

1 SUPREME COURT OF THE STATE OF NEW YORK

2 COUNTY OF NEW YORK: TRIAL TERM PART 3

3 - - - - - X

4 NATIONAL RIFLE ASSOCIATION,

Plaintiff-
Counter Defendant,

- against -

7 OLIVER NORTH,

Defendant-
Counter Plaintiff.

10 - - - - - X

Index No. 653577/2019

October 10, 2019
60 Centre Street
New York, New York 10007

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

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1 THE COURT: Good morning everyone.

2 Counsel, can you please state your appearances?

3 MS. EISENBERG: Good morning, your Honor.

4 Svetlana Eisenberg from Brewer Attorneys and
5 Counselors on behalf of the plaintiff, the National Rifle
6 Association of America. With me at counsel table is my
7 colleague from our firm, Claudia Colon.

8 MR. ZOLAN: Good morning, your Honor.

9 Alexander Zolan from Williams & Connolly on behalf
10 of Col. North. With me is Steven Cady and Brendan Sullivan.

11 THE COURT: Good morning.

12 I have read the briefs and all of the papers. I
13 am sure you wouldn't do it anyway, but you don't need to
14 repeat what you have said.

15 Ms. Eisenberg, you're the movant.

16 MS. EISENBERG: Yes, your Honor.

17 THE COURT: Would you mind, if it's not too
18 difficult to balance your papers, to talk from there
19 (indicating). If you have a lot in front of you, I am fine
20 with you standing there.

21 MS. EISENBERG: I would be happy to.

22 THE COURT: Sorry to throw a curveball at you.
23 It's easier to hear from there.

24 MS. EISENBERG: Of course.

25 Your Honor, the defendant concedes that he has no

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1 statutory right to indemnification, and when it comes to
2 Section 4 of Article IV of the NRA's bylaws, he also
3 concedes that the word "such" in the second clause of that
4 section refers to the first clause.

5 So focusing on the first clause of Section 4,
6 what's important about it --

7 THE COURT: I am not sure they will say they
8 conceded that, but go ahead.

9 MS. EISENBERG: Which part?

10 THE COURT: The "such" part.

11 MS. EISENBERG: They actually state it in their
12 opposition that the word "such" refers back to the first
13 clause.

14 THE COURT: Okay.

15 MS. EISENBERG: And Section 4 states that, "The
16 indemnification and advancement of expenses of directors
17 granted pursuant to or provided by the laws of New York
18 shall not be exclusive of any other rights to which a
19 director seeking indemnification or advances of expenses may
20 be entitled." Those are three key words. There's no
21 disagreement that a director may have rights pursuant either
22 to the statute or some other source like the bylaws, the
23 Certificate of Incorporation, perhaps an agreement if that's
24 authorized, but what's critical here is that Mr. North
25 argues that this section, Section 4, in and of itself

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1 creates an affirmative right which it clearly does not. For
2 the Court to agree with Mr. North, the Court would have to
3 read the word "such" out of this bylaws provision which the
4 Court simply cannot do according to the well accepted
5 principles of statutory construction.

6 The defendant argues that the provision is
7 unambiguous, however, his reading of that provision is
8 simply not supported by its plain text.

9 As a result, your Honor, this is a very simple
10 case. His counterclaim should be denied, and the Court
11 should enter the declaratory judgment that the NRA seeks.

12 THE COURT: Can I ask you a question?

13 Does the NRA have agreements with other officers
14 and directors, just not this one? In other words, I assume
15 that sometimes your officers and directors are asked to give
16 testimony or documents to Congress or legislators. Do they
17 uniformly foot their own bill or does the NRA provide their
18 expenses for them?

19 MS. EISENBERG: I'm not able to speak as to what
20 may have happened, but to answer your first question,
21 certainly, your Honor, there are certain individuals with
22 whom the NRA has agreements pursuant to which there are
23 certain indemnification rights that are created for those
24 individuals pursuant to that specific written agreement.

25 What's important here, however, your Honor, is

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1 that neither in their counterclaim nor in their opposition
2 to the motion to dismiss have they once referred to any
3 contractual right, and, of course, if they had a contract,
4 if Mr. North had a contract pursuant to which he had such a
5 right, he would have come forward and identified it as a
6 source of such a right.

7 THE COURT: I think one of the sections of the
8 statute refers to board resolutions or the like, and I just
9 wanted to confirm that there were no board resolutions or
10 other kinds of things that more broadly provide for
11 indemnification that other officers and directors have used
12 in asking for indemnification.

13 So you're not aware of any?

14 MS. EISENBERG: There is one, and it was passed
15 after the briefing on this motion was completed on
16 September 14th. I have a copy for the Court here, if the
17 Court would like to see it.

18 THE COURT: Is that the Audit Committee or is that
19 the broader Board of Directors --

20 MS. EISENBERG: It follows on the Audit Committee
21 recommendation that was identified in prior briefing, and
22 recognizing that under the bylaws it's only the full board
23 that has the authority to authorize indemnification pursuant
24 to the bylaw sections that are cited in our brief,
25 specifically Article XI, Section 5, and Article VI, Section

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1 2(j).

2 The board considered that recommendation, and on
3 September 14th adopted a board resolution stating that, "In
4 the management's discretion where directors and officers
5 have incurred attorney's fees in connection with responding
6 to Congressional inquiries or in connection with current
7 litigation, the NRA is authorized to indemnify them in the
8 sound discretion of management, and only if it is compliant
9 with the law and other provisions -- and certain provisions
10 in the internal policies of the NRA."

11 THE COURT: You don't contend that the
12 indemnification that Col. North seeks is prohibited by New
13 York law, do you?

