

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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

**INDEX NO.** 451625/2020

**MOTION DATE** 02/10/2023

Plaintiff,

**MOTION SEQ. NO.** 044

- v -

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

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 044) 1164, 1165, 1166, 1167, 1168, 1169, 1170, 1171, 1172, 1173, 1174, 1175, 1176, 1177, 1178, 1252, 1253, 1331, 1332, 1334, 1335, 1336, 1337, 1338, 1339, 1340, 1341, 1342, 1343, 1344, 1345, 1346, 1347, 1348, 1349, 1350, 1351, 1352, 1353, 1354, 1355, 1356, 1357, 1358, 1359, 1360, 1361, 1362, 1363, 1364, 1365, 1366, 1367, 1368, 1369, 1370, 1371, 1372, 1373, 1374, 1375, 1376, 1377, 1378, 1379, 1380, 1381, 1382, 1383, 1384, 1385, 1386, 1387, 1388, 1389, 1390, 1391, 1392, 1393, 1394, 1395, 1396, 1397, 1398, 1399, 1400, 1401, 1402, 1403, 1404, 1405, 1406, 1407, 1408, 1409, 1410, 1411, 1412, 1413, 1414, 1415, 1416, 1417, 1418, 1419, 1420, 1421, 1422, 1423, 1424, 1458, 1459, 1460, 1461, 1462, 1463, 1464, 1465, 1466, 1467, 1468, 1469, 1470, 1471, 1472, 1473, 1474, 1475, 1476, 1477, 1478, 1479, 1480, 1481, 1482, 1483, 1484, 1485, 1486, 1487, 1488, 1489, 1490, 1491, 1492, 1493, 1494, 1495, 1496, 1497, 1498, 1499, 1500, 1501, 1502, 1503, 1504, 1505, 1506, 1507, 1508, 1509, 1510, 1511, 1512, 1513, 1514, 1515, 1516, 1517, 1518, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1815, 1825, 1826, 2010

were read on this motion for PARTIAL DISMISSAL OR SUMMARY JUDGMNET.

Upon the foregoing documents, and for the reasons stated on the record following oral argument on June 8, 2023, it is

**ORDERED** that Plaintiff People of the State of New York, By Letitia James, Attorney General of The State of New York’s motion to dismiss certain defenses pursuant to CPLR 3211(b) or, in the alternative, for partial summary judgment dismissing certain defenses pursuant to CPLR 3212(b) is **GRANTED IN PART** (excluding portions that were withdrawn or rendered moot) and Defendant the National Rifle Association of America’s (“NRA”) affirmative defenses

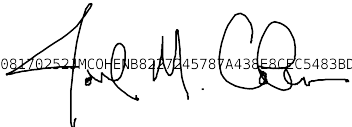
17, 20, 23, 24, 25, 26, 27, 28, 29, 33, 34, 35 and 36; Defendant Wayne LaPierre’s (“LaPierre”) affirmative defenses 2, 3, 26 and the unnumbered “catch all” defense; Defendant John Frazer’s (“Frazer”) affirmative defenses 3, 4 and 32; and Defendant Joshua Powell’s (“Powell”) affirmative defenses 6, 8 and the unnumbered “catch all” defense are **DISMISSED**; it is further

**ORDERED** that Defendants LaPierre and Frazer’s cross-motions to amend their affirmative defenses are **DENIED** as futile; it is further

**ORDERED** that the parties upload the June 8, 2023 transcript to NYSCEF upon receipt; it is further

**ORDERED** that, as soon as reasonably possible, the parties submit a joint letter proposing a trial plan and schedule so that the Court can reserve the necessary dates.

This constitutes the decision and order of the Court.

  
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**JOEL M. COHEN, J.S.C.**

6/8/2023  
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

-----X

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

**INDEX NO.** 451625/2020

**MOTION DATE** 02/10/2023

Plaintiff,

**MOTION SEQ. NO.** 045

- v -

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

**DECISION + ORDER ON  
MOTION**

Defendants.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 045) 1179, 1180, 1181, 1182, 1183, 1184, 1185, 1186, 1187, 1188, 1189, 1190, 1191, 1192, 1193, 1266, 1267, 1268, 1269, 1270, 1271, 1272, 1273, 1274, 1275, 1276, 1277, 1278, 1279, 1280, 1281, 1282, 1283, 1284, 1285, 1286, 1287, 1288, 1289, 1290, 1291, 1292, 1293, 1294, 1295, 1296, 1297, 1298, 1299, 1300, 1301, 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1309, 1310, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1715

were read on this motion for PARTIAL SUMMARY JUDGMENT.

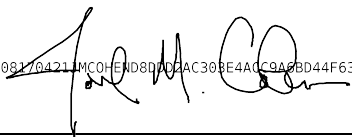
Upon the foregoing documents, and for the reasons stated on the record following oral argument on June 8, 2023, it is

**ORDERED** that Defendant Wilson Phillips' motion for partial summary judgment is **DENIED**; it is further

**ORDERED** that the parties upload the June 8, 2023 transcript to NYSCEF upon receipt.

This constitutes the decision and order of the Court.

20230608170421 JMCHE ND807DCAC30BE4ACC9AFBD44F63148146




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**JOEL M. COHEN, J.S.C.**

6/8/2023  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED				GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

-----X

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

**INDEX NO.** 451625/2020

Plaintiff,

**MOTION DATE** 02/10/2023

- v -

**MOTION SEQ. NO.** 046

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

**DECISION + ORDER ON  
MOTION**

Defendants.

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 046) 1194, 1195, 1196, 1197, 1198, 1199, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, 1209, 1210, 1211, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1222, 1223, 1224, 1225, 1226, 1227, 1228, 1229, 1230, 1231, 1232, 1233, 1234, 1235, 1522, 1523, 1524, 1525, 1526, 1527, 1528, 1529, 1530, 1531, 1532, 1533, 1534, 1535, 1536, 1537, 1538, 1539, 1540, 1541, 1542, 1543, 1544, 1545, 1546, 1547, 1548, 1549, 1550, 1551, 1553, 1554, 1555, 1556, 1557, 1558, 1559, 1560, 1561, 1562, 1563, 1564, 1565, 1566, 1567, 1568, 1569, 1570, 1571, 1572, 1573, 1574, 1575, 1576, 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1585, 1586, 1587, 1588, 1589, 1590, 1591, 1592, 1593, 1594, 1595, 1596, 1597, 1598, 1599, 1600, 1601, 1602, 1603, 1604, 1605, 1606, 1607, 1608, 1609, 1610, 1611, 1612, 1613, 1614, 1615, 1616, 1617, 1618, 1619, 1620, 1621, 1622, 1623, 1624, 1625, 1626, 1627, 1628, 1629, 1630, 1631, 1632, 1633, 1634, 1635, 1636, 1637, 1638, 1639, 1640, 1641, 1642, 1643, 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1800, 1801, 1802

were read on this motion for PARTIAL SUMMARY JUDGMENT.

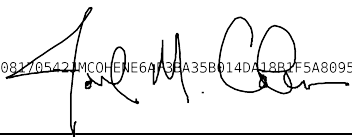
Upon the foregoing documents, and for the reasons stated on the record following oral argument on June 8, 2023, it is

**ORDERED** that Defendant Joshua Powell’s motion for partial summary judgment is **DENIED**; it is further

**ORDERED** that the parties upload the June 8, 2023 transcript to NYSCEF upon receipt.

This constitutes the decision and order of the Court.

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**JOEL M. COHEN, J.S.C.**

6/8/2023  
DATE

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					OTHER
					REFERENCE

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK: CIVIL TERM: PART 3

-----X

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

5 Plaintiff,

6 - against -

INDEX #  
451625/2020

7 THE NATIONAL RIFLE ASSOCIATION OF AMERICA,  
8 WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER  
9 and JOSHUA POWELL,

10 Defendants.

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11 Motion Seq. 44, 45 & 46

12 June 8, 2023

13 60 Centre Street  
14 New York, New York 10007

15 B E F O R E: THE HONORABLE JOEL M. COHEN,  
16 Justice of the Supreme Court

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

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19 Attorneys for the Plaintiff  
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21 New York, NY 10005  
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23 MONICA CONNELL, ESQ.  
24 STEPHEN THOMPSON, ESQ.  
25 ALEXANDER MENDELSON, ESQ.

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27 Attorneys for the National Rifle Association  
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29 New York, NY 10005  
30 By: SVETLANA EISENBERG, ESQ.  
31 SARAH ROGERS, ESQ.  
32 CHRISTOPHER ZONA, ESQ.  
33 DAVID UMANSKY, ESQ.

mlp

1 A P P E A R A N C E S: (Cont'd)

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AKIN GUMP STRAUSS HAUER & FELD  
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19

20

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23

24

MICHELE PANTELOUKAS  
Senior Court Reporter

25

mlp



## Proceedings

1 THE COURT: Good morning, everyone. Let's start  
2 with appearances, beginning with the plaintiffs.

3 MR. SHIFFMAN: Good morning, Your Honor.

4 Steven Shiffman, Assistant Attorney General,  
5 representing plaintiff. I am here today with Stephen  
6 Thompson, Alexander Mendelsohn and Monica Connell.

7 MS. CONNELL: Good morning, Your Honor.

8 MR. SHIFFMAN: Good morning, Your Honor.

9 THE COURT: Good morning.

10 And defendants.

11 MS. EISENBERG: Svetlana Eisienberg, counselors  
12 on behalf of the National Rifle Association of America. I  
13 am here today with my partner, Sarah Rogers, and our  
14 colleagues, David Umansky and Christopher Zona.

15 Good morning.

16 THE COURT: Good morning.

17 MR. FARBER: Seth Farber from Winston Strawn on  
18 behalf of Wilson Phillips.

19 MR. CORRELLELL: Good morning, Your Honor.

20 Kent Correll for Wayne LaPierre.

21 THE COURT: You caught me by surprise over  
22 there.

23 MR. ITKIN: Good morning, Your Honor.

24 Uri Itkin from Akin on behalf of Joshua Powell.

25 MR. FLEMING: William Fleming for John Frazer.

mlp

## Proceedings

1 Good morning.

2 THE COURT: Good morning.

3 We are doing three motion sequences today.

4 My inclination is to start with the two narrower  
5 ones, the motions by individual defendants. Those are  
6 sequence 45 is by Mr. Phillips for partial summary  
7 judgment; and motion 46 is by Mr. Powell for partial  
8 summary judgment. Before stepping into the yawning chasm  
9 of the other motion, I would like to start with those.

10 So, why don't we start with 45, which is  
11 Mr. Phillips, by Mr. Farber. Do you want to start us off?

12 If you could do it from the lectern I would  
13 appreciate it.

14 MR. FARBER: Sure.

15 Thank you, Your Honor. And I don't want to do  
16 too much to stand in the way of the yawning chasm that you  
17 are facing. And, you know, as you noted at the outset, I  
18 think our motions -- our motion is fairly discrete. And I  
19 think I just want to make a couple of -- emphasize a  
20 couple of points in connection with that. And I am happy  
21 to respond to whatever questions the Court has.

22 So, there are, as Your Honor has noted, there is  
23 a lot of material in this case. A lot of material  
24 generally, and a lot that is alleged with respect to  
25 Mr. Phillips. There are a wide range of claims of

mlp

## Proceedings

1 breaches of fiduciary duty, most of which go to his  
2 conduct as an officer, an employee of the NRA. Things  
3 where he is accused of wrongdoing for either approving  
4 certain contracts or directing payments to what are  
5 described as either friends or insiders.

6 Our motion is directed to things very different  
7 from that. The first piece of this is for a  
8 post-employment consulting contract. And, you know, the  
9 basic problem with the AG Offices' claim that this is a  
10 related-party transaction, is that, you know, Mr. Phillips  
11 wasn't acting as the treasurer or CFO in entering into  
12 this contract. He wasn't doing this on behalf of the  
13 National Rifle Association. He was doing this at arm's  
14 length. There is no dispute of the facts regarding that.

15 And, you know, as we point out in our papers, it  
16 simply doesn't make any sense under the statute to treat  
17 these sort of contracts where one is negotiating on one's  
18 behalf as related-party transactions.

19 And, I mean, I think --

20 THE COURT: Does that square with the language  
21 of the statute as to the definition of a related-party  
22 transaction? I mean, I -- we are not talking about  
23 salary.

24 Can I ask the folks who are on Teams to mute  
25 their lines, please?

mlp

## Proceedings

1 Thank you.

2 We are not talking about just run of the mill  
3 salary for employees. This is -- this is a transaction in  
4 the sense of signing a contract with an existing officer  
5 for post-employment consulting. Right?

6 MR. FARBER: Yes. But whether it is consulting  
7 or employment, there is a distinction without a  
8 difference. If I am employed by a term of years, I enter  
9 into a contract for employment for additional years, it is  
10 the same thing as when I am coming in from the outside.

11 The point --

12 THE COURT: Hang on a second.

13 (Muting Teams attendees.)

14 THE COURT: If only I could do this to people  
15 in-person sometimes.

16 Go ahead. I am sorry.

17 MR. FARBER: And I think if you look at the --  
18 again, it is the structure of what is going on. At one  
19 point in the AG's Office brief they fault Mr. Phillips  
20 because they say he is not placing the interests of the  
21 NRA above his own.

22 THE COURT: That's the fiduciary duty part.

23 But not to be too pedestrian about it, but he is  
24 a related party, right, he is a director, officer or key  
25 person of the corporation at the time that this agreement

mlp

## Proceedings

1 is signed?

2 MR. FARBER: Yes.

3 THE COURT: And then the definition of a  
4 related-party transaction under the statute, reading from  
5 Section 102, is any transaction, agreement or any other  
6 agreement in which a related party has a financial  
7 interest; and in which the corporation or any affiliate of  
8 the corporation is a participant. And then it has some,  
9 you know, de minimus or other exceptions, none of which, I  
10 don't think, applies here.

11 So what would be my grounds for just ignoring  
12 that language?

13 MR. FARBER: Well, I -- I don't think it is  
14 ignoring it. I think it doesn't encompass or is not  
15 intended to encompass this type of situation. And look,  
16 the guidance the Attorney General's Office themselves has  
17 put forward indicates that.

18 THE COURT: Well yeah, I can sort of understand,  
19 because there are different kinds of routine decisions in  
20 every company about what do we pay our people. And those  
21 have to go through their own rules and approvals where  
22 necessary. This is -- this is a bit more of an outside  
23 the ordinary course of business transaction; is it not?

24 MR. FARBER: Well, certainly, but what you are  
25 talking about is a question of degree. I think Your Honor

mlp

## Proceedings

1 by saying there are some things that fall outside of it,  
2 you have adopted the point that this is not a categorical  
3 absolute rule that doesn't encompass some sorts of  
4 situations. And then the question is just which ones are  
5 those.

6 THE COURT: So if they had a deal where, you  
7 know, on retirement somebody gets paid \$20 million just a  
8 flat -- just a check gets cut, that's your new retirement  
9 bonus. That's not a related-party transaction?

10 MR. FARBER: Well, there would be other problems  
11 with it, but the problem is not that it is a related-party  
12 transaction. There would be breach of fiduciary duty  
13 claims against the people on the NRA side who entered into  
14 that and negotiated it on behalf of the NRA.

15 There may be claims -- and the AG's Office in  
16 the brief talks about whether or not there was performance  
17 under the contract, that the -- that terms of it were  
18 excessive. That's not what is at issue in a related-party  
19 transaction.

20 THE COURT: The purpose behind this whole  
21 section of the law, and the principle generally, is that  
22 these are insiders. They have been working with each  
23 other for decades in some situations. And you know, the  
24 normal indicia of arm's length transactions at least might  
25 be absent. You know, you have Mr. Phillips negotiating, I

mlp

## Proceedings

1 guess, with people that work under him, or work with or  
2 under him for years. And so just -- the notion that it is  
3 just lifted entirely outside the scope of the statute is a  
4 little bit of a big pill to swallow, especially given the  
5 language I just read.

6 MR. FARBER: Well, to be fair, it is not people  
7 who are under him who negotiated that consulting fee. I  
8 mean, it is signed by, I believe, it was the president and  
9 vice president of the NRA. So, it is people who not only  
10 do not have any reporting authority to Mr. Phillips, but  
11 sort of in the hierarchy those are people to whom he is  
12 responsible.

13 THE COURT: The point, putting it outside of  
14 this particular factual setting is that he is a senior  
15 executive negotiating with a company for the future.

16 And, you know, I get it, these are not uncommon  
17 to have these kinds of things be negotiated. The argument  
18 is that these are a little unusual. Obviously the  
19 plaintiff has substantive issues with the terms and the  
20 like. But I am dealing with a statute. You know, I  
21 recognize that by calling it a related-party transaction  
22 it imposes certain procedural requirements of board  
23 approval or at least board committee approval and the  
24 like. So there is a significance to calling them that.  
25 But I am having trouble reading the language in a way that

mlp

## Proceedings

1 you want me to.

2 MR. FARBER: I think the way to think about it  
3 is, you know, in the context in which he is doing that, he  
4 is not acting as a related party, you know.

5 THE COURT: It doesn't say that. It just says  
6 it has to be a transaction in which a related party has a  
7 financial interest and in which the corporation is a  
8 participant. It doesn't necessarily mean that the related  
9 party has to be acting as the CFO or whatever.

10 MR. FARBER: No, I understand that. But I think  
11 as we have talked about earlier, there are going to be --  
12 there have to be some category of circumstances where  
13 somebody who is, for example, going to be an employee can  
14 negotiate his own salary and it doesn't fall within the  
15 context of this.

16 Again, the Attorney General's Office who is  
17 charged with enforcing this statute has issued guidance  
18 that says that those should not be considered  
19 related-party transactions. They don't back away from  
20 that. Their only argument is, well, a consulting  
21 agreement is different. So we are in agreement as to that  
22 principle interpretation. The only difference is they  
23 say, well, we ought to draw a line between employment  
24 agreements and consulting agreements. But they offer no  
25 logical basis for drawing that distinction, which I submit

mlp



## Proceedings

1 is a distinction without a difference.

2 THE COURT: Now, just in terms of the facts  
3 here. What was the approval -- was there any board  
4 approval either before or later for this -- for this one?

5 MR. FARBER: I believe it was ratified after the  
6 fact, but I don't recall sitting here.

7 THE COURT: There is not a lot of discussion  
8 about it, but -- in the papers. But Section 715, which  
9 governs related-party transactions, has a whole process  
10 for, you know, if board approval is required, it should be  
11 done in advance. But they added a section which says  
12 that, if you are going to use ratification, at least as I  
13 read it, you have to not only show the ratification was  
14 done, but also that the transaction was fair, reasonable  
15 and in the corporation's best interest.

16 Is that section relevant here?

17 MR. FARBER: I mean we are not arguing that it  
18 would satisfy the ratification standard. Our argument is  
19 that -- and I don't think on a summary judgment motion  
20 given that language, we necessarily would be able to do  
21 that.

22 THE COURT: Okay. But it is applicable --

23 MR. FARBER: Yes.

24 THE COURT: -- if it is a related-party  
25 transaction. Your point is that it is not a related-party

mlp

## Proceedings

1 transaction, and therefore it is not applicable.

2 Even if it is not a related-party transaction,  
3 there were supposed to be certain procedures followed  
4 within the NRA. Were they followed?

5 MR. FARBER: Well, I am not sure whether they  
6 were in this case. But whether they were or they weren't  
7 isn't relevant to the issue of whether there is liability  
8 for a related-party transaction.

9 In other words, if the AG's Office were to make  
10 the argument that you did not follow the NRA's internal  
11 procedures, that doesn't translate this into a claim that  
12 the statute for related-party transactions was violated.

13 THE COURT: Okay.

14 MR. FARBER: So if there is nothing further on  
15 this, I can turn to the second part --

16 THE COURT: Sure.

17 MR. FARBER: -- of the motion.

18 So the second thing we have argued both applies  
19 to -- and I'll start with this contract, that it can't be  
20 a basis for the failure to administer charitable assets or  
21 breach of fiduciary duty claims. And you know, as to  
22 these, I started to get into this point when you were  
23 talking about the related-party transaction, Mr. Phillips  
24 is not acting on behalf of the NRA in entering into this  
25 contract. So, the notion that you have a fiduciary duty

mlp

## Proceedings

1 to your employer, to act in your employer's best interest  
2 when you are negotiating an agreement on your own behalf,  
3 there is simply no -- there is no legal support for it and  
4 it doesn't make any sense. It is a matter of logic.

5 And similarly, there is no basis for saying he  
6 is responsible for failure to administer charitable assets  
7 for entering into this contract on his own behalf. I  
8 mean, the criticism there is that the -- this wasn't a  
9 contract that the NRA would receive value for, they didn't  
10 need his services. But again, to the extent that those  
11 assets weren't being safeguarded in entering into this  
12 contract with Mr. Phillips, but the fault for that would  
13 lie on the shoulders of those in the NRA who, on behalf of  
14 the NRA entered into it, not on Mr. Phillips.

15 THE COURT: Well, even if the only thing that  
16 they sought to do was to void the contract because of a  
17 violation on either end, wouldn't your client still be a  
18 proper defendant to that claim since he has got an  
19 interest in the contract?

20 MR. FARBER: Yeah, but then they would have to  
21 have a basis for voiding the contract. They haven't  
22 brought a claim like that. They have brought failure to  
23 administer charitable assets claims. They brought a  
24 breach of fiduciary duty claim. They haven't brought a  
25 claim that would annul the contract itself.

mlp

## Proceedings

1 THE COURT: I thought what you were suggesting  
2 was, to the extent that there is a claim for breach of  
3 fiduciary duty or even the statute, it would be on the  
4 part of the NRA executives who negotiated it on behalf of  
5 the NRA, not your client. But in either event, if I were  
6 to find that, at least one possible remedy down the road  
7 is that it is not a contract that can be enforced if it  
8 was a breach of fiduciary duties or otherwise.

9 MR. FARBER: I don't know if that's necessarily  
10 the case. If I enter into a contract with you to perform  
11 services and, you know, I breached my fiduciary duty  
12 because I did not negotiate it properly with you, and it  
13 is unduly favorable to you. Yeah, the entity may have a  
14 breach of fiduciary duty claim against you, but that  
15 doesn't mean that they can, if there was consideration  
16 provided, recover from me.

17 So, you know, Mr. Phillips had obligations under  
18 this contract. There was consideration on both sides.  
19 They have a dispute about whether he performed on it. But  
20 that's not -- that's not something that is at issue here  
21 in this motion.

22 THE COURT: Okay. Do you want to move to the  
23 HomeTelos contract?

24 MR. FARBER: The HomeTelos contract, if you boil  
25 this down -- this was a claim for some IT services that

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## Proceedings

1 were provided by a company whose principal was former  
2 girlfriend of Mr. Phillips. Now, they argue that there is  
3 evidence that it was still his girlfriend. We have  
4 pointed out in our papers why I don't think -- why the  
5 evidence is clear she wasn't. But it doesn't really  
6 matter for these purposes, because whether current  
7 girlfriend, former girlfriend, that doesn't fall in the  
8 category of a related party under the NRA's own policies  
9 and procedures.

10 And the NRA has its own related party concept.  
11 It is part of their manual. It is, I believe, Exhibit AI  
12 to the New York AG's motion. And you know, that  
13 definition is and the definition of related parties and  
14 related-party transactions is similar to the statutory  
15 one. And there are a bunch of enumerated parties, various  
16 relatives, spouses, but girlfriends doesn't fall within  
17 it. So, you know, what they have -- and there are  
18 certainly disclosure and approval requirements that are  
19 attendant upon related-party transactions. But  
20 essentially, their claim is that notwithstanding this  
21 scheme, there was a conflict of interest there that should  
22 have been disclosed. And therefore Mr. Phillips  
23 entered -- acted improperly in not coming forward and  
24 telling them about that.

25 And you know, I think the problems with that

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## Proceedings

1 are, number one, there is no basis for this disclosure  
2 requirement that -- that they have attempted to create.  
3 But also, sort of more fundamentally, this is part of a  
4 breach of fiduciary duty claim. And there is no evidence  
5 in the record. In fact, the evidence in the record is to  
6 the contrary that there is any harm that the NRA suffered  
7 because of this. This isn't a situation where there was  
8 consideration provided and nothing received in exchange  
9 for it. There is no evidence of that.

10 It is also the situation where the audit  
11 committee after the fact did approve this. Now, they can  
12 argue about whether that meets a ratification standard  
13 under the related-party statute. But this is not alleged  
14 as a related-party transaction, because it couldn't be.  
15 So, but what the audit committee's approval of this shows,  
16 is it wouldn't have made a difference had Mr. Phillips  
17 informed people about this before the end, as opposed to  
18 afterwards. Because when given the facts, everyone was  
19 perfectly happy with the situation. So, again, there is  
20 no evidence that this failure to disclose, even if there  
21 were a duty to disclose, caused anything. Because had  
22 that information been presented beforehand, the audit  
23 committee would have done exactly what it did and NRA  
24 management would have done exactly what it did.

25 These are two, sort of, discrete issues, but I

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## Proceedings

1 think they don't belong in the case.

2 THE COURT: Okay. Let me hear from the Attorney  
3 General on this one.

4 MR. FARBER: Thank you, Your Honor.

5 THE COURT: Thank you very much.

6 We are going to try to keep these brief so we  
7 can get through everything else. Okay?

8 MR. THOMPSON: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. THOMPSON: I will be brief.

11 First, just to address the related-party  
12 transaction issue. The only thing I want to touch on is  
13 the guidance that was issued by the Attorney General's  
14 Office. That guidance says that officer employee  
15 compensation is not a related-party transaction. And that  
16 makes sense because officer and director compensation is  
17 governed by a separate provision in Section 715 of the  
18 N-PCL, specifically 715(e). And that says that it must go  
19 through the board approved process in accordance with the  
20 bylaws. And so Mr. Phillips is trying to have his cake  
21 and eat it too. He does not want it to be officer  
22 compensation for the purposes of being a related-party  
23 transaction. But he -- I am sorry. He does want it to be  
24 officer compensation for purposes of being a related-party  
25 transaction, but does not want it to be officer

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## Proceedings

1 compensation for purposes of having to go through those  
2 other procedures.

3 And as Your Honor noted, the entire purpose of  
4 this statute is to create fairness in situations where  
5 arm's length negotiations are not necessarily possible.  
6 And the procedures are designed to help that along. And  
7 so we strongly believe that Mr. Phillips' post-employment  
8 contracts when he is not an employee, it is not a part of  
9 his retirement compensation, it is not a part of his  
10 normal compensation, that it is a related-party  
11 transaction within the meaning of the statute.

12 THE COURT: Now, the fiduciary duty argument is  
13 interesting, I think, from their perspective. It is when  
14 you are overtly -- I wouldn't say adverse to the  
15 organization, but you are, you know, you're contracting on  
16 an individual level with the company. Do fiduciary duties  
17 apply to that situation?

18 MR. THOMPSON: They do, Your Honor. And it is a  
19 two-part answer. If Your Honor agrees with us that it is  
20 a related-party transaction, then Mr. Phillips had a  
21 statutory and an NRA policy duty to inform the appropriate  
22 board committee, in this case the audit committee, of the  
23 transaction, in writing. And he did not do that here.

24 Even if it is not a related-party transaction,  
25 Mr. Phillips was the treasurer of the NRA at the time. He

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1 was the one charged with overseeing the NRA's financial  
2 policies. And he testified that he knew that his  
3 agreement didn't go through the normal policies required  
4 for contracts of this magnitude. There are various  
5 sign-offs required and a business case analysis. None of  
6 that happened.

7 And the NRA's policies also require you to  
8 report known violations of policies.

9 So in both instances he breached his fiduciary  
10 duties regardless of whether or not he was the one  
11 negotiating the contract on his own behalf. And --

12 THE COURT: But assigning -- so you are saying  
13 that the breach of fiduciary duty was the procedural  
14 aspect, not the substantive terms of the -- of the  
15 consulting arrangement?

16 MR. THOMPSON: Your Honor, we do take the  
17 position that he had a duty of loyalty to the organization  
18 that included being fair to the organization. And that  
19 the terms of this agreement, like the terms of many of the  
20 other agreements that we allege Mr. Phillips facilitated  
21 over his 25 years at the NRA, were unfair to the NRA and  
22 wasted corporate assets.

23 THE COURT: Right. Well, I am talking about  
24 this one in particular. Because the tricky thing about  
25 applying fiduciary duties in this setting is, it typically

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## Proceedings

1 means you have to put the entity's interest above your  
2 own. And the defense makes the, you know, sort of logical  
3 argument, how can that work in a situation where you are  
4 literally negotiating your own post-employment  
5 compensation.

6 MR. THOMPSON: And I think the answer, Your  
7 Honor, is the procedural safeguards that Mr. Phillips was  
8 required to follow the procedures for dealing with these  
9 kind of contracts, whether it was a related-party  
10 transaction, or just a simple conflict of interest, or  
11 normal employee compensation. Because all of that is  
12 supposed to be done by independent parties who are able to  
13 create the arm's length arrangement that was not present  
14 here.

15 THE COURT: Okay. All right. Thank you.

16 MR. THOMPSON: With respect to HomeTelos very  
17 briefly, Your Honor.

18 You know, Mr. Farber is correct that whether or  
19 not Ms. Richards was a significant other at the time the  
20 contract was entered into at the end of the day doesn't  
21 matter, because the NRA's policies clearly say that  
22 anything that creates even the appearance of a conflict of  
23 interest, must be appropriately approved. And that didn't  
24 happen here. Multiple NRA witnesses have testified that  
25 they believed Ms. Richards to be Mr. Phillips' significant

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## Proceedings

1 other at some point other another. And the head of the  
2 audit committee testified that the contract should have  
3 been disclosed to the audit committee before it was  
4 entered into, rather than the ratification process that  
5 they allege.

6 THE COURT: What is the statutory claim that you  
7 make with respect to the HomeTelos contract? It is not  
8 under 715 for related party?

9 MR. THOMPSON: Correct, Your Honor. It is only  
10 a breach of fiduciary duty claim under 720 and the EPTL.

11 THE COURT: Does the 720 automatically  
12 incorporate any breaches of bylaws and the like? Does  
13 that automatically become a violation of 720?

14 MR. THOMPSON: Yes, Your Honor. Violations of  
15 the entities' procedures and policies are breaches of  
16 fiduciary duty. As Your Honor actually held in connection  
17 with the second round of motions to dismiss, upholding  
18 certain of our claims against the other individual  
19 defendants for breaches of their fiduciary duty.

20 And with respect to the damages element that  
21 Mr. Phillips argues is absent, I have a few responses, and  
22 then I'll sit down.

23 First, we do allege, and there are issues of  
24 material fact as to whether or not NRA sued for damages.  
25 HomeTelos was a real estate technologies company that the

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## Proceedings

1 NRA hired to build a website for them to the tune of  
2 \$1.3 million. There isn't evidence that they received  
3 valuable services in connection with that.

4 And furthermore, Mr. Phillips is confusing our  
5 breach of fiduciary duty claim with a common law one.  
6 When it is a statutory claim under 720 of the EPTL --

7 THE COURT: Well, I mean, this is a summary  
8 judgment motion. And there has been discovery up and  
9 down, I assume, on this. Is there particular evidence  
10 that would suggest that they didn't provide value or they  
11 didn't do as good a job as somebody else might have done?

12 MR. THOMPSON: What we know, Your Honor, is that  
13 there was no bidding process that was done for this  
14 contract, which is also a violation of the NRA's  
15 procedures. So we don't know what the market value of  
16 these services was. We just know that that particular  
17 aspect of the policy was violated.

18 THE COURT: But if you were bringing -- and you  
19 are bringing a claim for damages, wouldn't -- I think you  
20 are anyway. Wouldn't you normally have to show that and  
21 say, well, we paid 1.3, the market value is 800,000,  
22 therefore we were harmed?

23 MR. THOMPSON: Your Honor, what we are bringing  
24 a claim for is accounting under 720. And the accounting  
25 requires Mr. Phillips to come forward and justify the

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## Proceedings

1 behavior once we have demonstrated a breach of his  
2 fiduciary duties.

3 THE COURT: So, you think that it is -- to state  
4 a claim you can talk about the procedural problems, the  
5 lack of a bidding process, and that it is for the  
6 accounting, to sort out whether it actually mattered?  
7 Because it is possible you could have gotten a great deal  
8 in a situation where you don't have any bidding. I am not  
9 saying that's what happened here. But we would just defer  
10 the injury issue to the accounting?

11 MR. THOMPSON: Yes, Your Honor. That it is  
12 Mr. Phillips' requirement to come forward and say why this  
13 was fair market value in the best interest of the NRA.

14 THE COURT: Now, I noted this back and forth in  
15 the briefs. And I don't want to get -- go down a dark  
16 hole here, but in terms of Judge and jury, I am aware that  
17 the statute does have a some broad provisions talking  
18 about this as a jury trial. Do you envision that a jury  
19 would be overseeing all aspects or deciding all aspects of  
20 this case? At some point we are going to have to figure  
21 out who does what here. And I assume the jury is not  
22 doing the accounting, which is a whole separate procedure.

23 MR. THOMPSON: Your Honor, one of my colleagues  
24 today is going to be speaking about that at length. So I  
25 would like to defer to her, it is a little above my

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1 paygrade.

2 THE COURT: I would defer too. I would defer  
3 also. Unfortunately I have nobody to defer to. Okay.

4 All right. Thank you.

5 MR. THOMPSON: Thank you.

6 MR. FARBER: May I respond briefly, just a  
7 couple of things?

8 THE COURT: Yes.

9 MR. FARBER: So, the Attorney General's Office  
10 made the point that the guidance they issued applies to  
11 officer and employee compensation, and that makes sense  
12 because -- that you would take officer compensation out of  
13 consideration, because there is a separate rubric for  
14 dealing with it.

15 Notice they didn't talk about employee  
16 compensation. And what Mr. Phillips is doing in entering  
17 into a post-employment consulting contract, obviously he  
18 is not going to be an officer after he retires. That is  
19 the piece that is akin to being an employee. And they  
20 don't offer any basis -- the logic that they are saying is  
21 their guidance, makes sense for not considering officer  
22 and employee compensation, because there is a separate  
23 procedure that officers and directors have to go through.  
24 But that's not the logic that underlies it. Because it  
25 applies to every employee.

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1 THE COURT: That kind of ignores the substance  
2 of the related-party transaction. The point is, when it  
3 was being negotiated he was a senior officer. It may  
4 relate to a period later down the road, but the harm --  
5 the concerns about the transaction are that it was  
6 negotiated at a time when he was an insider. So, the fact  
7 that it relates to, you know, consultant after he is  
8 already resigned, I am not sure that that really holds  
9 together as a distinguishing factor.

10 MR. FARBER: The point I am making is that the  
11 guidance talks about how the related-party transaction  
12 does not apply to negotiations of officer or employee  
13 compensation. And their response to that is to say, well,  
14 but there is a separate rubric that you are covered. But  
15 that rubric doesn't encompass employee compensation.  
16 That's not what that guidance is getting at. Because  
17 employees are not subject to that separate approval  
18 process. And so the reason behind it goes back, it is  
19 just a common sense one, that the, you know, arm's length  
20 negotiations that one has in the employee context are not  
21 meant to be covered.

22 THE COURT: Well, an employee typically wouldn't  
23 be a related-party anyway though. Right? I mean you have  
24 to be a director or officer or key person.

25 MR. FARBER: Well, you can be a key person as an

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1 employee. I mean as CFO you may not be a statutory  
2 officer, you can be a high ranking member of the  
3 organization, but you are not a statutory officer.

4 THE COURT: Okay. I understand.

5 MR. FARBER: The other point I would like to  
6 make, they are criticizing Mr. Phillips for not, himself,  
7 reporting this to the audit committee. If he were the  
8 person who were dealing with the audit committee on his  
9 own contracts, that would be a separate area they would be  
10 criticizing him for. There are other NRA officials who  
11 were taking on that role in the context of his consulting  
12 agreement, the president the vice president. The notion  
13 that he would be the one who would be coming forward and  
14 presenting for his approval his own contract, in fact I  
15 think there are other parts of this complaint that  
16 criticize the NRA for doing exactly that. When you  
17 have -- when you are acting at arm's length you are not  
18 the person who is going to go and present your own  
19 agreement to an audit committee or to anybody else in the  
20 organization for approval.

21 THE COURT: Okay.

22 Let's move to Mr. Powell's motion.

23 MR. ITKIN: Uri Itkin from Akin Gump.

24 Let me know when you are ready for me, Judge.

25 THE COURT: I am ready.

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## Proceedings

1 MR. ITKIN: Okay. I represent Josh Powell. And  
2 as we said in our motion, Judge, he is not really supposed  
3 to be in this case. He is a supporting player. There is  
4 a huge cast of characters, very important people. He was  
5 reporting to them.

6 He is accused, really at the heart of all of  
7 this after all the discovery that barely even involved  
8 him, there is no expert discovery related to him, barely  
9 any fact discovery related to him. The two things that  
10 the AG really accuses Powell of are mischarging expenses;  
11 and two, related-party transactions involving companies  
12 that the NRA already had a relationship with that had  
13 hired, one, his wife at some point as a consultant, and  
14 the second one, his father as a photographer for certain  
15 events.

16 Most of these claims fail. And at most,  
17 whatever the AG can recover from them on the damages side  
18 can really be no more than the \$54,000 of improper  
19 expenses that the NRA found that he charged after  
20 investigation.

21 I want to start with a legal claim made by the  
22 AG, trying to clawback his compensation. Now, there is a  
23 claim for, I guess, breach of fiduciary duty related to  
24 the charged compensation under Section 715 of the N-PCL.

25 And I think what we are heard here today already

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## Proceedings

1 confirms our argument. The Attorney General has issued  
2 guidance saying that compensation, officer director  
3 compensation subject to Section 715, it has to go through  
4 board approval. It has to demonstrate other requirements,  
5 reasonableness and so forth.

6 Well, when we pressed the AG in our motion, what  
7 gives them the right to clawback his compensation under  
8 720, all they could muster is a footnote saying, well,  
9 there is this faithless servant doctrine. That's under  
10 common law, Your Honor. And you already ruled in this  
11 case and the Court of Appeals has ruled on this in *Grasso*,  
12 that the Attorney General can't fashion theories of  
13 recovery under the common law.

14 THE COURT: That's not quite what *Grasso* says.  
15 It says you can't use a common law claim that is  
16 inconsistent with the statutory regime.

17 MR. ITKIN: Correct. This is by definition  
18 inconsistent with a statutory regime, because under the  
19 faithless servant doctrine all you need to show is that  
20 someone performed some wrongdoing at some point. And then  
21 you can be able to clawback their entire compensation  
22 during that period of time. So, for example, if someone  
23 was stealing from a company not only are they supposed to  
24 be held accountable for the money that they stole, the  
25 company can also clawback their compensation that was paid

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## Proceedings

1 to them during that time. It serves to disincentivize  
2 them or any person from doing bad things to the company,  
3 because they would effectively have been fired had that  
4 conduct --

5 THE COURT: To be fair, the faithless servant  
6 doctrine usually comes up in a very different kind of  
7 context. I often see it when an employee is essentially  
8 starting to feed information to a competitor, working for  
9 their own account instead of for the company. And you  
10 know, the idea here is, you know, that that's what your  
11 salary is for. And if you are going to be working for  
12 somebody else you shouldn't get your salary. That kind of  
13 thing. This is a different kind of a fit.

14 I understand your point.

15 MR. ITKIN: Right, Judge. And I think you agree  
16 with me that in the context you see it, which sounds  
17 pretty egregious, there is still no -- there is zero  
18 consideration of whether the salary was approved by the  
19 board, whether it is reasonable, none of that. That's  
20 required by Section 715.

21 THE COURT: Just to be clear, I mean, you know,  
22 at some point they are alleging, I think, a conduct  
23 bordering on, sort of, theft from the company or  
24 misappropriation of -- I am not hinting that the faithless  
25 servant doctrine couldn't be applicable in that setting,

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## Proceedings

1 if that's proven that, you know, somebody is siphoning  
2 money away from the company. I am not ruling anything at  
3 this point. But that's the point here. And in fact even  
4 the company is opposing your claim here.

5 MR. ITKIN: Well, that's an interesting one. I  
6 was a little surprised at that motion. Because we are not  
7 being sued by the company, at least as far as I know. So  
8 if they sued us I think we would talk about the faithless  
9 servant doctrine in that context.

10 But what I am saying is, I don't think the AG  
11 has the ability to rely on a common law doctrine of  
12 faithless servant in its claims here. If it seeks to  
13 clawback Mr. Powell's compensation, it has to do so under  
14 Section 715. And it has to comply with certain  
15 requirements under that section. It has to bear the  
16 burden of proof of complying with those requirements. It  
17 does not do that here. It cannot do that here under the  
18 faithless servant doctrine. It is two different things.  
19 That's what I am saying. And that's why I thought that --  
20 and I submit, that *Grasso* is directly on point, and your  
21 ruling in this case is directly on point.

22 Now I want to talk about the related-party  
23 transactions for a moment as well. So --

24 THE COURT: That seems to be the main focus of  
25 your motion. You wanted partial summary judgment on those

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## Proceedings

1 two transactions.

2 MR. ITKIN: Correct. But I also think that the  
3 salary clawback is superfluous here, and that should be  
4 dismissed.

5 THE COURT: Okay.

6 MR. ITKIN: Now, the related-party transactions,  
7 like I said, there were two. And both were approved.  
8 Both were approved and ratified by the NRA. There is a  
9 document attached as Exhibit 24 to our motion. I don't  
10 know if you have it, Judge. I am so used to electronic.

11 THE COURT: I have the whole docket.

12 MR. ITKIN: We are going into the 22<sup>nd</sup> century  
13 here, out of the 21<sup>st</sup>.

14 THE COURT: I didn't think we were talking that  
15 long.

16 MR. ITKIN: I am saying technology wise. We  
17 have been in the dark ages for a long time with all of the  
18 paper.

19 So anyway, there is two transactions, and this  
20 is Exhibit 24 is --

21 THE COURT: Before we go too deep into -- if you  
22 are in the board ratification zone of the statute, to  
23 establish a defense under ratification under the statute  
24 you have to -- the defendant has to show that the  
25 transaction was fair, reasonable and in the corporation's

mlp

## Proceedings

1 best interest. Right?

2 MR. ITKIN: Well, I am not sure about that. I  
3 think that all the defendant has to show is that it was  
4 ratified and found to be that.

5 THE COURT: Well, are we looking at 715(j)?

6 MR. ITKIN: Yes.

7 THE COURT: So it says: In an action by the  
8 Attorney General with respect to a related-party  
9 transaction not approved in accordance with the earlier  
10 paragraphs, which means approved in advance, it shall be a  
11 defense to a claim of violations of these provisions. And  
12 then it has two things:

13 One, that the transaction was fair, reasonable  
14 and in the corporation's best interest at the time the  
15 corporation approved it.

16 And two, prior to receipt of any request for  
17 information by the Attorney General regarding the  
18 transaction, the board has ratified it by finding in good  
19 faith that it was fair, reasonable, et cetera.

20 Now, if it read the way you were reading it, you  
21 wouldn't have needed that first part about having to show  
22 that it actually was fair, reasonable and in the  
23 corporation's best interest. You would just need the  
24 second one.

25 MR. ITKIN: Judge, I see where you are going. I

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## Proceedings

1 don't see the language that you are talking about either.  
2 Because it doesn't say the defendant has to show.

3 THE COURT: It says it shall be a defense if.

4 MR. ITKIN: Right. So I mean the fact that the  
5 NRA audit committee approved this -- both of these  
6 transactions as fair, reasonable and in the best interest  
7 of the NRA, and ratified them, I mean I think is --

8 THE COURT: You are saying that if the company  
9 does that, then that's a complete defense.

10 MR. ITKIN: I mean, that's how I read the  
11 statute. If the company hadn't done that and we come  
12 back, and I agree we have to show that, but it has already  
13 been done. And I am not even sure that --

14 THE COURT: Well, what does the first subsection  
15 mean then?

16 MR. ITKIN: I mean --

17 THE COURT: Why do they have two?

18 MR. ITKIN: It just means that the transaction  
19 did have to -- did have to be found fair, reasonable and  
20 in the best interest of the NRA.

21 THE COURT: That's what the second one says, it  
22 had to have been found by the board. But the first  
23 section says it has to actually be fair, reasonable.

24 MR. ITKIN: The second one says it has to be  
25 ratified, which happened independently.

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## Proceedings

1                   And the second one -- the first one talks about  
2                   the fair, reasonable and in the best interest of the NRA.

3                   And I am looking at the audit committee minutes  
4                   that say that exact thing.

5                   THE COURT: Okay. I understand your point.

6                   MR. ITKIN: And Judge, I am not even sure that  
7                   we get to subsection (j) because, and I know you said this  
8                   earlier but I want to push back on this point, I am not  
9                   sure that the NRA's finding that the -- that these  
10                  transactions were, in fact, reasonable and fair and in the  
11                  best interest of the NRA have to be at the time of the  
12                  transaction.

13                  THE COURT: I think that's the whole point of  
14                  (j). Isn't it? Part (a) of this provision says that you  
15                  can't enter into a related party transaction unless it  
16                  is -- it is determined by the board to be -- or an  
17                  authorized committee, to be fair, reasonable and in the  
18                  corporation's best interest at the time of that  
19                  determination. At least it seems to me, anyway, that they  
20                  are distinguishing between a contemporaneous approval and  
21                  one done after the fact. And they are being, at least if  
22                  you -- there has to be some reason why the drafters of  
23                  this legislation added this ratification section. There  
24                  is a different set of possibilities when it is done after  
25                  the fact. Right?

mlp



## Proceedings

1 MR. ITKIN: I understand what you are struggling  
2 with. I was thinking through the same thing yesterday.

3 So if you look at (b), when it talks about a  
4 transaction, related-party transaction with a substantial  
5 financial interest, the legislature made it very clear  
6 that the determination has to happen, if you look at  
7 (b) (1) prior to entering into the transaction.

8 Now, if you look at (a), there is no such  
9 language there. It just talks about, at the time of such  
10 determination, it doesn't say when that determination had  
11 to be made. And I think that (j) was included, and I  
12 don't know why -- I haven't seen the legislative history.

13 THE COURT: Why wouldn't this be a transaction  
14 in which a related party has a substantial financial  
15 interest?

16 MR. ITKIN: I don't think that's been alleged,  
17 and I don't think the evidence supports that. I mean,  
18 this is a consultant that had ongoing -- or a large  
19 consulting company or, I am not -- scratch large.

20 THE COURT: I mean, I read the allegations are  
21 that, I think, that the NRA increased its payment to the  
22 consultant by the exact amount of the amount that his wife  
23 was going to be paid or something along those lines?

24 MR. ITKIN: You know, maybe. But again, she is  
25 a consultant. She is a consultant at this company that's

mlp

## Proceedings

1           been employed by or been used by the NRA before. She was  
2           there during and after. And that happened with both of  
3           these consulting companies. So to say that Mr. Powell had  
4           substantial financial interest in these transactions, I  
5           think would be a stretch. And I didn't hear that argument  
6           from the other side in the briefs.

7                        So to go back to (a), this just requires the  
8           time of such determination, never said it had to be at the  
9           time of the transaction. And the NRA in the minutes, the  
10          audit committee goes through that and says, yeah, you know  
11          what, there is a bunch of people who didn't say this at  
12          the time, but we went back and considered all of the facts  
13          and they approved and ratified the transactions  
14          nonetheless.

15                      Now, to answer your question about (j), I think  
16          (j) was added when there was no determination. Right? So  
17          it is a defense, if the company doesn't make that  
18          determination at the time, there is still a defense for  
19          them to say, well, it was ratified later on, and you have  
20          to go through all of these factors.

21                      THE COURT: Okay.

22                      MR. ITKIN: And look, on the last point, the  
23          expenses. So, what happened with the expenses is that, as  
24          I think you gleaned from all of the allegations, the NRA  
25          had a pretty liberal expense reimbursement policy. There

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1 are folks charging expenses, getting them reimbursed, many  
2 of them were reimbursed. In the case of Mr. Powell there  
3 is an investigation. And there were certain things  
4 identified by accountants and forensic accountants hired  
5 to participate in that investigation. Out of that  
6 investigation the NRA determined that he had mischarged  
7 \$54,000 of expenses. That's it. That's the extent of  
8 this. There is no --

9 THE COURT: That's what the NRA determined?

10 MR. ITKIN: That's what the NRA determined.

11 THE COURT: Is the AG limited to what the NRA  
12 determined?

13 MR. ITKIN: They would not be if they had done  
14 any of their own investigation or any of their own  
15 discovery. If they had experts of their own on that  
16 investigation. But they don't. All they do is just rely  
17 on the NRA. And this is now summary judgment, as you said  
18 before. If this was a complaint, if this was a motion to  
19 dismiss, that would be one thing. But we are now at  
20 summary judgment. So this gentleman is going to have to  
21 go to trial and on what facts. And the facts are simply  
22 that the NRA did an investigation, concluded that \$54,000  
23 of expenses, of all of the expenses that are charged, were  
24 improper. Okay. Then they are stuck with that, the AG is  
25 stuck with that. That's our point, Your Honor.

mlp

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1 THE COURT: So are you seeking to dismiss it or  
2 just limit it to a certain number?

3 MR. ITKIN: Limit it to that number. And by the  
4 way, this number is public. I mean, this was something  
5 that was disclosed in the NRA's filings to the AG and in  
6 the Form 990. I realized last night as I was looking at  
7 it, that the form we submitted, the Form 990 from 2019  
8 that we submitted, was not the right version. There is  
9 apparently a later version that does talk about this. I  
10 have a copy for you, if you would consider it. I have a  
11 copy for counsel. It may not be a huge issue right now  
12 but I want to make sure that you have it, if that's okay.

13 (Handing.)

14 THE COURT: Thank you.

15 All right. Attorney General?

16 MR. MENDELSON: Alexander Mendelsohn.

17 THE COURT: Good morning.

18 MR. MENDELSON: Good morning, Your Honor.

19 Your Honor, the plaintiff and the NRA have not  
20 seen eye to eye on much in this case, but here we agree  
21 there are triable issues of fact that preclude summary  
22 judgment in Mr. Powell's favor. The lengthy  
23 counterstatements --

24 THE COURT: So mark the transcript on that spot.

25 MR. MENDELSON: The lengthy counterstatements

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## Proceedings

1 of material fact that were submitted by both plaintiff and  
2 the NRA and Powell's lengthy replies to those  
3 counterstatements, underscore the need for a trial on  
4 those issues.

5 And contrary to Mr. Powell's objections, he does  
6 belong in this lawsuit. During the relevant time period  
7 he was an officer and an ex-officio director and a key  
8 person of the NRA. And he was an active participant in  
9 the NRA's culture of mismanagement and self-dealing and  
10 private endearment.

11 And just turning to the argument that-- sorry.

12 Turning to Mr. Powell's most recent argument  
13 regarding his expenses, that \$54,000 that he is talking  
14 about, that was just American Express charges, and it is  
15 just the tip of the iceberg. As we have laid out in our  
16 submission, there are -- I don't want to go too deeply  
17 into the subject of certain pending motions to seal, but  
18 there is evidence that we put forward suggesting or  
19 indicating that his liability far exceeds just the  
20 \$54,000.

21 In addition to that, Your Honor, Mr. Powell  
22 referenced the NRA's liberal reimbursement policy. I am  
23 not sure that the policy was necessarily liberal, but it  
24 just wasn't followed.

25 Turning to -- in addition, Mr. Powell argues

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1 that Lisa Supernaugh and Craig Spray, Lisa Supernaugh was  
2 his assistant, Craig Spray became the CFO after Defendant  
3 Phillips left, he argues that they reviewed his expenses  
4 and therefore he can't be liable for a breach of fiduciary  
5 duty. But Ms. Supernaugh, who was his direct report,  
6 testified that she only did administrative work on the  
7 expenses. And she testified that she would do whatever  
8 she had to do in order to make sure that her boss was  
9 going to be reimbursed.

10 And Mr. Spray, once he became CFO and he  
11 inherited the responsibility to review the expenses, he  
12 ultimately determined that there were improprieties going  
13 on, investigated them, and he -- the NRA now alleges  
14 that's why Mr. Powell was terminated.

15 And essentially there are just questions of fact  
16 regarding Mr. Powell's expenses, regarding their propriety  
17 and how much he owes. So he is not entitled to summary  
18 judgment on that issue.

19 Briefly with respect to the faithless servant  
20 issue. The faithless servant doctrine is not inconsistent  
21 with the statutory regime. Under section 720 the language  
22 of the statute indicates that the faithless servant  
23 doctrine would be available as a remedy to account for the  
24 acquisition by Mr. Powell of the corporate assets that he  
25 acquired through his violations of his duties.

mlp

## Proceedings

1 THE COURT: Which violations are we talking  
2 about now, the expenses or the related-party transactions?

3 MR. MENDELSON: It would be under both. The  
4 related-party transactions, his failure to disclose, his  
5 clear conflicts of interest would also be separate  
6 breaches of fiduciary duty and violations of the NRA's  
7 policies, in addition to being related-party transactions.

8 THE COURT: And from your -- well, maybe you  
9 will defer again, but does the jury decide things like  
10 faithless servant and what the proper scope of that is?

11 MR. MENDELSON: Your Honor, if it was above my  
12 colleague's paygrade, it is certainly above mine. I  
13 apologize.

14 THE COURT: All right. Well, we will hit the  
15 government surface level at some point.

16 MR. MENDELSON: It is not inconsistent with  
17 statutory regime. If you look to section 112(a)(10) of  
18 the N-PCL, that provides that in related-party situations,  
19 any appropriate remedy available in law or equity is  
20 available to the Court to -- that would include faithless  
21 servant doctrine. And it is just a traditional remedy for  
22 breaches of fiduciary duty.

23 In addition the EPTL claims would also bring  
24 in --

25 THE COURT: The EPTL?

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1 MR. MENDELSON: The Estates Powers and Trusts  
2 Law. That would also bring in the faithless servant  
3 doctrine as well.

4 THE COURT: Okay.

5 MR. MENDELSON: Thank you, Your Honor.

6 THE COURT: And on the -- we talked for a little  
7 bit with counsel about the ratification defense. Do you  
8 read it -- how do you read it? Do you read it that if  
9 you -- all you have to show for the ratification defense  
10 is the ratification?

11 MR. MENDELSON: No, Your Honor.

12 The ratification defense in section 715(j) has  
13 very specific, stringent requirements that a defendant  
14 would have to show in order to satisfy those requirements.  
15 And there are issues of fact here that preclude that  
16 finding on summary judgment.

17 THE COURT: Just to put a fine point on it, do  
18 you think that he would have to show not only the  
19 ratification with a finding that the transaction was fair,  
20 reasonable, et cetera, but also separately prove that the  
21 transaction was fair, reasonable and in the corporation's  
22 best interest?

23 MR. MENDELSON: Um, Your Honor, I think that he  
24 would need to separately prove that, yes. Or he would at  
25 least need prove that the audit committee made that

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1 finding properly.

2 THE COURT: So that would be enough, if he says  
3 that the audit committee made that finding, that would be  
4 enough?

5 MR. MENDELSON: Not just that they made the  
6 finding, but that they properly did so. That there needs  
7 to be some inquiry into the circumstances.

8 THE COURT: That actually raises a question that  
9 I intended to ask. There is a flowing through the  
10 complaint, the papers, there is a certain amount of  
11 scepticism about the functioning of the board and the  
12 board committees. Is that any part of the claim here,  
13 that with respect to ratification and the like that there  
14 was anything about the board or its committees that would  
15 undermine ratification as a defense?

16 MR. MENDELSON: Yes, Your Honor. It speaks to  
17 the proper functioning of the board and whether they were  
18 reviewing the documentation that would be necessary to  
19 actually ratify these -- these transactions. Whether they  
20 were functioning properly to begin with.

21 And as we have laid out in our submission,  
22 current president of the NRA, the former audit chair of  
23 the NRA, he testified that he couldn't remember looking at  
24 documentation underlying the transaction with Mr. Powell's  
25 wife. And he testified that he didn't look at underlying

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1 documentation with respect to the transaction with  
2 Mr. Powell's father where he was paid over \$100,000 over a  
3 couple of years.

4 THE COURT: All right. Thank you.

5 Anything further?

6 MR. ITKIN: Judge, I have a few words. If you  
7 want to move this along I can stand down.

8 THE COURT: It works for me.

9 MR. ITKIN: If you will indulge me, I will take  
10 it.

11 Look, on the faithless servant doctrine I didn't  
12 see anything in the Attorney General's brief about the  
13 EPTL. And I also don't see anything in section 715  
14 entitling the Attorney General to take advantage of that  
15 doctrine. Section 715 talks about compensation in the  
16 context of board approval and as a related-party  
17 transaction has to be reasonable to the company. In fact  
18 I submit, the AG cannot assert that common law doctrine  
19 because it is in conflict with those requirements.

20 THE COURT: And what about the reference to the  
21 statutory provision which says that, at least in the  
22 related party context, equitable remedies are available.

23 MR. ITKIN: They might be available, but you  
24 still have to comply with the other burdens of proof in  
25 that section. So they are creating a novel doctrine going

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1 outside of the statutory regime, in my view.

2 THE COURT: Well, statutory regime refers you to  
3 other equitable principle, at least in this narrow  
4 respect.

5 MR. ITKIN: Judge, that would be a huge elephant  
6 going through a mouse hole. If you think about that, that  
7 means the entire provision in *Grasso* or the entire Court  
8 of Appeals decision in *Grasso* doesn't really mean  
9 anything, because then they could squeeze through any sort  
10 of equitable relief that they want without complying with  
11 that section.

12 THE COURT: Well, there is a difference -- I  
13 mean, I don't want to go too far down this hole, but it is  
14 a difference between liability and relief. *Grasso* was  
15 about you can't create a claim where liability can be  
16 established, short of the conduct requirements of the  
17 statute.

18 This one is, once you find a violation, if you  
19 do, the Court has flexibility with respect to relief.

20 MR. ITKIN: To find the violation, Judge, they  
21 would have to show that this compensation was not approved  
22 by the board. They, in fact, completely disclaim that,  
23 and said they are not -- they are not contesting that his  
24 compensation was reasonable, and they are not contesting  
25 that it wasn't approved by the board. So they cannot

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1 possibly show a violation. They say that in their brief  
2 very clearly. And what the Court of Appeals said is, you  
3 can't come up with theories of recovery outside of the  
4 statutory regime. And I believe Your Honor quoted them in  
5 your motion to dismiss decision in this case. It is not  
6 that they are not going to show that, but they have  
7 admitted that they are not going to.

8 THE COURT: Okay.

9 MR. ITKIN: So they can't get to the faithless  
10 servant doctrine with those admissions.

11 THE COURT: I am going to take a short break  
12 before we turn to the --

13 MS. CONNELL: We have one quick statement, Your  
14 Honor.

15 THE COURT: Sure.

16 MR. MENDELSON: Very briefly, Your Honor.

17 We don't take issue with the overall amount of  
18 compensation that Mr. Powell was paid in salary and base  
19 compensation. But we do take issue with the amounts he  
20 was paid beyond that in terms of improper expenses, sort  
21 of thing. In addition, the burdens of proof aren't  
22 changed. Mr. Powell still has the defenses that are  
23 available in a section 720 claim, for example the section  
24 717 defense. So, the burdens of proof haven't shifted and  
25 *Grasso* doesn't apply here.

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1 THE COURT: Okay. Thank you.

