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.	INDEX NO.: 451625/2020 Motion Seq. No. 25

THE NATIONAL RIFLE ASSOCIATION OF AMERICA'S MEMORANDUM OF LAW IN OPPOSITION TO EVERYTOWN FOR GUN SAFETY ACTION FUND, INC.'S MOTION TO QUASH AND FOR A PROTECTIVE ORDER

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The National Rifle Association of America (the "NRA") respectfully submits this memorandum of law in opposition to Everytown for Gun Safety Action Fund, Inc.'s ("Everytown") motion to quash a subpoena (the "Subpoena") and for a protective order. The NRA also cross-moves for an order pursuant to article 31 and CPLR 3124 compelling Everytown to comply with the Subpoena.

I.
PRELIMINARY STATEMENT

The Court should overrule Everytown's objections to the Subpoena and compel Everytown to comply with its discovery obligations under article 31 of the CPLR. After Everytown apparently "warn[ed]" the NYAG in 2019 (and possibly earlier) of alleged corruption at the NRA and indeed dispatched a group of its representatives to meet with senior NYAG officials in February 2019, the NYAG commenced an expansive investigation of the NRA in the hopes of uncovering pervasive evidence of wrongdoing sufficient to warrant the NRA's dissolution.

Specifically, a representative of the NYAG testified under oath that, in February 2019, Everytown met with representatives of the NYAG in order to advise the NYAG of a complaint about the NRA's 2017 Form 990 filing. (William Wang deposition at 54:13 – 77:3). According to sworn testimony of an Assistant Attorney General, the team from Everytown that attended the meeting included Jason Lilien (a former head of the OAG's Charities Bureau and, at the time of the meeting, Everytown's outside counsel), Nicholas Suplina (Everytown's Managing Director for Law and Policy), Rachel Nash (Legal Consultant at Everytown), Michael-Sean Spence (Everytown's Senior Director, Community Safety Initiatives), and an individual named Michael Kane. (William Wang Deposition at 55:18-21). The Everytown team met with the Charities Bureau Chief and Lilien's successor, James Sheehan, and then-Assistant Attorney General Laura Wood. Assistant Attorney General Wang testified that at the time of the meeting Ms. Wood served

as "an Assistant Attorney General within the executive division of the [NYAG's] office." (William Wang Deposition at 55:14-15).

Although the NYAG's subsequent 15-month investigation of the NRA revealed no evidence warranting the draconian remedy of dissolution, when the NYAG filed her complaint against the NRA in August 2020, she chose to seek the NRA's dissolution anyway. And in her lawsuit, the NYAG features prominently the topics her representatives discussed with Everytown on the eve of her investigation, including the NRA's tax filings (which the NYAG claims are materially false or misleading, *see e.g.*, NYSCEF 333, Compl. at 109-113) and allegedly improper related-party transactions (which the NYAG seeks to unwind, *see, e.g.*, NYSCEF 333 Compl. at 36-93). In the face of these facts, Everytown cannot show that the disclosure the NRA seeks from Everytown is utterly irrelevant. *See also* Affirmation of Svetlana Eisenberg at ¶ 6.

Everytown's claims that the Subpoena is overly broad or unduly burdensome are similarly meritless. Everytown refuses to provide any indication of the volume of responsive documents, and it is unclear if Everytown has made any attempt to estimate the claimed burden—if any—of complying with the NRA's subpoena. Accordingly, Everytown's objections should be overruled.

Indeed, Everytown's arguments—considered as a whole—are self-defeating: If Everytown has so many responsive documents that production would be unduly burdensome, then its argument that it is unconnected to this case fails. On the other hand, if Everytown has few responsive documents and few communications to discuss at its deposition, then Everytown cannot claim to be unduly burdened by Subpoena.

Finally, in light of the Court's recent three-month extension of fact discovery, any arguments by Everytown that the Subpoena is burdensome because it seeks a response promptly

are moot. By now, Everytown has been on notice of the Subpoena for over seven weeks—ample time to prepare a production and for its deposition.

The NRA respectfully requests that the Court deny Everytown's Motion to Quash the Subpoena and grant the NRA's cross motion for an order compelling Everytown to comply with its proper discovery requests.

II.
BACKGROUND

On December 30, 2021, the NRA served Everytown with a Subpoena requesting testimony and documents in connection with this action. The Subpoena called for twelve categories of documents and enumerated eight topics for Everytown's Rule 11-f deposition. The Subpoena stated that the documents had to be produced by no later than January 20, 2022 and that the deposition would take place on February 2, 2022.

