

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, BY  
LETITIA JAMES, ATTORNEY GENERAL OF  
THE STATE OF NEW YORK

Plaintiff,

v.

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

Defendants.

Index No. 451625/2020

Hon. Joel M. Cohen

Motion Seq. No. 25

**REPLY MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY EVERYTOWN'S  
MOTION TO QUASH AND FOR A PROTECTIVE ORDER**

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## I. PRELIMINARY STATEMENT

The NRA's Opposition brief ("Opposition" or "Opp.") ([NYSCEF No. 605](#)) fails to address directly the infirmities with the Subpoena that Everytown raised in its opening memorandum of law (the "Motion" or "Mot."), thereby demonstrating why the Subpoena should be quashed. In its Motion, non-party Everytown pointed out that it is not mentioned anywhere in the Amended and Supplemental Verified Complaint (the "Amended Complaint") ([NYSCEF No. 333](#)), or in the NRA's Amended Verified Answer and Counterclaims (the "Amended Answer and Counterclaims") ([NYSCEF No. 325](#)); that Everytown has no conceivable role in the litigation, which concerns enforcing the NRA's compliance with the not-for-profit laws of New York; and therefore, Everytown had no notice of the relevant information sought by the Subpoena, as required by the CPLR. The NRA's response? That sufficient notice to Everytown is contained in the pleadings—the ones that nowhere mention Everytown—and in the substance of the Subpoena itself. Not only is this astoundingly circular logic, but the NRA fails to distinguish the cases directly on point that affirm notice requires more.

Everytown also demonstrated that, given its complete absence from the pleadings and lack of any possible role in this enforcement action, the information sought is neither necessary nor material to the dispute. This showing was buttressed by two separate letters from the OAG—one sent directly to the NRA ([NYSCEF No. 572](#)) and the other recently filed with the Court ([NYSCEF No. 589](#) (the "February 18 Letter"))—in which the OAG also argues that the Subpoena seeks utterly irrelevant information, makes overly broad demands, and is a thinly-veiled attempt to engage in an impermissible fishing expedition. In response, the NRA offers up a jumble of obviously after-the-fact conspiracy theories to justify the Subpoena, none of which was ever raised by the NRA before it filed its Opposition. Indeed, the NRA's primary justification for the Subpoena is demonstrably a last-minute pretext: it says the Subpoena is necessary to obtain

information about a single, one-hour meeting that Everytown had with the OAG over two years ago, *yet it knew all about this meeting before the Amended Answer and Counterclaims were filed*, and did not think it important enough to raise before now, including in its Amended Answer and Counterclaims.

Finally, Everytown demonstrated that despite the NRA's assertions that the information it seeks is necessary and material to the action, it never sought to obtain any of it until well over year after the start of the underlying litigation, and six weeks before the then-scheduled end of fact discovery. What is more, when Everytown learned from the OAG that it considered discovery on the NRA's counterclaims to be stayed, and that the Court scheduled a hearing on the motion to dismiss the counterclaims, Everytown proposed simply holding the Subpoena in abeyance, without prejudice, pending the outcome of that motion. Not only did the NRA refuse this self-evidently practical request, it demanded the deposition take place on the original date it unilaterally noticed in the Subpoena, before any documents could be reviewed or produced and before anyone could know the status of the counterclaims. The NRA threatened Everytown with contempt if it did not show up for a deposition on the Subpoena's return date, necessitating this Motion. The NRA is silent in its Opposition with regard to its conduct, and indeed, irrationally demands immediate compliance with the Subpoena now, even though the discovery schedule has been formally extended and the OAG's motion to dismiss remains pending.

The Subpoena should be quashed and a protective order should be granted for the reasons set forth in Everytown's memorandum of law and as further set forth below.

## II. ARGUMENT

### A. The NRA Failed To Provide Adequate Notice Of The Circumstances And Reasons Disclosure Is Required From Everytown

In the Opposition, the NRA argues that the pleadings attached to the Subpoena—which include the OAG’s Amended Complaint and the NRA’s Amended Answer and Counterclaims—provide the requisite notice to Everytown under CPLR 3101(a)(4). [Opp.](#) at 6-7. Yet Everytown is not mentioned once in any of the pleadings (either by name or implication). Indeed, as the OAG stated to the Court in its February 18 Letter, this action is “focused exclusively on the conduct of the NRA and its leadership as it relates to New York not-for-profit law,” and “[n]ot a single allegation in the Supplemental Complaint implicates substantive matters related to Everytown’s activities and the misconduct alleged is entirely unrelated to Everytown.” [February 18 Letter](#) at 3.

