

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

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NATIONAL RIFLE ASSOCIATION OF AMERICA, :
:
Plaintiff, : Index No. 653577/2019
:
v. :
:
OLIVER NORTH, :
:
Defendant. :
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PLAINTIFF’S REPLY TO DEFENDANT’S COUNTERCLAIM

Plaintiff National Rifle Association of America (“Plaintiff” or the “NRA”) files this Reply to Defendant’s Counterclaim, as follows:

PRELIMINARY STATEMENT

1. To obtain money from the NRA, in his Counterclaim, Lt. Col. North (“North”) misrepresents the text of the NRA’s Bylaws to the Court in an obvious attempt to make it look like the Bylaws create a blanket right of indemnification for North simply because he is an NRA director. Specifically, North omits a critical word from his purportedly verbatim quote—without giving the Court any indication of the omission. When read as actually written, the Bylaws do not create a blanket right of indemnification for NRA directors; in fact, the Bylaws do not create any indemnification rights at all. Rather, the Bylaws provide a mechanism for directors to request prompt and full indemnification (i.e., a request in writing to the Secretary or Executive Vice President of the NRA) to the extent rights to indemnification exist under New York law or on some other basis. That is all the Bylaws do. And while North wishes he could seek indemnification under New York law, he knows he cannot because the indemnification rights created by New York law do not apply here.

2. The NRA's Complaint recounts the many times when, out of self-interest and in flagrant disregard of his fiduciary duties to the NRA, North defied the law and the expectations that the NRA placed on him as an NRA President and director. In his Counterclaim, North underscores his cavalier disregard for the rules—here, the Bylaws. Rather, he wants to rewrite them to fit the outcome he desires.

3. Whether he likes it or not, nothing entitles North to indemnification here. Just because he, an NRA director, has legal bills, does not mean that he can force the NRA to pay them. Instead, what the Bylaws clearly say—when read as written—is that, just like any other NRA director North must show that he is entitled to indemnification pursuant to the corporate laws of the State of New York. North cannot show that he was made a party to an action by reason of the fact that he is or was a director, let alone meet the even more burdensome requirements of the statute, such as showing that he acted in good faith or for a purpose that he reasonably believed to be in the NRA's best interest.

4. As a result, his Counterclaim lacks merit and should be dismissed.

REPLY

1. The NRA denies the allegation in Paragraph 1.c regarding the purpose of this lawsuit. The NRA states that it brought this lawsuit to obtain a declaration from the Court that it has no obligation to indemnify North because he has no legal right to the indemnification that he seeks. As stated in the Complaint, the NRA exists to fight for the Second Amendment—not pay other people’s bills. The NRA admits the remaining allegations in Paragraph 1.

2. The NRA admits that the language of the NRA’s Bylaws is clear but denies the remaining allegations in Paragraph 2. The NRA states that, in Paragraph 2, North misleads the Court by misquoting the Bylaws and omitting crucial language, which makes clear that directors are entitled to indemnification only if such indemnification is provided for by the law of the State of New York or is requested on another independent basis, such as a contract or a Board resolution (which North does not and cannot do). The chart below compares the misleading quote in North’s pleading to the actual language of the Bylaws.

NRA Bylaws - Article IV, Section 4 (As quoted in Paragraph 2 of North's Answer and Counterclaim)	NRA Bylaws - Article IV, Section 4 (Complete and accurate quote; language omitted by North highlighted and underlined)
<p>“[E]ach Director shall be entitled to indemnification and expenses immediately to the fullest extent requested in writing to the Secretary of Executive Vice President by such Director unless and only unless prohibited by corporate laws of the state under which the Association is incorporated.”</p>	<p>“<u>The indemnification and advancement of expenses of Directors granted pursuant to, or provided by, the corporate laws of the state under which the Association is incorporated [i.e., New York] shall not be exclusive of any other rights to which a Director seeking indemnification or advancement of expenses may be entitled,</u> and each Director shall be entitled to <u>such</u> indemnification and expenses immediately to the fullest extent requested in writing to the Secretary or Executive Vice President by such Director unless and only unless prohibited by corporate laws of the state under which the Association is incorporated.”</p>

3. Plaintiff admits the allegations in Paragraph 3.

4. Plaintiff lacks sufficient knowledge or information to form a belief as to what North learned and when. Plaintiff further denies the allegation in Paragraph 4 to the extent it implies that in respects relevant to this litigation North acted in good faith.

5. Plaintiff lacks sufficient knowledge and information to form a belief as to what North learned and when. Plaintiff denies the remaining allegations in Paragraph 5.

6. Plaintiff lacks knowledge or information sufficient to form a belief as to what North learned and when. The New Yorker article referenced in Paragraph 6 speaks for itself. Plaintiff denies the allegation that North acted in good faith.

7. Plaintiff denies the allegation in Paragraph 7 that Mr. LaPierre allegedly received personal benefits paid by the NRA. Plaintiff also denies the allegation in Paragraph 7 that North acted in good faith.

