Motion Sequence 001

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

PEOPLE OF THE STATE OFNEWYORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK	§ § § §	
Plaintiff,	§ §	**INDEX NO. 451625/2020**
v.	§ §	
THE NATIONAL RIFLE ASSOCIATION et al.,	§ § §	
Defendants.	§	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT THE NATIONAL RIFLE ASSOCIATION'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Brought in the name of the State and ostensibly on behalf of the People (including, preposterously, on behalf of NRA members),[1] this lawsuit is actually the capstone of a partisan election-interference project that has drawn fire from constitutional scholars, politicians and civil rights organizations across the ideological spectrum. Its proponent, Attorney General Letitia James, campaigned on defamatory and threatening assertions that the NRA was a "criminal enterprise" and "terrorist organization," which she promised to dismantle using her office's regulatory oversight powers. Her Complaint[2] fails to support these allegations, and cannot dispute that the NRA expends significant resources in furtherance of its Second Amendment advocacy mission. Indeed, the NRA's success at that mission has made it a target.

Shortly after taking office, James hastily delivered on her campaign promise by initiating a fishing expedition into the NRA's finances and governance. By that time, the NRA had publicly and directly undertaken efforts to redress the same alleged abuses by a handful of faithless fiduciaries that James now purports to pursue derivatively. Indeed, although the New York State Office of the Attorney General (the "NYAG") notably declines to name the agency as a defendant, the NRA commenced claims more than a year ago for fraud and breach of fiduciary duty against its former public relations firm, Ackerman McQueen ("Ackerman"), regarding several of the transactions alleged in the Complaint. Those claims have already withstood a motion to dismiss

[1] Among other things, James purports to sue derivatively on behalf of NRA members. *See* Compl. ¶¶ 27, 577, 648 (claiming without basis that Section 623 of the N-PCL authorizes the Attorney General to commence derivative actions on behalf of members; Section 623 makes no mention of the Attorney General). James cannot allege that the NRA's millions of members wish for their century-old Association to be dismantled and its assets redistributed by New York State Democrats. Instead, the central objective of this lawsuit is to harm the NRA's membership and its cause.

[2] All references to the Complaint ("Compl.") in this action refer to the Amended Complaint filed on August 10, 2020, Dkt. No. 11.

and are currently in the early stages of discovery (such litigation, the "Ackerman Litigation").[3] The Ackerman Litigation is not the only federal lawsuit that overlaps with, and precedes, this one. On August 6, 2020 (before this lawsuit was commenced),[4] the NRA sued James in the Northern District of New York for her politicized targeting of the NRA. That case (the "NRA-NYAG Federal Action") is the second of two related cases filed in the Northern District regarding New York State's unconstitutional hostilities against the NRA. The first, involving a financial-censorship campaign implemented through the New York Department of Financial Services, has withstood multiple motions to dismiss and is currently in discovery.[5] Two additional federal lawsuits arising out of the same subject matter as the Complaint are pending in the Middle District of Tennessee[6] and the Northern District of Texas.[7] The NRA is presently filing an application to consolidate the majority of these federal cases (collectively, the "Related Federal Cases") before the Judicial Panel on Multidistrict Litigation.

It is no coincidence that James' lawsuit arrives in the wake of so much related litigation. Contrary to the Complaint's disingenuous, unfounded allegation that seeking the cooperation of the NRA's Board of Directors to ensure compliance with its own policies and procedures would be "futile,"[8] the NRA has shouldered considerable burdens to place its governance and compliance programs beyond reproach. Faced with the threat of a smear campaign, the NRA nonetheless stood firm in its decision to fire and sue Ackerman. It has doggedly pursued internal compliance efforts,

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[3] *Nat'l Rifle Ass'n of Am. v. Ackerman McQueen,* et al., Civ. No. 3:19-cv-02074–G (N.D. Tx.).

[4] This lawsuit was commenced on August 10, 2020, at the earliest. *See* discussion *infra* at 15-16.

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

[6] *Dell'Aquila*, et al. *v. Wayne LaPierre*, et al., Civ. No. 3:19-cv-00679 (M.D. Tn.).

[7] *Ackerman McQueen v. Stinchfield*, Civ. No. 3:19-cv-03016-X (N.D. Tx.).

[8] Compl. ¶ 663.

brought in a new CFO, and fired executives (*e.g.*, Defendant Powell) for the same conduct alleged by the NYAG. Not surprisingly, the corporate death sentence[9] of dissolution has never been sought, or imposed, by New York State on facts even remotely resembling these. Instead, dissolution has historically (and rightly) been reserved for fraudulent, *sham* entities—*e.g.*, a purported puppy rescue that was really a puppy mill;[10] breast cancer charities that performed no such work;[11] and a leukemia foundation that spent less than one percent of its revenue to help children suffering from cancer.[12] Even where the NYAG can credibly allege insider self-dealing or lax oversight of charitable spending, it has traditionally targeted the individual tortfeasors and worked with the charities to reform their governance so that they could continue serving their corporate purposes.[13] However, the NYAG has no interest in such efforts here, because thwarting the NRA's corporate purpose is a career goal for James.

