SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: TRIAL TERM PART 3

- X

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.

- X

Index No. 451625/2020

September 29, 2022
60 Centre Street
New York, New York 10007

B E F O R E: THE HONORABLE JOEL M. COHEN, Justice

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THE COURT: Good afternoon.

Let's start with appearances beginning with the plaintiff.

MR. SHIFFMAN: Good afternoon, your Honor.

My name is Steven Shiffman. I am appearing for the plaintiff, the New York State Attorney General's Office. I am here today with Monica Connell, Emily Stern and Yael Fuchs.

THE COURT: Good afternoon.

Defendants, in whatever order you choose.

MS. EISENBERG: Good afternoon, your Honor.

Svetlana Eisenberg, Brewer, Attorneys and Counselors, on behalf of the National Rifle Association of America. I am joined by my colleagues, Josh Dillon and David Umansky.

THE COURT: Again, can you turn the camera on -- not the camera, the microphone?

Thank you.

MR. CORRELL: Good afternoon, your Honor.

Kent Correll for Wayne LaPierre.

MR. FLEMING: Good afternoon, your Honor.

Your Honor, William Fleming, Gage Spencer & Fleming, for the defendant John Frazer.

MR. FARBER: Good afternoon, your Honor.

Seth Farber from Winston & Strawn for

Mr. Phillips.

MR. McLISH: Your Honor, this is Thomas McLish for Joshua Powell.

THE COURT: Okay. So we have several motions today. I thought we would start briefly with motion 27 to review the Special Referee's decision. I was thinking about dealing with that on the papers, but since the briefing was before my decision on what I will call the companion motion, and the parties did not address my decision because it hadn't happened yet, I thought I would give you a chance to argue whether I should do something other than what I did, and I think it may be motion number 26, but whatever the discovery motion was.

So let me start with, it's the NRA's motion, so Ms. Eisenberg. Would you mind doing it over there (indicating)?

MS. EISENBERG: It would be my pleasure.

Your Honor, the documents at issue are protected not only by the attorney-client privilege, but also as attorney work product and as trial preparation materials.

Judge Sherwood in his ruling made it pretty clear that his ruling was only based on his consideration of the attorney-client privilege issue, and the standard according to the case law is that his opinion has to be based on law and it has to be supported by the facts. It is the NRA's

position that the attorney work product claim is quite strong, and given the Confidentiality Agreement with Aronson who acted as a tax preparer and as an auditor, the NRA had a reasonable expectation that the materials shared with Aronson would not be made available to the NRA's adversary.

THE COURT: By definition an auditor is an independent accountant, it's not part of, you know, the team as it were for a litigation. Isn't that inconsistent with -- you know, that's the whole point, when you share something with your independent auditor, that seems inconsistent to me then on the other hand saying it's this superseding trial preparation privilege.

MS. EISENBERG: First, there are many documents at issue that were shared with the team that was on the tax preparation side, not on the audit side. So for some documents even if one were to be skeptical of this position, the skepticism doesn't apply to a large group of documents because the individuals with whom it was shared were on the tax preparation team, not the audit team.

In addition, I understand your question, and I think it's a fair question, but what we have to consider is that the agreement very clearly spells out the confidentiality obligations of the auditor, and while the auditor clearly is a third party, there was no reason to expect they would share it with our adversary, that has

never happened, we had no reason to believe it would, and we had the agreement that obligated them not to.

THE COURT: And what's the basis for the underlying assertion of privilege with respect to these documents?

MS. EISENBERG: It is conversations between and among lawyers for the NRA in-house and/or outside depending on the communication where they are determining, applying their skill sets as Rule 3101 refers, and they are applying the law, determining strategy, preparing drafts, and otherwise exercising their skills as lawyers. Whether it's in connection with the language on a schedule --

THE COURT: Tax lawyers or as litigators?

MS. EISENBERG: I think that it depends on --

THE COURT: You don't get a trial preparation privilege as a tax lawyer, do you?

MS. EISENBERG: You still get the attorney work product privilege which is separate and absolute in New York.

THE COURT: Attorney work product is in connection with litigation, right?

MS. EISENBERG: No, your Honor, in New York it's attorney work product, period, it does not have to be in connection with litigation.

THE COURT: What distinguishes attorney work

product from attorney-client communications then?

MS. EISENBERG: Attorney-client communication is a client communicating with an attorney, communicating confidential information to inform legal voice or provide legal advice.

THE COURT: So when an attorney provides legal advice, you're saying that it's also at the same time attorney work product also?

MS. EISENBERG: Yes, I would say that.

THE COURT: So the same exact thing, all the normal waiver rules under attorney-client privilege, you would say that in each case whatever an attorney prepares something, whether it's a legal memorandum or whatever, it can share it with whoever he or she wants, and it's subject to a different waiver principle than any other attorney-client piece of work product?

MS. EISENBERG: Yes, absolutely, your Honor. I think that we assess each privilege one by one.

THE COURT: I agree with that, but typically, maybe not only, but typically the 3101 type of material is given somewhat special treatment because of the adversary process where there's are some things where you shouldn't have to share with the person on the other side of the versus sign in a lawsuit, but you seem to be expanding that to anything a lawyer writes about anything which seems to be

quite a lot, of bit of an expansion.

MS. EISENBERG: Right, that I think that's clearly codified in 3101 and the cases interpreting it, and it's different from the federal jurisprudence on that topic, it's absolute, number one, and it simply talks about attorneys applying their skill sets in rendering legal advice or preparing strategy whether in connection with a trial or otherwise.

THE COURT: Which section of 3101 is this?

MS. EISENBERG: I have to look it up. I apologize, your Honor.

THE COURT: 3101(d), right?

MS. EISENBERG: Yes.

THE COURT: Which is called trial preparation.

MS. EISENBERG: No, there's one -- there's one above (d).

THE COURT: (c) attorney work product; the work product of an attorney shall not be obtainable?

MS. EISENBERG: Yes, thank you, your Honor.

And then absolute privilege which is a distinction from federal jurisprudence in this area where it could be overcome by a showing of substantial need, not so in New York.

THE COURT: Okay.

Let me hear from the State.

MS. FUCHS: Thank you, your Honor.

My name is Yael Fuchs. I am an Assistant Attorney General representing the Attorney General's Office.

As you noted, your Honor, you have ruled in motion sequence 26 on a substantially identical issue involving documents withheld in their entirety, and there's no reason for a different result with respect to these redacted documents.

The Special Master did a thorough review, he reviewed the documents at issue in camera, he created an itemized chart, and provided document-by-document explanations of his decisions. And in his order, which is available at docket number 663, he found that Aronson was a non-privileged third party, that the NRA and its outside counsel took steps to exclude Aronson from privileged communications, and we detailed those numerous steps in our briefing in motion sequence 26. They explicitly excluded Aronson, and then there came a point in time when they start intentionally and repeatedly sharing those communications with Aronson, in many cases both the audit partner and the tax partner. That's what the Special Master found, and that was correct.

In the interim and at subsequent briefing the NRA has not offered any evidence or argument to undercut those conclusions. The NRA has not and cannot dispute the fact

that the NRA and its counsel did not consider Aronson to be covered by any privilege, and they have not demonstrated that Aronson was involved in the provision [sic] of legal advice. Again, because they weren't, the NRA, when they forwarded them those communications, the privilege was waived.

If I can address the Confidentiality Agreement --

THE COURT: Look, their argument, I think it is that, they won't concede it, but they would say that my prior ruling is correct with respect to attorney-client privilege, but they assert a substantially broader and much less easily waivable work product privilege with respect to the same documents so that as long as they, this third party, is not going to share it with their adversaries, they say they can share with whoever they want.

MS. FUCHS: The work product privilege is not that broad, in fact, the law says the privilege should be naturally construed, and any privilege that attached was waived when the client acted in a manner inconsistent with a desire to maintain confidentiality. And there the Confidentiality Agreement is not dispositive because then you are basically creating an auditor-client privilege, an accountant-client privilege which New York law clearly does not have. You can't create that privilege simply by entering into a Confidentiality Agreement. That would

basically be an end run around New York law that excludes having an auditor- or accountant-client privilege.

As we briefed, the cases say further, there's no waiver, there needs to be a common interest with the party to whom the material was disclosed, and I think it's in the Medinol case.

THE COURT: We are still talking about work product?

MS. FUCHS: Absolutely.

The Court in the Medinol case was very clear, as you pointed you out, that auditors do not share and cannot share common interests with the company that they audit. Similarly with respect to the tax preparers, there was not a legal common interest here.

They also argue in the alternative that the work product privilege extends to accountants as a sort of agency principle when the accountant is adjunct to the lawyers strategic thought process. That's just totally inapposite on the facts here where, again, Aronson was explicitly excluded from these deliberations.

And, your Honor, if I may, I think that the facts there are very persuasive. We took the deposition of Greg Plotts, Aronson's corporate representative, so not just for the audit side, but the corporate representative in general, and he testified that he could not recall any occasion where

attorneys from the Brewer firm asked him or Aronson for their opinion on accounting matters. He confirmed that the NRA refused on privilege grounds to provide Aronson with information regarding what the Brewer firm was doing with respect to the Attorney General's action or regarding the calculation of excess benefit transactions.

So, again, this seems to be a classic sword and shield or having your cake and eating it too. You can't in real time demonstrate that you don't consider this party to be within the circle of privilege, and then after your people forward them and share these communications then assert a privilege.

THE COURT: I think I have it.

Ms. Eisenberg, anything further?

MS. EISENBERG: Yes, very quickly, your Honor.

I think Ms. Fuchs' metaphors assume that the NRA always acts through the one person, but that's not the case. Even though one person might have been careful not to disclose information on the theory that a court might one day find waiver, another person who was not, who is on a different side of the organization subjectively believed that the recipient would maintain the information confidential, and just because an entity takes steps to be careful does not concede that there was waiver.

THE COURT: Okay.

