Motion Sequence 003

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,	:	**Index No. 451625/2020**
	:	**Hon. Joel M. Cohen**
Plaintiff,	:	
v.	:	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT WAYNE LAPIERRE'S MOTION TO DISMISS OR STAY

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TABLE OF CONTENTS

Page

I. PRELIMINARY STATEMENT……..1

II. STATEMENT OF FACTS....……...1

III. SUMMARY OF ARGUMENT…….....6

IV. ARGUMENT…….7

A. Legal Standard……..7

B. This Action Should Be Dismissed pursuant to CPLR 3211(a)(1), (a)(2), (a)(3) and (a)(7) on the Ground that a Defense Is Founded Upon Documentary Evidence—the NRA's Certificate of Incorporation……..…9

C. This Action Should Be Dismissed pursuant to CPLR 3211(a)(4) on the Ground that Another Action Is Pending Involving the "Same Parties" and, Substantively, the "Same Cause of Action"……..16

D. This Action Should Be Dismissed or Stayed pursuant to CPLR 327 on the Ground of *Forum Non Conveniens*……18

E. In the Alternative, a Stay Is Warranted under CPLR 2201...……20

V. CONCLUSION……...21

TABLE OF AUTHORITIES

Pages(s)

Cases

11 E. 68th St. LLC v. Madison 68 Realty LLC,
2014 Slip. Op. 31872(U) (Sup. Ct. N.Y. County July 10, 2014)……16, 17

342 West 30th Street Corp. v. Bradbury, 30 Misc.3d 132(A) (1 Dept 2011)……...17

A&S Med., P.C. v. ELRAC, Inc., 184 Misc.2d 257 (Civ. Ct. N.Y. Cnty. 2000).……..18

AIG Financial Products Corp. v. Penncara Energy, LLC, 83 A.D.3d 495 (1 Dept 2011)……..17

Alden v Gambino, 53 Misc.3d 1204(A) (City Ct. Poughkeepsie Sept. 29, 2016)……17

Application of Baumann, 201 A.D. 136 (1st Dep't 1922), aff'd sub nom.,
In re Baumann, 234 N.Y. 555 (N.Y. 1922) ……16

Asher v. Abbott Laboratories, 307 A.D.2d 211 (1 Dept. 2003)……21

Astarita v. Acme Bus Corp., 55 Misc. 3d 767 (Sup. Ct. N.Y. Cnty. 2017)……..10

Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dep't 1997) ……..8, 15

Buzzell v. Mills, 32 A.D.2d 897 (1 Dept 1969) ……21

Citigroup Glob. Markets, Inc. v. Metals Holding Corp., 45 A.D.3d 361 (1 Dept. 2007) ……18

Cooper v Mobil Oil Corp., 264 A.D.2d 578 (1 Dept 1999)……..10

Croce v. Preferred Mut. Ins. Co., 35 Misc.3d 161 (Dist. Ct. Suffolk Co. 2011)..……18

CSSEL Bare Trust v. Phoenix Life Ins. Co., 2009 WL 741177 (N.Y. Sup. Ct. Mar. 11, 2009)…21

Detectives Endowment Assn. v. City of New York, 181 A.D.3d 490 (1st Dep't 2020),
lv to appeal denied, 35 N.Y.3d 914 (2020)……15

Diagnostic Rehab. Med. Serv. v. Republic W. Ins. Co.,
2003 WL 22888389 (N.Y. Civ. Ct. Nov. 19, 2003)……..18

Escoe v. Zerbst, 295 U.S. 490 (1935)..……8

Estate of Webster v. State of New York, 2003 N.Y. Slip Op. 50590(U) (Ct. Cl. Jan. 30, 2003)...14

Fry v. Village of Tarrytown, 89 N.Y.2d 714 (1997).……17

Gilinsky v. Ashforth Properties Construction, Inc., 2019 WL 4575685 (Sup.Ct. New York County Sept. 17, 2019)..……11

Islamic Republic of Iran v. Pahlavi, 62 N.Y.2d 474 (1984)...……18, 20

Jaber v. Elayyan, 168 A.D.3d 693 (2 Dept 2019).……17

Jack Vogel Associates v. Color Edge, Inc., N.Y. Slip Op. 31509(U) (New York County 2008) ……17

Keehn v. S. & D. Motor Lines, Inc., 41 N.Y.S.2d 521 (Sup. Ct. N.Y. County 1943)...……10

Leitner v. Sadhana Temple of New York, Inc., 2014 WL 12588643 (C.D. Cal. Oct. 17, 2014) ……20

Magee v. Geneseo Academy, 1 N.Y.S. 709 (5th Dep't 1888) ...……...16

Matter of In re Friends for Long Island's Heritage, 80 A.D.3d 223 (2d Dep't 2010) ……12

Matter of Miller v Bd. of Assessors, 92 N.Y.2d 82 (1997) ……..16

Matter of Pofit For Dissolution of St. Clare's Corp., 67 Misc.3d 1237(A) (Sup.Ct., Schenectady County 2020).……..12, 13

McHale v Metro. Life Ins. Co., 165 A.D.3d 914 (2d Dept 2018)..……15

Morgan v. Maher, 50 Misc.2d 642 (Sup. Ct., Nassau County 1969) ……..17

Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills, 815 F. Supp. 2d 679 (S.D.N.Y. 2011) ..……17

Nutronics Imaging, Inc. v. Danan, 1998 WL 426570 (E.D.N.Y. 1998) ….……20

Osborn v. Montelac Park, 35 N.Y.S. 610 (2d Dep't 1895), aff'd 153 N.Y. 672 (1897) ...……..16

People ex rel. Gambling v. Board of Police, 6 Abb.Pr. 162 (Sup. Ct., General Term, N.Y. 1858) ...…….16

People v. Grasso, 11 N.Y.3d 64 (2008) (Kaye, C.J.) ……13, 16

Parker v. 30 Wall St. Apartment Corp., 2015 WL 7906823 (1 Dept Dec. 4, 2015) ……18

Price v. Brown Group, 206 A.D.2d 195 (4 Dept 1994)……19

Roseman v. McAvoy, 401 N.Y.S.2d 988 (N.Y. City Civ. Ct. 1978).……18

Sicignano v. Hymowitz, 2014 WL 3583886 (N.Y. Sup.),
2014 N.Y. Slip Op. 51100(U) (Sup.Ct., Kings Co., N.Y. 2014)...15

Silver v. Great Am. Ins. Co., 29 N.Y.2d 356 (1972).. ..18

Statutes and Rules

CPLR 304...17

CPLR 306-a ..17

CPLR 327...passim

CPLR 327(a)..9, 20

CPLR 503...passim

CPLR 2201..passim

CPLR 3022..16

CPLR 3117(a)(3)(11)..19

CPLR 3211(a)(1)..passim

CPLR 3211(a)(2)..passim

CPLR 3211(a)(3)..passim

CPLR 3211(a)(4) ...passim

CPLR 3211(a)(7) ...passim

N-PCL § 102… ..10

N-PCL § 1008..8, 12

N-PCL § 1101..7

N-PCL § 1110..passim

N-PCL Article 11...passim

1865 N.Y. Sess. Laws 692-695 (McKinney)...4

N.Y. Bus. Corp. L. § 1112...11, 12

N.Y. Membership Corp. L. (1895 N.Y. Laws 559) (repealed 1970) ……4

28 U.S.C. § 1367…….. 20

Fed.R.Civ.P. 12(a) ……17

Other Authorities

4-2201 Weinstein-Korn-Miller……..21

I.

