

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

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PEOPLE OF THE STATE OF NEW YORK, BY	:	
LETITIA JAMES, ATTORNEY GENERAL OF THE	:	Index No. 451625/2020
STATE OF NEW YORK,	:	
	:	<u>AFFIRMATION</u>
Plaintiff,	:	
	:	
-against-	:	
	:	
THE NATIONAL RIFLE ASSOCIATION OF	:	
AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS,	:	
JOHN FRAZER, and JOSHUA POWELL	:	
	:	
Defendants.	:	
-----	X	

I, Svetlana M. Eisenberg, an attorney duly admitted to practice law before the Courts of the State of New York, affirm under penalty of perjury pursuant to CPLR § 2106 as follows:

1. I am a Partner at Brewer, Attorneys & Counselors, counsel for the National Rifle Association of America.

2. I submit this affirmation in support of the NRA's motion pursuant to CPLR 3104(d) for review of a Decision, dated December 21, 2022, by the Special Master for Discovery pertaining to the NYAG's communications with an unidentified law enforcement agency.

3. Attached are true and correct copies of the following documents:

- a. Judge Sherwood December 21, 2022 Decision (Exhibit 1)
- b. December 3, 2021 OAG Certification and Privilege Log (Exhibit 2)

- c.* May 25, 2021 OAG Amended Certification and Privilege Log (Exhibit 3)
- d.* NRA's First Request for Production to NYAG (Exhibit 4)
- e.* NRA's Second Set of Requests for Production to NYAG (Exhibit 5)
- f.* October 20, 2022 NRA Letter to Judge Sherwood regarding Privilege Log (Exhibit 6)
- g.* Special Master's November 29, 2022 Decision (Exhibit 7)
- h.* M. Connell December 8, 2022 Affirmation Privilege Log (Exhibit 8)
- i.* M. Connell December 8, 2022 Motion Letter (Exhibit 9)
- j.* Oct. 20, 2022 OAG Omnibus Discovery Letter to the Special Master (Exhibit 10)
- k.* December 12, 2022 NRA Letter Brief (Exhibit 11)
- l.* November 14, 2022 Transcript of the Oral Argument before the Special Master (Exhibit 12)

Dated: New York, New York
December 29, 2022

/s/ Svetlana M. Eisenberg
Svetlana M. Eisenberg

EXHIBIT “1”

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,

Index N. 451625/2020

Plaintiff,

v.

THE NATIONAL RIFLE ASSOCIATION OF
AMERICA, WAYNE LAPIERRE, WILSON
PHILLIPS, JOHN FRAZER, and JOSHUA
POWELL,

Defendants.

This decision addresses a request of the OAG, dated December 8, 2022, for reconsideration of a Decision dated November 29, 2022 (“Decision”) and the NRA’s opposition dated December 12, 2022. The request relates to that portion of the Decision granting the NRA’s request to compel disclosure of a subset of withheld documents described by the OAG as “communications with other law enforcement agencies” (“Category 2 Documents”) on grounds of law enforcement, public interest and common interest privilege.¹ As discussed below, I find that the common interest privilege applies.

The common interest privilege is an exception to the general rule that the presence of a third-party at privileged communication is sufficient to deprive the communication of confidentiality (*see Kindred Healthcare, Inc. v SAI Global Compliance, Inc.*, 169 AD 3d 517 [1st Dept 2019]). The common interest doctrine applies in civil cases “but always in the context of

¹ In its December 8, 2022 submission, the OAG adds that the attorney work product privilege applies as well (*see* OAG Letter at p. 3).

pending or reasonable anticipated litigation” *Ambac Assoc. Corp. v. Countrywide Home Loans, Inc.*, 27 NY 3d 616, 627 (2016). “The common interest doctrine . . . requires that (1) the underlying material qualify for protection [under a recognized privilege], (2) the parties to the disclosure have a common legal interest, and (3) the material must pertain to pending or reasonably anticipated litigation for it to be protected” *Kindred Healthcare*, 169 AD 3d at 517. The NRA’s request to compel disclosure was granted principally because it appeared the investigation of another enforcement agency with which the OAG was sharing information regarding management of the NRA and the NRA Foundation, the Office of the Attorney General for the District of Columbia (“DCAG”), was no longer pending. On December 8, 2022, the DCAG submitted a letter informing the Special Master that its investigation is on-going, that it is prosecuting a civil action against the NRA Foundation, Inc. (“Foundation”) in the Superior Court of the District of Columbia, that not unlike the issue here, the issues in that case involve allegations of misuse of charitable funds and breaches of fiduciary duty, that the DCAG and OAG have a common interest in investigating the NRA and the Foundation and that the two agencies are party to a Common Interest Agreement dated February 26, 2020 (“Agreement”). Like the OAG, the DCAG states that “[d]isclosure of information and strategy shared between [the two offices] may hamper the ability of state Attorney General offices to pursue joint multistate enforcement actions” (DCAG Letter at p. 2). Upon these submissions, the common interest privilege may apply.