The NRA argues that the Amended Complaint contains allegations concerning “the NRA’s regulatory filings” and the attached Amended Answer and Counterclaims contains allegations concerning the “animus” of Attorney General James ([Opp.](#) at 6-7), but these arguments fail to provide any explanation as to why the NRA seeks discovery specifically from Everytown. Thus, the pleadings, without more, do not provide an adequate explanation as to why Everytown, a non-party, should be required to produce documents and a representative to be deposed in this litigation. *See Capacity Grp. of NY, LLC v. Duni*, 186 A.D.3d 1482, 1483 (2d Dept. 2020) (quashing a subpoena for insufficient notice where neither the subpoena nor the attached complaint provided adequate explanation “of the circumstances or reasons requiring disclosure”).

Similarly, the NRA argues that “the reasons and circumstances for the disclosure are revealed by the requests for documents and the deposition topics listed in the Subpoena” ([Opp.](#) at 7)—in effect, saying that Everytown must engage in a guessing game. For instance, the NRA relies heavily on the Subpoena’s request for communications related to the February 14, 2019 meeting

between Everytown and the OAG, but the NRA does not explain how such documents (or testimony) on that topic relate to *this lawsuit*, a regulatory enforcement action seeking dissolution of the NRA primarily based on financial improprieties by its senior leadership. Similarly, the NRA claims that the Testimony Request seeking information about certain of Attorney General James' statements about the NRA "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." [Opp.](#) at 7. But that is merely stating the obvious, *i.e.*, that the NRA wants testimony from Everytown on this topic. *Why* the NRA believes such information is material and necessary to the litigation, and *why* it believes Everytown has any information about this topic at all, is conspicuously absent from the Subpoena and the Opposition.

In its Motion, Everytown cited cases demonstrating that the very position taken by the NRA—that a non-party has to guess at the purpose for discovery from the face of the subpoena or attached materials—is insufficient to provide notice under the CPLR. The NRA fails to distinguish that authority, thereby proving Everytown's point. In *Gandham*, the Court quashed a subpoena for failing to provide the reasons requiring disclosure "on the face of the subpoenas *or in any accompanying material*." *Gandham v. Gandham*, 170 A.D.3d 964, 966 (2d Dep't 2019) (emphasis added). The NRA pretends to distinguish *Gandham* by simply ignoring the language of the holding: it claims that the Court gave no indication that the subpoena attached additional material for context, yet the Court plainly stated that its basis for quashing the subpoena was because neither the subpoena *nor* any accompanying material provided adequate notice.

The NRA's attempt to distinguish *Phoenix Grantor* is unavailing for the same reason. The NRA acknowledges that the Court in *Phoenix Grantor* found the subpoena failed to convey sufficient notice because "it d[id] not indicate the circumstances or reasons why disclosure is

sought,” but claims that the situation is different here because the NRA “attached the pleadings and included descriptive deposition topics and document requests.” *Phx. Grantor Tr. v. Exclusive Hospitality, LLC*, 59 Misc. 3d 1231[A], [2018 Slip Op. 50808\[U\]](#), at \*4 (Sup. Ct., Queens County 2018); [Opp.](#) at 8. As discussed both above and in Everytown’s Motion, however, neither the pleadings (which do not mention Everytown once) nor the requests (which are plainly overbroad and not tailored to the underlying action) provide adequate notice to Everytown of the reasons the information sought in the Subpoena would be relevant to the underlying action. Cf. *Kapon v. Koch*, 23 N.Y.3d 32, 39 (2014) (finding that the notice requirement was satisfied where the subpoenaing party had attached a copy of the complaint to the subpoena, and the complaint detailed the relationship between the non-party and the disputant party—the very opposite of the situation here where the Amended Complaint nowhere references Everytown).

#### **B. The NRA Failed To Demonstrate The Relevance Of Its Overly Broad Requests**

In its Opposition, the NRA offers four reasons as to why the discovery sought by the Subpoena is relevant to this action at this time. First, the NRA claims that the Subpoena is justified by the meeting between Everytown and the OAG in February 2019. [Opp.](#) at 1, 6. Second, the NRA argues that it is “entitled to the information underlying Everytown’s ‘warning[s]’ of corruption at the NRA to the regulators,” as such information could purportedly be “introduced against the NRA at trial.” [Id.](#) at 9. Third, the NRA claims that the information would allow it to “evaluate the NYAG’s fitness to seek the NRA’s dissolution,” including whether Attorney General James “harbors an animus toward[s] the NRA.” [Id.](#) at 9, 11. Finally, the NRA argues that it is entitled to discovery from Everytown in order to test its theory that the OAG brought this action “on behalf of the NRA’s political opponent Everytown[.]” [Id.](#) at 11.

