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VIA NYSCEF

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

Re: *People of the State of New York, by Letitia James, Attorney
General of the State of New York v. The National Rifle Association of
America, Inc. et al.*, Index No. 451625/2020

Dear Justice Cohen:

On behalf of the plaintiff, the Attorney General of the State of New York, we respectfully submit this letter pursuant to the Court's request (Dkt #155) for the parties' responses to the letter, dated November 11, 2020, from George C. Douglas, Esq., counsel for several unnamed non-party members of the National Rifle Association of America, Inc. (the "NRA Members").

The NRA Members request that the Court order the Attorney General to provide the membership of the NRA with notice and an opportunity to be heard concerning dissolution of the NRA, and assert that the Attorney General had an obligation to do so immediately on commencement of this action. The key distinction here is that the Attorney General has brought a plenary action for dissolution, not a petition, and so Not-for-Profit Corporation Law ("N-PCL") § 1104, and the requirement to move by order to show cause on notice to the NRA membership among others, is not applicable. The interests of the NRA membership in whether the NRA should be dissolved will be considered by this Court pursuant to N-PCL § 1109 after the Attorney General has had the opportunity to take discovery and present the evidence to this Court supporting its dissolution claims.

The Timing and Requirement of Notice of Dissolution under Article 11 of the N-PCL.

Article 11 of the N-PCL establishes the statutory scheme governing the dissolution claims in this proceeding. It confers on the Attorney General authority to seek dissolution. It also establishes the substantive and procedural requirements to dissolve a not-for-profit corporation.

Here, in the exercise of her direct authority, the Attorney General has brought "an action for dissolution of (the) corporation" pursuant to N-PCL § 1101(a)(2), where "the corporation has exceeded the authority conferred upon it by law, or ... has carried on, conducted or transacted its

business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to the public policy of the state has become liable to be dissolved.” The Attorney General also seeks dissolution of the NRA in the exercise of her authority to enforce rights granted by statute to members, directors, or officers of a not-for-profit corporation under N-PCL § 112(a)(7). The Attorney General invokes N-PCL § 1102(a)(2)(D) providing for dissolution where the “directors or members in control of the corporation have “looted or wasted the corporate assets, have perpetuated the corporation solely for their personal benefit, or have otherwise acted in an illegal, oppressive or fraudulent manner.”

In addition to satisfying these statutory standards, N-PCL § 1109 provides that “[i]n an action or special proceeding” under Article 11, the court’s discretionary decision to order dissolution requires consideration and “paramount importance” be given to (a) “the interest of the public” in an action by the Attorney General; and (b) “the benefit to the members” in a “special proceeding brought by directors or members.” Should the Court, in its discretion, decide that dissolution of the NRA is appropriate under N-PCL § 1109, then additional provisions apply, including notice to creditors (N-PCL §§ 1115(a), 1007) and court supervision of the dissolution and liquidation (N-PCL §§ 1115(a), 1008).

The NRA Members contend that under N-PCL § 1104 the Attorney General was required to have made “a show cause order when the action [for dissolution] is commenced” and to give notice to the entire membership. N-PCL § 1104(a) provides that

[u]pon the presentation of such *a petition* [for dissolution], the court shall make an order requiring the corporation and all persons interested in the corporation to show cause. . . not less than four weeks after the granting of the order, why the corporation should not be dissolved. (emphasis added)¹

The order to show cause and notice procedures in N-PCL § 1104 relate to the statutory procedures governing judicial dissolution claims by directors and members, which are brought by a petition. *See* N-PCL § 1102 (providing for presentation of a “petition for the judicial dissolution” by members or directors); N-PCL § 1103 (discussing the contents of the petition); N-PCL § 1104 (“upon the presentation of such petition . . .”) A petition is the pleading applicable to a special proceeding, which is designed to obtain “a summary determination upon the pleadings, papers and admissions to the extent that no triable issues of fact are raised.” CPLR § 409. The parties can submit admissible evidence in support of their respective pleadings – the petition and answer. *See* CPLR § 403. No discovery, other than service of notices to admit, is permitted without leave of court. CPLR § 408.

The procedures in N-PCL § 1104 are not applicable here because the Attorney General commenced a plenary action with a complaint, which asserts judicial dissolution claims together with sixteen other claims. *See* N-PCL § 1101(a) & (b) (permitting the Attorney General to bring “an action” for dissolution, which is triable by jury). The Attorney General’s 163-page

¹ N-PCL § 1104(b) provides for publication of the order to show cause, § 1104(c) for service on the state tax commission, the corporation, each person named in the petition, members, creditors and claimants, and § 1104(d) for filing the order to show cause and petition with the clerk of the county where the corporation’s office is located.

complaint details extensive and particularized allegations in support of its claims. The Attorney General is entitled to take fact and expert discovery before having to meet its burden of proof, whether at the dispositive motion or trial stage. After the Court has determined that the Attorney General has satisfied the statutory basis for dissolution, then the interests of the members and the public in dissolving the NRA will be taken into account in accordance with N-PCL § 1109. The Court can determine at that time how it will take into consideration the criteria set forth in § 1109.

The NRA Members misconstrue N-PCL § 1104 as a mechanism to intervene in the Attorney General's proceeding and weigh in throughout the proceedings. (For example, the NRA Members indicate opposition to pending motions to change the venue of the action.) The statute does not grant non-parties such a role. It would also be impractical to permit the NRA Members to participate in that fashion given the number of members and potential for differing views. Moreover, the NRA Members' interests are adequately represented. Members who oppose the Attorney General's claims will be represented by the NRA, which is challenging the Attorney General's claims. In some respects, members may be aligned with the Attorney General, as the NRA Members acknowledge, noting that the Attorney General is seeking to recover the NRA's misused charitable assets by prosecuting claims against the individual defendants.

Finally, the NRA Members offer no legal authority requiring compliance with N-PCL § 1104 upon commencement of an action where, as here, the Attorney General is the plaintiff, the not-for-profit corporation is opposing dissolution and it is a plenary proceeding. The cases cited by the NRA Members are inapposite because they concern disputes over dissolution of jointly owned for profit corporations under the common law or provisions of the Business Corporation Law applicable to private parties. *See, e.g., Fedele v. Seybert*, 250 A.D.2d 519; 673 N.Y.S.2d 421 (1st Dep't 1998) (common law claim for dissolution was not subject to statutory requirements); *Muller v. Silverstein*, 92 A.D.2d; 458 N.Y.S.2d 597 (1st Dep't 1983) (dissolution order reversed where shareholders were given no opportunity to contest the dissolution under the BCL); *In re WTB Props.*, 291 A.D.2d 566, 737 N.Y.S.2d 654 (2d Dep't 2002) (applying BCL §1106 where no notice was given); *In re Cunningham & Kaming, P.C.*, 426 N.Y.S.2d 765, 75 A.D.2d 521 (1st Dep't 1980) (dispute between law partners over dissolution of law firm under BCL).

Conclusion

For the reasons set forth, the Attorney General respectfully requests that the Court deny the request by the NRA Members that notice be given to the entire membership at this time with an opportunity to show cause why the NRA should not be dissolved.

Respectfully,
/s/*Emily Stern*
Co-Chief, Enforcement Section
Assistant Attorney General

cc: All Counsel of Record