

B R E W E R
ATTORNEYS & COUNSELORS

September 16, 2020

VIA NYSCEF AND OVERNIGHT MAIL

Hon. Deborah A. Kaplan
Administrative Judge
Supreme Court, Civil Branch, New York County
60 Centre Street
New York, NY 10007

Re: Commercial Division Assignment of *People of the State of New York v. The National Rifle Association, et al.*, Index No. 451625/2020

Dear Judge Kaplan,

On behalf of defendant the National Rifle Association of America (the “NRA”) and pursuant to 22 NYCRR 202.70(d)(2)(e), I write to request that this case be transferred to the Commercial Division. The State seeks in this action, among other things, the rescission of tens of millions of dollars’ worth of vendor payments and employee compensation, the removal of individual defendants from executive positions within the NRA, and dissolution of the NRA itself. Spanning more than 160 pages, the Complaint challenges the substance and legitimacy of multiple complex business transactions which it seeks to unwind. This is precisely the type of complex commercial dispute that belongs in the Commercial Division, as contemplated by the Commercial Division Rules.

The State, apparently, agrees: on August 6, 2020, the New York State Office of the Attorney General (the “NYAG”) filed a Request for Judicial Intervention, along with the required addendum pursuant to 22 NYCRR 202.70(d)(1), which identified this action as a “commercial” one for “breach of fiduciary duty and dissolution of NFP corporation” suitable for hearing by the Commercial Division.¹ The addendum to the NYAG’s RJI identified three separate grounds under 22 NYCRR 202.70(b) for assignment to the Commercial Division:

- The lawsuit’s principal claims involve breaches of fiduciary duty alleged to arise out of business dealings, where the amount at issue far exceeds the \$500,000 threshold in New York County (22 NYCRR 202.70(b)(1));
- The lawsuit seeks equitable relief that would impact the internal affairs of a business organization (22 NYCRR 202.70(b)(7)); and
- The lawsuit seeks “[d]issolution of [a] corporation” (22 NYCRR 202.70(b)(11)).

¹ See Dkt. Nos. 7 and 8.

B R E W E R

Hon. Deborah A. Kaplan

September 16, 2020

Page 2

On August 10, 2020, this action was assigned to a complex commercial e-track but not assigned to a Commercial Division justice. Then, on September 10, 2020, the NRA was informed by the clerk's office that a determination had been made that this action did not satisfy the requirements of 22 NYCRR 202.70(b) because it concerned a not-for-profit corporation rather than a for-profit business.²

Respectfully, the NRA concurs with the State that this case does, indeed, concern "business" matters as contemplated by the Commercial Division Rules. New York courts do not construe the term "business" to encompass solely profit-seeking activity; rather, any enterprise that "busies or occupies or engages the time, attention, labor and effort of men as a principle serious concern or interest *or* for livelihood *or* profit" qualifies.³ Accordingly, New York's Not-for-Profit Corporation Law (the "N-PCL") explicitly states that the "conducting of activities" by a not-for-profit corporation may constitute "doing of business" or "transaction of business" as those terms are used in other New York statutes.⁴ Importantly, the NYAG's primary allegation in this case (pleaded using the exact verbiage of yet another provision of the N-PCL) is that the NRA "carried on, conducted or transacted its *business* in a persistently fraudulent or illegal manner."⁵ Even if the Court does not construe the NRA to be a "business organization" within the meaning of 22 NYCRR 202.70(b)(7)—a determination that would be inconsistent with the N-PCL—this case undisputedly involves "business dealings" between the NRA and other persons and entities, which dealings allegedly give rise to claims for breach of fiduciary duty. Examples of relevant "business dealings" include executive compensation and consulting contracts, vendor contracts, and purchases of commercial photography and other services.⁶

² After being informed of the date of this decision, counsel for the NRA identified an August 10, 2020 "case comment" on NYSCEF stating that "This action does not qualify for assignment into the Commercial Division and is directed to a General Commercial part. Please see Uniform Rule 202.70." The NRA has not identified any email notification it received of the posting of this comment. The NRA notes that because this is not a situation in which the case was erroneously assigned because of the failure of the filing party to designate this action as "commercial" in its RJI, the 10-day limitation period of 22 NYCRR 202.70(d)(2)(e) does not apply. Moreover, even if such a limitation period did apply, the NRA believes that "good cause" would exist to seek this relief now: based on the previous assignment of this matter to the complex commercial e-track, the NRA believed (prior to its conversation with the clerk's office) that an assignment to the Commercial Division was pending. The stipulated deadline for the NRA's response to the Complaint has not elapsed. Indeed, this case is in its infancy: no motions or responsive pleadings have been filed, and there are potential bias and conflict items, disclosed yesterday by Judge Lebovits, that remain to be addressed before this case could substantively proceed in the currently assigned court.

³ See *People v. Di Raffaele*, 100 Misc.2d 634 (Sup. Ct. Suffolk Cnty 1979) ("As used in our vocabulary, the term 'business' may be defined as 'an undertaking engaged in for profit' . . . *or* 'that which habitually busies or occupies or engages the time, attention, labor and effort of men as a principle serious concern or interest *or* for livelihood *or* profit.'") (citing Black's Law Dictionary, rev'd 4th Ed.) (emphasis added).

⁴ See N-PCL § 102(a)(4).

⁵ See Dkt. No. 1 ¶ 12; see also N-PCL § 1101(a)(2) (emphasis added).

⁶ See, e.g., Complaint ¶¶ 8, 243-246, 396-412 (alleging breaches of fiduciary duty relating to executive compensation) (cf. 22 NYCRR 202.70(b)(1), which specifies that the "business dealings" triggering a Commercial

B R E W E R

Hon. Deborah A. Kaplan

September 16, 2020

Page 3

Moreover, even if this action did not involve “business dealings” or the “internal affairs of [s] business organization[]” (as explained above, it involves both), yet another independent ground for assignment to the Commercial Division exists. Pursuant to 22 NYCRR 202.70(b)(11), cases involving “[d]issolution of corporations” are required to be heard (*i.e.*, “will be heard”) in the Commercial Division irrespective of the dollar amount involved.⁷ The NRA is undoubtedly a corporation, and actions by the NYAG seeking to dissolve other not-for-profit corporations—including actions far less complex, and involving far smaller dollar amounts, than this one—have appropriately been assigned to the Commercial Division.⁸

Because both the State and the NRA agree that this action does concern “business” matters as contemplated by the Commercial Division Rules, and because the case independently qualifies for assignment to the Commercial Division based on the NYAG’s dissolution claims, the NRA respectfully requests that Your Honor reconsider this decision and reassign this matter to the Commercial Division.

Sincerely,

/s/ Sarah B. Rogers

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Division assignment include “employment agreements”); ¶¶ 221-224 (challenging, as self-dealing, a \$1.4 million information-technology consulting arrangement); ¶¶ 253-265 (alleging conflict of interest, and consequent breach of fiduciary duty, relating to a multi-million dollar relationship with another consulting vendor); ¶ 266 (alleging an NRA executive improperly arranged for a family member to be paid \$93,000 for photography services without disclosing the conflict).

⁷ See 22 NYCRR 202.70(b) and (b)(11).

⁸ See, e.g. *People v. Donald Trump, et al.*, Index No. 451130/2018 (N.Y. Cnty.); *In re Greater Capital Region Assoc’n of Realtors, Inc.*, No.4459/2014 (Albany Cnty); *People v. National Coalition Against Breast Cancer*, No. 20432/2011 (Suffolk Cnty.); *Springer v. Linden Seventh Day Adventist Church*, No. 30296/2008 (Kings Cnty.)