The NRA is making its explanations up before the Court’s eyes—all of these arguments are *entirely new*, being advanced by the NRA for the first time now, in response to Everytown’s



motion to quash. The fact that the NRA waited over a year into discovery before serving this Subpoena on Everytown undercuts any argument that this information is “material and necessary” to the NRA’s claims or defenses in this action. Moreover, even considering each of these after-the-fact justifications for the Subpoena on its own terms, none of the NRA’s attempts to manufacture relevance pass muster.

The single one-hour meeting between Everytown and the OAG in February 2019 does not establish the relevance of the information sought by the Subpoena, no matter how many times the NRA simply asserts the conclusion that it does. The NRA never explains how this meeting relates to any of the claims or defenses in this action—rather, the NRA invents from whole cloth, without any basis (let alone evidence in the record), that this meeting shows that Everytown was the true motivating factor behind the OAG’s decision to pursue this regulatory enforcement action. But that claim is undermined by the Subpoena itself, which purports to catalog 12 separate anti-NRA statements by Attorney General James in 2018—months before the February 2019 meeting that the NRA relies on. *See* Document Request No. 2.

Moreover, the record is clear the NRA knew about the existence of the February 2019 meeting before it filed its answer on July 20, 2021—it says it learned of the meeting from a deposition taken in a separate proceeding on *March 23, 2021*. [Opp.](#) at 1-2. Yet this meeting is not mentioned at all in the NRA’s Amended Answer and Counterclaims. It is ludicrous for the NRA to assert that suddenly now, over a year later, it needs this critical piece of evidence, yet it was not important enough to put in its Amended Answer and Counterclaims. Clearly this February 2019 meeting is a pretext for the Subpoena, rather than the reason for it.

In addition, as discussed in Everytown’s Motion, the vast majority of the Document and Testimony Requests in the Subpoena seek information that goes well beyond the pretextual

February 2019 meeting. *See, e.g.*, [NYSCEF No. 569](#), Document and Testimony Request Nos. 1, 2, 4, 5, and 6. Thus, the existence of this meeting does not entitle the NRA to the vast swaths of additional information demanded by the Subpoena, including documents (and testimony) concerning internal Everytown communications.

The NRA's reliance on out-of-context, excerpted public statements by Everytown to establish relevance is similarly misplaced. Specifically, the NRA cites an August 17, 2021 Everytown press release in which Everytown's President, John Feinblatt, states that "Everytown has been warning regulators and the public about the NRA's corruption for years." [Opp.](#) at 6 n.2. The NRA claims that such "warn[ings]" by Everytown to the OAG may be introduced at trial. [Id.](#) at 9. But that too is just a conclusion, not an explanation of what that statement has to do with anything. To the contrary, the NRA offers no possible connection between those statements and the case, and they clearly would be inadmissible in a trial where the OAG must prove "that the NRA, its officers, and its Board permitted the diversion of millions of dollars away from the NRA's charitable mission." [February 18 Letter](#) at 1.

Equally unsupported is the NRA's conclusion that the discovery requested from Everytown is somehow "necessary" to assess the Attorney General's "fitness to seek the NRA's dissolution[.]" [Opp.](#) at 9. The NRA does not explain (because it cannot) how any communications between Everytown and the OAG, including the February 2019 meeting, would bear on the Attorney General's "fitness" to bring this action, or show that she "harbors an animus towards the NRA." [Id.](#) at 9, 11. Pursuant to New York's Not-For-Profit Corporation Law, the Attorney General has standing to maintain several types of actions against not-for-profit corporations, such as to dissolve a not-for-profit organization if it has acted in a persistently fraudulent manner, ultra vires or was not duly formed. N-PCL § 112[a]; N-PCL § 1101(a). Everytown's statements to the OAG

or to other government officials are irrelevant to the OAG's standing to bring this action. The OAG's standing is conferred by statute and Everytown's statements to government officials have no bearing on that issue. *64th Assocs., LLC v. Manhattan Eye, Ear & Throat Hosp.*, 2 N.Y.3d 585, 590 n.7 (2004) (stating that the Attorney General has standing under N-PCL 112); *Consumers Union of U.S., Inc. v. New York*, 5 N.Y.3d 327, 375 n.26 (2005) (stating same).

