

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,

INDEX NO.: 451625/2020
Motion Seq. No. 24

Plaintiff,

-against-

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

Defendants.

and

THE NATIONAL RIFLE ASSOCIATION OF
AMERICA,

Defendant-Counterclaim Plaintiff,

-against-

LETITIA JAMES, ATTORNEY GENERAL OF
THE STATE OF NEW YORK, IN HER
OFFICIAL AND INDIVIDUAL CAPACITIES,

Plaintiff-Counterclaim Defendants.

**AFFIRMATION OF SVETLANA M. EISENBERG IN OPPOSITION TO
NYAG'S ORDER TO SHOW CAUSE TO EXTEND DISCOVERY DEADLINES**

I, SVETLANA M. EISENBERG, an attorney duly admitted to practice law in the courts
of the State of New York, hereby affirm the following under penalty of perjury pursuant to
CPLR § 2106:

1. I am a Partner with the firm Brewer, Attorneys & Counselors, counsel for the
National Rifle Association of America (the "NRA") in the above-captioned action.

2. I respectfully submit this Affirmation in opposition to the New York Attorney General's ("NYAG") Order to Show Cause to Extend the Pretrial Schedule (NYSCEF 546).

3. I am familiar with the facts and circumstances of this action, either because I personally participated in the events described or through my conversations with my colleagues at Brewer and my review of the case file.

**Recent Unsuccessful Attempts by the NYAG to
Obtain Discovery Before the Fact Discovery Deadline**

4. The NYAG originally noticed and scheduled the deposition of Gayle Stanford for January 11, 2022. On or about January 5, 2022, the NYAG advised via email that "Gayle Stanford's deposition is being rescheduled" and that the NYAG is "in communication with her counsel and will advise the parties when a new date has been agreed upon." As of the date on which the NYAG sought the extension from the Court, the NYAG had not succeeded at rescheduling the deposition. On February 1, 2022, after she filed Proposed Order to Show Cause to Extend Discovery Deadlines, the NYAG informed the parties that "Gayle's Stanford's deposition has been rescheduled for February 18, 2022, at 9:00 am PST," that is, three days after the deadline for fact discovery.

5. On or about January 21, 2022, the NYAG circulated a "subpoena for Gurney Sloan," setting the date of the deposition as Saturday, February 12, 2022 at 9:30am PST, just three days before the close of fact discovery. Upon information and belief, the NYAG did not reach out to parties before setting the deposition for a Saturday to see if parties' counsel were available on that day. On or about January 30, 2022, the NYAG adjourned the deposition of Gurney Sloan.

6. On or about January 17, 2022, the NYAG emailed to all parties a subpoena for former NRA employee H. Paul Payne, setting the date of the deposition for February 2, 2022, a date on which the NYAG later scheduled the deposition of the NRA's outside auditor. On or

about January 25, 2022, the NRA objected to the subpoena on procedural grounds, i.e., the NYAG's failure to comply with the 20-day notice requirements of CPLR 3017 and 3120.

7. On or about January 5, 2022, the NYAG issued a subpoena to Susan LaPierre for documents (due by January 25, 2022) and for testimony (on February 4, 2022). The NYAG advised the NRA that she served the subpoena upon the witness on January 26, 2022. On or about January 27, 2022, one day after the NYAG served the subpoena, the NRA objected to the subpoena on the grounds that it fails to give the 20-days notice required under CPLR 3107 and 3120.2. According to NYAG, on or about February 4, 2022, the NYAG and counsel for Susan LaPierre held a meet and confer to agree on a reasonable scope for the subpoena. On or about January 30, 2022, the NYAG adjourned the deposition of Susan LaPierre.

8. On or about December 1, 2021, 15 months after the commencement of this action, the NYAG issued requests for the production of documents to John Frazer and Wayne LaPierre. The NYAG adjourned the depositions of John Frazer and Wayne LaPierre after the filing of the Proposed Order to Show Cause to Extend Discovery Deadlines.

9. On or about August 20, 2021, the NYAG sent via email a "a subpoena issued to David McKenzie," setting the date of the deposition as September 23, 2021. On or about September 20, 2021, the NYAG informed parties that she was adjourning the deposition. As of the date on which the NYAG filed the proposed Order to Show Cause to Extend Discovery Deadlines, the NYAG had not been able to reschedule the deposition of Mr. McKenzie.

10. On or about September 27, 2021, the NYAG requested that the Court issue subpoenas to seven vendors of the NRA. On or about February 2, 2022, in response to a request from the NRA, the NYAG confirmed that, with the exception of ATI, she had yet to receive a single document from any of these vendors.

11. As of the date of the NYAG's motion for an extension, she had not moved to compel any of these entities to comply with her subpoenas.

