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VIA NYSCEF

Honorable Joel M. Cohen
Justice of the Supreme Court of the State of New York State
Commercial Division, New York County
60 Centre Street
New York, NY 10007

Re: *People of the State of New York, by Letitia James, Attorney General of the State of New York v. The National Rifle Association of America, Inc. et al.*, Index No. 451625/2020

Dear Justice Cohen:

On behalf of the Plaintiff, the People of the State of New York, the Office of the Attorney General of the State of New York (“OAG”) respectfully writes in accordance with the Court’s Practices and Procedures Rule VI(B), Rule 14 of the Rules of the Commercial Division, and CPLR 3103, to join Everytown for Gun Safety Action Fund, Inc.’s (“Everytown”) motion to quash the Amended Subpoena *Duces Tecum* and *Ad Testificandum* issued by the National Rifle Association of America (“NRA”) and for a protective order regarding such subpoena. NYSCEF 566. Everytown is a non-party, and submitted its motion prior to the appointment of Justice O. Peter Sherwood as a Special Master for Discovery in this matter. The OAG asks that this matter be referred to Judge Sherwood in his capacity as Special Master. Everytown has informed the OAG that it has no objection to the referral.

I. Factual & Procedural Background

On August 6, 2020, after an extensive investigation, the OAG filed a civil enforcement action against the NRA and four of its current and former officers and directors. A year later, following the NRA’s unsuccessful bid to avoid New York’s regulatory oversight by filing for Chapter 11 bankruptcy, the OAG supplemented its complaint with factual allegations of misconduct that had occurred since the filing of the original complaint (“Supplemental Complaint”).

The Supplemental Complaint contains over 750 paragraphs of detailed allegations of substantial violations of New York laws governing charities by the NRA. It states, *inter alia*, that the NRA, its officers, and its Board permitted the diversion of millions of dollars away from the NRA’s charitable mission. NYSCEF 333 at ¶¶ 2-11. Further, it alleges that such misconduct is ongoing and includes the filing of the NRA’s failed bankruptcy petition in 2021. *See* NYSCEF

247 (decision dismissing bankruptcy). The Supplemental Complaint asserts 18 causes of action under New York Not-for-Profit Corporation Law and the Estates, Powers and Trusts Law.

Immediately after the original complaint was filed, the NRA filed a federal action against the OAG alleging, *inter alia*, First Amendment retaliation and selective enforcement. The NRA voluntarily withdrew that action while a fully briefed motion to dismiss was pending. It then asserted essentially the same claims against the OAG as counterclaims and then amended counterclaims in the state court action. NYSCEF 230 and 325, both of which the OAG moved to dismiss. NYSCEF 279 and 513. Oral argument on the fully briefed motion to dismiss the NRA's counterclaims is set to take place on February 25, 2022. This Court has stated that discovery on the counterclaims will proceed on a separate track should the counterclaims survive dismissal.¹

On December 30, 2021, the NRA served a subpoena seeking expansive discovery from Everytown, an advocacy organization, which is not a party to this action and whose conduct is not at issue. The NRA requested the production of documents and the testimony of a corporate representative of Everytown on a range of topics that are wholly unrelated to the factual allegations set forth in the Supplemental Complaint. Everytown objected to the subpoena. On January 19, 2022, the OAG wrote a letter to the NRA pursuant to CPLR §§ 2304 and 3103; the Court's Individual Practices and Procedures VI(B); and Rule 14 of the Commercial Division Rules requesting that the NRA withdraw the Subpoena in its entirety on multiple grounds, including that the requests therein were overly broad, unduly burdensome, not material or necessary to the prosecution or defense of the underlying action, and sought documents and testimony that related wholly to the NRA's counterclaims, discovery of which is effectively stayed pursuant to the Court's direction. On January 24, 2022, the NRA responded to the OAG's request by refusing to withdraw the Subpoena. On February 1, 2022, Everytown moved to quash the NRA's subpoena and sought a protective order foreclosing the NRA's requested discovery pending resolution of the OAG's motion to dismiss the counterclaims. On February 7, 2022, the Order appointing Justice Sherwood as special master was signed. For the reasons set forth below, the OAG now seeks to join Everytown's motion and asks that it be referred to the special master.