8. Plaintiff admits that as past President and current Board member of the NRA, North owed and owes fiduciary duties to the NRA. Plaintiff lacks knowledge or information sufficient to form a belief as to the allegation in the first sentence of Paragraph 8. Plaintiff denies the remaining allegations in Paragraph 8, including the allegation that, as it pertains to the events that are described in the Complaint, North acted responsibly or properly.

9. Plaintiff denies that North was concerned about the NRA's payments to its outside counsel. Plaintiff states that North's purported concern about outside counsel's fees was a tactic to deflect scrutiny from his multi-million dollar contract with Ackerman McQueen ("Ackerman"), which, in breach of his fiduciary duties to the NRA, North had for nearly a year failed to fully disclose. The letter referenced in Paragraph 9 speaks for itself. The NRA denies the allegations in that letter.

10. Plaintiff lacks knowledge or information sufficient to form a belief as to the allegation in the first sentence of Paragraph 10. Exhibit 2 is a document that speaks for itself. Plaintiff denies the remaining allegations in Paragraph 10, including the allegations in Exhibit 2.

11. Plaintiff denies the allegations in Paragraph 11.

12. Plaintiff denies the allegations in Paragraph 12.

13. Plaintiff denies the allegations in Paragraph 13.

14. Plaintiff denies the allegations in Paragraph 14.

15. Plaintiff admits that on April 25, 2019, Mr. LaPierre circulated a letter to the NRA Board of Directors that recounted an extortion attempt by North. Plaintiff denies that the contents of the letter were false, and denies the remaining allegations in Paragraph 15.

16. With regard to the first sentence of Paragraph 16, Plaintiff admits that, in response to the May 6, 2019, letter from North's counsel, on May 13, 2019, John Frazer, Secretary and

General Counsel of the NRA, sent to North's counsel a letter stating that "[p]ursuant to the NRA's Bylaws and the New York Not-for-Profit Corporation Law, the NRA is under no obligation to advance any of Col. North's legal fees and expenses." Plaintiff further states that the NRA denied North's request for indemnification because, as the NRA has asked the Court to declare, North has no right to it. Plaintiff denies the remainder of the allegations in Paragraph 16.

17. Plaintiff states that the May 31, 2019, letter from John Frazer, Secretary and General Counsel of the NRA, to North speaks for itself. Plaintiff denies the characterization by North that the letter asked him to resign from the NRA Board of Directors. Rather, the letter asked North to either resign from the NRA Board of Directors or from his multi-million dollar job at Ackerman, because the NRA's Audit Committee determined that North's continued employment with Ackerman presented an "irreconcilable conflict." Plaintiff denies the remaining allegations in Paragraph 17.

18. Plaintiff denies the allegations in Paragraph 18. Plaintiff states that it filed this lawsuit to obtain a declaration as to the non-existence of any obligation on its part to indemnify North.

19. Plaintiff denies the allegations in Paragraph 19.

20. Plaintiff denies the allegations in Paragraph 20.

21. Plaintiff denies the allegations in Paragraph 21.

22. Plaintiff admits that this action was filed in New York, because the NRA is organized under the laws of New York and the merits of this action turn on the interpretation of New York law. The NRA denies that its outside counsel "preaches the aggressive use of publicity as a litigation tool." To the extent the allegations in Paragraph 22 discuss an ongoing matter *sub judice* in another jurisdiction (to be heard on appeal by the Supreme Court of Texas this October),

it has no relationship to the NRA or North. As a result, those allegations are irrelevant and require no response.

23. Plaintiff denies the allegations in Paragraph 23.

24. Paragraph 24 contains legal conclusions and raises questions of law. As a result, no response to Paragraph 24 is required. However, without waiving any of its rights, the NRA admits that North had a legal obligation pursuant to the New York CPLR to file an Answer to the NRA's Complaint and that North filed a Counterclaim in this lawsuit. Plaintiff denies that North's Counterclaim has any merit. Plaintiff denies that North is entitled to indemnification pursuant to the NRA's Bylaws. Plaintiff further states that North's reliance on the Bylaws is misplaced. The NRA's Bylaws do not create an independent right of indemnification as North claims; rather, the NRA's Bylaws state that, if a director has a right to indemnification under New York law or on a different articulated basis, then the director has a right to such indemnification as soon as he or she requests it in writing as long as the requested indemnification is not prohibited under New York law.

25. Plaintiff lacks sufficient knowledge or information to form a belief about North's intent behind the letters referenced in the first sentence of Paragraph 25. Plaintiff admits that where a Board member is entitled to indemnification under New York Law, which North is not, before that Board member can receive any indemnification, he or she must submit a written request to the NRA for "such indemnification." The NRA denies that the written request is the only prerequisite for indemnification or that all Board members with legal bills can seek indemnification from the NRA. The NRA denies that its Bylaws create an independent right to indemnification. The NRA also denies that North has any right to indemnification with regard to the matters identified in Paragraphs 1a.-1c of North's Answer and Counterclaim.

81. Plaintiff restates, realleges, and incorporates by reference herein the statements in its Complaint and its responses to all prior paragraphs of the Preliminary Statement as if fully set forth herein.