I'm going to deny the motion to review the Special Master's order or confirm, I will confirm the Special Master's order. I think the defendant's view of the scope of the privilege is unreasonably broad, and its view of the waiver of such a privilege is unreasonably narrow, so for the same reasons as was the case with the unredacted version or documents subject to essentially the same motion, I agree with the Special Master that any privilege attaching to the documents was waived, and I'm frankly kind of dubious about the privilege to begin with to the extent that it's this sort of separate standing work product privilege as applied to these auditors and accountants. So that motion is denied.

Let's move on to the motions to dismiss, the third round of these. So, Ms. Eisenberg, since you're standing there ready to go, I will let you start.

MS. EISENBERG: Certainly, your Honor. I am prepared to answer questions you might have, but I can start with a general outline of our argument if that pleases the Court.

The issue the NRA brings to your Honor is in relation to a newly asserted claim. The first cause of action in the Second Amended Complaint is premised solely on one statutory provision in EPTL 8-1.4(m) and seeks a wide variety of injunctive relief including the appointment of a

special monitor and a governance expert, and this is what the NRA's motion is about.

The dispute here really is about a separation of powers because what the New York Attorney General is doing is asserting a claim pursuant to a statute that does not give rise to a claim seeking a remedy that the statute does not provide for, and, therefore, is doing something that the Legislature did not empower her to do. So with the motion to dismiss she now asks you, your Honor, to create a cause of action and to create a remedy that the Legislature after considered judgment in a comprehensive enforcement scheme did not give the Attorney General. So this breaks down into three or four arguments before you and you get to the First Amendment point, but the overarching theme is separation of powers.

The first point is that there's no cause of action that is created by the second part of the first sentence of EPTL 8-1.4. I think opinion of the Appellate Division in the Grasso case is very instructive, it has a lot of useful guidance that applies here. The first thing that the Court says there is that where you have a situation where the Legislature has not been silent on an area, you have to assume that what's admitted is excluded.

So, for example, here we have multiple provisions within the EPTL where the government is given expressly

causes of action and remedies. For example, in 8-1.4(m) the government is permitted to seek enforcement of a subpoena if the subpoena is disobeyed, it can also institute appropriate proceedings to seek compliance with Sections D, E, F and G which actually impose obligations, but if you focus on the language of the first sentence of that section, it doesn't say the Trustee shall, it doesn't say assets shall be properly administered, it doesn't talk about a duty, it doesn't talk about an obligation, it doesn't speak to terms of a proscription. In addition, what the statutory provision says is that the Attorney General may institute appropriate proceedings, and I believe that the word appropriate proceedings is very relevant.

THE COURT: Doesn't the same sentence say that "The Attorney General may institute appropriate proceedings to secure compliance with this section and to secure the proper administration of any trust, corporation or other relationship to which this section applies."

The second half of that sentence which has been relied on by courts, doesn't that make clear that there is a broader mandate here, and that's, the legislative history seems to suggest, that was the point, was to give the Attorney General more power to oversee these kinds of institutions?

MS. EISENBERG: I disagree, your Honor. If you

look at 8-1.4 in totality it provides a number of mechanisms for the Attorney General to obtain compliance with that section. It can or she can impose fines for failure to register, she can, like I said, enforce subpoenas, and there are other --

THE COURT: That's the first part of the sentence, "secure compliance with this section," but what about the second part which is, "and to secure the proper administration of any trust?"

MS. EISENBERG: Right, so a corporation would have a relationship to which this section applies. I think that the word appropriate means that this is not a sentence that gives rise to a cause of action, and the terminology that's used is so vague. You have to compare it -- sorry, go ahead -- you have to compare it against all the other provisions in the EPTL and the sister statute, N-PCL, where the Legislature went to great extent to say specifically the Attorney General may institute proceedings to restrain, annul, dissolve, remove, pick your remedy, and the Legislature did not use that language here.

The Attorney General represents to you in her opposition that it is well settled that that statutory provision creates a cause of action. We beg to differ. None of the cases cited by the Attorney General, Trump I Trump II, Lower Esopus, your Honor's decision earlier, or

the Abrams case "held that that provision gives rise to a cause of action." If you look at either one of those decisions, neither defendant argued that the provision does not give rise to a cause of action.

THE COURT: I did sustain a claim under this provision in this case to your co-defendants.

MS. EISENBERG: Right, but that was not their argument, their argument was I'm not a trustee or something else, they didn't say the provision does not give rise to a cause of action. This is an issue of first impression before your Honor and that's not something you have ruled on.

THE COURT: Is it an issue of first impression for everyone or just me?

MS. EISENBERG: Everyone, your Honor.

THE COURT: No one has ever made the argument that the Attorney General can't use this provision to oversee nonprofits?

MS. EISENBERG: Correct, and they have done it very rarely, they have only cited a few cases where that's been invoked, and, frankly the remedy that they typically seek is not as draconian as here so I think, empirically speaking, perhaps that explains why it would be an issue of first impression.

The bottom line is that, and the NYAG concedes it,

that there's not a single case where we have court precedent where a court imposes a monitor over the objection of a party.

That leads me to my second point which is even if you were to rule, your Honor, that that sentence does give rise to a cause of action which is a separate issue, separately we would say that it certainly doesn't create a remedy of appointing a compliance monitor or even an expert that the NYAG seeks. Why is that?

We go back to my separation of powers point and the statement in the Grasso case that where the Legislature has not been silent on a topic, you have to assume that what's admitted is excluded, and that goes back to what I said earlier. This statute provides for a wide and granular range of remedies, to dissolve, annul, remove, rescind, void, restrain, et cetera, et cetera. And, in fact, there is a whole article in the N-PCL devoted to receiverships, and it talks about the circumstances in which a receiver can be appointed, their presumptive duration of their term, circumstances under which they can be removed, their duties, their responsibilities, their authority, et cetera, et cetera.

So given --

THE COURT: Is a motion to dismiss the right vehicle to go at the specific remedy? I mean, typically

you're going at the claim itself, which is the first part of your argument, but isn't it premature to start getting into what the possible remedies might be?

MS. EISENBERG: Not here, your Honor, because we do have a statutory scheme that comprehensively defines remedies. There are multiple, dozens of provisions that specifically say if you do this, then this will happen, you can be annulled, you can be dissolved, you can be removed as an officer, you can be enjoined from soliciting, but the statute nowhere says that appointment of a compliance monitor is a remedy that the Legislature contemplated. I think that's really important because, and, again, Grasso tells us that we have to assume that the Legislature may consider judgments, and they made --

THE COURT: Grasso was really about whether you can be found to have violated the statute with a lower standard of culpability than the statute provides. Remedies have always been subject to -- the general principle in courts especially in fashioning a remedy to resolve a violation should have a fair amount of flexibility, and I think that the notion that there's some rigid list of things that a Court can do if it finds a violation A, it should be able to fashion a remedy that addresses whatever that violation was, and it may be narrower than what the statute talks about. Surely you don't think that the only thing I

can do is either annul or not annul, I mean, there's got to be something in between.

I think we are way passed, we are way beyond in the sense that I have not concluded that anybody did anything at that point, but it seems early in the case to say even if you find all this happened, you can't do this kind of thing to ensure compliance going forward. There's lots of situations where courts are given lots of flexibility to meet the harm that they find especially in an equitable proceeding.

MS. EISENBERG: Your Honor, I agree with you that in Grasso it was about the cause of action, and I agree -- well, and I believe that Grasso really helps us on the first point because what the Court said, as you may recall, is you have to look at what are the evidentiary pieces that will be required for the plaintiff to prove it up, right, and they said, well, Mr. Grasso, they are trying to disgorge his salary just because it was unreasonable without making the government show that it was also under the circumstances where he knew it was illegal. And I think here it's particularly salient as well because what is proper administration? What is the jury instruction going to say?

If you look at other provisions that are in play in this case, you have to have a related party, you have to have a transaction, there cannot be an exception --

THE COURT: Is this a jury trial claim?

MS. EISENBERG: Yes, your Honor, I mean, it's not a claim, so the statute does not provide --

THE COURT: If it's a claim, is it a jury trial?

MS. EISENBERG: Yes, absolutely, your Honor.

THE COURT: Absolutely?

MS. EISENBERG: Well, I think that it's a factual issue about proper administration, but I think that it's sort of really difficult to answer that question because I think that's actually another reason why the Court did not create a cause of action there because if you look at 102 of the N-PCL it says here's 12 to 20 things that the NYAG can do, and it says and all of these will be tried by a jury. So in the EPTL sentence that the Attorney General cites there is not a similar verbiage or even a discussion about whether it would be a jury claim or a bench trial.

If I may go back to your question about the distinction between remedy and causes of action, I think that the analogy from Grasso applies as well because here we have a statute that not only enumerates various causes of action, but it actually enumerates a lot of different remedies. It specifically says when someone can be dissolved, when someone can be annulled, restrained from doing something.

THE COURT: You are talking about this statute,

the EPTL?

MS. EISENBERG: Yes, I am talking about the EPTL, and the sister statute, the N-PCL which I submit, your Honor, is part of the comprehensive enforcements because they cross-refer to each other, and the legislative history makes that clear. In fact, they have parallel sister provisions, I would submit, on whistleblower and related-party issues.

So because we have a statutory scheme where the Legislature did a lot of work at various points in the last century and this century to specify various remedies, they made considered judgments, and just like in Grasso the Court said, when you have a person who signs up to be a director or an officer, they do it subject to the understanding that their salary will not be clawed back because someone finds it unreasonable.

So here you have also a corporation that chose to operate in New York or be incorporated in New York and continue to be incorporated in New York under the assumption that you have remedies that are stipulated in the statute or enumerated in the statute, you have dissolution, you have annulment, you have all these other remedies, but you don't have the new remedy that the Attorney General is trying to invent for the appointment of a compliance monitor if assets were administered improperly which is such an undefined and

vague standard.