II. The Subpoena Should be Quashed on the Basis that it Seeks Information that is The Plainly Irrelevant to the OAG's Enforcement Action

Under the CPLR, a party is only entitled to seek discovery from a nonparty to the extent the information sought is "material and necessary in the prosecution or defense of an action." CPLR § 3101(a)(4). In making this determination, "the proper inquiry is whether the information sought bears on the controversy and will assist in the preparation for trial." *Bolton v. Weil, Gotshal & Manges LLP*, 2004 WL 2239545 at *3 (Sup. Ct. 2004). Where a subpoena seeks information that is "utterly irrelevant to the matter at hand," it is appropriate for the court to grant a motion to quash the subpoena. *See Reuters Ltd. v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 341, (1st Dep't 1997)(internal citations and quotation marks omitted). The court should not "permit the subpoena power to be used as a tool of harassment or for the proverbial 'fishing expedition' to ascertain the existence of evidence." *Reuters* at 342.

¹ NYSCEF 544 (Mar. 9 2021 Tr.)p. 25 ("Why don't we just ... hold off on discovery on [the counter]claims for now."); NYSCEF 511 (Dec. 10, 2021 Tr.) pp. 7-8 ("my understanding was that the parties have held off on discovery on the counterclaim until the motion to dismiss was decided, ... in this case, you've got enough to do on the main claim that I would be okay with a discovery proceeding in two tracks.").

In the instant case, the NRA states that the requested disclosure from Everytown is “relevant, necessary and material to the prosecution and defense” of the pending action. However, the action to which the NRA’s nonparty subpoena relates is focused exclusively on the conduct of the NRA and its leadership as it relates to New York not-for-profit law. Not a single allegation in the Supplemental Complaint implicates substantive matters related to Everytown’s activities and the misconduct alleged is entirely unrelated to Everytown.

Nevertheless, the NRA issued a sweeping subpoena to Everytown seeking testimony and documents related to a broad range of issues that bear no relationship to the matters at issue in the above-referenced action. For example, the Subpoena requests communications between Everytown and the Attorney General, former Governor Andrew Cuomo, Michael Bloomberg, New York’s Department of Financial Services, the Democratic National Committee, the Gifford’s Law Center to Prevent Gun Violence, and others. Not only are these requests not “material and necessary” to the prosecution or defense of this action, they are “utterly irrelevant” to matters at issue in the underlying regulatory action.² The Subpoena should therefore be quashed in its entirety.

III. Protective Order Should Be Granted Pending Resolution of the OAG’s Motion to Dismiss the NRA’s Counterclaims

Pursuant to CPLR § 3103(a), the court may, in its discretion, issue a protective order “to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.” In exercising this discretion, the court must weigh the need for discovery against the detrimental effects of disclosure “in light of the facts of the particular case before it.” *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 461 (1983); *Jones v. Maples*, 257 A.D.2d 53, 56-57 (1st Dep’t 1999).

A protective order is appropriate where, as here, the material sought in the subpoena is plainly irrelevant, the subpoena represents an attempt to evade the OAG’s objections to similar discovery demands made by the NRA to the OAG, and compliance with the subpoena is likely to result in the production of an overbroad array of documents and the provision of extensive testimony, neither of which, in any manner, relate to the regulatory action that is the subject of the pending Supplemental Complaint. A protective order is also appropriate here because compliance with the NRA’s Subpoena is, at best, premature.

The only possible basis on which the NRA could be seeking discovery concerning Everytown’s interactions with the OAG and other New York state agencies and officials is to support the conspiracy theory advanced in its counterclaims. Argument on the OAG’s Motion to Dismiss the NRA’s counterclaims is scheduled for February 25, 2022, after which the Court will determine whether discovery on the counterclaims will proceed and, if so, the appropriate scope of such discovery. Thus, even if the Court does not quash the Subpoena in its entirety, a protective order barring the NRA’s requested discovery should be granted until such time as the Court has determined if the counterclaims may proceed. The propriety of the NRA’s subpoena to Everytown should be assessed in light of the Court’s ruling.

² The documents and testimony sought in the subpoena to Everytown mirror the NRA’s discovery demands previously directed to the OAG. The OAG timely served objections to those discovery demands, on the basis that, *inter alia*, the requests related wholly to the NRA’s counterclaims, were overly broad, unduly burdensome, not material or necessary to the prosecution or defenses of the action, and not reasonably calculated to lead to discovery of evidence material and necessary to the prosecution or defense of the action.

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We thank the Court for its attention to these matters.

Respectfully,

/s/ Monica Connell

Monica Connell
Assistant Attorney General

cc: All Counsel of Record