

# Exhibit 9

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:

<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☒

DENIED

<input checked="" type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>
<input type="checkbox"/>

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

20221003084757 JMC01169111760342644C2EA032254BFE71D573C

JOEL M. COHEN, J.S.C.

# Exhibit 10

1

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.  
19 MONICA CONNELL, ESQ.  
Yael FUCHS, ESQ.  
20 EMILY STERN, ESQ.

21 BREWER  
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.)

tav

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

2 GAGE SPENCER & FLEMING LLP  
Attorneys at Law  
3 410 Park Avenue  
New York, New York 10022  
4 BY: WILLIAM B. FLEMING, ESQ.

5 CORRELL LAW GROUP  
Attorneys at Law  
6 250 Park Avenue, 7th Floor  
New York, New York 10177  
7 BY: P. KENT CORRELL, ESQ.

8 WINSTON & STRAWN LLP  
Attorneys at Law  
9 200 Park Avenue  
New York, New York 10066  
10 BY: SETH C. FARBER, ESQ.

11 AKIN GUMP STRAUSS HAUER & FELD LLP  
Attorneys at Law  
12 One Bryant Park  
New York, New York 10036  
13 BY: THOMAS McLISH, ESQ. (via Teams)

14

15

16

17

18

Terry-Ann Volberg, CSR, CRR  
Official Court Reporter

19

20

21

22

23

24

25

tav

## 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

tav

## Proceedings

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



## Proceedings

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

## Proceedings

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

## 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

tav

## 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.

## Proceedings

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

tav

## 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

tav

## 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

## Proceedings

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.

tav



## 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

## Proceedings

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

tav

## Proceedings

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

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

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

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

tav

## Proceedings

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

## 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,

tav

## 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

## 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

## Proceedings

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 --

tav



## Proceedings

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,

tav

## Proceedings

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

tav

## Proceedings

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

tav

## Proceedings

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,

## Proceedings

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

## Proceedings

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 --

tav

## Proceedings

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.

tav

## Proceedings

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



## Proceedings

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,

## Proceedings

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,

tav

## Proceedings

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

tav

## Proceedings

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

tav

## Proceedings

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

tav

## Proceedings

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

tav

## Proceedings

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.

tav

## Proceedings

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

tav



## Proceedings

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.

tav

## Proceedings

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

tav

## Proceedings

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 --

## Proceedings

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,

tav

## Proceedings

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

## Proceedings

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.

tav

## Proceedings

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

tav

## Proceedings

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.

tav



## Proceedings

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

## Proceedings

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

## Proceedings

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

tav

## Proceedings

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

tav

## Proceedings

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.

## Proceedings

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

tav

## Proceedings

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

tav

## Proceedings

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



## Proceedings

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

## Proceedings

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

## Proceedings

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

tav

## Proceedings

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

tav

## Proceedings

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

## Proceedings

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

## Proceedings

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

## Proceedings

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.

tav



## Proceedings

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

tav

## Proceedings

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

tav

## Proceedings

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

tav

## Proceedings

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

tav

## Proceedings

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

## Proceedings

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

tav

## Proceedings

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

tav

## Proceedings

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

tav



## Proceedings

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

## Proceedings

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

tav

## Proceedings

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

## Proceedings

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

## Proceedings

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

## Proceedings

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

tav

## Proceedings

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

tav

## Proceedings

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.

tav



## Proceedings

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

## Proceedings

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

tav

## Proceedings

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.

tav

## Proceedings

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

## Proceedings

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

tav

## Proceedings

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?

tav

## Proceedings

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 \*\*\*

18 C E R T I F I C A T E

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

25

tav

NYSCEF DOC. NO. 84/75

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  
 MR. FLEMING: [7] 3/21 43/15 44/7 44/12 47/3 73/6 73/9  
 MR. SHIFFMAN: [8] 3/4 49/21 51/19 52/13 58/14 59/3 59/13 59/20  
 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  
 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  
 MS. FUCHS: [3] 9/1 10/16 11/9  
 THE COURT: [100]

1

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

2

2020 [1] 1/11

A

accountant [2] 10/23 11/2  
 accountant-client [2] 10/23 11/2  
 Ann [3] 2/17 83/19 83/23  
 Article [1] 29/21  
 Article 11 [1] 29/21  
 attorney [7] 4/19 4/23 7/1 7/2 7/11 7/16 10/10  
 attorney-client [7] 4/19 4/23 7/1 7/2 7/11 7/16 10/10  
 auditor [1] 10/22  
 auditor-client [1] 10/22