Everytown then requested that the NRA agree to an extension to Everytown's deadline for its production of documents. The NRA agreed to a modest extension and reminded Everytown that the deposition, in any case, was scheduled for February 2, 2022. After Everytown missed its deadline to inform the NRA of the representatives it designated for the Rule 11-f deposition (that deadline falls on 10 days before the deposition), the NRA asked Everytown to remedy its failure and to comply with its designation obligations under the applicable rules. It was at this point that Everytown for the first time informed the NRA that it was not going to appear for the deposition. Although Everytown served objections to the Subpoena, they identified no valid basis for Everytown's refusal to appear for the deposition. Ultimately, one day before the deposition was scheduled to proceed and thirty-three days after being served with the Subpoena, Everytown filed this motion for a protective order and to quash the subpoena.

In the course of its communications with the NRA, importantly, Everytown never proposed alternative deposition dates or claimed that the specific date designated by the NRA was not convenient for its representatives. Instead, throughout these communications and in its motion, Everytown took the position that it should not have to comply with the Subpoena because the information the NRA seeks is irrelevant to the action. Further, Everytown never provided the NRA with any indication of the volume of responsive documents, or any difficulty in collecting documents in response to the NRA's subpoena.

In apparent coordination with the NYAG, Everytown served its objections to the Subpoena on the same day that the NYAG requested that the NRA withdraw the Subpoena.[1] In its objections, Everytown raised general objections, such as overbreadth an undue burden posed by the document requests. The NRA informed the NYAG that she had no standing to interfere with the NRA's effort to obtain discovery from a third party and that the NRA would not withdraw the Subpoena. Also, the NRA informed Everytown that it was willing to engage with Everytown on the issue of alleged burden: if Everytown could explain why the requests are burdensome, the NRA would be glad to try to narrow them. Everytown, however, refused to provide any such information. In fact, it even refused to say whether responsive documents exist.

[1] The NYAG has no standing to request withdrawal of the Subpoena. Nonetheless, NYAG's reliance in her letter on *Reuters* Ltd. *v. Dow Jones Telerate, Inc.*, 231 A.D.2d 337, 341 (1st Dep't 1997), is unavailing because the NRA's Subpoena is a narrowly tailored request for documents and deposition testimony, not, as the NYAG suggests, a "fishing expedition." Furthermore, the NYAG's statement that "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" is, for the reasons set forth in this Opposition, simply not true.

III.
ARGUMENT

A. Under the applicable legal standard, Everytown must show that the disclosure sought is "utterly irrelevant," which it cannot do.

In *Matter of Kapon v. Koch*, the Court of Appeals made clear that, as the party seeking disclosure, the NRA must first provide Everytown with adequate notice of reasons or circumstances requiring disclosure. *See* 23 N.Y.3d 32, 33 (2014). Upon such notice, as the party moving to quash the Subpoena, Everytown must establish either that the discovery the NRA seeks is utterly irrelevant or that the futility of the process to uncover anything legitimate is inevitable or obvious. 23 N.Y.3d 32, 33 (2014). Only if Everytown meets this burden, the NRA as the subpoenaing party must then establish that the discovery sought is "material and necessary" (that is, "relevant") to the prosecution or defense of this cation. *Id*. "[S]o long as the disclosure sought is relevant to the prosecution or defense of [the] action, it must be provided by [Everytown]." *See id.* at 38.

B. The NRA provided sufficient notice of the circumstances and reasons requiring disclosure

Everytown asserts that the Subpoena and accompanying pleadings did not adequately reveal the reasons and circumstances necessitating Everytown's disclosure. That assertion is inaccurate. The pleadings attached to the NRA's Subpoena, depositions topics listed in the Subpoena, and document requests enumerated by the NRA provided Everytown with ample requisite notice.

Under CPLR 3101(a)(4), where a party seeks disclosure from a nonparty, it must include in the subpoena the "circumstances or reasons such disclosure is sought or required." As the Court of Appeals noted, this requirement is intended to "apprise a stranger to the litigation of the circumstances or reasons why the requested disclosure [is] sought or required." *Kapon*, 23 N.Y.3d

at 39 (cited in NYSCEF 566, Memorandum of Law in support of Everytown's Motion for a Protective order at Page 8).

