July 28, 2023

VIA NYSCEF

Judge Joel M. Cohen
Supreme Court of the State of New York
Commercial Division, Part 3
60 Centre Street, Courtroom 208
New York, NY 10007

Re: ***NYAG v. The National Rifle Association of America et al., Index No. 451625/2020***

Dear Justice Cohen:

This letter sets forth the position of Defendant the National Rifle Association of America (the "NRA") concerning bifurcation and jury proceedings in this case. In sum, the NRA believes the trial should be bifurcated with all disputed issues of fact presented to the jury. Once the jury has resolved disputed fact issues, the Court may, in light of the jury's findings, craft appropriate equitable relief, and may conduct an evidentiary hearing for this purpose if necessary.

Against the individual defendants, the NYAG alleges various forms of knowing and negligent misconduct, and seeks remedies both monetary and injunctive, retrospective (the clawing-back of funds) and prospective (prohibitions against certain future charitable involvement). To the extent that the Second Amended Complaint seeks relief ***against*** the NRA itself, the gravamen of its claims consists of: (i) a purportedly-ongoing failure to comply with related-party transaction requirements; and (ii) the involvement of officers and directors who purportedly violated whistleblower policy. *See* Second Amended Complaint filed May 2, 2022 [NYSCEF No. 646] (the "SAC") ¶¶ 694, 701.[1] Both of these matters are prominently and directly addressed in the N.Y. N-PCL, the State's predominant regulatory scheme for nonprofits, which

[1] Importantly, against the NRA the NYAG instead seeks forward-looking, mandatory relief. *See* SAC ¶ 694 (calling for "procedures to ensure that the NRA complies with the statutory requirements governing related-party transactions in the future"); ¶ 701 (calling for removal of control persons who allegedly violated whistleblower policy). The NYAG's claims for false filings (Count XV) and failure to properly administer assets (Count I) are intertwined with its related-party transaction claims that supply the critical mass of the complaint: filings are allegedly false because excess benefits were not properly disclosed, and assets were allegedly administered improperly because the NRA failed to halt self-dealing. Relief sought under these counts, too, is mandatory and forward-looking: a compliance monitor (SAC ¶ 643) and a prohibition against soliciting in New York (SAC ¶ 704).

guarantees the NRA a jury trial "as a matter of right." N-PCL § 112(b)(1). The NRA also has a statutory jury trial right in actions for waste, a category squarely applicable to cases like this one.[2]

The NYAG insists that because its N-PCL claims—and its overlapping claims under other statutes—seek equitable remedies that are beyond a jury's purview. Therefore, the NYAG argues, evidence presented to the jury should be restricted to discrete vignettes of purported past misconduct, with other factual determinations covered by the NRA's statutory jury-trial right shunted to a bench-tried "remedies" phase. But, this is not the law. Instead, a statutory jury-trial right guarantees the NRA a jury on constituent questions of fact, including fact questions raised by overlapping equitable claims. The jury must decide whether alleged N-PCL violations and alleged waste are occurring at the NRA. If the jury finds that they are, then the Court, sitting in equity, may properly exercise its powers with "certainty and precision"[3] to fashion relief.

Below, this letter: (i) summarizes the legal framework governing the existence and scope of a jury trial right in an action, like this one, that contains jury-triable claims alongside requests for bespoke court-ordered relief; and (ii) offers a breakdown of how bifurcation should function with respect to each count pleaded against the NRA.

I. NEW YORK LAW REQUIRES A JURY TRIAL ON N-PCL CLAIMS, WASTE CLAIMS, AND ANY "EQUIVALENT" CLAIMS RAISING COMMON ISSUES.

A. An "action or proceeding brought by the [NYAG] under any provision of" the N-PCL is triable by jury as a matter of right.

The claims under the N-PCL are jury-triable pursuant to N-PCL § 112(b)(1). As set forth below, the NRA believes that the Court should sculpt any equitable relief deemed appropriate under, for example, N-PCL § 112(a)(7) (providing for enforcement of rights accorded various constituents under the N-PCL). However, factual determinations that inform, justify, or preclude such relief should be made by the jury in the first instance.

The fact that the NYAG seeks an "accounting" under the N-PCL does not justify removing from the purview of the jury factual determinations relating to what should be paid and by whom. To the extent that an "award of money damages" might adequately redress alleged misconduct, a jury trial is available even if the financial relief sought is styled as an equitable demand for

[2] *See* discussion *infra* Section I.B.