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[9] *See People v. Oliver Schools*, 206 A.D.2d 143 (4 Dept 1994) (quoting *People v. North River Sugar Refining Co*., 121 N.Y. 582, 608 (1890).

[10] *See* Rogers Aff. Ex. 2 (Consent Order and Judgment, *People v. Precious Pups Rescue, Inc.,* et al., Index No. 17884/2014).

[11] *See* Rogers Aff. Ex. 3 (Complaint and Consent Order and Judgment, *People v. Mure Associates, L.P..,* et al., Index No. 450190/2014).

[12] *See* Rogers Aff. Ex. 4 (Complaint and the two executed Consent Order and Judgments, *People v. The Nat'l Children's Leukemia Foundation*, et al., Index No. 508930/2014). Unsurprisingly (in light of the political context of this action), the NYAG has purported to liken this case to its recent dissolution action against the Trump Foundation. *See id.* Ex. 5 (transcript of James' August 6, 2020 press conference) at 6-7. But that lawsuit, too, was starkly distinguishable—since it involved a 501(c)(3) entity, prohibited from engaging in political activity, which allegedly became a "checkbook" for a presidential campaign. *See id.* Ex. 6 (Petition, *People v. Donald J. Trump* et al., Index No. 451130/2018) ¶¶ 2, 106-108 (describing persistently fraudulent behavior under dissolution claim to consist of unpermitted political activity)).

[13] *See, e.g.*, Rogers Aff. 7 (NYAG press release noting settlement with the former president of NARAL Pro-Choice, who had been accused of self-dealing and intimidating board members into silence. A statement from NYAG counsel noted that "This office is committed to rooting out abuses of power in the charitable sector, holding wrongdoers accountable and working with nonprofit groups to help them tighten internal controls to prevent fraud and other illegal conduct."); Ex. 8 (NYAG press release noting settlement with trustees of the Victor E. Perley fund following a "shocking" "breakdown in governance" that led to the loss of the fund's entire $3.7 million portfolio. While the trustees faced fines, the non-profit was required only to reconstitute its board of directors with NYAG approval); Ex. 9 (NYAG press release noting settlement with the former president of NYLAG for diverting millions from the charity, which required the charity to only agree "to enhance their policies and procedures to protect the charitable assets entrusted to their care.").

Because this action is the latest-filed case in a cluster of related cases, it should be dismissed—or, in the alternative, stayed—on multiple grounds. *First*, considerations of *forum non conveniens* dictate that this lawsuit, which implicates dozens of out-of-state witnesses and documents, be litigated in the same federal forum as the NRA's related constitutional claims. There is no reason the NYAG's claims against the NRA cannot be adjudicated in federal court, and consolidation or coordination of this case with the NRA's first-filed federal lawsuit would promote judicial economy, avoid inconsistent adjudications, and facilitate the voluminous, multistate discovery that inevitably awaits the parties. *Second*, because this case involves "the same parties" and, substantively, the "same cause of action" as an already-pending federal case, CPLR 3211(a)(4) provides an additional, independent ground for dismissal. *Third*, this action should be dismissed because the NYAG has failed to file in the statutorily required venue, which is Albany County. *Fourth*, the Court can, and should, stay this action pursuant to CPLR 2201 until the Related Federal Cases are resolved.

STATEMENT OF FACTS

A. The NRA and Its Constitutionally Protected Purposes

The NRA was founded immediately following the Civil War "to promote the introduction of a system of army drill and rifle practice, as part of the military drill of the National Guard of [New York] and other states. . . ."[14] For 149 years, it has operated as a New York not-for-profit membership corporation and has established itself as one of the largest, and oldest, civil rights non-profits in the country.[15] As set forth in its bylaws, the NRA's stated mission comprises five purposes and objectives, including protecting and defending the Constitutional right to keep and

[14] Compl. ¶ 55.

[15] Compl. ¶¶ 1, 57.

bear arms; promoting public safety, law and order, and the national defense; training members of law enforcement, the armed forces and citizens in marksmanship and small arms handling; fostering and promoting shooting sports; and promoting hunter safety and sport.[16]

Today, the NRA counts more than five million members.[17] It employs hundreds of people,[18] and encompasses 11 divisions, each overseen by the Executive Vice President.[19] The NRA's bylaws establish a 76-member board of directors, who exercise general oversight of the organization;[20] the bylaws also establish a leadership structure of eight officers, six of whom are elected annually by the Board.[21] Four of these officers are *ex officio* members of the board but lack voting power.[22] There are "dozens of standing and Special Committees" of the board, including an officer compensation committee, a nominating committee, an executive committee, and an audit committee (with its own charter).[23] The NRA has formalized policies maintained in an employee handbook and a policy manual, including policies and procedures on employee selection, compensation, work standards, time off, work standards, insurance and pension benefits, a statement of corporate ethics, purchase policy, a contract review policy, travel and business expense reimbursement policy, an officer and board of directors policy relating to disclosure of conflicts of interest, and a related-party transaction policy.[24]

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[16] Compl. ¶ 17.

