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VIA EMAIL

Hon. O. Peter Sherwood, Special Master
360 Lexington Avenue
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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 Judge Sherwood:

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 response to the March 1, 2022 letter submitted by Defendant National Rifle Association of America ("NRA") in relation to the NRA's Amended Notice of Rule 11-f Oral Examination of the Office of the Attorney General of the State of New York ("11-f Notice").

This letter is also submitted in further support of the Plaintiff's objections to the 11-f Notice ("Plaintiff's Objections", which are attached hereto as Exhibit A), and the January 30, 2022 letter application for a protective order in relation to the 11-f Notice ("OAG 1/30 Letter"), which was previously provided to Your Honor and can also be found at NYSCEF 578.

Brief Statement of Recent Events in the Action

On March 2, 2022, the Hon. Joel M. Cohen issued an order partially granting and partially denying motions to dismiss which had been filed by the NRA and Defendants Wayne LaPierre and John Frazer. (A copy of that decision ("March 2 Decision") is annexed as Exhibit B.) The Court dismissed the Plaintiff's First, Second, Sixteenth and Eighteenth Causes of Action which included the Plaintiff's dissolution and NYPMIFA claims against the NRA, and unjust enrichment claims against the individual Defendants. The motions were otherwise denied and claims against all Defendants continue.

On February 25, 2022, the Court held argument on the motion to dismiss the NRA's Amended Counterclaims against the Attorney General. No decision has been issued on that motion yet nor has the transcript of argument been prepared.

For the further reasons set forth below, it is respectfully submitted that a protective order should issue as against the 11-f Notice.

I. The NRA's 11-f Notice Is Defective Because It is Vastly Overbroad.

In its opposition, the NRA has failed to remedy or even substantively address, the fundamental defects in its 11-f Notice. As set out in the OAG's Objections and the OAG's January 30th letter, the 11-f Notice purports to be directed at the Plaintiff, the OAG, the Attorney General in her individual and official capacities, former Attorneys General, and other unnamed agencies and employees of the State. Its definitions and scope are overbroad. The Notice also purports to be only a partial list of the deposition topics, which is not permitted under Rule 11-f.

Further, the 11-f Notice is improperly directed at the Attorney General and seeks discovery relating to the NRA's counterclaims against her despite the fact that such discovery has been stayed pending a decision on the motion to dismiss the amended counterclaims. On these grounds alone a protective order should issue.

II. A Deposition of a Corporate Representative Is Not an Appropriate Discovery Device Here Because It Seeks Testimony of Opposing Counsel Without the Required Showing and Will Improperly Invade Privileged Information.

A protective order against the 11-f Notice is necessary for additional reasons. The Plaintiff here is the People of the State of New York. The OAG acts in its protective law enforcement capacity as counsel for the Plaintiff. To the extent that the 11-f Notice is directed at the OAG, it asks for the deposition of counsel for a party without establishing a proper basis, as required. A party seeking to depose opposing counsel must demonstrate good cause and an inability to obtain information sought from another source, in addition to materiality and necessity. *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.,* 164 A.D.3d 401, 406 (1st Dep't 2018); *People v. Richmond Capital Group LLC*, Index No. 451368/2020 (N.Y. Supreme Ct. 2020).

Even if the standard for deposing opposing counsel did not apply, however, there is good cause for a protective order because the notice calls for testimony that is inextricable from attorney work product, and plainly protected by law enforcement and other privileges. For example, the NRA seeks testimony detailing internal aspects of the OAG investigation, litigation strategy and trial preparation. This includes protocols for commencing the investigation, interviews conducted by the OAG, grounds for the OAG's discretionary decision to seek dissolution and explanation as to how such dissolution would serve the public interest, how the OAG prepared responses to discovery demands in both this and the NRA's failed bankruptcy proceeding, and communications between the OAG and other agencies unrelated to this action. *See, e,g,* Exhibit A, Plaintiff's Objections, Matters 1, 2, 5, 6, 7, 8, 10, 11, 13, 19-22. As noted in the OAG 1/30 Letter, such testimony would directly implicate privileged information and is improperly sought herein. *See In re EEOC*, 207 Fed. Appx. 426, 432 (5th Cir. 2006); *S.E.C. v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992); *Liberty Petroleum*, 164 A.D.3d at 406.

