VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF FAIRFAX

UNDER WILD SKIES, INC. **Plaintiff,** **v.** **NATIONAL RIFLE ASSOCIATION OF AMERICA** **Defendant.**	**Case No. 2019-12530**

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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

OPPPOSITION TO DEMURRER

COMES NOW YOUR Plaintiff, Under Wild Skies, Inc., and for its Opposition to the Demurrer of Defendant National Rifle Association of America states as follows:

A. INTRODUCTION

Plaintiff ("UWS") has filed this Amended Complaint against Defendant ("NRA") for breach of contract. UWS has alleged sufficient facts to advise the NRA of the claims being made against it and, as such, the Demurrer of the NRA should be overruled.

B. STANDARD

"'A demurrer admits the truth of all material facts properly pleaded. Under this rule, the facts admitted are those expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged.'" CaterCorp., Inc. v. Catering Concepts, Inc., 246 Va. 22, 24, (1993) (quoting Rosillo v. Winters, 235 Va. 268, 270, (1988)). "Even though a motion for judgment may be imperfect, when it is drafted so that a defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer." CaterCorp, Inc., 246 Va. at 24. Further, under Virginia law, "[t]he trial court is not permitted on

demurrer to evaluate and decide the merits of the allegations set forth in a bill of complaint, but only may determine whether the factual allegations of the bill of complaint are sufficient to state a cause of action. Concerned Taxpayers of Brunswick County, 249 Va. 320, 327-28, 455 S.E.2d 712, 716 (1995). Pursuant to § 8.01-273 Va. Code., the Court may only consider those grounds as specifically set forth in the NRA's demurrer.

C. ARGUMENT

1. Counts I & II.

Paragraph 1 of the Demurrer asserts that the Amended Complaint in Counts I and II fail to state a claim because "NRA is not a party to any contact between UWS and Winnercomm, Inc." The Amended Complaint alleges that UWS has contractual obligations with a production company known as Winnercomm to produce the Under Wild Skied television program. Amended Complaint, ¶ 5. The Amended Complaint further alleges that the NRA's breach of its obligations under the contracts at issue have, in turn, caused UWS to breach obligations with Winnercomm. Amended Complaint, ¶¶ 5, 30, 54, 62, & 67. The Amended Complaint additionally alleges that the NRA was aware of UWS's obligations to Winnercomm and was aware that a breach by the NRA would cause those damages. Id. Thus, the Winnercomm damages were within the contemplation of the parties under the contracts at issue in this case.[1]

Under Virginia law, consequential damages are recoverable in a breach of contract action if such damages were "within the contemplation of the contracting parties at the time of contracting." Richmond Medical Supply Co. v. Clifton, 235 Va. 584, 586 (1988). While question of whether or not damages flowing from a breach of contract are direct or consequential is a question of law, the question of whether consequential damages were within the contemplation of

[1] To the extent that the Demurrer Memorandum, at page 2, mentions that the agreements do not reference Winnercomm, the agreements do not contain a specific integration clause.

the parties at the time of contracting is question for the fact finder and cannot be resolved on demurrer. Id. at 586-87; see also, Roanoke Hospital Asso. v. Doyle & Russell, Inc., 215 Va. 796, 801-02 (1975). UWS does not allege that the NRA was a party to the Winnercomm agreement. Rather, UWS has more than sufficiently alleged that the parties contemplated that non-performance by the NRA would result in UWS' breach of the agreement with Winnercomm. As such, UWS has stated a claim for consequential damages which must be resolved by the fact finder.

2. Promissory Estoppel as to Counts III and IV

As to Counts III and IV, the NRA spends some time arguing that "promissory estoppel" is not recognized in Virginia. UWS has not alleged any claim for promissory estoppel.

3. Consequential Damages as to Counts III and IV

In its Demurrer, the NRA makes the same arguments regarding Winnercomm as to Counts III and IV. The same reasoning and arguments as stated in Section C(1) would apply here as well. UWS has alleged a claim for consequential damages which is a question for the jury. See Am. Comp. ¶¶ 30, 54, 72, 76, 80 & 83.

4. Anticipatory Breach and Repudiation as to Counts III and IV.

The NRA argues that, as to Counts III and IV, the claims for anticipatory breach and repudiation are not available because the contracts at issue "provide for installment payments in exchange for performance."[2] The NRA misconstrues the contracts alleged and claims made by

[2] On page 3 of the Memorandum, the NRA cites to Bennett v. Sage Payment Solutions, Inc., 282 Va. 49 (2011) as authority for the proposition that a claim for anticipatory breach must allege a "clear, absolute, unequivocal" abandonment of the contract. The NRA did not assert, in its demurrer, that the allegations were insufficiently pled to establish a claim for anticipatory breach based upon abandonment. As such, the court may not consider this argument on demurrer to the extent that the NRA intends to make such an argument. The NRA is limited to the "installment" argument asserted in the demurrer. See 8.01-273 Va. Code. In any event, the question of whether a party's actions were sufficiently "unequivocal" to establish abandonment is a jury question. Board of Supervisors v. Ecology One, Inc., 219 Va. 29, 33 (1978).