[17] *See* Rogers Aff. Ex. 10 (Paul Bedard, *NRA is Back, "Highest Ever Membership*," WASH. EXAMINER (Apr.1, 2019) at 1.

[18] Compl. ¶ 135

[19] Compl. ¶ 62.

[20] Compl. ¶ 64.

[21] Compl. ¶ 66.

[22] Compl. ¶ 67.

[23] Compl. ¶¶ 82-94.

[24] Compl. ¶ 98, Compl. Exs. 2 and 3.

Political speech is a major purpose of the NRA and one in which it is expressly permitted to engage under its bylaws and New York law, and as a 501(c)(4) organization under federal law. The NRA engages in extensive legislative advocacy to promote its purposes, as well as to vindicate the rights of its members and all Americans. 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 Amendment freedoms and to assist NRA members who engage in national, state, and local firearm dialogue.[25] 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.

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.[26] For this reason, and because of its decisive support for President Trump in 2016, the NYAG and its political allies targeted the NRA for dissolution years ago.

B. New York State's Animus Toward the NRA and Related Pending Litigation

New York Governor Andrew Cuomo has a longstanding political vendetta against what he calls "Second Amendment types,"[27] especially the NRA, which he accuses of exerting a "stifl[ing]

[25] *See* Rogers Aff. Ex. 11 (NRA 2019 Annual Report) at 4.

[26] Rogers Aff. Ex. 12 (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)).

[27] On February 15, 2018, Cuomo appeared on the MSNBC program *The Beat with Ari Melber*, where he discussed championing legislation that some believed "trampled the Second Amendment." YOUTUBE, *Gov. Andrew Cuomo On Background Checks: "Bunch of Boloney* [sic]*" | The Beat With Ari Melber | MSNBC*, *available at*

. . . stranglehold" over national gun policy.[28] Beginning in 2018, Cuomo and several political allies orchestrated a campaign of selective enforcement, backroom exhortations, and public threats designed to coerce financial institutions to blacklist pro-gun advocacy groups, including the NRA.[29] The NRA's First Amendment claims against Governor Cuomo, the New York State Department of Financial Services, and its former superintendent arising from this pressure campaign have been pending for two years, have withstood multiple motions to dismiss, and are in discovery in the United States District Court for the Northern District of New York (such litigation, the "Cuomo Litigation").[30]

New York's former Attorney General, Eric Schneiderman, was so disturbed by mounting political pressure to commence an unconstitutional "investigation" of the NRA that he alerted the NRA about the situation scheme during 2017.[31] Shortly thereafter, Schneiderman resigned from office, and Cuomo's longtime acolyte,[32] Letitia James, became a candidate to replace him. On the campaign trail, before ever assuming office and without a shred of evidence against the NRA, James announced that she would follow in the footsteps of Cuomo's financial-blacklisting campaign if elected, by "put[ting] pressure upon the banks that finance the NRA" in order to choke

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https://www.youtube.com/watch?v=Tz8X07fZ39o (last visited June 6, 2020). However, Cuomo lamented that his "favorability rating" had dropped thereafter due to "backlash from conservatives and Second Amendment types." *Id.*

[28] *See* Rogers Aff. Ex. 13 (Kenneth Lovett, *Exclusive: Cuomo Fires Back at Jeb Bush for 'Stupid' and 'Insensitive' Gun Tweet*, NY DAILY NEWS (Feb. 17, 2016).

[29] *See* Rogers Aff. Ex. 14 (Press Release, Governor Cuomo Directs Department of Financial Services to Urge Companies to Weigh Reputational Risk of Business Ties to the NRA and Similar Organizations, N.Y.S. Office of the Governor (Apr. 19, 2018).

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

[31] *See* Rogers Aff. Ex. 1 (NRA-NYAG Federal Action Compl) ¶ 14.

[32] The *New York Times* expressly declined to endorse Attorney General James for office on the basis of her close connection to Cuomo and his "historically corrupt" administration. *See* Rogers Aff. Ex. 15 (Editorial, *The New York Times Endorses Zephyr Teachout for Attorney General*, N.Y. TIMES (Aug. 9, 2018)).

off support for its Second Amendment speech,[33] which she called a "poisonous agenda" that was "directly antithetical" to New York's gun-control laws.[34] She also attacked the NRA's legitimacy as a not-for-profit corporation.[35] 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."[36] Two days later, James doubled down: "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."[37] On October 31, 2018, in a magazine interview, James again stated that "the NRA holds [itself] out as a charitable organization, but in fact, [it] really [is] a terrorist organization."[38] During late summer and early fall 2018, James pledged that she would wield state power to conduct a fishing expedition to "see whether or not the[] [NRA] ha[d] in fact complied with the not-for-profit law."[39]

While James was publicly inveighing against the NRA and promising action, the NRA was busy heeding Schneiderman's advice. Although it believed it was already operating in compliance

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[33] *See* Rogers Aff. Ex. 16 (*Attorney General Candidate, Public Advocate Letitia James*, OUR TIME PRESS (Sept. 6, 2018)).