B

Blaustein [2] 81/10 83/12

C

claim [2] 42/18 42/19  
 client [10] 4/19 4/23 7/1 7/2 7/11 7/16 10/10 10/22 10/23 11/2  
 co [1] 17/6  
 co-defendants [1] 17/6  
 Correll [5] 30/24 43/16 44/1 44/21 68/5  
 Correll's [1] 74/25  
 cross [3] 22/5 42/18 42/19  
 cross-claim [2] 42/18 42/19  
 cross-refer [1] 22/5

D

defendants [1] 17/6  
 document [2] 9/11 9/11

E

ended [1] 39/4

F

Frazer [15] 44/3 45/10 47/13 48/10

63/24 64/18 64/24 65/7 73/11

G

go [1] 75/21  
 go-round [1] 75/21  
 gotten [1] 46/4  
 Grasso [1] 20/17

H

house [1] 6/7

I

ill [1] 46/4  
 ill-gotten [1] 46/4  
 in [1] 6/7  
 in-house [1] 6/7

K

Kent [1] 30/24  
 Kent Correll [1] 30/24

M

matter [2] 44/15 64/8  
 million [1] 33/19  
 monitor [1] 77/24  
 monitor-type [1] 77/24  
 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  
 Mr. Blaustein [2] 81/10 83/12  
 Mr. Correll [4] 43/16 44/1 44/21 68/5  
 Mr. Correll's [1] 74/25  
 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  
 Mr. Grasso [1] 20/17  
 Mr. Phillips [1] 4/1

N

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  
 non [1] 9/14  
 non-privileged [1] 9/14  
 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

O

open [1] 39/4  
 open-ended [1] 39/4  
 or [3] 6/7 67/22 67/22

P

page [1] 42/6  
 party [4] 22/8 28/18 28/19 42/20  
 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  
 Phillips [1] 4/1  
 privileged [1] 9/14  
 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  
 profits [1] 48/7

RECEIVED NYSCEF: 02/03/2022

refer [1] 22/5  
 related [3] 22/8 28/18 28/19  
 related-party [3] 22/8 28/18 28/19  
 round [1] 75/21

S

seven [1] 41/4  
 seven-zero [1] 41/4  
 subject [2] 44/15 64/8  
 subject-matter [2] 44/15 64/8

T

Terry [3] 2/17 83/19 83/23  
 Terry-Ann [3] 2/17 83/19 83/23  
 third [1] 42/20  
 third-party [1] 42/20  
 three [1] 41/1  
 three-two [1] 41/1  
 two [1] 41/1  
 type [1] 77/24

Z

zero [1] 41/4



# Exhibit 11

**From:** [Connell, Monica](#)  
**To:** [Kent Correll](#)  
**Cc:** [Stern, Emily](#)  
**Subject:** RE: NYSCEF Notification: New York - Commercial - Other - Commercial Division - <ANSWER (AMENDED)> 451625/2020 (People of the State of New York, by Letitia James, Attorney General of the State of New York v. The National Rifle Association of America, I...  
**Date:** Friday, January 6, 2023 1:49:00 PM

---

Kent,

We write concerning Mr. LaPierre's filing on January 3, 2023 of an Amended Answer to the Second Amended Complaint. The pleading is made in response to Plaintiff's Second Amended Verified Complaint, dated May 2, 2022 ("SAC Complaint"), and contends that it is being filed "[i]n light of this Court's Order Amending Caption dated December 13, 2022 (NYSCEF 921), and in accordance with CPLR 3025(d)." Neither the Court's December 13, 2022 Order nor CPLR 3025(d) provide an authoritative basis for service of the amended answer as a matter of right at this stage of the case.

Judge Cohen previously denied Mr. LaPierre's motion to dismiss Plaintiff's complaint on the ground that defendant the NRA was misidentified as the "National Rifle Association of America, Inc." as opposed to the "National Rifle Association of America." (NYSCEF 844) Instead, following various submissions to the Court addressing this issue (see NYSCEF 852, 853, and 854), the Court directed "the parties [to] submit a proposed order amending the caption. **The court sees no need for further amendment or motion practice to make this minor change.**" (NYSCEF 855.) Plaintiff submitted a proposed order. (NYSCEF 909-910) On December 9, 2022, you (as well as certain other defendants) wrote and again asked Judge Cohen, inter alia, to direct Plaintiff to amend the Complaint to address the name of the NRA. (NYSCEF 916) The Court denied this request in a strongly worded order, noting that you and certain other defendants asked the Court to order Plaintiff to amend the summons and complaint "despite the Court's clear and unequivocal order to submit a proposed order to make a simple change the change." The Court went on to hold that the change to the title of the NRA "does not warrant motion practice or the additional time and expense of further amendment and service of process. The parties' efforts should, instead, be focused on completing discovery on schedule and getting this case ready for a prompt and efficient resolution." (NYSCEF 921).