The law enforcement privilege is recognized in New York but only in limited circumstances (*see Steering Comm. v Port Auth (in re World Trade Center Bombing Litigation*, 93 NY 3d 1, 15 “[A]n agency claiming some special government – public interest ‘cone of silence’ [must] demonstrate the specific public interest that would be jeopardized by an otherwise

customary exchange of information”)). The OAG has not made such a demonstration in this request.

The OAG represents that the records submitted for *in-camera* review are a randomly selected sample drawn from a set of 1,063 documents. The sample was drawn by the OAG’s “practice technologies team” using a software utility “to randomly sample 5% of the population, resulting in 54 documents rounding up. [The OAG] then included the full families for those documents, resulting in a total of 128 documents” (Email of Stephen Thompson dated December 9, 2022). The OAG then added to these documents a sample from a time period requested by the NRA. I received and reviewed 143 documents.

These records consist almost exclusively of email communications among and between staff of the OAG and staff of the DCAG along with attachments.² The emails are subject to the Agreement. They are protected from disclosure because the email communications among counsel qualify for protection as attorney work product or trial preparation materials. The parties to the emails share a common legal interest and the materials pertain to pending litigations against the NRA and the Foundation involving similar issues. The attachments are documents obtained in discovery (or during the investigations) from NRA or through subpoenas of NRA auditors and vendors (“NRA Records”). Although the attachments themselves are not privileged, they were individually selected by counsel and pertain to the subject matter of the specific email communication to which each set of attachments is attached. In that context, the individual emails and its attachments provide windows into the mental processes of lawyers in pending cases. For

² There are three records received from another law enforcement. The OAG represents that the contents of the communications and the identity of the other agency were intended to be kept confidential by both the OAG and that agency (*see* Connell letter dated December 8, 2022 at n. 4).

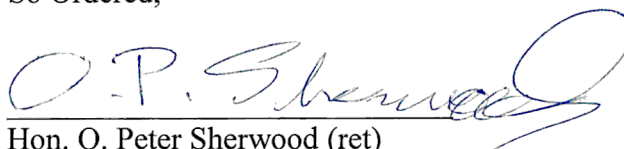
that reason, the attachments to the emails are also protected. Copies of the attached documents that are unassociated with an email communication are not privileged.

A few emails received from the DCAG pursuant to the Agreement are accompanied by attachments that are not NRA Records and which themselves are not privileged (e.g. attachments to email bearing bates number NYAG-SM-0000752). These attachments are privileged for the same reason NRA documents attached to the OAG emails are protected. Some of the documents reviewed are drafts of pleadings, subpoenas, subpoenas duces tecum and legal memoranda. All are attached to emails exchanged between the agencies. These records are subject to the attorney work product privilege. The Agreement itself was also reviewed. It is protected by the attorney work product privilege.

As the sample of Category 2 Documents reviewed *in camera* have been determined to be protected, I find that all Category 2 Documents are presumptively protected.

Dated: New York, New York
December 21, 2022

So Ordered,

A handwritten signature in blue ink, appearing to read "O.P. Sherwood", with a stylized flourish at the end.

Hon. O. Peter Sherwood (ret)

EXHIBIT “2”

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

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 certification in connection with the preparation of the attached Categorical Privilege Log pursuant to Rule 11-b(b)(1) of the Commercial Division Rules.
3. The attached 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 document preservation notices and 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. Chief Deputy Attorney General for Social Justice 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. Due to the unavailability of one attorney to consult on search terms prior to production of this privilege log, and ongoing technological issues with the OAG's document review platform, the total document number for Category 1 may increase. The list of witnesses, however, is complete to the best of my knowledge.