[34] See Rogers Aff. Ex. 17 (Jon Campbell, *NY AG Letitia James Called the NRA a 'Terrorist Organization.' Will It Hurt Her Case?*, USA TODAY (Aug. 19, 2020)).

[35] *Id*.

[36] *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)).

[37] Rogers Aff. Ex. 17 (*Attorney General Candidate, Public Advocate Letitia James*, OUR TIME PRESS (Sept. 6, 2018)).

[38] Rogers Aff. Ex. 18 (Teddy Grant, *Letitia 'Tish' James on Becoming New York's Next Attorney General*, EBONY (Oct. 31, 2018)).

[39] *See* Rogers Aff. Exs. 19–23 (Mike Spies, *Tom Selleck Quits NRA Board*, THE TRACE (Sept. 18, 2018); Mike Spies & John Cook, *Top NRA Executive's Trail of Business Flops and Unpaid Debt*, THE TRACE (Oct. 1, 2018); *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); *see also* Alex Yablon & Mike Spies, *FAQ: Is the NRA Going Broke?*, THE TRACE (Aug. 9, 2018); *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)).

with New York State law, it also understood that a politically driven "compliance audit" was something for which it should carefully prepare. The NRA therefore undertook a top-to-bottom review of its operations and governance.[40] In the process, the NRA determined that a relatively small group of vendors, executives and fiduciaries were not complying with NRA policies and/or reporting requirements. These included its largest vendor, Ackerman, whom the NRA eventually determined had been systematically overcharging the NRA, falsifying invoices, and engaging in a practice of pass-through block billing that obscured the nature of certain expenditures. When the NRA sought additional documentation from Ackerman, Ackerman refused to provide it, leading to litigation beginning in April 2019, by the NRA against Ackerman to force compliance with its requests and to recover funds fraudulently taken from the NRA.[41] Rather than acknowledge and support the NRA's efforts to recover funds for its members, however, James sought to undermine them. Later that same month, on April 27, 2019—a mere three months after taking office—she fulfilled a campaign pledge by announcing a Charities Bureau investigation into the NRA's not-for-profit status.[42]

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[40] Despite framing the NRA as a fraudulent organization beyond repair, James's own complaint extensively documents that the NRA voluntarily undertook efforts to improve its internal governance functions beginning in 2017, up to the present day. These efforts include replacing Defendant Wilson Phillips with a new treasurer that the complaint repeatedly lauds for engaging in remedial efforts such as a 50% reduction in travel expenses (Compl. ¶ 156), "reengineering" the process for handling Defendant Wayne LaPierre's expense reimbursements to "make it . . . robust and appropriate" (*id*. ¶ 197), investigating and terminating a complained-of vendor contract with HomeTelos in the spring of 2018 (*id*. ¶ 225), examining Defendant Joshua Powell's improper expenses and engaging outside counsel to assist, and confronting Powell regarding improper conflicts of interest in mid-2018, resulting in Powell's removal and repayment of misappropriated monies to the NRA (*id*. ¶¶ 249-50, 263), and investigating and examining the improper use of a corporate credit card by LaPierre's senior assistant (*id*. ¶ 294). The NRA engaged outside counsel to do an extensive review of the NRA's relationship with its contractual partners and in service of that effort ultimately commenced litigation against Ackerman to obtain documentation that Ackerman has been withholding. (*id*. ¶¶ 302, 455). The NRA has further been evaluating the establishment of an internal audit function (*id*. ¶ 483) and adopted a revised whistleblower policy in January 2020. (*id*. ¶ 115).

[41] *Nat'l Rifle Ass'n of Am. v. Ackerman McQueen, Inc.*, et al., Civ. Case No. 3-19-cv-02074-G (N.D. Tex.).

[42] Rogers Aff. Ex. 24 (David Sherfinski, *Letitia James, New York AG, Launches Investigation Into the NRA*, THE WASH. TIMES (Apr. 27, 2019)).

On August 6, 2020, the NRA commenced the NRA-NYAG Federal Action in the United States District Court for the Northern District of New York in response to the NYAG's unconstitutional, partisan targeting of the NRA. The NRA-NYAG Federal Action challenges the NYAG's politicized "investigation" of the NRA (here, the investigation by the NYAG as a violation of the NRA's First Amendment rights.[43] The Federal Action and the Cuomo Litigation are designated as "related cases" in federal court.[44]

C. The Other Related Federal Cases

The NRA commenced the Ackerman Litigation in August 2019.[45] As part of the Ackerman Litigation, a former Ackerman employee, Grant Stinchfield, filed an affidavit attesting to corrupt practices perpetrated by Ackerman, at the expense and without the knowledge of the NRA, which he had witnessed.[46] Ackerman sued Stinchfield in an attempt to silence him (the "Stinchfield Litigation").[47] The veracity of Stinchfield's statements about Ackerman is at issue in the Stinchfield Litigation; therefore, discovery is ongoing regarding many of the same aspects of the NRA's dealings with Ackerman referenced in the NYAG's Complaint. Separately, an NRA donor, David Dell'Aquila, commenced a putative class action against the NRA in the United States District Court for the Middle District of Tennessee in August 2019 (the "Dell'Aquila Litigation"). The Dell'Aquila Litigation alleges misspending by the NRA, and likewise involves transactions

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[43] Rogers Aff. Ex. 1.