Likewise, the narrative pushed by the NRA in its Opposition—that the Attorney General may be “pursuing this case on behalf of the NRA’s political opponent Everytown,” and that she is “seek[ing] to dissolve the NRA apparently in part based on Everytown’s warnings” ([Opp.](#) at 11)—is a conspiracy theory, not an argument. The NRA has no evidence or facts to support it. Indeed, this claim only underscores that the Subpoena is the epitome of an impermissible fishing expedition. *See 501 Fifth Ave. Co. v. Marion*, 2013 N.Y. Slip Op. 32401(U), \*3, (Sup Ct, NY County 2013) (internal quotation marks omitted) (scope of permissible discovery under CPLR 3101 “does not include disclosure demands used as a tool . . . for the proverbial fishing expedition to ascertain the existence of evidence”).

Because the discovery sought by the Subpoena is utterly irrelevant, it follows that it is unduly burdensome and facially overbroad. *See Mot.* at 12-13. The NRA’s Opposition invents a rule, without authority, that Everytown cannot claim the Subpoena is overly broad and unduly burdensome without disclosing to the NRA the volume of responsive documents Everytown has in its possession. The NRA cannot cure the deficiencies of its broad and burdensome Subpoena by forcing Everytown to conduct its own internal investigation into whether such evidence even exists. *N.Y. Cent. Mut. Fire Ins. Co. v. Librizzi*, 106 A.D.3d 921, 921-22 (2d Dep’t 2013) (quoting *Bell v. Cobble Hill Health Ctr., Inc.*, 22 A.D.3d 620, 621 (2d Dep’t 2005)) (“The burden of serving a proper demand is upon counsel, and it is not for the courts to correct a palpably bad one.”).

There is no authority to support the NRA's proposition that Everytown, a non-party, must first conduct an internal investigation of its records in response to sweeping, improper discovery demands so that the NRA can ascertain the existence of evidence.

**C. The Status Of The NRA's Counterclaims Is Still Uncertain**

Although the NRA now acknowledges that there is no basis to rush the discovery process given the recent three-month extension of the fact discovery period (*see* [NYSCEF No. 607](#)), it still irrationally demands that Everytown respond to the Subpoena forthwith. [Opp.](#) at 2-3. This demand is even more unreasonable in light of the OAG's pending motion to dismiss the NRA's counterclaims (which was argued just a few days ago).

As the OAG explained in its recent letter to the Court, the possible basis for the discovery the NRA seeks from Everytown "is to support the conspiracy theory advanced in [the NRA's] counterclaims." [February 18 Letter](#) at 3. Thus, should the Court grant the OAG's motion, it is undeniable that the scope of permissible discovery in this action will be altered (and, in all likelihood, drastically diminished). It makes no sense for Everytown to be required to produce a potentially broad array of documents, and a representative for a deposition, before this Court rules on that motion and clarifies the ultimate scope of discovery. (Indeed, the NRA's insistence on taking the deposition of an Everytown representative on February 2, in spite of the OAG's pending motion to dismiss, was what motivated Everytown to file the Motion in the first place).

Because the Court will soon determine whether, or in what form, discovery on the counterclaims may proceed, "the propriety of the NRA's subpoena to Everytown should be assessed in light of the Court's ruling" on the motion to dismiss. *Id.* And even if the Court finds that the discovery sought from Everytown is somehow relevant to the NRA's defenses and counterclaims, the precise scope of the requested discovery must still be narrowly tailored to the remaining claims in the case. At the very least, the Court should preclude the NRA from obtaining

any discovery from Everytown until resolution of the parties' dispute concerning the NRA's counterclaims, at which time the issues could be revisited.

### **III. CONCLUSION**

For the foregoing reasons, as well as those set forth in the Motion, Everytown respectfully requests that the Court quash the Subpoena and issue a protective order barring the NRA from obtaining discovery from Everytown pending the Court's ruling on the OAG's Motion to Dismiss the NRA's counterclaims and without prejudice to the NRA issuing a renewed subpoena following such a ruling.

Dated: February 28, 2022  
New York, New York

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**CERTIFICATION**

I hereby certify pursuant to Commercial Division Rule 17, 22 NYCRR § 202.70(g)(17), as follows:

1. The foregoing memorandum of law was prepared on a computer using Microsoft Word.
2. The total number of words in the affirmation, exclusive of caption, signature block, and this Certification is 3,065.
3. The foregoing document is in compliance with the word count limit set forth in Commercial Division Rule 17.