Motion Sequence 19

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

PEOPLE OF THE STATE OFNEWYORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK	§	
Plaintiff,	§	**INDEX NO. 451625/2020**
v.	§	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	
Defendants.	§	

MEMORANDUM OF LAW OF THE NATIONAL RIFLE ASSOCIATION
IN OPPOSITION TO MOTION TO INTERVENE

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I.
PRELIMINARY STATEMENT AND BACKGROUND

The New York Attorney General (the "NYAG") commenced this action (the "Action") against the National Rifle Association of America (the "NRA" or the "Association") and four individual defendants, on August 6, 2020. By Notice of Motion, dated September 24, 2021,[1] Roscoe B. Marshall, Jr. (the "Movant" or "Marshall") seeks to intervene pursuant to CPLR 1012(a)(2) and (3) and CPLR 1013 (the "Motion").

This baseless Motion is a transparent effort by a member of the Association to frustrate the collective will of millions of members by using this Action to gain control over the affairs of the Association to which he is not entitled. In violation of the contract between himself and the members of the Association, Movant seeks to dissolve the Board of Directors elected by hundreds of thousands of the NRA's members, by re-litigating grievances that this Court has already found meritless.[2] However, Movant is not a member of the NRA's Board of Directors. In fact, Movant has *never* been elected to the Board, having been twice rejected by the voting members of the NRA. First, he sought election the NRA's annual elections process in 2020, but his bid failed. Later that year he was invited to join the Board in 2021, to fill a vacancy, which term expired on October 2, 2021. Furthermore, when Movant again ran for the Board in 2021, he was not elected to serve on the Board. Yet, the Motion, and Movant's Proposed Answer in Intervention to the Amended Complaint, With Derivative Claims,

[1] NYSCEF No. 376.

[2] *See* NYSCEF No. 395, September 9, 2021 Transcript of Hearing and Decision denying Motion to Intervene of Francis Tait, Jr. and Mario Aguirre, dated June 17, 2021 ("September 9 Decision") at 44:23; NYSCEF No. 297 (Order Granting Motion to Dismiss, dated May 11, 2021) ("Bankr. Order"), issued in the Bankruptcy Action (denying Movant's supported, but ill-fated motion to appoint an examiner in the NRA's Chapter 11 proceedings).

Counterclaims and Crossclaims (the "Proposed Answer"),[3] are disingenuously brought by Movant in his capacity as an NRA director, knowing full well that his term would on October 2, 2021—prior to submission of his Motion.

This Motion is without merit and should be denied for the following reasons:

First, the Motion is untimely. Movant was aware of this lawsuit for at least 13 months, when the Action was commenced by the New York Attorney General in August 2020. Movant's own counsel filed a meritless letter with the Court in November 2020, demanding a right of "notice" on behalf of unnamed NRA members and later filed an unsuccessful intervention motion in June 2021 on behalf of two NRA members, Frank Tait ("Tait") and Mario Aguirre ("Aguirre"). Yet, Movant did nothing to intervene. As the court knows, New York law requires swift action by a proposed intervenor and any unexplained delay makes a motion untimely as a matter of law. Accordingly, this Motion should be denied as untimely.

Second, Movant lacks standing. Movant is not a director of the NRA. To have standing as a director under N-PCL §720, upon which Movant relies, he must be a director at the time the action he wishes to bring would be commenced. Should Movant be granted intervention, he would not have standing as a director to assert the proposed derivative claims as set forth in his Proposed Answer. Therefore, because Movant lacks standing to assert claims on behalf of the NRA pursuant to N-PCL §720, he lacks standing to intervene, and his Motion should be denied as futile.

[3] NYSCEF No. 378. The Amended Complaint, With Derivative Claims, Counterclaims and Crossclaims asserts claims for: (1) declaratory relief enjoining the NRA's current counsel, Brewer, Attorneys & Counselors ("BAC") from continued representation of the NRA (First Cross-Claim); (2) a declaratory judgment against indemnification of the NRA's officers and directors (Second Cross-Claim); (3) breach of fiduciary duty and disgorgement of profits on behalf of the NRA against the individual defendants (Third Cross-Claim); (4) damages for corporate waste on behalf of the NRA against the individual defendants (Fourth Cross-Claim); (5) constitutional free speech, free association, due process and equal protection violations and related injunctive relief against the New York Attorney General (First and Second Counterclaims); and (6) appointment of Movant as a temporary receiver for the NRA (Third Counterclaim).