14 MS. EISENBERG: Yes, your Honor, we definitely
15 would at a trial. At this point we --

16 THE COURT: His expenses for serving as a witness
17 in a case or serving as a witness in a Congressional
18 investigation, your position is that that would trigger the
19 bad faith limitations of the New York law?

20 MS. EISENBERG: Yes, your Honor. Under Section
21 721 it clearly states, "That while statutory rights are not
22 exclusive, in no event shall a director be indemnified if a
23 judgment or other final adjudication adverse to him
24 establishes that his acts were committed in bad faith and
25 were material to the cause of action so adjudicated."

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1 THE COURT: What about if a judgment would have
2 been entered against him -- certainly no judgment has been
3 entered against him now so it wouldn't be against the,
4 inconsistent with the statute now, would it?

5 MS. EISENBERG: It would be in this action, your
6 Honor. If the Court were to find that Mr. North has a
7 right, which obviously we contend he doesn't, then we would
8 be squarely within the prohibition of Section 721, and we
9 would respectfully submit, your Honor, that he has no
10 ability to receive indemnification because his acts were
11 committed in bad faith.

12 THE COURT: Hang on one second.

13 Okay.

14 MS. EISENBERG: That's, of course, for all the
15 reasons that are set forth in the Complaint. Those are
16 factual matters that perhaps are for another day, that
17 perhaps we will never have to reach.

18 THE COURT: I think typically, this is my
19 experience with that, what that refers to is if you are
20 seeking indemnification when shareholders sue you or
21 third-parties sue you, that if in that case it's found that
22 you were liable because of self-dealing or whatever, you
23 can't get indemnification for that.

24 Anyway, it's not in front of me now, but I'm not
25 sure that just a finding in the air about bad faith, if it

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1 doesn't relate to the fees that they are seeking, is
2 necessarily blocked by 721, but that's not in front of me
3 now.

4 Go ahead.

5 MS. EISENBERG: Right. And, of course, the point
6 is that he has no right to begin with so we don't even get
7 to Section 721 that says -- your Honor asked whether, if you
8 found otherwise would it be subject to 721.

9 THE COURT: So you are not seeking to dismiss the
10 claim on the ground of 721, that's only if we get passed
11 this stage and you go to trial?

12 MS. EISENBERG: That is correct, your Honor.

13 THE COURT: Okay.

14 MS. EISENBERG: If I may reserve time for
15 rebuttal, the only --

16 THE COURT: We don't have red lights or yellow
17 lights. I'm here nine to five, we are open, so --

18 MS. EISENBERG: The only other thing, your Honor,
19 when I was preparing my oral argument I noticed that
20 defendant made a reference in a footnote to a media article
21 claiming that in a case the organization indemnified an
22 officer. We obviously addressed that in our brief by saying
23 that nowhere does the defendant connect that article to
24 Section 4 which is the source of his contended right.

25 In addition, if it's helpful to the Court, I have

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1 since obtained an affidavit from the general counsel of the
2 NRA, I have it here, which I shared with opposing counsel
3 yesterday, in which the general counsel advised, submits an
4 affidavit stating that there was no indemnification of any
5 kind provided to the officer, and, in fact, even the article
6 that they cite is ambiguous on that point, they overstated
7 it. If the Court needed the comfort to confirm there was no
8 indemnification provided to the officer in that case, I have
9 an affidavit to that effect.

10 THE COURT: Okay.

11 Actually, I have one more question.

12 We have been looking around, and I have not found
13 anything. Section 722: I think your position is that if
14 the request for indemnification was within the scope of
15 Section 722 or 723 of the Not-For-Profit Corporation Act, if
16 it was, then the bylaw does provide indemnification for
17 that. In other words, if the director was a party to a
18 civil or criminal proceeding, I think your papers say that
19 the bylaws do incorporate 722 and 723, right?

20 MS. EISENBERG: Absolutely, your Honor. The
21 argument is that 722 and 723 do not apply because Mr. North
22 does not meet a whole host of requirements he would have to
23 meet for those sections to apply, which he concedes.

24 THE COURT: I am interested in what "proceeding"
25 means, and whether, for example, a Congressional

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1 investigation could -- interestingly, Delaware law includes
2 the word "investigative" in that similar kind of
3 paragraph -- but is there any law that you're aware of that
4 would say one way or the other whether an investigation can
5 be a proceeding?

6 MS. EISENBERG: Your Honor, I haven't found a case
7 that interprets the New York statute and says "proceeding"
8 does not equal a Congressional request for information,
9 however, it is plainly clear from the rest of Article VII
10 which talks about if there is a statutory right or if
11 somebody is given indemnification because the board
12 authorized it, and they later have to pay it back because
13 they were found to have been, you know, acting in bad faith
14 or otherwise, it's clear that the words "action" or
15 "proceeding" refers to something other than the
16 Congressional request that Mr. North received here.

17 In fact, he waived that argument. He concedes in
18 his opposition that he is not seeking indemnification
19 pursuant to the statute, and he doesn't --

20 THE COURT: Well, indirectly, right, because your
21 position is that the bylaw essentially incorporates what
22 would be permitted under 722. So if it's covered by 722,
23 it's covered by the bylaw. We just agreed on that a few
24 minutes ago.

25 MS. EISENBERG: Yes, but he says very clearly in

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1 his opposition that he is not seeking indemnification under
2 Section 722 or 723. In fact, he says that whole argument
3 that the NRA put together saying those sections don't apply,
4 that doesn't even matter because we are not arguing that we
5 have a right under 722 or 723. They concede that very
6 clearly.

