it is cited. That is that former directors are always permitted to continue representing the company after they had been voted out.

Again, with a few points about the Tenney case. First of all, as Mr. Correll and others have pointed out, it predated the Not-For-Profit Corporation Law. The Court of Appeals in the Grasso case declined to apply it and made the point that the enactment of the statute occupies the field with respect to claims by and for and on behalf of not-for-profit corporations.

Moving to the facts though, Tenney was a very set of facts for the result reached. The director plaintiff in that case asserted derivative causes of

action against other directors for wrongdoing against the corporation. After that director initiated the action, the other directors exercised their power to reduce the size of the board, making it mathematically more difficult for the plaintiff to be reelected.

The direct defendants announced prior to the election that the plaintiff would be defeated. Faced with those allegations and the fact in the absence of this director, there would be no claim. The Court of Appeals held that the fact that the plaintiff has failed to be reelected as a director does not automatically bar him from continuing to prosecute the action for the benefit of the corporation. That's at page 210 of the Court's opinion. Also noted that there are important reasons why the rule of automatic disqualification upon loss of status should not be extended to the director's action.

Again, most importantly in the Tenney case, the former director was the only one who could or would, as a practical matter, enforce the corporation's rights against the wrongdoers. If the claim was dismissed that was the end of it and the bad actors would not be held to account.

So, as I read Tenney it does provide some discretion to avoid a clearly inequitable result. There could be circumstances in which it would extend somewhat beyond the facts of Tenney. But I think that the facts we

have here are extremely quite different.

The same statute that permits directors to pursue claims against alleged wrongdoers within a not-for-profit corporation, permits the attorney general to do the same. Here, the attorney general has been vigorously prosecuting these claims since August 2020. Unlike in Tenney, I do not have evidence before me to suggest that Mr. Marshall was improperly ousted, based on the record before me anyway. He lost his bid for a board seat in 2020 before he filed this motion, and lost again in 2021 after he filed this motion. In addition, unlike in Tenney, the NRA's board of directors are not defendants in this action.

So, in sum, I don't think that Tenney provides any rationale or it provides sufficient rationale to reach a different result than would be reached in any other case where a plaintiff loses standing, when the status upon which the standing was initially predicated no longer exists.

So, Mr. Marshall lacks standing to bring derivative claims on behalf of the NRA and therefore, the motion to intervene to assert such claims must be denied.

Turning to the portion of the proposed intervention that relates to claims against the attorney general, a few additional points. First of all, the same

reasons as I just described, Mr. Marshall lacks standing to bring derivative claims against the attorney general on behalf of the NRA, but there is more than that. Because claims against the attorney general are beyond the realm of section 720 of the Not-For-Profit Law to begin with.

Statute permits a director to bring an action "Against one or more directors, officers, or key persons of a corporation to procure" several forms of the relief. The attorney general is not alleged to be a director, officer or key person of the NRA of course. So section 720 cannot be used to bring derivative claims or defenses against her. And the statute does not provide for the kind of relief that Mr. Marshall is seeking against the attorney general, nor does he meet the requirements for intervention either as of right or permissive, to the extent that Mr. Marshall asserts claims and defenses against the attorney general in his individual capacity. It's a bit unclear exactly what's going on there because he does make some references to individual constitutional rights. He does not meet the requirements for intervention under CPLR 1012 or 1013. As an initial matter, all of the counterclaims proposed intervention are denominated as derivative claims brought on behalf of the NRA. But Mr. Marshall alleges as an affirmative defense that the petition for dissolution violates numerous

Federal and state constitutional rights of the NRA and its members both individually and collectively.

In any event, all of the claims that are actually made are derivative claims. The same reasons for denying Mr. Marshall's intervention in connection with claims and defenses that are his individually, if there are any, echo the reasons I previously stated for denying intervention to Mr. Tait and Mr. Aguirre last year. Mr. Marshall as a former director simply has the same rights as the prior proposed intervenors as members of the NRA.

Again, you know, I don't think that the requirements of CPLR 1012 for mandatory intervention have been met. I don't find that grounds for permissive intervention in my discretion have been met either. On top of everything else, I do have concerns that even if intervention would be permissible, and I don't think in this situation it would, I would decline to exercise discretion to do it, because at this stage of the case the parties have engaged in fairly fierce litigation and adding new parties to the mix can only increase the complexity of the action.

So, for all of those reasons, the motion to intervene was extremely well, I thought, stated and argued by the intervenor, is nevertheless denied.