Third, Movant lacks standing because his allegations that the NRA's Board ignored his demands is demonstrably false. Movant never made a single demand that the NRA's Board consider asserting any of the derivative claims he now seeks intervention to interpose. Moreover, Movant fails to allege with particularity that *any* specific members, much less the majority, of the Association's 75 directors are complicit in any wrongdoing. Therefore, Movant fails to comply with the requirements of N-PCL §623(c), precluding his standing to assert derivative claims.

Fourth, to the extent Movant now seeks to intervene based on his standing as a lifetime member of the NRA, the motion lacks merit for the same reasons this Court already cited at the hearing on September 9, 2021 in connection with Tait and Aguirre's failed intervention motion.[4] Among other reasons, Tait and Aguirre, and now Movant, failed to plead the threshold requirement of N-PCL § 623(a), that he represents 5% or more of any class of members. The Motion must be denied on that basis alone.

Finally, if Movant were granted intervention, the Association and its members would undoubtedly be prejudiced. The NRA is governed by its Bylaws, the binding compact among the Association's members and its leadership. The Association's longstanding democratic traditions have recently been illustrated at its annual meeting of members and the meeting of the Board of Directors. They show that Movant, like Tait and Aguirre before him, have the right and opportunity to be heard, as do all the Association's members. What Movant does not have is the right to interlope in the management and oversight of the NRA in contravention of the Bylaws as

[4] *See* NYSCEF No. 395, September 9 Decision at 44:23. Movant explicitly adopts and incorporates Tait and Aguirre's unsuccessful arguments. *See* NYSCEF No. 377 at p. 2 ("Mr. Marshall adopts and incorporates all the submissions of Mr. Tait and Mr. Aguirre in support of intervention, and this memorandum will focus on his standing as a Director to assert derivative claims and to intervene as a result."). To the extent not expressly set forth herein, and where relevant, the NRA incorporates the arguments and authorities set forth in its Memorandum of Law in Opposition to the Motion to Intervene of Tait and Aguirre, dated July 9, 2021 (NYSCEF No. 300), and supporting papers (NYSCEF No. 291-299).

agreed to by Movant and all other members. The Motion is, therefore, not only meritless but prejudicial.

The Motion should be denied in its entirety.

II.
ARGUMENTS AND AUTHORITIES

A. The Motion is Untimely

The Motion is untimely as a matter of law. CPLR 1012 and 1013 require that a "timely motion" to intervene be made.[5] The primary fact courts consider with respect to the timeliness of a motion to intervene is the proximity of the motion to the movant's awareness of the underlying action. Courts require timely intervention once the movant is aware of the underlying action and have held that even a four-month delay in moving to intervene is untimely as a matter of law.[6]

As a member of the NRA, as a candidate for the NRA's Board in 2020, and as a former member of the NRA's Board,[7] Movant was undoubtedly aware of this Action when the New York Attorney General commenced it in August 2020, more than 13 months before he filed the Motion.[8] He was certainly aware no later than November 2020 when his counsel asked the Court to provide them notice in this Action.[9] Movant had over 13 months to file an intervention motion, yet he waited, including for three months after Movant's counsel filed a largely identical

[5] CPLR 1012 ("Upon timely motion, any person shall be permitted to intervene in any action … ."); CPLR 1013 ("Upon timely motion, any person shall be permitted to intervene in any action … .").

[6] *See Castle Peak 2012-1 Loan Trust v. Sattar,* 140 A.D.3d 1107, 1108 (2d Dep't 2016) (motion to intervene denied when intervenor moved four months after learning of pending foreclosure action); *Vacco v. Herrera*, 247 A.D.2d 608, 608-09 (2d Dep't 1998) (movants failed to move to intervene until seven months after being notified of the commencement of the action); *State of N.Y. v. Philip Morris Inc.*, 269 A.D.2d 268 (1st Dep't 2000) (movants waited eight months after becoming aware of underlying events).

[7] NYSCEF No. 397, Affidavit of Roscoe B. Marshall, Jr. in Support of Motion to Intervene ("Marshall Aff.") at ¶ 2.

[8] Marshall Aff. at ¶¶ 2, 5.