7 THE COURT: Okay. All right.

8 Anything else?

9 MS. EISENBERG: Thank you, your Honor.

10 THE COURT: You will have a chance to talk again
11 in the unlikely event that they say something you disagree
12 with.

13 MS. EISENBERG: Thank you.

14 MR. ZOLAN: Good morning, again, your Honor.

15 Alexander Zolan for Col. North.

16 THE COURT: Good morning.

17 MR. ZOLAN: So pending is the NRA's motion to
18 dismiss Col. North's counterclaim. They also seek to
19 dismiss his defenses, and they seek a declaratory judgment.
20 The Court should deny all of that relief and allow this case
21 to proceed to discovery.

22 Col. North urges the Court to apply the fair, the
23 plain meaning of the NRA bylaws. The bylaws clearly state
24 that New York statutory law is not the only source of
25 indemnification and advancement rights for NRA directors,

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1 and that NRA directors shall be entitled to such
2 indemnification and advancement rights unless and only
3 unless they are prohibited by New York law.

4 That plain reading of the bylaws does show an
5 affirmative grant of indemnification and advancement, and to
6 the extent that the NRA has managed to carry its burden of
7 showing another colorable meaning or reading of the NRA
8 bylaws, the motion should still be dismissed, and the case
9 should go to discovery regarding the meaning of the bylaws.

10 THE COURT: It's interesting. One of the things I
11 read is that that sentence that you just read or the first
12 sentence of the indemnification paragraph up until the words
13 "may be entitled" is essentially taken verbatim from Section
14 721 of the statute, and I don't know that I have ever heard
15 people or I don't know that I have seen an argument that 721
16 creates its own right.

17 So the words that, just to take the other side's
18 argument for them for a second, that you're leaving out, I
19 think, are the words "may be entitled," and the question
20 then is, you know, why doesn't that mean that they have to
21 have an entitlement under some other provision, and if this
22 provision was meant to do what you say it is, shouldn't it
23 say "entitled hereunder" or something like that? It just
24 says "may be entitled."

25 I think in 721 you are referencing entitled from

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1 something else because -- I will stop the monologue in a
2 second -- but in 721 right after the words "may be
3 entitled," again, all the language before it is pretty much
4 the same as your bylaw, it says, "...may be entitled,
5 whether contained in the Certificate of Incorporation or the
6 bylaws or when authorized by such Certificate of
7 Incorporation or bylaws, a resolution of members, or
8 resolution of directors, or an agreement providing for
9 indemnification."

10 So when I read 721, which, again, is almost
11 verbatim, the same, that seems to suggest that the
12 entitlement has to come from something else.

13 MR. ZOLAN: Your Honor, the reason the statute is
14 phrased that way, I think, is because the statute is saying
15 that here are the bases under which the statute understands
16 that New York law can or the statute understands that
17 corporations, not-for-profit corporations, can authorize
18 indemnification and advancement.

19 One of those that you just read in the statute is
20 through the bylaws. The bylaw provision, the NRA's bylaws,
21 is, I think, clear that the word "such," right after the
22 comma, is referring back, it is referring back to the
23 section of the bylaw before the comma, but it is referring
24 back to the other, the other rights to which a director
25 seeking indemnification and advancement may be entitled.

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1 THE COURT: It's a circle, right, because, again,
2 that sentence, which comes right out of 721, you're now
3 saying because that sentence is in the bylaws, that the
4 bylaws provides the right, but I think that's a circle.

5 MR. ZOLAN: Respectfully, your Honor, I disagree.
6 I think that the bylaws are recognizing that, and we don't
7 know the context in which the bylaws were passed. One of
8 reasons why we may need discovery on the meaning of the
9 bylaws is because we need to understand the meaning of the
10 bylaws when they were passed, what their intent was, how
11 they would have been applied.

12 But the bylaws, I wager to guess, when they were
13 passed, they were passed against the backdrop where New York
14 laws did not allow corporations or not-for-profit
15 corporations to provide for indemnification in circumstances
16 where New York statutory law did not allow for it because I
17 think at least in the '60s it was the case that New York,
18 the New York statute said it was the exclusive source of
19 indemnification. So what --

20 THE COURT: Wait a minute.

21 You think that randomly they came up with the
22 words that are exactly the same as 721, but somehow 721
23 didn't exist at that time?

24 MR. ZOLAN: No, your Honor. I think that when
25 those words are used, those words are used to say that the

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1 right to indemnification and advancement in New York law is
2 not the exclusive source of rights for NRA directors.
3 That's what the first -- that is what the first clause, the
4 portion of the bylaw before the comma means. It means New
5 York is not the only source of these rights. And right
6 after the comma it says, "...and such indemnification
7 rights, that NRA directors are -- shall be entitled to such
8 indemnification and advancement rights."

9 I think, your Honor, that the context in which
10 this dispute arises is important because I think it shows
11 the reason why the NRA in this case is urging a narrower
12 interpretation of its bylaws than was the understanding of
13 the board members, including Col. North, when they were
14 serving on the NRA board.

15 We describe the context in our papers, but just
16 briefly, Col. North had been on the board for 20 years. He
17 was recruited by the executive vice president of the NRA,
18 Wayne LaPierre, to be the president which is, it's a board
19 position that doesn't have any real power in practice.

20 Col. North learned shortly after he assumed the
21 presidency in September 2018 of potential financial
22 misconduct going on at the NRA including \$2 million of legal
23 fees billed per month by the Brewer firm, and personal
24 expenses for Mr. LaPierre.

