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,

-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.

INDEX NO.: 451625/2020

Motion Sequence No. 24

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S ORDER TO SHOW CAUSE TO EXTEND DISCOVERY DEADLINES

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I.
PRELIMINARY STATEMENT

The Court should deny the NYAG's request for the three-month extension. The NYAG shows no good cause for the extension, and the extension will cause great prejudice to the NRA. The reason the NYAG needs an extension is because, a year and a half into the case, she realized that she needs evidence to prove her draconian and excessive claims against the NRA and, yet, she ran out of time to keep looking for it. Rather than admit to her own delay or dismiss claims she cannot prove, the NYAG conjures up a false narrative in which she blames the NRA for purportedly falling short on its discovery obligations. Yet, as the NYAG herself concedes, the amount of data that the NRA produced to the NYAG is "enormous" and the NYAG finds it to be "highly relevant." Therefore, the NYAG cannot complain about the volume of the NRA's productions. Rather, her strategy is to nitpick at the timing of the NRA's remaining productions and its privilege log. But the NYAG cannot be one to complain. She delayed service of her privilege log by more than ten months, and the NRA has been in substantial compliance with its discovery obligations as early as December 2021. That outstanding productions remain is a function of the NYAG's own repeated delays. She did not serve her document demands on the NRA for nearly a year after commencing this action. She then delayed the process further by negotiating for months the search terms she wanted the NRA to use. Of course, the NYAG could have served appropriate requests in the first place or acceded early on to a more narrow set of search terms. Having caused the multiple delays herself, the NYAG is not entitled to an extension. As a result, the Court should deny the NYAG's request for an extension and order that current case deadlines should remain.

II.
FACTUAL BACKGROUND

A. At the eleventh-hour of fact discovery, the NYAG for the first time attempts but fails to secure documents and testimony from various individuals and entities.

The NYAG has known for a long time that fact discovery on her claims against the NRA would end on or before February 15, 2022.[1] Inexplicably, however, the NYAG waited to obtain discovery from fourteen individuals or entities until it was too late.[2] This is the true reason for her request for an extension.

First, the NYAG wishes to depose Gayle Stanford and originally scheduled her deposition for January 11, 2022.[3] However, on January 5, 2022, the NYAG advised that the January 11, 2022 date no longer works for Ms. Stanford and that the NYAG would advise the parties of a new date upon conferring with Ms. Stanford's counsel.[4] But, as of the date of the NYAG's motion for an extension, the deposition had not been rescheduled.[5] *After* the NYAG requested this extension, she advised the parties that Ms. Stanford's deposition has been rescheduled for February 18, 2022, *i.e.*, after the current deadline to complete fact discovery.[6] The NYAG does not assert that the NRA is in any way responsible for the NYAG's inability to proceed with Ms. Stanford's deposition in a timely manner.[7]

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[1] Modified Scheduling Order, dated December 1, 2021 (NYSCEF 463); Preliminary Conference Order, dated March 9, 2021 (NYSCEF 463, Exhibit A).

[2] *See* Affirmation of Svetlana M. Eisenberg in Opposition to Order to Show Cause to Extend Discovery Deadlines (hereinafter "Eisenberg Affirmation"), at ¶ 4.

[3] *See* Eisenberg Affirmation at ¶ 4.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *See* New York Attorney General Order to Show Cause to Extend Discovery Deadlines (hereinafter "NYAG OTSC"); *see also* Eisenberg Affirmation at ¶ 4.