2 Did the NRA want to speak on this motion?

3 MS. EISENBERG: In the interest of moving things  
4 along, I don't think we need to unless you have questions.

5 THE COURT: No, that's fine.

6 We will take a short break because this next one  
7 will take a while, and I want Michele to rest. We will  
8 see you in a second.

9 (Pause in the proceeding.)

10 COURT OFFICER: Come to order.

11 THE COURT: Have a seat.

12 So my plan, just for the schedule, is to have  
13 the argument go no later than 12:30, if it ends earlier  
14 that's fine, and then take a break. I have you scheduled  
15 through to 3:00. And that is designed so that if I can  
16 give rulings on any of these motions today, I will do it  
17 after lunch and have you come back and do that.

18 If I can't and I have to take it under  
19 submission, I'll do that. But I would like the argument  
20 portion to end 12:30, 12:40. That doesn't mean you have  
21 to use all of those minutes, but they are yours if you  
22 want them. Okay?

23 So this is the Attorney General's motion to  
24 dismiss four or 5,000 affirmative defenses.

25 MR. SHIFFMAN: Good morning, Your Honor.

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1 Steven Shiffman, Assistant Attorney General.

2 Actually it is not four or 5,000, although there  
3 is a mountain of paper here, which there is no dispute  
4 about that. We think that the issues to be decided on  
5 this motion are relatively narrow. And they are not only  
6 relatively narrow, they are issues that you already  
7 decided for the most part. They are issues that the  
8 defenses are at the real heart of our motion.

9 And those are defenses that relate to  
10 allegations of bias here. Those are issues that Your  
11 Honor decided when you decided our motion to dismiss the  
12 NRA's counterclaims last year. That decision not only is  
13 law of the case here, but the logic of that decision calls  
14 for the same result with respect to the affirmative  
15 defenses sounding in bias. And those, just to be clear,  
16 are the retaliation affirmative defenses, the selective  
17 prosecution affirmative defenses, unclear hands and bias.  
18 They are all -- we put them all in basically the same --

19 THE COURT: How about estoppel? Is estoppel the  
20 same?

21 MR. SHIFFMAN: Estoppel is, I think, a different  
22 category. We are certainly moving to dismiss the estoppel  
23 laches affirmative defenses.

24 THE COURT: Laches is -- they all use -- some of  
25 these them use slightly different wording.

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1 MR. SHIFFMAN: Yes.

2 THE COURT: At least in my listing of -- they  
3 have bias, selective enforcement, retaliation, political  
4 speech, selective prosecution, unclean hands.

5 MR. SHIFFMAN: Mm-Hm.

6 THE COURT: Those are all what you count as the  
7 bias defenses.

8 MR. SHIFFMAN: That's correct, Your Honor.

9 And I put estoppel in a separate category with  
10 laches, it is usually tied together in their affirmative  
11 defenses. I also don't really know what -- enough about  
12 what they are claiming as to the estoppel defenses here,  
13 other than with respect to laches, to put it in any other  
14 category. So we will get to it a little later.

15 I don't think anybody has said what we have done  
16 that should estop the People of the State of New York as  
17 opposed to anything even that the Attorney General has  
18 done. And I think that one important distinction for the  
19 Court and everybody to keep in mind, is that there is a  
20 distinction between the Attorney General and the People of  
21 the State of New York. The Attorney General brings these  
22 claims on behalf of the People of the State of New York.  
23 And that's very important here because it goes to a few  
24 different things. And primarily it goes also to the issue  
25 of whether or not this action is one in the public

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1 interest. This action is one in the public interest  
2 because of the nature of the claims asserted here.

3 The nature of the claims asserted are to enforce  
4 the charities laws here: The Not-for-Profit Corporation  
5 Law, the Estates Powers and Trusts Law; and the Executive  
6 Law.

7 Those are claims that are to benefit the people  
8 and to ensure that the charitable assets are properly  
9 administered. Whether or not anything that the Attorney  
10 General has done or any bias that is alleged here, that  
11 does not affect anything with respect to the validity or  
12 the merits of the claims that were brought in this  
13 complaint. And that's where we believe the Court should  
14 focus here.

15 As for the bias defenses, these are claims that  
16 all were decided in the counterclaim motion to dismiss.  
17 And that decision on retaliation is law of the case here,  
18 but also it is the same logic. The NRA argues that that  
19 claim was only -- the retaliation decision in this -- with  
20 respect to the counterclaims, only dealt with the  
21 initiation of the investigation. But actually, Your  
22 Honor, in looking at that motion, look to the fruits of  
23 the investigation and whether or not the complaint here  
24 stated valid claims. And Your Honor ruled that it in fact  
25 did state valid claims. Your Honor also has ruled

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## Proceedings

1 numerous times on the merits with respect to motions to  
2 dismiss those claims.

3 So we have claims here that have been determined  
4 to be legally viable. And by the logic of the  
5 counterclaims decision, that means that the NRA cannot  
6 show that any alleged bias was a but-for cause of  
7 retaliation. And for those -- we think that same logic  
8 applies here to a complaint that arose out of a justified  
9 investigation. Logic simply demands that that be the  
10 case.

11 In addition, with respect to the selective  
12 prosecution claims, their allegations as to selective  
13 prosecution defenses are even weaker than they were on the  
14 counterclaim motion. The NRA does not identify any  
15 comparators that it claims were treated differently.

16 So there is the test, as Your Honor laid out in  
17 the counterclaim decision that requires both an evil eye,  
18 and an uneven hand. Here they don't even attempt to show  
19 anyone who is a comparator that they claim is different.  
20 In fact, in their papers they refer to some of the same  
21 comparators that they referred to earlier. And they note  
22 in that, that the comparators were ones where dissolution  
23 wasn't sought, but claims for breaches of fiduciary duty  
24 for restitution would be sufficient. And that's the exact  
25 type of claims that we are bringing in the complaint now.

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1 So we think those selective prosecutions fail because of  
2 the inability to show any -- anybody who was treated  
3 differently.

4 And both of those two decisions also impact the  
5 unclean hands defenses. Which fail for two independent  
6 reasons. The first is in order to show an unclean hands  
7 or to properly state an unclean hands defense against the  
8 government, you need to show two things:

9 You need to show a constitutional injury, and  
10 that resulted from egregious conduct by the government.

11 But you also need to show that that  
12 constitutional injury affected your ability to defend the  
13 case. Not that it brought about the case, but it affects  
14 your ability to put on a defense, such as that the conduct  
15 interfered with the witness so you wouldn't be able to get  
16 from the that witness and put on your case at trial.

17 And the cases we cite such as the *Trump*  
18 *Entrepreneur Institute*, the *SEC v Cuban* case, and some of  
19 the other cases that we cite, all stand for that  
20 proposition, that you need to do both elements here. You  
21 need to both show a constitutional injury and you need to  
22 show that that constitutional injury impaired your ability  
23 to put on a case.

24 And the NRA fails on both counts. They fail on  
25 the first count for the same reasons as the counterclaims

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1 were dismissed. But, they fail on the second count  
2 because they don't even attempt to allege that. There is  
3 no allegations and no argument in any of the NRA's papers  
4 about how any purported bias affected their ability to  
5 defend the litigation. And the only thing they say is  
6 that it led to the litigation. But the cases make clear  
7 that that is not enough.

8 The NRA does try to distinguish the cases and  
9 say that that rule has been criticized. But actually the  
10 only debate in the cases is whether an unclean hands  
11 defense against the government is always precluded or  
12 whether it is -- it is only available in limited  
13 circumstances. We only rely on the latter rule.

14 THE COURT: And what do you take -- I'll  
15 obviously ask the defendants, but what do you say they are  
16 relying on for their unclean hands defense? What facts do  
17 you think? Is it just the stump speeches of the current  
18 Attorney General or is it something beyond that?

19 MR. SHIFFMAN: To be honest, I think that's a  
20 question better for them. But my understanding, at least,  
21 is that they are relying on that mountain of paper that  
22 they provided to you that deals with the stump speeches  
23 and allegations and comments made. Nothing that has been  
24 done in this case that would affect any witnesses.  
25 Nothing that would be done to, you know, alter trial in

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1 any respect. All of their -- some of the allegations may  
2 relate to things that postdated the filing of the  
3 complaint. But they are still just comments of the  
4 Attorney General. And that goes back to the point that I  
5 started with, in that there also is a distinction between  
6 the Attorney General and the People here. And you cannot  
7 have the ability -- the People's right to have violations  
8 of the law impaired by the agents of the government. And  
9 lots of cases that we cite stand for that proposition.

10 It goes to even the *Heckler* Supreme Court  
11 decision, many of the unclean hands cases including the  
12 *SEC v Cuban* case and the *Trump Entrepreneur* case get into  
13 this analysis. And it is an important one here because  
14 what is really at issue in this litigation is whether or  
15 not the defendants did what we allege that they did.

16 Now here the allegations have already been  
17 determined to state claims. So what is at issue is  
18 whether or not we can prove those allegations at trial.  
19 And whether or not a comment was made that evidences some  
20 bias or not, is not really at issue. And that's why we  
21 don't think that this mountain of paper is something that  
22 you really need to get into in great deal. What you need  
23 to get into are the legal issues here. And these are  
24 legal issues that have really mostly been decided already.  
25 So that -- I think from our perspective that deals with

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1 the bias affirmative defenses.

2 There is also the laches and the estoppel group  
3 of affirmative defenses. I don't fully understand what  
4 the estoppel claims are. I don't think they have  
5 articulated them. So I am not going to address them in  
6 great detail, other than to say that the rule is that  
7 estoppel, for the same reasons unclean hands is not  
8 available against the government, the rule is that  
9 estoppel is not generally available against the  
10 government, except perhaps in extraordinary circumstances,  
11 and those are not applicable here.

12 There is also the laches defense. And I think  
13 that one, Mr. LaPierre spends a lot of time in his papers  
14 dealing with that one and making allegations there. That  
15 fails for a few reasons. One, it is the same -- same  
16 basic concept that laches is not available against the  
17 government except in extraordinary circumstances, if at  
18 all. And that's -- goes back to that same thing. The  
19 reason is, you can't allow a delay by an agent of a  
20 government to impair the People's ability to pursue the  
21 claims and to have the laws enforced.

22 Here though, there is actually nothing that  
23 would even constitute laches if you actually reached the  
24 question. And that's because Mr. LaPierre points to  
25 disclosures that were purportedly made in the NRA's

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1 filings with the Attorney General concerning his salary  
2 and the use of charter flights and other benefits.

3 But those filings, first, are made with our  
4 office, so that we can, you know, so we can enforce the  
5 charities laws, but they are not submitted to us for our  
6 approval. We don't get that document and approve the  
7 contents of them. We get over 50,000 filings a year, and  
8 we use them to do our -- to do our job. And the public  
9 uses them to make decisions about making donations and  
10 things of that sort.

11 THE COURT: How far back in time do your claims  
12 go with respect to, for example, the individual  
13 defendants, in terms of compensation? Are you going back  
14 beyond the statute of limitations period?

15 MR. SHIFFMAN: We are not going beyond the  
16 statute of limitations period.

17 MS. CONNELL: No.

18 MR. SHIFFMAN: And there are a few reasons for  
19 that. One, as fiduciary, there is an issue as to when the  
20 statute runs and whether the statute of limitations is  
21 tolled during the time that they are fiduciaries.

22 THE COURT: For example, not to steal  
23 Mr. Correll's thunder, but they talk about filings made in  
24 2008 and earlier, and they make the point that somewhat  
25 resonates in laches principles, that if they had been

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1 aware in 2008, for example, which I guess may be a time  
2 when decisions were made about security concerns that  
3 required private travel, that they could have changed  
4 their behavior and that the witnesses who were around at  
5 the time who could support the decisions are no longer  
6 around.

7 MR. SHIFFMAN: Mm-Hm.

8 THE COURT: And therefore there is just a  
9 certain unfairness to having a, you know, a subsequent  
10 Attorney General go back and try to clawback that far  
11 back, when there is no way to defend it.

12 MR. SHIFFMAN: Right. And I think there are a  
13 couple of answers to that. And the first is, if you look  
14 at the 2008 filings here, they don't disclose any of the  
15 things that we are seeking to pursue on our claims here.

16 What is disclosed is, there is a box on the 990s  
17 which is the informational tax returns that charities file  
18 with the IRS. A copy of the 990 is filed with some other  
19 paperwork with the Attorney General's office in a chart  
20 500. That's filed each year. On the 990 there is a box  
21 that says: Did you use charter or first class travel? It  
22 is one check box. Okay? Then two pages later there is a  
23 place where you can give a little more of an explanation  
24 for that.

25 Beyond that explanation what the NRA says in

mlp

## Proceedings

1 2008, is that charter or first class travel was used in  
2 circumstances where there was -- where logistics or other  
3 available travel arrangements could not be made. That  
4 doesn't disclose the misuse of charter travel for personal  
5 benefit. It doesn't disclose the use of charter travel  
6 for companions, for family members. It doesn't disclose  
7 any of the misuse. There is no information given about  
8 the details of those transactions. It is not actually  
9 even until 2016 in the NRA's filings.

10 And just to be clear on that, the filing for the  
11 year 2016, which is not made until late 2017, that's the  
12 first time where that disclosure, that one or two sentence  
13 disclosure even mentions security concerns.

14 So, on a factual matter, as terms of what  
15 possibly those returns could have alerted to us, they  
16 don't alert us to the wrongdoing that's alleged in the  
17 complaint, because they really just say whether or not  
18 that's used. And there could be instances where charter  
19 travel for not-for-profit is used. So for example, it is  
20 often the case with, you know, rescue operations or things  
21 like that where you do need to do it. So simply checking  
22 the box doesn't necessarily show that there is a violation  
23 of law.

24 But also, there is with respect to the statute  
25 of limitations, there is both a continuing wrong doctrine

mlp



## Proceedings

1 and the doctrine that when fiduciary -- when fiduciary is  
2 in place, that the claims don't start to run until  
3 fiduciary leaves their position.

4 And I would like to address briefly too, the  
5 case that Mr. LaPierre submitted earlier this week, the  
6 *Meta* case, the *Facebook* case. That's the only case that  
7 the defendants have submitted that really deals with the  
8 laches claim when a government is -- a government entity  
9 is suing as plaintiff for, sort of, public type claims.

10 But it is very distinguishable from almost every  
11 other type of claim. And that's because that suit was  
12 brought under the Clayton Act. And as the Court there  
13 made very clear, the Clayton Act does not give the right  
14 to the states to sue in their sovereign capacity. Right?  
15 They can sue as persons, they can sue as associations, and  
16 other things, they cannot sue as sovereigns. And it is  
17 when the state sues as a sovereign, that laches is not  
18 available against the government. When the state sues in  
19 a proprietary capacity, there are some cases that say --

20 THE COURT: Well, weren't they suing as *parens*  
21 *patriae* in that case? But I think that's -- that's when  
22 you sue to challenge a merger, that's typically what it  
23 states.

24 MR. SHIFFMAN: And yes, the states were trying  
25 to sue in a *parens patriae* capacity. But an important

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1 factor in that case is that they were -- they did not get  
2 a congressional mandate to sue as sovereigns. They only  
3 got to come in and sue as a person. They had to fit it  
4 within the person definition. So by its very nature that  
5 means that the legislature, the Congress back in the early  
6 1900s when they passed the Clayton Act, they did not give  
7 any special right to the states to go in and sue under the  
8 Clayton Act for that. It was previously just the federal  
9 government that can sue. This expanded it to persons.  
10 But it did not expand it to the states. Right? So the  
11 states that were suing under -- they had to fit in under  
12 the persons.

13 THE COURT: Look --

14 MR. SHIFFMAN: But --

15 THE COURT: -- in those situations you are  
16 essentially suing on behalf of the citizens.

17 MR. SHIFFMAN: That's correct. But that's  
18 not -- my point is a slightly different one, Your Honor.  
19 My point is that you have to look at what the legislative  
20 intent was in determining whether or not laches should  
21 apply. And the cases that all rule that laches is not  
22 available against the government, really look at one  
23 thing. They don't look at the motivation of the  
24 government. They don't look at other things. What they  
25 look at are the nature of the claims and whether those

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1 claims are ones to enforce a legislative mandate. Right?  
2 There is no legislative mandate under the Clayton Act to  
3 the states, because they are not named in there. The  
4 Courts actually, in *Meta*, was actually I think a little  
5 bit skeptical even of their standing to fit in under the  
6 states definition.

7 But putting that aside, the real issue is that  
8 there is no legislative mandate given to the states to  
9 enforce the Clayton Act. Otherwise they would have been  
10 mentioned in there. There is legislative mandate to  
11 persons, associations and other things. So it is not  
12 something that is specially reserved to the state to  
13 enforce.

14 THE COURT: Right. I think your point, I  
15 assume, is here the Attorney General is the enforcer, is  
16 the one who, if there is someone to protect the states'  
17 interests in this -- in the context of not-for-profit  
18 corporations, it is the Attorney General.

19 MR. SHIFFMAN: That's exactly right, Your Honor.

20 And it is -- we are the only ones for a lot of  
21 these. There are some things that the NRA may be able to  
22 bring such as claims against Mr. Powell. But there are  
23 other things that the Attorney General is the one who is  
24 the only one who can really bring those things. So that's  
25 a very important distinction. Because with the Clayton

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1 Act you have the FTC, which had claims that were  
2 actually -- that are still -- we are able to continue in  
3 the *Meta* case. They were not estopped. But also that  
4 case is very distinguishable given that the underlying  
5 facts that were being challenged were well known. That  
6 merger was, you know, submitted to the federal government.  
7 Anybody working, I would assume, in the Attorney General's  
8 Office or any other state's Attorney General's Office  
9 would have been, in there Antitrust Bureau, would have  
10 been very well aware of that, and it was a  
11 multi-million -- multi-billion dollar merger.

12 Here, as I mentioned earlier, there is nothing  
13 that could give rise to laches because nothing was  
14 disclosed to us that we could have acted upon. And we  
15 know of no affirmative conduct to approve anything there.

16 THE COURT: Okay. Thank you.

17 MR. SHIFFMAN: Thank you, Your Honor.

18 MS. EISENBERG: Good morning, Your Honor.

19 THE COURT: Good morning.

20 Are you plugging into our screen?

21 MR. UMANSKY: Yes.

22 MS. EISENBERG: While there is a lot of paper --

23 THE COURT: Wait. I have to --

24 You can get started if you want.

25 MS. EISENBERG: Thank you, Your Honor.

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1 THE COURT: Just point the microphone at  
2 yourself so I can hear you. Thank you.

3 MS. EISENBERG: These motions are actually quite  
4 simple. If you look at the law, the facts, the procedural  
5 posture and even practical considerations, there is no  
6 reason for you to grant them. They should be denied.

7 First, let's talk about the procedural  
8 difference. When you assert a counterclaim, which is part  
9 of Mr. Shiffman's argument, you seek to impose liability  
10 on the other side.

11 When you assert a defense, that's a totally  
12 different animal. What you are trying to do is anticipate  
13 what might be presented at trial and react to it in the  
14 middle of the trial as evidence gets presented, none has  
15 been, as defenses mature.

16 And there are multiple situations in which some  
17 of these things might come up. For example, we have  
18 already talked about laches. Well, there are two  
19 related-party transactions that the NYAG asserts that  
20 actually involve individuals who have since passed. And  
21 some of these transactions were actually disclosed on  
22 Forms 990. So I think we can certainly envision a  
23 situation where, if the government were to pursue the NRA  
24 with regard to transactions that were disclosed, and where  
25 the witnesses are no longer alive, a laches argument will

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1 certainly come into play.

2 In addition, Your Honor, we have to focus on  
3 the --

4 THE COURT: Well, I -- for that to be helpful  
5 you have to be more granular. That's certainly not the  
6 thrust that I got out of the estoppel or the laches  
7 arguments. So if you have something in particular you  
8 want to direct me to, that's fine.

9 MS. EISENBERG: Sure thing, Your Honor.

10 Well, I think that at this point we have been  
11 asking the NYAG to tell us what specifically will be at  
12 issue at trial. And we don't necessarily know what  
13 specifically they will present on. And as they -- even  
14 when they do, things might come up, like what I just  
15 described. And I don't think that the government -- the  
16 NRA has the burden of identifying now, being able to  
17 predict now what permutations of facts will be presented  
18 at trial and how these defenses might come into play.

19 THE COURT: Well, I am a little confused because  
20 we are done -- largely done with discovery, I think  
21 subject to a couple of tails. But I am not sure what else  
22 we are waiting for to be ready for trial, since that's  
23 where we are supposed to be right now.

24 MS. EISENBERG: Certainly, Your Honor. The NYAG  
25 identified 43 individuals and said there were

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1 related-party transactions either involving them or their  
2 relatives or organizations associated with these  
3 individuals, or organizations associated with their  
4 relatives. As a result, we actually don't have a clear  
5 picture of what specifically the NYAG is going after.

6 In any case, we might as well start with the  
7 unclean hands defense. The unclean --

8 THE COURT: Are you trying to get this on the  
9 screen?

10 MR. UMANSKY: Yes, it is not coming up.

11 THE COURT: Are you plugged in?

12 MR. UMANSKY: Yes.

13 MS. EISENBERG: That's okay. We can do it  
14 later.

15 THE COURT: It should be -- you are plugged in  
16 right now?

17 This typically works.

18 Sharon, do you want to call?

19 COURT CLERK: Is he plugged in?

20 THE COURT: What are you plugging into exactly?

21 MR. UMANSKY: I am plugged in here, input.

22 COURT CLERK: Did you hit laptop?

23 THE COURT: We are in laptop, yes.

24 COURT CLERK: Little box over the top all the  
25 way up?

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## Proceedings

1 MS. EISENBERG: Would it be possible to give us  
2 control?

3 THE COURT: You can use the touchscreen whenever  
4 you want.

5 Which laptop is it? This one?

6 Everything I am doing up there you can do with  
7 your hands if you want.

8 Why don't we let her continue.

9 Call Sam to come down.

10 MS. EISENBERG: Thank you, Your Honor. I  
11 appreciate it.

12 THE COURT: I am not sure why it is not working.  
13 It usually does.

14 MS. EISENBERG: So Mr. Shiffman talked about  
15 mountains of paper. And in fact, he was helping me argue  
16 my side of this motion. The reason there is a mountain of  
17 paper is because Attorney General James has made so many  
18 different statements before, during and after the  
19 commencement of this litigation, including in connection  
20 with it, that it is incorrect for them to say that we  
21 presented no new evidence. We presented a ton of new  
22 evidence to Your Honor.

23 For example: On August 6, 2020, the NYAG files  
24 her lawsuit. What does she do? She starts fundraising  
25 the same day, she goes on MSNBC, and everywhere she tells

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1 everyone about how this is her lawsuit to dissolve the  
2 NRA.

3 Now, Your Honor is well familiar with the  
4 complaint. The complaint seeks multiple pieces of relief,  
5 more than a dozen. Yet, the NYAG is squarely and  
6 laser-focused on one thing and one thing only this is my  
7 lawsuit to dissolve the NRA.

8 And when she runs for governor in 2021, what  
9 does she do? She yet again touts her effort to eliminate  
10 the NRA. And that's a quote.

11 On August 6 when she commences the investigation  
12 she holds a press conference. She cannot identify a  
13 single dissolution case in which there is precedent for  
14 trying to do what she is trying to do here.

15 And she overstates the evidence. She says:  
16 Every single board member violated the law. There is no  
17 such allegation in the complaint. Every single individual  
18 defendant misappropriated funds and enriched themselves.  
19 There is no such allegation in the complaint against Mr.  
20 Frazer.

21 So, and then you know about the meeting with  
22 Everytown. And there are lots of other pieces of evidence  
23 that we have come forward with in our answer, as well as  
24 the papers in connection with this motion.

25 So, in your dismissal of the counterclaims you

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1 said, well, when she says I am going to go after the NRA  
2 because I disagree with the second amendment advocacy,  
3 that's evidence of animus. That's what you found. But  
4 then you went on to say, but it is irrelevant for current  
5 purposes because the NRA has not alleged sufficient nexus  
6 between the animus and the adverse action.

7 So, we heard you loud and clear, Your Honor. We  
8 have come forward with tons more evidence to clarify or to  
9 make it very clear, now that we had discovery and the  
10 record has developed, that the evidence of nexus is  
11 overwhelming.

12 And on top of that, we looked more closely at  
13 those -- what you refer to as stump speeches. And we  
14 found a few things that are quite powerful. And, in fact,  
15 we think egregious. For example, on July 12, 2018,  
16 Ms. James announces that she is going to run for Attorney  
17 General. She tweets about it. She issued a press  
18 release. And then she makes an appearance at which she  
19 discusses her campaign. And the tweet and the press  
20 release don't say it, but when she is addressing the  
21 public she says, well, I will have the constitutional  
22 power to investigate the NRA, because that's where they  
23 are incorporated. And I promise that we will investigate  
24 whether or not, quote, whether or not the NRA complies  
25 with the law. This was months before the New Yorker

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1 article that surfaced these allegations on which the Court  
2 relied in dismissing the counterclaims.

3 In addition, what she said was, we are going to  
4 go after the NRA. We are going to go after its banks. We  
5 are going to go after its investors. Again, so, the  
6 evidence of animus is express, direct, clear, irrefutable.  
7 In fact, if you look at their statement of facts, they do  
8 not deny any of that.

9 THE COURT: There is sort of a disconnect  
10 between the case that you are talking about and the case  
11 that's actually here right now. Right now the dissolution  
12 claims are not in the case. And what you are left with  
13 is, you know, a more, you know, I don't know what the  
14 right word is, straightforward, pedestrian, it is  
15 financial misfeasance, corporate malfeasance. Sort  
16 of -- I won't say run of the mill, but it is sort of  
17 normal kinds of things. It is not dissolution. And so it  
18 is a little unclear to me why all of that would be  
19 relevant to, you know, for example, if the defendants here  
20 were found to have, you know, walked out of the NRA with  
21 bags of cash every day at the end of the day and taking  
22 them home, which is not what is alleged, but just normal  
23 kind of corporate misbehavior, would it really be a  
24 defense to that to say that, well, the Attorney General  
25 candidate said lots of inflammatory things about

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1 dissolving the NRA. Therefore, I can't be sued for these  
2 financial -- for this financial misconduct. There is a  
3 disconnect there that I don't really understand.

4 Why -- what would be the rational for having the  
5 current claims be subject to a defense based on threats of  
6 dissolution which are no longer in the case?

7 MS. EISENBERG: Yes Your Honor. I think the  
8 answer differs a little bit, depending on the defense. So  
9 we can start with unclean hands, for example.

10 That ancient maxim says that the courts doors  
11 are closed to those who come to the court with unclean  
12 hands.

13 THE COURT: You recognize she is not the  
14 plaintiff, right? She is not. She is the current  
15 occupant of an office that represents the state.

16 MS. EISENBERG: But she does represent the  
17 state, Your Honor, and she did pledge to use the power  
18 that she was given as the Attorney General to go after the  
19 NRA.

20 So, I don't think that she can distance herself  
21 in that way by saying I represent the People, therefore  
22 everything I said and the express evidence of my  
23 retaliatory intent --

24 THE COURT: But the defense would be asserted  
25 against the state, the People, not Ms. James as a human

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1 being.

2 MS. EISENBERG: The defense is asserted against  
3 the plaintiff in this case, who has made very clear that  
4 they are using the power of the office to go after a  
5 political enemy. And so I think that as a court of equity  
6 and the equitable relief is what they are asking for as  
7 against the NRA, you certainly have discretion to look at  
8 the facts and the functional reality that it is Letitia  
9 James who pledged to destroy the NRA and is seeking --

10 THE COURT: That's not an issue in this case.  
11 Destroying the NRA is not part of this case.

12 MS. EISENBERG: Let me address that, Your Honor.  
13 One of the remedies she seeks is an injunction against  
14 solicitation. That's quite serious. You know how the NRA  
15 feels about the independent compliance monitor request.

16 She also seeks the removal of the executive vice  
17 president, an individual who has been elected every year  
18 by the 76 member board who in turn is elected by the  
19 members.

20 So all of those remedies, from our perspective,  
21 even though dissolution is appropriately off the table,  
22 are quite important. They are all in equity. And the law  
23 is quite clear that if you ask the Court for equitable  
24 relief, you better come with clean hands. And they don't.

25 THE COURT: Well, there are a fair amount of

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1 cases which the other side has put in front of me where  
2 the notion of applying that kind of common law unclean  
3 hands to an entire state of people because of whatever you  
4 might allege the Attorney General has or has not said or  
5 done, is not appropriate. You know, this is a, you know,  
6 at some level a law enforcement action. And the Attorney  
7 General can ask for relief, but it is up to the Court and  
8 a jury to actually provide it one way or the other. And  
9 saying that, essentially it is a defense to financial  
10 malfeasance, that the sitting Attorney General acted in a  
11 way that you would argue gives rise to unclean hands, it  
12 has a pretty substantial effect on the state to apply it  
13 that way. Which is presumably why the Courts have been  
14 reluctant to do so.

15 MS. EISENBERG: I would like to address that,  
16 Your Honor. In their moving brief they say there is  
17 Appellate authority in the First Department that says you  
18 cannot assert unclean hands against the government. And  
19 that's not true. We looked it up. The Appellate decision  
20 does not say that. And Mr. Shiffman admits in his brief  
21 that that was a mistake.

22 So he then says, that doesn't matter because we  
23 have Justice Kern who in the *Trump Entrepreneur Initiative*  
24 case said that it is unavailable or there are special  
25 requirements. So all you are left with, Your Honor, is a

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1 case from years ago by Justice Kern, Supreme Court of New  
2 York, where she issued a decision that spanned for dozens  
3 of pages, decided multiple issues, and one of them was,  
4 sort of, this cursory dismissal of a variety of defenses  
5 citing, you know, these SEC cases which are certainly not  
6 binding on you.

7 So, the bottom line is, there is no New York law  
8 that is binding upon you, Your Honor, that says that the  
9 defense somehow doesn't apply.

10 THE COURT: So we are talking about unclean  
11 hands. What is the unfairness, what is the lack of equity  
12 of, again, for now, assuming the truth of the allegations  
13 about financial malfeasance, what would be the equities  
14 of, essentially, letting defendants off the hook for  
15 those -- for that conduct because of speeches made by the  
16 Attorney General? Where is the equity in that? Why does  
17 that make sense even?

18 MS. EISENBERG: So I think we are relying on  
19 speeches not just because she made them, but because they  
20 evidence her intent and why she was doing what she was  
21 doing.

22 THE COURT: If the claims here were about the  
23 NRA's advocacy or something like that where there is a  
24 connection saying, well, you can't -- well, maybe there is  
25 some connection. But the actual claims that we are going

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## Proceedings

1 to trial on are just financial misconduct claims. And I  
2 still don't understand how equity would say that, well,  
3 you can't go after that kind of financial misconduct  
4 because you had an animus about trying to get rid of and  
5 harm the organization. You know, there is a disconnect  
6 there to me.

7 MS. EISENBERG: To me there is no disconnect at  
8 all, because what the AG seeks is equitable remedies.  
9 They said that several times today. And the law is very  
10 clear that if that's what you seek, you have to show that  
11 you did not perform a willful act perfecting the action  
12 that transgresses equitable standards.

13 She admits that she made those, or does not  
14 dispute that she made those speeches willfully. She  
15 certainly spoke about investigating the NRA, going after  
16 the NRA, so it is certainly in connection with the action.

17 And when a government official is using the  
18 constitutionally vested power to go after a political  
19 enemy or to weaken a political opponent, that certainly,  
20 Your Honor, transgresses equitable standards. And  
21 therefore we are squarely within the unclean hands  
22 doctrine.

23 And to address something else you said. The law  
24 in New York is very clear, unclean hands applies even if  
25 the defendant's conduct was improper. In fact, there are

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## Proceedings

1 cases that say, however improper the defendant's case, the  
2 Court's doors are shut to --

3 THE COURT: Do you have cases, though, applying  
4 that? Again, in a private dispute, I get that. But where  
5 the plaintiff represents the state of New York and all of  
6 its citizens, why would applying that to the detriment,  
7 arguably, of the state and its citizens make any sense?

8 MS. EISENBERG: Right. So I think the facts of  
9 this case are pretty rare where you have a government  
10 official declare her animus and then follow through. So  
11 we don't have a case like that in New York. But I do have  
12 two federal cases where the government made the same  
13 argument, that they are special and unclean hands doesn't  
14 apply against them, and Courts disagreed.

15 The first case is *EEOC v Exxon Corporation*. And  
16 that's at 1F. Supp. 2d, 635. That's from the Northern  
17 District of Texas from 1998.

18 And the second case is *United States Ex Rel.*  
19 *Zissler v Regents of the University of Minnesota*. And  
20 that's at 992 F. Supp. 1097. And that's from the District  
21 of Minnesota from 1998.

22 So, there are cases where Courts have squarely  
23 dismissed the argument that the legal argument the NYAG  
24 put forward, and even the cases on which they rely, if you  
25 read them closely, some of them comment on how there is

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1 inconsistency in the reasoning. All of these SEC cases  
2 kind of just repeat the same concept that purportedly  
3 equitable defenses don't apply against the government.  
4 But, they all come from these Supreme Court cases, that if  
5 you read those they actually say the government is just  
6 like any other litigant. And it was the circumstances of  
7 those cases that simply warranted denial or preclusion of  
8 that defense in that case.

9 Your Honor, what we have here on the slide is  
10 to, kind of, demonstrate what is different between when  
11 you were considering counterclaims and today. And  
12 certainly the procedural posture, of course, is very  
13 different as well. That was a motion to dismiss  
14 counterclaims. And we are on the eve of trial and they  
15 are trying to preclude us from putting in evidence and  
16 being able to defend ourselves.

17 So, if you look at the gray, those are the  
18 pieces of evidence that were referenced in the  
19 counterclaims. Your Honor is well aware of Attorney  
20 General's pledge to use her constitutional power as the AG  
21 to investigate the NRA's legitimacy.

22 You are well familiar with her statement that  
23 the NRA are is an organ of deadly propaganda.

24 And that she stated that she would take the NRA  
25 on and take the NRA down, because the NRA is a criminal

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1 enterprise.

2 THE COURT: Can you just move the microphone a  
3 little further towards you? Thanks.

4 MS. EISENBERG: So those were the things that  
5 were the evidentiary pieces that were alleged in the  
6 counterclaims when you dismissed them. But, since then a  
7 lot has come forward still. So, for example, on  
8 August 10, 2020, just four days after she brings this  
9 action, she states: "The alleged rot at the NRA runs deep  
10 and is pervasive throughout the organization."

11 That is a clear overstatement of the allegations  
12 in the complaint. In fact, I believe the Court  
13 acknowledged as much in dismissing the dissolution claims;  
14 and focused very much on the fact that what she focuses on  
15 is mismanagement, alleged waste within a very narrow  
16 portion of the organization. And that there are no  
17 allegations whatsoever that the NRA performed its mission  
18 in a completely honorable way. And -- I am sorry, there  
19 is no allegations that we do that in any fraudulent or  
20 illegal way. And it is conceded that that's completely  
21 not something that they allege at all.

22 So, what are some of the other things that have  
23 happened? We have, on February -- in February 2019, an  
24 interesting meeting. For the record I'll describe it  
25 somewhat, but I know that Your Honor is familiar with

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1 that.

2 So in summer of '18 she says: I pledge to go  
3 after the NRA because I disagree with their pro Second  
4 Amendment advocacy. And I will take them down.

5 Now, she gets elected, she comes into office,  
6 but the investigation actually doesn't start right away.  
7 Right? We know that the investigation starts only in  
8 April. So interestingly, just two months before the  
9 investigation and sometime after she gets in office, there  
10 is a meeting. And the meeting is between the head of the  
11 Charities Bureau, Mr. Sheehan, and someone from Letitia  
12 James' front office. So these are very senior people  
13 within the organization. And they are meeting with  
14 Everytown, multiple people, something like five to eight  
15 people showed up, including the head of their community  
16 safety initiative.

17 And as Your Honor knows, Everytown Gun Safety --  
18 for Gun Safety, is an organization that disagrees with the  
19 substance of the NRA's political speech, just like Letitia  
20 James does. And what we know is that that meeting is  
21 about one topic and one topic only, and that is the NRA.  
22 And I think we can all infer that they weren't talking  
23 about Everytown wanted to ensure that NRA donors' money  
24 was being spent properly.

25 Everytown is proclaiming on its website that the

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1 reason it exists is to be the counterweight to the NRA.  
2 And what they do is try to come up with legal ways in  
3 which their political opponent can be destroyed or  
4 weakened. And so this meeting is quite significant for  
5 that reason.

6 Your Honor, in your opinion dismissing the  
7 counterclaims, again, you said I need more of a quantum of  
8 evidence to show that there is a connection between what  
9 she said back in '18 and what she is doing. And all of  
10 these things individually, but obviously even more  
11 powerfully together, really show that.

12 I would like to switch topics a little bit and  
13 explain why I think this action is a bit of a non issue.  
14 What the -- by "this" I mean this motion. What the NYAG  
15 is clearly trying to do is, they definitely don't want us  
16 to present at trial before you and/or the jury, evidence  
17 of these statements of animus and the connection between  
18 the animus and what Letitia James did. We understand that  
19 that's what they are trying to achieve.

20 But frankly, all of the evidence that we would  
21 be presenting in order to prove up our constitutional  
22 defenses and the unclean hands defense, all of that  
23 evidence would come in to the case in any case. It would  
24 come in to evidence because there are multiple things that  
25 the NYAG alleges that would require this evidence to be

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1 presented to the jury. For example, the NYAG says, well,  
2 the NRA filed for bankruptcy and that shows that Wayne  
3 LaPierre was acting out of his selfish motives to escape  
4 the regulator who went after them. And that the board had  
5 no knowledge and no power to prevent it. And that was  
6 such a bad decision, shows disfunction, and so on and so  
7 forth. And that's certainly a part of why they are saying  
8 that allegedly we don't know how to properly manage  
9 assets.

10 Well, I think it would be really interesting to  
11 a juror to see the context and the backdrop to the NRA's  
12 decision to file for Chapter 11 protection in Texas in  
13 order to try to avoid the regulatory regime of a toxic  
14 regulator whose proclaimed objective is to destroy a  
15 political opponent. And all of these pieces of evidence  
16 give real texture and real context to the NRA's state of  
17 mind.

18 THE COURT: Look, even if I take for the moment  
19 your -- that point, that in batting back that particular  
20 allegation that this -- any of this stuff could be used as  
21 providing context for the bankruptcy, the question is  
22 whether it constitutes a defense to the claims. I still  
23 fail to see how it does.

24 MS. EISENBERG: What I am saying is that I think  
25 the NYAG's intent is to get you to dismiss these defenses,

mlp

## Proceedings

1 which is completely not necessary at this point, and then  
2 at trial say, ah-ha, those defenses were dismissed  
3 therefore the NRA cannot present evidence of what Letitia  
4 James said in July of 2018. Or her predecessor's call to  
5 a board member of the NRA where he warned that, powerful  
6 people in New York government were conspiring or were  
7 talking about what they could do to destroy or weaken a  
8 political opponent. Those are things that are critically  
9 important to understand why the NRA filed for bankruptcy.  
10 And so --

11 THE COURT: Are there any claims in this case  
12 about the bankruptcy or is it just allegations that are  
13 allegations in the background part of the complaint.

14 MS. EISENBERG: Yes. Well, I mean, they are not  
15 part of their claims 13 through 15. But they are  
16 certainly part of their first claim, unless they want to  
17 withdraw it right now. There are pages that talk about  
18 bankruptcy both in the complaint and in their expert  
19 reports; and then their first claim, which is under the  
20 EPTL, alleges that the NRA, allegedly, is failing to  
21 properly administer assets it holds and administers for  
22 charitable purposes. And so they showcase the bankruptcy  
23 filing as purportedly the salient piece of evidence that  
24 demonstrates that. And we cannot wait to tell the jury  
25 why we filed Chapter 11. We want to have that fight. But

mlp

## Proceedings

1 we cannot be fighting that fight with our hands tied  
2 behind our back. We have to offer and present to the jury  
3 the contextual information, what was being said and what  
4 the NRA was realizing about what it was facing.

5 There are multiple other ways in which this  
6 evidence will come in, and I am happy to go through them  
7 now if Your Honor --

8 THE COURT: I am focused on whether it is right  
9 now a proper affirmative defense.

10 MS. EISENBERG: Right. Yes.

11 THE COURT: The evidentiary question I am not  
12 expressing any opinion on right now.

13 MS. EISENBERG: Right.

14 So, no question that all of the defenses are  
15 proper. The special requirements that they want to apply  
16 to the government do not apply. They don't cite any New  
17 York Law that says that. And New York Law is very clear,  
18 if you seek equitable relief, you better come to court  
19 with clean hands.

20 There are ways in which these defenses can be  
21 bucketed. And they talk about how there are these bias  
22 defenses and equitable defenses. But I think that the  
23 best way to think of them is really constitutional  
24 defenses, and defenses that go to the issue of the power  
25 of the Court.

mlp



## Proceedings

1 For example, unclean hands, it goes to the power  
2 of the Court. Because the law says that the court's doors  
3 are closed to those who come to court with unclean hands.

4 The extra-territoriality issue as well goes to  
5 the power of the Court. The fact that they failed to  
6 allege or show that the assets over which they seek  
7 remedies are held and administered for charitable purposes  
8 or held and administered for charitable purposes in New  
9 York.

10 All of that is statutorily driven. And the  
11 statute is very clear that what you have to focus on is  
12 assets that are held and administered for charitable  
13 purposes, and the statute does not say that it applies in  
14 an extra-territorial way. And the law is very clear that  
15 if the legislature wants the statute to apply in that  
16 fashion, it must say so expressly. And the Court is  
17 simply without power to interpret the statute otherwise.

18 But all of it is really not an issue that the  
19 Court needs to decide today. Because when we are at trial  
20 and evidence is presented, and if Your Honor determines  
21 that there is not enough evidence to support a particular  
22 defense, Your Honor can simply opt not to instruct the  
23 jury on that.

24 And for all of those reasons, we believe that  
25 the Court should just deny the motion in its entirety.

mlp

## Proceedings

1 THE COURT: Okay. Thank you.

2 Do the other defendants want to? Mr. Correll?

3 MR. CORRELL: Your Honor, let me start by giving  
4 you a citation to a case that responds to a point Mr.  
5 Shiffman made. The case is *State of New York v United*  
6 *Parcel Service* 160 F. Supp. 3d, 629. That is Southern  
7 District of New York, 2016.

8 I'll flip to page 648.

9 MR. SHIFFMAN: Do you have a copy?

10 MR. CORRELL: I do not have a copy for you.

11 I'll just read briefly, I'll set the stage by  
12 saying, the Court was dealing with a statute under which  
13 the state of New York had exclusive enforcement authority  
14 and it was dealing with another statute under which the  
15 state of New York did not have exclusive enforcement  
16 authority.

17 THE COURT: Is this case in the brief by the  
18 way?

19 MR. CORRELL: It is not. But it is in response  
20 to the point that Mr. Shiffman raised in his argument.

21 THE COURT: Okay. Go ahead.

22 MR. CORRELL: He says -- he said in his  
23 argument, that, and I think Your Honor seemed to indicate  
24 and you tended to agree, that this is an enforcement  
25 action, a government enforcement action. In this case the

mlp

## Proceedings

1 Court draws a distinction between government enforcement  
2 actions that are brought pursuant to statutes that give  
3 the government exclusive enforcement authority, and  
4 enforcement or actions where Congress or a legislature has  
5 granted authority to private actors to bring actions under  
6 the statute. Clear distinction. And I'll just read what  
7 they say:

8 The Court broke the claims into two groups,  
9 Group one, Group two. Group one, exclusive enforcement  
10 authority; Group two not exclusive enforcement authority.

11 Said: As to plaintiff's RICO and AOD claims,  
12 claims under those statutes, the Court is not convinced  
13 that at this stage the same reason applies.

14 He was referring to other statutes under which  
15 it was exclusive enforcement authority. That would be  
16 like the SEC cases.

17 The RICO and AOD claims must be distinguished  
18 because as to these claims, plaintiffs are acting in a  
19 role that is more akin to that of a private actor, rather  
20 than in the role of a public enforcer of the public  
21 interest.

22 Now, the parens patriae doctrine is the official  
23 authority of the Attorney General to act as overseer of  
24 public corporations. There are very strict requirements  
25 you have to meet to invoke that authority. You have to

mlp

## Proceedings

1 show that there is an injury to a sovereign or  
2 quasi-sovereign interest. You have to show that it is --  
3 at issue is not just rights as between private parties.  
4 And you have to show that the interest affects a  
5 substantial portion of the citizenry of your state. High  
6 burden, high bar. They don't allege *parens patriae*  
7 authority here. In the *Grasso* case they did. And the  
8 First Department --

9 THE COURT: Because there are four or 500  
10 references to a specific statutory authority to bring this  
11 case. Right?

12 MR. CORRELL: Correct. So let me go to the  
13 statutory authority that they are invoking against my  
14 client, section 720 of the N-PCL says: An action may be  
15 brought for the relief provided in this section or -- or  
16 and, paragraph A of section 719, which deals with  
17 liabilities of directors in certain cases by the Attorney  
18 General, by the corporation, or on behalf of the  
19 corporation by a director, an officer of the corporation;  
20 also by a trustee, a receiver, creditor and members of the  
21 corporation.

22 So this is akin to the Clayton Act or the RICO  
23 where there is a private right of action where the state  
24 or Attorney General can step in and enforce it. But it is  
25 also available to private actors.

mlp

## Proceedings

1           When you are in this world, you play by the same  
2 rules. The equitable defenses apply to you as the  
3 Attorney General in the same way they apply to any other  
4 person who is authorized to bring that action.

5           And if you -- if you.

6           THE COURT: Isn't the Attorney General given  
7 that role because there are circumstances where all of  
8 those other people you listed are part of the problem?

9           MR. CORRELL: If -- well, I don't know that I  
10 quite understand that, Your Honor, because my focus is  
11 really on what the legislature has written. Which is they  
12 have created a private right of action and given it to a  
13 number of different -- a variety of people or persons.  
14 One of whom is the Attorney General, and the others are  
15 all related to the corporation.

16           The Attorney General purports she's trying to  
17 protect the interest of the corporation here, to protect  
18 the interest of the members. Which is odd given all of  
19 the things that the Attorney General has said about what  
20 she wants to do to these people.

21           So there is a disconnect there between what she  
22 is saying and what she is doing. In any event, the  
23 statute is clear, it is not exclusive enforcement  
24 authority for the Attorney General. That's where you draw  
25 the line. If you look at the case that was just decided

mlp

## Proceedings

1 by the DC Circuit, it touches on that point. And this  
2 case really drills down on it and makes that distinction  
3 clear.

4 As -- if you look at 720, and remember, this is  
5 Wayne LaPierre and individual is being sued and a  
6 provision that says actions against directors, officers  
7 and key persons. It is different from an action against a  
8 corporation. It is not monolithic. Wayne LaPierre and  
9 the NRA are not one and the same. The analysis for  
10 Mr. LaPierre has to be separate, it has to be under that  
11 statute.

12 In terms of whether there is -- the statute  
13 doesn't say the state may bring -- an action may be  
14 brought by the state. It does not say an action may be  
15 brought by the People of the State of New York. It does  
16 not import *parens patriae* power. And the vague sometimes,  
17 some people would say, unlimited, you know, active nature  
18 of that power to deal with things like pollution in the  
19 rivers or lead coming in, you know, from New Jersey, from  
20 you know, from smelting plants in the air, things like  
21 that. Those are big items that affect a majority of the  
22 people of the state. That is not this case. It is not  
23 *parens patriae*. It is not the state. It is an Attorney  
24 General acting in a manner that is akin to that of a  
25 private actor.

mlp

## Proceedings

1 Courts have actually characterized actions like  
2 this as private actions. And if you -- if you look at the  
3 AG's briefs you will see that they use the term  
4 "enforcement action" over and over and over and over  
5 again. And when I saw that I thought, there must be --  
6 this is like a talisman. There must be -- they must think  
7 there is some magic to that phrase. That's a label that  
8 they placed on this action, particularly against  
9 Mr. LaPierre. And the correct label is private action.  
10 The correct label is private actor here.

11 And if you -- or just forget about the labels  
12 and go to the statute and ask yourself, does the AG have  
13 exclusive enforcement authority under 720. And the answer  
14 is, no. That subjects them to all of the equitable  
15 defenses that Mr. LaPierre is asserting. And they are  
16 only challenging three of his affirmative defenses. It  
17 started with a broader challenge, it is down to three.

18 I urge --

19 THE COURT: Isn't the point that with -- at  
20 least with not-for-profit organizations, there are some  
21 disputes within any entity that can be purely economic.  
22 But with a not-for-profit there are certain public  
23 interests in terms of how they are run that a governmental  
24 body has been charged with overseeing.

25 MR. CORRELL: The legislature has defined the

mlp

## Proceedings

1 public interest for not-for-profit corporations in the  
2 Not-for-Profit Corporation Law. It is comprehensive and  
3 enormous. It spans I don't know how many pages, how many  
4 sections.

5 THE COURT: And they give the Attorney General  
6 substantial rights to enforce it.

7 MR. CORRELL: Correct. And I'll -- I am glad  
8 you raise that. In 112 they actually say in two different  
9 places, the Attorney General may maintain an action or  
10 special proceeding in Section 7 to enforce any right given  
11 under this chapter to members, a director or an officer of  
12 a charitable corporation. Next sentence: The Attorney  
13 General shall have the same status as such members,  
14 director or officer. It contemplates stepping into the  
15 shoes. And if you step into the shoes of someone who is  
16 subject to equitable defenses, you are subject to the  
17 equitable defenses.

18 And that's not the only time it says it. It  
19 says it again in 9. It says: For such purpose the  
20 Attorney General shall have the same such status, same  
21 status as such members, director or officer.

22 That's where it says: Upon application Ex Parte  
23 for an order to the Supreme Court at a special term held  
24 within the judicial district, where the office of the  
25 corporation is located, and if the Court so orders, to

mlp



## Proceedings

1 enforce any right given under this chapter to members, a  
2 director or an officer of a non-charitable.

3 THE COURT: Why don't we move to the specific  
4 application of these defenses that you say should not be  
5 dismissed? I understand the principle you are getting at,  
6 that some equitable defenses should not be categorically  
7 inapplicable. But why don't you -- let's bring it down to  
8 this case.

9 MR. CORRELL: Okay. So, the first thing,  
10 laches, I won't re-cover the points in the brief. But the  
11 fact is that the NRA has been filing chart 500s with the  
12 AG, attorney's bureau for years. It is a form that they  
13 fill out, a form that has been prepared by the AG, which  
14 presumably asks all of the questions that they want  
15 answers to. They have to attach a 990, which is prepared  
16 by the federal government, which asks all of the questions  
17 the federal government wants to ask. And people at the  
18 NRA, not Wayne LaPierre, other people, dutifully pull  
19 together the information and read the instructions and  
20 filled out the forms, checked the boxes. And the  
21 Charities Bureau was on notice of what compensation was  
22 being paid and that the NRA was providing first class or  
23 charter travel to certain executives.

24 THE COURT: But their point is that they are  
25 not -- that that does not give, they say, any indication

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## Proceedings

1 of matching what the allegations are here. They are  
2 not -- they are not going after his salary, per se, as  
3 being a violation of the law. And they are not even  
4 necessarily going after, you know, some use of charter  
5 travel. But none of those forms, on their face, get into  
6 the specific violations that they are alleging here.

7 MR. CORRELL: In their complaint they did go  
8 after compensation. They alleged in paragraph 450 that  
9 Mr. LaPierre was paid over \$5 million in 2015, implying  
10 there was work in 2015. Letitia James in a press  
11 statement the same day characterized that as grossly  
12 excessive compensation in order to get the headline and  
13 the media byte that she wanted.

14 They backed away from that now because we put on  
15 three experts. We brought out three experts on  
16 compensation, who all testified that it was reasonable.  
17 All of it was reasonable. Apparently they couldn't find  
18 an expert to testify that it was unreasonable. So they  
19 backed away from that core allegation that they rested  
20 this complaint on when they filed it.

21 THE COURT: Was there ever a claim that he and  
22 the NRA broke or violated any provision of the N-PL just  
23 by the compensation of Mr. LaPierre.

24 MR. CORRELL: Yes. My reading of the complaint  
25 was that they were alleging that Wayne LaPierre acted

mlp

## Proceedings

1 unlawfully by accepting compensation provided by the NRA  
2 that was excessive.

3 THE COURT: Just the salary?

4 MR. CORRELL: Pardon?

5 THE COURT: The salary itself?

6 MR. CORRELL: Salary and bonuses.

7 THE COURT: Okay. The complaint is too long for  
8 me to fully absorb it in one sitting, but I don't recall  
9 that.

10 MR. CORRELL: It is in there --

11 THE COURT: I recall the allegations as part of  
12 the background. But not that they said that it was an  
13 independent violation of the statute to pay him whatever  
14 it is the board agreed to pay him.

15 MR. CORRELL: They characterized it as a breach  
16 of fiduciary duty on his part to accept the compensation  
17 that was offered, even though it was determined by an  
18 officers' compensation committee and approved by a board.  
19 And our experts have testified that it was below the  
20 50 percent mark in terms of comparable executives.

21 Having faced that evidence without an expert of  
22 their own, they have backed off of that and they are now  
23 saying, no, we are not challenging that anymore. But,  
24 Mr. LaPierre had to go out and hire an expert to read the  
25 complaint, examine this, look at the pension plans, look

mlp

## Proceedings

1 at everything, and express his opinion.

2 So that's an example of a claim they did make,  
3 and now they are backing away from. They are still  
4 challenging charter travel. But it is unclear whether  
5 they are still challenging all charter travel.

6 But the simple fact is, they knew what his  
7 compensation was and they knew that charter travel was  
8 being provided, and they waited more than ten years to  
9 make an issue of it. And the fact is Attorney General  
10 Spitzer didn't make an issue of it. Attorney General  
11 Cuomo didn't make an issue of it. Attorney General  
12 Underwood didn't make an issue of it. Attorney General  
13 Schneiderman didn't make an issue of it. The only person  
14 who made an issue of it was Letitia James, and that's  
15 because she was looking for something to make an issue of,  
16 and something to grab the attention of the media. An  
17 employee of a non-profit organization being paid more than  
18 \$5 million in one year? That's eye popping. And she put  
19 it out there and it got picked up.

20 So, the point is that there are equitable  
21 defenses available here to Mr. LaPierre. I can't speak  
22 for other defendants, but for Mr. LaPierre, because they  
23 are proceeding against him primarily under Section 720 of  
24 the N-PCL, which is a statute that provides non-exclusive  
25 authority for the Attorney General to bring an action. To

mlp

## Proceedings

1 assert causes of action, four of them in 720, and to seek  
2 relief that is provided, three types of relief, each tied  
3 to a cause of action in that section.

4 I don't see how under these circumstances with  
5 this statute, the Attorney General can argue that Your  
6 Honor should follow the reasoning of the Courts that have  
7 distinguished between exclusive enforcement and  
8 non-exclusive enforcement in deciding whether to strip a  
9 defendant of his or her equitable defenses.

10 THE COURT: Thank you.

11 MR. FLEMING: William Fleming for defendant John  
12 Frazer.

13 I'll rest my papers, except I want to make one  
14 observation. And that is simply, with respect to -- there  
15 are two affirmative defenses that are at issue with  
16 Mr. Frazer, one is unclean hands; and the other is the  
17 third one, which is estoppel laches waiver. Estoppel and  
18 laches may no longer be at issue for Mr. Frazer because it  
19 related to his alleged excessive and unreasonable  
20 compensation, which seems to have been removed from the  
21 case recently by the Attorney General, although it is hard  
22 to say sometimes because it is always -- not always very  
23 clear.

24 But with respect to unclean hands, I would make  
25 one point. And that is, Mr. Shiffman talked about the

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## Proceedings

1 Attorney General acting in the public interest. And as  
2 you know, Your Honor, we have made multiple efforts to  
3 point out that the Attorney General has acted in a way  
4 beyond her statutory authority. She has alleged  
5 extra-statutory punishments, seeking remedies that are not  
6 permitted under the statute.

7 And my contention has always been that this  
8 presents a constitutional separation of powers at issue.  
9 Which prejudices Mr. Frazer because, quite frankly, he has  
10 had to now be the subject of, you know, blog reporting  
11 almost daily about how management at the NRA is so corrupt  
12 and all of this. It relates in part to the Attorney  
13 General's press release that Mr. Frazer used the NRA as  
14 his personal piggy bank, when now there are no allegations  
15 whatsoever that he received anything from the NRA other  
16 than his compensation.

17 And so, with respect to the Attorney General  
18 acting in a way beyond her statutory authority, I would  
19 contend it is not in the public's interest, but in fact  
20 flouts the public interest, as that interest is defined by  
21 the legislature.

22 Thank you.

23 THE COURT: Now with respect to Mr. Phillips. I  
24 just, so I am clear, I -- my tote board says that he --  
25 the motion was withdrawn by the Attorney General with

mlp

## Proceedings

1 respect to his second, third and fifth defenses. And his  
2 defense was withdrawn with respect to his eighth,  
3 ninth and 29<sup>th</sup> defenses. So there is really nothing to  
4 be decided on with respect to Mr. Phillips. Is that  
5 correct?

6 MR. SHIFFMAN: That's my understanding, Your  
7 Honor.

8 MR. FARBER: Yes. And it is mine as well, Your  
9 Honor.

10 I'll go back to the batting cage.

11 MR. SHIFFMAN: Thank you.

12 Your Honor, I'll just try to be brief and just  
13 address a few discrete issues that were raised by the  
14 various defendants here.

15 I guess the initial one is that providing  
16 additional evidence to the extent any of the things on the  
17 slide that Ms. Eisenberg presented is sufficient, I think  
18 a lot of that was already presented to Your Honor on the  
19 counterclaim motion. But more evidence of animus does not  
20 address the problem, even if it is anything new. What the  
21 problem that the NRA had with the defenses' retaliation,  
22 was that they didn't show a nexus between that animus and  
23 the action. And that's because of the requirement of  
24 showing but-for causation here. And as Your Honor held  
25 and as we set forth in our papers, the claims in the

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## Proceedings

1 complaint clearly provide a non-retaliatory basis for the  
2 action here.

3 You know, in that regard also, I think the key  
4 issue here is whether or not the remedies are appropriate  
5 in this case or not. And whether the remedies that we are  
6 seeking are appropriate or not, have nothing to do with  
7 any statements of the Attorney General. It relates to the  
8 conduct of the defendants here, and whether or not we can  
9 prove what we allege in the complaint. Things such as,  
10 you know, the injunction versus solicitation and removal.  
11 That again, those will be determined on whether or not we  
12 can meet the standards for those -- for those claims. And  
13 those are claims that, you know, we believe are set forth  
14 in the statute.

15 I would like to address also the comment that  
16 the NRA's counsel made concerning the *Trump Entrepreneur*  
17 case and binding authority in the state concerning unclean  
18 hands and what is necessary to show that.

19 We cited to the *Trump Entrepreneur* case which  
20 does go through and lays out that standard that we talked  
21 about. But that's not the only case in New York that  
22 deals with this issue. It is the most specific one. It  
23 is the one that deals with unclean hands in a case brought  
24 by the government. But there are many other cases that we  
25 cite in our brief where there is the general principle of

mlp



## Proceedings

1 equitable doctrines not being permitted against the  
2 government when it sues in its regulatory capacity to  
3 enforce a legislative mandate. And I'll get back to that  
4 in a little more detail later.