25 So what did Col. North do? He started asking

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1 questions. He thought that he was, he was doing his duty as
2 the president and a director to raise questions internally.
3 He sought an independent audit. He wrote memoranda raising
4 his concerns. He wrote a memoranda to the NRA's general
5 counsel, to the chair of the Audit Committee, to the NRA's
6 Executive Committee, and he formed this Crisis Management
7 Committee.

8 What was Mr. LaPierre's and the NRA's response?
9 Mr. LaPierre told Mr. North to "stay in his lane." Then he
10 is engaged in this pattern of retaliatory conduct against
11 Col. North. He prevented Col. North from being renominated
12 as President. He disbanded the Crisis Management Committee.
13 He made up a story of a coup, and he spread that rumor
14 around to the other 70-odd members of the board of the NRA.
15 And then Brewer and Mr. LaPierre tried to force Col. North
16 from the NRA board, and they denied Col. North's request for
17 indemnification. Then instead of just denying the request
18 for indemnification, they sued Col. North in this case.

19 This is all part of a pattern of retaliatory
20 conduct including the interpretation of the bylaws.

21 THE COURT: Is there any law, not that I have seen
22 any, that says that if the director, I wouldn't say
23 whistleblower, but if the director is taking action to
24 correct what he sees as corporate misconduct, that putting
25 aside the merits of all of that, that the indemnification

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1 rights should be different for a director in those
2 circumstances from another director who is sued for
3 something else? In other words, is there some policy reason
4 why the corporation has to indemnify the director who is
5 seeking to -- a director who is seeking to uncover misdeeds?

6 MR. ZOLAN: I'm not aware of any, your Honor, but
7 I think that's not -- it's sort of besides the point because
8 what they are doing --

9 THE COURT: You were bringing up all the
10 background facts.

11 MR. ZOLAN: This is why, it's because what the NRA
12 is doing is they are treating Col. North differently because
13 it was the understanding of the Board of Directors that they
14 were entitled to indemnification and advancement under the
15 bylaws of the NRA.

16 Part of the way we know that was the understanding
17 of the directors other than Col. North saying so is that the
18 resolution that the NRA just passed was done because the NRA
19 directors had reached out to their board counsel asking
20 questions about what's going on with this Col. North
21 lawsuit? Why aren't we entitled to indemnification? We
22 thought we were.

23 In the communication that the board counsel sent
24 to the directors of the NRA he said some of you have been
25 reaching out for, for understanding about the position. The

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1 board counsel refers specifically in this e-mail to this
2 case, and the position taken by the NRA in this case, and he
3 echoes the position the NRA is taking in this case. And
4 then, as counsel for the NRA said, he summarizes the new
5 resolution that's passed.

6 So what did that new resolution reveal? It
7 revealed that before this lawsuit the NRA had an
8 understanding of its bylaws that it communicated to its
9 directors. Its directors were under the understanding that
10 the bylaws provided indemnification and advancement
11 including when they were witnesses in investigations
12 pursuant to subpoenas.

13 Then Col. North gets involved, and the NRA wants
14 to retaliate against Col. North, and it has this narrower
15 meaning that it's advancing in this case. Then other board
16 members say, wait a minute, that wasn't our understanding,
17 and the NRA reverses course, passes a resolution that allows
18 for indemnification including as a witness in investigation,
19 and it simply reveals that the NRA is now back to
20 interpreting the bylaws the way it existed with the
21 understanding --

22 THE COURT: The NRA's position, Ms. Eisenberg read
23 it to me, simply says that the management has the discretion
24 to do it. So I guess to some extent the board can delegate
25 it to management, but it doesn't sound like it was conveying

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1 a right. It says, you can seek it, and management can
2 decide to give it to you or not. It's not really conveying
3 a right, at least as I heard it.

4 Did you hear it differently?

5 MR. ZOLAN: I have a copy, like Ms. Eisenberg did,
6 and I am happy to show it to your Honor. It authorizes --
7 it says that, "The board believes that indemnification of
8 legal expenses for directors, officers and employees may be
9 advisable subject to the sound discretion of senior
10 management." And then it says that it resolves that the NRA
11 can in its discretion authorize the payment to indemnify.

12 Now the NRA can't -- the board, the executives at
13 the NRA cannot have passed a resolution that said we
14 authorize indemnification in all cases because that would
15 have provided indemnification for Col. North here. As I've
16 said, the context in which this arises is trying to
17 retaliate against Col. North for fulfilling his fiduciary
18 duties as a director and as president.

19 But what the new resolution does show is that
20 there was an understanding of the board before. When the
21 board complained about it, the board passed a resolution
22 that provided for indemnification in these specific
23 circumstances in which Col. North is seeking
24 indemnification, acting as a witness arising out of
25 investigations that arise directly from these --

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1 THE COURT: Let me get to that in a second.

2 Does the resolution describe that it would apply
3 to things like that? How does it describe it?

4 MR. ZOLAN: It says, "The NRA currently confronts
5 multiple government investigations and lawsuits wherein the
6 board believes that indemnification of legal expenses for
7 directors, officers and employees may be advisable."

8 I think that the lawsuit in which the NRA is
9 involved in, one of them is against Ackerman McQueen, which
10 is one of the subpoenas that Col. North received and is
11 seeking indemnification for, the investigation, one of them
12 is from the Senate Finance Committee, that's the inquiry
13 that Col. North received, and there is also the New York
14 Attorney General investigating the NRA, Col. North was
15 subpoenaed in that case, as well, in that investigation, as
16 well.

17 THE COURT: Look, it's possible they are trying to
18 thread a needle to indicate that some of you might be
19 indemnified even if Col. North isn't.

20 MR. ZOLAN: That's the problem.

21 THE COURT: That's why I was asking the policy
22 question because nothing that you've read, I think, would
23 convey an enforceable right. It says that management has
24 the discretion to permit it in a given case which suggests
25 they have the discretion not to give it in a given case,

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1 right?