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. In particular, in regard to Category 5, the OAG is still in the process of ensuring that all relevant ESI was captured and reviewed, and documents within this Category are still under review for potential de-designation.

Dated: December 3, 2021
New York, New York

/s/ Stephen Thompson
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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	<p>Documents relating to communications with the following witnesses or their counsel, including document preservation notices, and document and testimonial subpoenas:</p> <p>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 Research, Planning, and Placement; OnMessage; Red Eagle Media Group; Sharpe Group; Starboard Strategic; Taurus International Manufacturing; Confidential source</p>	Law Enforcement Privilege, Public Interest Privilege	1,134
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	<p>Draft and final interview memoranda relating to the following witnesses:</p> <p>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</p>	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					2,666

EXHIBIT “3”

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:

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- 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
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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	<p>Documents relating to communications with the following witnesses or their counsel, including document preservation notices, and document and testimonial subpoenas:</p> <p>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</p>	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	<p>Draft and final interview memoranda relating to the following witnesses:</p> <p>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</p>	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 “4”

1. To the extent provided by the CPLR, the NRA's Requests are intended to be continuing in nature. You are requested and required to supplement Your responses when

appropriate or necessary to make correct and complete responses to the full extent provided by the CPLR and/or any other applicable rules or orders of the Court.

2. To the extent You believe that any of the following requests are vague or ambiguous, You are requested to notify the NRA immediately and a clarification will be provided.

3. These requests are intended to include all Documents in the possession of the Attorney General, or subject to the Attorney General's custody or control, whether directly or indirectly. A Document is deemed to be within Your possession, custody, or control if: (1) it is within Your actual possession, custody, or control; or (2) it is within the possession of any other person or entity and You have the right to obtain the Document from such person or entity, and You: (a) own the Document in whole or in part; (b) have a right by contract, statute, or otherwise to use, inspect, examine, or copy such Document on any term; or (c) as a practical matter, have been able to use, inspect, examine, or copy such Document when You have sought to do so. For the avoidance of doubt, these Requests are intended to, in addition to hard copy or paper records, include, but are not limited to, all Documents subject to Your control that are stored on any computers, tablets, and cellular devices, including Blackberries, iPhones, iPads, or other smart phones or devices.

4. Unless otherwise indicated, the use in these Requests of You, Your name or the name of any party, individual, business organization, or other legal entity, shall specifically include all of that individual's or entity's present or former employees, officers, directors, agents, representatives, members, departments, sections, affiliates, subsidiaries, parents, attorneys, and all other persons acting on his/her or its behalf.

5. These Requests seek production of responsive Documents in their entirety, without abbreviation, deletion, or redaction. For the avoidance of doubt, each responsive email message or other Document should be produced with all of its respective email or other attachments, and each responsive email attachment should be produced with its respective parent email message and with all email attachments to that respective parent email message. To the extent that You consider an email message and its corresponding email attachment(s) to constitute separate Documents, the NRA requests the production of all Documents attached to each responsive email message, as well as all e-mail messages to which a responsive Document is attached and all other Documents attached to said email messages. For the further avoidance of doubt, all responsive electronic Documents should be produced with all their corresponding metadata. To the extent that You consider an electronic Document's metadata to constitute a separate Document, the NRA requests the production of all metadata that correspond to each responsive electronic Document and all electronic Documents that correspond to each responsive piece of metadata.

6. In the event You interpose an objection to the Request or Requests, You should clearly indicate to which part or portion of the Request or Requests the objection is directed and provide all Documents to which objection is not made as if such part or portion were propounded as a separate request.

7. In the event that You seek to withhold any Document, thing or information on the basis that it is properly entitled to some privilege or other limitation of discovery, You are instructed to supply the NRA with a privilege log satisfying Commercial Division requirements.

8. You are to produce the Documents as they are kept in the ordinary course of business, with appropriate markings or designations, so that it may be determined to what Request they are intended to be responsive.

II. **DEFINITIONS**

1. “All” and “any” shall be construed so as to bring within the scope of the Requests all Documents which might otherwise be construed to be outside the scope.

2. “Attorney General,” “You,” and “Your” shall mean the New York State Office of the Attorney General, the plaintiff in the above-captioned action, and all other persons acting or purporting to act with, for, or on its behalf, including, but not limited to, consultants, advisors, attorneys, or any person acting in an advisory or consulting capacity, including, but not limited to: (i) Attorney General Letitia James (“James”) in her individual capacity; and (ii) where applicable, other agencies, offices, departments, or divisions of the State of New York or their constituent personnel.

