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, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL

Defendants.

Index No. 451625/2020
Motion Seq. No. 37

AFFIRMATION IN SUPPORT OF PLAINTIFF'S MOTION, PURSUANT TO CPLR 3104(d), FOR REVIEW AND REVERSAL OF CERTAIN RULINGS IN THE SPECIAL MASTER'S ORDER, DATED NOVEMBER 29, 2022

Stephen C. Thompson, an attorney duly admitted to the Bar of this State, affirms under penalties of perjury pursuant to Civil Practice Law and Rules 2016 as follows:

1. I am an Assistant Attorney General in the Office of Letitia James, Attorney General of the State of New York, who appears on behalf of the People of the State of New York in this action.

2. I submit this Affirmation in support of Plaintiff's motion pursuant to CPLR 3104(d) for review and reversal of the Special Master's order (i) requiring the production of documents relating to the Office of the Attorney General's communications with sister law enforcement agencies; and (ii) to the extent it found that certain communications between defendant The National Rifle Association of America and third parties were protected by the attorney-client privilege; and (iii) granting any other relief the Court deems just and proper.

3. I am familiar with the facts and circumstances set forth in this Affirmation, which are based upon my personal knowledge and information contained in the files of the Office of the Attorney General.

4. All non-confidential witnesses and all documents provided by non-confidential sources that were exchanged with the D.C. Office of the Attorney General have been disclosed to the defendants in this action.

5. Plaintiff's original certification and categorical privilege log was served on the defendants in this action on December 3, 2021.

6. Attached as Exhibit A to this Affirmation is a true and correct copy of the National Rifle Association of America's ("NRA") October 20, 2022 submission to the Special Master concerning Plaintiff's categorical privilege log.

7. Attached as Exhibit B to this Affirmation is a true and correct copy of Plaintiff's November 4, 2022 response to the NRA's October 20, 2022 submission.

8. Attached as Exhibit C to this Affirmation is a true and correct copy of Plaintiff's October 20, 2022 omnibus submission to the Special Master.

9. Attached as Exhibit D to this Affirmation is a true and correct copy of the NRA's November 4, 2022 response to Plaintiff's October 20, 2022 submission.

10. Attached as Exhibit E to this Affirmation is a true and correct copy of the NRA's July 5, 2022 supplemental privilege log.

11. Attached as Exhibit F to this Affirmation is a true and correct copy of the Special Master's November 29, 2022 order on the parties' October 20, 2022 submissions.

12. Attached as Exhibit G to this Affirmation is a true and correct copy of an excerpt of the transcript of the November 14, 2022 proceedings before the Special Master.

13. Attached as Exhibit H to this Affirmation is a true and correct copy of an excerpt of the transcript of the December 5, 2022 proceedings before the Special Master.

14. Attached as Exhibit I to this Affirmation is a true and correct copy of Plaintiff's April 27, 2022 letter to the NRA.

15. Attached as Exhibit J to this Affirmation is a true and correct copy of the D.C. Office of the Attorney General's December 8, 2022 letter to Judge Sherwood in support of Plaintiff's response to the NRA's October 20, 2022 submission, and its accompanying exhibits.

16. Attached as Exhibit K to this Affirmation is a true and correct copy of the Affirmation of Monica Connell, dated December 8, 2022, submitted to the Special Master.

17. Attached as Exhibit L to this Affirmation is a true and correct copy of Plaintiff's May 25, 2022 amended certification and categorical privilege log.

18. Attached as Exhibit M to this Affirmation is a true and correct copy of Plaintiff's December 8, 2022 letter to the Special Master.

Dated: New York, New York
December 20, 2022

/s/ Stephen Thompson
Stephen C. Thompson

Attorney Certification Pursuant to Commercial Division Rule 17

I, Stephen Thompson, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Affirmation of Stephen Thompson in Support of Plaintiff's Motion, Pursuant to CPLR 3104(d), for Review and Reversal of Certain Rulings in the Special Master's Order, Dated November 29, 2022 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 604 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 affirmation.

Dated: December 20, 2022
New York, New York

/s/ Stephen Thompson
Stephen C. Thompson

EXHIBIT A

DALLAS | NEW YORK

BREWER
ATTORNEYS & COUNSELORS

October 20, 2022

VIA EMAIL

Hon. O. Peter Sherwood, Special Master
Ganfer Shore Leeds & Zauderer
306 Lexington Avenue
New York, NY 10017
Psherwood@ganfershore.com

Re: **NYAG v. The National Rifle Association of America et al.,**
Index No. 451625/2020
NYAG's Privilege Log

Dear Judge Sherwood:

On behalf of the National Rifle Association of America, we seek an order to compel the NYAG to provide additional information in its privilege log, to produce logged documents that are not privileged, and, to the extent necessary, submit certain documents over which the NYAG claims privileges for an *in camera* review.

Once the NYAG complies, the NRA reserves the right to challenge the NYAG's assertions of privilege based on the additional and currently missing information.

I. BACKGROUND

In this action, on February 3, 2021 and October 14, 2021, the NRA served on the NYAG its requests for the production of documents. In response, the NYAG produced to the NRA some and withheld at least 2,724 other documents. For the latter, the NYAG provided a categorical privilege log (attached as Exhibit A to the accompanying affirmation of Svetlana M. Eisenberg dated October 20, 2022).

The NYAG's privilege log is deficient in several respects. As evidenced by the letters attached as exhibits B and C, the parties were unsuccessful in resolving the dispute without Your Honor's assistance.

II. PROCEDURAL POSTURE

On May 2, 2022, the NYAG amended her complaint by adding a new cause of action against the NRA. Subsequently, the NRA moved to dismiss the First Cause of Action. Earlier this Fall, Judge Cohen denied the motion. The NRA answered the operative complaint last week. In its Answer, the NRA asserted a number of defenses (excerpted as exhibit D), including the defense seeking the dismissal of the NYAG's claims against the NRA on First Amendment and other constitutional grounds.

III.
ARGUMENT

The NRA has identified the following deficiencies in the NYAG's privilege log, which, pursuant to Article 31 of the CPLR, must be corrected.

1) Public Interest Privilege

First, each of the five Categories contained within the NYAG's Privilege Log asserts the applicability of the public interest privilege. The public interest privilege protects communications between and to public officers "where the public interest requires that such confidential communications or the sources should not be divulged."[1] Application of the public interest privilege is justified where "the public interest might otherwise be harmed if extremely sensitive material were to lose this special shield of confidentiality."[2] However, "specific support is required to invoke it."[3] As such, it is not sufficient to claim, in conclusory fashion, that "confidentiality is necessary to the pending investigation and vital to public safety because it encourages potential witnesses to provide information."[4]

The NYAG's Privilege Log, the accompanying certification, and the conclusory assertions in counsel's subsequent correspondence are devoid of any explanation as to how the public interests would be harmed by the disclosure of the documents in Categories 1-5. Because the NYAG has failed to provide a basis for the assertion of this privilege, the Special Master should hold that the public interest privilege does not apply, and is not a proper basis on which the NYAG can withhold the documents.

2) Law Enforcement Privilege

All Categories on the NYAG's Privilege Log also identify "law enforcement privilege" as a basis for withholding documents. In New York, "the existence of such a privilege is questionable."[5] "Even assuming such a privilege exists . . . more is needed than a conclusory

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[1] *Cirale v. 80 Pine St. Corp*., 35 N.Y.2d 113, 117 (1974).

[2] In re World Trade Ctr. Bombing Litig., 93 N.Y.2d 1, 8 (1999).

[3] *Colgate Scaffolding & Equip. Corp. v. York Hunter City Servs., Inc.*, 14 A.D.3d 345, 346 (1st Dep't 2005).

[4] *Id*.

[5] *Taylor v. State*, 66 Misc. 3d 1229(A), 125 N.Y.S.3d 528 (N.Y. Ct. Cl. 2019); *see also In re 91st St. Crane Collapse Litig.*, 31 Misc. 3d 1207(A), 930 N.Y.S.2d 175 (Sup. Ct. 2010)

assertion that confidentiality is necessary to the pending investigation."[6] In those cases which have recognized the law enforcement privilege, it has been held that "in camera review of the material sought is particularly appropriate to determine if ***redaction*** is required to protect a legitimate law enforcement interest."[7]

Because the NYAG failed to identify the specific law enforcement interests which would be harmed by the disclosure of the documents identified in Categories 1-5, the NRA respectfully requests that the Special Master hold that the law enforcement privilege does not apply or perform an *in camera* review of the documents to determine whether or not it does.

3) Common Interest Privilege

The NYAG asserted the common interest privilege for Category 2, which consists of "[c]orrespondence with law enforcement agencies." In New York, the common interest privilege applies to "communications of both coplaintiffs and codefendants, but always in the context of pending or reasonably anticipated litigation."[8] The OAG is the only law enforcement agency which is named as a plaintiff or defendant in this action. Thus, the common interest privilege does not apply to communications the OAG has had with other law enforcement agencies. The Special Master should find that the common interest privilege does not apply to the NYAG's communications with the DCAG or other law enforcement agencies and hold that the documents are not properly withheld on this basis.

4) Communications Senders and Recipients

Category 1, 2, 3 and 5 consist, at least in part, of communications with various persons and entities. These categories do not identify the actual senders and recipients of the communications.

The NRA needs this information to assess the legitimacy of the NYAG's privilege assertions – particularly since the privileges the NYAG asserts can be waived as a result of the inclusion of third parties. The Special Master should direct the NYAG to provide this information for all responsive documents that have been withheld.

(determining that the City of New York had "neglected to point to authority" to suggest that the law enforcement privilege actually exists).

[6] *Id.* (internal citations and quotations omitted).

[7] *Colgate Scaffolding & Equip. Corp*., 14 A.D.3d at 347 (emphasis added).

[8] *Ambac Assur. Corp. v. Countrywide Home Loans, Inc*., 27 N.Y.3d 616, 627 (2016).

5) Identity of Consultants

Category 3 consists of "[c]orrespondence with consultants." We recognize that the identities of non-testifying expert consultants are typically protected from disclosure.

However, withholding from disclosure such information is not appropriate to the extent "consultants" include witnesses from whom the OAG derives the bases for the allegations in the Amended Complaint or whom it intends to call at trial or a hearing. The Special Master should direct the NYAG to confirm that none of the consultants who comprise Category 3 have provided any facts, assertions or allegations to the OAG which have been used to craft the allegations in the Amended Complaint and that none of the consultants will be called as a witness against the NRA at a trial or a hearing.

6) Identity of Complainants

Category 5 consists of "[c]ommunications with and documents obtained from or relating to complaints and confidential sources." The Special Master should direct the NYAG to confirm that she does not plan to call any of these individuals as a witness against the NRA at a hearing or at a trial. If the NYAG cannot confirm this, the information pertaining to her office's communications with these individuals should be disclosed.

7) Timeframe

The NYAG's privilege log states that the timeframe for the documents withheld in each category is September 1, 2018 through August 6, 2020—the date on which the NYAG filed this action. This artificial manner of indicating the timeframe provides no useful information to the NRA and merely indicates the timeframe restrictions the NYAG used to search for responsive documents it believes to be privileged. The NYAG should be ordered to reveal the real timeframe for each category.

Furthermore, the NYAG's log does not include any information pertaining to any records after the filing of this action. The Special Master should hold that the NYAG has a duty to amend or supplement its privilege log pursuant to CPLR 3101(h) and that, in any case, there is no basis for the NYAG's refusal to log post-August 6, 2020 responsive records that the NYAG claims are privileged. As a result, the privilege log must be amended and/or supplemented immediately.

8) Communications with Everytown

The NYAG's privilege log does not refer to any communications between the representatives of the NYAG and Everytown, even though Assistant Attorney General William Wang testified under oath that, on or about February 14, 2019, the two groups held an hour-long

meeting at the Attorney General's office ***about the NRA and its Form 990***. While the NRA understands that it may be necessary to use search terms and technology to identify responsive documents, the NYAG's privilege log reveals that the tools the NYAG used to identify and log her communications with Everytown were inadequate. The NRA respectfully requests that the Special Master order the NYAG to perform a more robust search for its communications with Everytown about the NRA and either produce such communications or log them in a separate category.

IV.
CONCLUSION

The NRA respectfully requests that, for the reasons set forth above, the Special Master issue an order directing the NYAG to augment its privilege log in order to provide the NRA with information to which it is entitled under Article 31 of the CPLR.

Respectfully submitted,

/s/ Svetlana M. Eisenberg
William A. Brewer III
Svetlana M. Eisenberg
Blaine E. Adams
BREWER, ATTORNEYS & COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

Enclosures

cc: Parties' counsel of record (via email)

EXHIBIT B

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CHARITIES BUREAU

212.416.8965
Monica.Connell@ag.ny.gov

November 4, 2022

VIA EMAIL

Hon. O. Peter Sherwood, Special Master
360 Lexington Avenue
New York, NY 10017
psherwood@ganfershore.com

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 ("Plaintiff"), the Office of the Attorney General of the State of New York ("OAG") respectfully submits this letter in response to the NRA's October 20, 2022 letters to Your Honor regarding: (i) the NRA's request for Plaintiff to supplement its privilege log; and (ii) the NRA's request for reimbursement of the costs of Aronson LLC's ("Aronson") subpoena response.

The NRA's Request for the OAG to Supplement Its Privilege Log

In its first October 20, 2022 letter (the "NRA Priv. Ltr."), the NRA is seeking an order compelling Plaintiff to, *inter alia*, supplement its privilege log.[1] The NRA's request should be denied because it is untimely, violates the law of the case doctrine and Your Honor's prior rulings, and is lacking in merit. The NRA's letter contains many of the same arguments, in nearly identical form, as set forth in an April 11, 2022 letter to the OAG. (*See* NRA Priv. Ltr., Ex. B.) The OAG responded to the NRA's April 11th letter on April 27, 2022 and not only set forth in detail the basis for the privileges that Plaintiff asserted but also explained why the vast majority of the documents listed on the privilege log were irrelevant to Plaintiff's claims or the NRA's defenses (at that time, discovery with respect to the NRA's counterclaims had been stayed). (*Id.*, Ex. C.)

The issues the NRA now raises are ones that it was aware of long before the close of document discovery and it has no excuse for its delay in raising this issue with Your Honor. In

[1] Plaintiff's privilege log was served on or about October 3, 2021.

addition, in the time since the parties last corresponded on the privilege log, the Court dismissed the NRA's counterclaims in a decision that leaves no doubt that the majority of the documents covered by the log are irrelevant to any remaining issue in the case.[2]

Moreover, Your Honor's prior rulings on the OAG's assertion of privilege with respect to the 11-f deposition notice the NRA foreclose the very same arguments on the scope of the applicable privileges that the NRA now reasserts. Those rulings mandate that the NRA's current request be denied.

The OAG's Production and Privilege Log

Plaintiff has already produced its entire discoverable investigative file to the NRA. That file included documents and testimony from non-confidential sources that the OAG had obtained during its investigation. The documents that Plaintiff withheld from the production were listed categorically on its privilege log and included documents relating to: (i) the OAG's communications with witnesses and their counsel; (ii) the OAG's communications with other law enforcement agencies; (iii) the OAG's communications with consultants; (iv) draft and final OAG interview memoranda; and (v) the OAG's communications with confidential informants and complainants. The NRA does not dispute that the OAG's interview memoranda, as well as its confidential communications with consultants, complainants and confidential informants were properly withheld as privileged. The remaining withheld documents relate solely to how the OAG conducted its investigation and have no relevance to any remaining issues in this litigation. In this regard, although the NRA's counterclaims challenged how the OAG conducted its investigation, Judge Cohen dismissed the counterclaims, holding that the NRA's allegations "do not support any viable legal claims that the Attorney General's investigation was unconstitutionally retaliatory or selective" or deprived the NRA of any constitutional rights. (NYSCEF No. 706 at 2, 13.) That ruling is fatal to any affirmative defense that the NRA has asserted relating to the OAG's investigation, such as an unclean hands affirmative defense, because such a defense must be premised on a constitutional violation that prevents the defendant from putting on a defense. *See, e.g.*, *People v. Trump Entrepreneur Initiative LLC*, 2014 WL 5241483, *12 (Sup. Ct. N.Y. Cty. Oct. 8, 2014), *aff'd in relevant part*, 137 A.D.3d 409 (1st Dep't 2014).

The Special Master Has Already Ruled that the OAG Properly Asserted the Public Interest and Law Enforcement Privileges

The NRA challenges the propriety of Plaintiff's assertion of the Public Interest Privilege and the Law Enforcement Privilege (also know as the Investigative Privilege) in disregard of Your Honor's prior rulings that sustained Plaintiff's assertion of these privileges in this litigation. (*See, e.g.*, NYSCEF 812, Mar. 10, 2022 Tr., at 27-31, 34, 42, 49-51, 54-56, 64-65 (colloquy concerning the assertion of the privileges with respect to the NRA's request for an 11-f examination of the OAG); NYSCEF 656, Mar. 23, 2022 Special Master Report, re Matters 6, 8 (granting OAG's request for a protective order based on, *inter alia*, the Public Interest and Investigative Privilege).) The NRA did not timely appeal Your Honor's March 23, 2022 Report

[2] The log also identifies memoranda of investigative interviews of witnesses that have been withheld although the identity of the witnesses has been disclosed. (*See* Oct. 22, 2022 NRA Privilege Ltr.; Ex. A, Category 4.) The NRA does not dispute that such documents have been properly withheld as work product or as trial preparation materials. (*See* Oct. 22, 2022 NRA Privilege Ltr.)

and it became a binding order of the Court. (*See* NYSCEF 579 ¶ 7.) In addition, the OAG's April 27, 2022 letter, which we incorporate herein by reference, set forth in detail why Plaintiff's assertion of these privileges was appropriate as a matter of fact and law. (NRA Priv. Ltr., Ex. C at 2-6.) In particular, contrary to the NRA's assertion, the OAG's April 27th letter not only explained how the public interest and law enforcement interests would be harmed by disclosure here, but it also cited to numerous authorities applying the privileges in analogous circumstances. (*See id.*) Your Honor's decision upholding the assertion of those privileges to the OAG's investigation is law of the case and requires that the NRA's current attempt to seek documents relating to matters Your Honor previously ruled were privileged be rejected.[3] *See, e.g.*, *Briggs v. Chapman*, 53 A.D.3d 900, 901 (3d Dep't 2008).

Undeterred by Your Honor's March 23, 2022 ruling, the NRA again sought to depose the OAG and Your Honor once again denied the request because it would invade numerous privileges, including the Public Interest and Law Enforcement privileges. (*See* NYSCEF 755, July 11, 2022 Amended Special Master Report on the July 7th Hearing, at 2-3; NYSCEF 769, July 15, 2022 Discovery Order, at 2.). Indeed, in Your Honor's July 11, 2022 Report, Your Honor held that "the OAG has represented that all of the factual information it has gathered has been provided defendants except for identified information it has retained on the basis of privilege. Defendants have not shown otherwise." The NRA appealed Your Honor's July 2022 rulings, arguing, among other things, that Your Honor erred in upholding the OAG's assertion of various privileges, "including attorney-client privilege, attorney work product privilege, trial preparation, **law enforcement, and public interest privileges**." (NYSCEF 796 at 5 (emphasis added).) On October 17, 2022, Judge Cohen upheld those rulings, rejecting the NRA's arguments that the rulings were clearly erroneous and contrary to law. (NYSCEF 859 at 3-4.)

The OAG Properly Withheld the Identity of Confidential Witnesses and Consultants

The NRA asserts that Plaintiff's privilege log is deficient because it does not identify the actual senders and recipients of the information that is being withheld in Categories 1, 2, 3 and 5 of the privilege log. The NRA contends that it needs this information to assess the privilege claims. Plaintiff has, however, identified by name (or position) the witnesses[4] with whom the communications in Category 1 were made. (NRA Priv. Ltr., Ex. A at 8.) In addition, unlike with attorney-client privileged materials, the identity of the senders and recipients of the documents are not needed to evaluate the applicability of the Law Enforcement or Public Interest privileges since the privilege is based on the OAG's investigation and, in part, is in place to shield investigative information, including with whom the OAG is communicating. *See, e.g., In re World Trade Center Bombing Litig.*, 93 N.Y.2d 1, 8 (1999). Similarly, with respect to

[3] The OAG also asserted the Common Interest privilege with respect to certain communications it had with the Attorney General's Office of the District of Columbia ("DCAG"), but all such documents are also covered by the Public Interest and Law Enforcement privileges and, as a result, there is no need to separately analyze the applicability of the Common Interest privilege here. Moreover, these communications solely relate to how the OAG conducted its investigation and they have no relevance to any remaining issue in the case.

[4] The privilege log identifies the specific witnesses to which Category 1 relates and states that the withheld documents related to communications with those "witnesses or their counsel."

Category 2, the OAG has stated that the privilege relates to its communications with the DCAG, and, while it has not identified the specific individuals there with whom it communicated, such information is not necessary to evaluate the assertion of the privilege. With respect to Categories 4 and 5, the OAG has not identified the individuals with whom it communicated, but, as the NRA appears to recognize (NRA Priv. Ltr. at 4), identifying those individuals would destroy the privilege.[5] *See In re World Trade Center Bombing Litig.*, 93 N.Y.2d at 8.

The OAG's Privilege Log Covers the Relevant Time Period

The NRA objects to the timeframe covered by the OAG's privilege log, which covered the period from when the OAG commenced its informal investigation to the filing of its complaint, asserting that the OAG must identify more specific periods for each category. It fails, however, to explain why it needs to know the specific dates the OAG engaged in certain privileged activities. There is, of course, nothing that the NRA would be able to obtain from such a revelation other than how the OAG chose to conduct its investigation, which is not only irrelevant, but protected by the Public Interest and Law Enforcement privileges. In any event, logs for privileged documents the OAG created or obtained after the commencement of litigation would represent a departure from standard practices and are not normally exchanged; courts typically refuse to require them unless there is a specific reason that they are needed. *See, e.g.*, *Harleysville Worcester Ins. Co. v. Sharma*, 2015 WL 3407209, *2 (E.D.N.Y. 2015); *In re Snap Inc. Securities Litig.*, 2018 WL 7501294, *1 (C.D. Cal. Nov. 29, 2018); *see generally* Cohen, *Reviewing Documents for Privilege: A Practical Guide to the Process*, New York State Bar Journal, 72-Sep N.Y. St. B.J. 43 (Sept. 2000) ("parties commonly do not log otherwise privileged documents relating to the litigation that are created after its commencement"). Here, Plaintiff has produced the discoverable contents of the OAG investigative file and a privilege log for what was withheld and has produced all materials obtained after commencement of the litigation in response to subpoenas and identified witnesses in response to interrogatories. The NRA has not come forward with any reason why it is entitled to more.

Everytown Documents

Finally, the NRA complains that the OAG has not logged any documents with Everytown for Gun Safety ("Everytown") on its privilege log. As a threshold matter, communications between the OAG and Everytown have no relevance to this matter given the Court's prior rejection of the NRA's claims of constitutional violations. In addition, Plaintiff has, as its privilege log makes clear, searched for such documents and has not found any responsive documents. (*See* NRA Priv. Ltr., Ex. A at Sch. A (referring to search terms including Everytown and names of associated individuals).) Contrary to the NRA's assertion, the fact that no documents were found does not mean that the search was not done properly.

[5] The OAG can confirm that it does not intend to call any of the consultants covered by Category 3 as witnesses at trial and that those witnesses did not provide it with any factual information or allegations that it relied upon in the preparing the Amended Complaint. Similarly, the OAG can confirm that it does not, at present, have any intention to call any confidential sources or complainants as witnesses at any hearing or trial in this matter. In the unlikely event that that intention changes, the OAG will promptly notify the NRA.

In short, Plaintiff provided a complete privilege log almost eleven months ago, based upon assertions of privilege that Your Honor and/or Judge Cohen have deemed appropriate. Accordingly, Plaintiff asks that Your Honor deny the NRA's application.

The NRA's Request for the Reimbursement of the Costs of Aronson LLC

In its second October 20, 2022 letter (the "NRA Aronson Ltr."), the NRA seeks the reimbursement of $325,000 in legal fees and costs that Aronson allegedly incurred in responding to the OAG's subpoena and that the NRA has paid for pursuant to an indemnification agreement with Aronson. The OAG does not dispute that it is responsible for defraying the ***reasonable*** expenses of a non-party to comply with a subpoena served upon it or that Aronson incurred expenses that the OAG must defray. While Aronson is entitled to be reimbursed for its reasonable costs in collecting and producing documents, the OAG has no obligation to defray: (i) costs associated with expenses that Aronson incurred in screening documents for privileges asserted by the NRA or redacting documents with respect to privileges the NRA asserted especially in the cumbersome, time-consuming and expensive manner in which the NRA insisted on proceeding even in light of Plaintiff's proposal for a more efficient method; (ii) expenses that Aronson incurred in producing documents that the NRA was obligated to produce itself but did not and instead relied on Aronson's production to fulfill the NRA's production obligations; or (iii) expenses that were not reasonable in amount, such as where Aronson used personnel with high billing rates for tasks that could have been handled by those with lower billing rates or outside vendors.

CPLR 3122(d) provides that '[t]he reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery." However, not all costs that a non-party incurs in responding to a subpoena are reasonable ones that it is entitled to be reimbursed for by the party seeking discovery. In particular, where the costs are incurred for the benefit of a party other than the party issuing the subpoena, they are not reimbursable under CPLR 3122(d). Thus, where the costs were incurred in connection with determining whether documents are relevant or covered by a privilege belonging to a litigant, they are not reimbursable. *Thump, LLC v. Michael De Luna AIA, Architect, P.C.*, 2022 WL 1909587, *1-*2 (Sup. Ct. N.Y. Cty. May 31, 2022) (pointing out that non-party responding to a subpoena bears the "costs associated with withholding documents from production due to relevancy or privilege" and holding that costs incurred for benefit of plaintiff were not reimbursable); *In re Khagan,* 66 Misc.3d 335, 342 (Sup. Ct. Queens Cty. 2019) (non-party responsible for costs of conferring with party's counsel regarding privilege and preparing objections to the subpoena); *Peters v. Peters*, 2016 WL 3597629, *4 (Sup. Ct. N.Y. Cty. July 5, 2016) (non-party is entitled to reimbursement "for gathering and reviewing documents for production," but not for "time spent conferring with defendants' counsel or determining which documents to withhold on the basis of privilege or relevancy") (citations omitted).[6] Here, among the expenses for which the NRA is seeking

[6] Appendix A to the Commercial Division Rules, which lists the costs of review for privilege as one cost that ***may*** be reimbursable, does not conflict with the cases cited in the text. The costs of review for a non-party's privilege is an example of costs that it ***may*** make sense to shift in certain circumstances, such as when it is reviewing documents for its own privilege or a privilege of another non-party. In contrast, as the cases cited in the text make clear, the costs of reviewing documents to see if they are covered by a privilege asserted by a party to the case is not one the requesting party should bear. This is the case here, where the privilege at issue was the NRA's not Aronson's.

reimbursement are the legal fees of Aronson's counsel to review documents for privilege "to honor the NRA's rights" and related costs associated with "privilege-related work."[7] (*See* NRA Aronson Ltr. at 3.) Such expenses are not ones that the OAG must reimburse. *See, e.g.*, *Khagan*, 66 Misc.3d at 342; *Peters*, 2016 WL 3597629 at *4; *AYW Networks, Inc. v. Teleport Comms. Group,* 2005 WL 8162267, *1 (Sup. Ct. Nassau Cty. June 13, 2005) (non-party not entitled to reimbursement of legal fees that were not related to its own rights). In a January 28, 2022 email to the NRA, the OAG noted that "Aronson's counsel has previously indicated to us that the process the NRA and Aronson are pursuing involves the NRA designating documents or portions of documents as privileged and then Aronson having to redact and remove the same by hand, which is time consuming. We had asked previously whether this could be expedited in some manner but did not receive a response." Exhibit A. The NRA elected to pursue this process, which is not only time consuming and expensive, but also shifts the cost of redacting the documents for the NRA's privilege to Aronson. It is respectfully submitted that the expense incurred by that choice is not reasonable and should be borne by the NRA under its agreement with Aronson.

Similarly, the NRA may not seek reimbursement for the costs Aronson incurred in order to respond to requests in the subpoena that Plaintiff sought from Aronson because of the NRA's own failure to produce those documents. Because the subpoena for such records was necessitated by the NRA's own conduct and Aronson's production was for the NRA's benefit – in that it did the work instead of the NRA – Aronson and the NRA are not entitled to reimbursement of those costs. *See Thump*, 2022 WL 1909587 at *2 (non-party not entitled to reimbursement for work done on behalf of a party other than the requesting party). The OAG pushed the NRA to produce information relating to Aronson as called for in its requests for production (RFPs) served in June of 2021. In January 2022, the OAG wrote to the NRA that "we have been asking for some time for confirmation that the NRA has produced communications and information exchanged between the NRA and its agents, including the Brewer firm, and Aronson. Has the NRA produced all such communications?" Exhibit A. Had the NRA agreed to produce such Aronson materials, instead of relying upon Aronson to do so, the scope of the Aronson production could have been narrowed and much expense avoided.