Another example of the NYAG's belated discovery requests is her attempt to depose a former employee of MMP, Gurney Sloane. On January 21, 2022 (less than a month before the close of fact discovery), the NYAG advised the parties that she was subpoenaing him for a deposition, but the date she picked was only ***three days*** before the end of fact discovery and was a ***Saturday***.[8] The NYAG scheduled the deposition on a Saturday without consulting with any parties or making sure that the date worked for all counsel. On January 30, 2022, *after moving for an extension*, the NYAG adjourned Mr. Sloane's deposition to a later undetermined date.[9]

Furthermore, on January 17, 2022, the NYAG emailed to parties a subpoena for documents and testimony from a former NRA employee H. Paul Payne.[10] The subpoena noticed the deposition for February 2, 2022, a date on which the NYAG later scheduled another deposition – of the NRA's outside auditor.[11] Not only did the noticed date for Mr. Payne's deposition conflict with another deposition, critically, the subpoena also failed to comply with the NYAG's obligation under the CPLR to give all parties the required 20-day notice.[12] The NRA objected to the subpoena. The NYAG does not claim that the NRA is in any way to blame for her belated effort to obtain documents or testimony from Mr. Payne.[13]

Next, on 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). However, the NYAG was unable to serve Ms. LaPierre with the subpoena until January 26, 2022.[14] Like NYAG's subpoena

[8] *See* Eisenberg Affirmation at ¶ 5.

[9] *Id.*

[10] *Id.* at ¶ 6.

[11] *Id.*

[12] CPLR 3107; CPLR 3120.2.

[13] *See* NYAG OTSC; Eisenberg Affirmation at ¶ 6.

[14] *See* Eisenberg Affirmation at ¶ 7.

to another witness, her subpoena to Susan LaPierre failed to comply with the NYAG's notice obligations under the CPLR.[15] The NRA objected to the subpoena on that basis.[16] The NYAG does not claim that the NRA is responsible for the belated nature of her effort to obtain testimony or records from Ms. LaPierre.[17] And, according to the NYAG, Ms. LaPierre objected to the NYAG's requests as unreasonably burdensome and broad[18] and the NYAG is currently in discussions with her counsel in an effort to agree on a mutually acceptable scope of the subpoena.[19] As a result, and as the NYAG recently confirmed to the NRA, as of the date of her motion for an extension, the NYAG had yet to secure the production of a single document.[20] And—predictably—after moving for an extension, the NYAG adjourned Ms. LaPierre's deposition to an undetermined future date.[21]

Yet another example of the NYAG's belated issuance of extensive discovery requests are her requests for documents to Wayne LaPierre and John Frazer. Although the NYAG sued Messrs. LaPierre and Frazer on August 6, 2020, she did not issue her requests for documents to them until over 15 months later (in December 2021).[22] The NYAG does not and cannot claim that the NRA is in any way to blame for her belated efforts to obtain documents from co-defendants. After moving for the extension, the NYAG adjourned the deposition dates for Messrs. LaPierre and Frazer to undetermined future dates.[23]

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[15] *Id.*; CPLR 3107; CPLR 3120.2.

[16] Eisenberg Affirmation at ¶ 7.

[17] *See* NYAG OTSC; Eisenberg Affirmation at ¶ 7.

[18] Eisenberg Affirmation at ¶ 7.

[19] *See* Eisenberg Affirmation at ¶ 7.

[20] *Id.*

[21] *Id.*

[22] *Id.* at ¶ 8.

[23] *Id.*

In addition, as of the date of the NYAG's motion for an extension, she was unable to re-schedule the date of the deposition originally noticed for September 23, 2021, of David McKenzie.[24] On September 20, 2021, the NYAG informed parties that she was adjourning the deposition.[25] When the NYAG moved for the extension, it was clear that her efforts to depose Mr. McKenzie before the end of discovery would be unsuccessful because she ran out of time to give the parties the required 20-day notice of the rescheduled deposition.[26] If the NYAG obtains the extension she seeks, the NYAG will undoubtedly renew her efforts to depose the witness. The NYAG does not claim that the NRA is in any way responsible for the NYAG's inability to depose Mr. McKenzie by the applicable deadline, which she now wants to extend.[27]

The list of the NYAG's discovery predicaments of her own making goes on. On September 27, 2021, the NYAG requested that the Court issue subpoenas to six vendors of the NRA.[28] They are TBK Strategies, Specter Security Group, Allegiance Creative Group, Concord Social and Public Relations, Membership Marketing Partners, and ASPIS.[29] On February 2, 2022, just 13 days before the end of fact discovery, in response to a request from the NRA, the NYAG confirmed that it had yet to receive a single document from any of these subpoenaed parties.[30] 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.[31]

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[24] *Id.* at ¶ 9.

