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

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ORDER TO SHOW CAUSE PURSUANT TO CIVIL PRACTICE LAW AND RULES 3401 AND RULE 202.21 OF THE UNIFORM CIVIL RULES FOR THE SUPREME COURTS AND COUNTY COURTS TO PERMIT PLAINTIFF TO FILE NOTE OF ISSUE ON DECEMBER 13, 2022 OR SUCH OTHER DATE SET BY THE COURT UPON CERTAIN CONDITIONS

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PRELIMINARY STATEMENT

Plaintiff People of the State of New York, through the Office of the New York Attorney General Letitia James ("OAG"), respectfully submits this memorandum of law in support of an application by order to show cause, pursuant to Civil Practice Law and Rules ("CPLR") 3401 and Rule 202.21(d) and Rule 202(d)(e) of the Uniform Civil Rules for the Supreme Courts and County Courts ("Rule 202.21"). Plaintiff seeks permission to file the note of issue and certificate of readiness in this action on December 13, 2022, the date it is due by Court order (NYSCEF 900), or on such other date as directed by the Court, upon certain conditions.

Specifically, Defendant National Rifle Association of America ("NRA") failed to comply with its discovery obligations concerning the NRA's purported remedial and corrective actions regarding the unlawful and improper conduct that is at issue in this action. The NRA has repeatedly touted its alleged efforts as a "course correction" or a "360 degree" review and referred to employing counsel to investigate and advise on such matters. However, after highlighting its supposed "good faith" efforts, the NRA selectively asserted attorney-client and work product privileges to shield discovery into steps it alleges it took as part of this course correction.

Plaintiff challenged the NRA's privilege assertions and sought appropriate relief, and the Special Master issued preliminary determinations that the NRA had not met its burden to establish privilege. Recognizing the jeopardy it had placed itself in, the NRA has proposed to try, through half measures, to cure its improper "sword and shield" tactics. Plaintiff has been and will be substantially prejudiced by the NRA's conduct and for that reason respectfully requests that it be given leave to file the note of issue and certificate of readiness upon the condition that it may still file an application seeking relief in conjunction with the NRA's discovery conduct. Alternatively, Plaintiff asks for a conference with the Court and to be permitted to file the note of issue and certificate of readiness, but complete any necessary discovery granted by the Court under Rule

202.21(e) and that the Court issue an order extending Plaintiff's time to file the note or issue pending a decision by the Court following such conference.

BRIEF STATEMENT OF RELEVANT FACTS

This is a regulatory enforcement action alleging that the NRA and four of its current and former senior officials violated New York State law aimed at preventing abuse of not-for-profit status and misuse of charitable funds. Discovery commenced in this action in June 2020. The discovery process has been extensive and required multiple extensions of time, as reflected in five scheduling orders. It has also required the involvement of a Special Discovery matter, Honorable O. Peter Sherwood, who was appointed by order of this Court dated February 7, 2022. (NYSCEF 579).

Pursuant to the Fifth Revised Scheduling Order (NYSCEF 829), all discovery, including expert discovery, ended on November 29, 2022. The note of issue and certificate of readiness were required to be filed on November 29, 2022. By order of this Court, dated November 22, 2022, and upon the recommendation and approval of the discovery Special Master Sherwood, that date was extended until December 13, 2022. (NYSCEF 900). Despite the Special Master's great efforts, a significant matter remains unresolved and requires the intervention of this Court.

Plaintiff would like to file the note of issue on December 13, 2022, in accordance with the current court-ordered schedule, and advance this case towards trial. However, because of a situation beyond Plaintiff's control, there is an outstanding issue which requires remedial relief and which prevents Plaintiff from being able to make the necessary affirmations on the certificate of readiness. Accordingly, Plaintiff now asks for relief in the form of an order permitting Plaintiff to file a note of issue and certificate of readiness upon the condition that Plaintiff may make an application to this Court for appropriate relief on this one issue.

Specifically, the NRA has used the assertion of privilege as both a sword and a shield throughout this action, particularly in regard to certain of the remedial measures the NRA asserts it undertook as part of its self-titled "course correction," but has blocked the Plaintiff from obtaining information, including testimony and documents, relating to such matters which the NRA itself has put into issue herein. Now, at the eleventh hour, after Plaintiff moved against the NRA and the Special Master has made adverse determinations, the NRA has apparently realized that its discovery tactics have unfairly prejudiced Plaintiff in a way that may ultimately adversely impact the NRA. The NRA is endeavoring to remedy its failure to provide required discovery, but its efforts are far too little, and far too late.

Plaintiff moved for relief to challenge selective, improper or unfounded assertions of privilege in the NRA's categorical privilege log. *See* the Affirmation of Monica Connell, dated December 12, 2022 ("Connell Aff."), Ex. A (Plaintiff's October 20, 2022 application). The Special Master directed the NRA to submit a sample of withheld documents. Despite efforts to work through this issue, the NRA submitted a clearly unrepresentative sample of documents for in camera review. *See* Connell Aff., Ex. E (November 23, 2022 Special Master direction).