Here, in February 2019, just two months before the NYAG announced her investigation of the NRA, multiple representatives of Everytown, including its outside counsel, convened an hourlong meeting with two senior officials from the NYAG's office to discuss the NRA, its IRS filings, and allegedly improper related party transactions. In fact, in August 2021, in commenting on the NYAG's amended complaint against the NRA in this action, Everytown's President claimed that the NRA had engaged in corruption, that scrutiny on the NRA was long overdue, that Everytown had warned regulators about the NRA's alleged corruption "for years," and that, by filing for chapter 11 protection, the NRA purportedly gave NYAG further ammunition and "bolster[ed]" Everytown's case against the NRA.[2] Everytown therefore cannot credibly claim to be a "stranger" to the action.

Nonetheless, to comply with its obligations under CPLR 3101, in the Subpoena, the NRA specifically stated that the circumstances and reasons requiring the disclosure sought were set forth in the pleadings that the NRA attached to the Subpoena. One such pleading—the NYAG's Amended Claims against the NRA—in turn alleges, among other things, that the NRA's regulatory filings—including the ones Everytown reviewed with the NYAG—contain materially false statements and that the NRA had engaged in improper related party transactions. Another pleading attached to the Subpoena—the NRA's Amended Answer to NYAG's original Claims—also alleges that what motivates this action is Letitia James's animus toward the NRA's constitutionally

[2] https://www.everytown.org/press/new-ny-ag-complaint-alleges-nra-spent-shocking-10m-on-private-jet-travel-75m-on-lawyers-building-on-nra-failed-bankruptcy-attempt-revelations/ (""Wayne LaPierre's failed bankruptcy scheme gave the NRA a stack of legal bills — and the New York Attorney General a stack of legal ammunition," said John Feinblatt, President of Everytown for Gun Safety. "Everytown has been warning regulators and the public about the NRA's corruption for years, and the NRA bolstered ***our case*** when it filed for bankruptcy and opened itself up for long-overdue scrutiny.")

protected political speech in support of the Second Amendment, her desire to destroy a political enemy, and her attempt to promote her own political career at the expense of the NRA's and its members' constitutional liberties. Finally, including based on the foregoing grounds, the Amended Answer asserts numerous defenses to the NYAG's claims against the NRA, including on lack-of-standing and regulatory estoppel grounds. Therefore, the allegations and defenses asserted by the parties provide Everytown with ample notice of the reasons and the circumstances for the disclosure that the Subpoena seeks.

In addition, the reasons and circumstances for the disclosure are revealed by the requests for documents and the deposition topics listed in the Subpoena. For example, the requests refer to communications related to the February 14, 2019 meeting between Everytown and the OAG and communications related to any other meetings between the two organizations about the NRA. Other requests zero in on the multiple representatives of Everytown in attendance at the February 14, 2019 meeting with OAG and seek any communications about the NRA between the attendee and the OAG.

Deposition topics are similarly informative. For example, one topic lists a series of statements by Candidate James during her campaign for Attorney General, in which she accused the NRA of disseminating "deadly propaganda," called it a "terrorist organization," and a "criminal enterprise," and vowed to "take it down." The deposition topic notifies Everytown that, at the deposition, its representative(s) would be asked about any communications between Everytown and the campaign in connection with the quoted statements or similar statements.

Everytown's reliance on *Gandham v. Gandham*, 170 A.D.3d 964 (2d Dep't 2019), and *Phoenix Grantor Trust v. Exclusive Hosp. LLC*, 59 Misc. 3d 1231[A], 2018 Slip Op 50808[U] (Sup. Ct., Queens County 2018), is unavailing because both cases are inapposite.

In *Gandham*, a divorce action by the husband, the wife alleged that he had had an affair, and served a nonparty subpoena on one of husband's alleged mistresses. *Id.* at 965-66. The court quashed the subpoena for failure to provide the nonparty with required explanation of the circumstances or reasons requiring disclosure. *Id.* Unlike here, there is no indication that the subpoena in *Gandham* attached pleadings for context or that the subpoena recipient was otherwise familiar with the litigation. *See generally, id.*

Phoenix Grantor Trusts is similarly inapposite. The subpoena there asserted that disclosure was sought because the recipient "possess[es] information material and relevant to the dispute between to [sic] the parties concerning the matters set forth in Exhibit A." *Phoenix Grantor Tr.* 59 Misc. 3d at *4. Importantly, Everytown fails to mention that "Exhibit A" to the *Phoenix Grantor* subpoena only contained "definitions and instructions, followed by a list of the documents requested . . . ." *Id.* The *Phoenix Grantor* court found the subpoena failed to convey sufficient notice because "it did not indicate the circumstances or reasons why disclosure is sought . . . [and] there [was] no separate notice . . . accompanying the subpoena." *Id.* In contrast, here, the NRA's subpoena attached the pleadings and included descriptive deposition topics and document requests.

