

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  
Hon. Joel M. Cohen

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW  
CAUSE TO EXTEND PRETRIAL SCHEDULE DUE TO DEFENDANT NRA'S  
DISCOVERY NON-COMPLIANCE AND FOR RELATED RELIEF**

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## Table of Authority

	Page(s)
<b>CASES</b>	
<i>Anonymous v. High Sch. for Env't Stud.</i> , 32 A.D.3d 353 (1st Dep't 2006) .....	14
<i>Cabral v. Rockefeller Univ.</i> , 69 Misc. 3d 1224(A) (Sup. Ct. N.Y. Co. 2020) .....	13
<i>Herzog v. Sacko Delivery &amp; Trucking</i> , 63 Misc. 3d 1228(A) (Sup. Ct. Bx. Co. 2019) .....	14
<i>Lipson v. Dime Sav. Bank, FSB</i> , 203 A.D.2d 161 (1st Dept. 1994) .....	14
<i>Matter of Hanlon</i> , 189 A.D.3d 1405 (2d Dep't 2020) .....	14
<i>Matter of Steam Pipe Explosion at 41st Street and Lexington Avenue</i> , 127 A.D.3d 554 (1st Dep't 2015) .....	14
<i>McNeil v. Milstein</i> , 240 A.D.2d 549 (2d Dept. 1997) .....	15
<i>Ryskin v. Corniel</i> , 181 A.D.3d 742 (2d Dep't 2020) .....	14
<i>St. Louis v. Willey</i> , 92 A.D.2d 703 (3rd Dep't 1983) .....	14
<b>STATE REGULATIONS</b>	
<a href="#"><u>(22 NYCRR 202.70(g))</u></a> .....	21
<b>RULES</b>	
<a href="#"><u>CPLR 2004</u></a> .....	14
<a href="#"><u>CPLR 3101</u></a> .....	13
<a href="#"><u>CPLR 3101(a)</u></a> .....	13
<a href="#"><u>CPLR 3101(h)</u></a> .....	9
<a href="#"><u>CPLR 3120</u></a> .....	2

[CPLR 3122](#) ..... 15

[CPLR 3122\(b\)](#).....15, 18

[CPLR 3122\(c\)](#)..... 8

Plaintiff People of the State of New York, through the Office of the New York Attorney General Letitia James (“OAG”), respectfully submits this memorandum of law in support of an application, brought by order to show cause, pursuant to New York Civil Practice Law and Rules (“CPLR”) [2004](#), [3101](#), [3120](#), [3122](#) and [3124](#), to extend the pretrial schedule in this case as a result of prejudice caused by the NRA’s failure to timely respond to OAG discovery demands and directives from this Court, and to allow the Special Master, upon his appointment, to address OAG’s motion to compel against the NRA.

### **PRELIMINARY STATEMENT**

This is a regulatory enforcement action alleging that the National Rifle Association of America (“NRA”) and four of its current and former senior officials violated New York State laws aimed at preventing abuse of not-for-profit status and misuse of charitable funds. The Complaint identifies an institution-wide culture that permitted at least tens of millions of dollars to be diverted away from the NRA’s mission activities to instead benefit the interests of the NRA’s entrenched leadership, loyal insiders, and favored vendors while the Board allowed this misconduct to continue. The Plaintiff has sought information relevant to the NRA’s conduct of its business including the grant of no-show contracts to insiders and loyalists, financial mismanagement and corruption, interference in Board elections, retaliation against whistleblowers and dissidents, false filings, related party transactions, payment of excess benefits to NRA leadership, and other illegal conduct. The information sought is tied directly to the claims against the Defendants and the factual allegations relating to how the NRA has done and continues to do business.

The Plaintiff has been prejudiced by the NRA’s late, still incomplete and ongoing production of documents. Without an agreement by the OAG to do so, the NRA has unilaterally

extended its time to respond to the OAG's June 2021 request for production ("OAG RFP"). The parties agreed upon a scheduling order ("Scheduling Order No. 1") which was verbally approved by the Court. The NRA could not complete its production when it was due or even within the document production deadline, October 8, 2021, set in Scheduling Order No. 1. Even after the OAG granted the NRA's request to have until November 8, 2021 to substantially complete production and the NRA's proposal for a two-month extension of discovery in this case, the NRA failed to timely meet its document production obligations under the expanded deadlines.