In a November 29, 2022 decision ("Decision" or "Dec."), the Special Master held that the NRA "seeks to cloak essentially all of its 'course correction' and '360° review' initiatives as privileged merely because the NRA included attorneys in those efforts, save for the selected portions it chooses to disclose to the OAG as proof of the 'reasonableness' of, for example, the amount of excess benefits it has request[ed] Mr. LaPierre to repay, the adequacy of its review of whistleblower complaints, the sufficiency of its investigations of alleged NRA employee misconduct or, more generally, its 'good faith.'" Connell Aff., Ex. F, (Decision) at 9. The Special Master found that the NRA failed to carry its burden to establish that the information in question

is privileged and directed the NRA to produce the allegedly privileged documents at issue, barring one last chance to submit the materials it is withholding for *in camera* review and to establish that the information sought is privileged and that the NRA has not waived such privilege by putting certain matters at-issue. *See* Connell Aff., Ex. F, (Decision) at 9.

The Special Master's ruling, which gave the NRA one final opportunity to meet its burden or produce the withheld documents, was issued just two weeks before the December 13th deadline for filing the note of issue and certificate or readiness. The Special Master recognized that his ruling did not resolve the prejudice to Plaintiff for a number of reasons. First, there is an unknown universe of NRA responsive documents, numbering at least in the thousands, that the NRA has withheld and are at issue. Even as of this application, the NRA has not identified the true number of relevant documents. Further, even if the full universe of such documents were known, they, or a representative sample, would have to be submitted to the Special Master for *in camera* review. Notably, the Special Master already asked the NRA to provide a representative sample for his review, but instead received a cherry-picked handful of documents, which he found to be unacceptable because the documents selected were not related to the matters at issue. Connell Aff., Ex. E (11/23/2022 email from Special Master) ("The OAG argues with substantial justification that the NRA failed to describe sufficiently how it selected the documents for the review. … These examples suggest that the search terms selected were either grossly inadequate or that the NRA elected to shield selected categories of documents from in camera review."); Ex. G (12/05/2022 Conference Tr. at 46) (directing NRA "to come up with a sample that is a fair sample of the documents that you are asserting privilege for. You can't cherry-pick them, which is my impression is …what you did last time."). So, a new, fairly representative sample would have to be produced. The NRA contends that it will begin to make such a submission today, but since

the universe of responsive documents is still not known and the parties continue to meet and confer to determine the same, as per the Special Master's direction, that sample cannot be complete. The NRA's first sample, numbering seven documents, did not capture whole areas that are at issue. The current documents being reviewed do not include documents that would be captured using key search words like investigation or investigate. They seem to exclude whole topics. Even setting this aside, after submission of this partial sample, the Special Master will have to determine whether the documents were privileged (in the initial, flawed process to submit a sample the NRA admitted that a large portion of the sampled documents had incorrectly been withheld as privileged) and then determine whether there has been an at-issue waiver in regard to such documents.

Further, even if Plaintiff were to receive such documents now, it would not undo the prejudice caused by the NRA's failure to produce the same during discovery when the information could have been used to question witnesses. Nor does it remedy the NRA's shielding of information behind privilege during the more than thirty depositions in this action, including the continued and prolonged corporate representative deposition, or in preparing or challenging the reports of the 12 experts in this case. Indeed, belated disclosures can and should result in appropriate preclusion orders. *See* Connell Aff., Ex. A (10/20/2022 letter application).

Despite efforts by Plaintiff and the Special Master to address this issue, on the eve of the due date for filing of the note of issue and certificate of readiness, this issue remains open. Plaintiff is therefore left to move for appropriate relief, including either that the NRA be precluded from offering evidence regarding specified matters on which it refused to permit disclosure or that the NRA cure its discovery failures and Plaintiff be permitted discovery on these issues, including

additional depositions and perhaps expert discovery.[1] Belated production and disclosure of the type here appropriately should result in a preclusion order. *See, e.g., Gottwald v. Sebert*, 204 A.D.3d 495, 495–96 (2d Dep't 2022) (affirming trial court's preclusion of "privileged communication that defendants sought to introduce after four years of extensive discovery and two years after discovery had closed" and holding that a "showing of willful and contumacious behavior was not required, and the preclusion is not "disproportionate" to defendant's discovery malfeasance"); *Delaney v. Nat'l Broad. Co*., 129 A.D.2d 673, 674 (2d Dep't 1987) (affirming sanction of preclusion where party's dilatory discovery tactics unnecessarily protracted discovery); *see also McGowan v. JPMorgan Chase Bank, N.A*., 2020 WL 1974109, at *3 (S.D.N.Y. Apr. 24, 2020).

The note of issue date is December 13, 2022. While the NRA suggested a two-week extension of that date, that suggestion delays but does not resolve the problem here. Two weeks is not long enough to remedy the prejudice caused by the NRA, particularly given its conduct thus far in regard to resolving this matter. Such suggestion would just mean, at best, that the Plaintiff would be making this motion two weeks later rather than now.