5 But so it is -- and that case, as well as the  
6 *SEC v Cuban* case that we cite, those cases are not unique.  
7 They are, in fact, actually in whatever disagreement that  
8 the NRA was referring to in the case law and  
9 inconsistencies in the case law, that language, which  
10 comes from the *SEC v Cuban* case, that language was focused  
11 on the criticism of the cases that held that an unclean  
12 hands defense is never available in government. So the  
13 Court in the *SEC v Cuban* case went through and analyzed  
14 those cases and said they are a little inconsistent, they  
15 don't really stand for that proposition. But what the  
16 cases do make clear, is that unclean hands -- the unclean  
17 hands defense is only available in very limited  
18 circumstances against the government.

19 So the cases that were criticized in the *SEC v*  
20 *Cuban* case, which is the case that the NRA cites for its  
21 proposition, are not ones we rely on. They are actually  
22 ones that just hold that it is never available. They  
23 don't criticize the ones that say it is only available in  
24 very limited circumstances.

25 I would also note that with respect to the

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1 filing of the bankruptcy, it is not appropriate for the  
2 NRA, if it believes that the case -- that there is animus  
3 against it, to run to another Court. In the Bankruptcy  
4 proceeding the Judge found that it did not do so in good  
5 faith. It can't use that again here to avoid the  
6 jurisdiction of this Court.

7 There are a few other points I would like to --

8 Mr. Correll, on behalf of Mr. LaPierre, made  
9 some arguments, one is with this UPS case, which I have  
10 not read recently. Actually it is a case that I have read  
11 in the past. It wasn't cited in his papers, so I wasn't  
12 quite familiar. But my colleagues were telling me that it  
13 does not necessarily stand for everything that he said.

14 THE COURT: Well, that's good enough for me.

15 MR. SHIFFMAN: I don't expect you to take that,  
16 but I'll distinguish some of the things that he mentioned.

17 One is in section 720. 720, unlike the statute  
18 I was talking about earlier under the Clayton Act, it  
19 specifically gives authority to the Attorney General to  
20 bring the claims. And as Your Honor correctly pointed  
21 out, it does so because there are many situations where  
22 the actors at the organization, kind of have conflicts and  
23 will not do so.

24 There is also a couple of other things that are  
25 important there. And so because of that, it is a

mlp

## Proceedings

1 legislative mandate to the Attorney General to enforce  
2 that loss. It is different than the Clayton Act where  
3 there was no naming of the states to bring the action.

4 But 720 is not the only relevant section. And  
5 it is not the only -- the N-PCL is not the only relevant  
6 statute. The EPTL is a statute that gives the authority  
7 to enforce it to the Attorney General. And that authority  
8 to enforce the charities loss to ensure that charities are  
9 properly administered, is one that lies solely with the  
10 Attorney General under the EPTL.

11 The Executive Law, again, is one that is -- that  
12 gives authority to the Attorney General and only the  
13 Attorney General to enforce.

14 715 of the N-PCL, the section there gives the  
15 Attorney General certain powers.

16 There is all -- there are, as Mr. Correll  
17 correctly pointed out, there are provisions in Section 112  
18 that says the Attorney General can stand in the shoes in  
19 certain instances of members or directors. But it does  
20 not always do so when it brings an action. It has its own  
21 authority to do so. So one example of that is between --  
22 in the dissolution proceedings, which are not here, just  
23 using it -- at issue here, I am using it to give an  
24 example of the distinction. Under 1101 the Attorney  
25 General can bring an action for dissolution for various

mlp

## Proceedings

1 reasons. 1102 doesn't mention the Attorney General, but  
2 gives additional reasons under which the Attorney -- the  
3 board or members can bring a dissolution proceeding.

4 The Attorney General can bring a dissolution  
5 proceeding under 1101 or 1102. And it is only when they  
6 do so under 1102, where there is no mention of the  
7 Attorney General, that they are stepping into the shoes of  
8 the members or directors, and using that authority that's  
9 referred to in Section 112. Not when they are bringing an  
10 action under 715 where it says the Attorney General may  
11 bring an action.

12 But putting all of that aside, the true essence  
13 of the claims here is one that is in the public interest.  
14 It is to enforce a legislative mandate given to the  
15 Attorney General to ensure that charitable interests are  
16 preserved; that charitable assets are administered  
17 properly. And that is a government purpose. It is one  
18 that was given to the Attorney General by the legislature  
19 and one that triggers the requirement that equitable  
20 defenses shall not be applied against the Attorney General  
21 except in very limited circumstances.

22 THE COURT: Okay.

23 MR. SHIFFMAN: Thank you very much, Your Honor.

24 MR. CORRELL: Your Honor, if I may briefly  
25 respond to one point? I'll be very brief.

mlp

## Proceedings

1           Your Honor, Mr. LaPierre's position is EPTL does  
2 not apply to him, because he is not a trustee. And his  
3 position is also that the EPTL does not create a right of  
4 action for failure to properly administer corporate  
5 assets. The provision of the EPTL that I think the AG has  
6 been referring to is paragraph M. It says: The Attorney  
7 General may institute appropriate proceedings to secure  
8 compliance with this section. This is a registration  
9 reporting section. And, to secure the proper  
10 administration of any trust, corporation or other  
11 relationship to which this section applies.

12           It doesn't apply to him. He is not a  
13 corporation. He is not a trustee. And for the AG to try  
14 to take this provision or this section of the EPTL and  
15 supplant the N-PCL and wipe out section 720, which  
16 specifically and expressly governs actions against  
17 directors, officers and key persons of not-for-profit  
18 corporations, runs contrary to the rules of statutory  
19 construction.

20           To the extent that these two statutes are  
21 compared, they have to be read and harmonized. The main  
22 statute, the primary statute, is the N-PCL, particularly  
23 when you are dealing with a director, officer or a key  
24 person in an action against a director, officer or key  
25 person. It is very specific, very clear.

mlp

## Proceedings

1 And the --

2 THE COURT: We are not here discussing a motion  
3 to dismiss the EPTL claims.

4 MR. CORRELL: Right. But my point is, it is  
5 just a response to the argument that they have -- that  
6 even if they don't have -- even if they are not subject to  
7 equitable defenses under 720, they have a valid claim  
8 against him under EPTL which allows them to strip him of  
9 his equitable defenses. That's inconsistent. That's not  
10 harmonious construction of two statutes. You can't have  
11 equitable defenses under one, not under the other.

12 MS. EISENBERG: Your Honor, may I briefly  
13 address the Court?

14 THE COURT: Sure.

15 MS. EISENBERG: Thank you, Your Honor.

16 Just to make it very clear, that the NYAG says  
17 that she is going after the NRA because she wants to  
18 protect the public. We believe she is going after the NRA  
19 because she wants to retaliate against a political enemy.  
20 We believe that the jury or the fact finder should decide  
21 who is right.

22 When Your Honor dismissed the counterclaims you  
23 were looking at the allegations. Now we are on the eve of  
24 trial and the NYAG will actually have to attempt to prove  
25 her allegations. We believe that she'll come short, and

mlp

## Proceedings

1 will not be able to prove anything but de minimus  
2 violations of the law, that certainly do not warrant the  
3 harsh relief she seeks against the NRA. At that point we  
4 believe the evidence will show the true reason why the  
5 NYAG is going after the NRA.

6 THE COURT: Okay. Thank you.

7 We have a few minutes before the lunch break.  
8 As I said, I wanted to take a little time during lunch  
9 break to just think about these motions. And so I am  
10 going to ask you to come back at, did I say 2:30 or 2:15?

11 I guess I didn't say.

12 I'll call it 2:15. Let's call it 2:30. Let's  
13 call it 2:15.

14 But while we have a couple more minutes, I did  
15 ask you to prepare today to talk about the trial and I --  
16 none of these motions would obviate the need for a trial.  
17 So I think we should be focused on scheduling it. As I  
18 mentioned, my focus has been on, sort of, the fall of this  
19 year. And so one question, I suppose, is the length of  
20 time that the parties have discussed, if you have  
21 discussed, that this trial would take. I recognize there  
22 are some motions in limine that I haven't decided yet.  
23 But assuming -- well, whatever you want to assume about  
24 those. Assume that most of the evidence, if not all of it  
25 that people are proposing comes in, have the parties

mlp

## Proceedings

1 talked about the likely length of trial?

2 MS. CONNELL: Monica Connell for the plaintiff.

3 The parties met and discussed this yesterday.

4 We also discussed the possibility of bifurcation, which is

5 something that the plaintiff has raised and actually the

6 Court, I think, sort of discussed at the

7 April 20<sup>th</sup> argument in this matter.

8 Plaintiff would propose, just to throw it out

9 there, bifurcation between the liability and the remedy

10 phase, as it is our position that the law is clear that

11 the Court determines, and only the Court can impose under

12 New York Law, equitable remedies. And that pretty much

13 all of the remedies that we seek are equitable.

14 We didn't receive a resounding rejection of that

15 principle, so that was progress. We -- the parties are

16 going to have further discussions about bifurcation. But

17 we did discuss the potential length of trial and the next

18 steps towards getting there. Obviously the Court would

19 determine bifurcation, we understand that. But if we

20 could potentially get some agreement, maybe that would be

21 helpful.

22 In terms of the liability phase for the

23 plaintiff's presentation of the case on direct, we

24 anticipate about 35 witnesses, give or take. I think

25 about seven of them may be unavailable, and we have their

mlp



## Proceedings

1 deposition videos and we can tailor those and get them a  
2 little shorter. But we think it could take as much as  
3 three and a half to four weeks.

4 For remedy phase, we think it would be much  
5 shorter, at most two weeks.

6 THE COURT: And that's just your presentation or  
7 are you baking in cross examination?

8 MS. CONNELL: I am baking in reasonable cross  
9 examination, and maybe even the idea that almost all of  
10 the witnesses we are going to call or the witnesses we are  
11 going to call for fact issues, not expert witnesses, would  
12 probably be a large overlap with the defendants' witness  
13 list. And that the defendants might agree, as we did at  
14 the bankruptcy, to question their witnesses that they  
15 would use on direct at the same time that we do our  
16 witnesses on direct. Sometimes that saves some time. So  
17 that's a possibility.

18 Again, I didn't hear a resounding no, I heard a,  
19 we will think about it. So that's progress.

20 I am not going to represent what each party  
21 said, unless the Court would like me to, as to how much  
22 time they would need for their cases.

23 THE COURT: So just -- so your point is, at  
24 least as your estimate goes, this three to four weeks  
25 includes not only cross examination, but it includes the

mlp

## Proceedings

1 direct examination that the defendants would provide of  
2 their own people?

3 MS. CONNELL: Potentially, Your Honor. Again, I  
4 am assuming reasonableness. I am assuming that we can get  
5 some reasonable stipulations of fact and resolve the  
6 admissibility of some documents that I don't think should  
7 be controversial. Yes, I am a little hesitant because of  
8 the length of time the NRA indicated it would need for its  
9 defense. If it does need that full amount of time, it  
10 would clearly not be sufficient. It would not include  
11 that.

12 THE COURT: Okay. Do the defendants want to.

13 MS. ROGERS: Yes.

14 MS. CONNELL: I am sorry, Your Honor. One other  
15 issue if I can speak to very quickly?

16 Just to clarify, I think there is something we  
17 need to clarify in the case. It is our position that the  
18 jury determines issues of fact under the N-PCL claims.  
19 But the EPTL and Executive Law claims and the equitable  
20 relief are determined by the Court.

21 THE COURT: How exactly is that all going to  
22 work?

23 MS. CONNELL: I think the same facts go in for  
24 the N-PCL and EPTL remedies, largely it has to do with the  
25 violation of fiduciaries duties and waste, that kind of

mlp

## Proceedings

1 thing. But ultimately whether there is liability under  
2 the EPTL and whether there is liability under the N-PCL,  
3 the Court ultimately determines that, the EPTL; and the  
4 jury determines the N-PCL.

5 THE COURT: And that's because of the statutory  
6 provision?

7 MS. CONNELL: That's correct, yes, Your Honor.

8 THE COURT: And your position is, is that all of  
9 the remedies you are seeking are essentially equitable in  
10 nature?

11 MS. CONNELL: Yeah. I think the bulk -- the  
12 vast bulk of them, Your Honor, and you know things like  
13 appointment of a monitor, restitution, accounting, those  
14 kind of things, are for the Court and not for the jury.

15 THE COURT: Okay. Let me hear from the defense,  
16 please. Ms. Rogers.

17 MS. ROGERS: Thank you, Your Honor.

18 We did confer, all of the parties conferred  
19 yesterday on the subject of scheduling and bifurcation.

20 The AG has represented that it needs four weeks  
21 to present its affirmative case, folding in at least some  
22 time for cross examination. And the NRA's response is,  
23 you know, we might need as many as three our four weeks in  
24 response to that, but we are hoping we don't.

25 THE COURT: When you say, "the NRA," are you

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## Proceedings

1 including the individual defendants?

2 MS. ROGERS: Right now, I am just including the  
3 NRA. But let me get to, I think I came up with a  
4 synthesis that simplifies things. So once we actually  
5 know the witness list we are facing, if 25 of those 35  
6 witnesses are also our witnesses, then we are willing to  
7 compromise to some degree on doing them at the same time,  
8 rather than calling them back. And we anticipate, you  
9 know, if we are able to realize some of the same  
10 efficiencies we did realize in the bankruptcy trial, we  
11 could probably get the whole fact finding liability phase  
12 done in eight weeks, counting the other defendants, who  
13 I'll let them speak for themselves, but I don't think  
14 they needed -- I think they might have needed an  
15 additional week or something. It is not substantially  
16 more time. I think eight weeks for the whole -- the whole  
17 enchilada.

18 THE COURT: Now, I am going to reserve comment  
19 on your estimates, but, the logistics of juries and bench,  
20 right, the jury portion of it has to be contiguous. We  
21 have to keep these folks here for whatever time we need  
22 them. The bench portion, to the extent that it is either  
23 bifurcated or separated by whatever some of the claims  
24 are, there is at least a little flexibility around having  
25 it be not necessarily all contiguous time. Because what I

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## Proceedings

1 want to avoid is, let's assume I am willing to give you  
2 all eight weeks. Are you talking about eight weeks of a  
3 jury sitting there?

4 MS. ROGERS: Potentially. We might be able to  
5 shorten it, again, if there is a lot of witness  
6 efficiencies. But Ms. Connell has said she wants four  
7 weeks just to put on her jury case, her liability case  
8 against the NRA. And we have to figure, you know,  
9 depending upon what those transactions are, that they are  
10 presenting to the jury --

11 THE COURT: Well her liability case she says  
12 from her perspective anyway, the only part that is a jury  
13 issue is the N-PCL part.

14 MS. ROGERS: I'll give you our perspective on  
15 that. I think the jury finds the facts, whatever factual  
16 predicates they allege entitle them to any liability, the  
17 jury can find. And if you look granularly, even at the  
18 equitable counts of their complaint, the factual  
19 allegations overlap pretty closely with the N-PCL counts:  
20 Did you violate policy? Was this a related-party  
21 transaction? And they are essentially asking for two  
22 bites of the exact same fact-finding apple. If they want  
23 the jury to decide whether the HT Solution transaction was  
24 lawful, and then have Your Honor decide the same thing  
25 under a different statute. The NRA's position is, we have

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## Proceedings

1 one liability phase and we come up with jury instructions  
2 that posits to the jury every disputed issue of fact. The  
3 jury comes back with a verdict. And then in the liability  
4 phase Your Honor, sitting in equity, decides based on the  
5 facts the jury found, what does each side deserve. What  
6 is an equitable remedy? Is there a compliance monitor?  
7 What would that look like? Et cetera. We think that's  
8 simpler and cleaner than trying to divide the liability  
9 phase and then -- their approach seems slightly less  
10 workable to me.

11 THE COURT: Understood. But just in principle  
12 then, it sounds like maybe you have gotten to that point  
13 where the idea of bifurcation --

14 MS. ROGERS: Yes.

15 THE COURT: -- which has at least one benefit,  
16 which is letting the jury go before the entire trial is  
17 done.

18 MS. ROGERS: Yes, the NRA is amenable to that.  
19 I remember Your Honor posited it the last time we were  
20 together. And the NRA agrees in principle. We might --  
21 it sounds like we are quibbling a little bit about how  
22 things will be bifurcated and what the jury instruction  
23 will say. But we don't disagree with allowing Your Honor  
24 to sit in equity and fashion any equitable remedies that  
25 liability may dictate.

mlp

## Proceedings

1 I want to say one more thing about scheduling.  
2 We heard some arguments today about political animus, and  
3 despite that element in the case, when the parties are  
4 before Your Honor, we really do try to keep politics out  
5 of it and focus on the claims, the defenses, the cases,  
6 because we are all professionals here. But this  
7 litigation is just the spearhead of a sweeping scorched  
8 earth reputational and political vendetta against the NRA,  
9 that has been waged by the State of New York since at  
10 least 2017. And it is the purpose and effect of this  
11 lawsuit and the preceding investigation, have been to cast  
12 a cloud over the NRA, much like the toxic fumes over the  
13 City, which we are eager to dispel.

14 We would love to get this done by Christmas. We  
15 have cleared our calendars to make that happen, if Your  
16 Honor is available. And so, you know, we would really  
17 like to let some sunlight in and we think some of these  
18 allegations will dissolve when we do. In the interest of  
19 our members and our mission, we favor an expeditious  
20 resolution.

21 THE COURT: So do I.

22 Okay. So, what I am hearing is, and I also  
23 think there may need to be some sharpening of pencils  
24 between you about how long this really is going to take,  
25 because my approach in these things is that once we agree

mlp

## Proceedings

1 on a timeframe for the trial, I will stick to it. And I  
2 will have the parties keep track of who is using how much  
3 time. But especially with respect to the jury, I like to  
4 give them a pretty solid date by which we intend to get  
5 the case to them. And enforce that through, I have a  
6 chess clock in my desk here. And otherwise it can spin  
7 out of control.

8 And just to dispel any due process issues,  
9 forewarned is forearmed. Right? So when you were on your  
10 feet doing cross examination, if you want to spend a month  
11 doing cross examination, you just know that that comes out  
12 of the back end of your time. So I want us to think very  
13 carefully about the schedule, because you should assume  
14 that I am going to stick to it. In large part because I  
15 am going to be scheduling things right before this trial  
16 and right after it. And I don't want to blow up my entire  
17 calendar because we can't get it done in the appropriate  
18 time. Plus I think it is both polite and proper to give  
19 the jurors a realistic and meet-able schedule.

20 So, I think you need to talk some more, because  
21 it sounds like your -- the defense estimate, and again I  
22 haven't heard from the other defendants yet. But if I am  
23 broad strokes, it sounds like six to eight weeks between  
24 the two sides.

25 Do any of the individual defendant's counsel

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## Proceedings

1 have a number higher than that in mind?

2 MR. CORRELL: Your Honor, because Mr. LaPierre  
3 is really sort of a main target here, the way I see it, I  
4 am going to have to reserve on that. It will depend on  
5 what the AG brings and what the NRA does in terms of  
6 covering bases. But I would think that -- I would want to  
7 reserve at least a week to deal with any issues that  
8 weren't appropriately covered, in my view, by the NRA.

9 THE COURT: Well -- we are all one big ship  
10 here. So we have to land it at the same time. So it  
11 has -- you all are going to have to figure out how to work  
12 together on a schedule that fits everybody in. I get your  
13 point. And you know, during the course of the trial you  
14 and the other defendants may have to end up deciding how  
15 to allocate who is going to do what, and make sure that  
16 you are not double teaming things. So we have to come up  
17 with a schedule where everybody has input in, that doesn't  
18 just expand so that everybody can feel comfortable.  
19 Because I do have to have a realistic schedule as well.  
20 So I understand your point. But I am going to need you to  
21 fold that in somehow in these discussions, because I am  
22 not going to regulate that. I am not going to say that,  
23 you know -- well, I am going to need you all to come up  
24 with a schedule that works for everyone.

25 So Mr. Correll, are you saying you don't know

mlp

## Proceedings

1 whether your time will fit within the six to eight weeks?

2 MR. CORRELL: I don't know whether my time will  
3 fit within the six to eight weeks, Your Honor. I can say  
4 this, in the bankruptcy trial we were able to coordinate  
5 pretty well to get everybody covered. And also in  
6 depositions we were able to share time on the defense  
7 side. And we were actually pretty efficient about that.

8 THE COURT: The others?

9 MR. FLEMING: Your Honor --

10 THE COURT: Mr. Fleming.

11 MS. ROGERS: Anyone can have the podium.

12 MR. FLEMING: I think folding in can be done as  
13 far as Mr. Frazer goes. I do have some personal  
14 preferences, but given flexibility, which I expect we will  
15 all work together, it shouldn't be a problem.

16 THE COURT: Okay.

17 MR. FARBER: I'll move here so people can hear  
18 me if they are remote.

19 I don't think, the time that this is set for,  
20 Mr. Phillips, I don't think the time that we will need for  
21 our case is going to affect those estimates significantly.  
22 We are talking a lot about this. I actually think that we  
23 need to talk about the trial date. And I think  
24 Mr. Powell's counsel is going to address that, because a  
25 trial of this length, I think presents potentially some

mlp

## Proceedings

1 scheduling conflicts, I think, for them. But I'll let  
2 them address that.

3 MR. ITKIN: Hi again, Judge. Mr. Itkin for  
4 Mr. Powell.

5 We don't expect to take a full week, but I think  
6 we will need a few days. I think, as Mr. Farber pointed  
7 out, our issue is with the trial date. I have two back to  
8 back trials in late November and early December. And I  
9 know another member of my team has trial in September and,  
10 I think, maybe early October.

11 I know that puts a huge damper on your plans to  
12 take a trial this fall, but that's our schedule.  
13 Obviously you can let Mr. Powell out of this case and that  
14 will make things a lot easier. I got a lot of laughs for  
15 that comment on our call yesterday. I figured I would let  
16 you enjoy it as well.

17 THE COURT: Well, I hear you. You know, we will  
18 have to get some proposals on trial dates that work. And  
19 you know, I really can't let one party completely derail  
20 the entire thing, and so we will see how that works out.  
21 Either your team will have to get it done or potentially a  
22 separate trial for your client. But you know, I am not --  
23 I am not really wild about the idea of pushing this all  
24 into 2024 just because of some counsels' trial schedules.  
25 I am not trying to be insensitive to it, but I have a

mlp

## Proceedings

1 fairly large vehicle to drive here, if you know what I  
2 mean.

3 So, look, I think I need you all to confer  
4 again. And I have your opening bid from which I will  
5 negotiate downward, if anything.

6 But, you know, that's a lot of time. That's  
7 twice as long as any trial I have had here. This is a big  
8 case, I get it. But I am going to want to, you know,  
9 maybe we can have a conference with, you know,  
10 Mr. Blaustein and I where we can really get more granular  
11 about the witnesses and what exactly is going to happen  
12 and what is a realistic timeframe. Because, you know,  
13 before I basically give you my entire fall, because there  
14 are four or 500 other cases that would like some of that  
15 time, I am going to want to push back some. I mean, I am  
16 not shocked by the number you gave me. In fact, kind of  
17 sort of what I thought.

18 MS. CONNELL: We should have gone higher.

19 THE COURT: No, I don't think so. But I think I  
20 am anxious to find ways to economize, especially if we are  
21 going to have the ability to have a portion of the trial  
22 be a bench trial that follows, or could go alongside, it  
23 depends, the jury portion it. We may be able to do --  
24 what I would like you to focus on is how -- initially how  
25 long the jury part needs to take.

mlp

## Proceedings

1 MS. CONNELL: May I speak, Your Honor? I know  
2 we have lunch, but very quickly. One of the, I think,  
3 selling points potentially of bifurcation is it takes some  
4 of the more complex issues, especially depending on how  
5 the Court rules on experts and pushes some of that to a  
6 bench trial where we have less concerns about prejudice.  
7 It also takes some of the complex evidentiary issues  
8 presented by our preclusion and sword and shield and that  
9 issue of social privilege, a lot of that, not all but a  
10 lot, would go to a bench trial. So we think that could  
11 maybe shorten, because a lot of it goes to the need for  
12 perspective relief.

13 A lot of that could shorten the jury aspect of  
14 this, which we are keen to do. I think we actually had a  
15 productive conversation yesterday.

16 THE COURT: It sounds like it. Look, I think  
17 what I am going to ask you to do, obviously not today, is  
18 to come up with a proposal, a written proposal of how you  
19 see the trial going, as much of it as can be agreed as  
20 possible. And flag the parts that you disagree about.  
21 But sort of like that. That the trial will proceed in  
22 phases. And the first phase we would want to reserve X  
23 amount of time for, you know. And then the next phase  
24 either you say continue right after or, you know,  
25 depending on when we do it there could be a short break.

mlp

## Proceedings

1 I don't know.

2 But for now try to work it out so that it works  
3 for everybody. I think you are closer together than I  
4 thought you would be. But that is often a mirage when you  
5 start putting in paper and you figure out what exactly it  
6 is going to be.

7 But I am -- look, I want to be very candid about  
8 it, I am going to hold people to a schedule once we get  
9 there. Because, to use the old high school science, you  
10 know, gas expands to fill the size of the bottle you put  
11 it in. Right? The more time I give you, you will figure  
12 out ways to use it. And if you have to be efficient on  
13 cross and on direct and get right to the point, then you  
14 will do that too.

15 So, you should assume that I am going to press  
16 for a very efficient schedule. I know it is an important  
17 case, and it is, you know, complicated, but the time to  
18 start taking out the pencils and really getting sharp  
19 about it is now. Because I do want to, you know, I have  
20 been trying to keep time in the fall available. You know,  
21 I don't know exactly what to do with Mr. Powell's  
22 counsel's schedule, because that's essentially all of the  
23 time one way or another. You know, again, you know, Akin  
24 Gump is a big outfit, and the fact that some people on the  
25 trial team may or may not be available doesn't mean that,

mlp

## Proceedings

1 you know, you can't do it. Again, I am reasonable but I  
2 have to also be practical.

3 MS. CONNELL: The parties are keen for a trial  
4 date, Your Honor. We don't want to prejudice Mr. Powell  
5 but prior to hearing from his counsel I think the NRA had  
6 suggested October 16 as date they are available. And I  
7 think everybody else agreed. But not that we dictate your  
8 schedule. And again, Mr. Powell will need to be  
9 considered in some way.

10 THE COURT: Yeah. That's kind of in the zone  
11 where I was. I'll even, with that, I am going to have to  
12 move another trial out of the way and a few other various  
13 things. So whatever we come up with is going to lead to a  
14 lot of ricocheting around in my schedule. But I want  
15 to -- the quicker we can do it, the quicker we can get on  
16 the calendar, the better.

17 I agree with all of the comments made that, you  
18 know, a lot of very serious allegations have been made in  
19 this case. And this is a situation where, you know,  
20 justice delayed is justice denied, either way. And I am  
21 fairly committed to getting this done this year. I think  
22 we should be able to do it.

23 So let's take a break until 2:15 and we will  
24 finish up. Thank you.

25 MS. CONNELL: Thank you, Your Honor.

mlp

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1 THE COURT: I am going to exit out of the Teams  
2 meeting because we are doing another seminar in this room  
3 at 1:00 o'clock.

4 Thank you.

5 (Whereupon, a luncheon recess was taken at this  
6 time.)

7 \* \* \*

8 A F T E R N O O N S E S S I O N

9 \* \* \*

10 THE COURT: Good afternoon, everyone.

11 Thanks again for the excellent briefing and  
12 argument.

13 I am quite aware of the timing here and, in my  
14 view, the need to get you a decision on these motions  
15 sooner rather than later. I am sure you would all greatly  
16 appreciate wonderful prose in a long-written opinion that  
17 you get a month before trial. But I think it is important  
18 to get you the substance of the ruling now, albeit in  
19 imperfect form.

20 I am going to start with the motion 44, which is  
21 the last-argued motion to dismiss from the defenses.

22 Just briefly on the standard. Motion to dismiss  
23 affirmative defenses, the plaintiff bears the burden.  
24 Demonstrating that the defenses are without merit as a  
25 matter of law, and deciding the motion to dismiss a

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Proceedings

1 defense, the defendants are entitled to the benefit of  
2 every reasonable intendment of the pleading which is to be  
3 liberally construed. A defense should not be stricken  
4 where there are questions of fact requiring trial.

5 There are many cases I could cite for that. It  
6 is essentially a mirror image of motion to dismiss a  
7 claim.

8 However, a defense that bears no relationship to  
9 the claims at issue is properly dismissed.

10 In considering this motion, I am not relying on  
11 the argument made by plaintiff that some of the  
12 affirmative defenses were stated in summary terms. I have  
13 assumed those defenses are based on the factual assertions  
14 the defendants put forth in their briefs, and where  
15 relevant in proposed amended pleadings.

16 If the defenses were otherwise meritorious based  
17 on those documents, I would have given leave to amend. So  
18 it is more efficient, in my view, to simply deal with them  
19 now on the merits in this fully-briefed motion, given the  
20 efforts that the parties have all put in to bring the  
21 legal issues to a head.

22 I am going to start with what has been called  
23 the bias defenses, also sometimes called the  
24 constitutional defenses or retaliation or unclean hands or  
25 a variety of other things. All told, these are based on

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## Proceedings

1 statements made by or on behalf of the Attorney General  
2 about the NRA and this litigation, either while she was  
3 running for office or while she was in office, although  
4 largely most of them are before.

5 I have already dismissed counterclaims based on  
6 similar allegations. And do so now with respect to the  
7 affirmative defenses, although on somewhat different  
8 grounds. But I incorporate by reference my description of  
9 the constitutional underpinnings of these various  
10 assertions. Quite simply in my view, there is no legal,  
11 factual or logical connection between these purported  
12 defenses -- these purported defenses and the claims  
13 remaining in this case.

14 Whether Candidate James or Attorney General  
15 James bore ill will toward the NRA or the individual  
16 defendants, or had as her goal to dissolve the NRA, which  
17 is no longer an issue in the case, has no relation,  
18 legally or factually, to whether these defendants engaged  
19 in improper related-party transactions, breached fiduciary  
20 duties, or otherwise mismanaged for their personal benefit  
21 in contravention of legal obligations set forth in  
22 statutes, under which the claims in this case are based,  
23 the activities of a New York Not-for-Profit Corporation.

24 The trial in this case will be on the merits of  
25 those claims, and the appropriate relief arising

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## Proceedings

1 therefrom, and not on the purported words and ideas  
2 between the Attorney General and the NRA.

3 In dismissing the dissolution claims early in  
4 the case, I did note that certain First Amendment  
5 principles played some role in that decision where that  
6 type of relief was sought. Those issues are no longer in  
7 the case. What is left is a more straightforward  
8 financial maladministration of a non-profit. And I think  
9 we risk overcomplicating this case and turning it into a  
10 series of irrelevant sideshows when we go beyond the  
11 claims made and the legitimate defenses thereto.

12 So, I would not discount entirely the  
13 possibility that in concluding on remedies I would take  
14 into account all surrounding circumstances. But in terms  
15 of the -- whether these are affirmative defenses to the  
16 claims, which is what this motion is about, they are not.

17 Whether, you know, assuming they prove -- that  
18 defendants were able to prove all of these statements were  
19 made, they really have nothing to do with the merits of  
20 the case, and therefore they are dismissed.

21 The next set of claims is a bit of a hodgepodge.  
22 The first one I'll deal with is the equitable defenses of  
23 estoppel and laches. Largely, the -- the only real  
24 substantive arguments have been about laches. As a  
25 general matter, those kinds of defenses are not available

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## Proceedings

1 against the state when acting in an official capacity.  
2 While some cases, such as the *SEC v Cuban* indicate that  
3 equitable defenses may be available in very limited  
4 circumstances, those circumstances are not present here.  
5 That case is 798 F. Supp. 2d, 783, Northern District of  
6 Texas, 2011.

7 The idea is that if the conduct is egregious and  
8 rises to a constitutional level, then you would leave open  
9 the possibility that even the state in its official  
10 capacity could be prohibited from seeking relief. The  
11 facts that have been set forth here, and it is a little  
12 difficult to tell in all cases what these defenses mean,  
13 but I think Mr. LaPierre has the most developed argument,  
14 with respect to laches, at least; is that the Attorney  
15 General had access to forms year in and year out which  
16 disclosed, to some extent anyway, Mr. LaPierre's  
17 compensation and use of charter flights. I don't think  
18 that those facts, even if proven, would give rise to a  
19 viable laches defense. Certainly not against the state.  
20 I don't think even if it wasn't the state, it would. But  
21 certainly not against the state. These are summary forms  
22 that the state received year in and year out. They do not  
23 disclose the facts upon which the claims in this case are  
24 based. The notion that the Attorney General who does have  
25 ample statutory authority to oversee chart -- charitable

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## Proceedings

1 organizations within the state, the notion that it would  
2 be enjoined from fulfilling that obligation simply because  
3 incomplete disclosures were made years ago, I think it is  
4 a clever -- it simply doesn't work. I think it is a  
5 clever argument, and I think it is well stated, but I  
6 don't think it is sufficient, even if those facts were  
7 proven, to establish laches.

8 I also, I understand the argument that in some  
9 cases where the state is acting as more of an economic  
10 actor as opposed to a sovereign, that there might be more  
11 leeway to apply normal equitable defenses. The *UPS* case  
12 that Mr. Correll referenced, I think is quite a different  
13 one. I think that was much more of a commercial  
14 relationship than what you have here. The Attorney  
15 General has, just, all sorts of statutory authority as, I  
16 think, the principal watchdog of the government over the  
17 activities of not-for-profit corporations. And you know,  
18 the fact that some of its claims can also be brought by  
19 private individuals does not, in my view, significantly  
20 impact the applicability of the kinds of equitable  
21 defenses that have been raised here. So, those claims  
22 are -- those defenses are also dismissed.

23 There was also in the briefing, although we  
24 didn't discuss it at argument today, various affirmative  
25 defenses with respect to extra-territoriality. I

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## Proceedings

1 previously observed in a different motion that it would be  
2 awfully easy to evade oversight as a New York  
3 not-for-profit corporation if all you had to do was keep  
4 your assets outside of the state, which I observed seemed  
5 inconsistent with the statutory scheme. That's from a  
6 September 29, 2022 transcript, NYSCEF 1175, at page 23.

7 I reached the same result here. The NRA is a  
8 New York not-for-profit entity, corporation, over which  
9 the OAG has oversight responsibilities. And I think that  
10 the statute gives ample authority to -- for the OAG to  
11 seek and the Court to grant relief with respect to the  
12 activities of the NRA as a New York not-for-profit  
13 corporation, regardless of where those assets may be.

14 Finally, also in the briefs and not much in the  
15 argument today, several of the defendants had what one  
16 might call, catchall defenses, which seemed to reserve the  
17 right to add other affirmative defenses. You know, I  
18 think it is true that there are situations where one might  
19 seek to amend pleadings to conform to the evidence at  
20 trial. But you can't just have an affirmative defense  
21 that open-endedly reserves the right to serve others. So,  
22 I don't know that dismissing it does much -- has much  
23 utility, but also keeping it in there as a separate  
24 enumerated defense seems kind of pointless. So I will  
25 dismiss that as well.

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## Proceedings

1           The cross motions to amend are denied on the  
2 ground that they are futile, because I have already  
3 considered the allegations that would be included in  
4 amplifying some of those defenses, and found that they  
5 would not, even if amended, be legally viable.

6           Moving on to the motions for summary judgment.

7           Mr. Phillips' motion for partial summary  
8 judgment is denied. I think there are a number of, I  
9 think, good arguments made as to potential defenses to  
10 various claims, but they are not conclusive in my view,  
11 and fact issues remain.

12           Mr. Phillips served as the NRA's treasurer and  
13 CFO for a number of years before retiring in 2018. The  
14 government asserts that he had had conflicts of interest,  
15 engaged in related-party transactions and self-dealing,  
16 among other things. And most relevant to today's motion,  
17 the state alleges that in 2014 the NRA, through  
18 Mr. Phillips, entered into a contract with an outfit  
19 called HomeTelos, and that Mr. Phillips failed to disclose  
20 his, quote, "long-standing personal relationship with  
21 HomeTelos' CEO."

22           Next, the OAG alleges that in 2018 Mr. Phillips  
23 entered into a post-employment consulting agreement with  
24 the NRA for \$30,000 per month, which it claims was an  
25 improper related-party transaction that was properly

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Proceedings

1 approved by the board.

2 The OAG asserts three claims, first as an  
3 improper related-party transaction; under the  
4 Not-for-Profit Corporation Law; and also breach of  
5 fiduciary duty under the Not-for-Profit Corporation Law.  
6 A very similar claim with similar statutory provisions  
7 under the EPTL, and also -- I am sorry, I got that wrong.

8 The fourth cause of action is the fiduciary duty  
9 claim under the Not-for-Profit Corporation Law.

10 The eighth claim, cause of action is under the  
11 EPTL.

12 And the 12<sup>th</sup> cause of action is a wrongful  
13 related-party transaction.

14 Okay. Let's go to the consulting agreement.  
15 First argument and principle argument that is made here is  
16 this is not the type of transaction that is covered by the  
17 related-party transaction provisions of the non profit --  
18 Not-for-Profit Corporation Law. And I think it is true  
19 that there is some authority and some support in the  
20 statute that, broadly speaking, compensation agreements  
21 between a not-for-profit company and its officers, is not  
22 considered an improper related-party transaction. I think  
23 the plaintiffs make a persuasive response that that is  
24 largely because compensation arrangements, at least with  
25 officers, such as Mr. Phillips, are covered by a different

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## Proceedings

1 section, Section 715 of the N-PCL.

2 I think that on its face the transaction that is  
3 challenged here is a related-party transaction. The  
4 definition of related-party clearly encompasses  
5 Mr. Phillips. The definition of a related-party  
6 transaction is quite broad. Essentially any transaction  
7 between a related party and in which the related party has  
8 a financial interest and the company, is a related-party  
9 transaction. So I don't think that I can rule as a matter  
10 of law that it is not a related-party transaction.

11 Whether it is a permissible transaction and  
12 whether Mr. Phillips can satisfy the requirements for  
13 defenses under Section 715 is a question for trial. I  
14 note that the -- there was a purported ratification after  
15 the fact of this transaction by the audit committee. But  
16 the statute does impose various specific requirements for  
17 that, and whether those were satisfied is a question for  
18 trial.

19 With respect to the HomeTelos contract, which is  
20 really not challenged as a related-party transaction but  
21 more so as a fiduciary duty claim, whether Mr. Phillips  
22 discharged his duties with the appropriate standard of  
23 care or may rely on a good faith defense, can't be  
24 resolved on this record. Including what disclosures he  
25 did or did not make; when he did or did not make them; and

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## Proceedings

1 what impact they had on the decision to extend this  
2 contract; and whether this contract, in fact, caused any  
3 harm, are all questions of fact, in my view, and not  
4 susceptible to summary judgment. So that motion is  
5 denied.

6 Finally, Mr. Powell's motion for summary  
7 judgment is also denied. The claims against Mr. Powell  
8 are similar in that first that it was a breach of -- that  
9 he breached fiduciary duty in connection with his duties  
10 at the NRA.

11 Second, that he failed to properly administer  
12 charitable assets under the EPTL.

13 And finally, that he engaged in a wrongful  
14 related-party transaction with the NRA.

15 The crux of Mr. Powell's argument is that he was  
16 not responsible for the decisions complained of in  
17 connection with its claim for breach of fiduciary duty,  
18 and unlawful related-party transactions. And he also  
19 seeks dismissal of claims concerning his compensation and  
20 expense reimbursements beyond a certain amount. And also  
21 makes specific arguments with respect to related-party  
22 transactions between the NRA and Mr. Powell's wife, and  
23 the entities in which Mr. Powell's wife and his father  
24 were employed.

25 I think as with the prior motion, there are just

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## Proceedings

1 too many un-- untied questions of fact here that preclude  
2 reaching judgment as a matter of law here.

3 First, I don't think that the record  
4 demonstrates as a matter of law that Mr. Powell was not a  
5 trustee as defined in the EPTL. Mr. Powell held an  
6 executive position and was delegated extensive powers by  
7 the NRA. And generally speaking, that is a question of  
8 fact.

9 Second, there are numerous material issues of  
10 fact warranting a trial concerning the alleged  
11 related-party transactions with the companies in which  
12 Mr. Powell's wife and father were engaged. That the  
13 challenged transactions may have, in part, been ratified  
14 after the fact, does not warrant summary judgment. In  
15 particular Section 715(j) of the N-PCL, which was added in  
16 2016, provides a defense for the specific circumstances  
17 involved here, which is where a related-party transaction  
18 is ratified after the fact.

19 And whether he satisfies the requirements of  
20 that statute is not something that can be decided as a  
21 matter of law here. Not only does the government  
22 challenge the fairness of the transaction to the company,  
23 but also challenges the procedure under which the decision  
24 was made by the audit committee years after the fact.

25 The statute of limitations argument, which we

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## Proceedings

1 didn't get into on the record here, also fails. The OAG  
2 commenced this action in 2020 and argues that a six-year  
3 statute applies. And also contends that Mr. Powell waived  
4 any statute of limitations arguments by not raising it in  
5 a responsive pleading. The reply is silent on this point,  
6 so I don't think that that is grounds for summary  
7 judgment.

8 And finally, the fact that some remedies may be  
9 unavailable at the end of the day, and I am referring here  
10 to the alleged or proposal to clawback salary, I am not  
11 making a decision on that one way or the other today. I  
12 don't think that warrants dismissal of the claim. Both  
13 Section 715(f)(4) and EPTL 8-1.9 permit the OAG to seek in  
14 the case of willful and intentional conduct, an amount up  
15 to double the amount of any benefit improperly obtained.

16 And again, as to that remedy as well, which is  
17 referenced in the motion, I am not making any ruling on  
18 the scope of recovery here. But the bottom line is that  
19 on the merits, on the liability merits, I don't believe  
20 that the motion has established as a matter of law  
21 conclusively entitlement to judgment. So that motion will  
22 be denied.

23 So that resolves the motions at issue today. I  
24 am quite glad that I took the other seven motions that  
25 were originally on the schedule off the schedule, because

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## Proceedings

1 I barely survived this one.

2 But I do appreciate the tremendous amount of  
3 work you have all put in. And you know, whether the  
4 motions were granted or denied, I thought all of the  
5 motions were exceptionally well done, and as was the  
6 advocacy today.

7 I don't know if I set a schedule for the other  
8 motions. Not yet? But I will. Those will impact to some  
9 extent, I suppose, your discussions about trial timing.  
10 But I'll try to get to that as soon as I can.

11 I do want you, as I said, to meet and confer and  
12 to the extent possible agree on a proposed trial plan and  
13 schedule, and give me broad availability in October,  
14 November and December, recognizing that the jury trial  
15 portion of this has to be contiguous. Ideally, the bench  
16 trial portion of it or liability or damages portion of it  
17 would be as well. But it is obviously not as critical.  
18 So I am willing to listen to creative solutions. I am not  
19 willing to put the trial off indefinitely. So, I am going  
20 to ask you to work hard to try to find a period of time  
21 that works.

22 Anything else?

23 MR. FARBER: Judge?

24 THE COURT: Yes, sir?

25 MR. FARBER: Could I ask a question regarding

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1 our planning of the trial schedule?

2 THE COURT: You can ask.

3 MR. FARBER: Do you have a standard practice --

4 THE COURT: Turn the mic on.

5 MR. FARBER: Apologies.

6 Your Honor, do you have a standard practice for  
7 jury trials? Do you sit five days a week? Do you sit  
8 full days? Because that will help us, I think, in  
9 figuring out the scheduling.

10 THE COURT: I think as a -- certainly for  
11 something this long I could not sit five days a week for  
12 eight weeks or six weeks. I have too many things. I  
13 would assume that Fridays are down.

14 Although I do my best to try to accommodate. If  
15 I can go five days, I will, but I can't shut down the rest  
16 of the docket for that long. So, assume at least four  
17 days a week, and five whenever I can.

18 MR. FARBER: Thank you, Your Honor.

19 THE COURT: And I took your prior estimates  
20 about weeks would assume five days. I recognize if it is  
21 not five days you need more. You are giving me days not  
22 calendar weeks, right?

23 MS. CONNELL: Yes, Your Honor.

24 THE COURT: But I am still going to hold you to  
25 it. Estoppel and unclean hands don't apply to me either.

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Proceedings

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MR. FARBER: Thank you, Judge.

THE COURT: Okay. Thank you all very much.

MR. SHIFFMAN: Thank you, Your Honor.

THE COURT: Order the transcript.

\* \* \*

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL  
STENOGRAPHIC MINUTES IN THIS CASE.



MICHELE PANTELOUKAS

SENIOR COURT REPORTER

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1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK: CIVIL TERM: PART 3

-----X

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

5 Plaintiff,

6 - against -

INDEX #  
451625/2020

7 THE NATIONAL RIFLE ASSOCIATION OF AMERICA,  
8 WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER  
9 and JOSHUA POWELL,

10 Defendants.

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11 Motion Seq. 44, 45 & 46

12 June 8, 2023  
13 60 Centre Street  
14 New York, New York 10007

15 B E F O R E: THE HONORABLE JOEL M. COHEN,  
16 Justice of the Supreme Court

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MICHELE PANTELOUKAS  
Senior Court Reporter

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Proceedings

1 THE COURT: Good morning, everyone. Let's start  
2 with appearances, beginning with the plaintiffs.

3 MR. SHIFFMAN: Good morning, Your Honor.  
4 Steven Shiffman, Assistant Attorney General,  
5 representing plaintiff. I am here today with Stephen  
6 Thompson, Alexander Mendelsohn and Monica Connell.

7 MS. CONNELL: Good morning, Your Honor.

8 MR. SHIFFMAN: Good morning, Your Honor.

9 THE COURT: Good morning.  
10 And defendants.

11 MS. EISENBERG: Svetlana Eisienberg, counselors  
12 on behalf of the National Rifle Association of America. I  
13 am here today with my partner, Sarah Rogers, and our  
14 colleagues, David Umansky and Christopher Zona.

15 Good morning.

16 THE COURT: Good morning.

17 MR. FARBER: Seth Farber from Winston Strawn on  
18 behalf of Wilson Phillips.

19 MR. CORRELLELL: Good morning, Your Honor.  
20 Kent Correll for Wayne LaPierre.

21 THE COURT: You caught me by surprise over  
22 there.

23 MR. ITKIN: Good morning, Your Honor.  
24 Uri Itkin from Akin on behalf of Joshua Powell.

25 MR. FLEMING: William Fleming for John Frazer.

mlp

## Proceedings

1 Good morning.

2 THE COURT: Good morning.

3 We are doing three motion sequences today.

4 My inclination is to start with the two narrower  
5 ones, the motions by individual defendants. Those are  
6 sequence 45 is by Mr. Phillips for partial summary  
7 judgment; and motion 46 is by Mr. Powell for partial  
8 summary judgment. Before stepping into the yawning chasm  
9 of the other motion, I would like to start with those.

10 So, why don't we start with 45, which is  
11 Mr. Phillips, by Mr. Farber. Do you want to start us off?

12 If you could do it from the lectern I would  
13 appreciate it.

14 MR. FARBER: Sure.

15 Thank you, Your Honor. And I don't want to do  
16 too much to stand in the way of the yawning chasm that you  
17 are facing. And, you know, as you noted at the outset, I  
18 think our motions -- our motion is fairly discrete. And I  
19 think I just want to make a couple of -- emphasize a  
20 couple of points in connection with that. And I am happy  
21 to respond to whatever questions the Court has.

22 So, there are, as Your Honor has noted, there is  
23 a lot of material in this case. A lot of material  
24 generally, and a lot that is alleged with respect to  
25 Mr. Phillips. There are a wide range of claims of

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## Proceedings

1 breaches of fiduciary duty, most of which go to his  
2 conduct as an officer, an employee of the NRA. Things  
3 where he is accused of wrongdoing for either approving  
4 certain contracts or directing payments to what are  
5 described as either friends or insiders.

6 Our motion is directed to things very different  
7 from that. The first piece of this is for a  
8 post-employment consulting contract. And, you know, the  
9 basic problem with the AG Offices' claim that this is a  
10 related-party transaction, is that, you know, Mr. Phillips  
11 wasn't acting as the treasurer or CFO in entering into  
12 this contract. He wasn't doing this on behalf of the  
13 National Rifle Association. He was doing this at arm's  
14 length. There is no dispute of the facts regarding that.

15 And, you know, as we point out in our papers, it  
16 simply doesn't make any sense under the statute to treat  
17 these sort of contracts where one is negotiating on one's  
18 behalf as related-party transactions.

19 And, I mean, I think --

20 THE COURT: Does that square with the language  
21 of the statute as to the definition of a related-party  
22 transaction? I mean, I -- we are not talking about  
23 salary.

24 Can I ask the folks who are on Teams to mute  
25 their lines, please?

mlp

## Proceedings

1 Thank you.

2 We are not talking about just run of the mill  
3 salary for employees. This is -- this is a transaction in  
4 the sense of signing a contract with an existing officer  
5 for post-employment consulting. Right?

6 MR. FARBER: Yes. But whether it is consulting  
7 or employment, there is a distinction without a  
8 difference. If I am employed by a term of years, I enter  
9 into a contract for employment for additional years, it is  
10 the same thing as when I am coming in from the outside.

11 The point --

12 THE COURT: Hang on a second.

13 (Muting Teams attendees.)

14 THE COURT: If only I could do this to people  
15 in-person sometimes.

16 Go ahead. I am sorry.

17 MR. FARBER: And I think if you look at the --  
18 again, it is the structure of what is going on. At one  
19 point in the AG's Office brief they fault Mr. Phillips  
20 because they say he is not placing the interests of the  
21 NRA above his own.

22 THE COURT: That's the fiduciary duty part.

23 But not to be too pedestrian about it, but he is  
24 a related party, right, he is a director, officer or key  
25 person of the corporation at the time that this agreement

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## Proceedings

1 is signed?

2 MR. FARBER: Yes.

3 THE COURT: And then the definition of a  
4 related-party transaction under the statute, reading from  
5 Section 102, is any transaction, agreement or any other  
6 agreement in which a related party has a financial  
7 interest; and in which the corporation or any affiliate of  
8 the corporation is a participant. And then it has some,  
9 you know, de minimus or other exceptions, none of which, I  
10 don't think, applies here.

11 So what would be my grounds for just ignoring  
12 that language?

13 MR. FARBER: Well, I -- I don't think it is  
14 ignoring it. I think it doesn't encompass or is not  
15 intended to encompass this type of situation. And look,  
16 the guidance the Attorney General's Office themselves has  
17 put forward indicates that.

18 THE COURT: Well yeah, I can sort of understand,  
19 because there are different kinds of routine decisions in  
20 every company about what do we pay our people. And those  
21 have to go through their own rules and approvals where  
22 necessary. This is -- this is a bit more of an outside  
23 the ordinary course of business transaction; is it not?

24 MR. FARBER: Well, certainly, but what you are  
25 talking about is a question of degree. I think Your Honor

mlp

## Proceedings

1 by saying there are some things that fall outside of it,  
2 you have adopted the point that this is not a categorical  
3 absolute rule that doesn't encompass some sorts of  
4 situations. And then the question is just which ones are  
5 those.

6 THE COURT: So if they had a deal where, you  
7 know, on retirement somebody gets paid \$20 million just a  
8 flat -- just a check gets cut, that's your new retirement  
9 bonus. That's not a related-party transaction?

10 MR. FARBER: Well, there would be other problems  
11 with it, but the problem is not that it is a related-party  
12 transaction. There would be breach of fiduciary duty  
13 claims against the people on the NRA side who entered into  
14 that and negotiated it on behalf of the NRA.

15 There may be claims -- and the AG's Office in  
16 the brief talks about whether or not there was performance  
17 under the contract, that the -- that terms of it were  
18 excessive. That's not what is at issue in a related-party  
19 transaction.

20 THE COURT: The purpose behind this whole  
21 section of the law, and the principle generally, is that  
22 these are insiders. They have been working with each  
23 other for decades in some situations. And you know, the  
24 normal indicia of arm's length transactions at least might  
25 be absent. You know, you have Mr. Phillips negotiating, I

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1 guess, with people that work under him, or work with or  
2 under him for years. And so just -- the notion that it is  
3 just lifted entirely outside the scope of the statute is a  
4 little bit of a big pill to swallow, especially given the  
5 language I just read.

6 MR. FARBER: Well, to be fair, it is not people  
7 who are under him who negotiated that consulting fee. I  
8 mean, it is signed by, I believe, it was the president and  
9 vice president of the NRA. So, it is people who not only  
10 do not have any reporting authority to Mr. Phillips, but  
11 sort of in the hierarchy those are people to whom he is  
12 responsible.

13 THE COURT: The point, putting it outside of  
14 this particular factual setting is that he is a senior  
15 executive negotiating with a company for the future.

16 And, you know, I get it, these are not uncommon  
17 to have these kinds of things be negotiated. The argument  
18 is that these are a little unusual. Obviously the  
19 plaintiff has substantive issues with the terms and the  
20 like. But I am dealing with a statute. You know, I  
21 recognize that by calling it a related-party transaction  
22 it imposes certain procedural requirements of board  
23 approval or at least board committee approval and the  
24 like. So there is a significance to calling them that.  
25 But I am having trouble reading the language in a way that

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1 you want me to.

2 MR. FARBER: I think the way to think about it  
3 is, you know, in the context in which he is doing that, he  
4 is not acting as a related party, you know.

5 THE COURT: It doesn't say that. It just says  
6 it has to be a transaction in which a related party has a  
7 financial interest and in which the corporation is a  
8 participant. It doesn't necessarily mean that the related  
9 party has to be acting as the CFO or whatever.

10 MR. FARBER: No, I understand that. But I think  
11 as we have talked about earlier, there are going to be --  
12 there have to be some category of circumstances where  
13 somebody who is, for example, going to be an employee can  
14 negotiate his own salary and it doesn't fall within the  
15 context of this.

16 Again, the Attorney General's Office who is  
17 charged with enforcing this statute has issued guidance  
18 that says that those should not be considered  
19 related-party transactions. They don't back away from  
20 that. Their only argument is, well, a consulting  
21 agreement is different. So we are in agreement as to that  
22 principle interpretation. The only difference is they  
23 say, well, we ought to draw a line between employment  
24 agreements and consulting agreements. But they offer no  
25 logical basis for drawing that distinction, which I submit

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1 is a distinction without a difference.

2 THE COURT: Now, just in terms of the facts  
3 here. What was the approval -- was there any board  
4 approval either before or later for this -- for this one?

5 MR. FARBER: I believe it was ratified after the  
6 fact, but I don't recall sitting here.

7 THE COURT: There is not a lot of discussion  
8 about it, but -- in the papers. But Section 715, which  
9 governs related-party transactions, has a whole process  
10 for, you know, if board approval is required, it should be  
11 done in advance. But they added a section which says  
12 that, if you are going to use ratification, at least as I  
13 read it, you have to not only show the ratification was  
14 done, but also that the transaction was fair, reasonable  
15 and in the corporation's best interest.

16 Is that section relevant here?

17 MR. FARBER: I mean we are not arguing that it  
18 would satisfy the ratification standard. Our argument is  
19 that -- and I don't think on a summary judgment motion  
20 given that language, we necessarily would be able to do  
21 that.

22 THE COURT: Okay. But it is applicable --

23 MR. FARBER: Yes.

24 THE COURT: -- if it is a related-party  
25 transaction. Your point is that it is not a related-party

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1 transaction, and therefore it is not applicable.

2 Even if it is not a related-party transaction,  
3 there were supposed to be certain procedures followed  
4 within the NRA. Were they followed?

5 MR. FARBER: Well, I am not sure whether they  
6 were in this case. But whether they were or they weren't  
7 isn't relevant to the issue of whether there is liability  
8 for a related-party transaction.

9 In other words, if the AG's Office were to make  
10 the argument that you did not follow the NRA's internal  
11 procedures, that doesn't translate this into a claim that  
12 the statute for related-party transactions was violated.

13 THE COURT: Okay.

14 MR. FARBER: So if there is nothing further on  
15 this, I can turn to the second part --

16 THE COURT: Sure.

17 MR. FARBER: -- of the motion.

18 So the second thing we have argued both applies  
19 to -- and I'll start with this contract, that it can't be  
20 a basis for the failure to administer charitable assets or  
21 breach of fiduciary duty claims. And you know, as to  
22 these, I started to get into this point when you were  
23 talking about the related-party transaction, Mr. Phillips  
24 is not acting on behalf of the NRA in entering into this  
25 contract. So, the notion that you have a fiduciary duty

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1 to your employer, to act in your employer's best interest  
2 when you are negotiating an agreement on your own behalf,  
3 there is simply no -- there is no legal support for it and  
4 it doesn't make any sense. It is a matter of logic.

5 And similarly, there is no basis for saying he  
6 is responsible for failure to administer charitable assets  
7 for entering into this contract on his own behalf. I  
8 mean, the criticism there is that the -- this wasn't a  
9 contract that the NRA would receive value for, they didn't  
10 need his services. But again, to the extent that those  
11 assets weren't being safeguarded in entering into this  
12 contract with Mr. Phillips, but the fault for that would  
13 lie on the shoulders of those in the NRA who, on behalf of  
14 the NRA entered into it, not on Mr. Phillips.

15 THE COURT: Well, even if the only thing that  
16 they sought to do was to void the contract because of a  
17 violation on either end, wouldn't your client still be a  
18 proper defendant to that claim since he has got an  
19 interest in the contract?

20 MR. FARBER: Yeah, but then they would have to  
21 have a basis for voiding the contract. They haven't  
22 brought a claim like that. They have brought failure to  
23 administer charitable assets claims. They brought a  
24 breach of fiduciary duty claim. They haven't brought a  
25 claim that would annul the contract itself.

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1 THE COURT: I thought what you were suggesting  
2 was, to the extent that there is a claim for breach of  
3 fiduciary duty or even the statute, it would be on the  
4 part of the NRA executives who negotiated it on behalf of  
5 the NRA, not your client. But in either event, if I were  
6 to find that, at least one possible remedy down the road  
7 is that it is not a contract that can be enforced if it  
8 was a breach of fiduciary duties or otherwise.

9 MR. FARBER: I don't know if that's necessarily  
10 the case. If I enter into a contract with you to perform  
11 services and, you know, I breached my fiduciary duty  
12 because I did not negotiate it properly with you, and it  
13 is unduly favorable to you. Yeah, the entity may have a  
14 breach of fiduciary duty claim against you, but that  
15 doesn't mean that they can, if there was consideration  
16 provided, recover from me.

17 So, you know, Mr. Phillips had obligations under  
18 this contract. There was consideration on both sides.  
19 They have a dispute about whether he performed on it. But  
20 that's not -- that's not something that is at issue here  
21 in this motion.

22 THE COURT: Okay. Do you want to move to the  
23 HomeTelos contract?

24 MR. FARBER: The HomeTelos contract, if you boil  
25 this down -- this was a claim for some IT services that

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1 were provided by a company whose principal was former  
2 girlfriend of Mr. Phillips. Now, they argue that there is  
3 evidence that it was still his girlfriend. We have  
4 pointed out in our papers why I don't think -- why the  
5 evidence is clear she wasn't. But it doesn't really  
6 matter for these purposes, because whether current  
7 girlfriend, former girlfriend, that doesn't fall in the  
8 category of a related party under the NRA's own policies  
9 and procedures.

