

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

V.

Defendants.

Hon. Joel M. Cohen

2. I submit this affirmation in support of the Motion to Review the Special Master’s Ruling Dated November 29, 2022 Pertaining to “At Issue” Waiver of Privileges. In that decision, the Special Master ruled that privileged documents that NRA has no intention of using or mentioning at trial must be submitted for in-camera review, based on the theory that the NRA made an “at issue” waiver of privileges. A copy of the Special Master’s decision is attached as **Exhibit D**. As shown below, and in the attached Memorandum of Law, the Special Master’s ruling is wrong as a matter of law and lacks factual support.

3. The Special Master's decision was prompted by the Omnibus Discovery Letter filed by the New York Attorney General's Office ("NYAG") on October 20 2022. A copy of that letter is attached as **Exhibit A**. In that letter, the NYAG argued that the NRA had effected a sweeping "at issue" waiver of attorney-client privilege because witnesses testified that they had sought legal advice on matters relating to compliance efforts.

4. Initially, it should be noted that the NYAG waited until three months after discovery closed to first assert a waiver theory based on allegedly overbroad invocation of the attorney client privilege in depositions.

5. Discovery in this matter has been extensive. During discovery, the NYAG took three days of corporate representative depositions, in addition to 26 depositions of fact witnesses. *See* Exhibits B, F, G, H, I, T, U. At these depositions, the NYAG received detailed testimony on NRA's efforts to improve compliance and obtain repayment of excess benefits. **Exhibit B** to this Affirmation is a true and correct copy of John Frazer's corporate representative deposition, which includes extensive testimony about the NRA's efforts to improve compliance and recover excess benefits. In addition, the NRA has produced detailed spreadsheets and underlying data showing the basis for its calculations of excess benefits. Thus, the NYAG's contention that the NRA "has blocked any meaningful inquiry into the reasonableness of such actions through the assertion of privilege" is **totally false**. The NYAG received than three days of corporate representative depositions at which it inquired extensively into how excess benefits were calculated. *See* Exhibits B, F.

6. As the primary support for its argument that there has been an "at issue" waiver, the NYAG cites excerpts from six depositions where witness invoked privileges. *See* Exhibit A. Four of these depositions took place in June and July of 2022. The other two- Days 2 and 3 of the NRA's corporate representative deposition—took place in early August and early September. Exhibit F. The

NYAG made no contemporaneous objection to the privilege assertions of these witnesses. Nor did it timely move to compel. Instead, it waited until 3 months after discovery closed to first raise its waiver theory.

7. The NYAG's delay was strategic: the NYAG does not want more information from the NRA, but rather for the NRA to be precluded from offering testimony about its robust efforts to comply with its internal controls and external obligations that is damaging to the NYAG's case.

8. However, the NYAG's gambit is without merit. The NYAG had years to obtain discovery regarding the efforts by NRA to comply with its governance and control obligations. It is inexcusable that the NYAG would first present its waiver theory three months *after* discovery closed.

9. Further, CPLR § 3115(b) states: "Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of persons, and errors of any kind which might be obviated or removed if objection were promptly presented, are waived unless reasonable objection thereto is made at the taking of the deposition."

10. Here, the NYAG failed make any objection to the privilege invocations of the NRA's witnesses. Had the NYAG moved to compel responses when privileges were asserted at the depositions cited by NYAG, this issue would have been obviated or removed. The NYAG should have its "at issue" waiver theory deemed waived because it failed to promptly raise its concerns sooner.

11. Moreover, the NYAG's evidentiary basis for finding that there has been an "at issue" waiver is woefully insufficient.

12. "At issue" waiver occurs only "when [a] party *has asserted a claim or defense that he intends to prove by use of the privileged materials.*" *Deutsche Bank Tr. Co. of*

Americas v. Tri-Links Inv. Tr., 43 A.D.3d 56, 64 (1st Dep’t 2007) (emphasis added). For an “at issue” waiver to occur, “a party must *rely* on privileged advice from his counsel to make his claim or defense.” *In re Cnty. of Erie*, 546 F.3d 222, 229 (2d Cir. 2008) (emphasis in original). That is, “the essential element” for at-issue waiver is “**reliance on privileged advice in the assertion of the claim or defense.**” *Id.* (emphasis added). “At issue” waiver only occurs where a party **intends to use privileged communications in connection with a claim or defense.** *Manufacturers & Traders Tr. Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 399 (4th Dep’t 1987) (defining waiver of privileges as “an intentional relinquishment of a known right” and underscoring that “[i]ntent must be the primary component of any waiver test.”) (internal formatting omitted). Further, attorney-client and work product privileges fully apply to compliance matters. *Spectrum Sys. Int’l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 380 (1991).