Instead, the NRA has unilaterally decided that it would extend its deadline for document production indefinitely and continues to dump tens of thousands of documents on the OAG months after they were due and even after the deadline for completion of document discovery in the extended Scheduling Order, with no end to its production in sight. For example, the NRA produced more than 123,000 documents in December 2021. As recently as January 12, 2022, the NRA produced over 19,000 documents to the Attorney General. On January 13, it produced 16,755 documents. It made another production on January 16, 2022 of 3,119 documents, comprising almost 84,000 pages. Indeed, NRA produced additional documents on January 20<sup>th</sup>, while at the same time unreasonably refusing to agree to an extension of the discovery schedule and objecting to adjourning depositions in the coming weeks due to the NRA's long delayed and ongoing document production.<sup>1</sup> As a practical matter, the OAG has not had adequate time to even upload all of these documents, let alone review hundreds of thousands of pages of documents. However, from the OAG's expedited review undertaken thus far, the materials the NRA has produced most recently, on the eve of depositions, include important and highly relevant documents. The NRA's

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<sup>11</sup> In advance of bringing this motion, the OAG requested consent of each of the defendants to an extension of the pretrial schedule. Defendants Joshua Powell and Wilson Phillips gave their consent. Defendants John Frazer and Wayne LaPierre did not respond to the OAG's request. The NRA refused.

production in January, alone, exceed the total number of documents it produced between July and November, the first four months of discovery.

Further, the NRA's conduct in obfuscating what it is producing, what it is withholding, and when it will complete production has already prejudiced the OAG in preparing for, scheduling and taking depositions. The NRA has informed the OAG that it cannot even predict when it will produce privilege logs. And, as discussed below, it has also violated the Court's directions to timely complete review of allegedly privileged documents held by other defendants and third parties so that the balance of their non-privileged documents may be produced.

Fact discovery in this case now closes on February 15, 2022. With almost thirty depositions scheduled in the next three weeks, the OAG is forced to seek emergency relief from this Court. The NRA's discovery conduct in failing to timely and properly complete document production constitutes good cause for an order compelling compliance and extending the discovery schedule under governing law.

Further, as reported to the Court on January 12, 2022, the parties reached agreement for the appointment of retired Justice Peter Sherwood as a discovery Special Master. The parties are in the process of preparing an order for referral of discovery disputes to Justice Sherwood and for his formal appointment. The OAG is confident that Justice Sherwood's appointment will provide a means to expeditiously resolve the disputes over the NRA's noncompliance with the OAG's document discovery demands and any future discovery disputes without burdening the Court. Together with an order directing the completion of the NRA's document review and production within a finite period of time, this should provide for a means to fully and fairly complete discovery on the extended discovery schedule that the OAG has been forced to request.

Accordingly, for foregoing reasons, the OAG respectfully requests that the Court issue an

Order:

- (i) extending each of the deadlines in the current Scheduling Order (NYSCEF 463) by three months from the certified completion of the NRA's document production, including privilege logs, to allow the Special Master O. Peter Sherwood, upon his appointment, to address the OAG's request for an order compelling the NRA to complete its document production, including documents post-dating the filing of this action, and privilege logs, by February 2, 2022 or such other date set by the Special Master;
- (ii) compelling the NRA to complete its review and/or production of the third party documents it demanded to review for privilege, and production of privilege logs, in particular arbitration documents it was previously ordered to review for production from Christopher Cox, documents in the possession of Defendant Joshua Powell that is was also directed by the Court to produce promptly, and communications with the NRA's outside auditor, Aronson LLP, along with accompanying privilege logs, by January 28, 2022 or such other date set by the Court or forego or waive any right to such review, although the parties' claw back provision would remain in effect for any privileged documents inadvertently produced; and
- (iii) granting such other and further relief as the Court deems just, fair and appropriate.

### STATEMENT OF RELEVANT FACTS

#### The Proceedings to Date

On August 20, 2020, the OAG commenced this enforcement action against the NRA and four of its current and former leaders by a 163-page Complaint that set forth detailed allegations of pervasive and persistent illegal conduct by and within the NRA. NYSCEF 1. The wrongdoing

alleged in the Complaint is not simply isolated bad acts, but rather the institutionalized misuse of assets for private benefit, in a financial system with inadequate controls and pervasive corruption, which was overseen by an entrenched leadership. The OAG alleges that the NRA, the individual defendants and the NRA Board permitted the diversion of tens of millions of dollars, perhaps much more, away from the NRA's charitable mission and ignored, and in some cases retaliated against, those who raised concerns about its operation and finances.

Upon denial of the motions to dismiss by various defendants on January 21, 2021, (NYSCEF 210, 220), discovery proceeded. The parties agreed to and proposed a schedule embodied in the Scheduling Order No. 1. NYSCEF 330. That schedule imposed a document production deadline of October 8, 2021 and an end date to fact discovery of December 17, 2021.