10 And the NRA has its own related party concept.  
11 It is part of their manual. It is, I believe, Exhibit AI  
12 to the New York AG's motion. And you know, that  
13 definition is and the definition of related parties and  
14 related-party transactions is similar to the statutory  
15 one. And there are a bunch of enumerated parties, various  
16 relatives, spouses, but girlfriends doesn't fall within  
17 it. So, you know, what they have -- and there are  
18 certainly disclosure and approval requirements that are  
19 attendant upon related-party transactions. But  
20 essentially, their claim is that notwithstanding this  
21 scheme, there was a conflict of interest there that should  
22 have been disclosed. And therefore Mr. Phillips  
23 entered -- acted improperly in not coming forward and  
24 telling them about that.

25 And you know, I think the problems with that

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1 are, number one, there is no basis for this disclosure  
2 requirement that -- that they have attempted to create.  
3 But also, sort of more fundamentally, this is part of a  
4 breach of fiduciary duty claim. And there is no evidence  
5 in the record. In fact, the evidence in the record is to  
6 the contrary that there is any harm that the NRA suffered  
7 because of this. This isn't a situation where there was  
8 consideration provided and nothing received in exchange  
9 for it. There is no evidence of that.

10 It is also the situation where the audit  
11 committee after the fact did approve this. Now, they can  
12 argue about whether that meets a ratification standard  
13 under the related-party statute. But this is not alleged  
14 as a related-party transaction, because it couldn't be.  
15 So, but what the audit committee's approval of this shows,  
16 is it wouldn't have made a difference had Mr. Phillips  
17 informed people about this before the end, as opposed to  
18 afterwards. Because when given the facts, everyone was  
19 perfectly happy with the situation. So, again, there is  
20 no evidence that this failure to disclose, even if there  
21 were a duty to disclose, caused anything. Because had  
22 that information been presented beforehand, the audit  
23 committee would have done exactly what it did and NRA  
24 management would have done exactly what it did.

25 These are two, sort of, discrete issues, but I

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1 think they don't belong in the case.

2 THE COURT: Okay. Let me hear from the Attorney  
3 General on this one.

4 MR. FARBER: Thank you, Your Honor.

5 THE COURT: Thank you very much.

6 We are going to try to keep these brief so we  
7 can get through everything else. Okay?

8 MR. THOMPSON: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. THOMPSON: I will be brief.

11 First, just to address the related-party  
12 transaction issue. The only thing I want to touch on is  
13 the guidance that was issued by the Attorney General's  
14 Office. That guidance says that officer employee  
15 compensation is not a related-party transaction. And that  
16 makes sense because officer and director compensation is  
17 governed by a separate provision in Section 715 of the  
18 N-PCL, specifically 715(e). And that says that it must go  
19 through the board approved process in accordance with the  
20 bylaws. And so Mr. Phillips is trying to have his cake  
21 and eat it too. He does not want it to be officer  
22 compensation for the purposes of being a related-party  
23 transaction. But he -- I am sorry. He does want it to be  
24 officer compensation for purposes of being a related-party  
25 transaction, but does not want it to be officer

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1 compensation for purposes of having to go through those  
2 other procedures.

3 And as Your Honor noted, the entire purpose of  
4 this statute is to create fairness in situations where  
5 arm's length negotiations are not necessarily possible.  
6 And the procedures are designed to help that along. And  
7 so we strongly believe that Mr. Phillips' post-employment  
8 contracts when he is not an employee, it is not a part of  
9 his retirement compensation, it is not a part of his  
10 normal compensation, that it is a related-party  
11 transaction within the meaning of the statute.

12 THE COURT: Now, the fiduciary duty argument is  
13 interesting, I think, from their perspective. It is when  
14 you are overtly -- I wouldn't say adverse to the  
15 organization, but you are, you know, you're contracting on  
16 an individual level with the company. Do fiduciary duties  
17 apply to that situation?

18 MR. THOMPSON: They do, Your Honor. And it is a  
19 two-part answer. If Your Honor agrees with us that it is  
20 a related-party transaction, then Mr. Phillips had a  
21 statutory and an NRA policy duty to inform the appropriate  
22 board committee, in this case the audit committee, of the  
23 transaction, in writing. And he did not do that here.

24 Even if it is not a related-party transaction,  
25 Mr. Phillips was the treasurer of the NRA at the time. He

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1 was the one charged with overseeing the NRA's financial  
2 policies. And he testified that he knew that his  
3 agreement didn't go through the normal policies required  
4 for contracts of this magnitude. There are various  
5 sign-offs required and a business case analysis. None of  
6 that happened.

7 And the NRA's policies also require you to  
8 report known violations of policies.

9 So in both instances he breached his fiduciary  
10 duties regardless of whether or not he was the one  
11 negotiating the contract on his own behalf. And --

12 THE COURT: But assigning -- so you are saying  
13 that the breach of fiduciary duty was the procedural  
14 aspect, not the substantive terms of the -- of the  
15 consulting arrangement?

16 MR. THOMPSON: Your Honor, we do take the  
17 position that he had a duty of loyalty to the organization  
18 that included being fair to the organization. And that  
19 the terms of this agreement, like the terms of many of the  
20 other agreements that we allege Mr. Phillips facilitated  
21 over his 25 years at the NRA, were unfair to the NRA and  
22 wasted corporate assets.

23 THE COURT: Right. Well, I am talking about  
24 this one in particular. Because the tricky thing about  
25 applying fiduciary duties in this setting is, it typically

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1 means you have to put the entity's interest above your  
2 own. And the defense makes the, you know, sort of logical  
3 argument, how can that work in a situation where you are  
4 literally negotiating your own post-employment  
5 compensation.

6 MR. THOMPSON: And I think the answer, Your  
7 Honor, is the procedural safeguards that Mr. Phillips was  
8 required to follow the procedures for dealing with these  
9 kind of contracts, whether it was a related-party  
10 transaction, or just a simple conflict of interest, or  
11 normal employee compensation. Because all of that is  
12 supposed to be done by independent parties who are able to  
13 create the arm's length arrangement that was not present  
14 here.

15 THE COURT: Okay. All right. Thank you.

16 MR. THOMPSON: With respect to HomeTelos very  
17 briefly, Your Honor.

18 You know, Mr. Farber is correct that whether or  
19 not Ms. Richards was a significant other at the time the  
20 contract was entered into at the end of the day doesn't  
21 matter, because the NRA's policies clearly say that  
22 anything that creates even the appearance of a conflict of  
23 interest, must be appropriately approved. And that didn't  
24 happen here. Multiple NRA witnesses have testified that  
25 they believed Ms. Richards to be Mr. Phillips' significant

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1 other at some point other another. And the head of the  
2 audit committee testified that the contract should have  
3 been disclosed to the audit committee before it was  
4 entered into, rather than the ratification process that  
5 they allege.

6 THE COURT: What is the statutory claim that you  
7 make with respect to the HomeTelos contract? It is not  
8 under 715 for related party?

9 MR. THOMPSON: Correct, Your Honor. It is only  
10 a breach of fiduciary duty claim under 720 and the EPTL.

11 THE COURT: Does the 720 automatically  
12 incorporate any breaches of bylaws and the like? Does  
13 that automatically become a violation of 720?

14 MR. THOMPSON: Yes, Your Honor. Violations of  
15 the entities' procedures and policies are breaches of  
16 fiduciary duty. As Your Honor actually held in connection  
17 with the second round of motions to dismiss, upholding  
18 certain of our claims against the other individual  
19 defendants for breaches of their fiduciary duty.

20 And with respect to the damages element that  
21 Mr. Phillips argues is absent, I have a few responses, and  
22 then I'll sit down.

23 First, we do allege, and there are issues of  
24 material fact as to whether or not NRA sued for damages.  
25 HomeTelos was a real estate technologies company that the

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1 NRA hired to build a website for them to the tune of  
2 \$1.3 million. There isn't evidence that they received  
3 valuable services in connection with that.

4 And furthermore, Mr. Phillips is confusing our  
5 breach of fiduciary duty claim with a common law one.  
6 When it is a statutory claim under 720 of the EPTL --

7 THE COURT: Well, I mean, this is a summary  
8 judgment motion. And there has been discovery up and  
9 down, I assume, on this. Is there particular evidence  
10 that would suggest that they didn't provide value or they  
11 didn't do as good a job as somebody else might have done?

12 MR. THOMPSON: What we know, Your Honor, is that  
13 there was no bidding process that was done for this  
14 contract, which is also a violation of the NRA's  
15 procedures. So we don't know what the market value of  
16 these services was. We just know that that particular  
17 aspect of the policy was violated.

18 THE COURT: But if you were bringing -- and you  
19 are bringing a claim for damages, wouldn't -- I think you  
20 are anyway. Wouldn't you normally have to show that and  
21 say, well, we paid 1.3, the market value is 800,000,  
22 therefore we were harmed?

23 MR. THOMPSON: Your Honor, what we are bringing  
24 a claim for is accounting under 720. And the accounting  
25 requires Mr. Phillips to come forward and justify the

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1 behavior once we have demonstrated a breach of his  
2 fiduciary duties.

3 THE COURT: So, you think that it is -- to state  
4 a claim you can talk about the procedural problems, the  
5 lack of a bidding process, and that it is for the  
6 accounting, to sort out whether it actually mattered?  
7 Because it is possible you could have gotten a great deal  
8 in a situation where you don't have any bidding. I am not  
9 saying that's what happened here. But we would just defer  
10 the injury issue to the accounting?

11 MR. THOMPSON: Yes, Your Honor. That it is  
12 Mr. Phillips' requirement to come forward and say why this  
13 was fair market value in the best interest of the NRA.

14 THE COURT: Now, I noted this back and forth in  
15 the briefs. And I don't want to get -- go down a dark  
16 hole here, but in terms of Judge and jury, I am aware that  
17 the statute does have a some broad provisions talking  
18 about this as a jury trial. Do you envision that a jury  
19 would be overseeing all aspects or deciding all aspects of  
20 this case? At some point we are going to have to figure  
21 out who does what here. And I assume the jury is not  
22 doing the accounting, which is a whole separate procedure.

23 MR. THOMPSON: Your Honor, one of my colleagues  
24 today is going to be speaking about that at length. So I  
25 would like to defer to her, it is a little above my

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1 paygrade.

2 THE COURT: I would defer too. I would defer  
3 also. Unfortunately I have nobody to defer to. Okay.

4 All right. Thank you.

5 MR. THOMPSON: Thank you.

6 MR. FARBER: May I respond briefly, just a  
7 couple of things?

8 THE COURT: Yes.

9 MR. FARBER: So, the Attorney General's Office  
10 made the point that the guidance they issued applies to  
11 officer and employee compensation, and that makes sense  
12 because -- that you would take officer compensation out of  
13 consideration, because there is a separate rubric for  
14 dealing with it.

15 Notice they didn't talk about employee  
16 compensation. And what Mr. Phillips is doing in entering  
17 into a post-employment consulting contract, obviously he  
18 is not going to be an officer after he retires. That is  
19 the piece that is akin to being an employee. And they  
20 don't offer any basis -- the logic that they are saying is  
21 their guidance, makes sense for not considering officer  
22 and employee compensation, because there is a separate  
23 procedure that officers and directors have to go through.  
24 But that's not the logic that underlies it. Because it  
25 applies to every employee.

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1 THE COURT: That kind of ignores the substance  
2 of the related-party transaction. The point is, when it  
3 was being negotiated he was a senior officer. It may  
4 relate to a period later down the road, but the harm --  
5 the concerns about the transaction are that it was  
6 negotiated at a time when he was an insider. So, the fact  
7 that it relates to, you know, consultant after he is  
8 already resigned, I am not sure that that really holds  
9 together as a distinguishing factor.

10 MR. FARBER: The point I am making is that the  
11 guidance talks about how the related-party transaction  
12 does not apply to negotiations of officer or employee  
13 compensation. And their response to that is to say, well,  
14 but there is a separate rubric that you are covered. But  
15 that rubric doesn't encompass employee compensation.  
16 That's not what that guidance is getting at. Because  
17 employees are not subject to that separate approval  
18 process. And so the reason behind it goes back, it is  
19 just a common sense one, that the, you know, arm's length  
20 negotiations that one has in the employee context are not  
21 meant to be covered.

22 THE COURT: Well, an employee typically wouldn't  
23 be a related-party anyway though. Right? I mean you have  
24 to be a director or officer or key person.

25 MR. FARBER: Well, you can be a key person as an

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1 employee. I mean as CFO you may not be a statutory  
2 officer, you can be a high ranking member of the  
3 organization, but you are not a statutory officer.

4 THE COURT: Okay. I understand.

5 MR. FARBER: The other point I would like to  
6 make, they are criticizing Mr. Phillips for not, himself,  
7 reporting this to the audit committee. If he were the  
8 person who were dealing with the audit committee on his  
9 own contracts, that would be a separate area they would be  
10 criticizing him for. There are other NRA officials who  
11 were taking on that role in the context of his consulting  
12 agreement, the president the vice president. The notion  
13 that he would be the one who would be coming forward and  
14 presenting for his approval his own contract, in fact I  
15 think there are other parts of this complaint that  
16 criticize the NRA for doing exactly that. When you  
17 have -- when you are acting at arm's length you are not  
18 the person who is going to go and present your own  
19 agreement to an audit committee or to anybody else in the  
20 organization for approval.

21 THE COURT: Okay.

22 Let's move to Mr. Powell's motion.

23 MR. ITKIN: Uri Itkin from Akin Gump.

24 Let me know when you are ready for me, Judge.

25 THE COURT: I am ready.

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1 MR. ITKIN: Okay. I represent Josh Powell. And  
2 as we said in our motion, Judge, he is not really supposed  
3 to be in this case. He is a supporting player. There is  
4 a huge cast of characters, very important people. He was  
5 reporting to them.

6 He is accused, really at the heart of all of  
7 this after all the discovery that barely even involved  
8 him, there is no expert discovery related to him, barely  
9 any fact discovery related to him. The two things that  
10 the AG really accuses Powell of are mischarging expenses;  
11 and two, related-party transactions involving companies  
12 that the NRA already had a relationship with that had  
13 hired, one, his wife at some point as a consultant, and  
14 the second one, his father as a photographer for certain  
15 events.

16 Most of these claims fail. And at most,  
17 whatever the AG can recover from them on the damages side  
18 can really be no more than the \$54,000 of improper  
19 expenses that the NRA found that he charged after  
20 investigation.

21 I want to start with a legal claim made by the  
22 AG, trying to clawback his compensation. Now, there is a  
23 claim for, I guess, breach of fiduciary duty related to  
24 the charged compensation under Section 715 of the N-PCL.

25 And I think what we are heard here today already

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1 confirms our argument. The Attorney General has issued  
2 guidance saying that compensation, officer director  
3 compensation subject to Section 715, it has to go through  
4 board approval. It has to demonstrate other requirements,  
5 reasonableness and so forth.

6 Well, when we pressed the AG in our motion, what  
7 gives them the right to clawback his compensation under  
8 720, all they could muster is a footnote saying, well,  
9 there is this faithless servant doctrine. That's under  
10 common law, Your Honor. And you already ruled in this  
11 case and the Court of Appeals has ruled on this in *Grasso*,  
12 that the Attorney General can't fashion theories of  
13 recovery under the common law.

14 THE COURT: That's not quite what *Grasso* says.  
15 It says you can't use a common law claim that is  
16 inconsistent with the statutory regime.

17 MR. ITKIN: Correct. This is by definition  
18 inconsistent with a statutory regime, because under the  
19 faithless servant doctrine all you need to show is that  
20 someone performed some wrongdoing at some point. And then  
21 you can be able to clawback their entire compensation  
22 during that period of time. So, for example, if someone  
23 was stealing from a company not only are they supposed to  
24 be held accountable for the money that they stole, the  
25 company can also clawback their compensation that was paid

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1 to them during that time. It serves to disincentivize  
2 them or any person from doing bad things to the company,  
3 because they would effectively have been fired had that  
4 conduct --

5 THE COURT: To be fair, the faithless servant  
6 doctrine usually comes up in a very different kind of  
7 context. I often see it when an employee is essentially  
8 starting to feed information to a competitor, working for  
9 their own account instead of for the company. And you  
10 know, the idea here is, you know, that that's what your  
11 salary is for. And if you are going to be working for  
12 somebody else you shouldn't get your salary. That kind of  
13 thing. This is a different kind of a fit.

14 I understand your point.

15 MR. ITKIN: Right, Judge. And I think you agree  
16 with me that in the context you see it, which sounds  
17 pretty egregious, there is still no -- there is zero  
18 consideration of whether the salary was approved by the  
19 board, whether it is reasonable, none of that. That's  
20 required by Section 715.

21 THE COURT: Just to be clear, I mean, you know,  
22 at some point they are alleging, I think, a conduct  
23 bordering on, sort of, theft from the company or  
24 misappropriation of -- I am not hinting that the faithless  
25 servant doctrine couldn't be applicable in that setting,

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1 if that's proven that, you know, somebody is siphoning  
2 money away from the company. I am not ruling anything at  
3 this point. But that's the point here. And in fact even  
4 the company is opposing your claim here.

5 MR. ITKIN: Well, that's an interesting one. I  
6 was a little surprised at that motion. Because we are not  
7 being sued by the company, at least as far as I know. So  
8 if they sued us I think we would talk about the faithless  
9 servant doctrine in that context.

10 But what I am saying is, I don't think the AG  
11 has the ability to rely on a common law doctrine of  
12 faithless servant in its claims here. If it seeks to  
13 clawback Mr. Powell's compensation, it has to do so under  
14 Section 715. And it has to comply with certain  
15 requirements under that section. It has to bear the  
16 burden of proof of complying with those requirements. It  
17 does not do that here. It cannot do that here under the  
18 faithless servant doctrine. It is two different things.  
19 That's what I am saying. And that's why I thought that --  
20 and I submit, that *Grasso* is directly on point, and your  
21 ruling in this case is directly on point.

22 Now I want to talk about the related-party  
23 transactions for a moment as well. So --

24 THE COURT: That seems to be the main focus of  
25 your motion. You wanted partial summary judgment on those

mlp



## Proceedings

1 two transactions.

2 MR. ITKIN: Correct. But I also think that the  
3 salary clawback is superfluous here, and that should be  
4 dismissed.

5 THE COURT: Okay.

6 MR. ITKIN: Now, the related-party transactions,  
7 like I said, there were two. And both were approved.  
8 Both were approved and ratified by the NRA. There is a  
9 document attached as Exhibit 24 to our motion. I don't  
10 know if you have it, Judge. I am so used to electronic.

11 THE COURT: I have the whole docket.

12 MR. ITKIN: We are going into the 22<sup>nd</sup> century  
13 here, out of the 21<sup>st</sup>.

14 THE COURT: I didn't think we were talking that  
15 long.

16 MR. ITKIN: I am saying technology wise. We  
17 have been in the dark ages for a long time with all of the  
18 paper.

19 So anyway, there is two transactions, and this  
20 is Exhibit 24 is --

21 THE COURT: Before we go too deep into -- if you  
22 are in the board ratification zone of the statute, to  
23 establish a defense under ratification under the statute  
24 you have to -- the defendant has to show that the  
25 transaction was fair, reasonable and in the corporation's

mlp

## Proceedings

1 best interest. Right?

2 MR. ITKIN: Well, I am not sure about that. I  
3 think that all the defendant has to show is that it was  
4 ratified and found to be that.

5 THE COURT: Well, are we looking at 715(j)?

6 MR. ITKIN: Yes.

7 THE COURT: So it says: In an action by the  
8 Attorney General with respect to a related-party  
9 transaction not approved in accordance with the earlier  
10 paragraphs, which means approved in advance, it shall be a  
11 defense to a claim of violations of these provisions. And  
12 then it has two things:

13 One, that the transaction was fair, reasonable  
14 and in the corporation's best interest at the time the  
15 corporation approved it.

16 And two, prior to receipt of any request for  
17 information by the Attorney General regarding the  
18 transaction, the board has ratified it by finding in good  
19 faith that it was fair, reasonable, et cetera.

20 Now, if it read the way you were reading it, you  
21 wouldn't have needed that first part about having to show  
22 that it actually was fair, reasonable and in the  
23 corporation's best interest. You would just need the  
24 second one.

25 MR. ITKIN: Judge, I see where you are going. I

mlp

## Proceedings

1 don't see the language that you are talking about either.  
2 Because it doesn't say the defendant has to show.

3 THE COURT: It says it shall be a defense if.

4 MR. ITKIN: Right. So I mean the fact that the  
5 NRA audit committee approved this -- both of these  
6 transactions as fair, reasonable and in the best interest  
7 of the NRA, and ratified them, I mean I think is --

8 THE COURT: You are saying that if the company  
9 does that, then that's a complete defense.

10 MR. ITKIN: I mean, that's how I read the  
11 statute. If the company hadn't done that and we come  
12 back, and I agree we have to show that, but it has already  
13 been done. And I am not even sure that --

14 THE COURT: Well, what does the first subsection  
15 mean then?

16 MR. ITKIN: I mean --

17 THE COURT: Why do they have two?

18 MR. ITKIN: It just means that the transaction  
19 did have to -- did have to be found fair, reasonable and  
20 in the best interest of the NRA.

21 THE COURT: That's what the second one says, it  
22 had to have been found by the board. But the first  
23 section says it has to actually be fair, reasonable.

24 MR. ITKIN: The second one says it has to be  
25 ratified, which happened independently.

mlp

## Proceedings

1                   And the second one -- the first one talks about  
2                   the fair, reasonable and in the best interest of the NRA.

3                   And I am looking at the audit committee minutes  
4                   that say that exact thing.

5                   THE COURT: Okay. I understand your point.

6                   MR. ITKIN: And Judge, I am not even sure that  
7                   we get to subsection (j) because, and I know you said this  
8                   earlier but I want to push back on this point, I am not  
9                   sure that the NRA's finding that the -- that these  
10                  transactions were, in fact, reasonable and fair and in the  
11                  best interest of the NRA have to be at the time of the  
12                  transaction.

13                  THE COURT: I think that's the whole point of  
14                  (j). Isn't it? Part (a) of this provision says that you  
15                  can't enter into a related party transaction unless it  
16                  is -- it is determined by the board to be -- or an  
17                  authorized committee, to be fair, reasonable and in the  
18                  corporation's best interest at the time of that  
19                  determination. At least it seems to me, anyway, that they  
20                  are distinguishing between a contemporaneous approval and  
21                  one done after the fact. And they are being, at least if  
22                  you -- there has to be some reason why the drafters of  
23                  this legislation added this ratification section. There  
24                  is a different set of possibilities when it is done after  
25                  the fact. Right?

mlp

## Proceedings

1 MR. ITKIN: I understand what you are struggling  
2 with. I was thinking through the same thing yesterday.

3 So if you look at (b), when it talks about a  
4 transaction, related-party transaction with a substantial  
5 financial interest, the legislature made it very clear  
6 that the determination has to happen, if you look at  
7 (b) (1) prior to entering into the transaction.

8 Now, if you look at (a), there is no such  
9 language there. It just talks about, at the time of such  
10 determination, it doesn't say when that determination had  
11 to be made. And I think that (j) was included, and I  
12 don't know why -- I haven't seen the legislative history.

13 THE COURT: Why wouldn't this be a transaction  
14 in which a related party has a substantial financial  
15 interest?

16 MR. ITKIN: I don't think that's been alleged,  
17 and I don't think the evidence supports that. I mean,  
18 this is a consultant that had ongoing -- or a large  
19 consulting company or, I am not -- scratch large.

20 THE COURT: I mean, I read the allegations are  
21 that, I think, that the NRA increased its payment to the  
22 consultant by the exact amount of the amount that his wife  
23 was going to be paid or something along those lines?

24 MR. ITKIN: You know, maybe. But again, she is  
25 a consultant. She is a consultant at this company that's

mlp

## Proceedings

1           been employed by or been used by the NRA before. She was  
2           there during and after. And that happened with both of  
3           these consulting companies. So to say that Mr. Powell had  
4           substantial financial interest in these transactions, I  
5           think would be a stretch. And I didn't hear that argument  
6           from the other side in the briefs.

7                        So to go back to (a), this just requires the  
8           time of such determination, never said it had to be at the  
9           time of the transaction. And the NRA in the minutes, the  
10          audit committee goes through that and says, yeah, you know  
11          what, there is a bunch of people who didn't say this at  
12          the time, but we went back and considered all of the facts  
13          and they approved and ratified the transactions  
14          nonetheless.

15                      Now, to answer your question about (j), I think  
16          (j) was added when there was no determination. Right? So  
17          it is a defense, if the company doesn't make that  
18          determination at the time, there is still a defense for  
19          them to say, well, it was ratified later on, and you have  
20          to go through all of these factors.

21                      THE COURT: Okay.

22                      MR. ITKIN: And look, on the last point, the  
23          expenses. So, what happened with the expenses is that, as  
24          I think you gleaned from all of the allegations, the NRA  
25          had a pretty liberal expense reimbursement policy. There

mlp

## Proceedings

1 are folks charging expenses, getting them reimbursed, many  
2 of them were reimbursed. In the case of Mr. Powell there  
3 is an investigation. And there were certain things  
4 identified by accountants and forensic accountants hired  
5 to participate in that investigation. Out of that  
6 investigation the NRA determined that he had mischarged  
7 \$54,000 of expenses. That's it. That's the extent of  
8 this. There is no --

9 THE COURT: That's what the NRA determined?

10 MR. ITKIN: That's what the NRA determined.

11 THE COURT: Is the AG limited to what the NRA  
12 determined?

13 MR. ITKIN: They would not be if they had done  
14 any of their own investigation or any of their own  
15 discovery. If they had experts of their own on that  
16 investigation. But they don't. All they do is just rely  
17 on the NRA. And this is now summary judgment, as you said  
18 before. If this was a complaint, if this was a motion to  
19 dismiss, that would be one thing. But we are now at  
20 summary judgment. So this gentleman is going to have to  
21 go to trial and on what facts. And the facts are simply  
22 that the NRA did an investigation, concluded that \$54,000  
23 of expenses, of all of the expenses that are charged, were  
24 improper. Okay. Then they are stuck with that, the AG is  
25 stuck with that. That's our point, Your Honor.

mlp

## Proceedings

1 THE COURT: So are you seeking to dismiss it or  
2 just limit it to a certain number?

3 MR. ITKIN: Limit it to that number. And by the  
4 way, this number is public. I mean, this was something  
5 that was disclosed in the NRA's filings to the AG and in  
6 the Form 990. I realized last night as I was looking at  
7 it, that the form we submitted, the Form 990 from 2019  
8 that we submitted, was not the right version. There is  
9 apparently a later version that does talk about this. I  
10 have a copy for you, if you would consider it. I have a  
11 copy for counsel. It may not be a huge issue right now  
12 but I want to make sure that you have it, if that's okay.

13 (Handing.)

14 THE COURT: Thank you.

15 All right. Attorney General?

16 MR. MENDELSON: Alexander Mendelsohn.

17 THE COURT: Good morning.

18 MR. MENDELSON: Good morning, Your Honor.

19 Your Honor, the plaintiff and the NRA have not  
20 seen eye to eye on much in this case, but here we agree  
21 there are triable issues of fact that preclude summary  
22 judgment in Mr. Powell's favor. The lengthy  
23 counterstatements --

24 THE COURT: So mark the transcript on that spot.

25 MR. MENDELSON: The lengthy counterstatements

mlp



## Proceedings

1 of material fact that were submitted by both plaintiff and  
2 the NRA and Powell's lengthy replies to those  
3 counterstatements, underscore the need for a trial on  
4 those issues.

5 And contrary to Mr. Powell's objections, he does  
6 belong in this lawsuit. During the relevant time period  
7 he was an officer and an ex-officio director and a key  
8 person of the NRA. And he was an active participant in  
9 the NRA's culture of mismanagement and self-dealing and  
10 private endearment.

11 And just turning to the argument that-- sorry.

12 Turning to Mr. Powell's most recent argument  
13 regarding his expenses, that \$54,000 that he is talking  
14 about, that was just American Express charges, and it is  
15 just the tip of the iceberg. As we have laid out in our  
16 submission, there are -- I don't want to go too deeply  
17 into the subject of certain pending motions to seal, but  
18 there is evidence that we put forward suggesting or  
19 indicating that his liability far exceeds just the  
20 \$54,000.

21 In addition to that, Your Honor, Mr. Powell  
22 referenced the NRA's liberal reimbursement policy. I am  
23 not sure that the policy was necessarily liberal, but it  
24 just wasn't followed.

25 Turning to -- in addition, Mr. Powell argues

mlp

Proceedings

1 that Lisa Supernaugh and Craig Spray, Lisa Supernaugh was  
 2 his assistant, Craig Spray became the CFO after Defendant  
 3 Phillips left, he argues that they reviewed his expenses  
 4 and therefore he can't be liable for a breach of fiduciary  
 5 duty. But Ms. Supernaugh, who was his direct report,  
 6 testified that she only did administrative work on the  
 7 expenses. And she testified that she would do whatever  
 8 she had to do in order to make sure that her boss was  
 9 going to be reimbursed.

10 And Mr. Spray, once he became CFO and he  
 11 inherited the responsibility to review the expenses, he  
 12 ultimately determined that there were improprieties going  
 13 on, investigated them, and he -- the NRA now alleges  
 14 that's why Mr. Powell was terminated.

15 And essentially there are just questions of fact  
 16 regarding Mr. Powell's expenses, regarding their propriety  
 17 and how much he owes. So he is not entitled to summary  
 18 judgment on that issue.

19 Briefly with respect to the faithless servant  
 20 issue. The faithless servant doctrine is not inconsistent  
 21 with the statutory regime. Under section 720 the language  
 22 of the statute indicates that the faithless servant  
 23 doctrine would be available as a remedy to account for the  
 24 acquisition by Mr. Powell of the corporate assets that he  
 25 acquired through his violations of his duties.

mlp

## Proceedings

1 THE COURT: Which violations are we talking  
2 about now, the expenses or the related-party transactions?

3 MR. MENDELSON: It would be under both. The  
4 related-party transactions, his failure to disclose, his  
5 clear conflicts of interest would also be separate  
6 breaches of fiduciary duty and violations of the NRA's  
7 policies, in addition to being related-party transactions.

8 THE COURT: And from your -- well, maybe you  
9 will defer again, but does the jury decide things like  
10 faithless servant and what the proper scope of that is?

11 MR. MENDELSON: Your Honor, if it was above my  
12 colleague's paygrade, it is certainly above mine. I  
13 apologize.

14 THE COURT: All right. Well, we will hit the  
15 government surface level at some point.

16 MR. MENDELSON: It is not inconsistent with  
17 statutory regime. If you look to section 112(a)(10) of  
18 the N-PCL, that provides that in related-party situations,  
19 any appropriate remedy available in law or equity is  
20 available to the Court to -- that would include faithless  
21 servant doctrine. And it is just a traditional remedy for  
22 breaches of fiduciary duty.

23 In addition the EPTL claims would also bring  
24 in --

25 THE COURT: The EPTL?

mlp

## Proceedings

1 MR. MENDELSON: The Estates Powers and Trusts  
2 Law. That would also bring in the faithless servant  
3 doctrine as well.

4 THE COURT: Okay.

5 MR. MENDELSON: Thank you, Your Honor.

6 THE COURT: And on the -- we talked for a little  
7 bit with counsel about the ratification defense. Do you  
8 read it -- how do you read it? Do you read it that if  
9 you -- all you have to show for the ratification defense  
10 is the ratification?

11 MR. MENDELSON: No, Your Honor.

12 The ratification defense in section 715(j) has  
13 very specific, stringent requirements that a defendant  
14 would have to show in order to satisfy those requirements.  
15 And there are issues of fact here that preclude that  
16 finding on summary judgment.

17 THE COURT: Just to put a fine point on it, do  
18 you think that he would have to show not only the  
19 ratification with a finding that the transaction was fair,  
20 reasonable, et cetera, but also separately prove that the  
21 transaction was fair, reasonable and in the corporation's  
22 best interest?

23 MR. MENDELSON: Um, Your Honor, I think that he  
24 would need to separately prove that, yes. Or he would at  
25 least need prove that the audit committee made that

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## Proceedings

1 finding properly.

2 THE COURT: So that would be enough, if he says  
3 that the audit committee made that finding, that would be  
4 enough?

5 MR. MENDELSON: Not just that they made the  
6 finding, but that they properly did so. That there needs  
7 to be some inquiry into the circumstances.

8 THE COURT: That actually raises a question that  
9 I intended to ask. There is a flowing through the  
10 complaint, the papers, there is a certain amount of  
11 scepticism about the functioning of the board and the  
12 board committees. Is that any part of the claim here,  
13 that with respect to ratification and the like that there  
14 was anything about the board or its committees that would  
15 undermine ratification as a defense?

16 MR. MENDELSON: Yes, Your Honor. It speaks to  
17 the proper functioning of the board and whether they were  
18 reviewing the documentation that would be necessary to  
19 actually ratify these -- these transactions. Whether they  
20 were functioning properly to begin with.

21 And as we have laid out in our submission,  
22 current president of the NRA, the former audit chair of  
23 the NRA, he testified that he couldn't remember looking at  
24 documentation underlying the transaction with Mr. Powell's  
25 wife. And he testified that he didn't look at underlying

mlp

## Proceedings

1 documentation with respect to the transaction with  
2 Mr. Powell's father where he was paid over \$100,000 over a  
3 couple of years.

4 THE COURT: All right. Thank you.

5 Anything further?

6 MR. ITKIN: Judge, I have a few words. If you  
7 want to move this along I can stand down.

8 THE COURT: It works for me.

9 MR. ITKIN: If you will indulge me, I will take  
10 it.

11 Look, on the faithless servant doctrine I didn't  
12 see anything in the Attorney General's brief about the  
13 EPTL. And I also don't see anything in section 715  
14 entitling the Attorney General to take advantage of that  
15 doctrine. Section 715 talks about compensation in the  
16 context of board approval and as a related-party  
17 transaction has to be reasonable to the company. In fact  
18 I submit, the AG cannot assert that common law doctrine  
19 because it is in conflict with those requirements.

20 THE COURT: And what about the reference to the  
21 statutory provision which says that, at least in the  
22 related party context, equitable remedies are available.

23 MR. ITKIN: They might be available, but you  
24 still have to comply with the other burdens of proof in  
25 that section. So they are creating a novel doctrine going

mlp

## Proceedings

1 outside of the statutory regime, in my view.

2 THE COURT: Well, statutory regime refers you to  
3 other equitable principle, at least in this narrow  
4 respect.

5 MR. ITKIN: Judge, that would be a huge elephant  
6 going through a mouse hole. If you think about that, that  
7 means the entire provision in *Grasso* or the entire Court  
8 of Appeals decision in *Grasso* doesn't really mean  
9 anything, because then they could squeeze through any sort  
10 of equitable relief that they want without complying with  
11 that section.

12 THE COURT: Well, there is a difference -- I  
13 mean, I don't want to go too far down this hole, but it is  
14 a difference between liability and relief. *Grasso* was  
15 about you can't create a claim where liability can be  
16 established, short of the conduct requirements of the  
17 statute.

18 This one is, once you find a violation, if you  
19 do, the Court has flexibility with respect to relief.

20 MR. ITKIN: To find the violation, Judge, they  
21 would have to show that this compensation was not approved  
22 by the board. They, in fact, completely disclaim that,  
23 and said they are not -- they are not contesting that his  
24 compensation was reasonable, and they are not contesting  
25 that it wasn't approved by the board. So they cannot

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## Proceedings

1 possibly show a violation. They say that in their brief  
2 very clearly. And what the Court of Appeals said is, you  
3 can't come up with theories of recovery outside of the  
4 statutory regime. And I believe Your Honor quoted them in  
5 your motion to dismiss decision in this case. It is not  
6 that they are not going to show that, but they have  
7 admitted that they are not going to.

8 THE COURT: Okay.

9 MR. ITKIN: So they can't get to the faithless  
10 servant doctrine with those admissions.

11 THE COURT: I am going to take a short break  
12 before we turn to the --

13 MS. CONNELL: We have one quick statement, Your  
14 Honor.

15 THE COURT: Sure.

16 MR. MENDELSON: Very briefly, Your Honor.

17 We don't take issue with the overall amount of  
18 compensation that Mr. Powell was paid in salary and base  
19 compensation. But we do take issue with the amounts he  
20 was paid beyond that in terms of improper expenses, sort  
21 of thing. In addition, the burdens of proof aren't  
22 changed. Mr. Powell still has the defenses that are  
23 available in a section 720 claim, for example the section  
24 717 defense. So, the burdens of proof haven't shifted and  
25 *Grasso* doesn't apply here.

mlp



## Proceedings

1 THE COURT: Okay. Thank you.

2 Did the NRA want to speak on this motion?

3 MS. EISENBERG: In the interest of moving things  
4 along, I don't think we need to unless you have questions.

5 THE COURT: No, that's fine.

6 We will take a short break because this next one  
7 will take a while, and I want Michele to rest. We will  
8 see you in a second.

9 (Pause in the proceeding.)

10 COURT OFFICER: Come to order.

11 THE COURT: Have a seat.

12 So my plan, just for the schedule, is to have  
13 the argument go no later than 12:30, if it ends earlier  
14 that's fine, and then take a break. I have you scheduled  
15 through to 3:00. And that is designed so that if I can  
16 give rulings on any of these motions today, I will do it  
17 after lunch and have you come back and do that.

18 If I can't and I have to take it under  
19 submission, I'll do that. But I would like the argument  
20 portion to end 12:30, 12:40. That doesn't mean you have  
21 to use all of those minutes, but they are yours if you  
22 want them. Okay?

23 So this is the Attorney General's motion to  
24 dismiss four or 5,000 affirmative defenses.

25 MR. SHIFFMAN: Good morning, Your Honor.

mlp

## Proceedings

1 Steven Shiffman, Assistant Attorney General.

2 Actually it is not four or 5,000, although there  
3 is a mountain of paper here, which there is no dispute  
4 about that. We think that the issues to be decided on  
5 this motion are relatively narrow. And they are not only  
6 relatively narrow, they are issues that you already  
7 decided for the most part. They are issues that the  
8 defenses are at the real heart of our motion.

9 And those are defenses that relate to  
10 allegations of bias here. Those are issues that Your  
11 Honor decided when you decided our motion to dismiss the  
12 NRA's counterclaims last year. That decision not only is  
13 law of the case here, but the logic of that decision calls  
14 for the same result with respect to the affirmative  
15 defenses sounding in bias. And those, just to be clear,  
16 are the retaliation affirmative defenses, the selective  
17 prosecution affirmative defenses, unclear hands and bias.  
18 They are all -- we put them all in basically the same --

19 THE COURT: How about estoppel? Is estoppel the  
20 same?

21 MR. SHIFFMAN: Estoppel is, I think, a different  
22 category. We are certainly moving to dismiss the estoppel  
23 laches affirmative defenses.

24 THE COURT: Laches is -- they all use -- some of  
25 these them use slightly different wording.

mlp

## Proceedings

1 MR. SHIFFMAN: Yes.

2 THE COURT: At least in my listing of -- they  
3 have bias, selective enforcement, retaliation, political  
4 speech, selective prosecution, unclean hands.

5 MR. SHIFFMAN: Mm-Hm.

6 THE COURT: Those are all what you count as the  
7 bias defenses.

8 MR. SHIFFMAN: That's correct, Your Honor.

9 And I put estoppel in a separate category with  
10 laches, it is usually tied together in their affirmative  
11 defenses. I also don't really know what -- enough about  
12 what they are claiming as to the estoppel defenses here,  
13 other than with respect to laches, to put it in any other  
14 category. So we will get to it a little later.

15 I don't think anybody has said what we have done  
16 that should estop the People of the State of New York as  
17 opposed to anything even that the Attorney General has  
18 done. And I think that one important distinction for the  
19 Court and everybody to keep in mind, is that there is a  
20 distinction between the Attorney General and the People of  
21 the State of New York. The Attorney General brings these  
22 claims on behalf of the People of the State of New York.  
23 And that's very important here because it goes to a few  
24 different things. And primarily it goes also to the issue  
25 of whether or not this action is one in the public

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## Proceedings

1 interest. This action is one in the public interest  
2 because of the nature of the claims asserted here.

3 The nature of the claims asserted are to enforce  
4 the charities laws here: The Not-for-Profit Corporation  
5 Law, the Estates Powers and Trusts Law; and the Executive  
6 Law.

7 Those are claims that are to benefit the people  
8 and to ensure that the charitable assets are properly  
9 administered. Whether or not anything that the Attorney  
10 General has done or any bias that is alleged here, that  
11 does not affect anything with respect to the validity or  
12 the merits of the claims that were brought in this  
13 complaint. And that's where we believe the Court should  
14 focus here.

15 As for the bias defenses, these are claims that  
16 all were decided in the counterclaim motion to dismiss.  
17 And that decision on retaliation is law of the case here,  
18 but also it is the same logic. The NRA argues that that  
19 claim was only -- the retaliation decision in this -- with  
20 respect to the counterclaims, only dealt with the  
21 initiation of the investigation. But actually, Your  
22 Honor, in looking at that motion, look to the fruits of  
23 the investigation and whether or not the complaint here  
24 stated valid claims. And Your Honor ruled that it in fact  
25 did state valid claims. Your Honor also has ruled

mlp

## Proceedings

1 numerous times on the merits with respect to motions to  
2 dismiss those claims.

3 So we have claims here that have been determined  
4 to be legally viable. And by the logic of the  
5 counterclaims decision, that means that the NRA cannot  
6 show that any alleged bias was a but-for cause of  
7 retaliation. And for those -- we think that same logic  
8 applies here to a complaint that arose out of a justified  
9 investigation. Logic simply demands that that be the  
10 case.

11 In addition, with respect to the selective  
12 prosecution claims, their allegations as to selective  
13 prosecution defenses are even weaker than they were on the  
14 counterclaim motion. The NRA does not identify any  
15 comparators that it claims were treated differently.

16 So there is the test, as Your Honor laid out in  
17 the counterclaim decision that requires both an evil eye,  
18 and an uneven hand. Here they don't even attempt to show  
19 anyone who is a comparator that they claim is different.  
20 In fact, in their papers they refer to some of the same  
21 comparators that they referred to earlier. And they note  
22 in that, that the comparators were ones where dissolution  
23 wasn't sought, but claims for breaches of fiduciary duty  
24 for restitution would be sufficient. And that's the exact  
25 type of claims that we are bringing in the complaint now.

mlp

## Proceedings

1 So we think those selective prosecutions fail because of  
2 the inability to show any -- anybody who was treated  
3 differently.

4 And both of those two decisions also impact the  
5 unclean hands defenses. Which fail for two independent  
6 reasons. The first is in order to show an unclean hands  
7 or to properly state an unclean hands defense against the  
8 government, you need to show two things:

9 You need to show a constitutional injury, and  
10 that resulted from egregious conduct by the government.

11 But you also need to show that that  
12 constitutional injury affected your ability to defend the  
13 case. Not that it brought about the case, but it affects  
14 your ability to put on a defense, such as that the conduct  
15 interfered with the witness so you wouldn't be able to get  
16 from the that witness and put on your case at trial.

17 And the cases we cite such as the *Trump*  
18 *Entrepreneur Institute*, the *SEC v Cuban* case, and some of  
19 the other cases that we cite, all stand for that  
20 proposition, that you need to do both elements here. You  
21 need to both show a constitutional injury and you need to  
22 show that that constitutional injury impaired your ability  
23 to put on a case.

24 And the NRA fails on both counts. They fail on  
25 the first count for the same reasons as the counterclaims

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1 were dismissed. But, they fail on the second count  
2 because they don't even attempt to allege that. There is  
3 no allegations and no argument in any of the NRA's papers  
4 about how any purported bias affected their ability to  
5 defend the litigation. And the only thing they say is  
6 that it led to the litigation. But the cases make clear  
7 that that is not enough.

8 The NRA does try to distinguish the cases and  
9 say that that rule has been criticized. But actually the  
10 only debate in the cases is whether an unclean hands  
11 defense against the government is always precluded or  
12 whether it is -- it is only available in limited  
13 circumstances. We only rely on the latter rule.

14 THE COURT: And what do you take -- I'll  
15 obviously ask the defendants, but what do you say they are  
16 relying on for their unclean hands defense? What facts do  
17 you think? Is it just the stump speeches of the current  
18 Attorney General or is it something beyond that?

19 MR. SHIFFMAN: To be honest, I think that's a  
20 question better for them. But my understanding, at least,  
21 is that they are relying on that mountain of paper that  
22 they provided to you that deals with the stump speeches  
23 and allegations and comments made. Nothing that has been  
24 done in this case that would affect any witnesses.  
25 Nothing that would be done to, you know, alter trial in

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1 any respect. All of their -- some of the allegations may  
2 relate to things that postdated the filing of the  
3 complaint. But they are still just comments of the  
4 Attorney General. And that goes back to the point that I  
5 started with, in that there also is a distinction between  
6 the Attorney General and the People here. And you cannot  
7 have the ability -- the People's right to have violations  
8 of the law impaired by the agents of the government. And  
9 lots of cases that we cite stand for that proposition.

10 It goes to even the *Heckler* Supreme Court  
11 decision, many of the unclean hands cases including the  
12 *SEC v Cuban* case and the *Trump Entrepreneur* case get into  
13 this analysis. And it is an important one here because  
14 what is really at issue in this litigation is whether or  
15 not the defendants did what we allege that they did.

16 Now here the allegations have already been  
17 determined to state claims. So what is at issue is  
18 whether or not we can prove those allegations at trial.  
19 And whether or not a comment was made that evidences some  
20 bias or not, is not really at issue. And that's why we  
21 don't think that this mountain of paper is something that  
22 you really need to get into in great deal. What you need  
23 to get into are the legal issues here. And these are  
24 legal issues that have really mostly been decided already.  
25 So that -- I think from our perspective that deals with

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1 the bias affirmative defenses.

2 There is also the laches and the estoppel group  
3 of affirmative defenses. I don't fully understand what  
4 the estoppel claims are. I don't think they have  
5 articulated them. So I am not going to address them in  
6 great detail, other than to say that the rule is that  
7 estoppel, for the same reasons unclean hands is not  
8 available against the government, the rule is that  
9 estoppel is not generally available against the  
10 government, except perhaps in extraordinary circumstances,  
11 and those are not applicable here.

12 There is also the laches defense. And I think  
13 that one, Mr. LaPierre spends a lot of time in his papers  
14 dealing with that one and making allegations there. That  
15 fails for a few reasons. One, it is the same -- same  
16 basic concept that laches is not available against the  
17 government except in extraordinary circumstances, if at  
18 all. And that's -- goes back to that same thing. The  
19 reason is, you can't allow a delay by an agent of a  
20 government to impair the People's ability to pursue the  
21 claims and to have the laws enforced.

22 Here though, there is actually nothing that  
23 would even constitute laches if you actually reached the  
24 question. And that's because Mr. LaPierre points to  
25 disclosures that were purportedly made in the NRA's

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1 filings with the Attorney General concerning his salary  
2 and the use of charter flights and other benefits.

3 But those filings, first, are made with our  
4 office, so that we can, you know, so we can enforce the  
5 charities laws, but they are not submitted to us for our  
6 approval. We don't get that document and approve the  
7 contents of them. We get over 50,000 filings a year, and  
8 we use them to do our -- to do our job. And the public  
9 uses them to make decisions about making donations and  
10 things of that sort.

11 THE COURT: How far back in time do your claims  
12 go with respect to, for example, the individual  
13 defendants, in terms of compensation? Are you going back  
14 beyond the statute of limitations period?

15 MR. SHIFFMAN: We are not going beyond the  
16 statute of limitations period.

17 MS. CONNELL: No.

18 MR. SHIFFMAN: And there are a few reasons for  
19 that. One, as fiduciary, there is an issue as to when the  
20 statute runs and whether the statute of limitations is  
21 tolled during the time that they are fiduciaries.

22 THE COURT: For example, not to steal  
23 Mr. Correll's thunder, but they talk about filings made in  
24 2008 and earlier, and they make the point that somewhat  
25 resonates in laches principles, that if they had been

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1 aware in 2008, for example, which I guess may be a time  
2 when decisions were made about security concerns that  
3 required private travel, that they could have changed  
4 their behavior and that the witnesses who were around at  
5 the time who could support the decisions are no longer  
6 around.

7 MR. SHIFFMAN: Mm-Hm.

8 THE COURT: And therefore there is just a  
9 certain unfairness to having a, you know, a subsequent  
10 Attorney General go back and try to clawback that far  
11 back, when there is no way to defend it.

12 MR. SHIFFMAN: Right. And I think there are a  
13 couple of answers to that. And the first is, if you look  
14 at the 2008 filings here, they don't disclose any of the  
15 things that we are seeking to pursue on our claims here.

16 What is disclosed is, there is a box on the 990s  
17 which is the informational tax returns that charities file  
18 with the IRS. A copy of the 990 is filed with some other  
19 paperwork with the Attorney General's office in a chart  
20 500. That's filed each year. On the 990 there is a box  
21 that says: Did you use charter or first class travel? It  
22 is one check box. Okay? Then two pages later there is a  
23 place where you can give a little more of an explanation  
24 for that.

25 Beyond that explanation what the NRA says in

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## Proceedings

1 2008, is that charter or first class travel was used in  
2 circumstances where there was -- where logistics or other  
3 available travel arrangements could not be made. That  
4 doesn't disclose the misuse of charter travel for personal  
5 benefit. It doesn't disclose the use of charter travel  
6 for companions, for family members. It doesn't disclose  
7 any of the misuse. There is no information given about  
8 the details of those transactions. It is not actually  
9 even until 2016 in the NRA's filings.

10 And just to be clear on that, the filing for the  
11 year 2016, which is not made until late 2017, that's the  
12 first time where that disclosure, that one or two sentence  
13 disclosure even mentions security concerns.

14 So, on a factual matter, as terms of what  
15 possibly those returns could have alerted to us, they  
16 don't alert us to the wrongdoing that's alleged in the  
17 complaint, because they really just say whether or not  
18 that's used. And there could be instances where charter  
19 travel for not-for-profit is used. So for example, it is  
20 often the case with, you know, rescue operations or things  
21 like that where you do need to do it. So simply checking  
22 the box doesn't necessarily show that there is a violation  
23 of law.

24 But also, there is with respect to the statute  
25 of limitations, there is both a continuing wrong doctrine

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1 and the doctrine that when fiduciary -- when fiduciary is  
2 in place, that the claims don't start to run until  
3 fiduciary leaves their position.

4 And I would like to address briefly too, the  
5 case that Mr. LaPierre submitted earlier this week, the  
6 *Meta* case, the *Facebook* case. That's the only case that  
7 the defendants have submitted that really deals with the  
8 laches claim when a government is -- a government entity  
9 is suing as plaintiff for, sort of, public type claims.

10 But it is very distinguishable from almost every  
11 other type of claim. And that's because that suit was  
12 brought under the Clayton Act. And as the Court there  
13 made very clear, the Clayton Act does not give the right  
14 to the states to sue in their sovereign capacity. Right?  
15 They can sue as persons, they can sue as associations, and  
16 other things, they cannot sue as sovereigns. And it is  
17 when the state sues as a sovereign, that laches is not  
18 available against the government. When the state sues in  
19 a proprietary capacity, there are some cases that say --

20 THE COURT: Well, weren't they suing as *parens*  
21 *patriae* in that case? But I think that's -- that's when  
22 you sue to challenge a merger, that's typically what it  
23 states.

24 MR. SHIFFMAN: And yes, the states were trying  
25 to sue in a *parens patriae* capacity. But an important

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1 factor in that case is that they were -- they did not get  
2 a congressional mandate to sue as sovereigns. They only  
3 got to come in and sue as a person. They had to fit it  
4 within the person definition. So by its very nature that  
5 means that the legislature, the Congress back in the early  
6 1900s when they passed the Clayton Act, they did not give  
7 any special right to the states to go in and sue under the  
8 Clayton Act for that. It was previously just the federal  
9 government that can sue. This expanded it to persons.  
10 But it did not expand it to the states. Right? So the  
11 states that were suing under -- they had to fit in under  
12 the persons.

13 THE COURT: Look --

14 MR. SHIFFMAN: But --

15 THE COURT: -- in those situations you are  
16 essentially suing on behalf of the citizens.

17 MR. SHIFFMAN: That's correct. But that's  
18 not -- my point is a slightly different one, Your Honor.  
19 My point is that you have to look at what the legislative  
20 intent was in determining whether or not laches should  
21 apply. And the cases that all rule that laches is not  
22 available against the government, really look at one  
23 thing. They don't look at the motivation of the  
24 government. They don't look at other things. What they  
25 look at are the nature of the claims and whether those

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1 claims are ones to enforce a legislative mandate. Right?  
2 There is no legislative mandate under the Clayton Act to  
3 the states, because they are not named in there. The  
4 Courts actually, in *Meta*, was actually I think a little  
5 bit skeptical even of their standing to fit in under the  
6 states definition.

7 But putting that aside, the real issue is that  
8 there is no legislative mandate given to the states to  
9 enforce the Clayton Act. Otherwise they would have been  
10 mentioned in there. There is legislative mandate to  
11 persons, associations and other things. So it is not  
12 something that is specially reserved to the state to  
13 enforce.

14 THE COURT: Right. I think your point, I  
15 assume, is here the Attorney General is the enforcer, is  
16 the one who, if there is someone to protect the states'  
17 interests in this -- in the context of not-for-profit  
18 corporations, it is the Attorney General.

19 MR. SHIFFMAN: That's exactly right, Your Honor.

20 And it is -- we are the only ones for a lot of  
21 these. There are some things that the NRA may be able to  
22 bring such as claims against Mr. Powell. But there are  
23 other things that the Attorney General is the one who is  
24 the only one who can really bring those things. So that's  
25 a very important distinction. Because with the Clayton

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1 Act you have the FTC, which had claims that were  
2 actually -- that are still -- we are able to continue in  
3 the *Meta* case. They were not estopped. But also that  
4 case is very distinguishable given that the underlying  
5 facts that were being challenged were well known. That  
6 merger was, you know, submitted to the federal government.  
7 Anybody working, I would assume, in the Attorney General's  
8 Office or any other state's Attorney General's Office  
9 would have been, in there Antitrust Bureau, would have  
10 been very well aware of that, and it was a  
11 multi-million -- multi-billion dollar merger.

12 Here, as I mentioned earlier, there is nothing  
13 that could give rise to laches because nothing was  
14 disclosed to us that we could have acted upon. And we  
15 know of no affirmative conduct to approve anything there.

16 THE COURT: Okay. Thank you.

17 MR. SHIFFMAN: Thank you, Your Honor.

18 MS. EISENBERG: Good morning, Your Honor.

19 THE COURT: Good morning.

20 Are you plugging into our screen?

21 MR. UMANSKY: Yes.

22 MS. EISENBERG: While there is a lot of paper --

23 THE COURT: Wait. I have to --

24 You can get started if you want.

25 MS. EISENBERG: Thank you, Your Honor.

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1 THE COURT: Just point the microphone at  
2 yourself so I can hear you. Thank you.

3 MS. EISENBERG: These motions are actually quite  
4 simple. If you look at the law, the facts, the procedural  
5 posture and even practical considerations, there is no  
6 reason for you to grant them. They should be denied.

7 First, let's talk about the procedural  
8 difference. When you assert a counterclaim, which is part  
9 of Mr. Shiffman's argument, you seek to impose liability  
10 on the other side.

11 When you assert a defense, that's a totally  
12 different animal. What you are trying to do is anticipate  
13 what might be presented at trial and react to it in the  
14 middle of the trial as evidence gets presented, none has  
15 been, as defenses mature.

16 And there are multiple situations in which some  
17 of these things might come up. For example, we have  
18 already talked about laches. Well, there are two  
19 related-party transactions that the NYAG asserts that  
20 actually involve individuals who have since passed. And  
21 some of these transactions were actually disclosed on  
22 Forms 990. So I think we can certainly envision a  
23 situation where, if the government were to pursue the NRA  
24 with regard to transactions that were disclosed, and where  
25 the witnesses are no longer alive, a laches argument will

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1 certainly come into play.

2 In addition, Your Honor, we have to focus on  
3 the --

4 THE COURT: Well, I -- for that to be helpful  
5 you have to be more granular. That's certainly not the  
6 thrust that I got out of the estoppel or the laches  
7 arguments. So if you have something in particular you  
8 want to direct me to, that's fine.

9 MS. EISENBERG: Sure thing, Your Honor.

10 Well, I think that at this point we have been  
11 asking the NYAG to tell us what specifically will be at  
12 issue at trial. And we don't necessarily know what  
13 specifically they will present on. And as they -- even  
14 when they do, things might come up, like what I just  
15 described. And I don't think that the government -- the  
16 NRA has the burden of identifying now, being able to  
17 predict now what permutations of facts will be presented  
18 at trial and how these defenses might come into play.

19 THE COURT: Well, I am a little confused because  
20 we are done -- largely done with discovery, I think  
21 subject to a couple of tails. But I am not sure what else  
22 we are waiting for to be ready for trial, since that's  
23 where we are supposed to be right now.

24 MS. EISENBERG: Certainly, Your Honor. The NYAG  
25 identified 43 individuals and said there were

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1 related-party transactions either involving them or their  
2 relatives or organizations associated with these  
3 individuals, or organizations associated with their  
4 relatives. As a result, we actually don't have a clear  
5 picture of what specifically the NYAG is going after.

6 In any case, we might as well start with the  
7 unclean hands defense. The unclean --

8 THE COURT: Are you trying to get this on the  
9 screen?

10 MR. UMANSKY: Yes, it is not coming up.

11 THE COURT: Are you plugged in?

12 MR. UMANSKY: Yes.

13 MS. EISENBERG: That's okay. We can do it  
14 later.

15 THE COURT: It should be -- you are plugged in  
16 right now?

17 This typically works.

18 Sharon, do you want to call?

19 COURT CLERK: Is he plugged in?

20 THE COURT: What are you plugging into exactly?

21 MR. UMANSKY: I am plugged in here, input.

22 COURT CLERK: Did you hit laptop?

23 THE COURT: We are in laptop, yes.

24 COURT CLERK: Little box over the top all the  
25 way up?

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1 MS. EISENBERG: Would it be possible to give us  
2 control?

3 THE COURT: You can use the touchscreen whenever  
4 you want.

5 Which laptop is it? This one?

6 Everything I am doing up there you can do with  
7 your hands if you want.

8 Why don't we let her continue.

9 Call Sam to come down.

10 MS. EISENBERG: Thank you, Your Honor. I  
11 appreciate it.

12 THE COURT: I am not sure why it is not working.  
13 It usually does.

14 MS. EISENBERG: So Mr. Shiffman talked about  
15 mountains of paper. And in fact, he was helping me argue  
16 my side of this motion. The reason there is a mountain of  
17 paper is because Attorney General James has made so many  
18 different statements before, during and after the  
19 commencement of this litigation, including in connection  
20 with it, that it is incorrect for them to say that we  
21 presented no new evidence. We presented a ton of new  
22 evidence to Your Honor.

23 For example: On August 6, 2020, the NYAG files  
24 her lawsuit. What does she do? She starts fundraising  
25 the same day, she goes on MSNBC, and everywhere she tells

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1 everyone about how this is her lawsuit to dissolve the  
2 NRA.

3 Now, Your Honor is well familiar with the  
4 complaint. The complaint seeks multiple pieces of relief,  
5 more than a dozen. Yet, the NYAG is squarely and  
6 laser-focused on one thing and one thing only this is my  
7 lawsuit to dissolve the NRA.