Let's turn now to the motion to extend discovery

deadlines and the like. We have to be efficient here, so I'm going to start with the Attorney General's office and explain exactly where things stand right now. Because we are now at the date that was supposed to be the end date for discovery. So it wouldn't be the first time that a court conference triggered some last minute flow of documents and discovery. So, let me just find out if you can, Mr. Thompson, bring me up to date.

MR. THOMPSON: Your Honor.

MR. DOUGLAS: George Douglas. May we be excused given the Court's ruling, and we obviously don't have any dog in the discovery fight.

THE COURT: Again, you have my thanks and you are certainly permitted to stay but not required. So, if you would like to leave, that's fine.

MR. DOUGLAS: Thank you, sir.

MR. BLAUDEAU: I just want to take a moment to thank the Court for its deliberations and thoughts on the motion to intervene. I appreciate the Court's comments and appreciate being excused at this moment. Thank you, sir.

THE COURT: Thank you all.

Mr. Thompson.

MR. THOMPSON: I'm sorry, Your Honor, my colleague, Monica Connell, will be handling the argument.

- J L M -

MS. CONNELL: Can you hear me?

THE COURT: I'm sorry about that, Ms. Connell.

MS. CONNELL: No problem. I'm plagued by sound problems. I will be handling this portion of the argument. Where we stand I think is somewhat in a better place after the Court's urging on February 7th. We managed to get the stipulation and order appointing Judge Sherwood as special master. So submission of outstanding discovery disputes can be focused and quickly resolved. But we are still in some trouble with regard to the NRA's discovery compliance. We have received more documents from the NRA. They continue to produce documents after the filing of this Order to Show Cause. In fact, we even received some more documents today just before this hearing. But we still have some serious disputes with regard to, particularly with regard to categories of documents that the NRA has not produced.

It has still not produced any privilege logs whatsoever. And privilege is a very important issue here because, Your Honor heard from the intervenors, the role of the NRA's counsel, Brewer, Counselors and Associates, is quite unusual here and complex. The NRA has, in our view, not entirely complied with the prompt review and production and/or service of privilege logs with regard to nonparty documents it was supposed to review for

privilege. That specifically relates to the Cox, Christopher Cox documents that Your Honor granted our motion to compel on. Those documents have largely been produced, but we haven't gotten a privilege log. And the documents we received were some documents that had been erroneously withheld from the NRA as an assertion of privilege. We haven't gotten the documents from Mr. Powell. At the December 10th status conference the Court ordered Mr. Powell and the NRA to quickly produce and prior to depositions. That in combination with the NRA's failure to produce, for example, Mr. Powell's personnel file and some other documents, caused us to have to adjourn Mr. Powell's deposition.

We also have ongoing NRA review of documents from the outside auditor Anderson, and production of privilege log has not occurred with regard to that. Although Anderson has referred us to the NRA's privilege log, the NRA has not given us a privilege log. Although they have indicated that for that particular privilege log they anticipate doing so by February 23rd.

So, I don't think that Your Honor, and I want to be quick because that first argument took a bit longer than we anticipated I think, I don't think that there is any issue that the NRA is not in compliance. It admits that it's still continuing to produce documents that are

key categories of documents it hasn't produced. It hasn't produced privilege logs. We just got the special master, Your Honor. I think what would make sense here, we don't want to drag this case out longer than need be, and we don't want to engage in endless fighting or arguments, but is to direct the NRA to certify completion of its document production, including service of privilege logs and the Cox, Powell and Anderson documents by a date certain, like February 28th or some other date that the NRA indicates it can actually comply by. And a date set by the special master extending the discovery deadlines in the scheduling or which is the document number 463 by three months from that date, to allow for resolution of pending discovery disputes and the depositions that are scheduled.

I just want to say very briefly, Your Honor, that, you know, in early November, even before that, the NRA proposed and asked for two months extension of discovery to permit its document production. We consented believing we would get those documents in time to complete disclosure, which is what we want to do, we don't want to keep moving back depositions and searching through document productions hoping that the documents we sought and believe were coming are going to be included. We want this production to come to an end. We think with a special master now it can.

- J L M -

So, I can address the NRA's discovery noncompliance, the prejudice we suffered as a result in detail for Your Honor. I can discuss the --

THE COURT: I think it's well said in the papers. So, just turning I guess to the NRA initially. It's pretty simple or straightforward as to what we're talking about now. It sounds like there are still documents coming in, which is not a shock to me. So we need to have an end day for that on both sides if there are any coming from the other side. But we have to have an end date and it has to be soon. Then we're going to need some time to finish things up, because you obviously have more to do.