The NRA's Diligent Review of Aronson's Draft Productions

12. To date, the NRA has reviewed and cleared for production seven batches of Aronson documents.

13. On or about January 25, 2022, the NRA received from Aronson a new batch of about 770 documents proposed by Aronson for production. The NRA cleared the production in less than two days.

Chris Cox

14. On or about January 5, 2022, the NRA advised counsel for Christopher Cox that the NRA had no objection to Cox's production to the NYAG of over 2,850 documents.

15. On or about January 13, 2022, the NRA emailed counsel for Christopher Cox, noting that "the NRA does not object to Cox producing documents." I understand that, shortly thereafter, Cox produced the documents.

Josh Powell

16. On or about January 24, 2022, the NRA held a meet and confer with counsel for Joshua Powell to better understand the basis on which Mr. Powell claims that his counsel should be entitled to review certain likely privileged documents belonging to the NRA.

**Materials Requested by the NYAG and Produced to the NYAG by the NRA to Date;
Search String Protocol**

17. In or around April 2018, the NYAG commenced an invasive investigation of the NRA (the "Investigation"). She subsequently advised the NRA that, during her 16-month investigation of the NRA, she, among other things, received testimony of at least 13 witnesses and,

interviewed others; and subpoenaed more than 100,000 documents from the NRA and third parties. The NRA diligently complied with the NYAG's preservation notice and responded to her subpoena requests. The NRA also objected to the subpoena requests to the extent they were burdensome. In response to the objections, the NRA and the NYAG agreed upon a search term-based protocol for the review and production of documents to the NYAG.

18. On June 25, 2021, the NYAG served her First Request for Production of Documents upon the NRA ("First RFP"), requesting that, by July 15, 2021, the NRA produce documents in response to 62 requests for production. A copy of the First RFP is annexed hereto as Exhibit 1. On July 15, 2021, the NRA served its Responses and Objections to the First RFP. A copy is attached to the movant's motion.

19. Between in or around August 2021 and in or around November 2021, the NRA and the NYAG engaged in lengthy negotiations around the search terms that the NRA should use to search for responsive documents as it complies with what is otherwise an exceedingly burdensome RFP.

20. The negotiations were conducted over the course of multiple meet and confer calls and multiple email exchanges. The negotiations were exceedingly granular, and, during that time, the NRA provided the NYAG with various information to aid the NYAG in determining the search terms she wanted the NRA to use.

21. Below is a summary of but a sampling of such communications, which demonstrates the degree of cooperation provided by the NRA.

- Following meet and confer conference calls between the NRA and the NYAG regarding the NYAG's RFPs, on August 12, 2021, the NRA proposed to the NYAG ESI search terms and custodians.

- On August 26, 2021, however, the NYAG proposed substantial revisions and significant additions to the ESI search terms and custodians. The NYAG also requested that the NRA analyze the ESI search terms and custodians by, for example: providing a “hit report” of the ESI search terms, including detail sufficient to identify the number of documents that hit on each search term and the number of documents by custodian; subtracting “from the hit report documents that have been previously withheld as privileged”; and subtracting from the hit report documents “that the NRA already produce to the NYAG”.
- Shortly thereafter and in anticipation of a meet and confer with the NYAG, on September 24, 2021, the NRA provided a “report showing the number of ‘hits’ produced by the OAG’s proposed search terms and custodian list, compared to the search terms and custodian list proposed by the NRA.”
- On September 27, 2021 at 12:21pm, the NYAG proposed that the “NRA review the documents hitting on” some of the terms and further proposed that the NYAG “refine” the other terms. As before, the NYAG requested that the NRA analyze the ESI search terms and custodians by, for example: confirming whether the “searches [have] been deduped for documents already produced to the NYAG, or that have otherwise been withheld for privilege”; and assessing whether the “searches encompass ESI from the additional custodians.”
- On September 27, 2021 at 3:01pm, the NRA promptly responded to the NYAG’s request, noting:
- “For both the NYAG and NRA proposed terms, documents already produced by the NRA to NYAG or withheld for privilege are excluded in the hit counts.”; and