8 And when she runs for governor in 2021, what  
9 does she do? She yet again touts her effort to eliminate  
10 the NRA. And that's a quote.

11 On August 6 when she commences the investigation  
12 she holds a press conference. She cannot identify a  
13 single dissolution case in which there is precedent for  
14 trying to do what she is trying to do here.

15 And she overstates the evidence. She says:  
16 Every single board member violated the law. There is no  
17 such allegation in the complaint. Every single individual  
18 defendant misappropriated funds and enriched themselves.  
19 There is no such allegation in the complaint against Mr.  
20 Frazer.

21 So, and then you know about the meeting with  
22 Everytown. And there are lots of other pieces of evidence  
23 that we have come forward with in our answer, as well as  
24 the papers in connection with this motion.

25 So, in your dismissal of the counterclaims you

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1 said, well, when she says I am going to go after the NRA  
2 because I disagree with the second amendment advocacy,  
3 that's evidence of animus. That's what you found. But  
4 then you went on to say, but it is irrelevant for current  
5 purposes because the NRA has not alleged sufficient nexus  
6 between the animus and the adverse action.

7 So, we heard you loud and clear, Your Honor. We  
8 have come forward with tons more evidence to clarify or to  
9 make it very clear, now that we had discovery and the  
10 record has developed, that the evidence of nexus is  
11 overwhelming.

12 And on top of that, we looked more closely at  
13 those -- what you refer to as stump speeches. And we  
14 found a few things that are quite powerful. And, in fact,  
15 we think egregious. For example, on July 12, 2018,  
16 Ms. James announces that she is going to run for Attorney  
17 General. She tweets about it. She issued a press  
18 release. And then she makes an appearance at which she  
19 discusses her campaign. And the tweet and the press  
20 release don't say it, but when she is addressing the  
21 public she says, well, I will have the constitutional  
22 power to investigate the NRA, because that's where they  
23 are incorporated. And I promise that we will investigate  
24 whether or not, quote, whether or not the NRA complies  
25 with the law. This was months before the New Yorker

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1 article that surfaced these allegations on which the Court  
2 relied in dismissing the counterclaims.

3 In addition, what she said was, we are going to  
4 go after the NRA. We are going to go after its banks. We  
5 are going to go after its investors. Again, so, the  
6 evidence of animus is express, direct, clear, irrefutable.  
7 In fact, if you look at their statement of facts, they do  
8 not deny any of that.

9 THE COURT: There is sort of a disconnect  
10 between the case that you are talking about and the case  
11 that's actually here right now. Right now the dissolution  
12 claims are not in the case. And what you are left with  
13 is, you know, a more, you know, I don't know what the  
14 right word is, straightforward, pedestrian, it is  
15 financial misfeasance, corporate malfeasance. Sort  
16 of -- I won't say run of the mill, but it is sort of  
17 normal kinds of things. It is not dissolution. And so it  
18 is a little unclear to me why all of that would be  
19 relevant to, you know, for example, if the defendants here  
20 were found to have, you know, walked out of the NRA with  
21 bags of cash every day at the end of the day and taking  
22 them home, which is not what is alleged, but just normal  
23 kind of corporate misbehavior, would it really be a  
24 defense to that to say that, well, the Attorney General  
25 candidate said lots of inflammatory things about

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1 dissolving the NRA. Therefore, I can't be sued for these  
2 financial -- for this financial misconduct. There is a  
3 disconnect there that I don't really understand.

4 Why -- what would be the rational for having the  
5 current claims be subject to a defense based on threats of  
6 dissolution which are no longer in the case?

7 MS. EISENBERG: Yes Your Honor. I think the  
8 answer differs a little bit, depending on the defense. So  
9 we can start with unclean hands, for example.

10 That ancient maxim says that the courts doors  
11 are closed to those who come to the court with unclean  
12 hands.

13 THE COURT: You recognize she is not the  
14 plaintiff, right? She is not. She is the current  
15 occupant of an office that represents the state.

16 MS. EISENBERG: But she does represent the  
17 state, Your Honor, and she did pledge to use the power  
18 that she was given as the Attorney General to go after the  
19 NRA.

20 So, I don't think that she can distance herself  
21 in that way by saying I represent the People, therefore  
22 everything I said and the express evidence of my  
23 retaliatory intent --

24 THE COURT: But the defense would be asserted  
25 against the state, the People, not Ms. James as a human

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1 being.

2 MS. EISENBERG: The defense is asserted against  
3 the plaintiff in this case, who has made very clear that  
4 they are using the power of the office to go after a  
5 political enemy. And so I think that as a court of equity  
6 and the equitable relief is what they are asking for as  
7 against the NRA, you certainly have discretion to look at  
8 the facts and the functional reality that it is Letitia  
9 James who pledged to destroy the NRA and is seeking --

10 THE COURT: That's not an issue in this case.  
11 Destroying the NRA is not part of this case.

12 MS. EISENBERG: Let me address that, Your Honor.  
13 One of the remedies she seeks is an injunction against  
14 solicitation. That's quite serious. You know how the NRA  
15 feels about the independent compliance monitor request.

16 She also seeks the removal of the executive vice  
17 president, an individual who has been elected every year  
18 by the 76 member board who in turn is elected by the  
19 members.

20 So all of those remedies, from our perspective,  
21 even though dissolution is appropriately off the table,  
22 are quite important. They are all in equity. And the law  
23 is quite clear that if you ask the Court for equitable  
24 relief, you better come with clean hands. And they don't.

25 THE COURT: Well, there are a fair amount of

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1 cases which the other side has put in front of me where  
2 the notion of applying that kind of common law unclean  
3 hands to an entire state of people because of whatever you  
4 might allege the Attorney General has or has not said or  
5 done, is not appropriate. You know, this is a, you know,  
6 at some level a law enforcement action. And the Attorney  
7 General can ask for relief, but it is up to the Court and  
8 a jury to actually provide it one way or the other. And  
9 saying that, essentially it is a defense to financial  
10 malfeasance, that the sitting Attorney General acted in a  
11 way that you would argue gives rise to unclean hands, it  
12 has a pretty substantial effect on the state to apply it  
13 that way. Which is presumably why the Courts have been  
14 reluctant to do so.

15 MS. EISENBERG: I would like to address that,  
16 Your Honor. In their moving brief they say there is  
17 Appellate authority in the First Department that says you  
18 cannot assert unclean hands against the government. And  
19 that's not true. We looked it up. The Appellate decision  
20 does not say that. And Mr. Shiffman admits in his brief  
21 that that was a mistake.

22 So he then says, that doesn't matter because we  
23 have Justice Kern who in the *Trump Entrepreneur Initiative*  
24 case said that it is unavailable or there are special  
25 requirements. So all you are left with, Your Honor, is a

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1 case from years ago by Justice Kern, Supreme Court of New  
2 York, where she issued a decision that spanned for dozens  
3 of pages, decided multiple issues, and one of them was,  
4 sort of, this cursory dismissal of a variety of defenses  
5 citing, you know, these SEC cases which are certainly not  
6 binding on you.

7 So, the bottom line is, there is no New York law  
8 that is binding upon you, Your Honor, that says that the  
9 defense somehow doesn't apply.

10 THE COURT: So we are talking about unclean  
11 hands. What is the unfairness, what is the lack of equity  
12 of, again, for now, assuming the truth of the allegations  
13 about financial malfeasance, what would be the equities  
14 of, essentially, letting defendants off the hook for  
15 those -- for that conduct because of speeches made by the  
16 Attorney General? Where is the equity in that? Why does  
17 that make sense even?

18 MS. EISENBERG: So I think we are relying on  
19 speeches not just because she made them, but because they  
20 evidence her intent and why she was doing what she was  
21 doing.

22 THE COURT: If the claims here were about the  
23 NRA's advocacy or something like that where there is a  
24 connection saying, well, you can't -- well, maybe there is  
25 some connection. But the actual claims that we are going

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1 to trial on are just financial misconduct claims. And I  
2 still don't understand how equity would say that, well,  
3 you can't go after that kind of financial misconduct  
4 because you had an animus about trying to get rid of and  
5 harm the organization. You know, there is a disconnect  
6 there to me.

7 MS. EISENBERG: To me there is no disconnect at  
8 all, because what the AG seeks is equitable remedies.  
9 They said that several times today. And the law is very  
10 clear that if that's what you seek, you have to show that  
11 you did not perform a willful act perfecting the action  
12 that transgresses equitable standards.

13 She admits that she made those, or does not  
14 dispute that she made those speeches willfully. She  
15 certainly spoke about investigating the NRA, going after  
16 the NRA, so it is certainly in connection with the action.

17 And when a government official is using the  
18 constitutionally vested power to go after a political  
19 enemy or to weaken a political opponent, that certainly,  
20 Your Honor, transgresses equitable standards. And  
21 therefore we are squarely within the unclean hands  
22 doctrine.

23 And to address something else you said. The law  
24 in New York is very clear, unclean hands applies even if  
25 the defendant's conduct was improper. In fact, there are

mlp

## Proceedings

1 cases that say, however improper the defendant's case, the  
2 Court's doors are shut to --

3 THE COURT: Do you have cases, though, applying  
4 that? Again, in a private dispute, I get that. But where  
5 the plaintiff represents the state of New York and all of  
6 its citizens, why would applying that to the detriment,  
7 arguably, of the state and its citizens make any sense?

8 MS. EISENBERG: Right. So I think the facts of  
9 this case are pretty rare where you have a government  
10 official declare her animus and then follow through. So  
11 we don't have a case like that in New York. But I do have  
12 two federal cases where the government made the same  
13 argument, that they are special and unclean hands doesn't  
14 apply against them, and Courts disagreed.

15 The first case is *EEOC v Exxon Corporation*. And  
16 that's at 1F. Supp. 2d, 635. That's from the Northern  
17 District of Texas from 1998.

18 And the second case is *United States Ex Rel.*  
19 *Zissler v Regents of the University of Minnesota*. And  
20 that's at 992 F. Supp. 1097. And that's from the District  
21 of Minnesota from 1998.

22 So, there are cases where Courts have squarely  
23 dismissed the argument that the legal argument the NYAG  
24 put forward, and even the cases on which they rely, if you  
25 read them closely, some of them comment on how there is

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## Proceedings

1 inconsistency in the reasoning. All of these SEC cases  
2 kind of just repeat the same concept that purportedly  
3 equitable defenses don't apply against the government.  
4 But, they all come from these Supreme Court cases, that if  
5 you read those they actually say the government is just  
6 like any other litigant. And it was the circumstances of  
7 those cases that simply warranted denial or preclusion of  
8 that defense in that case.

9 Your Honor, what we have here on the slide is  
10 to, kind of, demonstrate what is different between when  
11 you were considering counterclaims and today. And  
12 certainly the procedural posture, of course, is very  
13 different as well. That was a motion to dismiss  
14 counterclaims. And we are on the eve of trial and they  
15 are trying to preclude us from putting in evidence and  
16 being able to defend ourselves.

17 So, if you look at the gray, those are the  
18 pieces of evidence that were referenced in the  
19 counterclaims. Your Honor is well aware of Attorney  
20 General's pledge to use her constitutional power as the AG  
21 to investigate the NRA's legitimacy.

22 You are well familiar with her statement that  
23 the NRA are is an organ of deadly propaganda.

24 And that she stated that she would take the NRA  
25 on and take the NRA down, because the NRA is a criminal

mlp

## Proceedings

1 enterprise.

2 THE COURT: Can you just move the microphone a  
3 little further towards you? Thanks.

4 MS. EISENBERG: So those were the things that  
5 were the evidentiary pieces that were alleged in the  
6 counterclaims when you dismissed them. But, since then a  
7 lot has come forward still. So, for example, on  
8 August 10, 2020, just four days after she brings this  
9 action, she states: "The alleged rot at the NRA runs deep  
10 and is pervasive throughout the organization."

11 That is a clear overstatement of the allegations  
12 in the complaint. In fact, I believe the Court  
13 acknowledged as much in dismissing the dissolution claims;  
14 and focused very much on the fact that what she focuses on  
15 is mismanagement, alleged waste within a very narrow  
16 portion of the organization. And that there are no  
17 allegations whatsoever that the NRA performed its mission  
18 in a completely honorable way. And -- I am sorry, there  
19 is no allegations that we do that in any fraudulent or  
20 illegal way. And it is conceded that that's completely  
21 not something that they allege at all.

22 So, what are some of the other things that have  
23 happened? We have, on February -- in February 2019, an  
24 interesting meeting. For the record I'll describe it  
25 somewhat, but I know that Your Honor is familiar with

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## Proceedings

1 that.

2 So in summer of '18 she says: I pledge to go  
3 after the NRA because I disagree with their pro Second  
4 Amendment advocacy. And I will take them down.

5 Now, she gets elected, she comes into office,  
6 but the investigation actually doesn't start right away.  
7 Right? We know that the investigation starts only in  
8 April. So interestingly, just two months before the  
9 investigation and sometime after she gets in office, there  
10 is a meeting. And the meeting is between the head of the  
11 Charities Bureau, Mr. Sheehan, and someone from Letitia  
12 James' front office. So these are very senior people  
13 within the organization. And they are meeting with  
14 Everytown, multiple people, something like five to eight  
15 people showed up, including the head of their community  
16 safety initiative.

17 And as Your Honor knows, Everytown Gun Safety --  
18 for Gun Safety, is an organization that disagrees with the  
19 substance of the NRA's political speech, just like Letitia  
20 James does. And what we know is that that meeting is  
21 about one topic and one topic only, and that is the NRA.  
22 And I think we can all infer that they weren't talking  
23 about Everytown wanted to ensure that NRA donors' money  
24 was being spent properly.

25 Everytown is proclaiming on its website that the

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## Proceedings

1 reason it exists is to be the counterweight to the NRA.  
2 And what they do is try to come up with legal ways in  
3 which their political opponent can be destroyed or  
4 weakened. And so this meeting is quite significant for  
5 that reason.

6 Your Honor, in your opinion dismissing the  
7 counterclaims, again, you said I need more of a quantum of  
8 evidence to show that there is a connection between what  
9 she said back in '18 and what she is doing. And all of  
10 these things individually, but obviously even more  
11 powerfully together, really show that.

12 I would like to switch topics a little bit and  
13 explain why I think this action is a bit of a non issue.  
14 What the -- by "this" I mean this motion. What the NYAG  
15 is clearly trying to do is, they definitely don't want us  
16 to present at trial before you and/or the jury, evidence  
17 of these statements of animus and the connection between  
18 the animus and what Letitia James did. We understand that  
19 that's what they are trying to achieve.

20 But frankly, all of the evidence that we would  
21 be presenting in order to prove up our constitutional  
22 defenses and the unclean hands defense, all of that  
23 evidence would come in to the case in any case. It would  
24 come in to evidence because there are multiple things that  
25 the NYAG alleges that would require this evidence to be

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## Proceedings

1 presented to the jury. For example, the NYAG says, well,  
2 the NRA filed for bankruptcy and that shows that Wayne  
3 LaPierre was acting out of his selfish motives to escape  
4 the regulator who went after them. And that the board had  
5 no knowledge and no power to prevent it. And that was  
6 such a bad decision, shows disfunction, and so on and so  
7 forth. And that's certainly a part of why they are saying  
8 that allegedly we don't know how to properly manage  
9 assets.

10 Well, I think it would be really interesting to  
11 a juror to see the context and the backdrop to the NRA's  
12 decision to file for Chapter 11 protection in Texas in  
13 order to try to avoid the regulatory regime of a toxic  
14 regulator whose proclaimed objective is to destroy a  
15 political opponent. And all of these pieces of evidence  
16 give real texture and real context to the NRA's state of  
17 mind.

18 THE COURT: Look, even if I take for the moment  
19 your -- that point, that in batting back that particular  
20 allegation that this -- any of this stuff could be used as  
21 providing context for the bankruptcy, the question is  
22 whether it constitutes a defense to the claims. I still  
23 fail to see how it does.

24 MS. EISENBERG: What I am saying is that I think  
25 the NYAG's intent is to get you to dismiss these defenses,

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## Proceedings

1 which is completely not necessary at this point, and then  
2 at trial say, ah-ha, those defenses were dismissed  
3 therefore the NRA cannot present evidence of what Letitia  
4 James said in July of 2018. Or her predecessor's call to  
5 a board member of the NRA where he warned that, powerful  
6 people in New York government were conspiring or were  
7 talking about what they could do to destroy or weaken a  
8 political opponent. Those are things that are critically  
9 important to understand why the NRA filed for bankruptcy.  
10 And so --

11 THE COURT: Are there any claims in this case  
12 about the bankruptcy or is it just allegations that are  
13 allegations in the background part of the complaint.

14 MS. EISENBERG: Yes. Well, I mean, they are not  
15 part of their claims 13 through 15. But they are  
16 certainly part of their first claim, unless they want to  
17 withdraw it right now. There are pages that talk about  
18 bankruptcy both in the complaint and in their expert  
19 reports; and then their first claim, which is under the  
20 EPTL, alleges that the NRA, allegedly, is failing to  
21 properly administer assets it holds and administers for  
22 charitable purposes. And so they showcase the bankruptcy  
23 filing as purportedly the salient piece of evidence that  
24 demonstrates that. And we cannot wait to tell the jury  
25 why we filed Chapter 11. We want to have that fight. But

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## Proceedings

1 we cannot be fighting that fight with our hands tied  
2 behind our back. We have to offer and present to the jury  
3 the contextual information, what was being said and what  
4 the NRA was realizing about what it was facing.

5 There are multiple other ways in which this  
6 evidence will come in, and I am happy to go through them  
7 now if Your Honor --

8 THE COURT: I am focused on whether it is right  
9 now a proper affirmative defense.

10 MS. EISENBERG: Right. Yes.

11 THE COURT: The evidentiary question I am not  
12 expressing any opinion on right now.

13 MS. EISENBERG: Right.

14 So, no question that all of the defenses are  
15 proper. The special requirements that they want to apply  
16 to the government do not apply. They don't cite any New  
17 York Law that says that. And New York Law is very clear,  
18 if you seek equitable relief, you better come to court  
19 with clean hands.

20 There are ways in which these defenses can be  
21 bucketed. And they talk about how there are these bias  
22 defenses and equitable defenses. But I think that the  
23 best way to think of them is really constitutional  
24 defenses, and defenses that go to the issue of the power  
25 of the Court.

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## Proceedings

1 For example, unclean hands, it goes to the power  
2 of the Court. Because the law says that the court's doors  
3 are closed to those who come to court with unclean hands.

4 The extra-territoriality issue as well goes to  
5 the power of the Court. The fact that they failed to  
6 allege or show that the assets over which they seek  
7 remedies are held and administered for charitable purposes  
8 or held and administered for charitable purposes in New  
9 York.

10 All of that is statutorily driven. And the  
11 statute is very clear that what you have to focus on is  
12 assets that are held and administered for charitable  
13 purposes, and the statute does not say that it applies in  
14 an extra-territorial way. And the law is very clear that  
15 if the legislature wants the statute to apply in that  
16 fashion, it must say so expressly. And the Court is  
17 simply without power to interpret the statute otherwise.

18 But all of it is really not an issue that the  
19 Court needs to decide today. Because when we are at trial  
20 and evidence is presented, and if Your Honor determines  
21 that there is not enough evidence to support a particular  
22 defense, Your Honor can simply opt not to instruct the  
23 jury on that.

24 And for all of those reasons, we believe that  
25 the Court should just deny the motion in its entirety.

mlp

## Proceedings

1 THE COURT: Okay. Thank you.

2 Do the other defendants want to? Mr. Correll?

3 MR. CORRELL: Your Honor, let me start by giving  
4 you a citation to a case that responds to a point Mr.  
5 Shiffman made. The case is *State of New York v United*  
6 *Parcel Service* 160 F. Supp. 3d, 629. That is Southern  
7 District of New York, 2016.

8 I'll flip to page 648.

9 MR. SHIFFMAN: Do you have a copy?

10 MR. CORRELL: I do not have a copy for you.

11 I'll just read briefly, I'll set the stage by  
12 saying, the Court was dealing with a statute under which  
13 the state of New York had exclusive enforcement authority  
14 and it was dealing with another statute under which the  
15 state of New York did not have exclusive enforcement  
16 authority.

17 THE COURT: Is this case in the brief by the  
18 way?

19 MR. CORRELL: It is not. But it is in response  
20 to the point that Mr. Shiffman raised in his argument.

21 THE COURT: Okay. Go ahead.

22 MR. CORRELL: He says -- he said in his  
23 argument, that, and I think Your Honor seemed to indicate  
24 and you tended to agree, that this is an enforcement  
25 action, a government enforcement action. In this case the

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## Proceedings

1 Court draws a distinction between government enforcement  
2 actions that are brought pursuant to statutes that give  
3 the government exclusive enforcement authority, and  
4 enforcement or actions where Congress or a legislature has  
5 granted authority to private actors to bring actions under  
6 the statute. Clear distinction. And I'll just read what  
7 they say:

8 The Court broke the claims into two groups,  
9 Group one, Group two. Group one, exclusive enforcement  
10 authority; Group two not exclusive enforcement authority.

11 Said: As to plaintiff's RICO and AOD claims,  
12 claims under those statutes, the Court is not convinced  
13 that at this stage the same reason applies.

14 He was referring to other statutes under which  
15 it was exclusive enforcement authority. That would be  
16 like the SEC cases.

17 The RICO and AOD claims must be distinguished  
18 because as to these claims, plaintiffs are acting in a  
19 role that is more akin to that of a private actor, rather  
20 than in the role of a public enforcer of the public  
21 interest.

22 Now, the parens patriae doctrine is the official  
23 authority of the Attorney General to act as overseer of  
24 public corporations. There are very strict requirements  
25 you have to meet to invoke that authority. You have to

mlp

## Proceedings

1 show that there is an injury to a sovereign or  
2 quasi-sovereign interest. You have to show that it is --  
3 at issue is not just rights as between private parties.  
4 And you have to show that the interest affects a  
5 substantial portion of the citizenry of your state. High  
6 burden, high bar. They don't allege *parens patriae*  
7 authority here. In the *Grasso* case they did. And the  
8 First Department --

9 THE COURT: Because there are four or 500  
10 references to a specific statutory authority to bring this  
11 case. Right?

12 MR. CORRELL: Correct. So let me go to the  
13 statutory authority that they are invoking against my  
14 client, section 720 of the N-PCL says: An action may be  
15 brought for the relief provided in this section or -- or  
16 and, paragraph A of section 719, which deals with  
17 liabilities of directors in certain cases by the Attorney  
18 General, by the corporation, or on behalf of the  
19 corporation by a director, an officer of the corporation;  
20 also by a trustee, a receiver, creditor and members of the  
21 corporation.

22 So this is akin to the Clayton Act or the RICO  
23 where there is a private right of action where the state  
24 or Attorney General can step in and enforce it. But it is  
25 also available to private actors.

mlp



## Proceedings

1           When you are in this world, you play by the same  
2 rules. The equitable defenses apply to you as the  
3 Attorney General in the same way they apply to any other  
4 person who is authorized to bring that action.

5           And if you -- if you.

6           THE COURT: Isn't the Attorney General given  
7 that role because there are circumstances where all of  
8 those other people you listed are part of the problem?

9           MR. CORRELL: If -- well, I don't know that I  
10 quite understand that, Your Honor, because my focus is  
11 really on what the legislature has written. Which is they  
12 have created a private right of action and given it to a  
13 number of different -- a variety of people or persons.  
14 One of whom is the Attorney General, and the others are  
15 all related to the corporation.

16           The Attorney General purports she's trying to  
17 protect the interest of the corporation here, to protect  
18 the interest of the members. Which is odd given all of  
19 the things that the Attorney General has said about what  
20 she wants to do to these people.

21           So there is a disconnect there between what she  
22 is saying and what she is doing. In any event, the  
23 statute is clear, it is not exclusive enforcement  
24 authority for the Attorney General. That's where you draw  
25 the line. If you look at the case that was just decided

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## Proceedings

1 by the DC Circuit, it touches on that point. And this  
2 case really drills down on it and makes that distinction  
3 clear.

4 As -- if you look at 720, and remember, this is  
5 Wayne LaPierre and individual is being sued and a  
6 provision that says actions against directors, officers  
7 and key persons. It is different from an action against a  
8 corporation. It is not monolithic. Wayne LaPierre and  
9 the NRA are not one and the same. The analysis for  
10 Mr. LaPierre has to be separate, it has to be under that  
11 statute.

12 In terms of whether there is -- the statute  
13 doesn't say the state may bring -- an action may be  
14 brought by the state. It does not say an action may be  
15 brought by the People of the State of New York. It does  
16 not import *parens patriae* power. And the vague sometimes,  
17 some people would say, unlimited, you know, active nature  
18 of that power to deal with things like pollution in the  
19 rivers or lead coming in, you know, from New Jersey, from  
20 you know, from smelting plants in the air, things like  
21 that. Those are big items that affect a majority of the  
22 people of the state. That is not this case. It is not  
23 *parens patriae*. It is not the state. It is an Attorney  
24 General acting in a manner that is akin to that of a  
25 private actor.

mlp

## Proceedings

1 Courts have actually characterized actions like  
2 this as private actions. And if you -- if you look at the  
3 AG's briefs you will see that they use the term  
4 "enforcement action" over and over and over and over  
5 again. And when I saw that I thought, there must be --  
6 this is like a talisman. There must be -- they must think  
7 there is some magic to that phrase. That's a label that  
8 they placed on this action, particularly against  
9 Mr. LaPierre. And the correct label is private action.  
10 The correct label is private actor here.

11 And if you -- or just forget about the labels  
12 and go to the statute and ask yourself, does the AG have  
13 exclusive enforcement authority under 720. And the answer  
14 is, no. That subjects them to all of the equitable  
15 defenses that Mr. LaPierre is asserting. And they are  
16 only challenging three of his affirmative defenses. It  
17 started with a broader challenge, it is down to three.

18 I urge --

19 THE COURT: Isn't the point that with -- at  
20 least with not-for-profit organizations, there are some  
21 disputes within any entity that can be purely economic.  
22 But with a not-for-profit there are certain public  
23 interests in terms of how they are run that a governmental  
24 body has been charged with overseeing.

25 MR. CORRELL: The legislature has defined the

mlp

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1 public interest for not-for-profit corporations in the  
2 Not-for-Profit Corporation Law. It is comprehensive and  
3 enormous. It spans I don't know how many pages, how many  
4 sections.

5 THE COURT: And they give the Attorney General  
6 substantial rights to enforce it.

7 MR. CORRELL: Correct. And I'll -- I am glad  
8 you raise that. In 112 they actually say in two different  
9 places, the Attorney General may maintain an action or  
10 special proceeding in Section 7 to enforce any right given  
11 under this chapter to members, a director or an officer of  
12 a charitable corporation. Next sentence: The Attorney  
13 General shall have the same status as such members,  
14 director or officer. It contemplates stepping into the  
15 shoes. And if you step into the shoes of someone who is  
16 subject to equitable defenses, you are subject to the  
17 equitable defenses.

18 And that's not the only time it says it. It  
19 says it again in 9. It says: For such purpose the  
20 Attorney General shall have the same such status, same  
21 status as such members, director or officer.

22 That's where it says: Upon application Ex Parte  
23 for an order to the Supreme Court at a special term held  
24 within the judicial district, where the office of the  
25 corporation is located, and if the Court so orders, to

mlp

## Proceedings

1 enforce any right given under this chapter to members, a  
2 director or an officer of a non-charitable.

3 THE COURT: Why don't we move to the specific  
4 application of these defenses that you say should not be  
5 dismissed? I understand the principle you are getting at,  
6 that some equitable defenses should not be categorically  
7 inapplicable. But why don't you -- let's bring it down to  
8 this case.

9 MR. CORRELL: Okay. So, the first thing,  
10 laches, I won't re-cover the points in the brief. But the  
11 fact is that the NRA has been filing chart 500s with the  
12 AG, attorney's bureau for years. It is a form that they  
13 fill out, a form that has been prepared by the AG, which  
14 presumably asks all of the questions that they want  
15 answers to. They have to attach a 990, which is prepared  
16 by the federal government, which asks all of the questions  
17 the federal government wants to ask. And people at the  
18 NRA, not Wayne LaPierre, other people, dutifully pull  
19 together the information and read the instructions and  
20 filled out the forms, checked the boxes. And the  
21 Charities Bureau was on notice of what compensation was  
22 being paid and that the NRA was providing first class or  
23 charter travel to certain executives.

24 THE COURT: But their point is that they are  
25 not -- that that does not give, they say, any indication

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## Proceedings

1 of matching what the allegations are here. They are  
2 not -- they are not going after his salary, per se, as  
3 being a violation of the law. And they are not even  
4 necessarily going after, you know, some use of charter  
5 travel. But none of those forms, on their face, get into  
6 the specific violations that they are alleging here.

7 MR. CORRELL: In their complaint they did go  
8 after compensation. They alleged in paragraph 450 that  
9 Mr. LaPierre was paid over \$5 million in 2015, implying  
10 there was work in 2015. Letitia James in a press  
11 statement the same day characterized that as grossly  
12 excessive compensation in order to get the headline and  
13 the media byte that she wanted.

14 They backed away from that now because we put on  
15 three experts. We brought out three experts on  
16 compensation, who all testified that it was reasonable.  
17 All of it was reasonable. Apparently they couldn't find  
18 an expert to testify that it was unreasonable. So they  
19 backed away from that core allegation that they rested  
20 this complaint on when they filed it.

21 THE COURT: Was there ever a claim that he and  
22 the NRA broke or violated any provision of the N-PL just  
23 by the compensation of Mr. LaPierre.

24 MR. CORRELL: Yes. My reading of the complaint  
25 was that they were alleging that Wayne LaPierre acted

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1 unlawfully by accepting compensation provided by the NRA  
2 that was excessive.

3 THE COURT: Just the salary?

4 MR. CORRELL: Pardon?

5 THE COURT: The salary itself?

6 MR. CORRELL: Salary and bonuses.

7 THE COURT: Okay. The complaint is too long for  
8 me to fully absorb it in one sitting, but I don't recall  
9 that.

10 MR. CORRELL: It is in there --

11 THE COURT: I recall the allegations as part of  
12 the background. But not that they said that it was an  
13 independent violation of the statute to pay him whatever  
14 it is the board agreed to pay him.

15 MR. CORRELL: They characterized it as a breach  
16 of fiduciary duty on his part to accept the compensation  
17 that was offered, even though it was determined by an  
18 officers' compensation committee and approved by a board.  
19 And our experts have testified that it was below the  
20 50 percent mark in terms of comparable executives.

21 Having faced that evidence without an expert of  
22 their own, they have backed off of that and they are now  
23 saying, no, we are not challenging that anymore. But,  
24 Mr. LaPierre had to go out and hire an expert to read the  
25 complaint, examine this, look at the pension plans, look

mlp

## Proceedings

1 at everything, and express his opinion.

2 So that's an example of a claim they did make,  
3 and now they are backing away from. They are still  
4 challenging charter travel. But it is unclear whether  
5 they are still challenging all charter travel.

6 But the simple fact is, they knew what his  
7 compensation was and they knew that charter travel was  
8 being provided, and they waited more than ten years to  
9 make an issue of it. And the fact is Attorney General  
10 Spitzer didn't make an issue of it. Attorney General  
11 Cuomo didn't make an issue of it. Attorney General  
12 Underwood didn't make an issue of it. Attorney General  
13 Schneiderman didn't make an issue of it. The only person  
14 who made an issue of it was Letitia James, and that's  
15 because she was looking for something to make an issue of,  
16 and something to grab the attention of the media. An  
17 employee of a non-profit organization being paid more than  
18 \$5 million in one year? That's eye popping. And she put  
19 it out there and it got picked up.

20 So, the point is that there are equitable  
21 defenses available here to Mr. LaPierre. I can't speak  
22 for other defendants, but for Mr. LaPierre, because they  
23 are proceeding against him primarily under Section 720 of  
24 the N-PCL, which is a statute that provides non-exclusive  
25 authority for the Attorney General to bring an action. To

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## Proceedings

1 assert causes of action, four of them in 720, and to seek  
2 relief that is provided, three types of relief, each tied  
3 to a cause of action in that section.

4 I don't see how under these circumstances with  
5 this statute, the Attorney General can argue that Your  
6 Honor should follow the reasoning of the Courts that have  
7 distinguished between exclusive enforcement and  
8 non-exclusive enforcement in deciding whether to strip a  
9 defendant of his or her equitable defenses.

10 THE COURT: Thank you.

11 MR. FLEMING: William Fleming for defendant John  
12 Frazer.

13 I'll rest my papers, except I want to make one  
14 observation. And that is simply, with respect to -- there  
15 are two affirmative defenses that are at issue with  
16 Mr. Frazer, one is unclean hands; and the other is the  
17 third one, which is estoppel laches waiver. Estoppel and  
18 laches may no longer be at issue for Mr. Frazer because it  
19 related to his alleged excessive and unreasonable  
20 compensation, which seems to have been removed from the  
21 case recently by the Attorney General, although it is hard  
22 to say sometimes because it is always -- not always very  
23 clear.

24 But with respect to unclean hands, I would make  
25 one point. And that is, Mr. Shiffman talked about the

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## Proceedings

1 Attorney General acting in the public interest. And as  
2 you know, Your Honor, we have made multiple efforts to  
3 point out that the Attorney General has acted in a way  
4 beyond her statutory authority. She has alleged  
5 extra-statutory punishments, seeking remedies that are not  
6 permitted under the statute.

7 And my contention has always been that this  
8 presents a constitutional separation of powers at issue.  
9 Which prejudices Mr. Frazer because, quite frankly, he has  
10 had to now be the subject of, you know, blog reporting  
11 almost daily about how management at the NRA is so corrupt  
12 and all of this. It relates in part to the Attorney  
13 General's press release that Mr. Frazer used the NRA as  
14 his personal piggy bank, when now there are no allegations  
15 whatsoever that he received anything from the NRA other  
16 than his compensation.

17 And so, with respect to the Attorney General  
18 acting in a way beyond her statutory authority, I would  
19 contend it is not in the public's interest, but in fact  
20 flouts the public interest, as that interest is defined by  
21 the legislature.

22 Thank you.

23 THE COURT: Now with respect to Mr. Phillips. I  
24 just, so I am clear, I -- my tote board says that he --  
25 the motion was withdrawn by the Attorney General with

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1 respect to his second, third and fifth defenses. And his  
2 defense was withdrawn with respect to his eighth,  
3 ninth and 29<sup>th</sup> defenses. So there is really nothing to  
4 be decided on with respect to Mr. Phillips. Is that  
5 correct?

6 MR. SHIFFMAN: That's my understanding, Your  
7 Honor.

8 MR. FARBER: Yes. And it is mine as well, Your  
9 Honor.

10 I'll go back to the batting cage.

11 MR. SHIFFMAN: Thank you.

12 Your Honor, I'll just try to be brief and just  
13 address a few discrete issues that were raised by the  
14 various defendants here.

15 I guess the initial one is that providing  
16 additional evidence to the extent any of the things on the  
17 slide that Ms. Eisenberg presented is sufficient, I think  
18 a lot of that was already presented to Your Honor on the  
19 counterclaim motion. But more evidence of animus does not  
20 address the problem, even if it is anything new. What the  
21 problem that the NRA had with the defenses' retaliation,  
22 was that they didn't show a nexus between that animus and  
23 the action. And that's because of the requirement of  
24 showing but-for causation here. And as Your Honor held  
25 and as we set forth in our papers, the claims in the

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1 complaint clearly provide a non-retaliatory basis for the  
2 action here.

3 You know, in that regard also, I think the key  
4 issue here is whether or not the remedies are appropriate  
5 in this case or not. And whether the remedies that we are  
6 seeking are appropriate or not, have nothing to do with  
7 any statements of the Attorney General. It relates to the  
8 conduct of the defendants here, and whether or not we can  
9 prove what we allege in the complaint. Things such as,  
10 you know, the injunction versus solicitation and removal.  
11 That again, those will be determined on whether or not we  
12 can meet the standards for those -- for those claims. And  
13 those are claims that, you know, we believe are set forth  
14 in the statute.

15 I would like to address also the comment that  
16 the NRA's counsel made concerning the *Trump Entrepreneur*  
17 case and binding authority in the state concerning unclean  
18 hands and what is necessary to show that.

19 We cited to the *Trump Entrepreneur* case which  
20 does go through and lays out that standard that we talked  
21 about. But that's not the only case in New York that  
22 deals with this issue. It is the most specific one. It  
23 is the one that deals with unclean hands in a case brought  
24 by the government. But there are many other cases that we  
25 cite in our brief where there is the general principle of

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1 equitable doctrines not being permitted against the  
2 government when it sues in its regulatory capacity to  
3 enforce a legislative mandate. And I'll get back to that  
4 in a little more detail later.

5 But so it is -- and that case, as well as the  
6 *SEC v Cuban* case that we cite, those cases are not unique.  
7 They are, in fact, actually in whatever disagreement that  
8 the NRA was referring to in the case law and  
9 inconsistencies in the case law, that language, which  
10 comes from the *SEC v Cuban* case, that language was focused  
11 on the criticism of the cases that held that an unclean  
12 hands defense is never available in government. So the  
13 Court in the *SEC v Cuban* case went through and analyzed  
14 those cases and said they are a little inconsistent, they  
15 don't really stand for that proposition. But what the  
16 cases do make clear, is that unclean hands -- the unclean  
17 hands defense is only available in very limited  
18 circumstances against the government.

19 So the cases that were criticized in the *SEC v*  
20 *Cuban* case, which is the case that the NRA cites for its  
21 proposition, are not ones we rely on. They are actually  
22 ones that just hold that it is never available. They  
23 don't criticize the ones that say it is only available in  
24 very limited circumstances.

25 I would also note that with respect to the

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1 filing of the bankruptcy, it is not appropriate for the  
2 NRA, if it believes that the case -- that there is animus  
3 against it, to run to another Court. In the Bankruptcy  
4 proceeding the Judge found that it did not do so in good  
5 faith. It can't use that again here to avoid the  
6 jurisdiction of this Court.

7 There are a few other points I would like to --

8 Mr. Correll, on behalf of Mr. LaPierre, made  
9 some arguments, one is with this UPS case, which I have  
10 not read recently. Actually it is a case that I have read  
11 in the past. It wasn't cited in his papers, so I wasn't  
12 quite familiar. But my colleagues were telling me that it  
13 does not necessarily stand for everything that he said.

14 THE COURT: Well, that's good enough for me.

15 MR. SHIFFMAN: I don't expect you to take that,  
16 but I'll distinguish some of the things that he mentioned.

17 One is in section 720. 720, unlike the statute  
18 I was talking about earlier under the Clayton Act, it  
19 specifically gives authority to the Attorney General to  
20 bring the claims. And as Your Honor correctly pointed  
21 out, it does so because there are many situations where  
22 the actors at the organization, kind of have conflicts and  
23 will not do so.

24 There is also a couple of other things that are  
25 important there. And so because of that, it is a

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1 legislative mandate to the Attorney General to enforce  
2 that loss. It is different than the Clayton Act where  
3 there was no naming of the states to bring the action.

4 But 720 is not the only relevant section. And  
5 it is not the only -- the N-PCL is not the only relevant  
6 statute. The EPTL is a statute that gives the authority  
7 to enforce it to the Attorney General. And that authority  
8 to enforce the charities loss to ensure that charities are  
9 properly administered, is one that lies solely with the  
10 Attorney General under the EPTL.

11 The Executive Law, again, is one that is -- that  
12 gives authority to the Attorney General and only the  
13 Attorney General to enforce.

14 715 of the N-PCL, the section there gives the  
15 Attorney General certain powers.

16 There is all -- there are, as Mr. Correll  
17 correctly pointed out, there are provisions in Section 112  
18 that says the Attorney General can stand in the shoes in  
19 certain instances of members or directors. But it does  
20 not always do so when it brings an action. It has its own  
21 authority to do so. So one example of that is between --  
22 in the dissolution proceedings, which are not here, just  
23 using it -- at issue here, I am using it to give an  
24 example of the distinction. Under 1101 the Attorney  
25 General can bring an action for dissolution for various

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1 reasons. 1102 doesn't mention the Attorney General, but  
2 gives additional reasons under which the Attorney -- the  
3 board or members can bring a dissolution proceeding.

4 The Attorney General can bring a dissolution  
5 proceeding under 1101 or 1102. And it is only when they  
6 do so under 1102, where there is no mention of the  
7 Attorney General, that they are stepping into the shoes of  
8 the members or directors, and using that authority that's  
9 referred to in Section 112. Not when they are bringing an  
10 action under 715 where it says the Attorney General may  
11 bring an action.

12 But putting all of that aside, the true essence  
13 of the claims here is one that is in the public interest.  
14 It is to enforce a legislative mandate given to the  
15 Attorney General to ensure that charitable interests are  
16 preserved; that charitable assets are administered  
17 properly. And that is a government purpose. It is one  
18 that was given to the Attorney General by the legislature  
19 and one that triggers the requirement that equitable  
20 defenses shall not be applied against the Attorney General  
21 except in very limited circumstances.

22 THE COURT: Okay.

23 MR. SHIFFMAN: Thank you very much, Your Honor.

24 MR. CORRELL: Your Honor, if I may briefly  
25 respond to one point? I'll be very brief.

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1           Your Honor, Mr. LaPierre's position is EPTL does  
 2           not apply to him, because he is not a trustee. And his  
 3           position is also that the EPTL does not create a right of  
 4           action for failure to properly administer corporate  
 5           assets. The provision of the EPTL that I think the AG has  
 6           been referring to is paragraph M. It says: The Attorney  
 7           General may institute appropriate proceedings to secure  
 8           compliance with this section. This is a registration  
 9           reporting section. And, to secure the proper  
 10          administration of any trust, corporation or other  
 11          relationship to which this section applies.

12           It doesn't apply to him. He is not a  
 13          corporation. He is not a trustee. And for the AG to try  
 14          to take this provision or this section of the EPTL and  
 15          supplant the N-PCL and wipe out section 720, which  
 16          specifically and expressly governs actions against  
 17          directors, officers and key persons of not-for-profit  
 18          corporations, runs contrary to the rules of statutory  
 19          construction.

20           To the extent that these two statutes are  
 21          compared, they have to be read and harmonized. The main  
 22          statute, the primary statute, is the N-PCL, particularly  
 23          when you are dealing with a director, officer or a key  
 24          person in an action against a director, officer or key  
 25          person. It is very specific, very clear.

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## Proceedings

1 And the --

2 THE COURT: We are not here discussing a motion  
3 to dismiss the EPTL claims.

4 MR. CORRELL: Right. But my point is, it is  
5 just a response to the argument that they have -- that  
6 even if they don't have -- even if they are not subject to  
7 equitable defenses under 720, they have a valid claim  
8 against him under EPTL which allows them to strip him of  
9 his equitable defenses. That's inconsistent. That's not  
10 harmonious construction of two statutes. You can't have  
11 equitable defenses under one, not under the other.

12 MS. EISENBERG: Your Honor, may I briefly  
13 address the Court?

14 THE COURT: Sure.

15 MS. EISENBERG: Thank you, Your Honor.

16 Just to make it very clear, that the NYAG says  
17 that she is going after the NRA because she wants to  
18 protect the public. We believe she is going after the NRA  
19 because she wants to retaliate against a political enemy.  
20 We believe that the jury or the fact finder should decide  
21 who is right.

22 When Your Honor dismissed the counterclaims you  
23 were looking at the allegations. Now we are on the eve of  
24 trial and the NYAG will actually have to attempt to prove  
25 her allegations. We believe that she'll come short, and

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1 will not be able to prove anything but de minimus  
2 violations of the law, that certainly do not warrant the  
3 harsh relief she seeks against the NRA. At that point we  
4 believe the evidence will show the true reason why the  
5 NYAG is going after the NRA.

6 THE COURT: Okay. Thank you.

7 We have a few minutes before the lunch break.  
8 As I said, I wanted to take a little time during lunch  
9 break to just think about these motions. And so I am  
10 going to ask you to come back at, did I say 2:30 or 2:15?

11 I guess I didn't say.

12 I'll call it 2:15. Let's call it 2:30. Let's  
13 call it 2:15.

14 But while we have a couple more minutes, I did  
15 ask you to prepare today to talk about the trial and I --  
16 none of these motions would obviate the need for a trial.  
17 So I think we should be focused on scheduling it. As I  
18 mentioned, my focus has been on, sort of, the fall of this  
19 year. And so one question, I suppose, is the length of  
20 time that the parties have discussed, if you have  
21 discussed, that this trial would take. I recognize there  
22 are some motions in limine that I haven't decided yet.  
23 But assuming -- well, whatever you want to assume about  
24 those. Assume that most of the evidence, if not all of it  
25 that people are proposing comes in, have the parties

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1 talked about the likely length of trial?

2 MS. CONNELL: Monica Connell for the plaintiff.

3 The parties met and discussed this yesterday.

4 We also discussed the possibility of bifurcation, which is

5 something that the plaintiff has raised and actually the

6 Court, I think, sort of discussed at the

7 April 20<sup>th</sup> argument in this matter.

8 Plaintiff would propose, just to throw it out

9 there, bifurcation between the liability and the remedy

10 phase, as it is our position that the law is clear that

11 the Court determines, and only the Court can impose under

12 New York Law, equitable remedies. And that pretty much

13 all of the remedies that we seek are equitable.

14 We didn't receive a resounding rejection of that

15 principle, so that was progress. We -- the parties are

16 going to have further discussions about bifurcation. But

17 we did discuss the potential length of trial and the next

18 steps towards getting there. Obviously the Court would

19 determine bifurcation, we understand that. But if we

20 could potentially get some agreement, maybe that would be

21 helpful.

22 In terms of the liability phase for the

23 plaintiff's presentation of the case on direct, we

24 anticipate about 35 witnesses, give or take. I think

25 about seven of them may be unavailable, and we have their

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1 deposition videos and we can tailor those and get them a  
2 little shorter. But we think it could take as much as  
3 three and a half to four weeks.

4 For remedy phase, we think it would be much  
5 shorter, at most two weeks.

6 THE COURT: And that's just your presentation or  
7 are you baking in cross examination?

8 MS. CONNELL: I am baking in reasonable cross  
9 examination, and maybe even the idea that almost all of  
10 the witnesses we are going to call or the witnesses we are  
11 going to call for fact issues, not expert witnesses, would  
12 probably be a large overlap with the defendants' witness  
13 list. And that the defendants might agree, as we did at  
14 the bankruptcy, to question their witnesses that they  
15 would use on direct at the same time that we do our  
16 witnesses on direct. Sometimes that saves some time. So  
17 that's a possibility.

18 Again, I didn't hear a resounding no, I heard a,  
19 we will think about it. So that's progress.

20 I am not going to represent what each party  
21 said, unless the Court would like me to, as to how much  
22 time they would need for their cases.

23 THE COURT: So just -- so your point is, at  
24 least as your estimate goes, this three to four weeks  
25 includes not only cross examination, but it includes the

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1 direct examination that the defendants would provide of  
2 their own people?

3 MS. CONNELL: Potentially, Your Honor. Again, I  
4 am assuming reasonableness. I am assuming that we can get  
5 some reasonable stipulations of fact and resolve the  
6 admissibility of some documents that I don't think should  
7 be controversial. Yes, I am a little hesitant because of  
8 the length of time the NRA indicated it would need for its  
9 defense. If it does need that full amount of time, it  
10 would clearly not be sufficient. It would not include  
11 that.

12 THE COURT: Okay. Do the defendants want to.

13 MS. ROGERS: Yes.

14 MS. CONNELL: I am sorry, Your Honor. One other  
15 issue if I can speak to very quickly?

16 Just to clarify, I think there is something we  
17 need to clarify in the case. It is our position that the  
18 jury determines issues of fact under the N-PCL claims.  
19 But the EPTL and Executive Law claims and the equitable  
20 relief are determined by the Court.

21 THE COURT: How exactly is that all going to  
22 work?

23 MS. CONNELL: I think the same facts go in for  
24 the N-PCL and EPTL remedies, largely it has to do with the  
25 violation of fiduciaries duties and waste, that kind of

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1 thing. But ultimately whether there is liability under  
2 the EPTL and whether there is liability under the N-PCL,  
3 the Court ultimately determines that, the EPTL; and the  
4 jury determines the N-PCL.

5 THE COURT: And that's because of the statutory  
6 provision?

7 MS. CONNELL: That's correct, yes, Your Honor.

8 THE COURT: And your position is, is that all of  
9 the remedies you are seeking are essentially equitable in  
10 nature?

11 MS. CONNELL: Yeah. I think the bulk -- the  
12 vast bulk of them, Your Honor, and you know things like  
13 appointment of a monitor, restitution, accounting, those  
14 kind of things, are for the Court and not for the jury.

15 THE COURT: Okay. Let me hear from the defense,  
16 please. Ms. Rogers.

17 MS. ROGERS: Thank you, Your Honor.

18 We did confer, all of the parties conferred  
19 yesterday on the subject of scheduling and bifurcation.

20 The AG has represented that it needs four weeks  
21 to present its affirmative case, folding in at least some  
22 time for cross examination. And the NRA's response is,  
23 you know, we might need as many as three our four weeks in  
24 response to that, but we are hoping we don't.

25 THE COURT: When you say, "the NRA," are you

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1 including the individual defendants?

2 MS. ROGERS: Right now, I am just including the  
3 NRA. But let me get to, I think I came up with a  
4 synthesis that simplifies things. So once we actually  
5 know the witness list we are facing, if 25 of those 35  
6 witnesses are also our witnesses, then we are willing to  
7 compromise to some degree on doing them at the same time,  
8 rather than calling them back. And we anticipate, you  
9 know, if we are able to realize some of the same  
10 efficiencies we did realize in the bankruptcy trial, we  
11 could probably get the whole fact finding liability phase  
12 done in eight weeks, counting the other defendants, who  
13 I'll let them speak for themselves, but I don't think  
14 they needed -- I think they might have needed an  
15 additional week or something. It is not substantially  
16 more time. I think eight weeks for the whole -- the whole  
17 enchilada.

18 THE COURT: Now, I am going to reserve comment  
19 on your estimates, but, the logistics of juries and bench,  
20 right, the jury portion of it has to be contiguous. We  
21 have to keep these folks here for whatever time we need  
22 them. The bench portion, to the extent that it is either  
23 bifurcated or separated by whatever some of the claims  
24 are, there is at least a little flexibility around having  
25 it be not necessarily all contiguous time. Because what I

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1 want to avoid is, let's assume I am willing to give you  
2 all eight weeks. Are you talking about eight weeks of a  
3 jury sitting there?

4 MS. ROGERS: Potentially. We might be able to  
5 shorten it, again, if there is a lot of witness  
6 efficiencies. But Ms. Connell has said she wants four  
7 weeks just to put on her jury case, her liability case  
8 against the NRA. And we have to figure, you know,  
9 depending upon what those transactions are, that they are  
10 presenting to the jury --

11 THE COURT: Well her liability case she says  
12 from her perspective anyway, the only part that is a jury  
13 issue is the N-PCL part.

14 MS. ROGERS: I'll give you our perspective on  
15 that. I think the jury finds the facts, whatever factual  
16 predicates they allege entitle them to any liability, the  
17 jury can find. And if you look granularly, even at the  
18 equitable counts of their complaint, the factual  
19 allegations overlap pretty closely with the N-PCL counts:  
20 Did you violate policy? Was this a related-party  
21 transaction? And they are essentially asking for two  
22 bites of the exact same fact-finding apple. If they want  
23 the jury to decide whether the HT Solution transaction was  
24 lawful, and then have Your Honor decide the same thing  
25 under a different statute. The NRA's position is, we have

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1 one liability phase and we come up with jury instructions  
2 that posits to the jury every disputed issue of fact. The  
3 jury comes back with a verdict. And then in the liability  
4 phase Your Honor, sitting in equity, decides based on the  
5 facts the jury found, what does each side deserve. What  
6 is an equitable remedy? Is there a compliance monitor?  
7 What would that look like? Et cetera. We think that's  
8 simpler and cleaner than trying to divide the liability  
9 phase and then -- their approach seems slightly less  
10 workable to me.

11 THE COURT: Understood. But just in principle  
12 then, it sounds like maybe you have gotten to that point  
13 where the idea of bifurcation --

14 MS. ROGERS: Yes.

15 THE COURT: -- which has at least one benefit,  
16 which is letting the jury go before the entire trial is  
17 done.

18 MS. ROGERS: Yes, the NRA is amenable to that.  
19 I remember Your Honor posited it the last time we were  
20 together. And the NRA agrees in principle. We might --  
21 it sounds like we are quibbling a little bit about how  
22 things will be bifurcated and what the jury instruction  
23 will say. But we don't disagree with allowing Your Honor  
24 to sit in equity and fashion any equitable remedies that  
25 liability may dictate.

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1 I want to say one more thing about scheduling.  
2 We heard some arguments today about political animus, and  
3 despite that element in the case, when the parties are  
4 before Your Honor, we really do try to keep politics out  
5 of it and focus on the claims, the defenses, the cases,  
6 because we are all professionals here. But this  
7 litigation is just the spearhead of a sweeping scorched  
8 earth reputational and political vendetta against the NRA,  
9 that has been waged by the State of New York since at  
10 least 2017. And it is the purpose and effect of this  
11 lawsuit and the preceding investigation, have been to cast  
12 a cloud over the NRA, much like the toxic fumes over the  
13 City, which we are eager to dispel.

14 We would love to get this done by Christmas. We  
15 have cleared our calendars to make that happen, if Your  
16 Honor is available. And so, you know, we would really  
17 like to let some sunlight in and we think some of these  
18 allegations will dissolve when we do. In the interest of  
19 our members and our mission, we favor an expeditious  
20 resolution.

21 THE COURT: So do I.

22 Okay. So, what I am hearing is, and I also  
23 think there may need to be some sharpening of pencils  
24 between you about how long this really is going to take,  
25 because my approach in these things is that once we agree

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1 on a timeframe for the trial, I will stick to it. And I  
2 will have the parties keep track of who is using how much  
3 time. But especially with respect to the jury, I like to  
4 give them a pretty solid date by which we intend to get  
5 the case to them. And enforce that through, I have a  
6 chess clock in my desk here. And otherwise it can spin  
7 out of control.

8 And just to dispel any due process issues,  
9 forewarned is forearmed. Right? So when you were on your  
10 feet doing cross examination, if you want to spend a month  
11 doing cross examination, you just know that that comes out  
12 of the back end of your time. So I want us to think very  
13 carefully about the schedule, because you should assume  
14 that I am going to stick to it. In large part because I  
15 am going to be scheduling things right before this trial  
16 and right after it. And I don't want to blow up my entire  
17 calendar because we can't get it done in the appropriate  
18 time. Plus I think it is both polite and proper to give  
19 the jurors a realistic and meet-able schedule.

20 So, I think you need to talk some more, because  
21 it sounds like your -- the defense estimate, and again I  
22 haven't heard from the other defendants yet. But if I am  
23 broad strokes, it sounds like six to eight weeks between  
24 the two sides.

25 Do any of the individual defendant's counsel

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1 have a number higher than that in mind?

2 MR. CORRELL: Your Honor, because Mr. LaPierre  
3 is really sort of a main target here, the way I see it, I  
4 am going to have to reserve on that. It will depend on  
5 what the AG brings and what the NRA does in terms of  
6 covering bases. But I would think that -- I would want to  
7 reserve at least a week to deal with any issues that  
8 weren't appropriately covered, in my view, by the NRA.

9 THE COURT: Well -- we are all one big ship  
10 here. So we have to land it at the same time. So it  
11 has -- you all are going to have to figure out how to work  
12 together on a schedule that fits everybody in. I get your  
13 point. And you know, during the course of the trial you  
14 and the other defendants may have to end up deciding how  
15 to allocate who is going to do what, and make sure that  
16 you are not double teaming things. So we have to come up  
17 with a schedule where everybody has input in, that doesn't  
18 just expand so that everybody can feel comfortable.  
19 Because I do have to have a realistic schedule as well.  
20 So I understand your point. But I am going to need you to  
21 fold that in somehow in these discussions, because I am  
22 not going to regulate that. I am not going to say that,  
23 you know -- well, I am going to need you all to come up  
24 with a schedule that works for everyone.

25 So Mr. Correll, are you saying you don't know

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1 whether your time will fit within the six to eight weeks?

2 MR. CORRELL: I don't know whether my time will  
3 fit within the six to eight weeks, Your Honor. I can say  
4 this, in the bankruptcy trial we were able to coordinate  
5 pretty well to get everybody covered. And also in  
6 depositions we were able to share time on the defense  
7 side. And we were actually pretty efficient about that.

8 THE COURT: The others?

9 MR. FLEMING: Your Honor --

10 THE COURT: Mr. Fleming.

11 MS. ROGERS: Anyone can have the podium.

12 MR. FLEMING: I think folding in can be done as  
13 far as Mr. Frazer goes. I do have some personal  
14 preferences, but given flexibility, which I expect we will  
15 all work together, it shouldn't be a problem.

16 THE COURT: Okay.

17 MR. FARBER: I'll move here so people can hear  
18 me if they are remote.

19 I don't think, the time that this is set for,  
20 Mr. Phillips, I don't think the time that we will need for  
21 our case is going to affect those estimates significantly.  
22 We are talking a lot about this. I actually think that we  
23 need to talk about the trial date. And I think  
24 Mr. Powell's counsel is going to address that, because a  
25 trial of this length, I think presents potentially some

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1 scheduling conflicts, I think, for them. But I'll let  
2 them address that.

3 MR. ITKIN: Hi again, Judge. Mr. Itkin for  
4 Mr. Powell.

5 We don't expect to take a full week, but I think  
6 we will need a few days. I think, as Mr. Farber pointed  
7 out, our issue is with the trial date. I have two back to  
8 back trials in late November and early December. And I  
9 know another member of my team has trial in September and,  
10 I think, maybe early October.

11 I know that puts a huge damper on your plans to  
12 take a trial this fall, but that's our schedule.  
13 Obviously you can let Mr. Powell out of this case and that  
14 will make things a lot easier. I got a lot of laughs for  
15 that comment on our call yesterday. I figured I would let  
16 you enjoy it as well.

17 THE COURT: Well, I hear you. You know, we will  
18 have to get some proposals on trial dates that work. And  
19 you know, I really can't let one party completely derail  
20 the entire thing, and so we will see how that works out.  
21 Either your team will have to get it done or potentially a  
22 separate trial for your client. But you know, I am not --  
23 I am not really wild about the idea of pushing this all  
24 into 2024 just because of some counsels' trial schedules.  
25 I am not trying to be insensitive to it, but I have a

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1 fairly large vehicle to drive here, if you know what I  
2 mean.

3 So, look, I think I need you all to confer  
4 again. And I have your opening bid from which I will  
5 negotiate downward, if anything.

6 But, you know, that's a lot of time. That's  
7 twice as long as any trial I have had here. This is a big  
8 case, I get it. But I am going to want to, you know,  
9 maybe we can have a conference with, you know,  
10 Mr. Blaustein and I where we can really get more granular  
11 about the witnesses and what exactly is going to happen  
12 and what is a realistic timeframe. Because, you know,  
13 before I basically give you my entire fall, because there  
14 are four or 500 other cases that would like some of that  
15 time, I am going to want to push back some. I mean, I am  
16 not shocked by the number you gave me. In fact, kind of  
17 sort of what I thought.