Shortly before this Court heard and denied the motions to dismiss by various defendants, on January 15, 2021, the NRA filed for bankruptcy in the United States Bankruptcy Court for the Northern District of Texas *In Re National Rifle Association of America and Sea Girt LLC*, Jointly Administered, Case No. 21-30085-hdh11 (Bankr. S.D. Tex.). There were several months of expedited discovery and litigation concerning motions challenging the NRA's bankruptcy petition, followed by an eleven-day trial. On May 11, 2021, the Bankruptcy Court concluded that the NRA had not filed for bankruptcy in good faith and dismissed the proceeding. There was no formal stay of this action during the pendency of the bankruptcy case, but as a practical matter, the intensive and expedited bankruptcy proceedings interrupted discovery in this action.

After the bankruptcy, on August 16, 2021, Plaintiff filed the Amended and Supplemental Complaint. NYSCEF 333. That pleading alleges that the Defendants' unlawful conduct continued even after the commencement of this enforcement action and one example of the same was the manner in which Defendant LaPierre and the NRA orchestrated the organization's failed



bankruptcy petition, a boondoggle that cost the NRA tens of millions of dollars, including multi-millions in attorney's fees and costs alone.

The NRA, and Defendants LaPierre and Frazer, made a second round of motions to dismiss the OAG's claims in September 2021. Those motions were heard by the Court on December 10, 2021 and a decision remains pending.

On that same date, the Court held a status conference that raised various discovery issues. Given the complexity of this matter and the discovery issues, the Court recommended that the parties consider consenting to the appointment of a Special Master, who would be able to handle discovery matters in an efficient manner. The parties have since reached an agreement to appoint Hon. O. Peter Sherwood (Ret.) to serve as the Special Master and are working together with Justice Sherwood on the proposed order for his formal appointment, which the Court has asked the parties to submit on January 21, 2022.

**The OAG's Document Requests and Efforts to Resolve Problems with the NRA's Compliance**

Plaintiff served its initial requests for production ("OAG RFP") upon the NRA on or about June 25, 2021 and supplemental requests on November 30, 2021. On July 15, 2021, the NRA served its responses to the OAG RFP. It did not serve any documents at that time, but instead the NRA asserted boilerplate objections to each demand and stated merely that notwithstanding such objections, "it will conduct a reasonably diligent search of available and accessible sources and will produce documents responsive to this Request at a mutually agreeable time and place, to the extent such documents exist." A copy of the NRA's responses to the OAG RFP is annexed to the accompanying Affirmation of Monica Connell in Support of Order to Show Cause and Certificate

of Good Faith (“Connell Aff.”), as Exhibit A. *See, e.g.*, Connell Aff., Ex. A at Responses 3, 7, 8, 9, 11, 13-18, 20, 21, 22, 23, 25, *et seq.*

The OAG and NRA met and conferred on July 30, 2021. The OAG requested that non-privileged, non-confidential, relevant documents be produced promptly. The OAG memorialized that meet and confer in a letter dated August 4, 2021. Connell Aff. Ex. B. The OAG and NRA subsequently engaged in a series of meet and confers and other efforts to endeavor to commence production and to ascertain what the NRA was producing and what it was withholding. Connell Aff. ¶¶ 6-7. Yet the NRA was slow to commence production. As of September 21, 2021, it had produced 37 documents in total, prompting the OAG to submit a letter to the Court outlining various discovery disputes in preparation for conference. *See* NYSCEF 372.

The OAG made numerous efforts to work with the NRA to identify priorities and discuss procedures that would allow prompt production of responsive information in an organized fashion. The OAG learned that the NRA was not producing responsive documents for each demand nor was it producing documents in the manner they are kept in the ordinary course of business. Instead, the NRA had scanned all potentially responsive materials it gathered — regardless of how that document was maintained in hard or electronic form in the ordinary course of business — and was relying solely on search terms to identify documents for production. This method of proceeding was not compliant with the CPLR, unnecessarily complex, and required lengthy negotiation of search terms for different custodians and categories of materials. Connell Aff. ¶¶ 14-16, 21-23. Further, the NRA did not proceed expeditiously with such production. At various points in the discovery process, the OAG has asked for a status update from the NRA on its production and the NRA has been unable to represent where it was in the process of substantially completing its collection and review of responsive documents or whether it had engaged in any search and review

of ESI materials that would be clearly responsive to the demands. *Id.* Nevertheless, based upon representations from the NRA that it was in the process of producing responsive documents, the OAG continued to try to work collaboratively to obtain responsive materials.