Finally, even with respect to those costs that are associated with Aronson's review for responsiveness and the production of such records, in order to be reimbursed, Aronson must provide records that demonstrate that the costs it is seeking reimbursement for were reasonable.

[7] Aronson informed the OAG that the NRA delegated to Aronson's outside counsel the task of manually redacting documents based on the NRA's specific privilege designations. As noted in the text, such expenses are not reimbursable because they were for the benefit of the NRA. However, even if they were reimbursable, the cost of using lawyers, to redact documents where they were not exercising legal judgment and were merely ministerially following the NRA's instructions is unreasonable, since the task could be completed in a more cost-effective manner if lawyers were not used or if the NRA made the redactions itself, as Aronson was not disputing the NRA's privilege decisions. For example, on February 24, 2022, counsel for Aronson communicated to the OAG that "You state 'you', i.e. Aronson is asserting privilege over this document. As you know, the NRA, as the holder of the privilege, has asserted information in the document is privileged. The assertion by Aronson's client that information is protected as privileged requires Aronson to honor that assertion. Please raise the issue with the NRA." Exhibit B. Following requests for clarification of what was being withheld, also on February 24, 2022, the NRA produced what it described as a "a categorical log of documents withheld by Aronson pursuant to the direction of the NRA on privilege grounds."

CPRL 3122(d); *see generally Sands Harbor Marina Corp. v. Wells Fargo Ins. Servs.*, 2018 WL 1701944, *4 (E.D.N.Y. Mar. 31, 2018). To do so, it must come forward with evidence showing what it did to comply with the subpoena, how much time was expended, that the costs it incurred were not "'excessive, redundant or otherwise unnecessary,'" and that the rates it charged were reasonable for the work done. *Id.* (citations omitted). Only those costs that this evidence shows are reasonable and for the benefit of the requesting party are reimbursable. *Id.* at 6-7.

Here, although the NRA seeks $325,000 on behalf of Aronson, it has only produced records relating to $125,407.50 in expenses,[8] and those records do not provide sufficient detail to determine which of the expenses it is seeking reimbursement for are reasonable and which were not. The NRA's request for any costs above $125,407.50 should be precluded. With respect to the $125,407.50 reflected in the records the NRA has provided, Your Honor should order the NRA to produce sufficient evidence for the Court and the parties to evaluate the reasonableness of those costs, precluding the NRA from being reimbursed for any costs that: (i) were associated with reviewing or redacting documents for any privileges asserted by the NRA; (ii) were associated with the review or production of documents that the NRA was required to but did not produce; or (iii) were unreasonable because the work done or the rate charged was excessive, redundant or otherwise unnecessary.

Finally, in regard to the NRA's prior assertions that the OAG did not respond to its requests in regard to such costs, this is simply untrue. The OAG asked the NRA on more than one occasion for information pertaining to the Aronson billing to try to assess what would be reasonable fees. It never received the same.

CONCLUSION

As a result, the OAG respectfully requests that the NRA's privilege motion be denied in its entirety and that the NRA's motion for reimbursement of the costs of Aronson be denied, with an order issued prohibiting the NRA from obtaining reimbursement of any costs incurred for its benefit and requiring it to come forward with evidence supporting the reasonableness of any other costs it seeks.

Respectfully,

/s Monica Connell
Monica Connell
Assistant Attorney General

cc: All Counsel of Record

[8] Certain records relating to the $125,407.50 in costs that the NRA is seeking were included in Exhibits 4 and 5 to its letter. The text of the NRA's letter refers to Exhibits 3 and 4, rather than Exhibits 4 and 5, but no Exhibit 3 was attached to the letter and the NRA's counsel has confirmed that the documents attached as Exhibits 4 and 5 are what the letter was referring to (and that there is no Exhibit 3).

EXHIBIT C

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CHARITIES BUREAU

212.416.8965
Monica.Connell@ag.ny.gov

October 20, 2022

VIA EMAIL

Hon. O. Peter Sherwood, Special Master
360 Lexington Avenue
New York, NY 10017
psherwood@ganfershore.com

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 ("Plaintiff"), the Office of the Attorney General of the State of New York ("OAG") respectfully submits this letter to address significant outstanding discovery issues between Plaintiff and Defendant National Rifle Association of America ("NRA") in accordance with the Court's and Your Honor's directions communicated during the conferences held on October 3 and 5, 2022.

The NRA has disregarded its discovery obligations to the detriment of Plaintiff by belatedly producing documents responsive to document requests Plaintiff served more than a year ago, after the official close of fact discovery, and after relevant depositions were completed. The NRA has also improperly withheld from discovery documents that it claims are privileged where no such privilege applies, or where the NRA has waived any such privilege by affirmatively placing privileged information at issue. Discovery in this action has been protracted due to the NRA's discovery conduct, as evidenced by the record in this action, and Plaintiff is eager to bring discovery to a close.

For that reason, even though the NRA's compliance with its discovery obligations is woefully deficient in numerous respects, Plaintiff has raised in this omnibus motion outstanding discovery matters that are the most prejudicial to Plaintiff. In each instance, the NRA has failed to provide the Plaintiff with full and complete discovery of a matter on which the NRA is affirmatively relying to support its defenses in this action.

I. The NRA must provide disclosure concerning its reliance on the advice or work of counsel concerning the NRA's purported "course correction" or else risk preclusion.

The NRA has made its use of outside legal consultants and counsel, and its reliance on their reviews, analyses, and advice, central to its defense. Repeatedly, NRA fact and expert witnesses have discussed the "course correction" and "360-degree review" that the NRA allegedly began in late 2017 and remains ongoing, and which has been conducted by various outside counsel. But the NRA has repeatedly refused to disclose the substance of counsel's work and advice on privilege grounds, presenting a classic sword-and-shield abuse of privilege. For the reasons given below, the NRA should be directed to either produce relevant documents and its corporate representative for additional testimony, or else face preclusion from presenting evidence of its reliance on outside counsel. The choice is the NRA's, but it cannot withhold material and relevant information in discovery in this way while also citing to and relying upon such information in its defense.

a. Relevant Law

Under New York law, privileges are to be "narrowly construed," with the party asserting the privilege having the burden of establishing it. *McGowan v. JPMorgan Chase Bank, N.A.*, 2020 WL 1974109, at *3 (S.D.N.Y. Apr. 24, 2020)[1] (quoting *Spectrum Sys. Int'l Corp. v. Chm. Bank*, 78 N.Y.2d 371, 377 (1991)). "It is also the burden of the party asserting a privilege to establish that it has not been waived." *Id.* (citing *John Blair Comms., Inc. v. Reliance Capital Grp.*, 182 A.D.2d 578, 579 (1st Dep't 1992)). A party will waive privilege by placing the advice of counsel "at issue" in a litigation, even if the party does not expressly intend to rely on attorney-client communications in support of its claims.[2] *Id.* at *6. "Thus, the privilege may implicitly be waived when [a party] asserts a claim that in fairness requires examination of protected communications." *Id.* (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)).

Courts in this State routinely find that a party waived privilege when it asserts a claim or defense that can only be tested by invading that privilege. *See, e.g.*, *Village Board v. Rattner*, 130 A.D.2d 654, 655 (2d Dep't 1987) (party asserting good faith defense based on reliance on counsel waived privilege); *see McGowan*, 2020 WL 1974109 at *7 (noting that it "would be

[1] New York law on attorney-client privilege is generally similar to federal law and both federal and state law recognize the doctrine of at issue waiver. *McGowan*, 2020 WL 1974109 at *2, n.3, *7 (S.D.N.Y. Apr. 24, 2020).

[2] If a party waits until after the close of discovery to introduce a privileged communication that waives privilege, a court may preclude introduction of that communication since permitting its introduction would deprive the opposing party of the opportunity to take discovery on the privileged communications that would be waived by that selective disclosure. *Gottwald v. Sabert*, 204 A.D.3d 495, 495-96 (1st Dep't 2022); *see also McGowan*, 2020 WL 1974109 at *8 (party will be precluded from relying on evidence relating to investigation unless it confirms its intent to do so, in which case opposing party will be permitted to take discovery with respect to it and privilege will be waived).

unfair for a party who has asserted facts that place privileged communications at issue to deprive the opposing party of the means to test those factual assertions through discovery of those communications") (internal quotation marks omitted). In such circumstances, the assertion of the claim or defense waives the privilege as to all communications concerning the relevant transaction. *Village Board*, 130 A.D.2d at 655. To hold otherwise would permit a party to selectively disclose only "self-serving communications" while "rely[ing] on the protection of the privilege regarding damaging [ones]," which courts have repeatedly found to be impermissible. *Id.; see*, *e.g.*, *Banach v. Dedalus Fdn., Inc.*, 132 A.D.3d 543, 543 (1st Dep't 2015) (use of portion of board minutes placed contents at issue and required disclosure of full unredacted minutes); *Orco Bank, N.V. v. Proteinas Del Pacifico, S.A.*, 179 A.D.2d 390, 390-91 (1st Dep't 1992) (party waived privilege by making selective disclosure of its counsel's advice); *BMW Group v. Castlerom Holding Corp.*, 2018 WL 2432181, *7-*8 (Sup. Ct. N.Y. Cty. May 30, 2018) (finding waiver with respect to investigator and expert, where, among other things, party used excerpts of communications and documents to support its position but asserted privilege in an attempt to shield the remainder of the materials).

The "at issue" waiver doctrine not only covers privileged communications, but also extends to factual material that would otherwise be protected from disclosure by work-product protections. Thus, if a party relies on a report from an expert, it cannot withhold the underlying factual data on which the report was based because the reliance waives the protection. *See, e.g.*, *In re: New York City Asbestos Litig.*, 2011 WL 6297966 (Sup. Ct. N.Y. Cty. Dec. 7, 2011) (holding that party waived privilege over raw data underlying reports).

Even where it does not selectively disclose the underlying privileged documents, a party will still waive privilege if it relies on documents or testimony that were created by counsel or otherwise based on privileged information. Thus, a party may not "rely on the thoroughness and competency of its investigation and corrective actions and then try and shield discovery of documents underlying the investigation by asserting the attorney-client privilege or work-product protections." *Angelone v. Xerox Corp.*, 2011 WL 4473534, *3 (W.D.N.Y. Sept. 26, 2011); *accord Polidori v. Societe Generale Groupe*, 39 A.D.3d 404, 406 (1st Dep't 2007). In *Angelone*, the Court found that the defendant's reliance on its own internal investigation and corrective measures waived privilege with respect to all documents and communications "considered, prepared, reviewed, or relied on by [defendant] in creating or issuing [the report of its internal investigation]." 2011 WL 4473534 at *3.

Similarly, in *Polidori*, the Appellate Division found that the defendant's assertion that it investigated and took "immediate and adequate measures" to stop the wrongdoing waived work product protections because that "position puts in issue whether the corrective actions taken by defendant were reasonable in light of what it learned from the investigation." 39 A.D.3d at 406; *see also Coyne v. The City University of New York*, 2012 WL 12090963 (Sup. Ct. N.Y. Cty. Mar. 19, 2012) (same); *Brownell v. Roadway Package Sys., Inc.*, 185 F.R.D. 19, 25 (N.D.N.Y. 1999) (same, noting that permitting the defendant to continue to assert privilege would be to let it impermissibly use "privilege as both a sword and a shield"). Finally, a party cannot use its own litigation counsel to perform factual investigations and rely on those investigations in support of its claims or defenses without waiving "any otherwise applicable privilege as to the disclosed investigations." *Joint Stock Company "Channel One Russia Worldwide" v. Russian TV Co., Inc.*, 2020 WL 12834595, *2 (S.D.N.Y. May 1, 2020).

b. Relevant Facts

Since late 2017, the NRA has relied on outside counsel in connection with its so-called "course correction" and "360 degree review." The NRA cites to work performed by Morgan Lewis, the Brewer firm, BakerHostetler, K&L Gates, Wit Davis, and Steve Hart in support of the "course correction."[3] The NRA's corporate representative testified that the Brewer firm and attorney Don Lan investigated and determined amounts of certain excess benefits owed by Wayne LaPierre as part of course correction, but the corporate representative could not answer what investigations are still ongoing as such answer would reveal privileged information and counsel stated the NRA's position that "the entire review is privileged."[4] Members of the NRA Audit Committee identified various counsel the Audit Committee relied on as part of the course correction but declined to answer specific questions on privilege grounds.[5] Here, the NRA does exactly what is prohibited under the law: it has placed at issue in this case the existence, scope, thoroughness and results of its course correction including its investigations into wrongdoing while at the same time asserting privilege to shield those matters from being tested by Plaintiff. *See Angelone*, 2011 WL 4473534, at *3; *Polidori,* 39 A.D.3d at 406.

For example, the Complaint in this action alleges at length Defendant LaPierre's abuse of his position as a fiduciary to, *inter alia*, obtain millions of dollars in personal benefits including through charter flights for himself and his family, expense reimbursements, and NRA funded gifts and services.[6] This is a central issue in this case. The NRA and Wayne LaPierre have repeatedly represented that Mr. LaPierre has repaid monies owed as excess benefits to the NRA as part of its compliance reform process.[7] But at the same time as it points to this process and to its investigations and determination of amounts allegedly owed and repaid, it has blocked any meaningful inquiry into the thoroughness and reasonableness of such actions through the assertion of privilege.

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[3] *See, e.g.,* [redacted]).

[4] *See, e.g.,* [redacted]

[5] See, e.g., [redacted]

[6] Second Amended and Verified Complaint (NYSCEF 646), ¶¶ 9, 146-164, 199-208.

[7] *See, e.g.*, NRA Answer (NYSCEF 857) at ¶ 9 ("The NRA states that expenses associated with private air travel which were determined to constitute excess benefits were reimbursed by Mr. LaPierre to the NRA."), ¶ 149 ("The NRA states that air charter charges determined to constitute excess benefits were reimbursed by Mr. LaPierre to the NRA."); ¶ 152 ("The NRA states that expenses that were determined to constitute excess benefits were reimbursed to the NRA with interest."). The NRA now contends, through an expert report, that some amounts repaid by Mr. LaPierre were not excess benefits but without knowing how such amounts were calculated, Plaintiff's hands are tied. The NRA admits it paid for private flights by Mr. Lapierre to the Bahamas but admits cryptically that some such charges "deemed to constitute excess benefits were reimbursed by Mr. LaPierre." *Id.* at ¶ 165.

The NRA has testified that it relied on advice provided and work performed by the Brewer firm as well as the NRA's outside tax counsel, Don Lan, in determining what amounts paid by the NRA for LaPierre's travel constituted excess benefits.[8] But the underlying documentation or advice has not been provided to Plaintiff, and no NRA fact witness has been able to testify as to the accuracy of what was reported in the 990s.[9] In preparation for the corporate representative deposition of the NRA, [redacted].[11]

The NRA's investigation and attempts at remediation of other improper excess benefits received by the LaPierres, while touted as a compliance success story[12], were also shielded by

[8] Exhibit A at 372:3-374:11; [redacted] (attached as Exhibit D).

[9] *See, e.g.*, [redacted] Deposition at 129:9-130:12 (attached as Exhibit E) ([redacted]); Exhibit C at 427:14-433:22 [redacted].

[10] Exhibit A at 454:3-457:23.

[11] *Id.* at 454:3-463:25.

[12] LaPierre Deposition at 321:9-322:16 (attached as Exhibit F) (LaPierre testifying [redacted]), 323:8-324:18 ("[redacted]"), 346:13-347:25 ([redacted]); see also Bankruptcy Trial Transcript 4-5-21 PM at 18:13-17 (attached as Exhibit G) ("we set out to put our own house in order, which we did. We went out to self-report"), 18:23-25 ("it begins with the NRA hiring the law firm of Morgan Lewis to review our not-for-profit compliance procedures."), 33:19-34:7 ("The NRA finds that even Mr. LaPierre is subject to review. You will hear him say, no one should escape review, including me. Mr. LaPierre, we file a Form 990. It is, in fact, the tax IRS form that is for the IRS. That form, the National Rifle Association found that Mr. LaPierre had received an excess benefit to the tune of just over $300,000. Demand was made. He paid it. He didn't negotiate it. He wrote a check. He reimbursed the National Rifle Association to the tune of just over $300,000. And what else did he do? He paid his taxes. He paid his taxes to the tune of $70,000-plus, which is what you'll hear. **That $300,000, though, represents the totality of excess benefits from the time period of 2015 forward**.").

the NRA's assertion of privilege. [redacted] that may show what is included in the amounts paid back by LaPierre, but not the "raw data" underlying the determination of what was owed.[16] *Asbestos Litigation*, 2011 WL 6297966 ("[I]f a party selectively discloses certain privileged material but, as in this case, withholds underlying raw data that might be prone to scrutiny by the opposing party, principles of fairness may require a more complete disclosure.") As a result, the Plaintiff has been denied information sufficient to determine if these are the final work sheets, to determine the methodologies applied, or to determine the source and reliability of much of the information.

The NRA also blocked discovery of its alleged investigation of other instances of wrongdoing. Members of the NRA's Audit Committee were repeatedly instructed by counsel not to answer questions about what, if anything, the Audit Committee discussed, learned, or did in response to topics raised in the complaint, including with respect to allegations concerning Wayne LaPierre.[17] Invariably, the response to any question about what action the Audit Committee took was some variation on the theme, "We discussed this with counsel."[18] The same instructions were given when the Audit Committee members were asked about issues related to

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[13] Exhibit A at 483:22-484:11.

[14] *Id.* at 495:20-496:21.

[15] *Id.* at 503:2-23.

[16] NRA-NYAGCOMMDIV-00013553 (attached as Exhibit H); NRA-NYAGCOMMDIV-01540248 (attached as Exhibit I).

[17] [redacted]

[18] *See, e.g.*, Exhibit B at 59:23-60:10, 74:16-76:5

NRA vendors that feature in the complaint,[19] and their reliance on the Brewer firm to conduct any investigations concerning those vendors.[20]

The NRA's current treasurer and chief financial officer, Sonya Rowling, testified that [redacted]"[21] Ms. Rowling testified that [redacted][22]

When asked for details about the investigation into and calculations of excess benefits for LaPierre, [redacted].[23] [redacted].[24] Indeed, [redacted].[25]

Additionally, the NRA's expert witnesses have relied on work done by and advice provided to the NRA by several law firms in reaching a conclusion that Plaintiff's requested relief in the form of an independent compliance monitor is not necessary, since the NRA allegedly had effective internal controls as of December 31, 2020.[26] They have also cited to

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[19] Exhibit B at 82:8-83:3, 86:22-89:9.

[20] Exhibit B at 89:2-9.

[21] Rowling Deposition at 210:2-21.

[22] Exhibit E at 105:10-106:7, 206:7-25.

[23] *See, e.g.*, Exhibit A at 382:3-15; 389:24-391:22; 504:21-505:20; 774:10-23.

[24] Exhibit A at 788:2-22.

[25] *See, e.g.*, [redacted]

[26] *See, e.g.*, Expert Report of [redacted]

[redacted].[27]

Here, the NRA has put the existence, nature, thoroughness and reasonableness of its internal investigations and remediation efforts at issue. It has touted its efforts and cited its use of and reliance upon outside professionals including non-litigation work done by the Brewer firm, Don Lan, and other outside professionals while refusing to disclose the underlying work product—exactly the kind of sword-and-shield privilege assertion that the courts in *Angelone* and *Polidori* rejected. The NRA cannot, on the one hand, argue that it has fulfilled its discovery obligations with respect to internal investigations and identification of excess benefits while also refusing to provide Plaintiff with the means to test the NRA's conclusory assertions. Additionally, the individual defendants have asserted a business judgment defense under N-PCL § 717(b), which protects reasonable reliance on outside experts.[28] Plaintiff cannot test the reasonableness of that reliance without understanding the information communicated to and from the experts on which the defendants rely.

Plaintiff respectfully requests that the NRA be required to disclose the documents from external consultants as part of its "course correction" that have been withheld as privileged, specifically as related to the (1) calculation of excess benefits; (2) handling of whistleblower complaints; and (3) internal investigations, self-disclosures, and remedial actions taken as part of the NRA's course correction. Plaintiff also asks that the NRA be directed to produce a corporate representative capable of testifying regarding the NRA's reliance upon such outside advisors.

II. Plaintiff is entitled to additional disclosure from the NRA's independent auditor, as late disclosure from the NRA has prejudiced Plaintiff.

The NRA has made its external auditors, including Aronson, a centerpiece of its defense by both its fact and expert witnesses. Even though Plaintiff subpoenaed Aronson directly for relevant documents, the NRA interceded and acted as a gatekeeper for Aronson's production, resulting in relevant documents being withheld. On September 16, 2022—the day that initial expert disclosures were due and 5 months after Aronson was deposed in this action—the NRA

[redacted]

[27] Exhibit J at p. 15; [redacted] dated September 16, 2022, at pp. 34-35 (attached as Exhibit L).

[28] *See* NYSCEF 349 at 8 et seq. (Frazer memorandum in support of second motion to dismiss); NYSCEF 356 at 19 (LaPierre memorandum in support of second motion to dismiss); NYSCEF 681 at 91 (Powell answer asserting business judgment affirmative defense); NYSCEF 682 at 68 (Phillips answer asserting business judgment affirmative defense).

produced several material workpapers from Aronson's fiscal year 2020 audit.[29] These workpapers were prepared in 2021, and covered key issues such as the NRA's compliance (or lack thereof) with its policies governing contracts and the NRA's conflict of interest policy. Despite being called for by Plaintiff's document requests,[30] these documents were either not previously produced,[31] produced in a previously redacted (to the point of uselessness) form,[32] or previously logged on Aronson's privilege and redaction log.[33] It is clear that the NRA decided to produce these documents months after the close of fact discovery to support the NRA's expert witnesses.[34]

The NRA's delay in producing these documents has prejudiced Plaintiff. *See Gottwald*, 204 A.D.3d at 495-96 (holding that trial court correctly exercised discretion in precluding selective privilege waiver after close of discovery since opposing party would have been entitled to expanded discovery based on such waiver). Aronson's corporate representative was deposed in March and April of this year, and, as evidenced by the NRA's expert reports, the NRA has made Aronson's audits a central part of its defense. Plaintiff respectfully requests the opportunity to depose Aronson for 3 hours on a date agreeable to the parties and the witness in early December, and that the NRA be required to cover the cover all costs of that deposition.

III. The NRA must disclose documents concerning recent negotiations between the NRA and Membership Marketing Partners and its affiliates, including communications involving the NRA's counsel.

The NRA's ongoing relationship with Membership Marketing Partners ("MMP") and its affiliates, including Allegiance Creative Group ("Allegiance") is a central topic in this litigation. Wayne LaPierre and his family have accepted benefits from MMP even while the NRA paid MMP tens of millions of dollars above any written contractual amount in violation of NRA internal controls. Yet the NRA has failed to produce documents relevant to its ongoing

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[29] NRA-NYAGCOMMDIV-01539999 through NRA-NYAGCOMMDIV-01540003 (attached as Exhibits M through Q).

[30] Plaintiff's First Requests for Production of Documents to Defendant National Rifle Association of America, dated June 25, 2021, at Request 23 (attached as Exhibit R); Plaintiff's Subpoena *Duces Tecum* to Aronson LLC, dated June 21, 2022, at Request 7 (attached as Exhibit S).

[31] Exhibit P.

[32] *Compare* Aronson_NRA0047392 (attached as Exhibit T) *and* Exhibit Q.

[33] Aronson's NRA 2020 audit work paper redaction log dated February 2, 2022, at Row 90 (attached as Exhibit U) (showing entry for [redacted]).

[34] *See* Exhibit J at pp. 18-19 (citing the newly produced Aronson workpapers).

relationship with MMP. For the reasons given below, Plaintiff requests that the NRA be directed to produce all documents concerning the recent negotiations of a new contract with Allegiance, and any consideration by the NRA's Audit Committee thereof.

In July of 2022, Plaintiff learned through the deposition of [redacted].[36] Plaintiff repeatedly requested production of documents related to the negotiations between the NRA and MMP and its affiliates, which was largely being handled on the NRA's side by its litigation counsel, the Brewer firm.[37]

During the final day of the deposition of the NRA's corporate representative deposition on September 9, 2022, Plaintiff learned that the NRA had [redacted] contrary to earlier testimony by the NRA's treasurer.[39]

Yet the NRA did not produce the new Allegiance memorandum of understanding and contract until September 12, 2022, after the completion of the continued deposition of the NRA's corporate representative on September 9, 2022. At that point, Plaintiff was denied the opportunity to question the witness on these very important matters. The NRA subsequently produced a record of a July 2022 meeting of the NRA's Audit Committee that purportedly shows the Audit Committee approved the memorandum of understanding for the new Allegiance contract—albeit after the memorandum had already been signed.[40] Other than the memorandum itself and an incomplete internal NRA contract review sheet for the memorandum,[41] the NRA has not produced any documents, notes, or communications concerning that Audit Committee Meeting. Additionally, the NRA has withheld documents relating to the negotiation of this contract.

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[35] Exhibit E at 257:17-25.

[36] *Id.* at 259:12-260:23.

[37] *Id.* at 257:17-261:3.

[38] Exhibit A at 939:23-940:9.

[39] *Id.* at 949:13-951:23, 952:10-953:22.

[40] NRA-NYAGCOMMDIV-01540050 (attached as Exhibit V); NRA-NYAGCOMMDIV-01539964 (attached as Exhibit W).

[41] NRA-NYAGCCOMMDIV-01539969 (attached as Exhibit X).

The NRA has failed to articulate a basis for withholding communications between its counsel and its vendor, a third party—nor could it. The NRA has not demonstrated it is entitled to the "absolute immunity of work product . . . [which] should be limited to those materials which are uniquely the product of a lawyer's learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy." *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211 (1st Dep't 1980). And even if contract negotiation conversations could be stretched to meet the definition of work product, it waived any such privilege: work product protection is waived "when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality." *Bluebird Partners v. First Fid. Bank*, 248 A.D.2d 219, 225 (1998). The MMP entities have been the subject of testimonial and document subpoenas in this action, and the NRA should have no expectation of privacy in the conversations between it and MMP, particularly given the relevance of its relationship to MMP in the complaint.

Furthermore, market testing a fundraising contract is not "uniquely the product of a lawyer's learning and professional skills," *Hoffman*, 73 A.D.2d at 211, and the NRA can claim no privilege over the alleged market testing conducted by the NRA or its outside counsel.

Finally, the NRA has not asserted a claim of privilege—nor can it—over any of the discussions that took place during the July 2022 Audit Committee meeting at which the MMP memorandum of understanding was discussed. Any such discussions are relevant to Plaintiff's claim concerning the Audit Committee's failure to adequately address Defendant LaPierre's conflicts of interest.

Plaintiff respectfully requests that the NRA be directed to disclose documents related to the new Allegiance contract, and any negotiations or discussions thereof.

IV. The NRA improperly withholds certain material evidence as privileged.

The NRA's privilege log contains twenty-eight (28) categories of documents withheld on privilege grounds.[42] Many of these categories include communications between the NRA and third parties who are either non-attorneys or do not represent the NRA, and which Plaintiff believes to be material to this action.

- Categories A, B, C, D, E, F, H, L, N, R, S, T, U include communications between the NRA and one or more of its external auditors (RSM and Aronson).
- Categories E, H, K, and N include communications between the NRA and McKenna & Associates—an NRA vendor that provided fundraising and business consulting services.
- Categories H, L, M, O, and U include communications between the NRA and Membership Marketing Partners—an NRA vendor that provides membership and fundraising services.

[42] NRA Supplemental Privilege Log dated July 5, 2022 (attached as Exhibit Y).

- Category J includes communications between the NRA and TBK Strategies LLC—an NRA vendor that provides security services.

With respect to the Aronson and RSM documents, those documents should be produced to the extent they have not already, in light of Your Honor's and the Court's rulings on the NRA's communications with its auditors.[43] Then, with respect to the NRA's communications with its vendors, the NRA has failed to establish that its communications with these third parties are privileged.

Additionally, each of the categories on the NRA's privilege log relates to the NRA's past and ongoing "course correction" efforts. The withheld documents include communications with counsel who have been identified as having advised the NRA on its remedial actions and cover the time periods when the NRA purportedly took such actions. For example:

- Category A relates to corporate governance issues and the Top Concerns memorandum;
- Category C relates to meetings of the Audit Committee;
- Category E relates to issues concerning the NRA's travel policy, contract approvals, vendors, travel expenses, compliance seminars, and corporate governance;
- Category I relates to related party transactions and vendor issues;
- Category K relates to LaPierre's expenses;
- Category L relates to excess benefit transactions;
- Category M relates to the NRA's investigation into Millie Hallow, LaPierre's longtime advisor, who was recently terminated;
- Category O relates to ethics considerations around NRA whistleblower Oliver North;
- Category Q relates to a vendor owned by the significant other of Defendant Phillips;
- Category R relates to conflict concerns surrounding Defendant Powell and McKenna & Associates;
- Category V relates to the NRA's annual conflict of interest questionnaires;
- Category ZB relates to the make-up artist for Susan LaPierre.

