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**VIA NYSCEF**

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

Re: *People of the State of New York, by Letitia James, Attorney General v. The National Rifle Association of America, Inc. et al.*, Index No. 451625/2020

Dear Justice Cohen:

On behalf of the plaintiff, the Attorney General of the State of New York (“OAG”), we respectfully submit this letter to: (a) apprise the Court of recent developments in related litigation; and (b) obtain the Court’s approval of a confidentiality order appropriately tailored to the nature of this action, which was brought pursuant to the OAG’s responsibility and authority to regulate the National Rifle Association of America, Inc. (“NRA”) as a New York public charity, and certain of its current and former leaders.

**I. Recent Litigation Developments**

By decision dated May 11, 2021, the Hon. Harlin D. Hale dismissed the NRA’s bankruptcy case in the United States Bankruptcy Court for the Northern District of Texas in the action entitled *In Re National Rifle Association of America and Sea Girt LLC*, Jointly Administered, Case No. 21-30085-hdh11. Following an eleven-day evidentiary hearing on motions by the OAG and others, Judge Hale held that the NRA had not filed for bankruptcy in good faith and specifically found that it sought to improperly use the bankruptcy process to obtain a litigation advantage in this regulatory enforcement action by the OAG.<sup>1</sup>

On June 4, 2021, the NRA voluntarily dismissed its federal countersuit against the OAG, *National Rifle Association of America, Inc. v. James*, N.D.N.Y. Case No. 20-cv-889, which sought to challenge commencement and prosecution of this action on constitutional grounds.<sup>2</sup> The OAG’s motion to dismiss that action in its entirety had been fully briefed and submitted

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<sup>1</sup> See *In re Nat’l Rifle Ass’n of Am.*, 628 B.R. 262 (Bankr. N.D. Tex. 2021).

<sup>2</sup> Attached as Exhibit A is a copy of the NRA’s Notice of Voluntary Dismissal filed in *The National Rifle Association v. James*.

since January 4, 2021. The NRA filed an Answer with nearly identical counterclaims in this action on February 23, 2021. The OAG filed a motion to dismiss the NRA's counterclaims on June 24, 2021 and the parties have stipulated that the NRA's opposition will be filed on July 20, the OAG's reply will be filed on July 29<sup>th</sup>. Dkt No. 288.

## **II. The Confidentiality Order**

At the March 9, 2021 conference in this case, the Court approved a discovery plan and directed the OAG to submit a preliminary conference order upon the parties' resolution of one outstanding issue – the NRA and certain other defendants' request for a confidentiality order. The expedited discovery and hearing in the bankruptcy court delayed the parties' resolution of issues concerning the scope and terms of a confidentiality order in this action.<sup>3</sup> Following dismissal of the bankruptcy case, the parties met and conferred, but have been unable to agree on the terms of a confidentiality order. The NRA and the OAG both seek amendments to the Commercial Division's Model Confidentiality Order (the "Model Order"). The OAG's proposed amendments modify provisions to address the public nature of this government enforcement action and the OAG's disclosure obligations as a law enforcement agency. A copy of the proposed confidentiality order is attached hereto as Exhibit B with a redline indicating the proposed changes that are in dispute.<sup>4</sup>

The changes the OAG requests to the Model Order are appropriate and necessary to the confidentiality considerations in this regulatory enforcement action, which are different than those in a typical private commercial case. As an initial matter, the need for public access is heightened in regulatory enforcement actions like this one. *Gliklad v. Deripaska*, 185 A.D.3d 512, 513 (2020)(scrutinizing the need for sealing where "New York has a 'long-standing, sound public policy 'that all judicial proceedings, both civil and criminal, are presumptively open to the public.'"). Where, as here, the "lawsuit is not between two private companies claiming patent infringement, where trade secrets are of little public concern" but instead involves state action and a matter of public interest, the right of public access to information is "especially strong." *Gulino v. Bd. of Educ. of City Sch. Dist. of City of New York*, No. 96 CIV. 8414 (CBM), 2003 WL 1878235, at \*2–3 (S.D.N.Y. Apr. 11, 2003) (discussing competing factors and need for open courts in regard to documents submitted to court).

In addition, the OAG, as a government agency, has disclosure obligations to the public and to other government agencies, which conflict with standard provisions in the Model Order and the scope and terms of the confidentiality order sought by the NRA. In addition, the OAG must be able, as a regulator and law enforcement agency, to make confidential referrals to other law enforcement agencies, subject to confidentiality protections. These obligations distinguish

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<sup>3</sup> This also delayed the OAG's submission of a proposed preliminary conference order to memorialize the discovery schedule approved at the March 9, 2020 conference. The OAG is prepared to submit a proposed form of order now or upon resolution of the issues presented concerning the confidentiality order.