2 MR. ZOLAN: I agree with you that that is how the
3 bylaw or the new resolution reads. I'm not sure how that's
4 consistent with the bylaw which says that directors shall be
5 entitled to indemnification immediately and to the fullest
6 extent. There is nothing about executive management
7 discretion there.

8 THE COURT: I'm not sure about that because I
9 think what the combination of the bylaw and 721 say is that
10 if there's a resolution of the board or an agreement or
11 whatever, then the corporation can indemnify, and it sounds
12 like what they did is create a resolution so that going
13 forward it just makes it clear that the management has
14 authority, notwithstanding, I think they argue, the bylaw to
15 extend the scope of indemnification to directors on an ad
16 hoc basis.

17 So I think you still have to have an argument
18 under the text of the bylaw because the subsequent
19 resolution is different. That's a different source, right?

20 MR. ZOLAN: I wholeheartedly agree, and Col. North
21 is entitled to indemnification under the bylaw itself.

22 THE COURT: Right.

23 You would agree -- let's assume the resolution had
24 been passed in January, and Col. North sent the letter, the
25 same one, that that resolution by itself wouldn't be enough

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1 to come to Court and mandate that they indemnify him; do you
2 think?

3 MR. ZOLAN: I am not sure. I think that's one of
4 the reasons why we need discovery into, for example, the
5 resolution that was passed, and the --

6 THE COURT: I am supposed to be looking at the
7 plain language of things unless you say that there is
8 something in there that's ambiguous. I didn't hear anything
9 in the resolution that's ambiguous, it says discretion.

10 MR. ZOLAN: Can I point one thing out, your Honor?

11 "It is resolved that the NRA is hereby authorized
12 to indemnify legal expenses for directors, officers and
13 employees subject to the recusal of interested individuals
14 from any decision-making process concerning whether or to
15 what extent indemnification or advancement will be
16 provided." I don't know whether in a hypothetical world if
17 Col. North sought indemnification pursuant to this
18 resolution who those interested individuals might be.

19 THE COURT: I think it means that he wouldn't be
20 able to participate.

21 MR. ZOLAN: I think it would mean that the people
22 who are interested in retaliating against Col. North would
23 not be able to participate in the decision about whether or
24 not to give him indemnification.

25 THE COURT: Okay. In any event, the text of it --

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1 I only get to look at parole evidence, right.

2 Indemnification is a matter of contract. I only get to look
3 at parole evidence, the law goes back centuries, if you can
4 show me that it's ambiguous or that it's plainly in your
5 favor.

6 So I don't see that language being plainly in your
7 favor. It's not clear why it's ambiguous. It says in the
8 management's discretion, and, A, the resolution didn't exist
9 until after this case, and, B, they can exercise discretion.

10 Do you think I'm empowered to overturn that
11 discretion?

12 MR. ZOLAN: I think that Col. North might have a
13 claim that exists under that resolution. That's not the
14 basis under which Col. North is seeking indemnification
15 here. Col. North's position is that the bylaws are clear on
16 their face, unambiguous; they provide affirmative
17 indemnification and advancement.

18 So the reason I brought up the resolution is not
19 to show that he's entitled to indemnification and
20 advancement under the plain meaning of the resolution. I
21 brought it up to show that the NRA is trying to, as your
22 Honor said, thread the needle here where there was an
23 understanding of the bylaws Prior to this lawsuit. Then
24 they retaliated against Col. North by filing the lawsuit,
25 urging the narrower meaning of the bylaws, and then has

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1 tried to thread the needle to quiet the other board members
2 who were asked questions about indemnification, and still
3 carve out Col. North. They can't do that because the bylaws
4 require indemnification.

5 THE COURT: Now, you know, and I have seen, there
6 are lots of corporate bylaws or resolutions that are much
7 more expansive than this and more specific, and they use
8 more active verbs like "you are hereby indemnified" for the
9 following things, and often times they include things like
10 investigations, but you don't have that kind of affirmative
11 right, at least clearly.

12 One of the arguments they make, which I want to
13 get your reaction to, I was wondering about it myself, is
14 what's the limit? Right now I think the way I read your
15 argument is, you know, certainly it can be more than what
16 the statute provides, I think everybody -- it could be more,
17 and that it can't go beyond what the statute prohibits. So
18 I think the way I read it is that once you make a written
19 request, you're entitled to indemnification of anything
20 without limit other than if it's illegal.

21 What's the limit there?

22 They say, well, if you're involved in some tort
23 case, a slip and fall, there's nothing in your argument that
24 would prevent a director from writing to the NRA saying,
25 I've been sued, it's not illegal for you to do it, please

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1 indemnify me.

2 What's your limit?

3 MR. ZOLAN: Sure. I think the NRA said it has two
4 arguments, one is about the word "such," and one is about
5 this limiting principle, and most of its reply brief was
6 spent arguing about the limiting principle.

7 I confess, I don't really see that there because
8 you have got to look at the provision in context. It's an
9 indemnification of directors provision of bylaws for a
10 not-for-profit corporation. Of course it only applies to a
11 director's conduct that arises out of the director's role as
12 the director of a not-for-profit corporation. That's what
13 director indemnification is in this context.

14 THE COURT: It's anything -- so it would be
15 anything that relates in any way to the role of a director,
16 and one can imagine lots of far afield things that might
17 come under that.

18 You're saying that this little paragraph goes to
19 the farthest reach of New York law, and all you have to do
20 is ask, and then you're entitled to it; is that basically
21 it?