CPLR 3025(d) also does not justify the filing of an amended answer to the SAC Complaint as a matter of right. That provision requires an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Here, Plaintiff has not filed an amended or supplemented pleading and the Court has already rejected the idea that the pleadings here need to be amended for the change ordered on December 13, 2022. Finally, the amended answer filed on January 3, 2023 purports to amend Mr. LaPierre's previous answer to the SAC Complaint concerning allegations that are unrelated to the change to the NRA's name in the complaint. Therefore, Mr. LaPierre's amended answer is also not justified as "required" by the stipulation changing the name of the NRA in the operative complaint. We would most likely not object to a pleading that *only* made changes to the NRA's name but note that the same is not necessary under the terms of the December 13, 2022 order.

Accordingly, we view Mr. LaPierre's purported amended answer (NYSCEF 1023) as a nullity; it was

not filed as of right, on consent or with permission of the Court. If you have authority that supports Mr. LaPierre's filing, please so provide. Otherwise, Plaintiff views this pleading as a nullity.

Regards,

Monica

---

**From:** Kent Correll <kent@correlllawgroup.com>

**Sent:** Tuesday, January 3, 2023 8:20 PM

**To:** Connell, Monica <Monica.Connell@ag.ny.gov>

**Subject:** Re: NYSCEF Notification: New York - Commercial - Other - Commercial Division - <ANSWER (AMENDED)> 451625/2020 (People of the State of New York, by Letitia James, Attorney General of the State of New York v. The National Rifle Association of America, I...

Monica,

Yes, please see attached.

Thanks, I will look for an email from Jonathan.

Best,

Kent

On Tue, Jan 3, 2023 at 7:54 PM Connell, Monica <[Monica.Connell@ag.ny.gov](mailto:Monica.Connell@ag.ny.gov)> wrote:

Kent,

Do you have a redline of this answer? Also, Jonathan will be reaching out to you to set up a discussion regarding the bills for subpoena compliance.

Thanks,

Monica

Get [Outlook for iOS](#)

---

**From:** [efile@nycourts.gov](mailto:efile@nycourts.gov) <[efile@nycourts.gov](mailto:efile@nycourts.gov)>

**Sent:** Tuesday, January 3, 2023 7:48:27 PM

**To:** James, Erica <[Erica.James@ag.ny.gov](mailto:Erica.James@ag.ny.gov)>; [kristen.chin@akingump.com](mailto:kristen.chin@akingump.com) <[kristen.chin@akingump.com](mailto:kristen.chin@akingump.com)>; [smcmillen@winston.com](mailto:smcmillen@winston.com) <[smcmillen@winston.com](mailto:smcmillen@winston.com)>; [djp@brewerattorneys.com](mailto:djp@brewerattorneys.com) <[djp@brewerattorneys.com](mailto:djp@brewerattorneys.com)>; [pbannon@winston.com](mailto:pbannon@winston.com) <[pbannon@winston.com](mailto:pbannon@winston.com)>; [ejohnson@gagespencer.com](mailto:ejohnson@gagespencer.com) <[ejohnson@gagespencer.com](mailto:ejohnson@gagespencer.com)>; [dkolansky@winston.com](mailto:dkolansky@winston.com) <[dkolansky@winston.com](mailto:dkolansky@winston.com)>; [Andrew.Cauchi@weil.com](mailto:Andrew.Cauchi@weil.com)

