Mot. Seq. Nos. 1, 3, 4, 5, 6, 7

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

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.

Index No. 451625/2020

Affirmation of Jonathan Conley in Support of the Attorney General's Opposition to Defendants' Motions to Transfer, Dismiss, or Stay this Action

JONATHAN CONLEY, an attorney duly admitted to practice before the Courts of this State, hereby affirms the following under the penalty of perjury pursuant to CPLR § 2106:

1. I am an Assistant Attorney General in the Enforcement Section of the Charities Bureau of the Office of the New York State Attorney General ("OAG" or "Attorney General").

2. I submit this affirmation in support of the Attorney General's opposition to Defendants National Rifle Association of America, Inc. ("NRA"), Wayne LaPierre, and John Frazer's motions to transfer, dismiss, or stay this action for the limited purpose of providing the Court with true and correct copies of documents that are referenced in the accompanying memorandum of law.

3. Attached as Exhibit A is a true and correct copy of the NRA's Original Complaint in *NRA v. North*, Index No. 653577 (Sup. Ct. N.Y. Cnty.), filed on June 19, 2019.

4. Attached as Exhibit B is a true and correct copy of the NRA's Original Complaint and Jury Demand in *NRA v. James*, No. 1:20-cv-889 (N.D.N.Y.) (the "Federal Countersuit"), filed on August 6, 2020.

5. Attached as Exhibit C is a true and correct copy of the Attorney General's Rule 12(b) motion to dismiss, without exhibits, in the Federal Countersuit, filed on November 20, 2020.

6. Attached as Exhibit D is a true and correct copy of the Attorney General's Opposition to the NRA's Motion to Transfer Four Actions to the Northern District of Texas for Consolidation or Coordination in *In re National Rifle Association Business Expenditures Litigation*, No. 20-cv-00889 (J.P.M.L.), filed on November 12, 2020.

7. Attached as Exhibit E is a true and correct copy of the NRA's Amended Complaint and Jury Demand in *NRA v. North*, Index No. 903843-20 (Sup. Ct. Albany Cnty.), filed on August 11, 2020.

8. Attached as Exhibit F is a true and correct copy of the Albany County Supreme Court's Decision & Order in *NRA v. North*, Index No. 903843-20 (Sup. Ct. Albany Cnty.), dated October 2, 2020.

9. Attached as Exhibit G is a true and correct copy of a printout of the entity information page for the NRA, current as of December 9, 2020, from the New York State Department of State Division of Corporations Corporation and Business Entity Database accessed on December 10, 2020. The publicly available entity information from this Department of State database can be accessed at: https://appext20.dos.ny.gov/corp_public/corpsearch.entity_search_entry.

Dated: New York, New York
December 10, 2020

Jonathan Conley

Mot. Seq. Nos. 1, 3, 4, 5, 6, 7

Attorney Certification Pursuant to Commercial Division Rule 17

I, Jonathan Conley, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Affirmation in Support of the Attorney General's Opposition to Defendants' Motions to Change Venue, Dismiss, or Stay this Action in Mot. Seq. No. 1, 3, 4, 5, 6, and 7 complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the affirmation contains 412 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law and affirmation.

Dated: December 10, 2020
New York, New York

Jonathan Conley

Exhibit A

NRA's Original Complaint in
NRA v. North, Index No. 653577
(Sup. Ct. N.Y. Cnty.)

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

NATIONAL RIFLE ASSOCIATION OF AMERICA, Plaintiff, -against- OLIVER NORTH, Defendant.	Index # _____ **ORIGINAL COMPLAINT**

Plaintiff National Rifle Association of America ("Plaintiff" or the "NRA") files this Original Complaint against defendant Oliver North ("Defendant" or "North"), upon personal knowledge as to all facts regarding itself and upon information and belief as to others, as follows:

I.

PRELIMINARY STATEMENT

1. A former president of the NRA who departed office after a widely publicized, failed coup attempt,[1] North now seeks indemnification and advancement from the NRA for legal fees and expenses incurred by reason of his misconduct. Under New York law, North is entitled to neither.

2. The legal fees and expenses for which North seeks indemnification and advancement arise in connection with two sets of document requests—a judicial subpoena and a Congressional inquiry—that relate to a conspiracy by North to extort the NRA. As discussed in

[1] "NRA Ousts President Oliver North After Alleged Extortion Scheme Against Chief Executive," The Washington Post, April 27, 2019, https://www.washingtonpost.com/nation/2019/04/27/nra-chief-wayne-lapierre-claims-hes-being-extorted-by-oliver-north-hes-standing-his-ground/?noredirect=on&utm_term=.f3060246ef0b; "Oliver North Steps Down as NRA President Amid Dispute Over 'Damaging' Information," Reuters, April 27, 2019, https://www.reuters.com/article/us-usa-guns-nra/oliver-north-steps-down-as-nra-president-amid-dispute-over-damaging-information-idUSKCN1S30EQ.

the underlying litigation from which certain of these document requests arise,[2] North is a highly compensated agent of the NRA's former advertising agency, Ackerman McQueen, Inc. ("Ackerman"). For more than six months, North conspired with Ackerman to withhold material facts and documents from the NRA. When the NRA sued Ackerman for specific performance of a contractual obligation to furnish those documents, North and his employer took extreme measures to deter the NRA's demands for transparency. As the New York Times reported[3]—and secret text messages obtained by the NRA now show—North conspired with Ackerman, and another errant NRA Board member, to unseat the NRA's executive leadership and give Ackerman lucrative, *de facto* control over its largest client. That scheme failed. Unsurprisingly, it is now the subject of litigation discovery. On May 3, 2019, the United States Senate Committee on Finance also sought information from North about the same events. North has incurred legal expenses responding to these requests, but the NRA has no obligation or inclination to pay them.

3. Although North is a former President and a current director of the NRA, privileges and honors that should have estopped him from harming the NRA in the first place, he certainly cannot invoke those privileges now to obtain indemnification from the NRA for the cost of discovery into his own misconduct. The NRA would readily indemnify, in appropriate circumstances, officers or directors who discharge their roles in good faith and in the best interests

[2] Specifically, the subpoena which gives rise to North's indemnification demand was issued in *National Rifle Association of America v. Ackerman McQueen, Inc. and Mercury Group, Inc.*, Civil Case No. CL19002067, in the Circuit Court for the City of Alexandria, Virginia (the "Second Virginia Action"). The events summarized in this Complaint are also the subject of a related lawsuit, *National Rifle Association of America v. Ackerman McQueen, Inc. and Mercury Group, Inc.*, Civil Case No. CL19001757, in the Circuit Court for the City of Alexandria, Virginia (the "First Virginia Action," both actions, collectively, the "Virginia Litigation").

[3] "Wayne LaPierre Prevails in Fierce Battle for the N.R.A.," The New York Times, April 29, 2019, https://www.nytimes.com/2019/04/29/us/nra-wayne-lapierre-oliver-north.html.

of the NRA. But the NRA cannot, and will not, expend its donors' funds to pay North's legal fees after he chose to pursue his own financial interests at the direct expense of the NRA. For example, as Exhibits to this Complaint demonstrate, the corrupt conduct spearheaded by North which gave rise to ongoing litigation discovery included premeditated efforts to invoice the NRA for work performed by Ackerman for non-NRA clients.

4. Simply put, the NRA exists to fight for the Second Amendment—not pay other people's bills. Accordingly, the NRA seeks a declaration that North's demands for indemnification and advancement fail.

II.

JURISDICTION AND VENUE

5. Pursuant to sections 301 and 302 of the New York Civil Practice Law and Rules ("CPLR"), the Court has subject matter jurisdiction over this action.

6. The Court has personal jurisdiction over Defendant because he is a director of Plaintiff (a not-for-profit corporation organized under the laws of New York), committed tortious acts causing injury to persons or property within New York, and should have reasonably expected his actions to have consequences in New York.

7. Pursuant to CPLR § 503, venue is proper in New York because Plaintiff designates New York County as the place of trial and Plaintiff is a not-for-profit corporation organized under the laws of New York.

III.

PARTIES

8. Plaintiff National Rifle Association of America is a not-for-profit corporation organized under the laws of New York with its principal place of business in Fairfax, Virginia.

9. Lieutenant Colonel Oliver North (Ret.) is an individual who resides in Virginia.

IV.

STATEMENT OF RELEVANT FACTS

A. Plaintiff National Rifle Association Of America

10. Plaintiff NRA is a not-for-profit corporation organized under the laws of New York with its principal place of business in Fairfax, Virginia. The NRA is America's leading provider of gun-safety and marksmanship education for civilians and law enforcement. It is also the foremost defender of the Second Amendment of the United States Constitution. A 501(c)(4) tax-exempt organization, the NRA has over five million members—and its programs reach many millions more.

B. Defendant Oliver North

11. Defendant Oliver North is an employee of Ackerman, a former NRA President, and an NRA Board member.

12. Despite his fiduciary duties to the NRA, North has acted in the best interests of himself and Ackerman and at the expense of the interests of the NRA, engaged in conduct harmful to the NRA, and persistently failed to provide to the NRA important details related to his lucrative contract with Ackerman. For example, when the NRA sought to obtain information about that contract from North and Ackerman, North and Ackerman sought to deflect scrutiny by promulgating false allegations against the NRA. Their conduct left the NRA no choice but to sue Ackerman for, among other things, breaches of contract and fiduciary duties.

13. As a result of his false allegations and conduct harmful to the NRA, North was subpoenaed by the NRA for deposition and documents and also received a request for documents related to those false allegations from the United States Senate Committee on Finance.

14. Then, inexplicably, on May 6, 2019, and June 6, 2019, through counsel, North requested that the NRA indemnify him for the legal fees and expenses that he is now forced to incur all because of steps that he took adversely to the NRA.

15. Certain NRA directors have rights to indemnification of certain legal fees and expenses, but those rights exist only so long as directors meet the narrowly circumscribed requirements specified in New York law. North does not and cannot possibly meet those requirements.

C. The Relationship with Ackerman

16. Since May 2018, North has been employed by Ackerman, a public relations firm. Until recently, the details of his contract with Ackerman were concealed by him and Ackerman from the NRA.

17. The NRA and Ackerman have worked closely together since the 1980s. Over that time, the NRA placed extensive trust and confidence in Ackerman to perform services on its behalf. However, since in or around May 2018, Ackerman has repeatedly betrayed the NRA's trust. In fact, Ackerman's escalating breaches of its duties forced the NRA to file not just one but two lawsuits against Ackerman.

18. For approximately 30 years, Ackerman's work on behalf of the NRA has been governed by successive iterations of a Services Agreement. The current Services Agreement between the NRA and Ackerman dated April 30, 2017 (as amended May 6, 2018, the "Services Agreement") provides that certain categories of services, such as Owned Media and Internet Services, are compensated with an agreed annual fee, while others are required to be invoiced on an *ad hoc* basis based on estimates furnished by Ackerman and approved by the NRA.

19. The Services Agreement contains detailed guidelines identifying categories of expenses that can be invoiced to the NRA. In addition, any expenses must be authorized by the NRA.

20. Furthermore, the NRA bargained for transparency into Ackerman's files, books and records to ensure that the NRA, a not-for-profit corporation, could appropriately monitor the use of its funds. As a result, the records-examination clause of the NRA's contract with Ackerman (the "Records-Examination Clause") requires Ackerman to open its files for the NRA's inspection upon reasonable notice.

21. Over the parties' long relationship, Ackerman did not always supply underlying receipts and other support for Ackerman's expenses but repeatedly reassured the NRA that Ackerman retained appropriate documentation which could be audited at the NRA's request. Indeed, the NRA understood that annual audits of Ackerman's expense records were conducted for this purpose.

22. During early- and mid-2018, the NRA sought information from Ackerman pursuant to the Records-Examination Clause. However, after the NRA began to request access to records that would shed light on concerns which had arisen regarding Ackerman's business and accounting practices, Ackerman's responses became evasive and hostile.

23. In or around August 2018, within days after the NRA announced that it would now require supporting documentation to be transmitted contemporaneously with vendor invoices, a media outlet hostile to the NRA quoted "an anonymous source at Ackerman McQueen"—creating serious concerns about Ackerman's compliance with the stringent confidentiality obligations contained in the Services Agreement. When another outlet described the same source as a former

(rather than a current) employee of Ackerman, the NRA's trust in its longtime collaborator caused it not to pursue the matter further. Unfortunately, Ackerman's apparent breaches did not end there.

24. In late August 2018, Ackerman sent a letter to the NRA which purported to comply with the NRA's request for a comprehensive audit of Ackerman's expense records. The letter identified several categories of items, some relating to travel and entertainment, which it warned would be encompassed in a fulsome production of Ackerman's expense records—perhaps believing that the threat of such disclosure would dampen the NRA's demands for transparency. However, the NRA was undeterred. Indeed, the NRA believed that all of the expenses it incurred had been proper, and simply sought to review and verify their details.

25. Thereafter, Ackerman embarked on a campaign to kill the messenger. At first, it scapegoated the NRA's outside counsel. Then, Ackerman refused requests even from NRA executives. After the NRA retained a third-party forensic accounting firm, in or around January 2019, Ackerman indicated it would cooperate, but that pledge of cooperation was short-lived, as Ackerman purported to forbid the accountants from disclosing to the NRA material information, including copies of annual budgets that the NRA allegedly approved. When the NRA's General Counsel sought additional information in follow-up to the forensic audit, Ackerman ignored his letters.

26. As Ackerman continued to stonewall the NRA's requests for information, the NRA was contacted with increasing frequency by journalists acting on purported "leaks" relating to matters on which Ackerman had worked. The contents of these leaks reflected a malicious, out-of-context use of the NRA's confidential information, with a clear intent to damage the NRA.

27. On April 12, 2019, having exhausted its efforts to access documents pursuant to the Services Agreement, the NRA filed the First Virginia Action, a narrowly tailored suit in Virginia

seeking specific performance by Ackerman of its obligation to share relevant records with the NRA. In retaliation for the First Virginia Action, rather than provide the requested documents to the NRA (as the NRA had sought for months), Ackerman conspired with others to disseminate select, out-of-context portions of those records to members of the NRA Board of Directors, with the obvious intent of effectuating a coup against the NRA's executive leadership.

28. On or about April 22, 2019, days before the NRA's Annual Meeting of Members, Ackerman doubled down on the tactic it had previewed in its late August 2018 letter. In letters to select NRA executives, Ackerman referenced and excerpted certain expense records which had previously been withheld from the NRA. Importantly, Ackerman did not contend (nor could it) that any of the referenced expenses were improper. Nonetheless, those expenses were cynically selected by Ackerman to foster salacious, misleading impressions of the NRA's expense accounting practices. Ackerman's letters carried an implicit threat, made explicit in a subsequent series of communications: If the NRA failed to withdraw its lawsuit seeking access to Ackerman's records, Ackerman would maliciously publicize portions of those records in a manner tailored to cause maximum reputational damage to the NRA's leadership.

D. North Acts In Bad Faith And Breaches His Fiduciary Duties To The NRA.

29. Roughly one year before Ackerman's escalating breaches culminated in a lawsuit by the NRA, Ackerman and the NRA amended their Services Agreement to accommodate a purported third-party contract between Ackerman and North.

30. As North prepared to assume the presidency of the NRA, he separately discussed a potential engagement by Ackerman as the host of an NRATV documentary series. On May 6, 2018, the NRA and Ackerman amended the Services Agreement (the "Amendment") to affirm that any contract between Ackerman and North would be considered an Ackerman-Third Party NRA Contract, for which outstanding compensation would be owed by

the NRA to Ackerman if the Services Agreement was terminated. Importantly, the Amendment treated North as a third-party contractor—but not an employee—of Ackerman.

31. New York law requires that the NRA Board of Directors, or an authorized committee thereof, review and approve "any transaction, agreement, or any other arrangement in which [a director or officer of the NRA] has a financial interest and in which the [NRA or an affiliate] is a participant." *See* N.Y. N-PCL § 715. Of course, a board of directors may define additional restrictions on transactions giving rise to potential conflicts of interest; and, consistent with best practices, the NRA's Conflict of Interest Policy requires disclosure of contracts between NRA leadership and vendors, like Ackerman, that receive funds from the NRA.

32. Aware that North entered into a contract with Ackerman (the "North Contract"), the NRA diligently sought to comply with its obligations concerning analysis and approval of the North Contract. During September 2018, the Audit Committee of the NRA Board of Directors (the "Audit Committee") reviewed a purported summary of the material terms of the North Contract and ratified the relationship pursuant to New York law–subject to carefully drawn provisos designed to avoid any conflicts of interest.

33. When the Audit Committee enacted that September 2018 resolution, it was assured that the NRA's counsel would review the North Contract in full. But that turned out to be false, at least for the duration of 2018, as both Ackerman and North, consistent with Ackerman's *modus operandi* described above, refused to provide the North Contract pursuant to the Records-Examination Clause. Meanwhile, North indicated via counsel that he could only disclose a copy of the contract to the NRA subject to Ackerman's consent. This back-and-forth persisted for nearly six months.

34. Eventually, in February 2019, Ackerman acceded to a brief, circumscribed, "live" review of the North Contract (but not to retention of any copies) by the General Counsel of the NRA. This review raised concerns about whether the previous summary of the North Contract which had been provided to the Audit Committee was accurate. Among other things, the NRA's brief, limited review of the North Contract—along with other information disclosed for the first time by North—gave rise to questions regarding whether: (i) North was a third-party contractor of Ackerman or a full-time employee with fiduciary duties to Ackerman that supersede his duties to the NRA; (ii) the prior disclosures about the costs borne by the NRA in connection with the North Contract were accurate; and (iii) the contract imposed obligations on North that prevent him from communicating fully and honestly with other NRA fiduciaries about Ackerman. Against the backdrop of escalating concerns about Ackerman's compliance with the Services Agreement and applicable law, the NRA became determined to resolve these issues.

35. By letters dated March 25 and 26, 2019, the NRA's General Counsel again sought additional visibility regarding the North Contract and related business arrangements, as well as copies of other material business records pursuant to the Services Agreement.

36. By this point, the NRA had been requesting North's contract with Ackerman for over *six months*, but North continued to stonewall the NRA. Although North entered into this contract on or about May 15, 2018, he did not provide the NRA a written copy of the contract until April 2019.

37. Therefore, it was not until April of 2019 that the NRA learned that, under the contract with Ackerman, North was an actual *employee* of Ackerman, not a third-party contractor as had originally been represented. This means that all this time North has owed fiduciary duties to Ackerman. North had been provided conditional approval by the NRA to continue his

engagement with Ackerman—but such approval was based on the premise that he was a third-party contractor of Ackerman, not a full-time employee with fiduciary duties to Ackerman.

38. Under his employment agreement with Ackerman, North is compensated directly by Ackerman—money which would ultimately be reimbursed by the NRA. Such an arrangement creates a clear conflict of interest for North.

39. Subsequent to the above revelations, North dropped another bombshell—he was not meeting his contractual obligations in connection with his employment agreement with Ackerman. Ackerman had advised the NRA that it had contracted North to host "[t]welve feature-length episodes'' of a digital documentary series, to be produced "during each 12 months of a three-year [a]greement," commencing during or about May 2018. Yet by April 19, 2019—eleven months into North's engagement—only three episodes were available, and none were "feature-length.'' Rather, they are approximately 39 minutes, 33 minutes, and 11 minutes in length, respectively.

40. Although North produced only a fraction of the "American Heroes" episodes for which Ackerman and he were being compensated, North has provided no financial reimbursement to the NRA. Nor has North facilitated a report from Ackerman about the production costs it is charging the NRA for the failing series.

E. In April 2019, North Again Acts In Bad Faith, And Again Breaches His Fiduciary Duties—Again, To Deflect Scrutiny From His Seven-Figure Contract.

41. North continued to act in bad faith and for purposes that he could not have reasonably believed to be in the best interests of the NRA.

42. In April 2019, North, in conspiracy with others, resorted to even more drastic behavior: an extortion scheme, the objective of which was to enrich himself and protect his employer Ackerman, at the expense of the NRA.

43. Specifically, on or about April 24, 2019, North contacted by telephone an aide of NRA CEO and Executive Vice President Wayne LaPierre and relayed the contents of yet another letter that Ackerman purportedly planned to disseminate. On the telephone call with the aide, North emphasized that the letter would be "bad" for LaPierre and the NRA. North described a laundry list of misleading, malicious allegations that the letter would contain. Notably, according to North, the letter would (selectively) disclose travel and related expense records—the same types of records that Ackerman had refused to provide confidentially for the NRA's review. After withholding this information for more than six months in an attempt to stonewall the NRA's compliance efforts, Ackerman and North now threatened to strategically and selectively publicize the information in a manner calculated to cause maximum reputational harm.

44. On the same telephone call with Mr. LaPierre's aide, North proceeded to make an extortion demand: Mr. LaPierre must resign from his position as CEO of the NRA and support North's continued tenure as President—or the "bad" letter manufactured by Ackerman would be publicized. Mr. LaPierre was later informed he also had to meet a third condition: arrange for the NRA to withdraw its lawsuit seeking access to Ackerman's records.

45. On the telephone call with Mr. LaPierre's aide, North took the position that unless Mr. LaPierre acceded to these demands immediately, he would become the target of a PR campaign meant to embarrass him and the NRA through the promulgation of falsehoods. North assured Mr. LaPierre's aide that if Mr. LaPierre acted upon the ultimatum *immediately*, Ackerman's salacious and untrue accusations would not surface.

46. To further induce Mr. LaPierre to comply with Ackerman's extortion, North made an additional, stunning offer: If LaPierre cooperated, North indicated that he could "negotiate with" Ackerman's co-founder to secure an "excellent retirement" for Mr. LaPierre. In other words,

in exchange for retreating from enforcing the NRA's legal rights, and ceding leadership of the NRA to Ackerman's salaried agent, Ackerman appeared to be offering Mr. LaPierre a lucrative backroom retirement "deal."

47. Of course, Mr. LaPierre rejected North's offer.

48. North and his co-conspirators orchestrated these threats through, among other things, a string of text messages that are filed herewith. The text messages were produced in the Virginia Litigation by Dan Boren, an NRA board member employed by one of Ackerman's other major clients, the Chickasaw Nation. Boren relayed the contents of Ackerman's threatened letter to North and helped to choreograph the ultimatum they presented to Mr. LaPierre. Moreover, in email correspondence transmitted over non-NRA servers, Boren admitted his knowledge that Ackerman may have been invoicing the NRA for full salaries of employees who were actually working on the Chickasaw Nation account. The same text messages and email messages demonstrate that another errant NRA fiduciary, Chris Cox[4]—once thought by some to be a likely successor for Mr. LaPierre—participated in the Ackerman/North/Boren conspiracy.

49. Rather than accede to an obvious extortion attempt, Mr. LaPierre wrote a letter to the NRA's Board of Directors that gave a transparent account of Ackerman's threat and concluded: "so long as I have your confidence . . . I will not back down." As became widely publicized, Mr. LaPierre prevailed—and the attempted coup by Ackerman, spearheaded by North, failed. Today, North is no longer President of the NRA.

50. North engaged in extortion and other wrongful conduct to enrich himself at the expense of the NRA. He acted in bad faith, adversely to the NRA, and in breach of his fiduciary duties to the NRA.

[4] Identified in text messages as CC and Chris.

F. North's Misconduct Subjects Him to Subpoenas And a Request for Information, But He—Not the NRA—Should Bear the Legal Costs of Complying with Them.

51. On or about May 3, 2019, United States Senate Committee on Finance (the "Finance Committee") sent North a request for information, which was based on media reports of North's bad-faith conduct described above. The letter from the Finance Committee stated: "We are writing to request information related to public statements you recently made alleging financial improprieties at the [NRA] . . . ." As explained above, the statements by North were nothing more than an attempt to deflect attention from himself, avoid scrutiny on the North Contract, and enrich himself at the expense of the NRA and its membership. The Finance Committee's request for information specifically referenced North's attempt to obtain the resignation of Wayne LaPierre.

52. Then, approximately three days later, in a letter dated May 6, 2019, counsel for North demanded that the NRA indemnify and advance North's legal fees and expenses in connection with his response to the Finance Committee's May 3, 2019 request. North's counsel's letter did not stop there: it went on to prospectively demand that the NRA indemnify North for legal fees incurred in complying with "any other inquiries" North "may receive" in the future.

53. On or about May 13, 2019, the NRA sent a letter rejecting his demand.

54. On May 22, 2019, the NRA filed the Second Virginia Action against Ackerman. The Second Virginia Action seeks, among other things, compensatory and punitive damages from Ackerman for its breaches of contract with the NRA and for its breaches of fiduciary duties owed to the NRA, which stem in significant part from North's conduct.

55. Shortly thereafter, in late May 2019, in the Second Virginia Action, the NRA served upon North a subpoena *duces tecum* and a deposition subpoena (collectively, the "Subpoenas"). The subpoena duces tecum predominantly seeks from North records related to North's extortion

demand, his communications with other employees of Ackerman, and Ackerman's salacious allegations of allegedly inappropriate expenses.

56. By letter dated June 6, 2019, counsel for North requested that "the NRA indemnify North for the costs and legal fees he incurs relating to the NRA's subpoenas." This letter also repeated North's prior demand for indemnification in connection with the request from the Finance Committee.

57. North has no legal right to advancement or indemnification from the NRA.

G. The NRA Demands That North Resign From The NRA Board Of Directors Or From Ackerman.

58. By letter dated May 31, 2019, following a resolution by the NRA's Audit Committee that detected an "irreconcilable conflict" arising from North's continued employment with Ackerman, the NRA Secretary and General Counsel wrote to North's counsel requesting that North resign—either from his remaining leadership positions with the NRA, or from Ackerman. Prompted to choose between the NRA and Ackerman, North appears to have chosen Ackerman (although as of June 12, 2019, he has also refused to resign from the NRA Board).

V.

CAUSE OF ACTION

A. COUNT ONE: Declaratory Relief That Defendant North Is Not Entitled To Advancement Or Indemnification Of Legal Fees Or Expenses From The NRA.

59. Plaintiff repeats the allegations contained in the preceding paragraphs.

60. An actual and justiciable controversy exists between Plaintiff and Defendant.

61. Defendant contends that he is entitled to advancement and indemnification from Plaintiff.

62. Plaintiff contends that Defendant has no right to advancement or indemnification from Plaintiff.

63. North does not have a right under New York law to advancement or indemnification from the NRA for several independent reasons.

64. First, North is not entitled to advancement or indemnification under New York law because the requests were not sent to North by reason of the fact that he was or is a director of the NRA.

65. Second, North is not entitled to advancement or indemnification under New York law because the Congressional inquiry and the Second Virginia Action are not civil or criminal proceedings in which North is a defendant or is threatened to be a defendant.

66. Third, North is not entitled to advancement or indemnification under New York law because North did not act in good faith.

67. Fourth, North is not entitled to advancement or indemnification under New York law because he did not act for a purpose which he reasonably believed to be in the best interests of the NRA.

68. Fifth, North is not entitled to advancement or indemnification because, in entering into the North Contract with Ackerman and failing to properly disclose it to the NRA and the Audit Committee, North personally gained a financial profit and other advantages to which he was not legally entitled.

69. North does not have any contractual rights to advancement or indemnification from the NRA.

70. North does not have any rights to advancement or indemnification under the Certificate of Incorporation of the NRA.

71. North does not have any rights to advancement or indemnification under the Bylaws of the NRA.

72. North does not have any common law rights to advancement or indemnification from the NRA.

73. The NRA requests that the Court declare that North has no rights to advancement or indemnification from the NRA.

VI.

DEMAND FOR RELIEF

WHEREFORE Plaintiff respectfully requests that the Court enter a judgment in favor of Plaintiff National Rifle Association of America and against Defendant Oliver North (1) declaring that, insofar as Defendant Oliver North incurs any legal fees or expenses in complying with the Subpoenas and the Finance Committee's request, he has no right to advancement or indemnification of such fees or expenses from Plaintiff National Rifle Association of America; and (2) granting Plaintiff National Rifle Association of America any and all relief that the Court deems just and proper.

Dated: June 19, 2019
New York, New York

Respectfully submitted,

s/ Svetlana M. Eisenberg
William A. Brewer III
Svetlana M. Eisenberg

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ATTORNEYS FOR PLAINTIFF

Exhibit B

NRA's Original Complaint and Jury Demand in *NRA v. James*, No. 1:20-cv-889 (N.D.N.Y.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

NATIONAL RIFLE ASSOCIATION OF AMERICA,	§	
Plaintiff,	§	**CASE NO** 1:20-cv-889 (MAD/TWD)
v.	§	
LETITIA JAMES, both individually and in her official capacity,	§	
Defendant.	§	**JURY TRIAL DEMANDED**

NATIONAL RIFLE ASSOCIATION OF AMERICA'S ORIGINAL COMPLAINT AND JURY DEMAND

Plaintiff the National Rifle Association of America (the "NRA") files this Original Complaint and Jury Demand ("Complaint") against Defendant New York State Attorney General Letitia James ("James"), in her individual and official capacity, upon personal knowledge of its own actions, and upon information and belief as to all other matters, as follows:

I.

PRELIMINARY STATEMENT

In the wake of violent tragedies, amid a polarized political landscape, a candidate for the New York State Office of the Attorney General made a stunning campaign promise. If elected, James said, she would "take down the NRA"—not by refuting its policy positions or by advocating for gun control legislation, but by wielding the powers of the NYAG to dismantle the NRA as a not-for-profit corporation. James was explicit about her motivation: she saw "no

distinction"[1] between the NRA's charitable existence and its ability to engage in pro-gun political speech (characterized by James as "deadly propaganda"). To silence the NRA's advocacy, and neutralize it as an opposing political force, James promised that she would leverage "the constitutional power as an attorney general to regulate charities" to instigate a fishing expedition into the NRA's "legitimacy . . . to see whether or not they have in fact complied with the not-for-profit law in the State of New York."[2] She also maligned the NRA as a "terrorist organization" and a "criminal enterprise," and vowed that financial institutions and donors linked to the NRA would be pursued by law enforcement—just like supporters of Al Qaeda or the mafia.[3]

Importantly, James made these promises without a single shred of evidence, nor any sincere belief, that the NRA was violating the New York Not-For-Profit Corporation Law, or any other law.