22 MR. ZOLAN: That is the incentive for serving as a
23 director on the board of many, many companies including the
24 NRA, is that you know that as part of your service on the
25 board, you will be indemnified for any conduct that arises

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1 out of your service as a director of the NRA.

2 THE COURT: Have you seen in your travels other
3 kinds of indemnification agreements that are broader than
4 this? They don't read this way. If you look in the cases,
5 and you look for examples, they are much more affirmative in
6 terms of "you are hereby granted indemnification if."

7 I think you could say you may be reading Section
8 721 of the Act which is defined simply as making it clear
9 that the statute is not exclusive as providing a right, and
10 I don't know that I have ever seen 721 interpreted that way.

11 MR. ZOLAN: Well, I think there were two questions
12 there. One, this is a very broad and simple bylaw
13 provision. I have seen more specific bylaw provisions.
14 It's hard to say I have ever seen one that is more
15 affirmative. This one says that directors shall be entitled
16 to such indemnification immediately and to the fullest
17 extent unless and only unless prohibited by New York law.

18 As to the second, Col. North's argument is not
19 that 721 is creating this right somehow. This right was
20 created in the NRA bylaws to provide indemnification for NRA
21 directors.

22 THE COURT: What does the word "such," the phrase
23 "such indemnification" mean to you? It has to refer to the
24 first sentence.

25 MR. ZOLAN: It refers to the language, and this is

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1 what we chart out in pages five and six of our brief, that
2 "such" refers to the other rights to which a director
3 seeking indemnification or advancement of expenses may be
4 entitled.

5 THE COURT: How do you figure out what that is?

6 Again, "may be entitled," that same word, that
7 same phrase, "may be entitled," is in the statute, and it
8 references that entitlement as coming from other corporate
9 documents or agreements. It's not --

10 MR. ZOLAN: Including the bylaws.

11 THE COURT: Right, but your reading would mean
12 that 721, which is the same language, by itself says that
13 all, all directors are entitled to the full extent of New
14 York law.

15 MR. ZOLAN: I disagree with that.

16 THE COURT: It's the same word.

17 MR. ZOLAN: But 721, as your Honor's pointed out,
18 is much more specific. It delineates the various ways in
19 which under New York law directors may receive
20 indemnification and advancement rights. One of those is the
21 bylaws, and here in the NRA's bylaw they say directors shall
22 be entitled to such indemnification.

23 I understand your Honor's point. I think the NRA
24 is looking at this circularly, and if there is a dispute, if
25 there is a colorable argument on both sides, that

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1 underscores the reason why we need to go into discovery in
2 this case in the usual course to find out what the meaning
3 of these bylaws was, is, and how it's applied.

4 THE COURT: Okay.

5 Anything else?

6 MR. ZOLAN: I think unless your Honor has any
7 other questions, I don't have anything else.

8 Maybe one point about the affidavits.

9 THE COURT: I've never had anybody, when I say
10 "anything else," almost always there is something.

11 MR. ZOLAN: Usually I have three things, but the
12 one thing I will say about the affidavits, I don't really
13 understand the purpose of the affidavits on a motion to
14 dismiss. I think that they are relevant, that we should
15 absolutely be able to cross-examine the affiants regarding
16 them, and I don't think the Court needs to credit them.

17 I don't think I am telling the Court anything he
18 doesn't already know.

19 Thank you.

20 THE COURT: Ms. Eisenberg.

21 MS. EISENBERG: Thank you, your Honor.

22 I think it's telling that opposing counsel has
23 multiple times misquoted the bylaws provision. Opposing
24 counsel did so in the original counterclaim that was filed
25 omitting the word "such," and today Mr. Zolan multiple times

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1 said that the bylaws says that "directors shall be entitled
2 to indemnification" is a phrase that's present in the bylaws
3 provision. There is no such phrase. It only says "shall be
4 entitled to such indemnification" which refers back to
5 clause one.

6 In fact, in discussing the recent board
7 resolution, again, opposing counsel has misquoted the
8 language. I'm happy to offer the language of that
9 resolution as an exhibit. However, because opposing counsel
10 has conceded that Mr. North is not seeking indemnification
11 pursuant to the recent board resolution, I don't think it's
12 necessary, but if it's helpful to the Court to have the full
13 language in front of it, particularly because it's misquoted
14 by opposing counsel, I'm happy to offer that for the Court.

15 THE COURT: It's not in the record.

16 Is it the same language that's in the Audit
17 Committee e-mail?

18 MS. EISENBERG: No, your Honor, it's not. It
19 specifically says, "Resolved that the NRA, where management
20 in the exercise of its sound discretion deems it
21 appropriate, is hereby authorized to indemnify and where
22 appropriate advance legal expenses for directors, officers
23 and employees of the NRA subject to, one, all applicable
24 statutory requirements, two, the recusal of interested
25 individuals from any decision-making process concerning

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1 whether or to what extent indemnification or advancement
2 will be provided, and, three, the contract approval and
3 signature requirements set forth in the NRA purchasing
4 policy, and be it further resolved that this authorization
5 will be reassessed and if appropriate renewed by the board
6 at its April 2020 meeting."

7 Your Honor, I think what's also telling is that
8 Mr. North's counsel wanted to talk a lot about issues
9 relating to good faith. Although they are not before the
10 Court, I must respond.

11 If we are to have a trial about good faith,
12 respectfully, the evidence will show that Mr. North was not
13 a whistleblower. Mr. North was acting to deflect scrutiny
14 from his own misconduct. The evidence will show that the
15 NRA for days, weeks, and months asked Mr. North to disclose
16 the details of his lucrative contract with Ackerman McQueen,
17 and that throughout those days, weeks, and months Mr. North
18 refused to do so, and only when scrutinized, and only when
19 pressured, he came up with this idea to go after the person
20 who scrutinized his actions, and that's Mr. LaPierre.