[25] *Id.* at ¶ 9.

[26] CPLR 3107.

[27] *See* NYAG OTSC; Eisenberg Affirmation at ¶ 9

[28] *See* Eisenberg Affirmation at ¶ 10.

[29] *Id.*

[30] *Id.*

[31] *Id.* at ¶ 11.

Finally, on November 30, 2021, the NYAG served on the NRA another set of burdensome requests for documents, in which she demanded that the NRA produce to the NYAG additional documents.[32] The categories she outlined mirrored 29 of the categories in her earlier requests except she demanded that the documents produced cover the time period from the filing of this action through the date of the new request.[33] On December 20, 2021, the NRA served timely objections to the NYAG's Second set of requests.[34] As of the date when the NYAG moved for an extension, the NYAG had yet to move to compel the NRA to comply with her second set of document requests.[35] And she offers no excuse for her failure to do so to date.[36] Yet, in her court filing, she confesses that she needs the extension so that she can belatedly move to compel the NRA's compliance with her excessive and unreasonable request.[37] The NYAG does not claim that the NRA is in any way responsible for her failure to attempt to enforce—before the applicable discovery deadline—her second set of document requests.[38]

In short, by the time the NYAG asked the NRA for an agreement to extend fact discovery—along with all other deadlines in the case—the NYAG was clearly and demonstrably running out of time to keep looking for evidence she believes she needs to prove her case. She was desperately scrambling yet failing to obtain materials and testimony from ***fourteen*** individuals or entities.[39] With fact discovery deadline looming, the NYAG had to come up with an excuse.

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[32] *Id.* at ¶ 25.

[33] *Id.*

[34] *Id.*

[35] *Id.*.

[36] *See* NYAG OTSC; Eisenberg Affirmation at ¶ 25.

[37] *See* NYAG OTSC, at Pages 20-21.

[38] *Id.*

[39] *See* Eisenberg Affirmation.

B. Because the NYAG needed an excuse for the requested extension, she decided to blame the NRA. But the NRA's record of cooperation—in response to the NYAG's unduly burdensome requests—is unassailable.

Because of the Attorney General's inability to obtain the above-referenced discovery—which she clearly thinks she needs for trial, the NYAG now asks the Court for an extension of fact discovery.[40] However, rather than confess that the reason for the request is her own failure to take discovery when that opportunity was available, the NYAG disingenuously blames the NRA. Even though she admits that the NRA to date produced to her "enormous" amounts of data, she comes up with a kitchen sink of meritless accusations and a false narrative that is easily debunked.[41] As an initial matter, in this action alone, the NRA produced to the NYAG over 1,000,000 pages of records, including email messages, text messages, other electronic documents, and scanned documents maintained in hard copy form.[42] In addition, during her investigation and in this action, the NYAG already obtained from numerous third parties other voluminous records.[43] During her 16-month investigation of the NRA, she, among other things, took testimony of at least 13 witnesses and, on information and belief, interviewed others; and subpoenaed more than 100,000 documents from the NRA and third parties.

As a result, there can be no debate that the NRA has complied with—and in fact—exceeded its obligations under the CPLR[44] and the NYAG's request for an extension is based on a false premise and should therefore be denied.

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[40] *Id.* at ¶ 29.

[41] *See* NYAG OTSC, at Page 12**.**

[42] *See* Eisenberg Affirmation at ¶ 27.

[43] *Id.* at ¶¶ 10, 17, 27.