[9] NYSCEF No. 245.

intervention motion on behalf of Tait and Aguirre on June 16, 2021,[10] and an additional month after that intervention motion was denied.[11]

In denying Tait and Aguirre's motion to intervene, the Court correctly stated that "there's a decent argument that it is not timely."[12] That motion to intervene was filed in June 2021, three months *before* this Motion. Despite Movant's assertions that the NRA's Chapter 11 filing stayed this case, as this Court has already correctly noted, "there was no automatic stay."[13] Moreover, Movant cites no support for his argument that a motion to intervene is timely because the court has only ruled on certain substantive or procedural motions, or because an amended complaint is filed, or because discovery is in progress.[14] Accordingly, the Motion is untimely and should be denied.

B. Movant Lacks Standing Because He Is Not A Director of the NRA

Standing "is a threshold determination."[15] A proposed intervenor has the burden to establish standing to assert the purported claims he seeks to interpose, and thereby be granted intervention under CPLR 1012 or 1013.[16] "Logically the result could hardly be otherwise, for it would make little sense to permit intervention only to hold that as to the intervenor the complaint had to be dismissed because he lacked standing."[17]

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[10] NYSCEF No. 243.

[11] NYSCEF No. 395, September 9 Decision at 44:23.

[12] *Id.* at 57:15.

[13] *Id.* at 57:19.

[14] NYSCEF No. 377, Motion at p. 11-12.

[15] *Socy. of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 769 (1991).

[16] *See In re Rapoport*, 91 A.D.3d 509, 510 (1st Dep't 2012) (affirming denial of motion to intervene when "the Movants have no standing to intervene"); *In re Village of Sloatsburg*, 17 N.Y.S.3d 386, 48 Misc.3d 1206(A), *2 (Sup. Ct. Rockland Cnty. 2015) (citing *Socy. of Plastics Indus.* and denying intervention because movants "lack[ed] the requisite standing to present the claims contained in their proposed pleading").

[17] *Unitarian Universalist Church of Central Nassau v. Shorten*, 316 N.Y.S.2d 837, 64 Misc.2d 1027, 1029 (Sup. Ct. Nassau Cnty. 1970) (denying intervention for lack of standing).

Under N-PCL §720, upon which Movant relies, only directors who are on the board of a non-profit corporation at the time the action is commenced have standing to assert derivative claims on behalf of the non-profit.[18] Moreover, a counterclaim is not deemed interposed until the pleading containing it is served.[19] Here, Movant's term as a member of the NRA's Board of Directors expired on October 2, 2021,[20] a fact notably left unmentioned by Movant in his Motion papers. Movant ran unsuccessfully for election to the Board in 2020, and again in 2021 as a write-in candidate, but was again unsuccessful.[21]

Movant is not now a member of the NRA's Board of Directors and will not be a director should he be granted intervention in order to serve his Proposed Answer setting forth his various purported claims. Accordingly, as this Court held in denying Tait and Aguirre's motion to intervene, because Movant as a former director of the NRA lacks standing under N-PCL §720 to assert his purported derivative claims on behalf of the NRA, he lacks standing to intervene under CPLR 1012 or 1013.[22]

C. Movant Lacks Standing Because He Fails to Allege The Requisite Demand on the NRA's Board of Directors

Even if Movant were a director of the NRA, which he is not, he in any event fails to sufficiently allege compliance with N-PCL §623(c). An allegation recounting a demand to the board by a director seeking to assert derivative claims is insufficient if it fails to detail why the

[18] *Romney v. Mazur*, 52 A.D.3d 610, 610 (2d Dep't 2008) ("[W]e agree with the Supreme Court that the appellants lacked standing to commence this CPLR article 78 proceeding on behalf of the Fund against the respondents, as the appellants were removed from their respective positions [as directors, officers, and/or members] in November 2004, and thus did not represent any interest in the Fund at the time the proceeding was commenced in December 2004.") (internal citations omitted).

[19] *See* CPLR 203(d) ("A defense or counterclaim is interposed when a pleading containing it is served.").

[20] Affidavit of William Davis, sworn to on October 18, 2021 ("Davis Aff."), annexed to the Affirmation of David J. Partida ("Partida Aff.") . as Exhibit 1 at ¶ 21.

[21] Davis Aff. at ¶ 22; Affidavit of David G. Coy, sworn to on October 16, 2021 ("Coy Aff."), annexed to the Partida Aff. as Exhibit 2 at ¶ 11.