Throughout the OAG's negotiations with the NRA over document production, the OAG has attempted to mitigate the burden on the NRA for review and production by negotiating applicable protocols. For example, during negotiations over search terms to be used, the OAG asked the NRA to consider doing a sampling of documents to determine responsiveness rates, so that the search terms could be tailored appropriately. Connell Aff. ¶¶ 24-25. The OAG also attempted to categorically exclude documents with limited to no relevance, such as emails containing daily news digests that multiple NRA employees received or similar kinds of irrelevant communications. *See, e.g.*, Connell Aff. Ex. F. And the OAG recommended that the NRA revisit terms with the OAG after review began if non-responsiveness rates were high. But the NRA largely ignored these proposals, ultimately resulting in voluminous productions containing many thousands of spam and other irrelevant emails, unnecessarily wasting the NRA's and the OAG's time and resources. Connell Aff.15.

The OAG also attempted to mitigate potential delays in production by providing the NRA with agreed-to search terms on a rolling basis, which would allow the NRA to commence review while other search terms were negotiated. Connell Aff. Ex. F. Between July and November 30, 2021, the NRA produced approximately 38,000 documents. This includes the re-production of materials already produced in the NRA's bankruptcy proceeding. However, it appears that, notwithstanding the OAG's request that the NRA review and produce documents on a rolling basis, the NRA did not begin its document review in earnest until November of 2021, after the entire set of search terms had been finalized for all custodians.

Despite repeated requests from the OAG, the NRA has not produced various categories of documents as one would reasonably expect them to be maintained in the ordinary course of business, such as quarterly financial reports or packets given to the Board members for full board and committee meetings. Connell Aff. ¶¶ 16, 24-26, 43. Instead, to the extent that NRA has produced such documents, they are randomly distributed in voluminous productions, making it exceedingly difficult to locate them. Indeed, the NRA produced emails referencing transmittal of documents to board members but has not produced the attachments sent to the directors. CPLR 3122(c) requires that when a party is required to produce documents, it must do so “as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request.” Given the NRA’s wholesale violation of this requirement, and as a means of resolving the dispute, the OAG repeatedly asked that the NRA at least produce certain identified categories of documents that could be readily gathered. *Id.* However, the NRA has not produced documents categorically, as requested. Because the NRA has almost entirely failed to describe the contents of its productions, locating or identifying what it has produced is a time consuming and difficult task.

#### **The NRA’s Repeated Failures to Comply with Production Deadlines**

The NRA’s rolling document production initially had an externally-imposed end-date of October 8, 2021, which was the end date for document production in Scheduling Order No. 1. NYSCEF 330. But the NRA did not complete document production as required by the OAG’s notice or by October 8, 2021.

The NRA asked OAG to extend the deadline for completion of its production to permit resolution of remaining issues with search terms in regard to some custodians, to allow the NRA

to gather information from custodians that it had failed to do earlier<sup>2</sup>, and to permit the completion of a rolling production. The NRA ultimately asked the OAG to consent to push back the date for document production in Scheduling Order No. 1 to November 8<sup>th</sup>. The OAG agreed.

At that point, the OAG had already been forced to adjourn numerous depositions due to the NRA's delayed production. At or about the same time, the NRA proposed a stipulation moving all of the discovery deadlines in Scheduling Order No. 1 by roughly two months. The OAG acceded to the NRA's proposal as a necessary compromise in order to have time to receive and review the rolling document production and to permit completion of depositions. In addition, there were other outstanding discovery disputes, some of which resulted in Court mandates that the NRA has disregarded, as discussed below. The parties needed to resolve these disputes prior to the end of fact discovery as well. The new Scheduling Order put the end date for parties' document production as December 20, 2021 and for fact discovery as February 15, 2022 *See* NYSCEF 463 ("Extended Scheduling Order").

Instead of timely completing its document production on November 8, 2021 (the extension to which the parties agreed), the NRA unilaterally extended its production deadline. First it stated in meet and confers with the OAG that it would complete production document production by the "end of November" and then stated it would be done by December 15, 2021. The OAG did not agree to either of the NRA's unilateral extensions of the time for responses to the June OAG RFP.

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<sup>2</sup> In meet and confers, the NRA revealed that it had gathered information on the NRA servers from individual NRA custodians, such as NRA employees and officers, in 2019 and early 2020, during the OAG's pre-suit investigation. However, after the OAG filed this action and sought discovery, the NRA had not gathered more recent materials to produce in this action. It asserted that it need not gather updated materials and need not supplement document productions to cover the period after the filing of this action. However, the Complaint and Amended and Supplemental Complaint alleged continuing wrongdoing within the NRA, post-filing misconduct by the NRA in regard to its filing of a bankruptcy petition, and the NRA has asserted purported post-filing internal reforms as a defense. Accordingly, the NRA's production should include post-commencement materials. It is not entirely clear that it does or will. In any event, pursuant to CPLR 3101(h), parties are required to supplement their discovery responses to make sure that they are correct and complete, and the circumstances are such that a failure to amend or supplement the response would be materially misleading.