Although NRA was disappointed by these threats, it was not surprised—because James's predecessor in office, New York Attorney General Eric Schneiderman, defied his own party loyalties to warn the NRA that this would happen. In a telephone call to Tom King, an NRA director, in late 2017, Schneiderman emphasized that while he opposed the NRA's positions on the Second Amendment, he felt troubled by recent, extraordinary pressures being placed on his office by powerful political interests. Namely, Schneiderman said that key Democratic actors blamed the NRA for President Trump's 2016 election victory, and were brainstorming ways that

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[1] *See Annual NRA Fundraiser Sparks Protests*, LI HERALD (Oct. 25, 2018), http://liherald.com/stories/nassau-protests-nra-fundraiser,107617.

[2] *See* Jillian Jorgensen, *Letitia James Says She'd Investigate NRA's Not-For-Profit Status If Elected Attorney General*, DAILY NEWS (July 12, 2018), https://www.nydailynews.com/news/politics/ny-pol-tish-james-nra-20180712-story.html.

[3] *See Attorney General Candidate, Public Advocate Letitia James*, OUR TIME PRESS (Sept. 6, 2018), http://www.ourtimepress.com/attorney-general-candidate-public-advocate-letitia-james/ (emphasis added).

New York State could weaken the NRA as a political force in 2020. Referencing efforts by the New York Department of Financial Services ("DFS") to target several of the NRA's insurance providers, Schneiderman noted that "one piece of this is already happening," but that a bigger "piece" was in the works: the NYAG, too, was being pressured to pursue the NRA for purely political purposes. Schneiderman seemed to know that a sham prosecution of a political enemy would be blatantly improper, but advised King to "get ready."

Although the NRA believed it was already operating in compliance with New York State law, it took no chances in the face of this warning. To fortify its defenses, as well as inform litigation strategy against New York State and others, the NRA undertook a top-to-bottom compliance review of its operations and governance. In the process, the NRA made enemies: vendors and executives who had grown comfortable with the status quo did not welcome the NRA's push for additional documentation and transparency. Over the ensuing year, the NRA endured slings and arrows from those discontented with the principled path it had chosen and became embroiled in litigation. But the NRA stuck to its guns, determined to prepare itself to fend off a political attack from the NYAG if one came.

Months after delivering his warning to Mr. King, Schneiderman resigned from office. Vying to succeed him, James—whom the New York Times expressly declined to endorse for Attorney General, due to perceived corrupt ties to Cuomo[4]—made the political prosecution of the NRA a central campaign theme. Within months of James's inauguration, the NYAG predictably moved against the NRA by launching a sweeping investigation in April 2019. In response, the NRA cooperatively engaged and furnished thousands of documents, along with

[4] New York Times Editorial Board, *The New York Times Endorses Zephyr Teachout for Attorney General in Thursday's Primary*, THE NEW YORK TIMES (Aug. 19, 2019), https://www.nytimes.com/2018/08/19/opinion/zephyr-teachout-new-york-attorney-general.html.

testimony from key executives and board members, some of whom patiently answered the NYAG's questions for multiple days on end. Despite hopes that playing by the rules would procure a just outcome, the NRA has not been treated fairly by James's office.

Though it continues unabated, this injustice has not gone unnoticed: Civil Procedure scholar Arthur Miller, the American Civil Liberties Union, the New Republic, and other voices not traditionally aligned with the NRA have rallied to express concerns about New York's conduct. Senior former prosecutors have also criticized James's apparent politicization of her office.[5]

The New York Democratic Party political machine seeks to harass, defund, and dismantle the NRA because of what it believes and what it says. Only this Court can stop it. The NRA accordingly brings this lawsuit for declaratory and injunctive relief under the First Amendment of the United States Constitution, as well as for a judicial declaration of what is obvious: the NRA operates in substantial compliance with New York not-for-profit law.

II.

PARTIES

1. The NRA is a nonprofit corporation organized under the laws of the State of New York with its principal place of business in Fairfax, Virginia. The NRA is America's leading provider of gun-safety and marksmanship education for civilians and law enforcement. It is also the foremost defender of the Second Amendment to the United States Constitution. The NRA has over five million members, and its programs reach millions more.

2. James is the Attorney General of the State of New York and, at certain times relevant to the Complaint, was acting individually—as she sought political office—and at other

[5] *See* Jeffery C. Mays, N.Y.'s New Attorney General Is Targeting Trump. Will Judges See a 'Political Vendetta?', NEW YORK TIMES (December 31, 2018)

times under color of state law. Her principal place of business is 28 Liberty Street, 15th Floor, New York, NY 10005. James is sued in her individual and official capacities.

III.

JURISDICTION AND VENUE

3. Pursuant to 28 U.S.C. § 1331, the Court has subject matter jurisdiction because this action involves claims based on the First and Fourteenth Amendments to the United States Constitution, and because this action seeks to prevent state officials from interfering with federal rights. Further, subject matter jurisdiction is conferred on this Court by 28 U.S.C. § 1343(a)(3) because this action is brought to redress deprivations under color of state law of rights, privileges, and immunities secured by the United States Constitution. This Court has supplemental jurisdiction over all state-law claims asserted in this action under 28 U.S.C. § 1367.

4. Venue is proper in this district under 28 U.S.C. § 1391(b).

5. There is a present and actual controversy between the parties.

6. The relief requested is authorized pursuant to 28 U.S.C. § 1343(a)(4) (recovery of damages or equitable relief or any other such relief for the protection of civil rights), 28 U.S.C. §§ 2201 and 2202 (declaratory and other appropriate relief), 42 U.S.C. § 1983 (deprivation of rights, privileges, and immunities secured by the Constitution), and 42 U.S.C. § 1988 (awards of attorneys' fees and costs).

IV.

STATEMENT OF RELEVANT FACTS

A. The NRA: Support For Gun Safety And A Commitment To Core Political Speech.

7. After the Civil War, two Union Army officers created a private association to promote marksmanship among the citizenry. The officers believed that the war would have

ended significantly sooner if the northern troops had been able to shoot as well as the Confederate soldiers. They obtained a charter from the State of New York in November of 1871; thereafter, the NRA built a proud legacy in the State of New York.

8. From the NRA's inception, it received praise from the State of New York for its many public contributions. In 1872, the New York State legislature and the NRA jointly dedicated funds for the creation of a rifle range on Creed Farm, in what is now Queens Village, Queens, New York. For many decades, the NRA partnered with the State to advance firearms safety, education, conservation, and other public policy goals. For example, when New York City public schools sought to educate boys in marksmanship and gun safety, NRA co-founder Gen. George Wingate designed and headed the resulting Public Schools Athletic League (PSAL) marksmanship program.[6] Likewise, in 1949, the NRA worked with the State of New York to create the nation's first hunter education program. Similar courses were subsequently adopted by state fish and game departments across the country and in Canada, helping to make hunting among the safest sports in existence.

9. First among the "Purposes and Objectives" contained in the NRA's bylaws is "[t]o protect and defend the Constitution of the United States." Accordingly, political speech is a major purpose of the NRA. The NRA engages in extensive legislative advocacy to promote its purposes, as well as to vindicate the rights of its members and all Americans.

10. The NRA spends tens of millions of dollars annually distributing pamphlets, fact sheets, articles, electronic materials, and other literature to advocate in support of Second

[6] *See e.g.*, STEVEN A. RIESS, SPORTS IN AMERICA FROM COLONIAL TIMES TO THE TWENTY-FIRST CENTURY: AN ENCYCLOPEDIA 736 (Steven A. Riess ed., 2015); ROBERT PRUTER, THE RISE OF AMERICAN HIGH SCHOOL SPORTS AND THE SEARCH FOR CONTROL, 1880-1930 122 (1st ed. 2013); Robert Pruter, *Boys Rifle Marksmanship*, ILLINOIS HIGH SCHOOL ASSOCIATION, http://www.ihsa.org/archive/hstoric/marksmanship_boys.htm?NOCACHE=5:53:58%20PM (last visited May 11, 2018).

Amendment privileges and to assist NRA members who engage in national, state, and local firearm dialogue. The NRA's direct mail, television, radio, and digital communications seek to educate the public about issues bearing on the Second Amendment, defend the NRA and its members against political and media attacks, and galvanize participation in the political process by NRA members and supporters.

11. To its critics, the NRA is best known as a "superlobby – one of the largest and most truly conservative lobbying organizations in the country," able to mobilize its millions of members in concerted efforts to protect the Second Amendment rights of all Americans.[7] In addition, the NRA's letter-writing campaigns, peaceable public gatherings, and other grassroots "lobbying" activities constitute precisely the type of political speech which rests "[a]t the core of the First Amendment."[8]

B. <u>The State Of New York Targets The NRA Based On The Viewpoint Of Its Speech.</u>

12. Since the NRA's founding, the NRA's corporate domicile—New York—has become a less hospitable political environment for Second Amendment advocacy. The NRA welcomes fair, full-throated policy debate, but cannot abide the opportunistic, corrupt misuse of government power by certain New York officials to squelch political opposition. Regrettably, this is what has occurred, and is already the subject of another ongoing federal court lawsuit.

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[7] Christina Robb, HANDGUNS AND THE AMERICAN PSYCHE THE ATTEMPTED ASSASSINATION OF A PRESIDENT BRINGS THE ISSUE INTO SHARP FOCUS ONCE AGAIN. HANDGUNS – WHAT DO THEY MEAN TO AMERICANS? TO THE NRA, THEY ARE A SYMBOL OF FREEDOM; TO THOSE FRIGHTENED OF CRIME, THEY REPRESENT SAFETY – EVEN IF THE OWNER DOESN'T KNOW HOW TO USE THEM; TO GUN CONTROL ADVOCATES, THEY ARE SYMBOLS OF ULTIMATE EVIL., BOSTON GLOBE, 1981 WLNR 68847 (June 7, 1981).

[8] *See, e.g.*, *Brown v. Hartlage*, 456 U.S. 45, 52 (1982).

13. New York Governor Andrew Cuomo has a longstanding political vendetta against "Second Amendment Types,"[9] especially the NRA, which he accuses of exerting a "stifl[ing] . . . stranglehold" over national gun policy.[10] For Cuomo, silencing the NRA is a career strategy. During 2018, Cuomo and several political allies, including Maria Vullo (then the Superintendent of the Department of Financial Services) orchestrated a campaign of selective enforcement, backroom exhortations, and public threats designed to coerce financial institutions to blacklist pro-gun advocacy groups, especially the NRA. The NRA's First Amendment claims arising from this conduct have withstood motions to dismiss and are currently pending in the United States District Court for the Northern District of New York.[11]

14. After New York's previous Attorney General, Eric Schneiderman, resigned amid allegations of sexual misconduct, several Democratic candidates vied to replace him. Nearly all of these candidates took affirmative steps to "distance themselves"[12] from Cuomo—who presided over a government that the *New York Times* called "historically corrupt" and "a chamber of ethical horrors."[13] But as the NRA's First Amendment lawsuit against Governor Cuomo received increased coverage during the summer of 2018 (and garnered support from the

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[9] On February 15, 2018, Cuomo appeared on the MSNBC program "The Beat," where he discussed championing legislation that some believed "trampled the Second Amendment." YOUTUBE, Gov. *Andrew Cuomo On Background Checks: "Bunch Of Boloney" | The Beat With Ari Melber | MSNBC*, https://www.youtube.com/watch?v=Tz8X07fZ39o (last visited May 7, 2018). However, Cuomo lamented that his "favorability rating" had dropped thereafter due to "backlash from conservatives and Second Amendment types." *Id.*

[10] *See* Kenneth Lovett, *Exclusive: Cuomo Fires Back at Jeb Bush for 'Stupid' and 'Insensitive' Gun Tweet*, NY DAILY NEWS (Feb. 17, 2016), http://www.nydailynews.com/news/politics/cuomo-blasts-jeb-stupid-insensitive-gun-tweet-article-1.2534528.

[11] *Nat'l Rifle Ass'n of Am. v. Cuomo,* Case No. 1:18-cv-00566-TJM-CFH (N.D.N.Y.)

[12] *See* Jeffery Mays, *Letitia James Has Embraced Andrew Cuomo. Is It Worth It?* THE NEW YORK TIMES (Aug. 13, 2018), https://www.nytimes.com/2018/08/13/nyregion/letitia-james-attorney-general-independence.html.

[13] New York Times Editorial Board, *The New York Times Endorses Zephyr Teachout for Attorney General in Thursday's Primary*, THE NEW YORK TIMES (Aug. 19, 2019), https://www.nytimes.com/2018/08/19/opinion/zephyr-teachout-new-york-attorney-general.html.

American Civil Liberties Union),[14] James embraced Cuomo's endorsement, pursued contributions from his donors,[15] and promised to apply the same unconstitutional tactics against the NRA. On September 6, 2018, James announced that, if elected, she would follow in the footsteps of Cuomo's financial-blacklisting campaign, by "put[ting] pressure upon the banks that finance the NRA" in order to choke off support for Second Amendment speech.[16] She also reiterated her attacks on the NRA's legitimacy as a not-for-profit corporation.[17]

C. To Contrive a Pretext For Law-Enforcement Action, James Conspires With Everytown—And Maliciously Defames the NRA.

15. To create air cover for their campaign against the NRA (which had begun to attract bipartisan criticism),[18] Cuomo and James coordinated actively with Everytown for Gun Safety ("Everytown"). Richly endowed by Michael Bloomberg, Everytown is an activist organization whose explicit political mission is to oppose the NRA. Documents that have surfaced to date in the NRA's First Amendment litigation against Cuomo show that Everytown was instrumental in orchestrating New York State's politically motivated investigation of certain

[14] *See* David Cole, *New York State Can't Be Allowed to Stifle the NRA's Political* Speech, SPEAK FREELY (Aug. 24, 2018), https://www.aclu.org/blog/free-speech/new-york-state-cant-be-allowed-stifle-nras-political-speech; *see also* Cheryl Chumley, *ACLU defends NRA - - Yes, you read that right*, The Washington Times (Aug. 27, 2018) https://www.washingtontimes.com/news/2018/aug/27/aclu-defends-nra-yes-you-read-right/; *see also* Declan McCullagh, *ACLU Sticks Up for the NRA?!*, REASON (Aug. 24, 2018), https://reason.com/2018/08/24/aclu-teams-up-with-nra/.

[15] New York Times Editorial Board, *The New York Times Endorses Zephyr Teachout for Attorney General in Thursday's Primary*, THE NEW YORK TIMES (Aug. 19, 2019), https://www.nytimes.com/2018/08/19/opinion/zephyr-teachout-new-york-attorney-general.html.

[16] *See* Our Time Press, *Attorney General Candidate, Public Advocate Letitia James*, https://www.ourtimepress.com/attorney-general-candidate-public-advocate-letitia-james/ (last visited Feb. 11, 2020).

[17] *Id.*

[18] *See, e.g.*, Matt Ford, *The NRA Is Not a Domestic Terrorist Organization*, THE NEW REPUBLIC (September 17, 2019), https://newrepublic.com/article/155085/nra-not-domestic-terrorist-organization; Jim Geraghty, *For Americans' Gun Rights, the Stakes in 2020 Are as High as Ever*, NATIONAL REVIEW (April 25, 2019), https://www.nationalreview.com/the-morning-jolt/for-americans-gun-rights-the-stakes-in-2020-are-as-high-as-ever/ ("Even if the IRS doesn't find the Bloomberg group's complaint compelling, New York State's new attorney general, Letitia James, pledged to investigate whether the NRA is complying with the requirements for nonprofit organizations. James, a fierce proponent of gun control, may very well be driven by political ambitions …").

NRA-related insurance products. The group has played a similar role in support of James's attacks on the NRA's legitimacy as a charitable organization.

16. Everytown funds a digital media outlet known as *The Trace*, which dedicates itself exclusively to publishing articles that advance a gun-control agenda. During late summer and early fall 2018, as James aligned herself with Cuomo and pledged that she would wield state power to "see whether or not the[] [NRA] ha[d] in fact complied with the not-for-profit law," *The Trace* began to publish articles that purported to focus on governance, spending, and personnel issues at the NRA.[19]

17. Simultaneously, James began to publicize false, defamatory assertions that the NRA had engaged in criminal activity. On September 4, 2018, during a debate between Democratic candidates, James stated that, if elected, her "top issue" would be "going after the NRA because ***it is a criminal enterprise***."[20] Two days later, James doubled down on this assertion, and elaborated: "We need to again take on the NRA, which holds itself out as a charitable organization. But in fact, they are not. ***They are nothing more than a criminal enterprise.*** We are waiting to take on all of the banks that finance them, their investors."[21] James falsely, maliciously accused the NRA of criminal conduct in the hope of damaging its goodwill

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[19] *See* Mike Spies, *Tom Selleck Quits NRA Board*, THE TRACE (Sept. 18, 2018), https://www.thetrace.org/2018/09/tom-selleck-quits-nra-board/; *see also* Mike Spies & John Cook, *Top NRA Executive's Trail of Business Flops and Unpaid Debt*, THE TRACE (Oct. 1, 2018), https://www.thetrace.org/2018/10/nra-josh-powell/; *see also* Mike Spies & John Cook, *For the Second Time in Two Years, the NRA Will Raise Dues on Members*, THE TRACE (Aug. 27, 2018), https://www.thetrace.org/2018/08/nra-membership-dues-increase/; *see also* Alex Yblon & Mike Spies, *FAQ: Is the NRA Going Broke?*, THE TRACE (Aug. 9, 2018), https://www.thetrace.org/2018/08/nra-financial-health-new-york-state-lawsuit-carry-guard/; *see also* Brian Freskos, *We Translated Maria Butina's Russian Blog Posts. Here's What They Reveal About Her Obsession with the NRA*, THE TRACE (July 24, 2018), https://www.thetrace.org/2018/07/maria-butina-nra-russian-blog-post-translation/.

[20] *See* New York City Bar Association, *Forum for the Democratic Attorney General Primary Candidates*, YOUTUBE (Sept. 4, 2018), https://www.youtube.com/watch?v=6n2_LHNEUW0 (statement at the 17:50 mark).

[21] *See* Our Time Press, *Attorney General Candidate, Public Advocate Letitia James*, https://www.ourtimepress.com/attorney-general-candidate-public-advocate-letitia-james/ (last visited Feb. 11, 2020).

among existing and potential members, donors, and business partners, as well as its access to funds. James's "criminal enterprise" language, accompanied by references to collateral action against financiers and bankers, deliberately invoked the specter of a broad, RICO-style action that could ensnare and punish anyone who supported the NRA. The purpose and effect of James's statement was to induce a belief that the NRA had engaged in criminal (likely, racketeering) activity that placed its banks and business counterparties at risk of law-enforcement action.

18. Similarly, on October 31, 2018, in an interview with *Ebony Magazine*, James stated that "the NRA holds [itself] out as a charitable organization, but in fact, [it] really [is] a ***terrorist organization***."[22] Against the backdrop of similar statements that were routinely couched in references to specific laws and promises of law-enforcement action, this statement was not mere heated political rhetoric. Rather, it was intended to reiterate and reinforce James's false, malicious assertion that the NRA had committed serious crimes, including crimes for which its financial backers might face repercussions.

19. Unsurprisingly, amid such wild accusations, investigative reporters from outlets other than *The Trace* began to inquire whether James's claims against the NRA had any merit. The NRA engaged patiently and extensively with Pulitzer Prize-winning journalists from both *The Wall Street Journal* and *The New York Times* to elucidate footnotes on its tax returns and rectify lies about its governance. Ultimately, neither newspaper reported anything to substantiate James's accusations—nor could they. As James knew, her claims were false.

[22] *See* Teddy Grant, *Letitia 'Tish' James on Becoming New York's Next Attorney General*, EBONY (Oct. 31, 2018), https://www.ebony.com/news/letitia-tish-james-on-becoming-new-yorks-next-attorney-general/ (emphasis added).

20. Although it was confident in the propriety of its own finances and governance, the NRA sought to leave no stone unturned in the face of James's threats. Accordingly, in 2018, the NRA began to strengthen its demands for documentation and verification of compliance by third-party vendors with their NRA contracts. On April 11, 2019, the NRA filed an action for specific performance against one vendor, the advertising agency Ackerman McQueen, which had failed to comply with the NRA's requests for documents under a contractual record-inspection right. Determined to strike before the NRA could prevail against Ackerman (and duly repudiate, under New York not-for-profit law, any improper transaction or expenditure the agency had concealed), James, *The Trace*, and Everytown sprang into action. On April 17, 2019, Everytown filed complaints with the IRS and New York State targeting the NRA's tax-exempt status. The same day, *The New Yorker* published a purported exposé of the NRA—authored by *Trace* staffer Mike Spies—which replicated Everytown's claims.

21. Shortly thereafter, James delivered on the first part of her campaign promise to "take down the NRA." On April 27, 2019, she announced a Charities Bureau investigation into the NRA's not-for-profit status.

D. The Conduct Of The NYAG's Investigation Underscores James's Improper, Viewpoint-Discriminatory Purpose.

22. Even though James had defamed and inveighed against the NRA, the NRA initially extended the benefit of the doubt to the Office of the Attorney General and offered to cooperate with any good-faith inquiry into its finances.[23] After all, the NYAG is the supervising regulator for all New York not-for-profits, including the NRA. The NRA hoped that, despite its

[23] Gabriela Resto-Montero, *New York's attorney general opens investigation into the NRA as its president steps down*, VOX, (April 28, 2019) https://www.vox.com/policy-and-politics/2019/4/27/18519685/nra-ceo-accuses-president-extortion-wayne-lapierre-oliver-north ("A lawyer for the NRA said the organization will 'fully cooperate' with the investigation, and added, 'The NRA is prepared for this, and has full confidence in its accounting practices and commitment to good governance.'").

political differences with James, it might rectify any misunderstandings and put the matter to rest—just as it had rectified misunderstandings in its interactions with the *Wall Street Journal* and the *New York Times.*

23. The NRA's hopes were quickly dashed. While purporting to accept the NRA's offer of cooperation (and suggesting a meeting to such effect), James's staff secretly subpoenaed the NRA's accounting firm, demanding reams of sensitive records, including names of NRA members and donors—and tried to forbid the firm from alerting the NRA. And when the NRA requested that confidential documents produced to the NYAG Charities Bureau be maintained in confidence for purposes of James's purported charitable-compliance investigation—and not given to other NYAG staff who were adverse to the NRA on Second Amendment matters—the NYAG flatly refused.

24. A state attorney general is obligated to seek justice and not just win at all costs. As counsel for a state or governmental agency, the attorney general owes duties similar to prosecutors in criminal cases,[24] and she is bound by the so-called "Neutrality Doctrine" even in civil litigation. The United States Supreme Court has stated that a government attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore is not that it shall win a case, but that justice shall be done."[25]

25. Courts have recognized that this principle also applies in civil cases and have held that a "government lawyer in a civil action or administrative proceedings has the responsibility to seek justice and develop a full and fair record, and he should not use his position or the economic

[24] *See* Model Rules of Professional Conduct 3.8 cmt. 1 ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

[25] *See Berger v. United States*, 295 U.S. 78, 88 (1935) (criminal case).

power of the government to harass parties or to bring about unjust settlements or results."[26] A government lawyer in such a scenario is held to a higher standard than a lawyer in private practice and "should refrain from instituting or continuing litigation that is obviously unfair."[27]

26. Put differently, a government attorney "'may prosecute with earnestness and vigor—indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones.'"[28] Additionally, a government lawyer "has obligations that might sometimes trump the desire to pound an opponent into submission."[29] Courts have expressly recognized that a state attorney general "is to decline the use of individual passions, and individual malevolence."[30]

27. As a pillar of her campaign platform, James boasted that she would strike foul blows against the NRA and pound the NRA into submission. She vowed that she would use the NYAG's investigative and enforcement powers for the precise purpose of stanching political speech ("deadly propaganda") with which she and Cuomo disagree. She has begun to deliver on her campaign promises to retaliate against the NRA for constitutionally protected speech on issues that James opposes. As NYAG, James has regrettably succumbed to "individual passions, and individual malevolence."

28. There can be no doubt that the James's actions against the NRA are motivated and substantially caused by her hostility toward the NRA's political advocacy.

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[26] *See People ex rel. Clancy v. Superior Court*, 39 Cal.3d 740, 746 (1985) (quoting Model Code of Professional Responsibility EC 7–14 (1981)).

[27] *Freeport McMoRan Oil & Gas Co. v. F.E.R.C.*, 962 F.2d 45, 47 (D.C. Cir. 1992) (quoting Model Code of Professional Responsibility EC 7–14 (1981)).

[28] *Berger*, 295 U.S. at 88. *See also DaCosta v. City of New York*, 296 F. Supp. 3d 569, 600 (E.D.N.Y. 2017) *reconsideration denied sub nom. DaCosta v. Tranchina*, 285 F. Supp. 3d 566 (E.D.N.Y 2018).

[29] *Freeport McMoRan Oil & Gas Co*., 962 F.2d at 48.

[30] *State of R.I. v. Lead Indus. Ass'n, Inc.*, 951 A.2d 428 (R.I. 2008) (quoting *Foute v. State*, 4 Tenn. (3 Hayw.) 98, 99 (1816)).

29. James's Charities Bureau investigation is nothing more than a pretext for her goal of depriving the NRA, its members, and its donors of their constitutional right to freedom of speech under the First Amendment. In actual fact, the NRA's finances are more robust than ever, and it operates to a high standard of compliance with New York not-for-profit law.

E. The Damage Done.

30. James's threatened, and actual, regulatory reprisals are a blatant and malicious retaliation campaign against the NRA and its constituents based on her disagreement with the content of their speech. This wrongful conduct threatens to destabilize the NRA and chill the speech of the NRA, its members, and other constituents.

V.

COUNT ONE

Violation Of The NRA's First And Fourteenth Amendment Rights Under 42 U.S.C. § 1983 And Article 1, Section 8 Of The New York Constitution By Retaliating Against The NRA Based On Its Speech

31. Under 42 USC § 1983, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the [United States] Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

32. The NRA repeats and re-alleges each and every allegation in the preceding paragraphs as though fully set forth herein.

33. The First Amendment, which applies to James by operation of the Fourteenth Amendment, and Article One, Section Eight of the New York Constitution, secures the NRA's

right to free speech, including its right to express political beliefs concerning the constitutionally protected right to keep and bear arms.

34. The NRA has a longstanding history of political advocacy advancing the Second Amendment rights of all Americans. Although James disagrees with and opposes the NRA's political views, the NRA's freedom to express its views is a fundamental right protected by the First Amendment.

35. James's actions as NYAG—including, but not limited to, the investigation into the NRA's tax-exempt status—were undertaken directly in response to and substantially motivated by the NRA's political speech regarding the right to keep and bear arms. James has acted with the intent to obstruct, chill, deter, and retaliate against the NRA's core political speech, which is protected by the First Amendment. Cuomo has actively directed and been continuously involved in the foregoing conduct.

36. Although influenced by Cuomo, James maintains the discretion in determining whether and how to carry out her actions, including the decision to initiate a wrongful investigation into the NRA's business practices. James chose to exercise her discretion to harm the NRA based on the content of the NRA's speech regarding the Second Amendment.

37. James's unlawful and intentional actions are not justified by a substantial or compelling government interest and are not narrowly tailored to serve any such interest.

38. James's intentional actions have resulted in significant damages to the NRA, including, but not limited to, damages due to reputational harm, as well as injury to the NRA's trade, business, or profession.

39. The NRA is also entitled to compensatory and punitive damages from James in her personal capacity, as well as an award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and New York Civil Practice Law and Rules § 8601.

40. Absent an injunction against Defendants' violation of the NRA's rights to free speech, the NRA will suffer irrecoverable loss and irreparable harm.

COUNT TWO

Declaratory Judgment

41. The NRA repeats and re-alleges each and every allegation in the preceding paragraphs as though fully set forth herein.

42. A substantial controversy exists between James and her office, on the one hand, and the NRA, on the other hand, regarding whether the NRA operates in compliance with New York State not-for-profit law. James and the NRA have adverse legal interests with respect to this controversy, and the conflict is sufficiently real and immediate to warrant the issuance of a declaratory judgment. James is maligning the NRA in the press (including by calling it a "criminal enterprise" that merely "masquerade[es] as a charity"), and harassing the NRA and its business counterparties and stakeholders with invasive subpoenas, and the NRA has been and continues to be damaged by James's actions. The NRA repeats and re-alleges each and every allegation in the preceding paragraphs as though fully set forth herein.

43. Accordingly, the NRA seeks a judgment declaring that the NRA is operating in substantial compliance with New York not-for-profit law.

VI.

DEMAND FOR JURY TRIAL

44. The NRA hereby demands a trial by jury on all issues so triable.

VII.

REQUEST FOR RELIEF

WHEREFORE the NRA respectfully requests that the Court enter judgment in the Plaintiff NRA's favor and against Defendant James, as follows:

a. Declaring, pursuant to 28 U.S.C. § 2201, that Defendants have violated and continue to violate the NRA's rights to free speech under both the Federal and New York Constitutions;

b. Granting, pursuant to 28 U.S.C. § 2202, a stay of James's and/or the Charities Bureau's investigations into the NRA's not-for-profit status;

c. Granting a preliminary and permanent injunction, pursuant to 28 U.S.C. § 1651(a), 42 U.S.C. § 1983, and Rule 65 of the Federal Rules of Civil Procedure, ordering James, the Charities Bureau, its agents, representatives, employees and servants and all persons and entities in concert or participation with it and James (in her official capacity), to immediately cease and refrain from engaging in any conduct or activity which has the purpose or effect of interfering with the NRA's exercise of the rights afforded to it under the First and Second Amendment to the United States Constitution and Section 8 to the New York Constitution;

d. Granting such other injunctive or equitable relief to which the NRA is entitled;

e. Granting and entering a judgment declaring that the NRA is operating in substantial compliance with New York not-for-profit law;

f Granting and entering a judgment that in light of the retaliatory intent and chilling effect of James's actions, any further investigation of the NRA by the NYAG implicates First Amendment concerns, and should be narrowly tailored to further a compelling government interest;

Awarding the NRA actual damages, including compensatory and consequential damages, in an amount to be determined at trial;

g. Awarding the NRA exemplary or punitive damages;

h. Awarding the NRA such costs and disbursements as are incurred in prosecuting this action, including reasonable attorneys' and experts' fees; and

i. Granting the NRA such other and further relief as this Court deems just and proper.