13. **Exhibit E** is a true and correct excerpt of the NRA’s Answer in this matter, showing that it asserts no “advice of counsel” defense. Nor will the NRA mention any privileged communications, its engagement of attorneys, or any investigations conducted by them.

14. Under settled law, that should end the waiver inquiry. *U.S. Fid. & Guar. Co. v. Excess Cas. Reinsurance Ass’n*, 68 A.D.3d 481, 482 (1st Dep’t 2009) (“In view of cedant’s concession, however, that it will not raise the ‘advice of counsel’ defense and make any reference to attorney-client communications by cedant at the trial, we agree that the court should not permit cedant to . . . refer to any such communications”); *Miteva v. Third Point Mgmt. Co.*, 218 F.R.D. 397, 397-98 (S.D.N.Y. 2003) (disclosure of attorney-client communication not appropriate where defendant expressly represented that “it is not asserting nor relying on the advice of counsel defense”).

15. Nonetheless, the NYAG contends that NRA “cannot withhold material and relevant information in discovery in this way *while also citing to and relying upon such information in its*

defense.” Exhibit A at 2 (emphasis added). Thus, the NYAG’s argument for “at issue” waiver rests on a false premise: that NRA is “citing to and relying upon” privileged communications in its defense. *Id.* But NRA has no intention of doing so.

16. In an effort to find some support for its waiver argument, the NYAG cobbles together out-of- context bits of deposition testimony where witnesses invoked attorney-client privilege. *Id.* at 4-8. But statements from witnesses in depositions are not claims, defenses, or legal arguments, and they do not waive the privilege. *Deutsche Bank Tr. Co. of Americas.*, 43 A.D.3d at 64, 68-69; *Williams v. Sprint/United Management Co.*, 464 F.Supp.2d 1100, 1116 (D. Kan. 2006); *Soho Generation of New York, Inc. v. Tri-City Ins. Brokers, Inc.*, 236 A.D.2d 276, 277 (1st Dep’t 1997).

17. By definition, privileges “block” the opposing party from obtaining discovery of communications between counsel and client that relate to topics “at issue” in the litigation. But “that a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself ‘at issue’ in the lawsuit; if that were the case, a privilege would have little effect.” *Deutsche Bank Tr. Co. of Americas*, 43 A.D.3d at 64. “Rather, ‘at issue’ waiver occurs when the party has asserted a claim or defense that he intends to prove by use of the privileged materials.” *Id.* (emphasis added).

18. Importantly, the bits of deposition testimony and excerpts from expert reports that the NYAG cites do not support a finding of waiver. And the NYAG provides no other factual basis but these snippets. Below is a discussion of each excerpt of deposition testimony and each excerpt from an expert report cited by the NYAG in order. **None** support a finding of “at issue” waiver.

19. First, the NYAG cites excerpts of the NRA's corporate representative deposition, which occurred on July 29, August 9, and September 9, 2022. A true and correct copy of these excerpts is attached as **Exhibit F**; they are Exhibit A to the NYAG's October 20 letter.

20. In the excerpts cited by the NYAG, the NRA's corporate representative mentioned in passing that—unsurprisingly—the NRA received assistance from outside law firms relating to certain compliance matters. *See* Exhibit F.

21. Over the course of three days, there were two passages where the corporate representative was instructed not to reveal privileged information. One concerned discussions with NRA's outside tax counsel, Don Lan, regarding repayment of excess benefits by Wayne LaPierre. The NYAG falsely claims that it was unable to probe how the repayment amounts were determined. But the corporate representative testified at length about these issues for hours and the NRA produced detailed spreadsheets and underlying data. *See* Exhibit B. A true and correct copy of the spreadsheets is attached as **Exhibit P**. A true and correct copy of a spreadsheet showing the Bates numbers of the "raw data" documents is attached as **Exhibit R**.

22. The other passage involved privileged communications relating to ongoing internal investigations. Once again, the NYAG never moved to compel the NRA to answer these questions. nor is it clear why the NYAG requires discovery regarding communications with attorneys regarding these investigations.

