SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

NATIONAL RIFLE ASSOCIATION OF AMERICA,	:	
	:	
Plaintiff,	:	Index # 653577/2019
	:	
-against-	:	Hon. Joel M. Cohen
	:	IAS Part 3
OLIVER NORTH,	:	
	:	Motion Sequence No. 2
	:	
Defendant.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE NRA'S MOTION FOR AN ORDER DISMISSING OLIVER NORTH'S COUNTERCLAIM AND AFFIRMATIVE DEFENSES AND DECLARING THAT NORTH HAS NO RIGHT TO INDEMNIFICATION FOR ANY OF THE MATTERS FOR WHICH HE SEEKS IT

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The National Rifle Association of America (the "NRA") moves for a judgment (i) dismissing Defendant Oliver North's Corrected Counterclaim (Dkt No. 27) in its entirety with prejudice as failing to state a cause of action; (ii) dismissing North's affirmative defenses (Dkt No. 27) in their entirety with prejudice on the ground that they are not stated and have no merit; and (iii) declaring that North has no right to indemnification with regard to any of the matters for which he seeks it.

The NRA respectfully submits this Memorandum of Law, together with a notice of motion, an affirmation of Svetlana M. Eisenberg, an Affidavit of Mark Ness, and exhibits attached thereto, in support of its motion.

I.

PRELIMINARY STATEMENT

In his Corrected Counterclaim, North seeks indemnification of legal fees for a host of matters on the mere basis that he is an NRA director. But North's status as a director does not entitle him to indemnification—nor can North identify any other basis for the indemnification he seeks.

First, North misreads certain language in the NRA's Bylaws (the "Bylaws") to suggest that the Bylaws create an independent right to indemnification. Read in its entirety, the text of the relevant Bylaws provision clearly provides for an indemnification right that is coextensive with—and contingent upon—indemnification rights provided under New York law. Put simply, if New York law does not entitle an NRA director to indemnification, the Bylaws do not entitle him to indemnification, either. Consequently, North has no right to indemnification here.

Second, although directors of not-for-profit corporations have indemnification rights under New York law, such rights depend on a number of prerequisites, which the Corrected

Counterclaim fails to allege. Specifically, a director must have been made a party to an "action or proceeding." The Corrected Counterclaim makes no such allegations, with one exception: this action. However, in interpreting the identically worded indemnification statute within the Business Corporations Law, the Court of Appeals has unequivocally rejected the "fees on fees" that North seeks.

Lastly, the Court should dismiss North's affirmative defenses to the NRA's Complaint, which merely seeks a declaratory judgment that North has no claim in the first place. These affirmative defenses are not stated and have no merit. North cannot rely on equitable principles to expand a narrow statutory right.

II.

PROCEDURAL HISTORY AND STATEMENT OF RELEVANT FACTS

The NRA is a not-for-profit corporation organized under the laws of New York. North is a current Board member of the NRA and its immediate past President. The Bylaws discuss the right of Board members, like North, to receive indemnification – in Article IV, Section 4. Specifically, the Bylaws state that a director who is entitled to indemnification should submit a written request for such indemnification to the NRA's Secretary or its Executive Vice President. The Bylaws also state that to the extent New York law creates statutory indemnification rights for directors, those rights are not exclusive of any other rights that may exist. Finally, the Bylaws state that in no event shall a director receive indemnification if New York law prohibits it:

> 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.[1]

On May 6, 2019, North requested that the NRA indemnify him "pursuant to" the NRA's Bylaws for legal fees and expenses in responding to a document request from a Congressional committee. (Dkt No. 13.) The NRA considered the request and determined that it had no obligation, under the Bylaws or otherwise, to indemnify North. The NRA informed North of its decision on May 13, 2019. On June 6, 2019, North again argued that "Article IV, Section 4 of the NRA's Bylaws entitles Col. North to indemnification" in connection with the Congressional request. (Dkt No. 14.) At the same time, North also sought indemnification from the NRA for another matter, involving subpoenas for his testimony and documents in the NRA's lawsuit against Ackerman McQueen, Inc. and its subsidiary Mercury Group, Inc. (collectively, "Ackerman"). *Id.*

On June 19, 2019, the NRA filed this action for a declaratory judgment that North has no right to indemnification in connection with the matters described above. (Dkt No. 2.)

