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December 3, 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:

On behalf of the National Rifle Association of America (the “NRA”), in advance of the status conference set for December 10, 2021, we respond to the letter filed by the Attorney General for the State New York (the “NYAG”), dated November 22, 2021 (NYSCEF No. 457). In this letter, the NRA addresses the points raised by the NYAG but first raises two additional issues related to the NYAG’s failure to respond adequately to the NRA’s document requests.

1. The NRA Served Requests for Production of Documents on the NYAG, who Objected. On October 14, 2021, the NRA served its Second Set of Requests for Production of Documents on the Attorney General, in her official and individual capacities (“NRA’s Second RFPs”). (The NRA’s First Set of Requests for Production of Documents on the Attorney General was served on February 3, 2021, and included just one request, for the NYAG’s investigation file).

On November 10, 2021, the NYAG served Responses and Objections to the NRA’s Second RFPs. The NYAG objected to each of the NRA’s 15 requests, stating that she would not produce any documents in response to the RFPs. The NYAG maintains that the Requests call for information that, with few exceptions, relate solely to the NRA’s counterclaims against the NYAG, “about which [the NYAG claims] the Court has ruled discovery is stayed and regarding which the NRA has stipulated discovery is stayed.” The NYAG’s position lacks merit for two independent reasons. First, the requests call for information that relates to the NYAG’s claims and the NRA’s defenses against the same, not just to the NRA’s counterclaims. Second, there is no order staying discovery and the stipulation on which the NYAG relies has no application here. The stipulation, dated July 2, 2021 (NYSCEF No. 288) states that, “subject to any subsequent order of the Court,” “[d]iscovery on the counterclaims shall be stayed *pending resolution of the [NYAG]’s motion to dismiss the counterclaims or any subsequent motion to dismiss [by the NYAG] if the NRA amends its counterclaims.*” (Emphasis added). The NRA filed its Amended Verified Answer and Counterclaims on July 20, 2021 (the “Amended Counterclaims”) (NYSCEF No. 325). The NYAG never moved to dismiss the NRA’s Amended Counterclaims, and now, only after the NRA demanded a reply to the Amended Counterclaims, does the NYAG take the position that her

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previously filed motion to dismiss (Motion Sequence No. 13) is a live motion. The stipulation clearly anticipated that the NYAG would move to dismiss the Amended Counterclaims in August 2021, and only in that case did the NRA agree to a stay of discovery. Having failed to move to dismiss the Amended Counterclaims in a timely fashion, the NYAG cannot now rely on the July Stipulation to contend there is a stay of discovery in December 2021. Moreover, under Commercial Division Rule 11(d), there is no automatic stay of discovery upon the filing of a dispositive motion; rather, the NYAG must show cause for the stay, which must be ordered by the Court.

The NRA and the NYAG have met and conferred regarding the NYAG's refusal to produce documents, and have reached an impasse. On November 17 and 18, the NYAG stated an intention to serve supplemental responses and objections but, to date, has not done so. Should the NYAG's position remain unchanged, the NRA intends to move to compel the NYAG's production of the records the NRA seeks. Specifically, the NRA will seek a threshold ruling from the Court that the NYAG must respond substantively to the NRA's Second RFPs now.

2. The NYAG Has Yet to Produce a Privilege Log for a Production Served in February 2021. The NYAG has yet to produce a privilege log with respect to her production of documents in response to the NRA's First Set of Requests for Production served in February 2021. Although the NYAG produced documents in response to the First Set of Requests on February 10 and 18, 2021, she expressly represented that her production excluded privileged documents yet she has never produced a privilege log. She recently stated that she would serve a privilege log on November 19, 2021. Despite the NRA's agreement to an extension of time, the NYAG has not produced a log.

Below are the NRA's responses to the issues raised by the NYAG:

1. NYAG's Failure to Reply to NRA's Amended Counterclaims. On November 17, 2021, the NRA requested that the Court order the NYAG to file, within 14 days, a reply to the NRA's amended counterclaims, or face a motion for default judgment. (NYSCEF No. 455). The NRA respectfully reiterates its request.

2. Privileged Documents Belonging to the NRA Withheld by Joshua Powell. On November 3, 2021, counsel for defendant Joshua Powell advised the Court that he is in the process of responding to document requests from the NYAG, but believes that responsive documents in his possession include documents the NRA might contend are subject to the NRA's attorney-client privilege. (NYSCEF No. 432). He states he is withholding production of such documents subject to a privilege review. Mr. Powell raised this issue with the NRA's counsel, who advised that she would review the documents and log any privileged documents. Mr. Powell rejected this offer, contending that the potentially privileged communications are "intermingled with materials that are not subject to the NRA attorney-client privilege but may be privileged with respect to Mr. Powell." Mr. Powell proposed that his counsel review and log the documents, or that the NRA would have to retain additional counsel for such review. Mr. Powell now contends that review of

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such documents by counsel for the NRA risks waiver of Mr. Powell's privilege or disclosure of other information to which the NRA is not entitled, and that his counsel should review the NRA's privileged documents. (NYSCEF No. 432). The NYAG has taken the position, without support, that counsel for Mr. Powell should review the NRA's privileged documents, and that a review by the NRA would be "unnecessary and inefficient" and cause delay. (NYSCEF No. 435).

The NRA is open to solutions that would prevent review by its counsel of documents belonging to Mr. Powell that do not relate to his work for the NRA and may be "intermingled," as his counsel described it, with the NRA's privileged documents. However, the law is clear that that documents subject to the attorney-client privilege belong to the client; here, the NRA. *People v. Osorio*, 75 N.Y.2d 80, 84 (1989) ("The privilege belongs to the client and attaches if information is disclosed in confidence to the attorney for the purpose of obtaining legal advice or services."); *Arkin Kaplan Rice LLP v. Kaplan*, 107 A.D.3d 502, 503 (1st Dep't 2013) ("The privilege belongs to the client" and "[plaintiff] cannot unilaterally waive it on defendants' behalf so as to benefit her coplaintiffs."). Accordingly, only the NRA should control the review, withholding, and logging of such documents. Indeed, just as Mr. Powell argues that counsel for the NRA should not review documents that may be subject to *his* attorney-client privilege, all the more so, his counsel should not review documents he knows are privileged and belong to the NRA. The NRA respectfully requests that, if the Court considers the issue ripe for decision, it direct Mr. Powell to provide counsel for the NRA with any documents in his possession that may be subject to the NRA's attorney-client privilege for an expeditious review by the NRA's counsel.

3. Cox Arbitration Documents. The NYAG filed a letter stating she intends to move to compel nonparty Christopher Cox to produce confidential arbitration documents produced during a confidential arbitration between Mr. Cox and the NRA. (NYSCEF No. 457). The NRA has set forth its opposition to the production of such confidential documents, which are nondiscoverable under the applicable law. The factual and legal bases for the NRA's position are set forth in the parties' joint submission to the Court dated October 14, 2021. (NYSCEF No. 402).

We thank the Court for its attention to these matters.

Respectfully,

/s/ Svetlana M. Eisenberg

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cc: Counsel for all Parties (via NYSCEF)

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