**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK**
**COMMERCIAL DIVISION**

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| **PEOPLE OF THE STATE OF NEWYORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,** | § | |
| **Plaintiff,** | § | **INDEX NO. 451625/2020** |
| **v.** | § | |
| **THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,** | § | |
| **Defendants.** | § | |

**THE NRA'S MOTION PURSUANT TO CPLR 3104(d) FOR REVIEW OF THE SPECIAL MASTER'S RULING DATED NOVEMBER 29, 2022 PERTAINING TO "AT ISSUE" WAIVER OF PRIVILEGES**

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**TABLE OF CONTENTS**

## PRELIMINARY STATEMENT

The National Rifle Association ("NRA") seeks review of the Special Master's November 29, 2022 ruling that privileged documents that NRA has no intention of using or mentioning at trial are "presumptively discoverable" and must be submitted for in-camera review based on the theory that the NRA effected an "at issue" waiver. Exhibit D at 5.

## FACTUAL BACKGROUND

On July 5, 2022, NRA served its Supplemental Categorical Log. Exhibit Q. The New York Attorney General's Office ("NYAG") made no challenge to it during the next seven months.

Fact discovery closed on July 15, 2022. During discovery, NYAG took three days of NRA corporate representative depositions, in addition to 26 depositions of fact witnesses. At these depositions, NYAG received detailed testimony on NRA's efforts to improve compliance and obtain repayment of potential excess benefits. *See, e.g.*, Exhibits B, T. NRA even offered a fourth day, which NYAG refused. Exhibit S.

On October 20—three months after fact discovery closed—NYAG claimed that NRA had made a sweeping "at issue" waiver of privilege over all matters related to its "compliance efforts." Exhibit A at 1. NRA responded on November 4. Exhibit C. On November 15, NRA submitted a sample of privileged documents relating to its compliance efforts to the Special Master for in-camera review. He found each document to be privileged. Exhibit K.

On November 23, the Special Master asked the parties to meet and confer and NRA to then prepare a "representative sample" of privileged documents related to its compliance efforts. Exhibit L. Then, on November 29, before the meet-and-confer had occurred, the Special Master declared that "the documents requested" by NYAG were "presumptively discoverable and shall be produced unless the NRA makes the necessary showing." Exhibit D at 5.

## ARGUMENT

### I. There Is No Legal or Factual Basis for Finding Any Waiver

"At issue" waiver occurs only "when [a] party *has asserted a claim or defense* that *he intends to prove by use of the privileged materials*." *Deutsche Bank Tr. Co. of Americas v. Tri-Links Inv. Tr.*, 43 A.D.3d 56, 64 (1st Dep't 2007) (emphasis added). For an "at issue" waiver to occur, "a party must *rely* on privileged advice from his counsel to make his claim or defense." *In re Cnty. of Erie*, 546 F.3d 222, 229 (2d Cir. 2008) (emphasis in original). That is, "the essential element" for at-issue waiver is "**reliance on privileged advice in the assertion of the claim or defense**." *Id*. (emphasis added). "At issue" waiver only occurs where a party **intends to use privileged communications in connection with a claim or defense**. *Manufacturers & Traders Tr. Co. v. Servotronics, Inc*., 132 A.D.2d 392, 399 (4th Dep't 1987). Further, attorney-client and work product privileges fully apply to compliance matters. *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 380 (1991).

Here, NRA asserts no "advice of counsel" defense. *See* Exhibit E. Nor will it mention any privileged communications, its engagement of attorneys, or any investigations conducted by them.

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

NYAG contends that NRA "cannot withhold material and relevant information in discovery in this way *while also citing to and relying upon such information in its defense*." Exhibit

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

In an effort to find some support for her waiver argument, NYAG cobbles together bits of deposition testimony where witnesses invoked attorney-client privilege. *Id.* at 4-8; *see also* Exhibits T, G, H, U, V, I. But statements from witnesses in depositions are not claims, defenses, or legal arguments, and they do not waive the privilege. *Deutsche Bank Tr. Co. of Americas.*, 43 A.D.3d at 64, 68-69 (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"); *Williams v. Sprint/United Management Co*., 464 F.Supp.2d 1100, 1116 (D. Kan. 2006) (finding that defendant did not voluntarily raise the advice-of-counsel defense because its witnesses "raised it only in response to direct questions from plaintiffs' counsel concerning privileged communications"); *Soho Generation of New York, Inc. v. Tri-City Ins. Brokers, Inc.*, 236 A.D.2d 276, 277 (1st Dep't 1997) ("By merely mentioning at his deposition that he had withdrawn plaintiff's claim upon the advice of counsel, plaintiff's president . . . 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.").

