

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

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

Plaintiff,

v.

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

Defendants.

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§
§
§ **INDEX NO. 451625/2020**
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§ **IAS PART THREE**
§
§ **HON. JOEL M. COHEN**
§
§ **NOTICE OF APPEAL**
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§

PLEASE TAKE NOTICE that that the National Rifle Association of America (the “NRA”) hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, from the Decision and Order on Motion of the Supreme Court of the State of New York, New York County (Joel M. Cohen, J.S.C.), dated October 3, 2022 [NYSCEF 846], and entered in the Office of the New York County Clerk on the same date.

In the Decision and Order on Motion, the Supreme Court denied the NRA’s motion to dismiss with prejudice, pursuant to CPLR 3211, the New York Attorney General’s First Cause of Action [NYSCEF 705].

This appeal is taken from the denial of the NRA’s motion to dismiss the New York Attorney General’s First Cause of Action [NYSCEF 705].

A true and correct copy of the Decision and Order, together with the Notice of Entry dated October 3, 2022 is annexed hereto as Exhibit A. The transcript of the hearing referenced in the

Decision and Order is annexed hereto as Exhibit B. The NRA's Initial Informational Statement is annexed hereto as Exhibit C.

Dated: November 2, 2022

Respectfully submitted,

By: /s/ Svetlana M. Eisenberg
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**ATTORNEYS FOR DEFENDANT
THE NATIONAL RIFLE ASSOCIATION**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal and related documents was electronically served via the Court's electronic case filing system upon all counsel of record on November 2, 2022.

/s/ Svetlana M. Eisenberg

Svetlana M. Eisenberg

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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

Plaintiff,

v.

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

Defendants.

**NOTICE OF ENTRY OF
DECISION AND ORDER**

Index No. 451625/2020

Motion Seq. No. 30

PLEASE TAKE NOTICE that attached is a true copy of a Decision and Order on Motion Sequence No. 30 by the Hon. Joel Cohen, dated October 3, 2022, which was duly entered in this action and filed in the office of the Clerk of the Supreme Court, New York County, on the 3rd day of October, 2022.

DATED: October 3, 2022

Respectfully submitted,

LETITIA JAMES
*Attorney General
of the State of New York*

/s Stephen Thompson

Stephen C. Thompson
Assistant Attorney General
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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

Plaintiff,

- v -

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

Defendants.

INDEX NO. 451625/2020

MOTION DATE 06/14/2022,
06/14/2022,
06/14/2022

MOTION SEQ. NO. 028 029 030

**DECISION + ORDER ON
MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 028) 684, 685, 686, 687, 688, 689, 690, 830

were read on this motion to

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 029) 691, 692, 693, 694, 695, 696, 697, 826, 838, 839, 840, 841, 842

were read on this motion to

DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 030) 698, 699, 700, 701, 702, 703, 704, 705, 708, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 819, 831, 832, 833, 834, 835, 836, 837

were read on this motion to

DISMISS

Upon the foregoing documents, and for the reasons stated on the record after oral argument on September 29, 2022, it is hereby

ORDERED that the motions by Defendants John Frazer, Wayne LaPierre, and the NRA to dismiss portions of the Second Amended Complaint are **DENIED**. Counsel for Defendants shall upload a copy of the oral argument transcript to NYSCEF upon receipt.

This constitutes the decision and order of the Court.

10/3/2022

DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

☐

CASE DISPOSED

☐

GRANTED

☐

SETTLE ORDER

☐

INCLUDES TRANSFER/REASSIGN

☒

DENIED

☒

NON-FINAL DISPOSITION

☐

GRANTED IN PART

☐

SUBMIT ORDER

☐

FIDUCIARY APPOINTMENT

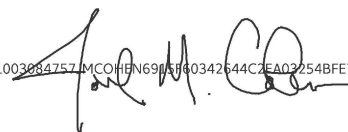
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OTHER

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REFERENCE

20221003084757 MCOHEN690A7F40342644C2EA03254BFE71D573C



JOEL M. COHEN, J.S.C.