For all of the reasons stated above in Section I, the NRA has waived any claim of privilege it has over documents related to its past and ongoing "course correction" efforts, and must disclose them or be precluded from doing so at trial.

[43] NYSCEF 711, 848.

V. The NRA must be directed to produce certain documents on an ongoing basis.

The NRA has an ongoing obligation to produced documents where its prior response to document requests is no longer complete. *See* CPLR 3101(h) (requiring supplementation of discovery responses when, *inter alia*, a prior response is no longer complete); Siegel, N.Y. Prac. § 352A (6th ed. 2022) (producing party is responsible for supplementing its response automatically). As argued above, the NRA has made its ongoing "course correction" and related internal investigations central to its defense against Plaintiff's claims, particularly with respect to Plaintiff's request for forward looking equitable relief such as an independent compliance monitor. This is particularly relevant in this case, where Plaintiff seeks prospective injunctive relief, and the NRA alleges that such relief is not necessary. The NRA should be required to supplement its production of documents on an ongoing basis, including:

- Board Reports and minutes,
- Reports, presentations, retention letters and management letters from Aronson or any other external auditor;
- Documents reflecting, containing or summarizing its investigations, determinations, and actions taken by the NRA as part of its "course correction,"
- Documents reflecting the NRA's calculations, demands for payment, and receipt of payments for excess benefit transactions.

CONCLUSION

In light of the foregoing, it is respectfully requested that (1) Defendants produce documents related to the "course correction", including relating to the determination of excess benefits and investigations undertaken as part of the same, that have been withheld on privilege grounds and a witness able to testify to facts related to those documents, or otherwise be precluded from relying on advice provided to them by third parties at trial; (2) Plaintiff be permitted to depose Aronson for additional time as a result of the NRA's delinquent production of documents, and that the NRA cover the costs of such deposition; (3) the NRA produce documents concerning its relationship with MMP and Allegiance, including any documents related to the recent renegotiations of the NRA's contracts with MMP and Allegiance and market testing relating to the MMP entities; (4) the NRA produce the identified material documents inappropriately denoted as privileged on the NRA's privilege log; and (5) the NRA be directed to supplement its production of documents in accordance with CPLR 3101(h). To allow Plaintiff to complete the discrete discovery requested and avoid substantial prejudice, Plaintiff requests a modest extension for filing the Note of Issue by two weeks—until December 13—and a corresponding two-week extension of the date for filing dispositive motions and motions directed to experts to February 3, 2023.

Respectfully,

/s Monica Connell
Monica Connell
Assistant Attorney General

cc: All Counsel of Record

EXHIBIT D

DALLAS | NEW YORK

BREWER
ATTORNEYS & COUNSELORS

November 4, 2022

VIA EMAIL

Hon. O. Peter Sherwood, Special Master
Ganfer Shore Leeds & Zauderer
306 Lexington Avenue
New York, NY 10017
psherwood@ganfershore.com

Re: ***NYAG v. The National Rifle Association of America et al.*,**
Index No. 451625/2020

Dear Judge Sherwood:

In response to the discovery letter from the New York Attorney General ("NYAG"), dated October 20, 2022, the National Rifle Association of American ("NRA") will comply with the reasonable requests in the motion. Specifically, it will:

1) provide the raw data underlying the determination of excess benefits repaid by Wayne LaPierre (*see* Letter at 6) (requesting "the 'raw data' underlying the determination of what was owed");

2) agree to an additional three-hour deposition of Aronson LLP by the NYAG (Letter at 9);

3) produce non-privileged documents relating to contract negotiations between NRA and Allegiance Creative and any market testing of the relationship with Membership Marketing Partners (Letter at 8-11); and

4) produce Board Reports, minutes, and other items listed on Page 13 of NYAG's letter on a continuing basis, to the extent such communications are otherwise discoverable and not privileged (Letter at 13).

However, the NYAG's contention that NRA waived its attorney-client, work product, or trial preparation privileges is without merit, for five reasons.

First, despite what NYAG argues (Letter pp. 2-8), the NRA has never asserted an "advice of counsel" defense in this matter and has no intention of doing so. (*See* Answer at pp. 150-160) (listing 34 affirmative defenses or defenses; "advice of counsel" not included). That fact is dispositive of NYAG's claim that the NRA has effected an "at issue" waiver of its attorney-client privilege. *See Deutsche Bank Tr. Co. of Americas v. Tri-Links Inv. Tr.*, 43 A.D.3d 56, 64 (1st Dep't 2007) ("at issue" waiver occurs only "when the party *has asserted a claim or defense* that *he intends to prove by use of the privileged materials*.") (emphasis added). The privilege is not being

wielded as a "sword" by the NRA simply because witnesses have invoked it to shield confidential attorney-client or otherwise privileged communications from disclosure. *See id*. at 68-69.

Second, New York law is clear that 1) the privilege fully applies to compliance matters, and 2) references to internal investigations in pleadings do not break the privilege. *See Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 380 (1991) (noting that "[l]egal advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client's course of conduct."); *McGowan v. JPMorgan Chase Bank, N.A.*, No. 18CIV8680PACGWG, 2020 WL 1974109, at *7 (S.D.N.Y. Apr. 24, 2020) ("[t]he mere fact that a defendant in an answer denies an allegation made in a complaint is insufficient to place the substance of the allegation at issue for purposes of the waiver doctrine," and "[i]f the rule was otherwise, any plaintiff could force a defendant to choose between the Scylla of admitting that it had conducted an inadequate investigation and the Charibdis of placing at issue the contents of any investigation that it did conduct.")

Third, although the NRA invokes a "good faith" defense, this does not break the privilege because this defense does not turn in any way on any advice it received from its attorneys. *McGowan*, 2020 WL 1974109, at *8 ("As to the defense asserted in the Answer, the mere use of the term 'good faith' in an Answer does not by itself reflect reliance on a 'good faith' defense that requires disclosure of privileged communications.").

Fourth, the cases cited by NYAG nearly all involve a defendant's assertion of a *Faragher-Ellerth* affirmative defense, and the NRA invokes no comparable affirmative defense in its Answer that would put the legal advice it received from counsel at issue. *Id*. Thus, cases involving a defendant's assertion of a *Faragher-Ellerth* defense are irrelevant here. Other cases cited by NYAG are similarly distinguishable.

Fifth, and contrary to NYAG's assertion on pages 11-12 of her letter, the NRA has not waived privilege over any document on which an auditor or vendor was copied. Nor is it required to update its privilege log. There is no waiver where the presence of a third party is necessary to the provision of legal advice and the holder of the privilege has a reasonable expectation of confidentiality. *Bluebird Partners. v. First Fid. Bank*, 248 A.D.2d 219, 225 (1st Dep't 1998). And communications involving multiple privilege holders are privileged to the extent made in furtherance of common legal interests. *Hyatt v. State Franchise Tax Bd*., 105 A.D.3d 186, 205 (2d Dep't 2013). Here, the NRA's detailed privilege log adequately explains the basis for its privilege assertions.

I. Factual Background

After the Court dismissed her two dissolution claims against the NRA, Attorney General James asserted a new claim against the NRA. The First Cause of Action asserts that the NRA is not capable of properly administering assets donated to it for charitable purposes and that the Court should appoint an independent compliance monitor to oversee the NRA's administration of its assets.

As the trial in this action will show, the NYAG's claim has no merit because, even if certain deficiencies existed in the past, the NRA, among other things, has since (i) instituted a series of additional checks and balances, (ii) improved processes related to vendor payments and expense reimbursements, and (iii) obtained repayments from employees of alleged excess benefits.

Despite years of discovery, the NYAG now seeks privileged communications and materials related to the series of steps taken by the NRA that have been referred to as its "course correction," i.e. the efforts pursued by the NRA to insure compliance with its accounting controls, governance rules and administrative process.

The NYAG's unreasonable request is unwarranted. The information is privileged on multiple grounds and therefore not discoverable. The implicit waiver theory on which the NYAG relies has no application here. As the NYAG concedes, the privilege may be waived when a party asserts a claim or affirmative defense that places protected communications "at issue."

Here, the NRA does not assert an "advice of counsel" defense or anything similar. If the NYAG believes that internal control deficiencies have not been fixed, she can present evidence of ongoing problems. If the NYAG believes that the NRA has not periodically and consistently trained its officers, Board members, and employees, she can present evidence that she believes refutes that assertion. If the NYAG believes that Wayne LaPierre has not repaid enough money to the NRA, despite the evidence of the checks he wrote to the NRA, she can offer evidence that she thinks undermines that claim. Finally, if she disagrees that procurement practices are fully compliant, she can present evidence of ongoing issues.

Discovery in this case indeed has been protracted, but not because of the NRA's discovery conduct; rather because the NYAG's repeated requests for documents and information have been extraordinarily excessive. To date, the NRA has produced 311,640 documents, amounting to over *1.5 million* pages. Of that production, the NRA has produced approximately 219,680 documents relating its course correction and remedial efforts. (*See* Exhibit A) It has withheld approximately 629 documents relating to its course correction and remedial efforts—approximately 0.002%—based on privileges. (*See* Exhibit B). Indeed, the NRA's discovery conduct has by far exceeded its obligations under the CPLR.

That the NYAG claims that the affairs of the NRA are not in order—an assertion she must realize she cannot prove—does not mean that the NRA should be denied the right to assert basic privileges applicable to all litigants. The NYAG's request should be denied.

II. Legal Background

In New York, the attorney-client privilege is codified in CPLR §§ 3101(b) and 4503(a)(1). It "shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship." *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 623 (2016) (citing CPLR 4503(a)(1)). The attorney-client privilege enables one seeking legal advice to

communicate with counsel for this purpose secure in the knowledge that the contents of the exchange will not later be revealed against the client's wishes. *See People v. Mitchell*, 58 N.Y.2d 368, 373 (4th Dept 1983). The privilege "belongs to the client and attaches if information is disclosed in confidence to the attorney for the purpose of obtaining legal advice or services." *People v. Osorio*, 549 N.E.2d 1183, 1185 [1989]. Attorney-client privileged material is "absolutely immune from discovery." *Spectrum Sys. Int'l Corp*., 78 N.Y.2d at 376 (citing CPLR § 3101(b).)

Under CPLR § 3101(c), "[t]he work product of an attorney shall not be obtainable." Attorney work product consists of "documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer's learning and professional skills, such as those reflecting an attorney's legal research, analysis, conclusions, legal theory or strategy." *Brooklyn Union Gas Co. v. Am. Home Assur. Co.*, 23 A.D.3d 190, 190–91 (1st Dep't 2005). Like the attorney-client privilege, the attorney work-product privilege is unqualified and absolute. *Corcoran v. Peat. Marwick*, 151 A.D.2d 443, 445 (1st Dep't 1989) ("an attorney's work product is absolutely exempt from discovery"); CPLR § 3101(c) (it "shall not be obtainable").

The third privilege category is trial preparation materials, which (unlike attorney-client communications and attorney work-product, which are shielded from discovery absolutely) may be discoverable "on a showing of substantial need and undue hardship in obtaining the substantial equivalent of the materials by other means." *Spectrum Sys. Int'l Corp*., 78 N.Y.2d at 377 (citing CPLR § 3101(d)(2)).

Legal advice concerning investigative or compliance matters is fully subject to attorney-client and work-product protection. As the Court of Appeals explained, "[l]egal advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client's course of conduct*." Id*. at 380.

"At issue" waiver of privilege occurs only "where a party *affirmatively* places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information." *Deutsche Bank Tr. Co. of Americas*, 43 A.D.3d at 63 (emphasis added).

Thus, "at issue" waiver requires three elements: 1) an "affirmative act" that 2) "put[s] the protected information at issue by making it relevant to the case" 3) under circumstances where "application of the privilege would have denied the opposing party access to information vital to his defense." *Arkwright Mut. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.,* No. 90 CIV. 7811 (AGS), 1994 WL 510043, at *11 (S.D.N.Y. Sept. 16, 1994).

Importantly, "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*. (internal

quotation marks omitted, emphasis added); *see also Vill. Bd. of Vill. of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (1987) ("[w]here a party asserts *as an affirmative defense* the reliance upon the advice of counsel," it "waives the attorney-client privilege with respect to all communications to or from counsel concerning the transactions for which counsel's advice was sought") (emphasis added).

Further, references in a pleading to an investigation or the involvement of counsel are not enough to break the privilege or place attorney-client communications "at issue." As one court has explained, "[t]he mere fact that a defendant in an answer denies an allegation made in a complaint is insufficient to place the substance of the allegation at issue for purposes of the waiver doctrine." *McGowan*, 2020 WL 1974109, at *7 (emphasis added).

Dispositive here, statements by witnesses indicating that they received legal advice as to a matter at issue in the litigation are insufficient to break the privilege. *Deutsche Bank Tr. Co. of Americas.*, 43 A.D.3d at 64, 68-69; *Soho Generation of New York, Inc. v. Tri-City Ins. Brokers, Inc.*, 236 A.D.2d 276, 277 (1st Dep't 1997).

III. Analysis

A. The NRA Has Not Raised an "Advice of Counsel" Defense, and Therefore It Has Not Waived Any Privilege Between Itself and Its Counsel

Here, the NRA has not raised any defense, affirmative defense or claim that effects an "at issue" waiver of its attorney-client, work product, or trial preparation privileges. The NRA asserted 34 defenses or affirmative defenses in this matter. "Advice of counsel" is not one of them. (*See* Answer of the NRA to Second Amended and Verified Complaint (NYSCEF 857) at pp. 150-160). The NRA never asserted an "advice of counsel" defense, and it has no intention of ever doing so. NYAG is simply wrong in suggesting otherwise.

That the NRA does not assert and will not assert an "advice of counsel" defense obviates the need for any "sword and shield" inquiry. *U.S. Fid. & Guar. Co. v. Excess Cas. Reinsurance Ass'n*, 68 A.D.3d 481, 482 (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 raise this defense to reinsurers' claims, or refer to any such communications"; moreover, no waiver of attorney-client privilege occurred due to the concession.); *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"). Simply put, there has been no "affirmative act" by the NRA that "put[s] the protected information at issue by making it relevant to the case." *Arkwright Mut. Ins. Co.,* 1994 WL 510043, at *11.

NYAG's assertion that the NRA has made an "at issue" waiver of its privileges is meritless. Nor has NRA made any selective disclosure of communications with its counsel that would effect such a waiver.

While the NRA indeed undertook a "course correction" beginning in 2018, the NRA has been clear that the NRA itself, particularly its Treasurer, Craig Spray and then Sonya Rowling, spearheaded this effort—not its counsel. (Answer at 4). NRA's Answer does not mention legal advice from its attorneys or assert reliance on such advice.

Instead of citing claims or defenses that the NRA makes, the NYAG cites deposition statements by witnesses declining to answer specific questions that sought disclosure of legal advice from the NRA's attorneys. But statements from witnesses in depositions are not claims, defenses, or legal arguments. *See Deutsche Bank Tr. Co. of Americas.*, 43 A.D.3d at 64, 68-69 (testimony from plaintiff's managing director [Cohen] stating that he consulted counsel before approving settlement did not waive privilege because the plaintiff had "never, either through counsel or through Cohen's testimony, stated an intention to use the advice of counsel to prove the reasonableness of the . . . settlement, and it now explicitly disclaims any such intention"); *Soho Generation of New York, Inc. v. Tri-City Ins. Brokers, Inc.*, 236 A.D.2d at 277 ("By merely mentioning at his deposition that he had withdrawn plaintiff's claim upon the advice of counsel, plaintiff's president Mr. Mosery did not waive any attorney-client privilege by placing the subject matter of counsel's advice in issue or by making selective disclosure of such advice.").

The witness statements cited by NYAG seeking to protect the confidentiality of attorney-client communications are not "swords" that those witnesses are somehow wielding against NYAG. *See Deutsche Bank Tr. Co. of Americas*, 43 A.D.3d at 64, 68-69 (witness testimony from plaintiff's president that he received legal advice from counsel before settling matter, where defendant contended that settlement was excessive and unreasonable, did not mean he was using legal advice as a "sword"). Instead, the statements cited by NYAG are garden-variety invocations of the privilege as a "shield" against compelled disclosure of confidential legal advice and attorney work-product. Thus, there is no "sword and shield" inquiry to be had because the NRA has never sought to use legal advice as a "sword." It seeks merely to preserve the basic right of any litigant—to receive confidential legal advice from its attorneys.

Thus, to the extent that the references to "external consultants" in NYAG's letter includes NRA's litigation counsel, there is no basis whatsoever to require the NRA to produce a "corporate representative" to testify about the NRA's "reliance" on the Brewer Firm. (*See* Letter at 8). Nor is there any basis for requiring the NRA to turn over attorney work-product, attorney-client communications, or trial preparation materials on the theory that these are somehow merely "documents from external consultants," and not truly attorney-client communications or attorney work-product. (*Id.*) Finally, there is no basis whatsoever for the sweeping production of privileged materials requested on pages 12-13 of NYAG's Letter on the ground that the NRA has effected a sweeping waiver of privileged communications with its attorneys related to its "course correction."

B. References to the NRA's "Course Correction" in NYAG's Complaint and the NRA's Answer Do Not Place Attorney-Client Communications "At Issue"

Unlike the NRA's answer, which neither invokes "advice of counsel" or even mentions legal advice from the Brewer Firm or outside tax counsel, NYAG makes repeated and gratuitous

reference to the Brewer Firm in its Complaint, charging falsely that the Brewer Firm was "in charge of NRA's compliance efforts." (*See* Second Amended Complaint ¶¶ 252, 253, 262, 471-486, 489, 492-493, 514-515, 554-55, 561, 604, 623.) This contention is rebutted by the very witness testimony that NYAG cites. [redacted].

The law is clear that efforts by plaintiffs like NYAG to destroy litigation privileges by making irrelevant allegations in pleadings are doomed to failure. According to the case law that NYAG herself relies upon in her Letter,

> The mere fact that a defendant in an answer denies an allegation made in a complaint is insufficient to place the substance of the allegation at issue for purposes of the waiver doctrine. **If the rule was otherwise, any plaintiff could force a defendant to choose between the Scylla of admitting that it had conducted an inadequate investigation and the Charibdis of placing at issue the contents of any investigation that it did conduct.** To be entitled to discovery, it is not enough to point to an allegation made in a complaint or to a denial of that allegation. **Rather, the plaintiff must show that the allegation has relevance to a claim or defense.** See Fed. R. Civ. P. 26(b)(1).

McGowan, 2020 WL 1974109, at *7 (emphasis added). NYAG's baseless assertions in its Second Amended Complaint attacking the Brewer Firm are woefully insufficient to break the privilege.

And ultimately, whether counsel was involved in NRA's compliance efforts or litigation efforts or in some other capacity does not matter for purposes of the privilege. The New York Court of Appeals has made clear—in a decision cited by NYAG—that legal advice on compliance matters may properly be subject to attorney-client privilege. As the Court of Appeals has explained, "[l]egal advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client's course of conduct*." Spectrum Sys. Int'l Corp*, 78 N.Y.2d at 380. Thus, the fact that outside law firms or its own lawyers provided legal advice in connection with the NRA's "course correction" does not break the privilege or make all such communications discoverable. *Id*. Instead, "[t]he critical inquiry is whether, viewing the lawyer's communication in its full content and context, it was made in order to render legal advice or services to the client." *Id*. at 379. If so, the communication is not discoverable.

Further rebutting NYAG's contentions, the NRA has produced many thousands of pages of documents of non-privileged communications relating to its "course correction," its handling of whistleblower complaints, its internal investigations, its self-disclosures, and its remedial efforts. (Exhibit A). Specifically, NRA has produced *219,680* documents relating to the 28 categories mentioned on pages 11-12 of the NYAG's Letter. (*Id*.) It has withheld approximately 629 of those documents—less than one-quarter of 1% of that total—based on privileges. (Exhibit B). That is,

the NRA is withholding a miniscule fraction of documents that contain or reflect legal advice or work product of its counsel—as is its right under CPLR §§ 3101(b)-(d) and 4503. (*See* Supplemental Privilege Log [attached as Exhibit C] [explaining the basis for the NRA's privilege assertions]). The NRA's voluminous production regarding its "course correction" proves that NYAG's suggestion that NRA is seeking to shield its "course correction" behind attorney-client privilege is baseless.

C. The NRA's Assertion of a "Good Faith" Defense Does Not Break the Privilege

One of the NRA's affirmative defenses is "good faith." (Answer at p. 152). As it explains,

> The NRA has no liability under any of the causes of action asserted against it in the Complaint to the extent that officers and directors of the NRA whose conduct Plaintiff attempts to impute to the NRA discharged their responsibilities in good faith and with the degree of diligence, care, and skill which ordinarily prudent persons in a similar position would exercise in like circumstances and at all times, and acted in good faith and relied on information, opinions, or reports of reasonable reliability either presented or available to them.

This statement does not mean that the NRA cannot assert privilege over confidential attorney-client communications it had with its counsel relating to remedial, compliance efforts, or investigative efforts, or over confidential attorney work-product or trial preparation material—and NYAG does not contend otherwise. "As to the defense asserted in the Answer, the mere use of the term 'good faith' in an Answer does not by itself reflect reliance on a 'good faith' defense that requires disclosure of privileged communications." *McGowan*, 2020 WL 1974109, at *8. As in *McGowan*, NYAG does not explain how attorney-client communications or work-product "would be relevant to a claim or defense." *Id*. at *7. Here, as in *McGowan*, the NRA does not contend that its "good faith" or "degree of diligence, care, and skill which ordinarily prudent persons in a similar position would exercise" had anything to do with the substance of any legal advice that it received, Again, NYAG makes no argument whatsoever that NRA's "good faith" defense requires disclosure of privileged documents.

D. The NRA Does Not Assert a *Faragher-Ellerth* Defense, Which Distinguishes the Cases Cited By NYAG

Like *McGowan*, this is not a case where the NRA has asserted a *Faragher-Ellerth* defense. *Faragher-Ellerth* is a special affirmative defense in sexual harassment cases where the employer may avoid supervisory liability if it proves that it "exercised reasonable care to prevent and correct any harassing behavior and . . . the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided." *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013). It must be specifically pleaded and proved. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

Nearly every case cited by NYAG where a court ordered privilege documents produced involved a specific assertion by the defendant of a *Faragher-Ellerth* defense. *Compare Angelone v. Xerox Corp.*, No. 09-CV-6019, 2011 WL 4473534, at *2 (W.D.N.Y. Sept. 26, 2011) ("Here, Xerox has clearly invoked the *Faragher–Ellerth* defense"); *Brownell v. Roadway Package Sys., Inc*., 185 F.R.D. 19, 21–22 (N.D.N.Y. 1999) (case involving *Faragher-Ellerth* defense); *Coyne v. The City University of New York, No. 1040282008*, 2012 WL 12090963 (N.Y. Sup. Ct. Mar. 19, 2012) (in sexual harassment case, employer waived privilege by raising the issue of "the reasonableness and outcome of its investigation into" plaintiff's complaint as a defense); *Polidori v. Societe Generale Groupe*, 39 A.D.3d 404, 406, 835 N.Y.S.2d 80 (2007) (in sexual harassment case, privilege waived where defendant had "taken the position that plaintiff has no cause of action because it took immediate and adequate measures to stop the harassment.")

A *Faragher-Ellerth* defense is not at issue here, and "there is no claim of harassment contained in [NYAG]'s complaint." *McGowan*, 2020 WL 1974109, at *8. Thus, the many cases cited by NYAG involving the employer's assertion of a *Faragher-Ellerth* defense have no relevance here.

Other cases cited by NYAG are similarly distinguishable. In *Banach v. Dedalus Found., Inc.*, the defendant waived its attorney-client privilege regarding the minutes of a board meeting by using portions of those minutes during a deposition and by placing the contents of the minutes at issue. 132 A.D.3d 543, 544 (2015). The NRA has done nothing similar in this case—it has never sought to rely on a document over which it simultaneously asserts privilege.

In *BMW Group v. Castlerom Holding Corp.*, a fraud suit involving allegedly adulterated heating oil, the results of testing conducted by a non-attorney environmental scientist (Clarke) and an investigation by a non-attorney private investigator (Valenti) had to be disclosed where they were used by the plaintiffs to support their complaint and request for injunction. No. 650910/2013, 2018 WL 2432181, at *4 (N.Y. Sup. Ct. May 30, 2018). The court observed that the attorney-client privilege does not extend to underlying facts; that "this court and the Appellate Division relied on the tests and Valenti's and Clarke's findings in making determinations in this case[;]" and that "plaintiffs disclosed only portions of the tests and Valente's and Clarke's communications in their court papers." *Id*. Thus, the plaintiffs could not "use excerpts of privileged communications and documents to make out their case and then assert the privilege to shield the remainder of the material." *Id*. The NRA has done nothing remotely similar here.

In *In re: New York City Asbestos Litigation*, the court held that work-product privilege could not be asserted regarding underlying data used in published scientific research studies and that the crime-fraud exception applied to waive privileges once applicable to certain other communications with attorney. No. 400000/88, 2011 WL 6297966 (N.Y. Sup. Ct. Dec. 07, 2011). Here, there is no claim involving the crime-fraud exception, and no assertion of privilege over underlying data.

In *Joint Stock Co. "Channel One Russia Worldwide" v. Russian TV Co. Inc.*, the court held that "a party that chooses to use its litigation counsel to perform factual investigations, *and submits counsel's sworn testimony concerning those investigations as evidence going to the merits*, has waived any otherwise applicable privilege as to the disclosed investigations." No. 18CV2318LGSBCM, 2020 WL 12834595, at *2 (S.D.N.Y. May 1, 2020) (emphasis added). Here, the NRA has not submitted its counsel's sworn testimony concerning any investigation "as evidence going to the merits." *Id*.

Orco Bank, N.V. v. Proteinas Del Pacifico, S.A was a suit by a lender against a borrower. 179 A.D.2d 390, 390-91 (1992). The borrower attempted to probe the lender's due diligence in making the loan at issue, and "received responses that plaintiff relied upon the advice of its lawyers who informed it, for example, 'we had a good security.'" *Id*. In these circumstances, the court held, "plaintiff had waived the attorney-client privilege by placing the subject matter of counsel's advice in issue and by making selective disclosure of such advice." *Id*. Moreover, the "record disclose[d] a substantial need for said defendant to have access to materials which may allow it to contest plaintiff's claims that its attorneys advised it at all." *Id*. In this case, there is no factual dispute over whether the NRA's attorneys "advised it all"; moreover, the advice given by the NRA's attorneys has no relevance whatsoever to any claim or defense.

United States v. Bilzerian involved a criminal securities fraud trial. 926 F.2d 1285, 1291-92 (2d Cir. 1991). There, the defendant (Bilzerian) asserted lack of *mens rea* based on "his good faith attempt to comply with the securities laws." *Id*. The court held that if Bilzerian chose to make this defense, he would effect a waiver of attorney client privilege "for Bilzerian's testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue." *Id*. Under those circumstances, "[h]is conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent." *Id*. Here, the NRA has not made any similar "good faith" or "advice of counsel" defense that would implicate communications with its attorneys.

E. The NRA Has Not Waived Privilege Over All Documents on Which Non-Attorney Auditors and Vendors Were Included

The NYAG also asserts in Section IV of the Letter that documents withheld on privilege grounds and listed on the NRA's detailed categorical log should be produced because they involve third parties. The NYAG's request should be rejected because it is untimely and has no merit.

As the NYAG's letter acknowledges, the NRA's categorical logs were supplemented by the NRA (at the NYAG's request) on or about July 5, 2022. Months later and weeks before the note of issue date, the NYAG takes issue with the NRA's categorical logs. There is no reason why the NYAG could not have sought this relief as early as July 2022.

Moreover, the fact that third parties were copied on certain communications is not

dispositive on the issue of privilege. For example, there is no waiver where the presence of a third party is necessary to the provision of legal advice and the holder of the privilege has a reasonable expectation of confidentiality. *Bluebird Partners*, 248 A.D.2d at 225 ("The work product privilege is waived upon disclosure to a third party only when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality"); *Oakwood Realty Corp. v. HRH Constr. Corp.*, 51 A.D.3d 747, 749 (2d Dep't 2008). And communications involving multiple privilege holders are also privileged to the extent made in furtherance of common legal interests. *Hyatt*, 105 A.D.3d at 205. The NYAG's belated request that the NRA re-review the documents it withheld. in order to more granularly assert the basis for withholding these documents should, be rejected. The NRA's privilege log is more than adequate to support its privilege claims.