[22] NYSCEF No. 395, September 9 Decision at 51:10-17.

board of directors refused to act, or does not make specific allegations of wrongdoing against board members not named as defendants in the derivative complaint.[23]

Movant alleges that he sent five emails to the NRA Board of Directors between March and August 2021: (a) urging special meetings to investigate the New York Attorney General's allegations, (b) recommending that the Board support a motion for an examiner in the NRA's Chapter 11 proceeding, (c) claiming, in conclusory fashion, that BAC is conflicted, (d) urging a special meeting to address Board oversight and fiduciary duties, and (e) accusing the Board of withholding information from itself and stating it needed to regain control of the NRA.[24]

First, in none of the emails does Movant make any formal demand that the NRA's Board specifically consider asserting any of the derivative claims he now seeks intervention to interpose. Movant's emails are nothing more than Movant's personal opinions on how to run the NRA. Accordingly, Movant has failed to sufficiently allege compliance with N-PCL §623(c).

Second, Movant fails to allege that he did not receive a response from any of the NRA's Board members or other officers or executives in response to his emails—which, in any event, did not demand that the Board undertake the actions Movant now seeks to interpose. Nor does Movant provide evidence that the NRA's Board ignored his emails. Instead he states in conclusory fashion "the NRA Board was completely unresponsive to his efforts and took no action to address any of his requests" and simply alleges, without any support, "that it is clear from the inaction of the Board's 'special litigation committee' ('SLC') that this committee is just another rubber-stamp subset of the NRA Board that is subservient to Defendant LaPierre and the

[23] *See Tomczak v. Trepel* 283 A.D.2d 229, 229-230 (1st Dep't 2001) (affirming dismissal of derivative complaint seeking to nullify sale of non-profit's headquarters for failing to allege under N-PCL 623(c) why board refused to take action on plaintiff's purported claim and failing to allege wrongdoing against other board members not named as defendants).

[24] NYSCEF No. 377 at pp. 5-6 and Exhibits E, F, I, J, and K.

Brewer law firm."[25] These conclusory allegations are plainly insufficient to establish that Movant made a proper demand on the Board and that the demand was rejected.[26]

Finally, again as the Court held in denying Tait and Aguirre's intervention motion,[27] here Movant fails to allege with any particularity that *any* of the 75 current members of the NRA's Board were complicit in any wrongdoing, much less that a *majority* was. Therefore, Movant's allegations do not satisfy the N-PCL §623(c) pleading requirement to allege facts with particularity showing that a majority of the board is complicit in any alleged wrongdoing.[28] In fact, Movant's Motion papers identify only the four individual defendants in this action as wrongdoers, none of whom are even Board members, and two of whom, Wilson Phillips and Joshua Powell, no longer work for the NRA and did not work for the NRA in 2021 when Movant made his purported demands on the Board. Accordingly, because Movant failed to sufficiently allege compliance with N-PCL § 623(c), the Motion must be denied.

D. <u>This Court Has Already Denied Intervention By Similarly Situated Members</u>

Because Movant is not a director of the NRA, the only other basis upon which Movant could intervene is as a member of the Association. However, to the extent that Movant seeks intervention in that capacity, the Court has already determined that he lacks grounds to intervene under CPLR 1012(a)(2) and (3) or CPLR 1013. Specifically, in denying the motion to intervene of Tait and Aguirre, the Court made the following holdings, which are dispositive of the Motion here.

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[25] NYSCEF No. 377 at p. 6.

[26] *See Tomczak* 283 A.D.2d 229, 229-30.

[27] This Court held that "the Proposed Intervenors have not alleged specific facts with particularity showing that a majority of the Board is complicit in any alleged wrongdoing." September 9 Decision at 52:4-6.

[28] *See Tomczak* 283 A.D.2d at 230-231.

First, Tait and Aguirre, as members of the NRA, failed to meet the threshold requirement of N-PCL § 623(a), which provides that in order to establish standing to assert a claim on behalf of a not-for-profit charitable corporation, such as the Association, a member of the corporation must represent 5% or more of any class of the members of the corporation.[29] Here, too, Movant has not alleged compliance with N-PCL § 623(a), and would therefore lack standing as an NRA member to assert the claims he seeks to interpose as set forth in his Proposed Answer.

Second, Movant fails to allege a sufficient interest in this action. He alleges that he has the necessary "bona fide" or "real and substantial" interest entitling him to intervention under CPLR § 1012(a)(2) because he is a director—which he is not—and a member of the NRA. However, this Court held that "[g]enerally, shareholders or members of companies do not have a right to intervene as separate parties in a law enforcement action, no matter how great their financial or emotional or associational interest is in the entity."[30] Here, Movant alleges nothing more than did Tait and Aguirre: a general interest in the NRA, that is shared by all of its five million members.[31] Otherwise, he alleges in conclusory fashion that "as an NRA Director with standing to sue under N–PCL § 720, Mr. Marshall plainly has the requisite 'real and substantial interest' in this action to support his intervention as of right and as a discretionary matter."[32] Again, however, Movant is in fact not a director of the Association. Similarly, while Movant alleges that he has a financial interest because he is a member of the NRA and the NRA may be

[29] *Id.* at 45:21-46:2 50:18-17.