<Andrew.Cauchy@weil.com>; wab@brewerattorneys.com <wab@brewerattorneys.com>;  
clf@brewerattorneys.com <clf@brewerattorneys.com>; Sheehan, James  
<James.Sheehan@ag.ny.gov>; Loegering, Becca <rloegering@winston.com>; Young, Judith  
<Judith.Young@ag.ny.gov>; Sash, Sharon <Sharon.Sash@ag.ny.gov>;  
mwerbner@werbnerlaw.com <mwerbner@werbnerlaw.com>; Sarah Rogers  
<sbr@brewerattorneys.com>; mdp@brewerattorneys.com <mdp@brewerattorneys.com>;  
mco.ecf@weil.com <mco.ecf@weil.com>; Conley, Jonathan <Jonathan.Conley@ag.ny.gov>;  
jfb@brewerattorneys.com <jfb@brewerattorneys.com>; Jenna.Harris@weil.com  
<Jenna.Harris@weil.com>; mdp1@brewerattorneys.com <mdp1@brewerattorneys.com>;  
efile@nycourts.gov <efile@nycourts.gov>; wfleming@gagespencer.com  
<wfleming@gagespencer.com>; samantha.block@akingump.com  
<samantha.block@akingump.com>; carl.sr@carliligio.com <carl.sr@carliligio.com>;  
CopyCenter@brewerattorneys.com <CopyCenter@brewerattorneys.com>;  
copycenter@brewerattorneys.com <copycenter@brewerattorneys.com>;  
sme@brewerattorneys.com <sme@brewerattorneys.com>; swashington@hgdllawfirm.com  
<swashington@hgdllawfirm.com>; Wang, William <William.Wang@ag.ny.gov>;  
nbp@brewerattorneys.com <nbp@brewerattorneys.com>; cbc@brewerattorneys.com  
<cbc@brewerattorneys.com>; Connell, Monica <Monica.Connell@ag.ny.gov>; Sargent, Nina  
<Nina.Sargent@ag.ny.gov>; nymco@akingump.com <nymco@akingump.com>; Sheehan, James  
<James.Sheehan@ag.ny.gov>; docketny@winston.com <docketny@winston.com>;  
blb@brewerattorneys.com <blb@brewerattorneys.com>; mdn@brewerattorneys.co.m  
<mdn@brewerattorneys.co.m>; tbart.lett@hgdllawfirm.com <tbart.lett@hgdllawfirm.com>;  
rru@brewerattorneys.com <rru@brewerattorneys.com>; sfarber@winston.com  
<sfarber@winston.com>; Thompson, Stephen <Stephen.Thompson@ag.ny.gov>;  
diu@brewerattorneys.com <diu@brewerattorneys.com>; kent@correlllawgroup.com  
<kent@correlllawgroup.com>; uitkin@akingump.com <uitkin@akingump.com>; Stern, Emily  
<Emily.Stern@ag.ny.gov>; Shiffman, Steven <Steven.Shiffman@ag.ny.gov>;  
bozarowski@gagespencer.com <bozarowski@gagespencer.com>; Fuchs, Yael  
<Yael.Fuchs@ag.ny.gov>; caroline.zalka@weil.com <caroline.zalka@weil.com>  
**Subject:** NYSCEF Notification: New York - Commercial - Other - Commercial Division - <ANSWER  
(AMENDED)> 451625/2020 (People of the State of New York, by Letitia James, Attorney General  
of the State of New York v. The National Rifle Association of America, Inc. e...

[EXTERNAL]



# New York County Supreme Court Notification of Filing 01/03/2023

On 01/03/2023, the NYSCEF System received the documents listed below from filing user PHILIP CORRELL . Please keep this notice as a confirmation of this filing.

## Case Information

Index #: **451625/2020**

Caption: **People of the State of New York, by Letitia James, Attorney General of the State of New York v. The National Rifle Association of America, Inc. et al**

eFiling Status: **Full Participation Recorded**

Assigned Case Judge: **Joel M. Cohen**

Working Copies By order of the Chief Administrative Judge ([A0/267/20](#)), the court shall NOT request working copies of documents filed electronically.

## Documents Received

Doc #	Document	Received Date
1023	<a href="#">ANSWER (AMENDED)</a> Amended Verified Answer of Def LaPierre to NYSCEF Doc 646	01/03/2023

## E-mail Service Notifications Sent

Name	Email Address
SETH FARBER	<a href="mailto:sfarber@winston.com">sfarber@winston.com</a>
SHARON SASH	<a href="mailto:Sharon.Sash@ag.ny.gov">Sharon.Sash@ag.ny.gov</a>
Yael FUCHS	<a href="mailto:yael.fuchs@ag.ny.gov">yael.fuchs@ag.ny.gov</a>
STEVEN SHIFFMAN	<a href="mailto:steven.shiffman@ag.ny.gov">steven.shiffman@ag.ny.gov</a>
MONICA CONNELL	<a href="mailto:Monica.Connell@ag.ny.gov">Monica.Connell@ag.ny.gov</a>
WILLIAM FLEMING	<a href="mailto:wffleming@gagespencer.com">wffleming@gagespencer.com</a>
SVETLANA EISENBERG	<a href="mailto:sme@brewerattorneys.com">sme@brewerattorneys.com</a>
WILLIAM WANG	<a href="mailto:william.wang@ag.ny.gov">william.wang@ag.ny.gov</a>
URI ITKIN	<a href="mailto:uitkin@akingump.com">uitkin@akingump.com</a>
EMILY STERN	<a href="mailto:emily.stern@ag.ny.gov">emily.stern@ag.ny.gov</a>
JONATHAN CONLEY	<a href="mailto:jonathan.conley@ag.ny.gov">jonathan.conley@ag.ny.gov</a>
WILLIAM BREWER	<a href="mailto:wab@brewerattorneys.com">wab@brewerattorneys.com</a>
SARAH ROGERS	<a href="mailto:sbr@brewerattorneys.com">sbr@brewerattorneys.com</a>
CARL LIGGIO	<a href="mailto:carl.sr@carlliggio.com">carl.sr@carlliggio.com</a>
TAYLOR BARTLETT	<a href="mailto:tbartlett@hgdllawfirm.com">tbartlett@hgdllawfirm.com</a>
STEPHEN THOMPSON	<a href="mailto:stephen.thompson@ag.ny.gov">stephen.thompson@ag.ny.gov</a>

