SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Plaintiff,

v.

THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL

Defendants.

Index No. 451625/2020
Motion Seq. No. 23

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE TO COMPEL DEFENDANT NATIONAL RIFLE ASSOCIATION AND NONPARTY CHRISTOPHER COX TO COMPLY WITH PLAINTIFF'S SUBPOENA DUCES TECUM

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Plaintiff New York Attorney General Letitia James ("OAG") respectfully submits this memorandum of law in support of her motion to compel Defendant National Rifle Association of America ("NRA") and nonparty Christopher Cox to produce documents in response to the OAG's subpoena duces tecum directed to Mr. Cox.

STATEMENT OF FACTS

Nonparty witness Christopher Cox is the former Executive Director of the NRA's Institute for Legislative Action, the chief lobbying and political arm of the NRA. He resigned from the NRA in June 2019 after being placed on administrative leave by Defendant Wayne LaPierre for allegedly participating in an attempt to oust Mr. LaPierre.[1] Since his resignation, Mr. Cox and the NRA were involved in arbitration over, among other things, Mr. Cox's alleged misuse of NRA money for personal expenses, including for meals and flights. NYSCEF No. 333 at ¶¶ 600-604. During failed bankruptcy proceedings initiated by the NRA in the United States Bankruptcy Court for the Northern District of Texas entitled *In Re National Rifle Association of America and Sea Girt LLC*, Case No. 21-30085, it was revealed that the NRA had paid millions of dollars in attorney's fees in connection with the arbitration, over and above the $2 million sought by Cox in the arbitration. Further, documents from the arbitration produced in the bankruptcy proceedings made it apparent that the NRA has applied a different, more exacting methodology to calculate Mr. Cox's excess benefits—as a disfavored former employee—than the methodology used with respect to the calculation of excess benefits received by Mr. LaPierre and others.

The OAG served Mr. Cox with a subpoena for the production of documents on August 17, 2021 and provided the subpoena to the parties in this action on the same date. Affirmation of Stephen C. Thompson of Good Faith and in Support of Plaintiff's Order to Show Cause to Compel

[1] *See* Associated Press, "NRA's top lobbyist resigns amid turmoil within group," June 26, 2019, https://www.politico.com/story/2019/06/26/nra-lobbyist-chris-cox-resigns-1383846.

Defendant National Rifle Association and Nonparty Christopher Cox to Comply with Plaintiff's Subpoena Duces Tecum ("Affirmation") Ex. A (hereinafter the "Cox Subpoena"); *id*. ¶ 8. The Cox Subpoena seeks, among other things, documents related to the arbitration between Mr. Cox and the NRA, including any exhibits, expert reports, transcripts, submissions to the arbitrator, and documents relevant to the dispute between Mr. Cox and the NRA. *Id*. Ex. A.

Counsel for Mr. Cox separately informed the NRA of the subpoena on August 20, 2021 and asked whether the NRA intended to move to quash the subpoena. Affirmation Ex. D. For weeks the NRA did nothing. It did not move or reach out to the OAG in an attempt to resolve any objections that it intended to assert. Instead, on September 5, 2021, the day before the Cox Subpoena was returnable, the NRA demanded that Mr. Cox "provide the NRA with any document production anticipated to be made in response to the [Cox Subpoena] for review by the NRA prior to such production." Affirmation Ex. C. To date, the OAG has not received any documents from Mr. Cox responsive to the Cox Subpoena. Affirmation ¶ 10. Neither Mr. Cox nor his counsel have objected to producing any documents in response to the Cox Subpoena. *Id.* ¶ 9.

The NRA has already voluntarily produced materials from the arbitration to third parties—during the course of its bankruptcy in Texas, the NRA and Mr. Cox provided the Unsecured Creditors Committee with all of the pleadings from the arbitration. *Id.* ¶ 8, Ex. D; NYSCEF No. 402 at 33. Furthermore, the NRA produced an expert report prepared by the NRA's expert in the arbitration to the OAG during the bankruptcy. Affirmation ¶ 11.

The NRA maintains that it is entitled to pre-review and withhold Mr. Cox's documents because (1) the relevant rules governing the arbitration between it and Mr. Cox, as well as a private agreement entered into between the two, immunize the documents from disclosure to the NRA's regulator, and (2) Mr. Cox may have documents protected by a privilege belonging to the NRA in

his possession, or personally identifying information of NRA members or donors.

The OAG understands that the NRA currently has Mr. Cox's documents in its possession for pre-review prior to production to the OAG. *Id.* ¶ 12. Although the OAG objects to this pre-review, and litigated this issue and won as against the NRA as discussed below, the OAG attempted to work out the issue with the NRA on October 5, 2021 by asking whether the pre-reviewed documents, at least, were ready for production, or when to expect their production. *Id.* ¶ 13. In response, counsel for the NRA stated that the NRA has stopped its pre-review because the majority of the documents are allegedly connected to the NRA's arbitration with Mr. Cox, and thus will not be produced at all. *Id*. Counsel for the NRA was not able to state whether any attorney-client communication or work product privileged documents have been identified as part of its review. *Id*.