[44] *Nat'l Rifle Ass'n of Am. v. James,* Case No. 1:20-cv-00889-MAD-TWD (N.D.N.Y.)

[45] Two related disputes between the NRA and Ackerman, which were previously being litigated in Virginia State Court, are stayed pending adjudication of the federal Ackerman Litigation. *See National Rifle Association of America v. Ackerman McQueen, Inc., and Mercury Group, Inc.*, Cons. Case Nos. CL19002067; CL19001757; CL19002886 (Va. Cir. Ct.)

[46] *Nat'l Rifle Ass'n of Am. v. Ackerman McQueen, Inc.*, et al., Civ. Case No. 3-19-cv-02074-G, Dkt. No. 122.

[47] *Ackerman McQueen v. Stinchfield*, Civ. No. 3:19-cv-03016-X (N.D. Tx.).

between the NRA and Ackerman.[48] Although several of Dell'Aquila's claims have been dismissed, others remain pending.

D. The Dissolution Action

On August 6, 2020, James held a highly publicized press conference for what she described as a "major national" announcement: the filing of a dissolution lawsuit against the NRA.[49] A summons and complaint were filed that morning and an index number purchased. That complaint, however, was missing the complete verification required by New York Not-for-Profit Corporation Law ("N-PCL") § 1103. On August 9, 2020, Defendant NRA filed, pursuant to CPLR 3022, a notice of its election to treat the putative complaint as a nullity.[50] The following day, the NYAG filed a "Complaint (Amended)," described on the docket as containing only a corrected verification.[51]

ARGUMENT

I. This Action Should Be Dismissed or Stayed on the Grounds of *Forum Non Conveniens*.

New York's doctrine of *forum non conveniens,* codified in CPLR 327, permits a court to dismiss or stay any action that "in the interest of substantial justice should be heard in another forum."[52] The rule provides one of several discretionary grounds under New York law for the dismissal of cases, like this one, which overlap with lawsuits pending in other fora that pertain to

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[48] *Dell'Aquila*, et al. *v. Wayne LaPierre*, et al., Civ. No. 3:19-cv-00679 (M.D. Tn.) Dkt. No. 43.

[49] Rogers Aff. Ex. 25 (Stephen Gandel August 5, 2020 Twitter post)

[50] Dkt. No. 10.

[51] Dkt. No. 11.

[52] CPLR 327 (McKinney). *See also Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984) (explaining that CPLR 327 permits a court to dismiss an action which "although jurisdictionally sound, would be better adjudicated elsewhere.") (internal citations omitted).

the same parties or issues.[53] Those potential alternative fora include more convenient venues within New York.[54] The Court of Appeals has explained that the application of *forum non conveniens* "turn[s] on considerations of justice, fairness, and convenience;" thus, no single factor is dispositive.[55] Factors considered in the *forum non conveniens* analysis include: (i) the burden on New York courts; (ii) the hardship to the defendant; and (iii) the availability of an alternate forum.[56] Each favors dismissal here.

A. Retaining this action in this forum would impose substantial, unnecessary burdens on both the NRA and the Court.

The NYAG's 163-page complaint challenges, and purportedly seeks to unwind, dozens of business transactions over at least a three-year period. Virtually none of these transactions took place in New York City, and the counterparties to these transactions reside far away—as do their documents. For example, this action is virtually guaranteed to require third-party discovery from: various former NRA employees and board members, who may continue to reside near NRA Headquarters in Virginia; Ackerman McQueen, Inc. (headquartered in Oklahoma City,

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[53] *See, e.g.*, *Citigroup Glob. Markets, Inc. v. Metals Holding Corp*., 45 A.D.3d 361, 362 (1 Dept. 2007) (affirming *forum non conveniens* dismissal because, *inter alia*, the subject matter of the action was "already being litigated abroad" which created "a risk that conflicting rulings w[ould] be issued by different courts of different jurisdictions") (internal citations and quotation marks omitted).

[54] *See, e.g. Parker v. 30 Wall St. Apartment Cor*p., 2015 WL 7906823, at *1 (1 Dept Dec. 4, 2015); *Croce v. Preferred Mut. Ins. Co*., 35 Misc.3d 161 (Dist. Ct. Suffolk Co. 2011); *A&S Med., P.C. v. ELRAC, Inc*., 184 Misc.2d 257 (Civ. Ct. N.Y. Cnty. 2000); *Roseman v. McAvoy*, 401 N.Y.S.2d 988, 990 (N.Y. City Civ. Ct. 1978); *Diagnostic Rehab. Med. Serv. v. Republic W. Ins. Co*., 2003 WL 22888389, at *11 (N.Y. Civ. Ct. Nov. 19, 2003)).

