

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

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

Plaintiff,

v.

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

Defendants.  
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Index No. 451625/2020

IAS Part 3

Hon. Joel M. Cohen

**AMENDED MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT  
JOHN FRAZER'S MOTION TO DISMISS OR STAY**

Defendant John Frazer ("Frazer"), by and through his attorneys Carl D. Liggio, Esq. and Gage Spencer & Fleming LLP, respectfully submits this memorandum of law in support of his motion to dismiss the Complaint of Plaintiff People of the State of New York, by Letitia James, Attorney General of the State of New York ("NYAG") pursuant to CPLR 327, 3211(a)(1), 3211(a)(4), or to stay pursuant to CPLR 2201. For the reasons which follow, the motion should be granted.

**Background**

The NYAG's complaint contains 559 separate (and sometimes conflicting) allegations and eighteen claims for relief in another 107 paragraphs. The allegations cover events over an almost 30-year period involving multiple individuals (many of whom are no longer with the NRA) and an equally significant number of third parties, all of whom are located

outside New York County, dispersed both throughout the United States and abroad.<sup>1</sup> The NYAG has taken testimony from multiple individuals and obtained thousands of documents prior to the filing of this action.

Defendant John Frazer has been in the NRA or practiced firearms-related law for 27 years. Compl., ¶¶ 272-74. In 2015, he left his private law practice – where the NRA was among his clients -- to accept the position of General Counsel of the NRA. Compl., ¶ 274. Later in 2015, the NRA Board of Directors also elected him Secretary of the organization. *Id.*

Frazer was hired in the wake of New York State’s implementation of the New York Nonprofit Revitalization Act of 2013 and the governance requirements it imposed on charitable corporations. One year into his tenure, the NRA adopted an enhanced Conflict of Interest and Related Party Transaction Policy (Compl., ¶127) (the “Conflict Policy”), which the Attorney General admiringly characterizes as “comprehensive” (*see id.*, ¶ 127), and which it concludes “defines conflicts of interest *more broadly* [than the N-PCL] . . . .” *See* Compl., ¶ 128 (emphasis added). Nonetheless, motivated by politics, not N-PCL compliance, the NYAG resorts to conclusory, vague, and contradictory allegations against Frazer, even attempting to smear Frazer with allegations of self-dealing (Compl. ¶ 139), while failing to identify any self-interested transactions he participated in (there were none). Grasping at straws, the NYAG even accuses Frazer of failing to make necessary changes to governance procedures during 2014, before he was employed by the NRA and assumed his position as General Counsel. Compl. ¶ 279.

The pleading’s internal contradictions aside, the NYAG has proceeded in the incorrect court and ignored the anchor of an earlier-filed and related case against it by the NRA

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<sup>1</sup> *See* NYSCEF Doc. No. 71, Ex. 27 (chart of “Persons Likely to Possess Relevant Knowledge And/Or Documents – NYAG Litigation”).

in the federal court in the Northern District of New York. As set forth in NRA's memorandum of law submitted in support of its pending motion to dismiss (NYSCEF Doc. No. 99) ("NRA Motion to Dismiss"), the entirety of which Frazer incorporates by reference and adopts herein, this case should be dismissed for being lodged in an improper, inconvenient forum.

Having been named as a party, Frazer must now traverse the onerous discovery obstacles presented by the expansive footprint of this case (and related parallel proceedings), where witnesses and documents are scattered throughout numerous jurisdictions. Frazer will likely field an avalanche of discovery demands. The NRA's shared concerns about the burdens and logistics of litigating multiple overlapping cases in disparate fora at the same time prompted it to file a motion, on October 20, 2020, before the United States Judicial Panel on Multidistrict Litigation to transfer four related federal actions to the Northern District of Texas for the purpose of centralizing them for coordinated or consolidated pre-trial proceedings (the "MDL Motion"). Though this case is not currently eligible for consolidation in any MDL case,<sup>2</sup> the policy considerations underlying the MDL Motion apply here and, for the reasons given below, Frazer believes the instant case, if not dismissed, should be transferred to Albany to avail it of the proximity to the federal action brought by the NRA against New York sited there and obtain the benefits of streamlined discovery mechanisms that would be available if the two cases were in the same geographic locus.