The OAG took steps to try to resolve this issue with the NRA and Mr. Cox, culminating in the submission of letters on the topic in compliance with the Court's Practices and Procedures. The OAG's efforts are outlined in the Affirmation and in NYSCEF No. 402.

At a status conference on December 10, 2021, the Court addressed this issue and indicated that "agree[ing] to confidentiality in an arbitration does not mean [documents are] immune from subpoena." NYSCEF No. 511 at 21:4-13. The NRA has nevertheless maintained its position that the arbitration materials are not discoverable, and that it is entitled to pre-review all documents responsive to the Cox Subpoena before they are produced to the OAG. Affirmation ¶ 16.

The Court indicated that an application to compel would have to be made and permitted the OAG to move by order to show cause. NYSCEF No. 511 at 27:1-12. The OAG now asks for an order directing the production of responsive documents immediately.

ARGUMENT

Rule 3101(a)(4) of the Civil Practice Law and Rules ("CPLR") provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof, by . . . any other person, upon notice stating the circumstances or reasons such disclosure is sought or required."

> The words 'material and necessary' as used in section 3101 must be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. Section 3101(a)(4) imposes no requirement that the subpoenaing party demonstrate that it cannot obtain the requested disclosure from any other source. Thus, so long as the disclosure sought is relevant to the prosecution or defense of an action, it must be provided by the nonparty.

Kapon v. Koch, 23 N.Y.3d 32, 38 (2014) (internal citation and quotation marks omitted).

Additionally, "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, . . . the party seeking disclosure may move to compel compliance or a response." CPLR 3124.

To date, the OAG has received no documents from Mr. Cox in response to the Cox Subpoena. The NRA has instructed Mr. Cox not to produce relevant documents on the grounds that documents in Mr. Cox's possession (1) are protected from disclosure pursuant to an arbitration agreement entered into between Mr. Cox and the NRA or (2) contain privileged information belonging to the NRA. For the reasons given below, both arguments fail and the Court should order Mr. Cox to produce the documents from the arbitration.

A. The Documents in Mr. Cox's Possession Are Relevant to this Action

The NRA has not and cannot object to production of Mr. Cox's documents from the arbitration as irrelevant to this action, especially where those documents apparently reflect that the NRA has applied a more exacting standard (and level of scrutiny) to Mr. Cox's conduct than what

has been applied to Defendant Wayne LaPierre.

The OAG's complaint in this action contains numerous allegations against the NRA and the individual defendants related to improper excess benefits obtained by NRA executives. Many of these expenses related to reimbursements for personal travel, meals, tickets to events, and gifts reimbursed by the NRA. *See*, *e.g.*, NYSCEF No. 333 at ¶¶ 144-229. The arbitration between Mr. Cox and the NRA involved accusations by the NRA that Mr. Cox received excess benefits and violated the NRA's policies regarding travel and reimbursement. *Id.* at ¶ 602.

B. Documents from the NRA's Arbitration with Mr. Cox Are Discoverable

1. The NRA waived whatever claim to confidentiality it may have had by voluntarily producing arbitration documents to third parties and the OAG during its bankruptcy.

The NRA has allowed documents from its arbitration with Mr. Cox to be produced to both the OAG and the Unsecured Creditors Committee during the course of its bankruptcy. *See* NYSCEF No. 402 at 33; Affirmation ¶¶ 8, 11; *see also Chevron Corp. v. Salazar*, 275 F.R.D. 437, 445 (S.D.N.Y. 2011) ("Where a party voluntarily discloses privileged documents to an adversary in one proceeding, it cannot withhold the same documents on the basis of privilege in a subsequent proceeding, even if that subsequent proceeding involves a different adversary."). The NRA has thus waived whatever claim to confidentiality it may have otherwise had in the arbitration documents.

2. The NRA's and Mr. Cox's private arbitration agreement does not immunize documents from discovery in this regulatory enforcement action.

The NRA's effort to insulate documents from disclosure to the OAG, its regulator, by invoking a private agreement was litigated during the course of the OAG's investigation preceding this action, and decided in the OAG's and the public's favor. *See People v. Ackerman McQueen*, No. 451825/2019, 2020 WL 1878107, at *6 (Sup. Ct. N.Y. Cnty. Feb. 21, 2020). Justice Melissa

Crane held 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. The NRA, through its use of a private contract, cannot demand to preview responsive documents related to a law enforcement investigation." *Id.* (internal citations omitted); *see also Grumman Aerospace Corp. v. Titanium Metals Corp. of Am.*, 91 F.R.D. 84, 87–88 (E.D.N.Y. 1981) (parties cannot be permitted to "contract privately for the confidentiality of documents, and foreclose others from obtaining, in the course of litigation, materials that are relevant to their effort to vindicate a legal position").