Dated: August 6, 2020

Respectfully submitted,

By: */s/ William A. Brewer III*

William A. Brewer III
wab@brewerattorneys.com
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ATTORNEYS FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA

Exhibit C

Attorney General's Rule 12(b) motion to dismiss in *NRA v. James*, No. 1:20-cv-889 (N.D.N.Y.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,

Plaintiff,

v.

LETITIA JAMES, both individually and in her official capacity,

Defendant.

20-CV-00889 (MAD)(TWD)

NOTICE OF MOTION TO DISMISS THE AMENDED COMPLAINT

Filed on ECF

PLEASE TAKE NOTICE, that upon the Amended Complaint and all prior proceedings filed herein, the accompanying declaration of Assistant Attorney General Monica Connell and exhibits thereto, and the accompanying Memorandum of Law in Support of Attorney General Letitia James' Motion to Dismiss the Amended Complaint, the undersigned, on behalf of Defendant LETITIA JAMES, Attorney General of the State of New York, will move this Court before the Honorable Mae A. D'Agostino, on January 5, 2021 or such other date and time as is determined by the Court, at the United States District Courthouse located at the United States District Court, Northern District of New York, James T. Foley U.S. Courthouse, 445 Broadway, Albany, NY 12207, for an order pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure dismissing the Amended Complaint with prejudice, and for such further relief as the Court deems just and proper.

PLEASE TAKE FURTHER NOTICE that, in the absence of a different date set by the Court, pursuant to Local Rule 7.1 of the Local Rules of Practice for the Northern District of New

York, plaintiff's opposition to this motion, if any, is due at least seventeen days before the return date of this motion.

Dated: New York, New York
November 20, 2020

Respectfully submitted,

LETITIA JAMES
Attorney General of the
State of New York
By:

Monica Connell
Assistant Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-8965
Monica.Connell@ag.ny.gov

To: All Counsel of Record (*via ECF*)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,

Plaintiff,

v.

LETITIA JAMES, both individually and in her official capacity,

Defendant.

20-CV-000889 (MAD)(TWD)

ATTORNEY GENERAL LETITIA JAMES'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION TO DISMISS

LETITIA JAMES
Attorney General
of the State of New York
28 Liberty St.
New York, New York 10005

Monica Connell
Yael Fuchs
Stephen Thompson
Assistant Attorneys General
of Counsel

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MISCELLANEOUS AUTHORITIES

LETITIA JAMES, Attorney General of the State of New York (the "Attorney General"), sued herein in her individual and official capacities, respectfully submits this memorandum of law in support of her motion, brought pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss the Amended Complaint in this action, dated October 9, 2020 (Dkt. No. 13) (the "Am. Compl."), in its entirety, with prejudice.[1]

PRELIMINARY STATEMENT

This action is an attempt by a regulated entity to immunize itself from regulatory action by improperly asking a federal court to interfere with an ongoing state proceeding. The National Rifle Association of America, Inc. ("NRA"), as a not-for-profit entity chartered in New York, is subject to regulatory oversight by the Charities Bureau of the Office of the Attorney General. On August 6, 2020, after an extensive investigation, the New York Attorney General filed a civil enforcement action in New York State Supreme Court against the NRA and four of its current and former officers and directors (the "State Enforcement Action"). The complaint's 163 pages include 18 causes of action, and detailed factual allegations of pervasive illegal conduct at the NRA -- the diversion of millions of dollars away from the NRA's charitable mission for private benefit, the lack of internal controls enabling this abuse, the false regulatory filings, the lucrative no-show contracts used to buy loyalty, and the retaliation against those who tried to seek reform. The complaint seeks multiple forms of relief, including restitution, an accounting, removal of those wrongdoers who are still leading the NRA, and judicial dissolution.

After the Attorney General filed the State Enforcement Action, on the same day, the NRA

[1] A copy of the State Enforcement Action complaint is attached as Exhibit 1 to the Amended Complaint. Dkt. No. 13-1 (hereinafter, the "State Enforcement Action Compl."). Other documents referenced here are annexed to the accompanying Declaration of Monica Connell, dated November 20, 2020 ("Connell Decl."). A copy of the Amended Complaint, dated October 9, 2020, is attached as Exhibit A.

commenced this federal action. In its Amended Complaint, the NRA minimizes or ignores the extensive allegations of illegal conduct set out in the State Enforcement Action and instead points to the Attorney General's campaign statements about the NRA and falsely claims that she seeks dissolution of the NRA "solely based" upon "executive misconduct." Despite the more than 600 paragraphs of detailed factual allegations in the State Enforcement Action Complaint, the NRA states in a conclusory fashion that the Attorney General's "investigation found no evidence to support her audacious claims." Ironically, it is in the State Enforcement Action where the merits of the Attorney General's evidence will be determined; yet the NRA, in what appears to be procedural gamesmanship, brought this action in federal court seeking relief which would have the effect of enjoining the State Enforcement Action.

But the NRA's attempt to forestall the State Enforcement Action fails for a number of reasons.

First, many of the NRA's claims and requests for relief are barred by the Eleventh Amendment to the United States Constitution as well as New York's sovereign immunity.

Second, given the pending State Enforcement Action, which will assess and determine whether the Attorney General's claims against the NRA have merit, this is a textbook case for abstention under either the *Younger* or *Burford* abstention doctrines. To the extent that any of the NRA's claims could survive, they are more appropriately heard in the State Enforcement Action.

Third, the NRA's direct claims under the New York State Constitution are not permitted.

Fourth, each of NRA's efforts to plead a plausible constitutional claim fails. Illegal conduct is not subject to First Amendment protection and the NRA has not come close to pleading, as it must, that viewpoint discrimination was the but-for cause of the Attorney General's decision to commence the State Enforcement Action. The NRA's mischaracterization of the State

Enforcement Action and misstatement of the standards governing dissolution of not-for-profit entities are not sufficient to state a viable selective prosecution claim. Nor has the NRA established that the dissolution statutes are unconstitutional as-applied to it. Finally, the NRA lacks standing to assert a violation of its members' association rights and has not established a violation of that right in any event.

Fifth, the NRA's claims for monetary relief are barred by absolute and qualified immunity.

For all of these reasons, it is respectfully submitted that this action should be dismissed.

STATEMENT OF PROCEDURAL HISTORY AND RELEVANT FACTS

I. The Attorney General is Authorized to Oversee Registered Not-for-Profit Entities like the NRA.

The Office of the New York State Attorney General ("OAG") is vested under State law, specifically the Not-for-Profit Corporations Law ("N-PCL"); the Estates, Powers and Trusts Law; and the Executive Law, with expansive authority to oversee not-for-profit entities, like the NRA, which are organized under New York law. *See Schneiderman v. Tierney*, 2015 WL 2378983, at *2–3 (Sup. Ct., N.Y. Co. 2015); *Matter of Cuomo v. Dreamland Amusements Inc.*, 2008 WL 4369270, at *4 (Sup. Ct., N.Y. Co. 2009); *In re McDonell*, 195 Misc.2d 277, 278-79 (Sup. Ct. N.Y. Co. 2002); s*ee also Citizens United v. Schneiderman*, 882 F.3d 374, 379 (2d Cir. 2018).

The Attorney General is responsible, by statute, for ensuring that not-for-profit charitable corporations and their assets are not abused or misused, and for protecting "the public interest in charitable property." *Tierney*, 2015 WL 2378983, at *3; *see also Abrams v Temple of the Lost Sheep, Inc.*, 148 Misc. 2d 825, 828-29 (Sup. Ct., N.Y. Co. 1990). As the State's chief law enforcement officer, *People v. Grasso*, 54 A.D.3d 180, 204 (1st Dep't 2008), the Attorney General safeguards the public interest through investigations and enforcement actions to prevent, among other things, fraud and misconduct.

New York law provides for various types of relief against charitable entities and their officers for violations of the law. Potential remedies vary from orders directing restitution, unwinding transactions, and requiring an accounting, to removing officers and directors, up to and including judicial dissolution of an entity and distribution of its remaining assets for charitable uses consistent with its charitable mission. *See, e.g.,* N-PCL §§ 706, 714, 715, 717, 720, 1008(a)(15), 1101, 1102, 1109(b), and 1115(a); *see also* N-PCL, Art. 5.

II. The OAG Charities Bureau Initiates an Investigation of the NRA Culminating in the Commencement of a State Court Enforcement Action Against the NRA.

By document preservation notice dated April 26, 2019, the OAG Charities Bureau notified the NRA that it was the subject of an investigation. Am. Compl. ¶ 23. In June 2019, the Attorney General served the NRA with an initial subpoena for documents and the investigation continued for 15 months thereafter. Connell Decl., Ex. B. Commencement of the OAG's investigation followed review of the NRA's regulatory filings, including the organization's IRS Form 990 and CHAR500 official filings, and its audited financials, some of which noted substantial inaccuracies in earlier mandated filings.[2] *See People v. Ackerman McQueen*, 67 Misc. 3d 1206(A) (Sup. Ct. N.Y. Co. 2020) ("Ackerman Subpoena Action"). Examples of substantial irregularities were apparent from the filings. *See* Connell Decl., Ex. C (Ackerman Subpoena Action Dkt. #14) ¶ 7.[3]

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[2] The IRS Form 990 is the federal information tax return that the NRA must file annually with the Internal Revenue Service and as part of its OAG CHAR500, an annual regulatory filing required by the OAG.

[3] On a motion to dismiss for failure to state a claim, courts may consider the pleading, as well as any written instrument attached to the pleading as an exhibit, information incorporated in it by reference, any document upon which the complaint heavily relies, as well as certain other documents. *Geron v. Seyfarth Shaw LLP (In re Thelen LLP)*, 736 F.3d 213, 219 (2d Cir. 2013); *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002). For example, courts may consider a document where a complaint "relies heavily upon its terms and effect," or "[w]here plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint…." *Chambers*, 282 F.3d at 153. Courts may also consider

The serious dysfunction, governance and financial problems within the NRA were publicly reported in the press, publicly available documents, and litigation filings.[4] Whistleblowers within the NRA also raised concerns. *See* State Enforcement Action Compl. ¶¶ 7, 10, 220, 226, 263, 266, 279, 452, 453, 472-73 484-497. Longtime members of the NRA's own Board of Directors—including its then-President, Lt. Col. Oliver North—were raising credible concerns about alleged financial misconduct within the organization. After North attempted to investigate these concerns, he was denied re-nomination and pushed from his leadership position at a deeply divided and highly publicized annual convention in April 2019.[5]

Similarly, when other dissident board members called for an independent investigation, they were allegedly "stonewalled, accused of disloyalty, stripped of committee assignments and denied effective counsel," and ultimately resigned from the board.[6] As these board members were

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matters that are subject to judicial notice, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007), including prior proceedings and official filings in plaintiff's possession. *See Faulkner v. Verizon Comm., Inc.*, 156 F.Supp.2d 384, 391 (S.D.N.Y.2001); Fed. R. Evid. 201.

[4] *See, e.g.,* Mark Maremont, *NRA Awarded Contracts to Firms with Ties to Top Officials*, WALL STREET JOURNAL (November 30, 2018) (https://www.wsj.com/articles/nra-awarded-contracts-to-firms-with-ties-to-top-officials-1543590697); Mike Spies, *Secrecy, Self-Dealing, and Greed at the N.R.A.*, THE NEW YORKER (April 17, 2019), (https://www.newyorker.com/news/news-desk/secrecy-self-dealing-and-greed-at-the-nra); Beth Reinhard, Katie Zezima, Tom Hamburger, and Carol D. Leonning, *NRA money flowed to board members amid allegedly lavish spending by top officials and vendors*, WASHINGTON POST (June 9, 2019, 9:22 PM), https://www.washingtonpost.com/investigations/nra-money-flowed-to-board-members-amid-allegedly-lavish-spending-by-top-officials-and-vendors/2019/06/09/3eafe160-8186-11e9-9a67-a687ca99fb3d_story.html).

[5] *See, e.g.,* Brian Freskos, *The NRA Ousts Oliver North and Stifles Debate on Financial Wrongdoing*, THE NEW YORKER (April 28, 2019), https://www.newyorker.com/news/news-desk/the-nra-ousts-oliver-north-and-stifles-debate-on-financial-wrongdoing; *see also Nat'l Rifle Ass'n of Am. v. North*, 69 Misc. 3d 1201(A) (Sup. Ct. Albany Co. 2020) (discussing North's whistleblowing status).

[6] Beth Reinhard, *Three NRA Board Members Resign in Latest Sign of Upheaval at Gun Rights* Group, WASHINGTON POST (August 1, 2019), https://www.washingtonpost.com/politics/three-nra-board-members-resign-in-latest-sign-of-upheaval-at-gun-rights-group/2019/08/01/aad49bc0-

sounding the alarm internally, a group of longtime NRA members was also vocalizing its concerns about the organization's management by launching the "Save the Second" campaign, which purportedly arose out of a "Facebook discussion concerning the NRA's poor management."[7] Reports of abuses within the NRA were detailed in lawsuits and press coverage, including by The Trace, The New Yorker, The Wall Street Journal, The Washington Post and The New York Times.

During the pendency of the Attorney General's investigation, the NRA never moved to quash the subpoenas served upon it nor commence an action asserting that the investigation constituted selective prosecution or First Amendment retaliation.[8] Indeed, in its own pleading, it discusses its own efforts to "bring all into full compliance" and the resistance it met from some quarters. Am. Compl. ¶¶ 15, 22. These admissions by the NRA contradict its assertions that there

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b49d-11e9-8f6c-7828e68cb15f_story.html; *see also* F. Riehl, *NRA Board Members' Maloney, Knight, Schneider Resign from NRA-BOD*, AMMO LAND (August 1, 2019), https://www.ammoland.com/2019/08/nra-board-members-maloney-knight-schneider-resign-from-nra-bod/#axzz6dKJIw0xd.

[7] Alex Yablon, *New Gun Rights Campaign Seeks to Reform the Scandal-Plagued NRA*, THE TRACE (July 1, 2019), https://www.thetrace.org/2019/07/save-the-second-nra-gun-rights-campaign/.

[8] On or about August 16, 2019, the NRA commenced a special proceeding demanding to be present during the subpoenaed testimony of its former president, Lt. Col. Oliver North. *See National Rifle Association of America, Inc. v. Letitia James*, Supreme Ct., N.Y. Co. Index No. 158019/2019 (the "North Subpoena Action"). As part of its application, the NRA asserted some of the same arguments it now puts forward, *i.e.,* that the Attorney General was biased against the NRA and had made statements to the effect that she would "take down" the NRA, using language identical to that used in the NRA's current complaint. Compare North Subpoena Action Dkt. 43 (NRA Reply Mem.), pp. 4-5 with Dkt. 1 (Compl.) p. 1. The Supreme Court rejected the NRA's arguments and denied the application. The Appellate Division, First Department, denied the NRA's stay application and the NRA declined to pursue further appeal. *Id*., Ex. E (collecting the NRA's application and orders). Since the NRA could have, and did, raise its claims of bias in the North Subpoena Action, it is precluded from re-litigating them here. *See O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981); *Temple of Lost Sheep Inc.*, 930 F.2d at 185 (holding that a regulated entity could bring constitutional claims of bias in state court proceeding challenging investigatory subpoenas).

were no compliance issues.

The investigation continued, with numerous witnesses interviewed or examined, including current NRA employees, and tens of thousands of documents reviewed. Based upon the evidence uncovered, the OAG determined that enforcement action was warranted.

III. The OAG Commences the State Enforcement Action.

On August 6, 2020, the Attorney General filed the 163-page State Enforcement Action against the NRA and four of its current and former leaders.[9]

The State Enforcement Action sets forth detailed allegations of pervasive and persistent illegal conduct at the NRA. The facts alleged demonstrate that the wrongdoing was not limited to isolated bad acts, but rather was part of a system of misuse of assets for private benefit, combined with inadequate controls, favors and retaliation that corrupted the organization from within. It sets forth facts establishing that the NRA and its Board permitted the diversion of tens of millions of dollars, perhaps much more, away from the NRA's charitable mission, imposing substantial reductions in its expenditures for core program services, including gun safety, education, training, member services. State Enforcement Action Compl. ¶ 2. It alleges that the NRA ignored, and in some cases retaliated against, those who raised concerns about its operation and finances. These whistleblowers included multiple board members and a former NRA President who began to investigate the governance of the NRA upon learning of complaints by other whistleblowers, senior staff and donors. Many whistleblowers have resigned or been ousted. *Id*., ¶¶ 444-475.

The State Enforcement Action sets forth facts alleging that the NRA has persistently engaged in illegal conduct. As a result of these persistent violations of law, the Attorney General

[9] *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.*, Supreme Court N.Y. Co. Index No. 451625/2020.

asserted 18 causes of action and requested multiple forms of relief, including but not limited to an order directing an accounting; mandating that the individual defendants pay restitution and penalties, be removed from office, and be enjoined from future leadership roles in any New York not-for-profit or charitable organization; rescinding certain transactions and classes of transactions; directing the NRA to account for its official conduct with respect to management of the NRA's institutional funds; and ordering repayment of illegal, unauthorized or ultra vires compensation, reimbursements, benefits or amounts unjustly paid. *Id*., ¶¶ 560-666.

Among the relief requested in the State Enforcement Action, the OAG also seeks a finding by the State Court that the NRA is liable to be dissolved pursuant to the standard for such actions set forth in the N-PCL. *See* N-PCL §§ 1101 and 1102. The N-PCL requires, as the Attorney General's complaint expressly acknowledges, that the State court determine, in the exercise of its discretion under N-PCL § 1109(b)(1), that the interest of the public and the members of the NRA supports a decision to dissolve the NRA.

IV. The NRA Filed This Countersuit Seeking to Preclude Regulatory Oversight of Its Operation as a Not-for-Profit Entity.

On the same day that the OAG commenced the State Enforcement Action, just hours after the filing, the NRA commenced this countersuit.[10] In the original complaint, the NRA did not address the State Enforcement Action but instead sought an order enjoining the OAG investigation, which had already ended with the filing of the State Enforcement Action. Dkt. No. 1. The OAG filed a pre-motion conference letter seeking leave to move to dismiss the complaint. Dkt. No. 8. On September 21, 2020, after a pre-motion conference, the Court granted the NRA's request to

[10] In its Amended Complaint, at fn 8, the NRA alleges that notwithstanding that this action was commenced after the State Enforcement Action, this action was "first filed." As set forth in Point II(A), *infra*, the NRA is incorrect on this point as a matter of law.

amend the complaint and gave the OAG leave to move to dismiss the amended pleading, when filed. On October 9, 2020, the NRA filed the Amended Complaint.

In its Amended Complaint, the NRA cites the Attorney General's campaign statements, sometimes out of context,[11] and claims that the State Court Enforcement Action was instituted in retaliation for the NRA's First Amendment-protected activities. The NRA acknowledges the OAG's regulatory authority and that it was aware of the investigation as of April 2019. Am. Compl. ¶¶ 23, 24. At that time, the NRA was aware of the Attorney General's campaign statements and the alleged political bias against it. Am. Compl. ¶¶ 14-24. Yet the NRA waited until the end of the investigation and the commencement of the State Enforcement Action to file this case in an effort to effectively immunize itself from accountability.

Throughout its Amended Complaint, the NRA mischaracterizes the nature and scope of the Attorney General's State Enforcement Action. The NRA implies that dissolution is the only claim for relief asserted against it and portrays the action as one that is based "solely on allegations of misconduct by four individual executives." Am. Compl., pp. 4, 8. This characterization is fundamentally at odds with the allegations of the NRA's systemic misconduct, illegality, mismanagement of charitable assets, and abuse of its powers and charitable status.[12]

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[11] For example, the NRA edits the Attorney General's quote about her intention to investigate the NRA if elected. Am. Compl., p. 2. The quote reads in full, "I will use the constitutional power as an attorney general to regulate charities that includes the NRA, to investigate their legitimacy." Jillian Jorgenson, *Letitia James Says She'd Investigate NRA's Not-For-Profit Status If Elected Attorney General*, N.Y. DAILY NEWS (July 12, 2018), https://www.nydailynews.com/news/politics/ny-pol-tish-james-nra-20180712-story.html. The "top issue" quote that the NRA links to this statement in its Amended Complaint is found nowhere in the cited article.

[12] For example, the State Enforcement Action asserts the NRA's violation of numerous laws; pervasive and persistent lack of oversight of expenditures; allowance of waste and misuse of charitable assets; long-running self-dealing with board members without requisite disclosures and approvals; false filings; improper setting and reporting of compensation paid to officers; whistleblower retaliation; suppression of reform efforts; and a sustained and systemic failure of

Ignoring most of the claims and requests for relief in the State Enforcement Action, the NRA focuses on the request for judicial dissolution and argues that it is retaliatory and unlawful because allegedly (1) the Attorney General is motivated by animus towards the NRA; (2) the request for dissolution is based "solely on allegations of executive misconduct"; and (3) the OAG has supposedly never sought dissolution based solely upon claims of executive misconduct before. Am. Compl., p. 18, sec. E, ¶¶ 43, 95, 104, 115, Wherefore Cl, (d). In regard to other allegations against it, the NRA concludes that "construed deferentially, the [OAG] complaint at most accuses the NRA and its Board of failing to maintain fulsome records and of lax oversight." *Id.* ¶ 33.

The NRA asks this Court to enjoin the State Enforcement Action, in particular, to:

- issue declaratory relief that the Attorney General, in taking action against the NRA, has violated its rights to free speech, equal protection, and its members' right to free association under the United States and New York State Constitutions;
- declare N-PCL §§ 1101 and 1102 unconstitutional as applied to the NRA;
- enjoin the Attorney General from pursuing any requests for dissolution of the NRA in the State Enforcement Action;
- direct the Attorney General and non-party Charities Bureau and OAG employees "to immediately cease and refrain from engaging in any further conduct or activity which has the purpose or effect of interfering with the NRA's exercise of the rights afforded to it under the First Amendment to the United States Constitution and Sections 8, 9 and 11 of the New York State Constitution"; and
- award compensatory and punitive damages as well as an award of fees and costs.

See Am. Compl. Wherefore Cl.

V. The NRA has Undertaken Multiple Procedural Maneuvers to Transfer this Action to the Northern District of Texas and to Move the State Court Enforcement Action Out of the Supreme Court, New York County.

On October 20, 2020, the NRA moved to have this action transferred to the Judicial Panel on Multidistrict Litigation. Dkt. No. 14. It seeks to have this matter joined with four other cases

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exercise oversight. *See, e.g.,* State Enforcement Complaint State Enforcement Compl. at ¶¶ 308, 365, 401, 408, 473, 487, 531.

and moved to the Northern District of Texas for pre-trial purposes. In the Supreme Court, New York County, on October 19, 2020, respectively, the NRA moved to dismiss the State Enforcement Action on *forum non conveniens* grounds, arguing that this Court is the more convenient forum for litigating the OAG's exclusively state law claims. State Enforcement Action, Dkt. 99. Also in its October 19, 2020 motion to dismiss, as well as in a November 3, 2020 motion, the NRA moved to transfer the State Enforcement Action to the Supreme Court, Albany County. *Id.*, Dkt. 99, 133.

The Attorney General is opposing all of the NRA's applications and now moves to dismiss this action in its entirety.

STANDARD OF REVIEW

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), in deciding a motion to dismiss, the Court must accept all well pled factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 169 (2d Cir. 2015). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, (2007)). "A plaintiff must show 'more than a sheer possibility that a defendant has acted unlawfully.'" *Avery v. DiFiore*, 2019 WL 3564570, at *2 (S.D.N.Y. Aug. 6, 2019) (quoting *Twombly*, 550 U.S. at 555). Conclusory allegations are not entitled to any assumption of truth, and therefore, will not support a finding that the plaintiff has stated a valid claim. *See Hayden v. Paterson*, 594 F.3d 150, 161 (2d Cir. 2010).

"The standard for reviewing a 12(b)(1) motion to dismiss is essentially identical to the 12(b)(6) standard, except that '[a] plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists.'" *Allstate Ins. Co. v. Elzanaty*, 916 F.

Supp. 2d 273, 286 (E.D.N.Y. 2013) (quoting *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000)).

ARGUMENT

I. ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY BAR MANY OF THE NRA'S CLAIMS.

The NRA has asserted seven causes of action against the Attorney General. The NRA's causes of action seeking retroactive relief or damages against the Attorney General in her official capacity under 42 U.S.C. § 1983—*see* Am. Compl. Counts One, Three, and Five—and for any relief under Article 1, Sections 8, 9, and 11 of the New York State Constitution—*see* Am. Compl. Counts Two, Four, and Six—are barred by the Eleventh Amendment. The Court should dismiss these claims under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction.

The Eleventh Amendment to the United States Constitution "bars a suit in law or equity in federal court against a State absent the State's consent to such a suit or congressional abrogation of immunity." *Aron v. Becker,* 48 F.Supp.3d 347, 366 (N.D.N.Y. 2014). "[I]t is beyond dispute that the State of New York … [has] never consented to be sued in federal court." *Bryant v. New York State Dept. of Correction Services Albany*, 146 F.Supp.2d 422, 425 (S.D.N.Y. 2001) (citing *Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594-95 (2d Cir. 1990)) (internal quotation marks omitted). Since Congress did not abrogate Eleventh Amendment immunity by enacting § 1983, a suit against a state officer in her official capacity is a suit against the state and cannot be maintained. *Aron v. Becker*, 48 F. Supp.3d 347, 366 (N.D.N.Y. 2014). Further, state officials sued in their official capacities are not "persons" subject to suit under § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70-71 (1989). Therefore, the NRA's damages claims against the Attorney General in her official capacity, in Counts One, Three, and Five of the Amended Complaint, must be dismissed.

Furthermore, "[s]overeign immunity bars state constitutional claims against the state, its

agencies, or against its employees in their official capacity, regardless of the relief sought." *Alleyne v. N.Y. State Educ. Dep't*, 691 F.Supp.2d 322, 335 (N.D.N.Y. 2010) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 105-106 (1984)). Sovereign immunity similarly bars the NRA's state constitutional claims against the Attorney General in her individual capacity. Those claims seek to block the regulation and civil prosecution of the NRA and are thus against the State, regardless of whether the NRA seeks damages or injunctive or declaratory relief.[13] *Pennhurst*, 465 U.S. at 101-102. The exception to sovereign immunity for prospective injunctive or declaratory relief set forth in *Ex parte Young*, 209 U.S. 123 (1908), does not apply to alleged violations of state law. *Pennhurst*, 465 U.S. at 106.

Accordingly, the NRA's claims for retroactive injunctive and declaratory relief are barred, as are all claims for monetary relief against the Attorney General in her official capacity and all claims under the State Constitution.

II. ABSTENTION IS APPROPRIATE GIVEN THE SUBSTANTIAL FEDERALISM AND COMITY CONCERNS PRESENT HERE.

This action is an explicit attempt by the NRA to evade its regulator and, by extension, its responsibility for the pervasive violations of New York state laws that are the subject of the State Enforcement Action. The NRA's request that this Court enjoin the Attorney General's pending State Enforcement Action constitutes an unwarranted federal intrusion into New York's oversight of charitable entities that raises serious federalism and comity concerns. Given the pending State Enforcement Action, the NRA's claims here, including the constitutional issues it raises, may be

[13] To the extent that the NRA is seeking injunctive relief against the Attorney General in her individual capacity, that relief is unavailable, since injunctive relief against a state official may be recovered, if at all, only in an official capacity suit. *Rockland Vending Corp. v. Creen*, 2009 WL 2407658, fn. 2 (S.D.N.Y. Aug. 4, 2009); *Corr. Officers Benevolent Ass'n v. Kralik*, 2009 WL 856395, fn.7 (S.D.N.Y. Mar. 26, 2009); *Fox v. State Univ. of N.Y.*, 497 F. Supp. 2d 446, 451 (E.D.N.Y. 2007).

litigated as defenses in the state forum. This is a textbook example of an instance where abstention is justified under both the *Younger* and *Burford* abstention doctrines. *See Younger v. Harris*, 401 U.S. 37 (1971); *Burford v. Sun Oil Co*., 319 U.S. 315 (1943); *Temple of Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 185 (2d Cir. 1991); *see also MyInfoGuard, LLC v. Sorrell*, 2012 WL 5469913, at *3 (D. Vt. Nov. 9, 2012).

A. This Court should abstain under the *Younger* abstention doctrine.

In recognition of fundamental principles of federalism and comity, the *Younger* abstention doctrine mandates that federal courts refrain from enjoining state criminal and certain civil state enforcement proceedings absent extraordinary circumstances where the risk of irreparable injury is "both great and immediate." *Younger*, 401 U.S. at 45-46 (addressing state criminal proceedings); *Huffman v. Pursue, Ltd*., 420 U.S. 592, 604–05 (1975) (addressing civil state enforcement proceedings); *see also Trainor v. Hernandez*, 431 U.S. 434, 440-445 (1977). The doctrine reflects "a strong federal policy against federal court interference with pending state judicial proceedings absent extraordinary circumstances." *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982).

"*Younger* abstention is required when three elements are met: 1) there is an ongoing state proceeding; 2) an important state interest is implicated; and 3) the plaintiff has a state court avenue open for review of constitutional claims." *DeMartino v. New York State Dep't of Labor*, 167 F. Supp.3d 342, 354 (E.D.N.Y. 2016), aff'd in part, 712 F. App'x 24 (2d Cir. 2017). All criteria are met here.