The NRA's MDL Motion raises deeply important concerns which touch on the instant case. The four federal cases present overlapping and contradictory factual issues regarding the same parties, events, and relationships with those at issue here. For instance, those

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<sup>2</sup> Although Frazer is not currently a party to any action that would be subject to MDL jurisdiction, a MDL judge has the authority to permit the coordination of discovery issues that are identical or related in both the Federal and State actions. Such coordination would enhance judicial economy and materially advance the issues of justice.

four cases all include a significant identity of issues such as: (i) the relationship with, and invoicing by, the NRA's largest vendor, Ackerman McQueen; (ii) a putative class action filed on behalf of all NRA donors from January 2015 to the present spawned by the Ackerman McQueen-related assertions; (iii) a retaliatory lawsuit filed by Ackerman McQueen against a former employee who filed an affidavit attesting to corrupt practices he witnessed while employed at Ackerman McQueen; and (iv) the NRA's action against the NYAG under 42 U.S.C. § 1983 based on the Attorney General's admitted politicized hostility to the NRA and its selective enforcement of New York's not-for-profit law. Among other related issues, the Ackerman McQueen relationship figures prominently in the instant case too.<sup>3</sup> Accordingly, all of these cases are certain to command discovery about issues common, if not identical, to the issues in the instant dissolution action.

### Argument

For the reasons given in the NRA's motion to dismiss, the instant actions should be dismissed or stayed (i) on grounds of *forum non conveniens*, (ii) pursuant to CPLR 3211(a)(4) based on the existence of a pending and substantially identical suit, (iii) pursuant to CPLR 3211(a)(1) because documentary evidence establishes that the NRA is not located in New York County where it needed to be to ground the suit there under the mandate of N-PCL § 1110, and/or (iv) pursuant to CPLR 2201 based on the existence of the pending related actions.

New York's codification of the *forum non conveniens* doctrine, CPLR 327, permits a court to dismiss even an action that is jurisdictionally sound if it "would be better adjudicated elsewhere." *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984).

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<sup>3</sup> Indeed, Frazer has already provided deposition testimony in the now-stayed Virginia litigation against Ackerman McQueen, as well as an affidavit in the ongoing Texas litigation.

Relevant factors include the burden on New York courts, the hardship to the defendant, and the availability of an alternate forum. *Id.* at 479. Where, as here, there are alternate fora in which either to litigate or more effectively coordinate the issues, relief under CPLR 327 is appropriate. But, for Frazer, the relief is especially appropriate due to burden that the extensive scope of this litigation and voluminous related litigation will impose upon him individually. A dismissal would facilitate an effort to consolidate all related litigation in federal court, where related cases already have been brought, and ease the inconvenience and expense of duplicative discovery and conserve vital resources for Frazer's defense of the NYAG's unfounded allegations. In view of the number of potential witnesses and documents and their geographic spread (*see* NYSCEF Doc. No. 71, Ex. 27) and, assuming the NRA's motion for MDL consolidation is granted, the inherent ability of the MDL judge to coordinate the proceedings through its enhanced abilities to facilitate multistate discovery would reduce the procedural burdens and costs associated with obtaining such necessary testimony and materials.<sup>4</sup> Even if the MDL panel decides not to grant consolidation, the presence of this case in the proximity to the Albany-based NRA Federal Action will enhance judicial efficiency and materially permit the control of costs in the multiple actions.

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<sup>4</sup> Indeed, these witnesses, who will be able to refute allegations, particularly those made against Frazer, and corroborate his participation in the NRA's drive to implement policies and procedures to comply with New York's Nonprofit Revitalization Act of 2013, are located around the country. These include Board Members and employees who witnessed Frazer's involvement as an officer with the disclosures of related party transactions and conflicts of interest, and his responsiveness to allegations brought by whistleblowers. For reasons discussed in the NRA's motion to dismiss, all of these witnesses are out-of-state and unavailable for trial pursuant to CPLR 3117(a)(3)(ii), a burden on record development which, to the extent possible, strongly advocates in favor of the NRA's effort to consolidate all pending, related litigation in federal court where substantially related causes of action are currently being heard and where mechanisms exist with the power to eliminate these procedural obstacles.

For this reason, if the action is not dismissed for the reasons set out in the NRA's Motion to Dismiss, the transfer of this action to Albany County will permit enhanced coordination of the instant case with the two cases already pending in the federal court involving the NRA and New York State – the Section 1983 suit against the NYAG and a prior lawsuit arising from other retaliatory, selective prosecutions of the NRA by the New York State Department of Financial Services. Further, if the MDL Motion is successful, these efficiencies would be maximized. Unnecessary taxing of limited resources raises concerns which merit serious consideration, especially where options exist to prevent it. *Cf. Silver v. Great American Insurance Co.*, 29 N.Y.2d 356, 361 (1972) (a court's evaluation of a *forum non conveniens* motion "should turn on considerations of justice, fairness and convenience and not solely on the residence of one of the parties"). For these reasons, we respectfully submit the instant action should be dismissed for *forum non conveniens* or, at a minimum, transferred to Albany.