The authority that the NRA has cited in support of its position that confidential arbitration materials are immune from discovery is dicta from *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 41 A.D.3d 362 (1st Dep't 2007). In *Occidental*, the First Department upheld the Supreme Court's determination that a special referee's failure to identify particular documents that should be produced from an arbitration warranted vacatur of the special referee's directive. *See Occidental*, Index No. 602948/01, 2006 WL 4758800 (N.Y. Sup. Ct. June 5, 2006). The First Department then noted an "important public interest in protecting the rights of parties who submit to confidential arbitration." *Occidental*, 41 A.D.3d at 365.

Even if the dicta in *Occidental* were binding on this Court—which it is not—the public interest in protecting the rights of parties who submit to confidential arbitration cannot take precedence over the equally, if not more important interest that the public has in ensuring that the "OAG's regulatory and law enforcement duties, and its oversight of charities" is not hampered by private agreements to keep documents hidden from regulators. *Ackerman McQueen*, 2020 WL 1878107, at *6.

3. Production of documents pursuant to a subpoena is "required by law" within the meaning of the relevant arbitration rule.

Even if the NRA could protect documents from disclosure through private agreement, the relevant arbitration rule cited by the NRA permits disclosure where required by law. Affirmation Ex. C. Production of documents in response to a validly issued subpoena is "required by law" within the meaning of standard confidentiality provisions. *See Peskoff v. Faber*, 233 F.R.D. 207, 209 (D.D.C. 2006) (holding that subpoenas for documents and testimony met the "required by law" exception in a confidentiality agreement); *see also Veleron Holding, B.V. v. Stanley*, No. 12-cv-5966, 2014 WL 1569610, at *5 (S.D.N.Y. Apr. 16, 2014) (holding that a "subpoena imposed on [a party] a legal duty to produce the document, which meant that it could be produced without any violation of [arbitration] confidentiality").

Further, there can be no debate that "[e]videntiary material at an arbitration proceeding is not immune from disclosure." *Kamyr, Inc. v. Combustion Eng'g, Inc.*, 554 N.Y.S.2d 619, 620 (1st Dep't 1990). Discovery of arbitration documents is called for where there is a "possibility" or any "indication in the record that defendants may be taking positions in the arbitration proceeding inconsistent with the position they are . . . asserting in defense of the instant litigation." *Id*. (internal quotation marks omitted). Where, as here, the NRA has, among other things, asserted that it has performed a review of excess benefits received by Mr. LaPierre and others, but that review was markedly different from the type of review applied to a disfavored former executive, the documents would be discoverable on that ground alone.

C. The NRA Should Not Be Permitted to Pre-review All Documents Responsive to the Cox Subpoena

The NRA has asserted a right to pre-review for privilege and donor/member information all of Mr. Cox's documents responsive to the Cox Subpoena before they are produced to the OAG. Affirmation Ex. C.

With respect to alleged privileged information, despite having all of Mr. Cox's responsive documents in its possession, counsel for the NRA has not been able to identify a single piece of privileged information in Mr. Cox's possession warranting such a review. Affirmation ¶ 13. Wholesale review of Mr. Cox's documents is unnecessary, and instead the NRA should have proposed a targeted means for identifying potentially privileged information. The NRA should not be permitted to delay production even further by reviewing entire categories of documents that are categorically not privileged, such as documents exchanged with Mr. Cox as an adversary of the NRA during the arbitration.

With respect to donor or member information, that information is explicitly protected by the terms of the confidentiality order in this action, as proposed by the OAG. NYSCEF No. 394 at ¶ 3(a). Pre-review and redaction is thus not necessary, and will unduly delay an already significantly delayed production.

D. The Cox Subpoena Was Validly Issued, and the NRA Lacks Standing to Challenge the Subpoena for Alleged Lack of Sufficient Notice

In its October 14, 2021 letter to the Court, the NRA suggested that the Cox Subpoena was not validly issued because the Cox Subpoena does not identify the provision of the CPLR pursuant to which the subpoena was issued. NYSCEF No. 402 at 33. The NRA cites to no authority for this proposition. In any event, the Cox Subpoena meets the OAG's "minimal obligation" to "give [the nonparty] sufficient information to challenge the subpoena[] on a motion to quash" if Mr. Cox so desired. *Kapon v. Koch*, 988 N.Y.S.2d 559, 566 (2014). Furthermore, the NRA lacks standing to challenge the subpoena for insufficient notice. *See Velez v. Hunts Point Multi-Service Center, Inc.*, 29 A.D.3d 104, 111-12 (1st Dep't 2006) (holding that notice requirement is waived if recipient of a subpoena does not object on grounds of insufficient notice).

CONCLUSION

For the foregoing reasons, the OAG respectfully requests that the Court compel Christopher Cox to produce documents in response to the OAG's subpoena.

Dated: December 15, 2021
New York, New York

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Attorney Certification Pursuant to Commercial Division Rule 17

I, Stephen Thompson, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Memorandum of Law in Support of Plaintiff's Order to Show Cause to Compel Defendant National Rifle Association and Nonparty Christopher Cox to Comply with Plaintiff's Subpoena Duces Tecum complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the memorandum of law contains 2,609 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law and affirmation.

Dated: December 15, 2021
New York, New York

/s Stephen C. Thompson
_____
Stephen C. Thompson