[30] NYSCEF No. 395, September 9 Decision at 45:10-13.

[31] NYSCEF No. 377 at p. 9. ("Mr. Marshall and all other NRA members will be adversely affected here whether the AG prevails and the NRA is abolished, or whether the Defendants prevail and the NRA continues to be the fiefdom of Wayne LaPierre and his favored friends. All the present parties are adverse to Mr. Marshall and the NRA's membership in one way or another, and cannot adequately represent their interests.")

[32] *Id.* at pp. 7-8.

subject to pecuniary penalties in the Action, the Court has already held that "members do not have individual financial or property interests in the NRA's assets."[33]

Third, Movant has not made any showing that intervention is warranted in this Action as a matter of right or discretion. He simply repeats the unsuccessful arguments made previously by Tait and Aguirre in their intervention motion.[34] For example, he argues that "[b]ecause the present parties will not, or at the very least may not, adequately represent the interests of the NRA or its members, Mr. Marshall has the necessary 'bona fide' or 'real and substantial' interest entitling him to intervention under CPLR § 1012(a)(2)."[35] However, the Court held in deciding Tait and Aguirre's motion that they made no showing "that their intervention as independent parties is warranted, either as a matter of right or as a matter of discretion."[36] The same applies equally to Movant here.

Fourth, while Movant again, like Tait and Aguirre, argues that BAC is purportedly "conflicted" as the Association's counsel, because it at one time represented Mr. LaPierre in different matters, but not in this Action, this Court correctly held that "a motion to disqualify . . . can only be brought by the law firm's current or former client," not Movant.[37] The Court further correctly found that Tait and Aguirre therefore lacked standing to move disqualify the NRA's chosen counsel, even if they were granted intervention: "[t]he attorney-client relationship between the Brewer firm and NRA can't be imputed to the NRA's membership writ large. So the

[33] NYSCEF No. 395, September 9 Decision at 46:14-16; 55:14-56:5.

[34] NYSCEF No. 377 at pp. 7-11

[35] *Id.* at pp. 9-10; *see also* September 9 Decision at 52:10-20 (denying the same argument by previous proposed intervenors and holding "the Intervenors have not established that their interests regarding claims or defenses against the AG are inadequately represented.").

[36] NYSCEF No. 395, September 9 Decision at 46:23-25.

[37] *Id.* at 54:17-21.

Proposed Intervenors lack standing to raise that specific concern about the Brewer firm."[38] That holding also directly applies to Marshall's futile intention to move to disqualify BAC.

Finally, Movant has failed to show that he has standing to advance any arguments or claims other than those already being advanced by the NRA against the New York Attorney General in this Action. Movant purports to bring claims for restitution against third parties, namely the individual defendants, and to remove BAC as the NRA's counsel in this Action.[39] Movant however has not established—and cannot—that the Special Litigation Committee of the Association's Board of Directors is incapable of leading the Association in this Action.[40] Instead, Movant asserts, in conclusory fashion, that "the SLC has done nothing to investigate those concerns, and control of this case remains with Wayne LaPierre and the Brewer firm to this very day."[41] However, Movant willfully ignores that Mr. LaPierre recused himself from this Action, and Movant has no basis to disparage the SLC, whose members are independent and disinterested, and as a matter of law, are entitled to deference.[42] As this Court has already determined in rejecting Tait and Aguirre's intervention effort: "there's a special litigation committee and the Proposed Intervenors have not alleged specific facts with particularity showing that a majority of the Board is complicit in any alleged wrongdoing."[43] Critically, the

[38] *Id.* at 54:22-25.

[39] NYSCEF No. 377 at p. 8.

[40] *Id.* at pp. 8, 13-15.

[41] *Id.* at p. 6.

[42] *See Auerbach v. Bennett*, 47 N.Y.2d 619, 633-634 (1979) ("the determination of the special litigation committee forecloses further judicial inquiry" into the committee's decision that it would "not be in the best interests of the corporation to press claims against defendants"); *Pillartz v. Weissman*, Index No. 654401/2019, 2021 WL 2592672, *2 (Sup. Ct. N.Y. Cnty. June 24, 2021) (relying on *Auerbach*, holding that a special litigation committee "is entitled to deference," and "[d]eclining to pursue plaintiff's derivative claims, which belong to the company, is a valid exercise of business judgment") (*citing Matter of Comverse Tech., Inc. Derivative Litig.*, 56 A.D.3d 49, 53 (1st Dep't 2008)).