82. Plaintiff admits the allegations in Paragraph 82.

83. Paragraph 83 states a legal conclusion to which no response is required. However, without waiving any of its rights, Plaintiff states that, under certain circumstances, members of its Board are entitled to indemnification pursuant to New York law. Plaintiff, however, denies the allegation in Paragraph 83 that Board members are entitled to indemnification of any legal fees any time fees are “incur[red] in connection with” their Board service. The NRA states that, rather, Board members must show that they have a right to indemnification under New York law (in which case they must show that they meet the prerequisites enumerated in the law) or, where applicable, pursuant to a different articulated basis (which North has not articulated), such as a Board resolution or the Certificate of Incorporation.

84. Plaintiff denies the allegations in Paragraph 84. North’s quote of the Bylaws is misleading and inaccurate because he omits (without so much as inserting an ellipsis to flag his omission to the Court) a key word—“such”—in the Bylaws. An accurate quote of the Bylaws reads:

The indemnification and advancement of expenses of Directors granted pursuant to, or provided by, the corporate laws of the state under which the Association is incorporated [i.e., New York] shall not be exclusive of any other rights to which a Director seeking indemnification or advancement of expenses may be entitled, and each Director shall be entitled to **such** indemnification and expenses immediately to the fullest extent requested in writing to the Secretary or Executive Vice President by such Director unless and only unless prohibited by corporate laws of the state under which the Association is incorporated.

85. Plaintiff states that the letter from North's counsel referenced in Paragraph 85 of the Counterclaim speaks for itself. Plaintiff denies that North's counsel wrote the letter "pursuant to" Article IV Section 4 of the NRA's Bylaws to the extent North implies that the NRA Bylaws provide for a right of indemnification for North or that they create a right to indemnification upon a mere written request.

86. Plaintiff states that the letter from North's counsel referenced in Paragraph 86 of the Counterclaim speaks for itself. Plaintiff denies that North's counsel wrote the letter "pursuant to" Article IV Section 4 of the NRA's Bylaws to the extent that North implies that the NRA Bylaws provide for a right of indemnification for North or that they create a right to indemnification upon a mere written request.

87. Plaintiff states that the letter from North's counsel referenced in Paragraph 87 speaks for itself. Plaintiff denies that North's counsel wrote the letter "pursuant to" Article IV Section 4 of the NRA's Bylaws to the extent that North implies that the NRA Bylaws provide for a right of indemnification for North or that they create a right to indemnification upon a mere written request.

88. Paragraph 88 contains legal conclusions and raises questions of law. As a result, no response to Paragraph 88 is required. However, without waiving any of its rights, the NRA states that it denies the allegations in Paragraph 88 and disagrees with the legal conclusions in it. The NRA states that it filed this action for declaratory judgment because it believes that it has no obligation to advance or indemnify North's legal fees or expenses. Defendant's latest request for indemnification of fees incurred in connection with this lawsuit is also without merit. North cannot show that he meets the requirements for indemnification because he cannot show that he was named a party to this lawsuit by reason of the fact that he was a director, that he acted in good

faith, that he acted for a purpose that he believed to be in the best interests of the NRA, or that any such belief was in any way reasonable.

89. Paragraph 89 contains legal conclusions and raises questions of law. As a result, no response to Paragraph 89 is required. However, without waiving any of its rights, the NRA states that it disagrees with the legal conclusions stated in Paragraph 89. At no point did the NRA breach its Bylaws. In fact, by refusing to indemnify North in circumstances that do not comply with New York law, the NRA honored its Bylaws and complied with New York law.

PLAINTIFF'S AFFIRMATIVE DEFENSES TO
DEFENDANT'S COUNTERCLAIM

Without admitting that North's Counterclaim has any merit, without conceding that the NRA has an evidentiary burden of proof, without assuming the responsibility for any burden of proof on any of the following defenses, and without relieving North of his burden of proof on any element of any claim or defense, the NRA asserts the following defenses to North's Counterclaim. For each defense, the NRA reasserts and reincorporates all other paragraphs of its Complaint and this Reply, including the paragraphs of the Preliminary Statements. The NRA hereby gives notice that it intends to rely upon any other and additional defense that is now or may become available during any discovery, and hereby reserves the right to amend this Reply to assert any such defense.

First Defense

90. North's Counterclaim is barred because it fails to state a claim upon which relief can be granted.

Second Defense

91. North's claim is barred in whole or in part by the express terms of the NRA's Bylaws.

Third Defense

92. North's claim is barred in whole or in part by the doctrines of estoppel and unclean hands.

Fourth Defense

93. Insofar as North seeks indemnification for future unspecified and hypothetical matters, his Counterclaim is not ripe and should also be dismissed on justiciability grounds.

Fifth Defense

94. North's claim is barred in whole or in part by his failure to mitigate his damages.

DEMAND FOR RELIEF

Plaintiff denies that North is entitled to any of the relief that he seeks in his Counterclaim. The Counterclaim fails to state a claim for which relief can be granted. As a result, the Court should dismiss the Counterclaim in its entirety.

Dated: July 31, 2019
New York, New York

Respectfully submitted,

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