The third and fourth arguments kind of go together. Basically the statute talks about one being a trustee in one of two ways. The first way is if you, if you are trusted with assets, and you are holding and administering them, but there's a very well established rule of statutory construction that unless a statute specifically says that the Legislature intended for the statute to apply extraterritorially the judge should not apply it in that manner.

So here we happen to have a defendant who incorporated in New York, but whose assets are not located in New York for the most part, and as the Attorney General, as the plaintiff the Attorney General doesn't even bother asserting in her complaint that the NRA holds and administers assets in New York even though she says many other things happen in New York, that she does not actually allege.

THE COURT: It would be awfully easy to evade any oversight as a New York not-for-profit corporation if all you had to do was keep your assets outside the state. I mean, that's kind of what you are saying, is that as long as they keep their assets outside the state, then the Attorney General is essentially powerless to exercise oversight over how they deal with their donations and operate their

business, but that seems inconsistent with the statutory scheme where if you are, for reasons of your own choice, a New York not-for-profit corporation, the New York Attorney General has authority over you.

MS. EISENBERG: Well, your Honor, I think that's exactly why the Legislature could have made the reasoned judgment that the statute should expressly say that it applies to assets administered allegedly improperly wherever they are held across the nation or across the world, but the statute does not say that.

THE COURT: So if you had a New York based charity that was ripping people off all over the country and the world the Attorney General would just have to let that happen?

MS. EISENBERG: Not at all, the Attorney General can pursue the officers and directors, it can seek to dissolve the corporation, it can seek to annul the corporation, it can seek to restrain the corporation from doing what's illegal. The Attorney General at her disposal has a lot of different remedies that aren't tied to the assets. This one happens to be tied to the assets.

THE COURT: So a New York -- again, following the money is an important part, and, again, I am not saying this is this case, but the Attorney General, one of her jobs is to oversee charities that are authorized under New York law,

and following the money is an important part of that. The way you would read this statute I can follow the money only until I get to the George Washington Bridge and then I have to stop.

MS. EISENBERG: Well, your Honor, I think there are lots of monetary remedies like disgorgement or restitution or even punitive damages where you go to a director, an officer, and you say you breached your duties, and you will be liable or you must return the monies. Here the remedy is worded in terms of alleged, continued, improper administration of assets, so it's really qualitatively different.

THE COURT: But you would say, you would add the words assets if you keep them in New York. So if you take donations in from all over the world, house them in an account in New Jersey, then the New York Attorney General can't get at those even if you are misusing them? Again, I am not saying this is the NRA, but just in principle, any nonprofit under her jurisdiction.

MS. EISENBERG: Well, she is not trying to get those assets, she's trying to instill a program to oversee them through a compliance --

THE COURT: Which is lesser. Rather than seizing them, what she is saying is if after a long trial, and far from where we are today, the conclusion is that this is an

entity that, you know, again, we are hypothesizing, is so far off the rails that it can't regulate itself, it can't monitor itself, that as a remedy short of dissolution we can't have someone watch over it for a while, that seems like kind of an extreme position, that she doesn't have the ability to seek a remedy that would permit a court to let the organization continue, but just have oversight at a more direct level.

Now, again, I'm not saying that this is what I order them to do or whether I would do it or not, but you are saying that if the assets are outside the state, then the Attorney General who has statutory authority over this entity, and this Court which has authority over actions by the Attorney General is kind of hamstrung by where the assets just happen to be which in the current economy seems awfully narrow.

MS. EISENBERG: I think I have a really good answer to that, your Honor. The NRA is the victim to the extent that people are alleged to have done bad things to the NRA, they are alleged to have taken money away from the NRA. So the NRA is not -- the NYAG is not seeking damages from the NRA. So, in fact, I am not aware of a single provision in the EPTL, N-PCL, the Executive Law where a victim corporation is being asked to pay damages because that would be --

THE COURT: That's not what this is. This is, you know, having a monitor, the company runs itself, but if they are able to prove some systemic problems where, you know, you can't trust the managers who are there to operate it, again, this is all hypothetical because we are off into the future, you are saying that they don't even have the ability to ask for and I don't have the ability to grant the ability to say for a period of time since we have found this systemic problem, I have no choice but to either get rid of the whole thing or to just let it be run by the same people or their designees and just hope for the best. They're suggesting, it seems like, you know, again, it's a very muscular kind of remedy, I get it, but I'm still having trouble with the idea that the Court does not have the ability if the appropriate facts are proven to say, well, what we need to do is to have oversight, let it run itself, but with oversight.

So I think the thing I'm uncomfortable with is that at a very early stage of the case before any facts have been proven you're saying that I have to limit the scope of remedies, and then this particular point is that even if I were to consider a remedy, any assets that are outside of New York would have to be outside the scope of what I could do. With an entity like this, that would leave the Attorney General and I to be awfully weak.

MS. EISENBERG: Your Honor, I think this hypothetical, also because that cause of action does not exist, they are trying to ask you to read it into the statute, and I think it's reasonable to suspect that if the Legislature had made the reasoned judgment that a monitorship is a remedy that's appropriate, they probably would have said that it doesn't matter where the assets are located, and then you could apply it extraterritorially, but that's not what the Legislature here did. I think the problem is the fact that the cause of action does not even exist in the first place.

I want to pick up on something else you said, you know, don't I have the power to do this or don't I have the power to do that? Well, I think that really runs into the Grasso problem because again the Legislature very clearly defined remedies that the Attorney General can seek or the Court can grant. In fact, if you look at the N-PCL provision for related-party transactions it says you can void, rescind, enjoin related-party transactions or you can even seek remedies in law or equity.

So, again, the Legislature knew how to say you can do more if appropriate facts require additional action, but that certainly is not the language that's used in --

THE COURT: That's certainly true as to conduct. They were saying you can't find somebody who runs one of

these entities liable for something that wouldn't rise to the statutory level of culpability. That's the actual holding in Grasso. Grasso does not mean that the courts have no power outside the four walls of the statute in terms of remedy, at least I didn't see that in that case.

MS. EISENBERG: Well, I agree, it does not say just because it's not expressly a remedy, it's not a remedy, period, it didn't reach that question, but it said to the extent what the government is seeking here is inconsistent, that certainly is off the table. And I submit that it's inconsistent here because the remedies that the Legislature prescribed are dissolution, annulment or much lesser remedies, and doesn't talk about monitorships even though it talks about receiverships which is not being sought here. So I think it's inconsistent and incompatible with the menu of remedies that the Legislature went to great length to specify.

THE COURT: Receivership is listed as one of the remedies they have under the statute or not?

MS. EISENBERG: Yes, it is. There's an article in the N-PCL, Article 11, that tells us not only the circumstances under which a receiver can be appointed, but how long they will serve, when they might be removed, what their duties are, et cetera, et cetera.

THE COURT: This is less restrictive than that,

but you think it is still not appropriate because it's either receivership or nothing?

MS. EISENBERG: Well, the statute says you can seek to dissolve, you can seek to impose a receiver, you can seek to enjoin from soliciting in New York, and a bunch of other things, but the point is that the statute specifies what they are and does not talk about monitorships.

I certainly would disagree with the premise that monitorships are qualitatively less intrusive, I think it really all depends on circumstances. If you talk about a mortgage foreclosure case where you have a receiver for rent appointed who collects rents for a couple of months, I think you can't say that that is more invasive than what is being sought here.

THE COURT: A receivership could also be someone running the entire organization.

MS. EISENBERG: It could be, but it depends on the facts and circumstances. Here, suffice it to say, the Legislature thought about the remedies appropriate and did not deem monitorships appropriate.

THE COURT: Let's hear from the individual defendants and then we will have the State respond.

MR. CORRELL: Good afternoon, your Honor.

Kent Correll for Wayne LaPierre.

I would like to reserve five minutes for rebuttal,

if I may.

I wanted to start by just sort of setting the table by saying I view this as a question of power, a question of authority, and that is an issue that both the Appellate Division First Department and the Court of Appeals have addressed. They put quite a lot of thought and time into it.

I wanted to start by directing your attention to People v. Grasso, 42 A.D.3d 126, where the Court did address exactly the issue you talking about which is remedial choices, whether judges get to make them or the Legislature gets to make them or the Attorney General gets to make them.

At page 137 -- actually, I will back up a little bit. The Court frames the issue, he said, "The narrower issue that must be resolved," and this is with regard to whether the Attorney General has any authority to bring causes of action against directors and officers of not-for-profit corporations other than the causes of action the Legislature expressly authorized the Attorney General to bring, so this issue is narrower than the issue you were just discussing, this relates to actions against directors, officers and key persons which has a specific provision with a specific subparagraph 720(b) that explicitly codifies the authority of the Attorney General with respect to these actions. It says that an action may be brought for the

relief provided in Section 720 and paragraph A of Section 719. I submit that that language should be interpreted to limit the authority of the Attorney General with respect to bringing actions against directors, officers and key persons of not-for-profit corporations.

Let me read you what I wanted to read to you from the People v. Grasso opinion. It says, there are talking about Mark G. v. Sabol, a Court of Appeals case, 93 N.Y.2d 720, where they said in Mark G. v. Sabol the Court rejected the plaintiff's claim for money damages, this is under Social Services Law, it should be recognized, but it said in explaining the conclusion that recognizing such a cause of action "would not be consistent with the legislative scheme." The Court wrote, "The Legislature specifically considered and expressly provided for enforcement mechanisms. The provisions of this statute were enacted as the comprehensive means by which the statute accomplishes its objectives. Given this background it would be inappropriate for us to find another enforcement mechanism beyond the statute's already comprehensive scheme."

Now I don't think the Legislature made a mistake in enacting this comprehensive scheme or that they didn't think about the relief that they would allow the Attorney General to seek. It's all the relief the Attorney General needs to do its job, to do his or her job, and I think that

we have to respect the policy making authority of the Legislature and not tread on it.