23. Second, the NYAG cites snippets of David Coy's June 15, 2022 deposition. A true and correct copy of these excerpts is attached as **Exhibit G**; they are Exhibit B to the NYAG's October 20 letter. The NYAG asked Coy to reveal the substance of privileged communications with outside litigation counsel. Unsurprisingly, and properly, Coy declined. The NYAG never moved to compel.

24. Third, the NYAG cites Charles Cotton's deposition on June 17, 2022. A true and correct copy of these excerpts is attached as **Exhibit H**; they are Exhibit C to the NYAG's October 20 letter. The NYAG asked Cotton a series of speculative questions about discussions between Lan and LaPierre regarding how excess benefit repayments were calculated. Cotton testified that he had never spoken to Lan. Of course, Cotton could not answer questions about discussions he had no part in. The NRA's corporate representative later testified at length about these calculations and the basis for them. *See* Exhibits B, P, R.

25. Fourth, the NYAG cites Frazer's July 12 deposition. A true and correct copy of these excerpts is attached as **Exhibit T**; they are Exhibit D to the NYAG's October 20 letter. The NYAG claims that "Mr. Frazer was unable to describe key pieces of the process for calculating excess benefits, and pointed to as yet unproduced documents supporting the calculation." Exhibit A at 5. That is false: Frazer subsequently testified *for three days* as NRA's corporate representative about excess benefit calculations and provided detailed answers to the questions posed and the spreadsheets and underlying data supporting those calculations. *See* Exhibits B, P, R.

26. Fifth, the NYAG cites Sonya Rowling's July 14 deposition, where she mentioned that she asked attorney Lan about the tax treatment of one former NRA employee's membership in the Capitol Hill Club, and that the Brewer Firm had been involved in renegotiating a contract with MMP/Allegiance. A true and correct copy of these excerpts is attached as **Exhibit U**; they are Exhibit E to the NYAG's October 20 letter. Importantly, Rowling did not testify about the contents of any communications with counsel. *Murata Mfg. Co. v. Bel Fuse, Inc.*, No. 03 C 2934, 2007 WL 781252, at *3 (N.D. Ill. Mar. 8, 2007) ("There is a significant difference between indicating the fact or topic of a confidential[communication] with an attorney and revealing its content. The latter effects a waiver of the attorney-client privilege, while the former does not."). In

addition, the NYAG has all non-privileged documents regarding the Capitol Hill Club issue and the contract renegotiation with MMP. *See* Exhibit P, Exhibit W. And the NYAG never moved to compel Rowling to testify about any tax law advice she received from Lan.

27. Sixth, the NYAG cites Wayne LaPierre’s June 28, 2022 deposition. A true and correct copy of these excerpts is attached as **Exhibit I**; they are Exhibit F to the NYAG’s October 20 letter. LaPierre testified that NRA “may have had outside tax counsel” review his expense reimbursements. Exhibit I. The NYAG then had three full days of testimony from NRA’s corporate representative regarding these reimbursements and the methodology behind them. *See* Exhibit B; Exhibit F.

28. The NYAG cites three passages from NRA’s expert reports. In one, Matthew Lerner, notes in passing that “outside consultants and attorneys” played a “support” role in NRA’s course correction efforts. A true and correct copy of that excerpt is attached as **Exhibit J**; it is Exhibit J to the NYAG’s October 20 letter. But Lerner identifies several NRA employees—each of whom was deposed at length by the NYAG—as having led the course correction. Exhibit J at 14-15.

29. The NYAG also points to a fleeting reference in Amish Mehta’s Expert Report to Lan’s retention as a “reasonable step” that NRA took to ensure the accuracy of its 990 filings. A true and correct copy of Mehta’s expert report is attached as **Exhibit M**, it is attached as Exhibit K to the NYAG’s October 20 letter. Again, the NYAG was able to inquire extensively into the accuracy of and basis for Lan’s calculations during its three full days of deposing the NRA’s corporate representative. Exhibit B. Further, the NRA will not include any mention of Lan’s at trial. In short, the fleeting mention of Lan’s retention in an expert report hardly places Lan’s privileged communications “at issue.”

30. Finally, the NYAG points to a reference in Ryan Sullivan and Bruce Blacker's expert report to LaPierre having paid back excess benefits as evidence that NYAG's requested relief is unnecessary. A true and correct copy of Sullivan and Blacker's expert report is attached as **Exhibit L**. Advice from Lan is nowhere mentioned in Sullivan and Blacker's expert report.

31. In sum, there is no basis for the Special Master's determination that "the documents requested" by the NYAG were "presumptively discoverable and shall be produced unless the NRA makes the necessary showing." Exhibit D at 5.