[55] *Silver v. Great Am. Ins. Co*., 29 N.Y.2d 356 (1972).

[56] *See Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 479 (1984). Notably, the oft-cited articulation of the *forum non conveniens* factors in the *Pahlavi* case contains two additional factors not listed here: the residency of the parties, and the locus of the transaction out of which the claims arose. *See id.* The NRA de-emphasizes these factors in its analysis because both the current forum and the desired forum (the U.S. District Court for the Northern District of New York) are sited in the same state. Thus, the NRA does not dispute whether this lawsuit has a cognizable nexus to New York—only whether the current forum is a just, convenient one. Although *forum non conveniens* is typically invoked to permit a transfer to a foreign jurisdiction, courts have also granted such motions in favor of other, more convenient, venues within New York. *See, e.g. Parker v. 30 Wall St. Apartment Corp*., 2015 WL 7906823, at *1 (1 Dept Dec. 4, 2015); *Croce*, 938 N.Y.S.2d; *A&S Med.*, 707 N.Y.S.2d at 780; *Roseman v. McAvoy*, 401 N.Y.S.2d at 990; *Diagnostic Rehab. Med.* Serv., 2003 WL at *11.

Oklahoma); McKenna & Associates (headquartered in Arlington, Virginia); Membership Marketing Partners, Allegiance Creative Group and Concord Social & Public Relations (headquartered in Fairfax, Virginia); HomeTelos L.P. (headquartered in Dallas, Texas); LookingGlass Cyber Solutions, Inc. (headquartered in Reston, Virginia); employees of those companies; the NRA's travel consultant (who resides in California) and, providers of lodging, transportation, and similar services in locations as far-flung as Italy, the Bahamas, and Normandy, France. Thus, key documents and witnesses lay outside the jurisdiction of this Court and obtaining these documents and testimony will hamper the NRA's ability to conduct its defense. Indeed, as set forth in Exhibit 27 to the Rogers Affirmation, the Complaint can be conservatively estimated to implicate 90 witnesses residing in 27 U.S. states, plus Washington D.C.

Needless to say, these witnesses will also be considered unavailable for trial pursuant to CPLR 3117(a)(3)(ii) and many of these depositions will be required in order for the NRA to adequately defend itself. This discovery and its potential use at trial would be most efficiently sought in federal court pursuant to federal rules designed to facilitate multistate (and, where necessary, cross-border) discovery. By contrast, retaining the action in this forum would require that virtually all witnesses and documents be sought pursuant to a protracted process, whereby a subpoena is first issued in New York, then domesticated elsewhere, then served or challenged pursuant to a patchwork of differing procedures and rules and litigated in all the different venues. This would create unnecessary burdens for both the NRA[57] and the Court.

Moreover, the mere fact that the NRA is already litigating overlapping and related claims in another available forum renders the duplicative litigation in this forum unnecessarily

[57] *See, e.g.*, *Price v. Brown Group*, 206 A.D.2d 195, 201 (4 Dept 1994) (recognizing that for purposes of analyzing the hardship imposed on the defendant in a *forum non conveniens* analysis, the location of relevant evidence is a key consideration).

burdensome. At the very least, the pendency of two overlapping lawsuits in two different New York courts will require the NRA to incur duplicative expenses litigating issues already decided, or under consideration, by the federal court; at worst, substantial additional expenses will arise as the parties invariably dispute the admissibility, and/or preclusive effect, of evidence or findings in the parallel federal proceeding. Such burdens could be minimized or eliminated entirely via a *forum non conveniens* dismissal, with the stipulation that the NRA will not contest the NYAG's re-filing of its claims in federal court.

B. Federal court provides a suitable alternative forum for the NYAG's claims.

The availability of an alternative forum to the plaintiffs is "a most important factor to be considered in ruling on a motion to dismiss."[58] Here, none of the claims asserted by the NYAG are within the exclusive subject-matter jurisdiction of New York state courts; indeed, statutory claims under the same N-PCL provisions that undergird the Complaint have been adjudicated by at least one federal court exercising diversity jurisdiction, and nothing prevents the federal courts already hearing substantially related causes of action from asserting jurisdiction pursuant to 28 U.S.C. § 1367 because the NYAG's claims are so related that they are effectively part of the existing Article III case or controversy.[59]

Moreover, to the extent that the NRA is able to consolidate all pending, related litigation in federal court, the forum will not only prove acceptable, but superior: the NRA has been litigating against several organs of the New York State government in federal district court since 2018, and the court has accrued significant familiarity with documents and issues likely to overlap with this case. The federal court in the Cuomo Litigation has also appointed a special master to conduct *in*

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[58] *Pahlavi,* 62 N.Y.2d at 481.