PRELIMINARY STATEMENT

Defendant Wayne LaPierre moves to dismiss or stay this action pursuant to section 1110 of the New York Not-for-Profit Corporation Law, and CPLR 3211(a)(1), (a)(2), (a)(3) and (a)(7) on the ground that a defense of improper venue is founded upon documentary evidence, the Court lacks jurisdiction over the subject matter of this action under Article 11 of the New York Not-for-Profit Corporation Law, plaintiff lacks legal capacity to maintain this action in this Court, and the complaint fails to state a cause of action under Article 11 of the New York Not-for-Profit Corporation Law because plaintiff has failed to comply with the mandatory venue requirement of the statute. In addition, he moves to dismiss this action pursuant to CPLR 3211(a)(4) on the ground that another action is pending in the United States District Court for the Northern District of New York between the "same parties", and, substantively, the "same cause of action." He also moves to dismiss or stay this action pursuant to CPLR 327 on the ground that this is an inconvenient venue. In the alternative, he moves to stay this action pursuant to CPLR 2201 action pending resolution of related federal cases. For the reasons set forth below, his motion should be granted.

II.

STATEMENT OF FACTS

On August 6, 2020, the People of the State of New York, by Letitia James, Attorney General of the State of New York (the "Attorney General" or "NYAG") filed a summons and verified complaint in this Court in an attempt to commence an action under Article 11 of the New York Not-for-Profit Corporation Law against the National Rifle Association of America, Inc., a New York not-for-profit corporation (the "NRA"), LaPierre and others seeking judicial

dissolution of the NRA.[1] A few minutes later, the NRA filed an action in the United States District Court for the Northern District of New York against Letitia James, individually and in her official capacity as Attorney General of the State of New York, alleging that she was engaged in a corrupt scheme to "take down the NRA", challenging the constitutionality of the NYAG's actions, and seeking a judicial declaration that "the NRA operates in substantial compliance with New York not-for-profit law".[2] The current, operative pleading in this federal lawsuit (the "NRA Federal Action") also asserts claims for selective enforcement and infringement of associational rights.[3]

On August 9, 2020, in the instant action, the NRA filed a notice of election to treat the Attorney General's unverified or defectively verified pleading as a nullity, stating:

PLEASE TAKE NOTICE that Defendant the National Rifle Association of

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[1] *See* NYSCEF Doc. No. 1 (summons and complaint dated August 6, 2020); complaint ¶ 12 ("As a result of … persistent violations of law by the Defendants, the Attorney General seeks a finding by this Court that the NRA is liable to be dissolved pursuant to (a) N-PCL § 1101(a)(2) based upon the NRA's pattern of conducting its business in a persistently fraudulent or illegal manner, abusing its powers contrary to public policy of New York and its tax exempt status, and failing to provide for the proper administration of its trust assets and institutional funds; and/or (b) N-PCL § 1102(a)(2) because directors or members in control of the NRA have looted or wasted the corporation assets, have operated the NRA solely for their personal benefit, or have otherwise acted in an illegal, oppressive or fraudulent manner. The Attorney General requests that this Court determine, in the exercise of its discretion under Section 1109(b)(1) of the N-PCL, that the interest of the public and the members of the NRA supports a decision to dissolve the NRA."); ¶¶ 560-574 ("**FIRST CAUSE OF ACTION [-] Dissolution of the NRA – N-PCL §§ 112(a)(1), 112(a)(5), 1101(a)(2)**") and ¶¶ 576-579 ("**SECOND CAUSE OF ACTION [-] Dissolution of the NRA – N-PCL §§ 112(a)(7), 1102(a)(2)(D)**") (bolding in original); and Prayer for Relief ("[T]he Attorney requests judgment against the Defendants for the following relief: A. Dissolving the NRA and directing that its remaining assets and any future assets be applied to charitable uses consistent with the mission set forth in the NRA's certificate of incorporation pursuant to N-PCL §§ 112(a)(1), 112(a)(5), 112(a)(7), 1101(a)(2), 1102(a)(2)(D) and 1109; B. Declaring that the NRA has exceeded the authority conferred upon it by law, has carried on, conducted, or transacted its business in a persistently fraudulent or illegal manner, or has abused its powers contrary to the public policy of the State of New York, and determining, in the court's discretion, that it is in the interest of the public to dissolve the NRA pursuant to N-PCL §§ 112(a)(1), 112(a)(5), 1101(a)(2), 1109, and C.P.L.R. § 3001; [and] C. Declaring that directors or members in control of the NRA have looted or wasted the NRA's charitable assets, have perpetuated the corporation solely for their personal benefit, or have otherwise acted in an illegal, oppressive or fraudulent manner, and determining, in the court's discretion, that it is in the interest of the members to dissolve the NRA pursuant to N-PCL §§ 112(a)(7), 1102(a)(2)(D), 1109 and C.P.L.R. § 3001") (boldface appears in original).

[2] *See* Affirmation of P. Kent Correll, Esq. dated October 30, 2020 (hereinafter cited as "Correll Affirm."), ¶ 3, Ex. 1 (Complaint dated August 6, 2020, filed by the NRA against Letitia James, both individually and in her official capacity, Civ. No. 1:20-cv-00889-MAD-TWD (N.D.N.Y.) (hereinafter cited and referred to as the "NRA Federal Action").

[3] *See id.*, ECF No. 13.

> America (the "NRA") elects to treat as a nullity, pursuant to N.Y. C.P.L.R. 3022, the "Verified Complaint" filed August 6, 2020, in the above-referenced matter (NYSCEF Doc. No. 1) (the "Complaint"), on the ground that the Complaint seeks judicial dissolution pursuant to N-PCL Article 11, yet fails to satisfy the verification requirements of N-PCL § 1103 and C.P.L.R. 3020.
>
> As the Attorney General is no doubt aware, judicial dissolution under New York's Not-for-Profit Corporation Law is a serious matter. Government officials who target a nonprofit for destruction must swear under oath that their allegations are true—or, at minimum, that they ***believe*** they are telling the truth. *See* N-PCL § 1103. The government has not done so here.
>
> In particular, C.P.L.R. 3020 requires that any verification state "under oath that the pleading is true to the knowledge of the deponent, except as to matters alleged on information and belief, ***and that as to those matters he believes it to be true***." (emphasis added). The Complaint against the NRA contains a purported verification, but omits the last clause: it does not state matters alleged on information and belief are believed to be true. Under C.P.L.R. 3022, the Complaint was, accordingly, "served without sufficient verification."[4]

On August 10, 2020, the Attorney General filed a second summons and a second verified complaint with a different verification.[5] In the new verified complaint ("Complaint"), the Attorney General alleged: "Venue is properly set in New York County pursuant to (a) CPLR § 503 because the Attorney General has an office in the county; and (b) N-PCL §§ 1110 and 102(a)(11), because the office of the NRA is in New York County as set forth in the NRA's certificate of incorporation."[6]

Contrary to the Attorney General's assertion, the NRA's certificate of incorporation does not "set forth" that "the office of the NRA is in New York County."[7] The original certificate of

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[4] *See* NYSCEF Doc. No. 10 (Notice of election to treat unverified or defectively verified pleading as a nullity dated August 9, 2020).

[5] *See* NYSCEF Doc. No. 11 (Summons dated August 10, 2020 and Complaint dated August 10, 2020).

[6] *See* NYSCEF Doc. No. 11 (Complaint), ¶ 26 and (Summons) ("The basis of venue pursuant to CPLR § 503(a) is that Plaintiff is located in New York County, with its address at 28 Liberty Street, New York, New York 10005, and because the office of defendant [NRA] is in New York County as set forth in its certificate of incorporation, pursuant to N-PCL §§ 1110 and 102(a)(11).").

[7] *See* Correll Affirm. ¶¶ 4 to 11 and Exs. 2 - 9 (NRA original certificate of incorporation, amendments and other certificates or instruments contained in the file maintained at the NYS Department of State, Division of Corporations). As shown below, these certificates and other instruments constitute the "certificate of incorporation"

incorporation, issued in 1871, does not "set forth" the location of an office,[8] nor was the NRA required to state the location of an office under then-governing law.[9] In 1877, an order was issued authorizing the NRA to change its name; neither this order nor any documentation filed in response thereto states the location of an office, either.[10] In 1895, New York amended its laws for the first time to require that a newly formed nonprofit designate and maintain a principal office within the State, but did not adopt any provision requiring previously-existing nonprofits to update their filings to specify an office location.[11] In 1973, a certificate was issued by the Department of State of the State of New York, which states: "The post office address to which the Secretary of State shall mail a copy of any notice required by law is 1600 Rhode Island Avenue, N.W., Washington, D.C. 20036".[12] In 1977, a certificate of amendment of the certificate of incorporation was issued, which states (again): "The post office address to which the Secretary of State shall mail a copy of any notice required by law is 1600 Rhode Island Avenue, N.W., Washington, D.C. 20036".[13] In 1985, another certificate of amendment of the certificate of incorporation was issued, which states: "The Secretary of State of New York is the designated agent for service of process on the corporation. The post office address to which the

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of the NRA for purposes of the New York Not-for-Profit Corporation Law and the mandatory statutory venue requirement of N-PCL § 1110. *See* N-PCL 102(a)(3).