It cannot be disputed that the State Enforcement Action is an ongoing proceeding which meets the necessary criteria for the application of *Younger*. It "(1) was 'initiate[d]' by'a state actor' (namely, the state attorney general in his or her official capacity) to (2) 'sanction the federal

plaintiff . . . for some wrongful act' (namely, [the federal plaintiff] for its allegedly false and misleading representations)); and (3) 'involved' a lengthy 'investigation [] . . . culminating in the filing of a formal complaint or charges.'" *In re Standard & Poor's Rating Agency Litig.*, 23 F. Supp.3d 378, 409 (S.D.N.Y. 2014) (quoting *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 79-80 (2013)).

The State Enforcement Action is both ongoing and preceded this action. The NRA's argument that this counter-action was "first filed" due to a typographical error in the verification to the State Enforcement Action, Am. Compl. fn 8, is unavailing. Under New York law, a typographical error does not nullify the commencement of the action[14] and the "first filed" rule precludes such gamesmanship.

In any event, "*Younger* abstention only requires that the state action be initiated 'before any proceedings of substance on the merits have taken place in federal court.'" *MyInfoGuard, LLC*, 2012 WL 5469913, at *8 (abstaining where state court proceeding was commenced two days after the federal proceeding) (quoting *Hicks v. Miranda*, 422 U.S. 332, 349 (1975)). In fact, in *Standard & Poors*, the court held that under *Younger*, the federal court was required to abstain for later-filed

[14] Under New York law, even where a verification is legally required, an allegedly incomplete or defective verification is "inconsequential in nature, nonprejudicial in substance and correctable at any stage of the proceedings" and does not require dismissal or re-starting of proceedings. *Hablin Realty Corp. v. McCain*, 123 Misc. 2d 777, 778 (App. Term 1st Dep't 1984) (internal citation omitted). Accordingly, even if the verification in the State Enforcement Action was legally "defective"—a fact the Attorney General disputes—such defect would not nullify the complaint or the commencement of the action. In any event, the "first filed"' rule would not assist the NRA in the present case. In filing this counter action immediately on the heels of Attorney General's filing of the State Enforcement Action and subsequently claiming "first filed" status based on an allegedly defective verification, the NRA has engaged in the type of pre-emptive and strategic filing that courts routinely reject. *See e.g. White Light Prods., Inc. v. On the Scene Prods., Inc.*, 231 A.D.2d 90, 98 (1st Dep't 1997); *Brierwood Shoe Corp. v. Sears, Roebuck & Co.,* 479 F. Supp. 563, 568 (S.D.N.Y. 1979); *Bridas Int'l S.A. v. Repsol, S.A.*, 2013 WL 4437189, at *4 (Sup. Ct. N.Y. Co. 2013).

state actions where the federal plaintiff had commenced federal actions as a preemptive strike to have the issues heard by federal court rather than state courts. 23 F. Supp. 3d at 408-09.

Nor can it be disputed that the State has an important interest in exercising its authority over the NRA, a New York-chartered not-for-profit charity, to protect the public interest and prevent fraud, theft and waste of charitable assets. *In re Standard & Poor's Rating Agency Litig*., 23 F. Supp. 3d at 410 (federal courts should broadly interpret state's interest, noting that "courts have repeatedly held that state actions to enforce consumer-protection statutes and laws against deceptive business practices" qualify under *Younger*); *Dreamland Amusements, Inc*., 2008 WL 4369270, at *10 (abstaining and reasoning that a "state's interest in enforcing its own laws and investigating their violation cannot seriously be disputed").

Finally, the state court provides the NRA with a venue to vindicate its federal rights. *Temple of Lost Sheep Inc.*, 930 F.2d at 183 ("*Younger* abstention derives from the recognition that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights") (internal quotation marks omitted); *see also Dreamland Amusements, Inc*., 2008 WL 4369270, at *10-11.

Given the State's interest in enforcing its laws governing charitable entities, the ongoing State Enforcement Action and the ability of the NRA to assert its constitutional claims and defenses in the State Court, abstention is clearly appropriate and the NRA's claims should be heard, if at all, before the State Court.

B. Abstention is also appropriate under the *Burford* abstention doctrine.

In *Burford v. Sun Oil Co*., 319 U.S. 315 (1943), the Supreme Court held that where "timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings…where the 'exercise of federal review … would be disruptive of

state efforts to establish a coherent policy with respect to a matter of substantial public concern.'" *New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 361 (1989) (hereinafter "*NOPSI*") (internal citation and quotation marks omitted).

Burford abstention applies to prevent federal courts from "interfering with state efforts … in an area of comprehensive regulation or administration," even where a federal question may be present. *American Disposal Services, Inc. v. O'Brien*, 839 F.2d 84, 87 (2d Cir.1988) (noting also that abstention may be appropriate "in deference to parallel state court proceedings. . . .in order to further the interests of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'"). *See also Levy v. Lewis*, 635 F.2d 960, 963–64 (2d Cir.1980). Burford abstention applies when "the subject matter of the litigation is traditionally one of state concern." *Liberty Mut. Ins. Co. v. Hurlbut*, 585 F.3d 639 (2d Cir. 2009), and charities regulation certainly qualifies.

New York has a comprehensive statutory scheme for the oversight of not-for-profits and charities, which empowers the Attorney General to carry out the important state interest of ensuring the proper use of charitable assets to fulfill a legitimate charitable mission. Following a 16-month investigation, the Attorney General commenced the State Enforcement Action, alleging, in a highly particularized pleading, substantial violations of New York laws governing charities by the NRA and its current and former officers. The appropriate place to assess the NRA's assertions that the Attorney General's claims of illegal conduct lack merit, are a purported unlawful exercise of the Attorney General's authority or infringe constitutional rights is in the ongoing proceeding in New York State Supreme Court.

In light of the foregoing, it is respectfully submitted that abstention is appropriate here.

III. THE NRA'S CLAIMS AGAINST THE ATTORNEY GENERAL UNDER THE NEW YORK STATE CONSTITUTION FAIL TO STATE A CLAIM.

The NRA's claims for damages from the Attorney General, in her individual capacity, for alleged violations of Article 1, Sections 8, 9, and 11 of the New York State Constitution—*see* Am. Compl. Counts Two, Four, and Six—fail. Federal courts have repeatedly held that a cause of action will be implied only "where remedies are otherwise unavailable at common law or under [42 U.S.C. § 1983]." *Allen v. Antal*, 665 Fed. Appx. 9, 13 (2d Cir. 2016) (summary order).

Where a plaintiff has § 1983 claims available, a direct claim for damages under the State Constitution will not lie. *See Felmine v. N.Y.C.*, 2012 WL 1999863, at *6 (E.D.N.Y. June 4, 2012) (noting that private cause of action under New York Constitution is only available when there are no alternative remedies); *see also Martinez v. City of Schenectady*, 97 N.Y.2d 78 (2001).

Here, the NRA has access to § 1983 claims to vindicate its asserted constitutional rights. Accordingly, the NRA's claim for damages against the Attorney General in her individual capacity arising out of alleged violations of Article 1, Sections 8, 9, and 11 of the New York State Constitution should be dismissed.

IV. THE NRA'S ALLEGATIONS OF POLITICAL BIAS IN REGARD TO THE ATTORNEY GENERAL'S INVESTIGATION DO NOT STATE PLAUSIBLE FIRST OR FOURTEENTH AMENDMENT CLAIMS.

The complaint in the State Enforcement Action sets out in exacting detail the Attorney General's findings of persistent and pervasive illegal conduct within the NRA. The NRA's allegations that the investigation and the Attorney General's assertion of a dissolution claim are the product of bias do not provide a basis to allow the NRA to evade accountability in the State Enforcement Action. Neither the First nor Fourteenth Amendment bar a state from conducting a proper investigation to uncover wrongful conduct. Nor is it "within the province of the courts to subjectively determine the motivation of a government agency in commencing an enforcement

proceeding, or to dismiss the proceeding because of the political disagreements of the parties." *People by Underwood v. Trump*, 62 Misc. 3d 500, 509 (Sup. Ct. N.Y. Co. 2018). Where an enforcement action sets forth serious or substantial allegations of wrongdoing, courts may hold that there is no basis for "finding that animus and bias were the sole motivating factors for initiating the investigation and pursuing [a] proceeding." *Id*.

For the reasons set forth below, the NRA's pleading does not state a plausible claim of First Amendment retaliation or Fourteenth Amendment selective enforcement. Counts One and Five of the NRA's amended complaint should therefore be dismissed.

A. The NRA has failed to plausibly plead the elements of a First Amendment retaliation claim.

To state a First Amendment retaliation claim, the NRA must adequately plead that "(1) [it] has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by [its] exercise of that right; and (3) the defendant's actions caused [it] some injury." *Dorsett v. City of Nassau*, 732 F.3d 157, 160 (2d Cir. 2013). With respect to the third element, "[i]t is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must *cause* the injury. Specifically, it must be a 'but-for' cause, meaning that the adverse action against the plaintiff would not have been taken absent the retaliatory motive." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019) (emphasis in original).

The NRA fails to adequately plead all three elements. *First*, the wrongdoing at issue in the State Enforcement Action is not First Amendment-protected activity. *Second*, the NRA has not, and cannot, plead that the Attorney General's investigation was illegitimate. The NRA's allegations cannot overcome the "presumption of regularity" afforded the Attorney General's actions. *See Hartman v. Moore*, 547 U.S. 250, 263 (2006). *Third*, the NRA has not pleaded that retaliatory animus was the but-for cause of any injury.

1. Fraud and illegal conduct are not protected by the First Amendment.

The NRA fails to support its First Amendment claim with allegations of any protected conduct at issue. The NRA does not contend, and could not, that the conduct at issue in the State Enforcement Action—misrepresentations, fraud, self-dealing, looting of charitable assets, waste, false filings—is protected by the First Amendment. There is no First Amendment right to use charitable funds on no-show consulting contracts, approving lavish expenditures for insiders, and other violations of applicable law. *See Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) ("[T]he First Amendment does not shield fraud."); *Exxon Mobil Corp. v. Schneiderman*, 316 F. Supp. 3d 679, 710 (S.D.N.Y. 2018) ("Ensuring that 'accurate information' reaches the market and the public is consistent with a *bona fide* investigation—not retaliation."); *see also United States v. Konstantakakos*, 121 F. App'x 902, 905 (2d Cir. 2005) ("[I]t has long been established that the First Amendment does not shield knowingly false statements made as part of a scheme to defraud."). The NRA can express itself and engage in First Amendment-protected conduct. But it has no right to engage in the pervasive illegal conduct alleged in the State Enforcement Action. The NRA's conduct at issue here is thus not protected by the First Amendment.

2. The NRA has not and cannot plead "but for" causation, as it must, because no First Amendment claim can arise from an objectively justified investigation.

The NRA's First Amendment retaliation claim also fails because the NRA has not, and cannot, plead that the Attorney General's investigation was not justified by legitimate concerns. The Supreme Court has held that to state a prima facie claim under § 1983, a plaintiff must plead and prove that the action was independently unjustified and "but for" the retaliatory motive, the action would not have been taken. *Nieves*, 139 S.Ct. at 1722 (citing *Hartman v. Moore*, 547 U.S.

250, 259-260 (2006)); *see also Avery v. DiFiore*, 2019 WL 3564570, at *3 (S.D.N.Y. Aug. 6, 2019) (applying *Nieves* on a motion dismiss).

The requirement of "but for" causation is consistent with the "presumption that a prosecutor has legitimate grounds for the action he takes." *Hartman*, 547 U.S. at 263 (citing *Wayte v. United States*, 470 U.S. 598, 607-608 (1985)). As a matter of law, allegations of an improper motive cannot raise a plausible claim of bad faith when the complaint also alleges an "obvious alternative explanation" for the conduct. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009) (quotation marks and citation omitted).

Here, even on a motion to dismiss, the record is replete with evidence of pervasive and persistent illegal contact by and within the NRA. *Ackerman McQueen*, 2020 WL 1878107, at *2; State Enforcement Action Compl. Even in its own complaint, while alleging bias or error, the NRA admits that there was widespread press coverage of its internal financial and governance problems. Am Compl. ¶¶ 17-18, 21. The NRA admits that the accusations were not baseless, since the NRA's own internal inquiry resulted in the NRA cutting off relationships with certain executives and vendors "who did not welcome the NRA Board's push for additional documentation and transparency"—one of whom is a defendant in the State Action. Am. Compl. pg. 4 & ¶ 15. The NRA's present claim that it is in full compliance with New York charities law is belied by such admissions and the allegations in the State Enforcement Action Complaint demonstrating that the NRA's compliance attempts were abject failures fraught with retaliation against whistleblowers against reform efforts. *See* State Enforcement Action, ¶¶ 444-475, 534-543. In any event, the NRA's assertion of full compliance is a conclusory legal assertion that carries no weight on a motion to dismiss. *See Iqbal*, 566 U.S. at 679.

In sum, the NRA cannot use the First Amendment to enjoin or receive damages because of

a well-supported enforcement action, which sets forth claims of pervasive illegal conduct, by claiming that the OAG was acting with political motivations.

3. The NRA fails to plead that illicit animus caused it injury.

In addition, the NRA has also failed to set forth facts to establish an actionable injury due to the OAG action, as it must. *Dorsett*, 732 F.3d at 160. The NRA's only allegations of injury from the State Enforcement Action are 1) the conclusory assertion that the action "threatens to destabilize the NRA and chill the speech of the NRA, its members, and other constituents" and 2) the cost of defense of the litigation. Am. Compl. ¶ 51, 52. This is inadequate. The NRA's allegations of an abstract threat are not sufficient to make out the prima facie case. Given its allegations that it is continuing activities, it has not suffered an actionable injury. *Curley v. Vill. of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001). Further, given that the NRA has not contested the OAG's non-dissolution claims, it admittedly would have to defend itself in the State Enforcement Action in any event and so cannot even try to claim the defense costs of the litigation as an injury.

For these reasons, the First Amendment claims fail.

B. The NRA does not state a Fourteenth Amendment selective prosecution claim.

Counts Four and Five of the NRA's Amended Complaint accuse the Attorney General of selective prosecution exclusively with respect to the claims seeking dissolution of the organization. The NRA does not challenge the other statutory claims in the State Enforcement Action asserted against the organization. *See* State Enforcement Action Compl. ¶¶ 626-645. Instead it attacks the OAG's request for judicial dissolution, which it argues is sought "on the sole basis of executive misconduct for the very first time against the NRA despite more than two decades of non-enforcement against similarly situated non-profits." *Id.* ¶ 95. A selective-enforcement claim

requires a plaintiff to establish "(1) that it was treated differently from other similarly situated businesses and (2) that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 40 (2d Cir. 2018) (quotation marks, citation, and edit omitted). The NRA's allegations fail on both prongs.

1. The Attorney General is authorized to seek dissolution in appropriate cases and her decisions are entitled to a presumption of good faith.

As an initial matter, in the State Enforcement Action, the OAG seeks dissolution based on the findings of an extensive investigation and pursuant to its well-established statutory authority. The OAG's complaint speaks for itself and the Attorney General is entitled to a presumption that it is acting in good faith. *United States v. Bassford*, 812 F.2d 16, 19 (1st Cir. 1987). Whether dissolution is warranted is ultimately a decision for a New York state court based on the record established in the State Enforcement Action. Here, multiple remedies are sought to which the NRA does not object. The NRA's constitutional challenge to the State Enforcement Action is undercut by its tacit admission of the propriety of the other relief sought. Further, dissolution will only be imposed upon a judicial determination that the requisite standards for such relief are met.

2. The NRA has failed to plausibly allege that it was treated differently than similarly situated charities.

To survive a motion to dismiss, a plaintiff must set forth well-pled facts showing that the plaintiff has been treated differently from others who were similarly situated. *Lanning v. City of Glens Falls*, 2017 WL 922058, at *8 (N.D.N.Y. Mar. 8, 2017), *aff'd*, 908 F.3d 19 (2d Cir. 2018). Similarly situated means "comparators whom a prudent person would think were roughly equivalent". *Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 815 F. Supp. 2d 679, 696 (S.D.N.Y. 2011) (internal quotation marks omitted). The NRA has failed to state a plausible claim.

The NRA has set up a straw man argument: it claims that it is subject to dissolution "solely" due to "executive misconduct," and that to obtain dissolution the OAG must establish that the NRA is a "sham" organization that does not carry out any activities that advance its mission. Am. Compl. Comp ¶¶ 35, 43, 95. The NRA's argument mischaracterizes the facts and the law.

First, the NRA's description of the State Enforcement Action as a case for dissolution "on the sole basis of executive misconduct" (Am. Compl. at ¶ 95), is inaccurate and frivolous on its face. Rather, the complaint describes, in great detail, the OAG's findings of pervasive and persistent illegality. It is also significant that, unlike many of the executives involved in wrongdoing in past OAG actions, the chief wrongdoers at the NRA remain at the helm. As such, the NRA's citations to other OAG actions, which the NRA characterizes as instances of executive misconduct where the Attorney General did not seek dissolution, are inapposite. *See* Am. Compl. ¶ 37. As set forth above, the State Enforcement Action alleges far more than isolated instances of misconduct by a small number of rogue executives.

Second, contrary to the NRA's interpretation of the law and the OAG's past practice, there is no requirement that the OAG prove that an entity is a "sham" in order to dissolve it. The term "sham" or any equivalent requirement, does not appear in the N-PCL statutes or cases regarding dissolution. The Attorney General's authority to seek dissolution of a corporation is a well-established statutory power, found in both Article 11 of the N-PCL[15] and the analogous article of the Business Corporation Law. *See* Bus. Corp. Law § 1101 et seq.; *see also People v. N. Leasing Sys., Inc*., 2020 NY Slip Op 20243, at *14 (Sup. Ct., May 29, 2020) (dissolving corporate entity

[15] Section 112 of the N-PCL, which enumerates the Attorney General's enforcement powers, provides that the Attorney General is authorized to maintain an action or special proceeding to dissolve a corporation that has acted beyond its capacity or power or to restrain it from carrying on unauthorized activities. N-PCL § 112(a)(1). Article 11 elaborates on the bases for dissolution.

under Bus. Corp. Law and noting "Section 1101 merely vests in the Attorney-General, or merely only codifies, his standing to vindicate the State's right and provides for dissolution of the corporate abuser of the State's grant of corporate existence.") (internal quotation marks omitted). Under N-PCL § 1101(a)(2), the Attorney General may bring an action seeking dissolution when "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 public policy of the state has become liable to be dissolved." Under N-PCL § 1102(a)(2)(D), dissolution is appropriate 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."

The NRA's legal argument that it can't be dissolved because it is not a total sham and carried out some mission-advancing activities is beside the point. "Sham" is not the relevant legal standard. The NRA's citation to *Leibert v. Clapp*, 13 N.Y.2d 313 (1963), Am. Compl. fn. 55, does not advance its argument. There the Court of Appeals held that it *is not* a bar to the grant of dissolution that an entity might operate profitably, *i.e.,* not be a total sham. *Leibert*, 13 N.Y.2d at 316; *see also N. Leasing Sys., Inc.,* 2020 WL 5755495, at *14 (dissolution held appropriate where entity engaged in persistently fraudulent conduct, even where the majority of its business was legitimate).

The OAG's actions fit squarely within enforcement cases it has brought after findings of breaches of fiduciary duty. Each case presents a unique set of facts, and the OAG, in a wholly appropriate use of its discretion, determines which remedies to seek based on a wide variety of factors, including the severity of the wrongdoing, available resources, and willingness of the organization to take meaningful remedial steps. Most recently, the OAG sought and obtained

dissolution of the Trump Foundation, which conducted some charitable grant making. The OAG deemed that dissolution was an appropriate remedy because of pervasive mismanagement and repeated self-dealing. *People of the State of New York v. Trump*, 62 Misc. 3d 500, 516-18 (Sup. Ct. N.Y. Co. 2018), *see also People of the State of New York v. Federation of Multicultural Programs*, (https://www.openminds.com/market-intelligence/news/new-york-opwdd-shuts-dd-provider-organization-federation-multicultural-programs-due-poor-service-financial-problems) obtaining dissolution of a provider of services to people with disabilities because of extensive financial mismanagement); *N. Leasing Sys., Inc*., 2020 NY Slip Op 20243, at *14 (in the for-profit context, granting Attorney General's action for dissolution despite defendant's claims that the allegedly abusive leases at the heart of the OAG's complaint were only a small fraction of defendant's total business). In other instances, including the matters cited by the NRA (all of which were settlements that followed the departure of the chief wrongdoers), the OAG has obtained other remedies, including permanent bars on fiduciary service and monitorships, as well as criminal convictions. *See e.g.* Settlement Agreement with the Metropolitan Council on Jewish Poverty, signed December 19, 2013 (following removal upon felony conviction of Executive Director, mandating staff changes and adoption of new policies, and imposing a multiyear monitorship on the organization); *In the Matter of the Investigation of the Richenthal Foundation*, AOD No. 18-034 (imposing permanent bars on fiduciary service, board reforms, training, and disclosure requirements).

The Attorney General has broad discretion and may seek the statutory remedy of dissolution where an entity meets the statutory standards, rather than the fabricated standards the NRA has devised. *People v. Oliver Schs., Inc*., 206 A.D.2d 143, 148 (4th Dep't 1994) (noting the Attorney General's discretion); *N. Leasing Sys., Inc*., 2020 WL 5755495, at *14 (rejecting the

respondent's suggested standards for dissolution and contentions that dissolution was not appropriate when the majority of its business was not fraudulent.)

3. The Attorney General is not treating the NRA differently than similarly situated entities based upon impermissible considerations.

The NRA also fails to adequately plead that the State Enforcement Action is based on impermissible considerations. *See Exxon Mobile Corp.*, 316 F. Supp. 3d at 704 (finding that Exxon failed to establish a plausible inference that the Attorney Generals of New York and Massachusetts did not act on a good faith belief that Exxon may have violated state laws); *Trump*, 62 Misc. 3d at 509. The NRA's claims regarding the Attorney General's statements do not alter this analysis. Allegations of political disagreement cannot insulate the subject of an ongoing investigation from law enforcement activity. *In re FDIC*, 58 F.3d 1055, 1062 (5th Cir. 1995) (taking political considerations into account could not establish "bad faith or improper behavior" by agency officials). A rule that prosecutors and enforcement agencies cannot investigate any subject with whom they are alleged to disagree politically would allow subjects to avoid investigation for wrongdoing wholly unrelated to their protected activity.

The Attorney General's exercise of her prosecutorial discretion, including what relief to seek, is well within her authority. Courts unsurprisingly acknowledge that some selectivity is inevitable in State law enforcement decisions. *People v. Goodman*, 31 N.Y.2d 262, 268 (1972); *see also, 303 West 42nd St. Corp. v. Klein*, 46 N.Y.2d 686, 693 (1979) ("latitude must be accorded authorities charged with making decisions related to legitimate law enforcement interests."); *People v. Utica Daw's Drug Co.*, 16 A.D.2d 12, 21 (4th Dept. 1962) ("Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary."). The extensive

and serious allegations in the OAG complaint undermine the notion that bias was the sole motivating factor for the investigation and the proceeding.

In sum, in an effort to have this Court enjoin the State Enforcement Action, the NRA asks this Court to ignore the detailed and extensive allegations of illegal conduct against the NRA and its current and former officers, almost all of which the NRA does not contest, and instead to find (1) that the OAG alleges bad conduct solely by individual officers and (2) the OAG has never sought dissolution in such circumstance or in any case in which the charity was not totally lacking in any charitable activities. Because neither supposition is true and for the reasons set forth above, the NRA's selective enforcement claim fails.

V. THE NRA LACKS STANDING TO ASSERT A CLAIM ON BEHALF OF ITS MEMBERS FOR VIOLATION OF THEIR RIGHT TO ASSOCIATION.

The NRA's constitutional claims "based upon its members' exercise of association rights," Counts Three and Four, fail under established Second Circuit authority that an organization may not bring § 1983 claims on behalf of its members rather than on its own behalf. *Nnebe v. Daus,* 644 F.3d 147, 156 (2d Cir. 2011) ("it is the law of this Circuit that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983"); *N.Y. State Citizens' Coal. for Children v. Velez*, 629 F. App'x 92, 93 (2d Cir. 2015).

There is a narrow exception that permits organizations to assert claims of abridgment of members' right of association in certain circumstances, but it is inapplicable here. To fit within the exception, an organization must show that the challenged action threatens the very ability of both the organization and its members to assemble and carry out their First Amendment activities. *Aguayo v. Richardson*, 473 F.2d 1090, 1100 (2d Cir. 1973) (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459–460 (1958)). In *Patterson*, the NAACP challenged a state statute that forced disclosure of all member information. *Id.*, 357 U.S. at 451. The Supreme Court found

that the NAACP had standing to assert the rights of its members where it had "made an uncontroverted showing that … revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility," clearly impacting the associational rights of the NAACP and its members and requiring the members to individually participate would be untenable in such circumstances. *Id*., 357 U.S. at 462-63.

Accordingly to fit within this exception, standing hinges on the right of organizations to oppose compelled disclosure of member identities or other conduct which has "adverse effects" on the right of the collective exercise of protected First Amendment activity. *Aguayo*, 473 F.2d at 1100; *Capital Associated Indus., Inc. v. Stein*, 283 F. Supp. 3d 374, 387–88 (M.D.N.C. 2017), *aff'd*, 922 F.3d 198 (4th Cir. 2019); *Nassau & Suffolk Cty. Taxi Owners Ass'n, Inc. v. State*, 336 F. Supp. 3d 50, 71 (E.D.N.Y. 2018); *Am. Charities for Reasonable Fundraising Regulation, Inc. v. Shiffrin*, 46 F. Supp. 2d 143, 153 (D. Conn. 1999), *aff'd*, 205 F.3d 1321 (2d Cir. 2000).

Where an organization cannot establish an injury to its own and its members' right of association, particularly impacting its ability to engage in First Amendment protected activities, it lacks standing under this exception. *See Capital Associated Indus., Inc.*, 283 F. Supp.3d at 387–88; *Stauber v. City of New York*, 2004 WL 1593870, at *14 (S.D.N.Y. July 16, 2004); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, (1992).

In this case, the NRA has not alleged facts showing that it and its members have or imminently will have their associational rights violated, as it must. *Shiffrin*, 46 F. Supp. 2d at 152-53. Instead, the Amended Complaint describes the NRA's continuing successful association and advocacy activities, claiming it is "America's leading provider of gun-safety and marksmanship education" and "the foremost defender of the Second Amendment…. The NRA has over five

million members, and its programs reach millions more." Am. Compl. ¶ 1. It further claims that it is best known as a "superlobby" and "one of the largest. . . conservative lobbying organizations in the country, able to mobilize its millions of members". *Id.*, ¶ 11, *see also* ¶ 40. Indeed, in the original Complaint, the NRA claimed that "In actual fact, the NRA's finances are more robust than ever." Dkt # 1, ¶ 27, see also ¶¶ 1, 10, 11. ¶ 27.

The NRA has not alleged any non-conclusory facts showing any impairment of the organization's and its members' ability to associate and pursue First Amendment protected activities. Accordingly, the NRA lacks standing and its Third and Fourth Causes of Action must be dismissed.

VI. THE NRA'S AS-APPLIED CHALLENGE TO NOT-FOR-PROFIT CORPORATION LAW §§ 1101 AND 1102 FAILS.

In its Seventh Cause of Action, the NRA seeks a declaration that the "allegations of [NRA] executive misconduct do not constitute corporate fraud or criminality and that [N-PCL] Sections 1101 and 1102 are unconstitutional as-applied to the NRA absent such a showing." Am. Compl. ¶ 115. The dissolution statutes in N-PCL §§ 1101 and 1102 (hereinafter collectively referred to as the "Dissolution Statutes") are constitutional as applied to the NRA because they are unrelated to the suppression of free expression and thus, at most, are subject to, and survive, the intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968). Accordingly, the NRA's challenge to the N-PCL statutes fail to state a claim.

The NRA's suggestion that any dissolution of the NRA must be examined under the lens of strict scrutiny because the NRA engages in unspecified "constitutionally protected activity," Am. Compl. ¶ 46, is incorrect as a matter of law. Instead, at most, it is the intermediate scrutiny standard set forth in *United States v. O'Brien* that applies. 391 U.S. 367 (1968). The *O'Brien* test is applicable where a plaintiff brings an as-applied challenge to a regulation that is "unrelated to

the suppression of expression." *Texas v. Johnson*, 491 U.S. 397, 407 (1989). There is no question that the Dissolution Statutes are facially neutral and "unrelated to the suppression of expression." Neither statute regulates expression protected by the First Amendment.

Accordingly, at most the four-part test in *O'Brien* governs: "[A] government regulation is sufficiently justified [1] if it is within the constitutional power of the Government; [2] if it furthers an important or substantial government interest; [3] if the government interest is unrelated to the suppression of free expression; [4] and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The Dissolution Statutes, as applied to the NRA, satisfy all four requirements.

The first and second prongs cannot seriously be disputed. The NRA admits that "the [Attorney General] is the supervising regulator for all New York non-profits, including the NRA." Am. Compl. ¶ 24. And, while the NRA decries the Attorney General's reliance on "general *parens patriae* principles underlying non-profit laws that ensure charities perform in the public interest," Am. Compl. ¶ 47, it is settled law that the State has an important interest in "preventing fraud and self-dealing in charities." *Citizens United v. Schneiderman*, 882 F.3d 374, 384 (2d Cir. 2018). The Dissolution Statutes further that interest by authorizing the Attorney General to seek the dissolution of a charity that is systematically and persistently violating charities laws.

Regarding the third prong, a determination of whether "the government's interest is unrelated to the suppression of free expression" is "equivalent to the 'content neutrality' requirement" that triggers application of the *O'Brien* test in the first instance. *Young v. New York City Transit Authority*, 903 F.2d 146, 158 (2d Cir. 1990). "The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S.

781, 791 (1989)). As explained *supra*, the Dissolution Statutes are content neutral on their face and the NRA has not alleged that the Dissolution Statutes were passed for the purpose of suppressing constitutionally protected activity.

