November 19, 2020

VIA NYSCEF

Hon. Joel M. Cohen
Justice, Supreme Court of New York County
Commercial Division
60 Centre Street
New York, NY 10007

Re: *People v. Nat'l Rifle Ass'n of Am., Inc.*, et al., Index No. 451625/2020

Dear Justice Cohen,

On behalf of Defendant the National Rifle Association of America (the "NRA"), and consistent with the Court's order dated November 12, 2020, we write to address issues set forth in the letter submitted November 11, 2020, by an Alabama law firm, purportedly on behalf of "several members" of the NRA (the "Letter"). As the oldest and largest civil rights organization in the United States, the NRA takes the views of its members seriously and presumes, for purposes of this response, that at least some NRA members (the "Objecting Members") share those expressed in the Letter. However, several assertions made in the Letter reflect a misunderstanding of the NRA's legal affairs and the facts surrounding other referenced litigation. The NRA respectfully responds that NPCL § 1104 does not apply to this action; moreover, even if it did, the Objecting Members would lack standing to raise the items set forth in the Letter. Finally, the NRA stands by its choice of counsel. Although the NRA believes no conflict exists between itself and its chief executive officer, conflict waivers were obtained out of an abundance of caution.

1. **NPCL § 1104 Only Applies to Special Proceedings Commenced by Petition, Not Plenary Actions Like This One.**

Article 11 of the NPCL contains two procedural mechanisms for judicial dissolution: an "action," which may only be brought by the Attorney General (§ 1101), and a "special proceeding" also available to directors or members (§ 1102). The distinction between this action, commenced by summons and complaint, and a special proceeding, commenced by "petition" or an order to show cause, is an important one. Dissolution ***actions*** are triable by jury as of right.[1] By contrast, special proceedings are generally "similar to motion practice," "designed for speedy resolution of issues"[2] with discovery permitted only by court order.[3] Special proceedings (unlike actions) are frequently non-adversarial;[4] therefore, absent a statutory notice process and a hearing on an order to show cause, interested parties who oppose dissolution could be robbed of any opportunity to be heard. By contrast, in an adversarial plenary action such as this one, arguments opposing dissolution will invariably be heard. Therefore, in cases where dissolution is sought other than by petition, formal adherence to similar notice provisions under the Business Corporation Law has

[1] NPCL §§ 112(b)(1); 1101(b).

[2] *See Nat'l American Corp. v. Fed. Rep. of Nigeria*, 448 F. Supp. 622, 633 n.19 (S.D.N.Y. 1978) (citing Wachtell, New York Practice Under the CPLR 459 (5th ed. 1976)).

[3] *See* CPLR 408.

[4] *See* CPLR 402 (delineating procedures applicable "where there is an adverse party.").

been deemed unnecessary.[5] The plain language of NPCL § 1104 is consistent with this scheme: the statute is triggered "[u]pon the presentation of such a petition," which in context clearly refers to the special-proceeding petition that may be lodged by directors or members under the preceding Section 1102, not a plenary action by the Attorney General.

The legal and practical distinctions between a special proceeding and a plenary action are thrown into sharp focus by this action, which is founded on a 163-page complaint that encompasses hundreds of events, transactions, and personnel and vendor relationships over a multi-year period and will, therefore, require extensive discovery—and significant trial proceedings. Although the Court may wish to entertain appearances or arguments from members, the order-to-show-cause hearing contemplated by Section 1104 is inappropriate device in this procedural context, where the parties remain engaged in pre-answer motion practice and have not even begun to discover or present evidence on the matter set forth in Section 1104: "why the corporation should not be dissolved." Finally, to the extent that the Court deems NPCL § 1104 applicable to this action, the NRA opposes any mandated disclosure of its members' identities,[6] which would raise serious constitutional privacy issues.

2. <u>The Objecting Members Lack Derivative Standing, And May Not Intervene As "Interested" Parties Under NPCL § 1104.</u>

Although Section 1104 contemplates notice to "members," the only constituency explicitly afforded standing to appear in a dissolution proceeding under the statute consists of "persons interested in the corporation,"[7] which is a narrower constituency than "members." While NRA members certainly have constitutional and public policy interests implicated by this case, corporate dissolutions are *in rem* proceedings,[8] and the type of "interest" contemplated by Section 1104 is therefore, likely, a property interest, which Black's Law Dictionary defines as "[a]n interest, perhaps including rights of possession and control, held by an owner, beneficiary, or remainderman . . . ."[9] Obviously recognizing this, the Objecting Members assert that the NRA's assets "belong to the NRA's members."[10] Although the NRA stewards its assets in the interest of its members and its mission, members do not possess property interests akin to those of creditors or shareholders.