[8] *See* Correll Affirm. ¶ 4, Ex. 2 (1871 NRA Certificate of Incorporation, which states that it was filed on November 20, 1871 with the Department of the Secretary of State.) Albany became the capital of New York in 1797, therefore, the Secretary of State would have been located in Albany County in 1871.

[9] *See* 1865 N.Y. Sess. Laws 692-695 (McKinney) (the "1865 Act"). The 1865 Act provides, in relevant part, that a nonprofit association "may" file a certificate of incorporation in the location where it intends to maintain an office (and must obtain the approval of a local judge if so), but does not require that an office address be designated for service of process or any other reason. Irrespective of where the association actually operates or sites its offices in subsequent years, the 1865 Act provides that annual asset inventories continue to be filed in the same district as the original certificate of incorporation. *Id.*

[10] *See* Correll Affirm. ¶ 5, Ex. 3 (1877 court order authorizing NRA name change).

[11] *See* N.Y. Membership Corp. L. (1895 N.Y. Laws 559) (repealed 1970).

[12] *See* Correll Affirm. ¶ 8, Ex. 6 (1973 Certificate of Type of Not-for-Profit Corporation of the National Rifle Association of America).

[13] *See* Correll Affirm. ¶ 9, Ex. 7 (1977 Certificate of Amendment of the Certificate of Incorporation of the National Rifle Association of America).

Secretary of State shall mail a copy of any notice required by law is 1600 Rhode Island Avenue, N.W., Washington, D.C. 20036." [14] Finally, in 2002, a certificate of change was issued by the New York State Department of State, which states the NRA's address as: "11250 Waples Mill Road, Fairfax, VA 22030,"[15] and further states: (1) "The address to which the Secretary of State shall forward copies of process accepted on behalf of the corporation is changed to: Corporation Service Company 80 State Street, Albany, NY 12207-2543;" and (2) "The corporation hereby: … Changes the designation of its registered agent to: Corporation Service Company 80 State Street, Albany, NY 12207-2543".[16] Hence, in over 149 years, the NRA's certificate of incorporation has never "set forth" that "the office of the NRA is in New York County", and, since 2002, the only office address "set forth" in the NRA's certificate of incorporation, other than the address of the NRA's office in Virginia, has been 80 State Street, Albany, New York.[17]

On October 19, 2020, in the instant action, the NRA filed a demand under CPLR Rule 511(b) for change of place of trial on the ground that the county designated for that purpose is not the proper county.[18] That same day, the NRA moved this Court for an order: (1) pursuant to CPLR 327(a) dismissing this action on the basis of *forum non conveniens*; (2) pursuant to CPLR 3211(a)(4) dismissing or staying this action because of pending litigation between the parties; (3) pursuant to 3211(a)(1) dismissing or staying this action for improper venue; and (4) pursuant to

[14] *See* Correll Affirm. ¶ 10, Ex. 8 (1985 Certificate of Amendment of the Certificate of Incorporation of the National Rifle Association of America).

[15] *See* Correll Affirm. ¶ 11, Ex. 9 (2002 Certificate of Change of the National Rifle Association of America).

[16] *Id.*

[17] *See* Correll Affirm. Exs. 2 – 9. All of these documents state that they were filed with the Secretary of State in Albany County. *Id.*

[18] *See* NYSCEF Doc. No. 39 (Demand under CPLR 511(b) for Change of Place of Trial on the Ground that the County Designated for that Purpose Is Not a Proper County dated October 19, 2020).

CPLR 2201 staying this action pending the resolution of related federal cases.[19] The next day, the NRA filed a motion to transfer cases for coordinated or consolidated pre-trial proceedings pursuant to 28 U.S.C. § 1407.[20] On October 26, 2020, the Attorney General filed an affirmation in response to the NRA's CPLR 511 demand, in which she abandoned the allegation that the NRA's certificate of incorporation "sets forth" that "the office of the NRA is in New York County."[21]

On October 29, 2020, in the instant action, LaPierre filed a notice of election to treat the Attorney General's unverified or defectively verified August 6, 2020, pleading as a nullity.[22] LaPierre now moves to dismiss or stay on the same grounds as the NRA, incorporating by reference the papers filed by the NRA in support of its motion, adopting the statement of facts and argument set forth in the NRA's papers, and presenting additional facts and argument.

III.

SUMMARY OF ARGUMENT

Venue is not properly set in New York County because (1) CPLR 503 does not apply where venue is "otherwise prescribed by law", (2) here, venue is "otherwise prescribed by law"—in section 1110 of the New York Not-for-Profit Corporation law, a mandatory statutory venue provision, which states, clearly and unambiguously: "An action … under this article ***shall*** be brought in the supreme court in the judicial district in which the office of the corporation is

[19] *See* NYSCEF Doc. No. 70 (Notice of Motion dated October 19, 2020), Doc. No. 71 (Affirmation of Sarah B. Rogers dated October 19, 2020), Doc. Nos. 72-98 (Exhibits), Doc. No. 99 (Memorandum of Law in Support of Defendant The National Rifle Association's Motion to Dismiss dated October 19, 2020). LaPierre hereby adopts and incorporates by reference the affirmation and brief submitted by NRA in support of its motion, and joins in the NRA's motion.

[20] *See* Correll Affirm. ¶ 12, Ex. 10 (The National Rifle Association's Motion to Transfer Cases for Coordinated or Consolidated Pre-Trial Proceedings Pursuant to 28 U.S.C. § 1407 dated October 20, 2020).

[21] *See* NYSCEF Doc. No. 108 at ¶ 7.

[22] *See* NYSCEF Doc. No. 112 (Notice of Election to Treat Unverified or Defectively Verified Pleading as a Nullity Pursuant to CPLR 3022 dated October 29, 2020).

located at the time of the service on the corporation of a summons in such action ….", and (3) the NRA's certificate of incorporation does not "set forth" that "the office of the NRA is in New York County", but, rather, sets forth that the office of the NRA is in Albany County. Moreover, there is another action pending in federal court in Albany County involving the "same parties" and, substantively, the "same cause of action", and New York County is an inconvenient forum. Accordingly, the Court should dismiss or stay the instant action pursuant to N-PCL § 1110, CPLR 3211(a)(1), (a)(2), (a)(3), (a)(4), (a)(7), and CPLR 327, or, in the alternative, stay this action pursuant to CPLR 2201 pending resolution of related federal cases.

IV.

ARGUMENT

A. Legal Standard

Article 11 of the New York Not-for-Profit Corporation Law governs judicial dissolution.[23] Section 1101 ("Attorney-general's action for judicial dissolution") provides:

> (a) The attorney-general may bring an action for the dissolution of a corporation upon one or more of the following grounds:
>
> (1) That the corporation procured its formation through fraudulent misrepresentation or concealment of a material fact.
>
> (2) That the corporation has exceeded the authority conferred upon it by law, or has violated any provision of law whereby it has forfeited its charter, or carried on, conducted or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to public policy of the state has become liable to be dissolved.
>
> (b) An action under this section is triable by jury as a matter or right.
>
> (c) The enumeration in paragraph (a) of grounds for dissolution shall not exclude actions or special proceedings by the attorney-general or other state officials for

[23] N-PCL, Art. 11.