[3] *See Caldwell v. Taggart*, 29 U.S. 190, 199 (1830) (A court of equity is bound to employ "certainty and precision" in the exercise of its jurisdiction.").

disgorgement or accounting. *See, e.g.*, *Cadwalader Wickersham & Taft v. Spinale*, 177 A.D.2d 315, 316 (1st Dept. 1991) (reversing trial court's rejection of jury demand, where "[a]n accounting and discovery [we]re sought to permit an itemization" of amounts allegedly overpaid, and reasoning: "The accounting is merely a method to determine the amount of monetary damages"); *Azoulay v. Cassin*, 103 A.D.2d 836 (2d Dept 1984)(same outcome in another "accounting" case, on the ground that "artful pleading[] cannot deprive a defendant of a jury trial upon a proper demand"); *Pac Fung Feather Co. v. Porthault NA LLC*, 118 A.D.3d 472, 987 (1st Dep't 2014) (same, where plaintiff sought "equitable remedy of disgorgement").

The presence of an explicit statutory jury-trial right in the N-PCL also favors jury input on factual questions relating to the relief sought, even if such relief is usually classified as equitable in nature. As federal courts have reasoned with respect to federal statutes that guarantee jury trials yet afford "equitable" relief:

> A decision as to whether an issue is "legal" or "equitable" is to some extent flavored by whether there are jury-type factual determinations to be made. In Title VII cases, the courts have considered that an award of back pay is "equitable" relief and that therefore no jury trial is required. But the age discrimination statute specifically provides for trial by jury, and the same question of back pay considered "equitable" in Title VII cases is submitted to the jury as a "legal" question in age discrimination cases. This apparent inconsistency illustrates that the labels "legal" and "equitable" do not necessarily provide a principled answer to the question before the court.

Creed v. Argonne Nat. Lab'y, No. 86 C 3934, 1988 WL 74725, at *1 (N.D. Ill. July 11, 1988). Here, the "accounting" remedy sought by the NYAG in connection with its N-PCL claims is likewise susceptible to a jury trial (indeed, as discussed above, the Appellate Division has mandated jury trials in other "accounting" cases). Throughout the parties' extensive meet-confer process, the NYAG has not mustered any authority—nor does the NRA expect any authority in the NYAG's submission—that would deny a jury trial on an issue of fact in an action brought under a statute containing a jury-trial guarantee. This Court need not be the first to do so.

B. The C.P.L.R. entitles the NRA to a jury on claims for waste, a category that includes claims under the EPTL provisions here.

Under CPLR 4101(2), "fact issues" in "actions . . . for waste" are triable by a jury as a matter of right. As discussed below, the NYAG's claims against the NRA are rife with allegations that explicitly entail waste or mirror allegations so classified by other courts. For example, the NYAG's comparable lawsuit against the Trump Foundation under the N-PCL and EPTL was found to have stated waste claims because: "the essence of a waste claim is 'the diversion of corporate assets for improper or unnecessary purposes." *People by Underwood v. Trump*, 62 Misc. 3d 500, 511 (N.Y. Sup. Ct. 2018) (internal citations omitted).

Unsurprisingly, other New York courts have described claims alleging misuse or diversion of corporate assets as "actions for waste." *See, e.g.*, *Gross v. Price*, 286 A.D. 1031, 1032 (2d Dep't 1955) (holding that factual allegations of gross waste and dishonesty on the part of controlling directors are pertinent to an "action for waste"); *see also Fellner v. Morimoto* 52 A.D.3d 352 (1st Dep't 2008) (diversions of business opportunities and profits constitute waste; recognizing an individual's right to assert "a cause of action for waste" under such circumstances); *Aronoff v. Albanese* 85 A.D.2d 3, 6 (2d Dep't 1982) ("A claimant need not necessarily expressly aver 'gift' or 'waste' in order to make out a claim on these theories [so] long as claimant alleges facts in his description of a series of events from which a gift or waste may reasonably be inferred.") (internal citations omitted); *id*. ("[A]ssertions of unreasonable transactions – which benefited individual defendants personally – should be sufficient to put them on notice of plaintiffs' [waste] theory.") (internal citations omitted).

C. Under New York law, claims that are "equivalent" to—and issues that overlap with—those triable by jury must be tried to a jury.

Based on the same principled aversion to letting "artful pleading" extinguish jury-trial rights, New York authorities also favor jury trials on equitable claims for which jury-trial "equivalents" exist. David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR **C4101**. In *Matter of Estate of Tisdale*, 171 Misc. 2d 716 (Sur. Ct. 1997), the court confronted simultaneously-pleaded efforts to set aside a trust (a remedy that is ordinarily equitable in nature, and not jury-triable) and a will left by the same decedent (challenges which were jury-triable). Noting that "the factual questions and evidence in all likelihood will be almost identical with respect to both instruments," the court observed that "only one factual determination" was practicable, and refused to "subvert" distributees' jury-trial right—instead allowing for a jury on the trust-related claims and the will-related claims, both. *Id.*

Similarly, the United States Supreme Court has held that where jury-triable and bench-triable claims raise overlapping factual issues, a jury trial on common questions of fact is a Seventh Amendment right. *See, e.g.*, *Tull v. United States*, 481 U.S. 412, 425 (1987) ("[I]f a legal claim is joined with an equitable claim, the right to jury trial on the legal claim, ***including all issues common to both claims***, remains intact. The right cannot be abridged by characterizing the legal claim as "incidental" to the equitable relief sought.) (internal citations and quotation marks omitted).