EXHIBIT B

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1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF NEW YORK: TRIAL TERM PART 3

3 - - - - - X

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

6 Plaintiff,

7 - against -

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

10 Defendants.

11 - - - - - X

12 Index No. 451625/2020

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

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

15 A P P E A R A N C E S:

16 STATE OF NEW YORK OFFICE OF THE
17 ATTORNEY GENERAL LETITIA JAMES

28 Liberty Street
New York, New York 10005

18 BY: STEVEN SHIFFMAN, ESQ.

MONICA CONNELL, ESQ.

19 YAEL FUCHS, ESQ.

EMILY STERN, ESQ.

20 BREWER

21 Attorneys and Counselors at Law
750 Lexington Avenue, 14th Floor
22 New York, New York 10022

BY: SVETLANA M. EISENBERG, ESQ.

23 JOSH DILLON, ESQ.

24 DAVID UMANSKY, ESQ.

25 (Appearances continued on next page.)

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1 A P P E A R A N C E S: (Continuing)

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14

15

16

17

Terry-Ann Volberg, CSR, CRR

18

Official Court Reporter

19

20

21

22

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Proceedings

1 THE COURT: Good afternoon.

2 Let's start with appearances beginning with the
3 plaintiff.

4 MR. SHIFFMAN: Good afternoon, your Honor.

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

9 THE COURT: Good afternoon.

10 Defendants, in whatever order you choose.

11 MS. EISENBERG: Good afternoon, your Honor.

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

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

18 Thank you.

19 MR. CORRELL: Good afternoon, your Honor.

20 Kent Correll for Wayne LaPierre.

21 MR. FLEMING: Good afternoon, your Honor.

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

24 MR. FARBER: Good afternoon, your Honor.

25 Seth Farber from Winston & Strawn for

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1 Mr. Phillips.

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

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

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

17 MS. EISENBERG: It would be my pleasure.

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

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

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

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

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

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

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

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

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

13 THE COURT: Tax lawyers or as litigators?

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

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

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

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

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

25 THE COURT: What distinguishes attorney work

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Proceedings

1 product from attorney-client communications then?

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

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

9 MS. EISENBERG: Yes, I would say that.

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

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

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

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Proceedings

1 quite a lot, of bit of an expansion.

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

9 THE COURT: Which section of 3101 is this?

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

12 THE COURT: 3101(d), right?

13 MS. EISENBERG: Yes.

14 THE COURT: Which is called trial preparation.

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

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

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

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

24 THE COURT: Okay.

25 Let me hear from the State.

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1 MS. FUCHS: Thank you, your Honor.

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

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

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

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

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Proceedings

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

7 If I can address the Confidentiality Agreement --

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

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

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Proceedings

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

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

7 THE COURT: We are still talking about work
8 product?

9 MS. FUCHS: Absolutely.

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

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

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

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

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

13 THE COURT: I think I have it.

14 Ms. Eisenberg, anything further?

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

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

25 THE COURT: Okay.

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Proceedings

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

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

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

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

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

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

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

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

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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

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

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

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

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

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Proceedings

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

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

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

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

15 MS. EISENBERG: Everyone, your Honor.

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

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

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

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Proceedings

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

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

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

23 So given --

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

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Proceedings

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

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

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

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

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

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

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

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1 THE COURT: Is this a jury trial claim?

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

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

5 MS. EISENBERG: Yes, absolutely, your Honor.

6 THE COURT: Absolutely?

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

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

25 THE COURT: You are talking about this statute,

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1 the EPTL?

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

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

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

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1 vague standard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 THE COURT: This is less restrictive than that,

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

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

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

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

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

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

23 MR. CORRELL: Good afternoon, your Honor.

24 Kent Correll for Wayne LaPierre.

25 I would like to reserve five minutes for rebuttal,

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1 if I may.

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

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

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

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

6 Let me read you what I wanted to read to you from
7 the People v. Grasso opinion. It says, there are talking
8 about Mark G. v. Sabol, a Court of Appeals case, 93 N.Y.2d
9 720, where they said in Mark G. v. Sabol the Court rejected
10 the plaintiff's claim for money damages, this is under
11 Social Services Law, it should be recognized, but it said in
12 explaining the conclusion that recognizing such a cause of
13 action "would not be consistent with the legislative
14 scheme." The Court wrote, "The Legislature specifically
15 considered and expressly provided for enforcement
16 mechanisms. The provisions of this statute were enacted as
17 the comprehensive means by which the statute accomplishes
18 its objectives. Given this background it would be
19 inappropriate for us to find another enforcement mechanism
20 beyond the statute's already comprehensive scheme."