[44] The preamble to the Commercial Division Rules explicitly "encourage[s] proportionality in discovery." 22 NYCRR § 202.70(g); *see also Ambac Assurance Corp. v. First Franklin Financial Corp.*, 2016 WL 3671111 at *4 (N.Y. Sup. Ct. July 8, 2016) ("the spirit of the commercial rules [is to] encourage 'proportionality in discovery' to effectively resolve matters"). Further, "[t]he standards of usefulness and reason, in addition to consideration of

III.
ARGUMENT

A. The NYAG failed to establish the requisite good cause for extending the discovery schedule.

The NYAG concedes that to obtain the extension she seeks, the burden is on her to demonstrate good cause for the extension.[45] In her attempt to do so, the NYAG claims that the NRA failed to complete an "orderly production of NRA documents, privilege logs, and the privilege review of third party documents."[46] The NYAG then argues that, based on these alleged factual predicates, an extension of the discovery schedule is warranted.[47] In reality, as demonstrated below, the NRA is in substantial compliance with its discovery obligations and is in the process of completing in a timely manner its review of third party documents and preparing a privilege log. The NYAG, by comparison, did not produce her privilege log for almost a year after she claimed to have completed her productions. Given this inordinate delay by the NYAG, the NRA actually is ahead of schedule and the NYAG is precluded from arguing that any delay in the production of the privilege log by the NRA is unreasonable. As a result, the NYAG is not entitled to an extension.

1. The NRA has substantially complied with and exceeded its discovery obligations.

The NYAG falsely claims that the NRA is yet to complete an orderly production of its documents. In reality, despite the NYAG's unreasonably broad and unduly burdensome demands,

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expense and undue disadvantage, have always been considered under CPLR 3103 in limiting the scope of discovery." Subcommittee on Procedural Rules to Promote Efficient Case Resolution, Proposal to Amend Preamble of the Commercial Division Rules to Mention Proportionality (March 6, 2015), available at https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/CD-Proportionality.pdf

[45] *See* NYAG OTSC, at Page 15.

[46] *See* NYAG OTSC, at Page 15-16.

[47] *Id.* at Page 19.

the NRA has gone above and beyond its discovery obligations and has to date produced over a million pages of records to the NYAG.[48]

After the NYAG served on June 25, 2021 her sixty-two requests for documents, on July 15, 2021, the NRA objected to most of such requests—pursuant to CPLR 3122—as, among other things, unduly burdensome and/or unreasonably broad.[49] There were multiple problems with the NYAG's requests. To begin with, the first of the sixty-two requests incorporated by reference fifty-five requests previously propounded by the NYAG during her investigation (and objected to by the NRA as unduly burdensome). As a result, in effect, the NYAG was demanding that the NRA comply with **over 100 individual requests,** many of which—to make the demand even more burdensome—consisted of multiple subparts. E.g., RFP Nos. 19, 27, and 38 (consisting of 6, 7, and 9 subparts, respectively).

In addition, most of the individual requests were broadly worded and called for an inordinate amount of information, much of it having nothing to do with the allegations in her complaint. For instance, Request No. 19, which consisted of six subparts, called, in part, for "all documents summarizing or reporting on the [NRA's] financial condition and projected financial condition [since January 1, 2015]." In subpart one of Request No. 19 alone, the NYAG demanded that the NRA produce not only "reports . . . of [the NRA's] assets [since 2015]," but also, for the same time period, all of the NRA's [2] liabilities, [3] revenues (including member dues and contributions), [4] expenses, [5] cash flows, [6] business operations, [7] fundraising results, [8] cash receipts, [9] cash disbursements, [10] potential liability of pending litigation, [11] costs of pending litigation, [12] potential liability of anticipated litigation, [13] costs of anticipated

[48] *See* Eisenberg Affirmation at ¶ 27.

[49] *Id.* at ¶ 18.

litigation, [14] financial forecasts, [15] any assessments of the preceding 14 matters, and [16] any audits of the same 14 matters.

Similarly, Request No. 17 called for "all" documents concerning payments to "any" of the NRA's current or former directors, executives, or officers. Request No. 16 called for "all documents [since 2015] relating to [among other things] reviews . . . concerning any governance, managerial or financial problems within the NRA."