What's the NRA's position as to -- I had in mind the, frankly, the same, the February in my mind to have an end date for everybody to certify that they are done with document production. Then move on with some reasonable extension of time to finish everything else.

MS. EISENBERG: Your Honor, the NRA has to date produced over one million, including ESI and category documents as well. While at the same time reviewing other productions for NRA privilege, Mr. Cox's and Mr. Powell's production.

So to answer your question directly, it's a little bit hard to estimate because it's not like all the

data resides in one place and that the review proceeds at the same rate. There are privilege calls that have to be made. There are different types of data. We don't know how much privilege hits you have until you run it. So I think that --

THE COURT: Let me make sure I understand that. You filed a brief opposing the extension of the discovery deadlines. So how does that square with what you're saying now?

MS. EISENBERG: Yes, Your Honor. The way that this squares with what I'm saying now is, that the Attorney General served exceedingly broad demands. Their demands consisted of 62 questions, the first of all refers to 55 that they enumerated in their investigation. Then they proceeded to demand a very granular search protocol. So there is no requirement under the CPLR for us to be, for the NRA to continue to be producing, yet we are because we are trying to be cooperative. But having produced what we already have in the investigation and then this action, and given the information that the Attorney General has from third parties, we are in substantial compliance. We think that the Attorney General is still receiving the documents and they seem to be happy about receiving them. But we don't think that that should be a reason to continue to postpone this case,

because we want this case to move forward and get resolved, including our counterclaims.

THE COURT: We have to postpone it. You just said that you still have things that need to be done. I assume that there are still depositions to be had. I recall reading somewhere that a lot of people have not been deposed yet.

Look, I get it, it's a big case and it's very important and I assume that a lot of the million documents that you talked about were produced in the investigation, right? I guess let's take it in two pieces, first of all. What the bid on the table is end of the month to finish whatever is still in process. Obviously if there are continuing disputes about scope or whatever, that's what Judge Sherwood is there for. But are you saying that it's not possible to complete whatever is still in process by the end of the month?

MS. EISENBERG: I know, Your Honor, to be safe I would like to ask for March 10th, again, with the reservation. I think that we've already substantially complied and they want to continue to receive documents and we're happy to turn them over. But I think that March 10th would be a safer date.

THE COURT: Okay. Well, no real basis to evaluate that. I'll say this, I'll extend it to

February 28th and then give you a 12 day extension to March 10th. So that you can assume that you already got an extension, if you know what I'm saying. So if it's March 10th, that's a real date and it's not going to be where we sort of March on from that. Barring anything extraordinary, what I'm saying is that the order should say, document discovery complete, certified by all parties as of March, by March 10th. I think that the three months to complete everything else.

Ms. Connell, just remind me, what exactly would be encompassed in the three months, just the rest of depositions?

MS. CONNELL: Yes, Your Honor. It would include, I think that it would give Judge Sherwood, who seems quite adept solving problems, but it would allow him to resolve some of it, including privilege issues. And from the -- not from the NRA, from the state's perspective, we have just shy of like, I think, 26 depositions to take. I believe other parties may want to take some depositions as well, but that's what needs to be completed. We have tried to take depositions where we can, but unfortunately have been prejudiceed by missing documents.

THE COURT: The number of depositions, I think that I recall seeing a number, if you can remind me.

- J L M -

MS. CONNELL: I believe that it was five. We were limited to 30 by the preliminary conference order and we're trying to stay under that number. But then I can give you examples how even the depositions that we tried to take and that we've taken so far, we've been prejudiceed by receiving documents in last January, early February that were relevant to the depositions we took.

THE COURT: You're going to take five more?

MS. CONNELL: No, we're going to take, I think that we have 26 more to take, Your Honor.

THE COURT: That's what I thought.

MS. CONNELL: That math isn't adding up, so I am going to say it's probably 25 left, excuse me.

THE COURT: How long do you think that you need? I don't know what discovery you're continuing to take in terms of deposition. What would your proposal be for how long?

MS. EISENBERG: Your Honor, we think a three month extension from the date that we are done is too long, given the context and how much time that the NYAG has had, and given that clearly many of these 25 or so depositions Ms. Connell just referenced are third parties who should not have been delayed until now.