3. “Communication(s)” shall mean any oral, written, or recorded utterance, notation, or statement of any nature whatsoever, by and to whomsoever made, including, but not limited to, correspondence, emails, text messages, conversations, facsimiles, letters, telegrams, cables, telexes, dialogues, discussions, negotiations, interviews, consultations, telephone calls, agreements, and other understandings, among two or more persons. The term “Communication(s)” includes written summaries of any of the foregoing Communications. Drafts of Communications—including unsent drafts which may or may not have been sent to or received by another person and hence may not thus have been “among two or more persons”—are encompassed by the term “Communication(s).”

4. “Document(s)” has the broadest meaning permitted by the CPLR and any other applicable laws and rules including, without limitation, any written, recorded, graphic, or other matter, whether sent or received or made or used internally, however produced or reproduced and whatever the medium on which it was produced or reproduced (whether on paper, cards, charts, files, printouts, tapes, discs, belts, video tapes, audiotapes, tape recordings, cassettes, or other types of voice recording or transcription, computer tapes, databases, emails, pictures, photographs, slides, films, microfilms, motion pictures, or any other medium), and any other tangible item or thing of readable, recorded, or visual material of whatever nature including without limitation originals, drafts, electronic documents with included metadata, and all non-identical copies of each Document (which, by reason of any variation, such as the presence or absence of handwritten notes or underlining, represents a separate Document within the meaning of this term). The foregoing specifically includes information stored electronically, whether in a computer database or otherwise, regardless of whether such Documents are presently in documentary form or not.

5. “Investigation” shall mean any investigation, inquiry, inquest, examination, inspection, audit, survey, surveillance, interrogation, enforcement action, or other work performed or undertaken by You relating to the affairs, management, governance, accounts, membership, or conduct of the NRA, including, without limitation: (i) any investigation commenced, or sought to be commenced, during the tenure of former New York State Attorney General Eric Schneiderman; (ii) any investigation(s) or adverse state action(s) against the NRA referenced by, promised by, or known to James during her campaign for office in 2018;¹ and (iii)

¹ By way of illustrative example, the NRA refers to James’ statement on September 4, 2018, that her “top priority” if elected would be “going after the NRA,” along with James’ statement on or about September 6, 2018, that “[w]e are waiting to take on all of the banks that

the investigation referenced in the “Document Preservation for New York State Attorney General Investigation” dated April 26, 2019, appended hereto as Exhibit A.

6. “NRA” shall mean the National Rifle Association of America and any person acting, or who has so acted, on its behalf, including, but not limited to, any of their agents, representatives, officers, directors, employees (current and former), independent contractors, attorneys, and each and every person acting on their behalf or at their direction or on whose behalf they were acting with respect to the matters referred to herein.

7. “Person” and “persons” includes natural persons, groups of natural persons acting in a collegial capacity (e.g., a committee or counsel), firms, corporations, partnerships, associations, joint ventures, trusts, and any other incorporated or unincorporated business, governmental, public, or legal entity.

8. “Relating to” or “concerning” shall mean relating to, concerning, reflecting, referring to, having a relationship to, pertaining to, identifying, containing, pertinent to, comprising, setting forth, showing, disclosing, describing, explaining, summarizing, evidencing, or constituting, directly or indirectly, in whole or in part, or to be otherwise factually, legally, or logically connected to, the subject matter of the particular Request; with respect to the Investigation, records and information “relating to” or “concerning” the Investigation shall be construed to encompass all records and information provided to, considered by, examined by, or prepared by You in connection with the Investigation.

finance [the NRA], their investors.” *See* New York City Bar Association, Forum for the Democratic Attorney General Primary Candidates, YOUTUBE (Sept. 4, 2018), https://www.youtube.com/watch?v=6n2_LHNEUW0 (statement at the 17:50 mark); Our Time Press, Attorney General Candidate, Public Advocate Letitia James, <https://www.ourtimepress.com/attorney-general-candidate-public-advocate-letitia-james/> (last visited Feb. 11, 2020).

9. Whenever appropriate, the singular form of a word shall be interpreted in the plural, and vice-versa, and the words “and” and “or” shall be construed either disjunctively or conjunctively, as necessary, to bring within the scope of the Requests all Documents that might otherwise be construed to be outside their scope.