Regarding the fourth prong, the State's interest in preventing fraud and abuse of the charitable form would be achieved less effectively without its ability to petition courts and, where appropriate, seek dissolution of persistent and systematic offenders like the NRA. Contrary to the NRA's assertion that the Attorney General is required to demonstrate that dissolution is "the least restrictive means of achieving a compelling state interest," Am. Compl. ¶ 46 (internal quotation marks and citation omitted), the fourth *O'Brien* factor is similar to the test for a content neutral time, place, or manner regulation:

> [A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least-restrictive or least-intrusive means of doing so. Rather, the requirement of narrow tailoring is satisfied so long as the regulation . . . promotes a substantial government interest that would be achieved less effectively absent the regulation.

Ward, 491 U.S. at 798-99 (discussing the fourth *O'Brien* factor) (internal quotation marks and citations omitted).

Here, the Dissolution Statutes do not permit the Attorney General to summarily dissolve a charity, but rather place a burden upon the Attorney General to prove to a court that dissolution is called for under the law in a given circumstance. With respect to N-PCL § 1101, the Attorney General must show a regulated entity's misconduct "has produced, or tends to produce, injury to the public. The transgression must not be merely formal or incidental, but material and serious, and such as to harm or menace the public welfare." *People v. Oliver Schools, Inc.*, 206 A.D.2d 143, 145 (4th Dep't 1994) (interpreting BCL § 1101, from which N-PCL § 1101 is derived) (quoting *People v. North River Sugar Refining Co.*, 121 N.Y. 582, 609 (1890)). And it is the court

that ultimately decides whether dissolution of the NRA is in the best interest of the public. N-PCL § 1109(b)(1).

With respect to § 1102, the Attorney General stands in the shoes of the NRA's members and, as relevant here, must prove that the "directors or members in control of [the NRA] 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." N-PCL § 1102(a)(2)(D); 112(a)(7). And it is the court that must ultimately decide whether dissolution of the NRA is in the best interest of its members. *See* N-PCL § 1109(b)(2).

The Attorney General is confident that the allegations in the State Enforcement Action of persistent and systemic waste, lack of oversight, false filings, conflicts of interest, related party transactions, financial mismanagement, and whistleblower retaliation that the NRA perpetuated over the course of years warrant the dissolution of the NRA. *See* State Enforcement Action Compl. ¶¶ 560-579. But it will be the New York State courts that ultimately decide whether the Attorney General has met her burden, and whether dissolution of the NRA is in the public's and its member's interests. *See* N-PCL § 1109(b). Therefore, the Dissolution Statutes are narrowly tailored to serve the State's legitimate interest in preventing systematic abuse of the charitable form. Of course, in the State Enforcement Action, dissolution is one form of relief among many sought by the OAG. The New York State Supreme Court will ensure that dissolution is imposed only where necessary.[16]

For all of these reasons, the NRA's as-applied challenge to the Dissolution Statutes fails to state a claim for which relief may be granted, and should be dismissed

[16] To the extent that the NRA argues that it is capable of and engaged in internal reform, see Am. Compl. ¶¶ 49-50, those arguments go to the merits of the Attorney General's State Enforcement Action and favor *Younger* abstention. *See* Point II(A), *supra*.

VII. THE NRA'S § 1983 CLAIMS AGAINST THE ATTORNEY GENERAL IN HER INDIVIDUAL CAPACITY MUST BE DISMISSED.

To establish a claim under § 1983, the NRA must show that the Attorney General, while acting under color of state law, was personally involved in the violation of the NRA's federal statutory or constitutional rights. *Annis v. Cty. Of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998); *Eagleston v. Guido*, 41 F.3d 865, 872 (2d Cir. 1994). Here, the NRA fails to show that its federal statutory or constitutional rights have been violated. *See* Point IV-VI, *supra*. But even if it had, its claims for monetary damages are barred by absolute and qualified immunity.

A. The Attorney General is entitled to absolute immunity in relation to her decision to commence an action against the NRA.

The Attorney General is entitled to absolute immunity from monetary damages for her decision to commence a suit against the NRA. *See, e.g., Spear v. Town of West Hartford*, 954 F.2d 63, 66 (1992) (absolute immunity applies "to government attorneys who initiate civil suits"). Government officers are entitled to absolute immunity from damages in suits in connection with the initiation of civil litigation. *Id.* at 66; *see also Cornejo v. Bell*, 592 F.3d 121, 127 (2d Cir. 2010).

Government officials who determine whether to commence proceedings have broad discretion and are entitled to absolute immunity to suit for the same. *Butz v. Economou*, 438 U.S. 478, 515 (1978)(such "discretion "might be distorted if their immunity from damages arising from that decision was less than complete."). Where absolute immunity applies, an official's motivations for initiating an action are irrelevant. *Bernard v. Cnty. of Suffolk*, 356 F.3d 495, 504 (2d Cir. 2004) (holding that, where a defendant entitled to absolute immunity has acted within their statutory authority, "the fact that improper motives may influence his authorized discretion cannot deprive him of absolute immunity").

Here, the Attorney General's decision to commence proceedings against the NRA is protected by absolute immunity regardless of her motivation and any request for damages premised on such commencement fails.

B. The NRA's claims against the Attorney General for money damages are barred by qualified immunity.

The NRA's claims for monetary relief are barred by qualified immunity.

Qualified immunity is an immunity from suit, not just liability. Accordingly, the question of whether the doctrine applies should therefore be decided "at the earliest possible opportunity . . . if the defendant officer, confronted with the facts as alleged by the plaintiff, could reasonably have believed that his actions did not violate some settled constitutional right." *Diggs v. Marikah*, 2012 WL 934523, at *5 (S.D.N.Y. Mar. 20, 2012). Under the federal qualified immunity doctrine, government officials are protected from liability for civil damages where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

Here, the Attorney General has the legal authority to investigate whether charitable entities comply with applicable statutory requirements. Given the Attorney General's obligation to oversee not-for-profit corporations and the indicators of illegal conduct by and within the NRA, which the NRA admits led to its own internal investigation, it is objectively reasonable for the Attorney General to believe that an investigation and civil action against the NRA are appropriate and do not violate a clearly established right. *See Winfield v. Trottier*, 710 F.3d 49, 57 (2d Cir. 2013). As such, she is entitled to federal qualified immunity.

Official immunity under New York law is "considerably greater" than that offered under the federal qualified immunity doctrine. *Hirschfeld v. Spanakos*, 909 F.Supp. 174, 180 (S.D.N.Y.

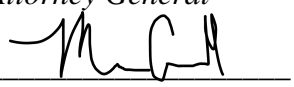
1995). New York law provides immunity for state employees in the performance of conduct that involves "the exercise of reasoned judgment which could typically produce different acceptable results." *Tango v. Tulevech,* 61 N.Y.2d 34, 40-41 (1983). The question of whether to pursue an investigation or commence a civil action are quintessential examples of the type of conduct that requires "reasoned judgement" on the part of officials and could result in various satisfactory outcomes. *See Nash v. City of New York*, 2003 WL 22455641 at *3 (N.Y. Civ. Ct. Oct. 21, 2003). The Attorney General is thus entitled to qualified immunity under state law.

CONCLUSION

For the foregoing reasons, Attorney General Letitia James respectfully requests that the Court issue an order dismissing this action in its entirety and granting such other and further relief as it deems just and proper.

Dated: November 20, 2020
New York, New York

LETITIA JAMES
Attorney General



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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,

Plaintiff,

v.

LETITIA JAMES, both individually and in her official capacity,

Defendant.

20-CV-00889 (MAD)(TWD)

DECLARATION OF MONICA CONNELL IN SUPPORT OF MOTION TO DISMISS

MONICA CONNELL, an attorney duly admitted to practice before this Court, declares under penalty of perjury that the following is true and correct, pursuant to 28 U.S.C. § 1746:

1. I am an Assistant Attorney General in the office of Letitia James, the Attorney General of the State of New York, defendant in the above-referenced action.

2. I submit this declaration in support of the Attorney General's motion to dismiss the Amended Complaint in this action and for the limited purpose of providing the Court with true and correct copies of documents that are referenced in the accompanying memorandum of law.

3. Exhibit A is a true and correct copy of the Amended Complaint in this Action.

4. Exhibit B are true and correct copies of the document preservation notice and subpoena served upon the National Rifle Association of America, Inc. ("NRA") in this action.

5. Exhibit C is a true and correct copy of the Affirmation of Good Faith and in Support of the Attorney General's Order to Show Cause to Compel Compliance with an

Investigatory Subpoena by Monica Connell, dated September 30, 2019 in *People v. Ackerman McQueen*, Supreme Court, New York County, Index No. 451825/2019.

6. Collectively attached as Exhibit D are true and correct copies of the NRA's application to the Appellate Division, First Department for a stay of the August 19, 2019 order in the matter *National Rifle Association of America, Inc. v. Letitia James*, Supreme Ct., N.Y. Co. Index No. 158019/2019, including the Supreme Court order as well as the Appellate Division's denial. The NRA declined to pursue further appeal.

7. Attached as Exhibit E is a true and correct copy of the Assurance of Discontinuance 18-034, entered into by and among the Attorney General, the Richenthal Foundation, and the Trustees of the Richenthal Foundation on April 25, 2018.

8. Attached as Exhibit F is a true and correct copy of the Office of the Attorney General's Settlement Agreement with the Metropolitan Council on Jewish Poverty, signed December 19, 2013.

I declare under penalty of perjury that the foregoing is true and correct.

MONICA CONNELL
Assistant Attorney General

Executed on November 20, 2020, in New York, New York.

Exhibit D

Attorney General's Opposition to the NRA's Motion in *In re National Rifle Association Business Expenditures Litigation*, No. 20-cv-00889 (J.P.M.L.)

BEFORE THE UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: NATIONAL RIFLE ASSOCIATION BUSINESS EXPENDITURES LITIGATION	MDL Docket No. 2979

NEW YORK ATTORNEY GENERAL LETITIA JAMES'S OPPOSITION TO THE NATIONAL RIFLE ASSOCIATION'S MOTION TO TRANSFER FOUR ACTIONS TO THE NORTHERN DISTRICT OF TEXAS FOR CONSOLIDATION OR COORDINATION

Defendant New York Attorney General Letitia James ("Attorney General") submits this response in opposition to the National Rifle Association of America, Inc.'s (the "NRA") motion to consolidate the four actions in this docket in the Northern District of Texas.

INTRODUCTION

The NRA asks the Judicial Panel on Multidistrict Litigation to transfer four federal actions pending in three districts to the Northern District of Texas for consolidated pretrial proceedings.[1] The motion should be denied. Consolidation is proper only where the movant has demonstrated that cases share common facts that are numerous or complex and that consolidation would serve "the convenience of parties and witnesses" and "promote the just and efficient conduct" of the actions. 28 U.S.C. § 1407; *In re Nat'l Credit Union Admin. Bd. Mortgage-Backed Sec. Litig.*, 996 F. Supp. 2d 1374, 1376 (J.P.M.L. 2014). The burden on the NRA is especially heavy because of the minimal number of actions involved (four). The NRA fails to satisfy that heavy burden here.

[1] *See* J.P.M.L. Dkt. 2979, ECF No. 1-1 ("NRA Br.").

Consolidation is not appropriate here because common factual issues in the four actions are few, and individual issues predominate. The issues are not numerous or complex. Two of the actions allege no violations of federal law, and involve different common-law claims brought under different state laws against different defendants. In the third action, the NRA brought a bevy of common law claims against two corporate defendants and several individual defendants, including claims of fraud, breach-of-fiduciary-duty, conversion, and conspiracy, along with statutory claims for trademark and copyright infringement. In contrast to those three actions, which are largely predicated on state common law claims, the fourth action—the only action involving the New York Attorney General—is a Section 1983 action alleging violations of federal and state constitutional law. The NRA commenced this action in the Northern District of New York in response to the Attorney General's state court enforcement action against the organization.[2]

These actions do not share a common factual core. They arise from different grievances, rely on different laws, and allege different facts. To the extent the complaints in these actions share any common questions of fact, those commonalities are plainly outweighed by the individual factual and legal issues unique to each case, and fall far short of what is required for consolidation under Section 1407.

All other relevant factors likewise counsel against granting the NRA's request. The NRA seeks consolidation of only four actions, with no common defendants. The NRA is represented by common counsel, and the number of parties and actions are limited. There are no meaningful

[2] The NRA, a New York not-for-profit charitable organization, is subject to the oversight of the New York Attorney General. On August 6, 2020, the New York Attorney General filed a 163-page complaint in New York State court against the NRA and four of its current and former executives alleging numerous violations of New York law, captioned as *People v. NRA, et al.*, Index No. 451625/2020 (N.Y. Sup. Ct. N.Y. Cnty.) (the "NYAG Enforcement Action").

benefits of convenience for the parties or witnesses in consolidation. Further, the procedural posture of the actions does not support consolidation.

No grounds support transfer; all relevant factors weigh against it. The NRA's motion should be denied.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Ackerman Actions in the Northern District of Texas

The two actions pending in the Northern District of Texas arise from the NRA's acrimonious split with one of its largest vendors, Ackerman McQueen ("AMc"). In the first action, *NRA v. AMc*, 3:19-cv-02074-G (S.D. Tex.) ("AMc Action"), the NRA sued AMc, Mercury Group (a wholly owned subsidiary of AMc), and four AMc executives alleging they intentionally infringed on the NRA's intellectual property rights, overbilled them for services, and made misrepresentations about a digital media platform called NRATV ("AMc Action").[3] The NRA brought common law claims of fraud, breach-of-fiduciary-duty, conversion, and conspiracy, along with claims for trademark and copyright infringement. AMc, in turn, filed counterclaims for libel, tortious interference, fraud, and breach of contract. The AMc Action is the most procedurally advanced of the four actions. Discovery in this action is well under way, with over 25,000 pages of document discovery having already been exchanged.[4]

The second action, *AMc v. Stinchfield*, 3:19-cv-03016-X (S.D. Tex.) ("Stinchfield Action"), alleges different state common-law tort claims against an individual defendant based

[3] Joint Status Report at 1-3, *NRA v. AMc*, 3:19-cv-02074-G (S.D. Tex. Oct. 5, 2020), ECF No. 172.

[4] After "[a] review of the parties' pending discovery motions," Magistrate Judge Renée Harris Toliver recently observed "that many of the document requests at issue relate to now-dismissed claims and are likely no longer relevant to the litigation as it currently stands. Additionally, with the passage of time and considering the representations the parties made in their motions and exhibits, it appears that discovery efforts have been well underway for some time, with

on a distinct set of facts. In late 2019, a former AMc employee, Grant Stinchfield, provided NRA counsel with written statements about his employment at AMc. AMc then sued Stinchfield in the Northern District of Texas for defamation and libel ("Stinchfield Action").[5] The NRA is not a party to this action. Pretrial motion practice has been ongoing for nearly a year. Notwithstanding the NRA's contention that discovery "is expected to overlap extensively with discovery in the other Actions" (NRA's Br. at 3-4), fact discovery in the Stinchfield Action is set to conclude next month.

B. The Dell'Aquila Action in the Middle District of Tennessee

The third action, *Dell'Aquila v. LaPierre, et al.*, 3:19-cv-00679 (M.D. Tenn.) ("Dell'Aquila Action"), similarly alleges no violations of federal law, and is the only putative class action among the four actions identified in the NRA's motion. In the Dell'Aquila Action, four NRA donors sued the NRA, the NRA Foundation, and the NRA's Executive Vice President, Wayne LaPierre, in the Middle District of Tennessee for allegedly making fraudulent misrepresentations about the use of donated funds.[6] In September 2020, the court dismissed most of the defendants and claims from the suit; all that remains is one claim of common-law fraud under Tennessee law against the NRA.[7]

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production taking place on a rolling basis, as need be, and the parties collaborating during the discovery process to navigate any disputes that may arise." Order at 2, *AMc v. NRA*, 3:19-cv-02074-G (S.D. Tex. Sept. 23, 2020), ECF No. 169.

[5] *See* Pl.'s Original Compl., *AMc v. Stinchfield*, 3:19-cv-03016-X (S.D. Tex. Dec. 20, 2019), ECF No. 1.

[6] *See* Am. Compl., *Dell'Aquila v. LaPierre, et al.*, 3:19-cv-00679 (M.D. Tenn. Oct. 11, 2019), ECF No. 5.

[7] Court Memorandum, ECF No. 63, *Dell'Aquila v. LaPierre, et al.*, 3:19-cv-00679, Sept. 30, 2020.

C. The NRA/NDNY Action

In the fourth action, *NRA v. James*, 1:20-cv-00889-MAD-TWD (N.D.N.Y.) ("NDNY Action"), the NRA sued the New York Attorney General Letitia James in the Northern District of New York under Section 1983 challenging the constitutionality of the Attorney General's investigation into the NRA and the commencement of the NYAG Enforcement Action. The NRA commenced the NDNY action immediately after the Attorney General commenced the NY AG Enforcement Action in New York State Supreme Court. The operative complaint alleges that the Attorney General violated the NRA's rights to free speech, freedom of association, and equal protection under the United States and New York State Constitutions by investigating the NRA and commencing the NYAG Enforcement Action. In addition to actual and punitive damages, the NRA seeks declaratory and injunctive relief.

Discovery has not started in the NDNY action, and dispositive motion practice is proceeding. On August 31, 2020, the Attorney General filed a pre-motion letter seeking leave from the court to move to dismiss the action in its entirety under FRCP 12(b), [8] which was granted on September 21, 2020.[9] In response the NRA filed an Amended Complaint on October 9, 2020. The Court granted the Attorney General permission to move to dismiss the Amended Complaint. Accordingly, the Attorney General intends to move to dismiss under FRCP 12(b)(1) and (6) by November 20, 2020, on several dispositive grounds, including, but not limited to, Eleventh Amendment immunity, abstention under the *Younger* abstention doctrine, absolute and qualified immunity, and failure to state a claim.

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[8] Attorney General's Pre-Motion Letter, *NRA v. James*, 1:20-cv-00889-MAD-TWD (N.D.N.Y. Aug. 31, 2020), ECF No. 8.

[9] *See* Docket Minute Entry for Telephonic Pre-Motion Conference before U.S. District Judge Mae A. D'Agostino, *NRA v. James*, 1:20-cv-00889-MAD-TWD (N.D.N.Y. Sept. 21, 2020).

ARGUMENT

I. Legal Standard

The presence of some common questions of fact, by itself, is not enough to justify transfer and consolidation under Section 1407. *See In re Drowning Incident at Quality Inn Ne., Wash., D.C. on May 3, 1974,* 405 F. Supp. 1304, 1306 (J.P.M.L. 1976) (common facts is but one condition precedent to transfer under §1407). To transfer multiple actions to a single district for pretrial proceedings, this Panel must find that: (1) there are multiple actions sharing one or more common questions of fact; (2) transfer would be for the convenience of the parties and witnesses; and (3) transfer would advance the just and efficient conduct of the litigation. 28 U.S.C. § 1407(a). The NRA has the burden of showing that common questions of fact exist and that transfer serves the § 1407(a) objectives. *In re: Select Retrieval, LLC, ('617) Patent Litig.*, 883 F. Supp. 2d 1353, 1354 (J.P.M.L. 2012). The Panel has emphasized that "'centralization under Section 1407 should be the last solution after considered review of all other options.'" *In re Six Flags Fair & Accurate Credit Transactions Act (FACTA) Litig.*, 289 F. Supp. 3d 1343, 1345 (J.P.M.L. 2018) (citation omitted); *cf. In re Gemcap Lending I, LLC, Litig.*, 382 F. Supp. 3d 1352, 1352 (J.P.M.L. 2019) ("We do not find Section 1407 centralization is necessary for a minimal number of parties and actions, particularly where the parties have made no effort to informally cooperate.").

A. The number of actions is minimal.

The number of actions that a movant seeks to consolidate is an important threshold consideration in MDL litigation. Here, the NRA seeks to consolidate a mere four actions. In litigation such as this, where only a few actions are involved, "the proponent of centralization bears a heavier burden to demonstrate that centralization is appropriate." *In re Enhanced*

Recovery Co., LLC, Fair Debt Collection Practices Act (FDCPA) Litig., 363 F. Supp. 3d 1375, 1377 (J.P.M.L. 2019); *see also In re Covidien Hernia Mesh Prod. Liab. Litig.,* No. MDL 2953, 2020 WL 4670694, at *1 (J.P.M.L. Aug. 7, 2020) (higher burden where there were twelve actions in nine districts); *accord In re Joel Snider Litig.,* 437 F. Supp. 3d 1371 (J.P.M.L. 2020) (four actions pending in two districts); *In re Bernzomatic & Worthington Branded Handheld Torch Prod. Liab. Litig. (No. II)*, 410 F. Supp. 3d 1355, 1356 (J.P.M.L. 2019) (three actions pending in three districts); *In re Walden Univ., LLC, Doctoral Program Litig*., 273 F. Supp. 3d 1367, 1368 (J.P.M.L. 2017) (citation omitted) (same). The moving party must show "that the common questions of fact are so complex and the accompanying common discovery so time-consuming as to overcome the inconvenience to the party whose action is being transferred and its witnesses." *In re Scotch Whiskey Antitrust Litig.*, 299 F. Supp. 543, 544 (J.P.M.L. 1969); *see also In re Royal Am. Indus., Inc. Sec. Litig.*, 407 F. Supp. 242, 243 (J.P.M.L. 1976).

The NRA has failed to meet that burden here, just as other movants failed to do in recent cases involving a limited number of actions. *See, e.g.*, *In re Bank of Am. Paycheck Prot. Program Litig.*, No. MDL 2952, 2020 WL 4673776, at *1 (J.P.M.L. Aug. 5, 2020) (denying centralization where there were only three pending actions); *In re Wells Fargo Paycheck Prot. Program Litig.*, No. MDL 2954, 2020 WL 4673472, at *1 (J.P.M.L. Aug. 5, 2020) (five actions); *In re JPMorgan Chase Paycheck Prot. Program Litig.*, No. MDL 2944, 2020 WL 4677846, at *1 (J.P.M.L. Aug. 5, 2020) (four actions); *In re Prevagen Prod. Mktg.*, 437 F. Supp. 3d 1381, 1382 (J.P.M.L. 2020) (five actions); *In re Family Dollar Stores, Inc., Access for Individuals With Disabilities Litig.*, No. MDL 2939, 2020 WL 2849474, at *1 (J.P.M.L. Jun. 2, 2020) (three actions).

B. Individual facts predominate over alleged common fact questions.

To be eligible for transfer under Section 1407, it is not sufficient to show that the actions have "some factual overlap." *In re Abbott Labs., Inc., Similac Products Liab. Litig.*, 763 F. Supp. 2d 1376, 1377 (J.P.M.L. 2011). *Accord In re Truck Accident Near Alamogordo, N.M., on Jun. 18, 1969*, 387 F. Supp. 732, 733 (J.P.M.L. 1975) ("A mere showing that common questions of fact exist . . . is not sufficient, in and of itself, to warrant transfer by the panel."). In this regard, this Panel has consistently found that Section 1407 transfer does not serve its statutory purposes even where "some common questions of fact" exist, if "these common questions of fact will [not] predominate over individual questions of fact present in each action." *In re Rely Tampon Products Liab. Litig.*, 533 F. Supp. 1346, 1347 (J.P.M.L. 1982); *see also In re Stirling Homex Corp. Sec. Lit.*, 442 F. Supp. 547, 549 (J.P.M.L. 1977) (actions must share a "common factual core"). Further, as mentioned previously, when relatively few cases are involved, "transfer under § 1407 would be inappropriate" unless the common issues of fact are "unusually complex." *In re Iowa Beef Packers, Inc.*, 309 F. Supp. 1259, 1260 (J.P.M.L. 1970); *accord Pullen & Assocs., LLC, Brokered Grp. Health Plans Lit.*, 366 F. Supp. 2d 1383, 1383 (J.P.M.L. 2005) (applying "unusually complex" standard to motion involving seven actions); *see also Abbott Labs.*, 763 F. Supp. 2d at 1377 ("Although plaintiffs are correct that some factual overlap exists among the present actions, the proponents of centralization have failed to convince us that any shared factual questions in these actions are sufficiently complex and/or numerous to justify Section 1407 transfer[.]").

Here, the NRA's motion relies heavily on the argument that, because these actions share some common questions of fact concerning the NRA's spending, governance, and relationship with Ackerman McQueen, they are sufficiently similar to warrant centralization. But the

"individual facts contained in these actions [] predominate over any alleged common fact questions," *Abbott Labs*., 763 F. Supp. 2d at 1376.

Each of the complaints includes different federal statutory and state statutory and common-law claims with different elements and potential defenses. The defendants differ in each action, and the complaints do not allege common conduct that could be proved with common evidence.

For example, the Stinchfield Action centers on two state-law claims of defamation and business disparagement against an individual defendant who is not named in any of the other actions. [10] The major factual issues will involve whether the individual defendant's written statements were false or misleading; whether those statements were made with scienter; whether the statements were privileged; and whether they harmed AMc's reputation. These case-specific factual questions share little in common with the other actions, and they are neither complex nor numerous.

The AMc Action similarly presents unique questions of fact and law. In that case, the NRA has asserted common law claims of fraud, breach-of-fiduciary-duty, conversion, and conspiracy, along with federal-law claims for trademark and copyright infringement, against AMc, Mercury Group, and four AMc executives alleging they intentionally infringed on the NRA's intellectual property rights, overbilled them for services, and made misrepresentations about a digital media platform called NRATV.[11] In its response, AMc asserted counterclaims for libel, tortious interference, fraud, and breach of contract.[12] The operative complaint and

[10] Compl. ¶¶ 40-56, *AMc v. Stinchfield*, 3:19-cv-03016-X (N.D. Tex. Dec. 20, 2019), ECF No. 1.

[11] Joint Status Report Pursuant to Court Order Dated Sept. 15, 2020 (ECF No. 168) at 1-3, *NRA v. AMc, et al.*, 3:19-cv-02074-G (N.D. Tex. Oct. 5, 2020), ECF No. 172.

[12] *Id.*

counterclaims raise several significant and unique factual questions including, *inter alia*, NRATV's performance, valuation, and analytics and damages arising from the alleged breach of the AMc-NRA Services Agreement.

The Dell-Aquila Action is a putative class action pending in the Middle District of Tennessee. The parties have been engaged in pretrial motion practice for a full year now, which has winnowed out several claims and defendants. The only surviving claim is a single common-law claim of fraud asserted against the NRA under Tennessee law.[13] The crux of the plaintiffs' claim is that the NRA solicited their financial support by falsely representing that their donations would be spent in furtherance of the NRA's core mission, only to then spend their donations on things unrelated to the NRA's core mission.[14] This case will turn on individualized facts, such as whether the NRA knowingly or recklessly made false representations; whether the plaintiffs reasonably relied on those representations; and whether the plaintiffs suffered an injury as a result. *See In Re: Narconin Drug Rehabilitation Marketing, Sales Practices, & Products Liab. Lit.*, 84 F.Supp.3d 1367 (J.P.M.L. 2015) (consolidation inappropriate where "actions are primarily fraud actions and will involve significant case-specific facts").

The NDNY Action presents a wholly different issue: whether the New York Attorney General—by investigating the NRA and commencing the NYAG Enforcement Action—violated the NRA's constitutional rights under the United States and New York Constitutions. Specifically, the NRA alleges the Attorney General conducted an "unconstitutional, retaliatory investigation" of the NRA as a "pretext for her goal of depriving the NRA, its members, and its

[13] Court Memorandum, *Dell'Aquila v. LaPierre, et al.*, 3:19-cv-00679 (M.D. Tenn. Sept. 30, 2020), ECF No. 63.

[14] Second Am. Compl. ¶¶ 9-54, *Dell'Aquila v. LaPierre, et al.*, 3:19-cv-00679 (M.D. Tenn. Jan. 22, 2020), ECF No. 43.

donors of their constitutional rights" under the First and Second Amendments. [15] The NRA further alleges that the Attorney General's decision to commence a state enforcement proceeding against it constituted selective enforcement of New York's not-for-profit law in violation of the Equal Protection Clause of the Fourteenth Amendment and Article I, Section 11 of the New York State Constitution. The Attorney General is not a party to any of the other actions at issue.

The Stinchfield, AMc, and NDNY Actions involve different individual defendants, raising distinct fact questions about their alleged liability that are ill-suited for centralization. *See, e.g.*, *In re Brazilian Prosthetic Device Bribery Litig.*, 283 F. Supp. 3d 1381, 1382 (J.P.M.L. 2017) (observing that when "[d]ifferent defendants are sued in each action," the factual issues "will be primarily case-specific," minimizing the risk of overlapping discovery or inconsistent pretrial rulings).

The Panel has found that "[c]ommon questions of fact . . . do not predominate" where unique factual and legal issues exist as to each defendant, resulting in "individualized discovery and legal issues." *In re Mortg. Lender Force-Placed Ins. Litig.*, 895 F. Supp. 2d 1352, 1353 (J.P.M.L. 2012). Because individual issues will predominate over any common issues, transfer is not appropriate in such cases. *See In re Proton-Pump Inhibitor Products. Liab. Litig.*, MDL No. 2757, 2017 WL 475581, at *2 (J.P.M.L. Feb. 2, 2017) (denying motion to transfer where "a significant amount of the discovery in these actions appears almost certain to be defendant-specific"); *In re Victoria's Secret Undergarments/Intimate Apparel Products Liab. Litig.*, 626 F. Supp. 2d 1349, 1350 (J.P.M.L. 2009) (denying motion to transfer where unique factual issues "overshadowed" common ones); *In re Tyson Foods, Inc., Meat Processing Facilities FLSA*

[15] NRA's Am. Compl. & Jury Demand at 3-4; ¶ 30, *NRA v. James*, 1:20-CV-00889-MAD-TWD (N.D.N.Y. Oct. 9, 2020), ECF No. 13.