UWS. UWS has alleged that the NRA has abandoned and repudiated the contract which gives rise to a claim for anticipatory breach regardless of the time of performance.

Both the Advertising Agreement and Sponsorship Agreement are virtually identical. In both agreements UWS is charged with delivering television episodes and airing the same both as first run and repeat airings. The Advertising Agreement provides for advertising time and the Sponsorship Agreement provides for certain content within the episodes. The NRA agreed and promised to pay for such time and content. Both agreements provide for 10 year terms which end December 31, 2025. Within the Amended Complaint it is alleged that the Under Wild Skies program has aired continuously for 26 years. Am. Comp.¶ 4. And, in paragraph 5, it is alleged that the program "is contractually bound to air, and will continue to air through calendar year 2025." Significantly, the parties signed and ratified the agreements at issue in 2018 after performance had begun. This is evidence of the parties' intention that this agreement would be a single, indivisible contract to provide continuous services (i.e. television episodes and advertising and promotional considerations within those episodes) over a 10 year term in exchange for payment. The Amended Complaint alleges not just that the NRA has breached this agreement partially but that it has abandoned and repudiated the entire agreement. Am. Complaint ¶¶ 75 & 83.

Under Virginia law, the "abandonment of a contract will give rise to an action for anticipatory breach." Bennett, 282 Va. at 56-57 (internal citations omitted). Indeed a parties' abandonment of its contractual duties under a "continuous performance contract, after performance has commenced, constitutes anticipatory repudiation." Id.; see also, Merrifield Indus. Corp. v. Glaze, 77 Va. Cir. 264, 267 (Fairfax Cir. 2008). Anticipatory repudiation applies to contracts for services. Simpson v. Scott, 189 VA. 392, 397 (1949). Where a party has entirely

abandoned the contract, the other party may sue without waiting for the time of performance to arrive.

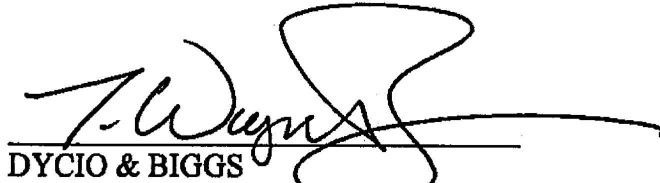
In this case, UWS has clearly alleged abandonment by the NRA of a contract that contained an indivisible obligation by both parties that was intended to span over a decade. Accordingly, UWS may proceed to sue on a claim of anticipatory repudiation.

The NRA cites to Fairfax-Falls Church Community Services Bd. v. Herren, 230 Va. 390 (1985) in support of its argument. However, the Herren case concerns the claims of county employees and the constitutional debt prohibition of Va. Const. art. VII, § 10(b). The court determined that to survive the debt prohibition, the contracts asserted by the claimants must "essentially unilateral" and that anticipatory breach was not available for "such contracts." Id. at 395. A unilateral contract is one in which only one party promises performance in exchange for something given other than a promise; a bilateral contract is one in which each party promises performance. Beck v. Kenney Builders, 58 Va. Cir. 349, 350 (Fairfax 2002). The agreements at issue here are clearly not unilateral. UWS promised to produce television episodes over 10 years and provide advertising during such episodes and the NRA promised to pay money in exchange during the entire term. The NRA's citations to Henderson v. Martin & Meyer Investments, Inc., 1992 WL 884691 (Loudoun Cir. 1992) and Legard v. EQT Prod. Co., 2011 WL 86598 (W.D. Va. 2011) are similarly misplaced. Neither case concerned claims of anticipatory breach based upon abandonment of the contracts at issue.

D. CONCLUSION

WHEREFORE Plaintiff prays that the demurrer be overruled in its entirety and for such other relief as may be appropriate.

Respectfully submitted,
Under Wild Skies, Inc.
By Counsel



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Certificate of Service

I hereby certify that on this 3 day of January 2020, I caused a true and accurate copy of the foregoing to be mailed and faxed to counsel for Defendant via US Mail, postage prepaid, first class and via the fax number indicated below:

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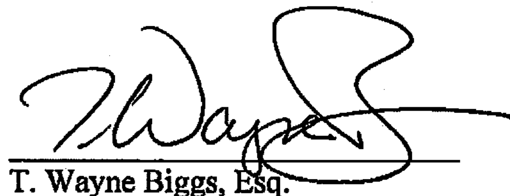

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