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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 of the State of New York v. The National Rifle Association of America, Inc. et al.*, Index No. 451625/2020

Dear Justice Cohen:

On behalf of the plaintiff, the New York Attorney General (“NYAG”), we respectfully ask that the NYAG’s motion to dismiss the NRA’s counterclaims, Motion Sequence No. 13 (NYSCEF 264-279), be deemed applicable as against the NRA’s Amended Answer and Counterclaims (NYSCEF 325). If necessary to re-set a return date, we can file an amended notice of motion for the same.

We propose this as a reasonable means to resolve a dispute between the NYAG and the NRA. The NRA asserts that the NYAG must respond to the counterclaims asserted in its Amended Answer and Counterclaims. As set forth below, this position is without legal or practical support. Nevertheless, in the interests of offering a pragmatic approach to resolving this issue, and given the NRA’s request that the NYAG respond to the NRA’s counterclaims, the NYAG makes this request and asks that the Court set a new return date and argument date for Motion Sequence No. 13.

Statement of Relevant Procedural History

- The NYAG commenced this action on August 6, 2020 (NYSCEF 1).
- The NRA moved to dismiss and on January 21, 2021, this Court denied that motion. (NYSCEF 210).
- On February 23, 2021, the NRA answered the Complaint and asserted counterclaims against the Attorney General (NYSCEF 228).

- The NYAG moved to dismiss the counterclaims. Motion Sequence No. 13 (NYSCEF 264-279).
- In response to the motion to dismiss the counterclaims, on July 20, 2021, the NRA filed an Amended Answer and Counterclaims (NYSCEF 325).
- By agreement of the parties, and in response to the NRA's Amended Answer and Counterclaims, the NYAG filed its Amended and Supplemental Complaint ("FAC") on August 16, 2021 (NYSCEF 333).
- Rather than answer the FAC, on September 15, 2021, the NRA moved to dismiss (NYSCEF 363-371).
- The NYAG opposed that motion on October 15, 2021 (NYSCEF Nos. 404-406). The motion will be fully submitted as of November 12th and is set to be argued on December 10, 2021.¹

The Dispute Regarding the NYAG's Response to the NRA's Amended Counterclaims

The parties do not agree as to whether the NYAG must respond to the NRA's Amended Answer and Counterclaims prior to a decision on the NRA's motion to dismiss the FAC (Motion Sequence No. 18). The parties had several meet and confer sessions, but were not able to resolve the issue and the NRA has maintained its position that the NYAG must answer, but may not move in response to, its Amended Answer and Counterclaims.

Under well-established law, the NYAG has no obligation to respond to the NRA's Amended Counterclaims now, because the complaint to which it responded was superseded by the FAC. By agreement, the NYAG filed its FAC on August 16, 2021 (NYSCEF 325), and at that time it superseded previous pleadings "and bec[ame] the only complaint in the case" and in such instance, a defendant's "original answer has no effect and a new responsive pleading must be substituted for the original answer." *St. Lawrence Explosives Corp. v. Law Bros. Contr. Corp.*, 170 A.D.2d 957, 957 (4th Dep't 1991) (addressing amendment of an answer and counterclaims following amendment of a complaint); *Seidler v. Knopf*, 186 A.D.3d 886, 888 (2d Dep't 2020) (holding that plaintiff's motion for summary judgment on defendant's counterclaims was rendered academic by the grant of plaintiff's motion to amend the complaint); *see also Madison-Murray Assocs. v. Perlbiner*, 188 A.D.2d 362, 362 (1st Dep't 1992) (holding defendant had the right to assert a new counterclaim responding to the new matter in the plaintiff's amended complaint).

Following the filing of the FAC, the NRA was required to respond to that pleading by filing a second amended answer and counterclaims to address the new matters put forward in the FAC or to move to dismiss the pleading. The NRA chose the latter course. It makes little sense

¹ On October 20, 2021, the Court issued a notice setting Motion Sequence 13 for argument on December 10, 2021. The NRA responded with an October 22, 2021 letter (NYSCEF 414), asserting that the NYAG's motion to dismiss the NRA's counterclaims was no longer live because it was superseded by the NRA's Amended Answer and Counterclaims. The Court thereafter amended its notice, and argument on the NRA's motion to dismiss the FAC in Motion Sequence 18 will take place on December 10, 2021. In its letter, the NRA asserted that once the NRA filed its Amended Answer and Counterclaims, the NYAG "was required to reply under CPLR 3025(d) or move to dismiss the Amended Counterclaims" notwithstanding that the NRA had not filed a responsive pleading to the NYAG's FAC. The NRA had first raised this issue in September 2021.

that the NYAG must, as the NRA contends, respond to a superseded pleading, particularly where the NRA has not waived any right to once again amend its counterclaims in response to the FAC. Nor has the NRA provided any convincing authority for the same.

Further, even accepting the NRA's position that the NYAG had to respond to the NRA's Amended Answer and Counterclaims notwithstanding the NYAG's subsequent filing of its FAC, the NYAG's then-pending motion to dismiss the NRA's original counterclaims (Motion Sequence No. 13) could and should be deemed asserted against the amended counterclaims. "[W]here an amended pleading is submitted in response to a pre-answer motion to dismiss, the provident course of action for the motion court is to include the amended complaint in the record on the pending motion, which should then be granted or denied based on the sufficiency of the amended pleading." *Uptown Healthcare Mgmt. Inc. v. Allstate Ins. Co.*, 117 A.D.3d 542, 543 (1st Dep't 2014). Where, as here, a party responds to a motion to dismiss by amendment, a court may "properly appl[y] the dismissal motion" to the amended pleading. *Sage Realty Corp. v. Proskauer Rose LLP*, 251 A.D.2d 35, 38 (1st Dep't 1998). Thus, the NYAG's motion to dismiss the counterclaims may be deemed asserted against the amended counterclaims.

To the extent that the NRA's position relies upon its interpretation of a stipulation concerning the timing of the NRA's and other defendants' responses to the motion to dismiss (NYSCEF 288), its position is baseless. That stipulation—a courtesy agreed to by the NYAG to provide the NRA and the other defendants with additional time to respond to the motion to dismiss—did not moot the NYAG's motion.

Our efforts to resolve this issue have failed, with the NRA asking the NYAG to move forward on the counterclaims and file an answer. In the interest of expeditiously resolving this procedural dispute and addressing the NRA's request that the parties move forward on the NRA's counterclaims, the NYAG is prepared to rest on its motion to dismiss (Motion Sequence No. 13) as applied to the Amended Answer and Counterclaims and to proceed with the motion on an expedited basis. We propose that the NRA's opposition be due by November 23rd, with the NYAG's reply due by December 9th, or on such other schedule as the Court orders or the parties agree upon. The NYAG is prepared to submit an amended notice of motion should the Court so require.

Respectfully,

/s/ Monica Connell

Monica Connell
Assistant Attorney General

cc: All Counsel of Record