[43] NYSCEF No. 395, September 9 Decision at 52:3-6.

Court further observed that "I don't have an evidentiary basis at this point to conclude that the Special Litigation Committee set up by the NRA, which shares the Brewer firm, is incapable of determining who should represent the Association."[44]

Instead of advancing new arguments or viable potential claims, Movant states that he would seek to consolidate power in *himself*, by demanding that the Court appoint Movant as temporary receiver of the NRA,[45] and then order the dissolution of the current Board of Directors in favor of an election of a new board.[46] This self-serving and preposterous plan negates the expressed democratic will of the almost 350,000 NRA members who have voted to elect or reelect the current Board of Directors between 2019 and 2021,[47] and it should be rejected on that ground alone. But in any event, Movant offers no arguments opposing the Attorney General's effort to dissolve the NRA that would differ from those the Association is already advancing. This Court denied Tait and Aguirre's motion to intervene in part because, like Movant here, they failed "to show how they would advance different arguments or facts against the AG's claim than those currently being litigated by the NRA."[48]

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[44] *Id.* 55:1-3.

[45] NYSCEF No. 377 at p. at p. 4 ("Mr. Marshall is also well qualified to act as a temporary Receiver for an accounting and a new member election of an independent Board of Directors.").

[46] *Id.* ("[M]eaningful reform requires both removal of the Individual Defendants as officers and executives of the NRA and election of a new Board of Directors that will properly oversee the NRA.").

[47] Davis Aff. at ¶ 15. In 2019, 2,452,813 ballots were mailed to eligible voting members of the Association for the annual Board of Directors election, and 141,101 valid ballots were cast. In 2020, 2,471,629 ballots were mailed to eligible voting members and 110,118 valid ballots were cast. In 2021, 2,555,196 ballots were mailed to eligible voting members, and 95,365 valid ballots were cast.

[48] NYSCEF No. 395, September 9 Decision at 52:15-17. Movant here fails to make any allegations in this regard.

E. Movant's Self-Serving Narrative of the Association is False and His Motion is Prejudicial to the Association and its Members

In considering a motion to intervene under CPLR 1012 and CPLR 1013, courts also must "consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party."[49]

Movant attempts to support his motion to intervene by painting a false narrative of the Association, its Board of Directors and its leadership that is belied by the facts and is prejudicial to the Association and its members. He states that "the Board has simply 'rubberstamped' the actions of Wayne LaPierre, the Brewer law firm, and other LaPierre cronies," that "the NRA's Board has not and will not fulfill its fiduciary duties to the NRA and its members," and that "these issues have been raised many times in the last several years by intelligent and serious people but the Board has steadfastly refused to objectively investigate and analyze them, or to take any action against the Individual Defendants."[50] Movant's solution, incredibly, is to have himself appointed temporary receiver of the Association, and to dissolve the current Board of Directors in favor of an election of a full new board.[51] Movant's gambit is not only meritless, it is prejudicial to the Association and its members. He seeks to circumvent the will of 350,000 members who elected the current Board, and to upend the governance structure provided for in the Association's Bylaws, which gives voice and control to the membership and their elected Board. It should not be countenanced by the Court.

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[49] *See* CPLR 1013; *Gladstein v. Martorella*, 75 A.D.3d 465, 466 (1st Dep't 2010) (reversing grant of motion to intervene as prejudicial); *Mavente v. Albany Medical Center Hosp.*, 126 A.D.3d 1090, 1091 (3d Dep't 2015) (affirming denial of intervention as prejudicial). *See also Berry v. St. Peter's Hosp. of City of Albany*, 250 A.D.2d 63, 69 (3d Dep't 1998) (holding "analysis of prejudice under CPLR 1013 equally applicable to the propriety of intervention under CPLR 1012," because a "court still enjoys a measure of discretion in determining whether the relief should be granted dependent upon a showing that intervention would not prejudice any of the rights of the existing parties").

[50] NYSCEF No. 377 at pp. 2-3.