On July 11, 2019, North answered the NRA's Complaint and asserted several affirmative defenses. In the same pleading, he asserted a Counterclaim against the NRA (Dkt No. 8), to which the NRA replied on July 31, 2019 (Dkt No. 24). The Reply made clear that North's counterclaim has no merit and that it materially misquotes a critical provision of the NRA's Bylaws (Dkt. No. 8 at page 16).

[1] NRA Bylaws, Article IV, Section 4 (Exhibit 1 to NRA's Reply (Dkt No. 26) also attached as Exhibits B and C to the accompanying affidavit of Mark Ness).

On the same night, North corrected the error by filing his Corrected Answer and Counterclaim (Dkt No. 27) yet continues to demand indemnification under the NRA's Bylaws.[2]

In his Corrected Counterclaim, North seeks indemnification with regard to legal fees and expenses incurred in connection with four or more matters: (i) the NRA's subpoenas for testimony and documents in its action against Ackerman; (ii) the request for information from the United States Senate Committee on Finance ("Senate Finance Committee"); (iii) this lawsuit; and (iv) unidentified matters for which North may incur legal fees "in connection with responding to additional requests or lawsuits in connection with [his] service as President of the NRA or service on the NRA Board of Directors" (Dkt No. 27 at pages 1-2 and 18).[3]

The NRA now moves for (i) judgment, pursuant to CPLR 3211(a)(7) and (b), dismissing (a) the Corrected Counterclaim (Dkt No. 27) in its entirety with prejudice because it fails to state a cause of action; and (b) North's affirmative defenses in their entirety with prejudice because they are not stated and have no merit; and (ii) declaratory judgment pursuant to CPLR 3001 that North has no right to indemnification for any of the matters for which he seeks it.

III.

LEGAL STANDARD

Because North's Counterclaim fails to allege material allegations to support his Counterclaim, it should be dismissed pursuant to CPLR 3211(a)(7). Even if the facts alleged in

[2] If the Court were to issue an order denying this motion, the NRA's deadline to Reply to North's Corrected Answer and Counterclaim would be ten days after service of notice of entry of such order. CPLR 3211(f).

[3] On July 31, 2019, North's counsel sent to the NRA yet another request for indemnification, this time in connection with his response to subpoenas from the New York Attorney General. North has not amended his Corrected Counterclaim to include a request for indemnification in that matter and that alleged claim is not before the Court.

the Corrected Counterclaim were true, it does not fit within any cognizable legal theory and therefore should be dismissed. *Morone v. Morone*, 50 N.Y.2d 481, 484 (1980) (affirming dismissal where plaintiff sought relief for which there was no basis in the law); *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group*, 115 A.D.3d 128, 133 (App. Div. 1st Dep't 2014) (dismissing a claim that omitted a material allegation necessary to support it).

Under CPLR 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." Under CPLR 3001, the court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relation of the parties to a justiciable controversy whether or not further relief is or could be claimed."

IV.

ARGUMENT

In his Corrected Counterclaim, North claims that he has a right to indemnification pursuant to the NRA's Bylaws and that the Bylaws themselves create such a right. (Corrected Counterclaim, Dkt No. 27 Page 16 Para. 83 (North claiming that "[p]ursuant to the NRA's Bylaws, members of the Board of Directors of the NRA are entitled to indemnification for legal fees and costs that they incur in connection with their service as members of the Board of Directors of the NRA") (citing Article IV, Section 4 of the NRA's Bylaws)).[4]

Although the NRA's Bylaws state that Board members can receive indemnification if they are entitled to it under New York law or on some other basis, the Bylaws themselves do not create an independent right to indemnification. In addition, North is not entitled to

[4] *See also* Page 2 Para. 1.c (claiming that the NRA "owes [indemnification] to North pursuant to the NRA's Bylaws") and Para. 2 (claiming that "North's entitlement to indemnification is reflected in the clear language of the NRA's Bylaws")).

indemnification under New York law. And North has failed to cite—nor can he—any other basis pursuant to which he may be entitled to indemnification.

North's affirmative defenses, such as laches, unclean hands, waiver, estoppel and the like, should similarly be dismissed pursuant to CPLR 2311(b) as not stated and lacking merit because they are unsupported by his allegations. In addition, the entire purpose of the NRA's complaint was to obtain a declaratory judgment that North has *no claim*. His asserted defenses are simply inapposite.