[59] *See e.g.*, *Nutronics Imaging, Inc. v. Danan*, 1998 WL 426570 (E.D.N.Y. 1998); *Leitner v. Sadhana Temple of New York, Inc.*, 2014 WL 12588643, at *14 (C.D. Cal. Oct. 17, 2014).

camera review of investigative-privilege and related privilege claims asserted by the government, an issue that is almost certain to reoccur in this case—and could dealt with efficiently by the federal court's existing process.

Thus, per the application of the above factors, this action should be dismissed under CPLR 327(a) for *forum non conveniens.*

II. <u>This Action Should Be Dismissed Based on the Pendency of the NRA-NYAG Federal Action Pursuant to CPLR 3211(a)(4).</u>

Pursuant to CPLR 3211(a)(4), a court has broad discretion to dismiss or stay an action when another action is already pending and there is a "substantial identity" of the parties and causes of action. This relief is available even if the first action was commenced only a day earlier.[60] Here, NYAG purported to commence this action on August 6, 2020, but the filed complaint attached a defective verification missing statements required by N-PCL § 1103 and CPLR 3020. When a pleading required to be verified is not, the adverse party is entitled to treat it "as a nullity, provided he gives notice with due diligence" upon the attorney of the adverse party.[61] This is because the failure to verify or sign the complaint—for whatever reason—affects a substantial right of the defendant in that plaintiff's claims cannot be challenged as false, which imposes prejudice upon the defendant who seeks to challenge these allegations.[62] The NRA notified the opposing party, in writing, within 72 hours, that it elected to treat the Complaint as a nullity.[63]

An action is not deemed commenced in New York State until an index number is obtained and the initiating papers are filed.[64] Strict compliance is mandatory, and so long as noncompliance

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[60] *11 E. 68th St. LLC v. Madison 68 Realty LLC*, 2014 Slip. Op. 31872(U) (Sup. Ct. N.Y. Cnty. July 10, 2014).

[61] CPLR 3022; *see also Matter of Miller v Bd. of Assessors*, 92 N.Y.2d 82 (1997).

[62] *Jack Vogel Associates v. Color Edge, Inc.,* 2008 N.Y. Slip Op. 31509(U) (New York County 2008).

[63] Dkt. No. 10.

[64] CPLR 304, 306-a.

is timely raised by the opposing party, warrants outright dismissal.[65] Unverified pleadings are properly stricken.[66] Following the NRA's notice of rejection to NYAG, NYAG filed an amended complaint with a corrected verification on August 10, 2020. Pursuant to CPLR 304, this action must therefore be deemed to have been filed as of that date—when a valid summons and complaint were filed with the Court.

The NRA's Federal Action therefore constitutes an action already pending for purposes of CPLR 3211(a)(4). Both the NRA and NYAG are parties and the NRA-NYAG Federal Action arises out of the "same subject matter or series of alleged wrongs," seeking redress under Section 1983 for NYAG's improper motive and abuse of dissolution power in bringing this action.[67] The fact that where, as here, a defendant's claim is one for declaratory relief does not minimize the potential need for a stay or dismissal.[68] Nor is a complete identity of parties required, so long as there "be at least one plaintiff and one defendant common to both actions."[69] Because the NRA's First Amendment claims lie at the heart of both actions, the NRA requests that this Court dismiss this action, or in the alternative, to stay this proceeding until the NRA-NYAG Federal Action resolves this critical issue.[70]

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[65] *Fry v. Village of Tarrytown*, 89 N.Y.2d 714 (1997).

[66] *See Morgan v. Maher*, 50 Misc.2d 642 (Sup. Ct. Nassau Cnty. 1969); *see also Alden v Gambino*, 53 Misc.3d 1204(A) (City Ct. Poughkeepsie Sept. 29, 2016) (acknowledging that striking a defective complaint is proper but declining to do so where defendant did not act with due diligence and seek a verified complaint in writing).

[67] Because the NRA-NYAG Federal Action argues that the politically motivated investigation and contemplated (now ripe) enforcement action by NYAG is unconstitutional, this action is properly considered a compulsory counterclaim to the NRA-NYAG Federal Action. *See* Fed. R. Civ. P. 12(a); *see also Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 815 F. Supp. 2d 679 (S.D.N.Y. 2011) (constitutional challenge to village's enforcement action compulsory counterclaim to the enforcement action).

[68] *11 E. 68th St. LLC* , 2014 N.Y. Slip Op. 31872(U) (Sup. Ct. N.Y. Cnty. July 10, 2014).

[69] *Jaber v. Elayyan*, 168 A.D.3d 693 (2 Dept 2019).

[70] *342 West 30th Street Corp., v. Bradbury,* 30 Misc.3d 132(A) (1 Dept 2011); *see also AIG Financial Products Corp. v. Penncara Energy, LLC*, 83 A.D.3d 495 (1 Dept 2011).

III. Documentary Evidence Establishes that the NYAG's Dissolution Action is Nonviable in New York County, Warranting Dismissal Under CPLR 3211(a)(1).