> the annulment or dissolution of a corporation for other causes as provided in this chapter or in any other statute of this state.[24]

Section 1110 provides: "An action … under this article ***shall*** be brought in the supreme court in the judicial district in which the office of the corporation is located at the time of the service on the corporation of a summons in such action …."[25]

CPLR 503 ("Venue based on residence") provides, in subdivision (a): "Generally. ***Except where otherwise prescribed by law***, the place of trial shall be in the county in which one of the parties resided when it was commenced; the county in which a substantial part of the events or omissions giving rise to the claim occurred; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county."[26]

In a motion to dismiss, the allegations of the complaint are presumed to be true and accorded every favorable inference, except to the extent that the allegations are bare legal conclusions or are completely contradicted by documentary evidence.[27] CPLR 3211(a)(1) provides that a party may move for judgment dismissing one or more causes of action against him on the ground that "a defense is founded upon documentary evidence".[28] CPLR 3211(a)(2)

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[24] N-PCL § 1101 ("Attorney-general's action for judicial dissolution").

[25] N-PCL § 1110; *see Escoe v. Zerbst*, 295 U.S. 490, 493 (1935) ("[S]hall … is the language of command …"); *see also* N-PCL § 1008 ("***Jurisdiction of supreme court to supervise dissolution*** and liquidation") ("(a) At any time after the filing of a certificate of dissolution under this article, ***the supreme court in the judicial district where the office of the corporation was located at the date of its dissolution,*** in a special proceeding instituted under this section, upon the petition of the corporation or, in a situation approved by the court, upon the petition of a creditor, claimant, director, officer, member, subscriber for capital certificates, incorporator or the attorney general, may suspend or annul the dissolution or continue the liquidation of the corporation under the supervision of the court and ***may make all such orders as it may deem proper in all matters in connection with the dissolution or the winding up of the affairs of the corporation***, …. ***) ("Comment: This section, patterned after § 1008 of the Bus.Corp.L., spells out the jurisdiction of the supreme court over the affairs of the dissolved corporation during the liquidation period in greater detail than § 56 of the Mem.Corp.L., which presently regulates not-for-profit corporations.") (emphasis added).

[26] CPLR 503.

[27] *See Beattie v. Brown & Wood*, 243 A.D.2d 395 (1st Dep't 1997).

[28] CPLR 3211(a)(1).

provides that a party may move for judgment dismissing one or more causes of action against him on the ground that "the court has not jurisdiction of the subject matter of the cause of action".[29] CPLR 3211(a)(3) provides that a party may move for judgment dismissing one or more causes of action against him on the ground that "the party asserting the cause of action has not legal capacity to sue".[30] CPLR 3211(a)(4) provides that a party may move for judgment dismissing one or more causes of action against him on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States".[31] CPLR 3211(a)(7) provides that a party may move for judgment dismissing one or more causes of action against him on the ground that "the pleading fails to state a cause of action".[32] In addition, CPLR 327(a) provides: "When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that maybe just."[33] Lastly, CPLR 2201 provides: "Except where otherwise prescribed by law, the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just."[34]

B. This Action Should be Dismissed pursuant to CPLR 3211(a)(1), (a)(2), (a)(3) and (a)(7) on the Ground that a Defense Is Founded Upon Documentary Evidence—the NRA's Certificate of Incorporation.

In Part III of its brief (NYSCEF Doc. No. 99, pages 17-18), the NRA argues:

> The NYAG's dissolution claims are governed by Article 11 of the New York Not-for-Profit Corporation Law. N-PCL § 1110 provides: "An action … under this

[29] CPLR 3211(a)(2).

[30] CPLR 3211(a)(3).

[31] CPLR 3211(a)(4).

[32] CPLR 3211(a)(7).

[33] CPLR 327(a) ("Inconvenient Forum").

[34] CPLR 2201("Stay").

> article ***shall*** be brought in the supreme court in the judicial district in which the office of the corporation is located at the time of the service on the corporation of a summons in such action …."[35] "Office of a corporation" is defined as "the office the location of which is stated in the certificate of incorporation …. Such office need not be a place where activities are conducted by such corporation."[36] Contrary to NYAG's allegation in paragraph 26 of the complaint, the NRA's certificate of incorporation does not "set forth" that "the office of the NRA is in New York County." The original certificate of incorporation, issued in 1871, does not state the location of an office.[37] In 2002, a certificate of change was issued by the New York Secretary of State, stating that the NRA "changes the designation of its registered agent to: Corporation Service Company 80 State Street, Albany, NY 12207-2543" and identifying a principal place of business in Virginia. A plain reading of the statute required that this action therefore be filed in Albany County, New York.[38] In the alternative, this action should be transferred.[39] (Footnotes in original.)

LaPierre adopts this argument.

In addition, LaPierre respectfully points out: (1) that, for purposes of the N-PCL, "Certificate of Incorporation" is defined, as: "(A) the original certificate of incorporation or any other instrument filed or issued under any statute to form a domestic or foreign corporation, ***as amended, supplemented or restated by certificates of amendment,*** merger or consolidation ***or***

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[35] *See* N-PCL § 1110 ("Venue") and Comment ("This section, dealing with the venue in proceedings for judicial dissolution, is an adaptation of § 1112 of the Bus. Corp. L. It departs from §§ 138 and 139 of the Gen. Corp. L. in the fact that it makes no special provision for dissolution proceedings initiated by the attorney-general. This is covered by § 112 of this chapter.") (emphasis added).

[36] N.Y. N-PCL § 102 ("Definitions"), subparagraph (a)(11). *See Cooper v. Mobil Oil Corp.,* 264 A.D.2d 578, 578-79 (1 Dep't 1999) ("Plaintiffs commenced this personal injury action against defendant based upon alleged Labor Law violations and designated New York County as venue by reason of defendant's certificate of incorporation which named New York County as the location of its principal office. Supported by an affidavit from a corporate officer, defendant moved to change venue to Suffolk County, plaintiffs' county of residence, upon the ground that defendant had no principal office or place of business in New York when this action was commenced and that the defendant's principal office is, in fact, located in Fairfax County, Virginia. Although CPLR 503(c) deems a corporation to be a resident of the county in which its principal office is located, Business Corporation Law § 402 requires that a corporation list on its certificate of incorporation a location within New York State for its principal place of business. Defendant designated New York County in that manner and plaintiffs properly relied upon that designation in selecting venue) (citations omitted); *Astarita v. Acme Bus Corp.,* 55 Misc. 3d 767 (Sup. Ct. N.Y. Cnty. 2017) (granting motion for change of venue, holding that venue was proper in Suffolk County where corporation changed its principal office as reported in biennial registration statement); *Keehn v. S. & D. Motor Lines, Inc*., 41 N.Y.S.2d 521 (Sup.Ct. N.Y. Cnty. 1943) ("The law is abundantly clear that the office and principal place of business for venue purposes of a domestic corporation, …, is fixed by its certificate of incorporation.").

[37] Rogers Aff. Ex. 26 at 1. [(NYSCEF Doc. No. 71)].

[38] *Id*. at 2-16. [(NYSCEF Doc. No. 71)].

[39] The NRA served a transfer demand pursuant to CPLR 511 on October 19, 2020. *See* Dkt. No. 39.

other certificates or instruments filed or issued under any statute; or (B) a special act or charter creating a domestic or foreign corporation, as amended, supplemented or restated;"[40] (2) that certificates of amendment issued in 1977 and 1985 did not "set forth" that "the office of the NRA is in New York County;"[41] (3) that, in addition to designating a registered agent in Albany County, the certificate of change issued in 2002 by the New York Secretary of State also stated: "The address to which the Secretary of State shall forward copies of process accepted on behalf of the corporation is changed to: Corporation Service Company 80 State Street, Albany, NY 12207-2543;" and (4) that the original certificate of incorporation of the NRA was amended, supplemented or restated by certificates of amendment or other certificates or instruments filed or issued under the Not-for-Profit Corporation Law in 2002 to specify the location of an office in Albany County.[42] LaPierre further respectfully points out that CPLR 503 simply does not apply here.[43] CPLR 503 ("Venue based on residence") states: "***Except where otherwise prescribed by law***, the place of trial shall be in the county in which one of the parties resided when it was commenced; or, if none of the parties then resided in the state, in any county designated by the plaintiff. A party resident in more than one county shall be deemed a resident of each such county."[44] In an action for judicial dissolution under Article 11, venue is "***otherwise prescribed by law***"—in N-PCL § 1110.[45]

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[40] *See* N-PCL § 102(a)(3) (emphasis added).