By definition, privileges "block" the opposing party from obtaining discovery of communications between counsel and client that relate to topics "at issue" in the litigation. But "that a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue' in the

lawsuit; if that were the case, a privilege would have little effect." *Deutsche Bank Tr. Co. of Americas*, 43 A.D.3d at 64. "Rather, 'at issue' waiver occurs when the party **has asserted a claim or defense that he intends to prove by use of the privileged materials**." *Id*. (emphasis added).

Moreover, the deposition testimony NYAG cites do not amount to waiver. First, NYAG cites NRA's corporate representative deposition, which occurred on July 29, August 9, and September 9, 2022. *See* Exhibit F. The representative mentioned in passing that—unsurprisingly—NRA had received assistance from outside law firms relating to certain compliance matters. Over the course of three days, there were two specific areas where the representative was instructed not to reveal privileged information. One was discussions with NRA's outside tax counsel, Don Lan, regarding repayment of excess benefits by Wayne LaPierre. NYAG falsely claims that it was unable to probe how the repayment amounts were determined. But Frazer testified in-depth about these issues for hours and NRA produced detailed spreadsheets and underlying data. *See* Exhibits F, P, R.

The other area involved privileged communications relating to ongoing internal investigations. Once again, NYAG never moved to compel Frazer to answer.

Second, NYAG cites snippets of David Coy's June 15, 2022 deposition. NYAG asked Coy to reveal the substance of privileged communications with outside litigation counsel. Exhibit G. Unsurprisingly, and properly, Coy declined. NYAG never moved to compel.

Third, NYAG cites Charles Cotton's deposition on June 17, 2022. NYAG asked Cotton a series of speculative questions about discussions between Lan and LaPierre regarding how excess benefit repayments were calculated. Cotton testified that he had never spoken to Lan. Exhibit H. Of course, Cotton could not answer questions about discussions he had no part in. NRA's corporate representative later testified in-depth about these calculations and the basis for them. Exhibit B.

Fourth, NYAG cites John Frazer's July 12 deposition, claiming that "Mr. Frazer was unable to describe key pieces of the process for calculating excess benefits, and pointed to as yet unproduced documents supporting the calculation." Exhibit A at 5; *see also* Exhibit T. That is false: Frazer subsequently testified *for three days* as NRA's corporate representative including about excess benefit calculations and NRA provided detailed spreadsheets and underlying data supporting those calculations. *See* Exhibits B, P, R.

Fifth, NYAG cites Sonya Rowling's July 14 deposition, where she mentioned that she asked Lan about the tax treatment of one former NRA employee's membership in the Capitol Hill Club, and that the Brewer Firm had been involved in renegotiating a contract with MMP/Allegiance. Exhibit U. Importantly, Rowling did not testify about the contents of any communications with counsel. *See Murata Mfg. Co. v. Bel Fuse, Inc.*, No. 03 C 2934, 2007 WL 781252, at *3 (N.D. Ill. Mar. 8, 2007) ("There is a significant difference between indicating the fact or topic of a confidential [communication] with an attorney and revealing its content. The latter effects a waiver of the attorney-client privilege, while the former does not."). In addition, NYAG has all non-privileged documents regarding the Capitol Hill Club issue and the contract renegotiation with MMP. *See* Exhibit P, Exhibit W. And NYAG never moved to compel Rowling to testify about any tax law advice NRA received from Lan.

Sixth, NYAG cites LaPierre's June 28, 2022 deposition. LaPierre testified that NRA "may have had outside tax counsel" review his expense reimbursements. Exhibit I. NYAG then had three full days of testimony from NRA's corporate representative regarding these reimbursements and the methodology behind them. *See* Exhibit B.[1]

[1] NYAG cites three passages from NRA's expert reports. In one, Matthew Lerner notes in passing that "outside consultants and attorneys" played a "support" role in NRA's course

In sum, NRA has not wielded privileges as a "sword" merely because witnesses invoked them to shield privileged communications from disclosure. *See Deutsche Bank Tr. Co. of Americas*, 43 A.D.3d at 64, 68-69.