Litig., 581 F. Supp. 2d 1374, 1375 (J.P.M.L. 2008) (rejecting transfer motion despite overlap in legal theories because discovery was "likely to be plant-specific and proceed on a plant-by-plant basis," making the focus about events in individual states).

In sum, "common questions of fact . . . will [not] predominate over individual questions of fact present in each action," and consolidation would thus "neither serve the convenience of the parties and witnesses nor further the just and efficient conduct of the litigation." *Rely Tampon*, 533 F. Supp. at 1347. Further, the actions share no "unusually complex questions of fact" that could justify transfer when so few cases are at issue. *Iowa Beef Packers*, 309 F. Supp. at 1260.

C. Transfer is unwarranted given the procedural posture of the actions.

This Panel has declined to consolidate actions even where there are common questions of fact when "review of the entire record . . . persuaded [it]" that the actions were "expeditiously [proceeding toward] trial or disposition by other means." *In re G. D. Searle & Co. "Copper 7" IUD Products Liab. Copper 7*, 483 F. Supp. 1343, 1345 (J.P.M.L. 1980); *see also In re Boeing Co. Employment Practices Litig. (No. II)*, 293 F. Supp. 2d 1382, 1383 (J.P.M.L. 2003) (denying consolidation where it "appear[ed] that [one of three] action[s] [was] moving forward rapidly"). In this case, the procedural posture of the actions at issue make transfer unnecessary and unwarranted.

In two of the four actions at issue, dispositive motions will soon be filed in the court of original jurisdiction, and transfer is unlikely to hasten the just and efficient resolution of either case. In the Stinchfield Action, fact discovery is set to close next month, and the deadline to move for summary judgment is January 18, 2021.[16] And in the NDNY Action, pursuant to a

[16] Order Extending Deadlines, *AMc v. Stinchfield*, 3:19-cv-03016-X (N.D. Tex. Oct. 16, 2020),

court order, the Attorney General will move to dismiss on several dispositive grounds on November 20, 2020.

The posture of these pending proceedings weighs against transfer. As this Panel has noted, principles of comity counsel against transferring matters when a dispositive motion is pending:

> On principles of comity, where appropriate, the Panel has in the past timed its actions and constructed its orders in a manner which will permit the transferor courts . . . to reach timely decisions on particular issues without abrupt, disconcerting, untimely or inappropriate orders of transfer by the Panel. This policy of comity has been followed in the past and will be followed in the future by the panel.

In re Plumbing Fixture Cases, 298 F. Supp. 484, 496 (J.P.M.L. 1968). Accordingly, the Panel is "reluctant to transfer any action that has an important motion under submission with a court." *In re L. E. Lay & Co. Antitrust Litig.*, 391 F. Supp. 1054, 1056 (J.P.M.L. 1975); *see also Glasstech, Inc. v. AB Kyro OY*, 769 F.2d 1574, 1577 n.1 (Fed. Cir. 1985) ("[T]he stated policy of the Panel is to consider whether motions are pending in deciding whether and when to transfer a case."). The Panel should follow that policy here. *See, e.g., In re ATM Interchange Fee Antitrust Litig.*, 350 F. Supp. 2d 1361, 1362-63 (J.P.M.L. 2004) (denying consolidation where "[t]he multidistrict character of the five actions [at issue] . . . may be eliminated by district court action on defendants' motions pending in the [district court]"); *In re: Droplets, Inc. Patent Lit.*, 908 F. Supp. 2d 1377 (J.P.M.L. 2012) (denying centralization where "a potentially case-dispositive motion" was pending in an action at issue that, if granted, would leave only "five actions … pending in only two districts, further weakening the case for Section 1407 centralization");

ECF No. 32.

Boeing, 293 F. Supp. 2d at 1383 (denying consolidation where the Panel believed that "a motion for summary judgment may be filed shortly" in one of three actions).

In the other two actions, dispositive motion practice has weeded out claims and reduced the number of parties, and there is nothing in the record to suggest consolidation is necessary for these cases to proceed expeditiously. In the Dell'Aquila Action, motion practice has narrowed the scope of litigation to a single common-law claim of fraud asserted against one defendant. And in the Ackerman action, fact discovery is well under way, with over 25,000 pages of document discovery having already been exchanged between the parties.

The actions, therefore, are "expeditiously" proceeding toward disposition, and principles of comity and convenience weigh heavily against consolidation.

It bears noting that the NRA's references to "other, related actions that are likely to be removed to federal court" are irrelevant and do not lend support to its transfer motion. As this Panel has consistently observed, "the mere possibility of additional actions does not support centralization[.]" *In re Hotel Indus. Sex Trafficking Litig.*, 433 F. Supp. 3d 1353, 1356 (J.P.M.L. 2020). *Accord In re Camp Lejeune, N.C., Water Contamination Litig. (No. II)*, 396 F. Supp. 3d 1368, 1369 (J.P.M.L. 2019); *see also In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Products Liab. Litig.*, 959 F.Supp.2d 1375, 1376 (J.P.M.L. 2013) (The Panel is "disinclined to take into account the mere possibility of future filings in our centralization calculus." (internal quotation marks and citation omitted)).

D. Other factors counsel against consolidation.

The NRA's failure to establish significant common questions of fact is sufficient grounds to deny transfer. But all other relevant factors likewise counsel against consolidation. Transfer and consolidation of these proceedings would neither increase "the convenience of parties and

witnesses" nor "promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. Therefore, there is no justification for transfer and consolidation of these four actions.

The NRA raises the specter of inconsistent rulings and duplicative discovery absent consolidation, but these concerns are unfounded. As this Panel has recognized, the potential for inconsistent pretrial rulings and duplicative discovery is greatly diminished where, as here, the number of actions is minimal, the laws involved are distinct among the actions, and all but one of the actions "are brought on an individual (not a class) basis against different defendants." *Brazilian Prosthetic Device Bribery Litig.*, 283 F. Supp. 3d at 1382; *see also In re: Nutek Baby Wipes Prod. Liab. Litig.*, 96 F. Supp. 3d 1373, 1374 (J.P.M.L. 2015) (denying centralization of three actions in two districts given"[h]aving so few counsel involved and only one class alleged greatly diminishes the risk of inconsistent pretrial rulings").

Transfer and consolidation "'under Section 1407 should be the last solution after considered review of all other options.'" *In re: Six Flags*, 289 F. Supp. 3d at 1345 (quoting *In re: Best Buy Co., Inc., Cal. Song-Beverly Credit Card Act Litig.*, 804 F. Supp. 2d 1376, 1378 (J.P.M.L. 2011)). Here, the NRA has not addressed any possible alternatives to consolidation, which is a further reason to deny its motion.

E. No single district is most convenient for the parties and witnesses.

Transfer and consolidation of these actions in a single district will not increase the convenience for the parties or witnesses. None of the parties in the NDNY action or Dell'Aquila Action reside or have offices located in Texas,[17] and the NRA's claim that transferring these actions to Texas "would eliminate duplicative discovery and … and conserve the resources of the

[17] The NRA is a New York not-for-profit charitable organization headquartered in Fairfax, Virginia. AMc's principal place of business is in Oklahoma City, Oklahoma. The four plaintiffs in the Dell'Aquila Action reside in Kansas, Arizona, and Tennessee.

parties, their counsel, and the judiciary"[18] is simply not true. For example, centralization would require counsel for the New York Attorney General—who has been named as a defendant in just one suit—to travel to a distant location for MDL proceedings. The Attorney General would certainly face substantially increased litigation costs resulting from participating in MDL proceedings in Texas, as compared to expeditiously litigating the NDNY Action on an individual basis near where she and her counsel are located and where the NRA is incorporated.

Nor would transfer serve the convenience of witnesses. Even by the NRA's own tally,[19] the vast majority of potential witnesses identified by the NRA are located outside of Texas. And if, as the NRA claims, the potential witnesses in these actions "are numerous and scattered across the country," then transfer and consolidation in a single federal district court will not result in any greater convenience to them or their counsel.

The NRA argues that "[a]bsent transfer, most of the witnesses … would face the prospect of being separately deposed in each of the actions." As set forth above, the risk of duplicative discovery is low given the disparate legal claims and distinct factual issues present in these four actions. But regardless, this is an issue that can readily be managed on an individual case basis through procedural avenues short of centralization. This is especially so here, where the NRA is represented by common counsel, and the number of actions is minimal.

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[18] NRA Br. at 12-13.

[19] Of the 151 witnesses the NRA identifies as "likely to possess documents or knowledge relevant" to one or more of the actions, 116 are located outside the State of Texas. (Dkt. 1-3 at ¶ 9.) The same holds true for the "numerous NRA employees and current and former Board members" whom the NRA believes "possess knowledge and/or records relevant to all four Actions," as the NRA is a New York not-for-profit charitable organization headquartered in Virginia.

CONCLUSION

Because consolidation will not serve the convenience of the parties and witnesses or further the just and efficient conduct of this litigation, *see* 28 U.S.C. § 1407(a), the NRA's motion should be denied.

Dated: November 12, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2020, a true and correct copy of the foregoing was electronically served via the Court's electronic case filing system upon all counsel of record.

Monica A. Connell

Exhibit E

NRA's Amended Complaint and Jury Demand in *NRA v. North*, Index No. 903843-20 (Sup. Ct. Albany Cnty.)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,	:	
Plaintiff,	:	Index # 903843-20
-against-	:	Jury Trial Demanded
OLIVER NORTH,	:	
Defendant.	:	Hon. Richard Platkin

AMENDED COMPLAINT AND JURY DEMAND

Plaintiff National Rifle Association of America ("Plaintiff," the "NRA," or the "Association") files this Amended Complaint and Jury Demand against defendant Oliver North ("Defendant" or "North"), upon personal knowledge as to all facts regarding itself and upon information and belief as to others, as follows:

I.

PRELIMINARY STATEMENT

1. Like many nationally recognized 501(c)(4) organizations, the NRA operates pursuant to Bylaws that govern the conduct of the Association, its members, its officers, and its 76-person Board of Directors.[1] The NRA has grown to approximately five million members since it was founded almost 150 years ago due, in significant measure, to the principled leadership of its Board of Directors and its strict adherence to the policies that regulate member conduct.

2. Under the NRA's Bylaws (the "Bylaws"), a member in good standing of the NRA is entitled to lodge with the Secretary of the NRA a complaint seeking the expulsion or other

[1] The NRA's Bylaws are attached to this Complaint as Exhibit A.

discipline of another member for good cause, such as conduct contrary to or in violation of the Bylaws. Under the Bylaws, a complaint must be verified, and any subsequent proceedings are confidential. When a complaint is filed, it is referred to the NRA's Ethics Committee, which, after considering it, must determine whether the charges in the complaint, if proved, would warrant suspension, expulsion, or other discipline, or should be dismissed.

3. If the Ethics Committee determines that the charges, if proved, would warrant suspension, expulsion, or other discipline, the accused member is afforded the opportunity to request a hearing, an impartial forum where testimony must be under oath and the accused member may be represented by counsel to defend his or her conduct and maintain their membership status. As designed, this process guarantees that rights and responsibilities are afforded to the NRA, any complaining member, and any members who are the subject of disciplinary proceedings.

4. Following such a hearing , the NRA's Hearing Board then prepares a recommended determination on whether good cause exists for expulsion from NRA membership, if another form of discipline is appropriate, or if the member should remain in good standing with the organization.

5. The full Board of Directors then considers the Hearing Board's recommendation and votes to either dismiss the charges or, by three-quarters vote, order the accused member's expulsion, suspension, or other discipline.

6. On August 5, 2019, NRA life member Thomas J. King, who also serves as the Executive Director and Chairman of the New York State Rifle and Pistol Association,[2] filed with

[2] The New York State Rifle and Pistol Association (or "NYSRPA) is an official NRA-affiliated State Association which is the largest and oldest Second Amendment advocacy organization in New York.

the NRA's Secretary a sworn complaint against NRA member North (the "Disciplinary Complaint"). The Disciplinary Complaint seeks the expulsion of North from the NRA's membership pursuant to the Bylaws.

7. Although North has been on notice of the Disciplinary Complaint since September 2019, nearly eight months later, on May 18, 2020, North threatened to sue the NRA—under Section 715-B of New York's Not-For-Profit Corporation Law—if the proceedings initiated by the Disciplinary Complaint move forward as contemplated by the NRA's Bylaws. Notably, the first time North claimed to be a whistleblower was on October 25, 2019—in a letter from his counsel to the NRA after the Honorable Joel M. Cohen had ruled just fifteen days earlier that North was not entitled to the indemnification he sought from the NRA and noted in passing that North did not argue that he was a "whistleblower."[3] Six days later, on October 31, 2019, North through counsel demanded a hearing in the disciplinary proceedings and made no mention of his purported status as a "whistleblower."

8. On May 12, 2020, however, in obvious anticipation of an adverse outcome and because North was apparently unwilling to defend his actions or conduct, North threatened the NRA based on a contrived allegation that he is a whistleblower and that, by being subjected to the ordinary process prescribed by the NRA's Bylaws for the adjudication of one member's complaint against another, the NRA is retaliating against North. To be a whistleblower, North must have made good faith reports of alleged illegalities or improprieties at the NRA that he reasonably believed were true, which he did not do. In any case, North cannot rely on New York's whistleblower statute to prevent the disciplinary proceedings from moving forward.

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[3] Transcript of hearing before the Hon. Joel M. Cohen in NRA v. North, Index No. 653577/2019 (October 10, 2019) (attached as Exhibit B).

9. In order to dispel any notion that North's continued membership in the Association is not governed by its Bylaws, the NRA seeks a declaratory judgment that an outcome of disciplinary proceedings conducted in conformity with the Bylaws is binding on the NRA, King, and North.

10. In addition, for the reasons set forth below, the NRA seeks a declaration that North's refusal in June 2019 to resign from his employment at Ackerman McQueen in order to remedy a situation that the NRA Board's Audit Committee had determined to be an irreconcilable conflict of interest was an election by North to forfeit his NRA Board membership.

11. Finally, the NRA seeks to hold North responsible for the harm he and others have caused to the NRA by breaching their fiduciary duties to the Association. As an officer and a director, North owed to the NRA an inflexible duty of fidelity, which bars blatant self-dealing and also required him to avoid situations in which personal interest possibly conflicts with the interest of the NRA. That North did not do. Specifically, for months in 2018 and 2019, North defied the NRA's compliance efforts and refused to make necessary disclosures to the Association about his lucrative contract with a large NRA vendor (under which as the NRA later learned North failed to perform).[4] And, when the NRA stood firm in its demand for transparency, North resorted to drastic measures: he led an unsuccessful effort to oust the NRA's Executive Vice President—who led the compliance effort—from his position as the EVP. Through his actions, albeit ultimately unsuccessful, North blatantly breached his fiduciary duties to the NRA—and duties imposed on

[4] As set forth below, although the vendor had advised the NRA that it had contracted with North to host "[t]welve feature length episodes" of a digital documentary series, to be produced "during each 12 months of a three-year [a]greement," it became evident that eleven months into North's engagement only three episodes were available, and none are "feature-length."

him by New York law. In the process, he also conspired with other unfaithful fiduciaries, while causing substantial reputational and economic harm to the NRA. In this action, the NRA seeks to hold North for the lasting harm he and his co-conspirators caused.

II.

JURISDICTION AND VENUE

12. The Court has personal jurisdiction over North pursuant to N.Y. Civil Practice Law and Rules ("CPLR") Sections 302(a)(1) and 302(a)(3) because (i) North is a member, has served several terms as a member of the NRA's Board of Directors, and is a former officer of the NRA; (ii) the NRA is a not-for-profit corporation organized under the laws of New York; (iii) North threatened to sue the NRA under Section 715-B of New York's Not-For-Profit Corporation Law ("NY NPCL"), and (iv) North is alleged to have committed tortious acts causing injury to person and property within New York, should have reasonably expected his tortious acts to have consequences in New York, and derives substantial revenue from interstate or international commerce.

13. The Court also has personal jurisdiction over North pursuant to New York NPCL Section 309 ("Section 309"). Under that statute, "[a] person, by becoming a director, officer, key person or agent of a corporation is subject to the personal jurisdiction of the supreme court of the state of New York." North served as an officer, director, key person, and agent of the NRA—a "corporation" within the meaning of Section 309.

14. Venue is proper in Albany County pursuant to CPLR §§ 503(a) and 509 because the NRA designates Albany County as the place of trial and the NRA is a not-for-profit corporation organized under the laws of New York.

III.

PARTIES

15. Plaintiff National Rifle Association of America is a corporation organized under the laws of New York with its principal place of business in Fairfax, Virginia.

16. Defendant North is an individual who resides in Virginia. He is a member of the NRA, has served several terms as a member of the NRA's Board of Directors, and is a former officer of the NRA.

IV.

STATEMENT OF RELEVANT FACTS

A. Plaintiff National Rifle Association Of America

17. Plaintiff National Rifle Association of America is a not-for-profit corporation organized under the laws of New York. The NRA is America's leading provider of gun-safety and marksmanship education for civilians and law enforcement. It is also the foremost defender of the Second Amendment to the United States Constitution. A 501(c)(4) tax exempt organization, the NRA has approximately five million members—and its programs reach many millions more. It was founded in 1871 and operates pursuant to its Bylaws, which specify, among other things, membership eligibility, procedures for admission to membership, privileges, rights, and duties of members, and procedures for voluntary and involuntary terminations of membership and disciplinary proceedings.

B. Defendant Oliver North

18. Lieutenant Colonel Oliver North (Ret.) is an individual who resides in Virginia and is a member of the NRA. He also was an employee of Ackerman McQueen (the NRA's former advertising and communications firm) and has served several terms as a member of the NRA's

Board of Directors. For a certain time period in 2018 and 2019, he also served as the NRA's President. Under the Bylaws, the NRA's officers include, among others, its president, and North therefore was also an NRA officer. On or about August 5, 2019, Tom King, a member of the NRA filed a complaint against North seeking expulsion of North from the NRA's membership pursuant to Article III Section 11 of the NRA's Bylaws. In May 2020, North threatened to sue the NRA if the Association continues to move forward with the resulting disciplinary proceedings even though the NRA was simply following the steps contemplated in its Bylaws.

C. The NRA's Bylaws Set Forth The Rights And Responsibilities Of The Organization – And Those It Serves, Including Procedures For "Involuntary Termination Of Membership And Disciplinary Proceedings"

a. Eligibility for Becoming a Member

19. Article III, Section 1 of the NRA's Bylaws defines eligibility terms for becoming a member of the NRA. Specifically, that provision states: "Any citizen of the United States who is and while he remains of good repute, who subscribes to the objectives and purposes of the Association [which are separately set forth in Article II of the Bylaws] . . . shall be eligible to be a member of the Association, provided that citizens of foreign nations and organizations composed in whole or in major part of citizens of foreign nations may be admitted to membership as provided in Sections 3 and 4 of this Article." Article III, Section 1 also states: "No individual who is a member of, and no organization composed in whole or in part of individuals who are members of, any organization or group having as its purpose or one of its purposes the overthrow by force and violence of the Government of the United States or any of its political subdivisions shall be eligible for membership."

b. Procedures for Becoming a Member.

20. Further, Article III, Section 5 of the Bylaws specifies the procedure for becoming an NRA member as follows: "An appropriate card, certificate or insignia shall be issued to each member as evidence of membership. Any applicant for . . . membership . . . may be refused admission . . . by the Board of Directors for any reason deemed by it to be sufficient."

c. NRA Members' Rights and Privileges.

21. Article III, Section 6 of the Bylaws defines NRA members' rights and privileges. For example, it states: "All members shall have the privilege of requesting and receiving from the Association such advice and assistance as may be currently available concerning small arms, ammunition and accessories, range construction, and organization and management of clubs and competitions." As another example, the Bylaws state that "all . . . members of the Association shall be entitled to a subscription to the official journal as a privilege of membership." Under the Bylaws, "[a]ll members shall [also] have the privilege to attend and be heard at all official meetings of members, and shall have the right to attend all meetings of the Board of Directors, Executive Committee, and standing and special committees of the Association, except during executive sessions thereof."

d. Duties of NRA Members.

22. Article III, Section 9 of the Bylaws states that the duties of NRA members are "to assist in every feasible manner in promoting the objectives of the Association as set forth in Article II of these Bylaws and to act at all times and in every matter in a manner befitting a sportsman and a good citizen."

e. Purposes and Objectives of the NRA.

23. Article II of the Bylaws, in turn, defines the purposes and objectives of the Association as follows: "1. To protect and defend the Constitution of the United States, especially with reference to the God-given inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, collect, exhibit, transport, carry, transfer ownership of, and enjoy the right to use, keep and bear arms, in order that the people may exercise their individual rights of self-preservation and defense of family, person, and property, and to serve in the militia of all law-abiding men and women for the defense of the Republic and the individual liberty of the citizens of our communities, our states and our great nation; 2. To promote public safety, law and order, and the national defense; 3. To train members of law enforcement agencies, the armed forces, the National Guard, the militia, and people of good repute in marksmanship and in the safe handling and efficient use of small arms; 4. To foster, promote and support the shooting sports, including the advancement of amateur and junior competitions in marksmanship at the local, state, regional, national, international, and Olympic levels; 5. To promote hunter safety, and to promote and defend hunting as a shooting sport, for subsistence, and as a viable and necessary method of fostering the propagation, growth and conservation, and wise use of our renewable wildlife resources." Article II of the Bylaws also states: "The Association may take all actions necessary and proper in the furtherance of these purposes and objectives."

f. Voluntary Termination of Membership.

24. Article III, Section 10 of the Bylaws sets forth the procedures for voluntary termination of membership: "Any . . . member may terminate his or her membership at any time by a resignation in writing sent by first class United States mail to the Secretary of the Association."

g. Involuntary Termination of Membership and Disciplinary Proceedings.

25. Finally, Article III, Section 11 of the Bylaws, entitled "Involuntary Termination of Membership and Disciplinary Proceedings," sets forth procedures for expulsion, suspension, and discipline of NRA members. Those procedures consist of several formal stages, including (i) a signed and notarized complaint by a member in good standing against an accused member seeking expulsion, suspension, or discipline for "good cause," including but not limited to, several examples set forth in the Bylaws; (ii) a transmittal of the complaint to the NRA's Ethics Committee; (iii) the Ethics Committee's determination whether to dismiss the charges or recommend expulsion, suspension, or discipline; (iv) notice to the accused member and the accused member's election whether to demand a hearing on the charges or consent to the action recommended by the Ethics Committee; (v) assuming the accused member elects to request a hearing, a hearing before the Hearing Board, a panel of three members of the NRA's Committee on Hearings with no personal interest in the proceedings elected by members of the Committee on Hearings; (vi) a post-hearing recommendation by the Hearing Board to the NRA's full Board of Directors; and (vii) a vote by the full Board of Directors based on the Hearing Board's recommendation on whether to dismiss the charges against the accused member or, by three-quarters vote, order the accused member's expulsion, suspension or other discipline.

26. Specifically, Article III, Section 11(b) of the Bylaws entitled "Discipline, Suspension and Expulsion," states: "Any individual . . . member may be disciplined, suspended, or expelled for good cause, including but not limited to, any conduct as a member that is contrary to or in violation of the Bylaws of the Association; for . . . without limitation, conduct disruptive of the orderly operation of the Association in pursuit of its goals; violating one's obligation of

loyalty to the Association and its objectives; or willfully making false statements or misrepresentations about the Association or its representatives."

27. Article III Section 11(d), "Procedure for Discipline, Suspension, or Expulsion," states that "[a]ny member of the Association in good standing may file a complaint with the Secretary of the Association against any individual . . . member."

28. It goes on to state: "The complaint must be in writing, notarized, and signed by the complainant. It must distinctly describe the cause for which the member's discipline, suspension, or expulsion is sought. No complaint shall be filed or considered with respect to the same facts or transactions as an earlier filed complaint. . . . [T]he complaint shall be based solely on facts, events, and transactions that shall have occurred not more than three years prior to the filing of the complaint. All exhibits referred to in the complaint shall accompany the complaint."

29. After a complaint is filed with the NRA's Secretary, the Secretary "shall transmit the complaint to the [NRA's] Ethics Committee for consideration at its next meeting." Art. III Section 11. At that meeting, "The Ethics Committee shall determine whether the charges if proved [at a hearing] would warrant suspension, expulsion, or other discipline, or should be dismissed." *Id.*

30. Under the Bylaws, "[i]f the Ethics Committee determines not to dismiss the charges, it shall propose a resolution providing for suspension, expulsion, or other discipline as the appropriate remedy in the event the charges are proved, or a hearing is not requested." *Id.*

31. The NRA Secretary then must inform the accused member (i) of the proposed suspension, expulsion, or other discipline by mailing him or her a copy of the Ethics Committee's resolution, enclosing a copy of the complaint, any exhibits, and the Bylaws of the Association; and (ii) of the right of the accused member to a hearing as provided for under the Bylaws. *Id.* The

Secretary must also inform the accused member that "unless the member requests a hearing in writing received by the Secretary within forty-five days after the date of such notice, the proposed resolution will be submitted to the [NRA's] Board of Directors for adoption."

32. The Bylaws also provide: "If a hearing is timely requested [by the accused member], the Secretary shall immediately notify the Chairman of the Committee on Hearings." Under Section 12 of Article III of the Bylaws, "[t]he Committee on Hearings shall be appointed by the President and composed of nine members entitled to vote, no more than six of whom shall be members of the Board of Directors or Executive Council."[5] The President is an Officer of the NRA. She is nominated for the position by the Nominating Committee of the NRA's Board and is elected by the Board of Directors. Bylaws Art. V. Section 1 ("The President . . . shall be elected annually by and from the Board of Directors.") Members of the Board of Directors, in turn, are elected by the NRA's members. Bylaws Art. VIII Section 2(a) ("Directors shall be elected from among the lifetime members of the Association.").

33. Article III Section 12 of the Bylaws, in turn, states that a Hearing Board composed of three hearing officers shall be elected by and from the membership of the Committee on Hearings, none of whom shall have any personal interest in the proceeding. Section 12 also states: "No more than two such hearing officers may be members of the Board of Directors or the Executive Council. The hearing officers shall choose a chairman from among their membership. The Hearing Board shall hold a hearing upon at least sixty days' notice to the complainant and the accused."

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[5] The Executive Council is a non-voting advisory body to the NRA Board of Directors. Executive Council members are elected for life by the Board. Bylaws Art. VII. Currently and historically, the Executive Council consists of past NRA Presidents and other former officers.

34. Under the Bylaws, at the hearing, the accused member has the right to be represented by counsel. NRA Bylaws, Article III Section 11. The Chairman of the Hearing Board shall preside at the hearing and may rule on all procedural matters. *Id.* Further, no testimony is accepted unless it is provided "under oath." *Id.* In addition, as a matter of practice, the Hearing Board Chairperson can order additional procedures for the hearing to ensure that the hearing allows for the presentation of all relevant evidence and affords the accused member important procedural rights, including the right to call witnesses in his defense and to cross examine witnesses against him.

35. In addition, under the Bylaws, "[a]t the conclusion of the hearing, the Hearing Board shall determine its recommendation to the Board of Directors." Thereafter, "[u]pon receiving the recommendation of the Hearing Board, . . . , the Board of Directors [of the NRA], in Executive Session, shall consider the submission at its next meeting and [i] may dismiss the charges or, [ii] by a three-quarters vote, order the [a] expulsion, [b] suspension or [c] other discipline of the accused member."

36. Finally, under the Bylaws, "All proceedings under [Section 11 of Article III] shall be confidential."

D. As an Officer and Board Member of the Association, North Owed It Fiduciary and Statutory Duties

37. Officers and Directors of the NRA owe the organization fiduciary duties, including duties of good faith, candor, fair dealing, and loyalty. North served as an Officer and a Director of the NRA.

38. In addition, under New York NPCL, "Directors, officers and key persons [must] discharge the duties of their respective positions in good faith and with the care an ordinarily

prudent person in a like position would exercise under similar circumstances." NPCL § 717(a). North therefore had an obligation to discharge his duties to the NRA in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

E. Since May 2018, North Violated His Duties to the NRA and Demonstrated Disloyalty to the NRA and Its Objectives.

39. As alleged elsewhere in this Complaint, on August 5, 2019, NRA life member King filed with the NRA's Secretary a sworn complaint against North. In his complaint, King seeks expulsion of North from the NRA's membership.

40. The disciplinary proceedings against North—as against any other accused members—are confidential. Unfortunately, much about North's demise as a leader on the NRA's Board and the context in which it occurred—that is, the NRA's relationship with and severance of ties with North's employer, Ackerman McQueen—has been reported in the news and appeared in public court filings. In addition, when he filed an Answer to the Complaint, he attached a copy of King's Complaint to his Answer.[6]

41. Since May 2018, North has been employed by Ackerman. Until April 2019, however, the details of his contract with Ackerman were concealed by him and Ackerman from the NRA. This was problematic and created undue exposure for the NRA because Ackerman was a major vendor of the NRA, North was hired by Ackerman to host a television show for which

[6] The Bylaws contemplate that any member may file a complaint. While a member aggrieved with another member might reasonably be expected to disclose this fact–the proceedings that ensue once the complaint is filed are confidential. The NRA kept the content of the complaint, and subsequent actions relating to the complaint, completely confidential until North elected not to. Specifically, although the NRA offered to join in North's motion for an order sealing portions of the Complaint in this action, North through counsel stated that he intended to seek no such relief and that the NRA should file the Complaint unredacted, which the NRA then did. Since then, North filed a copy of King's complaint against him as an exhibit to his Answer. See NYSCEF Dkt No. 15 at page labeled "LtCol North Submission 148" et seq,

Ackerman was paid by the NRA, and North, at the same time, served as the NRA's Director and, in 2018/2019, as its President. Under the NRA's Conflict of Interests Policy, commercial transactions between a Director or an officer, on the one hand, and the NRA (or, under certain circumstances, a vendor it pays), on the other hand, must be reviewed and approved by the NRA's Board of Directors—or a designated committee of the Board—to ensure that the terms of the transaction serve the best interests of the NRA.