<sup>4</sup> Many proposed changes to the Model Order were discussed and negotiated between the parties. The resulting redline was unnecessarily confusing and complex. The OAG has endeavored in good faith to specifically highlight or leave in the redline changes that it believes are in dispute. The changes to the Model Order to which the parties have agreed are not highlighted.

the OAG from a private party in litigation and broad designations of confidentiality present particular problems in the context of this regulatory proceeding.

Given these concerns, the OAG seeks modifications to the Commercial Division's standard form confidentiality order, as modified by the NRA's proposal, in three respects: (1) narrowing the scope of "Confidential Information"; (2) shifting the burden of challenging a confidentiality designation; and (3) amending the OAG's disclosure obligations to third parties.

**First**, during meet and confers, the parties were unable to agree on the scope of what should be treated as "Confidential Information" in this action. The Commercial Division's definition, with some proposed amendments agreed to by the NRA and the OAG, is overbroad for this particular regulatory enforcement action in that it provides that "Confidential Information" shall mean all information:

designated as confidential, if such Documents or Testimony, based upon a good faith determination by the Producing Party, contain trade secrets, proprietary business information, competitively sensitive information, personally identifying information of a confidential nature such as birth date, home address, social security number, or other personally sensitive information including, without limitation, information identifying members of or donors to the National Rifle Association (the "NRA") (such information, collectively, "Personally Identifying Information"), *or other information the disclosure of which would, in the good faith judgment of the Party or, as appropriate, the non-party designating the material as confidential, be detrimental to the conduct of that Party or non-party's business or the business of any of that Party or non-party's customers, clients, donors or stakeholders.* Information other than Personally Identifying Information, whether documents or testimony, shall not be designated as "Confidential Information" if it has been previously disclosed publicly by the Producing Party. *See Exhibit B, Proposed Order, p. 2, ¶ 3(a) (emphasis added.)*

The NRA also seeks to limit the use of information designated as "Confidential Information" to only this litigation. *See Exhibit B, Proposed Order, p. 6, ¶ 7.*

The OAG objects to protecting "information the disclosure of which would... *be detrimental to the conduct of that Party or non-party's business or the business of any of that Party or non-party's customers, clients, donors or stakeholders.*" This language would allow the NRA, or any defendant or non-party, to designate as confidential any information that is unflattering, embarrassing or supports allegations of a violation of applicable law. This is subject to abuse and over-designation.

For example, documents demonstrating the waste of charitable assets by the individual defendants, a central claim in this regulatory enforcement claim, could be designated as confidential for the sole reason that they could be detrimental to the defendants' reputation. Similarly, information regarding unlawful payments made to and contractual agreements with insiders could be designated as confidential for no other reason than that such documents support the OAG's allegations of misconduct, waste and abuse by the NRA and its current and former

leaders. Under the Model Order’s definition of “Confidential Information,” almost all relevant documents to be produced by the defendants could conceivably be designated as confidential without having any legitimate justification for the same, unnecessarily imposing burdens and expense upon the OAG. *See, e.g.,* Thomas J. Hall & Judith A. Archer, *Use and Abuse of Confidentiality Orders*, N.Y. L.J. (Dec. 20, 2018), <https://www.law.com/newyorklawjournal/2018/12/20/use-and-abuse-of-confidentiality-orders/?slreturn=20190113131625>.

The risk that the NRA will improperly use a broad definition of confidentiality to limit access to information by over-designation is not mere speculation. In the course of the OAG investigation of the NRA, the NRA attempted to interfere with an OAG investigative subpoena by enforcing a non-disclosure agreement against a third-party subpoena recipient. The NRA demanded that it be allowed to preview and potentially withhold relevant information from the OAG. This necessitated the expense and delay of litigation to resolve the issue. The court rejected the NRA’s efforts, holding that “to allow not-for-profit entities, like the NRA, to shield its conduct through use of an NDA would frustrate OAG’s regulatory and law enforcement duties, and its oversight of charities.” *People v. McQueen*, 67 Misc. 3d 1206(A), 125 N.Y.S.3d 838 (N.Y. Sup. Ct. 2020)(Crane, J.). More recently, in the Bankruptcy Proceeding, the NRA designated essentially every document of the thousands it produced as confidential. This included publicly-filed documents and others that had previously been publicly disclosed and for which there was no basis to assert confidentiality. The OAG can present numerous examples to this Court.

Equally problematic is the NRA’s proposal to limit information it has self-designated as “Confidential” from being used for the OAG’s regulatory purposes or in other lawsuits or investigations arising out of the same facts and circumstances. *See* Exhibit B, Proposed Order, p. 6, ¶ 7 (OAG proposes allowing use of Confidential Information for “regulation of the regulated entity, and any other litigation, investigations, and/or referrals concerning or arising out of the same facts and circumstances”). Such a limitation would be inappropriate here given the OAG’s continuing obligation to regulate the NRA and the NRA’s record of engaging in collateral litigation, such as the recently dismissed actions in the Northern District of New York and the Northern District of Texas, Bankruptcy Court.