Looking at it another way, the Attorney General cannot rewrite a statute nor can this Court, nor can the Court rewrite it under the guise of interpreting it and applying it. If the mandate from the Legislature is clear, if the boundaries of the Attorney General's authority are clear, then the Attorney General may not reach beyond that authority.

THE COURT: Counsel, that sounds an awful lot like a motion to reargue or renew the motion to dismiss you made last time.

MR. CORRELL: It's not, your Honor, and the reason is the complaint changed.

THE COURT: The complaint did not change with respect to your clients.

MR. CORRELL: It did, your Honor, with respect, it changed in the sense that they are now asking for a monitor for the top executive of a 5 million person organization that is engaged in constitutionally protected advocacy in a case in which the Attorney General has already announced that she wants to destroy the entity, and --

THE COURT: But that's relief against the entity, not against your client.

MR. CORRELL: Well, it would affect my client

dramatically unless they are willing to concede that they are not going to monitor my client and any communications he may have with members or donors which is also constitutionally protected activity.

I can't envision a monitor that would not infringe upon his ability to function the way he normally functions which is with a high degree of confidentiality precisely because of a concern --

THE COURT: Do you have any cases where an employee of a company has standing to challenge the imposition of a monitor on the organization?

MR. CORRELL: I can't think of one off the top of my head --

THE COURT: You either work there or you don't. If you work there you are governed by whatever monitor the law applies. I don't know that as an employee or officer you have any -- that seems like the NRA's argument, not your client's.

MR. CORRELL: I am thinking back to the '60s and '70s where unions were being confronted with monitors. I know the unions, a lot of them, the members of unions were opposing appointments of monitors back then.

The fact is that the appointment of a monitor is such a rare thing in not-for-profit corporations, I am not aware of it ever happening before so if it's never happened

before it's not surprising that there wouldn't be a case in which, you know, the issue of standing applies.

THE COURT: The cause of action in which this is sought is not a cause of action against your client, right?

MR. CORRELL: It's characterized as a cause of action against the NRA, but it's based on exactly the same provision, EPTL 8-1.4, on which the Attorney General bases a cause of action against my client. If you look to the prayer for relief you will see that the first three paragraphs of their prayer for relief asks for exactly the same relief against my client that they are asking for against the NRA.

So, yes, I mean, if you want, if you don't want to look passed the label, then they are right, but if you look passed the label to the reality of what they are seeking, they are seeking a judgment against my client requiring him to submit to a monitor and to what they characterize as governance reforms, but it really just interferes with his ability to do his job the way his members want him to do it and the way his board wants him to do it.

So it's profoundly changed, it's profoundly changed the complaint, it's introduced a dangerous and, I would argue, unconstitutional new element where you have the Attorney General of the State trying to interfere with the operation of a not-for-profit organization.

That happened in the '50s in NAACP v. Alabama. The Attorney General of the State of Alabama wanted to try to do what he could to disrupt the NAACP. He said you have got to give me your member list if you want to continue to operate in my state. They said, no, and they went to the Supreme Court. The Supreme Court said, no, you can't do that, you can't interfere with an organization like this because they are engaged in free speech, we respect that, and we will protect that.

THE COURT: Again, the difficulty I have with some of these arguments is that you can't really assess the remedy without knowing what the fact findings are that give rise to the remedy because that's the point of a remedy, but if the organization is otherwise entirely fine, but there is a major problem in the cash management, let's make something narrow up, the cash management of the organization is just a mess, and the people who are in charge of it don't know what they are doing, and the only way to get a handle on this is to put somebody else in charge of cash management, literally just the accounting and the like, you're saying that there's no way for a court to say, you know, with donor funds being, you know, lost because of just simple cash management problems, that there's no way to address that?

MR. CORRELL: There are many ways to address it: Remove the cash -- sue the corporation seeking removal of

the cash manager, that's one way. Ask for -- sue under 720(a)(1) and ask for a judgment to compel the cash manager to account for his official conduct, give you a report of what he is doing, explain what he is doing, why is he doing this, how can it be done differently.

THE COURT: So in that context a court could not say because this was such a serious problem I would like reports, I would like there to be a reporting for some period of time to make sure that whoever is taking over is doing, is not repeating the same mistakes, you're saying that there's no way for a court to do that, you just have to hope for the best with the next person?

MR. CORRELL: I am not saying that at all, no. EPTL 8-1.4 gives the Attorney General the ability to serve subpoenas, and to ask people questions, and compel compliance. If you want to know what someone is doing, just hit them with a subpoena and you will find out, and then if you find out they are doing something they shouldn't do, there are other remedies.

What I am saying is that they are trying to expand a narrow set of remedies or set of relief that allow them to do their job as supervisors to really sort of, you know, camp out at an organization, become a government monitor or conduct surveillance, and it's highly sensitive in an organization like this.

I would like to read one other thing which I think goes right to this point. This is again the Appellate Division, Justice McGuire writing in Grasso. He said, "A due respect for the competence of the Legislature requires us to conclude that the many remedial choices it made were considered choices." It cites Middlesex County Sewage Authority v. National Sea Clammers Association, a famous case in the U.S. Supreme Court, 53 U.S.115 [1981], saying, "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate."

Now the word appropriate is important. It appears in the EPTL, it says you can bring appropriate proceedings. If the Legislature has decided that it has provided precisely the remedies it considers appropriate in an action against a director, officer or key person, then they can't use EPTL to circumvent that statute, they are just going in the back door looking for relief that they are not, that's not provided in 720 and that the Legislature did not want to be available in an action against directors, officers and key persons.

And, you know, that's what the, rightly or wrongly, that's what the Legislature said and did. It's right in my view because the Legislature has struggled with

the balance of making a vital, vibrant, competitive nonprofit sector where you encourage people to come and serve. If you make their, if you provide no certainty as to their liability, open-ended relief, no insurance company is going to underwrite D&O in New York or if they do it will be at a prohibitive price, and you would have to be crazy to go to work for a New York not-for-profit corporation not knowing what a court might decide in terms of what the remedy is.

Let's look at some of the remedies they are asking for. Lifetime ban on nonprofit service for my client. Holy cow! Really? A disgorgement of all the compensation he earned over 30 years. Really? Do you think the Legislature wanted that? Damages. No, they didn't authorize damages. The word restitution does not appear in 720, damages does not appear in 720, removal does not appear in 720, monitor does not, governance reform doesn't.

THE COURT: What would be the remedy for a hypothetical manager who directed corporate funds to him or herself?

MR. CORRELL: It depends on the facts. One remedy is if this person is an officer, the statute, the Legislature, expressly provided that the Attorney General has authority to seek removal. Now against whom? Against that person --

THE COURT: What happens to the money?

MR. CORRELL: Well, it depends. If it was an honest mistake --

THE COURT: Assume the worst because you are going to the ends of power. So the facts show just outright theft, walked off with donor money, and built a house somewhere.

MR. CORRELL: So that's 720(a)(2), and it talks about you can get a judgment to set aside a conveyance, assignment or transfer of corporate assets where the transferee knew of its unlawfulness. So you have to -- it has to be unlawful, and you have to know it's unlawful. So if you have a bag of cash, and you walk out, and you know you are taking that cash and you shouldn't, then, yes, you can set that aside, and you can go after that person for that.

It's a very high standard, and that's the standard that Eliot Spitzer tried to get around in Grasso because he didn't want to have to allege and prove that Grasso knew that receiving compensation that had been approved by the Board of the New York Stock Exchange was unlawful, that, A, it was unlawful and unreasonable, and, B, he knew it was unlawful, and so he tried to fudge it, he tried to kind of get around it. And the courts, this court in the person of Justice Ramos said, yes, fine. The Appellate Division,

three-two, with Justice McGuire writing the majority and Justice Mazzarelli writing the dissent, they had a spirited debate over it, and by the time it got to the Court of Appeals it was seven-zero unanimous with Chief Judge Kaye writing a beautiful opinion, short and concise, and adopting everything the Appellate Division majority had said which is this respect for the Legislature and this reluctance to allow the Attorney General or courts to tread on that policy making authority.

THE COURT: Okay. Thank you.

MR. CORRELL: Would you like me to address any of the other points they raise? I do have a point I would like to address, it's housekeeping, but it's important.

The lead defendant in this case does not exist, and I've moved under CPLR 3211(a)(10) to dismiss for failure, for nonjoinder, failure to join a necessary party. For some reason, and I would love to have an explanation, for the Court to ask for an explanation, the AG has stubbornly refused to amend its complaint to name the National Rifle Association of America as a defendant. Instead, they have named an entity of which there's no record under a different name. So that's one.

The last thing is, it's is a smaller point, it's a subset of that larger point, which is --

THE COURT: Before we leave that, who exactly are

you saying should be named as the lead? I have the National Rifle Association of America, Inc.

MR. CORRELL: Right, the Inc. is not part of the name. If you call up the State Secretary and ask them to do an entity search you will not find that. It's more than just theoretical. Going through a 200-page complaint that refers to this entity over and over again, and having to admit or deny the allegations makes it just unwieldy, it makes it impossible, because every time you have to deny the allegation and then say except if you are referring to this entity then --

THE COURT: Okay.

MR. CORRELL: -- because otherwise it produces confusion.

The other thing is, in order to do complete justice, if we have a judgment at the end of the case it has to have the right caption, the right name on it, and also if my client should want to cross-claim, he should have a defendant in the case to cross-claim against, he shouldn't have to serve a third-party summons and bring the entity in as a third party. The rules require it. To do complete justice, the Court should not proceed without the actual entity in the case properly.

The last point, and just indulge me on this last one, you dismissed the unjust enrichment claim in this case.

They took out, the Attorney General took out the claim, but left in the request for relief. So now it's even worse. Then they had to, they wanted to allege unjust enrichment which left out an element they needed to prove for a statutory violation, but they left in the relief. So now they get the relief without even alleging anything, it's not tied to any claim. So that should certainly come out, and that's why I think the complaint should be dismissed as against my client to give the AG an opportunity to rewrite her complaint rather than asking this Court to rewrite the statutes under which she is moving.