10. Unless otherwise specified, the time period covered by each Request is from January 1, 2017, to present.

III.
REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 1:

All Documents and Communications concerning the Investigation including, without limitation, all Documents referenced in the Attachment to the January 27, 2021, letter sent by Assistant Attorney General Stephen C. Thompson to Defendants’ counsel, a copy of which is appended hereto as Exhibit B.

Dated: New York, New York
February 3, 2021

By: /s/ Sarah B. Rogers

William A. Brewer III
wab@brewerattorneys.com
Sarah B. Rogers
sbr@brewerattorneys.com

BREWER, ATTORNEYS & COUNSELORS

750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

**ATTORNEYS FOR DEFENDANT
THE NATIONAL RIFLE ASSOCIATION**

EXHIBIT A



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CHARITIES BUREAU

April 26, 2019

By Overnight Mail

National Rifle Association of America
c/o NRA OGC
11250 Waples Mill Road
Fairfax, VA 22030

DOCUMENT PRESERVATION FOR NEW YORK STATE ATTORNEY GENERAL INVESTIGATION

The New York State Office of the Attorney General ("OAG") is currently investigating conduct by the National Rifle Association of America, Inc. and Affiliated Entities¹ (collectively, the "NRA"), including related party transactions between the NRA and its board members; unauthorized political activity; and potentially false or misleading disclosures in regulatory filings. Such conduct may relate to violations of New York law, including but not limited to Article 7 of the Not-for-Profit Corporation Law, Article 7-A of the Executive Law, and Article 8 of the Estates, Powers, and Trust Law.

The OAG hereby requests that the National Rifle Association ("You") preserve all physical and electronic data and records, including documents and correspondence ("Records" as defined more fully in Section II, below) pertaining to matters that are the subject of this investigation. This letter provides information regarding the current scope of the investigation and the scope of the obligation to preserve Records.

¹ "Affiliated Entities" include, without limitation, the NRA Foundation, Inc., NRA Civil Rights Defense Fund, NRA Freedom Action Foundation, NRA Special Contribution Fund d/b/a NRA Whittington Center, NRA Institute for Legislative Action, and NRA Political Victory Fund.

I. Current Scope of the Investigation

The scope of the investigation is subject to change based on the information collected. At the present time, You are directed to preserve all Records relating to or concerning the following subject matter areas (including communications related thereto) for the period **January 1, 2012 to the present**, and continuing thereafter:

1. Meetings of Your board of directors and any committees thereof, and any materials (e.g. board books, financial statements, budgets, memoranda) provided to or considered by the board and any committee;
2. Payments, including without limitation, compensation, reimbursements, and/or benefits, made directly or indirectly, to all board members, trustees, officers, directors, key employees, and family members or entities owned or controlled by the same;
3. Services provided by, contracts with and payments, direct or indirect, to fundraising consultants, professional fundraisers, marketing, public relations, branding, event planning, media and advertising consultants, including the contemplation or consideration thereof;
4. Membership recruitment or promotional programs, campaigns or relationships involving third parties;
5. Affinity programs with third parties, including with Lockton Affinity, LLC;
6. All transactions or consideration of transactions between You and Your board members, trustees, officers, directors, key employees, or family members or entities owned or controlled by the same;
7. All financial transactions between and among NRA Affiliated Entities;
8. Financial audits, regulatory disclosures, and/or legal compliance, including communications and information provided to outside auditors and consultants concerning the same;
9. Any coordination or communication between the NRA or NRA Affiliated Entities and any campaign for elected office;
10. All conflict of interest policies and documents concerning implementation thereof, including without limitation all conflict of interest disclosures;
11. All whistleblower policies and documents concerning implementation thereof, including any whistleblower complaints.

II. Scope of the Obligation to Preserve

“Records” is used in the broadest sense of the term and shall mean all records and other tangible media of expression of any nature, including: including hardcopy and documentary records, and other systems, as well as electronic records, video recordings, audio recordings, e-mail, text messages, instant messages, voicemail messages or social media accounts maintained directly or by or through third parties, QuickBooks records, clinical records, billings records, computer systems, removable electronic media, and other systems. “Other systems” include word

processing documents, spreadsheets, databases, calendars, telephone logs, Internet usage files, and network access information. You should also preserve the following platforms in its possession or in the possession of an entity or third party under its control and/or practically accessible by You: databases, networks, computer systems, including legacy systems (hardware and software), servers, archives, backup or disaster recovery systems, tapes, discs, drives, cartridges, cloud storage, other storage media, laptops, personal computers, and tablets.

