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 REPLY MEMORANDUM OF LAW IN FURTHER 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 the People of the State of New York by the Office of New York Attorney General Letitia James ("OAG") respectfully submits this reply memorandum of law in further support of Plaintiff's 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.

PRELIMINARY STATEMENT

The NRA concedes that the subpoena duces tecum served on Mr. Cox (the "Cox Subpoena") is valid and seeks relevant documents. The only issue for this Court, then, is whether the documents responsive to the subpoena are protected by any relevant privilege. For the reasons given in the OAG's moving papers, NYSCEF Nos. 515 & 520, and below, they are not, and Mr. Cox should be compelled to produce the documents immediately.

ARGUMENT

A. The Documents from the NRA's Arbitration with Mr. Cox Must Be Produced

In its memorandum of law in support of the order to show cause to compel, NYSCEF No. 520, the OAG demonstrated that (1) the NRA waived any claim to confidentiality it had in the arbitration materials; (2) documents created in connection with a confidential arbitration are not generally immunized from disclosure; and (3) the relevant arbitration rule providing for confidentiality permits disclosure where that disclosure is, like here, required by law. Nothing in the NRA's opposition rebuts the OAG's arguments.

1. The NRA voluntarily and knowingly waived confidentiality over documents from the arbitration with Mr. Cox.

The NRA admits that it voluntarily and intentionally produced documents from its arbitration with Mr. Cox to the professionals representing the Unsecured Creditors' Committee ("UCC") in the NRA's failed bankruptcy in Texas. NYSCEF No. 530 at 8. The NRA's argument

that this voluntary, intentional disclosure is not "evidence of a knowing or voluntary relinquishment of any right" is meritless. *Id.* Furthermore, the NRA's disclosure of the arbitration pleadings to the UCC professionals and its expert report to the OAG constituted a subject matter waiver over all the pleadings and documents from the arbitration, requiring disclosure of documents created and exchanged after the bankruptcy concluded. *See Arkin Kaplan Rice LLP v. Kaplan*, 118 A.D.3d 492, 493 (1st Dep't 2014) (holding that party waived privilege as to all documents related to the subject matter of a privileged email that was disclosed).[1]

2. The NRA has not cited to any authorities supporting its argument that documents responsive to the Cox Subpoena are immune from disclosure.

The OAG has shown that litigants cannot, by private agreement, immunize documents from discovery by their regulator. NYSCEF No. 520 at 6-7. The NRA has not cited to any authority in support of its argument that documents created as part of a confidential arbitration are afforded a blanket protection from disclosure to its regulator. As already discussed in the OAG's opening brief, the dicta in *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 41 A.D.3d 362 (1st Dep't 2007) does not protect Mr. Cox's documents from disclosure. NYSCEF No. 520 at 7. The NRA's citation to *Matter of Transport Workers Union, Local 100 v. New York City Tr. Auth.*, 57 A.D.3d 684 (2d Dep't 2008) is inapposite—contrary to the NRA's suggestion that the court in that case "protect[ed] arbitration confidentiality," NYSCEF No. 530 at 5, the court only addressed the standard for judicial review of an arbitration award. *Transport Workers Union*, 57 A.D.3d at 685 (holding that an arbitration award will not be overturned unless arbitrator "exceed[ed] [their] power or render[ed] a completely irrational award in this case").

[1] In its memorandum of law and affirmation, the NRA quotes the OAG as stating that "the NRA required Mr. Cox to provide all the arbitration materials to" the UCC. NYSCEF No. 530 at 8-9; NYSCEF No. 531 at ¶ 7. Contrary to the NRA's citations, that sentence does not appear in the OAG's memorandum of law or in its affirmation in support of the order to show cause.

The NRA's reliance on non-binding federal authorities is equally unavailing. In *Pasternak v. Dow Kim*, No. 10-cv-5045, 2013 WL 1729564 (S.D.N.Y. April 22, 2013), unlike here, the court was not presented with the argument that disclosure pursuant to a subpoena is "required by law" within the meaning of the relevant exception to arbitration confidentiality. *Id.* at *6 ("The third [exception] is if it is 'required by law' . . . . Pasternak has not identified any authority that would require disclosure . . . ."). And in *Guyden v. Aetna Inc.*, 544 F.3d 376 (2d Cir. 2008), the Second Circuit merely rejected the argument made by one *signatory* to an arbitration agreement that the confidentiality clause in the agreement—which also included an exception where disclosure is required by law—violated public policy. *Id.* at 384-85.

