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OFFICE OF THE ATTORNEY GENERAL

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CHARITIES BUREAU

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January 20, 2021

**BY NYSCEF**

Honorable Joel M. Cohen  
Justice of the Supreme Court of the State of New York  
Commercial Division, New York County  
60 Centre Street  
New York, NY 10007

**Re: *People of the State of New York by Letitia James v. National Rifle Association of America, Inc.* (“NRA”), Index No. 451625/2020**

Dear Justice Cohen:

We write on behalf of the plaintiff, the Attorney General of the State of New York, in response to the Court’s request for the parties’ positions as to whether and to what extent the Court should adjudicate the pending motions to dismiss, transfer, or stay filed by the NRA and certain individual defendants in light of the NRA’s Notice of Suggestion of Bankruptcy. *See* NYSCEF Nos. 195, 196. Oral argument on the motion is currently scheduled for January 21, 2021.

As set forth below, the Court can and should proceed with adjudicating the motions in this regulatory enforcement action and, if resolved in the Attorney General’s favor, allow the action to proceed with discovery and trial. First, the automatic stay effectuated by filing a bankruptcy petition pursuant to 11 U.S.C. § 362(a) is not applicable by its terms to the Attorney General’s action to enforce its police and regulatory powers over the NRA as a regulated entity. Second, the NRA’s bankruptcy has no effect on this action with respect to the individual defendants, who are not debtors.

The Honorable Harlin D. Hale, Chief United States Bankruptcy Judge for the Northern District of Texas, set hearings for today at 2 p.m. (Central Time) on the bankruptcy “first day” motions filed by the NRA and its newly formed entity, Sea Girt LLC. We respect the jurisdiction of the Bankruptcy Court over the NRA as a debtor and over its assets while the bankruptcy matters are pending, and will share a copy of this letter with his chambers today. To the extent it is necessary or appropriate, we will make motions relating to the propriety of the bankruptcies before Judge Hale. However, as explained herein, this Court may exercise its concurrent jurisdiction to decide the applicability of the automatic stay.

## **Background**

The Attorney General filed this civil enforcement action on behalf of the People of the State of New York pursuant to her statutory authorities to regulate charitable organizations and fiduciaries, and to oversee the solicitation, appropriate use, and investment of charitable gifts assets. The 163-page complaint against the NRA, a New York chartered not-for-profit charitable corporation, and four of its current and former officers and directors details factual allegations of pervasive and systemic illegal conduct at the NRA—diversion of millions of dollars from the NRA’s charitable mission for private benefit, a lack of internal controls enabling such abuse, false regulatory filings, lucrative no-show contracts to loyalists, and retaliation against dissidents and whistleblowers within the NRA. The complaint asserts eighteen causes of action against the NRA and individual defendants for violations of provisions of the state statutory scheme that safeguards against, *inter alia*, the improper administration and abuse of charities. The complaint seeks injunctive and equitable relief, including judicial dissolution of the NRA, a remedy that gives paramount importance to the interests of the public. *See* [N-PCL § 1109\(b\)\(1\)](#). The Attorney General is not seeking to recover monetary damages on behalf of individuals.

On January 15, 2021, the NRA publicly announced that it was “dumping New York” by “utilizing the protection of the bankruptcy court” to re-establish itself as a Texas nonprofit.<sup>1</sup> The NRA expressly stated that it is seeking to exit New York, its state of incorporation for nearly 150 years, to escape the authority of this Court and the oversight of the Attorney General, whom it falsely accuses of “an abuse of legal and regulatory power.”<sup>2</sup> The NRA asserts that its bankruptcy filing is not financially motivated, claiming that the organization “is in its strongest financial condition in years.”<sup>3</sup>

The NRA filed its petitions for bankruptcy under Chapter 11 of the Bankruptcy Code in the Northern District of Texas, Dallas Division. The NRA, which has no offices in Texas, asserted venue based on the domicile of an affiliate, Sea Girt, LLC.<sup>4</sup>

## **This enforcement action is exempt from the automatic stay**

The NRA has invoked [Section 362\(a\)](#) of the Bankruptcy Code to automatically stay this action in disregard of the specific exemption from the automatic stay for

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<sup>1</sup> *See* Ex. 1 (NRA Press Release, dated January 15, 2021); Ex. 2 (Wayne LaPierre’s letter to NRA Members). Exhibits to this letter are bookmarked herein.