So, obviously we look forward to our hearing on the 25th that relates to our counterclaims. We look

forward to taking discovery as to those. But my client's utmost desire is to proceed swiftly and to bring to resolution both the counterclaims and the claims as quickly as possible. So, we do think that the three month extension to just complete fact discovery is not appropriate. So we would ask for something in the vicinity of two months.

THE COURT: Anyone else want to weigh in?

MR. CORRELL: Your Honor, this is Mr. Correll. I've been engaged to represent Susan LaPierre who is the wife of Wayne LaPierre, in connection with a subpoena that the Attorney General served 20 days ago.

Ms. LaPierre's role was mainly fundraising, dealing with members and donors through something called The Women's Leadership Forum. So it raises serious issues under NAACP v. Alabama in terms of protecting the names and addresses of members and donors from disclosure to government entities.

I think that this presents special issues. So I would ask that we not be bound by the timeframe that's being imposed on the parties. She's a nonparty and I think that the most logical way to proceed is for the NRA to complete its production, since most of that material will be on NRA servers. Imposing a burden on a nonparty witness, who was a volunteer and is no longer a volunteer

for the NRA, would be inappropriate under the circumstances, especially given the fact that it may take quite a bit of time to identify documents and go through and redact all donor names and addresses.

So, I raise that as an issue now to seek guidance from the Court on that. But I would not want Ms. LaPierre to be squeezed unnecessarily conducting what might be duplicative and wasteful efforts to identify, redact and produce documents that are on NRA servers and that will either have been produced by the NRA or will be produced by the NRA or should have been requested by the AG from the NRA.

THE COURT: I guess maybe I wasn't as precise about, is March 10th the end for party discovery? Has there already been or is that an end for third-party discovery as well?

MS. CONNELL: Your Honor, I think that that should be an end for party discovery. We're happy to engage in, and already have engaged with Mr. Correll, with regard to not having to take discovery from Ms. LaPierre. I would take issue with the allegation that we just served a subpoena 20 days ago. I can discuss the history of what went into that service, but I don't want to burden the Court. But I do think that with regard to Ms. LaPierre, we're certainly willing to engage and discuss what she can

produce. We've asked her to identify information that she has that the NRA does not. This is something that the special master can get into whether -- but this type of difficulty and talking about the history of trying to get information from Mr. LaPierre or regarding Ms. LaPierre, would demonstrate why three months is reasonable so we're not back in front of you in two months asking for another extension.

THE COURT: So, the three months is going to encompass finishing the depositions and third-party discovery. So to Mr. Correll's point, the March 10th date does not apply to accelerate or change whatever the response time would be for the third-party subpoena.

MS. CONNELL: That's right, Your Honor, that's correct. It's really a matter of trying to get outstanding documents from the NRA to Mr. Powell to a certain extent, and there are some other demands outstanding still I think, but really that's for the parties. But there are some nonparty issues, like Ms. LaPierre, that will take a little while to sort out.

THE COURT: Anyone else?

MR. CORRELL: Your Honor, if I may just raise one other point. That the subpoena on Ms. LaPierre did raise the issue of whether or not the Attorney General should be required to advance reasonable expenses of

nonparty production. I would just like to get the Court's sense or guidance on how you would like to see that issue handled, or whether you would like us to raise that with Judge Sherwood?

THE COURT: I think that's fine to have Judge Sherwood deal with that whole issue.

MR. CORRELL: Thank you.

THE COURT: Mr. Farber, you had something?

MR. FARBER: Yes, Judge. So in terms of the proposed scheduling extension and the amount of time from Mr. Phillips' standpoint, we're in favor of moving this along as expeditiously as possible. But we're talking about doing a large number of depositions in a confined period of time, which we would like to accommodate. I would just like to suggest that the Court endorse what I think has been the practice of the parties here, which is to have a policy that the parties who are taking depositions make remote participation available for any party who wants to do so. Which particularly since a number of these are out of state, I think will go a long way towards facilitating, accomplishing all these depositions within the time period that's contemplated.

THE COURT: Look, I imagine that both Judge Sherwood and I would be flexible on those things and obviously hope that the parties will agree. People have

had to get very creative on doing depositions and to go dealing with how you do exhibits long distance and all of that. The short answer is, I'm sure that we can work out accommodations that make sense to get this done.

MR. FARBER: Thank you.

THE COURT: Mr. Mclish, you had something as well.