[41] *See* Correll Affirm. ¶¶ 9 - 10 and Exs. 7 and 8.

[42] *See* NYSCEF Doc. No. 71 (Rogers Aff. Ex. 26 at 1); and Correll Affirm. ¶ 11 and Ex. 9; *Gilinsky v. Ashforth Properties Construction, Inc.*, 2019 WL 4575685 *1 (Sup.Ct. New York County Sept. 17, 2019) (finding that designation of county in which registered agent would accept service of process on behalf of corporation established defendant corporation's residence in that county for venue purposes).

[43] *See* CPLR 503 (stating expressly that it does not apply where venue is "otherwise prescribed by law").

[44] *Id*. (emphasis added).

[45] N-PCL § 1110. As noted above, the Comment to N-PCL § 1110 states: "***This section***, dealing with the venue in proceedings for judicial dissolution, is an adaptation of § 1112 of the Bus. Corp. L. It departs from §§ 138 and 139 of the Gen. Corp. L. in the fact that it ***makes no special provision for dissolution proceedings initiated by the attorney-general***. This is covered by § 112 of this chapter." (Emphasis added.) N-PCL § 112 provides: "(a) The

Indeed, echoing the mandatory and exclusive language of the venue provision of section 1110, section 1008 of the N-PCL, which applies to actions brought under Article 11, expressly limits jurisdiction to supervise dissolution to "the supreme court in the judicial district where the office of the corporation was located at the date of its dissolution".[46] Thus, compliance with

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attorney-general may maintain an action or special proceeding: (1) To annul the corporate existence or dissolve a corporation that has acted beyond its capacity or power or to restrain it from carrying on unauthorized activities; *** (5) To dissolve a corporation under article 11 (Judicial dissolution); *** (9) Upon application, ex parte, for an order to the supreme court at a special term held within the judicial district where the office of the corporation is located, and if the court so orders, to enforce any right given under this chapter to members, a director or an officer of a non-charitable corporation. For such purpose, the attorney-general shall have the same status as such members, director or officer." Clearly, section 112 does not exempt the attorney general from the mandatory statutory venue requirement prescribed by law in N-PCL § 1110. Thus, under the clear and unambiguous language of the careful and comprehensive scheme established by the New York Legislature for regulation and oversight of New York not-for-profit corporations, the Attorney General is required to comply with the mandatory statutory venue requirement of section 1110 applicable to all actions for dissolution, and can claim no exemption. *See* N.Y. Bus. Corp. L. § 1112 ("An action or special proceeding under this article shall be brought in the supreme court in the judicial district in which the office of the corporation is located at the time of the service on the corporation of a summons in such action or of the presentation to the court of the petition in such special proceeding.") ("Comment: ***The exception in General Corporation Law § 139 that an action brought by the attorney-general may be brought in any county designated by him has been omitted.***") (Emphasis added.)

[46] *See* N-PCL 1008 ("Jurisdiction of supreme court to supervise dissolution and liquidation") ("[T]he supreme court in the judicial district where the office of the corporation was located at the date of its dissolution … may make all such orders as it may deem proper in all matters in connection with the dissolution or the winding up of the affairs of the corporation, …. ***."; *Matter of In re Friends for Long Island's Heritage*, 80 A.D.3d 223, 232-33 (2d Dep't 2010) (subject to other article 11 provisions, certain provisions of article 10 (which relates to nonjudicial dissolutions) shall apply. As particularly relevant here, N-PCL 1115 (a) incorporates N-PCL 1008. N-PCL 1008 (a) in turn provides, in relevant part, that the Supreme Court "may make all such orders as it may deem proper in all matters in connection with the dissolution . . . of the corporation, and in particular, and without limiting the generality of the foregoing, in respect of the following: . . . *** Similarly, N-PCL 1109 (c), which describes the court's discretion with respect to the final order of dissolution, provides that "[i]f the judgment or final order shall provide for a dissolution of the corporation, the court may, in its discretion, provide therein for the distribution of the property of the corporation to those entitled thereto according to their respective rights. Any property of the corporation described in subparagraph one of paragraph (c) of section 1002-a (Carrying out the plan of dissolution and distribution of assets) shall be distributed in accordance with that section.") (emphasis added); *Matter of Pofit For Dissolution of St. Clare's Corp*., 67 Misc.3d 1237(A) (Sup.Ct. 2020) ("It is also clear based on the Court's reading of Article 11 of the NPCL, that certain provisions contained in Article 10 of the NPCL also apply to proceedings brought under Article 11. NPCL § 1115, entitled "Applicability of other provisions", provides in pertinent part as follows: (a) Subject to the provisions of this article, the provisions of sections 1006 (Corporate action and survival of remedies after dissolution), 1007 (Notice to creditors; filing or barring claims) and 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation) ***shall apply to a corporation dissolved under this article***. (b) Any orders provided for in section 1008, may be made at any stage of an action or special proceeding for dissolution of a corporation under this article,...(c) Notice to creditors and claimants, provided for in section 1007, may also be given, by order of the court, at any stage of an action or special proceeding for dissolution of a corporation under this article. [Emphasis added]. Thus, NPCL § 1008, which gives the Court wide discretion to supervise the dissolution of a corporation and "make all such orders as it may deem proper in all matters in connection with the dissolution", applies to this Article 11 proceeding. See, NPCL § 1008. Accordingly, this Court has the power and discretion to make any orders it deems appropriate at any stage of this proceeding.") (Emphasis in original; citations omitted.).

section 1110 should be viewed, not only as an exclusive venue provision, but also as a condition precedent to the exercise of jurisdiction in an action under Article 11 and as an element of a cause of action for dissolution under Article 11.[47] Section 1008 makes clear that the Legislature intended to make the exercise of jurisdiction in an action brought under Article 11 dependent on the action being brought in the supreme court in the judicial district in which the office of the corporation facing dissolution is located. This makes perfect sense because, otherwise, the court determining whether or not to order dissolution would lack jurisdiction to oversee the dissolution. Thus, the jurisdiction, power and authority of a supreme court to order and supervise dissolution should be viewed as having been expressly conditioned by the Legislature on compliance with the mandatory venue provision of section 1110. It would not make any sense for the Legislature to bestow exclusive jurisdiction to supervise dissolution on the supreme court in the judicial district in which a not-for-profit corporation is located at the time of dissolution and enact a specific venue provision requiring that any action under Article 11 be brought in that court, then allow the attorney general to bring an action under Article 11 in any court she likes based on the general "residence based on venue" provision of CPLR 503, thereby thwarting the legislative scheme, particularly when the Legislature has gone to such great pains to enact a substantive statute specifically governing not-for-profit corporations and has taken such great care to include both a specific jurisdiction provision and a specific venue provision, making jurisdiction and venue in the supreme court in the judicial district in which the corporation facing dissolution is located key elements of the statutory scheme, in terms which could hardly be any clearer.[48]

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[47] *See* N-PCL 1110; and *see Matter of Pofit For Dissolution of St. Clare's Corp.*, 67 Misc.3d 1237(A) (Sup.Ct. 2020).