The NYAG's dissolution claims are governed by Article 11 of the New York Not-for-Profit Corporation Law. N-PCL § 1110 provides: "An action … under this article ***shall*** be brought in the supreme court in the judicial district in which the office of the corporation is located at the time of the service on the corporation of a summons in such action …."[71] The office of a corporation is defined as "the office the location of which is stated in the certificate of incorporation … Such office need not be a place where activities are conducted by such corporation."[72] Contrary to NYAG's allegation in paragraph 26 of the complaint, the NRA's certificate of incorporation does not "set forth" that "the office of the NRA is in New York County." The original certificate of incorporation, issued in 1871, does not state the location of an office.[73] In 2002, a certificate of change was issued by the New York Secretary of State, stating that the NRA "changes the designation of its registered agent to: Corporation Service Company 80 State Street, Albany, NY 12207-2543" and identifying a principal place of business in Virginia. A plain reading of the statute

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[71] See N-PCL § 1110 ("Venue") and Comment ("This section, dealing with the venue in proceedings for judicial dissolution, is an adaptation of § 1112 of the Bus. Corp. L. It departs from §§ 138 and 139 of the Gen. Corp. L. in the fact that it makes no special provision for dissolution proceedings initiated by the attorney-general. This is covered by § 112 of this chapter.") (emphasis added).

[72] N-PCL § 102 ("Definitions"), subparagraph (a)(11). *See Cooper v Mobil Oil Corp.,* 264 A.D.2d 578, 578-79 (1 Dept 1999) ("Plaintiffs commenced this personal injury action against defendant based upon alleged Labor Law violations and designated New York County as venue by reason of defendant's certificate of incorporation which named New York County as the location of its principal office. Supported by an affidavit from a corporate officer, defendant moved to change venue to Suffolk County, plaintiffs' county of residence, upon the ground that defendant had no principal office or place of business in New York when this action was commenced and that the defendant's principal office is, in fact, located in Fairfax County, Virginia. Although CPLR 503(c) deems a corporation to be a resident of the county in which its principal office is located, Business Corporation Law § 402 requires that a corporation list on its certificate of incorporation a location within New York State for its principal place of business. Defendant designated New York County in that manner and plaintiffs properly relied upon that designation in selecting venue) (citations omitted); *Astarita v Acme Bus Corp.,* 55 Misc. 3d 767 (Sup. Ct. N.Y. Cnty. 2017) (granting motion for change of venue, holding that venue was proper in Suffolk County where corporation changed its principal office as reported in biennial registration statement); *Keehn v. S. & D. Motor Lines, Inc.*, 41 N.Y.S.2d 521 (Sup. Ct. N.Y. Cnty. 1943) ("The law is abundantly clear that the office and principal place of business for venue purposes of a domestic corporation, …, is fixed by its certificate of incorporation.").

[73] Rogers Aff. Ex. 26 at 1.

required that this action therefore be filed in Albany County, New York.[74] In the alternative, this action should be transferred.[75]

IV. In the Alternative, a Stay Is Warranted Under CPLR 2201.

The existence of a pending related action is a common ground for a stay of proceedings under CPLR 2201.[76] A stay is especially appropriate where, as here, there are "overlapping issues and common questions of law and fact," the first-filed case has progressed into discovery, and determination of the first-filed action may dispose of or limit issues in the second.[77] A significant portion of funds NYAG purportedly seeks to recover come from Ackerman, and the validity of these expenditures and the circumstances under which they were requested and approved are fundamental questions underlying NYAG's dissolution claim. The NRA and Ackerman have already been litigating these exact issues for well over a year in another forum and are now six months into discovery, with hundreds of document requests served, responsive documents exchanged and depositions beginning in November.[78] Moreover, the position that the NRA has taken with respect to Ackerman's actions—that Ackerman was an NRA fiduciary that breached its duty and defrauded the NRA—run squarely counter to the NYAG's allegations made "upon information and belief" in this action that Ackerman was conspiring with NRA executives. Allowing this action to proceed under NYAG's unsupported theory risks undermining the NRA's causes of action in the Ackerman case and jeopardizing its potential recovery, to the detriment of NRA members whose interests NYAG purportedly seeks to vindicate. Thus, "to avoid potentially

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[74] *Id.* at 2-16.

[75] The NRA served a transfer demand pursuant to CPLR 511 on October 19, 2020. *See* Dkt. No. 39.

[76] *See* 4-2201 Weinstein-Korn-Miller, N.Y. Civ. Prac. CPLR 2201.03.

[77] *See*, *e.g.*, *Buzzell v. Mills*, 32 A.D.2d 897, 897 (1 Dept 1969); *Asher v. Abbott Laboratories*, 307 A.D.2d 211, 211-12 (1 Dept. 2003).

[78] *See* Rogers Aff. Ex. 25 (Oct. 5, 2020 Status Report).

inconsistent determinations and duplication of judicial resources," a stay under CPLR 2201 is appropriate.[79]

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed or, in the alternative, this action stayed.

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Respectfully submitted,

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[79] *See CSSEL Bare Trust v. Phoenix Life Ins. Co.*, 2009 WL 741177 (N.Y. Sup. Ct. Mar. 11, 2009).