Equally misguided is the NYAG's argument based on Judge Cohen's recent ruling regarding certain specific documents in Aronson's possession. The NYAG fails to mention that Your Honor held that certain documents shared with the auditor were privileged—a ruling the NYAG did not appeal. (*See* Second Amendment to Order re Aronson Documents, dated May 12, 2022). It is precluded from arguing that all communications with auditors are not privileged. Moreover, that the NYAG has been on notice that some of the withheld communications are with RSM and Aronson for months and never sought relief until the eleventh hour is another reason for denying the relief she seeks.

***

In sum, while the NRA will comply with the reasonable requests in NYAG's letter, it vigorously rejects NYAG's baseless contention that NRA has somehow effected a sweeping subject-matter waiver of its attorney-client, work product, or trial preparation privileges, or that its privilege log is otherwise inadequate.

Respectfully submitted,

/s/ Noah Peters
William A. Brewer III
Svetlana M. Eisenberg
Noah Peters
BREWER, ATTORNEYS & COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

CC: All Counsel of Record

EXHIBIT E

Cat. No.	Search Term Category [1]	Affiliations of Sender(s)/Recipient(s)/Copyee(s)	Category Description	Privilege Justification	No. of Documents Withheld (Incl. Families)[2]
1.	Category A	NRA OGC; NRA employees and directors; Michel & Associates; Williams & Connolly LLP; K&L Gates; RSM; Baker Hostetler; Brewer, Attorneys and Counselors; McKenna & Associates; Ackerman McQueen; Digital Strategies LLC; Cooper & Kirk; Virginia State Bar Ethics Counsel; Aronson LLC; Briglia Hundley; Contact Discovery Services; Volkov Law; Schlam Stone & Dolan LLP; Sean Maloney, Attorney at Law; Bradley Arant Boult Cummings LLP; Morgan Lewis & Bockius LLP; Neal & Harwell, PLC Attorneys at Law; Vedder Price; Berke Farah LLP; DLA Piper	Date range: Jan. 2015 – Dec. 2021[3] Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding the vendor relations, corporate governance and compliance, and related matters implicated by Top Concerns search terms. This category includes documents prepared in anticipation of: the NRA's litigation with NYDFS; the NRA's litigation with AMc; investigations by the NYAG and DCAG; Congressional Russia investigations; and, other litigation matters. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding same. Communications with third-party agents include: • RSM and Aronson: Communications regarding tax preparation and attorney audit-response letters. • McKenna: Communications protected by common interest agreement concerning captive-insurance project and DFS/Lockton litigation; correspondence drafted by Steve Hart regarding same. • AMc: Two common-interest emails regarding Carry Guard regulatory issues,	Attorney-Client Privilege Work Product Doctrine Trial Preparation	NRA: 2951 (4242) NRA Board: 454 (819)

[1] The procedures and search terms for the creation of the categories in this column are set forth in Appendix 1.
[2] The withheld documents exist on two distinct and separate databases, and cannot be reliably de-duplicated; therefore, document counts may overlap.
[3] The date ranges provided are good faith approximations based on database analytics. Some documents may be technically older than the date indicated on the "document date" field.

			prepared in the course of multiple pending litigation matters concerning same. • Digital Strategies LLC: Correspondence prepared by or at the direction of counsel updating social media consultant re: pending litigation developments impacting social media messaging.		
2.	Category B	NRA OGC; NRA employees & directors; K&L Gates; Cooper & Kirk; Aronson LLC; Brewer, Attorneys and Counselors; Steve Hart; Williams & Connolly LLP; Morgan Lewis; McKenna Associates; David Jensen PLLC; Neligan LLP.	Date range: Feb. 2015 – Dec. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: a 2015 insurance-coverage issue analyzed by Emily Cummins; the NRA whistlebower policy; potential 2017 employment litigation; compliance seminars; the NRA's litigation with AMc; investigations by the NYAG and DCAG; and, other litigation matters. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding same. Communications with third-party agents include: • Aronson: Updates prepared by counsel regarding pending litigation • McKenna: Correspondence drafted by Steve Hart regarding common-interest insurance issues and pending and anticipated litigation.	Attorney-Client Privilege Work Product Doctrine Trial Preparation	NRA: 839 (1085) NRA Board: 118 (143)
3.	Category C	NRA OGC; NRA employees & directors; Morgan Lewis; RSM; Pillsbury Winthrop Shaw Pittman; Smith; Brewer, Attorneys and Counselors; Neligan LLP; BVA Group.	Date range: Jan. 2015 – Nov. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: draft 990 schedules; IRS donor-disclosure requirements; unrelated matters involving firearms-referral attorney named "Sweeney;"	Attorney-Client Privilege Work Product Doctrine Trial Preparation	NRA: 427 (1492) NRA Board: 44 (116)

			Audit Committee proceedings; officer compensation; AGIA/Transamerica insurance litigation; NRA bankruptcy. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding same. Communications with third-party agents include: • BVA Group: Bankruptcy financial advisor • RSM: Updates prepared by counsel regarding pending litigation		
4.	Category D	NRA OGC; NRA employees & directors; RSM; Brewer, Attorneys & Counselors; Morgan Lewis; Briglia Hundley; Lyons & Simmons, LLP.	Date range: Jul. 2017 – Nov. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: Schedule B donor-disclosure requirements; drafts of Form 990; counsel memoranda regarding legal issues pertaining to Form 990; state charitable registrations; calculation of top-vendor expenses; the NRA's litigation with AMc; NYAG investigation and litigation. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding same. Communications with third-party agents include: • RSM: In tax-preparer capacity, not audit capacity: Facilitating legal advice regarding tax matters; recipient of documents prepared by NRA counsel embodying counsel's mental impressions and strategies.	Attorney-Client Privilege Work Product Doctrine Trial Preparation	NRA: 1255 (3090) NRA Board: 49 (129)

5.	Category E	NRA OGC; NRA employees & Directors; Brewer, Attorneys & Counselors; Schlam Stone & Dolan LLP; Morgan Lewis; Volkov Law; Fortney Scott Attorneys at Law; Foley & Lardner; Neligan LLP; Squire Patton & Boggs; FTI Consulting; Strategic Risk Solutions; Cooper & Kirk; Aronson; RSM; Ackerman McQueen; Sullivan, Bruyette, Speros & Blayney, LLC; Briglia Hundley; Williams & Connolly LLP; Digital Strategies LLC; McKenna Associates; BVA Group; Forensic Risk Alliance; Contact Discovery Services; Page One Legal; Bradley Arant Boult Cummings LLP; Garman Turner Gordon Attorneys; K&L Gates; DLA Piper.	Date range: Mar. 2015 – Jun. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: Form 990; NRA travel policy; vendor and contract approval; travel expense reimbursement questions; compliance seminars; corporate governance and compliance; the NRA's litigation with AMc; investigations by the NYAG and DCAG; the NRA bankruptcy; and, other litigation matters. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding same. Communications with third-party agents include: • RSM: Correspondence constituting attorney work product regarding facilitation of legal advice in tax/compliance matters and anticipated litigation. • Aronson: Correspondence constituting attorney work product facilitating legal advice regarding matters involving NYAG and DCAG investigations and related litigation. • FRA: Analysis prepared at the direction of counsel in anticipation of litigation; common-interest coordination regarding litigation discovery. • McKenna: Correspondence regarding common-interest insurance issues and pending and anticipated litigation. • Fortney Scott, LLC: Correspondence between John Frazer, in his capacity as General Counsel, and outside counsel conveying and discussing legal advice regarding Federal Acquisition Regulation	Attorney-Client Privilege Work Product Doctrine Trial Preparation	NRA: 3035 (4353) NRA Board: 345 (566)

			(FAR) and related compliance matters. • FTI Consulting: Correspondence between attorney-supervised consultant and in-house counsel in order to facilitate the rendition of legal advice regarding regulatory compliance and government affairs. • Strategic Risk Solutions: Correspondence with Steve Hart to facilitate the rendition of legal advice regarding legal issues related to the Lockton litigation and settlement and insurance-related issues. • Digital Strategies: Correspondence from outside consultant to NRA employees and employee of outside counsel's law firm in order to transmit information related to press coverage of certain Supreme Court decision and other matters that was assembled at the request of counsel in order to facilitate the rendition of legal advice.		
6.	Category F	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Lan, Smith & Sosolik; Aronson; Neligan LLP; Lockton Companies; Briglia Hundley; K&L Gates; Kennaday Leavitt PC; Sullivan, Bruyette, Speros & Blayney, LLC; Troutman Pepper;; Rogers & Company; Ryan, Swanson & Cleveland, PLLC; Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C.; Garman Turner Gordon Attorneys; Thomas Balch Parliamentarian; Alward Fisher Law; Schlam Stone & Dolan LLP; Dickinson Wright PLLC; BVA Group; Copilevitz, Lam & Raney, PC; Porter, Porter & Hassinger, P.C.; Law Firm of Russell R. Johnson III, PLC; Baker Hostetler; Carl Liggio; (Gage Spencer & Fleming LLP; Blank Rome LLP; Anderson Kill P.C.	Date Range: Aug. 2020 – Dec. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: Craig Spray's departure and severance; other employment-law matters unrelated to Craig Spray, including pension and retirement matters; Form 990 expense and contractor classifications; the NRA bankruptcy; insurance issues including vis-à-vis Lockton; litigation holds; state registrations; and, pending and anticipated litigation including the instant litigation. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the above. Communications with third-party agents include:	Attorney-Client Privilege' Attorney Work Product Doctrine; Trial Preparation	NRA: 4149 (5753) NRA Board: 435 (667)

			• Aronson: correspondence (some prepared by counsel) facilitating legal advice regarding the NRA pension plan, Form 990 disclosures, and other tax-related issues. • Lockton Companies: Confidential common-interest communications relating to insurance-coverage issues.		
7.	Category G	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Lan, Smith & Sosolik; Briglia Hundley; Winston & Strawn; Lyons & Simmons, LLP; Neligan LLP.	Date Range: Jan 2015 – Dec. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: Lockton litigation and related issues; Audit Committee proceedings; vendor relations and vendor compliance; North-Ackerman contract; and, pending and anticipated litigation, including pending NYAG and DCAG matters. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same. Communications with third-party agents include: • Winston & Strawn: Common-interest emails between counsel discussing Winston's representation of NRA employees	Attorney-Client Privilege; Attorney Work Product Doctrine; Trial Preparation	NRA: 1106 (3334) NRA Board: 46 (120)
8.	Category H	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Michel & Associates; Foley & Lardner; K&L Gates; Porter, Porter & Hassinger, P.C.; Squire Patton Boggs LLP; Morgan Lewis; Baker Hostetler; Pillsbury Winthrop Shaw Pittman; Williams & Connolly LLP; Cooper & Kirk; Neligan LLP; Lan, Smith & Sosolik; Schlam Stone & Dolan LLP; Fortney Scott Attorneys at Law; Aronson; DLA Piper; Forensic Risk Alliance; Ackerman McQueen;	Date Range: Feb. 2015 – March 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: conflicts of interest and related-party transactions; pending legislation; document retention and collection; Form 990 disclosures; invoice payments, disputes, and vendor compliance; press inquiries; ethics matters; and, pending and	Attorney-Client Privilege Attorney Work Product Doctrine Trial Preparation	NRA: 2932 (4838) NRA Board: 598 (1169)

		Norton Rose Fulbright; Membership Marketing Partners; McKenna Associates; Briglia Hundley; Volkov Law; Thomas Balch Parliamentarian; Walsh Colucci Lubeley & Walsh PC; The Risk Management Society; David Jensen PLLC; BVA Group.	anticipated litigation, including the instant litigation. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same. Communications with third-party agents include: Membership Marketing Partners: Communications between NRA counsel and NRA-hired marketing contractor conveying legal advice regarding usage of marketing materials produced by contractor. McKenna Associates: Correspondence regarding common-interest insurance issues and pending and anticipated litigation.		
9.	Category I	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Lan, Smith & Sosolik; Porter Porter & Hassinger, P.C.; Baker Hostetler; Cooper Kirk PLLC.	Date Range: Aug. 2016 – Nov. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: related-party transactions and relationships; vendor contracts; invoice payments and disputes; matters; and, pending and anticipated litigation, including the instant litigation. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same.	Attorney-Client Privilege Attorney Work Product Doctrine Trial Preparation	NRA: 469 (1388) NRA Board: 29 (71)
10.	Category J	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Walsh Colcucci Lubeley & Walsh PC; Christopher Consultants; Neligan Law; Parameter Security; Cooper Kirk PLLC; Clare Locke LLP; Snowfensive, LLC; Michelle McGrath & Associates LLC; TBK Strategies LLC;	Date Range: Feb. 2015 – Dec. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding compliance questions and potential litigation	Attorney-Client Privilege Attorney Work Product Doctrine	NRA: 1445 (4457) NRA Board:

			dealing with issues surrounding Wayne Lapierre and Mr. Lapierre's security concerns, and associated organizational policies and expenses; and documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies. Documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same. In addition, and more specifically, the category also contains other kinds of privileged documents, that reveal the substance of legal advice in the ways, and under the subject matter sub-categories, that overlap with categories listed under numbers 1, 2, 5, 8, and 21 herein. Communications with third-party agents include: Christopher Consultants: Correspondence with NRA lawyers and consultants regarding "I-66 Project Impact on NRA Property" Snowfensive, LLC/Parameter Security: Correspondence with NRA counsel facilitating legal advice regarding cybersecurity/data-related risks and potential liabilities. TBK Strategies LLC: Correspondence facilitating legal advice regarding security risks and potential liabilities. Walsh Colcucci Lubeley & Walsh PC: Privileged communications regarding "I-66 Project Impact on NRA Property" and DOT-related legal issues. Clare Locke LLP: Common-interest communications, exchanged in anticipation of litigation, regarding security threats to C. Cox and potential recourse against same.	Trial Preparation	29 (91)
11.	Category K	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Winston & Strawn; Dan M. Peterson PLLC; Schlam	Date Range: Jan 2015 – Nov. 2021 Confidential communications (including	Attorney-client privilege;	NRA 587 (3432)

		Stone & Dolan LLP; Morgan Lewis; Forensic Risk Alliance; McKenna Associates; Bradley Arant Boult Cummings LLP; Cooper Kirk PLLC.	correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding compliance questions and potential litigation dealing with issues surrounding Wayne Lapierre, Mr. Lapierre's expenses, and associated organizational policies regarding the reimbursement of those expenses (including private travel). Documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same. In addition, and more specifically, this category also contains other kinds of privileged documents, that reveals the substance of legal advice in the ways, and under the subject matter sub-categories, that overlap with categories listed under numbers 1, 2, 5, 8, and 21 herein. Communications with third-party agents include: McKenna Associates: Correspondence regarding common-interest insurance issues and pending and anticipated litigation.	Attorney work product doctrine; Trial Preparation	NRA Board: 22 (99)
12.	Category L	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Troutman Pepper; Lan, Smith & Sosolik; Porter, Porter & Hassinger, P.C.; Neligan LLP; Morgan Lewis; Baker Hostetler; Aronson LLC; Membership Marketing Partners; Garman Turner Gordon Attorneys; Pillsbury Winthrop Shaw Pittman; McKenna Associates.	Date Range: Jan 2015 – Nov. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding compliance questions and potential litigation dealing with issues surrounding the NRA's compliance-related efforts – specifically those regarding excess benefit transactions and excise taxes. Documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same. In addition, the category contains other kinds of privileged documents, that reveals the substance of legal advice in the ways, and under the subject	Attorney-client privilege; Attorney work product doctrine; Trial Preparation	NRA: 1104 (1527) NRA Board: 101 (153)

			matter sub-categories, that overlap with categories listed under numbers 1, 2, 5, 8, and 21 herein. Communications with third-party agents include: Aronson: Correspondence constituting attorney work product facilitating legal advice regarding matters involving pending and anticipated litigation – more specifically, legal issues dealing with tax-related advice, form 990 disclosures, and the NRA Pension Plan. Membership Marketing Partners: Correspondence between NRA-hired marketing contractor and the NRA's in-house counsel seeking legal opinion on NRA marketing materials. McKenna Associates: Correspondence regarding common-interest insurance issues and pending and anticipated litigation.		
13.	Category M	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Kennaday Leavitt PC; Fortney Scott Attorneys at Law; Troutman Sanders LLP; Membership Marketing Partners; Porter Porter & Hassinger, P.C.; Lan, Smith & Sosolik; Gammon Mediations; Neligan LLP; Cooper Kirk PLLC; Winston & Strawn.	Date Range: Jan 2015 – Dec. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding compliance questions and potential litigation dealing with issues surrounding Millie Hallow. Documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same. In addition, the category contains other kinds of privileged documents, that reveals the substance of legal advice in the ways, and under the subject matter sub-categories, that overlap with categories listed under numbers 1, 2, 5, 8, and 21 herein.	Attorney-client privilege; Attorney work product doctrine; Trial Preparation	NRA: 1443 (1724) NRA Board: 14 (23)
14.	Category N	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Lockton Companies; Williams & Connolly LLP; Morgan Lewis; Aronson; McKenna	Date Range: Jan. 2015 – Dec. 2021 Confidential communications (including correspondence and drafts prepared by or at the	Attorney-client privilege; Attorney work	NRA: 1021 (1337)

		Associates; Cooper Kirk PLLC; Neligan Law; Forensic Risk Alliance; BVA Group; Troutman Sanders LLP; Lan, Smith & Sosolik.	direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: review and negotiation of contracts with security vendors; line of credit; election expenditures; NRA bankruptcy; and, pending and anticipated litigation, including NYAG and DCAG litigation. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same Communications with third-party agents include: • Lockton: Correspondence with NRA counsel facilitating legal advice in connection with litigation-related insurance coverage issues. • Aronson: Correspondence constituting attorney work product facilitating legal advice regarding matters involving pending and anticipated litigation – more specifically, legal issues dealing with tax-related advice, form 990 disclosures, and the NRA Pension Plan. • McKenna Associates: Correspondence regarding common-interest insurance issues and Lockton settlement.	product doctrine; Trial Preparation	NRA Board: 37 (52)
15.	Category O	NRA OGC; NRA employees & directors; NRATV; Brewer, Attorneys & Counselors; Morgan Lewis; Briglia Hundley; McDermott Will & Emery; Williams & Connolly LLP; Volkov Law; Membership Marketing Partners; Schlam Stone & Dolan LLP; Winston & Strawn; Digital Strategy Ltd; Cooper Kirk PLLC; Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C.; Forensic Risk Alliance; Lan, Smith & Sosolik.	Date Range: Feb. 2018 – Nov. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding compliance questions and potential litigation dealing with issues surrounding the NRA's compliance-related efforts – specifically those regarding Col. North, Mr. North's role in the Ackerman litigation, and Mr. North's related party	Attorney-client privilege; Attorney work product doctrine; Trial Preparation	NRA: 832 (1054) NRA Board: 78 (93)

			transactions and ethics-related issues. Documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same. In addition, the category contains other kinds of privileged documents, that reveals the substance of legal advice in the ways, and under the subject matter sub-categories, that overlap with categories listed under numbers 1, 2, 5, 8, 10, 11, and 21 herein.		
16.	Category P	NRA OGC; NRA employees & directors; Mullen Coughlin LLC.	Date Range: Sept. 2017 – Jun. 2018 These 18 privileged documents seek or reflect counsel's legal advice and mental impressions regarding: • The NRAF Form 990 disclosure rules and charitable renewals • NRA's state tax audit and California update • Applications of the NRA's privacy policy • IRS tax compliance and refund-related issues • Retention of outside professionals – working under the NRA's in-house counsel – for review of the NRA's privacy policy • Tax and risk management questions • ERISA plans audit • NRA expense reimbursements • Counsel's opinion regarding payments to outside counsel, and • Allocations of time for form 990/tax purposes This includes legal advice and counsel's mental impressions related to risk assessment of potential anticipated litigation related to tax compliance and the specific above-listed issues.	Attorney client privilege; Attorney work product doctrine; Trial Preparation	NRA: 18 (20) NRA Board: 0

17.	Category Q	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors	Date Range: Feb. 2015 – Nov. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding HomeTelos L.P, as well as pending and anticipated litigation, including the instant litigation. Documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same. In addition, the category contains other kinds of privileged documents, that reveals the substance of legal advice in the ways, and under the subject matter sub-categories, that overlap with categories listed under numbers 5, 8, and 21 herein.	Attorney-client privilege; Attorney work product doctrine; Trial Preparation	NRA: 276 (818) NRA Board: 40 (127)
18.	Category R	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Morgan Lewis; Winston & Strawn; McKenna & Associates; Squire Patton Boggs LLP; FTI Consulting; Zukerman Gore & Brandeis, LLP; Aronson; Michel & Associates, P.C; CPR International Institute for Conflict Prevention & Resolution; California Rifle & Pistol Association	Date Range: Jul. 2015 – Aug. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: McKenna vendor relationship, including donor-relations and consulting work by McKenna preceding J. Powell NRA involvement; Colleen Gallagher; and, pending and anticipated litigation, including Lockton litigation, related insurance-regulatory proceedings, and NYAG investigation and litigation. In addition, the category contains other kinds of privileged documents that reveal the substance of legal advice in the ways, and under the subject matter sub-categories, that overlap with categories listed under numbers 5, 8, and 21 herein. Communications with third-party agents include: Zukerman Gore & Brandeis, LLP: Correspondence among attorneys regarding common interest related to certain insurance issues.	Attorney-client privilege; Attorney work product doctrine; Trial Preparation	NRA: 1672 (2345) NRA Board: 19 (44)

19.	Category S	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Briglia Hundley; RSM; Volkov Law; Negligan LLP; Lytle Soule & Felty, P.C.	Date Range: Nov. 2016 – Jul. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: 2016 Russia events; WBB Investments; related compliance issues; related tax-disclosure and corporate-legal issues; and, pending and anticipated litigation, including Under Wild Skies litigation, NRA/AMc litigation, and instant litigation. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same.	Attorney-client privilege; Attorney work product doctrine; Trial Preparation	NRA: 1645 (3654) NRA Board: 78 (256)
20.	Category T	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Morgan Lewis; Briglia Hundley; Volkov Law; RSM; Porter Porter & Hassinger, P.C.	Date Range: Mar. 2016 – Nov. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: pre-2018 fundraising and donor issues; Lance Olson, including his deposition and antique gun purchases; bills from outside counsel containing unredacted descriptions revealing the substance of legal advice and work product delivered to the client (NRA); "redline" and "draft" versions of agreements, which reflect counsel's legal advice and input regarding the same; Audit Committee proceedings. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same. Communications with third-party agents include:	Attorney-client privilege; Attorney work product doctrine; Trial Preparation	NRA: 380 (1460) NRA Board: 36 (76)

			RSM: Correspondence containing attorney work product, exchanged to facilitate legal advice regarding Form 990 disclosure language		
21.	Category U	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Michel & Associates, P.C.; Schlam Stone & Dolan LLP; Aronson; Membership Marketing Partners; Briglia Hundley; Volkov Law; Forensic Risk Alliance; Winston & Strawn; Berke Farah LLP; Murphy & Buchal LLP; McNelly & Goldstein, LLC; Vedder Price; Williams & Connolly LLP; Neligan LLP; Porter Porter & Hassinger, P.C.; Emily C. Gross Law Firm; Jorge I. Hernandez Attorney At Law; Lan, Smith & Sosolik.	Date Range: Jan. 2015 – Dec. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: vendor compliance, Ackerman prelitigation dispute and ensuing litigation; drafts, with input of counsel, related to the NRA's lawsuit against the City of Pittsburg; discussions and questions related to contract interpretations of several contracts; Form 990 disclosure issues; NRAF loan; employee benefit enrollment; and, employee electronic device. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same. Communications with third-party agents include: Winston & Strawn: Common-interest emails discussing C. Cox electronic devices	Attorney-client privilege; Attorney work product doctrine; Trial Preparation	NRA: 1195 (1579) NRA Board: 103 (161)
22.	Category V	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Morgan Lewis; Lan, Smith & Sosolik.	Date Range: Nov. 2015 – Nov. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: state charitable registrations; financial-interest questionnaires; related-party transactions; Form	Attorney client privilege; Attorney work product doctrine; Trial Preparation	NRA: 530 (3293) NRA Board: 23 (48)

			990 tax issues; and, pending and anticipated litigation, including Cox arbitration and instant litigation. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same.		
23.	Category W	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Cooper Kirk PLLC; Volkov Law.	Date Range: May 2015 – Nov. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: financial interest questionnaires and related-party transaction review; vendor compliance review; NRA bankruptcy; Russia-related congressional investigations; and, pending and anticipated litigation, including instant litigation.	Attorney client privilege; Attorney Work Product Doctrine; Trial Preparation	NRA: 473 (1251) NRA Board: 42 (102)
24.	Category X	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors.	Date Range: Apr. 2015 – Nov. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: Spirit of the Wild Contracts; vendor compliance review; Audit Committee proceedings; Form 990 issues; and, pending and anticipated litigation, including instant litigation. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same.	Attorney client privilege; Attorney work product doctrine; Trial Preparation	NRA: 553 (1545) NRA Board: 38 (109)
25.	Category Y	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Schlam Stone & Dolan LLP.	Date Range: Dec. 2015 – Jan. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting,	Attorney work product doctrine; Attorney client	NRA: 77 (88) NRA Board:

			reflecting, and facilitating legal advice regarding: financial disclosure questionnaires; Audit Committee proceedings; Form 990 issues; and, pending and anticipated litigation, including Cox arbitration and instant litigation. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same.	privilege; Trial Preparation	10 (13)
26.	Category Z	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Schlam Stone & Dolan LLP; Morgan Lewis.	Date Range: May 2017 – Oct. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: donor gifts; financial disclosure questionnaires; Audit Committee proceedings; Form 990 issues; and, pending and anticipated litigation, including Russia matters and instant litigation. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same.	Attorney client privilege; Attorney work product doctrine; Trial Preparation	NRA: 704 (2295) NRA Board: 199 (443)
27.	Category ZA	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors; Schlam Stone & Dolan LLP; Lan, Smith & Sosolik.	Date Range: July 2018 – Nov. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: form 990 drafts; Audit Committee proceedings; vendor compliance review; Julie Golob's contract for NRATV; and, pending and anticipated litigation, including Ackerman litigation and instant litigation. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same.	Attorney-client privilege; Attorney work product doctrine; Trial Preparation	NRA: 350 (982) NRA Board: 36 (105)

28.	Category ZB	NRA OGC; NRA employees & directors; Brewer, Attorneys & Counselors.	Date Range: Sep. 2018 – Nov. 2021 Confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice regarding: Board and committee proceedings involving Susan Howard; makeup-artist issue; and, pending and anticipated litigation, including Under Wild Skies litigation and instant litigation. Documents prepared by and at the direction of counsel reflecting counsel's mental impressions and strategies, and documents prepared by the NRA and its representatives in anticipation of litigation, regarding the same.	Attorney work product doctrine; Attorney client privilege; Trial Preparation;	NRA: 76 (180) NRA Board: 25 (59)

EXHIBIT F

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 et al., Defendants.	:	Index No. 451625/2020 Hon. Joel M. Cohen **DECISION**

This decision supplements three prior decisions of this Special Master arising from separate letter motions filed by the OAG and the NRA, dated October 20, 2022 and a request by email for relief by the OAG dated November 22, 2022. Several of the issues raised in the October 20, 2022 letters were resolved, at least partially, by agreement of the parties. These include the NRA's offers to provide 1) raw data underlying the determination of excess benefits repaid by Mr. La Pierre; 2) three additional hours of depositions of the NRA's independent auditors, Aronson LLP; 3) production of non-privileged documents relating to recent contract negotiations between the NRA and certain outside vendors; and 4) certain Board Reports and other items listed on page 13 of the OAG October 20, 2022 letter.

The NRA also filed a letter motion for reimbursement of attorney fees it paid to non-party Aronson LLP for services relating to its response to an OAG subpoena. The motion was denied without prejudice to renew upon presentation of proper proof.

I. OAG Motion to Compel

The OAG seeks to compel several categories of documents the NRA is withholding on the basis of various recognized privileges. In response, the NRA concedes it will comply with certain of the requests but resists producing others, including production of documents concerning the NRA's "course correction" and "360 degree review" initiatives, on grounds of attorney client privilege and attorney work product privilege. The OAG insists the NRA must provide disclosure because, having placed reliance on reviews, analyses, or advice of legal consultants and counsel at issue in the litigation, the NRA has waived any claim of privilege (*see* Connell Letter dated November 20, 2022 at 2 ["OAG Letter"]). The NRA responds that the privileges are not waived because it is not asserting an "advice of counsel" defense (*see* Eisenberg Letter dated November 4, 2022 at 1) ("NRA Reply"). It acknowledges that it is invoking a "good faith" defense, but that such defense does not break the privilege (*see id.* citing *McGowan v. JP Morgan Chemical Bank, NA*, 2020 U.S. Dist. LEXIS 73051, 2020 WL 1974109 [SDNY April 24, 2020]).