[48] *See People v. Grasso*, 11 N.Y.3d 64, 72 (N.Y. 2008) (Kaye, C.J.) (affirming order of Appellate Division, First Department, reversing, on the law, an order of the Supreme Court, New York County (Ramos, J.), which had denied

Accordingly, section 1110 must be viewed as a mandatory venue provision that may not be disregarded.[49]

As the Court of Claims has explained:

> On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). The Court accepts the facts as alleged in the Claim as true, accords the Claimant the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law (see, e.g., Leon v. Martinez, 84 N.Y.2d 83, 88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [documentary evidence must utterly refute factual allegations]. The term "documentary evidence" as referred to in CPLR 3211(a)(1) typically means judicial records such as judgments and orders or out-of-court documents such as contracts, deeds, wills, and/or mortgages (Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20) and includes "[a] paper whose content is essentially undeniable and which, assuming the verity of its contents and the validity of its execution, will itself support the ground on which the motion is based" (*Id*. at 21; see also 7 Weinstein–Korn–Miller, N.Y. Civil Practice, ¶ 3211.06).[50]

Here, LaPierre has offered as his documentary evidence 149 years' worth of documents filed in Albany County with the Secretary of State, not one of which states that the office of the NRA is in New York County, and the most recent of which, issued in 2002, sets forth an office address in Albany County.[51] All of the documents submitted by LaPierre are "documents" within the meaning of CPLR 3211(a)(1) that are "essentially undeniable".[52] Thus, the documentary evidence properly before the Court establishes the location of the office of the corporation within the State as 80 State Street, Albany, New York, which is in Albany County, and, therefore, establishes that the supreme court for the county of Albany is the court in which this action for

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a motion by defendant Grasso, pursuant to CPLR 3211(a)(7), to dismiss four causes of action, and granting the motion, stating: "***The Legislature … enacted a statute requiring more. The Attorney General may not circumvent that scheme …. To do so would tread on the Legislature's policy-making authority.***") (Emphasis added).

[49] *See supra*, note 46 and accompanying text.

[50] *See Estate of Webster v. State of New York*, 2003 N.Y. Slip Op. 50590(U) (Ct. Cl. Jan. 30, 2003).

[51] *See* Section II, *supra*, at 3-5.

[52] *See Webster, supra,* note 47 and accompanying text.

judicial dissolution under Article 11 of the New York Not-for-Profit Corporation Law should have been filed.[53] As such, LaPierre has established a defense by documentary evidence—i.e., that venue is not properly laid in this Court and that he is entitled to judgment dismissing this action on the ground of improper venue. Hence, this action should be dismissed pursuant to CPLR 3211(a)(1), (a)(2), (a)(3) and (a)(7) on the ground that a defense (of improper venue, lack of subject matter jurisdiction, lack of legal capacity, power, authority or standing to maintain this action in this Court, and failure to state a cause of action) is founded upon conclusive documentary evidence—the NRA's certificate of incorporation.[54]

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[53] *See McHale v Metro. Life Ins. Co.*, 165 A.D.3d 914, 914-17 (2d Dep't 2018) (affirming order granting motion to dismiss complaint insofar as asserted against defendant insurer MetLife pursuant to CPLR 3211(a) (1) and (a)(7), stating: "Since the contract between MetLife and Scope conclusively establishes that Scope, and therefore Doe, were independent contractors of Met Life, and because the plaintiffs failed to point to any relevant exception to the rule that an employer is not liable for the torts of an independent contractor, we agree with the Supreme Court's conclusion that the contract "resolve[d] all factual issues as a matter of law, and conclusively dispose[d] of the plaintiff[s'] claim[s]" against MetLife."). Here, similarly, the NRA's certificate of incorporation, as amended, supplemented or restated by certificates of amendment or other certificates or instruments filed or issued under the Not-for-Profit Corporation Law conclusively establishes that, at the time the NRA was served with a summons in this action, the office of the NRA was located in Albany County and that, therefore, this action for under Article 11 was required by law to be brought in the supreme court in Albany County, which means that venue in New York is improper, and the certificate of incorporation resolves all factual issues relating to venue as a matter of law, and, conclusively disposes of the issue of whether venue in this Court is proper and whether this action should be dismissed pursuant to CPLR 3211(a)(1) because there is a defense of improper venue founded documentary evidence; *Detectives Endowment Assn. v. City of New York*, 181 A.D.3d 490, 490-92 (1st Dep't 2020), *lv to appeal denied*, 35 N.Y.3d 914 (2020) (unanimously reversing, on the law, an order of the Supreme Court, New York County (Reed, J.), which denied defendants' motion pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint in its entirety, and granting motion, finding that dispute fell "squarely within the definition of a grievance" under the collective bargaining agreements in question, i.e., "a dispute concerning the ... interpretation of the terms of this collective bargaining agreement."; and holding: "As such, it must be resolved pursuant to the grievance procedures set forth in the agreements. The grievance procedures provide that if the matter is not resolved at an earlier stage, it will be arbitrated before the Board of Collective Bargaining (BCB) (see NYC Charter § 1171). Thus, this dispute is within BCB's primary jurisdiction.").

[54] *Id. See* CPLR 3211(a)(1); N-PCL § 1110; *Beattie v. Brown & Wood*, 243 A.D.2d 395, 395 (1st Dep't 1997) (unanimously affirming judgment of the Supreme Court, New York County (Gammerman, J.), dismissing complaint upon basis of documentary evidence, among other reasons, explaining: "Plaintiff client's allegation that he was not advised by defendant law firm that a settlement agreement, which he executed in an earlier action, withdrew his counterclaims in that action with prejudice, is flatly contradicted by the agreement itself. 'Although on a motion to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the facts pleaded are presumed to be true and are accorded every favorable inference, *where, as here, the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration.*'") (citations omitted and emphasis added); *Sicignano v. Hymowitz*, 44 Misc.3d 1212(A), 2014 WL 3583886 *2 (N.Y. Sup.), 2014 N.Y. Slip Op. 51100(U) (Sup.Ct., Kings Co., N.Y. 2014) ("[I]n an action seeking judicial dissolution, Business Corporation Law § 1112 is controlling for determining venue. Business Corporation Law § 1112 prescribes that 'an action or a special proceeding under this article shall be

C. This Action Should Be Dismissed Pursuant to CPLR 3211(a)(4) on the Ground that Another Action Is Pending Involving the "Same Parties" and, Substantively, the "Same Cause of Action."

In Part II of its brief (NYSCEF Doc. No. 99, pages 15-16), the NRA argues:

> Pursuant to CPLR 3211(a)(4), a court has broad discretion to dismiss or stay an action when another action is already pending and there is a "substantial identity" of the parties and causes of action. This relief is available even if the first action was commenced only a day earlier.[55] Here, NYAG purported to commence this action on August 6, 2020, but the filed complaint attached a defective verification missing statements required by N-PCL § 1103 and CPLR 3020. When a pleading required to be verified is not, the adverse party is entitled to treat it "as a nullity, provided he gives notice with due diligence" upon the attorney of the adverse party.[56] This is because the failure to verify or sign the complaint—for whatever reason—affects a substantial right of the defendant in that plaintiff's claims cannot be challenged as false, which imposes prejudice upon the defendant who seeks to

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brought in the supreme court in the judicial district in which the office of the corporation is located at the time of the service on the corporation of a summons in such action or of the presentation to the court of the petition in such special proceeding.' '"Office of a corporation" means the office the location of which is stated in the certificate of incorporation of a domestic corporation" (Business Corporation Law § 102). Here, the plaintiffs clearly seek judicial dissolution of the Corporation, pursuant to Business Corporation Law § 1104–a, and the Certificate of Incorporation states Kings County as the location of the office of the Corporation. Since 'the office of the corporation' was located in Kings County at the time Defendants commenced this dissolution proceeding, Kings County is a proper venue. Plaintiffs assert that the Corporation has offices at c/o Hyomwitz & Freeman, 30 E 33rd Street, New York, New York, 10016. However, 'the sole residence of a domestic corporation for venue purposes is the county designated in its certificate of incorporation, despite its maintenance of an office or facility in another county'. The principal office of the corporation as stated in its certificate 'is conclusive evidence of its residence'. Hence, Kings County is a proper venue for this action ….."); *see also Magee v. Geneseo Academy*, 1 N.Y.S. 709, 710-711 (5th Dep't 1888) ("In this state a court of equity has not, by virtue of its general inherent powers, the right to dissolve a corporation, but such power is entirely statutory, and can only be exercised in a manner sanctioned by the legislature."); *Osborn v. Montelac Park*, 35 N.Y.S. 610, 611 (2d Dep't 1895), aff'd 153 N.Y. 672 (1897) ("The complaint …, so far as it applied to an action to dissolve the corporation, was defective in every particular required by the statute. *** The court had no general jurisdiction on the dissolution of the corporation. Its power in that respect was derived solely from the statute, and, unless the complaint showed the jurisdictional facts, it had no power to act, and its decree was void. *** The judgment … so far as it purports to dissolve the corporation, … is a nullity."); *Application of Baumann*, 201 A.D. 136, 138 (1st Dep't 1922), *aff'd sub nom., In re Baumann*, 234 N.Y. 555 (N.Y. 1922) ("*It is undoubtedly true that the proceeding being purely statutory is required to be conducted strictly in accordance with the statute*.") (emphasis added); *People ex rel. Gambling v. Board of Police*, 6 Abb.Pr. 162 (Sup. Ct., General Term, N.Y. 1858) ("When a statute prescribes the mode of acquiring jurisdiction, the mode pointed out must be complied with, or the proceeding will be a nullity."). *Cf. People v. Grasso*, 11 N.Y.3d 64, 72 (N.Y. 2008) (Kaye, C.J.) (affirming order of Appellate Division, First Department, reversing, on the law, an order of the Supreme Court, New York County (Ramos, J.), which had denied a motion by defendant Grasso, pursuant to CPLR 3211(a)(7), to dismiss four causes of action, and granting the motion, stating: "***The Legislature … enacted a statute requiring more. The Attorney General may not circumvent that scheme …. To do so would tread on the Legislature's policy-making authority.***") (Emphasis added).