The NRA's bylaws, as permitted by the NPCL, create "classes" of members, only certain of which are entitled to rights beyond access to shooting matches, firearms technical information and NRA periodicals, and the right to attend Association meetings.[11] Even those members who are given substantive rights have only the right to vote; some may vote for various director slots or on ballot questions, while others may vote only for the 76th director; however, no class has property rights in NRA assets. To claim derivative standing under NPCL § 623, the Objecting Members would need to amass a quorum of five percent of a class of members within the NRA's total

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[5] *See, e.g.*, *Fedele v. Seybert*, 250 A.D.2d 519 (1 Dep't. 1998). In *Fedele*, the First Department ***reversed*** the trial court's order that a common law dissolution cause of action be converted to a petition complying with the statutory requirements, including notice requirements, of BCL § 1106. *See Fedele*, 250 A.D.2d at 523 (emphasizing that statutory strictures should not have been triggered because "plaintiff herein pleaded a general cause of action for dissolution, ***not in petition form***") (emphasis added).

[6] *See* NPCL § 1104(a).

[7] *Id.*

[8] *Rigas v. Livingston*, 178 N.Y. 20, 24 (1904).

[9] Black's Law Dictionary (11th ed. 2019).

[10] Letter at 6.

[11] *See generally* NRA Bylaws, Art. III, § 6, previously filed at Dkt. No. 109, Ex. A at 56-57.

membership.[12] The Objecting Members fail to satisfy this threshold, and lack standing to participate here.

3. <u>The Objecting Members Lack Standing to Challenge the NRA's Choice of Counsel, Which in Any Event is Proper.</u>

Although the Letter purportedly asserts notice rights under NPCL § 1104, it also interposes unrelated challenges to the NRA's choice of counsel. As a threshold matter, only a current or former client of the NRA's counsel has standing to seek disqualification in this situation.[13] Although the NRA values its members' views, as set forth above, the Objecting Members do not have derivative standing under NPCL § 623, and thus cannot stand in the shoes of the "client" for disqualification purposes. Moreover, as described in the attached Affidavit of Carolyn Meadows and in Mr. LaPierre's separate submission, the Objecting Members' challenges are misguided. Undersigned counsel formerly served as counsel to Mr. LaPierre in a limited number of other cases at the request of the NRA and Mr. LaPierre, but Mr. LaPierre now has separate counsel. Moreover, the NRA's counsel in this proceeding were chosen by and report to a special committee of independent directors. Even if a cognizable conflict might exist, appropriate waivers were obtained.[14] The NRA chose its counsel precisely in anticipation of this dissolution action, and its choice cannot and should not be overridden. The NRA wishes for its members' interests to be fairly and orderly advanced—a goal that is served, not hindered, by adherence to derivative-standing quorums and other procedural guardrails.

Sincerely,

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[12] A derivative action for dissolution under NPCL § 1102 requires an even larger quorum of 10 percent of all members. *See* NPCL § 1102(a)(2).

[13] *See 426 Realty Assocs. v. Lynch*, 2019 N.Y. Slip Op. 32936 (Sup. Ct. N.Y. Cnty. Oct. 4, 2019) ("A party seeking to disqualify another party's attorney on conflict of interest grounds must have standing to do so based on either being a present or former client of the subject attorney." (*citing Campbell v. McKeon*, 75 A.D.3d 479 (1 Dep't. 2010); *A.F.C. Enter., Inc. v. N.Y. School Constr. Auth.*, 33 A.D.3d 736 (2 Dep't. 2006)). Although there are rare circumstances where a third party may advance such challenges, this is not one of them.

[14] In addition, the advocate-witness rule does not apply: it only requires withdrawal if the attorney's testimony is "necessary," taking into account the weight and significance of the matters and the availability of other evidence. *See, e.g.*, *Dishi v. Fed. Ins. Co*., 112 A.D.3d 484 (1 Dep't. 2013). Here, the NRA has no intention of calling counsel as a witness, and the Complaint contains no allegations about counsel's conduct—only the NRA's internal handling of engagement letters and invoices.