[51] *Id.*

1. The Board of Directors Oversees the Association's Leadership, and the Board is Elected by the Association's Members

As set forth above, Movant has never been elected to the Board of Directors by his fellow members. Nonetheless, he puts himself forward as the one person qualified to manage the affairs of the Association by dissolving the current Board. Movant's proposal would frustrate the wishes of, and prejudice, the very members he seeks to represent by cancelling their democratically elected choices that comprise the current Board. Indeed, every Board member currently serving has been elected or reelected since 2018,[52] when whistleblowers within the NRA came forward to raise concerns about mismanagement and wrongdoing by former officers of the Association and by certain former vendors. In fact, almost one-third of the current Board of Directors, or 21 of 75 members, are new Board members elected since 2018.[53]

Moreover, the notion that the Board is a "rubberstamp" for any of the NRA's management is simply not supported by the facts. The Board is comprised of successful, independent individuals, from all walks of American life, including current and former members of Congress and senior government officials, and leaders in the business, military and entertainment communities.[54] They are not compensated for their service on the Board, and they must stand for reelection by the Association's membership, at least every three years.[55]

In reality, no officer of the Association controls the Board of Directors, but rather, the executive leadership of the Association answers to the Board. The NRA's Bylaws provide that the Board elects the non-salaried officers of the Association, such as the President and the Vice Presidents, and also elects the salaried executive leadership of the Association, namely the

[52] *See* Davis Aff. at ¶ 16.

[53] *Id*.

[54] Coy Aff. at ¶ 6.

[55] *Id.*; Davis Aff. at ¶ 16.

Executive Vice President, the Treasurer and the Secretary.[56] Both salaried and non-salaried officers stand for election on an annual basis. The slate of candidates presented to the Board for the salaried and non-salaried officer positions is compiled by the Board's Nominating Committee, under a detailed and robust process set forth in the Bylaws.[57] Further, and significantly, the Board, with a three-fourths vote, has the power to remove both salaried and non-salaried officers, with or without cause.[58] In fact, the Board not only elects the salaried leadership of the Association, it is also charged with approving such officers' compensation after being given a recommendation by the Board's Officers Compensation Committee.[59]

The open and consistent democratic traditions of the Association were recently illustrated, involving both Movant, and the previous proposed intervenor, Tait.

At this year's Fall Board of Directors meeting held in Charlotte, North Carolina on October 2, 2021, the Nominating Committee submitted to the Board the names of Wayne LaPierre for the office of Executive Vice President, Sonya Rowling for Treasurer, and John Frazer for Secretary. After that submission, from the floor, Board member Phillip Journey nominated Movant to run against Mr. LaPierre for the position of Executive Vice President. The nomination was accepted and ballots were prepared for the Board members then present to vote by secret ballot. Mr. LaPierre was reelected by the Board of Directors, receiving 44 votes, with 2 votes cast for Movant. Ms. Rowling and Mr. Frazer were reelected without opposition.[60]

The results of the election obviously reflect the Board's considered judgment as to the direction the Association has taken since 2018. That is consistent with the May 2021 ruling of

[56] Coy Aff. at ¶ 8.

[57] *See* Davis Aff. at ¶¶ 9-13.

[58] Coy Aff. at ¶10.

[59] *Id.* at ¶ 9.

[60] *Id.* at ¶ 15.

the Texas federal bankruptcy court, which, among other things, found that the NRA had undertaken a "course correction" since 2018, that it "now understands the importance of compliance," and that the Association's CFO had credibly testified that "the change that has occurred within the NRA over the past few years could not have occurred without the active support of LaPierre."[61] The court further stated, with regard to Ms. Rowling, that it was "encouraged" that she had been promoted within the Association after having been a whistleblower, and that the court's impression of her was as "a champion of compliance."[62]

Also at the October 2, 2021 Board meeting, the Nominating Committee put forward to the following candidates for the Association's non-salaried leadership: Charles L. Cotton for President, Lieutenant Colonel Willes K. Lee for First Vice President, and David G. Coy for Second Vice President. The Chair of the meeting, Mr. Cotton, asked the Board in open session for any additional nominees for President, to which there were no replies. However, Mr. Journey announced from the floor that he would vote "no" on Mr. Cotton's nomination, and after being informed that a "no" vote was not possible under parliamentary rules of order as Mr. Cotton was unopposed, Mr. Journey changed his vote to an abstention. As a result, Mr. Cotton, Lieutenant Colonel Lee, and Mr. Coy were elected by acclamation. Mr. Cotton, and Lieutenant Colonel Lee and Mr. Coy, both of whom were also unopposed, were elected by acclamation.[63]

Therefore, not only does the Board of Directors control the appointment and (where relevant) the compensation of the Association's leadership, in Movant's specific case, he was nominated to run for Executive Vice President, ballots were prepared with his name on it, and the Board of Directors voted on his nomination by secret ballot and defeated it overwhelmingly.

