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May 17, 2022

VIA NYSECF

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

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

Dear Justice Cohen:

Plaintiff, People of the State of New York by Attorney General Letitia James, the Office of the Attorney General ("OAG"), respectfully submits this supplemental letter brief in further support of Plaintiff's motion to dismiss (Motion Sequence No. 13) the National Rifle Association of America's ("NRA") supplemental counterclaims (NYSCEF 629).

As set forth below, the supplemental counterclaims are procedurally improper and moot. Further, the new allegations asserted by the NRA are insufficient to save its counterclaims.

Brief Statement of Relevant Facts and Procedure

On March 2, 2022, this Court partially granted the motions to dismiss by the NRA and two of the individual Defendants. NYSCEF 609-611. As is relevant here, the Court dismissed those claims seeking dissolution of the NRA.

On April 15, 2022, the NRA served corrected supplemental counterclaims (NYSCEF 629) that are substantively identical to its original and amended counterclaims (NYSCEF 325, 622), except for allegations of additional purported comparators in support of their selective enforcement claim.

On May 9, 2022, the OAG deemed its fully briefed motion to dismiss the NRA's counterclaims applicable as against the NRA's supplemental counterclaims while seeking leave to make this brief submission. NYSCEF 651.

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For the reasons given below and in the OAG's previous submissions in support of its motion to dismiss, the NRA's supplemental counterclaims should be dismissed.

Argument

I. The NRA's Supplemental Counterclaims Are Procedurally Improper and Moot.

The Court should disregard the NRA's supplemental counterclaims because the NRA failed, as required by CPLR 3025(b), to obtain leave of the Court to file the same. But even if it had sought leave, the Court should not permit the NRA to proceed because its counterclaims fail and the relief it is seeking is rendered moot by the dismissal of Plaintiff's dissolution claims.

The NRA's supplemental counterclaims continue to focus on the Plaintiff's judicial dissolution claims. *See, e.g.*, NYSCEF 629 at counterclaims ¶¶ 34-48; NYSCEF 625 at 6:20-24. Similarly, the relief the NRA seeks is damages or declaratory/injunctive relief relating to the Plaintiff's now-dismissed claims for dissolution. NYSCEF 629 at counterclaims ¶¶ 62, 75, 86, Section IX (Request for Relief). The NRA cannot obtain retroactive declaratory or injunctive relief pertaining to dismissed dissolution claims; such claims are thus moot. *Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 713-14 (1980). And, for the reasons set forth in the OAG's previously filed papers, the Attorney General, in her individual and official capacities, is immune from the NRA's claims for monetary relief on its counterclaims. NYSCEF 279 at 34-36; NYSCEF 560 at 16-17. The NRA's supplemental counterclaims, as a whole, are moot.

II. The NRA's Selective Prosecution Claim Fails as a Matter of Law.

As demonstrated in Plaintiff's previous submissions, the NRA has not met its burden of pleading facts to establish that it was treated differently than similarly situated entities for an impermissible reason, and the NRA's supplemental allegations do not cure this pleading deficiency. *Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 815 F. Supp. 2d 679, 696 (S.D.N.Y. 2011).

The NRA has failed to allege that any of the newly cited examples of purported non-enforcement by the OAG involved entities similarly situated to the NRA, as it must. *Mosdos Chofetz Chaim*, 815 F. Supp. 2d at 696. It has not alleged whether any of those entities, like the NRA, are incorporated in New York and subject to judicial dissolution claims; in what ways the conduct allegedly committed by those entities is similar to what is alleged against the NRA; whether any of those entities are alleged, as here, to have filed years' worth of materially misleading filings with the OAG; or whether the entities have continued to support entrenched leadership in the face of corruption. *See* NYSCEF 646 at ¶¶ 562-68; *see also Baines v. City of New York*, 2015 WL 3555758, at *11 (S.D.N.Y. June 8, 2015) (dismissing selective prosecution claim where comparators' alleged crimes were not of the same degree as plaintiff's, and collecting cases).