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

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

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

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

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

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

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

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

25 MR. CORRELL: Well, it would affect my client

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

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

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

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

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

19 MR. CORRELL: I am thinking back to the '60s and
20 '70s where unions were being confronted with monitors. I
21 know the unions, a lot of them, the members of unions were
22 opposing appointments of monitors back then.

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

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

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

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

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

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

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

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

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

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1 the cash manager, that's one way. Ask for -- sue under
2 720(a)(1) and ask for a judgment to compel the cash manager
3 to account for his official conduct, give you a report of
4 what he is doing, explain what he is doing, why is he doing
5 this, how can it be done differently.

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

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

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

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

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

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

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

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

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

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

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1 THE COURT: What happens to the money?

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

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

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

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

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

10 THE COURT: Okay. Thank you.

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

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

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

25 THE COURT: Before we leave that, who exactly are

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

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

12 THE COURT: Okay.

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

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

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

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

12 THE COURT: Thank you.

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

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

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

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

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

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

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

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

12 MR. FLEMING: No, it's different. They are asking
13 for items of relief that just are not in the statute. This
14 is a question of power, it does go, I contend, to
15 subject-matter jurisdiction which, of course, can be raised
16 at any time, and specifically can be raised under 3211(e).
17 So if I may, you know, I will start with the N-PCL, Section
18 720.

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

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1 The First Department has said that it is Section
2 720 in the BCL context, which is the twin statutes identical
3 in language, but BCL Section 720 is a statute that does not
4 permit an action at law for money judgment. The Fourth
5 Department has echoed that. Magistrate Judge Peck across
6 the street has done that. Judge Masley here in this court
7 has agreed with that as well. This is, this is 50 or 60
8 years now of that jurisprudence passing muster. So this is
9 not a claim where you can seek damages, and yet the Attorney
10 General says with respect to Mr. Frazer that he is liable
11 for all of the losses that purportedly were caused to the
12 corporation. It is just not the case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 THE COURT: Thank you.

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

17 I will be back in five minutes.

18 (A recess was taken.)

19 (After the recess the following occurred:)

20 THE COURT: Plaintiff.

21 MR. SHIFFMAN: Good afternoon, your Honor.

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

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1 LaPierre.

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

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

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

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1 here.

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

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

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

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

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

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

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

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

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

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

8 Unlike what counsel for Mr. Frazer just said, that
9 is not solely a power to investigate, it is a power to both
10 supervise and to enforce when it finds problems. It would
11 make no sense for the Legislature to enhance our supervisory
12 powers, give us the power to investigate transactions to see
13 if people were properly administering them, to get reports
14 under penalty of perjury concerning the administration of
15 charitable assets, but not give us the power to institute
16 actions. Even if that weren't clear from those other
17 sections, it's clear from 8-1.4(m). If you look at
18 8-1.4(n), it specifies that the statute's to be interpreted
19 very liberally to achieve its means of protecting charitable
20 beneficiaries.

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

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

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

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

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

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

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

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

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1 what the remedy should be here.

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

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

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

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

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

7 8-1.4(a) could not be more clear of the
8 Legislature's intent to have Section 8-1.4 in its entirety
9 apply to trustees like the NRA who are organized under the
10 laws of this state. It says that in very express terms that
11 a trustee is an entity that is formed under the laws of New
12 York. The NRA is that. It also fits under another
13 definition, but that's the primary one here.

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

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

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

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

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

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

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1 that the state imposes it on an otherwise independent
2 organization.