A deposition of the OAG in an enforcement action like this one is simply not permissible

where the requests seek information that is privileged and protected from disclosure. *People v. Katz*, 84 A.D.2d 381, 384 (1st Dep't 1982); *People by Lefkowitz v. Volkswagen of Am., Inc.*, 41 A.D.2d 827, 342 N.Y.S.2d 749 (1st Dep't 1973) (denying discovery sought from Attorney General and finding "that the Attorney-General [in an enforcement action] is not a party plaintiff. Plaintiffs are the People and the Attorney-General as the People's attorney sues in their behalf in a protective capacity.").

III. The NRA's Assertion That A Non-Attorney OAG Employee Could Be Designated for the 11-f Deposition Is Factually And Legally Wrong.

The OAG investigation and this enforcement action were and continue to be carried out by the Plaintiff's trial team, comprised of attorneys within the OAG. To assert otherwise, the NRA relies upon a press release that listed the assistant attorneys general who conducted the investigation and commenced the action and added thanks for the "additional assistance" by certain accountants within the OAG. Contrary to the NRA's assumption, OAG accountants, or any non-attorney personnel, who may have assisted the attorneys cannot testify about the vast range of topics identified in the 11-f Notice from personal knowledge, as is evident on the face of the topics themselves. Attorneys would have to prepare a non-attorney witness to memorize information to respond to the various topics. Such deposition of any OAG non-attorney staff member would be equivalent to deposing an attorney with respect to privilege concerns and would not justify a departure from the standard set forth in *Liberty Petroleum*, 164 A.D.3d at 406.[1] Further, the NRA's request for testimony on the factual basis for the OAG's claims would still necessarily intrude on privileged content, regardless of the identity of the witness. *See Volkswagen*, 41 A.D.2d at 827.

[1] The NRA points to the deposition of Assistant Attorney General Will Wang as a corporate representative, which took place in its bankruptcy proceedings, arguing that this supports its 11-f Notice. It does not. The OAG objected and the Court quashed almost the entirety of the NRA's 30(b)(6) notice. The Bankruptcy Court permitted a deposition only on a very narrow fraction of the topics sought by the NRA that were pertinent to the bankruptcy. The Court's order does not support allowing an OAG corporate representative deposition here. Indeed, the Bankruptcy Court distinguished the deposition of the OAG from the deposition in the same proceeding of the NRA's counsel, John Frazer, who had factual knowledge. The Court was careful to note that, in contrast:

> The Attorney General does not have independent knowledge of the facts. The knowledge of facts that the Attorney General has appears to largely come from the investigatory file which was turned over to the NRA in February. The majority of the topics in the document request appear to focus on the mental impression of trial attorneys and I don't think can be the subject of the deposition.

See Exhibit C, attaching March 19, 2021 Tr., pp. 28-29. Again, the Court permitted only inquiry relating to the State's intentions regarding how the NRA's assets should be distributed if dissolution was granted. The Court found that information was relevant to the questions it and creditors had regarding the NRA's current and future distribution of assets. The Court also allowed inquiry into non-privileged conversations with certain other non-parties, including Everytown for Gun Safety, a topic repeated in the NRA's 11-f Notice but for which it already obtained discovery. By contrast, here, the NRA seeks broad discovery into clearly privileged topics calling for the mental impressions of attorneys and/or into immaterial and overbroad topics, topics already deemed improper for a deposition of the OAG in the Bankruptcy Court's decision.

Helpful here is the case *S.E.C. v. Rosenfeld,* 1997 WL 576021, at *2 (S.D.N.Y. Sept. 16, 1997). There, the court flatly rejected an argument that the government regulator could simply identify a non-attorney designee to sit for a deposition as a corporate representative, holding that "this action is an SEC enforcement proceeding seeking a determination as to whether defendant has violated the securities laws of this country, and that because such investigations are conducted by the SEC's legal staff, a [corporate representative] deposition of an SEC official with knowledge of the extent of that investigative effort, amounts to the equivalent of an attempt to depose the attorney for the other side." The court added that "since the investigation was conducted by SEC attorneys, preparation of the witnesses would include disclosure of the SEC attorneys' legal and factual theories" concerning the allegations, as well as "their opinions as to the significance of documents, credibility of witnesses, and other matters constituting attorney work product." *Id.* at *2-3.

Here, the OAG staff most knowledgeable about the proposed topics are attorneys, and the knowledge necessary to prepare a witness is in the possession of OAG attorneys. Therefore, the deposition of any OAG staff member in this case would pose the same privilege concerns as the deposition of an attorney. *See E.E.O.C. v. McCormick & Schmick's Seafood Restaurants, Inc.,* 2010 WL 2572809, at *6 (D. Md. June 22, 2010); *United States v. Dist. Council of New York City & Vicinity of United Bhd. of Carpenters & Joiners of Am.,* 1992 WL 208284, at *15 (S.D.N.Y. Aug. 18, 1992). The NRA accordingly would face the same hurdles it faces deposing an attorney. *Liberty Petroleum*, 164 A.D.3d at 406.