A. The NRA Bylaws create no independent right to indemnification.

Contrary to North's position, the NRA's Bylaws—when read as written—do not create an independent right to indemnification. All that they do is spell out a mechanism for a director to request prompt and full indemnification from the NRA to the extent that he or she is entitled to it under New York law.

The two-clause structure and phrasing of Article IV, Section 4 ("Section 4") makes this clear:

> [1] 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** [2] 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.[5]

A careful reading of Section 4 makes clear that:

[5] Exhibit 1 to Dkt No. 26.

- To the extent New York law creates indemnification rights for directors of not-for-profit corporations, those rights are incorporated by reference in the NRA's Bylaws.

- Indemnification rights that exist under New York law are not "exclusive of any other rights to which a Director . . . may be entitled." The Bylaws do not state how or under what circumstances such "other rights" may arise, but Section 721 of New York Not-for-Profit Corporation Law makes clear that such rights can exist in the corporation's "certificate of incorporation," its "by-laws," or, "when authorized by such certificate of incorporation or by-laws, (a) a resolution of members, (b) a resolution of directors, or (c) an agreement providing for such indemnification." NPCL § 721.

- If a Board member has rights to indemnification under New York law or otherwise, he or she must request it in writing to the NRA's Secretary or its Executive Vice President.

- If a director makes the appropriate written request—*and* is entitled to indemnification—the NRA, under Section 4, must indemnify the director immediately and "to the fullest extent requested."

- In no event shall a director receive indemnification if New York law prohibits it.[6]

Nowhere does Section 4 create an independent right to indemnification. North's reliance on the second clause of Section 4 to argue otherwise is misplaced. It states: ". . . , 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." (Exhibit 1 to Dkt No. 26) (Section 4; emphasis added)). The word "such" makes clear that the indemnification to which a Director "shall be entitled" under the second clause is the indemnification referred to in the first clause, here indemnification under New York law.[7]

[6] Although this provision is not at issue in this motion, the NRA reserves is right to object to any indemnification he seeks on this and all other bases sated in the Complaint.

[7] Corrected Counterclaim (Dkt No. 27) at page 8 Paragraph 1 (quoting the second clause of Section 4 and omitting the first clause of Section 4 altogether); page 5 Paragraph 16 (same); page 2 Paragraph 2 (same).

North's argument requires the Court to read the word "such" out of the Bylaws in violation of a "cardinal rule" of construction to interpret Bylaws to give "meaning to all of [their] language and avoid an interpretation that effectively renders meaningless a part of a [provision]." *Helmsley-Spear, Inc. v. New York Blood Ctr.*, 257 A.D.2d 64, 68-69 (App. Div. 1st Dep't 1999) (rejecting a reading of a contract that would require the court to ignore some of its language); *see also LaSonde v. Seabrook*, 89 A.D.3d 132, 137 (App. Div. 1st Dep't 2011) (noting the well-settled principle that a corporation's bylaws—just as contracts—are interpreted based on the general rules of statutory construction); *Abraham v. Diamond Dealers Club, Inc.*, 27 Misc.3d 663, 667 (Sup. Ct. 2010) (interpreting the bylaws of a not-for-profit corporation under statutory rules of construction), *aff'd*, 80 A.D.3d 461 (App. Div. 1st Dep't 2011).

B. With respect to the matters at issue here, North has no right to indemnification under New York law.

1. <u>North fails to allege several threshold requirements for indemnification under New York law.</u>

Statutory indemnification rights of directors of a not-for-profit corporation are codified in Sections 721 through 726 of New York's Not-for-Profit Corporation Law, including in

- Section 722, "Authorization for indemnification of directors and officers";
- Section 723, "Payment of indemnification other than by court award"; and
- Section 724, "Indemnification of directors and officers by a court."

Section 722 defines the corporation's authority to indemnify a director, while Sections 723 and 724 define, subject to Section 722, the director's rights. See NPCL 723(a) ("[a] person who has been successful, on the merits or otherwise, in the defense of a civil or criminal action or proceeding of the character described *in section 722* shall be entitled to indemnification *as authorized in such section [i.e., Section 722]*"); NPCL 724(a) ("[n]otwithstanding the failure of a corporation to provide indemnification, and despite any contrary resolution of the board or of the members in the specific case under section 723

(Payment of indemnification other than by court award), indemnification shall be awarded by a court *to the extent authorized under section 722* (Authorization for indemnification of directors and officers), and paragraph (a) of section 723 (Payment of indemnification other than by court award)").