18 MS. CONNELL: We should have gone higher.

19 THE COURT: No, I don't think so. But I think I  
20 am anxious to find ways to economize, especially if we are  
21 going to have the ability to have a portion of the trial  
22 be a bench trial that follows, or could go alongside, it  
23 depends, the jury portion it. We may be able to do --  
24 what I would like you to focus on is how -- initially how  
25 long the jury part needs to take.

mlp



## Proceedings

1 MS. CONNELL: May I speak, Your Honor? I know  
2 we have lunch, but very quickly. One of the, I think,  
3 selling points potentially of bifurcation is it takes some  
4 of the more complex issues, especially depending on how  
5 the Court rules on experts and pushes some of that to a  
6 bench trial where we have less concerns about prejudice.  
7 It also takes some of the complex evidentiary issues  
8 presented by our preclusion and sword and shield and that  
9 issue of social privilege, a lot of that, not all but a  
10 lot, would go to a bench trial. So we think that could  
11 maybe shorten, because a lot of it goes to the need for  
12 perspective relief.

13 A lot of that could shorten the jury aspect of  
14 this, which we are keen to do. I think we actually had a  
15 productive conversation yesterday.

16 THE COURT: It sounds like it. Look, I think  
17 what I am going to ask you to do, obviously not today, is  
18 to come up with a proposal, a written proposal of how you  
19 see the trial going, as much of it as can be agreed as  
20 possible. And flag the parts that you disagree about.  
21 But sort of like that. That the trial will proceed in  
22 phases. And the first phase we would want to reserve X  
23 amount of time for, you know. And then the next phase  
24 either you say continue right after or, you know,  
25 depending on when we do it there could be a short break.

mlp

## Proceedings

1 I don't know.

2 But for now try to work it out so that it works  
3 for everybody. I think you are closer together than I  
4 thought you would be. But that is often a mirage when you  
5 start putting in paper and you figure out what exactly it  
6 is going to be.

7 But I am -- look, I want to be very candid about  
8 it, I am going to hold people to a schedule once we get  
9 there. Because, to use the old high school science, you  
10 know, gas expands to fill the size of the bottle you put  
11 it in. Right? The more time I give you, you will figure  
12 out ways to use it. And if you have to be efficient on  
13 cross and on direct and get right to the point, then you  
14 will do that too.

15 So, you should assume that I am going to press  
16 for a very efficient schedule. I know it is an important  
17 case, and it is, you know, complicated, but the time to  
18 start taking out the pencils and really getting sharp  
19 about it is now. Because I do want to, you know, I have  
20 been trying to keep time in the fall available. You know,  
21 I don't know exactly what to do with Mr. Powell's  
22 counsel's schedule, because that's essentially all of the  
23 time one way or another. You know, again, you know, Akin  
24 Gump is a big outfit, and the fact that some people on the  
25 trial team may or may not be available doesn't mean that,

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## Proceedings

1 you know, you can't do it. Again, I am reasonable but I  
2 have to also be practical.

3 MS. CONNELL: The parties are keen for a trial  
4 date, Your Honor. We don't want to prejudice Mr. Powell  
5 but prior to hearing from his counsel I think the NRA had  
6 suggested October 16 as date they are available. And I  
7 think everybody else agreed. But not that we dictate your  
8 schedule. And again, Mr. Powell will need to be  
9 considered in some way.

10 THE COURT: Yeah. That's kind of in the zone  
11 where I was. I'll even, with that, I am going to have to  
12 move another trial out of the way and a few other various  
13 things. So whatever we come up with is going to lead to a  
14 lot of ricocheting around in my schedule. But I want  
15 to -- the quicker we can do it, the quicker we can get on  
16 the calendar, the better.

17 I agree with all of the comments made that, you  
18 know, a lot of very serious allegations have been made in  
19 this case. And this is a situation where, you know,  
20 justice delayed is justice denied, either way. And I am  
21 fairly committed to getting this done this year. I think  
22 we should be able to do it.

23 So let's take a break until 2:15 and we will  
24 finish up. Thank you.

25 MS. CONNELL: Thank you, Your Honor.

mlp

Proceedings

1 THE COURT: I am going to exit out of the Teams  
2 meeting because we are doing another seminar in this room  
3 at 1:00 o'clock.

4 Thank you.

5 (Whereupon, a luncheon recess was taken at this  
6 time.)

7 \* \* \*

8 A F T E R N O O N S E S S I O N

9 \* \* \*

10 THE COURT: Good afternoon, everyone.

11 Thanks again for the excellent briefing and  
12 argument.

13 I am quite aware of the timing here and, in my  
14 view, the need to get you a decision on these motions  
15 sooner rather than later. I am sure you would all greatly  
16 appreciate wonderful prose in a long-written opinion that  
17 you get a month before trial. But I think it is important  
18 to get you the substance of the ruling now, albeit in  
19 imperfect form.

20 I am going to start with the motion 44, which is  
21 the last-argued motion to dismiss from the defenses.

22 Just briefly on the standard. Motion to dismiss  
23 affirmative defenses, the plaintiff bears the burden.  
24 Demonstrating that the defenses are without merit as a  
25 matter of law, and deciding the motion to dismiss a

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## Proceedings

1 defense, the defendants are entitled to the benefit of  
2 every reasonable intendment of the pleading which is to be  
3 liberally construed. A defense should not be stricken  
4 where there are questions of fact requiring trial.

5 There are many cases I could cite for that. It  
6 is essentially a mirror image of motion to dismiss a  
7 claim.

8 However, a defense that bears no relationship to  
9 the claims at issue is properly dismissed.

10 In considering this motion, I am not relying on  
11 the argument made by plaintiff that some of the  
12 affirmative defenses were stated in summary terms. I have  
13 assumed those defenses are based on the factual assertions  
14 the defendants put forth in their briefs, and where  
15 relevant in proposed amended pleadings.

16 If the defenses were otherwise meritorious based  
17 on those documents, I would have given leave to amend. So  
18 it is more efficient, in my view, to simply deal with them  
19 now on the merits in this fully-briefed motion, given the  
20 efforts that the parties have all put in to bring the  
21 legal issues to a head.

22 I am going to start with what has been called  
23 the bias defenses, also sometimes called the  
24 constitutional defenses or retaliation or unclean hands or  
25 a variety of other things. All told, these are based on

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Proceedings

1 statements made by or on behalf of the Attorney General  
2 about the NRA and this litigation, either while she was  
3 running for office or while she was in office, although  
4 largely most of them are before.

5 I have already dismissed counterclaims based on  
6 similar allegations. And do so now with respect to the  
7 affirmative defenses, although on somewhat different  
8 grounds. But I incorporate by reference my description of  
9 the constitutional underpinnings of these various  
10 assertions. Quite simply in my view, there is no legal,  
11 factual or logical connection between these purported  
12 defenses -- these purported defenses and the claims  
13 remaining in this case.

14 Whether Candidate James or Attorney General  
15 James bore ill will toward the NRA or the individual  
16 defendants, or had as her goal to dissolve the NRA, which  
17 is no longer an issue in the case, has no relation,  
18 legally or factually, to whether these defendants engaged  
19 in improper related-party transactions, breached fiduciary  
20 duties, or otherwise mismanaged for their personal benefit  
21 in contravention of legal obligations set forth in  
22 statutes, under which the claims in this case are based,  
23 the activities of a New York Not-for-Profit Corporation.

24 The trial in this case will be on the merits of  
25 those claims, and the appropriate relief arising

mlp

## Proceedings

1 therefrom, and not on the purported words and ideas  
2 between the Attorney General and the NRA.

3 In dismissing the dissolution claims early in  
4 the case, I did note that certain First Amendment  
5 principles played some role in that decision where that  
6 type of relief was sought. Those issues are no longer in  
7 the case. What is left is a more straightforward  
8 financial maladministration of a non-profit. And I think  
9 we risk overcomplicating this case and turning it into a  
10 series of irrelevant sideshows when we go beyond the  
11 claims made and the legitimate defenses thereto.

12 So, I would not discount entirely the  
13 possibility that in concluding on remedies I would take  
14 into account all surrounding circumstances. But in terms  
15 of the -- whether these are affirmative defenses to the  
16 claims, which is what this motion is about, they are not.

17 Whether, you know, assuming they prove -- that  
18 defendants were able to prove all of these statements were  
19 made, they really have nothing to do with the merits of  
20 the case, and therefore they are dismissed.

21 The next set of claims is a bit of a hodgepodge.  
22 The first one I'll deal with is the equitable defenses of  
23 estoppel and laches. Largely, the -- the only real  
24 substantive arguments have been about laches. As a  
25 general matter, those kinds of defenses are not available

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## Proceedings

1 against the state when acting in an official capacity.  
2 While some cases, such as the *SEC v Cuban* indicate that  
3 equitable defenses may be available in very limited  
4 circumstances, those circumstances are not present here.  
5 That case is 798 F. Supp. 2d, 783, Northern District of  
6 Texas, 2011.

7 The idea is that if the conduct is egregious and  
8 rises to a constitutional level, then you would leave open  
9 the possibility that even the state in its official  
10 capacity could be prohibited from seeking relief. The  
11 facts that have been set forth here, and it is a little  
12 difficult to tell in all cases what these defenses mean,  
13 but I think Mr. LaPierre has the most developed argument,  
14 with respect to laches, at least; is that the Attorney  
15 General had access to forms year in and year out which  
16 disclosed, to some extent anyway, Mr. LaPierre's  
17 compensation and use of charter flights. I don't think  
18 that those facts, even if proven, would give rise to a  
19 viable laches defense. Certainly not against the state.  
20 I don't think even if it wasn't the state, it would. But  
21 certainly not against the state. These are summary forms  
22 that the state received year in and year out. They do not  
23 disclose the facts upon which the claims in this case are  
24 based. The notion that the Attorney General who does have  
25 ample statutory authority to oversee chart -- charitable

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## Proceedings

1 organizations within the state, the notion that it would  
2 be enjoined from fulfilling that obligation simply because  
3 incomplete disclosures were made years ago, I think it is  
4 a clever -- it simply doesn't work. I think it is a  
5 clever argument, and I think it is well stated, but I  
6 don't think it is sufficient, even if those facts were  
7 proven, to establish laches.

8 I also, I understand the argument that in some  
9 cases where the state is acting as more of an economic  
10 actor as opposed to a sovereign, that there might be more  
11 leeway to apply normal equitable defenses. The *UPS* case  
12 that Mr. Correll referenced, I think is quite a different  
13 one. I think that was much more of a commercial  
14 relationship than what you have here. The Attorney  
15 General has, just, all sorts of statutory authority as, I  
16 think, the principal watchdog of the government over the  
17 activities of not-for-profit corporations. And you know,  
18 the fact that some of its claims can also be brought by  
19 private individuals does not, in my view, significantly  
20 impact the applicability of the kinds of equitable  
21 defenses that have been raised here. So, those claims  
22 are -- those defenses are also dismissed.

23 There was also in the briefing, although we  
24 didn't discuss it at argument today, various affirmative  
25 defenses with respect to extra-territoriality. I

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## Proceedings

1 previously observed in a different motion that it would be  
2 awfully easy to evade oversight as a New York  
3 not-for-profit corporation if all you had to do was keep  
4 your assets outside of the state, which I observed seemed  
5 inconsistent with the statutory scheme. That's from a  
6 September 29, 2022 transcript, NYSCEF 1175, at page 23.

7 I reached the same result here. The NRA is a  
8 New York not-for-profit entity, corporation, over which  
9 the OAG has oversight responsibilities. And I think that  
10 the statute gives ample authority to -- for the OAG to  
11 seek and the Court to grant relief with respect to the  
12 activities of the NRA as a New York not-for-profit  
13 corporation, regardless of where those assets may be.

14 Finally, also in the briefs and not much in the  
15 argument today, several of the defendants had what one  
16 might call, catchall defenses, which seemed to reserve the  
17 right to add other affirmative defenses. You know, I  
18 think it is true that there are situations where one might  
19 seek to amend pleadings to conform to the evidence at  
20 trial. But you can't just have an affirmative defense  
21 that open-endedly reserves the right to serve others. So,  
22 I don't know that dismissing it does much -- has much  
23 utility, but also keeping it in there as a separate  
24 enumerated defense seems kind of pointless. So I will  
25 dismiss that as well.

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## Proceedings

1           The cross motions to amend are denied on the  
2 ground that they are futile, because I have already  
3 considered the allegations that would be included in  
4 amplifying some of those defenses, and found that they  
5 would not, even if amended, be legally viable.

6           Moving on to the motions for summary judgment.

7           Mr. Phillips' motion for partial summary  
8 judgment is denied. I think there are a number of, I  
9 think, good arguments made as to potential defenses to  
10 various claims, but they are not conclusive in my view,  
11 and fact issues remain.

12           Mr. Phillips served as the NRA's treasurer and  
13 CFO for a number of years before retiring in 2018. The  
14 government asserts that he had had conflicts of interest,  
15 engaged in related-party transactions and self-dealing,  
16 among other things. And most relevant to today's motion,  
17 the state alleges that in 2014 the NRA, through  
18 Mr. Phillips, entered into a contract with an outfit  
19 called HomeTelos, and that Mr. Phillips failed to disclose  
20 his, quote, "long-standing personal relationship with  
21 HomeTelos' CEO."

22           Next, the OAG alleges that in 2018 Mr. Phillips  
23 entered into a post-employment consulting agreement with  
24 the NRA for \$30,000 per month, which it claims was an  
25 improper related-party transaction that was properly

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Proceedings

1 approved by the board.

2 The OAG asserts three claims, first as an  
3 improper related-party transaction; under the  
4 Not-for-Profit Corporation Law; and also breach of  
5 fiduciary duty under the Not-for-Profit Corporation Law.  
6 A very similar claim with similar statutory provisions  
7 under the EPTL, and also -- I am sorry, I got that wrong.

8 The fourth cause of action is the fiduciary duty  
9 claim under the Not-for-Profit Corporation Law.

10 The eighth claim, cause of action is under the  
11 EPTL.

12 And the 12<sup>th</sup> cause of action is a wrongful  
13 related-party transaction.

14 Okay. Let's go to the consulting agreement.  
15 First argument and principle argument that is made here is  
16 this is not the type of transaction that is covered by the  
17 related-party transaction provisions of the non profit --  
18 Not-for-Profit Corporation Law. And I think it is true  
19 that there is some authority and some support in the  
20 statute that, broadly speaking, compensation agreements  
21 between a not-for-profit company and its officers, is not  
22 considered an improper related-party transaction. I think  
23 the plaintiffs make a persuasive response that that is  
24 largely because compensation arrangements, at least with  
25 officers, such as Mr. Phillips, are covered by a different

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## Proceedings

1 section, Section 715 of the N-PCL.

2 I think that on its face the transaction that is  
3 challenged here is a related-party transaction. The  
4 definition of related-party clearly encompasses  
5 Mr. Phillips. The definition of a related-party  
6 transaction is quite broad. Essentially any transaction  
7 between a related party and in which the related party has  
8 a financial interest and the company, is a related-party  
9 transaction. So I don't think that I can rule as a matter  
10 of law that it is not a related-party transaction.

11 Whether it is a permissible transaction and  
12 whether Mr. Phillips can satisfy the requirements for  
13 defenses under Section 715 is a question for trial. I  
14 note that the -- there was a purported ratification after  
15 the fact of this transaction by the audit committee. But  
16 the statute does impose various specific requirements for  
17 that, and whether those were satisfied is a question for  
18 trial.

19 With respect to the HomeTelos contract, which is  
20 really not challenged as a related-party transaction but  
21 more so as a fiduciary duty claim, whether Mr. Phillips  
22 discharged his duties with the appropriate standard of  
23 care or may rely on a good faith defense, can't be  
24 resolved on this record. Including what disclosures he  
25 did or did not make; when he did or did not make them; and

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## Proceedings

1 what impact they had on the decision to extend this  
2 contract; and whether this contract, in fact, caused any  
3 harm, are all questions of fact, in my view, and not  
4 susceptible to summary judgment. So that motion is  
5 denied.

6 Finally, Mr. Powell's motion for summary  
7 judgment is also denied. The claims against Mr. Powell  
8 are similar in that first that it was a breach of -- that  
9 he breached fiduciary duty in connection with his duties  
10 at the NRA.

11 Second, that he failed to properly administer  
12 charitable assets under the EPTL.

13 And finally, that he engaged in a wrongful  
14 related-party transaction with the NRA.

15 The crux of Mr. Powell's argument is that he was  
16 not responsible for the decisions complained of in  
17 connection with its claim for breach of fiduciary duty,  
18 and unlawful related-party transactions. And he also  
19 seeks dismissal of claims concerning his compensation and  
20 expense reimbursements beyond a certain amount. And also  
21 makes specific arguments with respect to related-party  
22 transactions between the NRA and Mr. Powell's wife, and  
23 the entities in which Mr. Powell's wife and his father  
24 were employed.

25 I think as with the prior motion, there are just

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## Proceedings

1 too many un-- untied questions of fact here that preclude  
2 reaching judgment as a matter of law here.

3 First, I don't think that the record  
4 demonstrates as a matter of law that Mr. Powell was not a  
5 trustee as defined in the EPTL. Mr. Powell held an  
6 executive position and was delegated extensive powers by  
7 the NRA. And generally speaking, that is a question of  
8 fact.

9 Second, there are numerous material issues of  
10 fact warranting a trial concerning the alleged  
11 related-party transactions with the companies in which  
12 Mr. Powell's wife and father were engaged. That the  
13 challenged transactions may have, in part, been ratified  
14 after the fact, does not warrant summary judgment. In  
15 particular Section 715(j) of the N-PCL, which was added in  
16 2016, provides a defense for the specific circumstances  
17 involved here, which is where a related-party transaction  
18 is ratified after the fact.

19 And whether he satisfies the requirements of  
20 that statute is not something that can be decided as a  
21 matter of law here. Not only does the government  
22 challenge the fairness of the transaction to the company,  
23 but also challenges the procedure under which the decision  
24 was made by the audit committee years after the fact.

25 The statute of limitations argument, which we

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## Proceedings

1 didn't get into on the record here, also fails. The OAG  
2 commenced this action in 2020 and argues that a six-year  
3 statute applies. And also contends that Mr. Powell waived  
4 any statute of limitations arguments by not raising it in  
5 a responsive pleading. The reply is silent on this point,  
6 so I don't think that that is grounds for summary  
7 judgment.

8 And finally, the fact that some remedies may be  
9 unavailable at the end of the day, and I am referring here  
10 to the alleged or proposal to clawback salary, I am not  
11 making a decision on that one way or the other today. I  
12 don't think that warrants dismissal of the claim. Both  
13 Section 715(f)(4) and EPTL 8-1.9 permit the OAG to seek in  
14 the case of willful and intentional conduct, an amount up  
15 to double the amount of any benefit improperly obtained.

16 And again, as to that remedy as well, which is  
17 referenced in the motion, I am not making any ruling on  
18 the scope of recovery here. But the bottom line is that  
19 on the merits, on the liability merits, I don't believe  
20 that the motion has established as a matter of law  
21 conclusively entitlement to judgment. So that motion will  
22 be denied.

23 So that resolves the motions at issue today. I  
24 am quite glad that I took the other seven motions that  
25 were originally on the schedule off the schedule, because

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## Proceedings

1 I barely survived this one.

2 But I do appreciate the tremendous amount of  
3 work you have all put in. And you know, whether the  
4 motions were granted or denied, I thought all of the  
5 motions were exceptionally well done, and as was the  
6 advocacy today.

7 I don't know if I set a schedule for the other  
8 motions. Not yet? But I will. Those will impact to some  
9 extent, I suppose, your discussions about trial timing.  
10 But I'll try to get to that as soon as I can.

11 I do want you, as I said, to meet and confer and  
12 to the extent possible agree on a proposed trial plan and  
13 schedule, and give me broad availability in October,  
14 November and December, recognizing that the jury trial  
15 portion of this has to be contiguous. Ideally, the bench  
16 trial portion of it or liability or damages portion of it  
17 would be as well. But it is obviously not as critical.  
18 So I am willing to listen to creative solutions. I am not  
19 willing to put the trial off indefinitely. So, I am going  
20 to ask you to work hard to try to find a period of time  
21 that works.

22 Anything else?

23 MR. FARBER: Judge?

24 THE COURT: Yes, sir?

25 MR. FARBER: Could I ask a question regarding

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## Proceedings

1 our planning of the trial schedule?

2 THE COURT: You can ask.

3 MR. FARBER: Do you have a standard practice --

4 THE COURT: Turn the mic on.

5 MR. FARBER: Apologies.

6 Your Honor, do you have a standard practice for  
7 jury trials? Do you sit five days a week? Do you sit  
8 full days? Because that will help us, I think, in  
9 figuring out the scheduling.

10 THE COURT: I think as a -- certainly for  
11 something this long I could not sit five days a week for  
12 eight weeks or six weeks. I have too many things. I  
13 would assume that Fridays are down.

14 Although I do my best to try to accommodate. If  
15 I can go five days, I will, but I can't shut down the rest  
16 of the docket for that long. So, assume at least four  
17 days a week, and five whenever I can.

18 MR. FARBER: Thank you, Your Honor.

19 THE COURT: And I took your prior estimates  
20 about weeks would assume five days. I recognize if it is  
21 not five days you need more. You are giving me days not  
22 calendar weeks, right?

23 MS. CONNELL: Yes, Your Honor.

24 THE COURT: But I am still going to hold you to  
25 it. Estoppel and unclean hands don't apply to me either.

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Proceedings

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MR. FARBER: Thank you, Judge.

THE COURT: Okay. Thank you all very much.

MR. SHIFFMAN: Thank you, Your Honor.

THE COURT: Order the transcript.

\* \* \*

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL  
STENOGRAPHIC MINUTES IN THIS CASE.



MICHELE PANTELOUKAS

SENIOR COURT REPORTER

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NYSCEF DOC

NO. 2024  
**COURT CLERK: [3]** 65/18  
 65/21 65/23  
**COURT OFFICER: [1]** 47/9  
**MR. CORRELL: [19]** 84/2  
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 93/3 93/5 93/9 93/14 102/23  
 104/3 115/1 116/1  
**MR. CORRELLELL: [1]** 3/18  
**MR. FARBER: [34]** 3/16 4/13  
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 10/1 10/9 11/4 11/16 11/22  
 12/4 12/13 12/16 13/19 14/8  
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 25/24 26/4 97/7 116/16 135/22  
 135/24 136/2 136/4 136/17  
 136/25  
**MR. FLEMING: [4]** 3/24 95/10  
 116/8 116/11  
**MR. ITKIN: [33]** 3/22 26/22  
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**MR. MENDELSON: [13]**  
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**MR. SHIFFMAN: [23]** 3/2 3/7  
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**MR. THOMPSON: [13]** 17/7  
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**MR. UMANSKY: [4]** 62/20  
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**MS. CONNELL: [15]** 3/6 46/12  
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**MS. EISENBERG: [27]** 3/10  
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104/14  
**MS. ROGERS: [8]** 108/12  
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**THE COURT: [180]**  
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1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK: CIVIL TERM: PART 3

-----X

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

5 Plaintiff,

6 - against -

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7 THE NATIONAL RIFLE ASSOCIATION OF AMERICA,  
8 WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER  
9 and JOSHUA POWELL,

10 Defendants.

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11 Motion Seq. 44, 45 & 46

12 June 8, 2023

13 60 Centre Street  
14 New York, New York 10007

15 B E F O R E: THE HONORABLE JOEL M. COHEN,  
16 Justice of the Supreme Court

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MICHELE PANTELOUKAS  
Senior Court Reporter

mlp



Proceedings

1 THE COURT: Good morning, everyone. Let's start  
2 with appearances, beginning with the plaintiffs.

3 MR. SHIFFMAN: Good morning, Your Honor.  
4 Steven Shiffman, Assistant Attorney General,  
5 representing plaintiff. I am here today with Stephen  
6 Thompson, Alexander Mendelsohn and Monica Connell.

7 MS. CONNELL: Good morning, Your Honor.

8 MR. SHIFFMAN: Good morning, Your Honor.

9 THE COURT: Good morning.

10 And defendants.

11 MS. EISENBERG: Svetlana Eisienberg, counselors  
12 on behalf of the National Rifle Association of America. I  
13 am here today with my partner, Sarah Rogers, and our  
14 colleagues, David Umansky and Christopher Zona.

15 Good morning.

16 THE COURT: Good morning.

17 MR. FARBER: Seth Farber from Winston Strawn on  
18 behalf of Wilson Phillips.

19 MR. CORRELLELL: Good morning, Your Honor.  
20 Kent Correll for Wayne LaPierre.

21 THE COURT: You caught me by surprise over  
22 there.

23 MR. ITKIN: Good morning, Your Honor.  
24 Uri Itkin from Akin on behalf of Joshua Powell.

25 MR. FLEMING: William Fleming for John Frazer.

mlp

## Proceedings

1 Good morning.

2 THE COURT: Good morning.

3 We are doing three motion sequences today.

4 My inclination is to start with the two narrower  
5 ones, the motions by individual defendants. Those are  
6 sequence 45 is by Mr. Phillips for partial summary  
7 judgment; and motion 46 is by Mr. Powell for partial  
8 summary judgment. Before stepping into the yawning chasm  
9 of the other motion, I would like to start with those.

10 So, why don't we start with 45, which is  
11 Mr. Phillips, by Mr. Farber. Do you want to start us off?

12 If you could do it from the lectern I would  
13 appreciate it.

14 MR. FARBER: Sure.

15 Thank you, Your Honor. And I don't want to do  
16 too much to stand in the way of the yawning chasm that you  
17 are facing. And, you know, as you noted at the outset, I  
18 think our motions -- our motion is fairly discrete. And I  
19 think I just want to make a couple of -- emphasize a  
20 couple of points in connection with that. And I am happy  
21 to respond to whatever questions the Court has.

22 So, there are, as Your Honor has noted, there is  
23 a lot of material in this case. A lot of material  
24 generally, and a lot that is alleged with respect to  
25 Mr. Phillips. There are a wide range of claims of

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## Proceedings

1 breaches of fiduciary duty, most of which go to his  
2 conduct as an officer, an employee of the NRA. Things  
3 where he is accused of wrongdoing for either approving  
4 certain contracts or directing payments to what are  
5 described as either friends or insiders.

6 Our motion is directed to things very different  
7 from that. The first piece of this is for a  
8 post-employment consulting contract. And, you know, the  
9 basic problem with the AG Offices' claim that this is a  
10 related-party transaction, is that, you know, Mr. Phillips  
11 wasn't acting as the treasurer or CFO in entering into  
12 this contract. He wasn't doing this on behalf of the  
13 National Rifle Association. He was doing this at arm's  
14 length. There is no dispute of the facts regarding that.

15 And, you know, as we point out in our papers, it  
16 simply doesn't make any sense under the statute to treat  
17 these sort of contracts where one is negotiating on one's  
18 behalf as related-party transactions.

19 And, I mean, I think --

20 THE COURT: Does that square with the language  
21 of the statute as to the definition of a related-party  
22 transaction? I mean, I -- we are not talking about  
23 salary.

24 Can I ask the folks who are on Teams to mute  
25 their lines, please?

mlp

## Proceedings

1 Thank you.

2 We are not talking about just run of the mill  
3 salary for employees. This is -- this is a transaction in  
4 the sense of signing a contract with an existing officer  
5 for post-employment consulting. Right?

6 MR. FARBER: Yes. But whether it is consulting  
7 or employment, there is a distinction without a  
8 difference. If I am employed by a term of years, I enter  
9 into a contract for employment for additional years, it is  
10 the same thing as when I am coming in from the outside.

11 The point --

12 THE COURT: Hang on a second.

13 (Muting Teams attendees.)

14 THE COURT: If only I could do this to people  
15 in-person sometimes.

16 Go ahead. I am sorry.

17 MR. FARBER: And I think if you look at the --  
18 again, it is the structure of what is going on. At one  
19 point in the AG's Office brief they fault Mr. Phillips  
20 because they say he is not placing the interests of the  
21 NRA above his own.

22 THE COURT: That's the fiduciary duty part.

23 But not to be too pedestrian about it, but he is  
24 a related party, right, he is a director, officer or key  
25 person of the corporation at the time that this agreement

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## Proceedings

1 is signed?

2 MR. FARBER: Yes.

3 THE COURT: And then the definition of a  
4 related-party transaction under the statute, reading from  
5 Section 102, is any transaction, agreement or any other  
6 agreement in which a related party has a financial  
7 interest; and in which the corporation or any affiliate of  
8 the corporation is a participant. And then it has some,  
9 you know, de minimus or other exceptions, none of which, I  
10 don't think, applies here.

11 So what would be my grounds for just ignoring  
12 that language?

13 MR. FARBER: Well, I -- I don't think it is  
14 ignoring it. I think it doesn't encompass or is not  
15 intended to encompass this type of situation. And look,  
16 the guidance the Attorney General's Office themselves has  
17 put forward indicates that.

18 THE COURT: Well yeah, I can sort of understand,  
19 because there are different kinds of routine decisions in  
20 every company about what do we pay our people. And those  
21 have to go through their own rules and approvals where  
22 necessary. This is -- this is a bit more of an outside  
23 the ordinary course of business transaction; is it not?

24 MR. FARBER: Well, certainly, but what you are  
25 talking about is a question of degree. I think Your Honor

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## Proceedings

1 by saying there are some things that fall outside of it,  
2 you have adopted the point that this is not a categorical  
3 absolute rule that doesn't encompass some sorts of  
4 situations. And then the question is just which ones are  
5 those.

6 THE COURT: So if they had a deal where, you  
7 know, on retirement somebody gets paid \$20 million just a  
8 flat -- just a check gets cut, that's your new retirement  
9 bonus. That's not a related-party transaction?

10 MR. FARBER: Well, there would be other problems  
11 with it, but the problem is not that it is a related-party  
12 transaction. There would be breach of fiduciary duty  
13 claims against the people on the NRA side who entered into  
14 that and negotiated it on behalf of the NRA.

15 There may be claims -- and the AG's Office in  
16 the brief talks about whether or not there was performance  
17 under the contract, that the -- that terms of it were  
18 excessive. That's not what is at issue in a related-party  
19 transaction.

20 THE COURT: The purpose behind this whole  
21 section of the law, and the principle generally, is that  
22 these are insiders. They have been working with each  
23 other for decades in some situations. And you know, the  
24 normal indicia of arm's length transactions at least might  
25 be absent. You know, you have Mr. Phillips negotiating, I

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## Proceedings

1 guess, with people that work under him, or work with or  
2 under him for years. And so just -- the notion that it is  
3 just lifted entirely outside the scope of the statute is a  
4 little bit of a big pill to swallow, especially given the  
5 language I just read.

6 MR. FARBER: Well, to be fair, it is not people  
7 who are under him who negotiated that consulting fee. I  
8 mean, it is signed by, I believe, it was the president and  
9 vice president of the NRA. So, it is people who not only  
10 do not have any reporting authority to Mr. Phillips, but  
11 sort of in the hierarchy those are people to whom he is  
12 responsible.

13 THE COURT: The point, putting it outside of  
14 this particular factual setting is that he is a senior  
15 executive negotiating with a company for the future.

16 And, you know, I get it, these are not uncommon  
17 to have these kinds of things be negotiated. The argument  
18 is that these are a little unusual. Obviously the  
19 plaintiff has substantive issues with the terms and the  
20 like. But I am dealing with a statute. You know, I  
21 recognize that by calling it a related-party transaction  
22 it imposes certain procedural requirements of board  
23 approval or at least board committee approval and the  
24 like. So there is a significance to calling them that.  
25 But I am having trouble reading the language in a way that

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## Proceedings

1 you want me to.

2 MR. FARBER: I think the way to think about it  
3 is, you know, in the context in which he is doing that, he  
4 is not acting as a related party, you know.

5 THE COURT: It doesn't say that. It just says  
6 it has to be a transaction in which a related party has a  
7 financial interest and in which the corporation is a  
8 participant. It doesn't necessarily mean that the related  
9 party has to be acting as the CFO or whatever.

10 MR. FARBER: No, I understand that. But I think  
11 as we have talked about earlier, there are going to be --  
12 there have to be some category of circumstances where  
13 somebody who is, for example, going to be an employee can  
14 negotiate his own salary and it doesn't fall within the  
15 context of this.

16 Again, the Attorney General's Office who is  
17 charged with enforcing this statute has issued guidance  
18 that says that those should not be considered  
19 related-party transactions. They don't back away from  
20 that. Their only argument is, well, a consulting  
21 agreement is different. So we are in agreement as to that  
22 principle interpretation. The only difference is they  
23 say, well, we ought to draw a line between employment  
24 agreements and consulting agreements. But they offer no  
25 logical basis for drawing that distinction, which I submit

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## Proceedings

1 is a distinction without a difference.

2 THE COURT: Now, just in terms of the facts  
3 here. What was the approval -- was there any board  
4 approval either before or later for this -- for this one?

5 MR. FARBER: I believe it was ratified after the  
6 fact, but I don't recall sitting here.

7 THE COURT: There is not a lot of discussion  
8 about it, but -- in the papers. But Section 715, which  
9 governs related-party transactions, has a whole process  
10 for, you know, if board approval is required, it should be  
11 done in advance. But they added a section which says  
12 that, if you are going to use ratification, at least as I  
13 read it, you have to not only show the ratification was  
14 done, but also that the transaction was fair, reasonable  
15 and in the corporation's best interest.

16 Is that section relevant here?

17 MR. FARBER: I mean we are not arguing that it  
18 would satisfy the ratification standard. Our argument is  
19 that -- and I don't think on a summary judgment motion  
20 given that language, we necessarily would be able to do  
21 that.

22 THE COURT: Okay. But it is applicable --

23 MR. FARBER: Yes.

24 THE COURT: -- if it is a related-party  
25 transaction. Your point is that it is not a related-party

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1 transaction, and therefore it is not applicable.

2 Even if it is not a related-party transaction,  
3 there were supposed to be certain procedures followed  
4 within the NRA. Were they followed?

5 MR. FARBER: Well, I am not sure whether they  
6 were in this case. But whether they were or they weren't  
7 isn't relevant to the issue of whether there is liability  
8 for a related-party transaction.

9 In other words, if the AG's Office were to make  
10 the argument that you did not follow the NRA's internal  
11 procedures, that doesn't translate this into a claim that  
12 the statute for related-party transactions was violated.

13 THE COURT: Okay.

14 MR. FARBER: So if there is nothing further on  
15 this, I can turn to the second part --

16 THE COURT: Sure.

17 MR. FARBER: -- of the motion.

18 So the second thing we have argued both applies  
19 to -- and I'll start with this contract, that it can't be  
20 a basis for the failure to administer charitable assets or  
21 breach of fiduciary duty claims. And you know, as to  
22 these, I started to get into this point when you were  
23 talking about the related-party transaction, Mr. Phillips  
24 is not acting on behalf of the NRA in entering into this  
25 contract. So, the notion that you have a fiduciary duty

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## Proceedings

1 to your employer, to act in your employer's best interest  
2 when you are negotiating an agreement on your own behalf,  
3 there is simply no -- there is no legal support for it and  
4 it doesn't make any sense. It is a matter of logic.

5 And similarly, there is no basis for saying he  
6 is responsible for failure to administer charitable assets  
7 for entering into this contract on his own behalf. I  
8 mean, the criticism there is that the -- this wasn't a  
9 contract that the NRA would receive value for, they didn't  
10 need his services. But again, to the extent that those  
11 assets weren't being safeguarded in entering into this  
12 contract with Mr. Phillips, but the fault for that would  
13 lie on the shoulders of those in the NRA who, on behalf of  
14 the NRA entered into it, not on Mr. Phillips.

15 THE COURT: Well, even if the only thing that  
16 they sought to do was to void the contract because of a  
17 violation on either end, wouldn't your client still be a  
18 proper defendant to that claim since he has got an  
19 interest in the contract?

20 MR. FARBER: Yeah, but then they would have to  
21 have a basis for voiding the contract. They haven't  
22 brought a claim like that. They have brought failure to  
23 administer charitable assets claims. They brought a  
24 breach of fiduciary duty claim. They haven't brought a  
25 claim that would annul the contract itself.

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1 THE COURT: I thought what you were suggesting  
2 was, to the extent that there is a claim for breach of  
3 fiduciary duty or even the statute, it would be on the  
4 part of the NRA executives who negotiated it on behalf of  
5 the NRA, not your client. But in either event, if I were  
6 to find that, at least one possible remedy down the road  
7 is that it is not a contract that can be enforced if it  
8 was a breach of fiduciary duties or otherwise.

9 MR. FARBER: I don't know if that's necessarily  
10 the case. If I enter into a contract with you to perform  
11 services and, you know, I breached my fiduciary duty  
12 because I did not negotiate it properly with you, and it  
13 is unduly favorable to you. Yeah, the entity may have a  
14 breach of fiduciary duty claim against you, but that  
15 doesn't mean that they can, if there was consideration  
16 provided, recover from me.

17 So, you know, Mr. Phillips had obligations under  
18 this contract. There was consideration on both sides.  
19 They have a dispute about whether he performed on it. But  
20 that's not -- that's not something that is at issue here  
21 in this motion.

22 THE COURT: Okay. Do you want to move to the  
23 HomeTelos contract?

24 MR. FARBER: The HomeTelos contract, if you boil  
25 this down -- this was a claim for some IT services that

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## Proceedings

1 were provided by a company whose principal was former  
2 girlfriend of Mr. Phillips. Now, they argue that there is  
3 evidence that it was still his girlfriend. We have  
4 pointed out in our papers why I don't think -- why the  
5 evidence is clear she wasn't. But it doesn't really  
6 matter for these purposes, because whether current  
7 girlfriend, former girlfriend, that doesn't fall in the  
8 category of a related party under the NRA's own policies  
9 and procedures.

10 And the NRA has its own related party concept.  
11 It is part of their manual. It is, I believe, Exhibit AI  
12 to the New York AG's motion. And you know, that  
13 definition is and the definition of related parties and  
14 related-party transactions is similar to the statutory  
15 one. And there are a bunch of enumerated parties, various  
16 relatives, spouses, but girlfriends doesn't fall within  
17 it. So, you know, what they have -- and there are  
18 certainly disclosure and approval requirements that are  
19 attendant upon related-party transactions. But  
20 essentially, their claim is that notwithstanding this  
21 scheme, there was a conflict of interest there that should  
22 have been disclosed. And therefore Mr. Phillips  
23 entered -- acted improperly in not coming forward and  
24 telling them about that.

25 And you know, I think the problems with that

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## Proceedings

1 are, number one, there is no basis for this disclosure  
2 requirement that -- that they have attempted to create.  
3 But also, sort of more fundamentally, this is part of a  
4 breach of fiduciary duty claim. And there is no evidence  
5 in the record. In fact, the evidence in the record is to  
6 the contrary that there is any harm that the NRA suffered  
7 because of this. This isn't a situation where there was  
8 consideration provided and nothing received in exchange  
9 for it. There is no evidence of that.

10 It is also the situation where the audit  
11 committee after the fact did approve this. Now, they can  
12 argue about whether that meets a ratification standard  
13 under the related-party statute. But this is not alleged  
14 as a related-party transaction, because it couldn't be.  
15 So, but what the audit committee's approval of this shows,  
16 is it wouldn't have made a difference had Mr. Phillips  
17 informed people about this before the end, as opposed to  
18 afterwards. Because when given the facts, everyone was  
19 perfectly happy with the situation. So, again, there is  
20 no evidence that this failure to disclose, even if there  
21 were a duty to disclose, caused anything. Because had  
22 that information been presented beforehand, the audit  
23 committee would have done exactly what it did and NRA  
24 management would have done exactly what it did.

25 These are two, sort of, discrete issues, but I

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## Proceedings

1 think they don't belong in the case.

2 THE COURT: Okay. Let me hear from the Attorney  
3 General on this one.

4 MR. FARBER: Thank you, Your Honor.

5 THE COURT: Thank you very much.

6 We are going to try to keep these brief so we  
7 can get through everything else. Okay?

8 MR. THOMPSON: Good morning, Your Honor.

9 THE COURT: Good morning.

10 MR. THOMPSON: I will be brief.

11 First, just to address the related-party  
12 transaction issue. The only thing I want to touch on is  
13 the guidance that was issued by the Attorney General's  
14 Office. That guidance says that officer employee  
15 compensation is not a related-party transaction. And that  
16 makes sense because officer and director compensation is  
17 governed by a separate provision in Section 715 of the  
18 N-PCL, specifically 715(e). And that says that it must go  
19 through the board approved process in accordance with the  
20 bylaws. And so Mr. Phillips is trying to have his cake  
21 and eat it too. He does not want it to be officer  
22 compensation for the purposes of being a related-party  
23 transaction. But he -- I am sorry. He does want it to be  
24 officer compensation for purposes of being a related-party  
25 transaction, but does not want it to be officer

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## Proceedings

1 compensation for purposes of having to go through those  
2 other procedures.

3 And as Your Honor noted, the entire purpose of  
4 this statute is to create fairness in situations where  
5 arm's length negotiations are not necessarily possible.  
6 And the procedures are designed to help that along. And  
7 so we strongly believe that Mr. Phillips' post-employment  
8 contracts when he is not an employee, it is not a part of  
9 his retirement compensation, it is not a part of his  
10 normal compensation, that it is a related-party  
11 transaction within the meaning of the statute.

12 THE COURT: Now, the fiduciary duty argument is  
13 interesting, I think, from their perspective. It is when  
14 you are overtly -- I wouldn't say adverse to the  
15 organization, but you are, you know, you're contracting on  
16 an individual level with the company. Do fiduciary duties  
17 apply to that situation?

18 MR. THOMPSON: They do, Your Honor. And it is a  
19 two-part answer. If Your Honor agrees with us that it is  
20 a related-party transaction, then Mr. Phillips had a  
21 statutory and an NRA policy duty to inform the appropriate  
22 board committee, in this case the audit committee, of the  
23 transaction, in writing. And he did not do that here.

24 Even if it is not a related-party transaction,  
25 Mr. Phillips was the treasurer of the NRA at the time. He

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1 was the one charged with overseeing the NRA's financial  
2 policies. And he testified that he knew that his  
3 agreement didn't go through the normal policies required  
4 for contracts of this magnitude. There are various  
5 sign-offs required and a business case analysis. None of  
6 that happened.

7 And the NRA's policies also require you to  
8 report known violations of policies.

9 So in both instances he breached his fiduciary  
10 duties regardless of whether or not he was the one  
11 negotiating the contract on his own behalf. And --

12 THE COURT: But assigning -- so you are saying  
13 that the breach of fiduciary duty was the procedural  
14 aspect, not the substantive terms of the -- of the  
15 consulting arrangement?

16 MR. THOMPSON: Your Honor, we do take the  
17 position that he had a duty of loyalty to the organization  
18 that included being fair to the organization. And that  
19 the terms of this agreement, like the terms of many of the  
20 other agreements that we allege Mr. Phillips facilitated  
21 over his 25 years at the NRA, were unfair to the NRA and  
22 wasted corporate assets.

23 THE COURT: Right. Well, I am talking about  
24 this one in particular. Because the tricky thing about  
25 applying fiduciary duties in this setting is, it typically

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## Proceedings

1 means you have to put the entity's interest above your  
2 own. And the defense makes the, you know, sort of logical  
3 argument, how can that work in a situation where you are  
4 literally negotiating your own post-employment  
5 compensation.

6 MR. THOMPSON: And I think the answer, Your  
7 Honor, is the procedural safeguards that Mr. Phillips was  
8 required to follow the procedures for dealing with these  
9 kind of contracts, whether it was a related-party  
10 transaction, or just a simple conflict of interest, or  
11 normal employee compensation. Because all of that is  
12 supposed to be done by independent parties who are able to  
13 create the arm's length arrangement that was not present  
14 here.

15 THE COURT: Okay. All right. Thank you.

16 MR. THOMPSON: With respect to HomeTelos very  
17 briefly, Your Honor.

18 You know, Mr. Farber is correct that whether or  
19 not Ms. Richards was a significant other at the time the  
20 contract was entered into at the end of the day doesn't  
21 matter, because the NRA's policies clearly say that  
22 anything that creates even the appearance of a conflict of  
23 interest, must be appropriately approved. And that didn't  
24 happen here. Multiple NRA witnesses have testified that  
25 they believed Ms. Richards to be Mr. Phillips' significant

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## Proceedings

1 other at some point other another. And the head of the  
2 audit committee testified that the contract should have  
3 been disclosed to the audit committee before it was  
4 entered into, rather than the ratification process that  
5 they allege.

6 THE COURT: What is the statutory claim that you  
7 make with respect to the HomeTelos contract? It is not  
8 under 715 for related party?

9 MR. THOMPSON: Correct, Your Honor. It is only  
10 a breach of fiduciary duty claim under 720 and the EPTL.

11 THE COURT: Does the 720 automatically  
12 incorporate any breaches of bylaws and the like? Does  
13 that automatically become a violation of 720?

14 MR. THOMPSON: Yes, Your Honor. Violations of  
15 the entities' procedures and policies are breaches of  
16 fiduciary duty. As Your Honor actually held in connection  
17 with the second round of motions to dismiss, upholding  
18 certain of our claims against the other individual  
19 defendants for breaches of their fiduciary duty.

20 And with respect to the damages element that  
21 Mr. Phillips argues is absent, I have a few responses, and  
22 then I'll sit down.

23 First, we do allege, and there are issues of  
24 material fact as to whether or not NRA sued for damages.  
25 HomeTelos was a real estate technologies company that the

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## Proceedings

1 NRA hired to build a website for them to the tune of  
2 \$1.3 million. There isn't evidence that they received  
3 valuable services in connection with that.

4 And furthermore, Mr. Phillips is confusing our  
5 breach of fiduciary duty claim with a common law one.  
6 When it is a statutory claim under 720 of the EPTL --

7 THE COURT: Well, I mean, this is a summary  
8 judgment motion. And there has been discovery up and  
9 down, I assume, on this. Is there particular evidence  
10 that would suggest that they didn't provide value or they  
11 didn't do as good a job as somebody else might have done?

12 MR. THOMPSON: What we know, Your Honor, is that  
13 there was no bidding process that was done for this  
14 contract, which is also a violation of the NRA's  
15 procedures. So we don't know what the market value of  
16 these services was. We just know that that particular  
17 aspect of the policy was violated.

18 THE COURT: But if you were bringing -- and you  
19 are bringing a claim for damages, wouldn't -- I think you  
20 are anyway. Wouldn't you normally have to show that and  
21 say, well, we paid 1.3, the market value is 800,000,  
22 therefore we were harmed?

23 MR. THOMPSON: Your Honor, what we are bringing  
24 a claim for is accounting under 720. And the accounting  
25 requires Mr. Phillips to come forward and justify the

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## Proceedings

1 behavior once we have demonstrated a breach of his  
2 fiduciary duties.

3 THE COURT: So, you think that it is -- to state  
4 a claim you can talk about the procedural problems, the  
5 lack of a bidding process, and that it is for the  
6 accounting, to sort out whether it actually mattered?  
7 Because it is possible you could have gotten a great deal  
8 in a situation where you don't have any bidding. I am not  
9 saying that's what happened here. But we would just defer  
10 the injury issue to the accounting?

11 MR. THOMPSON: Yes, Your Honor. That it is  
12 Mr. Phillips' requirement to come forward and say why this  
13 was fair market value in the best interest of the NRA.

14 THE COURT: Now, I noted this back and forth in  
15 the briefs. And I don't want to get -- go down a dark  
16 hole here, but in terms of Judge and jury, I am aware that  
17 the statute does have a some broad provisions talking  
18 about this as a jury trial. Do you envision that a jury  
19 would be overseeing all aspects or deciding all aspects of  
20 this case? At some point we are going to have to figure  
21 out who does what here. And I assume the jury is not  
22 doing the accounting, which is a whole separate procedure.

23 MR. THOMPSON: Your Honor, one of my colleagues  
24 today is going to be speaking about that at length. So I  
25 would like to defer to her, it is a little above my

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## Proceedings

1 paygrade.

2 THE COURT: I would defer too. I would defer  
3 also. Unfortunately I have nobody to defer to. Okay.

4 All right. Thank you.

5 MR. THOMPSON: Thank you.

6 MR. FARBER: May I respond briefly, just a  
7 couple of things?

8 THE COURT: Yes.

9 MR. FARBER: So, the Attorney General's Office  
10 made the point that the guidance they issued applies to  
11 officer and employee compensation, and that makes sense  
12 because -- that you would take officer compensation out of  
13 consideration, because there is a separate rubric for  
14 dealing with it.

15 Notice they didn't talk about employee  
16 compensation. And what Mr. Phillips is doing in entering  
17 into a post-employment consulting contract, obviously he  
18 is not going to be an officer after he retires. That is  
19 the piece that is akin to being an employee. And they  
20 don't offer any basis -- the logic that they are saying is  
21 their guidance, makes sense for not considering officer  
22 and employee compensation, because there is a separate  
23 procedure that officers and directors have to go through.  
24 But that's not the logic that underlies it. Because it  
25 applies to every employee.

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1 THE COURT: That kind of ignores the substance  
2 of the related-party transaction. The point is, when it  
3 was being negotiated he was a senior officer. It may  
4 relate to a period later down the road, but the harm --  
5 the concerns about the transaction are that it was  
6 negotiated at a time when he was an insider. So, the fact  
7 that it relates to, you know, consultant after he is  
8 already resigned, I am not sure that that really holds  
9 together as a distinguishing factor.

10 MR. FARBER: The point I am making is that the  
11 guidance talks about how the related-party transaction  
12 does not apply to negotiations of officer or employee  
13 compensation. And their response to that is to say, well,  
14 but there is a separate rubric that you are covered. But  
15 that rubric doesn't encompass employee compensation.  
16 That's not what that guidance is getting at. Because  
17 employees are not subject to that separate approval  
18 process. And so the reason behind it goes back, it is  
19 just a common sense one, that the, you know, arm's length  
20 negotiations that one has in the employee context are not  
21 meant to be covered.

22 THE COURT: Well, an employee typically wouldn't  
23 be a related-party anyway though. Right? I mean you have  
24 to be a director or officer or key person.

25 MR. FARBER: Well, you can be a key person as an

mlp

## Proceedings

1 employee. I mean as CFO you may not be a statutory  
2 officer, you can be a high ranking member of the  
3 organization, but you are not a statutory officer.

4 THE COURT: Okay. I understand.

5 MR. FARBER: The other point I would like to  
6 make, they are criticizing Mr. Phillips for not, himself,  
7 reporting this to the audit committee. If he were the  
8 person who were dealing with the audit committee on his  
9 own contracts, that would be a separate area they would be  
10 criticizing him for. There are other NRA officials who  
11 were taking on that role in the context of his consulting  
12 agreement, the president the vice president. The notion  
13 that he would be the one who would be coming forward and  
14 presenting for his approval his own contract, in fact I  
15 think there are other parts of this complaint that  
16 criticize the NRA for doing exactly that. When you  
17 have -- when you are acting at arm's length you are not  
18 the person who is going to go and present your own  
19 agreement to an audit committee or to anybody else in the  
20 organization for approval.

21 THE COURT: Okay.

22 Let's move to Mr. Powell's motion.

23 MR. ITKIN: Uri Itkin from Akin Gump.

24 Let me know when you are ready for me, Judge.

25 THE COURT: I am ready.

mlp



## Proceedings

1 MR. ITKIN: Okay. I represent Josh Powell. And  
2 as we said in our motion, Judge, he is not really supposed  
3 to be in this case. He is a supporting player. There is  
4 a huge cast of characters, very important people. He was  
5 reporting to them.

6 He is accused, really at the heart of all of  
7 this after all the discovery that barely even involved  
8 him, there is no expert discovery related to him, barely  
9 any fact discovery related to him. The two things that  
10 the AG really accuses Powell of are mischarging expenses;  
11 and two, related-party transactions involving companies  
12 that the NRA already had a relationship with that had  
13 hired, one, his wife at some point as a consultant, and  
14 the second one, his father as a photographer for certain  
15 events.

16 Most of these claims fail. And at most,  
17 whatever the AG can recover from them on the damages side  
18 can really be no more than the \$54,000 of improper  
19 expenses that the NRA found that he charged after  
20 investigation.

21 I want to start with a legal claim made by the  
22 AG, trying to clawback his compensation. Now, there is a  
23 claim for, I guess, breach of fiduciary duty related to  
24 the charged compensation under Section 715 of the N-PCL.

25 And I think what we are heard here today already

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## Proceedings

1 confirms our argument. The Attorney General has issued  
2 guidance saying that compensation, officer director  
3 compensation subject to Section 715, it has to go through  
4 board approval. It has to demonstrate other requirements,  
5 reasonableness and so forth.

6 Well, when we pressed the AG in our motion, what  
7 gives them the right to clawback his compensation under  
8 720, all they could muster is a footnote saying, well,  
9 there is this faithless servant doctrine. That's under  
10 common law, Your Honor. And you already ruled in this  
11 case and the Court of Appeals has ruled on this in *Grasso*,  
12 that the Attorney General can't fashion theories of  
13 recovery under the common law.

14 THE COURT: That's not quite what *Grasso* says.  
15 It says you can't use a common law claim that is  
16 inconsistent with the statutory regime.

17 MR. ITKIN: Correct. This is by definition  
18 inconsistent with a statutory regime, because under the  
19 faithless servant doctrine all you need to show is that  
20 someone performed some wrongdoing at some point. And then  
21 you can be able to clawback their entire compensation  
22 during that period of time. So, for example, if someone  
23 was stealing from a company not only are they supposed to  
24 be held accountable for the money that they stole, the  
25 company can also clawback their compensation that was paid

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## Proceedings

1 to them during that time. It serves to disincentivize  
2 them or any person from doing bad things to the company,  
3 because they would effectively have been fired had that  
4 conduct --

5 THE COURT: To be fair, the faithless servant  
6 doctrine usually comes up in a very different kind of  
7 context. I often see it when an employee is essentially  
8 starting to feed information to a competitor, working for  
9 their own account instead of for the company. And you  
10 know, the idea here is, you know, that that's what your  
11 salary is for. And if you are going to be working for  
12 somebody else you shouldn't get your salary. That kind of  
13 thing. This is a different kind of a fit.

14 I understand your point.

15 MR. ITKIN: Right, Judge. And I think you agree  
16 with me that in the context you see it, which sounds  
17 pretty egregious, there is still no -- there is zero  
18 consideration of whether the salary was approved by the  
19 board, whether it is reasonable, none of that. That's  
20 required by Section 715.

21 THE COURT: Just to be clear, I mean, you know,  
22 at some point they are alleging, I think, a conduct  
23 bordering on, sort of, theft from the company or  
24 misappropriation of -- I am not hinting that the faithless  
25 servant doctrine couldn't be applicable in that setting,

mlp

## Proceedings

1 if that's proven that, you know, somebody is siphoning  
2 money away from the company. I am not ruling anything at  
3 this point. But that's the point here. And in fact even  
4 the company is opposing your claim here.

5 MR. ITKIN: Well, that's an interesting one. I  
6 was a little surprised at that motion. Because we are not  
7 being sued by the company, at least as far as I know. So  
8 if they sued us I think we would talk about the faithless  
9 servant doctrine in that context.

10 But what I am saying is, I don't think the AG  
11 has the ability to rely on a common law doctrine of  
12 faithless servant in its claims here. If it seeks to  
13 clawback Mr. Powell's compensation, it has to do so under  
14 Section 715. And it has to comply with certain  
15 requirements under that section. It has to bear the  
16 burden of proof of complying with those requirements. It  
17 does not do that here. It cannot do that here under the  
18 faithless servant doctrine. It is two different things.  
19 That's what I am saying. And that's why I thought that --  
20 and I submit, that *Grasso* is directly on point, and your  
21 ruling in this case is directly on point.

22 Now I want to talk about the related-party  
23 transactions for a moment as well. So --

24 THE COURT: That seems to be the main focus of  
25 your motion. You wanted partial summary judgment on those

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## Proceedings

1 two transactions.

2 MR. ITKIN: Correct. But I also think that the  
3 salary clawback is superfluous here, and that should be  
4 dismissed.

5 THE COURT: Okay.

6 MR. ITKIN: Now, the related-party transactions,  
7 like I said, there were two. And both were approved.  
8 Both were approved and ratified by the NRA. There is a  
9 document attached as Exhibit 24 to our motion. I don't  
10 know if you have it, Judge. I am so used to electronic.

11 THE COURT: I have the whole docket.

12 MR. ITKIN: We are going into the 22<sup>nd</sup> century  
13 here, out of the 21<sup>st</sup>.

14 THE COURT: I didn't think we were talking that  
15 long.

16 MR. ITKIN: I am saying technology wise. We  
17 have been in the dark ages for a long time with all of the  
18 paper.

19 So anyway, there is two transactions, and this  
20 is Exhibit 24 is --

21 THE COURT: Before we go too deep into -- if you  
22 are in the board ratification zone of the statute, to  
23 establish a defense under ratification under the statute  
24 you have to -- the defendant has to show that the  
25 transaction was fair, reasonable and in the corporation's

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## Proceedings

1 best interest. Right?

2 MR. ITKIN: Well, I am not sure about that. I  
3 think that all the defendant has to show is that it was  
4 ratified and found to be that.

5 THE COURT: Well, are we looking at 715(j)?

6 MR. ITKIN: Yes.

7 THE COURT: So it says: In an action by the  
8 Attorney General with respect to a related-party  
9 transaction not approved in accordance with the earlier  
10 paragraphs, which means approved in advance, it shall be a  
11 defense to a claim of violations of these provisions. And  
12 then it has two things:

13 One, that the transaction was fair, reasonable  
14 and in the corporation's best interest at the time the  
15 corporation approved it.

16 And two, prior to receipt of any request for  
17 information by the Attorney General regarding the  
18 transaction, the board has ratified it by finding in good  
19 faith that it was fair, reasonable, et cetera.

20 Now, if it read the way you were reading it, you  
21 wouldn't have needed that first part about having to show  
22 that it actually was fair, reasonable and in the  
23 corporation's best interest. You would just need the  
24 second one.

25 MR. ITKIN: Judge, I see where you are going. I

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## Proceedings

1 don't see the language that you are talking about either.  
2 Because it doesn't say the defendant has to show.

3 THE COURT: It says it shall be a defense if.

4 MR. ITKIN: Right. So I mean the fact that the  
5 NRA audit committee approved this -- both of these  
6 transactions as fair, reasonable and in the best interest  
7 of the NRA, and ratified them, I mean I think is --

8 THE COURT: You are saying that if the company  
9 does that, then that's a complete defense.

10 MR. ITKIN: I mean, that's how I read the  
11 statute. If the company hadn't done that and we come  
12 back, and I agree we have to show that, but it has already  
13 been done. And I am not even sure that --

14 THE COURT: Well, what does the first subsection  
15 mean then?

16 MR. ITKIN: I mean --

17 THE COURT: Why do they have two?

18 MR. ITKIN: It just means that the transaction  
19 did have to -- did have to be found fair, reasonable and  
20 in the best interest of the NRA.

21 THE COURT: That's what the second one says, it  
22 had to have been found by the board. But the first  
23 section says it has to actually be fair, reasonable.

24 MR. ITKIN: The second one says it has to be  
25 ratified, which happened independently.

mlp

## Proceedings

1                   And the second one -- the first one talks about  
2                   the fair, reasonable and in the best interest of the NRA.