32. The Special Master's decision followed an unusual procedural course. As noted, the NYAG waited three months after discovery closed to first present its waiver argument on October 20. The NRA submitted a response on November 4, 2022, denying any intention to rely upon any privileged communication for any claim or defense and refuting the legal basis for the NYAG's theory of "at issue" waiver. A true and correct copy of the NRA's response is attached as **Exhibit C**.

33. On November 15, NRA submitted a sample of privileged documents relating to its compliance efforts to the Special Master for in-camera review. He found each document to be privileged. **Exhibit K** is a true and correct copy of the email reflecting the results of the Special Master's review.

34. On November 23, the Special Master asked the parties to meet and confer and directed the NRA to then prepare a "representative sample" of privileged documents related to its compliance efforts. A true and correct copy of that email is attached as Exhibit L.

35. Then, on November 29, before the meet-and-confer had occurred, the Special Master unexpectedly issued his decision. Exhibit D at 5.

36. The Special Master's November 29 decision is riddled with serious errors and should be reviewed and reversed.

37. The Special Master states that “less than a third of the documents selected for review were found to be protected.” Exhibit D at 5. But, that number includes communications between NRA and its agents, a separate category of documents that the Special Master does not address in his decision. *See* Exhibit A at 11-12. Clearly, the Special Master was mistaken; he found that each of the documents in NRA’s initial sample relating to its compliance efforts was privileged. Exhibit K.

38. The Special Master mentions NRA’s review of “certain excess benefits owed by Wayne LaPierre,” Exhibit D at 6, and states that NRA’s position as to this matter is that “the entire review is privileged.” *Id.* That is wrong. The NRA never asserted that “the entire review” of LaPierre’s excess benefits is privileged, nor does the NYAG claim that NRA did so. Exhibit A at 4. Indeed, NRA provided numerous documents and three days of corporate representative testimony on this issue. *See* Exhibits B, N, P, R.

39. Attempting to distinguish *Deutsche Bank*, the Special Master states that “[t]his is not a situation where the communication sought to be protected merely informs a decision made by a party to the litigation.” Exhibit D at 7. But a review of the deposition testimony cited by the NYAG shows exactly that—a handful of instances where NRA employees mentioned that they consulted with Lan and other attorneys to receive tax and compliance advice. *See supra*, at ¶¶ 20–29.

40. The Special Master asserts 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 that selected portions it chooses to disclose to the OAG. . . .” Exhibit D at 7. That is not true. NRA has never taken the position that all communications reflecting its compliance efforts are privileged. In fact, NRA has produced many thousands of documents

relating to its compliance efforts. Exhibit N. Thus, there is no basis for the Special Master's finding that NRA "has disclosed 'a select few 'and withheld 'essentially all.'" Exhibit D at 7.

41. The Special Master claims that "the NRA does not explain the distinction it is attempting to assert" between an advice of counsel defense and its good faith defense. *Id.* at 6. The distinction is that NRA's good faith defense does not depend in any way on advice it received from counsel. Indeed, in the very decision the Special Master cites, *McGowan*, holds that the assertion of a good faith defense does not by itself waive attorney-client privilege.

42. The Special Master contends that "[t]he NRA also listed the attorney work product privilege as a ground for assertion of privilege but it does not argue specifically that the privilege applies to the documents the OAG seeks." *Id.* 5, n. 1. Again, that is not accurate. NRA argued specifically that both the work product and trial preparation privileges apply to some of the documents the NYAG seeks. Exhibit K at 4-6, 8. The Special Master states that NRA "has not established entitlement to that protection." Exhibit D at 5, n. 1. But the NYAG has never challenged NRA's assertion of work product or trial preparation privilege over any documents, arguing only "at issue" waiver. Exhibit A at 4-8, 11-12.

43. Finally, the Special Master states that "[w]here the NRA establishes by competent evidence that a particular communication or document it wishes to use it in connection with a 'good faith defense' or otherwise is privileged, it shall identify the item and submit it for in camera review along with a brief explanation of why such use does not break the privilege." Exhibit D at 7. But NRA has stipulated it will not use any privileged "communication or document" in connection with any defense.

44. The Special Master's decision was egregiously wrong. There is no factual or legal basis for finding that the NRA effected an "at issue" waiver. The NYAG's motion to compel should be denied.

Dated: December 20, 2022
Dallas, Texas

By: /s/ Noah Peters
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