- “For the hits on NYAG proposed terms, all NYAG custodians are included. For the NRA proposed terms, just the NRA custodians were used.”
- On or about September 27, 2021 at 8:22 pm, following a meet and confer, the NYAG requested that the NRA provide “approximately how many documents are represented by the search terms” that the NYAG previously proposed to “refine.”
- On or about September 28, 2021 at 11:17am, the NYAG provided a “revised version of the hit report,” noting that it “tried to substantially cut down the number of documents for initial review by the NRA while [it] continue[s] to work on the terms that returned a larger number of hits.” The NYAG further amended the terms by “suggest[ing] specific custodians” for a portion of the terms. The NYAG also requested that the NRA “confirm the total number of documents represented by the terms” “let [the NYAG] know what the numbers look like when th[e] searches are run against th[e] [specific] custodians only.”
- On or about September 28, 2021 at 8:10pm, the NRA promptly responded to the NYAG’s request and provided a “hit report and total count on the revised” search terms the NYAG provided.
- On or about September 30, 2021, the NYAG proposed an additional, revised “list of search terms and custodians for the NRA’s review.” The NYAG specified that it intended to propose “additional search terms . . . early next week” and explained that its “intention [was] to revisit the terms not included” in the then-circulated proposal.
- On or about October 4, 2021, the NRA followed up with the NYAG, requesting if the NYAG has a “sense of when [it] will be providing the additional proposed search terms that are not included in the spreadsheet” circulated on September 30, 2021.

- On October 5, 2021 at 1:12pm, the NYAG circulated “additional, revised search terms,” noting that it “would appreciate having a hit report for these searches as soon as possible.” The NYAG requested that the NRA follow the NYAG’s technical guidance, including:
- “For all of the searches where we have noted they should be done on ‘Emails only,’ our intention is that the search be run on emails exclusive of any attachments they have (so, a document should not be responsive if the term hits on the attachment to an email only rather than the email itself). If that is not technically feasible, we ask that you add this to the end of each such term: ‘AND (subject AND importance)’ That should limit the searches only to emails themselves.”; and
- “We have introduced a new Boolean operator to try and limit searches: ‘+/' This is intended to capture words that follow a particular word. For example, ‘internal* +/2 control*’ is intended to capture documents where the word control follows within 2 words of the word internal. Please let us know if your review platform does not support this operator.”
- Shortly thereafter and following a meet and confer, on or about October 5, 2021, the NRA circulated “a spreadsheet reflecting the additional search terms [the NYAG] proposed along with the number of ‘hits’ for each.” For the “terms that returned large hits,” the NRA expressed hope that the NYAG “can reduce [the] hit numbers by revising the terms, or perhaps deciding that not all the listed terms are necessary.”
- During the majority of this time, the NRA and the NYAG were also meeting and conferring about other discovery subjects (that is, subjects unrelated to the negotiation of the search terms).

- On or about October 6, 2021, the NYAG provided revised terms, including terms that it “edited and/or added limitations to.”
- On or about October 7, 2021, the NRA provided a “spreadsheet showing [the] results” of the “additional search terms” the NYAG asked the NRA to run. The NRA noted that the additional search “terms yielded 371,037 documents with families” and that such “results are made up largely of several terms that yielded large numbers of hits” in addition to “the previous set of terms that yielded approximately 185,000 documents.”
- On or about October 7, 2021 at 5:19pm, the NYAG provided “revised terms,” noting that it was “concerned about refining” two terms further because the NYAG thought the two terms “are likely to turn up responsive documents.” The NYAG requested, “as a general point,” that the NRA “come back” to the NYAG “once the review starts.”
- On or about October 8, 2021, the NRA responded to the NYAG’s requests and provided four excel spreadsheets providing analysis in response to, among other requests, the NYAG’s requests to the NRA to analyze ESI search terms, provide hit counts, and review mobile data of Mildred Hallow
- On or about October 10, 2021, across several email exchanges, the NYAG requested that the NRA further analyze the ESI search term hits “from the previous report” and that the NRA revise specific search terms—for example:
- “We were using the operator ‘AND NOT,’ but from the edits your team made to a few of the terms, it looks like ‘NOT’ is the correct operator on your platform. But our ‘AND NOT’ was still used for some of the terms returning a larger number of hits, and for the

security-related terms. Would you be able to rerun just these terms using the ‘NOT’ operator?”

- On October 19, 2021, the NRA confirmed that the NYAG “proposed a total of 110 separate search terms.” The NRA agreed “to apply 103 of the terms to [its] search and review of documents.” The NRA noted that the remaining seven search terms accounted “for approximately 98,000 document ‘hits’” and, again, asked the NYAG that such terms “be substantially revised or eliminated” as such terms “are unreasonable and disproportional.”
- Thereafter, the NRA and NYAG continued to negotiate seven of the 110 search terms. 482 separate search terms made up the seven string search terms.