Connell Aff. ¶¶ 9-19.

The NRA did not even comply with its self-authorized extension of its production deadline to December 15, 2021. The NRA also did not complete its production by December 20, 2021, the deadline for completion of document production in the Extended Scheduling Order. Connell Aff. ¶¶ 9-19.

Instead, between December 6, 2021 and January 20, 2022, the NRA has made a series of voluminous productions. This has meant that the overwhelming majority of the NRA's document production began months late and has continued up to and even after the bulk of the OAG's depositions were scheduled to begin on January 14, 2021. As set out in the table, below, the NRA produced just over 123,000 documents in December 2021, and has continued to produce tens of thousands in January.

Date of Production	Number of Documents
12/6/2021	75,672
12/17/2021	13,997
12/18/2021	13,392
12/19/2021	9,095
12/21/2021	4,015
12/23/2021	1,064
12/28/2021	919
12/29/2021	4,900
1/3/2022	226
1/11/2022	295
1/11/2022	114

1/12/2022	19,113
1/13/2022	16,755
1/16/2022	3,119
1/19/2022	17,565
1/20/2022	undetermined, upload in process

The OAG inquired of the NRA but the NRA would not, or could not, inform the OAG when its production will be complete. Even as of January 18, 2022, the NRA admitted that its productions were not complete. Connell Aff. ¶ 43. The OAG also still has unanswered questions regarding what is and is not in the NRA's productions.

The OAG is in the process of reviewing the enormous volume of documents that the NRA produced in the last few weeks. It is already apparent from that ongoing review that these recent productions include documents that are highly relevant, but likely are incomplete. For example, the NRA recently began to produce text messages between and among various NRA officers, including the individual defendants, NRA employees and key third-party witnesses. The OAG does not believe that the NRA has produced all responsive text messages because the NRA is using inappropriate search terms to identify responsive messages and the messages produced thus far are incomplete. The NRA has refused to revisit the process it is using to identify potentially responsive text messages.

The NRA's belated and incomplete productions have and will continue to prejudice the OAG's ability to prepare for upcoming depositions. For example, the OAG deposed the NRA's former CFO and Treasurer Craig Spray on January 14, 2022. The OAG had to proceed despite having received certain key documents relating to Spray just prior to his deposition and without

other, important documents that the NRA still has not produced.

Currently there are almost thirty fact depositions scheduled to be completed before February 15, 2022 end date for fact discovery. Under the current pretrial schedule, the OAG cannot push the depositions back any farther. The OAG should not suffer prejudice as a result of the NRA's discovery misconduct, and thus the OAG has been forced to bring this application.

### **The NRA's Outstanding Privilege Logs**

The NRA also has yet to provide any privilege logs and has been unable or has refused to even predict when it will provide the OAG with privilege logs for its productions. Connell Aff. Ex. ¶¶ 20, 29, 43. The question of what documents the NRA is withholding on privilege grounds is important because of the role that NRA counsel, the Brewer firm, had in addressing key governance and compliance matters that are at issue in this matter. For example, during the pre-suit investigation and during the bankruptcy proceedings, witnesses testified that the NRA relied on the Brewer firm (the NRA's counsel in this matter) to handle a variety of these issues, including without limitation, its response to whistleblower complaints by NRA Financial Service Division employees, evaluating allegedly improper expenditures by NRA senior personnel (including defendants Wayne LaPierre, Woody Phillips, and Joshua Powell and Wayne LaPierre's longtime adviser, Mildred Hallow), preparing the IRS 990 returns for 2019 and 2020 and advising and directing the NRA's purported "compliance review," which the NRA has repeatedly referenced as a defense to the OAG's claims.

### **The NRA's Failure to Timely Comply with Court-Mandated Timetable for Completing Pre-Review of Third Party Documents**

The Court recently resolved disputes concerning the NRA's right to review documents for privilege that are in the possession of third parties, in particular, two former NRA senior executives: defendant Joshua Powell and Christopher Cox, the former Executive Director of the



NRA Institute for Legislative Affairs. As addressed in more detail below, the Court directed the NRA to promptly complete its privilege review in order to ensure that the OAG receives all responsive, non-privileged documents reasonable in advance of the depositions. The NRA has not complied with the Court's directives, as further detailed below. To date, the OAG the OAG has not received substantial documents from Mr. Powell. Immediately prior to this filing, Mr. Cox produced to the OAG responsive documents that had been reviewed by the NRA. The OAG has not had an opportunity to review these documents. The NRA has not produced a privilege log, nor has it revealed what documents it is withholding from Mr. Cox's documents, or the basis for withholding any documents.