As addressed comprehensively by the NRA in its motion, the federal lawsuit between the NRA and the NYAG was filed first in time. In view of the *forum non conveniens* considerations discussed above, the pre-existence of a federal lawsuit involving the same parties and a similarity of issues, which arises out of the same subject matter as the instant action in this Court, favors a discretionary dismissal or stay. CPLR 3211(a)(4), which permits dismissal or an "order as justice requires" in such circumstances, adds yet further heft to the idea of judicial action to reduce the obstacles faced by defendants, especially individuals like Frazer. Without coordination of these and still other pending cases involving issues related to those in the instant case, the parties not only face the certainty of unwieldy and repetitive discovery demands, but also the increased likelihood that different courts will decide common issues inconsistently. For these reasons, New York's CPLR provides further authority for stay of this action. *See* CPLR

2201 (permitting a stay of proceedings upon the existence of a pending related action involving, as here, overlapping issues, common questions, identity of witnesses, and risks of inconsistent determinations and duplication of judicial resources).

Lastly, because Article 11 of New York's Not-for-Profit Corporation Law mandates that the NYAG have filed the instant case in Albany County, the instant case should be dismissed or, alternatively, transferred to that county. *See* N-PCL § 1110; NRA Motion to Dismiss at 17-18. Under N-PCL § 1110, "[a]n 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 . . . ." *See* N-PCL § 1110; NRA Motion to Dismiss at 17, n.71. "Office of a corporation" is defined, as relevant here, as "the office the location of which is stated in the certificate of incorporation of a domestic corporation . . . ." *See* N-PCL § 102; NRA Motion to Dismiss at 17, n.72. Here, documentary evidence establishes that the NRA is not located in New York County, nor has its certificate of incorporation ever indicated that its office is there.<sup>5</sup> NRA Motion to Dismiss at 17 and n.73 (noting that the NRA's original certificate of incorporation does not state the location of an office, and that addresses associated with the NRA in applicable records are to Albany, New York and Virginia, not New York County). For the foregoing reasons, based on documentary evidence under CPLR 3211(a)(1) and because the statute required that this action should have

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<sup>5</sup> Frazer also incorporates by reference, and adopts, the persuasive factual recitation and legal reasoning in the Memorandum of Law in Support of Defendant Wayne LaPierre's Motion to Dismiss establishing that, in the 149-year history of the NRA, its certificate of incorporation has never "set forth" that "the office of the NRA is in New York County" as asserted by the NYAG. *See* NYSCEF Doc. No. 126 at 3-5 and Argument section "B" at 9-15. Rather, if anything, the NRA amended its certificate of incorporation, which had been silent on an office location, to specify the location of an office in Albany County, New York. *Id.* at 9 (citing NYSCEF Doc. No. 71, Ex. 26 at 1).

been filed in Albany County, New York, the instant action should be dismissed or, alternatively, transferred there.<sup>6</sup>

### **Conclusion**

For the reasons given here, and in the Memorandum of Law in Support of Defendant The National Rifle Association's Motion to Dismiss which Defendant Frazer incorporates by reference and adopts, Frazer's motion to dismiss the Complaint should be granted and the Complaint dismissed or, in the alternative, this action stayed or transferred to the Supreme Court, Albany County.

Dated: New York, New York  
November 6, 2020

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<sup>6</sup> Frazer served a transfer demand pursuant to CPLR 511 prior to filing this motion on October 30, 2020.

To: PEOPLE OF THE STATE OF  
NEW YORK, by LETITIA JAMES,  
Attorney General of the State of New York (via NYSCEF)

**CERTIFICATION OF COUNSEL OF  
COMPLIANCE WITH APPLICABLE WORD LIMITS**

Pursuant to Commercial Division Rule 17 (22 NYCRR 220.70), I hereby certify that this Amended Memorandum of Law in Support of Defendant John Frazer's Motion to Dismiss or Stay is 2,308 words, and, therefore complies with the 7,000-word limit applicable to memoranda of law.

Dated: New York, New York  
November 6, 2020

By: /s/ Carl D. Liggio  
Carl D. Liggio

By: /s/ William B. Fleming  
William B. Fleming