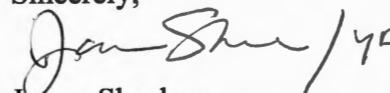
The information that should be preserved includes active data (readily accessible today), archived data (stored on backup media), and deleted data (still recoverable through the use of computer forensics).

We also request that you take affirmative steps to prevent anyone with access to your data systems and archives from seeking to modify or destroy Records on network or local hard drives (such as by deleting or overwriting files, using data shredding and overwriting applications, defragmentation, re-imaging or replacing drives, encryption, compression, or the like). Likewise, for information or data that is identified as concerning or possibly concerning the investigation, we request that you take affirmative steps to prevent account holders from deleting such information and data in any way that would prevent you from recovering it in the future if needed.

To guard against inadvertent spoliation of evidence, please forward a copy of this letter to any and all persons and entities with custodial responsibilities for the items referred to above. We specifically request that you forward a copy of this letter or an equivalent notice to all of Your current board members or past board members who may have relevant information, including information stored on any personal systems, servers, or cloud-based accounts.

If you have any questions, please contact Senior Enforcement Counsel John Oleske at (212) 416-8660.

Sincerely,

A handwritten signature in dark ink, appearing to read "James Sheehan / JC", written over the typed name.

James Sheehan
Bureau Chief, Charities Bureau

EXHIBIT B



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CHARITIES BUREAU

(212) 416-6183
Stephen.Thompson@ag.ny.gov

January 27, 2021

BY EMAIL

Sarah Rogers, Esq.
Brewer, Attorneys & Counselors
750 Lexington Ave., 14th Floor
New York, NY 10022

Kent Correll, Esq.
Correll Law Group
250 Park Ave., 7th Floor
New York, NY 10177

William Fleming, Esq.
Gage Spencer & Fleming, LLP
410 Park Ave., 9th Floor
New York, NY 10022

Mark MacDougall, Esq.
Akin Gump Strauss Hauer & Feld LLP
2001 K Street, N.W.
Washington, D.C.

Seth Farber, Esq.
Mark Werbner, Esq.
Winston & Strawn, LLP
200 Park Ave.
New York, NY 10166

Re: *People of the State of New York by Letitia James v. National Rifle Association of America, Inc.*, Index No. 451625/2020

Dear Counsel:

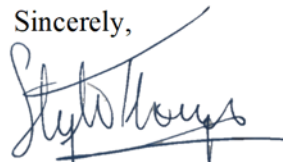
We write as a follow-up to our January 23, 2021 letter. Please find attached to this letter an index providing a broad overview of the number and custodians of non-privileged, relevant documents and testimony in the Office of the Attorney General's ("OAG") pre-complaint investigation file that serve as the basis for the OAG's complaint.

While we believe the documents and testimony summarized in the index to be non-privileged, by voluntarily preparing and producing this index in response to the Defendants' oral request during the parties' January 22, 2021 meet and confer, the OAG does not waive any rights with respect to these documents and testimony, including the potential assertion of privilege.

January 27, 2021

The OAG also reserves all rights to supplement this index as necessary. We look forward to a meaningful discussion of the OAG's proposed discovery schedule during the parties' next meet and confer on February 1, 2021.

Sincerely,

A handwritten signature in blue ink, appearing to read "Stephen C. Thompson", with a horizontal line drawn underneath.

Stephen C. Thompson
Assistant Attorney General

Attachment

Custodian/Witness	Approximate document count
NRA Entities	21,400
NRA (N.Y.A.G. production)	18,900
NRA (D.C.A.G. production)	350
NRAAF (N.Y.A.G. production)	2,000
NRAAF (D.C.A.G. production)	950
SCF	
FAF	
CRDF	
NRA Board Members	6,500
Allan Cors	
Anthony Colandro	
Bart Skelton	
Bill Bachenberg	
Bob Nosler	
Carolyn Meadows	
Charles Cotton	
Clel Baudler	
Curtis Jenkins	
Dan Boren	
David Coy	
Duane Liptak	
Edie Fleeman	
Esther Schneider	
Graham Hill	
Herb Lanford	
Jay Printz	
John Sigler	
Julie Golob	
Kristy Titus	
Linda Walker	
Maria Heim	
Marion Hammer	
Matt Blunt	
Patricia Clark	
Peter Brownell	
Richard Childress	
Robert Mansell	
Ron Schmeits	
Ronnie Barret	
Steve Hornady	
Tom Arvas	
Willes Lee	