<sup>2</sup> *Id.* In other legally baseless efforts to forestall this action, the NRA has advanced similar false claims against the Attorney General in its countersuit, *NRA v. James*, 1:20-cv-889 (N.D.N.Y.). The Attorney General’s motion to dismiss that action is fully briefed and pending. As of the filing of this letter, the NRA has not filed a notice of suggestion of bankruptcy in that action. Further, on October 20, 2020, the NRA filed a petition before the Judicial Panel on Multidistrict Litigation, entitled *In Re: National Rifle Association Business Expenditures Litigation*, MDL No. 2979, asserting similar claims and seeking to consolidate its countersuit with other pending litigation and move the consolidated cases to the Northern District of Texas for pre-trial purposes.

<sup>3</sup> Ex. 1; *see also* Ex. 2 at 2.

<sup>4</sup> *See* Ex. 3 (NRA Voluntary Petition for Bankruptcy), at Question 11; Ex. 4 (Sea Girt LLC Voluntary Petition for Bankruptcy).

the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's . . . police or regulatory power.

11 U.S.C. § 362(b)(4). A “governmental unit” includes a “department, agency, or instrumentality of . . . a State.” 11 U.S.C. § 101(27). The purpose of this exception is to “discourage[] debtors from submitting bankruptcy petitions either primarily or solely for the purpose of evading impending governmental efforts to invoke the governmental police powers to enjoin or deter ongoing debtor conduct which would seriously threaten the public safety and welfare.” *In re Halo Wireless, Inc.*, 684 F.3d 581, 587 (5th Cir. 2012) (quoting *In re McMullen*, 386 F.3d 320, 324-25 (1st Cir. 2004)).<sup>5</sup> Furthermore, “where a governmental unit is suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection, safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay.” *Id.* (quoting H.R.Rep. No. 95–595, at 343, reprinted in 1978 U.S.C.C.A.N. 5963, 6299).

This Court has authority to determine that this action falls within § 362(b)(4)'s exception. See *In re Coho Resources, Inc.*, 345 F.3d 338, 345 (5th Cir. 2003) (“State courts . . . routinely rule on the applicability of a bankruptcy stay or permanent injunction to state judicial proceedings.”); *In re Gandy*, 327 B.R. 796, 800-801 (Bankr. S.D. Tex. 2005) (“[T]he state courts in the present cases had the authority to determine that the automatic stay did not apply to the governmental units’ actions to enforce their police and regulatory power.”); *First Franklin Fin. Corp. v. Merchant*, 132 N.Y.S.3d 635, 636 (1st Dep’t 2020) (“Supreme Court had jurisdiction to determine whether the proceeding before it was subject to the automatic bankruptcy stay triggered upon [debtor’s] Chapter 11 bankruptcy filing.”).

The NRA’s apparent attempt to automatically stay this action by filing a notice of suggestion of bankruptcy is exactly the kind of procedural abuse that concurrent exercise of jurisdiction by state and federal courts is designed to alleviate. The court in *In re Gandy* noted:

This Court is frequently called upon to determine whether the automatic stay applies to state court lawsuits involving a governmental unit’s enforcement of police and regulatory powers. Sometimes[,] . . . despite the plain application of the police and regulatory power exception, a debtor will file a suggestion of bankruptcy or affirmatively represent to the state court that the automatic stay precludes a state court from continuing with its adjudication. . . . Such actions delay state court proceedings and waste the resources of the parties and the courts.

327 B.R. at 800.

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<sup>5</sup> Without waiver of any objection to the NRA’s choice of venue in the Bankruptcy Court for the Northern District of Texas, precedent from the Fifth Circuit is relevant to bankruptcy procedural questions at issue.

To determine whether a state enforcement action falls within this exception, courts apply two interrelated tests. The first—the “pecuniary purpose” test—“asks whether the government primarily seeks to protect a pecuniary governmental interest in the debtor’s property, as opposed to protecting the public safety and health.” *In re Halo Wireless*, 684 F.3d at 588 (internal quotation marks omitted). The second—the “public policy” test—“asks whether the government is effectuating public policy rather than adjudicating private rights.” *Id.* (internal quotation marks omitted). Both tests require the court to “determine whether the particular regulatory proceeding at issue is designed primarily to protect the public safety and welfare, or represents a governmental attempt to recover from property of the debtor estate, whether on its own claim, or on the nongovernmental debts of private parties.” *Id.* (internal quotation marks omitted).