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

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

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

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

19 THE COURT: That's in a different statute?

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

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

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

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

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

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

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

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

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

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

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

11 Your Honor, do you have any other questions?

12 THE COURT: I am good.

13 MR. SHIFFMAN: Thank you very much.

14 THE COURT: Ms. Connell.

15 MS. CONNELL: Good afternoon, your Honor.

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

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

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

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

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

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

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

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1 can make a motion for failure to state a claim at any
2 subsequent time, but the Court of Appeals rejected this
3 argument. They say that the defense of failure to state a
4 cause of action may not be raised in another motion under
5 3211(a) of which the statute permits only one. It may be
6 raised in another form of motion such as by summary
7 judgment. So that does not help him nor does his passing
8 reference to subject-matter jurisdiction, your Honor.

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

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

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

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

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

15 THE COURT: That's okay.

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

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

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

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

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

4 THE COURT: And the name of the entity?

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

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

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

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

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

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

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

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

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

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

6 THE COURT: Okay. Thank you.

7 Ms. Eisenberg.

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

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

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

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

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

4 THE COURT: Thank you.

5 Mr. Correll.

6 MR. CORRELL: Thank you, your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. CORRELL: In the N-PCL?

11 THE COURT: No, the statute.

12 MR. CORRELL: The EPTL.

13 They said the actual language is appropriate
14 proceedings.

15 THE COURT: Appropriate proceedings.

16 MR. CORRELL: Yes.

17 THE COURT: We are talking about remedy.

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

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

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

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

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

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

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

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

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

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

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

4 THE COURT: Understood. Okay.

5 Anything further?

6 MR. FLEMING: One point very brief.

7 THE COURT: I would have been disappointed
8 otherwise.

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

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

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

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

20 That's my point.

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

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

2 Thank you.

3 THE COURT: Thank you.

4 I'm ready to resolve the motion.

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

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

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

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

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

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

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

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

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

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

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

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

15 The motions are denied.

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

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

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1 incorporating what I just said.

2 Ms. Connell, you wanted to say something.

3 Hopefully what you say will also include why you were
4 shaking your head potentially about discovery being
5 completed.

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

8 May I speak from here or would you prefer --

9 THE COURT: The podium, please.

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

19 THE COURT: They are fully briefed?

20 MS. CONNELL: Yes.

21 THE COURT: They have motion sequence numbers?

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

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

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

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

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

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

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

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1 discovery anticipated?

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

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

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

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

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1 Committee, that that prejudices us.

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

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

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

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

23 THE COURT: Anything further?

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

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

3 MS. EISENBERG: Thank you, your Honor.

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

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

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

10 Thank you.

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

14 Thank you all very much.

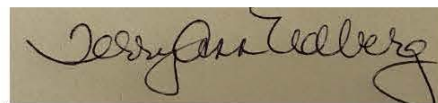
15 Excellent job.

16 I will see you next time.

17 ***

C E R T I F I C A T E

18
19 I, Terry-Ann Volberg, C.S.R., an official court reporter of
20 the State of New York, do hereby certify that the foregoing
21 is a true and accurate transcript of my stenographic notes.