[55] *11 E. 68th St. LLC v. Madison 68 Realty LLC*, 2014 Slip. Op. 31872(U) (Sup. Ct. N.Y. Cnty. July 10, 2014).

[56] CPLR 3022; *see also Matter of Miller v. Bd. of Assessors*, 92 N.Y.2d 82 (1997).

challenge these allegations.[57] The NRA notified the opposing party, in writing, within 72 hours, that it elected to treat the Complaint as a nullity.[58]

An action is not deemed commenced in New York State until an index number is obtained and the initiating papers are filed.[59] Strict compliance is mandatory, and so long as noncompliance is timely raised by the opposing party, warrants outright dismissal.[60] Unverified pleadings are properly stricken.[61] Following the NRA's notice of rejection to NYAG, NYAG filed an amended complaint with a corrected verification on August 10, 2020. Pursuant to CPLR 304, this action must therefore be deemed to have been filed as of that date—when a valid summons and complaint were filed with the Court.

The NRA's Federal Action therefore constitutes an action already pending for purposes of CPLR 3211(a)(4). Both the NRA and NYAG are parties and the NRA-NYAG Federal Action arises out of the 'same subject matter or series of alleged wrongs,' seeking redress under Section 1983 for NYAG's improper motive and abuse of dissolution power in bringing this action.[62] The fact that where, as here, a defendant's claim is one for declaratory relief does not minimize the potential need for a stay or dismissal.[63] Nor is a complete identity of parties required, so long as there "be at least one plaintiff and one defendant common to both actions."[64] Because the NRA's First Amendment claims lie at the heart of both actions, the NRA requests that this Court dismiss this action, or in the alternative, to stay this proceeding until the NRA-NYAG Federal Action resolves this critical issue.[65] (Footnotes in original.)

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[57] *Jack Vogel Associates v. Color Edge, Inc.,* 2008 N.Y. Slip Op. 31509(U) (New York County 2008).

[58] Dkt. No. 10.

[59] CPLR 304, 306-a.

[60] *Fry v. Village of Tarrytown*, 89 N.Y.2d 714 (1997).

[61] *See Morgan v. Maher*, 50 Misc.2d 642 (Sup. Ct. Nassau Cty. 1969); *see also Alden v. Gambino*, 53 Misc.3d 1204(A) (City Ct. Poughkeepsie Sept. 29, 2016) (acknowledging that striking a defective complaint is proper but declining to do so where defendant did not act with due diligence and seek a verified complaint in writing).

[62] Because the NRA-NYAG Federal Action argues that the politically motivated investigation and contemplated (now ripe) enforcement action by NYAG is unconstitutional, this action is properly considered a compulsory counterclaim to the NRA-NYAG Federal Action. *See* Fed. R. Civ. P. 12(a); *see also Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 815 F. Supp.2d 679 (S.D.N.Y. 2011) (constitutional challenge to village's enforcement action compulsory counterclaim to the enforcement action).

[63] *11 E. 68th St. LLC*, 2014 N.Y. Slip Op. 31872(U) (Sup. Ct. N.Y. Cnty. July 10, 2014).

[64] *Jaber v. Elayyan*, 168 A.D.3d 693 (2 Dept 2019).

[65] *342 West 30th Street Corp., v. Bradbury,* 30 Misc.3d 132(A) (1 Dept 2011); *see also AIG Financial Products Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495 (1 Dept 2011).

LaPierre adopts this argument and, based on this argument, respectfully submits that this action should be dismissed pursuant to CPLR 3211(a)(4) on the ground that another action is pending involving the "same parties" and, substantively, the "same cause of action."

D. This Action Should Be Dismissed or Stayed Pursuant to CPLR 327 on the Ground of *Forum Non Conveniens*.

In Part I of its brief (NYSCEF Doc. No. 99, pages 11-15), the NRA argues:

> New York's doctrine of *forum non conveniens,* codified in CPLR 327, permits a court to dismiss or stay any action that 'in the interest of substantial justice should be heard in another forum.'[66] The rule provides one of several discretionary grounds under New York law for the dismissal of cases, like this one, which overlap with lawsuits pending in other fora that pertain to the same parties or issues.[67] Those potential alternative fora include more convenient venues within New York.[68] The Court of Appeals has explained that the application of *forum non conveniens* 'turn[s] on considerations of justice, fairness, and convenience;' thus, no single factor is dispositive.[69] Factors considered in the *forum non conveniens* analysis include: (i) the burden on New York courts; (ii) the hardship to the defendant; and (iii) the availability of an alternate forum.[70] Each favors dismissal here. (Footnotes in original.)

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[66] N.Y. C.P.L.R. 327 (McKinney). *See also Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984) (explaining that CPLR 327 permits a court to dismiss an action which "although jurisdictionally sound, would be better adjudicated elsewhere.") (internal citations omitted).

[67] *See, e.g.*, *Citigroup Glob. Markets, Inc. v. Metals Holding Corp*., 45 A.D.3d 361, 362 (1 Dept. 2007) (affirming *forum non conveniens* dismissal because, *inter alia*, the subject matter of the action was "already being litigated abroad" which created "a risk that conflicting rulings w[ould] be issued by different courts of different jurisdictions") (internal citations and quotation marks omitted).

[68] *See, e.g. Parker v. 30 Wall St. Apartment Cor*p., 2015 WL 7906823, at *1 (1st Dep't Dec. 4, 2015); *Croce v. Preferred Mut. Ins. Co*., 35 Misc.3d 161 (Dist. Ct. Suffolk Co. 2011); *A&S Med., P.C. v. ELRAC, Inc*., 184 Misc.2d 257 (Civ. Ct. N.Y. Cnty. 2000); *Roseman v. McAvoy*, 401 N.Y.S.2d 988, 990 (N.Y. City Civ. Ct. 1978); *Diagnostic Rehab. Med. Serv. v. Republic W. Ins. Co*., 2003 WL 22888389, at *11 (N.Y. Civ. Ct. Nov. 19, 2003)).

[69] *Silver v. Great Am. Ins. Co*., 29 N.Y.2d 356 (1972).

[70] *See Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984). Notably, the oft-cited articulation of the *forum non conveniens* factors in the *Pahlavi* case contains two additional factors not listed here: the residency of the parties, and the locus of the transaction out of which the claims arose. *See id.* The NRA de-emphasizes these factors in its analysis because both the current forum and the desired forum (the U.S. District Court for the Northern District of New York) are sited in the same state. Thus, the NRA does not dispute whether this lawsuit has a cognizable nexus to New York—only whether the current forum is a just, convenient one. Although *forum non conveniens* is typically invoked to permit a transfer to a foreign jurisdiction, courts have also granted such motions in favor of other, more convenient, venues within New York. *See, e.g. Parker v. 30 Wall St. Apartment Corp*., 2015 WL 7906823, at *1 (1 Dept Dec. 4, 2015); *Croce,* 938 N.Y.S.2d; *A&S Med.,*707 N.Y.S.2d at 780; *Roseman v. McAvoy*, 401 N.Y.S.2d at 990; *Diagnostic Rehab. Med. Serv.*, 2003 WL at *11.