3                   And I am looking at the audit committee minutes  
4                   that say that exact thing.

5                   THE COURT: Okay. I understand your point.

6                   MR. ITKIN: And Judge, I am not even sure that  
7                   we get to subsection (j) because, and I know you said this  
8                   earlier but I want to push back on this point, I am not  
9                   sure that the NRA's finding that the -- that these  
10                  transactions were, in fact, reasonable and fair and in the  
11                  best interest of the NRA have to be at the time of the  
12                  transaction.

13                  THE COURT: I think that's the whole point of  
14                  (j). Isn't it? Part (a) of this provision says that you  
15                  can't enter into a related party transaction unless it  
16                  is -- it is determined by the board to be -- or an  
17                  authorized committee, to be fair, reasonable and in the  
18                  corporation's best interest at the time of that  
19                  determination. At least it seems to me, anyway, that they  
20                  are distinguishing between a contemporaneous approval and  
21                  one done after the fact. And they are being, at least if  
22                  you -- there has to be some reason why the drafters of  
23                  this legislation added this ratification section. There  
24                  is a different set of possibilities when it is done after  
25                  the fact. Right?

mlp



## Proceedings

1 MR. ITKIN: I understand what you are struggling  
2 with. I was thinking through the same thing yesterday.

3 So if you look at (b), when it talks about a  
4 transaction, related-party transaction with a substantial  
5 financial interest, the legislature made it very clear  
6 that the determination has to happen, if you look at  
7 (b) (1) prior to entering into the transaction.

8 Now, if you look at (a), there is no such  
9 language there. It just talks about, at the time of such  
10 determination, it doesn't say when that determination had  
11 to be made. And I think that (j) was included, and I  
12 don't know why -- I haven't seen the legislative history.

13 THE COURT: Why wouldn't this be a transaction  
14 in which a related party has a substantial financial  
15 interest?

16 MR. ITKIN: I don't think that's been alleged,  
17 and I don't think the evidence supports that. I mean,  
18 this is a consultant that had ongoing -- or a large  
19 consulting company or, I am not -- scratch large.

20 THE COURT: I mean, I read the allegations are  
21 that, I think, that the NRA increased its payment to the  
22 consultant by the exact amount of the amount that his wife  
23 was going to be paid or something along those lines?

24 MR. ITKIN: You know, maybe. But again, she is  
25 a consultant. She is a consultant at this company that's

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1           been employed by or been used by the NRA before. She was  
2           there during and after. And that happened with both of  
3           these consulting companies. So to say that Mr. Powell had  
4           substantial financial interest in these transactions, I  
5           think would be a stretch. And I didn't hear that argument  
6           from the other side in the briefs.

7                        So to go back to (a), this just requires the  
8           time of such determination, never said it had to be at the  
9           time of the transaction. And the NRA in the minutes, the  
10          audit committee goes through that and says, yeah, you know  
11          what, there is a bunch of people who didn't say this at  
12          the time, but we went back and considered all of the facts  
13          and they approved and ratified the transactions  
14          nonetheless.

15                      Now, to answer your question about (j), I think  
16          (j) was added when there was no determination. Right? So  
17          it is a defense, if the company doesn't make that  
18          determination at the time, there is still a defense for  
19          them to say, well, it was ratified later on, and you have  
20          to go through all of these factors.

21                      THE COURT: Okay.

22                      MR. ITKIN: And look, on the last point, the  
23          expenses. So, what happened with the expenses is that, as  
24          I think you gleaned from all of the allegations, the NRA  
25          had a pretty liberal expense reimbursement policy. There

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## Proceedings

1 are folks charging expenses, getting them reimbursed, many  
2 of them were reimbursed. In the case of Mr. Powell there  
3 is an investigation. And there were certain things  
4 identified by accountants and forensic accountants hired  
5 to participate in that investigation. Out of that  
6 investigation the NRA determined that he had mischarged  
7 \$54,000 of expenses. That's it. That's the extent of  
8 this. There is no --

9 THE COURT: That's what the NRA determined?

10 MR. ITKIN: That's what the NRA determined.

11 THE COURT: Is the AG limited to what the NRA  
12 determined?

13 MR. ITKIN: They would not be if they had done  
14 any of their own investigation or any of their own  
15 discovery. If they had experts of their own on that  
16 investigation. But they don't. All they do is just rely  
17 on the NRA. And this is now summary judgment, as you said  
18 before. If this was a complaint, if this was a motion to  
19 dismiss, that would be one thing. But we are now at  
20 summary judgment. So this gentleman is going to have to  
21 go to trial and on what facts. And the facts are simply  
22 that the NRA did an investigation, concluded that \$54,000  
23 of expenses, of all of the expenses that are charged, were  
24 improper. Okay. Then they are stuck with that, the AG is  
25 stuck with that. That's our point, Your Honor.

mlp

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1 THE COURT: So are you seeking to dismiss it or  
2 just limit it to a certain number?

3 MR. ITKIN: Limit it to that number. And by the  
4 way, this number is public. I mean, this was something  
5 that was disclosed in the NRA's filings to the AG and in  
6 the Form 990. I realized last night as I was looking at  
7 it, that the form we submitted, the Form 990 from 2019  
8 that we submitted, was not the right version. There is  
9 apparently a later version that does talk about this. I  
10 have a copy for you, if you would consider it. I have a  
11 copy for counsel. It may not be a huge issue right now  
12 but I want to make sure that you have it, if that's okay.

13 (Handing.)

14 THE COURT: Thank you.

15 All right. Attorney General?

16 MR. MENDELSON: Alexander Mendelson.

17 THE COURT: Good morning.

18 MR. MENDELSON: Good morning, Your Honor.

19 Your Honor, the plaintiff and the NRA have not  
20 seen eye to eye on much in this case, but here we agree  
21 there are triable issues of fact that preclude summary  
22 judgment in Mr. Powell's favor. The lengthy  
23 counterstatements --

24 THE COURT: So mark the transcript on that spot.

25 MR. MENDELSON: The lengthy counterstatements

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## Proceedings

1 of material fact that were submitted by both plaintiff and  
2 the NRA and Powell's lengthy replies to those  
3 counterstatements, underscore the need for a trial on  
4 those issues.

5 And contrary to Mr. Powell's objections, he does  
6 belong in this lawsuit. During the relevant time period  
7 he was an officer and an ex-officio director and a key  
8 person of the NRA. And he was an active participant in  
9 the NRA's culture of mismanagement and self-dealing and  
10 private endearment.

11 And just turning to the argument that-- sorry.

12 Turning to Mr. Powell's most recent argument  
13 regarding his expenses, that \$54,000 that he is talking  
14 about, that was just American Express charges, and it is  
15 just the tip of the iceberg. As we have laid out in our  
16 submission, there are -- I don't want to go too deeply  
17 into the subject of certain pending motions to seal, but  
18 there is evidence that we put forward suggesting or  
19 indicating that his liability far exceeds just the  
20 \$54,000.

21 In addition to that, Your Honor, Mr. Powell  
22 referenced the NRA's liberal reimbursement policy. I am  
23 not sure that the policy was necessarily liberal, but it  
24 just wasn't followed.

25 Turning to -- in addition, Mr. Powell argues

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## Proceedings

1 that Lisa Supernaugh and Craig Spray, Lisa Supernaugh was  
2 his assistant, Craig Spray became the CFO after Defendant  
3 Phillips left, he argues that they reviewed his expenses  
4 and therefore he can't be liable for a breach of fiduciary  
5 duty. But Ms. Supernaugh, who was his direct report,  
6 testified that she only did administrative work on the  
7 expenses. And she testified that she would do whatever  
8 she had to do in order to make sure that her boss was  
9 going to be reimbursed.

10 And Mr. Spray, once he became CFO and he  
11 inherited the responsibility to review the expenses, he  
12 ultimately determined that there were improprieties going  
13 on, investigated them, and he -- the NRA now alleges  
14 that's why Mr. Powell was terminated.

15 And essentially there are just questions of fact  
16 regarding Mr. Powell's expenses, regarding their propriety  
17 and how much he owes. So he is not entitled to summary  
18 judgment on that issue.

19 Briefly with respect to the faithless servant  
20 issue. The faithless servant doctrine is not inconsistent  
21 with the statutory regime. Under section 720 the language  
22 of the statute indicates that the faithless servant  
23 doctrine would be available as a remedy to account for the  
24 acquisition by Mr. Powell of the corporate assets that he  
25 acquired through his violations of his duties.

mlp

## Proceedings

1 THE COURT: Which violations are we talking  
2 about now, the expenses or the related-party transactions?

3 MR. MENDELSON: It would be under both. The  
4 related-party transactions, his failure to disclose, his  
5 clear conflicts of interest would also be separate  
6 breaches of fiduciary duty and violations of the NRA's  
7 policies, in addition to being related-party transactions.

8 THE COURT: And from your -- well, maybe you  
9 will defer again, but does the jury decide things like  
10 faithless servant and what the proper scope of that is?

11 MR. MENDELSON: Your Honor, if it was above my  
12 colleague's paygrade, it is certainly above mine. I  
13 apologize.

14 THE COURT: All right. Well, we will hit the  
15 government surface level at some point.

16 MR. MENDELSON: It is not inconsistent with  
17 statutory regime. If you look to section 112(a)(10) of  
18 the N-PCL, that provides that in related-party situations,  
19 any appropriate remedy available in law or equity is  
20 available to the Court to -- that would include faithless  
21 servant doctrine. And it is just a traditional remedy for  
22 breaches of fiduciary duty.

23 In addition the EPTL claims would also bring  
24 in --

25 THE COURT: The EPTL?

mlp

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1 MR. MENDELSON: The Estates Powers and Trusts  
2 Law. That would also bring in the faithless servant  
3 doctrine as well.

4 THE COURT: Okay.

5 MR. MENDELSON: Thank you, Your Honor.

6 THE COURT: And on the -- we talked for a little  
7 bit with counsel about the ratification defense. Do you  
8 read it -- how do you read it? Do you read it that if  
9 you -- all you have to show for the ratification defense  
10 is the ratification?

11 MR. MENDELSON: No, Your Honor.

12 The ratification defense in section 715(j) has  
13 very specific, stringent requirements that a defendant  
14 would have to show in order to satisfy those requirements.  
15 And there are issues of fact here that preclude that  
16 finding on summary judgment.

17 THE COURT: Just to put a fine point on it, do  
18 you think that he would have to show not only the  
19 ratification with a finding that the transaction was fair,  
20 reasonable, et cetera, but also separately prove that the  
21 transaction was fair, reasonable and in the corporation's  
22 best interest?

23 MR. MENDELSON: Um, Your Honor, I think that he  
24 would need to separately prove that, yes. Or he would at  
25 least need prove that the audit committee made that

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1 finding properly.

2 THE COURT: So that would be enough, if he says  
3 that the audit committee made that finding, that would be  
4 enough?

5 MR. MENDELSON: Not just that they made the  
6 finding, but that they properly did so. That there needs  
7 to be some inquiry into the circumstances.

8 THE COURT: That actually raises a question that  
9 I intended to ask. There is a flowing through the  
10 complaint, the papers, there is a certain amount of  
11 scepticism about the functioning of the board and the  
12 board committees. Is that any part of the claim here,  
13 that with respect to ratification and the like that there  
14 was anything about the board or its committees that would  
15 undermine ratification as a defense?

16 MR. MENDELSON: Yes, Your Honor. It speaks to  
17 the proper functioning of the board and whether they were  
18 reviewing the documentation that would be necessary to  
19 actually ratify these -- these transactions. Whether they  
20 were functioning properly to begin with.

21 And as we have laid out in our submission,  
22 current president of the NRA, the former audit chair of  
23 the NRA, he testified that he couldn't remember looking at  
24 documentation underlying the transaction with Mr. Powell's  
25 wife. And he testified that he didn't look at underlying

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## Proceedings

1 documentation with respect to the transaction with  
2 Mr. Powell's father where he was paid over \$100,000 over a  
3 couple of years.

4 THE COURT: All right. Thank you.

5 Anything further?

6 MR. ITKIN: Judge, I have a few words. If you  
7 want to move this along I can stand down.

8 THE COURT: It works for me.

9 MR. ITKIN: If you will indulge me, I will take  
10 it.

11 Look, on the faithless servant doctrine I didn't  
12 see anything in the Attorney General's brief about the  
13 EPTL. And I also don't see anything in section 715  
14 entitling the Attorney General to take advantage of that  
15 doctrine. Section 715 talks about compensation in the  
16 context of board approval and as a related-party  
17 transaction has to be reasonable to the company. In fact  
18 I submit, the AG cannot assert that common law doctrine  
19 because it is in conflict with those requirements.

20 THE COURT: And what about the reference to the  
21 statutory provision which says that, at least in the  
22 related party context, equitable remedies are available.

23 MR. ITKIN: They might be available, but you  
24 still have to comply with the other burdens of proof in  
25 that section. So they are creating a novel doctrine going

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1 outside of the statutory regime, in my view.

2 THE COURT: Well, statutory regime refers you to  
3 other equitable principle, at least in this narrow  
4 respect.

5 MR. ITKIN: Judge, that would be a huge elephant  
6 going through a mouse hole. If you think about that, that  
7 means the entire provision in *Grasso* or the entire Court  
8 of Appeals decision in *Grasso* doesn't really mean  
9 anything, because then they could squeeze through any sort  
10 of equitable relief that they want without complying with  
11 that section.

12 THE COURT: Well, there is a difference -- I  
13 mean, I don't want to go too far down this hole, but it is  
14 a difference between liability and relief. *Grasso* was  
15 about you can't create a claim where liability can be  
16 established, short of the conduct requirements of the  
17 statute.

18 This one is, once you find a violation, if you  
19 do, the Court has flexibility with respect to relief.

20 MR. ITKIN: To find the violation, Judge, they  
21 would have to show that this compensation was not approved  
22 by the board. They, in fact, completely disclaim that,  
23 and said they are not -- they are not contesting that his  
24 compensation was reasonable, and they are not contesting  
25 that it wasn't approved by the board. So they cannot

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1 possibly show a violation. They say that in their brief  
2 very clearly. And what the Court of Appeals said is, you  
3 can't come up with theories of recovery outside of the  
4 statutory regime. And I believe Your Honor quoted them in  
5 your motion to dismiss decision in this case. It is not  
6 that they are not going to show that, but they have  
7 admitted that they are not going to.

8 THE COURT: Okay.

9 MR. ITKIN: So they can't get to the faithless  
10 servant doctrine with those admissions.

11 THE COURT: I am going to take a short break  
12 before we turn to the --

13 MS. CONNELL: We have one quick statement, Your  
14 Honor.

15 THE COURT: Sure.

16 MR. MENDELSON: Very briefly, Your Honor.

17 We don't take issue with the overall amount of  
18 compensation that Mr. Powell was paid in salary and base  
19 compensation. But we do take issue with the amounts he  
20 was paid beyond that in terms of improper expenses, sort  
21 of thing. In addition, the burdens of proof aren't  
22 changed. Mr. Powell still has the defenses that are  
23 available in a section 720 claim, for example the section  
24 717 defense. So, the burdens of proof haven't shifted and  
25 *Grasso* doesn't apply here.

mlp

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1 THE COURT: Okay. Thank you.

2 Did the NRA want to speak on this motion?

3 MS. EISENBERG: In the interest of moving things  
4 along, I don't think we need to unless you have questions.

5 THE COURT: No, that's fine.

6 We will take a short break because this next one  
7 will take a while, and I want Michele to rest. We will  
8 see you in a second.

9 (Pause in the proceeding.)

10 COURT OFFICER: Come to order.

11 THE COURT: Have a seat.

12 So my plan, just for the schedule, is to have  
13 the argument go no later than 12:30, if it ends earlier  
14 that's fine, and then take a break. I have you scheduled  
15 through to 3:00. And that is designed so that if I can  
16 give rulings on any of these motions today, I will do it  
17 after lunch and have you come back and do that.

18 If I can't and I have to take it under  
19 submission, I'll do that. But I would like the argument  
20 portion to end 12:30, 12:40. That doesn't mean you have  
21 to use all of those minutes, but they are yours if you  
22 want them. Okay?

23 So this is the Attorney General's motion to  
24 dismiss four or 5,000 affirmative defenses.

25 MR. SHIFFMAN: Good morning, Your Honor.

mlp

## Proceedings

1 Steven Shiffman, Assistant Attorney General.

2 Actually it is not four or 5,000, although there  
3 is a mountain of paper here, which there is no dispute  
4 about that. We think that the issues to be decided on  
5 this motion are relatively narrow. And they are not only  
6 relatively narrow, they are issues that you already  
7 decided for the most part. They are issues that the  
8 defenses are at the real heart of our motion.

9 And those are defenses that relate to  
10 allegations of bias here. Those are issues that Your  
11 Honor decided when you decided our motion to dismiss the  
12 NRA's counterclaims last year. That decision not only is  
13 law of the case here, but the logic of that decision calls  
14 for the same result with respect to the affirmative  
15 defenses sounding in bias. And those, just to be clear,  
16 are the retaliation affirmative defenses, the selective  
17 prosecution affirmative defenses, unclear hands and bias.  
18 They are all -- we put them all in basically the same --

19 THE COURT: How about estoppel? Is estoppel the  
20 same?

21 MR. SHIFFMAN: Estoppel is, I think, a different  
22 category. We are certainly moving to dismiss the estoppel  
23 laches affirmative defenses.

24 THE COURT: Laches is -- they all use -- some of  
25 these them use slightly different wording.

mlp

## Proceedings

1 MR. SHIFFMAN: Yes.

2 THE COURT: At least in my listing of -- they  
3 have bias, selective enforcement, retaliation, political  
4 speech, selective prosecution, unclean hands.

5 MR. SHIFFMAN: Mm-Hm.

6 THE COURT: Those are all what you count as the  
7 bias defenses.

8 MR. SHIFFMAN: That's correct, Your Honor.

9 And I put estoppel in a separate category with  
10 laches, it is usually tied together in their affirmative  
11 defenses. I also don't really know what -- enough about  
12 what they are claiming as to the estoppel defenses here,  
13 other than with respect to laches, to put it in any other  
14 category. So we will get to it a little later.

15 I don't think anybody has said what we have done  
16 that should estop the People of the State of New York as  
17 opposed to anything even that the Attorney General has  
18 done. And I think that one important distinction for the  
19 Court and everybody to keep in mind, is that there is a  
20 distinction between the Attorney General and the People of  
21 the State of New York. The Attorney General brings these  
22 claims on behalf of the People of the State of New York.  
23 And that's very important here because it goes to a few  
24 different things. And primarily it goes also to the issue  
25 of whether or not this action is one in the public

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## Proceedings

1 interest. This action is one in the public interest  
2 because of the nature of the claims asserted here.

3 The nature of the claims asserted are to enforce  
4 the charities laws here: The Not-for-Profit Corporation  
5 Law, the Estates Powers and Trusts Law; and the Executive  
6 Law.

7 Those are claims that are to benefit the people  
8 and to ensure that the charitable assets are properly  
9 administered. Whether or not anything that the Attorney  
10 General has done or any bias that is alleged here, that  
11 does not affect anything with respect to the validity or  
12 the merits of the claims that were brought in this  
13 complaint. And that's where we believe the Court should  
14 focus here.

15 As for the bias defenses, these are claims that  
16 all were decided in the counterclaim motion to dismiss.  
17 And that decision on retaliation is law of the case here,  
18 but also it is the same logic. The NRA argues that that  
19 claim was only -- the retaliation decision in this -- with  
20 respect to the counterclaims, only dealt with the  
21 initiation of the investigation. But actually, Your  
22 Honor, in looking at that motion, look to the fruits of  
23 the investigation and whether or not the complaint here  
24 stated valid claims. And Your Honor ruled that it in fact  
25 did state valid claims. Your Honor also has ruled

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## Proceedings

1 numerous times on the merits with respect to motions to  
2 dismiss those claims.

3 So we have claims here that have been determined  
4 to be legally viable. And by the logic of the  
5 counterclaims decision, that means that the NRA cannot  
6 show that any alleged bias was a but-for cause of  
7 retaliation. And for those -- we think that same logic  
8 applies here to a complaint that arose out of a justified  
9 investigation. Logic simply demands that that be the  
10 case.

11 In addition, with respect to the selective  
12 prosecution claims, their allegations as to selective  
13 prosecution defenses are even weaker than they were on the  
14 counterclaim motion. The NRA does not identify any  
15 comparators that it claims were treated differently.

16 So there is the test, as Your Honor laid out in  
17 the counterclaim decision that requires both an evil eye,  
18 and an uneven hand. Here they don't even attempt to show  
19 anyone who is a comparator that they claim is different.  
20 In fact, in their papers they refer to some of the same  
21 comparators that they referred to earlier. And they note  
22 in that, that the comparators were ones where dissolution  
23 wasn't sought, but claims for breaches of fiduciary duty  
24 for restitution would be sufficient. And that's the exact  
25 type of claims that we are bringing in the complaint now.

mlp

## Proceedings

1 So we think those selective prosecutions fail because of  
2 the inability to show any -- anybody who was treated  
3 differently.

4 And both of those two decisions also impact the  
5 unclean hands defenses. Which fail for two independent  
6 reasons. The first is in order to show an unclean hands  
7 or to properly state an unclean hands defense against the  
8 government, you need to show two things:

9 You need to show a constitutional injury, and  
10 that resulted from egregious conduct by the government.

11 But you also need to show that that  
12 constitutional injury affected your ability to defend the  
13 case. Not that it brought about the case, but it affects  
14 your ability to put on a defense, such as that the conduct  
15 interfered with the witness so you wouldn't be able to get  
16 from the that witness and put on your case at trial.

17 And the cases we cite such as the *Trump*  
18 *Entrepreneur Institute*, the *SEC v Cuban* case, and some of  
19 the other cases that we cite, all stand for that  
20 proposition, that you need to do both elements here. You  
21 need to both show a constitutional injury and you need to  
22 show that that constitutional injury impaired your ability  
23 to put on a case.

24 And the NRA fails on both counts. They fail on  
25 the first count for the same reasons as the counterclaims

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1 were dismissed. But, they fail on the second count  
2 because they don't even attempt to allege that. There is  
3 no allegations and no argument in any of the NRA's papers  
4 about how any purported bias affected their ability to  
5 defend the litigation. And the only thing they say is  
6 that it led to the litigation. But the cases make clear  
7 that that is not enough.

8 The NRA does try to distinguish the cases and  
9 say that that rule has been criticized. But actually the  
10 only debate in the cases is whether an unclean hands  
11 defense against the government is always precluded or  
12 whether it is -- it is only available in limited  
13 circumstances. We only rely on the latter rule.

14 THE COURT: And what do you take -- I'll  
15 obviously ask the defendants, but what do you say they are  
16 relying on for their unclean hands defense? What facts do  
17 you think? Is it just the stump speeches of the current  
18 Attorney General or is it something beyond that?

19 MR. SHIFFMAN: To be honest, I think that's a  
20 question better for them. But my understanding, at least,  
21 is that they are relying on that mountain of paper that  
22 they provided to you that deals with the stump speeches  
23 and allegations and comments made. Nothing that has been  
24 done in this case that would affect any witnesses.  
25 Nothing that would be done to, you know, alter trial in

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## Proceedings

1 any respect. All of their -- some of the allegations may  
2 relate to things that postdated the filing of the  
3 complaint. But they are still just comments of the  
4 Attorney General. And that goes back to the point that I  
5 started with, in that there also is a distinction between  
6 the Attorney General and the People here. And you cannot  
7 have the ability -- the People's right to have violations  
8 of the law impaired by the agents of the government. And  
9 lots of cases that we cite stand for that proposition.

10 It goes to even the *Heckler* Supreme Court  
11 decision, many of the unclean hands cases including the  
12 *SEC v Cuban* case and the *Trump Entrepreneur* case get into  
13 this analysis. And it is an important one here because  
14 what is really at issue in this litigation is whether or  
15 not the defendants did what we allege that they did.

16 Now here the allegations have already been  
17 determined to state claims. So what is at issue is  
18 whether or not we can prove those allegations at trial.  
19 And whether or not a comment was made that evidences some  
20 bias or not, is not really at issue. And that's why we  
21 don't think that this mountain of paper is something that  
22 you really need to get into in great deal. What you need  
23 to get into are the legal issues here. And these are  
24 legal issues that have really mostly been decided already.  
25 So that -- I think from our perspective that deals with

mlp

## Proceedings

1 the bias affirmative defenses.

2 There is also the laches and the estoppel group  
3 of affirmative defenses. I don't fully understand what  
4 the estoppel claims are. I don't think they have  
5 articulated them. So I am not going to address them in  
6 great detail, other than to say that the rule is that  
7 estoppel, for the same reasons unclean hands is not  
8 available against the government, the rule is that  
9 estoppel is not generally available against the  
10 government, except perhaps in extraordinary circumstances,  
11 and those are not applicable here.

12 There is also the laches defense. And I think  
13 that one, Mr. LaPierre spends a lot of time in his papers  
14 dealing with that one and making allegations there. That  
15 fails for a few reasons. One, it is the same -- same  
16 basic concept that laches is not available against the  
17 government except in extraordinary circumstances, if at  
18 all. And that's -- goes back to that same thing. The  
19 reason is, you can't allow a delay by an agent of a  
20 government to impair the People's ability to pursue the  
21 claims and to have the laws enforced.

22 Here though, there is actually nothing that  
23 would even constitute laches if you actually reached the  
24 question. And that's because Mr. LaPierre points to  
25 disclosures that were purportedly made in the NRA's

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## Proceedings

1 filings with the Attorney General concerning his salary  
2 and the use of charter flights and other benefits.

3 But those filings, first, are made with our  
4 office, so that we can, you know, so we can enforce the  
5 charities laws, but they are not submitted to us for our  
6 approval. We don't get that document and approve the  
7 contents of them. We get over 50,000 filings a year, and  
8 we use them to do our -- to do our job. And the public  
9 uses them to make decisions about making donations and  
10 things of that sort.

11 THE COURT: How far back in time do your claims  
12 go with respect to, for example, the individual  
13 defendants, in terms of compensation? Are you going back  
14 beyond the statute of limitations period?

15 MR. SHIFFMAN: We are not going beyond the  
16 statute of limitations period.

17 MS. CONNELL: No.

18 MR. SHIFFMAN: And there are a few reasons for  
19 that. One, as fiduciary, there is an issue as to when the  
20 statute runs and whether the statute of limitations is  
21 tolled during the time that they are fiduciaries.

22 THE COURT: For example, not to steal  
23 Mr. Correll's thunder, but they talk about filings made in  
24 2008 and earlier, and they make the point that somewhat  
25 resonates in laches principles, that if they had been

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1 aware in 2008, for example, which I guess may be a time  
2 when decisions were made about security concerns that  
3 required private travel, that they could have changed  
4 their behavior and that the witnesses who were around at  
5 the time who could support the decisions are no longer  
6 around.

7 MR. SHIFFMAN: Mm-Hm.

8 THE COURT: And therefore there is just a  
9 certain unfairness to having a, you know, a subsequent  
10 Attorney General go back and try to clawback that far  
11 back, when there is no way to defend it.

12 MR. SHIFFMAN: Right. And I think there are a  
13 couple of answers to that. And the first is, if you look  
14 at the 2008 filings here, they don't disclose any of the  
15 things that we are seeking to pursue on our claims here.

16 What is disclosed is, there is a box on the 990s  
17 which is the informational tax returns that charities file  
18 with the IRS. A copy of the 990 is filed with some other  
19 paperwork with the Attorney General's office in a chart  
20 500. That's filed each year. On the 990 there is a box  
21 that says: Did you use charter or first class travel? It  
22 is one check box. Okay? Then two pages later there is a  
23 place where you can give a little more of an explanation  
24 for that.

25 Beyond that explanation what the NRA says in

mlp

## Proceedings

1 2008, is that charter or first class travel was used in  
2 circumstances where there was -- where logistics or other  
3 available travel arrangements could not be made. That  
4 doesn't disclose the misuse of charter travel for personal  
5 benefit. It doesn't disclose the use of charter travel  
6 for companions, for family members. It doesn't disclose  
7 any of the misuse. There is no information given about  
8 the details of those transactions. It is not actually  
9 even until 2016 in the NRA's filings.

10 And just to be clear on that, the filing for the  
11 year 2016, which is not made until late 2017, that's the  
12 first time where that disclosure, that one or two sentence  
13 disclosure even mentions security concerns.

14 So, on a factual matter, as terms of what  
15 possibly those returns could have alerted to us, they  
16 don't alert us to the wrongdoing that's alleged in the  
17 complaint, because they really just say whether or not  
18 that's used. And there could be instances where charter  
19 travel for not-for-profit is used. So for example, it is  
20 often the case with, you know, rescue operations or things  
21 like that where you do need to do it. So simply checking  
22 the box doesn't necessarily show that there is a violation  
23 of law.

24 But also, there is with respect to the statute  
25 of limitations, there is both a continuing wrong doctrine

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## Proceedings

1 and the doctrine that when fiduciary -- when fiduciary is  
2 in place, that the claims don't start to run until  
3 fiduciary leaves their position.

4 And I would like to address briefly too, the  
5 case that Mr. LaPierre submitted earlier this week, the  
6 *Meta* case, the *Facebook* case. That's the only case that  
7 the defendants have submitted that really deals with the  
8 laches claim when a government is -- a government entity  
9 is suing as plaintiff for, sort of, public type claims.

10 But it is very distinguishable from almost every  
11 other type of claim. And that's because that suit was  
12 brought under the Clayton Act. And as the Court there  
13 made very clear, the Clayton Act does not give the right  
14 to the states to sue in their sovereign capacity. Right?  
15 They can sue as persons, they can sue as associations, and  
16 other things, they cannot sue as sovereigns. And it is  
17 when the state sues as a sovereign, that laches is not  
18 available against the government. When the state sues in  
19 a proprietary capacity, there are some cases that say --

20 THE COURT: Well, weren't they suing as *parens*  
21 *patriae* in that case? But I think that's -- that's when  
22 you sue to challenge a merger, that's typically what it  
23 states.

24 MR. SHIFFMAN: And yes, the states were trying  
25 to sue in a *parens patriae* capacity. But an important

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1 factor in that case is that they were -- they did not get  
2 a congressional mandate to sue as sovereigns. They only  
3 got to come in and sue as a person. They had to fit it  
4 within the person definition. So by its very nature that  
5 means that the legislature, the Congress back in the early  
6 1900s when they passed the Clayton Act, they did not give  
7 any special right to the states to go in and sue under the  
8 Clayton Act for that. It was previously just the federal  
9 government that can sue. This expanded it to persons.  
10 But it did not expand it to the states. Right? So the  
11 states that were suing under -- they had to fit in under  
12 the persons.

13 THE COURT: Look --

14 MR. SHIFFMAN: But --

15 THE COURT: -- in those situations you are  
16 essentially suing on behalf of the citizens.

17 MR. SHIFFMAN: That's correct. But that's  
18 not -- my point is a slightly different one, Your Honor.  
19 My point is that you have to look at what the legislative  
20 intent was in determining whether or not laches should  
21 apply. And the cases that all rule that laches is not  
22 available against the government, really look at one  
23 thing. They don't look at the motivation of the  
24 government. They don't look at other things. What they  
25 look at are the nature of the claims and whether those

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## Proceedings

1 claims are ones to enforce a legislative mandate. Right?  
2 There is no legislative mandate under the Clayton Act to  
3 the states, because they are not named in there. The  
4 Courts actually, in *Meta*, was actually I think a little  
5 bit skeptical even of their standing to fit in under the  
6 states definition.

7 But putting that aside, the real issue is that  
8 there is no legislative mandate given to the states to  
9 enforce the Clayton Act. Otherwise they would have been  
10 mentioned in there. There is legislative mandate to  
11 persons, associations and other things. So it is not  
12 something that is specially reserved to the state to  
13 enforce.

14 THE COURT: Right. I think your point, I  
15 assume, is here the Attorney General is the enforcer, is  
16 the one who, if there is someone to protect the states'  
17 interests in this -- in the context of not-for-profit  
18 corporations, it is the Attorney General.

19 MR. SHIFFMAN: That's exactly right, Your Honor.

20 And it is -- we are the only ones for a lot of  
21 these. There are some things that the NRA may be able to  
22 bring such as claims against Mr. Powell. But there are  
23 other things that the Attorney General is the one who is  
24 the only one who can really bring those things. So that's  
25 a very important distinction. Because with the Clayton

mlp

## Proceedings

1 Act you have the FTC, which had claims that were  
2 actually -- that are still -- we are able to continue in  
3 the *Meta* case. They were not estopped. But also that  
4 case is very distinguishable given that the underlying  
5 facts that were being challenged were well known. That  
6 merger was, you know, submitted to the federal government.  
7 Anybody working, I would assume, in the Attorney General's  
8 Office or any other state's Attorney General's Office  
9 would have been, in there Antitrust Bureau, would have  
10 been very well aware of that, and it was a  
11 multi-million -- multi-billion dollar merger.

12 Here, as I mentioned earlier, there is nothing  
13 that could give rise to laches because nothing was  
14 disclosed to us that we could have acted upon. And we  
15 know of no affirmative conduct to approve anything there.

16 THE COURT: Okay. Thank you.

17 MR. SHIFFMAN: Thank you, Your Honor.

18 MS. EISENBERG: Good morning, Your Honor.

19 THE COURT: Good morning.

20 Are you plugging into our screen?

21 MR. UMANSKY: Yes.

22 MS. EISENBERG: While there is a lot of paper --

23 THE COURT: Wait. I have to --

24 You can get started if you want.

25 MS. EISENBERG: Thank you, Your Honor.

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1 THE COURT: Just point the microphone at  
2 yourself so I can hear you. Thank you.

3 MS. EISENBERG: These motions are actually quite  
4 simple. If you look at the law, the facts, the procedural  
5 posture and even practical considerations, there is no  
6 reason for you to grant them. They should be denied.

7 First, let's talk about the procedural  
8 difference. When you assert a counterclaim, which is part  
9 of Mr. Shiffman's argument, you seek to impose liability  
10 on the other side.

11 When you assert a defense, that's a totally  
12 different animal. What you are trying to do is anticipate  
13 what might be presented at trial and react to it in the  
14 middle of the trial as evidence gets presented, none has  
15 been, as defenses mature.

16 And there are multiple situations in which some  
17 of these things might come up. For example, we have  
18 already talked about laches. Well, there are two  
19 related-party transactions that the NYAG asserts that  
20 actually involve individuals who have since passed. And  
21 some of these transactions were actually disclosed on  
22 Forms 990. So I think we can certainly envision a  
23 situation where, if the government were to pursue the NRA  
24 with regard to transactions that were disclosed, and where  
25 the witnesses are no longer alive, a laches argument will

mlp

## Proceedings

1 certainly come into play.

2 In addition, Your Honor, we have to focus on  
3 the --

4 THE COURT: Well, I -- for that to be helpful  
5 you have to be more granular. That's certainly not the  
6 thrust that I got out of the estoppel or the laches  
7 arguments. So if you have something in particular you  
8 want to direct me to, that's fine.

9 MS. EISENBERG: Sure thing, Your Honor.

10 Well, I think that at this point we have been  
11 asking the NYAG to tell us what specifically will be at  
12 issue at trial. And we don't necessarily know what  
13 specifically they will present on. And as they -- even  
14 when they do, things might come up, like what I just  
15 described. And I don't think that the government -- the  
16 NRA has the burden of identifying now, being able to  
17 predict now what permutations of facts will be presented  
18 at trial and how these defenses might come into play.

19 THE COURT: Well, I am a little confused because  
20 we are done -- largely done with discovery, I think  
21 subject to a couple of tails. But I am not sure what else  
22 we are waiting for to be ready for trial, since that's  
23 where we are supposed to be right now.

24 MS. EISENBERG: Certainly, Your Honor. The NYAG  
25 identified 43 individuals and said there were

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1 related-party transactions either involving them or their  
2 relatives or organizations associated with these  
3 individuals, or organizations associated with their  
4 relatives. As a result, we actually don't have a clear  
5 picture of what specifically the NYAG is going after.

6 In any case, we might as well start with the  
7 unclean hands defense. The unclean --

8 THE COURT: Are you trying to get this on the  
9 screen?

10 MR. UMANSKY: Yes, it is not coming up.

11 THE COURT: Are you plugged in?

12 MR. UMANSKY: Yes.

13 MS. EISENBERG: That's okay. We can do it  
14 later.

15 THE COURT: It should be -- you are plugged in  
16 right now?

17 This typically works.

18 Sharon, do you want to call?

19 COURT CLERK: Is he plugged in?

20 THE COURT: What are you plugging into exactly?

21 MR. UMANSKY: I am plugged in here, input.

22 COURT CLERK: Did you hit laptop?

23 THE COURT: We are in laptop, yes.

24 COURT CLERK: Little box over the top all the  
25 way up?

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1 MS. EISENBERG: Would it be possible to give us  
2 control?

3 THE COURT: You can use the touchscreen whenever  
4 you want.

5 Which laptop is it? This one?

6 Everything I am doing up there you can do with  
7 your hands if you want.

8 Why don't we let her continue.

9 Call Sam to come down.

10 MS. EISENBERG: Thank you, Your Honor. I  
11 appreciate it.

12 THE COURT: I am not sure why it is not working.  
13 It usually does.

14 MS. EISENBERG: So Mr. Shiffman talked about  
15 mountains of paper. And in fact, he was helping me argue  
16 my side of this motion. The reason there is a mountain of  
17 paper is because Attorney General James has made so many  
18 different statements before, during and after the  
19 commencement of this litigation, including in connection  
20 with it, that it is incorrect for them to say that we  
21 presented no new evidence. We presented a ton of new  
22 evidence to Your Honor.

23 For example: On August 6, 2020, the NYAG files  
24 her lawsuit. What does she do? She starts fundraising  
25 the same day, she goes on MSNBC, and everywhere she tells

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1 everyone about how this is her lawsuit to dissolve the  
2 NRA.

3 Now, Your Honor is well familiar with the  
4 complaint. The complaint seeks multiple pieces of relief,  
5 more than a dozen. Yet, the NYAG is squarely and  
6 laser-focused on one thing and one thing only this is my  
7 lawsuit to dissolve the NRA.

8 And when she runs for governor in 2021, what  
9 does she do? She yet again touts her effort to eliminate  
10 the NRA. And that's a quote.

11 On August 6 when she commences the investigation  
12 she holds a press conference. She cannot identify a  
13 single dissolution case in which there is precedent for  
14 trying to do what she is trying to do here.

15 And she overstates the evidence. She says:  
16 Every single board member violated the law. There is no  
17 such allegation in the complaint. Every single individual  
18 defendant misappropriated funds and enriched themselves.  
19 There is no such allegation in the complaint against Mr.  
20 Frazer.

21 So, and then you know about the meeting with  
22 Everytown. And there are lots of other pieces of evidence  
23 that we have come forward with in our answer, as well as  
24 the papers in connection with this motion.

25 So, in your dismissal of the counterclaims you

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1 said, well, when she says I am going to go after the NRA  
2 because I disagree with the second amendment advocacy,  
3 that's evidence of animus. That's what you found. But  
4 then you went on to say, but it is irrelevant for current  
5 purposes because the NRA has not alleged sufficient nexus  
6 between the animus and the adverse action.

7 So, we heard you loud and clear, Your Honor. We  
8 have come forward with tons more evidence to clarify or to  
9 make it very clear, now that we had discovery and the  
10 record has developed, that the evidence of nexus is  
11 overwhelming.

12 And on top of that, we looked more closely at  
13 those -- what you refer to as stump speeches. And we  
14 found a few things that are quite powerful. And, in fact,  
15 we think egregious. For example, on July 12, 2018,  
16 Ms. James announces that she is going to run for Attorney  
17 General. She tweets about it. She issued a press  
18 release. And then she makes an appearance at which she  
19 discusses her campaign. And the tweet and the press  
20 release don't say it, but when she is addressing the  
21 public she says, well, I will have the constitutional  
22 power to investigate the NRA, because that's where they  
23 are incorporated. And I promise that we will investigate  
24 whether or not, quote, whether or not the NRA complies  
25 with the law. This was months before the New Yorker

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1 article that surfaced these allegations on which the Court  
2 relied in dismissing the counterclaims.

3 In addition, what she said was, we are going to  
4 go after the NRA. We are going to go after its banks. We  
5 are going to go after its investors. Again, so, the  
6 evidence of animus is express, direct, clear, irrefutable.  
7 In fact, if you look at their statement of facts, they do  
8 not deny any of that.

9 THE COURT: There is sort of a disconnect  
10 between the case that you are talking about and the case  
11 that's actually here right now. Right now the dissolution  
12 claims are not in the case. And what you are left with  
13 is, you know, a more, you know, I don't know what the  
14 right word is, straightforward, pedestrian, it is  
15 financial misfeasance, corporate malfeasance. Sort  
16 of -- I won't say run of the mill, but it is sort of  
17 normal kinds of things. It is not dissolution. And so it  
18 is a little unclear to me why all of that would be  
19 relevant to, you know, for example, if the defendants here  
20 were found to have, you know, walked out of the NRA with  
21 bags of cash every day at the end of the day and taking  
22 them home, which is not what is alleged, but just normal  
23 kind of corporate misbehavior, would it really be a  
24 defense to that to say that, well, the Attorney General  
25 candidate said lots of inflammatory things about

mlp

## Proceedings

1 dissolving the NRA. Therefore, I can't be sued for these  
2 financial -- for this financial misconduct. There is a  
3 disconnect there that I don't really understand.

4 Why -- what would be the rational for having the  
5 current claims be subject to a defense based on threats of  
6 dissolution which are no longer in the case?

7 MS. EISENBERG: Yes Your Honor. I think the  
8 answer differs a little bit, depending on the defense. So  
9 we can start with unclean hands, for example.

10 That ancient maxim says that the courts doors  
11 are closed to those who come to the court with unclean  
12 hands.

13 THE COURT: You recognize she is not the  
14 plaintiff, right? She is not. She is the current  
15 occupant of an office that represents the state.

16 MS. EISENBERG: But she does represent the  
17 state, Your Honor, and she did pledge to use the power  
18 that she was given as the Attorney General to go after the  
19 NRA.

20 So, I don't think that she can distance herself  
21 in that way by saying I represent the People, therefore  
22 everything I said and the express evidence of my  
23 retaliatory intent --

24 THE COURT: But the defense would be asserted  
25 against the state, the People, not Ms. James as a human

mlp

## Proceedings

1 being.

2 MS. EISENBERG: The defense is asserted against  
3 the plaintiff in this case, who has made very clear that  
4 they are using the power of the office to go after a  
5 political enemy. And so I think that as a court of equity  
6 and the equitable relief is what they are asking for as  
7 against the NRA, you certainly have discretion to look at  
8 the facts and the functional reality that it is Letitia  
9 James who pledged to destroy the NRA and is seeking --

10 THE COURT: That's not an issue in this case.  
11 Destroying the NRA is not part of this case.

12 MS. EISENBERG: Let me address that, Your Honor.  
13 One of the remedies she seeks is an injunction against  
14 solicitation. That's quite serious. You know how the NRA  
15 feels about the independent compliance monitor request.

16 She also seeks the removal of the executive vice  
17 president, an individual who has been elected every year  
18 by the 76 member board who in turn is elected by the  
19 members.

20 So all of those remedies, from our perspective,  
21 even though dissolution is appropriately off the table,  
22 are quite important. They are all in equity. And the law  
23 is quite clear that if you ask the Court for equitable  
24 relief, you better come with clean hands. And they don't.

25 THE COURT: Well, there are a fair amount of

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## Proceedings

1 cases which the other side has put in front of me where  
2 the notion of applying that kind of common law unclean  
3 hands to an entire state of people because of whatever you  
4 might allege the Attorney General has or has not said or  
5 done, is not appropriate. You know, this is a, you know,  
6 at some level a law enforcement action. And the Attorney  
7 General can ask for relief, but it is up to the Court and  
8 a jury to actually provide it one way or the other. And  
9 saying that, essentially it is a defense to financial  
10 malfeasance, that the sitting Attorney General acted in a  
11 way that you would argue gives rise to unclean hands, it  
12 has a pretty substantial effect on the state to apply it  
13 that way. Which is presumably why the Courts have been  
14 reluctant to do so.

15 MS. EISENBERG: I would like to address that,  
16 Your Honor. In their moving brief they say there is  
17 Appellate authority in the First Department that says you  
18 cannot assert unclean hands against the government. And  
19 that's not true. We looked it up. The Appellate decision  
20 does not say that. And Mr. Shiffman admits in his brief  
21 that that was a mistake.

22 So he then says, that doesn't matter because we  
23 have Justice Kern who in the *Trump Entrepreneur Initiative*  
24 case said that it is unavailable or there are special  
25 requirements. So all you are left with, Your Honor, is a

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## Proceedings

1 case from years ago by Justice Kern, Supreme Court of New  
2 York, where she issued a decision that spanned for dozens  
3 of pages, decided multiple issues, and one of them was,  
4 sort of, this cursory dismissal of a variety of defenses  
5 citing, you know, these SEC cases which are certainly not  
6 binding on you.

7 So, the bottom line is, there is no New York law  
8 that is binding upon you, Your Honor, that says that the  
9 defense somehow doesn't apply.

10 THE COURT: So we are talking about unclean  
11 hands. What is the unfairness, what is the lack of equity  
12 of, again, for now, assuming the truth of the allegations  
13 about financial malfeasance, what would be the equities  
14 of, essentially, letting defendants off the hook for  
15 those -- for that conduct because of speeches made by the  
16 Attorney General? Where is the equity in that? Why does  
17 that make sense even?

18 MS. EISENBERG: So I think we are relying on  
19 speeches not just because she made them, but because they  
20 evidence her intent and why she was doing what she was  
21 doing.

22 THE COURT: If the claims here were about the  
23 NRA's advocacy or something like that where there is a  
24 connection saying, well, you can't -- well, maybe there is  
25 some connection. But the actual claims that we are going

mlp

## Proceedings

1 to trial on are just financial misconduct claims. And I  
2 still don't understand how equity would say that, well,  
3 you can't go after that kind of financial misconduct  
4 because you had an animus about trying to get rid of and  
5 harm the organization. You know, there is a disconnect  
6 there to me.

7 MS. EISENBERG: To me there is no disconnect at  
8 all, because what the AG seeks is equitable remedies.  
9 They said that several times today. And the law is very  
10 clear that if that's what you seek, you have to show that  
11 you did not perform a willful act perfecting the action  
12 that transgresses equitable standards.

13 She admits that she made those, or does not  
14 dispute that she made those speeches willfully. She  
15 certainly spoke about investigating the NRA, going after  
16 the NRA, so it is certainly in connection with the action.

17 And when a government official is using the  
18 constitutionally vested power to go after a political  
19 enemy or to weaken a political opponent, that certainly,  
20 Your Honor, transgresses equitable standards. And  
21 therefore we are squarely within the unclean hands  
22 doctrine.

23 And to address something else you said. The law  
24 in New York is very clear, unclean hands applies even if  
25 the defendant's conduct was improper. In fact, there are

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## Proceedings

1 cases that say, however improper the defendant's case, the  
2 Court's doors are shut to --

3 THE COURT: Do you have cases, though, applying  
4 that? Again, in a private dispute, I get that. But where  
5 the plaintiff represents the state of New York and all of  
6 its citizens, why would applying that to the detriment,  
7 arguably, of the state and its citizens make any sense?

8 MS. EISENBERG: Right. So I think the facts of  
9 this case are pretty rare where you have a government  
10 official declare her animus and then follow through. So  
11 we don't have a case like that in New York. But I do have  
12 two federal cases where the government made the same  
13 argument, that they are special and unclean hands doesn't  
14 apply against them, and Courts disagreed.

15 The first case is *EEOC v Exxon Corporation*. And  
16 that's at 1F. Supp. 2d, 635. That's from the Northern  
17 District of Texas from 1998.

18 And the second case is *United States Ex Rel.*  
19 *Zissler v Regents of the University of Minnesota*. And  
20 that's at 992 F. Supp. 1097. And that's from the District  
21 of Minnesota from 1998.

22 So, there are cases where Courts have squarely  
23 dismissed the argument that the legal argument the NYAG  
24 put forward, and even the cases on which they rely, if you  
25 read them closely, some of them comment on how there is

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## Proceedings

1 inconsistency in the reasoning. All of these SEC cases  
2 kind of just repeat the same concept that purportedly  
3 equitable defenses don't apply against the government.  
4 But, they all come from these Supreme Court cases, that if  
5 you read those they actually say the government is just  
6 like any other litigant. And it was the circumstances of  
7 those cases that simply warranted denial or preclusion of  
8 that defense in that case.

9 Your Honor, what we have here on the slide is  
10 to, kind of, demonstrate what is different between when  
11 you were considering counterclaims and today. And  
12 certainly the procedural posture, of course, is very  
13 different as well. That was a motion to dismiss  
14 counterclaims. And we are on the eve of trial and they  
15 are trying to preclude us from putting in evidence and  
16 being able to defend ourselves.

17 So, if you look at the gray, those are the  
18 pieces of evidence that were referenced in the  
19 counterclaims. Your Honor is well aware of Attorney  
20 General's pledge to use her constitutional power as the AG  
21 to investigate the NRA's legitimacy.

22 You are well familiar with her statement that  
23 the NRA are is an organ of deadly propaganda.

24 And that she stated that she would take the NRA  
25 on and take the NRA down, because the NRA is a criminal

mlp

## Proceedings

1 enterprise.

2 THE COURT: Can you just move the microphone a  
3 little further towards you? Thanks.

4 MS. EISENBERG: So those were the things that  
5 were the evidentiary pieces that were alleged in the  
6 counterclaims when you dismissed them. But, since then a  
7 lot has come forward still. So, for example, on  
8 August 10, 2020, just four days after she brings this  
9 action, she states: "The alleged rot at the NRA runs deep  
10 and is pervasive throughout the organization."

11 That is a clear overstatement of the allegations  
12 in the complaint. In fact, I believe the Court  
13 acknowledged as much in dismissing the dissolution claims;  
14 and focused very much on the fact that what she focuses on  
15 is mismanagement, alleged waste within a very narrow  
16 portion of the organization. And that there are no  
17 allegations whatsoever that the NRA performed its mission  
18 in a completely honorable way. And -- I am sorry, there  
19 is no allegations that we do that in any fraudulent or  
20 illegal way. And it is conceded that that's completely  
21 not something that they allege at all.

22 So, what are some of the other things that have  
23 happened? We have, on February -- in February 2019, an  
24 interesting meeting. For the record I'll describe it  
25 somewhat, but I know that Your Honor is familiar with

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## Proceedings

1 that.

2 So in summer of '18 she says: I pledge to go  
3 after the NRA because I disagree with their pro Second  
4 Amendment advocacy. And I will take them down.

5 Now, she gets elected, she comes into office,  
6 but the investigation actually doesn't start right away.  
7 Right? We know that the investigation starts only in  
8 April. So interestingly, just two months before the  
9 investigation and sometime after she gets in office, there  
10 is a meeting. And the meeting is between the head of the  
11 Charities Bureau, Mr. Sheehan, and someone from Letitia  
12 James' front office. So these are very senior people  
13 within the organization. And they are meeting with  
14 Everytown, multiple people, something like five to eight  
15 people showed up, including the head of their community  
16 safety initiative.

17 And as Your Honor knows, Everytown Gun Safety --  
18 for Gun Safety, is an organization that disagrees with the  
19 substance of the NRA's political speech, just like Letitia  
20 James does. And what we know is that that meeting is  
21 about one topic and one topic only, and that is the NRA.  
22 And I think we can all infer that they weren't talking  
23 about Everytown wanted to ensure that NRA donors' money  
24 was being spent properly.

25 Everytown is proclaiming on its website that the

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## Proceedings

1 reason it exists is to be the counterweight to the NRA.  
2 And what they do is try to come up with legal ways in  
3 which their political opponent can be destroyed or  
4 weakened. And so this meeting is quite significant for  
5 that reason.

6 Your Honor, in your opinion dismissing the  
7 counterclaims, again, you said I need more of a quantum of  
8 evidence to show that there is a connection between what  
9 she said back in '18 and what she is doing. And all of  
10 these things individually, but obviously even more  
11 powerfully together, really show that.

12 I would like to switch topics a little bit and  
13 explain why I think this action is a bit of a non issue.  
14 What the -- by "this" I mean this motion. What the NYAG  
15 is clearly trying to do is, they definitely don't want us  
16 to present at trial before you and/or the jury, evidence  
17 of these statements of animus and the connection between  
18 the animus and what Letitia James did. We understand that  
19 that's what they are trying to achieve.

20 But frankly, all of the evidence that we would  
21 be presenting in order to prove up our constitutional  
22 defenses and the unclean hands defense, all of that  
23 evidence would come in to the case in any case. It would  
24 come in to evidence because there are multiple things that  
25 the NYAG alleges that would require this evidence to be

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## Proceedings

1 presented to the jury. For example, the NYAG says, well,  
2 the NRA filed for bankruptcy and that shows that Wayne  
3 LaPierre was acting out of his selfish motives to escape  
4 the regulator who went after them. And that the board had  
5 no knowledge and no power to prevent it. And that was  
6 such a bad decision, shows disfunction, and so on and so  
7 forth. And that's certainly a part of why they are saying  
8 that allegedly we don't know how to properly manage  
9 assets.

10 Well, I think it would be really interesting to  
11 a juror to see the context and the backdrop to the NRA's  
12 decision to file for Chapter 11 protection in Texas in  
13 order to try to avoid the regulatory regime of a toxic  
14 regulator whose proclaimed objective is to destroy a  
15 political opponent. And all of these pieces of evidence  
16 give real texture and real context to the NRA's state of  
17 mind.

18 THE COURT: Look, even if I take for the moment  
19 your -- that point, that in batting back that particular  
20 allegation that this -- any of this stuff could be used as  
21 providing context for the bankruptcy, the question is  
22 whether it constitutes a defense to the claims. I still  
23 fail to see how it does.

24 MS. EISENBERG: What I am saying is that I think  
25 the NYAG's intent is to get you to dismiss these defenses,

mlp

## Proceedings

1 which is completely not necessary at this point, and then  
2 at trial say, ah-ha, those defenses were dismissed  
3 therefore the NRA cannot present evidence of what Letitia  
4 James said in July of 2018. Or her predecessor's call to  
5 a board member of the NRA where he warned that, powerful  
6 people in New York government were conspiring or were  
7 talking about what they could do to destroy or weaken a  
8 political opponent. Those are things that are critically  
9 important to understand why the NRA filed for bankruptcy.  
10 And so --

11 THE COURT: Are there any claims in this case  
12 about the bankruptcy or is it just allegations that are  
13 allegations in the background part of the complaint.

14 MS. EISENBERG: Yes. Well, I mean, they are not  
15 part of their claims 13 through 15. But they are  
16 certainly part of their first claim, unless they want to  
17 withdraw it right now. There are pages that talk about  
18 bankruptcy both in the complaint and in their expert  
19 reports; and then their first claim, which is under the  
20 EPTL, alleges that the NRA, allegedly, is failing to  
21 properly administer assets it holds and administers for  
22 charitable purposes. And so they showcase the bankruptcy  
23 filing as purportedly the salient piece of evidence that  
24 demonstrates that. And we cannot wait to tell the jury  
25 why we filed Chapter 11. We want to have that fight. But

mlp

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1 we cannot be fighting that fight with our hands tied  
2 behind our back. We have to offer and present to the jury  
3 the contextual information, what was being said and what  
4 the NRA was realizing about what it was facing.

5 There are multiple other ways in which this  
6 evidence will come in, and I am happy to go through them  
7 now if Your Honor --

8 THE COURT: I am focused on whether it is right  
9 now a proper affirmative defense.

10 MS. EISENBERG: Right. Yes.

11 THE COURT: The evidentiary question I am not  
12 expressing any opinion on right now.

13 MS. EISENBERG: Right.

14 So, no question that all of the defenses are  
15 proper. The special requirements that they want to apply  
16 to the government do not apply. They don't cite any New  
17 York Law that says that. And New York Law is very clear,  
18 if you seek equitable relief, you better come to court  
19 with clean hands.

20 There are ways in which these defenses can be  
21 bucketed. And they talk about how there are these bias  
22 defenses and equitable defenses. But I think that the  
23 best way to think of them is really constitutional  
24 defenses, and defenses that go to the issue of the power  
25 of the Court.

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## Proceedings

1 For example, unclean hands, it goes to the power  
2 of the Court. Because the law says that the court's doors  
3 are closed to those who come to court with unclean hands.

4 The extra-territoriality issue as well goes to  
5 the power of the Court. The fact that they failed to  
6 allege or show that the assets over which they seek  
7 remedies are held and administered for charitable purposes  
8 or held and administered for charitable purposes in New  
9 York.

10 All of that is statutorily driven. And the  
11 statute is very clear that what you have to focus on is  
12 assets that are held and administered for charitable  
13 purposes, and the statute does not say that it applies in  
14 an extra-territorial way. And the law is very clear that  
15 if the legislature wants the statute to apply in that  
16 fashion, it must say so expressly. And the Court is  
17 simply without power to interpret the statute otherwise.

18 But all of it is really not an issue that the  
19 Court needs to decide today. Because when we are at trial  
20 and evidence is presented, and if Your Honor determines  
21 that there is not enough evidence to support a particular  
22 defense, Your Honor can simply opt not to instruct the  
23 jury on that.

24 And for all of those reasons, we believe that  
25 the Court should just deny the motion in its entirety.

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## Proceedings

1 THE COURT: Okay. Thank you.

2 Do the other defendants want to? Mr. Correll?

3 MR. CORRELL: Your Honor, let me start by giving  
4 you a citation to a case that responds to a point Mr.  
5 Shiffman made. The case is *State of New York v United*  
6 *Parcel Service* 160 F. Supp. 3d, 629. That is Southern  
7 District of New York, 2016.

8 I'll flip to page 648.

9 MR. SHIFFMAN: Do you have a copy?

10 MR. CORRELL: I do not have a copy for you.

11 I'll just read briefly, I'll set the stage by  
12 saying, the Court was dealing with a statute under which  
13 the state of New York had exclusive enforcement authority  
14 and it was dealing with another statute under which the  
15 state of New York did not have exclusive enforcement  
16 authority.

17 THE COURT: Is this case in the brief by the  
18 way?

19 MR. CORRELL: It is not. But it is in response  
20 to the point that Mr. Shiffman raised in his argument.

21 THE COURT: Okay. Go ahead.

22 MR. CORRELL: He says -- he said in his  
23 argument, that, and I think Your Honor seemed to indicate  
24 and you tended to agree, that this is an enforcement  
25 action, a government enforcement action. In this case the

mlp

## Proceedings

1 Court draws a distinction between government enforcement  
2 actions that are brought pursuant to statutes that give  
3 the government exclusive enforcement authority, and  
4 enforcement or actions where Congress or a legislature has  
5 granted authority to private actors to bring actions under  
6 the statute. Clear distinction. And I'll just read what  
7 they say:

8 The Court broke the claims into two groups,  
9 Group one, Group two. Group one, exclusive enforcement  
10 authority; Group two not exclusive enforcement authority.

11 Said: As to plaintiff's RICO and AOD claims,  
12 claims under those statutes, the Court is not convinced  
13 that at this stage the same reason applies.

14 He was referring to other statutes under which  
15 it was exclusive enforcement authority. That would be  
16 like the SEC cases.

17 The RICO and AOD claims must be distinguished  
18 because as to these claims, plaintiffs are acting in a  
19 role that is more akin to that of a private actor, rather  
20 than in the role of a public enforcer of the public  
21 interest.