Nor was the timeframe of the requests properly circumscribed. For example, Request No. 38, which consisted of 9 subparts and went on for an entire page (single-spaced), demanded "documents, including communications, from 1997 to the present."

Indeed, literal compliance with each of the NYAG's requests would have taken years to complete. Naturally, in its objections, the NRA advised the NYAG that it would undertake a reasonably diligent effort to search for and produce non-privileged requested documents to the extent they exist and was available to meet and confer about an appropriate set of search parameters to comply with the requests.[50] At that point, the NYAG could have moved to compel the NRA to comply with all of her unreasonably broad and burdensome demands,[51] yet presumably understood that the CPLR imposes no such obligations. So the NYAG and the NRA instead set out on a months-long process—which was not completed until early November 2021—during which the NYAG identified and calibrated, based on hits counts repeatedly and patiently provided by the NRA, about 110 sets of search strings, each consisting of multiple search terms and proximity

[50] *Id.* at ¶ 18.

[51] CPLR 3122(a)(1) ("The party seeking disclosure under rule 3120 or section 3121 may move for an order under rule 3124 or section 2308 with respect to any objection to, or other failure to respond to or permit inspection as requested by, the notice or subpoena duces tecum, respectively, or any part thereof.")

operators and each designed to semi-automate the review process as the NRA said it would do but do so through the use of search terms picked by the NYAG.[52]

Notably, during the negotiations of the 110 search strings, the NRA repeatedly requested that the NYAG further narrow her search terms because the NYAG's proposed list was unduly long and hitting on a disproportionately high number of documents.[53] In the end, although the NRA believed that the final list was still unduly long, the NRA agreed to the list in an effort to accommodate the NYAG's requests and to avoid burdening the Court with a discovery dispute.[54]

After the parties settled on the list of the 110 search strings, the NRA began its searches, review, and productions.[55] The NYAG concedes that the NRA's productions are voluminous and contain highly relevant documents but falsely claims that the NRA's compliance is nonetheless deficient because (i) according to the NYAG, the NRA should have begun its productions ***before*** the search parameters were finalized; and (ii) according to the NYAG, the NRA must specify what specific request in the broad set of sixty-two requests matches each of the documents that the NRA produced.[56] The NYAG's arguments, however, plainly lack merit. First, the process of running search parameters through the data, batching out hits for privilege and First Amendment review, and producing nonprivileged hits is a highly technical, detail-oriented, time-consuming and costly process.[57] Any fragmentation of the process would have defeated the purpose of the pre-agreed upon set of search parameters. After all, had the NRA broken up its review as the NYAG suggests and initiated an *en masse* review while the search strings negotiations with the NYAG were

[52] *See* Eisenberg Affirmation at ¶¶ 19-24.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *See* NYAG OTSC, at Page 9.

[57] *See* Eisenberg Affirmation at ¶ 26.

ongoing, the process would have gone back to being as unduly burdensome as when the negotiations first started. Second, it is disingenuous for the NYAG to suggest that the NRA's productions of over 1 million pages of documents to the NYAG should have included a document-specific listing of the NYAG's requests to which each document is responsive. Nothing in the CPLR imposes such a burden, and doing so would have eroded any efficiencies gained through the search terms-based review process. After all, a reviewer would have had to pause on each document that hit on search terms and evaluate it for responsiveness to each of the NYAG's sixty-two document requests. Moreover, nothing prevents the NYAG from running the 110 search strings individually in her own database in order to identify documents that hit on each string. As a result, the NRA objects to the NYAG's accusation that the NRA is "hiding the ball"[58] as utterly baseless and the suggestion that the NRA has a legal obligation to assist the NYAG with the search and review process.