MR. MCLISH: You've heard reference to Mr. Powell's documents. There is an issue that will, if not addressed, prevent us from completing his document production by March 10th. You may recall that we, and this was discussed at the December 10th hearing, that we have a number of documents, mostly e-mails, in which Mr. Powell was e-mailing with a NRA lawyer. We have segregated those documents and have not reviewed them. Subsequent to the December 10th hearing we tried to proceed exactly in accordance with your guidance. What we did, took the documents and put them into two categories based on the metadata. The first category is documents that involve communications between Mr. Powell and a NRA lawyer and either no one else or only other NRA employees. So other NRA e-mail addresses. So in group category of documents is NRA only. We've taken those and we've given them to the NRA's counsel for them to make the privilege call on without reviewing them.

- J L M -

The second category are documents in which Mr. Powell was communicating at some point in the e-mail chain with a NRA lawyer, but there are also e-mail addresses in that chain that are outside the NRA. Those documents of which there are about 1500, we have proposed to do what we discussed at the December 10th hearing and have a walled off lawyer in our firm, who is not working on the case otherwise, former federal prosecutor, review those and make sure that nothing would be produced that is privileged to Mr. Powell or otherwise not appropriate for production, confidential, whatever. Then anything that is a close call on privilege that the NRA might have some argument for privilege, then we would give those to them.

The NRA has objected. We had a good discussion with them on January 24 where I thought that we made progress, but received word yesterday from NRA's counsel that they object and they are demanding that we produce all of the documents to them by today.

THE COURT: You mean instead of having it be done by your in-house person?

MR. MCLISH: Yes.

THE COURT: I already signed off on the approach that you described. And the NRA wants to move things forward, so I changed my mind on that. So your approach is what I authorized and it seems perfectly reasonable to

me and so proceed.

MR. MCLISH: Will do.

THE COURT: You have a month so for 1500 documents, you should be able to make it, one would hope.

MR. MCLISH: Yes, we've just been stymied by the lack of agreement by the NRA to go forward. But based on your direction, we will have that lawyer begin reviewing those documents and complete our production by March 10th.

THE COURT: Okay. Long day. Thank you everyone. I don't think that there -- is there anything else? I guess I would ask the parties to submit a proposed letter for signature just setting forth the revised schedule. I don't know what on the other end of that three month. I didn't give you the answer of what was going -- I had this very clear quasi-compromise.

The document date is March 10th and it's three months is the end. So I was going to give them until the end of February to do the documents that I will continue to roll them. And just have the three months period be, you know, all of March, April and May, starting from March 10th.

MS. CONNELL: Thank you, Your Honor.

THE COURT: No mathematical precision in the calculation. So just send me a proposed order and I will sign it. Good luck with Judge Sherwood for any things

that come up. But I think that March 10th should be enough time to finish up. Thank you all.

MS. EISENBERG: May I ask a question? We have an oral argument coming up on the 25th of February next week. Does Your Honor prefer to handle that oral argument remotely just like today's?

THE COURT: I'm here and, you know, I'm fine either way. If it is substantially more convenient, people are traveling and would rather do it remotely, that's fine. I have had some in-person arguments, including with you, so I'm flexible. Is there a consensus one way or the other?

MS. CONNELL: For the Attorney General's office I just found it, and this is no disrespect to your courtroom, but a little cumbersome with the shields around it and had to keep switching places. That seemed to me to interrupt and drag out the proceedings. But I'm happy to do what the Court wants.

THE COURT: Criticism of the Plexiglas will not be rebutted by me. Why don't we just assume it will be done the same way that we've done it today. Somebody feels extremely strongly about it? If there is no witnesses, it's just argument. I obviously prefer to see you all because I thought that makes for a better argument, but I'm not going to force it.

- J L M -

PROCEEDINGS

MS. EISENBERG: Thank you.

THE COURT: Okay, thank you all. Have a great rest of the week.

Jack, you want to give your -- you guys have ordered the transcript before. Jack is your guy this time. Jack, just for purposes of anybody reviewing this, because my decisions were separated out during the course of it, just when I start the decisions, just put decision on the top of the page, so it's broken up. Thanks all. Have a good day.

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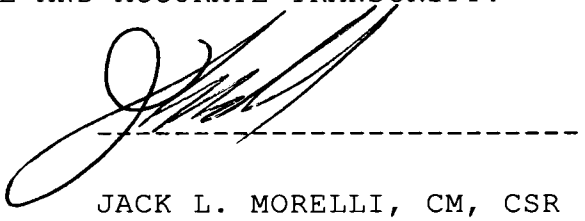

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- J L M -