The OAG proposes to narrow the definition of “Confidential Information” to omit only the language permitting a confidential designation based upon the producing party’s subjective assessment that such information would be “detrimental” to its own or another’s business. The OAG does not object, on a categorical basis, to treating as confidential information that is personally identifying, a trade secret or otherwise legally protected as confidential.

**Second**, given the nature of this action, the importance of public access to relevant information, and the history of over-designation, the OAG proposes shifting the burden regarding challenges to confidential designations to the designating party who seeks to shield the information from public view. *See* Exhibit B, Proposed Order, p. 3 at ¶¶ 4, 10. In that way, the party seeking to preserve something as confidential, if such designation is challenged in good faith, would bear the burden of moving to protect its designation.

It cannot be doubted that the widespread designation of information as confidential here would impose additional burdens and prejudice upon the OAG as a regulating entity as it would require the OAG to comply with certain notice and motion procedures. For example, in *Callsome Solutions Inc. v. Google, Inc.*, No. 652386/2014, 2018 WL 5267147, at \*4 (N.Y. Sup. Ct. Oct. 23, 2018), in ruling on the plaintiff's repeated challenges to Google's confidentiality designations, the Commercial Division held that by "providing piecemeal de-designations, only when prompted, and dropping its designations, only when threatened with court review," Google had prejudiced plaintiff.

Under the Model Order, the OAG must obtain a signed acknowledgement prior to sharing confidential information with any witness or potential witness or law enforcement agency and inform the NRA of the same<sup>5</sup>; use of Confidential Information during a deposition may render whole portions of the deposition confidential; and before using Confidential Information during any argument, hearing or trial, the OAG must first notify the NRA or other producing party, allow application to the Court and follow such steps as are deemed necessary to shield the information.

The proposed amendment would merely require that if the receiving party in good faith disputes the producing party's designation as confidential, it can object in writing. The parties must meet and confer and if they cannot resolve the dispute, the burden would be on the producing party to seek resolution from the Court. This proposal would encourage the defendants to make only appropriate confidentiality designations.

**Third**, the OAG has proposed changes to (a) comply with the agency's obligations under Article 6 of the New York Public Officers Law, The Freedom of Information Law, *see* Exhibit B, Proposed Order, at 3, ¶ 5; (b) permit it to share confidential information with potential witnesses with appropriate protection but without having to inform the defendants that it is interviewing the same. *id.*, at 6, ¶ 8; and (c) respond to confidential requests from law enforcement agencies without informing the producing party of the same. *See, e.g., Id.*, at 3, ¶ 5(b) (OAG objects to NRA proposed addition of a provision to give notice before disclosure in connection with a criminal matter). This provision is in furtherance of the OAG's obligations as a law enforcement agency to respond to public inquiries under certain circumstances,<sup>6</sup> to respond to confidential requests from other law enforcement agencies and, with applicable protections in the form of signed acknowledgements of confidentiality, to speak with witnesses and potential witnesses, including whistleblowers, without advance notice and approval of the NRA. The

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<sup>5</sup> This requirement is particularly problematic as it would require the OAG to disclose to the NRA when it provides information in response to a confidential request from other law enforcement agencies or to any witnesses or potential witnesses that the OAG identifies, including whistleblowers. As the court in *People v. Ackerman* found, providing such notice would likely impede a regulator and potentially discourage compliance. *People v. Ackerman McQueen*, 67 Misc. 3d 1206(A), *citing S.E.C. v. Jerry T. O'Brien, Inc.*, 267 US 735, 743 (1984).

<sup>6</sup> Public Officers Law § 87 would not require the OAG to disclose information if it falls within a statutory exemptions, such as information the disclosure of which "would constitute an unwarranted invasion of personal privacy", reveal a trade secret, or would "interfere with law enforcement investigations or judicial proceedings. *See* N.Y. Pub. Officers Law § 87(2)(b), (d) & (e).

modifications that the NRA proposes requiring the OAG to provide advance notice before disclosure, *see e.g.*, Exhibit B, Proposed Order, at p. 3, ¶ 5(b), would impede the OAG's ability to respond to a confidential request, which may be made formally by subpoena or informally by written request, from a law enforcement agency for information.

**Conclusion**

Accordingly, the OAG respectfully requests that the Court grant its proposed amendments to the confidentiality protective order and decline to adopt those requested by the NRA.

Respectfully,

*/s/ Monica Connell*  
Special Counsel  
Assistant Attorney General

cc: All Counsel of Record