22. Search strings ultimately agreed to by the NYAG and the NRA are attached as Exhibit 3.

23. As exhibit 3 demonstrates, the search strings are rather elaborate.

24. Below are a few examples of the 110 search strings agreed to by the NRA and the NYAG:

(related pre/2 (part OR parts* OR parta* OR parte* OR parti* OR parto* OR partu* OR partr* OR parth* OR party*)) or “RPT”
(“46 Entertainment” OR (Morgan pre/3 (Mills OR Music)) OR Monarch OR Raiola OR (passcode pre/3 creative) OR (Rich pre/3 (entertainment OR touring)) OR (Ripple pre/3 (Effect OR Outdoors)) OR WarpSpeed OR (Webster w/3 (Public OR Relations))) AND ((contract pre/3 (review or signature)) OR (business pre/3 (case or analysis)) OR RFP OR (request pre/2 proposal) OR NDA OR agreement OR verbal OR oral OR summary OR analysis OR evaluat* OR value* OR perform* OR bid* OR approv* OR variance OR budget* OR EVP or Wayne or WLP or WRL or Woody or (Vanessa NOT Shahidi) or (Lisa NOT Supernaugh) or (Youth pre/2 Tomorrow) OR YFT)
internal* pre/2 control*

(“II IS” OR “IIS” OR “i.i. & i.s.” OR “II & IS” OR “GS2”)

25. On or about November 30, 2021, the NYAG served her Second Request for Production of Documents upon the NRA (“Second RFP”), requesting that, by December 20, 2021, the NRA produce to the NYAG additional documents. On December 20, 2021, the NRA served its Responses and Objections to the Second RFP. A copy of the Responses and Objections to the Second RFP is annexed hereto as Exhibit 2. At no point before filing this motion did the NYAG seek to compel the NRA to produce documents requested in the NYAG’s Second RFP.

26. The NRA incurred significant expenses in complying with the NYAG’s investigative subpoenas and CPLR 3120 request for documents and in reimbursing Aronson for its legal fees and costs in connection with its compliance with its own subpoena from the NYAG. The NYAG has not offered to defray any of the NRA’s costs associated with these burdensome productions.

27. By on or about December 31, 2021, the NRA produced to the NYAG approximately 161,000 documents. As of the date of this affirmation (February 8, 2022), the NRA produced to the NYAG approximately 229,000 documents (comprising **approximately 1,100,000 million pages**).

The NYAG’s Request for an Extension

28. On January 20, 2022, the NRA sent a letter to the NYAG regarding the NYAG’s request for an extension of the discovery deadlines. The NRA stated that it objected to the request for an extension because, among other things, any additional extensions are unwarranted and will cause further prejudice to the NRA. Specifically, the letter stated:

Your stated reason for the extension is to obtain more time to review the documentary discovery produced by the NRA. That is not an appropriate ground

for the extension sought. As we repeatedly advised you, the OAG's requests for documents are excessive and unduly burdensome. That the NRA has accommodated the OAG's demands and is producing voluminous documentary discovery is not a sufficient reason to extend the deadline for the conclusion of fact discovery. The OAG's position is all the more unreasonable given that the OAG opposes even beginning discovery on the NRA's counterclaims as part of its proposed extended deadline.

As part of its unilateral approach to discovery, yesterday the OAG adjourned, without consulting the NRA, the depositions of [two NRA Board members and two NRA employees]. This is the second time in this proceeding that the OAG has unilaterally cancelled scheduled depositions. **The OAG's actions are prejudicial to the NRA, its directors, officers and employees who have taken time to make themselves available to the OAG, despite the burdens of travel and the ongoing pandemic. Indeed, [two of the witnesses,] as directors, are unpaid volunteers.** The OAG has given as a reason, among other things, that it has "substantial questions about the adequacy of the NRA's production." This contention is preposterous. The NRA has, to date, produced to the OAG more than one million pages of documents in this proceeding—including personal texts and emails—in addition to the documents produced by the NRA during the OAG's expansive pre-action investigation. The OAG's stated reason is obviously pre-textual. **The OAG's effort to prolong this proceeding is also prejudicial to the NRA given the continuing chilling effect on the NRA and its members. Attorney General James continues to make public statements disparaging the NRA, as part of a concerted public campaign against the Association.** The NRA has gone above and beyond its discovery obligations and has the right to conclude this proceeding in an expeditious manner.

29. On January 21, 2022, the NYAG filed an Order to Show Cause to Extend the Pretrial Schedule (NYSCEF 546).

Dated: February 8, 2022
New York, New York

/s/ Svetlana Eisenberg
Svetlana Eisenberg

Certification of Compliance with Word Count

I, Svetlana M. Eisenberg, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Affirmation of Svetlana M. Eisenberg 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 Affirmation of Svetlana M. Eisenberg contains 3,546 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 reply memorandum of law.

By: /s/ Svetlana S. Eisenberg
Svetlana S. Eisenberg
Attorney for Defendant Counterclaim-Plaintiff
The National Rifle Association of America