Under CPLR 4503, a party seeking to invoke the attorney client privilege must show that the materials in question reflect communications between the attorney or his or her agents and the client or its agents, that the communications were made and kept in confidence, and that they were made principally to assist in obtaining or providing legal advice or services for the client (*see People v. Mitchell,* 58 NY2d 368, 373 [1983]; *see also Spectrum Sys. Int'l Corp. v. Chem Bank*, 78 NY2d 371, 378-380 [1991]. The privilege protects communications, not underlying facts, and must be legal in character, *see Id.* at 377. Because the privilege conflicts with New York's policy favoring liberal disclosure, it "must be narrowly construed" *Ambac Assurance Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 NY3d 616, 624 (2016). The

privilege may be waived. Waiver occurs when a privileged communication is revealed to a third party, or where "a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of the claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information," *Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust*, 43 AD3d 56, 63 (1st Dept 2007). The privilege is also waived by placing the subject matter of counsel's advice in issue and by selective disclosure of such advice (*see Orco Bank, N.V. v. Proteinas Del Pacifico, S.A.*, 179 AD2d 390 [1st Dept 1991]; *see also Banach v. The Dedalus Foundation, Inc.*, 132 AD 3d 543 [1st Dept 2015] privilege waived by using portions of board minutes at deposition and by placing contents at issue). Selective disclosure of privileged information waives the privilege because "a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications." *Village Bd. of Vill. of Pleasantville v. Rattner*, 130 AD2d 654, 655 (2d Dept 1987).

As the United States Magistrate Judge applying New York law summarized in *McGowan*, 2020 WL 1974109 at *7;

> "The proponent of the privilege has the burden of establishing that the information was a communication between client and counsel, that it was intended to be and was kept confidential, and [that] it was made in order to assist in obtaining or providing legal advice or services to the client." *Charter One Bank, F.S.B. v. Midtown Rochester, L.L.C.,* 191 Misc. 2d 154, 166, 738 N.Y.S.2d 179 (Sup. Ct. 2002) (citation omitted); *accord People v. Mitchell,* 58 N.Y.2d 368, 373, 448 N.E.2d 121, 461 N.Y.S.2d 267 (1983) (citing cases. Such showings must be made through "competent evidence" such as "affidavits, deposition testimony or other admissible evidence." *Parneros v. Barnes & Noble, Inc.,* 332 F.R.D. 482, 491 (S.D.N.Y. 2019); *accord Bowne of N.Y. City, Inc. v. AmBase Corp.,* 150 F.R.D. 465, 472 (S.D.N.Y. 1993). The burden cannot be met by

> "mere conclusory or ipse dixit assertions" in unsworn motion papers authored by attorneys. *See Von Bulow by Auersperg v. Von Bulow,* 811 F.2d 136, 146 (2d Cir. 1987) (quoting *In re Bonanno,* 344 F.2d 830, 833 (2d Cir. 1965)). It is also the burden of the party asserting a privilege to establish that it has not been waived. *See John Blair Commc'ns, Inc. v. Reliance Capital Grp.,* 182 A.D.2d 578, 579, 582 N.Y.S.2d 720 (1st Dept. 1992).

Having understood that the NRA is attempting to invoke a "good faith" defense based in part on materials it seeks to protect under the attorney client privilege, the NRA was accorded ample opportunity to establish that the materials being sought are privileged communications and that the privilege has not been waived. However, the NRA has made no effort before me to show *by competent evidence* that the communications at issue qualify as privileged communications. Despite an absence of such evidence but recognizing that determining immunity claims and reviewing them "are largely fact-specific processes," *Spectrum*, 78 NY2d at 381, the NRA was invited to present a representative sample of the communications at issue for *in camera* review. The NRA selected a small unrepresentative sample (94 out of 629 documents being withheld (*see* NRA Reply) for review but elected to withdraw its assertion of privilege as to 53 of them. Of the remaining 44, approximately 17 appear to be duplicates. The remaining, approximately 24 separate documents, were found to meet the requirements of CPLR 4503(a).

Most of the documents submitted are from the categories of documents listed on pages 11-12 of the OAG Letter (*see* Eisenberg email to Sherwood dated November 15, 2022). As represented by the NRA, these are communications involving NRA third-party vendors (*see id.)*. There are eight email chains that the NRA states "related to the NRA's efforts to ensure its compliance with its governance controls" (*id.*). Notably, the documents submitted do not reference matters on which the OAG has focused much of its time and attention, *e.g.*, whistle

blower complaints, investigation of alleged misconduct within the NRA, related party transactions and investigations and corrective action involving officers or directors of the NRA.

Because the NRA has largely failed to meet its burden of demonstrating the communications at issue are protected by either the attorney client privilege or the attorney work product doctrine and less than a third of the documents selected for review were found to be protected, I find that the documents requested are presumptively discoverable and shall be produced unless the NRA makes the necessary showing.[1] Any communication or document the NRA wishes to protect as privileged shall be submitted along with evidence sufficient to meet the burden, described at pages 3-4, above.

I decline to order the remedy requested by the OAG, specifically disclosure of identified categories of documents without allowing the NRA a further opportunity to establish immunity of specifically identified communications and documents. The request for an order directing production of a corporate representative capable of testifying regarding the NRA's reliance on outside advisors is denied without prejudice to renew following completion of all document production.

Whether the NRA has waived the attorney client privilege by placing the advice of counsel "at issue" in the litigation remains to be determined. The NRA states that it "has never

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[1] The 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 as to the documents the OAG seeks. In any event, the NRA has not established entitlement to the protection *see McGowan*, 2020 US Dist LEXIS 73051 *8-9. "The party asserting work product protection must demonstrate that the material at issue (1) [is] a document or a tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by his representative." [Internal quotation marks and citations omitted].

asserted an 'advice of counsel' defense in this matter and has no intention of doing so" (NRA Reply at 1) but states that it "maintains a good faith defense" (*id.* at 2). The NRA does not explain the distinction it is attempting to assert, or how the good faith defense applies without waiver in each instance.

The OAG argues that "the NRA's corporate representative testified that the Brewer firm and attorney Don Lam investigated and determined the amounts of certain excess benefits owed by Wayne La Pierre as part of the course correction, but the corporate representative could not answer what investigations are still ongoing as such an answer would reveal privileged information and counsel stated the NRA's position that 'the entire review is privileged." OAG Letter at 4. The NRA does not dispute the OAG's statement of these facts. It explains that "the NRA indeed undertook a course correction beginning in 2018 [but that] it has been clear that the NRA itself, particularly its treasurer, Craig Spray and then Sonya Rowling, spearheaded this effort – not its counsel. (NRA Reply at 6.)

Quoting from *Deutsche Bank*, 43 AD3d at 64, the NRA points out, "'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. 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." (internal quotation marks omitted).] Citing *Vill. Bd. of Vill. of Pleasantville v. Rattner*, 130 A.D.2d at 655, the NRA adds ("[w]here a party asserts as an affirmative defense the reliance upon the advice of counsel, it 'waives the attorney-client privilege with respect to all communications to or from counsel concerning the transactions for which counsel's advice was sought'").

In the *Deutsche Bank* case cited by the NRA, where plaintiff was seeking damages for breach of an indemnity contract, the Appellate Division, First Department stated that "[a]t issue waiver of privilege occurs where a party affirmatively places the subject matter of its own privileged communication at issue in litigation, so that invasion of the privilege is required to determine the validity of a claim or defense of the party asserting the privilege, and application of the privilege would deprive the adversary of vital information" *id.* at 64. The court explained the privileged information received by plaintiff in the underlying litigation was not premised on its contractual claims for indemnity in the instant litigation. Nor had plaintiff made any self-serving selective disclosure of any protected material.

This is not a situation where the communication sought to be protected merely informs a decision made by a party to the litigation. Instead 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 those selected portions it chooses to disclose to the OAG as proof of the "reasonableness" of, for example, the amount of excess benefits it requested Mr. La Pierre 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."

Where 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.

The NRA shall advise by 9:00 a.m. on December 5, 2022 whether it intends to present proof in support of its privilege or good faith claim. If it determines it wishes to do so, it shall

also indicate how much of an extension beyond December 13 being requested by the OAG it wishes to seek from Justice Cohen.

II. NRA Motion to Compel

The NRA seeks an order compelling the OAG to provide additional information referenced in its privilege log or, in the alternative, to produce documents claimed to be privileged for *in camera* review.

The documents that were withheld from production are listed categorically on the OAG's privilege log and included documents relating to:

1. The OAG's communications with witnesses and their counsel;
2. the OAG's communications with other law enforcement agencies;
3. OAG's communications with consultants;
4. draft and final OAG interview memoranda; and
5. the OAG's communications with informants.

The OAG states that the NRA does not dispute that documents in categories 4 (interview memoranda) and its confidential communications with consultants, complainants and confidential informants were properly withheld as privileged. It adds that the remaining withheld documents relate solely to how the OAG conducted its investigation and have no relevance to any remaining issues in the litigation. The OAG also notes that Justice Cohen dismissed the NRA's counterclaims because the NRA's allegations "do not support any viable legal claims that the Attorney General's investigation was unconstitutionally retaliatory or selective" or deprived the NRA of any constitutional rights (*see* OAG Reply at 2).

A. Public Interest, Law Enforcement and Public Interest Privilege

The NRA challenges the OAG's assertion of the public interest, law enforcement and common interest privilege. As to the first, there is no showing of the existence of extremely sensitive material which, if disclosed, might result in harm. As to the second privilege, the OAG has not identified any law enforcement interest that would be harmed by disclosure. Moreover, any such interest could be satisfied by redaction of the portions in need of protection. These two asserted privileges relate to all five categories of documents contained in the OAG's privilege log.

Regarding the third asserted privilege, it is limited to communications among law enforcement agencies in the context of pending or reasonably anticipated litigation. No such litigation has been shown here (*see Ambac*, 27 NY3d at 627). In any event, the OAG has abandoned this defense (*see* OAG Reply at n.3.)

The OAG argues that the Special Master has already held and the Court has affirmed that the OAG properly asserted the public interest and law enforcement privileges. In that ruling, I rejected efforts by the NRA to take depositions of OAG employees. It did not address demands for document production.

The OAG has not shown that any document in Category 1 (communications with witnesses and their counsel) implicates any interest requiring protection against harm. Documents in Category 1 shall be produced.

Similarly, the OAG has failed to show that confidentiality is necessary as to documents in Category 2 (communication with other law enforcement agencies) or to protect a pending investigation.

As noted above, the NRA does not dispute that documents in Category 3 (OAG communications with consultants), Category 4 (drafts in final OAG interview memoranda) and Category 5 (OAG's communications with informants) are all properly withheld as privileged.

B. Defense of Unconstitutional Retaliation

The NRA argues that despite dismissal of the counterclaims these the constitutional arguments it has raised remain viable because the NRA's affirmative defenses have not been dismissed. The assertion is rejected because the same analysis that resulted in dismissal of the counterclaims would require rejection of the affirmative defenses.

C. Adequacy of ESI

The NRA also seeks an expansion of the "timeframe for documents withheld in each category but it does not contend that the OAG failed to apply a timeframe the NRA demanded previously or that the search parameters used failed to meet any specific parameter previously demanded. This request is rejected.

D. Everytown

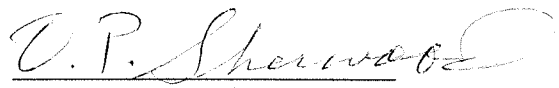
The NRA also seeks production of communications with Everytown, a gun control advocacy organization. Efforts to subpoena Everytown became moot after the court dismissed the NRA's counterclaims. The fact that the court has not yet dismissed the affirmative defenses that are based on the previously rejected legal theories, does not render those defenses any more viable than the counterclaims. This request is denied.

III. Extension of Note of Issue and Other Deadlines

Consideration of the OAG's request for a recommendation to Justice Cohen for a short extension of the Note of Issue date to December 13, 2022 shall be deferred until December 5,

2022 in order to give the NRA an opportunity to respond regarding the matters referenced on page 7, surpa.

Dated: New York, New York
November 29, 2022



Hon. O. Peter Sherwood (Ret.)
Special Master

EXHIBIT G

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

----------X

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

PLAINTIFF,

-against-

Case No.: 451625/2020

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

DEFENDANT.

----------X

DATE: November 14, 2022
TIME: 10:00 A.M.

ORAL ARGUMENT before SPECIAL MASTER O. PETER SHERWOOD for Discovery, held remotely, at all parties' locations, before Karyn Chiusano, a Notary Public of the State of New York.

ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

going to be presenting.

That's how I interpret it.

MS. CONNELL: No, Your Honor.

I'm sorry, Your Honor, it's potential witnesses that we spoke to as part of the investigation and it's just some interaction between us and those witnesses; the Preservation Notice, the subpoena Letters of Scheduling, letters, by and large.

But, Your Honor, again, this goes to how and what we ask for and when we ask for it, its investigative technique and this should be privileged.

SPECIAL MASTER SHERWOOD: I think you have lost me there, but okay. I am not going to belabor the point.

What about communications with other law enforcement agencies?

That is communications between your office and the D.C. AG?

MS. CONNELL: Yes, Your Honor.

ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

By and large.

SPECIAL MASTER SHERWOOD: Is that the City attorney?

What is the title of the -- of the --

MS. CONNELL: It's the Attorney General.

SPECIAL MASTER SHERWOOD: What is that>?

MS. CONNELL: It's the Attorney General of the District of Columbia.

SPECIAL MASTER SHERWOOD: Okay.

And Ms. Eisenberg, why do you think you're entitled to that information?

MS. EISENBERG: Oh, Your Honor, it's very simple: We need to look at our defenses, which include unclean hands and that claims are precluded on constitutional grounds because Letitia James threatened to destroy the NRA even before she became the Attorney General and before she even saw a single shred of evidence.

ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

And then, her office met -- shortly after she became the NYAG, her office, Mr. Sheehan, himself, and someone from her front office met with every town, in person, at the NYAG's Office for a whole hour to speak about nothing else but the NRA and its Form 990'S.

So, even though the counterclaims have been dismissed, the defenses raise all the same issues.

And Ms. Connell's office hasn't moved to dismiss the defenses. Those defenses are in the case. And Ms. Connell's alleged argument about alleged irrelevance has no merit whatsoever.

In addition, I will remind Your Honor that we sought, and obtained, the Attorney General's Office communications with Philip Journey, one of the NRA's Board Members, and we found out that their

C E R T I F I C A T E

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

I, KARYN CHIUSANO, a Notary Public for and within the State of New York, do hereby certify:

That the witness whose examination is hereinbefore set forth was duly sworn and that such examination is a true record of the testimony given by that witness.

I further certify that I am not related to any of the parties to this action by blood or by marriage and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 21st day of November, 2022.

KARYN CHIUSANO

EXHIBIT H

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
Index No. 451625/2020
----------x
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, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, JOSHUA POWELL,

Defendants.
----------x

Zoom videocoference

December 5, 2022
2:59 p.m.

CONFERENCE BEFORE SPECIAL MASTER
HON. O. PETER SHERWOOD (Retired)

Reported By:
Todd DeSimone, RPR

CONFERENCE

Now, with respect to the NRA's request for documents that you described as privileged, I must say that when I was looking at this, I had the impression that we weren't going over what was decided back in April or May, way back then, but that there were some, I hate to call them new documents, but other documents, not the specific documents that were being addressed then, and I was left with the impression that, for example, with the law enforcement privilege, that the investigation in D.C. had come to an end, and so you didn't have a pending investigation. Now, maybe I was mistaken about that, but you can tell me.

MS. CONNELL: Yes, your Honor. I'm sorry to say you were mistaken, and if we didn't make that clear, that's on us, I think. In fact, the D.C. Attorney General's office investigation continued and it is now an enforcement action against the NRA.

JUDGE SHERWOOD: Oh, is that

CONFERENCE

right?

MS. CONNELL: Yes. So it is ongoing and that comes to the point that we wanted to make an additional submission --

JUDGE SHERWOOD: Well, let's give Ms. Eisenberg an opportunity I guess to speak first, or would you prefer to hear from Ms. Connell first, Ms. Eisenberg? Up to you.

MS. EISENBERG: I'm happy to speak, your Honor.

From our perspective, the fact that the DCAG is continuing litigation against the Foundation and the NRA doesn't make a difference. To the extent your Honor is holding each side to the burden of ab initio showing that privileges apply, it seems only fair that if we are going to have to do that, the NYAG should have to do that as well, and that's how I read your ruling.

JUDGE SHERWOOD: I agree with you that certainly the burden is on them, but to illustrate, with respect to the law

CONFERENCE

enforcement privilege, as I understand it, it focuses on pending investigations and cooperation between two governmental agencies as they are doing work in connection with an ongoing or an existing litigation or investigation, and I must tell you, I had the impression that D.C. was no longer active, which is what got you the different result, by the way.

MS. EISENBERG: Your Honor, I think from our perspective, the analysis doesn't stop there. You have to look at the issues that are at issue in those two litigations, and here we think they are not sufficiently similar to permit the NYAG to invoke it.

Nonetheless, in addition, there is the investigative privilege, and, again, the order that you issued on the 29th states that they haven't put forward a showing to --

JUDGE SHERWOOD: The burden is on them, no question about that.

MS. EISENBERG: Right. So I

New York Code

Civil Practice Law and Rules

Article 31 Disclosure, Section 3116

(a) Signing. The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination.

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VERITEXT LEGAL SOLUTIONS
COMPANY CERTIFICATE AND DISCLOSURE STATEMENT

Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

Veritext Legal Solutions is committed to maintaining the confidentiality of client and witness information, in accordance with the regulations promulgated under the Health Insurance Portability and Accountability Act (HIPAA), as amended with respect to protected health information and the Gramm-Leach-Bliley Act, as amended, with respect to Personally Identifiable Information (PII). Physical transcripts and exhibits are managed under strict facility and personnel access controls. Electronic files of documents are stored in encrypted form and are transmitted in an encrypted fashion to authenticated parties who are permitted to access the material. Our data is hosted in a Tier 4 SSAE 16 certified facility.

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Inquiries about Veritext Legal Solutions' confidentiality and security policies and practices should be directed to Veritext's Client Services Associates indicated on the cover of this document or at www.veritext.com.

EXHIBIT I

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CHARITIES BUREAU

(212) 416-6241
Emily.Stern@ag.ny.gov

April 27, 2020

BY EMAIL

Philip J. Furia, Esq.
Brewer, Attorneys & Counselors
750 Lexington Avenue, 14th Floor
New York, New York 10022
pjf@brewerattorneys.com

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 Mr. Furia:

I write in response to the National Rifle Association's ("NRA") letter dated April 11, 2022. The Office of the Attorney General's ("OAG") Rule 11-b Certification and categorical privilege log (together, the "OAG Privilege Log") were served on the NRA on December 3, 2021. Over five months later, the NRA now writes to identify alleged deficiencies in the OAG privilege log and seeks production of the properly withheld documents. While the NRA asserts that the documents at issue are "critically relevant," in fact, these documents are wholly irrelevant to the NRA's defense. Moreover, for the reasons set forth in the OAG Privilege Log and accompanying certification, and explained in more detail below, such documents are privileged. Indeed, in rulings that the NRA has not contested, the Special Master upheld the privileged nature of much of the information reflected in the OAG's privilege log. *See* Special Master Report on the Office of the Attorney General's Motion for a Protective Order, dated March 23, 2022 (the "Special Master 3-23 Ruling").

This letter is supplied in furtherance and in preparation for discussions in a meet and confer.

1) The documents sought by the NRA are not relevant

As a threshold matter, the documents logged on the OAG Privilege Log are not material to or probative of the Plaintiff's claims or the NRA's defenses herein, and therefore are not subject to production on that basis. To the extent that the NRA contends the privileged documents that the OAG has withheld are relevant to the NRA's affirmative defenses or counterclaims, the OAG

disagrees, but in any event, the Court and Special Master have held that the NRA is not entitled to take discovery into the OAG's investigatory process at this juncture.

In February of 2021, the OAG produced to the NRA its entire discoverable investigative file, comprised of extensive documents and testimony obtained from non-confidential sources in its pre-complaint investigation. In December 2021, the OAG provided a privilege log that both identified the categories of documents the OAG is withholding and disclosed the non-confidential sources of information provided to the OAG during the investigation. Accordingly, the NRA has in its possession all non-privileged documents and testimony, as well as the identity of non-confidential sources of the information on which the OAG relied in commencing the instant litigation and that is relevant to its defense. Aside from the bare assertion that the documents withheld by the OAG are "critically relevant," the NRA has not identified any reason why the documents logged on the OAG Privilege Log have any bearing on the NRA's defense. The NRA's demand for disclosure of these documents appears to be an attempt to investigate the OAG's investigation, which Justice Cohen previously determined is not a proper topic of discovery.

In addition, each of the categories of documents identified in the OAG Privilege Log are protected from disclosure for the reasons set forth below.

2) The documents covered by Category 1 of the OAG Privilege Log were properly withheld on the basis of privilege

With a very narrow exception for confidential informants, the NRA knows the source of all the information derived by the OAG in its investigation and, again with very narrow exception, has all such information. It has the information obtained as part of the investigation and the sources of the information. To the extent the NRA wants to make the investigation itself a focus of discovery it is irrelevant.

At the outset, the Special Master previously denied the NRA's effort to take discovery of the OAG concerning the office's communications with various third parties in the course of conducting its pre-complaint investigating, holding that such information was protected by attorney work product, investigative and public interest privileges. Special Master 3-23 Ruling at 2 (discussion of Matter 8).

The documents encompassed within Category 1 of the OAG Privilege Log are protected from disclosure by the public interest privilege. New York courts have long recognized that "the public interest is served by keeping certain government documents privileged from disclosure." *One Beekman Place, Inc. v. City of New York*, 564 N.Y.S.2d 169, 170 (1st Dep't 1991). The privilege attaches to "confidential communications between public officers, and ***to*** public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged." *In re World Trade Center Bombing Litig.*, 93 N.Y.2d 1, 8 (1999) (internal citation omitted) (emphasis added). The "hallmark" of the privilege is that such privilege applies "when the public interest would be harmed if the material were to lose its cloak of confidentiality." *Cirale v. 80 Pine St. Corp.*, 35 N.Y.2d 113, 117 (1974). In determining whether the public interest privilege applies, the court must determine overall public

interest by balancing the interests of the government in nondisclosure against the interests of the party seeking the information. *Id*. at 118.

Category 1 of the privilege log covers communications between the OAG and witnesses or their counsel. The documents that fall within this category constitute confidential communications involving public officers in the performance of their duties, disclosure of which would be harmful to the interests of the government and the public which it represents. These communications, at their core, relate to the OAG's investigative process and their disclosure would risk revealing the OAG's unique investigative techniques and strategies. As such, they directly implicate the public interest in allowing the Attorney General to conduct critically important investigations in confidence. In this case, the public interest "in enabling the government effectively to conduct sensitive investigations involving matters of demonstrably important public concern" is stronger than the NRA's interest in obtaining the communications at issue and therefore the public interest privilege should apply to protect these communications from disclosure. *Brady v. Ottoway Newspapers, Inc.*, 467 N.Y.S.2d 417, 418 (2d Dep't 1983), (citation omitted), *aff'd*, 63 N.Y.2d 1031 (1984). The NRA has, in its possession, the substantive results of the OAG's investigative efforts and is not entitled to irrelevant, privileged documents whose sole purpose would be providing the NRA with a roadmap of the OAG's investigative decision-making process. *See Comptroller of City of New York v. City of New York*, 152 N.Y.S.3d 16, 20 (1st Dep't 2021) (explaining, "the [public interest] privilege will be applied where the government demonstrates that the public interest in confidentiality outweighs the public interest in disclosure.").

Likewise, the documents encompassed within Category 1 of the OAG Privilege Log are protected from disclosure by the law enforcement/ investigative privilege. The law enforcement privilege "prevent[s] disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *Colgate Scaffolding & Equipment Corp. v. York Hunter City Servs., Inc.*, 787 N.Y.S.2d 305, 307 (1st Dep't 2005) (quoting *In re Dept. of Investigation of the City of New York*, 856 F.2d 481, 484 (2d Cir. 1988)); *see also People v. Richmond Capital Group LLC*, No. 451368/2020, 2021 WL 5412143, at *2 (N.Y. Sup. Ct. Nov. 19, 2021). The communications in question reflect discussions that the OAG engaged in with individuals that were called upon to participate in a law enforcement investigation. The government has a clear interest in encouraging potential witnesses to come forward with information during the course of its investigation. *See Colgate Scaffolding* at 307. To protect that interest, especially here, where retaliation against whistleblowers and dissidents is evident (*see, e.g.*, NYSCEF 333 at ¶¶ 483, 489, 491, 492), it is imperative that the government be able to provide some level of assurance that the communications that potential witnesses have with public officers be protected from disclosure.

3) The documents covered by Category 2 of the OAG Privilege Log were properly withheld on the basis of privilege

Category Two of the OAG Privilege Log covers correspondence between the OAG and other law enforcement agencies. As New York State's chief law enforcement officer, the Attorney General has an obligation to protect the public interest through, among other things, investigations into violations of state law. During such investigations, when the OAG correspond with other law

enforcement agencies, those communications are typically confidential to avoid jeopardizing ongoing investigations or inquiries. Pursuant to the public interest privilege, such correspondence should similarly be shielded from disclosure so as to safeguard the OAG's ability to effectively investigate and prosecute violations of law on behalf of the public.

In addition, the documents in Category 2 are protected by the common interest privilege. *See, e.g., Kindred Healthcare, Inc. v SAI Global Compliance, Inc.,* 169 A.D.3d 517, 92 N.Y.S. 3d 691 (1st Dep't 2019). As the NRA is aware, the OAG had a common interest with the D.C. Office of the Attorney General ("DC OAG") in connection with the parallel investigations that each office conducted of the NRA and its affiliated entities. For example, the NY OAG and DC OAG conducted joint testimonial examinations of various witnesses and both OAG offices had access to documents produced by the NRA and its affiliated entities. Information exchanged or communicated between these offices concerning our respective pre-litigation investigations is protected by the common interest privilege.

4) The documents covered by Category 3 of the OAG Privilege Log were properly withheld on the basis of privilege

Category Three of the OAG Privilege Log consists of correspondence between the OAG and consultants from which it sought guidance on various technical matters related to its investigation of the NRA. These documents are shielded from disclosure pursuant to the public interest and law enforcement privileges. The documents that fall within this category constitute confidential communications involving public officers in the performance of their duties. Consultants advance the OAG's investigations, and the public interest would be harmed without the ability to ensure the security of their identities and work product. *See Comptroller of City of New York*, 152 N.Y.S. 3d at 20 (finding that the public interest privilege applied where the Mayor and his leadership team "needed access to information and unvarnished advice from all source" which "required that the sources have some assurance that their advice would remain confidential and free from fear of reprisal.").

Disclosure of the communications encompassed by Category Three would also result in the disclosure of protected work product and trial preparation materials. It is well established that the work product privilege extends to "experts retained as consultants to assist in analyzing or preparing the case as adjunct to the lawyer's strategic though processes." *Hudson Ins. Co. v. Oppenheim*, 899 N.Y.S.2d 29, 30 (1st Dep't 2010) (internal quotation marks and citation omitted) (finding that documents prepared by a consultant retained to assist in handling forensic accounting in an insurance coverage dispute were protected by the work product doctrine); *see also MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 941 N.Y.S.2d 56, 58 (1st Dep't 2012)) (internal quotation marks and citation omitted) (establishing that the work product privilege extends to documents generated by consultants retained by counsel to assist in analyzing or preparing for anticipated litigation).

Finally, while the NRA correctly recognizes that the identities of non-testifying expert consultants are typically protected from disclosure, it expresses concern that the OAG's definition of "consultants" may include fact witnesses. As Category 3 of the OAG privilege log makes clear, the consultants in question advised the OAG as to technical matters related to the OAG's

investigation of the NRA. None of the consultants identified therein served as fact witnesses for the OAG. Accordingly, the NRA is not entitled to the identities of these consultants.

5) The documents covered by Category 4 of the OAG Privilege Log were properly withheld on the basis of privilege

Category Four of the OAG Privilege Log describes "[d]raft and final interview memoranda," and provides the NRA with a comprehensive list of all non-confidential witnesses for whom interview memoranda were drafted, all of which were prepared by OAG attorneys. The NRA provides no authority for its argument that "[m]emoranda which summarize statements made during an interview do not qualify for work product protection." To the contrary, "[l]awyer's interviews, mental impressions and personal beliefs procured in the course of litigation are deemed to be an attorney's work product." *Corcoran v. Peat, Marwick, Mitchell and Co.,* 542 N.Y.S.2d 642, 643 (1st Dep't 1989) (internal citations omitted). The Special Master so held that the OAG's investigatory interviews were protected work product and immune from discovery by way of a deposition of a representative of the OAG. Special Master 3-23 Ruling at 2 (referring to Matter 7 in NRA Rule 11-f Notice).