3. Confidential arbitration documents are not meaningfully different from, and are no less discoverable than, confidential settlement documents.

In support of its argument that the Cox Subpoena operates as an exception to confidentiality under the relevant arbitration rule, the OAG cited to *Peskoff v. Faber*, 233 F.R.D. 207 (D.D.C. 2006). The NRA attempts to distinguish *Peskoff* on the basis that it related to a confidential settlement agreement, and not a confidential arbitration. NYSCEF No. 530 at 6-7. But the same public policy that the NRA claims immunizes arbitration documents from discovery also exists for settlement agreements. *See Bottaro v. Hatton Assocs.*, 96 F.R.D. 158, 160 (E.D.N.Y. 1982) (noting that there is a "strong public policy of favoring settlements and [a] congressional intent to further that policy by insulating the bargaining table from unnecessary intrusions"). This public policy does not immunize documents from disclosure. *Laforest v. Honeywell Int'l Inc.*, No. 03-CV-6248, 2004 WL 1498916, at *7 (W.D.N.Y. July 1, 2004) (granting motion to compel discovery of settlement terms that were relevant and reasonably calculated to lead to the discovery of admissible evidence). The NRA's attempt to distinguish settlement contexts from arbitration contexts thus fails.

B. The NRA Cannot Delay Production of Mr. Cox's Documents to Review and Redact Donor Information

The NRA cannot be permitted to further delay production of documents from Mr. Cox simply because those documents contain the names of NRA donors. The NRA's vague allusions to the First Amendment do not establish any claim of privilege that would allow the NRA to redact names contained in documents in the possession of a nonparty where those names are already subject to a protective order in this action. NYSCEF No. 394 at ¶ 3(a). Furthermore, the NRA has put the "donor-cultivation work" of its top executives—including Defendant LaPierre—squarely at issue in its defense of the OAG's complaint. *See*, *e.g.*, NYSCEF No. 325 at ¶¶ 159, 175 (NRA's amended answer defending Mr. LaPierre's conduct, including trips to the Bahamas with his family that were reimbursed by the NRA, as being related to donor cultivation, and claiming that "evidentiary support" exists for Mr. LaPierre's work). The OAG is entitled to relevant information in support of its allegations, and to appropriately respond to defenses raised by the Defendants, including the production of donor information in relevant documents. *See* *Americans for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2386-87 (2021) (noting that donor information may be obtainable by law enforcement through subpoenas, audits, or "alternative mechanisms").

C. Production of the Underlying Historical Documents Exchanged in the Arbitration Is Insufficient

The NRA's statement that it will produce "underlying historical documents produced in the arbitration" is insufficient. NYSCEF No. 530 at 10. It is apparent from the expert report produced to the OAG, and from the NRA's conduct in the bankruptcy, that "the NRA has applied a more exacting standard (and level of scrutiny) to Mr. Cox's conduct [concerning personal expenses] than what has been applied to Defendant Wayne LaPierre." NYSCEF No. 520 at 5-6. The OAG, as the NRA's regulator tasked with ensuring that the NRA is using donations lawfully and in accordance with its charitable mission, is entitled to know whether the NRA "may [have

taken] positions in the arbitration proceeding inconsistent with the position [it is] . . . asserting in defense of the instant litigation." *Kamyr, Inc. v. Combustion Eng'g, Inc.*, 554 N.Y.S.2d 619, 620 (1st Dep't 1990). The arbitration pleadings and papers themselves are relevant to this action and responsive to the Cox Subpoena, and must be produced.

D. Mr. Cox Should Not Be Permitted to File Documents Under Seal

The NRA's attempts to shoehorn in an argument in favor of Mr. Cox's order to show cause to seal should be rejected for all the reasons in the OAG's memorandum of law in opposition to that application. NYSCEF No. 523.

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 29, 2021
New York, New York

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Motion Seq. No. 23

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 Plaintiff's Reply Memorandum of Law in Further Support of 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 1,458 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 29, 2021
New York, New York

/s Stephen Thompson
_____
Stephen C. Thompson