ERICA JAMES	<a href="mailto:erica.james@ag.ny.gov">erica.james@ag.ny.gov</a>
PHILIP CORRELL	<a href="mailto:kent@correlllawgroup.com">kent@correlllawgroup.com</a>
JAMES SHEEHAN	<a href="mailto:james.sheehan@ag.ny.gov">james.sheehan@ag.ny.gov</a>
SAMANTHA BLOCK	<a href="mailto:samantha.block@akingump.com">samantha.block@akingump.com</a>
Mark Werbner	<a href="mailto:mwerbner@werbnerlaw.com">mwerbner@werbnerlaw.com</a>
Rebecca Loegering	<a href="mailto:rloegering@winston.com">rloegering@winston.com</a>
DAVID KOLANSKY	<a href="mailto:dkolansky@winston.com">dkolansky@winston.com</a>
DAVID PARTIDA	<a href="mailto:djp@brewerattorneys.com">djp@brewerattorneys.com</a>
CAROLINE ZALKA	<a href="mailto:caroline.zalka@weil.com">caroline.zalka@weil.com</a>
PATRICK BANNON	<a href="mailto:pbannon@winston.com">pbannon@winston.com</a>
NOAH PETERS	<a href="mailto:nbp@brewerattorneys.com">nbp@brewerattorneys.com</a>
KRISTEN CHIN	<a href="mailto:kristen.chin@akingump.com">kristen.chin@akingump.com</a>

## Filing User

**PHILIP CORRELL** | [kent@correlllawgroup.com](mailto:kent@correlllawgroup.com) | 2124753070

Emergency Applications For Emergency Applications made after 5 p.m. or on days when the court is closed, please call 800-430-8457 or email [emergency@nycourts.gov](mailto:emergency@nycourts.gov).

**NOTICE:** This e-mail is intended only for the named recipient and for the purposes of the New York State Courts E-Filing System. If you are neither the intended recipient nor a person designated to receive messages on behalf of the intended recipient, notify the sender immediately.

**If you are unsure of the contents or origin of this email, it is advised to NOT click on any links provided. Instead, log into your NYSCEF account to access the documents referred to in this email. Thank you.**



**Hon. Milton A. Tingling, New York County Clerk and Clerk of the Supreme Court**

**Phone:** 646-386-5956

**Website:** [http://www.nycourts.gov/courts/1jd/supctmanh/county\\_clerk\\_operations.shtml](http://www.nycourts.gov/courts/1jd/supctmanh/county_clerk_operations.shtml)

**IMPORTANT NOTICE:** This e-mail, including any attachments, may be confidential, privileged or otherwise legally protected. It is intended only for the addressee. If you received this e-mail in error or from someone who was not authorized to send it to you, do not disseminate, copy or otherwise use this e-mail or its attachments. Please notify the sender immediately by reply e-mail and delete the e-mail from your system.

-----  
  
P. Kent Correll, Esq.

Correll Law Group  
250 Park Avenue, 7th Floor  
New York, New York 10177

Phone: (212) 475-3070

Cell: (646) 707-6937

Email: [kent@correlllawgroup.com](mailto:kent@correlllawgroup.com)

\*\*\*CONFIDENTIALITY NOTICE\*\*\* This message and any attachments are intended only for the designated recipient(s) and may contain confidential and privileged information, prohibited from disclosure or unauthorized use. If you are not the intended recipient, you may not review, copy or distribute this message or any attachments. If you receive this in error, please notify the sender by reply e-mail and destroy all copies and attachments in your possession. Thank you.