Finally, NRA has produced 86,188 documents relating to the 28 categories mentioned in its Supplemental Categorical Log (126,668 with families). Exhibit N. It has withheld a tiny fraction based on privileges. NRA's voluminous document production regarding its compliance efforts, along with the hundreds of hours of depositions it has provided, dispels NYAG's allegation that NRA is somehow blocking discovery.[2]

## II. NRA's Invocation of Not-for-Profit Law § 717 Does Not Waive Privileges

NRA's invocation of a good faith defense does not break the privilege. That defense derives from New York Not-for-Profit Corp. Law § 717, which states that "directors, officers and key persons shall discharge the duties of their respective positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." If merely invoking this provision placed all attorney-client communications "at issue," it would mean that non-profit corporations would effectively have no attorney-client or work-product privileges at all. That is, a corporation and its officers would face the Hobson's choice of either waiving privileges,

correction efforts. Exhibit J at 14-15. But Lerner identifies several NRA employees—each of whom was deposed at length by NYAG—as having led the course correction. *Id*. NYAG also points to a fleeting reference in Amish Mehta's Expert Report to Lan's retention as a "reasonable step" that NRA took to ensure the accuracy of its 990 filings, and a reference in Ryan Sullivan and Bruce Blacker's report to LaPierre having paid back excess benefits as some evidence that NYAG's requested relief is unnecessary. *See* Exhibit M at 30, Exhibit V at 34-35.

[2] Further, NYAG raised no issue regarding NRA's privilege assertions—nearly all of which occurred in June or July of 2022—contemporaneously. Instead, the NYAG waited until three months after discovery closed. That NYAG's motion to compel production of privileged documents came so late is reason alone for rejecting it. *See GoSmile, Inc. v. Levine*, 112 A.D.3d 469, 470 (1st Dep't 2013) ("the delay [in seeking to compel], coupled with the absence of any rational reason or excuse, is nothing less than a constructive waiver").

or else foregoing their right to seek counsel in connection with their obligations under the Not-for-Profit Corporations Law. There is no case which supports this conclusion.

Here, NRA's good faith defense does not involve any advice it received from its attorneys. [3] Under settled law, that means it does not waive NRA's privileges. *McGowan v. JPMorgan Chase Bank, N.A.*, No. 18CIV8680PACGWG, 2020 WL 1974109, at *8 (S.D.N.Y. Apr. 24, 2020) ("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**.") (emphasis added).

As noted above, none of the deposition testimony cited by NYAG shows that NRA is placing "reliance on reviews, analyses, or advice of legal counsel at issue in the litigation." Exhibit D at 2. As in *McGowan*, 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 any legal advice. Thus, the "good faith" defense does not break the privilege. *See Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co*., 40 A.D.3d 486, 492 (1st Dep't 2007) ("An insurer does not place the bona fides of a settlement at issue merely by alleging in a pleading that the settlement was reasonable and in good faith").

## III. The Special Master's Decision is Factually Wrong and Legally Flawed

The Special Master's November 29 decision is riddled with errors. For example, the

[3] NRA's Answer [NYSCEF Doc No. 857] states (pp. 152-153): "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." NRA stipulates that "information, opinions, or reports of reasonable reliability either presented or available to them" do not encompass any communications to or from attorneys.

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

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

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

The Special Master asserts that "the NRA seeks to cloak essentially all of its 'course correction' and '360 review' initiatives as privileged merely because the NRA included attorneys in those efforts, save for that selected portions it chooses to disclose to the OAG. . . ." *Id*. That simply is not true. NRA has never taken the position that all communications reflecting its compliance efforts are privileged. NRA has produced many thousands of documents relating to its compliance efforts. Exhibit N. Thus, there is no basis for the Special Master's finding that NRA "has disclosed 'a select few 'and withheld 'essentially all.'" Exhibit D at 7.

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

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

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

## CONCLUSION

The Court should review the Special Master's November 29, 2022 decision and deny the NYAG's motion to compel.

Dated: December 20, 2022

By: */s/ Noah Peters*

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**THE NATIONAL RIFLE ASSOCIATION**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record, on this 20th day of December, 2022.

*/s/ Noah Peters*
Noah Peters

**CERTIFICATE OF CONFERENCE**

In compliance with 22 New York Codes, Rules and Regulations (NYCRR) §§ 202.7 and 202.20-f, I conferred with the Office of the Attorney General of the State of New York in a good faith effort to resolve the issues raised by the annexed motion by email. I advised NYAG that NRA intends to appeal certain aspects of the Special Master's rulings. The parties also had attempted to resolve this dispute amicably previously, including during meet and confer calls and emails involving myself and Monica Connell at various points in December 2022.

*/s/ Noah Peters*
Noah Peters

**CERTIFICATION OF COMPLIANCE WITH WORD COUNT**

I, Noah Peters, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing brief filed by NRA pursuant to CPLR 3104(d) for review of the Special Master's November 29 decision complies with the word count limit set forth in the Order for Appointment of a Master for Discovery dated February 7, 2022, because the memorandum of law contains fewer than 3,000 words, excluding exhibits. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

*By: Noah Peters*
Noah Peters

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