The clear language of Section 722 of the NPCL plainly restricts the scope of North's indemnification rights under Sections 723(a) and 724(a) to fees incurred in an "action or proceeding" to which he was either "made" a "party" or "threatened to be made a . . . party":

> A corporation may indemnify <u>any person, made, or threatened to be made, a party to an action or proceeding</u> . . . by reason of the fact that he . . . was a director or officer. . . if such director or officer acted, in good faith, for a purpose which he reasonably believed to be in . . . the best interests of the corporation . . . .[8]

Moreover, a director seeking indemnification has to show that he was made a party to the action or proceeding "by reason of the fact that [he was]" an NRA director. NPCL § 722.

As pled in the NRA's Complaint, the three statutory requirements mentioned above are only three of many. Satisfying these requirements only gets a director to "first base." Once he or she gets there, the director also has to show that he acted in good faith, for a purpose that he reasonably believed to be in the best interests of the NRA, and that any such belief was reasonable. As the NRA's Complaint makes clear, the NRA's position is that, assuming arguendo, that North could overcome this Motion, he would still be ineligible for indemnification on the many additional and independent grounds. However, because North cannot even arrive at first base, the fact-specific inquiries are irrelevant.

[8] NPCL § 722(a) (emphasis added).

2. Section 722 of the NPCL authorizes indemnification for parties—not mere witnesses, like North.

In his Corrected Counterclaim (Dkt No. 27), North seeks indemnification for fees and expenses in at least four matters. One relates to legal fees that he may incur in responding to two subpoenas from the NRA for documents and deposition testimony in *NRA v. Ackerman McQueen, Inc. and Mercury Group, Inc*. As North counsel's letter notes (Exhibit 5 to North's Answer and Counterclaim (Dkt No. 14)), the parties in that action are the NRA, on the one hand, and Ackerman McQueen, Inc. and Mercury Group, Inc., on the other. North is not a party in that action. Nor does he allege anywhere in his pleadings that he is threatened to be made a party in that action. As a result, any fees he may incur in responding to the NRA's subpoenas in that action are ineligible for indemnification under New York law.

3. Similarly, the Congressional letter request at issue here does not constitute an action or proceeding to which North is a party.

Next, North seeks indemnification for fees incurred in responding to a letter dated May 3, 2019, from the United States Committee on Finance, which asks North to produce several categories of documents. North does not allege that the letter (attached as Exhibit 4 to his Answer and Counterclaim (Dkt No. 13)) constitutes an "action or proceeding," let alone that he has been made or threatened to be made a party to it. (Exhibit 4 to Dkt No. 13; *see also* Dkt. No. 27.)

NPCL Sections 723(a) and (c) and 725 make clear that the congressional request is not an action or proceeding for which North can get indemnified. North is not "defen[ding]" himself in a "civil or criminal action or proceeding." *See* NPCL 723(a) and (c). Nor is he involved in a "litigation" in which he has to lodge a "defense" or file "pleadings." *See* NPCL 725.

The May 3, 2019 request from the Senate Finance Committee (Dkt No. 13) merely seeks documents from North on the basis that he is uniquely suited to shed light on alleged potentially

improper activity. It is not an "action or proceeding," and North has not been made a "party" to it. As a result, North has no statutory right to indemnification for legal fees incurred in responding to the congressional request.

4. Nor can North obtain indemnification for fees incurred in this action—because "fees on fees" are not indemnifiable.

North also seeks indemnification for his fees in this action. (Dkt No. 27 at page 18.) However, NPCL Sections 722 (a) and (c) authorize a corporation to indemnify only such attorneys' fees that were "actually and necessarily incurred [by the director] *as a result of*" an action or proceeding that was brought against him "by reason of the fact" that he was a director. NPCL §§ 722(a) and (c).