At best, the NRA makes one conclusory statement that three of the new examples "have undergone highly publicized scandals with allegations resembling or exceeding those here." NYSCEF 629 at counterclaims ¶ 24. But "[c]onclusory allegations of selective treatment are insufficient to state an equal protection claim." *Jarrach v. Sanger*, 2010 WL 2400110, at *8 (E.D.N.Y. June 9, 2010) (granting motion to dismiss equal protection claim). The NRA does not and cannot assert that these comparators are similarly situated to it.

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Moreover, the NRA is simply incorrect that “the public record discloses no evidence of any enforcement action against” entities listed in the *Tampa Bay Times* article cited in its supplemental counterclaims. NYSCEF 629 at counterclaims ¶ 24. Several entities from that list—which is incorporated by reference into the NRA’s counterclaims—were shut down as a result of publicly-announced OAG enforcement actions. A non-exhaustive list includes:

- The OAG joined all fifty states, the District of Columbia, and the Federal Trade Commission in a lawsuit and settlement resulting in the dissolution of Cancer Fund of America Inc.—a charity listed in the *Times* article. See OAG, *A.G. Schneiderman Announces Settlement With Two Sham Cancer Charities That Bilked More Than \$75 Million From Donors* (March 30, 2016), available at <https://ag.ny.gov/press-release/2016/ag-schneiderman-announces-settlement-two-sham-cancer-charities-bilked-more-75> (last accessed May 17, 2022).
- The OAG joined a twenty-four-state settlement with VietNow National Headquarters, Inc.—another charity listed in the *Times* article—resulting in its dissolution. See OAG, *A.G. Schneiderman Announces Multistate Settlement Dissolving Deceptive Veterans Charity* (Nov. 6, 2017), available at <https://ag.ny.gov/press-release/2017/ag-schneiderman-announces-multistate-settlement-dissolving-deceptive-veterans> (last accessed May 17, 2022).
- The OAG shut down Reserve Police Officers Association—another charity listed in the *Times* article—as part of its “Operation Bottomfeeder” targeting fraudulent fundraising practices. See OAG, *Pennies for Charity: Where your Money Goes* p. 6 (Nov. 2018), available at https://ag.ny.gov/sites/default/files/pennies_for_charity_2018.pdf (last accessed May 17, 2022).

The Court may take judicial notice of enforcement action referenced in OAG press releases. See *In re Foreign Exchange Benchmark Rates Antitrust Litigation*, 74 F.Supp.3d 581, 587 n.4 (S.D.N.Y. 2015) (collecting cases). Since the OAG did in fact take enforcement action against entities listed in the *Times* article, the NRA’s efforts to use them as comparators fail for this additional reason.

Further, the NRA’s supplemental counterclaims do not overcome the presumption of regularity that applies to prosecutorial discretionary decisions. See, e.g., *U.S. v. Armstrong*, 517 U.S. 456, 464 (1996) (observing prosecutors’ decisions are shielded by a “presumption of regularity” and a presumption that they have “properly discharged their official duties”). As the Court noted during oral argument on the motion to dismiss the counterclaims, “The Attorney General’s job is to decide what cases to bring and to try to persuade a jury or a Court the merit of those claims.” NYSCEF 625 at 32:23-25; see also *U.S. v. Catlett*, 584 F.2d 864, 868 (8th Cir. 1978) (dismissing selective prosecution claim against government’s enforcement prioritization).

Because the NRA has failed to sufficiently allege the existence of any similarly situated entities that have received disparate treatment by the OAG, and has also failed to allege that any selectivity in enforcement was not the result of legitimate prosecutorial discretion, see *Catlett*, 584 F.2d at 868, the OAG respectfully requests that the Court dismiss the NRA’s counterclaims including those asserting selective enforcement.

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Conclusion

For the reasons set forth in Plaintiff's prior submissions in support of Motion Sequence No. 13 and herein, the NRA's supplemental counterclaims should be dismissed in their entirety and the Court should order such other and further relief as it deems just and proper.

* * *

Pursuant to Your Honor's May 16, 2022 order (NYSCEF 658), I certify that the body of this supplemental letter brief is 1,243 words in length using Microsoft Word's word count function.

Respectfully,

/s/ Monica Connell

Monica Connell
Assistant Attorney General

cc: All Counsel of Record