21 Mr. Zolan also said that Ackerman is involved.
22 What the evidence will show is that Ackerman had been
23 suspected of overcharging the NRA, and it was because of
24 this serious concern that the NRA sued Ackerman, and that
25 confronted with that litigation, Ackerman joined forces with

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1 Mr. North, and they plotted to extort Mr. LaPierre, and say
2 to him, well, if you retire, and I remain president, then I
3 won't release these made-up allegations.

4 So if Mr. Zolan wants to talk about good faith,
5 and evidence about the merits of good faith, I respectfully
6 submit that the evidence will show that nothing that
7 Mr. Zolan alleged is true.

8 Bottom line, your Honor: Mr. North concedes and
9 states several times that Section 4 is unambiguous. Plain
10 and simple, there is no need for discovery. He has not
11 asserted a right pursuant to which he is entitled to
12 indemnification.

13 THE COURT: Thank you.

14 Anything further?

15 MR. ZOLAN: Your Honor, I think that it's clear
16 that there are factual disputes between the parties.

17 I was trying to give your Honor the context
18 because I think it helps show the motivation for why the
19 NRA's reading its bylaw provision narrowly in this case.

20 I don't want to get into a dispute about who is
21 right and who is wrong. We think we are right, and I don't
22 think they are right.

23 You know, one salient fact is that for everything
24 that counsel for the NRA just said, Mr. LaPierre knew all
25 the details about Col. North's contract with Ackerman

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1 McQueen. He helped negotiate the contract. He was
2 involved. He knew the particulars of it at the time it was
3 negotiated. So the allegation that Col. North somehow was
4 hiding those facts from the NRA, again, once this case
5 appropriately goes into discovery and good faith, that
6 entire issue, we will be proven right about that.

7 THE COURT: I think the lurid details going back
8 and forth don't strike me as relevant. This is, frankly, a
9 somewhat dry legal dispute about what this paragraph means,
10 and it's just about who pays legal fees. So that's what I
11 was getting at a little earlier.

12 Indemnification is a contract matter. You can
13 argue that as a policy matter legislators might say you have
14 to indemnify somebody when they are making allegations like
15 you have.

16 Anyway, I think the back and forth on what lead to
17 this schism is -- I have not heard anything that suggests to
18 me that that's relevant to the question in front of me which
19 is a little more pedestrian than that.

20 If there is nothing further, I will take 15
21 minutes to see if I have any other questions, to consult
22 with the brain trust over here (indicating), and come out,
23 and see if there is anything further.

24 MR. ZOLAN: Thank you, your Honor.

25 THE COURT: I will see you at 11:00.

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Court's Decision

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1 (A recess was taken.)

2 (After the recess the following occurred:)

3 THE COURT: Thank you counsel.

4 The arguments and briefs were extremely helpful,
5 and I am ready to render a decision.

6 I'm going to summarize my reasoning in some
7 detail, but so as not to bury the lede, here's the bottom
8 line: The NRA's motion to dismiss Col. North's claim for
9 indemnification of his legal fees is granted.

10 Indemnification of corporate directors for legal
11 expenses generally is a matter of contract. New York law
12 mandates indemnification only in narrow circumstances which
13 are not applicable here, otherwise, it gives corporations
14 flexibility to decide whether to provide for indemnification
15 in its corporate documents or agreements subject to a few
16 exceptions. In a nutshell, from the facts here, the NRA
17 could agree to pay Col. North's legal fees for his role as a
18 witness in two lawsuits and a Senate investigation, but it's
19 not required to.

20 The, and we've been calling them, lurid facts
21 underlying the dispute between Col. North and Mr. LaPierre
22 or anyone else, and whether Col. North is being singled out
23 from other directors with respect to indemnification is not
24 relevant to what's in front of me, which, again, is to
25 construe the text of the bylaws as to who pays legal fees.

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Court's Decision

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1 Those facts could some day be relevant in a dispute between
2 the parties on other grounds including fiduciary duties, as
3 to what a company should do when a director reports what he
4 asserts to be corporate misconduct, but that's not what we
5 are dealing with here.

6 In the end, this is a straightforward case. The
7 parties don't agree on much, but they do agree that it all
8 comes down to the meaning of the 93 word sentence contained
9 in the NRA's corporate bylaws. It's a complicated sentence,
10 and I guess no sentence should be 93 words long, but once
11 you wade through it the meaning is clear.

12 I think it's telling that for the most part the
13 bylaw tracks the provisions of Section 721 of the New York
14 Not-For-Profit Corporation Law. The first portion of the
15 sentence is taken almost verbatim from the statute.
16 Basically it says that in addition to whatever specific
17 indemnification rights that a director has under the next
18 two sections, 722 and 723, which don't apply here, the
19 director "may be entitled" to more indemnification rights if
20 they are granted in the company's bylaws, Certificate of
21 Incorporation, or by an agreement.

22 Most importantly, Section 721 does not create
23 indemnification rights and neither does the NRA bylaw, it
24 just says that the specific indemnification provisions
25 described in the statute are not exclusive. In fact, that's

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Court's Decision

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1 the title of 721. The title is "Nonexclusivity of Statutory
2 Provisions for Indemnification of Directors and Officers,"
3 and that's exactly what it's about. A company can give its
4 directors more rights than the statute does, and many
5 companies do, but it doesn't have to.