Strictly construing the identically worded Section 722(a) of New York Business Corporation Law, the Court of Appeals held that "fees on fees" are not indemnifiable because they lack the necessary nexus to the underlying suit:

> In limiting recovery to only those expenses that are 'actually and necessarily incurred as a result of such action or proceeding' . . . , section 722(a) quite clearly in our view requires *a reasonably substantial nexus between the expenditures and the underlying suit*. In actuality, the attorneys' fees arising in connection with this motion [i.e., dispute over the indemnification issue] were caused by [the corporation's] refusal to indemnify [the individual] . . . . It stretches language beyond the outer limits of meaning to claim that those fees on fees were necessarily incurred by reason of the joinder of [the individual] in the securities fraud suits.[9]

Baker v. Health Mgmt. Sys., Inc., 98 N.Y.2d 80, 83-89 (2002) (emphasis added) (also stating: "The American Rule provides that 'attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between

[9] *Id.* at 85.

the parties, statute or court rule . . .; [as a result,] to the extent the indemnification statutes 'chang[e] the common-law rule that each party pays his own lawyer, [they are] to be construed strictly.'" (internal citations omitted)).

5. North's claim for indemnification in "additional" unspecified matters fails as a matter of law and should also be dismissed.

In his Corrected Counterclaim, North also seeks indemnification from the NRA for fees and expenses "in connection with responding to additional requests or lawsuits in connection with [his] service as President of the NRA or service on the NRA Board of Directors." (Dkt No. 27 Page 19.) North's claim to indemnification for unspecified "additional" matters fails as a matter of law because he fails to so much as enumerate or describe these "additional requests" with any specificity, let alone begin to make the necessary showing that he is entitled to be indemnified for any related fees. The NRA does not object to North in the future seeking indemnification for future matters—not enumerated in his Corrected Counterclaim—if, with regard to those matters, he can meet the requirements of the applicable law.

C. Apart from the NRA Bylaws, North identifies no basis for indemnification—nor can he.

New York law contemplates that indemnification rights of directors of not-for-profit corporations could also spring from the corporation's certificate of incorporation, or—when authorized by its certificate of incorporation or bylaws—a resolution of members, a resolution of directors, or "an agreement providing for such indemnification."[10] In seeking indemnification here, North relies solely on the NRA's Bylaws. (Dkt No. 27.) He does not claim that the NRA's certificate of incorporation or any resolution or contract provide for an indemnification right. In addition, the NRA submits in support of this motion an affidavit by Mark Ness, Operations

[10] NPCL § 721.

Research Analyst in the Office of the Secretary of the NRA, which states that neither the NRA Board nor its members has passed resolutions providing for such a right. As a result, the Counterclaim should be dismissed.

D. North's affirmative defenses fail.

The affirmative defenses that North asserts in his Corrected Answer (Dkt No. 27 at Pages 15-16) should also be dismissed. The Complaint merely seeks a declaratory judgment that North has no claim in the first place. North's assertion of affirmative defenses to the NRA's Complaint makes no sense.

In any case, North cannot rely on equitable principles to expand a narrow statutory right. North's Fifth Defense, for example, states that he allegedly relied in good faith on advice of counsel. (Dkt No. 27 at Page 16.) North's Seventh Defense alleges that the NRA acted in bad faith. His Third, Fourth, and Sixth Defenses are estoppel, laches, waiver, acquiescence, ratification, unclean hands, and unjust enrichment. These defenses have no bearing on the resolution of the action. Equitable principles cannot enlarge a statutorily prescribed power of a New York not-for-profit corporation.[11]

V.

CONCLUSION

North has failed to allege that he has a right to indemnification with respect to any of the matters for which he seeks it. The entire action can and should be resolved as a matter of law. The NRA therefore respectfully requests that the Court (i) pursuant to Rule 3211(a)(7), enter a judgment dismissing the Corrected Counterclaim (Dkt No. 27) in its entirety with prejudice,

[11] The remaining First and Second "Defenses"—while styled as defenses—are simply restatements of North's position on the merits of this dispute.

(ii) pursuant to CPLR 3211(b), enter a judgment dismissing North's affirmative defenses (Dkt No. 27) in their entirety with prejudice on the ground that the defenses are not stated and have no merit; (iii) declare pursuant to CPLR 3001 that North is not entitled to indemnification for any of the matters listed in his Corrected Counterclaim; and (iv) award any other relief that the Court deems just and proper.

Dated: August 20, 2019
New York, New York

Respectfully submitted,

s/ Svetlana M. Eisenberg

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ATTORNEYS FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 17 of the Statewide Rules of the Commercial Division, I hereby certify that this Memorandum of Law contains 4,504 words, exclusive of the caption and signature block.

Dated: August 20, 2019

s/ Svetlana M. Eisenberg
Svetlana M. Eisenberg