42. In addition, New York law requires that the NRA Board of Directors, or an authorized committee thereof, review and approve "any transaction, agreement, or any other arrangement in which [a director or officer of the NRA] has a financial interest and in which the [NRA or an affiliate] is a participant." *See* New York Not-For-Profit Corporation Law Section 715. Of course, a board of directors may define additional restrictions on transactions giving rise to potential conflicts of interest; and, consistent with best practices, the NRA's Conflict of Interest Policy requires disclosure of contracts between NRA leadership and vendors, like Ackerman, that receive funds from the NRA.

43. As a result, the contract between Ackerman and North was subject to such review. As part of their fiduciary duties to the NRA and their statutory duties under New York law, its Directors and officers, therefore, must fully disclose to the NRA the terms of any such transaction to enable such a review and to ensure that the NRA complies with applicable laws as well as internal policies. North had an obligation to disclose his contract with Ackerman, knew of the obligation, but—for months—did not disclose the contract.

44. Aware that North entered into a contract with Ackerman (the "North Contract"), the NRA diligently sought to comply with its obligations concerning analysis and formal approval of the North Contract. During September 2018, the Audit Committee of the NRA Board of

Directors reviewed a purported summary of the material terms of the North Contract and ratified the relationship pursuant to New York law–subject to carefully drawn provisos designed to avoid any conflicts of interest.

45. When the Audit Committee enacted that September 2018 resolution, it was assured that the NRA's counsel would review the North Contract in full. Unfortunately, that turned out to be false, at least for the duration of 2018, as both Ackerman and North, in breach of their duties to the NRA, stonewalled the NRA and refused to provide the North Contract. Thereafter, a game of "cat and mouse" persisted for nearly six months.

46. Eventually, in February 2019, Ackerman acceded to a brief, circumscribed, "live" review of the North Contract (but not to retention of any copies of the document) by the General Counsel of the NRA. This review revealed that the previous "summary" of the North Contract, which had been provided to the Audit Committee the previous September, was inaccurate. Among other things, the NRA's brief review of the North Contract revealed that: (i) North was not a third-party contractor of Ackerman but a full-time employee with fiduciary duties to Ackerman that supersede his duties to the NRA; (ii) the prior disclosures about the costs borne by the NRA in connection with the North Contract were not accurate; and (iii) the contract imposed obligations on North that prevent him from communicating fully and honestly with other NRA fiduciaries about Ackerman. Against the backdrop of escalating concerns about Ackerman's own failure to comply with its obligations under its Services Agreement with the NRA and applicable law, the NRA became determined to resolve these issues.

47. By letters dated March 25 and 26, 2019, the NRA's General Counsel sought additional visibility regarding the North Contract and related business arrangements, as well as copies of other material business records pursuant to the Services Agreement with Ackerman.

48. By this point, the NRA had been requesting North's contract with Ackerman for more than six months. However, North continued to stonewall the NRA. Although North entered into this contract on or about May 15, 2018, he did not submit a copy to the NRA until April 2019.

49. The disclosure confirmed that North was an employee of Ackerman—not an independent contractor of Ackerman as the NRA had previously been led to believe. This means that during all that time, unbeknownst to the NRA, North was a fiduciary of Ackerman. While resisting requests for full disclosure and refusing cooperation with the NRA's effort to comply with the laws applicable to a non-profit and the NRA's internal policies, North conspired with his employer and others to manufacture allegations against the outside counsel for the NRA which was directing the NRA's compliance efforts, including the effort to gain greater transparency from Ackerman and North.

50. Under the guise of being an "independent" director, in or around March 2019, North wrote a letter to the NRA's Audit Committee raising purported concerns about the amount of the law firm's fees—a measure designed to distract from scrutiny of North and his employer, Ackerman. This is an act he now claims entitles him to whistleblower protections. In reality, any outside counsel of the NRA works under the supervision of the Executive Vice President and CEO, coordinates closely with the Office of the General Counsel and Chief Financial Officer, and collaborates with various committees of the NRA's Board of Directors. As was known to North, the relationship with outside counsel had been vetted and approved.

51. Subsequent to the revelations regarding North being a fiduciary of Ackerman, another bombshell revelation came to light—neither he nor Ackerman were meeting their obligations in connection with his employment agreement with Ackerman. Although Ackerman had advised the NRA that it had contracted with North to host "[t]welve feature length episodes"

of a digital documentary series, to be produced "during each 12 months of a three-year [a]greement," it became evident that eleven months into North's engagement only three episodes were available, and none are "feature-length."

52. Although North and Ackerman produced only a fraction of the "American Heroes" episodes for which Ackerman and he were paid millions of dollars, neither North nor Ackerman has provided any financial reimbursement to the NRA. Nor did North facilitate a report from Ackerman about the production costs it charged the NRA for the failed series despite it having been requested.

53. In addition, in April 2019, North, in conspiracy with others, resorted to drastic behavior: an extortion scheme, the objective of which was to enrich himself and protect his employer, Ackerman, at the expense of the NRA.

54. Specifically, on or about April 24, 2019, North contacted by telephone an aide of NRA Executive Vice President and CEO Wayne LaPierre and relayed the contents of a letter that Ackerman purportedly planned to disseminate. On the telephone call with the aide, North described a laundry list of misleading, malicious allegations that the letter would contain—the centerpiece of a reputational attack meant to harm the Association, Wayne LaPierre, and senior members of the NRA leadership team. Notably, according to North, the letter would (selectively) disclose travel and related expense records—the same types of records that the NRA had been requesting from Ackerman for months and Ackerman had refused to provide confidentially for the NRA's review. After withholding this information for more than six months in an attempt to stonewall the NRA's compliance efforts, Ackerman and North now threatened to strategically and selectively publicize the information in a manner calculated to cause maximum reputational harm.

55. On the same telephone call with LaPierre's aide, North proceeded to issue an ultimatum: LaPierre must resign from his position as CEO of the NRA and support North's continued tenure as President—or the supposed letter manufactured by Ackerman would be publicized in furtherance of a national smear campaign. LaPierre was later informed he also had to meet a third condition: arrange for the NRA to withdraw its lawsuit against Ackerman—filed just days earlier—which sought to compel Ackerman to turn over to the NRA Ackerman's records in accordance with Ackerman's contractual and fiduciary obligations.

56. On the telephone call with LaPierre's aide, North took the position that unless LaPierre acceded to these demands immediately, he would become the target of a PR campaign meant to embarrass both LaPierre and the NRA through the promulgation of falsehoods. North assured LaPierre's aide that if LaPierre acted upon the ultimatum immediately, Ackerman's salacious and untrue accusations would not surface.

57. To further induce LaPierre to comply with the extortion demand, North made an additional, stunning offer: If LaPierre cooperated, North indicated that he could "negotiate with" Ackerman's co-founder to secure an "excellent retirement" for LaPierre. In other words, in exchange for retreating from enforcing the NRA's legal rights, and ceding leadership of the NRA to Ackerman's salaried agent, Ackerman appeared to be offering LaPierre a lucrative backroom retirement "deal."

58. It is now known that, in furtherance of his scheme to extort LaPierre, North had been secretly working with errant NRA lawyers and other fiduciaries to draft a "crisis memo" that would be strategically released to apply pressure to LaPierre in the event he did not accept North's "offer" to step aside. Significantly, the matters about which North wrote were considered and approved by NRA Board and its Audit Committee.

59. Of course, LaPierre rejected North's offer and, in accordance with his professional obligations, immediately notified the full Board of Directors of its existence. In the ensuing days, LaPierre attended the NRA Members Meeting and NRA Board of Directors meeting–forums in which he answered questions from King and others about the extortion demand. It was during this time that King and other NRA board members learned not only that LaPierre's aide received the telephonic extortion demand, but that long-time NRA board member and current NRA President Carolyn Meadows also heard most of North's statements to the aide.

60. Notably, North and his co-conspirators orchestrated telephone calls, meetings, and related threats, through a series of text messages and calls, all in furtherance of their unlawful scheme.

61. For example, Dan Boren, an NRA board member at the time, employed by one of Ackerman's other major clients, the Chickasaw Nation, relayed the contents of Ackerman's threatened letter to North and helped to choreograph the ultimatum that was presented to LaPierre. Specifically, according to Chris Cox—another co-conspirator—on April 24, 2019, Boren told Cox that Ackerman was "demanding that Mr. LaPierre step down as Executive Vice President."[7] Thereafter, Cox called North and then texted Boren that North would call him. Within hours, North delivered the threat to LaPierre.

62. Moreover, in email correspondence transmitted over non-NRA servers, Boren admitted his knowledge that Ackerman may have been invoicing the NRA for full salaries of employees who were actually working on the Chickasaw account.

[7] Dkt No. 15 at page labeled "LtCol North Submission 116."

63. As became widely publicized, the attempted coup by Ackerman, spearheaded by North, failed. After North failed to appear at the above-mentioned Members Meeting and Board of Directors meeting, a new President was nominated and elected.

64. In his Answer, North presents a contrived narrative—that his wrongful conduct was in conformity with his fiduciary responsibilities. For that, he relies, in part, on the "opinion" of Harvey Pitt, an unqualified "expert" who famously "resigned" from a short stint as the Chairman of the SEC amidst controversy related to his own conduct.[8] Of course, Mr. Pitt has no personal knowledge of the facts, and offers opinions on ultimate conclusions of fact and law that are for the fact finder to decide. What Pitt impermissibly attempts to do here is exactly what two courts have told him he cannot do. For example, in *SEC. v. ITT Educational Services*, 311 F. Supp. 3d 977, the United States District Court for the Southern District of Indiana just two years ago precluded Pitt's report and testimony from the jury because he sought to give testimony that was "prohibit[ed]" by the Federal Rules of Evidence, was "not necessary," was "improper," included an "impermissible" legal conclusion, and sought to invade the " province" of the fact finders. *See also Rivera v. Allstate Ins. Co.*, No. 10 C 1733, 2016 WL 1055580, *1 (N.D. Ill. 2016) (granting motion to exclude Pitt's testimony because it was "not necessary or helpful" on similar grounds).

[8] See CFO.com, "Hello, I must be going," December 1, 2002 (noting that "[t]he perpetually embattled chairman of the Securities and Exchange Commission [Harvey Pitt] resigned on Election Night after 15 tumultuous months in office" and that he was "[c]riticized for being too close to his former Wall Street clients, unable to build consensus, and arrogant to boot, he finally succumbed to criticism over his selection of William Webster to head the Public Company Accounting Oversight Board [despite Webster's involvement in an accounting imbroglio while in private sector]"), https://www.cfo.com/2002/12/hello-i-must-be-going/ (last visited August 11, 2020).

F. May 2019: The NRA Demands That North Address His Conflict Of Interest.

65. On May 30, 2019, the NRA's Audit Committee rescinded its previous resolution passed in September 2018 approving North's participation in the North Contract while continuing his service as an NRA Board member. The committee did so because it concluded that its previous approval was based upon information that was not complete and not accurate. The committee also noted that North's actions in connection with the extortion demand underscored his conflict, and that the conflict was "irreconcilable."

66. By letter dated May 31, 2019, following the resolution by the NRA's Audit Committee regarding the "irreconcilable conflict" arising from North's employment with Ackerman, the NRA Secretary and General Counsel wrote to North's counsel requesting that North resign—either from his remaining leadership positions with the NRA or from Ackerman. The letter from the NRA Secretary and General Counsel, which North read, also advised North that "[a]bsent the Audit Committee's approval, Col. North's continued, simultaneous service as a board and Executive Council member, on the one hand, and an employee of Ackerman McQueen, on the other hand, violates Article V, Section 5 of the NRA's Bylaws, as well as the NRA's Conflict of Interest and Related-Party Transaction Policy adopted by the Board on January 9, 2016."[9]

67. North, however, has yet to acknowledge his conflict, or duties—as directed by the NRA. Indeed, he specifically refused to take either action requested by the NRA. He informed the NRA of this in a letter sent by his counsel, dated June 12, 2019, where he dismissed as allegedly

[9] Article V Section 5 of the NRA's Bylaws states: "No Director or member of the Executive Council shall receive any salary or other private benefit unless specifically authorized by resolution of the Board of Directors or an authorized committee thereof."

meritless the request to step down from his leadership positions at the NRA or from Ackerman. According to North, he continued to be an Ackerman employee until at least December 2019.

G. August 5, 2019: Tom King, An NRA Member And A Director, Seeks Expulsion Of North From The NRA's Membership.

68. In light of the above, on August 5, 2019, King, an NRA member in good standing, filed a complaint against North with the NRA's Secretary John C. Frazer. The written, notarized, and signed 9-page complaint (not counting the accompanying exhibits), distinctly describes the cause for which North's expulsion is sought under Article III Section 11 of the NRA's Bylaws. The basis for the complaint: Since at least in or around May 2018, North acted contrary to and in violation of the NRA's Bylaws, engaged in conduct that was disruptive of the orderly operation of the NRA in pursuit of its goals, and violated his obligation of loyalty to the NRA and its objectives.

69. In his Complaint, which North has filed publicly, King concluded that:

> [T]the [extortion] demand itself was . . . the culmination of a series of ethical breaches committed by LtCol North, his employer, Ackerman McQueen . . . , and others. . . .
>
> Put directly, I believe LtCol North's actions over the past several months were undertaken to protect his own financial and personal interests and to insulate his employer, Ackerman, from review and scrutiny of its billing practices as a vendor to the NRA.

70. King concluded: "These actions subject the NRA to legal, regulatory, financial and reputational risks – and can now been seen for what they were: part of a conspiracy that is unlike any other in the history of our organization."

71. In his detailed Complaint, King explained why he believed North's actions warrant the expulsion remedy King seeks, including how North became involved in the conspiracy, his

participation in it, his apparent motivations, and the harm the conspiracy caused. For example, King explained:

> Within days after LtCol North delivered his threat, the reputational attack he promised had become a dark reality. There has been a steady drumbeat of negative media reports fueled by misleading and scandalously false information about Mr. LaPierre and the Association. Confidential documents have been leaked and an untruthful narrative has emerged.
>
> As reported in The New York Times on May 13, 2019, " ... Mr. North's threat effectively came to fruition in the recent leaks..." Reporting of these unfounded allegations embolden our adversaries, mislead our millions of loyal members, and distract us from our core mission of defending the Second Amendment.

H. September 12, 2019: The NRA's Ethics Committee Considers Tom King's Complaint And Determines That The Charges Would Warrant Expulsion If Proved.

72. On September 12, 2019, at its next meeting, in accordance with the NRA's Bylaws, the NRA's Ethics Committee considered the King Complaint and "determined that the charges [against North] would warrant expulsion, and that the defendant be expelled in the event the charges are proved or a hearing is not requested." The Ethics Committee also resolved to request that, pursuant to Article III, Section 11(d)(6) of the NRA Bylaws, the NRA Secretary promptly notify North of the Ethics Committee's action, and further inform North that he has the right to request a hearing within forty five days of the date of the Secretary's notice, and that if the defendant does not timely request a hearing, the Ethics Committee's proposed resolution will be submitted to the NRA Board of Directors for adoption."

I. September 18, 2019: NRA Secretary Notifies North Of The King Complaint And The Ethics Committee's Resolution.

73. On September 18, 2019, as required by the NRA's Bylaws and requested by the Ethics Committee, NRA Secretary Frazer notified North by letter that a complaint had been filed against North by an NRA member pursuant to Article III, Section 11(d) of the Bylaws of the NRA. The letter enclosed a copy of Tom King's complaint and its exhibits, along with a copy of the Bylaws of the NRA. Frazer's letter quoted the Ethics Committee's resolution and advised North: (i) "[I]n accordance with Article III, Section 11(d)(6) of the NRA Bylaws, you have the right to request a hearing within forty-five (45) days of the date of this letter. Your request for a hearing must be received by this office no later than November 2, 2019;" and (ii) "pursuant to Article III, Section 11(d)(6), if you do not request a hearing, the Ethics Committee's proposed resolution [that North be expelled unless he requests a hearing] will be submitted to the NRA Board of Directors for adoption."

J. October 31, 2019: North Elects To Demand A Hearing.

74. On October 31, 2019, North through counsel responded to Frazer's letter dated September 18, 2019 and demanded a hearing.

K. May 1, 2020: North And King Are Advised Of The Date Of The Hearing And Their Rights.

75. In letters dated May 1, 2020, Jacqueline Mongold, Acting Secretary of the NRA's Committee on Hearings, advised King (as the complainant) and North (as the accused member) that the Hearing Board "intends to convene . . . for the purpose of making a recommendation to the Board of Directors of the NRA concerning the sworn complaint filed against [North] by . . . King."

76. In her letters, Mongold advised King and North that "[t]he hearing [would] be conducted on August 12, 2020, commencing at 11:00 am EDT at the headquarters of the National Rifle Association, 11250 Waples Mill Road, Fairfax, Virginia 22030-9400."

77. Mongold also informed King and North that "[t]he Hearing Board intends to proceed in regard to this matter on the testimony, written submissions, and affidavits of the parties" and that "[t]he hearing will be conducted in a manner designed to facilitate the full disclosure of all relevant facts and information, and to provide all interested parties, including [King and North], an opportunity to be heard."

78. Mongold's letter also advised King and North of their rights to, among other things:

- Call witnesses;
- Offer written materials, exhibits, affidavits, and other evidence that King and North wish the Hearing Board to consider as long as they are submitted by no later than June 1, 2020;
- Make an opening statement and a summation statement;
- Be present during the hearing process;
- Confront and cross-examine any witnesses;
- Appear at the hearing in person or via written submission;
- In the event King or North chooses not to appear in person or through counsel, submit any "relevant additional statements, documents, information or other evidence you wish to submit, including testimony in the form of sworn affidavits."

79. Mongold requested that King and North inform her in writing whether they intend to be present at the hearing and whether they intend to appear in person or through counsel.

L. May 18, 2020: North Threatens To Sue The NRA Under New York's Whistleblower Statute Unless The NRA Abandons Its Adjudication Of King's Complaint.

80. In a letter dated May 18, 2020—seven months *after* he demanded a hearing—North, through counsel, demanded that the NRA cease the disciplinary proceedings.

81. In the same letter, North claims that, in or around April of 2019, he blew the whistle on alleged financial improprieties at the NRA and was therefore entitled to the protections of New York's whistleblower statute. On top of that, North threatened to sue the NRA under the whistleblower statute if the NRA did not, in effect, cancel the hearing scheduled for August 12, 2020, and allowed him to remain a member of the NRA.

82. Specifically, the letter alleges: "These proceedings to involuntarily terminate North as a member of the NRA under Article III, Section 11 of the NRA Bylaws is the NRA's latest act of illegal retaliation. The NRA must cease these proceedings. If the NRA instead decides to move forward, North reserves his right to enforce New York's whistleblower protections in court. *See Pietra v. Poly Prep Country Day Sch.*, 2016 WL 11432581, 2016 N.Y. Slip Op. 32916, at 7 (N.Y. Sup. Ct. 2016)."[10]

83. Although North has alleged that he invoked purported whistleblower status for "the same conduct described in the [King] complaint," that is simply not the case. Although King's

[10] Should North in fact sue the NRA under the statute, the NRA reserves all rights to move to dismiss any such lawsuit on the grounds that, among other things, the statute he cites does not create a private cause of action. *Compare Pietra v. Poly Prep Country Day Sch.*, No. 506586/2015, 2016 WL 11432581, at *1 (N.Y. Sup. Ct. Oct. 07, 2016) (N.Y. N.P.C.L. Section 715-B creates a private cause of action) *with Ferris v. Lustgarten Found.*, 2017 WL 3897058 (N.Y. Sup. Ct. 2017) (N.Y. N.P.C.L. Section 715-B does not create a private cause of action). Of course, the point of this action is not to argue North's standing under the statute but to obtain a judicial determination that, among other things, any outcome of the disciplinary proceedings against North, as long as they are conducted in conformity with the NRA's Bylaws, are binding on the NRA, King, and North.

complaint sees North's effort to deflect scrutiny for what it is, the King Complaint makes clear that the conduct that compelled King to initiate the disciplinary proceeding against North is North's extortion demand and "actions [by North] undertaken to protect his own financial and personal interests and to insulate his employer, Ackerman, from review and scrutiny of its billing practices as a vendor to the NRA."

84. After North threatened to sue the NRA if it were to comply with the procedures set forth in its Bylaws, the Hearing Board—and King—elected to pause the disciplinary proceedings so that the NRA can seek assistance from the Court.

85. The whistleblower statute North cites in his letter states: "[T]he board of every corporation . . . shall adopt, and oversee the implementation of, and compliance with, a whistleblower policy to protect from retaliation persons who report suspected improper conduct. Such policy shall provide that no director, officer . . . or volunteer of a corporation who in *good faith* reports any action or suspected action taken by or within the corporation that is illegal, fraudulent or in violation of any adopted policy of the corporation shall suffer intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequence." New York NPCL Section 715-B(a) (emphasis added). The statute was passed to incentivize employees and others within an organization to come forward with good faith concerns about compliance within the organization by guaranteeing whistleblowers protection from harassment and retaliation. Ironically, the NRA did previously receive internal whistleblower complaints about the North Contract and the insufficiency of North's disclosures to the NRA related to it, which is among the reasons why the NRA so diligently and persistently pursued disclosure of the North Contract.

86. As required by the law, the NRA's whistleblower policy states: "It is the responsibility of each NRA employee, director, and contractor to report in good faith any concerns he or she may have regarding actual or suspected violations of this Corporate Ethics Policy or any NRA policies or controls."

87. The NRA's whistleblower policy also states:

- "No person who in good faith makes a report pursuant to this policy shall suffer intimidation, harassment, retaliation, discrimination, or adverse employment consequences because of such report."
- "A report is made in good faith if the person making the report reasonably believes that the information reported is true and constitutes a violation of the law or of NRA policies or controls."
- "The Secretary of the Audit Committee, in conjunction with the NRA Office of the General Counsel and any outside counsel or professionals they deem appropriate, shall be responsible for investigating and resolving all whistleblower reports. At the discretion of the Office of the General Counsel, investigative responsibilities may also be delegated to NRA staff including, where appropriate, Human Resources staff. In the course of investigating and resolving whistleblower concerns, neither the Secretary of the Audit Committee, nor the NRA Office of the General Counsel, nor any professionals or staff to whom investigative responsibilities are delegated shall take any action, unless legally required, that would compromise the identity of a person who reported a concern anonymously, or would otherwise compromise the integrity of any investigation. For example, under no circumstances shall a person who is the subject of a whistleblower

complaint be involved in the investigative process (except as necessary for the conduct of such process, *e.g.*, such person may be interviewed to elicit relevant facts), nor shall the person be present for any Board or committee deliberations or voting which relate to the whistleblower complaint."

88. However, New York's whistleblower statute—just like the NRA's whistleblower policy—applies only to those who report suspected violations of New York law or NRA policy and do so in "good faith." North never made such reports and any actions he characterizes as such were not taken in "good faith." As noted above, those reports were contrived by North with the singular goal of deflecting scrutiny from him and his employer, Ackerman.

89. In any case, even where NY NPCL Section 715-B applies, given the procedural safeguards under the NRA's Bylaws, the Association is entitled and in fact must follow its Bylaws when a disciplinary proceeding is initiated. The Association is entitled to and must follow its Bylaws and: (i) allow its Hearing Board to hold a hearing on a member's complaint; (ii) allow the Hearing Board to formulate a recommendation to the Board as prescribed by the Bylaws; and (iii) allow its Board of Directors to vote on the Hearing Board's recommendation by either dismissing the charges or adopting a disciplinary action against North through expulsion, suspension or otherwise.

90. Notably, although North accuses the NRA of whistleblower retaliation, he does not claim that the disciplinary proceedings against him are not being conducted in accordance with the NRA's Bylaws.

V.

CAUSES OF ACTION

A. First Cause of Action: Declaratory Relief

91. The NRA repeats the allegations contained in the preceding paragraphs.

92. An actual and justiciable controversy exists between the NRA and North.

93. King filed a complaint against North in August of 2019. The complaint seeks North's expulsion from the NRA's membership.

94. Until North threatened on May 18, 2020 to sue the NRA, the NRA and its various constituents had been carrying out their responsibilities under the Bylaws with regard to the disciplinary proceedings against North. At every step, North was afforded every procedural right safeguarded to him as an accused member by the Bylaws. North does not claim otherwise.

95. However, in the face of North's threat, the NRA cannot continue to move forward with the expulsion proceedings without risking a lawsuit by North.

96. The NRA contends that North is not a whistleblower and, in any case, under its Bylaws, the NRA and its various constituents (including the Hearing Board and its full Board) must follow the remaining steps for the disciplinary proceedings that are so carefully laid out in the NRA's Bylaws.

97. The NRA is a membership organization whose Bylaws set forth the rules for admitting members, expelling members, members' privileges, and members' duties. The Bylaws clearly state that conduct that is, among other things, contrary to the NRA's Bylaws and in violation of the Bylaws constitutes good cause for expulsion. In addition, the NRA's Bylaws create a series of procedural rights to ensure that the accused and the complainant are treated fairly.

At the conclusion, the Board is empowered by the Bylaws to either dismiss the charges or to expel, suspend, or discipline the accused member.

98. The NRA further contends that it will not be violating any laws if it completes steps remaining in the disciplinary proceedings against North as contemplated by the Bylaws, including, without limitation, if (i) the Hearing Board holds a hearing and makes a recommendation on the complaint filed by King against North; (ii) its Board votes on the recommendation; and (iii) King's complaint against North is thus heard and determined with finality.

B. Second Cause of Action: Declaratory Relief

99. The NRA repeats the allegations contained in the preceding paragraphs.

100. An actual and justiciable controversy exists between the NRA and North.

101. Over a year ago, in May 2019, the NRA's Audit Committee resolved that an irreconcilable conflict exists such that North cannot both remain an employee of Ackerman and simultaneously serve as a member of the NRA's Board of Directors.

102. In May 2019, the Audit Committee also rescinded its prior approval of North's continued participation in the North Contract during his Board membership.

103. On or about May 31, 2019, North was advised by the NRA's Secretary and General Counsel that, given the absence of the Audit Committee's approval, North's continued service in both roles—as an employee of Ackerman and an NRA Board member—violates (i) the NRA's Conflict of Interest and Related Party Transaction Policy, and (ii) Section 5 of Article V of the Bylaws, which states that no Board member shall receive any compensation from the NRA in the absence of the Audit Committee's approval.

104. North received the letter, read it, understood the message, yet, notified the NRA (through counsel) that he was not willing step down from either his position with Ackerman or

from the NRA Board. In fact, North remained an employee of Ackerman through at least as late as December 2019.

105. The NRA seeks a declaration that North's refusal in June 2019 to resign from his employment at Ackerman McQueen in order to remedy the related party transaction was an election by him to forfeit his NRA Board membership.

C. Third Cause of Action: Breach of Fiduciary and Statutory Duties

106. The NRA repeats the allegations contained in the preceding paragraphs.

107. North, as a former officer and President of the NRA and has served as a member of the NRA's Board of Directors. In those capacities, he owed and owes the NRA fiduciary duties, including duties of good faith, candor, fair dealing, and loyalty and owed such duties to the NRA at all times relevant to this action.

108. In addition, under NY NPCL Section 717(a), "Directors, officers and key persons shall discharge the duties of their respective positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances."

109. North breached his fiduciary and statutory duties to the NRA by engaging in obstructive behavior to protect his lucrative contract with Ackerman and impede the NRA's compliance efforts and by being paid millions of dollars for making a documentary series he and Ackerman simply failed to deliver.

110. The duty of loyalty that he owed to the NRA is an inflexible rule of fidelity. It not only bars blatant self-dealing, but also requires avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty.

111. That is exactly why North had an obligation to disclose his contract with Ackerman to the NRA as soon as disclosure was requested. Instead, he stonewalled the NRA for months,

leading the NRA to incur additional legal fees and costs and causing internal concerns, including among accounting staff, about his contract.

112. To make things worse, when he finally disclosed the contract, it revealed that he was an employee of the NRA's largest vendor and that he therefore had an irreconcilable conflict that required him to pick between his role at the NRA or his role at Ackerman. Yet, unwilling to make the choice, North resorted to drastic measures at the expense of the NRA's reputation which he was obliged to protect, not harm. Even after the need for a choice was made explicit in the NRA's letter, dated May 31, 2019, he persisted in the same course of action.

113. Although North's and his co-conspirators' plan failed, the damage it caused persists to this day.

114. Because North's breaches of his duties to the NRA directly harmed and damaged the NRA economically and reputationally, the NRA seeks damages to make it whole.

D. Fourth Cause of Action: Conspiracy to Violate Fiduciary Duties

115. The NRA repeats the allegations contained in the preceding paragraphs.

116. In an effort to conceal his wrongful conduct, North agreed and conspired with multiple parties—many, if not all, of whom themselves owed fiduciary and statutory duties to the NRA—to damage the NRA's reputation, extort its Executive Vice President, promulgate false and misleading information, and otherwise deflect scrutiny away from North's and his co-conspirators' malfeasance. North's co-conspirators included, among others, Ackerman and its principals.

117. North and his co-conspirators undertook numerous overt acts in furtherance of their conspiracy, including texts, phone calls, and other communications through which they coordinated their effort to preserve their lucrative contracts and get rid of LaPierre.

118. North and his co-conspirators participation in this conspiracy was intentional, with an intent to harm the NRA. North and his co-conspirators extensively planned the extortion and repeatedly threatened that if LaPierre failed to accede to their demands North and his co-conspirators would selectively release confidential records that would injure the NRA and its reputation. This attempted extortion and threat to harm the NRA—a threat that was later carried out—violated their duties to the NRA.

119. As a result of this conspiracy, the NRA has suffered substantial harm. As a co-conspirator, North is liable to the NRA for any damage that any member of the conspiracy caused.

VI.

DEMAND FOR JURY TRIAL

120. The NRA hereby demands a trial by jury on all issues of fact to which it is entitled to a jury trial in this action.

VII.