### ARGUMENT

#### **THE NRA'S FAILURE TO MEET ITS DISCOVERY OBLIGATIONS ENTITLES THE OAG TO AN ORDER EXTENDING DISCOVERY.**

CPLR 3101 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." "The words 'material and necessary' as used in CPLR 3101(a) are 'to be interpreted liberally to require disclosure ... of any facts bearing on the controversy.'" *Cabral v. Rockefeller Univ.*, 69 Misc. 3d 1224(A) (Sup. Ct. N.Y. Co. 2020) (vacating note of issue and issuing order granting extension of discovery period in light of need to complete outstanding discovery) (citing *Allen v. Crowell-Collier Pub. Co.*, 21 N.Y.2d 403, 406 (1968)); *Matter of Steam Pipe Explosion at 41st Street and Lexington Avenue*, 127 A.D.3d 554, 555 (1st Dep't 2015).

Where a party fails to timely or completely comply with its discovery obligations, a motion to compel is properly granted. *Anonymous v. High Sch. for Env't Stud.*, 32 A.D.3d 353, 358 (1st Dep't 2006) (affirming decision, compelling discovery and granting other relief including waiver of objections and award of fees for belated and incomplete production of relevant materials);

*Herzog v. Sacko Delivery & Trucking*, 63 Misc. 3d 1228(A) (Sup. Ct. Bx. Co. 2019) (granting motion to compel party to produce outstanding discovery material by a date certain and extending discovery).

A motion to compel discovery and extend discovery deadlines is properly granted pursuant to CPLR 2004 where a party demonstrates good cause for such order. *Matter of Hanlon*, 189 A.D.3d 1405 (2d Dep't 2020). CPLR 2004, provides that "[e]xcept where otherwise expressly prescribed by law, the court may extend the time fixed by any statute, rule or order for doing any act, upon such terms as may be just and upon good cause shown, whether the application for extension is made before or after the expiration of the time fixed." *See Ryskin v. Corniel*, 181 A.D.3d 742, 743–744 (2d Dep't 2020). The need for relevant and material discovery is good cause for a discovery extension. *Hanlon*, 189 A.D. at 1405. "If there is no showing of prejudice caused by an extension] ... extensions are rather liberally granted." *St. Louis v. Willey*, 92 A.D.2d 703 (3rd Dep't 1983) (internal citations and quotations omitted); *see also Lipson v. Dime Sav. Bank, FSB*, 203 A.D.2d 161, 162-63 (1st Dept. 1994) (where plaintiff had diligently sought discovery, it was an abuse of discretion to deny extension of discovery period to permit reasonable opportunity for discovery); *McNeil v. Milstein*, 240 A.D.2d 549 (2d Dept. 1997) (holding trial court had discretion to grant an extension of the time in which to complete discovery by six months upon showing of a reasonable cause).

**A. The NRA'S Failure to Complete an Orderly Production of NRA Documents, Privilege Logs and the Privilege Review of Third Party Documents Warrants an Extension of the Discovery Schedule.**

As noted above, in November 2021, the NRA proposed a stipulation moving all of the discovery deadlines in Scheduling Order No. 1 by roughly two months. The OAG acceded to the NRA's proposal as a necessary compromise in order to have time to receive and review the rolling

document production and to permit completion of depositions. *See* NYSCEF 463. Nevertheless, even with that extension, the NRA did not timely complete its production of documents. Despite the OAG's repeated requests, over many months, the NRA has not informed the OAG when its document production will be complete.

Additionally, the NRA has informed the OAG that it cannot predict when it will produce privilege logs, as it is required to do. Nor has it clarified, as it must under CPLR 3122(b), what responsive materials it is withholding or why. This, too, prejudices the Plaintiff.

Further, the NRA's apparent election to avoid producing documents either in response to each demand or in categories as kept in the ordinary course of business, in violation of CPLR 3122, has prejudiced the Plaintiff. The OAG believed that the NRA's document production would include at least those types and categories of documents the OAG specifically be produced as such. *See, e.g., Connell Aff. Exs. G, F.* Yet the NRA has ultimately failed to produce those documents categorically. The result is that the NRA has been able in many instances to "hide the ball" or distribute documents almost randomly among its productions. This prejudices the OAG in reviewing responsive information and preparing for depositions and trial.