The NRA does not contest that the interview memoranda were prepared in anticipation of litigation, and thus qualify as trial preparation materials. The interview memoranda were prepared by the OAG during its investigation, culminating in the instant enforcement action. CPLR 3101(d)(2) provides that trial preparation materials "may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Here, "defendants have not proffered an explanation for their failure to seek interviews with the [witnesses] at an earlier time or stated whether they ever made an independent attempt to secure the relevant statements, a requirement for obtaining an attorney's trial preparation materials." *People v. Kozlowski*, 11 N.Y.3d 223, 245–46 (2008).

The NRA has a list of the witnesses for whom memoranda were drafted and prepared, and could have, but has not, subpoenaed the witnesses to test the allegations raised in the complaint. The NRA's failure to do so dooms an attempt to invade the OAG's trial preparation privilege. *See People v. Richmond Capital Group LLC*, No. 451368/2020, 2021 WL 5412143, at *2 (N.Y. Sup. Ct. Nov. 19, 2021) ("Respondents have failed to demonstrate that they could not obtain the information they seek at deposition or by otherwise asking of the nonparty witnesses. Nor have they demonstrated undue hardship in obtaining the same or substantially similar information. In fact, they wholly fail to demonstrate any attempt to procure the information sought from the nonparty witnesses. Accordingly, the Richmond Capital Respondents have failed to demonstrate entitlement to materials created by NYAG in anticipation of litigation.").

Nor has the OAG placed the contents of the interview memoranda "at issue." As the NRA conveniently omits from its citation to *Deutsche Bank Trust Co. of Americas v. Tri-Links Inv. Trust*, 43 A.D.3d 56, 64 (1st Dep't 2007) (citation omitted), "'at issue' waiver occurs when the party has asserted a claim or defense that he intends to prove by use of the privileged materials." 43 A.D.3d at 64 (holding that no waiver occurred by plaintiff's commencement of action, and that disclosure of nonprivileged documents provided sufficient basis to argue merits of the action).

The documents encompassed within Category 4 of the OAG Privilege Log are also protected from disclosure based on the public interest and law enforcement privileges based on the authorities discussed above. Here, the interview memoranda at issue were prepared by OAG attorneys during the OAG's investigation. They are the product of communications between public officers and witnesses in the course of an investigation that directly implicate public officers' thought processes and legal theories, and contain information related to how public officers conducted their investigation and will prosecute the instant enforcement action. The public interest would be harmed if these interview memoranda are not shielded from disclosure.

6) The documents covered by Category 5 of the OAG Privilege Log were properly withheld on the basis of privilege

Category Five of the OAG Privilege Log encompasses communications with and documents obtained from or relating to complainants and confidential sources.

The term "Complainants" as used in the OAG Privilege Log refers to members of the public who raised concerns about the NRA to the OAG, but whose concerns did not form the basis of the OAG's complaint in the instant action.

The disclosure of any such complainant's identity is plainly protected by the public interest and law enforcement privileges. The OAG relies on complainants and confidential sources to conduct thorough, accurate, and fact-intensive investigations into violations of New York law. The OAG has a strong interest in protecting individuals who come forward to assist in an investigation from any retaliation or harassment that may result in such participation in a law enforcement action. In fact, the First Department has recognized the "controlling public interest" in having persons "be free to lay accusations and information" before an investigator without fear of disclosure. *Application of Langert*, 173 N.Y.S. 2d 665. 668 (1st Dep't 1958)(explaining, "It is just about universally true that an investigator is able to encourage such free communication only if he can give assurance that the communication and the identity of its maker will be kept confidential.").

As alleged in the complaint, the NRA has a history and practice of retaliating against whistleblowers and those it identifies as its enemies. *See, e.g.*, NYSCEF 333 at ¶¶ 483, 489, 491, 492. Where, as here, the subject of an enforcement action is alleged to have engaged in retaliation against individuals who raise concerns about the organization, the public interest privilege must apply to protect both the identities of the Complainants and the communications that they engaged in with the OAG. If members of the public do not have confidence that they can come forward with confidential concerns without fear of potential retaliation, their willingness to do so will be significantly chilled, resulting in potential irreparable harm to the public interest.

Sincerely,

/s/Emily Stern

Assistant Attorney General
Co-Chief, Charities, Enforcement Section

cc: Monica Connell, Assistant Attorney General

EXHIBIT J

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL

Karl A. Racine
Attorney General

Public Advocacy Division

Hon. O. Peter Sherwood, Special Master
360 Lexington Avenue
New York, NY 10017
psherwood@ganfershore.com

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

The Office of the Attorney General for the District of Columbia ("DC OAG") respectfully submits this letter supporting the Office of the Attorney General of the State of New York's ("NY OAG") position that communications and information shared between NY OAG and DC OAG are protected from disclosure under the common interest and attorney work product doctrines. DC OAG has an interest in the protection of these documents and information from disclosure as it is pursuing active litigation against the National Rifle Association of America, Inc. ("NRA") and the NRA Foundation, Inc. (the "Foundation"). The disclosure of these documents would prejudice the DC OAG's lawsuit and impact its ability to pursue multistate litigation with other state Attorneys General offices.

DC OAG has active litigation pending against the NRA. *See D.C. v. NRA Found., Inc. et al.,* 2020 CA 003454B (D.C. Super. Ct., August 18, 2020). The DC OAG's complaint against the NRA and the Foundation arises from facts learned during an extensive year-long pre-suit investigation conducted in anticipation of litigation. DC OAG and NY OAG shared documents and information collected as part of a multistate effort to investigate allegations of the misuse of charitable funds and breaches of fiduciary duty by the NRA and the Foundation. DC OAG and NY OAG held joint pre-suit depositions and interviews of NRA and Foundation staff and other relevant parties. At the end of the investigation, the DC OAG filed a complaint in the DC Superior Court based in part on the information gathered and exchanged with the NY OAG. The DC OAG's litigation remains active, and disclosure of information and documents shared during its investigation could reveal internal discussions and litigation strategy that will prejudice the DC litigation.

NY OAG and DC OAG have a common interest in investigating the NRA and the Foundation's compliance with laws governing nonprofit corporations. The litigation by the NY

OAG and the DC OAG arises from the same facts and conduct by the NRA and Foundation. In recognition of these shared interests, the DC OAG and the NY OAG signed a common interest agreement on February 26, 2020, which gave both offices assurances that they could share information, including litigation strategy, without the threat of waiving any privilege associated with the documents. Both offices agreed that information shared should be privileged and that maintaining the confidentiality of documents would advance the offices' shared goals of ensuring the NRA and Foundation's compliance with state nonprofit laws. The agreement between the parties remains active, and both parties have continued to act in reliance on the protections it provides.

Disclosure of information and strategy shared between DC OAG and NY OAG may hamper the ability of state Attorneys General offices to pursue joint multistate enforcement actions. DC OAG regularly coordinates with other state Attorneys General offices, including the NY OAG, to ensure that Defendants act in the public interest. As part of those efforts, DC OAG regularly exchanges information and litigation strategy to ensure that Defendants are held accountable for their conduct. It is in the public interest to protect these communications between Attorneys General offices from disclosure. The DC Superior Court has ruled that "communications and documents shared between the [DC OAG] and other state Attorneys General offices developing a common strategy regarding investigations . . . and litigation . . . are protected from disclosure by the attorney work product and common interest doctrines." *D.C. v. Town Sports Int'l Consulting, LLC,* 2022 D.C. Super. LEXIS 3 * 9-10, attached as Ex. 1. Furthermore, in the DC OAG's action against the NRA and the Foundation, the DC Superior Court held that discovery requests about the DC OAG's pre-suit investigation and coordination with other parties to investigate the NRA and the Foundation are protected by the attorney work product and common interest doctrines. *D.C. v. NRA Found. Inc.,* 2022 D.C. Super. LEXIS 33 * 7-9, attached as Ex. 2. The Court held that the NRA was "plainly prohibited" from obtaining materials prepared in anticipation of litigation and shared between two or more parties as part of a joint agreement, and this Court should do the same here. *See id.* at 8-9.

For the reasons set forth above, the DC OAG respectfully requests an order that documents and information shared between DC OAG and NY OAG regarding the NRA and the Foundation are protected from disclosure under the work product and common interest doctrines. We thank you for your attention to these matters.

Date: December 8, 2022.

s/ Ryan C. Wilson
Ryan C. Wilson
Senior Trial Counsel

Cara Spencer
Leonor Miranda
Assistant Attorneys General
Public Advocacy Division
Office of the Attorney General for the
District of Columbia
400 6th Street, N.W., 10th Floor
Washington, D.C. 20001

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA **Plaintiff,** **v.** **TOWN SPORTS INTERNATIONAL CONSULTING, LLC, *et al.*** **Defendants.**	**Case No. 2020 CA 003691 B** **Judge Juliet J. McKenna** **Next Event: Motions Hearing, May 12, 2022 at 9:30am**

ORDER

Pending before the Court is Defendant Patrick Walsh's [hereinafter "Defendant" or "Walsh"] Motion for Time Extension seeking a 60-day extension of all dates in the scheduling order, including an extension of the discovery deadlines, filed January 31, 2022 and the Plaintiff District of Columbia's [hereinafter "Plaintiff" or "District"] Opposition thereto, filed on February 14, 2022. Also pending before the Court is Walsh's Motion to Compel Discovery, filed on February 9, 2022; the District's Opposition thereto, filed February 23, 2022; and Walsh's Reply, filed on March 7, 2022 with the consent of the District and prior leave of the Court.[1] For the reasons set forth below, the Defendant's motions are denied.

RELEVANT BACKGROUND

[1] Also pending is 1) the District's Opposed Motion for Default Judgment against Town Sports International Holdings, Inc.; a hearing has been set on May 12, 2022 to hear additional argument on the Motion and 2) Defendant's Motion to Compel Expert Discovery, filed on April 11, 2022; this motion is not yet ripe. On April 4, 2022, the parties submitted a joint filing, without prejudice to Defendant's other pending motions, requesting a two-week extension of the dispositive motions deadlines and a 45-day extension of the pretrial conference. This consent request was granted by the Court on April 5, 2022; a date of April 25, 2022 was set for the filing of any dispositive motion and the Pretrial Conference continued to July 7, 2022.

This action for violations of the D.C. Consumer Protection Procedures Act [hereinafter "CPPA"], D.C. Code 28-3901 *et seq.*, arises from the defendants' alleged failures to provide promised health club credits and process cancellations during the COIVD-19 pandemic. As alleged in the original complaint, Defendant Town Sports International, LLC owns and operates fitness centers in Washington, D.C. under the name Washington Sports Clubs. *See* Compl. ¶ 5. On March 16, 2020, in response to the COVID-19 public health emergency, Mayor Muriel Bowser ordered all health clubs to close. *See id.* ¶ 6. Town Sports subsequently sent a letter to consumers promising that credits would be issued for membership fees charged during the time the clubs were closed. *See id.* ¶ 7. Town Sports also promised to allow consumers to cancel their memberships online. *Se id.* ¶ 8. The complaint alleges that, despite these promises, Town Sports charged members monthly dues during the time the clubs were closed, did not issue credits for those charges, and failed to process cancellation requests. *See id.* ¶¶ 8, 11-12. On August 20, 2020, the District filed this action, alleging that the defendants' material misrepresentations to consumers about membership credits and cancellations constitute deceptive and unlawful trade practices in violation of various provisions of the CPPA. *Id.* ¶¶ 13-20.

On November 18, 2020, the District filed its first amended complaint, adding Town Sports' former Chief Executive Officer Patrick Walsh as an individual defendant. *See generally* First Am. Compl. On April 7, 2020, the District filed its Second Amended Complaint to add Town Sports International Holdings, Inc., parent company of Town Sports International, LLC. On October 29, 2021, the Court entered a default against Town Sports International Holdings, Inc., given its failure to retain counsel. On November 18, 2021, the Court granted the District's Consent Motion for Voluntary Dismissal of Defendant Town Sports International, LLC given the

entry of a Stipulation of Settlement to resolve claims against it, leaving Defendant Walsh as the only remaining defendant actively involved in the litigation.

Motion for Time Extension

D.C. Superior Court Civil Rule 16(b)(7) provides that a "scheduling order may not be modified except by leave of court on a showing of good cause." The party seeking the extension bears the burden of showing good cause and in evaluating the request the Court "primarily considers the diligence of the party in seeking discovery before the deadline." *Lopez v. Timeco Inc.,* 291 F. Supp. 3d 1, 3 (D.D.C. 2017) (internal citations omitted). "[U]ltimately the decision is within the sound discretion of the trial court." *Id.* (internal citations omitted).

In support of his request for an extension of time, Defendant Walsh points to the number of potential witnesses identified by the District and the volume of materials provided in discovery. However, the District provided Defendant Walsh with its original witness list on July 8, 2021, almost seven months prior to the filing of the Motion to Extend, adding only six additional witnesses while also substantially reducing from 350 to 129 the number of potential witnesses in January 2022. Similarly, the vast majority of documents produced in discovery were turned over many months ago, in July and September of 2021, including a spreadsheet with contact information for the District's potential witnesses. Defendant Walsh has not provided the Court with any information concerning prior good faith efforts to subpoena, depose or seek discovery of potential adverse witnesses such as to warrant an extension of time, nor has he shown good cause as to why a further extension of the scheduling order is necessary to complete a review of documents that have been in his possession for months.

Moreover, the Court notes that parties have had abundant time to engage in discovery. This case was originally set on a Track 3 Schedule, generally reserved for the most complex cases, to allow the parties maximum time to complete discovery. Notwithstanding this elongated timeline, on October 29, 2021, over the District's objection, the Court further extended the discovery deadlines with the entry of a new Track 2 Scheduling Order. The District has also previously consented to limited extensions of specific deadlines upon a showing of good cause. *See* Order, Dec. 23, 2021 Order (extending due date for Defendant's expert witness disclosures and expert reports); *see also* Order, Apr. 5, 2022.

Finding no good cause for the further extension of the scheduling order, Defendant's Motion is denied.

Motion to Compel

In his Motion to Compel, Defendant Walsh objects to the District's assertion of privilege in withholding certain categories of documents in response to his discovery requests and in failing to designate a witness for a Rule 30(b)(6) deposition. Specifically, the Defendant argues that the provision of a categorical privilege log in lieu of a document-by-document privilege log violates Rule 26(b)(5)(A); that the common interest privilege shielding communication with lawyers of other states prior to the filing of this action is inapplicable; that the District is improperly withholding communications with consumers, and that the District cannot claim a blanket privilege applicable to internal communications between and among employees of the Office of the Attorney General [hereinafter "OAG"]. In addition, the Defendant requests that the Court compel the District to designate a Rule 30(b)(6) witness for deposition.

In its Opposition the District proffers, and the Defendant does not contest, that it has provided over 47,000 documents, "including all non-privileged portions of its casefile," Opp. at 1. These documents include initial consumer complaints and attachments received by OAG; OAG's communications with Defendants and third-parties affiliated with the bankruptcy of Defendant Town Sports International, LLC; and Defendants' communications with both consumers and other state Attorneys General Offices, which OAG has in its possession. The District asserts privilege over the following categories of documents: OAG's internal communications; OAG Attorneys' communications with attorneys from other state Attorneys General Offices; and communications prepared by OAG attorneys to consumers and responsive reply communications. The District opposes the Rule 30(b)(6) deposition on the grounds that it would impinge upon information protected by the work product privilege and that the information sought has either already been provided or is available from a more convenient source.

As an initial matter, this Court notes that this is a civil enforcement action initiated by the District pursuant to its authority to enforce the District's consumer protections laws under D.C. Code § 28-3909 on behalf of District of Columbia consumers. *See* D.C. Code § 28-3909(a). Thus, unlike other civil actions in which the District's own conduct gave rise to a claim or defense at issue in the litigation, the facts relevant to the claims and defenses in this case originated with the Defendants and the consumers whose rights the District is now suing to enforce. In this action, the role of the District of Columbia, through the Office of the Attorney General, commenced with its investigation of consumers' claims and Defendants' action in anticipation of filing suit and in pursuing this litigation.

Upon review of the pleadings and the authorities cited therein, the Court concurs with the District that the documents and communications that Defendant now seeks to compel are protected from disclosure by the attorney work product doctrine and the common interest doctrine. The work product doctrine is codified in Rule 26(b)(3): "[o]rdinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative . . ..". *See* D.C. Super. Civ. R. Rule 26(b)(3). "To qualify for protection under the attorney work-product doctrine, the material in question must (1) be a document or tangible thing, (2) which was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by or for its representative." *Darui v. United States Dep't of State*, 798 F. Supp. 2d 32, 38 (D.D.C. 2011). Moreover, "[a]ny part of [a document] prepared in anticipation of litigation, not just the portions concerning opinions, legal theories, and the like, is protected by the work product doctrine . . .." *Tax Analysts v. IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997). The work product doctrine clearly protects communications among OAG attorneys and staff working under the direction of counsel, including email communication.

The privilege also applies to communication with other state Attorneys General Offices investigating and prosecuting the Defendant for similar conduct in their respective jurisdictions. The District represents that it engaged in a multistate joint investigative and litigation effort with other Attorneys General Offices against the Defendant, as evidenced by a joint letter sent by the Attorneys General from D.C., New York and Pennsylvania to Defendant Walsh outlining concerns with Town Sports' business practices during the COVID-19 pandemic. *See* Opp., Exh. 1. Following the filing of this instant action, several other jurisdictions initiated similar actions, as evidenced by the complaints attached to the District's Opposition. *See id.*, Exh. 2, 3.

Communications and documents shared between the District and other state Attorneys General Offices developing a common strategy regarding investigations into and litigation against Town Sports International and affiliated entities and individuals, including Patrick Walsh, are protected from disclosure by the attorney work product and the common interest doctrines. *See U.S. ex rel. Purcell v. MWI Corp*., 209 F.R.D. 21, 25 (D.D.C. 2002); *see also United States v. Aramony,* 88 F. 3d 1369, 1392 (4th Cir. 1996) (protecting from disclosure communications between parties who share a common interest related to a legal issue); *Animal Welfare Inst. v. Nat'l Oceanic & Atmospheric Admin.,* 370 F. Supp. 3d 116, 133 (D.D.C. 2019) (allowing federal government agencies to share privileged information and work product with each other when they "share a substantial identity of legal interest."). "The purpose of the joint prosecution and common interest privileges is to ensure that attorneys feel free to fully and completely prepare for trial by assuring that their legal preparations will not be accessible to an adversary." *United States ex rel. Pogue v. Diabetes Treatment Ctrs. of Am.*, 2004 U.S. Dist. LEXIS 18747, *14 (*citing United States v. American Tel. & Tel. Co.,* 642 F.2d 1285, 1300 (D.C. Cir. 1980)).

Communications initiated by OAG attorneys to potential consumer witnesses in the investigation and preparation of its case and received in direct response to a communication by an attorney are also protected under the work-product doctrine. Here, the District turned over any consumer-initiated complaints or communication, and also provided a comprehensive list of all potential consumer witnesses and contact information to the Defendant. The Defendant is not further entitled to the specific communications the Plaintiff had with these witnesses as that would potentially reveal opposing counsel's litigation tactics and strategy. *Toensing v. United States Depart. of Just.,* 999 F. Supp. 2d 50, 57 (D.D.C. 2013); *United States v. All Assets Held at*

Bank Julius Baer & Co., Ltd., 270 F. Supp. 3d. 220, 225 (D.D.C. 2017). Disclosure of the additional information sought by the Defendant would reveal which consumers the District selected for follow-up interview and what information the District sought when communicating with those witnesses. *See Clampitt v. Am. Univ.,* 957 A.2d 23, 30, n. 8 (D.C. 2008) ("the very process of deciding . . . the questions to be asked, . . . offers insight into how the attorney taking or directing the taking of the statements views the case") (internal citations omitted).

Furthermore, the Court finds that the privilege log provided by the District at the request of the Defendant, combined with its prior written objections and assertions of privilege in response to Defendant's specific requests, is sufficient to meet the requirements of Rule 26(b)(5)(A), to set forth the basis of the claim and "describe the nature of the documents [or] communications. . . not produced or disclosed . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." *See St. John v. Napolitano,* 274 F.R.D. 12, 21 (D.D.C. 2011) ("Given the Court's conclusion that the plaintiff may invoke the psychotherapist-patient privilege . . . a[n] [itemized] log is unnecessary to satisfy Rule 26(b)(5)(A)"). The District's privilege log, provided on November 23, 2021 along with a cover letter detailing the basis for the assertion of the privilege, identified the two categories of documents withheld; the date range of the communications; the senders and recipients (with the exception of potential consumer witnesses); and the approximate number of documents withheld. The Court rejects Defendant's argument that a more detailed privilege log is required given that "to grant such a request would reveal . . . how [the Plaintiff] and [its] counsel choose to prepare their case, the efforts they undertake and the people they interview- all information that falls within the scope of the work-product doctrine." *United States v. All Assets Held at Bank Julius Baer & Co., Ltd.,* 270 F. Supp. 3d. at 225.

In the November 23, 2021 cover letter accompanying the privilege log, the District notes that it has "not searched for or produced internal communications between and/or among employees of the Office of the Attorney General, as those would be clearly protected from disclosure by applicable privileges, including the work product privilege, and a log of those communications would be unduly burdensome." *See* Mot. to Compel, Exh. H. The Defendant objects to this blanket approach, yet fails to articulate any theory under which communications between OAG employees relevant to this litigation would not also be encompassed by the work product privilege. In fact, the District contends that the Defendant's discovery requests did not even seek OAG's internal communications. In response, Defendant points to his First Requests for Production of Documents, #6. However, this request seeks communications between or among the District and other states, not internal OAG communications. This Court finds that to require the District to search for and catalog all such internal OAG communications would be a tremendously burdensome exercise in futility.

The Court next addresses Defendant's request that the District be compelled to designate a deposition witness. Under D.C. Super. Ct. Civ. R. 30(b)(6), a party may subpoena "a governmental agency . . . and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf[.]" While certainly a governmental agency is not immune from deposition simply because they serve as opposing counsel, a Rule 30(b)(6) notice is subject to the general limitations and scope of discovery pursuant to Rule 26(b)(1), permitting "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering . . . the parties' relative access to relevant information, the parties' resources, the

importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit."

In considering an analogous request for a Rule 30(b)(6) deposition of the Office of Attorney General, Judge Puig Lugo summarized the state of the law as follows:

> Courts "generally take a critical view" of deposing opposing counsel or "the practical equivalent thereof." *See FTC v. U.S. Grant Res., LLC*, No. 04-596, 2004 U.S. Dist. LEXIS 11769, at *28 (E.D. La. June 25, 2004). The "practical equivalent" has been interpreted to mean a government agency's "attorneys and persons working under their direction [that have] conducted investigation" subject to the deposition notice. *See SEC v. Jasper*, Civ. No. 07-06122, 2009 U.S. Dist. LEXIS 46678, 2009 WL 1457755, at *2-4 (N.D. Cal., 2009) (stating that the SEC's freedom to "designate and prepare any non-attorney to testify on its behalf" did not preclude finding an attempt to depose a "practical equivalent."); *FTC v. U.S. Grant Resources, LLC*, Civ. No. 04-596, 2004 U.S. Dist. LEXIS 11769, 2004 WL 1444951, at *9-11 (E.D. La. June 25, 2004) (finding Rule 30(b)(6) deposition of the FTC was improper, reasoning that FTC attorneys and non-attorneys were "practical equivalents" and the deposition sought not the underlying facts but mental impression and legal theories); *United States v. District Council*, Civ. No. 90-5722, 1992 U.S. Dist. LEXIS 12307, 1992 WL 208284, at *5-6, 10 (S.D.N.Y. Aug. 18, 1992) (denying Rule 30(b)(6) deposition directed to "counsel, the U.S. Attorney's Office, and an F.B.I. agent, *who worked with counsel on the preparation of [the] case*" after finding that the *Shelton* elements were not met) (emphasis added).
>
> Here, Plaintiff requests this Court to quash Defendants' Rule 30(b)(6) because the deposition against OAG is akin to deposing opposing counsel. In opposition, Defendant asserts that Plaintiff is free to "choose its representative(s)[,]" rather than counsel, as Plaintiff asserts. Defs.' Opp'n at 3. Considering the facts and analysis from neighboring jurisdictions, the Court finds that a Rule 30(b)(6) notice to Plaintiff is akin to a deposition of opposing counsel or "the practical equivalent." Federal courts have treated Rule 30(b)(6) notices against the attorney general office "or agents of that office" and agencies with a "common prosecutorial interest" as opposing counsel or its "practical equivalent." *See SEC v. Rosenfeld*, 97 Civ. 1467 (RPP), 1997 U.S. Dist. LEXIS 13996, at *10 (S.D.N.Y. Sep. 12, 1997); *Nishnic v. United States Dep't of Justice*, 671 F. Supp. 771, 775 (D.D.C. 1987), aff'd, 264 U.S. App. D.C. 264, 828 F.2d 844 (D.C. Cir. 1987); *EEOC v. McCormick & Schmick's Seafood Rests., Inc.*, No. WMN-08-CV-984, 2010 U.S. Dist. LEXIS 61603, at *10-11 (D. Md. June 22, 2010) ("Rule 30(b)(6) deposition notices directed to a law enforcement agency involving the type of information Defendants seek in this case were, in effect, notices to depose opposing counsel of record."); *United States*, 1992 U.S. Dist. LEXIS 12307, 1992

> WL 208284, at *16 ("In seeking to depose the U.S. Attorney's Office or agents of that office, defendants' search for facts relevant to the allegations of the Supplemental Complaint must inevitably clash with matters arguably protected by the work product doctrine."); *Kentucky v. Marathon Petro. Co. LP*, No. 3:15-CV-354-DJH, 2018 U.S. Dist. LEXIS 106176, at *9-10 (W.D. Ky. June 26, 2018) (where the court found that, although the deposition was not directed to OAG, there was "little difference between an OAG attorney testifying directly and an OAG non-attorney testifying armed only with information conveyed to him by the attorney.").

District of Columbia v. Capitol Petro. Grp., 2021 D.C. Super. LEXIS 28, *5-7 (October 20, 2021).

In the instant case, this Court finds that the Defendant has failed to meet his burden to demonstrate the necessity of obtaining a deposition of opposing counsel under either the test formulated by the Eighth Circuit and adopted by many jurisdictions in *Shelton v. American Motors Corp.,* 805 F.2d 1323 (8th Cir. 1986), or the requirements of Rule 26(c). Under *Shelton*, the party requesting the deposition must establish that "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Id.* at 1327. Similarly, Rule 26(b)(2)(C) provides that the Court "must limit the extent of discovery . . . if it determines that . . . the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome or less expensive."

Here the Defendant's twenty-four deposition topics have either been addressed by the District's written responses to interrogatories or could have been obtained from another source. This is particularly the case where the relevant information now in the District's possession came from the Defendants themselves or from third parties. Additionally, Defendant's deposition request would place an undue burden upon the District to avoid disclosure of otherwise protected

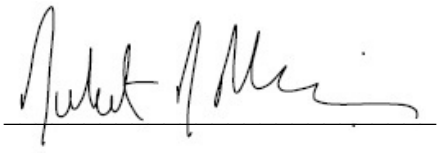
attorney work-product. For these reasons, the Defendant's request to compel the Plaintiff to designate a 30(b)(6) deposition witness is denied.

WHEREFORE it this 18th day of April 2022 hereby

ORDERED that Defendant Walsh's Motion for Extension of Time is **DENIED**; and it is further

ORDERED that Defendant Walsh's Motion to Compel is **DENIED.**

SO ORDERED.



Juliet J. McKenna
Associate Judge

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

DISTRICT OF COLUMBIA, **Plaintiff,** **v.** **NRA FOUNDATION INC, et al.,** **Defendants.**	**2020 CA 003454 B** **Judge Yvonne Williams**

OMNIBUS ORDER

The Court now considers four pending motions in this matter. Plaintiff District of Columbia's (the "District") Opposed Motion for a Protective Order to Prevent the NRA's Deposition of the Chief Administrative Officer for the Office of the Attorney General ("Motion for Protective Order") was filed on April 25, 2022, to which Defendant National Rifle Association (the "NRA") filed its Opposition ("Opposition to Motion for Protective Order") on May 9, 2022, and the District filed its Reply ("Reply in Support of Motion for Protective Order") on May 13, 2022. Defendant NRA Foundation, Inc. (the "Foundation") filed the Motion to Compel Plaintiff the District of Columbia to Provide Complete Interrogatory Responses and to Produce a Compliant Privilege Log ("Motion to Compel") and a Motion for Leave to File 10 Excess Pages ("Motion for Leave") on May 26, 2022. The District filed the Omnibus Opposition to Defendant NRA Foundation Inc.'s May 26, 2022 Motion to Compel and Motion to Exceed Page Limits ("Omnibus Opposition") on June 9, 2022, and the Foundation's Reply thereto was filed on June 16, 2022. Finally, the Consent Motion for Defendant NRA Foundation, Inc.'s Request Answer to First Amended Complaint ("Motion to Amend Answer") was filed on July 26, 2022. The District and the NRA consent to the relief requested in the Motion to Amend Answer. For the following reasons, the Motion for Protective Order shall be **GRANTED**; the Motion for Leave shall be

GRANTED; the Motion to Compel shall be **DENIED**; and the Motion to Amend Answer shall be **GRANTED**.

