July 26, 2021

VIA 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, Attorney General v. The National Rifle Association of America, Inc. et al.,* Index No. 451625/2020

Dear Justice Cohen,

On behalf of Defendants the National Rifle Association of America (the "NRA"), John Frazer ("Frazer") and Wayne LaPierre ("LaPierre" and, collectively with the NRA and Frazer, the "NRA Defendants"), we respectfully submit this letter in response to the OAG's letter dated July 12, 2021, which requests that the Court enter a confidentiality order in this matter that deviates substantially from Commercial Division's Model Confidentiality Order (the "Model Order"). Not surprisingly, the deviations sought by the OAG would accord substantially less confidentiality protection to the defendants in this matter than the Commercial Division contemplates—shifting the burden for assertion of confidentiality, stripping confidentiality protection entirely for broad swathes of documents, and creating capacious loopholes that unilaterally entitle the OAG to share other litigants' confidential material without providing any notice or opportunity to contest the dissemination of such documents.

The NRA Defendants recognize that this case raises considerations atypical of most commercial litigation: the NRA is more likely than most commercial litigants to possess documents protected on constitutional grounds, and less likely to possess commercial competitive information; moreover, the OAG may under some circumstances be mandated to share information pursuant to public-records laws or with other government agencies. Accordingly, the NRA Defendants proposed to the OAG, and now propose to the Court, a compromise form protective order that accommodates substantial deviations from the Model Order. For example, the NRA Defendants' Proposed Protective Order (attached as Exhibit 1 hereto)[1] would permit disclosures under New York Public Officers Law § 87 and New York Criminal Procedure Law § 245.[2] Similarly, the NRA Defendants' Proposed Protective Order would relax notice and consent requirements for the sharing of confidential documents where required by law.[3] The NRA Defendants' Proposed Protective Order even accepts the OAG's proposed requirement that a party

[1] For the Court's convenience, the NRA Defendants also enclose, as Exhibit 2 hereto, a redline markup highlighting differences between the NRA Defendants' Proposed Protective Order and the Model Order.

[2] *See* Exhibit 2 (Redline of NRA Defendants' Proposed Protective Order vs. Commercial Division Model Order), ¶ 5.

[3] Ex. 2, ¶ 6.

or non-party designating Confidential documents do so in good faith.[4] No additional deviations are necessary. For the reasons set forth below, the NRA Defendants respectfully request that the Court adopt this proposed compromise and enter the NRA Defendants' Proposed Protective Order so that discovery in this matter can proceed.

With respect to the scope and categories of material which may be designated "Confidential," the OAG proposes to strike from the Model Order language that protects 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." In New York, good cause to protect or seal documents exists where the documents sought to be sealed will disclose confidential or proprietary information, the public disclosure of which would cause harm, and where there is no overriding public interest in disclosure of the documents.[5] The OAG insists that the language in the Model Order, which aligns with this standard, could encompass virtually any document substantiating the OAG's claims—a contention that distends the Model Order's verbiage beyond its plain meaning and, moreover, misses the point. The OAG, not the NRA Defendants, bears the burden of proof with respect to the OAG's salacious allegations. The Commercial Division, in adopting its Model Order, surely contemplated that high-profile litigants would face allegations of poor governance, corruption, theft, and other misconduct; nonetheless, it did not elect to strip such litigants of the protections and conveniences of confidential discovery based on an inchoate presumption that any sensitive document unearthed by discovery constitutes evidence of guilt and must immediately be shared with the media. To the extent that New York has a public policy favoring transparency with respect to nonprofits, that policy is satisfied by statutory filing and disclosure requirements. Other categories of litigants in the Commercial Division, such as publicly traded securities issuers, likewise engage in activity that implicates the public interest and are subject to certain transparency requirements as a matter of law. This does not justify stripping public companies, or public charities, of the protections in the Model Order which the Commercial Division favors. Indeed, the Supreme Court recently recognized that nonprofit advocacy organizations, like the NRA, have a ***heightened*** interest in protecting the confidentiality of member and donor information.[6] Thus, public policy favors more protection for the NRA Defendants' documents—not less protection—than a typical commercial litigant would receive.[7]

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[4] Ex. 2, ¶ 3(a).

[5] *PricewaterhouseCoopers LLP v. Lewis*, 2020 NY Slip Op 33217(U), ¶ 5 (Sup. Ct.). The Model Order recognizes this and, in October 2020, even incorporated an amendment further permitting parties to invoke an "Attorney's Eyes-Only" protection for sensitive materials.

[6] *See generally Americans for Prosperity Foundation v. Bonta*, U.S. LEXIS 3569 at *4 (July 1, 2021) (finding that the California Attorney General's requirements for disclosure of donor identities inappropriately burdened First Amendment associational rights); *see also NRA of Am. v. Cuomo*, 2021 U.S. Dist. LEXIS 47395, at *35-36 (N.D.N.Y. Mar. 15, 2021) (sustaining claims by the NRA against New York Governor Andrew Cuomo and Maria Vullo, a former superintendent of the New York State Department of Financial Services, for attempting to choke off financial services to the NRA and chill protected First Amendment activity by the NRA in violation of the First Amendment).