As a result, the Court should overrule Everytown's objection to the Subpoena on the grounds of allegedly inadequate notice.

C. Everytown fails to show that the requested disclosure is "utterly irrelevant."

The party resisting discovery, in moving to quash, must establish either that the discovery sought is "utterly irrelevant" to the action or that the "futility of the process to uncover anything legitimate is inevitable or obvious." *Matter of Kapon*, 23 N.Y.3d at 34. Everytown fails to meet its burden here.

The disclosure the Subpoena seeks is relevant to the NYAG's action against the NRA and the NRA's defenses against the action. Everytown's assertion that the Subpoena "relates entirely

to the NRA's counterclaims" is incorrect. NYSCEF No. 566. The relevance of information to counterclaims does not render it irrelevant to the prosecution and defense of the NYAG's claims. Everytown's documents and testimony bear directly on the NYAG's claims against the NRA, and the NRA's defenses.

As an initial matter, to prepare for trial, NRA is entitled to the information underlying Everytown's "warning[s]" of corruption at the NRA to the regulators. The substance of such warnings is evidence that may be introduced against the NRA at trial. Accordingly, the requested disclosures are critical to the NRA's defense against the NYAG's claims.

In addition, the NRA is entitled to evaluate the NYAG's fitness to seek the NRA's dissolution on behalf of its officers or directors as the NYAG does in her Second Cause of Action. Because "derivative actions bind absent interest holders [and for that reason] take on 'the attributes of a class action,'" a plaintiff—like the NYAG here—"must . . . demonstrate that [she] will fairly and adequately represent the interests of the [corporate stakeholders in whose shoes she stands], and that ***[she] is free of adverse personal interest or animus***." *Pokoiok v. Norsel Realties*, 2017 WL 1347549, 2017 N.Y. Slip Op. 50459(U) (Supreme Court, New York County 2017) (internal citations omitted). In fact, if the NYAG ""cannot demonstrate such representation," the derivative causes of action "will be dismissed." *Id.*[3]

Therefore, the disclosure the NRA seeks from Everytown, an organization that disagrees with the NRA's political speech, bears on the NYAG's standing to bring her dissolution claim.

[3] See also James v. Bernhard, 106 A.D.3d 435, 435-436 (1st Dept 2013) (plaintiff in derivative action removed due to conflict of interest); Gilbert v. Kalikow, 272 A.D.2d 63, 63 (1st Dept 2000) ("derivative causes of action were properly dismissed on the ground that plaintiff has failed to demonstrate that he will fairly and adequately represent the interests of the limited partnership, in view of the 'totality of the relationship' between himself and the individual defendant, his former son-in-law and business partner"); Sigfeld Realty v. Landsman, 235 A.D.2d 148, 148 (1st Dept 1996) ("due to a conflict of interest, plaintiff sponsor . . . was an improper party to commence a shareholder's derivative action"); Steinberg v. Steinberg, 106 Misc. 2d 720, 722 (Sup. Ct. 1980) (dismissing complaint because "by reason of conflict of interest, plaintiff lack[ed] legal capacity to act as a fiduciary").

D. Everytown failed to show that the Subpoena is overbroad.

There is no merit to Everytown's assertions that the Subpoena seeks improper "general discovery," improperly "tr[ies] to ascertain the existence of documents," and should be quashed on those bases. (NYSCEF 566, Memorandum of Law in support of Everytown's Motion for a Protective order at 10). Everytown alleges impropriety and overbreadth in a conclusory fashion and fails to explain how the narrowly tailored Subpoena is in fact overbroad or otherwise improper.

In reality, the Subpoena does not seek any information that CPLR 3101 does not obligate Everytown to disclose. That provision entitles parties to this litigation, including the NRA, to "*full* disclosure of all matter *material and necessary* in the prosecution or defense of [the] action [including from] any . . . person [who, like Everytown, is not a party]." *See* CPLR 3101(a)(4) (emphasis added). In addition, contrary to Everytown's argument, nothing in "Section 3101(a)(4) imposes [any] requirement that the [NRA] demonstrate that it cannot obtain the . . . disclosure [requested from Everytown] from [the NYAG]." *See* Scope of disclosure under CPLR 3101, 4 N.Y. Prac., Com. Litig. in New York State Courts § 27:3 (5th ed.). Moreover, to show that the information the NRA seeks is "material and necessary" in the prosecution or defense of the action, the Association must merely show that it seeks "facts bearing on the controversy which will assist preparation for trial by sharpening the issues." *Matter of Kapon*, 23 N.Y.3d at 36 (also stating that the terms "material and necessary" must be interpreted "liberally").