In addition to violating discovery deadlines and rules, the NRA's production of documents has been incomplete in specific ways that have substantially prejudiced the Plaintiff's right to information and ability to prepare for depositions. For example:

- **Cox's Arbitration Documents Were Just Produced, at Least in Part and Without Privilege Logs, Today in Violation of the Court's Order.** The OAG subpoenaed documents from former NRA executive Christopher Cox relating to his arbitration with the NRA ("Cox Documents"). This was the subject of submissions to the Court and was discussed at the December 10, 2021 status conference at which the Court indicated that it "hadn't heard anything" to make it disagree with the OAG's entitlement to such materials and to direct expedited briefing on a motion to compel. NYSCEF 402; *Connell Aff. Ex. H* pp. 26-27. The OAG moved to compel by order to show cause. On **January 4, 2022**, this Court ordered that the NRA and/or former NRA executive Christopher Cox begin a rolling production of documents that the OAG had

subpoenaed in August 2021. Specifically, in light of the upcoming depositions, the Court directed that the documents be produced “as soon as they are ready. So the first slug should go out this week, if it's already been done, or no later than next week.” NYSCEF 540, p. 42. Despite the fact that the NRA has had Mr. Cox’s complete proposed production since at least October, NYSCEF 540, pp. 41-420, the documents were not produced to the OAG until January 21, 2022, just prior to this filing and without any privilege log or indication of what the NRA has withheld from the production. The OAG has already suffered prejudice because it had to proceed with the deposition of former NRA Treasurer and CFO Craig Spray without the benefit of the documents.

- **The NRA Has Failed to Complete Promptly a Privilege Review of Powell Documents Despite the Court’s December 10, 2021 Direction.** The OAG has been endeavoring to obtain a tranche of documents from Defendant Joshua Powell since July 2021. The documents were withheld as possibly privileged. At the status conference held on December 10, 2021, the Court directed the NRA and Defendant Joshua Powell to proceed expeditiously with a review and production process concerning the materials in Powell’s possession which the NRA sought to pre-review for privilege (“Powell Documents”). NYSCEF 432, 435, 464; Connell Aff, Ex. H. The Court specifically directed that “everything should move quickly.” *Id.*, pp. 19-20. Powell’s counsel reports that they proceeded with having contract attorneys prepare the documents, separating out all potentially privileged documents, and sent a January 12, 2022 letter to the NRA to coordinate review and production. Powell’s counsel indicates that the NRA did not respond until a January 18, 2022 letter objecting to the procedure proposed by Powell, which had been tacitly approved by the Court. Thus, the NRA has defied the Court’s directive to move quickly and little to no headway has taken place and no production of the Powell Documents has been made.
- **The NRA Has Not Completed Its Privilege Review or Produced Communications Pertaining to its Independent Auditor.** The OAG has sought, inter alia, certain communications and information exchanged between the NRA and the NRA’s independent auditor. (“Aronson Communications”).<sup>3</sup> The OAG asked for such documents in OAG RFP 23 (calling for production of all communications with the NRA’s external auditor, Aronson). Connell Aff., Ex. A. But it does not appear that the NRA has produced the Aronson Communications yet. The OAG also issued a subpoena to Aronson that would include the Aronson Communications, but Aronson’s production has been greatly delayed and hampered by the NRA’s insistence on pre-reviewing the same, even though the NRA must have copies of all such documents. This has resulted in a months-long process of pulling relevant tranches of documents, giving them to the NRA and its affiliate the NRA Foundation for privilege review which, according to Aronson’s counsel, has taken in excess of five weeks for a single

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<sup>3</sup> The OAG has also asked Aronson for its internal emails regarding audit services provided to the NRA. Aronson’s counsel has informed the OAG that the NRA’s review is lengthy and time consuming and the NRA then gives its demarcations to Aronson to make redactions of the identified allegedly privileged materials, which is also time consuming. Aronson made a production on January 20, 2022 but the OAG still does not have all of the communications sought.

tranche. Thus, the NRA has not produced important documents relating to the nature and sufficiency of its independent audit and has effectively blocked production of the same from the auditor itself. The NRA has not responded to the OAG's requests as to whether the NRA is producing this material in its ongoing production. Aronson is scheduled to be deposed on February 2, 2022. Connell Aff. ¶¶ 34-35, Ex. E.