22
23 

24 Terry-Ann Volberg, CSR, CRR
25 Official Court Reporter

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<p>NYSCEF DOC. NO. 847</p> <p>MR. CORRELL: [23] 3/19 30/23 33/13 33/17 33/25 34/12 34/19 35/5 36/24 37/13 39/21 40/2 40/8 41/11 42/3 42/13 68/6 69/15 70/10 70/12 70/18 71/16 72/9</p> <p>MR. FLEMING: [7] 3/21 43/15 44/7 44/12 47/3 73/6 73/9</p> <p>MR. SHIFFMAN: [8] 3/4 49/21 51/19 52/13 58/14 59/3 59/13 59/20</p> <p>MS. CONNELL: [16] 62/15 65/18 65/24 66/5 66/16 66/22 67/4 69/12 79/6 79/10 79/20 79/22 80/1 81/2 81/18 82/19</p> <p>MS. EISENBERG: [43] 3/11 4/17 5/13 6/6 6/14 6/17 6/22 7/2 7/9 7/17 8/2 8/10 8/13 8/15 8/19 12/15 13/17 15/25 16/10 17/7 17/15 17/19 19/4 20/11 21/2 21/5 21/7 22/2 24/5 24/15 25/5 25/20 26/17 28/1 29/6 29/20 30/3 30/17 67/8 67/15 82/24 83/3 83/8</p> <p>MS. FUCHS: [3] 9/1 10/16 11/9</p> <p>THE COURT: [100]</p>	<p>63/24 64/18 64/24 65/7 73/11</p> <p>G</p> <p>go [1] 75/21</p> <p>go-round [1] 75/21</p> <p>gotten [1] 46/4</p> <p>Grasso [1] 20/17</p> <p>H</p> <p>house [1] 6/7</p> <p>I</p> <p>ill [1] 46/4</p> <p>ill-gotten [1] 46/4</p> <p>in [1] 6/7</p> <p>in-house [1] 6/7</p> <p>K</p> <p>Kent [1] 30/24</p> <p>Kent Correll [1] 30/24</p> <p>M</p>	<p>refer [1] 22/8</p> <p>related [3] 22/8 28/18 28/19</p> <p>related-party [3] 22/8 28/18 28/19</p> <p>round [1] 75/21</p> <p>S</p> <p>seven [1] 41/4</p> <p>seven-zero [1] 41/4</p> <p>subject [2] 44/15 64/8</p> <p>subject-matter [2] 44/15 64/8</p> <p>T</p> <p>Terry [3] 2/17 83/19 83/23</p> <p>Terry-Ann [3] 2/17 83/19 83/23</p> <p>third [1] 42/20</p> <p>third-party [1] 42/20</p> <p>three [1] 41/1</p> <p>three-two [1] 41/1</p> <p>two [1] 41/1</p> <p>type [1] 77/24</p> <p>Z</p>
<p>1</p> <p>1.4 [23] 13/24 14/18 15/1 16/1 35/7 37/14 46/12 47/10 50/17 51/2 52/20 52/21 52/24 53/2 53/4 53/17 53/18 56/25 57/7 57/8 58/2 60/18 69/25 11 [1] 29/21</p>	<p>matter [2] 44/15 64/8</p> <p>million [1] 33/19</p> <p>monitor [1] 77/24</p> <p>monitor-type [1] 77/24</p> <p>Mr. [24] 4/1 20/17 43/16 44/1 44/3 44/21 45/10 47/13 48/10 48/16 49/25 53/8 62/23 63/3 63/22 63/24 64/18 64/24 65/7 68/5 73/11 74/25 81/10 83/12</p>	<p>zero [1] 41/4</p>
<p>2</p> <p>2020 [1] 1/11</p>	<p>Mr. Blaustein [2] 81/10 83/12</p>	
<p>A</p> <p>accountant [2] 10/23 11/2</p> <p>accountant-client [2] 10/23 11/2</p> <p>Ann [3] 2/17 83/19 83/23</p> <p>Article [1] 29/21</p> <p>Article 11 [1] 29/21</p> <p>attorney [7] 4/19 4/23 7/1 7/2 7/11 7/16 10/10</p> <p>attorney-client [7] 4/19 4/23 7/1 7/2 7/11 7/16 10/10</p> <p>auditor [1] 10/22</p> <p>auditor-client [1] 10/22</p>	<p>Mr. Correll [4] 43/16 44/1 44/21 68/5</p> <p>Mr. Correll's [1] 74/25</p> <p>Mr. Frazer [15] 44/3 45/10 47/13 48/10 48/16 49/25 53/8 62/23 63/3 63/22 63/24 64/18 64/24 65/7 73/11</p> <p>Mr. Grasso [1] 20/17</p> <p>Mr. Phillips [1] 4/1</p> <p>N</p> <p>N-PCL [22] 16/16 18/17 21/12 22/3 26/23 28/17 29/21 44/17 47/4 51/5 53/23 54/1 54/3 54/6 54/17 59/6 59/10 59/23 70/10 73/13 73/23 74/5</p>	
<p>B</p> <p>Blaustein [2] 81/10 83/12</p>	<p>non [1] 9/14</p>	
<p>C</p> <p>claim [2] 42/18 42/19</p> <p>client [10] 4/19 4/23 7/1 7/2 7/11 7/16 10/10 10/22 10/23 11/2</p> <p>co [1] 17/6</p> <p>co-defendants [1] 17/6</p> <p>Correll [5] 30/24 43/16 44/1 44/21 68/5</p> <p>Correll's [1] 74/25</p> <p>cross [3] 22/5 42/18 42/19</p> <p>cross-claim [2] 42/18 42/19</p> <p>cross-refer [1] 22/5</p>	<p>non-privileged [1] 9/14</p> <p>not [18] 23/20 24/3 31/18 32/5 34/24 35/25 39/7 43/24 48/1 48/7 48/12 48/14 49/8 54/7 54/8 54/9 54/15 55/2</p> <p>O</p> <p>open [1] 39/4</p> <p>open-ended [1] 39/4</p> <p>or [3] 6/7 67/22 67/22</p> <p>P</p> <p>page [1] 42/6</p> <p>party [4] 22/8 28/18 28/19 42/20</p> <p>PCL [22] 16/16 18/17 21/12 22/3 26/23 28/17 29/21 44/17 47/4 51/5 53/23 54/1 54/3 54/6 54/17 59/6 59/10 59/23 70/10 73/13 73/23 74/5</p>	
<p>D</p> <p>defendants [1] 17/6</p> <p>document [2] 9/11 9/11</p>	<p>Phillips [1] 4/1</p>	
<p>E</p> <p>ended [1] 39/4</p>	<p>privileged [1] 9/14</p>	
<p>F</p> <p>Frazer [15] 44/3 45/10 47/13 48/10</p>	<p>profit [18] 23/20 24/3 31/18 32/5 34/24 35/25 39/7 43/24 48/1 48/12 48/14 49/8 54/7 54/8 54/9 54/15 55/2 55/3</p> <p>profits [1] 48/7</p>	

