

B R E W E R
ATTORNEYS & COUNSELORS

September 22, 2021

BY NYSCEF

Hon. Joel M. Cohen
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 v National Rifle Association of America, et al.*,
Index No. 451625/2020**

Dear Justice Cohen:

We represent defendant, the National Rifle Association of America (“NRA”) in the above-referenced action (the “Action”). This responds to the letter to the Court, dated September 21, 2021 (NYSCEF No. 372), filed by Plaintiff, the New York Attorney General (“NYAG”).¹

As an initial matter, the pleadings in this Action are not complete. The NYAG filed a second Amended and Supplemental Complaint on August 16, 2021 (the “Second Amended Complaint”) (NYSCEF No. 333). On September 15, 2021, the NRA moved to dismiss the causes of action asserted against it in the Second Amended Complaint. (NYSCEF Nos. 363-371).² However, the counterclaims the NRA filed against the NYAG in its Amended Answer with Counterclaims on July 20, 2021 (NYSCEF No. 325), have not been responded to by the NYAG. Although the NYAG filed the Second Amended Complaint, she has failed, as required by CPLR 3025(d), to timely reply to the NRA’s Counterclaims against her. The NRA intends to serve discovery demands, as well as third-party discovery, in support of its defenses and its Counterclaims, and thus requests that the NYAG file its reply to the NRA’s Counterclaims.

NRA Document Production

The NRA has moved forward with discovery, including document production and producing witnesses for deposition. In fact, as the NRA advised the NYAG it would do so prior to the NYAG’s filing its September 21 letter, the NRA produced on September 21 1,933 documents, consisting of 14,902 pages. This follows an initial production by the NRA on August 11, 2021. These productions are in addition to the 18,722 documents produced by the NRA to the NYAG during the NYAG’s expansive pre-Action investigation, consisting of 88,500 pages. Thus, the NRA has already produced to the NYAG approximately 20,000 documents, in excess of 100,000 pages.

¹ Under Commercial Division Rule 14, the NRA should have been afforded four days to respond to the filing of NYAG’s letter prior to the Court conference scheduled for September 23, 2021.

² The NRA is optimistic regarding the likelihood of success of its motion to dismiss in whole or in part, including as to the main dissolution claims; dismissal or partial dismissal of those claims will dramatically reduce the scope of discovery. Nevertheless, the NRA recognizes that discovery may continue even after a motion to dismiss is granted, is not moving the Court for a stay of discovery and has moved forward with its productions.

In addition, the NRA is prepared to produce in this Action the entirety of its production in the NRA's bankruptcy case that had been pending earlier this year in the U.S. Bankruptcy Court for the Northern District of Texas, subject to a brief quality control review for confidential and privileged documents. That production will consist of approximately 24,000 documents and 178,000 pages. The delay in producing those documents was due to the fact that a confidentiality order has not yet been issued in this Action. On September 18, 2021, the NYAG stated that it would agree to abide by the proposed confidentiality order submitted to the Court by the NRA on July 26, 2021. (NYSCEF No. 327). As set forth above, the NRA produced almost 2,000 documents three days later. The NRA will similarly produce the documents produced by it in the bankruptcy case.³

Following the NYAG's service of its request for production, and service of the NRA's responses and objections on July 15, 2021, during August and September the NRA has been engaged in good faith negotiations with the NYAG to narrow the scope of the NYAG's document demands. Although the NRA has acceded to many of the NYAG's broad requests for production, some are simply burdensome. On August 12, 2021, the NRA proposed to the NYAG ESI search terms and a list of custodians for review and comment, that were largely identical to the search terms proposed by the NYAG and adopted by the NRA during the NYAG's investigation. Two weeks later, on August 26, the NYAG's counsel proposed dramatically expanded search terms. For example, the NYAG proposed a broad search term consisting of the following: (reimburse* OR expense* OR benefit* OR bonus* OR compensation*), which returned 633,855 document "hits" in the NRA's document database, compared to 41,080 hits for the comparable but more restrictive search term proposed by the NRA. Similarly, the NYAG's search terms proposed in addition to the NRA's search terms produced a total of 865,315 document hits. The NRA is prepared to enter into a reasonable accommodation to limit these expansive search terms. However, should the NYAG insist on its burdensome expansive search terms, which will no doubt require the NRA to review a substantial number of unresponsive documents, the costs of such discovery should shift, as contemplated by Commercial Division Rule 8(b).⁴

Discovery Schedule

Given that, pursuant to the Preliminary Conference Order, dated March 9, 2021, a trial is not anticipated until June 2022 or later, the NRA respectfully proposes that the Order be amended to extend the deadline for the end of fact discovery from December 17, 2021 to February 15, 2021. The current deadline for document discovery is October 8, 2021. If the NRA were to apply the search terms it proposed, in its database, excluding documents already reviewed as unresponsive and as

³ In fact, on July 9, 2021, the NYAG advised the NRA that the NYAG has retained the entirety of the NRA's document production made in the bankruptcy case, despite the protective order issued in that proceeding that required all parties to destroy all materials and documents containing Confidential Information within sixty days after final judgment or dismissal.