The NYAG makes much of the fact that the NRA is continuing to produce records to the NYAG. But the NYAG ignores the fact that, by the end of December 2021, the NRA had produced to the NYAG over 160,000 documents constituting over 70% of documents produced to date.[59] Therefore, as the NRA told the NYAG then,[60] as of December 2021, the NRA already was in substantial compliance with its discovery obligations. That the NRA has continued to date to produce documents to the NYAG does not render the NRA's production as of December 2021 not substantially complete, did not require a postponement of any of the depositions, and does not warrant the extension the NYAG seeks. The NYAG cites no rule or law that requires the party requesting a deposition to have received before the deposition every communication exchanged

[58] *See* NYAG OTSC, at Page 16.

[59] *See* Eisenberg Affirmation at ¶ 27.

[60] *Id.*

by the deponent. In the event the NYAG receives after a deposition new material that warrants an additional deposition, nothing precludes the NYAG from securing an additional deposition upon the requisite showing then. Here, the NYAG merely speculates that this will occur.[61] Moreover, although the NYAG alleges that certain documents related to a handful of deponents were received by her after their depositions, her assertions of prejudice are conclusory as she fails to explain with any particularity how she has been prejudiced.[62] For example, the NYAG does not assert that documents produced after the depositions revealed new topics for deposition inquiries of which the NYAG did not know at the time of the deposition.

Her accusations related to texts from a deponent's mobile device are similarly meritless. As NYAG well knows, the deponent could not remember the password to the device and, as a result, despite expending significant resources and time, the NRA's forensic vendor was initially unable to image the device. Yet, the NRA kept trying to think of a solution and, in fact, managed to come up with a way to help the deponent recall the password and to image the device before the deposition. It is surprising that, in her motion, the NYAG omits this important context from her discussion of this issue.

In addition, that the NRA's production of documents is still ongoing is the product of the NYAG's own choices. The NYAG chose not to serve her discovery requests until almost a year after she commenced this litigation, even though under the CPLR and the Commercial Division Rules she could have served her requests as early as August 2020.[63] The NYAG chose to engage in the Fall of 2021 in a protracted months-long negotiation about the search parameters, even though should could have foregone the delay by agreeing to a more reasonable set of terms early

[61] *See* NYAG OTSC, at Page 19-20.

[62] *Id.* at Pages 16-17, 19-20.

[63] *See* CPLR 3120; *see also* 22 NYCRR § 202.70-11.

on. And the NYAG chose to demand that in the Fall of 2021, the NRA divert its resources—which could have singularly been focused on review and productions—to update its collection of emails, other electronic documents, and—to a significant extent—text messages, whereas she could have agreed to limit the productions to records that had been collected as of late 2020/early 2021.[64] The NYAG does not justify her own decisions to delay matters. She merely claims—disingenuously—that "as a practical matter, the intensive and expedited bankruptcy proceedings in January through May 2021 interrupted discovery in this action."[65] The NYAG fails to mention that the NRA specifically advised the Court and the NYAG that even though the NRA was involved in a chapter 11 proceeding, the automatic stay under 11 U.S.C. 342 did not apply to this action. In addition, the NYAG does not explain why she chose to postpone serving her discovery demands while the NRA's bankruptcy proceeding was pending. There are at least nine Assistant Attorneys General who have appeared in this case. Moreover, during the chapter 11 proceedings, additional lawyers (Texas-based bankruptcy counsel) represented the NYAG. Therefore, there is no reason why the NYAG could not have issued its discovery demands as early as January 2021 or earlier and her allegations of purported "impracticality" or "interruption" baseless.

2. <u>The NRA has or is completing its privilege review of third party documents in a timely fashion.</u>

The NYAG is further grasping for straws when it accuses the NRA of having failed to review timely for privileges and First Amendment redactions materials prepared for production by third parties.[66]

[64] *See* Eisenberg Affirmation at ¶ 18.

[65] *See* NYAG OTSC, at Page 5.

[66] *See* NYAG OTSC, at Pages 4, 13-14, 17-18.