I. MOTION FOR PROTECTIVE ORDER

The District's Motion for Protective Order is granted. Defendant NRA has not shown that its purposes for noticing the deposition of Tarifah Coaxum, Chief Administrative Officer ("CAO") of the Office of the Attorney General for the District of Columbia ("OAG"), outweighs the undue burden to conduct the deposition. The NRA asserts Ms. Coaxum "occupies a position that likely equips her with personal knowledge of relevant facts or, at minimum, would enable her to direct the NRA to other, more fruitful witnesses and repositories." Opp'n to Mot. for Protective Order 1. The District states the CAO oversees a variety of administrative functions at OAG including financial, risk management, operations, and administrative services, but maintains: (1) the CAO had no role in investigating or litigating the instant matter or any matter in OAG's Public Advocacy Division, (2) the information requested by the NRA is privileged under the work product and common interest doctrines, and (3) the CAO is a high-ranking official and has no personal knowledge of the facts and circumstances at issue in this matter. Mot. for Protective Order 2, 4. The Court cannot find that relevant and discoverable information will result from a deposition of the CAO, thus, a protective order is warranted.

Under Rule 26(c), the Court may issue a protective order on behalf of parties from whom discovery is sought. A motion for a protective order "must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." Super. Ct. R. Civ. P. 26(c)(1). "The court may, for good cause, issue an order to protect a party or a person from annoyance, embarrassment, oppression, or undue

burden or expense, including … forbidding the disclosure or discovery." Super. Ct. R. Civ. P. 26(c)(1)(A).

The Court has substantial discretion in deciding whether to grant a protective order. *Mampe v. Ayerst Laboratories*, 548 A.2d 798, 803 (D.C. 1988). However, to grant a protective order, "the party seeking it must make a showing of good cause, stating with some specificity how it may be harmed by the disclosure of a particular document or piece of information." *Id*. At 804 (internal citation omitted). The party seeking a protective order bears the burden of proving its necessity, must articulate specific facts showing a clearly defined and serious injury resulting from the discovery sought, and cannot rely on mere conclusory statements. *Cont'l Transfert Technique, Ltd. v. Fed. Gov't of Nig.*, 308 F.R.D. 27, 38 (D.D.C 2015) (internal citations, quotation marks, and ellipses omitted).

The Court is required to limit discovery "if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Super. Ct. R. Civ. P. 26(b)(2)(C). Under Rule 12(b)(1),

> the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Super. Ct. R. Civ. P. 26(b)(1).

The District has made a good cause showing for a protective order precluding the NRA from deposing CAO Tarifah Coaxum. The Court finds that the information sought by NRA through Ms. Coaxum's testimony is not relevant to the claims and defenses in this matter. The NRA is seeking information related to why the District began investigating the Defendants, the identities of individuals who were involved in that investigation, and why they made the decision to initiate this lawsuit. In an April 18, 2022 email between the parties, counsel for the NRA represented it would forgo the CAO's deposition if Ms. Coaxum agreed to provide an affidavit attesting that she lacks personal knowledge regarding:

> The reasons for the OAG's commencement of its investigation of the NRA/NRAF, including without limitation to identities of persons involved in the decision to commence the investigation and the source(s) of any referral(s) or requests to investigate;
>
> The occurrence and extent of any coordination among the OAG, on the one hand, and any non-governmental actor, on the other hand, in connection with the investigation and this lawsuit. (Of course, this line of inquiry would exclude interactions with witnesses and vendors or agents engaged by the OAG in the course of its work.)
>
> The conduct of the investigation and commencement of this lawsuit.

Mot. for Protective Order, Ex. 3 at 5.

In its Opposition to the Motion for Protective Order, the NRA similarly asserts that "[e]ven if Ms. Coaxum lacks personal knowledge regarding the reason the District initiated its investigation, the extent of coordination between the District and non-government actors, and the conduct of the investigation or commencement of this lawsuit her position overseeing the OAG's investigative activities would allow her to identify other, apposite witnesses." Opp'n to Mot. for Protective Order 8. Further, that "[t]here is certainly a possibility that the identities of the individuals sought by the NRA may lead to information that directly addresses the allegations in the Amended Complaint, such as the individual's non-privileged communications and role in the investigation." *Id.* What the NRA fails to argue is how the identities of individuals involved in

the pre-lawsuit investigation of this matter or information generally related to the investigation and initiation of this litigation are relevant to any of the claims or defenses raised.

Why and under what circumstances the District decided to investigate the NRA is irrelevant to the claims against it. The First Amended Complaint alleges that the Foundation has improperly diverted funds to the NRA in violation of District of Columbia law and the Foundation's non-profit purpose. Am. Compl. 21. Nothing in the NRA's Opposition to the Motion for Protective Order purports to seek information from Ms. Coaxum, or other individuals she may identify, that would make the District's common law claims less probable; indeed the information sought is wholly irrelevant to that claim.

The information requested by the NRA regarding OAG's pre-ligation investigation of this matter is also protected by the attorney work product and common interest doctrines. Under the work product doctrine, "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative." D.C. Super. Ct. R. Civ. P. 26(b)(3)(A). "To qualify for protection under the attorney work-product doctrine, the material in question must (1) be a document or tangible thing, (2) which was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by or for its representative." *Darui v. United States Dep't of State*, 798 F. Supp. 2d 32, 38 (D.D.C. 2011) (citing Fed. R. Civ. P. 26(b)(3)(A)). In considering an analogous request to take a Rule 30(b)(6) deposition of a designee for OAG, Judge Juliet J. McKenna held that "[t]he work product doctrine clearly protects communications among OAG attorneys and staff working under the direction of counsel, including email communication. The privilege also applies to communication with other state Attorneys General Offices investigating and prosecuting the Defendant for similar conduct in their respective jurisdictions." *D.C. v. Town Sports Int'l Consulting, LLC*, 2022 D.C. Super. LEXIS 3, *8 (April

8, 2022) (citing *Tax Analysts v. IRS*, 117 F.3d 607, 620 (D.C. Cir. 1997); *U.S. ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 25 (D.D.C. 2002); *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996); and *Animal Welfare Inst. v. Nat'l Oceanic & Atmospheric Admin.*, 370 F. Supp. 3d 116, 133 (D.D.C. 2019)).

The common interest doctrine is an extension of the attorney-client privilege "that protects from forced disclosure communications between two or more parties and/or their respective counsel if they are participating in a joint defense agreement." *United States v. Hsia*, 81 F. Supp. 2d 7, 16 (D.D.C. 2000). Attorney-client privilege applies "(1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." *Jones v. United States*, 828 A.2d 169, 175 (D.C. 2003).

The Court cannot find that the NRA is entitled to the information it seeks involving the investigation and preparation of the instant lawsuit. Both the work product doctrine and the common interest doctrine protect parties from disclosing information prepared in the anticipation of litigation or made in confidence between an attorney and client with the intent to keep the information permanently protected. This is exact the type of information the NRA seeks from the District. Thus, the NRA is plainly prohibited from obtaining documents detailing the District's investigation of and its plans and motives for initiating this lawsuit.

Alternatively, the NRA asserts that documents related to the District's investigation may not be discoverable, but the identities of witnesses, even if spoken to confidentially, is not protected by the work-product doctrine because their identifies are not documents prepared in anticipation of litigation. Opp'n to Mot. for Protective Order 9-10. In its opposition to the Motion for

Protective Order, the NRA cities to two cases in support of its assertion that the identities of the District's witnesses are not protected: *In re Harmonic, Inc. Sec. Litig.* and *A.R. v. Dudek*, 2016 U.S. Dist. LEXIS 93300, *11 (S.D. Fla., Apr. 19, 2016). However, both *In re Harmonic* and *Dudek* are factually distinguishable from the instant matter. In *In re Harmonic*, the United States District Court for the Northern District of California found that the identity of five confidential witnesses was not barred by the work product privilege because plaintiffs referenced the witnesses and cited information they provided to support their 1934 Securities Exchange Act claims, thus making the witnesses relevant to the factual work product. *In re Harmonic, Inc. Sec. Litig.*, 245 F.R.D. 424, 427-29 (N.D. Cal. 2007). The witnesses discussed in *Dudek* were individuals from whom the State of Florida took declarations and were the parents or legal guardians of children who were parties to the litigation. *A.R. v. Dudek*, 2016 U.S. Dist. LEXIS 93300, *6, *11 (S.D. Fla., Apr. 19, 2016). The NRA's instant request seeks the identities of individuals with whom the District spoke during its investigation but does not link these individuals to any specific factual information sought to be discovered. Instead, it is the NRA's hope that the identities of these potential witnesses will lead it to additional facts. Unlike the parties in *In re Harmonic* and *Dudek*, the NRA has not shown that the identities of the witnesses are factually relevant to this matter or the allegations raised in the Complaint; their focus relates only to the District's investigation. Thus, the identities of the potential witnesses are protected because the Court cannot find that the NRA's need for the identities outweighs the District's rights under the work-product and common interest doctrines.

Further, discovery closed in this matter on April 25, 2022. The NRA has had ample time to determine the identities of the individuals it seeks through the normal course of discovery or request an extension of the discovery deadline to do so. That these identities have not yet been

revealed does not warrant the deposition of a high-ranking OAG officer that lacks personal knowledge of the facts of this case. The Court is thus required to limit the discovery requested from Ms. Coaxum because the NRA has failed to show the CAO has any personal knowledge of this litigation and because the identities of apposite witnesses are not relevant to the District's common law claims or proportional to the needs of this case.

Based on the representations made in the Motion for Protective Order and the opposition and reply thereto, the Court finds good cause to grant the relief requested by the District. The Court shall grant the motion and prohibits the NRA from depositing CAO Tarifah Coaxum about the District's motives and conduct through the pre-lawsuit investigation and its coordination with non-government actors because these matters are outside of the scope of discovery permitted by Rule 26(b)(1).

II. MOTION FOR LEAVE

The Motion for Leave is also granted. The Foundation's Motion to Compel, filed on May 26, 2022, is 25-pages long excluding the coverage, tables, signature and service pages, and discovery certification. Under Judge Yvonne Williams' Supplement to the General Order, parties are required to seek leave of the court when submitting filings more than fifteen pages long. *See* Suppl. to General Order 2. In the Motion for Leave, the Foundation submits that ten additional pages were required to address the volume of facts, the sixteen interrogatories at issue and their responses and deficiencies, and to provide a detailed explanation of the extensive discussions between the parties. Mot. for Leave ¶¶ 1-2. The District opposes the Motion for Leave because it does not set out the District's responses verbatim or sufficiently explain how each response is deficient as required by Rule 37(a)(1)(D). Omnibus Opp'n 14-15.

The Foundation has shown good cause why leave is necessary to fully encompass the representations made in the Motion to Compel. Due to the number of interrogatories discussed and the nature of the Parties' discovery disputes the Court finds an additional ten pages is warranted. Thus, the Motion for Leave is granted and the Foundation's Motion to Compel shall be accepted as filed on May 26, 2022.

III. MOTION TO COMPEL

Upon review of the representations made in the Motion to Compel and in the opposition and reply thereto, the Court finds the District's responses and supplemental responses to the Foundation's First Set of Interrogatories and its' privilege log are satisfactory. Therefore, the Motion to Compel and the request for attorney's fees and costs are denied.

In the instant Motion to Compel, the Foundation seeks a Court order compelling the District to: "(1) Complete its deficient responses to the Foundation's First Set of Interrogatories; (2) Confirm whether its responses to the Foundation's First Set of Interrogatories are complete with respect to at least the material produced in this case up to April 2022; and (3) Produce a privilege log that provides, for each withheld or redacted document, information that fully complies with Rule 26(b)(5)(A)." Mot. to Compel 25.

The Foundation claims the District has failed to submit a complete response to sixteen of its' First Set of Interrogatories, served on July 7, 2021 – Interrogatory Nos. 2 through 17. The Foundation alleges that the District's responses to these interrogatories are deficient for one of four reasons: (1) cites conclusory allegations in the Amended Complaint instead of responding with additional facts; (2) fails to provide sufficient detail for the facts included; (3) lists ranges of documents produced without specifying what information in those documents is actually

responsive to the interrogatory, or (4) incorporates responses to other interrogatories without providing any additional information. *See* Mot. to Compel 3.

Rule 37 of the Superior Court Rule of Civil Procedure allows a party seeking discovery to file a motion to compel an answer to the interrogatory if the deponent fails to answer. D.C. Super. Ct. R. Civ. P. 37(a)(3)(B). Under Rule 37, "an evasive or incomplete answer or response must be treated as a failure to answer or respond." D.C. Super. Ct. R. Civ. P. 37(a)(4).

A. Interrogatory No. 2

In Interrogatory No. 2, the Foundation asked the District to "[i]dentify each instance of payments from Foundation to the NRA that You contend support the allegations of the Complaint." Mot. to Compel 12. The Foundation claims the District's response to this request cites to the Amended Complaint without providing additional facts, identified documents or ranges of documents produced in this matter without specifying what information in the documents is responsive to the interrogatory, and fails to provide sufficient detail for the Foundation to understand the nature of the District's allegations, i.e., facts identifying the grant payments at issue. *Id*. at 12-14. The District asserts it has sufficiently identified categories of payments that it contends were improper, including facts beyond those referenced in the Amended Complaint. Relevant payments include, "two $5 million loans in 2017 and 2018 extension of those loans, a $5.9 million increase in the Foundation's management fee to the NRA, millions of dollars annually in grant funds to the NRA, and the Foundation's rent payments to the NRA that exceed the fair market value of the space it used." Omnibus Opp'n 7.

The Court agrees with the District. In its initial response to Interrogatory No. 2, the District provided enough detail to allow the Foundation to identify the types of payments it claims violated District law. The Foundation is displeased with this response because the District cites to the

Amended Complaint rather than the documents or other factual evidence that support the allegations in the Complaint. Considering that the alleged improper payment obligations are based upon documents produced by the Foundation and the NRA and not the District's own documents, the Court does not find additional facts are necessary. From the District's response to Interrogatory No. 2, the Foundation can determine the type of payments the District will raise at trial and can identify the exact documents the District will use to support its claims for the payments. The Foundation is not prejudiced by this response.

Furthermore, identifying documents or ranges of documents already produced in discovery is a proper response to an interrogatory. Under Rule 33:

> [i]f the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by:
>
> (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and
>
> (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

D.C. Super. Ct. R. Civ. P. 33(d). Prior to listing the range of documents responsive to Interrogatory No. 2, the District stated: "that the Foundation may derive or ascertain information responsive to this interrogatory from the records listed below without incurring a substantially greater burden than the District would by providing a narrative response to this interrogatory." Mot. to Compel, Ex. 9 at 6. As the burden of identifying each instance of payment at issue would be the same for either party, the District's response was justified in listing documents and document ranges with Defendant's document identifiers and it was not required to provide a pincite to the exact location of the responsive information in each document.

The Court is satisfied that the District's references to the Amended Complaint and documents responsive to the interrogatory, in addition to its lengthy narrative response, provide the Foundation with sufficient detail to understand the nature and type of payments the District alleges were unlawful. Thus, the District's responses to Interrogatory No. 2 are sufficient.

B. Interrogatory No. 3

Interrogatory No. 3 asks the District to "[s]tate the instances of wasteful, improper, or lavish spending by the NRA that You contend support the allegations of the Complaint, as referred to for example at paragraph 2 of the Complaint." Mot. to Compel 14-15. Similar to its opposition to the response to Interrogatory No. 2, the Foundation asserts the District's response to Interrogatory No. 3 is deficient because it relies on a document produced in this matter, the NRA's 2019 IRS Form 990, without specifying what information in the document is actually responsive to the interrogatory.

Identifying NRA's 2019 IRS Form 990 and providing a narrative response detailing the relevant contentions – that the Foundation allegedly entered consulting agreements with various former NRA senior managers who provided services to the NRA under the agreements, purchased personal and private air travel for Wayne LaPierre and his family, friends, employees, donors, and celebrities, and paying or Black Car service, luxury hotels stays, and restaurant meals for NRA senior managers – is a sufficient response to Interrogatory No. 3. Based on this information, the Foundation will not be left guessing what instances of spending the District may assert was wasteful. As explained in the previous section, a party may also cite to a document produced if that document is responsive to the interrogatory and the burden of identifying the exact lines that support the narrative claims is the same for both parties. *See* D.C. Super. Ct. R. Civ. P. 33(d).

Thus, the District's response was not insufficient when it failed to identify the specific lines in NRA's 2019 IRS Form 990 that constituted wasteful, improper, or lavish spending by the NRA because the narrative response clearly establishes the types of spending the District will raise at trial.

C. Interrogatory Nos. 6, 7, and 8

The Foundation's Interrogatory Nos. 6-8 requested that the District identify the steps Defendant should have taken to avoid the instant litigation. Specifically, Interrogatory No. 6 seeks "the steps You contend the Foundation and/or its Investment Committee should have taken to 'establish oversight of the funds' from the Foundation's loan to the NRA or to 'ensure they were being used for their stated purpose,' as referred to for example at paragraph 41 of the Complaint." Mot. to Compel 15. Interrogatory No. 7 requested the "steps You contend the Foundation and/or its Investment Committee should have taken in connection with any transaction with the NRA to 'implement[] an investment strategy to protect and monitor the Foundation's asset allocation,' as referred to for example at paragraph 45 of the Complaint." *Id.* Finally, Interrogatory No. 8 asked the District to "[i]dentify the specific documentation that You contend would constitute 'proper documentation from the NRA to show the dramatic increase in management fees was accurate or fair,' as referred to, for example, at paragraph 58 of the Complaint." *Id.*

To each of these three interrogatories, the District incorporated its responses and objections to Interrogatory Nos. 2, 3, and 5 and "contend[ed] that the steps the Foundation actually took were insufficient and improper based on these facts and as alleged in the First Amended Complaint." Mot. to Compel, Ex. 9 at 12-14. The Foundation claims this response was incomplete because Interrogatory Nos. 6, 7, and 8 seek information beyond that sought by Interrogatory Nos. 2, 3, and 5 and it is entitled to know the requested information. The District disagrees and argues that

Interrogatories 6, 7, and 8 "ask essentially the same question as Interrogatory 2 does: which payments were illegal and why?" Omnibus Opp'n 7.

Although the Court understands Interrogatory Nos. 6, 7, and 8 to ask for information beyond that requested in Interrogatory Nos. 2, 3, and 5, the responses to the earlier interrogatories are adequate to answer the latter. While the Foundation fails to state the exact reason it is "entitled" to know what steps the District asserts it should have taken, the responses to Interrogatory Nos. 2, 3, and 5 contain facts alleging improper payments and spending by the Foundation and the NRA's authority to exercise power. These facts directly relate to the Foundation's oversight of loans to the NRA, strategies to protect and monitor the Foundation's asset allocation, and proper documentation of management fees. The Court cannot find that the information requested needs to be produced with specificity without a proper explanation of how they are relevant to this matter and why that relevance warrants a more detailed response. The District is not be the arbiter of fact in this matter, thus what the District believes the Foundation should have done to avoid this litigation is irrelevant. Thus, the District's responses to Interrogatory Nos. 6, 7, and 8 are proper.

D. Interrogatory Nos. 9, 10, 11, 12, 13 and 14

Interrogatory Nos. 9-14 seek information related to the "other acts" that the District claims reflect that the Foundation subverted its charitable purposes in the interest of the NRA and asks the District to state the responsibilities of a charitable corporation and identify payments allegedly constituting waste of the Foundation's charitable assets. Mot. to Compel 16-18. The Foundation claims each of the responses to these interrogatories is improper because the responses to Interrogatory Nos. 8, 9, 10, and 14 only incorporate responses to earlier interrogatories without stating any additional information, and the responses to Interrogatory Nos. 9, 11, and 13 list

documents without specifically identifying what information in those documents the District believes is responsive to the request. *Id*. at 16.

As explained above, the District may properly incorporate its responses to other interrogatories if the information requested in the interrogatories is related. *See also Equal Rights Ctr. v. Post Props., Inc.*, 246 F.R.D. 29, 33 (finding that "to the extent that the information sought by this Interrogatory is a sub-set of the information sought by Interrogatory # 6, it was proper for Plaintiff's to answer this question by referring to its earlier answers.") The Court finds those earlier interrogatory responses sufficiently answer the requests in Interrogatory Nos. 9-14. Specifically, responses to Interrogatory Nos. 2 and 3 describe what the District believes to be improper funding and waste of the Foundation's funds as well as other acts that may represent the Foundation has subverted its charitable purposes. The Court assumes that any additional facts that could have been provided would have been provided in the District's responses had they existed because the District has the duty to provide a full answer. *See* D.C. Super. Ct. R. Civ. P. 33(b)(3).

Furthermore, the Court also determined above that the District is permitted to respond to an interrogatory with a citation to a document produced in discovery without providing specific pincites to the location of the information in that document that is responsive to the request. *See* D.C. Super. Ct. R. Civ. P. 33(d). Therefore, the responses to Interrogatory Nos. 9-14 are proper.

E. Interrogatory Nos. 16 and 17

In Interrogatory Nos. 16 and 17, the Foundation asks the District to identify the specific measures it seeks to impose regarding the Foundation's governing policies and the Foundation-NRA relationship that would ensure proper independence from the NRA. Mot. to Compel 18. The Foundation asserts the District's only response to these interrogatories was to refer to the First Amended Complaint at paragraph 21 and that these responses were improper because Complaint

allegations are not facts or evidence and may not be substituted as such in response to an interrogatory. *Id.*

It was proper for the District to incorporate Paragraph 21 of the Amended Complaint in its answers to Interrogatory Nos. 16 and 17. While Paragraph 21 does not refer to any specific measures in the Foundation's governing policies, it does refer to the Foundation's 501(c)(3) status, the fiduciary duties of the members of its Board of Trustees, and the decision-making authority of the Investment Committee. *See* First Am. Compl. ¶ 21. As the Foundation has its governing policies in its control and possession and it is most familiar with the policies, the Foundation should be able to ascertain which of its policies are related to its 501(c)(3) status, its member's fiduciary duties, and the decision-making authorities of its committees. Thus, the District's responses to Interrogatory Nos. 16 and 17 are sufficient.

F. The District is Not Required to Confirm in a Separate Writing Whether its Responses to the Foundation's First Set of Interrogatories are Complete.

The Court denies the Foundation's request for the District to confirm whether its interrogatory responses are complete as to the material produced in this matter until April 2022. According to the Foundation, the District is was aware of information that has not been disclosed to the Foundation, but which may be used to supplement the District's interrogatory responses. Mot. to Compel 19. The Foundation referenced the District's responses to Interrogatory Nos. 2, 4, 5, and 15 to support its demand for a statement of completion.

Interrogatory Nos. 2 and 15 ask the District to identify each instance of payments from the Foundation to the NRA in support of the Complaint and the improperly diverted funds over which the District seeks to impose a constructive trust. As explained above, the District's response to Interrogatory No. 2 contains adequate detail. The Foundation also concedes that the response to Interrogatory No. 15 appropriately identifies that the District seeks to impose a constructive trust

over all funds improperly diverted from the Foundation to the NRA and "lists some examples of funds it would contend were improperly diverted." Mot. to Compel 20. However, the Foundation argues the responses to both Interrogatory Nos. 2 and 15 are insufficient because the District does not state whether there are other improper payments or other improperly diverted funds not mentioned in the responses that will be addressed during this litigation. *Id*. 19-20.

The Foundation claims the responses to Interrogatory Nos. 4 and 5 are similarly incomplete. Interrogatory No. 4 requests the portions of the Foundation's by-laws the District alleges violate a statute, regulation, or common law doctrine and Interrogatory No. 5 seeks an explanation on how the NRA exercises power with respect to key offices of the Foundation. *Id*. at 21. Again, the Foundation does not raise concerns about the quality of the District's responses, but the quantity. The Foundation asserts the responses are incomplete because they do not confirm that the responses are complete with information for all documents produced up until April 2022, including information in the District's possession for months or years. *Id*. at 21-22. The District contends Rule 26 allows parties to amend all interrogatory answers until pretrial disclosures are made under Rule 16(c). Omnibus Opp'n 10-12. The Court agrees.

Rule 26(e) requires a party who has responded to an interrogatory to supplement or correct its disclosure or response, "in a timely manner if the party learns in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." D.C. Super. Ct. R. Civ. P. 26(e)(1)(A). Thus, the District may supplement its interrogatory responses throughout the course of discovery. While fact discovery closed in this matter on April 25, 2022, expert discovery was still open when the Motion to Compel was filed. *See* Order (Jan. 19, 2022) (establishing the close of expert discovery as July 29, 2022). Rule 26 does not proscribe

a specific time by which responses to interrogatories must be amended, only that amendments be made in a timely manner. *See* D.C. Super. Ct. R. Civ. P. 26(d)-(e). The Court agrees that a formal statement that the responses are complete and final until April 2022 is not necessary because it would circumvent Rule 26's ongoing duty to supplement the discovery response. The District is permitted to supplement its responses to the Foundation's expert opinions and after assessing the Defendants' April 25, 2022 and April 26, 2022 productions in a timely manner. *See* Omnibus Opp'n 10, 11 n.5.

G. The District's Privilege Log is Adequate to Support its Claims of Privilege.

The District's Privilege Log lists three categories of communications and documents that the District asserts cannot be produced in this matter. Mot. to Compel, Ex. 11. The log also identifies the parties to the communications, an estimated number of documents in each category, a date range for each category, and the applicable privileges. *Id*. In the Motion to Compel, the Foundation asserts the Privileges Log is too brief to justify the privileges asserted and that the District must:

> (1) specifically identify the number of withheld documents/communications; (2) identify the specific dates of the purported privileged communications; (3) disclose the names and email addresses of the persons involved in the purportedly privileged documents to allow the Foundation to evaluate the District's privilege claims and whether such privilege has been waived; (4) describe the subject of each purportedly privileged communications; and (5) describe the basis for its blanket assertion of "Attorney Work Product" and "Common Interest Doctrine" as the "Applicable Privileges.

Mot. to Compel 25. The District claims that the Foundation has specifically requested communications between the trial team litigating this case and law enforcement agencies investigating or pursuing claims against the Defendants, but fails to show that this information will help litigate this case or otherwise be of benefit to the Foundation. Omnibus Opp'n 12-13.

Rule 26(b)(5) provides that a party who withholds otherwise discoverable information by claiming a privilege or other trial protection must: "(i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." D.C. Super. Ct. R. Civ. P. 26(b)(5)(A).

The District's Privilege log is compliant with Rule 26(b)(5)(A). The Privilege Log expressly purports that the categories of documents are protected under the work product and common interest doctrines and describes the general nature of the documents and communications and documents that have not been produced. Rule 26(b)(5)(A) does not require the exact number of the documents withheld, the specific dates of the communications, disclosure of the individuals involved in the communications, a description of the subject of each, individual document, or the basis for the privileges asserted. Nor does the Foundation assert that the requested information is relevant or proportional to its needs in this case. The Court cannot require the District to expend its time and resources to search, collect, review, and log the hundreds of potentially privileged email communications based on conclusory statements that the Privilege Log is deficient. Because the burden to provide specific inquiries for each document withheld would outweigh any likely benefit the information would provide, the Foundation's request for an amended Privilege Log is denied. Therefore, each request in the Motion to Compel has been denied and the Court must also deny the Foundation's motion for attorney's fees and the cost of filing the motion.[1]

IV. MOTION TO AMEND ANSWER

[1] The Court also acknowledges that under Rule 26(f), "[e]xcept to the extent permitted by statute, expenses and fees may not be awarded against the United States or the District of Columbia under this rule." Neither the Motion to Compel nor the reply filed in support reference a District of Columbia statute that would permit an award of attorney's fees and expenses. Under these circumstances, the Court has no justification to award such relief.

As discussed in detail above, the instant matter concerns allegations that the Foundation and the NRA breached District of Columbia law by improperly handling funds in the subversion of the Foundation's charitable purposes and failing to maintain a relationship as independent entities. The District's initial Complaint for Declaratory Judgement was filed on August 16, 2020. Rather than directly answer the Complaint, the Foundation filed a 12(b)(6) Motion to Dismiss on September 22, 2020. After the Court denied the Motion to Dismiss on December 21, 2020, the District filed a Motion for Leave to Amend the Complaint on January 11, 2021. Shortly thereafter, on January 18, 2021, the NRA filed a Notice and Suggestion of Bankruptcy and the Court stayed the matter on February 1, 2021. On February 8, 2021, the District filed a Motion to reconsider the February 1, 2021 Order staying the case. The Motion to reconsider was granted on April 14, 2021, and the stay was lifted. Following the two-month stay, the Court granted the Motion for Leave to Amend the Complaint on July 16, 2021 and the Amended Complaint was filed the same day. The Foundation's Answer to the First Amended Complaint was filed on August 13, 2021.