THE COURT: Thank you.

Do any other individuals want to speak hopefully without repeating what has already been said?

MR. FLEMING: I know, your Honor, it's difficult. I will try not to go over grounds. Mr. Correll covered a lot of points I would have made.

Quickly to add to what has been said -- by the way, I represent John Frazer. You know, it's the policy of the State, it's in our brief, that, you know, not only are we supposed to try to determine the Legislature's will, but we are supposed to respect what is expressed excludes things that are not expressed. In this comprehensive statute, the statutes, I should say, relating to not-for-profit corporations, that rule, that policy of the State is

especially important. And as I said, Mr. Correll covered a lot of that so I will be very quick.

There are three claims against, Mr. Frazer, three different statutes.

THE COURT: They have not changed from the last motion to dismiss, correct?

MR. FLEMING: No, they have not, that's correct, but they do ask your Honor for relief that clearly is not permitted, it's just not.

THE COURT: Is it the same point about the monitor?

MR. FLEMING: No, it's different. They are asking for items of relief that just are not in the statute. This is a question of power, it does go, I contend, to subject-matter jurisdiction which, of course, can be raised at any time, and specifically can be raised under 3211(e). So if I may, you know, I will start with the N-PCL, Section 720.

The plain language of that statute is clear, it says, it provides equitable relief for an officer to account for his official conduct if, as Mr. Correll said, there was a transfer that is unlawful, and the transferee knows that it's unlawful, that can be said aside. The Attorney General can also enjoin transfers going forward, and so on its face it's equitable.

The First Department has said that it is Section 720 in the BCL context, which is the twin statutes identical in language, but BCL Section 720 is a statute that does not permit an action at law for money judgment. The Fourth Department has echoed that. Magistrate Judge Peck across the street has done that. Judge Masley here in this court has agreed with that as well. This is, this is 50 or 60 years now of that jurisprudence passing muster. So this is not a claim where you can seek damages, and yet the Attorney General says with respect to Mr. Frazer that he is liable for all of the losses that purportedly were caused to the corporation. It is just not the case.

Now, it's also true, Mr. Frazer is alleged simply to have received his salary compensation, that's it. There are no transfers that are alleged that he received that were outside of his compensation and so the idea that if his obligation is to account for his official conduct, and if there they are able to prove in some respect that he has failed his duties, that he's required to, therefore, return all of his compensation because of losses that may have been caused to the corporation, it's not permitted under the statute.

The Legislature was comprehensive in determining what remedies are available to the Attorney General, are available to suing parties that are able to sue under this

statute, and losses are not one of them. This is an equitable action. So, your Honor, at most, this is all in our brief, if there was any untoward conduct by Mr. Frazer they can seek disgorgement of his ill-gotten profits, but since it's his compensation that was determined by an independent board, committee of the Board, the Officers Compensation Committee, without any input by him, as a matter of law there's no way that he could know of its unlawfulness because there's nothing unlawful about, therefore, under 720(a)(2) a transfer could not be set aside as either unlawful or with knowledge of its unlawfulness.

So moving quickly to Section EPTL 8-1.4, Ms. Eisenberg covered that as well. I think, your Honor, a fair reading of the statute is, this is a statute that's designed to promote information flow to the Attorney General to permit it to supervise trustees. It permits subpoena power. They can get documents and they can get witnesses. They can enforce those subpoenas, specifically set aside, in the statute, to enforce the subpoenas. They can fine individuals. As relevant to Mr. Frazer, they can remove people, but the only way they can remove people is for failure to file reports or to register. That has not been alleged.

THE COURT: You base that on your reading of the word account, that accounting for things means making oral

or written description of what happened as opposed to accounting in the sense, in the common law sense?

MR. FLEMING: That concept, your Honor, relates to the last section I just spoke about, the N-PCL 720, and it does say to account for your official conduct. Now my reading is that account means to explain, to be accountable for, okay, and once you have determined that threshold issue, then you get to the remedies. The remedies are specified in 720.

Now I'm talking about EPTL 8-1.4, and the claim is under subsection M of that statute. What it says at the end of that is, "The failure of any trustee," and we spent a large part of our brief disputing that Mr. Frazer is a trustee, there's been a conclusory allegation that he is a trustee without any explanation of how in the world they arrive at that conclusion, but "the failure of any trustee to register or to file reports," those are the two things, those are the two threshold issues, "as required by this section may be ground for judicial removal of any person responsible for such failure." There's not been an allegation in the complaint, that large complaint, of any failure to register or any failure to file reports.

So, again, based on that they are seeking damages, they are seeking interest, they are seeking restitution, they are seeking a permanent bar from ever serving a

not-for-profit that is authorized to do business in New York. It is just simply not in the statute. I invite your Honor to just scour it.

It's very clear, this is an informational statute, it's designed to promote information flow to the Attorney General so they can then better supervise trustees and not-for-profits, but it does not permit what they claim.

Finally, on the Executive Law, this is really simple, the Executive Law permits specified remedies. What they are seeking, okay, is that Mr. Frazer be barred, be enjoined from soliciting or collecting for any not-for-profit operating in New York, and that he be enjoined from service as a director, officer or trustee for any not-for-profit authorized to do business in New York State. The statute does not permit that. What the statute says very clearly is they can enjoin Mr. Frazer from continuing to solicit or collect for the NRA, not for any other entity, and they can seek his removal.

Now, there are a couple of arguments, I don't want to belabor the record, they are in our brief, but the idea that he can be enjoined from continuing to solicit and collect is sort of odd because he doesn't solicit and he does not collect. So now the Attorney General has said, well, he filed, he signs the CHAR500 that is prepared by professionals or the attached documents are prepared by

professionals, and that that document, that filing, is used to solicit or collect. It seems attenuated to me, arguably it gets them in the ballpark, but here's the key but, they are not seeking to stop him from continuing to solicit or collect for the NRA, they are seeking to stop him, to enjoin him, to have your Honor issue an injunction to prevent him from ever doing anything of that nature for any not-for-profit authorized to do business in New York.

So it is a question of power. I can stand up here for a long time, I have got a lot of material to go through, I will spare you that, but the short part of this argument is, they are asking for things that are not authorized.

THE COURT: Thank you.

My superstar court reporter has been going at it for a long time right now with a lot of words, all good ones, but I will take a short break and let her rest.

I will be back in five minutes.

(A recess was taken.)

(After the recess the following occurred:)

THE COURT: Plaintiff.

MR. SHIFFMAN: Good afternoon, your Honor.

My name is Steve Shiffman. I am an Assistant Attorney General. I will be handling the response to the NRA's argument today. My colleague, Monica Connell, will respond to the arguments presented by Mr. Frazer and Mr.

LaPierre.

I would like to start, your Honor, I am happy to answer my questions that you may have, and, you know, address anything in our papers, but I would like to start today by addressing the points that Ms. Eisenberg made in her opening.

The first issue I think really relates to the application of Grasso here, and Grasso is not at all applicable here. As your Honor pointed out, Grasso relates to nonstatutory claims where the claim asserts, seeks a remedy that is different, but the main issue in Grasso, I'm sorry, it's not the remedy, but it's the claim itself when it imposes a lower burden of proof than a statutory claim, and that's not the case here. It's not the case here for a couple of reasons, but the primary reason is that the EPTL is the statute.

EPTL 8-1.4(m) has an express provision in it that gives the Attorney General the power to bring proceedings. That power is very clear. It says that the Attorney General may institute appropriate proceedings, and it says it may do so in two different instances. One, it can do so if another section is violated, another part of the section is violated, and it also provides that it can do so to secure the proper administration of assets, charitable assets by the trustee that's subject to it. That's very important

here.

And in numerous other sections in 8-1.4 they make it very clear that the Legislature, and there's a legislative intent behind the EPTL too, the defendants talk about the legislative intent here of the N-PCL, and they talk about it that that's the only relevant legislative action that's at play here. The EPTL is a statute that codified and strengthened the Attorney General's traditional power in equity jurisdiction to supervise charitable trustees in their administration of assets.

THE COURT: Let's assume you brought a complaint, and you added to count one we want treble damages, we want attorneys' fees, we want a whole bunch of things because we think that would be a good deterrent. So say you made a treble damages argument which is typically in the statute, but is not here. Is that something that I could, I would have no choice but to let you do because it's too early in the case to deal with remedies?

MR. SHIFFMAN: I guess, first, I want to ask your Honor, treble damages for what, what is the claim? If the claim is one that's covered by the EPTL, and we are able to bring the claim under the EPTL, then I think you need to look at what your equitable powers are, right, and what your equitable jurisdiction is.

I don't know if there's cases out there because I

have not looked at the issue whether a judge has equitable power to impose a treble damage remedy in a case. I think it's not that there's no restriction on it, but that the remedies that you have for violation of the equitable claims under the EPTL are equitable remedies.

THE COURT: So your point is that because what you're asking for is a species of equitable claim, you know, because treble damages is a different kind of thing, it is typically a statutory remedy, but you are saying that I would have inherent power under the various sources that you cite to do what is, you know, people always put this at the end of their complaint, whatever is just and equitable.

MR. SHIFFMAN: But that is not to say that's not unlimited, your Honor, it has to be I think tied into a traditional equitable power here when you are doing it.

My point, the point I was trying to make, it may be a slightly different point than your Honor's question, but that is that the claim that we are bringing here is not a nonstatutory claim. The claim is one that's provided for in the EPTL in Section 8-1.4(m), to be specific.

If you look at the remainder of Section 8-1.4, there are other things that make it very clear that there's a duty to administrator charitable assets properly. In Section F of 8-1.4 there's a duty for the trustees to file reports with the Attorney General under penalty of perjury

that both state the nature of the assets they administer as well as how they are administering them. 8-1.4(i) gives us the power to investigate how trustees are administering the charitable assets that they control. Then in 8-1.4(m) it's very express, it says the Attorney General has power to institute proceedings to secure the proper administration of those charitable assets.