DEMAND FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court enter a judgment in favor of Plaintiff the National Rifle Association of America and against Defendant Oliver North:

1. Declaring, including pursuant to Section 3001 of the CPLR, that:

   (i) NY NPCL 715-B does not prohibit the NRA from following the process prescribed in its Bylaws for the adjudication of member complaints, including, without limitation, Thomas J. King's complaint against North;

   (ii) accordingly, the NRA shall not be deemed to violate NPCL 715-B if it or its constituents complete steps contemplated by the NRA's Bylaws for the disciplinary proceedings against North, including, without limitation, if: (a) its Hearing Board

proceeds to conduct a hearing on King's complaint against North in accordance with the Bylaws, and (b) its Board of Directors, upon consideration of the Hearing Board's post-hearing recommendation, votes to either dismiss the charges against North or, by a three-quarters vote (required under the Bylaws), order the expulsion, suspension, or other discipline of North;

(iii) any outcome of disciplinary proceedings against North, as long as they are conducted in conformity with the NRA's Bylaws, is binding on the NRA, King, and North; and

(iv) North's refusal in June 2019 to resign from his employment at Ackerman McQueen in order to remedy the related party transaction—the North Contract—was an election by him to forfeit his NRA Board membership; and

2. Finding that North breached his fiduciary duties to the NRA and his duties to the NRA under NY NPCL 717 and ordering North to compensate the NRA in the amount to be determined at trial for the reputational and economic harm that his breaches have caused;

3. Further finding that North, as a co-conspirator, is jointly and severally liable to the NRA for any damage caused by his co-conspirators in the course of their conspiracy and ordering North to compensate the NRA for any damages any member of the conspiracy has caused; and

4. Granting Plaintiff National Rifle Association of America any and all relief that the Court deems just and proper.

Dated: August 11, 2020
New York, New York

Respectfully submitted,

s/ Svetlana M. Eisenberg
William A. Brewer III
Svetlana M. Eisenberg

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ATTORNEYS FOR PLAINTIFF

4851-1396-2439, v. 1

Exhibit F

October 2, 2020 Court Decision & Order
in *NRA v. North*, Index No. 903843-20
(Sup. Ct. Albany Cnty.)

STATE OF NEW YORK
SUPREME COURT
COMMERCIAL DIVISION

COUNTY OF ALBANY

THE NATIONAL RIFLE ASSOCIATION OF AMERICA,

Plaintiff,

-against-

DECISION & ORDER

OLIVER NORTH,

Defendant.

Index No.: 903843-20

(Judge Richard M. Platkin, Presiding)

APPEARANCES:

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Hon. Richard M. Platkin, A.J.S.C.

Plaintiff National Rifle Association of America ("NRA" or "Association") commenced this action on June 12, 2020 against defendant Oliver North, a member, director and former officer of the Association.

Through an amended complaint filed on August 11, 2020, the NRA seeks a declaration that it will not be in violation of Not-For-Profit Corporation Law ("N-PCL") § 715-b if it moves ahead with an internal disciplinary proceeding against North. The NRA also seeks to recover money damages from North based on alleged breaches of fiduciary and statutory duties. North joined issue by filing an answer to the NRA's amended complaint on August 31, 2020.

By notice of motion dated August 11, 2020, North moves pursuant to CPLR 2201 and the Court's inherent power for a stay of this action during the pendency of an action commenced by the Attorney General in Supreme Court, New York County on August 6, 2020 to dissolve the NRA (*see People of the State of New York v The National Rifle Association, Inc., et al.*, Index No. 451625-2020 ["Dissolution Case"]). The NRA opposes the requested stay.

BACKGROUND

A. The NRA's Amended Complaint

The NRA is a not-for-profit corporation organized under the laws of New York with its principal place of business in Fairfax, Virginia (*see* NYSCEF Doc No. 18 ["Amended Complaint"], ¶ 15). Lieutenant Colonel Oliver North (Ret.) ("North") is a member of the NRA and its board of directors, and he also served as the NRA's president in 2018 and 2019 (*see id.*, ¶¶ 16, 18).

In addition to his uncompensated work with the NRA, North was employed since 2018 by Ackerman McQueen ("Ackerman"), the NRA's former advertising and communications firm (*see id.*, ¶¶ 18, 49). In connection with that employment, North allegedly entered into a multi-million-dollar contract with Ackerman to produce a digital documentary series funded by the NRA (*see id.*, ¶¶ 11, 41-49, 51-52). Thus, the Amended Complaint alleges that "North was hired by Ackerman to host a television show for which Ackerman was paid by the NRA, and North, at the same time, served as the NRA's Director and, in 2018/2019, as its President" (*id.*, ¶ 41).

Under the NRA's Conflict of Interests Policy, "commercial transactions between a Director or an officer, on the one hand, and the NRA (or, under certain circumstances, a vendor it pays), on the other hand, must be reviewed and approved by the NRA's Board of Directors – or a designated committee of the Board – to ensure that the terms of the transaction serve the best interests of the NRA" (*id.*, ¶ 41; *see id.*, ¶ 42). The NRA alleges that North "defied the NRA's compliance efforts and refused to make necessary disclosures . . . about his lucrative contract with [Ackerman]" (*id.*, ¶ 11). "And, when the NRA stood firm in its demand for transparency, North resorted to drastic measures: he led an unsuccessful effort to oust" the NRA's executive vice-president and chief executive officer, Wayne LaPierre, who is said to "have led the compliance effort" (*id.*).

Thomas J. King, an NRA life member who also serves as the executive director and chairman of the New York State Rifle and Pistol Association ("NYSRPA"),[1] filed an internal disciplinary complaint against North on August 5, 2019, seeking his expulsion from the

[1] NYSRPA "is an official NRA-affiliated State Association which is the largest and oldest Second Amendment advocacy organization in New York" (*id.*, n 2).

Association under a provision of the NRA Bylaws that allows for the imposition of discipline, including expulsion, against a member "for good cause, including . . . any conduct as a member that is contrary to or in violation of the Bylaws" (*id.*, ¶ 26; *see id.*, ¶¶ 6, 39, 68).

King's complaint alleges that, "[s]ince at least . . . May 2018, North acted contrary to and in violation of the NRA's Bylaws, engaged in conduct that was disruptive of the orderly operation of the NRA in pursuit of its goals, and violated his obligation of loyalty to the NRA and its objectives" (*id.*, ¶ 68). Specifically, King alleges that: North and Ackerman concealed the terms of their contract from the NRA and resisted disclosure (*see id.*, ¶¶ 41, 45-46); North was not an independent contractor to Ackerman, as the NRA had been led to believe, but rather an employee and fiduciary of Ackerman (*see id.*, ¶ 49); and North and Ackerman had produced only a small portion of the documentary series for which the NRA had paid millions of dollars to Ackerman (*see id.*, ¶¶ 51-52).

King's complaint further alleges that, "[w]hile resisting requests for full disclosure and refusing cooperation with the NRA's efforts to comply with [laws and internal policies], North conspired with [Ackerman] and others to manufacture allegations against the outside counsel for the NRA which was directing the NRA's compliance efforts" (*id.*, ¶ 49). "Under the guise of being an 'independent' director, in or around March 2019, North wrote a letter to the NRA's Audit Committee raising purported concerns about the amount of the law firm's fees – a measure designed to distract from scrutiny of North and . . . Ackerman" (*id.*, ¶ 50). "This is an act that [North] now claims entitles him to whistleblower status" (*id.*).

Additionally, "in April 2019, North, in conspiracy with others, resorted to drastic behavior: an extortion scheme, the objective of which was to enrich himself and protect . . .

Ackerman, at the expense of the NRA" (*id.*, ¶ 53). Specifically, North is said to have delivered an ultimatum: Wayne LaPierre "must resign from his position as CEO of the NRA and support North's continued tenure as President"; otherwise, North and Ackerman would release damaging information concerning the NRA, LaPierre and other senior NRA officials (*see id.*, ¶¶ 54-55).

According to King, North's wrongful actions "were undertaken to protect his own financial and personal interests and to insulate his employer, Ackerman, from review and scrutiny of its billing practices as a vendor to the NRA" (*id.*, ¶ 68; *see also id.*, ¶ 71).

The NRA's Ethics Committee took up King's complaint at a September 12, 2019 meeting and "determined that the charges . . . would warrant expulsion, and that [North] be expelled in the event the charges are proved or a hearing is not requested" (*id.*, ¶ 72). After being advised of the complaint, North demanded a hearing, which was scheduled to commence on August 12, 2020 (*see id.*, ¶¶ 73-76).

On May 18, 2020, North, through his counsel, sent a letter demanding that the NRA terminate the disciplinary proceeding (*see id.*, ¶ 80). The letter stated that, "in or around April of 2019, [North] blew the whistle on alleged financial improprieties at the NRA and was therefore entitled to the protections of New York's whistleblower statute" (*id.*, ¶ 81). North also "threatened to sue the NRA under the whistleblower statute if the NRA did not, in effect, cancel the hearing . . . and allow[] him to remain a member" (*id.*; *see also id.*, ¶ 82).

The first and second causes of action alleged in the Amended Complaint seek declaratory relief related to what the NRA describes as "internal governance matters – i.e., a disciplinary proceeding initiated against North by another NRA member in accordance with the NRA's Bylaws – and a declaration that North – through his actions – forfeited his membership on the

NRA's Board" (NYSCEF Doc No. 32 ["Opp Mem"] at 3; *see* Amended Complaint, ¶¶ 91-105). In this regard, the NRA asserts that North is not entitled to whistleblower protections under N-PCL § 715-b, as his reports of misconduct were not made in good faith but rather were intended to protect his own pecuniary and personal interests (*see* Amended Complaint, ¶¶ 8, 85-87). The NRA further maintains that North "cannot rely on New York's whistleblower statute to prevent the disciplinary proceedings from moving forward" (*id.*, ¶ 8). The third and fourth causes of action seek money damages for North's alleged breaches of the fiduciary and statutory duties that he owed to the NRA as an officer and director and for allegedly conspiring with others to violate those duties (*see id.*, ¶¶ 11, 51-52, 106-119).

B. North's Answer

In his answer to the Amended Complaint (*see* NYSCEF Doc No. 41 ["Answer"]), North denies engaging in misconduct and alleges that the NRA is retaliating against him for reporting potential financial wrongdoing and inadequate governance to other NRA officers and directors.

The Answer begins by referencing the Attorney General's 160-page complaint in the Dissolution Case (*see* NYSCEF Doc No. 24 ["AG's Complaint"]), which was filed after North joined issue on the NRA's original complaint herein. The AG's Complaint, which is said to "detail[] years of widespread illegal conduct committed by the NRA and four of its officers, including . . . LaPierre," seeks "to dissolve the NRA, remove LaPierre, and permanently bar him from serving as an officer, director, or trustee of any New York not-for-profit organization" (Answer, ¶ 2). North emphasizes that the AG's Complaint "specifically alleges that the NRA has retaliated against [him] in violation of New York law" (*id.*, ¶ 3, citing AG's Complaint, ¶ 636).

North alleges that, around the time he took office as NRA president in September 2018, "he heard disgusting allegations of financial misconduct related to the use of NRA member dues" (*id.*, ¶ 4). In particular, North claims to have "discovered that the NRA had been making extraordinary payments to the law firm of its outside counsel William A. Brewer III based on enormous legal bills submitted by Brewer's law firm" (*id.*). These payments amounted to "over $1 million per month beginning in April 2018," increased to $1.8 million per month beginning in July 2018, with total billings reaching "$54 million between April 2018 and June 2020" (*id.*).

"Shocked by the magnitude of these legal fees, North sought the advice of the then-NRA Board Counsel and exercised his fiduciary duty to the NRA's Board, members, and donors by reporting these potentially excessive legal fees to other officers and directors of the NRA, and demanding the NRA conduct an outside, independent, confidential investigation" (*id.*, ¶ 5).

Allegedly upset by North's reporting of these matters to others within the NRA, including the Audit Committee, as well as by North's formation of a special committee of the board of directors to investigate the legal fees paid to Brewer,[2] LaPierre and Brewer allegedly acted to protect their own interests by blocking each of North's investigative attempts and "also embark[ing] on a scheme to denounce North, to defame him, and to expel him from the NRA" (*id.*, ¶¶ 6-7). The NRA's acts of retaliation allegedly included:

a. Blocking North's re-nomination as President of the NRA;

b. Disbanding the NRA Board special committee formed by North before it could do any work;

[2] North later learned of allegations that "LaPierre . . . had corruptly received hundreds of thousands of dollars in clothing and personal air, limo, and other travel charges, as well as other benefits. Allegations also surfaced in the press that the NRA was in violation of the laws governing tax-exempt organizations" (*id.*, ¶ 5).

c. Inventing and publicly disseminating a false story that North had engaged in a "coup" and tried to "extort" LaPierre;

d. Denying North indemnification that had been provided to other officers and directors of the NRA in connection with investigations and lawsuits related to the NRA, including investigations into the potential financial misconduct and inadequate governance reported by North; and

e. Attempting to force North to resign from the NRA Board (*id.*, ¶ 7).

The foregoing allegations are said to be consistent with the AG's Complaint, "which alleges that LaPierre acted 'to intimidate, punish, and expel anyone at a senior level who raised concerns about his conduct'" (*id.*, quoting AG's Complaint, ¶ 2). The NRA's subsequent attempt to expel North from its membership on account of "a baseless complaint purportedly made by a LaPierre crony, Thomas J. King," allegedly constitutes further retaliation against North (*id.*, ¶ 8, citing AG's Complaint, ¶¶ 471, 636).

Contrary to the NRA's claim that North did not raise his whistleblower concerns until May 2020, eight months after his receipt of King's complaint (*see id.*, ¶ 10), North maintains that he "consistently raised his concerns about the NRA's retaliation in numerous letters to NRA officers and directors, including the NRA's general counsel, since Spring 2019" (*id.*, ¶ 11). North also claims to have "specifically sought whistleblower protection from the NRA in a letter to the NRA's general counsel dated October 25, 2019" (*id.*, ¶ 12; *see also* NYSCEF Doc No. 43).

The Answer also cites North's June 1, 2020 submission to the NRA Hearing Board of "a presentation in defense" of the disciplinary complaint, which "include[d] statements from numerous witness[es] with firsthand knowledge of the matters at issue," all of whom indicated that North acted in accordance with his fiduciary obligations when he reported potential financial

misconduct and inadequate governance to other officers and directors of the NRA (Answer, ¶ 13; *see also* NYSCEF Doc No. 44). North's presentation also included "a lengthy analysis by Harvey Pitt, an expert on corporate governance [and] the former General Counsel and Chairman of the SEC," who concluded that North had acted in conformity with his "fiduciary, legal, and ethical responsibilities" to the Association (Answer, ¶ 13).

North asserts that his "conduct qualifies him as a whistleblower under New York law – a fact consistent with and supported by [the AG's Complaint] – and this Court should not issue an order allowing [him] to suffer retaliation for that conduct" (*id.*, ¶ 14).

C. The Stay Motion

North argues that a stay of this action during the pendency of the Dissolution Case "will preserve judicial resources, prevent inconsistent results, and protect [his] rights" because the Dissolution Case "encompasses substantially all of the issues in this action" (NYSCEF Doc No. 22, ¶¶ 14-18).

The NRA opposes the stay application, arguing first that North's motion is procedurally improper under Rule 24 of the Rules of the Commercial Division. As to the merits, the NRA contends that a stay is not warranted because this action was commenced first, there is not a complete identity of parties and claims, there is no overlap in the relief sought, and a stay would prejudice the NRA by "delaying its ability to obtain timely needed relief" (Opp Mem at 4).

Remote oral argument on the motion was held on September 2, 2020, and this Decision & Order follows.

DISCUSSION

A. Rule 24

The NRA argues, as a threshold matter, that North's motion violates Rule 24 of the Rules of the Commercial Division, which states, in pertinent part: "Prior to the making or filing of a motion, . . . the moving party shall advise the court in writing . . . outlining the issue(s) in dispute and requesting a telephone conference" (22 NYCRR 202.70, Rule 24 [c]).

The purpose of Rule 24 is "to permit the court the opportunity to resolve issues before motion practice ensues" (*id.* [a]). It is clear from the parties' written submissions and the oral argument held on September 2, 2020, however, that a consensual resolution of the stay application would not be possible. Under the circumstances, the Court will excuse North's non-compliance with Rule 24 (*see generally ADCO Elec. Corp. v McMahon*, 38 AD3d 805, 806 [2d Dept 2007]; *cf. Briarpatch Ltd., L.P. v Briarpatch Film Corp.*, 68 AD3d 520, 520 [1st Dept 2009]).

B. Stay

"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" (CPLR 2201). "Thus, a court has broad discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof and potential waste of judicial resources" (*Chaplin v National Grid*, 171 AD3d 691, 692 [2d Dept 2019] [internal quotation marks and citation omitted]; *see* Siegel & Connors, NY Prac § 255 [6th ed 2020] ["It is left to the court to determine what a 'proper case' is as a matter of discretion, which must be exercised with circumspection" (citation omitted)]).

"Although it is not dispositive on a motion to stay, the general rule in New York is that the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere" (*Matter of PPDAI Group Sec. Litig.*, 64 Misc 3d 1208[A], 2019 NY Slip Op 51075[U], *5 [Sup Ct, NY County 2019] [internal quotation marks and citation omitted]). "The first to file rule, however, should not be applied mechanically irrespective of other considerations" (*id.* [citation omitted]).

Initially, it is apparent that the AG's Complaint in the Dissolution Case encompasses the bulk of the issues raised by the NRA's request for declaratory relief in this action. In a section of her complaint entitled "The NRA's Retaliation Against Dissidents on the Board," the Attorney General alleges that the NRA retaliated against North – identified as "Dissident No. 1" – for exercising his fiduciary duties as an NRA officer and reporting potential financial misconduct to others within the Association (*see* AG's Complaint, ¶¶ 444-475). The alleged retaliation is said to include the NRA's actions in "conducting an internal expulsion proceeding against [North]" (*id.*, ¶ 471). On the basis of these allegations, the Attorney General's fifteenth cause of action seeks a judgment removing LaPierre and other NRA officers and directors from their positions for retaliating against North and other whistleblowers in violation of N-PCL § 715-b (*see id.*, ¶¶ 633-637).[3] Additionally, the cause of action for dissolution of the NRA is predicated, in part, on the unlawful retaliation allegedly inflicted upon North (*see id.*, ¶¶ 567, 573).

[3] The NRA recently stated its intention to file a motion to strike certain portions of North's Answer, specifically those that rely on allegations of the AG's Complaint (*see* NYSCEF Doc No. 46). However, even if those portions were stricken, it remains clear that the AG's Complaint is based, in pertinent part, on the allegations of retaliation set forth in North's initial answer and in the supporting documents filed in this action on July 22, 2020 (*see* NYSCEF Doc Nos. 12-16). Thus, any alleged improprieties in North's Answer would not affect the disposition of this motion.

If the evidence adduced in the Dissolution Case establishes that the NRA caused the initiation of disciplinary proceedings against North in retaliation for his good-faith reports of illegal or improper conduct, it seems doubtful that the NRA would be entitled to the declaration that it seeks here: that N-PCL § 715-b does not preclude it from imposing discipline upon North, including expulsion, so long as the NRA follows the disciplinary process prescribed in the Bylaws (*see* Amended Complaint, Demand for Relief [1]; *see generally Joshi v Trustees of Columbia Univ.*, 2018 WL 2417846, *10-12, 2018 US Dist LEXIS 89280, *31-36 [SD NY May 29, 2018, 17-CV-4112 (JGK)]).[4]

To be sure, the Court recognizes that there is not a full identity of issues, as the Amended Complaint seeks the recovery of money damages for North's alleged breaches of fiduciary and statutory duties, as well as for his alleged conspiracy to violate such duties (*see* Oral Arg Tr at 9-12).[5] In this regard, the NRA alleges that North "engag[ed] in obstructive behavior to protect his lucrative contract with Ackerman and impede the NRA's compliance efforts" (Amended Complaint, ¶ 109). The NRA further alleges that, "in an effort to conceal his wrongful conduct, North agreed and conspired with multiple parties . . . to damage the NRA's reputation, extort [LaPierre], promulgate false and misleading information, and otherwise deflect scrutiny away from North's and his co-conspirators' malfeasance" (*id.*, ¶ 117).

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[4] At oral argument, the Court inquired into the basis of the NRA's assertion that N-PCL § 715-b would not "prevent the disciplinary proceedings from moving forward," even if North were proven to be a protected whistleblower (*see* Amended Complaint, ¶ 8). The NRA failed to provide a clear answer (*see* NYSCEF Doc No. 47 ["Oral Arg Tr"] at 7-8), but it appears that the NRA takes the position that King's initiation of the disciplinary process in his role as an NRA member was independent of, and unrelated to, the alleged retaliation. North disagrees, dismissing King as "a LaPierre crony" (Answer, ¶ 8).

[5] The NRA amended its complaint to add these causes of action on August 11, 2020, following the Attorney General's commencement of the Dissolution Case on August 6, 2020.

Although the NRA's damages claims are not directly at issue in the Dissolution Case, the AG's Complaint is predicated on factual allegations that bear heavily on these claims. Thus, while the NRA seeks to recover damages for North's alleged concealment of his lucrative employment relationship with Ackerman, the AG's Complaint alleges, mirroring North's Answer, that LaPierre himself "negotiated" the employment contract in order to persuade North to accept the "unpaid position" of NRA president (AG's Complaint, ¶¶ 444-451, 465; *see* Answer, ¶ 11). Further, if North were found in the Dissolution Case to be a whistleblower who acted in good faith, the NRA's allegation of "obstructive behavior" here (Amended Complaint, ¶ 109) would have to be viewed in a very different light.

In addition to the absence of a complete identity of issues, the NRA also emphasizes that there is not a complete identity of parties. North is not a party to the Dissolution Case, and the four individual defendants named in the Dissolution Case are not parties to this action.[6] The NRA also stresses that the relief sought herein – a declaration of rights concerning its internal affairs and money damages – is very different from the relief sought by the Attorney General: dissolution of the NRA, removal of certain officers and directors, the voiding of allegedly illegal transactions, and payment of restitution (*see* AG's Complaint, Prayer for Relief).

On the other hand, North obviously is a key fact witness in the Dissolution Case, and there is a substantial argument that any issues decided in that case against the NRA will be entitled to preclusive effect in this case, even in the absence of a complete identity of parties (*see*

[6] In addition to the NRA, the Attorney General has sued LaPierre, Wilson "Woody" Phillips, who served as the NRA's *ex officio* director, treasurer and chief financial officer, Joshua Powell, a former officer, *de facto* officer or "key person" of the NRA, and John Frazer, the Association's secretary and general counsel (*see* AG's Complaint, ¶¶ 18-21).

Buechel v Bain, 97 NY2d 295, 304, 315 [2001]; *see Matter of Susan UU. v Scott VV.*, 119 AD3d 1117, 1120 [3d Dept 2014] ["respondent is entitled to assert collateral estoppel notwithstanding the fact that he was not a party to the (other) action, as mutuality is not required" (internal quotation marks and citation omitted)]). Likewise, North may be bound by a judgment adverse to the positions he takes here to the extent that he is found to be in privity with the Attorney General with respect to the whistleblower claim (*see e.g. Amalgamated Sugar Co. v NL Indus., Inc.*, 825 F2d 634, 641 [2d Cir 1987]; *Walter E. Heller & Co., Inc. v Cox*, 343 F Supp 519, 524 [SD NY 1972], *affd* 486 F2d 1398 [2d Cir 1973]). Thus, the determinations made in the Dissolution Case may serve as a basis for granting or withholding the relief sought in this case.[7]

Given the substantial identity between the two actions and the significant likelihood that determination of the Dissolution Case will dispose of this case or limit the issues to be adjudicated, the Court finds, in the exercise of discretion, that a stay is warranted to "preserve judicial resources, further the interest of justice by preventing inequitable results and promote orderly procedure by furthering the goals of comity and uniformity" (*Concord Assoc., L.P. v EPT Concord, LLC*, 101 AD3d 1574, 1575 [3d Dept 2012]).[8]

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[7] Of course, if the Attorney General prevails in obtaining the dissolution of the NRA, the issues raised by this action may well be rendered academic.

[8] It also bears emphasis that "[t]he primary purpose of a declaratory judgment is to adjudicate the parties' rights before a 'wrong actually occurs in the hope that later litigation will be unnecessary'" (*Klostermann v Cuomo* , 61 NY2d 525, 538 [1984], *quoting Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983], *cert denied* 464 US 993 [1983]), and "[t]he decision to entertain an action for declaratory judgment is a matter committed to the sound discretion of Supreme Court, which may decline to consider such relief where other adequate remedies are available" (*Clarity Connect, Inc. v AT&T Corp.*, 15 AD3d 767, 767 [3d Dept 2005]). Thus, the fact that the Attorney General already is seeking coercive relief in the Dissolution Case on the basis of her allegations that the NRA is engaging in unlawful retaliation against North further counsels against proceeding with the portion of this action seeking declaratory relief at this time.

In this connection, the Court rejects the NRA's reliance on authorities requiring a "'complete identity'" of parties, claims and requested relief (Opp Mem at 10, quoting *Abrams v Xenon Indus.*, 145 AD2d 362, 363 [1st Dept 1988]). The line of cases relied upon by the NRA has been expressly rejected by the Appellate Division, Third Department as "not uniform" and constituting an overly rigid interpretation of CPLR 2201's highly discretionary standard (*National Mgt. Corp. v Adolfi*, 277 AD2d 553, 555 [3d Dept 2000] [citation omitted]; *see Concord Assoc.*, 101 AD3d at 1575; *see also Asher v Abbott Labs.*, 307 AD2d 211, 211-212 [1st Dept 2003]; *Research Corp. v Singer-Gen. Precision, Inc.*, 36 AD2d 987, 988 [3d Dept 1971]).

The Court further finds that the prejudice to North from being forced to defend against this action during the pendency of the Dissolution Case outweighs any prejudice to the NRA that might result from the stay. The NRA clearly has greater financial resources than North, and it is questionable whether North would be entitled to indemnification from the NRA for his legal fees and other expenses incurred in defending against this action (*see* NYSCEF Doc No. 20 at 33-38). Thus, denial of the stay would require North to expend substantial sums to litigate many of the same issues that are the subject of the Dissolution Case. Moreover, this litigation may itself be part of the retaliation allegedly inflicted upon North for his whistleblowing activities.[9] On the other hand, the Court discerns little, if any, prejudice to the NRA if this case is stayed during the pendency of the Dissolution Case.[10]

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[9] Although North is "not asking th[is] Court to stop th[e] internal [expulsion] procedure" (Oral Arg Tr at 15; *see id.* at 27-28), the NRA asks the Court to place its judicial imprimatur on the process.

[10] The NRA laments that the Dissolution Case "will not be resolved imminently or quickly" (Opp Mem at 11), but the same likely is true of this highly fact-intensive case.

Finally, while this action was commenced first, the more comprehensive nature of the Dissolution Case, which is prosecuted by the Attorney General as the regulator of New York not-for-profit corporations, and the fact that both cases remain at their earliest stages counsel against a mechanical application of the first-to-file rule (*see AIG Fin. Prods. Corp. v Penncara Energy, LLC*, 83 AD3d 495, 495 [1st Dept 2011]; *cf. Matter of PPDAI Group Sec. Litig.*, 2019 NY Slip Op 51075[U], *5).

CONCLUSION

Accordingly,[11] it is

ORDERED that defendant's motion for a stay of this action pending determination of *People of the State of New York v The National Rifle Association of America, Inc., et al.*, Index No. 451625-2020 is granted; and it is further

ORDERED that this action is stayed pending further order of court.

This constitutes the Decision & Order of the Court, the original of which is being uploaded to NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for defendant shall promptly serve notice of entry on plaintiff.

Dated: Albany, New York
October 2, 2020

RICHARD M. PLATKIN
A.J.S.C.

Papers Considered:

NYSCEF Nos. 1-2, 12-16, 18-25, 32-36, 41-47.

10/02/2020

[11] Given the foregoing, the NRA's request for counsel fees pursuant to 22 NYCRR 130-1.1 on account of North's allegedly frivolous conduct in making this motion (*see* Opp Mem at 11-12) is denied.

Exhibit G

New York State Department of State Division of Corporations entity information page for the NRA as of December 9, 2020

NYS Department of State

Division of Corporations

Entity Information

The information contained in this database is current through December 9, 2020.

Selected Entity Name: NATIONAL RIFLE ASSOCIATION OF AMERICA

Selected Entity Status Information

Current Entity Name:	NATIONAL RIFLE ASSOCIATION OF AMERICA
DOS ID #:	11142
Initial DOS Filing Date:	NOVEMBER 20, 1871
County:	NEW YORK
Jurisdiction:	NEW YORK
Entity Type:	DOMESTIC NOT-FOR-PROFIT CORPORATION
Current Entity Status:	ACTIVE

Selected Entity Address Information

DOS Process (Address to which DOS will mail process if accepted on behalf of the entity)

CORPORATION SERVICE COMPANY
80 STATE ST.
ALBANY, NEW YORK, 12207-2543

Registered Agent

CORPORATION SERVICE COMPANY
80 STATE ST.
ALBANY, NEW YORK, 12207-2543

This office does not record information regarding the names and addresses of officers, shareholders or directors of nonprofessional corporations except the chief executive officer, if provided, which would be listed above. Professional corporations must include the name(s) and address(es) of the initial officers, directors, and shareholders in the initial certificate of incorporation, however this information is not recorded and only available by viewing the certificate.

***Stock Information**

# of Shares	Type of Stock	$ Value per Share
No Information Available		

*Stock information is applicable to domestic business corporations.

Name History

Filing Date	Name Type	Entity Name
OCT 26, 1877	Actual	NATIONAL RIFLE ASSOCIATION OF AMERICA
NOV 20, 1871	Actual	THE NATIONAL RIFLE ASSOCIATION

A **Fictitious** name must be used when the **Actual** name of a foreign entity is unavailable for use in New York State. The entity must use the fictitious name when conducting its activities or business in New York State.

NOTE: New York State does not issue organizational identification numbers.

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