[61] NYSCEF No. 297, Bankr. Order at p. 35.

[62] *Id.*

[63] Coy Aff. at ¶ 14.

Despite having his name submitted to the Board of Directors in open session as a candidate for the salaried leadership of the NRA, and having that nomination voted upon, Movant persists in advancing a narrative that intervention is his only means to have influence and be heard. That narrative is false, and the remedies Movant seeks would be prejudicial to the well-established democratic traditions of the Association that, just days ago, Movant benefitted from.

2. The Association's Bylaws Provide Robust Rights for Members to be Heard

To the extent Movant contends that intervention is necessary to give voice to the NRA's membership, the events of the recent NRA Annual Meeting of Members held in Charlotte on October 2, 2021, shows the degree to which members have robust opportunity to be heard under the NRA's Bylaws and democratic governance.

Among many other rights guaranteed by the Bylaws, members are permitted to submit resolutions for consideration by the members in attendance at the members' meeting. Tait, who unsuccessfully sought to intervene here, took to the floor at the October 2 Annual Members Meeting and offered a resolution that was read aloud in open session.[64] The resolution, among other things, condemned the current leadership of the NRA by name. A member moved from the floor to have the members present at the meeting decide whether the resolution should be considered. The parliamentarian ruled that under the relevant rules of order, consideration of the proposed resolution would be put to the members, with the votes of two-thirds of the members present required to consider the resolution. The members present voted to not consider Tait's resolution.[65] In other words, just days after being denied intervention in this Action for lack of standing, Tait stood before the entire leadership of the Association, and the members in attendance, and the press, and had his statement of condemnation read before all assembled.

[64] *See* Coy Aff. at ¶ 12.

[65] *Id.*, Ex. B at pp. 64-69.

That statement was then put up to a public vote of the membership. Movant and Tait cannot credibly argue that they or any other member is being "silenced."

In addition, the Association's Bylaws provide that the Association's members elect the Board of Directors. Approximately one-third of the Board seats are up for election in a given year.[66] According to the Bylaws, fully paid lifetime members and annual members with five or more consecutive years of membership, who are of age and citizens of the United States, are entitled to vote for the Board.

Finally, the Association's Bylaws gives the voting members themselves the power to remove officers and directors of the Association for cause, in a more efficient and democratic manner than the relief Movant seeks now, and which Tait and Aguirre sought before.[67] However, none of these proposed intervenors availed themselves of this process, choosing, rather, to undertake wasteful, meritless motion practice for which they lack standing. In foregoing the detailed and comprehensive procedures set out in the Bylaws—which is the binding compact among the Association's members and its leadership—in favor of litigation, Movant is prejudicing the rights of the members he claims he wants to represent. In addition to the foregoing reasons, the Motion should be denied on these grounds as well.

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[66] *See id*. at ¶ 4.

[67] *See* Coy Aff. at ¶ 5, explaining that the Bylaws also have a procedure to allow members to petition for the removal of a Board member or an officer of the Association for good cause. Pursuant to Article IX, Section 1 of the Bylaws, any voting member of the Association may in a single petition call for the removal of one officer or director. Article IX, Section 2 sets forth a detailed procedure for such a process, including that such a petition must garner a number of members eligible to vote that is not less than 5% of the number of valid ballots cast in the most recent mail ballot election of directors. If the petition is deemed valid by the Association's Secretary, an appeals process of such ruling is available, followed by a determination of the merits of the petition by a Hearing Board, which will issue a written opinion setting forth a recommendation on the petition, after a hearing with evidence. Recall ballots would be mailed out to each member entitled to vote for the election of directors, which will include the determination of the Hearing Board and any dissenting opinions. If a majority of votes cast on the recall ballot calls for the removal of an officer or director, the removal is effective immediately upon certification of the results.

III.
CONCLUSION

For all the foregoing reasons, the Motion to Intervene should be denied in its entirety.

Dated: October 18, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Mordecai Geisler, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Memorandum of Law in Opposition to the Motion to Intervene (Mot. Seq. 19) complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the memorandum of law contains 6,370 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law and affirmation.

Dated: October 18, 2021
New York, New York

/s/*Mordecai Geisler*
Mordecai Geisler