Unlike what counsel for Mr. Frazer just said, that is not solely a power to investigate, it is a power to both supervise and to enforce when it finds problems. It would make no sense for the Legislature to enhance our supervisory powers, give us the power to investigate transactions to see if people were properly administering them, to get reports under penalty of perjury concerning the administration of charitable assets, but not give us the power to institute actions. Even if that weren't clear from those other sections, it's clear from 8-1.4(m). If you look at 8-1.4(n), it specifies that the statute's to be interpreted very liberally to achieve its means of protecting charitable beneficiaries.

I think it's also very important to remember that there's two different statutes at play here that we are talking about, the N-PCL, as well as the Estates Powers and Trusts Law, the EPTL. There's also the Executive Law which does cover charitable organizations, as well, but the focus

of those two statutes that I referred to first, the N-PCL and EPTL, are somewhat different.

The N-PCL is a corporate statute that was derived from the same origins as the Business Corporation Law statute. They are both sections that are focused on corporations. The N-PCL obviously is focused on not-for-profit corporations. It's focused on both charitable not-for-profit corporations as well as noncharitable not-for-profit corporations. It focuses on corporate formalities, the duties of officers and directors.

The EPTL, on the other hand, is the embodiment of the Attorney General's power, traditional power in equity to supervise charitable trustees, and it covers charitable trustees of any type, charitable trustees that are in not-for-profit corporations such as the NRA here, charitable trustees or any other type of trustee, and so their focus is a little bit different. The N-PCL is focused on corporate formalities and structures, they definitely overlap, but the EPTL is focused on charitable entities, and the administration of charitable assets is a very important one to keep in mind here.

It's important in a lot of different respects. It's important to look at the different legislative intents that overlap a lot, but are not necessarily the exact same. It's also important in the Grasso situation. Grasso was not

about a charitable corporation, there was not misuse of charitable assets. It was a not-for-profit that had to be, eventually become a for-profit at the end of that case. So there are very important differences at play.

Also, as your Honor touched upon, their have been many cases that have dealt with claims under the EPTL including the first claims that were subject to the motions to dismiss in this case. There was the Lower Esopus River Watch case and the Trump cases. In those cases it was a necessary determination in order to find that there was a breach of a duty to administrator charitable assets that such a duty existed. A determination is necessary to a decision, it is precedential here, and I think in those cases it was contested. They did not raise the exact same argument that the NRA raises that there's no cause of action, but they disputed in their pleadings whether or not they had a duty to administer the charitable assets, and they disputed whether or not they had breached that duty, and it was a necessary finding just as it was in the claims earlier on in this case that that duty existed in order for there to be a finding that those claims stated a claim, those causes of action stated a claim.

I think then the next issue that I would like to address is the remedy. I think in a lot of respects, as your Honor pointed out, it's really premature to determine

what the remedy should be here.

We are bringing a cause of action under the EPTL asking your Honor to invoke the Court's inherent powers, and as the authorities that we refer to in our papers make clear, you have very broad inherent powers to do justice and to see that the remedy matches what's found out at trial here, and a monitor, we believe, will do that.

We think a monitor is a narrowly tailored remedy that is focused on ensuring that the organization is run properly, and it's run for the benefit of the members of the organization and its charitable beneficiaries, and that appointing a monitor will help ensure that.

We also think that how that remedy is tailored, and even, you know, whether and how long, all the elements of the monitorship are things that should not be determined now. What should be determined now is whether we state a claim under the EPTL, and we clearly do. What should be determined later after the trial, after the evidence has been presented, that's when it's time to determine what appropriate remedies are, and so we think that is pretty clear here.

I think the NRA also raised an argument about the scope of jurisdiction over assets that are not located in this state. I think it's important to remember what the focus of the EPTL is in Section 8-1.4. It's focused on the

supervision of trustees who administrator charitable assets. It's not focused on the assets themselves per se, it's obviously a related thing, but it's focused on how the organization in its internal affairs deals with its administration of assets. So the focus is on the trustee and Attorney General's power over the trustee.

8-1.4(a) could not be more clear of the Legislature's intent to have Section 8-1.4 in its entirety apply to trustees like the NRA who are organized under the laws of this state. It says that in very express terms that a trustee is an entity that is formed under the laws of New York. The NRA is that. It also fits under another definition, but that's the primary one here.

It's important because there are a lot of things that are alleged in complaint that don't neatly fit into one jurisdiction or another. The NRA's compliance with its obligation to have whistleblower policies, conflict of interest policies, those relate to the organization itself, and its failure to follow those policies, that doesn't really happen in one place or another, it relates to the laws of New York that require it to have those policies.

Similarly, the failure to accurately file reports with the State of New York has a couple of implications here. One, that directly ties it even more closely to the State of New York. Two, contrary to some of the things the

NRA has said before, that actually is a failure of the first part of 8-1.4(m) to comply with other parts of the statute, and that failure is relevant here. And, finally, I think the fact that the NRA has, you know, at least as alleged in the complaint has not filed accurate reports to the state makes it clear why a monitor may be appropriate in the end if we can prove that allegation because there needs to be oversight in a situation where in the past an organization has had numerous issues, those issues have prevailed, and even in reporting they have not been --

THE COURT: Are there any other examples of cases where that kind of remedy has been imposed other than through a settlement?

MR. SHIFFMAN: There's the Cooper Union case, you Honor, where it was a consent decree, but it's in the litigation, right. And a monitorship in a lot of respects is something that happens when you are reaching a resolution. So you reach, right, you offer a resolution that involves the organization surviving, it involves things like that. So there's Cooper Union. It's often a remedy that we seek and achieve in some form of a settlement because --

THE COURT: The difference is, to use the defendants' invocation of the word power, one is that an organization agrees to have it be imposed and the other is

that the state imposes it on an otherwise independent organization.

MR. SHIFFMAN: Right, but it has been imposed in Cooper Union with a so ordered consent decree.

I think it also is important to remember as it came up in the earlier argument that the N-PCL which is a different statute does have a section on receivers, and the Attorney General has the power in that section to seek a receiver on any action that it brings pursuant to 112 of the N-PCL. And I bring that up --

THE COURT: A monitorship is a diluted form of a receivership.

MR. SHIFFMAN: I would say it's a much more diluted form. It has the purpose of really just a very specific purpose, but it's also a purpose that can be really tailored to the evidence at trial and it can be tailored in a number of ways that's determined like the scope of the monitorship, what the monitorship looks like --

THE COURT: That's in a different statute?

MR. SHIFFMAN: That's in a different statute, but the NRA and the defendants have repeatedly said that you can't look for anything, you can't have anything in the EPTL that you don't have in the N-PCL. I don't agree with that at all because I think it is different, but I think there's also case law from the Court of Appeals to various Appellate

Divisions that say the Court has not just statutory power to appoint receivers, but it has inherent power to appoint receivers.

The Copeland case is one such case. 64 Blue Venture was an Appellate Division case. Copeland is a Court of Appeals case that talks about even where there was a statute, the Court has inherent power to appoint a receiver because it's part of its constitutional authority to seek justice and to impose remedies that will further justice.

Here I would say the EPTL gives you even more authority to impose a monitor because it's part of your equitable powers. The EPTL is much more of an equitable statute, and it's part of your inherent equitable powers which you have pursuant to those cases. It's part of the very constitution of this case [sic], the constitution of this state, excuse me. We go through those authorities in our brief for several pages.

Just looking at the language of EPTL 8-1.4(m) it says the Attorney General may institute appropriate proceedings. I think that language is important. It's not vague as to whether there's a cause of action to the Attorney General, it's clear there's a cause of action. It is very broad in what the power is because it wants to leave judgment in the court in order to fashion the appropriate remedy.

At this juncture the only real issue is whether or not we can keep that claim, that claim in the case, and whether we can keep the remedies in the case, potential for those remedies in the case. I think the answer to both those is clear.

I think one other point I would like to raise about the power under the EPTL section that Mr. Frazer raised, even though it somewhat relates to him, I think it does relate overall to the issue, he said that because of the power that we have to issue subpoenas in the case, a monitor is not appropriate. I think that really misses the point.

The monitor is a different level of scrutiny. The monitor does not report to the Attorney General, the monitor will report to the Court. We want input on the monitor. You know, if the monitor is determined to be appropriate, the NRA will have input to the Court. It's the monitor who will report to the Court, and the monitor will report on such things as whether or not the Court's own orders; are complied with.

It's also a different stage, right. The ability to serve a subpoena is something that happens before there's any determinative wrongdoing, there's wrongdoing that needs to be suspected. Here a monitor would only be appointed after trial or after a settlement, after something. It's

appointed once there's an agreed upon resolution in a case, okay, and so there's a predicate there, and that predicate is that there's some determination that's made that a monitorship is necessary.

So the EPTL's remedies while important, and while the Legislature, as we've set forth in our papers, really wanted to ensure that the Attorney General's supervisory powers were enhanced by the EPTL, it also wants to enforce our enforcement powers, and the legislative history makes that clear as well.

Your Honor, do you have any other questions?

THE COURT: I am good.

MR. SHIFFMAN: Thank you very much.

THE COURT: Ms. Connell.

MS. CONNELL: Good afternoon, your Honor.

We have all been sitting here for a long time so I will try to keep it short, but I would like to bring two overarching arguments to bear relating to the individual defendants, and the first is the single motion rule.

As the Court is aware, parties are not permitted to make a failure to state a claim argument and a subsequent motion to dismiss that they did or could have raised in an earlier motion to dismiss. Mr. Frazer and Mr. LaPierre have made two prior motions to dismiss including motions to dismiss the exact same claims against them based on the

exact same facts that are before the Court now. The Second Amended Complaint contains no new factual allegations or claims against Mr. LaPierre and Mr. Frazer. Their claims should be barred under the single motion rule.

The fact that we are now, you know, two years into this case still arguing failure to state a claim, and arguing whether the word responsible for changes the nature of whether a claim is stated demonstrates why we shouldn't have serial motions to dismiss, in my view.