Attachment

Custodian/Witness	Approximate document count
Financial Institutions	20,200
Bank of America	
Branch Banking & Trusts	
Fifth Third Bank	
First Citizens Bank	
Wells Fargo	
AMEX	
NYAG/DCAG examinations + exhibits	N/A
Charles Cotton	
David Coy	
Linda Crouch	
Michael Erstling	
Lisa George	
Christina Majors	
Wayne LaPierre	
Sonya Rowling	
William Satterfield	
Wayne Sheets	
Craig Spray	
Lisa Supernaugh	
Robert Unkovic	
NRA v. Ackerman depositions + exhibits	N/A
Andrew Arulanandam	
Ron Carter	
Charles Cotton	
Anthony Ferate	
John Frazer	
Mildred Hallow	
Steve Hart	
Wayne LaPierre	
Carolyn Meadows	
Oliver North	
Robert Pincus	
John Popp	
Craig Spray	
Lisa Supernaugh	
Michael Trahar	
RSM US LLP	21,200
Ackerman McQueen	19,000
Oliver North	90
Chris Cox	3,000
HWS Consulting, Inc.	100
McKenna & Associates	5,000

Attachment

Custodian/Witness	Approximate document count
Woody Phillips	2,600
Pearl Meyer & Partners	220
Ready to Roll Transportation, Inc.	220
Approximate total	100,500

EXHIBIT “5”

**SECOND SET OF REQUESTS FOR PRODUCTION
OF DEFENDANT COUNTERCLAIM-PLAINTIFF, THE NATIONAL RIFLE
ASSOCIATION OF AMERICA TO PLAINTIFF-COUNTERCLAIM DEFENDANT
LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,
IN HER OFFICIAL AND INDIVIDUAL CAPACITIES**

Pursuant to New York Civil Practice Law and Rules (“CPLR”) Section 3120 and Article 31 of the CPLR, Defendant and Counterclaim Plaintiff the National Rifle Association of America (“NRA”) by and through its undersigned counsel, hereby demands that Plaintiff-Counterclaim-Defendant Letitia James, Attorney General of the State of New York, in her official and individual capacities (the “Attorney General,” “You,” “Your,” or “James,” as defined below in Section II.2.) produce all documents and other things specified in the request(s) set forth below for inspection and copying at the offices of counsel for the NRA, Brewer, Attorneys & Counselors, 750 Lexington Avenue, 14th Floor, New York, New York, 10022, within twenty (20) days after service of these Requests for Production (the “Requests”), or upon a shortened time if ordered by the Court.¹

I. **INSTRUCTIONS**

1. Unless otherwise specified, these Requests apply to all Documents and things in effect, created, recorded, compiled, transmitted, or received from January 1, 2015, through the present.

2. To the extent provided by the CPLR or Commercial Division Rules, the NRA’s Requests are intended to be continuing in nature. Responsive Documents or things located any time after a response is due or submitted shall be promptly produced at the place and in the manner specified herein and You are requested and required to supplement Your responses when

¹ The NRA objects to the caption of the Amended Complaint filed by the Attorney General on the ground that the above-captioned action is purportedly brought in the name of “the People” rather than “the State.” *See* CPLR 1301 (“An action brought in behalf of the people ... shall be brought in the name of the state.”); *New York ex rel. Boardman v. Natl. R.R. Passenger Corp.*, 233 F.R.D. 259, 265 (N.D.N.Y. 2006) (“Although New York’s general statutory scheme is for the Attorney General to prosecute lawsuits,... *the case has to be prosecuted in the name of the State of New York.*”) (emphasis added). The NRA further notes that the caption incorrectly references “The National Rifle Association of America, Inc.”; although the NRA is a corporation, it is not denominated “Inc.”

appropriate or necessary to make correct and complete responses to the full extent provided by the CPLR and/or any other applicable rules or orders of the Court.