22 Now, the parens patriae doctrine is the official  
23 authority of the Attorney General to act as overseer of  
24 public corporations. There are very strict requirements  
25 you have to meet to invoke that authority. You have to

mlp

## Proceedings

1 show that there is an injury to a sovereign or  
2 quasi-sovereign interest. You have to show that it is --  
3 at issue is not just rights as between private parties.  
4 And you have to show that the interest affects a  
5 substantial portion of the citizenry of your state. High  
6 burden, high bar. They don't allege *parens patriae*  
7 authority here. In the *Grasso* case they did. And the  
8 First Department --

9 THE COURT: Because there are four or 500  
10 references to a specific statutory authority to bring this  
11 case. Right?

12 MR. CORRELL: Correct. So let me go to the  
13 statutory authority that they are invoking against my  
14 client, section 720 of the N-PCL says: An action may be  
15 brought for the relief provided in this section or -- or  
16 and, paragraph A of section 719, which deals with  
17 liabilities of directors in certain cases by the Attorney  
18 General, by the corporation, or on behalf of the  
19 corporation by a director, an officer of the corporation;  
20 also by a trustee, a receiver, creditor and members of the  
21 corporation.

22 So this is akin to the Clayton Act or the RICO  
23 where there is a private right of action where the state  
24 or Attorney General can step in and enforce it. But it is  
25 also available to private actors.

mlp

## Proceedings

1           When you are in this world, you play by the same  
2 rules. The equitable defenses apply to you as the  
3 Attorney General in the same way they apply to any other  
4 person who is authorized to bring that action.

5           And if you -- if you.

6           THE COURT: Isn't the Attorney General given  
7 that role because there are circumstances where all of  
8 those other people you listed are part of the problem?

9           MR. CORRELL: If -- well, I don't know that I  
10 quite understand that, Your Honor, because my focus is  
11 really on what the legislature has written. Which is they  
12 have created a private right of action and given it to a  
13 number of different -- a variety of people or persons.  
14 One of whom is the Attorney General, and the others are  
15 all related to the corporation.

16           The Attorney General purports she's trying to  
17 protect the interest of the corporation here, to protect  
18 the interest of the members. Which is odd given all of  
19 the things that the Attorney General has said about what  
20 she wants to do to these people.

21           So there is a disconnect there between what she  
22 is saying and what she is doing. In any event, the  
23 statute is clear, it is not exclusive enforcement  
24 authority for the Attorney General. That's where you draw  
25 the line. If you look at the case that was just decided

mlp

## Proceedings

1 by the DC Circuit, it touches on that point. And this  
2 case really drills down on it and makes that distinction  
3 clear.

4 As -- if you look at 720, and remember, this is  
5 Wayne LaPierre and individual is being sued and a  
6 provision that says actions against directors, officers  
7 and key persons. It is different from an action against a  
8 corporation. It is not monolithic. Wayne LaPierre and  
9 the NRA are not one and the same. The analysis for  
10 Mr. LaPierre has to be separate, it has to be under that  
11 statute.

12 In terms of whether there is -- the statute  
13 doesn't say the state may bring -- an action may be  
14 brought by the state. It does not say an action may be  
15 brought by the People of the State of New York. It does  
16 not import *parens patriae* power. And the vague sometimes,  
17 some people would say, unlimited, you know, active nature  
18 of that power to deal with things like pollution in the  
19 rivers or lead coming in, you know, from New Jersey, from  
20 you know, from smelting plants in the air, things like  
21 that. Those are big items that affect a majority of the  
22 people of the state. That is not this case. It is not  
23 *parens patriae*. It is not the state. It is an Attorney  
24 General acting in a manner that is akin to that of a  
25 private actor.

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## Proceedings

1 Courts have actually characterized actions like  
2 this as private actions. And if you -- if you look at the  
3 AG's briefs you will see that they use the term  
4 "enforcement action" over and over and over and over  
5 again. And when I saw that I thought, there must be --  
6 this is like a talisman. There must be -- they must think  
7 there is some magic to that phrase. That's a label that  
8 they placed on this action, particularly against  
9 Mr. LaPierre. And the correct label is private action.  
10 The correct label is private actor here.

11 And if you -- or just forget about the labels  
12 and go to the statute and ask yourself, does the AG have  
13 exclusive enforcement authority under 720. And the answer  
14 is, no. That subjects them to all of the equitable  
15 defenses that Mr. LaPierre is asserting. And they are  
16 only challenging three of his affirmative defenses. It  
17 started with a broader challenge, it is down to three.

18 I urge --

19 THE COURT: Isn't the point that with -- at  
20 least with not-for-profit organizations, there are some  
21 disputes within any entity that can be purely economic.  
22 But with a not-for-profit there are certain public  
23 interests in terms of how they are run that a governmental  
24 body has been charged with overseeing.

25 MR. CORRELL: The legislature has defined the

mlp

## Proceedings

1 public interest for not-for-profit corporations in the  
2 Not-for-Profit Corporation Law. It is comprehensive and  
3 enormous. It spans I don't know how many pages, how many  
4 sections.

5 THE COURT: And they give the Attorney General  
6 substantial rights to enforce it.

7 MR. CORRELL: Correct. And I'll -- I am glad  
8 you raise that. In 112 they actually say in two different  
9 places, the Attorney General may maintain an action or  
10 special proceeding in Section 7 to enforce any right given  
11 under this chapter to members, a director or an officer of  
12 a charitable corporation. Next sentence: The Attorney  
13 General shall have the same status as such members,  
14 director or officer. It contemplates stepping into the  
15 shoes. And if you step into the shoes of someone who is  
16 subject to equitable defenses, you are subject to the  
17 equitable defenses.

18 And that's not the only time it says it. It  
19 says it again in 9. It says: For such purpose the  
20 Attorney General shall have the same such status, same  
21 status as such members, director or officer.

22 That's where it says: Upon application Ex Parte  
23 for an order to the Supreme Court at a special term held  
24 within the judicial district, where the office of the  
25 corporation is located, and if the Court so orders, to

mlp



## Proceedings

1 enforce any right given under this chapter to members, a  
2 director or an officer of a non-charitable.

3 THE COURT: Why don't we move to the specific  
4 application of these defenses that you say should not be  
5 dismissed? I understand the principle you are getting at,  
6 that some equitable defenses should not be categorically  
7 inapplicable. But why don't you -- let's bring it down to  
8 this case.

9 MR. CORRELL: Okay. So, the first thing,  
10 laches, I won't re-cover the points in the brief. But the  
11 fact is that the NRA has been filing chart 500s with the  
12 AG, attorney's bureau for years. It is a form that they  
13 fill out, a form that has been prepared by the AG, which  
14 presumably asks all of the questions that they want  
15 answers to. They have to attach a 990, which is prepared  
16 by the federal government, which asks all of the questions  
17 the federal government wants to ask. And people at the  
18 NRA, not Wayne LaPierre, other people, dutifully pull  
19 together the information and read the instructions and  
20 filled out the forms, checked the boxes. And the  
21 Charities Bureau was on notice of what compensation was  
22 being paid and that the NRA was providing first class or  
23 charter travel to certain executives.

24 THE COURT: But their point is that they are  
25 not -- that that does not give, they say, any indication

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## Proceedings

1 of matching what the allegations are here. They are  
2 not -- they are not going after his salary, per se, as  
3 being a violation of the law. And they are not even  
4 necessarily going after, you know, some use of charter  
5 travel. But none of those forms, on their face, get into  
6 the specific violations that they are alleging here.

7 MR. CORRELL: In their complaint they did go  
8 after compensation. They alleged in paragraph 450 that  
9 Mr. LaPierre was paid over \$5 million in 2015, implying  
10 there was work in 2015. Letitia James in a press  
11 statement the same day characterized that as grossly  
12 excessive compensation in order to get the headline and  
13 the media byte that she wanted.

14 They backed away from that now because we put on  
15 three experts. We brought out three experts on  
16 compensation, who all testified that it was reasonable.  
17 All of it was reasonable. Apparently they couldn't find  
18 an expert to testify that it was unreasonable. So they  
19 backed away from that core allegation that they rested  
20 this complaint on when they filed it.

21 THE COURT: Was there ever a claim that he and  
22 the NRA broke or violated any provision of the N-PL just  
23 by the compensation of Mr. LaPierre.

24 MR. CORRELL: Yes. My reading of the complaint  
25 was that they were alleging that Wayne LaPierre acted

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## Proceedings

1 unlawfully by accepting compensation provided by the NRA  
2 that was excessive.

3 THE COURT: Just the salary?

4 MR. CORRELL: Pardon?

5 THE COURT: The salary itself?

6 MR. CORRELL: Salary and bonuses.

7 THE COURT: Okay. The complaint is too long for  
8 me to fully absorb it in one sitting, but I don't recall  
9 that.

10 MR. CORRELL: It is in there --

11 THE COURT: I recall the allegations as part of  
12 the background. But not that they said that it was an  
13 independent violation of the statute to pay him whatever  
14 it is the board agreed to pay him.

15 MR. CORRELL: They characterized it as a breach  
16 of fiduciary duty on his part to accept the compensation  
17 that was offered, even though it was determined by an  
18 officers' compensation committee and approved by a board.  
19 And our experts have testified that it was below the  
20 50 percent mark in terms of comparable executives.

21 Having faced that evidence without an expert of  
22 their own, they have backed off of that and they are now  
23 saying, no, we are not challenging that anymore. But,  
24 Mr. LaPierre had to go out and hire an expert to read the  
25 complaint, examine this, look at the pension plans, look

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1 at everything, and express his opinion.

2 So that's an example of a claim they did make,  
3 and now they are backing away from. They are still  
4 challenging charter travel. But it is unclear whether  
5 they are still challenging all charter travel.

6 But the simple fact is, they knew what his  
7 compensation was and they knew that charter travel was  
8 being provided, and they waited more than ten years to  
9 make an issue of it. And the fact is Attorney General  
10 Spitzer didn't make an issue of it. Attorney General  
11 Cuomo didn't make an issue of it. Attorney General  
12 Underwood didn't make an issue of it. Attorney General  
13 Schneiderman didn't make an issue of it. The only person  
14 who made an issue of it was Letitia James, and that's  
15 because she was looking for something to make an issue of,  
16 and something to grab the attention of the media. An  
17 employee of a non-profit organization being paid more than  
18 \$5 million in one year? That's eye popping. And she put  
19 it out there and it got picked up.

20 So, the point is that there are equitable  
21 defenses available here to Mr. LaPierre. I can't speak  
22 for other defendants, but for Mr. LaPierre, because they  
23 are proceeding against him primarily under Section 720 of  
24 the N-PCL, which is a statute that provides non-exclusive  
25 authority for the Attorney General to bring an action. To

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## Proceedings

1 assert causes of action, four of them in 720, and to seek  
2 relief that is provided, three types of relief, each tied  
3 to a cause of action in that section.

4 I don't see how under these circumstances with  
5 this statute, the Attorney General can argue that Your  
6 Honor should follow the reasoning of the Courts that have  
7 distinguished between exclusive enforcement and  
8 non-exclusive enforcement in deciding whether to strip a  
9 defendant of his or her equitable defenses.

10 THE COURT: Thank you.

11 MR. FLEMING: William Fleming for defendant John  
12 Frazer.

13 I'll rest my papers, except I want to make one  
14 observation. And that is simply, with respect to -- there  
15 are two affirmative defenses that are at issue with  
16 Mr. Frazer, one is unclean hands; and the other is the  
17 third one, which is estoppel laches waiver. Estoppel and  
18 laches may no longer be at issue for Mr. Frazer because it  
19 related to his alleged excessive and unreasonable  
20 compensation, which seems to have been removed from the  
21 case recently by the Attorney General, although it is hard  
22 to say sometimes because it is always -- not always very  
23 clear.

24 But with respect to unclean hands, I would make  
25 one point. And that is, Mr. Shiffman talked about the

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## Proceedings

1 Attorney General acting in the public interest. And as  
2 you know, Your Honor, we have made multiple efforts to  
3 point out that the Attorney General has acted in a way  
4 beyond her statutory authority. She has alleged  
5 extra-statutory punishments, seeking remedies that are not  
6 permitted under the statute.

7 And my contention has always been that this  
8 presents a constitutional separation of powers at issue.  
9 Which prejudices Mr. Frazer because, quite frankly, he has  
10 had to now be the subject of, you know, blog reporting  
11 almost daily about how management at the NRA is so corrupt  
12 and all of this. It relates in part to the Attorney  
13 General's press release that Mr. Frazer used the NRA as  
14 his personal piggy bank, when now there are no allegations  
15 whatsoever that he received anything from the NRA other  
16 than his compensation.

17 And so, with respect to the Attorney General  
18 acting in a way beyond her statutory authority, I would  
19 contend it is not in the public's interest, but in fact  
20 flouts the public interest, as that interest is defined by  
21 the legislature.

22 Thank you.

23 THE COURT: Now with respect to Mr. Phillips. I  
24 just, so I am clear, I -- my tote board says that he --  
25 the motion was withdrawn by the Attorney General with

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## Proceedings

1 respect to his second, third and fifth defenses. And his  
2 defense was withdrawn with respect to his eighth,  
3 ninth and 29<sup>th</sup> defenses. So there is really nothing to  
4 be decided on with respect to Mr. Phillips. Is that  
5 correct?

6 MR. SHIFFMAN: That's my understanding, Your  
7 Honor.

8 MR. FARBER: Yes. And it is mine as well, Your  
9 Honor.

10 I'll go back to the batting cage.

11 MR. SHIFFMAN: Thank you.

12 Your Honor, I'll just try to be brief and just  
13 address a few discrete issues that were raised by the  
14 various defendants here.

15 I guess the initial one is that providing  
16 additional evidence to the extent any of the things on the  
17 slide that Ms. Eisenberg presented is sufficient, I think  
18 a lot of that was already presented to Your Honor on the  
19 counterclaim motion. But more evidence of animus does not  
20 address the problem, even if it is anything new. What the  
21 problem that the NRA had with the defenses' retaliation,  
22 was that they didn't show a nexus between that animus and  
23 the action. And that's because of the requirement of  
24 showing but-for causation here. And as Your Honor held  
25 and as we set forth in our papers, the claims in the

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## Proceedings

1 complaint clearly provide a non-retaliatory basis for the  
2 action here.

3 You know, in that regard also, I think the key  
4 issue here is whether or not the remedies are appropriate  
5 in this case or not. And whether the remedies that we are  
6 seeking are appropriate or not, have nothing to do with  
7 any statements of the Attorney General. It relates to the  
8 conduct of the defendants here, and whether or not we can  
9 prove what we allege in the complaint. Things such as,  
10 you know, the injunction versus solicitation and removal.  
11 That again, those will be determined on whether or not we  
12 can meet the standards for those -- for those claims. And  
13 those are claims that, you know, we believe are set forth  
14 in the statute.

15 I would like to address also the comment that  
16 the NRA's counsel made concerning the *Trump Entrepreneur*  
17 case and binding authority in the state concerning unclean  
18 hands and what is necessary to show that.

19 We cited to the *Trump Entrepreneur* case which  
20 does go through and lays out that standard that we talked  
21 about. But that's not the only case in New York that  
22 deals with this issue. It is the most specific one. It  
23 is the one that deals with unclean hands in a case brought  
24 by the government. But there are many other cases that we  
25 cite in our brief where there is the general principle of

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## Proceedings

1 equitable doctrines not being permitted against the  
2 government when it sues in its regulatory capacity to  
3 enforce a legislative mandate. And I'll get back to that  
4 in a little more detail later.

5 But so it is -- and that case, as well as the  
6 *SEC v Cuban* case that we cite, those cases are not unique.  
7 They are, in fact, actually in whatever disagreement that  
8 the NRA was referring to in the case law and  
9 inconsistencies in the case law, that language, which  
10 comes from the *SEC v Cuban* case, that language was focused  
11 on the criticism of the cases that held that an unclean  
12 hands defense is never available in government. So the  
13 Court in the *SEC v Cuban* case went through and analyzed  
14 those cases and said they are a little inconsistent, they  
15 don't really stand for that proposition. But what the  
16 cases do make clear, is that unclean hands -- the unclean  
17 hands defense is only available in very limited  
18 circumstances against the government.

19 So the cases that were criticized in the *SEC v*  
20 *Cuban* case, which is the case that the NRA cites for its  
21 proposition, are not ones we rely on. They are actually  
22 ones that just hold that it is never available. They  
23 don't criticize the ones that say it is only available in  
24 very limited circumstances.

25 I would also note that with respect to the

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1 filing of the bankruptcy, it is not appropriate for the  
2 NRA, if it believes that the case -- that there is animus  
3 against it, to run to another Court. In the Bankruptcy  
4 proceeding the Judge found that it did not do so in good  
5 faith. It can't use that again here to avoid the  
6 jurisdiction of this Court.

7 There are a few other points I would like to --

8 Mr. Correll, on behalf of Mr. LaPierre, made  
9 some arguments, one is with this UPS case, which I have  
10 not read recently. Actually it is a case that I have read  
11 in the past. It wasn't cited in his papers, so I wasn't  
12 quite familiar. But my colleagues were telling me that it  
13 does not necessarily stand for everything that he said.

14 THE COURT: Well, that's good enough for me.

15 MR. SHIFFMAN: I don't expect you to take that,  
16 but I'll distinguish some of the things that he mentioned.

17 One is in section 720. 720, unlike the statute  
18 I was talking about earlier under the Clayton Act, it  
19 specifically gives authority to the Attorney General to  
20 bring the claims. And as Your Honor correctly pointed  
21 out, it does so because there are many situations where  
22 the actors at the organization, kind of have conflicts and  
23 will not do so.

24 There is also a couple of other things that are  
25 important there. And so because of that, it is a

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1 legislative mandate to the Attorney General to enforce  
2 that loss. It is different than the Clayton Act where  
3 there was no naming of the states to bring the action.

4 But 720 is not the only relevant section. And  
5 it is not the only -- the N-PCL is not the only relevant  
6 statute. The EPTL is a statute that gives the authority  
7 to enforce it to the Attorney General. And that authority  
8 to enforce the charities loss to ensure that charities are  
9 properly administered, is one that lies solely with the  
10 Attorney General under the EPTL.

11 The Executive Law, again, is one that is -- that  
12 gives authority to the Attorney General and only the  
13 Attorney General to enforce.

14 715 of the N-PCL, the section there gives the  
15 Attorney General certain powers.

16 There is all -- there are, as Mr. Correll  
17 correctly pointed out, there are provisions in Section 112  
18 that says the Attorney General can stand in the shoes in  
19 certain instances of members or directors. But it does  
20 not always do so when it brings an action. It has its own  
21 authority to do so. So one example of that is between --  
22 in the dissolution proceedings, which are not here, just  
23 using it -- at issue here, I am using it to give an  
24 example of the distinction. Under 1101 the Attorney  
25 General can bring an action for dissolution for various

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1 reasons. 1102 doesn't mention the Attorney General, but  
2 gives additional reasons under which the Attorney -- the  
3 board or members can bring a dissolution proceeding.

4 The Attorney General can bring a dissolution  
5 proceeding under 1101 or 1102. And it is only when they  
6 do so under 1102, where there is no mention of the  
7 Attorney General, that they are stepping into the shoes of  
8 the members or directors, and using that authority that's  
9 referred to in Section 112. Not when they are bringing an  
10 action under 715 where it says the Attorney General may  
11 bring an action.

12 But putting all of that aside, the true essence  
13 of the claims here is one that is in the public interest.  
14 It is to enforce a legislative mandate given to the  
15 Attorney General to ensure that charitable interests are  
16 preserved; that charitable assets are administered  
17 properly. And that is a government purpose. It is one  
18 that was given to the Attorney General by the legislature  
19 and one that triggers the requirement that equitable  
20 defenses shall not be applied against the Attorney General  
21 except in very limited circumstances.

22 THE COURT: Okay.

23 MR. SHIFFMAN: Thank you very much, Your Honor.

24 MR. CORRELL: Your Honor, if I may briefly  
25 respond to one point? I'll be very brief.

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## Proceedings

1           Your Honor, Mr. LaPierre's position is EPTL does  
2 not apply to him, because he is not a trustee. And his  
3 position is also that the EPTL does not create a right of  
4 action for failure to properly administer corporate  
5 assets. The provision of the EPTL that I think the AG has  
6 been referring to is paragraph M. It says: The Attorney  
7 General may institute appropriate proceedings to secure  
8 compliance with this section. This is a registration  
9 reporting section. And, to secure the proper  
10 administration of any trust, corporation or other  
11 relationship to which this section applies.

12           It doesn't apply to him. He is not a  
13 corporation. He is not a trustee. And for the AG to try  
14 to take this provision or this section of the EPTL and  
15 supplant the N-PCL and wipe out section 720, which  
16 specifically and expressly governs actions against  
17 directors, officers and key persons of not-for-profit  
18 corporations, runs contrary to the rules of statutory  
19 construction.

20           To the extent that these two statutes are  
21 compared, they have to be read and harmonized. The main  
22 statute, the primary statute, is the N-PCL, particularly  
23 when you are dealing with a director, officer or a key  
24 person in an action against a director, officer or key  
25 person. It is very specific, very clear.

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## Proceedings

1 And the --

2 THE COURT: We are not here discussing a motion  
3 to dismiss the EPTL claims.

4 MR. CORRELL: Right. But my point is, it is  
5 just a response to the argument that they have -- that  
6 even if they don't have -- even if they are not subject to  
7 equitable defenses under 720, they have a valid claim  
8 against him under EPTL which allows them to strip him of  
9 his equitable defenses. That's inconsistent. That's not  
10 harmonious construction of two statutes. You can't have  
11 equitable defenses under one, not under the other.

12 MS. EISENBERG: Your Honor, may I briefly  
13 address the Court?

14 THE COURT: Sure.

15 MS. EISENBERG: Thank you, Your Honor.

16 Just to make it very clear, that the NYAG says  
17 that she is going after the NRA because she wants to  
18 protect the public. We believe she is going after the NRA  
19 because she wants to retaliate against a political enemy.  
20 We believe that the jury or the fact finder should decide  
21 who is right.

22 When Your Honor dismissed the counterclaims you  
23 were looking at the allegations. Now we are on the eve of  
24 trial and the NYAG will actually have to attempt to prove  
25 her allegations. We believe that she'll come short, and

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## Proceedings

1 will not be able to prove anything but de minimus  
2 violations of the law, that certainly do not warrant the  
3 harsh relief she seeks against the NRA. At that point we  
4 believe the evidence will show the true reason why the  
5 NYAG is going after the NRA.

6 THE COURT: Okay. Thank you.

7 We have a few minutes before the lunch break.  
8 As I said, I wanted to take a little time during lunch  
9 break to just think about these motions. And so I am  
10 going to ask you to come back at, did I say 2:30 or 2:15?

11 I guess I didn't say.

12 I'll call it 2:15. Let's call it 2:30. Let's  
13 call it 2:15.

14 But while we have a couple more minutes, I did  
15 ask you to prepare today to talk about the trial and I --  
16 none of these motions would obviate the need for a trial.  
17 So I think we should be focused on scheduling it. As I  
18 mentioned, my focus has been on, sort of, the fall of this  
19 year. And so one question, I suppose, is the length of  
20 time that the parties have discussed, if you have  
21 discussed, that this trial would take. I recognize there  
22 are some motions in limine that I haven't decided yet.  
23 But assuming -- well, whatever you want to assume about  
24 those. Assume that most of the evidence, if not all of it  
25 that people are proposing comes in, have the parties

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1 talked about the likely length of trial?

2 MS. CONNELL: Monica Connell for the plaintiff.

3 The parties met and discussed this yesterday.

4 We also discussed the possibility of bifurcation, which is

5 something that the plaintiff has raised and actually the

6 Court, I think, sort of discussed at the

7 April 20<sup>th</sup> argument in this matter.

8 Plaintiff would propose, just to throw it out

9 there, bifurcation between the liability and the remedy

10 phase, as it is our position that the law is clear that

11 the Court determines, and only the Court can impose under

12 New York Law, equitable remedies. And that pretty much

13 all of the remedies that we seek are equitable.

14 We didn't receive a resounding rejection of that

15 principle, so that was progress. We -- the parties are

16 going to have further discussions about bifurcation. But

17 we did discuss the potential length of trial and the next

18 steps towards getting there. Obviously the Court would

19 determine bifurcation, we understand that. But if we

20 could potentially get some agreement, maybe that would be

21 helpful.

22 In terms of the liability phase for the

23 plaintiff's presentation of the case on direct, we

24 anticipate about 35 witnesses, give or take. I think

25 about seven of them may be unavailable, and we have their

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1 deposition videos and we can tailor those and get them a  
2 little shorter. But we think it could take as much as  
3 three and a half to four weeks.

4 For remedy phase, we think it would be much  
5 shorter, at most two weeks.

6 THE COURT: And that's just your presentation or  
7 are you baking in cross examination?

8 MS. CONNELL: I am baking in reasonable cross  
9 examination, and maybe even the idea that almost all of  
10 the witnesses we are going to call or the witnesses we are  
11 going to call for fact issues, not expert witnesses, would  
12 probably be a large overlap with the defendants' witness  
13 list. And that the defendants might agree, as we did at  
14 the bankruptcy, to question their witnesses that they  
15 would use on direct at the same time that we do our  
16 witnesses on direct. Sometimes that saves some time. So  
17 that's a possibility.

18 Again, I didn't hear a resounding no, I heard a,  
19 we will think about it. So that's progress.

20 I am not going to represent what each party  
21 said, unless the Court would like me to, as to how much  
22 time they would need for their cases.

23 THE COURT: So just -- so your point is, at  
24 least as your estimate goes, this three to four weeks  
25 includes not only cross examination, but it includes the

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1 direct examination that the defendants would provide of  
2 their own people?

3 MS. CONNELL: Potentially, Your Honor. Again, I  
4 am assuming reasonableness. I am assuming that we can get  
5 some reasonable stipulations of fact and resolve the  
6 admissibility of some documents that I don't think should  
7 be controversial. Yes, I am a little hesitant because of  
8 the length of time the NRA indicated it would need for its  
9 defense. If it does need that full amount of time, it  
10 would clearly not be sufficient. It would not include  
11 that.

12 THE COURT: Okay. Do the defendants want to.

13 MS. ROGERS: Yes.

14 MS. CONNELL: I am sorry, Your Honor. One other  
15 issue if I can speak to very quickly?

16 Just to clarify, I think there is something we  
17 need to clarify in the case. It is our position that the  
18 jury determines issues of fact under the N-PCL claims.  
19 But the EPTL and Executive Law claims and the equitable  
20 relief are determined by the Court.

21 THE COURT: How exactly is that all going to  
22 work?

23 MS. CONNELL: I think the same facts go in for  
24 the N-PCL and EPTL remedies, largely it has to do with the  
25 violation of fiduciaries duties and waste, that kind of

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## Proceedings

1 thing. But ultimately whether there is liability under  
2 the EPTL and whether there is liability under the N-PCL,  
3 the Court ultimately determines that, the EPTL; and the  
4 jury determines the N-PCL.

5 THE COURT: And that's because of the statutory  
6 provision?

7 MS. CONNELL: That's correct, yes, Your Honor.

8 THE COURT: And your position is, is that all of  
9 the remedies you are seeking are essentially equitable in  
10 nature?

11 MS. CONNELL: Yeah. I think the bulk -- the  
12 vast bulk of them, Your Honor, and you know things like  
13 appointment of a monitor, restitution, accounting, those  
14 kind of things, are for the Court and not for the jury.

15 THE COURT: Okay. Let me hear from the defense,  
16 please. Ms. Rogers.

17 MS. ROGERS: Thank you, Your Honor.

18 We did confer, all of the parties conferred  
19 yesterday on the subject of scheduling and bifurcation.

20 The AG has represented that it needs four weeks  
21 to present its affirmative case, folding in at least some  
22 time for cross examination. And the NRA's response is,  
23 you know, we might need as many as three our four weeks in  
24 response to that, but we are hoping we don't.

25 THE COURT: When you say, "the NRA," are you

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## Proceedings

1 including the individual defendants?

2 MS. ROGERS: Right now, I am just including the  
3 NRA. But let me get to, I think I came up with a  
4 synthesis that simplifies things. So once we actually  
5 know the witness list we are facing, if 25 of those 35  
6 witnesses are also our witnesses, then we are willing to  
7 compromise to some degree on doing them at the same time,  
8 rather than calling them back. And we anticipate, you  
9 know, if we are able to realize some of the same  
10 efficiencies we did realize in the bankruptcy trial, we  
11 could probably get the whole fact finding liability phase  
12 done in eight weeks, counting the other defendants, who  
13 I'll let them speak for themselves, but I don't think  
14 they needed -- I think they might have needed an  
15 additional week or something. It is not substantially  
16 more time. I think eight weeks for the whole -- the whole  
17 enchilada.

18 THE COURT: Now, I am going to reserve comment  
19 on your estimates, but, the logistics of juries and bench,  
20 right, the jury portion of it has to be contiguous. We  
21 have to keep these folks here for whatever time we need  
22 them. The bench portion, to the extent that it is either  
23 bifurcated or separated by whatever some of the claims  
24 are, there is at least a little flexibility around having  
25 it be not necessarily all contiguous time. Because what I

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1 want to avoid is, let's assume I am willing to give you  
2 all eight weeks. Are you talking about eight weeks of a  
3 jury sitting there?

4 MS. ROGERS: Potentially. We might be able to  
5 shorten it, again, if there is a lot of witness  
6 efficiencies. But Ms. Connell has said she wants four  
7 weeks just to put on her jury case, her liability case  
8 against the NRA. And we have to figure, you know,  
9 depending upon what those transactions are, that they are  
10 presenting to the jury --

11 THE COURT: Well her liability case she says  
12 from her perspective anyway, the only part that is a jury  
13 issue is the N-PCL part.

14 MS. ROGERS: I'll give you our perspective on  
15 that. I think the jury finds the facts, whatever factual  
16 predicates they allege entitle them to any liability, the  
17 jury can find. And if you look granularly, even at the  
18 equitable counts of their complaint, the factual  
19 allegations overlap pretty closely with the N-PCL counts:  
20 Did you violate policy? Was this a related-party  
21 transaction? And they are essentially asking for two  
22 bites of the exact same fact-finding apple. If they want  
23 the jury to decide whether the HT Solution transaction was  
24 lawful, and then have Your Honor decide the same thing  
25 under a different statute. The NRA's position is, we have

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## Proceedings

1 one liability phase and we come up with jury instructions  
2 that posits to the jury every disputed issue of fact. The  
3 jury comes back with a verdict. And then in the liability  
4 phase Your Honor, sitting in equity, decides based on the  
5 facts the jury found, what does each side deserve. What  
6 is an equitable remedy? Is there a compliance monitor?  
7 What would that look like? Et cetera. We think that's  
8 simpler and cleaner than trying to divide the liability  
9 phase and then -- their approach seems slightly less  
10 workable to me.

11 THE COURT: Understood. But just in principle  
12 then, it sounds like maybe you have gotten to that point  
13 where the idea of bifurcation --

14 MS. ROGERS: Yes.

15 THE COURT: -- which has at least one benefit,  
16 which is letting the jury go before the entire trial is  
17 done.

18 MS. ROGERS: Yes, the NRA is amenable to that.  
19 I remember Your Honor posited it the last time we were  
20 together. And the NRA agrees in principle. We might --  
21 it sounds like we are quibbling a little bit about how  
22 things will be bifurcated and what the jury instruction  
23 will say. But we don't disagree with allowing Your Honor  
24 to sit in equity and fashion any equitable remedies that  
25 liability may dictate.

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1 I want to say one more thing about scheduling.  
2 We heard some arguments today about political animus, and  
3 despite that element in the case, when the parties are  
4 before Your Honor, we really do try to keep politics out  
5 of it and focus on the claims, the defenses, the cases,  
6 because we are all professionals here. But this  
7 litigation is just the spearhead of a sweeping scorched  
8 earth reputational and political vendetta against the NRA,  
9 that has been waged by the State of New York since at  
10 least 2017. And it is the purpose and effect of this  
11 lawsuit and the preceding investigation, have been to cast  
12 a cloud over the NRA, much like the toxic fumes over the  
13 City, which we are eager to dispel.

14 We would love to get this done by Christmas. We  
15 have cleared our calendars to make that happen, if Your  
16 Honor is available. And so, you know, we would really  
17 like to let some sunlight in and we think some of these  
18 allegations will dissolve when we do. In the interest of  
19 our members and our mission, we favor an expeditious  
20 resolution.

21 THE COURT: So do I.

22 Okay. So, what I am hearing is, and I also  
23 think there may need to be some sharpening of pencils  
24 between you about how long this really is going to take,  
25 because my approach in these things is that once we agree

mlp

Proceedings

1 on a timeframe for the trial, I will stick to it. And I  
 2 will have the parties keep track of who is using how much  
 3 time. But especially with respect to the jury, I like to  
 4 give them a pretty solid date by which we intend to get  
 5 the case to them. And enforce that through, I have a  
 6 chess clock in my desk here. And otherwise it can spin  
 7 out of control.

8 And just to dispel any due process issues,  
 9 forewarned is forearmed. Right? So when you were on your  
 10 feet doing cross examination, if you want to spend a month  
 11 doing cross examination, you just know that that comes out  
 12 of the back end of your time. So I want us to think very  
 13 carefully about the schedule, because you should assume  
 14 that I am going to stick to it. In large part because I  
 15 am going to be scheduling things right before this trial  
 16 and right after it. And I don't want to blow up my entire  
 17 calendar because we can't get it done in the appropriate  
 18 time. Plus I think it is both polite and proper to give  
 19 the jurors a realistic and meet-able schedule.

20 So, I think you need to talk some more, because  
 21 it sounds like your -- the defense estimate, and again I  
 22 haven't heard from the other defendants yet. But if I am  
 23 broad strokes, it sounds like six to eight weeks between  
 24 the two sides.

25 Do any of the individual defendant's counsel

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## Proceedings

1 have a number higher than that in mind?

2 MR. CORRELL: Your Honor, because Mr. LaPierre  
3 is really sort of a main target here, the way I see it, I  
4 am going to have to reserve on that. It will depend on  
5 what the AG brings and what the NRA does in terms of  
6 covering bases. But I would think that -- I would want to  
7 reserve at least a week to deal with any issues that  
8 weren't appropriately covered, in my view, by the NRA.

9 THE COURT: Well -- we are all one big ship  
10 here. So we have to land it at the same time. So it  
11 has -- you all are going to have to figure out how to work  
12 together on a schedule that fits everybody in. I get your  
13 point. And you know, during the course of the trial you  
14 and the other defendants may have to end up deciding how  
15 to allocate who is going to do what, and make sure that  
16 you are not double teaming things. So we have to come up  
17 with a schedule where everybody has input in, that doesn't  
18 just expand so that everybody can feel comfortable.  
19 Because I do have to have a realistic schedule as well.  
20 So I understand your point. But I am going to need you to  
21 fold that in somehow in these discussions, because I am  
22 not going to regulate that. I am not going to say that,  
23 you know -- well, I am going to need you all to come up  
24 with a schedule that works for everyone.

25 So Mr. Correll, are you saying you don't know

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1 whether your time will fit within the six to eight weeks?

2 MR. CORRELL: I don't know whether my time will  
3 fit within the six to eight weeks, Your Honor. I can say  
4 this, in the bankruptcy trial we were able to coordinate  
5 pretty well to get everybody covered. And also in  
6 depositions we were able to share time on the defense  
7 side. And we were actually pretty efficient about that.

8 THE COURT: The others?

9 MR. FLEMING: Your Honor --

10 THE COURT: Mr. Fleming.

11 MS. ROGERS: Anyone can have the podium.

12 MR. FLEMING: I think folding in can be done as  
13 far as Mr. Frazer goes. I do have some personal  
14 preferences, but given flexibility, which I expect we will  
15 all work together, it shouldn't be a problem.

16 THE COURT: Okay.

17 MR. FARBER: I'll move here so people can hear  
18 me if they are remote.

19 I don't think, the time that this is set for,  
20 Mr. Phillips, I don't think the time that we will need for  
21 our case is going to affect those estimates significantly.  
22 We are talking a lot about this. I actually think that we  
23 need to talk about the trial date. And I think  
24 Mr. Powell's counsel is going to address that, because a  
25 trial of this length, I think presents potentially some

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1 scheduling conflicts, I think, for them. But I'll let  
2 them address that.

3 MR. ITKIN: Hi again, Judge. Mr. Itkin for  
4 Mr. Powell.

5 We don't expect to take a full week, but I think  
6 we will need a few days. I think, as Mr. Farber pointed  
7 out, our issue is with the trial date. I have two back to  
8 back trials in late November and early December. And I  
9 know another member of my team has trial in September and,  
10 I think, maybe early October.

11 I know that puts a huge damper on your plans to  
12 take a trial this fall, but that's our schedule.  
13 Obviously you can let Mr. Powell out of this case and that  
14 will make things a lot easier. I got a lot of laughs for  
15 that comment on our call yesterday. I figured I would let  
16 you enjoy it as well.

17 THE COURT: Well, I hear you. You know, we will  
18 have to get some proposals on trial dates that work. And  
19 you know, I really can't let one party completely derail  
20 the entire thing, and so we will see how that works out.  
21 Either your team will have to get it done or potentially a  
22 separate trial for your client. But you know, I am not --  
23 I am not really wild about the idea of pushing this all  
24 into 2024 just because of some counsels' trial schedules.  
25 I am not trying to be insensitive to it, but I have a

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## Proceedings

1 fairly large vehicle to drive here, if you know what I  
2 mean.

3 So, look, I think I need you all to confer  
4 again. And I have your opening bid from which I will  
5 negotiate downward, if anything.

6 But, you know, that's a lot of time. That's  
7 twice as long as any trial I have had here. This is a big  
8 case, I get it. But I am going to want to, you know,  
9 maybe we can have a conference with, you know,  
10 Mr. Blaustein and I where we can really get more granular  
11 about the witnesses and what exactly is going to happen  
12 and what is a realistic timeframe. Because, you know,  
13 before I basically give you my entire fall, because there  
14 are four or 500 other cases that would like some of that  
15 time, I am going to want to push back some. I mean, I am  
16 not shocked by the number you gave me. In fact, kind of  
17 sort of what I thought.

18 MS. CONNELL: We should have gone higher.

19 THE COURT: No, I don't think so. But I think I  
20 am anxious to find ways to economize, especially if we are  
21 going to have the ability to have a portion of the trial  
22 be a bench trial that follows, or could go alongside, it  
23 depends, the jury portion it. We may be able to do --  
24 what I would like you to focus on is how -- initially how  
25 long the jury part needs to take.

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1 MS. CONNELL: May I speak, Your Honor? I know  
2 we have lunch, but very quickly. One of the, I think,  
3 selling points potentially of bifurcation is it takes some  
4 of the more complex issues, especially depending on how  
5 the Court rules on experts and pushes some of that to a  
6 bench trial where we have less concerns about prejudice.  
7 It also takes some of the complex evidentiary issues  
8 presented by our preclusion and sword and shield and that  
9 issue of social privilege, a lot of that, not all but a  
10 lot, would go to a bench trial. So we think that could  
11 maybe shorten, because a lot of it goes to the need for  
12 perspective relief.

13 A lot of that could shorten the jury aspect of  
14 this, which we are keen to do. I think we actually had a  
15 productive conversation yesterday.

16 THE COURT: It sounds like it. Look, I think  
17 what I am going to ask you to do, obviously not today, is  
18 to come up with a proposal, a written proposal of how you  
19 see the trial going, as much of it as can be agreed as  
20 possible. And flag the parts that you disagree about.  
21 But sort of like that. That the trial will proceed in  
22 phases. And the first phase we would want to reserve X  
23 amount of time for, you know. And then the next phase  
24 either you say continue right after or, you know,  
25 depending on when we do it there could be a short break.

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1 I don't know.

2 But for now try to work it out so that it works  
3 for everybody. I think you are closer together than I  
4 thought you would be. But that is often a mirage when you  
5 start putting in paper and you figure out what exactly it  
6 is going to be.

7 But I am -- look, I want to be very candid about  
8 it, I am going to hold people to a schedule once we get  
9 there. Because, to use the old high school science, you  
10 know, gas expands to fill the size of the bottle you put  
11 it in. Right? The more time I give you, you will figure  
12 out ways to use it. And if you have to be efficient on  
13 cross and on direct and get right to the point, then you  
14 will do that too.

15 So, you should assume that I am going to press  
16 for a very efficient schedule. I know it is an important  
17 case, and it is, you know, complicated, but the time to  
18 start taking out the pencils and really getting sharp  
19 about it is now. Because I do want to, you know, I have  
20 been trying to keep time in the fall available. You know,  
21 I don't know exactly what to do with Mr. Powell's  
22 counsel's schedule, because that's essentially all of the  
23 time one way or another. You know, again, you know, Akin  
24 Gump is a big outfit, and the fact that some people on the  
25 trial team may or may not be available doesn't mean that,

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1 you know, you can't do it. Again, I am reasonable but I  
2 have to also be practical.

3 MS. CONNELL: The parties are keen for a trial  
4 date, Your Honor. We don't want to prejudice Mr. Powell  
5 but prior to hearing from his counsel I think the NRA had  
6 suggested October 16 as date they are available. And I  
7 think everybody else agreed. But not that we dictate your  
8 schedule. And again, Mr. Powell will need to be  
9 considered in some way.

10 THE COURT: Yeah. That's kind of in the zone  
11 where I was. I'll even, with that, I am going to have to  
12 move another trial out of the way and a few other various  
13 things. So whatever we come up with is going to lead to a  
14 lot of ricocheting around in my schedule. But I want  
15 to -- the quicker we can do it, the quicker we can get on  
16 the calendar, the better.

17 I agree with all of the comments made that, you  
18 know, a lot of very serious allegations have been made in  
19 this case. And this is a situation where, you know,  
20 justice delayed is justice denied, either way. And I am  
21 fairly committed to getting this done this year. I think  
22 we should be able to do it.

23 So let's take a break until 2:15 and we will  
24 finish up. Thank you.

25 MS. CONNELL: Thank you, Your Honor.

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1 THE COURT: I am going to exit out of the Teams  
2 meeting because we are doing another seminar in this room  
3 at 1:00 o'clock.

4 Thank you.

5 (Whereupon, a luncheon recess was taken at this  
6 time.)

7 \* \* \*

8 A F T E R N O O N S E S S I O N

9 \* \* \*

10 THE COURT: Good afternoon, everyone.

11 Thanks again for the excellent briefing and  
12 argument.

13 I am quite aware of the timing here and, in my  
14 view, the need to get you a decision on these motions  
15 sooner rather than later. I am sure you would all greatly  
16 appreciate wonderful prose in a long-written opinion that  
17 you get a month before trial. But I think it is important  
18 to get you the substance of the ruling now, albeit in  
19 imperfect form.

20 I am going to start with the motion 44, which is  
21 the last-argued motion to dismiss from the defenses.

22 Just briefly on the standard. Motion to dismiss  
23 affirmative defenses, the plaintiff bears the burden.  
24 Demonstrating that the defenses are without merit as a  
25 matter of law, and deciding the motion to dismiss a

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## Proceedings

1 defense, the defendants are entitled to the benefit of  
2 every reasonable intendment of the pleading which is to be  
3 liberally construed. A defense should not be stricken  
4 where there are questions of fact requiring trial.

5 There are many cases I could cite for that. It  
6 is essentially a mirror image of motion to dismiss a  
7 claim.

8 However, a defense that bears no relationship to  
9 the claims at issue is properly dismissed.

10 In considering this motion, I am not relying on  
11 the argument made by plaintiff that some of the  
12 affirmative defenses were stated in summary terms. I have  
13 assumed those defenses are based on the factual assertions  
14 the defendants put forth in their briefs, and where  
15 relevant in proposed amended pleadings.

16 If the defenses were otherwise meritorious based  
17 on those documents, I would have given leave to amend. So  
18 it is more efficient, in my view, to simply deal with them  
19 now on the merits in this fully-briefed motion, given the  
20 efforts that the parties have all put in to bring the  
21 legal issues to a head.

22 I am going to start with what has been called  
23 the bias defenses, also sometimes called the  
24 constitutional defenses or retaliation or unclean hands or  
25 a variety of other things. All told, these are based on

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## Proceedings

1 statements made by or on behalf of the Attorney General  
2 about the NRA and this litigation, either while she was  
3 running for office or while she was in office, although  
4 largely most of them are before.

5 I have already dismissed counterclaims based on  
6 similar allegations. And do so now with respect to the  
7 affirmative defenses, although on somewhat different  
8 grounds. But I incorporate by reference my description of  
9 the constitutional underpinnings of these various  
10 assertions. Quite simply in my view, there is no legal,  
11 factual or logical connection between these purported  
12 defenses -- these purported defenses and the claims  
13 remaining in this case.

14 Whether Candidate James or Attorney General  
15 James bore ill will toward the NRA or the individual  
16 defendants, or had as her goal to dissolve the NRA, which  
17 is no longer an issue in the case, has no relation,  
18 legally or factually, to whether these defendants engaged  
19 in improper related-party transactions, breached fiduciary  
20 duties, or otherwise mismanaged for their personal benefit  
21 in contravention of legal obligations set forth in  
22 statutes, under which the claims in this case are based,  
23 the activities of a New York Not-for-Profit Corporation.

24 The trial in this case will be on the merits of  
25 those claims, and the appropriate relief arising

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## Proceedings

1 therefrom, and not on the purported words and ideas  
2 between the Attorney General and the NRA.

3 In dismissing the dissolution claims early in  
4 the case, I did note that certain First Amendment  
5 principles played some role in that decision where that  
6 type of relief was sought. Those issues are no longer in  
7 the case. What is left is a more straightforward  
8 financial maladministration of a non-profit. And I think  
9 we risk overcomplicating this case and turning it into a  
10 series of irrelevant sideshows when we go beyond the  
11 claims made and the legitimate defenses thereto.

12 So, I would not discount entirely the  
13 possibility that in concluding on remedies I would take  
14 into account all surrounding circumstances. But in terms  
15 of the -- whether these are affirmative defenses to the  
16 claims, which is what this motion is about, they are not.

17 Whether, you know, assuming they prove -- that  
18 defendants were able to prove all of these statements were  
19 made, they really have nothing to do with the merits of  
20 the case, and therefore they are dismissed.

21 The next set of claims is a bit of a hodgepodge.  
22 The first one I'll deal with is the equitable defenses of  
23 estoppel and laches. Largely, the -- the only real  
24 substantive arguments have been about laches. As a  
25 general matter, those kinds of defenses are not available

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1 against the state when acting in an official capacity.  
2 While some cases, such as the *SEC v Cuban* indicate that  
3 equitable defenses may be available in very limited  
4 circumstances, those circumstances are not present here.  
5 That case is 798 F. Supp. 2d, 783, Northern District of  
6 Texas, 2011.

7 The idea is that if the conduct is egregious and  
8 rises to a constitutional level, then you would leave open  
9 the possibility that even the state in its official  
10 capacity could be prohibited from seeking relief. The  
11 facts that have been set forth here, and it is a little  
12 difficult to tell in all cases what these defenses mean,  
13 but I think Mr. LaPierre has the most developed argument,  
14 with respect to laches, at least; is that the Attorney  
15 General had access to forms year in and year out which  
16 disclosed, to some extent anyway, Mr. LaPierre's  
17 compensation and use of charter flights. I don't think  
18 that those facts, even if proven, would give rise to a  
19 viable laches defense. Certainly not against the state.  
20 I don't think even if it wasn't the state, it would. But  
21 certainly not against the state. These are summary forms  
22 that the state received year in and year out. They do not  
23 disclose the facts upon which the claims in this case are  
24 based. The notion that the Attorney General who does have  
25 ample statutory authority to oversee chart -- charitable

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1 organizations within the state, the notion that it would  
2 be enjoined from fulfilling that obligation simply because  
3 incomplete disclosures were made years ago, I think it is  
4 a clever -- it simply doesn't work. I think it is a  
5 clever argument, and I think it is well stated, but I  
6 don't think it is sufficient, even if those facts were  
7 proven, to establish laches.

8 I also, I understand the argument that in some  
9 cases where the state is acting as more of an economic  
10 actor as opposed to a sovereign, that there might be more  
11 leeway to apply normal equitable defenses. The *UPS* case  
12 that Mr. Correll referenced, I think is quite a different  
13 one. I think that was much more of a commercial  
14 relationship than what you have here. The Attorney  
15 General has, just, all sorts of statutory authority as, I  
16 think, the principal watchdog of the government over the  
17 activities of not-for-profit corporations. And you know,  
18 the fact that some of its claims can also be brought by  
19 private individuals does not, in my view, significantly  
20 impact the applicability of the kinds of equitable  
21 defenses that have been raised here. So, those claims  
22 are -- those defenses are also dismissed.

23 There was also in the briefing, although we  
24 didn't discuss it at argument today, various affirmative  
25 defenses with respect to extra-territoriality. I

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1 previously observed in a different motion that it would be  
 2 awfully easy to evade oversight as a New York  
 3 not-for-profit corporation if all you had to do was keep  
 4 your assets outside of the state, which I observed seemed  
 5 inconsistent with the statutory scheme. That's from a  
 6 September 29, 2022 transcript, NYSCEF 1175, at page 23.

7 I reached the same result here. The NRA is a  
 8 New York not-for-profit entity, corporation, over which  
 9 the OAG has oversight responsibilities. And I think that  
 10 the statute gives ample authority to -- for the OAG to  
 11 seek and the Court to grant relief with respect to the  
 12 activities of the NRA as a New York not-for-profit  
 13 corporation, regardless of where those assets may be.

14 Finally, also in the briefs and not much in the  
 15 argument today, several of the defendants had what one  
 16 might call, catchall defenses, which seemed to reserve the  
 17 right to add other affirmative defenses. You know, I  
 18 think it is true that there are situations where one might  
 19 seek to amend pleadings to conform to the evidence at  
 20 trial. But you can't just have an affirmative defense  
 21 that open-endedly reserves the right to serve others. So,  
 22 I don't know that dismissing it does much -- has much  
 23 utility, but also keeping it in there as a separate  
 24 enumerated defense seems kind of pointless. So I will  
 25 dismiss that as well.

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1           The cross motions to amend are denied on the  
2 ground that they are futile, because I have already  
3 considered the allegations that would be included in  
4 amplifying some of those defenses, and found that they  
5 would not, even if amended, be legally viable.

6           Moving on to the motions for summary judgment.

7           Mr. Phillips' motion for partial summary  
8 judgment is denied. I think there are a number of, I  
9 think, good arguments made as to potential defenses to  
10 various claims, but they are not conclusive in my view,  
11 and fact issues remain.

12           Mr. Phillips served as the NRA's treasurer and  
13 CFO for a number of years before retiring in 2018. The  
14 government asserts that he had had conflicts of interest,  
15 engaged in related-party transactions and self-dealing,  
16 among other things. And most relevant to today's motion,  
17 the state alleges that in 2014 the NRA, through  
18 Mr. Phillips, entered into a contract with an outfit  
19 called HomeTelos, and that Mr. Phillips failed to disclose  
20 his, quote, "long-standing personal relationship with  
21 HomeTelos' CEO."

22           Next, the OAG alleges that in 2018 Mr. Phillips  
23 entered into a post-employment consulting agreement with  
24 the NRA for \$30,000 per month, which it claims was an  
25 improper related-party transaction that was properly

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1 approved by the board.

2 The OAG asserts three claims, first as an  
3 improper related-party transaction; under the  
4 Not-for-Profit Corporation Law; and also breach of  
5 fiduciary duty under the Not-for-Profit Corporation Law.  
6 A very similar claim with similar statutory provisions  
7 under the EPTL, and also -- I am sorry, I got that wrong.

8 The fourth cause of action is the fiduciary duty  
9 claim under the Not-for-Profit Corporation Law.

10 The eighth claim, cause of action is under the  
11 EPTL.

12 And the 12<sup>th</sup> cause of action is a wrongful  
13 related-party transaction.

14 Okay. Let's go to the consulting agreement.  
15 First argument and principle argument that is made here is  
16 this is not the type of transaction that is covered by the  
17 related-party transaction provisions of the non profit --  
18 Not-for-Profit Corporation Law. And I think it is true  
19 that there is some authority and some support in the  
20 statute that, broadly speaking, compensation agreements  
21 between a not-for-profit company and its officers, is not  
22 considered an improper related-party transaction. I think  
23 the plaintiffs make a persuasive response that that is  
24 largely because compensation arrangements, at least with  
25 officers, such as Mr. Phillips, are covered by a different

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1 section, Section 715 of the N-PCL.

2 I think that on its face the transaction that is  
3 challenged here is a related-party transaction. The  
4 definition of related-party clearly encompasses  
5 Mr. Phillips. The definition of a related-party  
6 transaction is quite broad. Essentially any transaction  
7 between a related party and in which the related party has  
8 a financial interest and the company, is a related-party  
9 transaction. So I don't think that I can rule as a matter  
10 of law that it is not a related-party transaction.

11 Whether it is a permissible transaction and  
12 whether Mr. Phillips can satisfy the requirements for  
13 defenses under Section 715 is a question for trial. I  
14 note that the -- there was a purported ratification after  
15 the fact of this transaction by the audit committee. But  
16 the statute does impose various specific requirements for  
17 that, and whether those were satisfied is a question for  
18 trial.

19 With respect to the HomeTelos contract, which is  
20 really not challenged as a related-party transaction but  
21 more so as a fiduciary duty claim, whether Mr. Phillips  
22 discharged his duties with the appropriate standard of  
23 care or may rely on a good faith defense, can't be  
24 resolved on this record. Including what disclosures he  
25 did or did not make; when he did or did not make them; and

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1 what impact they had on the decision to extend this  
2 contract; and whether this contract, in fact, caused any  
3 harm, are all questions of fact, in my view, and not  
4 susceptible to summary judgment. So that motion is  
5 denied.

6 Finally, Mr. Powell's motion for summary  
7 judgment is also denied. The claims against Mr. Powell  
8 are similar in that first that it was a breach of -- that  
9 he breached fiduciary duty in connection with his duties  
10 at the NRA.

11 Second, that he failed to properly administer  
12 charitable assets under the EPTL.

13 And finally, that he engaged in a wrongful  
14 related-party transaction with the NRA.

15 The crux of Mr. Powell's argument is that he was  
16 not responsible for the decisions complained of in  
17 connection with its claim for breach of fiduciary duty,  
18 and unlawful related-party transactions. And he also  
19 seeks dismissal of claims concerning his compensation and  
20 expense reimbursements beyond a certain amount. And also  
21 makes specific arguments with respect to related-party  
22 transactions between the NRA and Mr. Powell's wife, and  
23 the entities in which Mr. Powell's wife and his father  
24 were employed.

25 I think as with the prior motion, there are just

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1 too many un-- untied questions of fact here that preclude  
2 reaching judgment as a matter of law here.

3 First, I don't think that the record  
4 demonstrates as a matter of law that Mr. Powell was not a  
5 trustee as defined in the EPTL. Mr. Powell held an  
6 executive position and was delegated extensive powers by  
7 the NRA. And generally speaking, that is a question of  
8 fact.

9 Second, there are numerous material issues of  
10 fact warranting a trial concerning the alleged  
11 related-party transactions with the companies in which  
12 Mr. Powell's wife and father were engaged. That the  
13 challenged transactions may have, in part, been ratified  
14 after the fact, does not warrant summary judgment. In  
15 particular Section 715(j) of the N-PCL, which was added in  
16 2016, provides a defense for the specific circumstances  
17 involved here, which is where a related-party transaction  
18 is ratified after the fact.

19 And whether he satisfies the requirements of  
20 that statute is not something that can be decided as a  
21 matter of law here. Not only does the government  
22 challenge the fairness of the transaction to the company,  
23 but also challenges the procedure under which the decision  
24 was made by the audit committee years after the fact.

25 The statute of limitations argument, which we

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1 didn't get into on the record here, also fails. The OAG  
2 commenced this action in 2020 and argues that a six-year  
3 statute applies. And also contends that Mr. Powell waived  
4 any statute of limitations arguments by not raising it in  
5 a responsive pleading. The reply is silent on this point,  
6 so I don't think that that is grounds for summary  
7 judgment.

8 And finally, the fact that some remedies may be  
9 unavailable at the end of the day, and I am referring here  
10 to the alleged or proposal to clawback salary, I am not  
11 making a decision on that one way or the other today. I  
12 don't think that warrants dismissal of the claim. Both  
13 Section 715(f)(4) and EPTL 8-1.9 permit the OAG to seek in  
14 the case of willful and intentional conduct, an amount up  
15 to double the amount of any benefit improperly obtained.

16 And again, as to that remedy as well, which is  
17 referenced in the motion, I am not making any ruling on  
18 the scope of recovery here. But the bottom line is that  
19 on the merits, on the liability merits, I don't believe  
20 that the motion has established as a matter of law  
21 conclusively entitlement to judgment. So that motion will  
22 be denied.

23 So that resolves the motions at issue today. I  
24 am quite glad that I took the other seven motions that  
25 were originally on the schedule off the schedule, because

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## Proceedings

1 I barely survived this one.

2 But I do appreciate the tremendous amount of  
3 work you have all put in. And you know, whether the  
4 motions were granted or denied, I thought all of the  
5 motions were exceptionally well done, and as was the  
6 advocacy today.

7 I don't know if I set a schedule for the other  
8 motions. Not yet? But I will. Those will impact to some  
9 extent, I suppose, your discussions about trial timing.  
10 But I'll try to get to that as soon as I can.

11 I do want you, as I said, to meet and confer and  
12 to the extent possible agree on a proposed trial plan and  
13 schedule, and give me broad availability in October,  
14 November and December, recognizing that the jury trial  
15 portion of this has to be contiguous. Ideally, the bench  
16 trial portion of it or liability or damages portion of it  
17 would be as well. But it is obviously not as critical.  
18 So I am willing to listen to creative solutions. I am not  
19 willing to put the trial off indefinitely. So, I am going  
20 to ask you to work hard to try to find a period of time  
21 that works.

22 Anything else?

23 MR. FARBER: Judge?

24 THE COURT: Yes, sir?

25 MR. FARBER: Could I ask a question regarding

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1 our planning of the trial schedule?

2 THE COURT: You can ask.

3 MR. FARBER: Do you have a standard practice --

4 THE COURT: Turn the mic on.

5 MR. FARBER: Apologies.

6 Your Honor, do you have a standard practice for  
7 jury trials? Do you sit five days a week? Do you sit  
8 full days? Because that will help us, I think, in  
9 figuring out the scheduling.

10 THE COURT: I think as a -- certainly for  
11 something this long I could not sit five days a week for  
12 eight weeks or six weeks. I have too many things. I  
13 would assume that Fridays are down.

14 Although I do my best to try to accommodate. If  
15 I can go five days, I will, but I can't shut down the rest  
16 of the docket for that long. So, assume at least four  
17 days a week, and five whenever I can.

18 MR. FARBER: Thank you, Your Honor.

19 THE COURT: And I took your prior estimates  
20 about weeks would assume five days. I recognize if it is  
21 not five days you need more. You are giving me days not  
22 calendar weeks, right?

23 MS. CONNELL: Yes, Your Honor.

24 THE COURT: But I am still going to hold you to  
25 it. Estoppel and unclean hands don't apply to me either.

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MR. FARBER: Thank you, Judge.

THE COURT: Okay. Thank you all very much.

MR. SHIFFMAN: Thank you, Your Honor.

THE COURT: Order the transcript.

\* \* \*

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL  
STENOGRAPHIC MINUTES IN THIS CASE.



MICHELE PANTELOUKAS

SENIOR COURT REPORTER

mlp

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