6 The next part of the NRA bylaw after the part
7 that's taken verbatim from the statute is about process. It
8 says that each director is entitled to "such"
9 indemnification, and that is, it seems clear to me, whatever
10 is provided under New York statute plus whatever the NRA
11 resolutions and agreements give him above and beyond that.
12 And it is implemented by making a written request to the
13 company. Once the request is made, the bylaw says the
14 director is entitled to be compensated immediately.

15 Col. North's argument is that once he makes a
16 written request under the bylaw provision, the NRA was
17 required to immediately indemnify him for all legal expenses
18 relating to his role as a director or officer regardless of
19 the circumstances as long as an indemnification wouldn't
20 violate the law, but the bylaw, frankly, doesn't say that,
21 it just provides the procedure for requesting, receiving
22 indemnification that is provided by the statute and by
23 whatever other rights, and the language is to which the
24 director "may be entitled" that are provided and granted by
25 the NRA itself. Col. North's reading would require

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Court's Decision

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1 something close to a blank check, and that's just not what
2 the bylaw says.

3 Finally, the bylaw returns to the structure of
4 721. It says that the director can't be indemnified if
5 doing so would be prohibited by New York law. To that
6 extent, one might say it's superfluous, but it essentially
7 means that a director can't be indemnified is he or she is
8 found to have acted in bad faith or gained some profit or
9 financial advantage to which he or she was not entitled.
10 Again, that part of the sentence does not create any new
11 rights.

12 So in combination the bylaw gives the NRA
13 flexibility to provide indemnification to the farthest
14 reaches of what New York law allows. It does not, however,
15 require the NRA to do so.

16 From there the result is pretty clear. Col. North
17 doesn't cite to any other NRA documents that could
18 conceivably be read as giving him more rights to an
19 indemnification than are described specifically in Sections
20 722 and 723 of the New York Not-For-Profit Corporation Law.

21 So the question is whether what Col. North is
22 seeking comes within the scope of those two sections, and
23 the parties seem to agree that it does not. Section 722
24 focuses on situations where the director or officer is
25 threatened to be made a "party" in a civil or criminal

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Court's Decision

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1 action or proceeding other than one brought by the company
2 itself seeking judgment in its favor. Section 723 involves
3 situations where the director actually prevails in a
4 litigation in which he or she is a party.

5 Here there is no question that Col. North is not a
6 party to any action or proceeding other than this one which
7 is brought by the NRA itself. He is simply a witness in two
8 lawsuits against the Ackerman firm, and he obviously has not
9 won any litigation with the NRA, at least not yet.

10 New York law also provides that a director cannot
11 recover what are called "fees on fees" meaning that Col.
12 North cannot recover his fees in this case which is simply
13 to determine whether he is entitled to fees. Again, the NRA
14 could decide to indemnify directors for this kind of thing,
15 and some do by agreement or otherwise, but it has not done
16 so, at least with respect to Col. North.

17 Finally, I don't think the recent board resolution
18 is relevant. It simply conveys discretion for management to
19 confer the indemnification on a case-by-case basis. It does
20 not create an enforceable right that triggers the NRA
21 bylaws. As I said before, there can be a dispute down the
22 road as to whether treating Col. North differently in view
23 of allegations he is raising creates some other cause of
24 action, whatever else that might be, but it's not -- that
25 does not trigger the rather dry provisions of the bylaw

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Court's Decision

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1 about indemnification.

2 Accordingly, my order is that Col. North's first
3 three requests for declaratory relief, that is, for
4 indemnification of the legal fees in this case, and for
5 being a witness in the Ackerman cases and a Senate
6 proceeding are dismissed on the merits and with prejudice.
7 Col. North's fourth claim for relief which seeks a
8 declaration with respect to unidentified future matters is
9 dismissed without prejudice because it is not ripe.

10 The right to indemnification will depend on the
11 nature of the specific action or proceeding. If Col. North
12 is a party to an action or proceeding within the scope of
13 Section 722 or 723 or any other grounds that would trigger
14 indemnification, then there might be a different result.

15 Under New York law the dismissal of Col. North's
16 claim for declaratory relief entitles the NRA to a
17 declaration in its favor which will be spelled out in a
18 written order.

19 Given that there is some overlap between the
20 various categories of relief in terms of them being existing
21 or future, the Court would ask the parties to submit within
22 one week a proposed order for review consistent with this
23 opinion, and by that I mean a portion that sets forth the
24 declaratory relief granted to the NRA as sort of a
25 reciprocal of denying it to Col. North.

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Court's Decision

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1 The NRA's motion to dismiss Col. North's
2 affirmative defenses is moot because the NRA is obtaining
3 the declaratory relief it seeks anyway. So to the extent
4 the NRA's Complaint seeks a declaration with respect to
5 future actions in which Col. North may be involved, again,
6 it is not ripe. The right to indemnification must be
7 decided on a case-by-case basis.

8 So that resolves the motion, and I believe based
9 on the nature of the Complaint that it should resolve the
10 case as a whole. Given that judgment is in the NRA's favor,
11 it seems to me that, again, there is no reason for further
12 proceedings in this case unless any of the parties disagree
13 with that.

14 MS. EISENBERG: No disagreement, your Honor.

15 THE COURT: Say that again.

16 MS. EISENBERG: No disagreement, your Honor.

17 MR. ZOLAN: No disagreement, your Honor.

18 (Continued on next page for certification.)

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THE COURT: Okay.

Anything further that we need to cover today?

MR. ZOLAN: No, your Honor.

MS. EISENBERG: No, your Honor.

THE COURT: Thank you.

C E R T I F I C A T E

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

Terry-Ann Volberg, CSR, CRR
Official Court Reporter

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**NRA v.
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October 10, 2019

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