The NRA argues further that retaining this action in this forum would impose substantial, unnecessary burdens on both the NRA and the Court, explaining:

> The NYAG's 163-page complaint challenges, and purportedly seeks to unwind, dozens of business transactions over at least a three-year period. Virtually none of these transactions took place in New York City, and the counterparties to these transactions reside far away—as do their documents. For example, this action is virtually guaranteed to require third-party discovery from: various former NRA employees and board members, who may continue to reside near NRA Headquarters in Virginia; Ackerman McQueen, Inc. (headquartered in Oklahoma City, Oklahoma); McKenna & Associates (headquartered in Arlington, Virginia); Membership Marketing Partners, Allegiance Creative Group and Concord Social & Public Relations (headquartered in Fairfax, Virginia); HomeTelos L.P. (headquartered in Dallas, Texas); LookingGlass Cyber Solutions, Inc. (headquartered in Reston, Virginia); employees of those companies; the NRA's travel consultant (who resides in California) and, providers of lodging, transportation, and similar services in locations as far-flung as Italy, the Bahamas, and Normandy, France. Thus, key documents and witnesses lay outside the jurisdiction of this Court and obtaining these documents and testimony will hamper the NRA's ability to conduct its defense. Indeed, as set forth in Exhibit 27 to the Rogers Affirmation, the Complaint can be conservatively estimated to implicate 90 witnesses residing in 27 U.S. states, plus Washington D.C.
>
> Needless to say, these witnesses will also be considered unavailable for trial pursuant to CPLR 3117(a)(3)(ii) and many of these depositions will be required in order for the NRA to adequately defend itself. This discovery and its potential use at trial would be most efficiently sought in federal court pursuant to federal rules designed to facilitate multistate (and, where necessary, cross-border) discovery. By contrast, retaining the action in this forum would require that virtually all witnesses and documents be sought pursuant to a protracted process, whereby a subpoena is first issued in New York, then domesticated elsewhere, then served or challenged pursuant to a patchwork of differing procedures and rules and litigated in all the different venues. This would create unnecessary burdens for both the NRA[71] and the Court.
>
> Moreover, the mere fact that the NRA is already litigating overlapping and related claims in another available forum renders the duplicative litigation in this forum unnecessarily burdensome. At the very least, the pendency of two overlapping lawsuits in two different New York courts will require the NRA to incur duplicative expenses litigating issues already decided, or under consideration, by the federal court; at worst, substantial additional expenses will arise as the parties invariably dispute the admissibility, and/or preclusive effect, of evidence or

[71] *See, e.g.*, *Price v. Brown Group*, 206 A.D.2d 195, 201 (4th Dep't 1994) (recognizing that for purposes of analyzing the hardship imposed on the defendant in a *forum non conveniens* analysis, the location of relevant evidence is a key consideration).

> findings in the parallel federal proceeding. Such burdens could be minimized or eliminated entirely via a *forum non conveniens* dismissal, with the stipulation that the NRA will not contest the NYAG's re-filing of its claims in federal court. (Footnote in original.)

In addition, the NRA argues that federal court provides a suitable alternative forum for the NYAG's claims, explaining:

> The availability of an alternative forum to the plaintiffs is "a most important factor to be considered in ruling on a motion to dismiss."[72] Here, none of the claims asserted by the NYAG are within the exclusive subject-matter jurisdiction of New York state courts; indeed, statutory claims under the same N-PCL provisions that undergird the Complaint have been adjudicated by at least one federal court exercising diversity jurisdiction, and nothing prevents the federal courts already hearing substantially related causes of action from asserting jurisdiction pursuant to 28 U.S.C. § 1367 because the NYAG's claims are so related that they are effectively part of the existing Article III case or controversy.[73]
>
> Moreover, to the extent that the NRA is able to consolidate all pending, related litigation in federal court, the forum will not only prove acceptable, but superior: the NRA has been litigating against several organs of the New York State government in federal district court since 2018, and the court has accrued significant familiarity with documents and issues likely to overlap with this case. The federal court in the Cuomo Litigation has also appointed a special master to conduct *in camera* review of investigative-privilege and related privilege claims asserted by the government, an issue that is almost certain to reoccur in this case—and could [be] dealt with efficiently by the federal court's existing process.
>
> Thus, per the application of the above factors, this action should be dismissed under CPLR 327(a) for *forum non conveniens.* (Footnotes in original.)

LaPierre adopts these arguments and respectfully submits that, for the same reasons, this action should be dismissed on the grounds of *forum non conveniens* pursuant to CPLR 327.

E. <u>In the Alternative, a Stay Is Warranted Under CPLR 2201</u>.

In Part IV of its brief (NYSCEF Doc. No. 99, pages 18 and 19), the NRA argues:

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[72] *Pahlavi,* 62 N.Y.2d at 481.

[73] *See e.g.*, *Nutronics Imaging, Inc. v. Danan*, 1998 WL 426570 (E.D.N.Y. 1998); *Leitner v. Sadhana Temple of New York, Inc*., 2014 WL 12588643, at *14 (C.D. Cal. Oct. 17, 2014).

> The existence of a pending related action is a common ground for a stay of proceedings under CPLR 2201.[74] A stay is especially appropriate where, as here, there are "overlapping issues and common questions of law and fact," the first-filed case has progressed into discovery, and determination of the first-filed action may dispose of or limit issues in the second.[75] A significant portion of funds NYAG purportedly seeks to recover come from Ackerman, and the validity of these expenditures and the circumstances under which they were requested and approved are fundamental questions underlying NYAG's dissolution claim. The NRA and Ackerman have already been litigating these exact issues for well over a year in another forum and are now six months into discovery, with hundreds of document requests served, responsive documents exchanged and depositions beginning in November.[76] Moreover, the position that the NRA has taken with respect to Ackerman's actions—that Ackerman was an NRA fiduciary that breached its duty and defrauded the NRA—run[s] squarely counter to the NYAG's allegations made 'upon information and belief' in this action that Ackerman was conspiring with NRA executives. Allowing this action to proceed under NYAG's unsupported theory risks undermining the NRA's causes of action in the Ackerman case and jeopardizing its potential recovery, to the detriment of NRA members whose interests NYAG purportedly seeks to vindicate. Thus, 'to avoid potentially inconsistent determinations and duplication of judicial resources,' a stay under CPLR 2201 is appropriate.[77] (Footnotes in original.)

LaPierre adopts this argument and, in the alternative, respectfully submits, for the same reasons, that a stay is warranted under CPLR 2201, pending resolution of related federal cases.

V.

CONCLUSION

For the reasons stated above, pursuant to CPLR 3211(a)(1), (a)(2), (a)(3), (a)(4) and (a)(7), and CPLR 327, this motion should be granted.[78]

Dated: New York, New York
October 30, 2020

Respectfully submitted,

P. Kent Correll

[74] *See* 4-2201 Weinstein-Korn-Miller, N.Y. Civ. Prac. CPLR 2201.03.

[75] *See, e.g., Buzzell v. Mills*, 32 A.D.2d 897, 897 (1 Dept 1969); *Asher v. Abbott Laboratories*, 307 A.D.2d 211, 211-12 (1 Dept. 2003).

[76] *See* Rogers Aff. Ex. 25 (Oct. 5, 2020 Status Report). [(NYSCEF Doc. No. 71)].

[77] *See CSSEL Bare Trust v. Phoenix Life Ins. Co.*, 2009 WL 741177 (N.Y. Sup. Ct. Mar. 11, 2009).

[78] In the alternative, the Court should stay this action pursuant to CPLR 2201.

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