Finally, as a practical matter, educating a lay witness on the factual bases of all of the allegations is a highly inefficient means of discovery, and a deposition in which every question is met with a privilege objection and an instruction not to answer is a fruitless exercise. *See McCormick & Schmick's,* 2010 WL 2572809, at *4 (citing "the undue burden and inefficiency entailed to prepare a lay witness to engage in rote memorization and recitation of the evidence in the case" as a reason to deny a deposition of a law enforcement agency).

The NRA's argument that a non-attorney member of the OAG staff could be properly deposed thus fails.

IV. The NRA's 11-f Notice Improperly Seeks Discovery of the OAG on Matters that Are Not Material and Necessary to the Defense of the Action

A protective order is warranted to preclude the NRA from seeking testimony concerning the Attorney General's alleged bias, conflict of interest or enforcement strategy in this action and its exercise of prosecutorial discretion in other actions. Those subjects are neither material nor necessary to the NRA's defense in this action. Rather, the discovery the NRA seeks concerning the OAG and Attorney General's internal and external communications about the NRA or decisions not to seek dissolution in other actions, at best, relates to the NRA's amended counterclaims. *See, e.g.,* Exhibit A, Plaintiff's Objections, Matters 4, 5, 6, 8, 9 and 23. The counterclaims assert that the Attorney General's investigation of, and enforcement action against, the NRA -- in particular the claims for dissolution – were motivated by an improper retaliatory purpose or bias against the NRA. As explained in the OAG 1/30 Letter, discovery on

the NRA's counterclaims is deferred until the Court rules on the OAG's pending motion to dismiss those counterclaims.

The NRA cannot justify proceeding with such discovery now by claiming it is relevant to the Attorney General's standing to seek dissolution purportedly in a "derivative capacity." *See* NRA 3/1/2022 Ltr. at 2. The OAG's Second Cause of Action sought dissolution pursuant to N-PCL § 112(a)(7) (authorizing the Attorney General to enforce rights that are otherwise granted to members, directors and officers) and N-PCL § 1102(a)(2)(D) (granting directors and members of a not-for-profit corporation a right to seek dissolution). That claim was dismissed by the Court's March 2 Decision. *See* Exhibit B. While the OAG reserves its rights to appeal that decision, at present any challenge to the Attorney General's standing concerning that claim is moot.

Moreover, even if the Second Cause of Action for dissolution was currently before the Court, the Attorney General's standing is explicitly established by statute under N-PCL § 112(a)(7). Section 112(a)(7) authorizes the Attorney General to seek dissolution pursuant to N-PCL § 1102 (which also applies to directors and members). The NRA has cited no authority for disqualifying the Attorney General's standing to exercise her statutory authority due to a purported conflict of interest.

This is distinct from the inapposite cases on which the NRA relies, which involve derivative actions brought for the benefit of a corporation or representatives in class action litigation. In those cases, the plaintiff, unlike the Attorney General, is seeking to assert rights it does not otherwise have in an action and that can bind absent interest holders. The court must inquire whether the derivative plaintiff can "fairly and adequately represent the interests of the shareholders and the corporation and . . . is free of adverse personal interest or animus." *Pokoik v. Norsel Realties,* 57 N.Y.S.3d 677 (N.Y. Supreme Court 2017); *see also James v. Bernhard,* 106 A.D.3d 435 (1st Dept. 2013) (derivative action); *Gilbert v. Kalikow*, 272 A.D. 2d 63 (1st Dept. 2000) (same); *Sigfeld Realty v. Landsman* , 234 A.D.2d 148 (1st Dept. 1996) (same); *cf. In re Flag Telecom Holdings Ltd. Securities Litig.*, 574 F.3d 29 (2d Cir, 2009) (class action). The few cases the NRA cites in footnote 4 that are not derivative actions, like *Lefkowitz v. Lebensfeld* and *Spitzer v. Grasso*, concern the Attorney General's standing in circumstances unlike here, where there is an absence of a statutory right. The Attorney General's alleged bias or animus are simply not at issue.

For the reasons set forth above, the OAG's motion for a protective order should be granted denying the NRA a deposition of a corporate representative of the OAG. We thank you for your attention to these matters.

Respectfully,

/s Monica Connell
Monica Connell
Assistant Attorney General

cc: All Counsel of Record