[1] As Plaintiff will demonstrate in its anticipated motion papers, the NRA put at issue and then blocked testimonial and document discovery of issues it asserts as evidence of its reform efforts, including: (1) the determination and calculation of excess benefits by Wayne LaPierre and other NRA executives (specifically that that the determinations and calculations were complete and accurate); (2) the NRA's investigations, including into: (a) Defendant Wilson Phillips' conduct as CFO and Treasurer and his receipt of private inurement, (b) whistleblower retaliation specifically relating to the Brewer firm, (c) board member travel, (d) use of an NRA vendor (Ackerman McQueen) to pay for personal expenses incurred by NRA employees, (e) diversions of assets, (f) Board member Marion Hammer payments, and (f) conflicts of interest, including the LaPierre family's relationship with the owners of several of the NRA's largest vendors; (3) the NRA's handling of whistleblower complaints, including the investigation of the same and treatment of complaints (which it largely delegated to litigation counsel) as well as those complaints not deemed to be made by whistleblowers, including N[redacted]; (4) reform of vendor relationships and compliance with contract procurement policies including those relating to Membership marketing Partners and related entities, Ackerman McQueen, Affiliated Television International, and Gayle Stanford-related entities; (5) Audit Committee review of allegations of wrongdoing and conflict of interest by defendant Wayne LaPierre, the signing of the NRA's 2019 IRS Form 990 filing, and allegations in the Complaint; and (6) work done by K&L Gates, Morgan Lewis, Don Lan, the Brewer firm and other outside counsel and consultants hired as part of the NRA "course correction" and touted by the NRA as evidence of its good faith reform efforts.

ARGUMENT

Rule 202.21(d) provides that "where a party is prevented from filing a note of issue and certificate of readiness because a pretrial proceeding has not been completed for any reason beyond the control of the party, the court, upon motion supported by affidavit, may permit the party to file a note of issue upon such conditions as the court deems appropriate." Such relief is appropriate where a plaintiff, through no fault of its own, has not yet obtained all discovery from defendants. *See, e.g., Scott v. Metro. Suburban Bus Auth*., 11 Misc. 3d 1079(A) (Sup. Ct. Nassau Co. 2006). Rule 202.21(e) also permits post-note of issue discovery where appropriate.

As set forth in the accompanying affirmation, Plaintiff endeavored to obviate and obtain relief based upon the NRA's conduct and was unable to do so. Indeed, at a conference held before the Special Master on December 5, 2022, counsel for the NRA, stated that the NRA was trying to "say where [Plaintiff has] been blocked, … we want to kind of make this right…We would like to be able to get to a point where [Plaintiff] feels that [it] has everything that [it] needs on these topics" and the Special Master responded that he did not see "how you are going to be able to accomplish that within the time you have, and I'm not positive that Judge Cohen is going to give you additional time." Connell Aff., Ex. G (December 5, 2022 Transcript) at 29-32.

Plaintiff therefore now asks that it be permitted to file a note of issue on December 13, 2022 or such other date set by the Court with the condition that Plaintiff be permitted to file an application seeking relief relating to the NRA's discovery tactics. Specifically, Plaintiff will identify areas where the NRA used privilege as a sword and a shield, placing matters at issue but blocking Plaintiff's ability to obtain discovery of the same and ask either that the NRA be precluded from introducing evidence relating to such topics or that privilege be deemed waived as to those topics, with discovery pertaining to these issues being permitted and other appropriate

remedial relief. Plaintiff also asks for a conference to discuss next steps in this action, including the timing and process for summary judgment and expert evidence motions.

Given the foregoing, Plaintiff asks to be permitted to file the note of issue and certificate of readiness on December 13, 2022 or such other date as is set by the Court but, pursuant to Rule 202.21(d), under the condition that Plaintiff may pursue motion practice and obtain such relief as the Court deems appropriate as a result of Defendant's discovery conduct. In the alternative, Plaintiff asks for a conference and to be permitted to file the note of issue and certificate of readiness but complete any necessary discovery granted by the Court thereafter under Rule 202.21(e) or for an order extending Plaintiff's time to file the note or issue pending a decision by the Court following that conference.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court issue an Order:

(i) Permitting Plaintiff to file the note of issue and certificate of readiness on December 13, 2022 or such other date as is set by the Court but, pursuant to Rule 202.21(d), under the condition that Plaintiff may pursue motion practice and obtain such relief as the Court deems appropriate as a result of Defendant's discovery conduct and may file the certificate of readiness with this reservation noted;

(ii) in the alternative, scheduling a conference and permitting Plaintiff to file the note of issue and certificate of readiness, but complete any necessary discovery granted by the Court thereafter under Rule 202.21(e) or extending Plaintiff's time to file the note or issue pending a decision by the Court following such conference; and

(iii) granting such other and further relief as the Court deems just, fair and appropriate.

Dated: December 12, 2022
New York, New York

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Of Counsel

Attorney Certification Pursuant to Commercial Division Rule 17

I, Monica Connell, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law 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 2809 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 and affirmation.

Dated: December 12, 2022
New York, New York

/s Monica Connell

Monica Connel