With regard to Aronson, the NRA has to date reviewed and cleared for production seven batches of Aronson's documents and, at all times, proceeded with exemplary speed.[67] That Aronson is continuing to produce documents to the NYAG more than half a year after the NYAG served her subpoena is a product of the burdensome nature of the NYAG's subpoena, not any alleged delay by the NRA. In fact, to date, the NRA's payments to Aronson for work, legal fees, and costs associated with its compliance with the NYAG's subpoena exceed $100,000. Moreover, although the NYAG appears to blame the NRA for the timing of Aronson's production, she does not articulate how precisely the NRA is at fault. Nor can she make that claim. As a recent example of the NRA's extraordinary cooperation with the NYAG, on January 25, 2022, the NRA received from Aronson a new batch of about 770 documents proposed by Aronson for production.[68] Although the NRA was in the middle of its own document review and production, it devoted resources to clearing the production in ***less than two days***.[69]

With regard to Chris Cox, the NYAG yet again distorts the record. The NRA is not in violation of any court order with regard to his production. In fact, the NRA had complied with the first portion of the order before the Court even entered it, clearing before the January 5, 2022 hearing more than 2,850 documents prepared by Cox for production.[70] Further, consistent with the Court's order, dated January 5, 2022, the NRA has completed its review of Cox's documents.[71]

With regard to Mr. Powell's documents, the NRA met and conferred with counsel for Mr. Powell on January 24, 2022, in order to better understand the basis on which Mr. Powell claims

[67] *See* Eisenberg Affirmation at ¶ 12-13.

[68] *Id.*

[69] *Id.*

[70] *Id.* at ¶ 14-15.

[71] *Id.* at ¶ 15.

that his counsel should be entitled to review certain of the likely privileged documents belonging to the NRA.[72] In light of the information the NRA learned during the meet and confer,[73] which was the first time the Association received a specific description of the documents at issue, the NRA does not believe that Mr. Powell is entitled to review them at all. In fact, the NRA believes that the documents should be handed over to the NRA immediately. In the event the issue cannot be resolved amicably with Mr. Powell, the NRA intends to seek a ruling from Judge Sherwood to that effect. Furthermore, the NRA intends to complete its review of the 5,512 documents transmitted by Mr. Powell's counsel to the NRA on January 19, 2022, for the NRA's review by no later than February 15, 2022.[74]

Finally, it is true that the NRA has not yet had a chance to prepare a privilege log for the privileged materials it directed Aronson, Cox, and Powell to withhold. The NRA believes that it will be much more efficient to list those documents on the same log as the documents withheld from its own productions. As noted above, the NYAG waited for over 10 months to produce its privilege log to the NRA and therefore has no standing to complain.

B. That the NRA will suffer prejudice from the extension the NYAG seeks is another reason why the Court should deny the NYAG's request for an extension.

The NYAG claims in conclusory terms that the NRA will not suffer any prejudice as a result of the extension.[75] The NYAG fails to even mention—let alone address—the NRA's letter to the NYAG dated January 20, 2022.[76] In that letter, the NRA made it clear that it opposed the NYAG's request for an extension precisely because such an extension would cause substantial

[72] *Id.* at ¶ 16.

[73] *Id.*

[74] *Id.*

[75] *See* NYAG OTSC, at Page 19-20.

[76] *See* Eisenberg Affirmation at ¶ 28 (January 20, 2022 Letter Correspondence).

prejudice to the NRA.[77] Specifically, the NRA explained that the unjustified extension not only greatly inconveniences the schedules of its executives and volunteer Board members but also further chills the exercise of First Amendment rights by the NRA and its members. The NRA wrote:

> 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 [four witnesses]. 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.[78]

[77] *Id.*

[78] *Id.*

IV.
CONCLUSION

For the foregoing reasons, the Court should deny the NYAG's motion in its entirely with prejudice and order such other relief as the Court deems just and appropriate.

Dated: February 8, 2022

Respectfully submitted,

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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 memorandum of law in opposition to the NYAG's Order to Show Cause to Extend Discovery Deadlines 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 5,770 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.

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