[7] The OAG purports to cite, to the contrary, a New York Supreme Court ruling in a discovery dispute involving the enforcement of a contractual nondisclosure agreement in the face of an investigative subpoena. That ruling is currently on appeal—and in any event, preceded the United States Supreme Court's decision in *Americans for Prosperity Foundation v. Bonta*, U.S. LEXIS 3569 at *4 (July 1, 2021). Moreover, crucially, the case cited by the OAG posits a public policy impediment to the use of an NDA to ***withhold documents from investigators—not the***

The Model Order also establishes the protocol for challenging the validity of confidentiality designations, which places the burden for doing so on the challenging party. This framework was preserved when the Model Order was most recently amended in October 2020. In its letter, the OAG requests that this traditional protocol be changed, with the burden inverted and placed on the designating party. First, the OAG is the Plaintiff which has brought this action against Defendants. Its proposal to invert the burden inappropriately rids itself of a burden it should rightly have, both as a plaintiff and under the policies inherent in the Model Order, and foists it upon the Defendants who are not the ones who have invoked the Court's resources. Second, the fact that the OAG has the resources of the New York State government and Defendants include individuals such as Mr. LaPierre and Mr. Frazer, further makes the shifting of cost and burden inappropriate. Lastly, the OAG's proposal is expressly premised on the erroneous idea that, under the OAG's proposed order, a party's lawyers will be less likely to make a determination that materials are confidential and designate them as such. This faulty notion presupposes that the lawyers would be incentivized to deviate from their professional judgment and responsibilities to their clients in the face of cost and difficulty. These prudential judgments to spare injury to a client from public disclosure are the factors which drive designating parties' decisions to designate documents as confidential. We respectfully suggest that a strategic election by a challenging party to challenge confidentiality designations is not comparatively as deeply rooted in such considerations as those undertaken by a designating party, and that this reality undergirds the challenge protocol chosen for and embedded in the Model Order. Even if not the case though, the OAG's proposal to invert the burden established by Commercial Division in the Model Order does not offer a compelling reason and should be rejected.

The OAG also argues that the standard provisions in the Model Order conflict with its possible disclosure obligations pursuant to Article 6 of the New York Public Officers Law § 87, and that it wishes to be able to share confidential information with witnesses and law enforcement agencies without informing the defendant which or who produced it. First, as the Public Officers Law contains exemptions from its scope, advance notice to the designating party is already required. The OAG's proposed protective order expresses this. *See* Ex. B at 4, ¶ 5(a). Given that notice is already required for the Public Officers Law, and that the OAG is willing to agree to provide notice for any other compelled production (*see* Ex. B at 11-12, ¶ 22), the NRA Defendants' request for similar notice upon any obligation to produce under CPL § 245.20(2) or otherwise,[8] is minimally invasive. The tensions raised by these conflicts, moreover, precisely advocate that they be given the maximum chance for appropriate resolution.

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media or the public. In this case, there is no dispute over whether the OAG may access documents designated "Confidential"—only whether the OAG may disseminate litigation discovery material to the *New York Times*.

[8] The NRA Defendants' inclusion of the "or otherwise" language in its proposed edit appears prescient to the extent the OAG now specifies that it wishes to be free from the obligation to give notice for the expanded category of "confidential requests from law enforcement agencies" (see July 12 Letter at 5), which we can fairly deduce relate to voluntary, non-compelled requests for production of confidential materials since compelled responses are governed by the notice requirements in Paragraph 22 of the proposed order.

Second, the Public Offers Law obviates any obligation of the OAG to make requested disclosures relating to information falling within statutory exemptions including, without limitation, where disclosure would (1) constitute an unwarranted invasion of privacy pursuant to N.Y. Pub. Off. Law § 89[9] or (2) endanger the life and safety of any person. N.Y. Pub. Off. Law § 87 (2) (b), (f). The necessity for personal privacy and safety has been a particular need of the NRA, its employees, donors, and stakeholders for years, and takes on a heightened importance in this case where the matter is highly publicized and politically charged. Given the sensitivities presented in this case, we respectfully submit the more prudent approach is to require notice and permit an opportunity to be heard to ensure that each of these issues are carefully and correctly addressed and resolved.

Very truly yours,

/s/ Sarah B. Rogers

Sarah B. Rogers
Counsel for Defendant the National Rifle Association of America

/s/ William B. Fleming

William B. Fleming
Counsel for Defendant John Frazer

/s/ P. Kent Correll

P. Kent Correll
Counsel for Defendant Wayne LaPierre

[9] *See* N.Y. Pub. Off. Law § 89 (2)(b) ("An unwarranted invasion of personal privacy includes, but shall not be limited to: **i.** disclosure of employment, medical or credit histories or personal references of applicants for employment; **ii.** disclosure of items involving the medical or personal records of a client or patient in a medical facility; **iii.** sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes; **iv.** disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; **v.** disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; **vi.** information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; **vii.** disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law; or **viii.** disclosure of law enforcement arrest or booking photographs of an individual, unless public release of such photographs will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal laws.").

cc: All Counsel of Record