Mr. LaPierre tries to avoid the application of the single motion rule by saying, but the complaint was amended, but, as your Honor pointed out, there's no new facts or claims as against him, and he has no protectable interest to prevent the appointment of a monitor should the Court determine that one's appropriate.

The cases he cites don't help him. I will not walk through them, but I will note that your Honor denied our motion to dismiss or denied our motion to dismiss on the single motion rule the last time around because your Honor found that the amended complaint asserted approximately 90 paragraphs of new factual allegations which were applicable as against all defendants including Mr. Frazer and Mr. LaPierre. That is not true now.

Mr. Frazer also attempts to evade the single motion rule. He says the language in 3211(e) says that you

can make a motion for failure to state a claim at any subsequent time, but the Court of Appeals rejected this argument. They say that the defense of failure to state a cause of action may not be raised in another motion under 3211(a) of which the statute permits only one. It may be raised in another form of motion such as by summary judgment. So that does not help him nor does his passing reference to subject-matter jurisdiction, your Honor.

The fact is, the Second Amended Complaint contains no new facts and no new claims against these defendants, and we respectfully submit that you shouldn't even consider their motions. For that reason alone we ask that they be denied, but there's a second overarching issue and that is law of the case.

Your Honor, under the law of the case doctrine parties are precluded from relitigating an issue decided earlier in an ongoing case. All of the remaining claims against Mr. Frazer and Mr. LaPierre have been subject, have been the subject of a motion to dismiss by these defendants, and your Honor has held that those claims were sufficiently pled. In fact, the defendants have made the identical arguments at times that they assert here. So, for example, in arguing his Executive Law claim should be dismissed or excuse me, Executive Law claim against Mr. Frazer should be dismissed, Mr. Frazer argued that he does not personally

solicit funds so he can't be held liable under the Executive Law. That's a claim he made previously before this Court. I refer the Court to the transcript of the argument on the earlier motion to dismiss, that's at Docket Number 510, and it's at pages 43 to 44. Your Honor dismissed this claim in its decision at pages 36 to 39 of Docket Number 609.

Mr. Frazer also argued that the plaintiff can't ask for the relief she seeks under the Executive Law as a matter of law. In his earlier motion to dismiss it was argued on the transcript at pages 45 to 46, and it was dismissed by your Honor again at pages, I believe it was, 34 to 37.

Your Honor, I could go through each of the claims --

THE COURT: That's okay.

Let me ask, maybe minor points, does the complaint still seek unjust enrichment?

MS. CONNELL: No, you Honor, and we said that in writing in our opposition. The unjust enrichment claim was dismissed by this Court, we did not appeal it, we do not seek recovery for unjust enrichment.

THE COURT: Is there anything in the addendum clauses that can be construed to be seeking that as relief?

MS. CONNELL: I believe Mr. LaPierre points to one claim, one phrase in there that says unjust enrichment. We

will sign a stipulation, we will put it on the record, in our papers, we will say it here, we are not seeking recovery for unjust enrichment.

THE COURT: And the name of the entity?

MS. CONNELL: Your Honor, I believe the name National Rifle Association, Inc., we used that initially based upon some of the foundational documents. If you recall, at the outset of this case we went through the long history of where the National Rifle Association was chartered, but this to me seems almost a frivolous argument. The National Rifle Association has been here defending this case for two years.

THE COURT: It may not be terribly important, but I think it would be useful to have the right name of the entity. Is there an official name of the entity now?

MS. CONNELL: It's my belief that it's National Rifle Association of America, Inc., but the parties can meet and confer and agree to substitute the name in the complaint if that would --

THE COURT: I would think there would be a way to find out.

MS. CONNELL: I think we could, your Honor.

Honestly, two years into this and we are addressing this now, I really --

THE COURT: I didn't expect this to blow the lid

off the case, but it's a little odd.

If there's any burning issues to respond to specifically, I will let you respond.

MS. CONNELL: Your Honor, at the end I have one issue to ask you that's unrelated to the motions.

THE COURT: Okay. Thank you.

Ms. Eisenberg.

MS. EISENBERG: Your Honor, I think the most unreasonable suggestion I have heard is why don't we let the proofs come in and then we can decide if this claim stays. I think my esteemed --

THE COURT: The remedy I think is what they are referring to, let's see what is proved, and then let's let the remedy match the violation if there is one.

MS. EISENBERG: Right, but let there be no doubt that the length of the trial will differ significantly if this claim remedy duo stays in the case. I guaranty you that there will be lots of evidence and lots of testimony that the government will seek to elicit and present to you that they will, if objected to on relevance grounds, they will say it's only relevant to the first claim, and not to the 13th or the 14th or the 15th.

So the concept of delaying a decision until the proofs are in, I think it's really unreasonable. This is a motion to dismiss. They don't -- they plead the claim

pursuant to a statute that does not give rise to a cause of action or to the remedy, and it should be dismissed on separation of powers grounds.

THE COURT: Thank you.

Mr. Correll.

MR. CORRELL: Thank you, your Honor.

First, I want to start off by saying, I put in an affirmation with search results from the Secretary of State. They know what the real name is, and the suggestion that the AG is two and a half years in the case and doesn't know the name of the defendant is absurd.

Number two, moving back to the question of whether there are new facts in the complaint, just read the first cause of action. They allege several paragraphs of where they say the NRA did this, and that, and that through my client. So they're accusing my client of doing additional things, and he certainly has an opportunity to challenge a new cause of action that's making allegations that relate to him.

The other thing is this, I put it in my brief, that we are not just saying it fails to state a cause of action. We are saying that there's a standing issue of power, authority, standing, and really a legal capacity to sue issue which goes to justiciability, whether there's a controversy that this Court can even resolve. If she has no

authority to seek relief and she is asking for relief, that's an issue.

Let me read from paragraph J of the prayer for relief. They are asking for "A judgment against defendants directing the individual defendants to pay the NRA restitution for all excessive, unreasonable and excess benefits that were paid to and unjustly enriched the individual defendants in violation of law in the NRA bylaws and policies." So that needs to come out in its entirety. They can't just strike out a word or so, but I am taking that as a representation that that's going to happen.

MS. CONNELL: Your Honor, we would take out the word unjust enrichment. We disagree, the rest of that, we believe, is appropriate.

MR. CORRELL: I would suggest that the entire paragraph should be stricken because it was the prayer for relief that was tied to the claim. So they are asking for exactly the same relief in exactly the same words, they just dropped the claim.

There were a couple of other points I wanted to address just very quickly.

The word appropriate, as I said, is really important. When you look at their brief, this new claim, they don't use the word appropriate in there. What they say is under Section 8-1.4(m) of the EPTL the Attorney General

may commence a proceeding "to secure compliance." So they start the quotation after the word appropriate.

Appropriate can't be treated as meaningless, and if we have controlling authority, the Court of Appeals and the Appellate Division, saying that the Legislature decided what was appropriate, an appropriate remedy for any alleged misconduct involving directors, officers --

THE COURT: Were your referring to the phrase appropriate action in the EPTL?

MR. CORRELL: In the N-PCL?

THE COURT: No, the statute.

MR. CORRELL: The EPTL.

They said the actual language is appropriate proceedings.

THE COURT: Appropriate proceedings.

MR. CORRELL: Yes.

THE COURT: We are talking about remedy.

MR. CORRELL: But the question is whether a proceeding seeking relief that the Legislature has deemed not appropriate is an appropriate proceeding. Our argument is it's not.

THE COURT: Here's the quibble I have with you on that. Grasso is a different case because there the statute specifically says, and the Court relies on it heavily, that it affirmatively provided the officers and directors with

the protections of the business judgment rule, it specifically provided that the officers must discharge their duties in good faith, and with that degree of diligence, care and skill which ordinarily prudent men or women would exercise under similar circumstances, and it says also under the statute officers and directors are permitted to rely on information, reports, and the like in good faith, and it further provides that persons who so perform their duties shall have no liability by reason of being or having been directors or officers of the corporation.

So what you had in that case is the attempt to bring a claim for unjust enrichment is affirmatively in conflict with the affirmative grants and statements in the statute. I'm not aware of anything in the statute that says the Attorney General shall not seek a monitor.

MR. CORRELL: The word monitor does not appear in the statute, I have looked and it's not there, and the question is, does the absence allow the appointment of a monitor or does it preclude it?

THE COURT: That's what -- and I understand why Grasso is a good case for your side, but I think it's a different thing to say that bringing a claim that is essentially in conflict with the statute is not appropriate, but that also means that whatever specific remedies are listed in the statute is an exhaustive list despite the fact

that courts for hundreds of years have had flexibility in terms of remedy. I think that's a very different argument to make, that the fact that the Legislature didn't list every remedy that one could possibly think of, it's not inconsistent with anything in the statute, it seems to me, to apply normal, equitable principles even if they are not set out specifically in the statute. I think it's a different argument than what was made in Grasso.

MR. CORRELL: I understand your concern, your Honor, and if I can take a minute to address it.

If you look back to the predecessor statutes, they all made a clear distinction between a judgment to compel an officer to account for his official conduct and then in a second section a judgment to compel an officer to pay money to the corporation. They were very clear in delineating the different types of remedies, and it's all considered equitable, all of those remedies in 720 are considered equitable.

If the Legislature sets out to circumscribe the relief that's available, and to specify the causes of action you may assert, and to specify the elements of each cause of action, how can a court or the Attorney General say, you know what, that's great, but I will make a different policy judgment, I want to expand that, and I'm going to include something as explosive and potentially unconstitutional as a

monitor when we don't know what kind of powers? It's kind of from my point of view, my client's point of view, it's frightening.

THE COURT: Understood. Okay.

Anything further?

MR. FLEMING: One point very brief.

THE COURT: I would have been disappointed otherwise.

MR. FLEMING: It speaks to legislative choices, and it's important because it bears on what we talked about, and it bears on why Mr. Frazer especially should not be in this case.