Under Rule 15(a)(3), "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." D.C. Super. Ct. R. Civ. P. 15(a)(3).

In the instant Motion to Amend Answer, the Foundation seeks to leave to file an amended answer to the Amended Compliant with consent from the District and the NRA. The Foundation submits that the only substantive difference between its original August 13, 2021 answer and its amended answer is the addition of one affirmative defense. In its entirety, the added defense reads: "Plaintiff's claims and requests for relief asserted against the Foundation violate the Foundation's First Amendment rights under the United States Constitution, including, but not limited to, its freedom of speech and freedom of association." Mot. to Am. Answer 1, *see also* Ex. B at 15. A

copy of Defendant the NRA Foundation, Inc.'s First Amended Answer to the First Amended Complaint was filed as Exhibit A to the Motion to Amend Answer and a redlined version of the amended answer is attached as Exhibit B.

Upon consideration of the representations made in the Motion to Amend Answer and with the consent of all parties, the Court finds good cause to grant the relief requested. The Motion to Amend Answer shall be granted and Defendant the NRA Foundation, Inc.'s First Amended Answer to the First Amended Complaint shall be accepted as filed.

Accordingly, it is on this 5th day of August 2022, hereby,

ORDERED that Plaintiff District of Columbia's Opposed Motion for a Protective Order to Prevent the NRA's Deposition of the Chief Administrative Officer for the Office of the Attorney General shall be **GRANTED**; and it is further

ORDERED that Defendant National Rifle Association of America shall be prohibited from deposing the Chief Administrative Officer for the Office of the Attorney General; and it is further

ORDERED that Defendant NRA Foundation, Inc.'s Motion for Leave to File 10 Excess Pages shall be **GRANTED**; and it is further

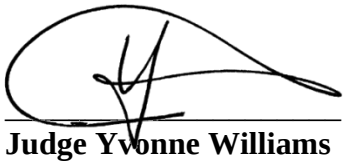
ORDERED that Defendant NRA Foundation, Inc.'s Motion to Compel Plaintiff the District of Columbia to Provide Complete Interrogatory Responses and to Produce a Compliant Privilege Log shall be accepted as filed on May 26, 2022; and it is further

ORDERED that Defendant NRA Foundation, Inc.'s Motion to Compel Plaintiff the District of Columbia to Provide Complete Interrogatory Responses and to Produce a Compliant Privilege Log shall be **DENIED**; and it is further

ORDERED that the Consent Motion for Defendant NRA Foundation, Inc.'s Request Answer to First Amended Complaint shall be **GRANTED**; and it is further

ORDERED that Defendant the NRA Foundation, Inc.'s First Amended Answer to the First Amended Complaint shall be accepted as filed.

IT IS SO ORDERED.



Judge Yvonne Williams

Date: August 5, 2022

Copies to:

Jessica E. Feinberg
Brendan V. Downes
Jennifer C. Jones
Lindsay Marks
Cara J. Spencer
Leonor Elisa Miranda
Counsel for Plaintiff

Robert H. Cox
Elizabeth Wolstein
Counsel for Defendant National Rifle Association of America, Inc.

Mary E. Gately
Olivia L. Houston
Elizabeth Wolstein
Counsel for Defendant NRA Foundation Inc.

EXHIBIT K

Mot. Seq. Nos. 28, 29 & 30

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

AFFIRMATION OF MONICA CONNELL

Monica Connell, an attorney duly admitted to practice before the Courts of this State, hereby affirms the following under the penalty of perjury pursuant to CPLR § 2106:

1. I am an Assistant Attorney General and Senior Counsel in the Enforcement Section of the Charities Bureau of the Office of the New York State Attorney General ("OAG" or "Attorney General") and am fully familiar with the facts stated herein based upon my personal knowledge and my own and my colleagues' review of records maintained by this Office.

2. I submit this affirmation in support of the letter of today's date which makes a further submission, pursuant to Your Honor's November 29, 2022 Decision ("Decision" or "Dec.") and subsequent November 29, 2022 email granting Plaintiff's request to make a further submission, as well as discussion had on the record at the December 5, 2022 conference.

3. Plaintiff's privilege log was originally produced on December 3, 2021 and was accompanied by a certification setting forth how it was generated, in compliance with

Commercial Division Rule 11-b. The OAG's entire investigatory file, other than matters listed as privileged and included on that log have been produced to all parties in this action.

4. The certification accompanying that privilege log described the materials set forth in Category 2 as follows:

> Category 2: Correspondence with law enforcement agencies. Production of these documents would result in the disclosure of law enforcement techniques and procedures. Furthermore, the OAG has a common interest with the D.C. Office of the Attorney General in connection with the investigation of the NRA and its affiliated entities. The OAG has shared work product and trial preparation materials with the D.C. Office of the Attorney General in connection with that common interest. Furthermore, these documents reflect communications with public officers in the performance of their duties, and the public interest requires that such communications should not be divulged.

5. The documents included in Category 2 consist almost entirely of communications between the OAG and the Attorney General's Office of the District of Columbia ("DCAG"). These communications include documents reflecting the thoughts, mental impressions, trial preparation and investigatory strategies of attorneys from these law enforcement agencies. Both the OAG and the DCAG intended for and believed these communications to be confidential and privileged.

6. There are approximately 3 communications with another law enforcement agency. It is my understanding that the identity of the other agency and content of the communications were intended to be kept confidential by both the OAG and that agency. The documents include work product that was intended to be confidential and if necessary, Plaintiff is prepared to provide the communications with the confidential law enforcement agency to Your Honor for *in camera* review.

7. The OAG and DCAG investigated the NRA and the NRA's affiliates. The OAG and DCAG conducted joint testimonial examinations of various NRA witnesses and both offices

had access to documents produced by the NRA and its affiliated entities. To ensure the confidentiality of the investigations and to enable the sharing of portions of attorney work product without jeopardizing confidentiality, the OAG and DCAG entered into a Common Interest Agreement. A copy is attached hereto for *in camera* review as Exhibit A. Each investigation led to the commencement of litigation. The DCAG enforcement action against the NRA and one of its affiliates is ongoing in the Superior Court in the District of Columbia, Civil Division (the "DC Enforcement Action"). *See* District of Columbia v. NRA Foundation Inc., et al., Case No. 2020 CA 003454 B (D.C. Super. Ct. 2020).

Dated: New York, New York
December 8, 2022

/s Monica Connell

Monica Connell

EXHIBIT L

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

AMENDED COMMERCIAL DIVISION RULE 11-b CERTIFICATION

1. I am an Assistant Attorney General ("AAG") in the Enforcement Section of the Charities Bureau of the New York State Office of the Attorney General ("OAG").

2. I provide this amended certification in connection with the preparation of the attached Amended Categorical Privilege Log pursuant to Rule 11-b(b)(1) of the Commercial Division Rules.

3. The attached Amended Categorical Privilege Log was prepared in response to the National Rifle Association of America's First Requests for Production to Plaintiff People of the State of New York, by Letitia James, Attorney General of the State of New York dated February 3, 2021.

4. The categories withheld on the basis of privilege include:

   a. Category 1: Communications with witnesses or their counsel, including subpoenas. Production of these documents would result in the disclosure of law enforcement techniques and procedures, and compromise confidential sources. Furthermore, these documents reflect communications with public officers in the

performance of their duties, and the public interest requires that such communications should not be divulged.

b. Category 2: Correspondence with law enforcement agencies. Production of these documents would result in the disclosure of law enforcement techniques and procedures. Furthermore, the OAG has a common interest with the D.C. Office of the Attorney General in connection with the investigation of the NRA and its affiliated entities. The OAG has shared work product and trial preparation materials with the D.C. Office of the Attorney General in connection with that common interest. Furthermore, these documents reflect communications with public officers in the performance of their duties, and the public interest requires that such communications should not be divulged.

c. Category 3: Correspondence with consultants. The OAG has communicated with consultants on various technical matters related to the NRA investigation. Disclosure of these communications would result in the disclosure of protected work product and trial preparation materials. Furthermore, these documents reflect communications with public officers in the performance of their duties, and the public interest requires that such communications should not be divulged.

d. Category 4: Draft and final interview memoranda. The OAG's interview notes and memoranda are protected work product and trial preparation materials. Disclosure of these materials would also reveal law enforcement techniques and procedures, and compromise confidential sources. The OAG has provided a list of the non-confidential persons interviewed to permit the NRA to subpoena and/or speak to those witnesses. Furthermore, these documents reflect communications with public officers in the performance of their duties, and the public interest requires that such communications should not be divulged.

e. Category 5: Communications with and documents obtained from or relating to complainants and confidential sources. The OAG received documents from complainants and confidential sources concerning the NRA. Disclosure of these documents would reveal law enforcement techniques and procedures, and compromise confidential sources. Furthermore, these documents reflect communications with public officers in the performance of their duties, and the public interest requires that such communications should not be divulged.

5. With respect to all five categories of the attached Categorical Privilege Log, the Office of the Attorney General ("OAG") collected and applied search terms to the OAG email accounts for the following custodians for the time period September 1, 2018 through August 6, 2020:

a. Charities Bureau Principal Accountant Judith Welsh-Liebross
b. Charities Bureau Accountant Darren Beauchamp
c. Charities Bureau Accountant Charles Aganu
d. AAG Jonathan Conley
e. AAG Monica Connell
f. AAG Erica James
g. AAG John Oleske
h. AAG Sharon Sash
i. AAG Stephen Thompson
j. AAG William Wang
k. Director of Research and Analytics Jonathan Werberg
l. Data Scientist Chansoo Song
m. Legal Assistant Nina Sargent
n. Former AAG Laura Wood
o. Charities Bureau, Enforcement Section Co-chief Emily Stern
p. Charities Bureau, Enforcement Section Co-chief Yael Fuchs
q. Charities Bureau Deputy Chief Karin Kunstler Goldman
r. Charities Bureau Chief James Sheehan
s. Deputy Solicitor General Steven Wu
t. Social Justice Department Deputy Chief Meghan Faux
u. First Deputy Attorney General Jennifer Levy
v. Chief of Staff Ibrahim Khan
w. Attorney General Letitia James

6. The search terms used, with the exception of those used to capture and identify confidential subjects or information, are included in the attached Schedule A.

7. A combination of batch coding, threading, and individual review was used for the review of emails that hit on search terms. Attachments to emails were coded according to the coding of the parent email.

a. With respect to batch coding, where a collection of emails was apparently relevant or not relevant based on recipients or subject, coding was applied en masse. For example, email chains with similar subject lines related to communications with law enforcement agencies concerning unrelated investigations or litigation were batch coded as not relevant. At the same time, emails with counsel who were known to only have communications with the custodians regarding a relevant witness were batch coded as relevant.

b. With respect to threading, an algorithm available on the document review platform used by the OAG was utilized whereby coding applied to the most recent email in an email chain was automatically applied to the remainder of the email chain.

8. Additional documents related to Category 1 have been identified following a review of documents conducted by an attorney who was not available to provide search terms when the OAG's original Rule 11-b Certification was served.

9. With respect to Categories 1, 5, and 6, I undertook a review of the internal shared drive used by OAG attorneys for the NRA investigation and litigation for correspondence, subpoenas, draft and final interview memoranda, and documents received from confidential sources.

10. The OAG reserves the right to amend the attached Categorical Privilege Log. Additionally, the OAG has not identified any documents to be de-designated.

Dated: May 25, 2021
New York, New York

/s/ Stephen Thompson
Stephen Thompson
Assistant Attorney General
NYS Office of the Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-6183
Stephen.Thompson@ag.ny.gov

SCHEDULE A

@akingump.com
@bakerbotts.com
@clayro.com
@winston.com
abarry@clinewilliams.com
AJeffers@dunnington.com
Alice Fisher
Alice.Fisher@lw.com
Aljuwan Jeffer
Andre Barry
Andrew Lankler
Arthur Meola
arthur@readytoroll.com
Brendan Sullivan
Brian Mason
cboehning@paulweiss.com
Charles Clayman
Chris Cox
Christopher Boehning
Christopher D'Agostino
Christopher.D'Agostino@lw.com
Clayman & Rosenberg LLP
clayman@clayro.com
Cynthia Neidl
dan@wardberry.com
Daniel Ward
David Rody
David Sterling
David Yoshimura
David.sterling@bakerbotts.com
David.yoshimura@faegredrinker.com
Deborah Lifshey
Deborah.Lifshey@pearlmeyer.com
dollar@clayro.com
Douglas Thomasina
drody@sidley.com
Dunnington Bartholow & Miller
Eric Dupont
Everytown for Gun Safety
gruber.mike@dorsey.com
Hayley Booker
Jason Lilien
Jay Willis (GQ)
jlilien@loeb.com

Joseph Perry
Judge Journey
LMcgrath@dunnington.com
Luke McGrath
Mallory Edel
Mann@clm.com
Marcus Owen
Marcus Owens
Mark Dycio
Mark MacDougall
Mark w/2 dycio
Mark Werbner
mason.brian@dorsey.com
Matthew Saxon
mburrage@whittenburragelaw.com
mdycio@dyciolaw.com
medel@sidley.com
Michael Burrage
Mike Gruber
Mowens@Loeb.com
MSaxon@winston.com
mwerbner@werbnerlaw.com
mwerbner@winston.com
NeidlC@gtlaw.com
nic* w/2 klinefeldt
Nicholas Klinefeldt
Nick Suplina
Nick.klinefeldt@faegredrinker.com
operations@everytown.org
Pamela Mann
Patricia Sawyer
psawyer@whittenburragelaw.com
SCady@wc.com
Seth Farber
sfarber@winston.com
sryan@mwe.com
Stephen Ryan
Steve Cady
Steve Ryan
TBuchana@winston.com
tdharrison@mwe.com
tdouglas@loeb.com
Thomas Dollar
Thomas McLish
Todd Harrison
Tom Buchanan

Tom Kissane
Winston & Strawn

Categorical Privilege Log

Category No.	Date Range	Document Type	Category Description	Privilege Justification	Documents Withheld, Including Families
1	9/1/2018-8/6/2020	Document Preservation Notices, Subpoenas, Correspondence, and Documents	Documents relating to communications with the following witnesses or their counsel, including document preservation notices, and document and testimonial subpoenas: Dan Boren; Esther Schneider; Julie Golob; Pete Brownell; Richard Childress; Steve Hornady; Bank of America; Branch Banking and Trusts; Fifth Third Bank; First Citizens Bank; Wells Fargo; AmEx; Ackerman McQueen; RSM; Oliver North; Chris Cox; Wayne Sheets / HWS; McKenna & Associates; Woody Phillips; Pearl Meyer; Ready to Roll Transportation; Josh Powell; Under Wild Skies; 501c Solutions LLC; Associated Television International; Allegiance Creative Group; American Media & Advocacy Group LLC; Braztech International; Brownells Inc.; Chubb Group Holdings; Concord Social and Public Relations; Diamondback Firearms, LLC; Heritage Manufacturing; Illinois Union Ins. Co.; Infocision; Lockton Affinity; Lockton Companies; Membership Marketing Partners; Mercury Group; National Media Resarch, Planning, and Placement; OnMessage; Red Eagle Media Group; Sharpe Group; Starboard Strategic; Taurus International Manufacturing; Confidential source	Law Enforcement Privilege, Public Interest Privilege	1,192
2	9/1/2018-8/6/2020	Correspondence and Documents	Correspondence with law enforcement agencies	Law Enforcement Privilege, Work Product Privilege, Common Interest Privilege, Trial Preparation, Public Interest Privilege	1,183
3	9/1/2018-8/6/2020	Correspondence and Documents	Correspondence with consultants	Law Enforcement Privilege, Work Product Privilege, Trial Preparation, Public Interest Privilege	303
4	9/1/2018-8/6/2020	Memoranda	Draft and final interview memoranda relating to the following witnesses: David Boren Peter Brownell Richard Childress Chris Cox Seth Downing Zachary Fortsch Julie Golob Mildred Hallow David Jones Tony Makris Steve Marconi Andrew McKenna Melanie Montgomery Oliver North Esther Schneider Nader Tavangar Al Weber Bill Winkler Confidential source	Law Enforcement Privilege, Work Product Privilege, Trial Preparation, Public Interest Privilege	84
5	9/1/2018-8/6/2020	Correspondence and Documents	Communications with and documents obtained from or relating to complainants and confidential sources	Law Enforcement Privilege, Public Interest Privilege	38
Total unique documents					**2,724**

EXHIBIT M

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CHARITIES BUREAU

212.416.8965
Monica.Connell@ag.ny.gov

December 8, 2022

VIA EMAIL

Hon. O. Peter Sherwood, Special Master
360 Lexington Avenue
New York, NY 10017
psherwood@ganfershore.com

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 ("Plaintiff"), the Office of the Attorney General of the State of New York ("OAG") respectfully submits this letter in accordance with Your Honor's direction during the December 5, 2022 conference to supplement the record concerning the Attorney General's assertion of privilege with respect to the documents listed in Category 2 of the OAG's privilege log. As set forth below, the OAG respectfully requests that Your Honor reconsider Your Honor's November 29, 2022 Decision ("Decision" or "Dec.") concerning the applicability of the law enforcement, public interest and common interest privileges to the extent that it requires Plaintiff to produce documents listed in Category 2 of the OAG's privilege log.[1]

There are four reasons why the documents in Category 2 are not subject to disclosure. First, the documents are irrelevant to any remaining issue in this litigation and merely relate to communications between the OAG and the law enforcement agencies with which it cooperated; they do not contain any factual information relating to this case that is not privileged or that has not already been disclosed to Defendants.[2] Second, the Decision was based on the incorrect

[1] The OAG is not seeking reconsideration of Your Honor's ruling with respect to documents listed on Category 1 of its privilege log and will produce documents covered by that category by December 12, 2022, unless such documents are also listed with respect to a separate category on the privilege log that provides an independent grounds for their being withheld, as we discussed with the Defendant National Rifle Association.

[2] The NRA's efforts to probe the OAG's interactions with other law enforcement agencies during the course of the OAG investigation, at best, relate to the same affirmative defenses of alleged unconstitutional retaliation or motives, which the Decision held were not legitimate bases for discovery. (Dec. at 10.)

premise that the Attorney General of the District of Columbia ("DCAG") no longer has an ongoing enforcement matter with respect to the NRA, when, in fact, such a matter is currently pending. Third, materials in Category 2 are protected by privileges, including the work product doctrine and the trial preparation privilege, that the OAG asserted in its privilege log, explained the basis for in prior correspondence to the NRA (*see* OAG April 27, 2022 ltr, attached to the NRA Oct. 20, 2022 ltr. as Ex. C) and which the NRA did not challenge. Finally, under a common interest agreement the OAG has with the DCAG, both law enforcement agencies intended to preserve the confidentiality of communications they exchanged about their respective investigations.[3]

The Category 2 Documents Being Withheld

Category Two of the OAG Privilege Log covers correspondence between the OAG and law enforcement agencies, almost the entirety of which are with the Attorney General of the District of Columbia ("DCAG").[4] As New York State's chief law enforcement officer, the Attorney General has an obligation to protect the public interest through, among other things, investigations into suspected violations of state law. During such investigations, when the OAG corresponds with other law enforcement agencies, those communications are protected by the law enforcement privilege to avoid jeopardizing ongoing investigations or inquiries.[5] In addition, pursuant to the public interest privilege, such correspondence should similarly be shielded from disclosure so as to safeguard the OAG's ability to effectively investigate and prosecute violations of law on behalf of the public.[6] Here, the OAG and DCAG were cooperating to further their respective parallel and overlapping investigations, which each office was conducting of the NRA and its affiliated entities. For example, as the NRA is well aware, the OAG and DCAG conducted joint testimonial examinations of various NRA witnesses and both offices had access to documents produced by the NRA and its affiliated entities. To ensure the confidentiality of their investigations and to enable them to share portions of their work product without jeopardizing confidentiality,

[3] If Your Honor is inclined to direct the production of documents between the DCAG and OAG despite the other independent privilege grounds, the DCAG would like the opportunity to be heard regarding the same.

[4] All but approximately 3 of the documents in Category 2 reflect communications with the DCAG. The identity of the other agency and content of the communications were intended to be kept confidential by both the OAG and that agency. The documents include work product that was intended to be confidential and, if necessary, Plaintiff is prepared to provide the communications to Your Honor for *in camera* review.

[5] The law enforcement privilege "prevent[s] disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *Colgate Scaffolding & Equipment Corp. v. York Hunter City Servs., Inc.,* 787 N.Y.S.2d 305, 307 (1st Dep't 2005) (quoting *In re Dept. of Investigation of the City of New York*, 856 F.2d 481, 484 (2d Cir. 1988)); *People v. Richmond Capital Group LLC*, No. 451368/2020, 2021 WL 5412143, at *2 (N.Y. Sup. Ct. Nov. 19, 2021); *see also* NRA Oct. 20, 2022 ltr, Ex. C (OAG Apr. 27, 2022 ltr. setting forth basis for privileges) at 3.

[6] New York courts have long recognized that "the public interest is served by keeping certain government documents privileged from disclosure." *One Beekman Place, Inc. v. City of New York*, 564 N.Y.S.2d 169, 170 (1st Dep't 1991); *see also* NRA Oct. 20, 2022 ltr, Ex. C (OAG Apr. 27, 2022 ltr.) at 2-3. The privilege attaches to "confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged." *In re World Trade Center Bombing Litig*., 93 N.Y.2d 1, 8 (1999) (internal citation omitted) (emphasis added). The "hallmark" of the privilege is that such privilege applies "when the public interest would be harmed if the material were to lose its cloak of confidentiality." *Cirale v. 80 Pine St. Corp*., 35 N.Y.2d 113, 117 (1974).

the OAG and DCAG entered into a Common Interest Agreement.[7] Each investigation led to the commencement of litigation. In addition to this ongoing litigation in New York, the DCAG has its own ongoing proceeding against the NRA and one of its affiliates in the Superior Court in the District of Columbia, Civil Division (the "DC Enforcement Action"). *See District of Columbia v. NRA Foundation Inc., et al*., Case No. 2020 CA 003454 B (D.C. Super. Ct. 2020).

The NRA's Motion Challenging Certain Privileges Applicable to Category 2 Documents Should Be Rejected

A. The NRA Did Not, and Cannot Challenge, the Protection For Category 2 Documents That Are Work Product and Trial Preparation Materials

In its October 20, 2022 letter to Your Honor, the NRA challenged the adequacy of certain privilege assertions referred to in the OAG's privilege log, specifically the law enforcement privilege, the public interest privilege and the common interest privilege and requested that the OAG be ordered to supplement its privilege log. Notably, the NRA did not challenge the OAG's assertion of work product protection or the trial preparation privilege with respect to Category 2 documents and did not seek production of such documents covered by Category 2. The communications in Category 2 reflect attorney work product and trial preparation and relate to both this action and the DC Enforcement Action. Indeed, as noted above, a number of investigative witness examinations were conducted jointly by the OAG and DCAG. Many of the withheld communications reflect attorney impressions and thoughts shared between the two law enforcement agencies pertaining to their related and overlapping investigations.

Although the NRA did not challenge the OAG's assertion of the work product doctrine and trial protection privilege with respect to documents in Category 2, it now asserts that Your Honor's determination that the law enforcement, common interest and public interest privileges are not applicable to Category 2 documents requires that all documents in Category 2 be produced. Such a broad request for production was not before Your Honor and, if it had been, the OAG would have strenuously objected. Nor is there anything in Your Honor's Decision that can be read to require production of documents in Category 2 that were withheld from production on the basis of privileges that the NRA has not challenged. Rather, the Decision only makes a determination regarding the law enforcement, public interest and common interest privileges in relation to documents in Category 2; it does not provide that the other privileges asserted with respect to those documents are improperly asserted or that all Category 2 documents must be produced. (*See* Dec. at 9.) Accordingly, any Category 2 documents subject to other, unchallenged privileges, such as the work product doctrine and trial preparation privileges, should be exempt from production.[8]

[7] The OAG and DCAG consider the Common Interest Agreement a confidential document and have provided a copy of the document as Exhibit A to the Affidavit of Monica Connell for *in camera* review by the Special Master.

[8] It is important to note that the fact that the OAG shared these documents with the DCAG does not waive work product or trial preparation protection. *See, e.g.*, *Bluebird Partners, L.P. v. First Fid. Bank, N.A., New Jersey*, 248 A.D.2d 219, 225 (1st Dep't 1998) ("work product privilege is waived upon disclosure to a third party only when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality"). Here, there was no likelihood that the material the DCAG and OAG shared would be revealed to an adversary or otherwise revealed because the DCAG and OAG not only shared a common interest in their investigations, but also expressly entered into a Common Interest Agreement that required that the

B. The Documents in Category 2 Relate to Ongoing Law Enforcement Activities, Concern Confidential Investigative Activities and Are Privileged.

Further, because the law enforcement, public interest, and/or common interest privileges[9] were properly asserted with respect to Category 2 documents, it is respectfully submitted that those assertions should be sustained.[10] As detailed above and in the Affidavit of Monica Connell, sworn to on December 8, 2022 and submitted herewith, the documents covered by Category 2 of the privilege log reflect confidential communications between the OAG and the DCAG, relating to the investigation that led to this enforcement action and the DCAG's investigation of the NRA and its affiliate that led to the DC Enforcement Action.[11]

As noted at argument on December 5, 2022 and contrary to the Decision (Dec. p. 9), the communications were made between law enforcement agencies in the context of pending and reasonably anticipated litigation and include information that is confidential in nature. Indeed, the DCAG and the OAG executed a common interest agreement that is being submitted for in camera review herewith. In compliance with its terms, the OAG has informed the DCAG of the Decision and the DCAG has asked for the opportunity to be heard.

CONCLUSION

In light of the foregoing, and the attached Connell affidavit, Plaintiff respectfully requests that the Court: (i) clarify that its Decision does not require the production of any documents listed in Category 2 of the privilege log that are covered by privileges that have not been challenged by

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materials be kept confidential. Unlike the NRA's sharing of information with its independent auditor, here, the OAG shared information with a sister law enforcement agency involved in a similar investigation, which was also adverse to the NRA and its affiliates. Indeed, the Protective Order entered in this case specifically, at Plaintiff's request, permitted Plaintiff to share confidential information with law enforcement agencies in response to inquiries or as part of a referral in connection with an actual or potential law enforcement investigation without prior notice to the party who produced such information. *See* NYSCEF 869, par. 5.

[9] The OAG's October 20, 2022 did not waive Plaintiff's assertion of the common interest privilege but, rather, asserted that it was not necessary to separately analyze the application of that privilege because the Court had previously ruled on the viability of other applicable privileges – specifically the law enforcement and public interest privileges – and those rulings were the law of the case. In addition, Plaintiff's justifications for the assertion of the common interest privilege was set forth in our letter to the NRA, dated April 27, 2022, which was an exhibit before the Court on this motion. (*See* OAG Nov. 4 ltr. at 1, citing to NRA Oct. 20, 2022 ltr., Ex. C (Apr. 27, 2022 OAG letter).) In any event, we respectfully request that Your Honor consider the points set forth herein and in the OAG's April 27, 2022 letter on the common interest privilege and reconsider its ruling with respect to that privilege.

[10] In addition, especially given the Court's dismissal of counterclaims against the Attorney General, it is respectfully asserted again that documents pertaining to the investigation, such as those contained in Category 2, are immaterial and irrelevant in this action.

[11] Because litigation was anticipated at the time the OAG and DCAG shared the communications at issue, and that litigation was actually commenced, the NRA's argument that the common interest privilege should not apply is unavailing. *See, e.g., Kindred Healthcare, Inc. v SAI Global Compliance, Inc.,* 169 A.D.3d 517, (1st Dep't 2019). Although the Court of Appeals in *Ambac* did refer to the parties sharing a common interest being in the same litigation, there is nothing in the analysis of the applicability of the common interest privilege in that case that counsels against the privilege being applied in parallel proceedings, rather than in one litigation, particularly where, as here, the parties sharing information are two law enforcement agencies that will be asserting any claims they bring in their own jurisdictions. *See Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616 (2016).

the NRA; and (ii) reconsider its Decision to the extent that it holds that the documents included in Category 2 of the privilege log are not subject to the law enforcement, public interest and common interest privileges. Alternatively, Plaintiff stands ready to produce a random sample of 5% of the documents from Category 2 (comprising approximately 60 documents) for Your Honor's *in camera* review. Finally, Plaintiff asks that the time to appeal your decision relating to the Category 2 documents be tolled pending your decision following this supplemental submission.

Respectfully,

/s Monica Connell
Monica Connell
Assistant Attorney General

cc: All Counsel of Record