The New York cases relied upon by the NYAG are not to the contrary. For example, in *Hudson View II Assocs*, defendants ***conceded***—the court did not decide—that equitable counts, such as a demand for removal of certain partners based on alleged fiduciary breaches, were not jury-triable despite the presence of overlapping claims at law. *Hudson View II Assocs. v. Gooden*,

222 A.D.2d 163, 169 (1st Dep't 1996). But on remand, the trial court properly ordered a jury trial on ***all factual issues in the case***, treating the jury's verdict as advisory[4] with respect to "those issues of fact which relate ***solely*** to the equitable claims." *Hudson View II* at 169 (agreeing with the motion court that "these claims are so intertwined with the legal claims as to make one trail of all the causes of action appropriate, providing that the jury serves exclusively in an advisory capacity as to those issues of fact which relate ***solely to the equitable claims***") (emphasis added). (There are no such issues here).

D. New York's jurisprudential history and statutory scheme make clear that when in doubt, contested facts should be presented to a jury.

Although the denial of a jury trial on a claim or issue for which a jury is constitutionally or statutorily guaranteed constitutes reversible error, New York authorities have long allowed courts to err in the direction of empaneling a jury on issues for which no clear jury-trial right exists. Thus, where ambiguity exists about a jury-trial right on particular claims, the court should elicit the jury's verdict on constituent facts.

The earliest codifications of New York civil procedure allowed for "jury trials in equity cases" at the court's discretion, particularly where a subset of factual issues in the same action were already jury-triable. *See Mellen v. Mellen*, 16 N.Y.S. 191 (Sup. Ct. 1891) (tracing the history of such provisions). Citing some of the same history, including commentaries by Cardozo and others, the *Hudson View II Assoc.* court allowed that there could be a "constitutional impediment" to depriving a defendant of a jury trial on equitable matters that "fall within categories specified in predecessor section 968 of the Code of Civil Procedure"—a list of categories that includes claims for waste, present here. *Hudson View II Assocs*., 222 A.D.2d at 166. Indeed, the allowance for an advisory jury fits into the same scheme: the CPLR explicitly contemplates that juries may hear and render determinations on bench-triable questions, but does not allow for judges to hear and render determinations on jury-triable matters where a party asserts his jury trial right.

[4] New York law also provides that in situations where efficiency, equity, or other considerations favor eliciting a jury verdict on matters which overlap with matters subject to a bench trial, the trial court may use the "advisory jury" mechanism of CPLR 4212. Therefore, even if the Court were to conclude (it should not) that some allegations were required - as a matter of law - to be tried in parallel to a jury (under the N-PCL) and to the Court (under another statute), the Court should elicit the jury's findings in an advisory capacity on the bench-triable claims. This would avoid duplicative presentation of evidence regarding claims brought under multiple statutes (because the jury would remain seated for the entire presentation of evidence, rather than repeatedly entering and exiting the courtroom), and would reduce the potential for inconsistent adjudications.

II. THE JURY SHOULD DECIDE FACTS AS FOLLOWS.

The NYAG's four claims against the NRA are: (i) the First Cause of Action under Section 8-1.4(m) of the Estates Powers and Trusts Law ("EPTL"), in which the NYAG seeks (A) declaratory judgment that the NRA allegedly is failing to administer properly property it holds and administers for charitable purposes, and (B) various injunctive relief purportedly necessary to ensure proper administration of such property, including the appointment of an independent compliance monitor; (ii) the Thirteenth Cause of Action under NPCL 112, N-PCL 715 and EPTL 8-1.9 for allegedly unauthorized related party transactions; (iii) the Fourteenth Cause of Action under N-PCL 715-b and EPTL 8-1.9 for alleged violations of whistleblower protections; and (iv) the Fifteenth Cause of Action under Sections 172-d and 175 of the Executive Law, which accuses the NRA of alleged material misrepresentations and omissions in the NRA's regulatory filings with the NYAG.

A. First Cause of Action: EPTL 8-1.4(m) // Compliance monitor and other relief.

JURY DECIDES	Disputed factual issues related to: (i) whether the NRA is improperly administering assets held and administered by it for charitable purposes; (ii) whether the foregoing has caused and will imminently cause, harm; and (iii) factual issues raised by a causation analysis, including whether acts by third parties constitute an intervening or superseding cause.
COURT DECIDES	Form of relief, if any.

1. The First Cause of Action is an action for waste, which is triable by the jury as a matter of right under CPLR 4101(2).