- **The NRA Waited Until the Night Before the Deposition of ex-CFO Craig Spray to Make a Partial Production of Key Spray-Related Documents.** Despite the fact that the OAG has actively sought information relating to former NRA CFO Craig Spray for months, particularly his texts which were in the NRA's possession, custody and control, agreements relating to Spray's termination by the NRA, and communications relating to the negotiation of all post-employment agreements with Spray, the NRA failed to timely produce the same. Instead, it was only after repeated prompting by the OAG that the NRA produced text messages from Mr. Spray's NRA-issued phone, and documents related to his termination as an NRA employee in January 2021. This occurred in the days right before his long-scheduled deposition on January 14, 2022, including on the evening before his deposition. The OAG was forced to go through hundreds of relevant documents the night before Spray's deposition and does not yet believe it has received full disclosure with regard to Spray. The NRA's conduct in producing tens of thousands of documents, including materials relevant to Spray's deposition, right before his deposition prejudiced the OAG's ability to prepare for Spray's deposition.
- **The NRA Has Not Yet Produced Packets of Information Given to the Board and Questions from the Board as Maintained Within the Files of the NRA or Conveyed via SendInc.** The OAG has requested production of information that the NRA provided to its Board of Directors, including the information that the Finance and Audit Committees were provided for review. The NRA used a service, SendInc., as a secure electronic method of transmitting information to its Board members. The OAG is seeking discovery of this information, which the OAG understands is within the NRA's custody and control. Months ago, the OAG asked the NRA to search for these categories of documents in the electronic files that the NRA maintained for the purpose of these board communications, which the OAG understands are separate from the NRA's email system. It does not appear that the NRA has undertaken any search for these documents, but instead ran search terms for communications in the NRA's email system. The NRA has produced 839 documents with secure@sendinc.net in the "From" field. These are all documents that confirm a transmittal of information and documents occurred, but, unless such information was produced in its latest production, the NRA did not produce the attachments or documents which were transmitted.
- **The NRA Has Not Produced Privilege Logs.** NRA Counsel has indicated that it cannot even predict when it will be able to produce the same.

These are just some examples of documents that have not been produced by the NRA or which were late or partially produced.

The NRA has made its document productions, for the most part, with no description of what is being produced or withheld, in violation of CPLR 3122(b); no statement that the production is complete or incomplete as to any particular request for production, custodian, or issue; and no indication of when the production will be complete. Connell Aff., ¶ 14.

This belated, incomplete, and obfuscated means of production has prejudiced the OAG's ability to review the documents and to prepare for depositions. The OAG should not be forced to proceed to its further prejudice with the remaining depositions until the completion of document discovery and the resolution of remaining discovery disputes.

In light of the foregoing, it is respectfully submitted that the OAG is entitled to an Order extending the discovery period to allow the OAG to reschedule depositions for a reasonable time after the NRA has completed its belated and still ongoing productions of documents and privilege logs for its own and third-party documents. An extension will permit the Special Master to address the OAG's request for an order directing the NRA to complete its production by a date certain, in compliance with its obligations under the CPLR, as well as address any other issues with the NRA's production.

**B. There is Good Cause for An Extension of Current Discovery Deadlines.**

There are almost thirty depositions already noticed in the coming month. Fact Discovery closes on February 15, 2022. Yet the NRA continues to make productions, with no explanation for the late production or when it will be complete.

In light of the NRA's general and specific failure to timely complete its document production or review documents for production in compliance with this Court's direction, it is respectfully submitted that the OAG has established good cause for a motion to compel the NRA to complete its document production and to extend the current discovery deadlines.

Further, no prejudice will accrue as a result of this request. First, it is the NRA's own

conduct that has necessitated this request. Second, there is no prejudice to the NRA or other defendants to extend the discovery deadline; the only prejudice is to the OAG if it is forced to proceed under the current timetable with depositions and preparation of experts without having a complete document production, without having reasonable time to review the documents that have been produced at this point in time. Third, the NRA itself previously sought an extension of discovery to permit the completion of document discovery and then failed to timely complete the same so it cannot claim to be now prejudiced by a further extension. Fourth, a Special Master has been agreed upon, hopefully reducing the burden on the Court to address discovery issues and allowing for the speedy resolution of disputes and an end to fact discovery. Finally, the Court recently scheduled argument on a motion to intervene (Mot. Seq. 19) and on the OAG's motion to dismiss the NRA's amended counterclaims (Mot. Seq. 13) for February 15 and 25, 2022, respectively.

### **CONCLUSION**

For the foregoing reasons, the OAG respectfully requests that the Court issue an Order:

- (i) extending each of the deadlines in the current Scheduling Order NYSCEF 463 by three months from the certified completion of the NRA's document production to allow the Special Master O. Peter Sherwood, upon his appointment, to address the OAG's request for an order compelling the NRA to complete its document production, including documents post-dating the filing of this action, and privilege logs, by February 2, 2022 or such other date set by the Special Master;
- (ii) compelling the NRA to complete its review and/or production of the Cox Documents, Powell Documents and the Aronson Communications, with accompanying privilege logs, by January 28, 2022 or such other date set by the

Court or forego or waive any right to such review, although the parties' claw back provision would remain in effect for any privileged documents inadvertently produced; and

(iii) granting such other and further relief as the Court deems just, fair and appropriate.

Dated: January 21, 2022  
New York, New York

LETITIA JAMES  
*Attorney General  
of the State of New York*

*/s/ Monica Connell*

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**Attorney Certification Pursuant to Commercial Division Rule 17**

I, Monica Connell, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law 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 6785 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: January 21, 2022  
New York, New York

*/s/ Monica Connell*

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Monica Connell