N-PCL 720, we went through the language, it derives from an old statute, an old codification of English law. I just thought it would be beneficial for the Court to have me read it so that you're aware of how it has evolved. Under the old revised statutes of New York which morphed into the General Corporation Law there was a codification which said that "Directors, managers, and other trustees and officers of corporations," essentially that covered, one, "to compel them to account for their official conduct in the management and disposition of the funds and property committed to their charge," almost identical to the N-PCL, but then the second section says, "to decree and compel payment by them to the corporation whom they represent and

to its creditors of all sums of money and of value of all property which they may have acquired to themselves or transferred to others or may have lost or wasted by any violation of the duties as such trustees."

The N-PCL has completely modified that language to remove the compulsion for an offending officer to pay the corporation, and what it has exchanged it for is language that says you will set aside a transfer where the transferee knows of its unlawfulness. This is an example of, I think a very important example of how the Legislature has made specific remedial policy choices. And Grasso in the First Department says, "Where the Legislature has not been completely silent, but has instead made express provision for civil remedy albeit a narrower remedy than the plaintiff might wish, the Court should ordinarily not attempt to fashion a different remedy with broader coverage, and then again a due respect to the competence of the Legislature requires us to conclude that the many remedial choices it made were considered choices."

That's my point.

The only other clarification is, I had mentioned about how the First Department, and the Fourth Department, and the Southern District, and even this court have determined that 720 does not permit an action at law for money judgment. That's the Ali Baba case in Mr. Correll's

brief. It's also the NYKCool case that's also in his brief.

Thank you.

THE COURT: Thank you.

I'm ready to resolve the motion.

Motions to dismiss are intended to be an efficient tool to eliminate claims at a threshold level typically early in the litigation before the parties spend unnecessary funds on discovery. You assume all the facts, factual allegations are true, and you make a threshold judgment about whether there's a basic cause of action, and as is often stated it's not to determine whether they stated a claim, but whether there is a claim in there somewhere.

The rule that you get one crack at it is an important one. There's lots of different times to test the legal sufficiency of a claim, there's motions to dismiss, and then later on summary judgment, and even after trial. It seems to me that this is now our third round on it, and I think all the briefing is very good, but I am persuaded that the motion by the individual defendants clearly violates the single motion rule. The claims are the same as they were in the last go-round. These are enhanced arguments and different arguments, but all ones that could have been made before so I think those motions are denied as procedurally improper. But I don't stop there, I do look at the substance of it. If I thought there was a miscarriage of

justice I would at least think about ways to get around that.

So I have looked at the claims which again are unchanged. I don't think that any of the revisions in the next complaint have anything to do with the claims against the individual defendants. My same analysis applies here.

I think that ironically the motion is a little bit too late and a little bit too early at the same time because I think the focus on the remedy is really unnecessary at this point. I do want to make it clear that in denying this motion I am not sustaining that any particular form of remedy that's in the complaint is something that I would consider or grant.

I think that the threshold challenge is whether this complaint states a cause of action under this statute. I think it does. I think the defendants attempt to read the statute so narrowly as almost into nonexistence the ability of the Attorney General to monitor how funds are used by an organization such as this. So I think the statute is plenty broad enough to encompass the factual allegations.

I think it is premature for me to on a motion to dismiss reach the question of what remedy one might responsibly and permissibly apply in the event that the Attorney General proves her case. So I think that that's not really the function of a motion to dismiss in my view.

I think the question is whether there's a cause of action. I think there is, assuming all the factual allegations are true. Whether these are the right remedies, I offer no opinion on at this point.

Moving to the NRA which is not subject to the single judgment rule issue because this is a new claim against the NRA, but I think the substantive arguments are the same, I think that for the same reasons that the claim is within the agreement of the Attorney General as to the individuals, the statutory language in my view is plenty broad enough to support the claim, putting aside the remedy for the moment, that the organization, if all of the facts are true, did not, in the words of the statute, did not properly administer the trust, and that is a broad phrase. The statute is written in a very broad way. Section N of that statute, which I think has not really been mentioned, specifically directs us to liberally construe the statute so as to effectuate its general purpose of protecting the public interest in charitable uses, purposes and dispositions. I think the statute is plenty broad enough.

Whether the plaintiffs can prove their case is an entirely other question. Whether the plaintiffs can prove their case in such a way that some sort of creative injunctive monitor-type relief would be appropriate is far too early for me to say, but the fact that they intoned

those words in the complaint does not give rise to dismissal. I think it's something that will be decided at the appropriate time.

I frankly think we have spent enough time on threshold issues. I don't criticize anyone, they have been well briefed, I think we have narrowed the issues, and we are now pretty much, as I understand it, done with discovery, I thought you were almost done with discovery. So I think we should move on to the next phase of completing discovery if it hasn't been completed, and getting on to summary judgment, and then trial. So that, you know, the investigation has gone on for a while, plenty of hours have been spent in investigating it, and I think that's where we should be, focused on going forward.

The motions are denied.

I mentioned, I should have added in, the frequent references to Grasso I think are not well -- it's not a good fit for this particular motion. This is not a situation where the statute provides, includes language that could be inconsistent with any of the relief being sought. Whether, again, the relief is appropriate, is an entirely different question. So I don't think the Grasso case is really applicable on these facts.

Again, all three motions are denied, and I will issue just a very short order summarizing what or

incorporating what I just said.

Ms. Connell, you wanted to say something. Hopefully what you say will also include why you were shaking your head potentially about discovery being completed.

MS. CONNELL: I thought it was more of an eyebrow raise myself, your Honor.

May I speak from here or would you prefer --

THE COURT: The podium, please.

MS. CONNELL: Your Honor, first, I just wanted to mention that there are three remaining outstanding appeals from the Special Master's orders. One of them pertains to whistleblower documents that the Attorney General's Office has been seeking for some time. We are happy to rest on the papers, but I wanted to bring this to the Court's attention. There have been a lot of motions in this case, and we would like to really bring discovery to a close as I think you would.

THE COURT: They are fully briefed?

MS. CONNELL: Yes.

THE COURT: They have motion sequence numbers?

MS. CONNELL: They do. I'm sorry, I didn't write them down.

THE COURT: I will find them. We are dancing as fast as we can, as they say.

MS. CONNELL: The other issue, your Honor, is a discovery issue, but I need some guidance from the Court.

Fact discovery ended some time ago. We did continue with depositions to accommodate witnesses, and that kind of thing, but we have been getting a lot of documents from the NRA now, documents that are new or that only came to light as relevant in depositions, I would put aside, it's understandable to get them now, but we are getting documents that we have been seeking for months, if not a year, we are getting documents that have long predated or preexisted fact discovery.

We would like to seek relief in relation to them including maybe a continued deposition of, for example, Aronson, the outside auditor. We just got a bunch of work they did for the NRA that we were never told about, did not know about, had no documents about. And I may seek other relief as well.

I believe this motion should be directed as the first matter to the Special Master, but I just wasn't sure since it involves the deadlines, and scheduling order, and other potential relief.

THE COURT: Well, I certainly want all issues resolved quickly because, I mean, I don't know where we are in the overarching schedule because we should be. If you have reached the end of the discovery, is there expert

discovery anticipated?

MS. CONNELL: We have already issued the parties jointly, at the same time exchanged initial expert reports, and it was funny, right before the expert reports were issued we got a bunch of documents, and now that rebuttals are due next Friday we are getting a bunch of documents. I understand this was a big case with a lot of documents, but this is causing prejudice to the plaintiff.

THE COURT: Well, I think what I would like to have you do is have a conference with Mr. Blaustein over here (indicating). I would like to get this on track to completion. You know, if we have to resolve some final issues to get you to the finish line, that's fine, but I really do want to get back on track.

I should ask, how far off schedule are we in terms of when we were supposed to be done and have the Note of Issue filed?

MS. CONNELL: Your Honor, we are still on track, and I don't believe it's the Attorney General's intention at this point to even seek to push back dates. We intend to have rebuttal expert reports by next Friday, but what we are concerned about is when, for example, we are told that the Audit Committee maybe didn't consider something or look at something, our expert relied on that representation, and all of a sudden we have some information regarding the Audit

Committee, that that prejudices us.

We are as anxious as the Court to stay on schedule and get this through summary judgment, we hope trial.

THE COURT: I would like all remaining issues, whatever they are, to be teed up, decided, and move on to the next level so we can -- I don't know whether there's going to be summary judgment motions in a case as sprawling as this, but I would like to set a trial date as soon as I can subject to one party or another winning on summary judgment.

Everybody has been working very hard, but my understanding was that things were near the end, which it sounds like it's true, so I would like -- we will reach out to set up a conference, a phone conference, to get all the issues on the table. My goal is to, you know, keep feet to the fire, to get the Note of Issue on time, and then, you know, either people move for summary judgment or we schedule a trial or both.

MS. CONNELL: Thank you, your Honor. I think the parties have been trying, the Special Master has been a great assistance thus far, but, thank you, we will look for that contact.

THE COURT: Anything further?

MS. EISENBERG: Your Honor, may I make a point briefly?

THE COURT: Sure. We only have a couple more minutes of court time available.

MS. EISENBERG: Thank you, your Honor.

Well, Ms. Connell made a variety of different representations --

THE COURT: In my mind I assumed you disagreed with some of them.

MS. EISENBERG: Correct, and I just wanted to make that clear for the record.

Thank you.

THE COURT: Okay. So we will reach out so you can have that at full length with Mr. Blaustein, and he can fill me in afterward.

Thank you all very much.

Excellent job.

I will see you next time.

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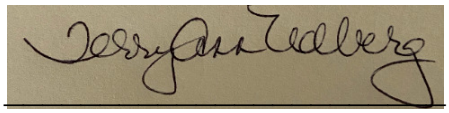
C E R T I F I C A T E

I, Terry-Ann Volberg, C.S.R., an official court reporter of the State of New York, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes.



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