This enforcement action, which is aimed at protecting the public from fraud and from a charity’s abuse of its charitable status, satisfies both tests. With respect to the pecuniary purpose test, none of the Attorney General’s claims involve any interest by the State of New York in property owned by the NRA, but instead seek to enforce compliance with State law governing the administration of the NRA as a state-chartered charitable not-for-profit corporation. Claims for financial restitution of charitable assets lie against the individual defendants only. Any moneys the Attorney General recoups will be returned to the NRA or, upon a judicial dissolution, used in accordance with donor intent or with Court direction and approval for a purpose substantially similar to the mission of the NRA. With respect to the public policy test, the Attorney General is not adjudicating private rights against the NRA but is enforcing New York law designed to protect the public and the undefined charitable beneficiaries as a class from fraud and misconduct by public charities.

*In re Universal Life Church, Inc.*, 128 F.3d 1294 (9th Cir. 1997), is particularly instructive. The debtor, a religious organization, challenged the Internal Revenue Service’s (“IRS”) decision to revoke the debtor’s tax-exempt status as a violation of the automatic stay. *Id.* at 1296. The Ninth Circuit held that, even if the revocation could be considered the type of action subject to the automatic stay in § 362(a), the IRS’s decision fell squarely within the exemption from the stay under § 362(b)(4), satisfying both tests:

[D]etermination that an organization may not meet the standards for tax exempt status in itself serves a general public welfare purpose beyond any pecuniary application in a particular case. . . . [T]his activity may be characterized as a type of fraud detection, assuring potential donors that the organization will not use their contributions for personal profit, but for the charitable purposes encouraged by law.

*Id.* at 1298 (internal quotation marks omitted). Here, the Attorney General’s complaint asserts that the NRA and individual defendants have abused the charitable form, and caused injury to donors and the public, which warrants dissolution of the NRA and other injunctive and equitable remedies.

This is exactly the kind of fraud prevention and protection of the public that [§ 362\(b\)\(4\)](#) was designed to exempt from the automatic stay.<sup>6</sup>

**The NRA's bankruptcy has no effect on this action as to the individual defendants**

Second, and only if the Court determines that this action does not fall within the exception under [§ 362\(b\)\(4\)](#), the NRA's bankruptcy has no effect on this action proceeding against the non-debtor individual defendants. Absent extraordinary circumstances, a [§ 362\(a\)](#) automatic stay applies only to actions against the debtor. *Reliant Energy Servs., Inc. v. Enron Canada Corp.*, 349 F.3d 816, 825 (5th Cir. 2003). To extend the automatic stay to the individual defendants, the NRA bears the burden of demonstrating the existence of those extraordinary circumstances to the bankruptcy court. *American Gen. Life Ins. Co. v. Schahin II Fin. Co. (SPV) Ltd.*, 2020 WL 3250753, at \*5 (S.D. Tex. June 16, 2020). The NRA has not done so here, and so the Attorney General's claims against the individual defendants should proceed.

**Conclusion**

The Attorney General respectfully requests that the Court determine that the automatic stay does not apply to this action, and maintain the current schedule for oral argument on the defendants' pending motions and otherwise proceed with this action.

Respectfully submitted,



James Sheehan  
Chief, Charities Bureau  
Assistant Attorney General

cc: All Counsel of Record (via NYSCEF)

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<sup>6</sup> See also *In re Gandy*, 327 B.R. at 805 (holding that the exemption under [§ 362\(b\)\(4\)](#) applies and noting that “this Court (as does a state court with concurrent jurisdiction) only looks to the four corners of the complaint to determine if the purpose of the litigation by the governmental unit is to enforce its police and regulatory powers.”); *In re Bloomfield Nursing Operations, LLC*, 609 B.R. 185, 191-92 (N.D. Tex. 2019) (reversing bankruptcy court and holding that New Mexico Attorney General's consumer protection and antifraud litigation fell within police or regulatory power exception to automatic stay); *Fed. Trade Comm'n v. Educare Ctr. Servs., Inc.*, 611 B.R. 556, 561 (W.D. Tex. 2019) (holding that joint Federal Trade Commission and Ohio Attorney General consumer protection action fell within police or regulatory power exception to automatic stay).