Information the Subpoena seeks bears on the controversy and will assist the NRA's preparation for trial by sharpening the issues. For example, the NRA seeks disclosure of Everytown's communications about the NRA with the NYAG and other government officials, including at the Department of Financial Services. RFP nos. 6, 7, 8 9 10, 11. Further, the NRA seeks disclosure of Everytown's communications about the NRA with Letitia James's Campaign. RFP nos. 2, 3, 4, 5. Such information bears on the controversy and will assist the NRA's

preparation for trial because it relates to Attorney General James's ability (or inability) to fairly and adequately represent the NRA's officers and directors and consequently her standing to bring her dissolution claim on their behalf. N-PCL 1102; see also NYAG's Second Cause of Action; Answer at 134-34 (asserting various defenses, including lack of standing). After all, if Attorney General James is pursuing this case against the NRA on behalf of the NRA's political opponent Everytown or if she herself harbors an animus toward the NRA, she cannot adequately represent the interests of the NRA's directors and officers in seeking the organization's dissolution.

Moreover, the same information relates to the bases of Attorney General James's allegations against the NRA. Now that James seeks to dissolve the NRA apparently in part based on Everytown's warnings, the CPLR requires Everytown to disclose to the NRA, whom it accused of impropriety, the substance of its alleged "warn[ings]." Likewise, the NRA is entitled to find out if the NRA is the only organization about whom Everytown "warn[ed]" the NYAG or other regulators.

In short, Everytown's overbreadth objection should be overruled. *See also Friel v. Papa*, 87 A.D.3d 1108, 1110 (2d Dep't 2011) (quoting *Allen v. Crowell-Collier Pub. Co.* 21 N.Y.2d 403 (1968)) (in addressing an overbreadth objection, "the test is one of usefulness and reason"); Scope of disclosure under CPLR 3101, 4 N.Y.Prac., Com. Litig. in New York State Courts § 27:3 (5th ed.) (stating that the Court of Appeals' broad approach to the scope of discovery "counsel[s] in favor of over-inclusiveness on the part of the party responding to disclosure requests").

E. Everytown has not shown that the Subpoena is unduly burdensome.

As the party resisting discovery, Everytown must show that the NRA's requests for information are unduly burdensome or that the Subpoena will cause it embarrassment or other prejudice that is "unreasonable." *Rawlins ex rel. Rawlins v. St. Joseph's Hosp. Health Center*, 108 A.D.3d 1191, 1192 (4th Dep't 2013); *Silverman v. Shaoul*, 913 N.Y.S.2d 870, 874 (Sup. Ct. New

York 2010) ("Data is not readily available upon a showing of undue burden by the producing party to obtain the data."). Importantly, while the Court can protect a third party against prejudice that is "unreasonable," a showing of simple inconvenience is insufficient to warrant a protective order under CPLR 3103.

During a meet and confer call on January 28, 2022, between counsel for the NRA and counsel for Everytown, counsel for the NRA asked counsel for Everytown what about the Subpoena's various requests rendered it burdensome. Specifically, she asked whether there were multiple communications between Everytown and the NYAG about the NRA. After all, if Everytown were to advise that such communications were so numerous as to render the Subpoena burdensome, the NRA could work with Everytown on appropriately narrowing the scope of the Subpoena without the need for judicial intervention. However, counsel for Everytown refused to state whether any responsive communications existed at all, let alone whether the number of such communications rendered the Subpoena unduly burdensome.

Even in its motion for a protective order, Everytown fails to assert that the number of responsive documents is unduly large or that the number of individuals whose email accounts or electronic devices contain responsive information is unduly long. Nor does Everytown articulate why designating and preparing a representative to testify on the eight topics set forth in the Subpoena allegedly presents undue burden. For these reasons, the Court should also overrule Everytown's undue burden objection.

IV. CONCLUSION

For the foregoing reasons, the NRA respectfully requests that the Court deny Everytown's motion to quash in its entirety and compel Everytown's production of documents and appearance at its deposition.

Dated: February 22, 2022
New York, New York

Respectfully submitted,

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Certification of Compliance with Word Count

I, Svetlana 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 Everytown's motion to quash, 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 4,163 words, excluding the parts exempted by Rule 17. In preparing this certification, I relied on the word count of the word-processing system used to prepare this memorandum of law.

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