⁴ See also *U.S. Bank Nat. Ass'n v. GreenPoint Mortg. Funding, Inc.*, 94 A.D.3d 58, 63-64 (1st Dep't 2012) (adopting cost-shifting standard set forth in *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212 (S.D.N.Y.2003)).

privileged during the NYAG’s investigation, the NRA believes it can be substantially finished with document production by October 31.⁵ If the NYAG’s substantially expanded search terms are applied, the deadline for the end of document discovery would have to be revisited. The deadline to file dispositive motions would remain at May 18, 2022. The NRA is not asking to move the trial date, but believes it makes sense to extend the interim dates beyond their current schedule.⁶

Subpoena Issued to Christopher Cox

The NYAG’s contention against the NRA with regard to the NYAG’s subpoena to Mr. Cox are similarly meritless. First, in the subpoena, the NYAG seeks from him, among other things, records related to a recent confidential arbitration between the NRA and Mr. Cox. Under Rule 18 (Confidentiality) of the applicable CPR Rules, “[u]nless the parties agree otherwise [which has not occurred here], the parties [that is, the NRA and Mr. Cox], the arbitrators and CPR [the arbitration organization under whose auspices the arbitration occurred] **shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential**, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and **unless otherwise required by law** or to protect a legal right of a party.”

When Mr. Cox asked if the NRA agrees that the “unless otherwise required by law” exception of Rule 18 applies to the NYAG’s subpoena, the NRA advised him and soon thereafter the NYAG that, based on the applicable precedent—including in the First Department—the NRA deems the exception inapplicable and that, if Mr. Cox were to produce such documents to the OAG, he would be in breach of his contractual, fiduciary, and other obligations to the NRA. As an initial matter, the subpoena fails to identify the provision of the CPLR pursuant to which it is issued; nor does it identify the reasons and circumstances requiring the production of the documents as required under Article 31 of the CPLR. More fundamentally, authority in the First Department holds that materials from a confidential arbitration are not discoverable.⁷ Moreover, the case on which the NYAG relies—*Kamyr, Inc. v. Combustion Eng’g, Inc.*, 161 A.D.2d 233 (1st Dep’t 1990)—is inapposite because it did not appear to involve a confidential arbitration,⁸ (and, moreover—unlike the NYAG’s subpoena

⁵ Such documents would include a date range up to December 2020, well after commencement of the Action. There would be additional documents to collect and review for the custodians proposed by the NRA, running the NRA’s proposed search terms, for the time period January 2021 to the present.

⁶ With the conference taking place on September 23, 2021, the NRA respectfully submits that the compliance conference currently scheduled for October 12, 2021, 9:30 a.m. be adjourned to a later date.

⁷ See *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 41 A.D.3d 362, 364 (1st Dep’t 2007) (“The motion court also properly rejected the Special Referee’s recommendation that respondent produce documents and testimony from a confidential arbitration proceeding in Belgium, to which Occidental was not a party.”). See also *Pasternak v. Dow Kim*, 2013 WL 1729564, *4 (S.D.N.Y. 2013) (motion to compel compliance with non-party subpoena denied when parties to a CPR arbitration agreed to treat the arbitration as confidential under Rule 18 of the CPR Rules, and court held that “[n]othing in the rules or any case law of which the Court is aware permits a non-party to a confidential arbitration to obtain materials from that arbitration. [The] subpoena, if enforced, would effectively require the Court to ignore the rules that governed the Dukhon Arbitration. The Court is not willing to do so.”) (citing, *inter alia*, *Occidental Gems, Inc.*).

⁸ This distinction is highlighted by the cases cited in *Kamyr* and subsequent authority citing *Kamyr*. See, e.g., *Milone v. General Motors Corp.*, 84 A.D.2d 921 (4th Dep’t 1981) (not involving a confidential arbitration); *Galleon Syndicate*

here, which seeks arbitration submissions, rulings, and resolution-related materials—concerned merely “evidentiary material” from the arbitration).

There is no basis for the NYAG’s assertion that by seeking to enforce its rights *vis-a-vis* Mr. Cox, a former officer, the NRA is interfering with a non-party’s compliance with a subpoena. Surely, just because the NYAG seeks certain documents through a subpoena alone does not mean that the NRA must waive its contractual rights or rights afforded to it by common law. The NYAG’s other assertions with regard to the third-party subpoena are similarly meritless.⁹ Given the Court’s space limitation rules applicable to letter submissions, the NRA respectfully requests an opportunity to further discuss its position at tomorrow’s conference.

Respectfully,

/s/ Svetlana Eisenberg

Svetlana Eisenberg

Mordecai Geisler

BREWER, ATTORNEYS & COUNSELORS

750 Lexington Avenue, 14th Floor

New York, New York 10022

Telephone: (212) 489-1400

Facsimile: (212) 751-2849

**ATTORNEYS FOR DEFENDANT
THE NATIONAL RIFLE ASSOCIATION OF
AMERICA**

cc: All Counsel of Record

Corp. v. Pan Atl. Grp., Inc., 223 A.D.2d 510, 511 (1st Dep’t 1996) (“There is no confidentiality privilege precluding disclosure of the material requested as the parties to the arbitration proceeding governed by the Rules of the American Arbitration Association are, in the absence of a confidentiality provision, not prohibited from disclosing documents generated or exchanged during the arbitration....”); *Scott v. Metro. Transp. Auth.*, 10 Misc. 3d 1058(A), 809 N.Y.S.2d 484 (Sup. Ct. Nassau Cnty. 2005) (“Defendants do not contend that the parties entered into a confidentiality provision regarding the arbitration proceeding.”). Similarly, *People v. Ackerman McQueen*, 2020 WL 1878107 (Sup. Ct. N.Y. Cnty. Feb. 21, 2020) did not deal at all with arbitration materials.

⁹ With respect to the subpoena duces tecum served by the NYAG on Aronson LLC (“Aronson”), the NRA’s outside auditor, the NRA has not objected to the production of documents by Aronson to the NYAG. The NRA has, in communication with Aronson’s counsel, simply requested that Aronson redact: (i) personally identifying NRA donor information, (ii) personally identifying NRA member information and (iii) legal representation letters from law firms, as well as withhold any privileged documents.