As set forth above, courts routinely treat actions sounding in the diversion or depletion of assets by allegedly-corrupt executives as actions for waste. The Trump Foundation matter, referred to by the Court as an action for waste, entailed claims under both the N-PCL and EPTL § 8-1.4(m)—just like the NYAG's lawsuit here. *People v. Trump*, 66 Misc. 3d. 200, 204 (Sup Ct, New York County 2019) ("As a director of the Foundation, [Defendant] owed fiduciary duties to the Foundation, pursuant to N-PCL 717; he was a trustee of the Foundation's charitable assets and was thereby responsible for the proper administration of these assets, pursuant to EPTL 8-1.4."). What is more, pleading its First Cause of Action, the NYAG explicitly accuses the NRA of failing

to properly administer assets held for charitable purposes and of waste. *See* Second Amended Verified Complaint (NYSCEF 646), Paragraphs 641 and 642. Thus, the First Cause of Action is the type of action for which New York law has guaranteed a jury-trial right since the dawn of civil procedure.

2. **The First Cause of Action is also jury-triable because it is "equivalent" to the NYAG's Thirteenth and Fourteenth counts, which are pleaded under the N-PCL.**

Because the First Cause of Action rests substantially on the same factual allegations as multiple jury-triable claims—including claims for waste and related-party transaction violations—"only one factual determination" can practically be made on such matters, and it should be made by a jury. *See Tisdale*, 171 Misc. 2d 716. Attempting to segregate and distinguish the factual questions underlying the NYAG's First Cause of Action ("failure to properly administer" NRA assets) from jury-triable matters (such as whether the NRA's executives engaged in self-dealing or wasted NRA assets) would be difficult or impossible. Because the NRA is entitled to a jury trial on all issues of fact shared in "common" by jury-triable claims and allegedly-bench-triable claims, *see Tull v. United States*, 481 U.S. at 425, the interests of justice and judicial economy strongly favor referring, to the jury, the fact issues raised by Count I.

B. Thirteenth and Fourteenth Causes of Action // Alleged related-party transactions and whistleblower claims.

JURY DECIDES	Factual issues related to liability and relief, such as whether: (i) the transaction constitutes a related party transaction (*e.g., not de minimis*); (ii) the transaction was authorized; (iii) authorization or ratification was based on adequate disclosure and was otherwise effective under the N-PCL; (iv) director, officer, employee or volunteer alleged to be a whistleblower in good faith reported an action taken by or within the corporation that is illegal, fraudulent or in violation of an NRA policy; (v) the individual suffered intimidation, harassment, discrimination, other retaliation, or, where applicable, adverse employment consequence; (vi) the harm allegedly suffered and any statutory or regulatory violations alleged were proximately caused by intervening and superseding actions and occurrences

	including, but not limited to, actions of persons, entities, and/or forces over which the NRA exerted no control and for which the NRA has no responsibility; (vii) in committing any violations, individuals acted knowingly and willfully; (viii) individuals' actions and any such knowledge and willfulness should be imputed to the NRA under the principles of respondeat superior; and (ix) alleged violations are ongoing.
COURT DECIDES	Form of relief, if any.

C. Fifteenth Cause of Action – Executive Law Claim (Executive Law §§ 172-d(1) and 175(2)(d)) // False filings.

JURY DECIDES	Factual issues related to liability and relief, such as whether: (i) the NRA or John Frazer has made a false statement in an application, registration or statement required to be filed pursuant to applicable law; (ii) the allegedly false statement was material; (iii) John Frazer knew of the statement's alleged falsehood or materiality; (iv) the harm allegedly suffered and any violations alleged was proximately caused by intervening and superseding actions and occurrences including, but not limited to, actions of persons, entities, and/or forces over which the NRA exerted no control and for which the NRA has no responsibility; and (iv) alleged violations are ongoing.
COURT DECIDES	Form of relief, if any.

In the Fifteenth Cause of Action, the NYAG accuses the NRA of allegedly untruthful material statements in certain of its CHAR500 filings.[5] On that basis, the NYAG seeks to enjoin

[5] Second Amended Verified Complaint (NYSCEF Do No. 646), Fifteenth Cause of Action (pleaded under Sections 172-d(1) and 175(2)(d) of the Executive Law).

the NRA and John Frazer—a co-defendant mentioned in the claim—from soliciting funds. This claim like the others should be tried by the jury.

The NYAG must show that Frazer knew that the filing contained untrue statements, and issues of misrepresentation, materiality, and knowledge are intertwined with disputed facts underlying conceded jury claims (Thirteenth, Fourteenth, and N-PCL claims against the individuals).

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For the foregoing reasons, the NRA seeks a jury trial on relevant facts as set forth above.

Respectfully submitted,

Regards,

s/ *Svetlana M. Eisenberg*

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