EXHIBIT C

Supreme Court of the State of New York

Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		For Court of Original Instance	
PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK <p style="text-align: center;">- against -</p> THE NATIONAL RIFLE ASSOCIATION OF AMERICA INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL		<div style="background-color: #cccccc; text-align: center; padding: 5px;">Date Notice of Appeal Filed</div>	
For Appellate Division			
Case Type	<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	Filing Type	<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding
<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review	
Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.			
<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial	<input type="checkbox"/> Contracts
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input type="checkbox"/> Real Property (other than foreclosure)	<input checked="" type="checkbox"/> Statutory	<input type="checkbox"/> Taxation	<input type="checkbox"/> Torts

Informational Statement - Civil

Appeal			
Paper Appealed From (Check one only):		If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.	
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input checked="" type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment	<input type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: Supreme Court <input type="button" value="v"/>	County: New York <input type="button" value="v"/>		
Dated: 10/03/2022	Entered: 10/03/2022		
Judge (name in full): Joel M. Cohen, J.S.C.		Index No.: 451625/2020	
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final		Trial: <input type="checkbox"/> Yes <input type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury	
Prior Unperfected Appeal and Related Case Information			
Are any appeals arising in the same action or proceeding currently pending in the court? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If Yes, please set forth the Appellate Division Case Number assigned to each such appeal. 2022-03159 & 2022-01488 Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:			
Original Proceeding			
Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus			Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:			
Proceeding Transferred Pursuant to CPLR 7804(g)			
Court: Choose Court		County: Choose County	
Judge (name in full):		Order of Transfer Date:	
CPLR 5704 Review of Ex Parte Order:			
Court: Choose Court		County: Choose County	
Judge (name in full):		Dated:	
Description of Appeal, Proceeding or Application and Statement of Issues			
Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.			
The NRA appeals from the portion of the decision and order on motion (entered on October 3, 2022) by Hon. Joel M. Cohen [NYSCEF 846; 851] denying the NRA's CPLR 3211 motion (Motion Sequence No. 30; NYSCEF 698 et seq.) to dismiss the First Cause of Action asserted in the NYAG's Second Amended Verified Complaint [NYSCEF 646].			
The NRA respectfully requests that the Appellate Division (i) vacate and reverse the portion of the Decision and Order [NYSCEF 846; 851] from which the NRA appeals; and (ii) dismiss the NYAG's First Cause of Action [NYSCEF 646].			

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

PLEASE SEE ATTACHMENT

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	People of the State of New York, by Letitia James, Attorney General of the State of New York	Plaintiff <input type="checkbox"/>	Respondent <input type="checkbox"/>
2	The National Rifle Association of America	Defendant <input type="checkbox"/>	Appellant <input type="checkbox"/>
3	Wayne LaPierre	Defendant <input type="checkbox"/>	None <input type="checkbox"/>
4	Wilson Phillips	Defendant <input type="checkbox"/>	None <input type="checkbox"/>
5	John Frazer	Defendant <input type="checkbox"/>	None <input type="checkbox"/>
6	Joshua Powell	Defendant <input type="checkbox"/>	None <input type="checkbox"/>
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

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Address: 28 Liberty Street

City: New York State: New York Zip: 10005 Telephone No: 212-416-8965

E-mail Address: monica.connell@ag.ny.gov

Attorney Type: ☐ Retained ☐ Assigned ☒ Government ☐ Pro Se ☐ Pro Hac Vice

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Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

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Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name: Thomas P. McLish/Akin Gump

Address: 2001 K Street, N.W.

City: Washington State: D.C. Zip: 20006 Telephone No: 202-887-4324

E-mail Address:

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

**Attachment to Information Statement
Filed by the National Rifle Association of America
Pursuant to 22 N.Y.C.R.R. 1250.3(a)**

Page 3— “Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.”

BACKGROUND

After the Court dismissed on March 2, 2022, the NYAG's two claims for dissolution of the NRA, the NYAG amended her complaint on May 2, 2022. In the amended pleading, the NYAG asserted no new allegations but added a new claim—purportedly under the first sentence of EPTL 8-1.4(m)—through which she seeks (A) the appointment of (i) an independent compliance monitor; and (ii) an independent governance expert, and (B) other unspecified items of injunctive relief.

On June 6, 2022, the NRA filed a motion to dismiss the NYAG's First Cause of Action. The NRA identified five independent reasons based on which the First Cause of Action should be dismissed with prejudice.

In his order dated October 3, 2022, the Honorable Joel M. Cohen, however, denied the NRA's motion for the reasons set forth on the record at the hearing on the motion on September 29, 2022.

ISSUES PROPOSED TO BE RAISED ON APPEAL

The issues proposed to be raised on appeal are:

1. Whether the Court below erred in holding that the First Cause of Action and the relief the NYAG seeks in connection with it are authorized by the Legislature; and
2. Whether the Court below erred in otherwise denying the NRA's motion to dismiss the NYAG's First Cause of Action.

GROUND FOR REVERSAL OR MODIFICATION TO BE ADVANCED

The grounds for reversal or modification to be advanced are:

1. The lower court erred by:
 - a. Disregarding apposite authorities and otherwise failing to apply the controlling procedural legal standard under CPLR 3211 in reviewing the NRA's motion to dismiss the NYAG's First Cause of Action;
 - b. Disregarding controlling authorities, relying on inapposite authorities, and otherwise failing to apply the controlling substantive law governing the court's interpretation of the statutory provisions invoked by the NYAG in the First Cause of Action and elsewhere in the Second Amended Verified Complaint;

- c. Disregarding the NRA's argument that the NYAG failed to plead in the Second Amended Verified Complaint that the charitable assets with regard to which she seeks relief in the First Cause of Action are held or administered in New York;
 - d. Holding that EPTL 8-1.4(m) applies extra-territorially;
 - e. Disregarding the NRA's argument that the NYAG fails to (i) show that EPTL 8-1.4(m) applies to the assets with regard to which the NYAG's First Cause of Action seeks injunctive relief; and (ii) plead facts sufficient to allege that EPTL 8-1.4(m) applies to any of such assets; and
 - f. Failing to address the NRA's argument that the NYAG's First Cause of Action should be dismissed on First Amendment grounds.
2. In denying the NRA's motion to dismiss the NYAG's First Cause of Action, the lower court committed reversible error.

SPECIFIC RELIEF SOUGHT

The specific relief sought is entry of an order:

- (i) Reversing and vacating the portion of Supreme Court's Decision and Order on Motion dated October 3, 2022, denying the NRA's motion to dismiss the First Cause of Action of the NYAG's Second Amended Verified Complaint; and
- (ii) Dismissing the NYAG's First Cause of Action.