3. If there are no Documents or things responsive to any particular request, You shall so state in writing, identifying the number(s) of the Request concerned. To the extent you claim that Documents or things responsive to any particular request are not in Your possession, custody or control, identify with particularity any Persons and/or entities with possession, custody or control of such Documents or things.

4. To the extent that You have previously produced to the NRA in the above-captioned action (the “Action”) or another proceeding Documents or things responsive to any Request, it is not necessary to re-produce those documents provided You identify (i) the Bates numbers of the responsive Documents or things, (ii) the request to which the Documents or things are responsive, and (iii) any applicable privilege logs relating to such productions. If any such previously produced responsive Documents or things were designated as “confidential” in a separate proceeding, that designation will not be applicable in this Action. If You contend in good faith that a previously produced Document or thing meets the criteria for confidential treatment under the terms of any applicable confidentiality agreement or order in this Action, You shall identify those documents or things by Bates number(s) and re-produce those documents with new confidentiality designations and new unique Bates numbers.

5. To the extent You believe that any of the following Requests are vague or ambiguous, You are requested to notify the NRA immediately and a clarification will be provided.

6. These Requests are intended to include all Documents and things in the possession, custody, or control of the Attorney General, or subject to the Attorney General’s custody or control, whether directly or indirectly. A Document is deemed to be within the Attorney General’s

possession, custody, or control if: (1) it is within Your actual possession, custody, or control; or (2) it is within the possession of any other person or entity and You have the right to obtain the Document from such person or entity, and You: (a) own the Document in whole or in part; (b) have a right by contract, statute, or otherwise to use, inspect, examine, or copy such Document on any term; or (c) as a practical matter, have been able to use, inspect, examine, or copy such Document when You have sought to do so. For the avoidance of doubt, these Requests are intended to, in addition to hard copy or paper records, include, but are not be limited to, all Documents and things subject to Your possession, custody, or control that are stored on any computers, tablets, cloud spaces, or cellular devices, including Blackberries, iPhones, iPads, or other smart phones or devices.

7. If any Document or thing requested was formerly in Your possession, custody or control but is no longer available or no longer exists, submit a statement in writing and under oath that: (i) describes in detail the nature of the Document and its contents; (ii) identifies the Person who prepared the Document; (iii) identifies all Persons who have seen or had possession, custody, or control of the Document; (iv) specifies the dates on which the Document was prepared, transmitted and/or received; (v) specifies the date on which the Document became unavailable; (vi) specifies the reason why the Document is unavailable, including whether it has been misplaced, lost, destroyed or transferred; (vii) if it has been destroyed or transferred, specifies the conditions of and reasons for such destruction or transfer and the Persons who requested and performed the destruction or transfer; and (viii) identifies all Persons with knowledge of any portion of the contents of the Document.

8. Unless otherwise indicated, the use in these Requests of You, Your name or the name of any party, individual, business organization, or other legal entity, shall specifically include

all of that individual's or entity's present or former employees, officers, directors, agents, representatives, members, departments, bureaus, sections, affiliates, subsidiaries, parents, attorneys, and all other persons acting on his/her or its behalf.

9. These Requests seek production of responsive Documents or things in their entirety, without abbreviation, deletion, or redaction. For the avoidance of doubt, each responsive email message or other Document should be produced with all of its respective email or other attachments, and each responsive email attachment should be produced with its respective parent email message and with all email attachments to that respective parent email message. To the extent that You consider an email message and its corresponding email attachment(s) to constitute separate Documents, the NRA requests the production of all Documents attached to each responsive email message, as well as all e-email messages to which a responsive Document is attached and all other Documents attached to said email messages. For the further avoidance of doubt, all responsive electronic Documents should be produced with all their corresponding metadata, including at minimum the types of metadata listed below in Appendix A. To the extent that You consider an electronic Document's metadata to constitute a separate Document, the NRA requests the production of all metadata that correspond to each responsive electronic Document and all electronic Documents that correspond to each responsive piece of metadata.

10. Should You interpose an objection to a Request or Requests, You should clearly indicate to which part or portion of the Request or Requests the objection is directed and provide all Documents and things to which objection is not made as if such part or portion were propounded as a separate request.

11. For each Document (or portion of a Document) withheld on any ground, You shall insert one or more placeholder page(s) in the production bearing the same document control

number(s) borne by the Document withheld, in the sequential place(s) originally occupied by the Document before it was removed from the production. You shall also submit with the production a statement in writing and under oath that provides, for each Document withheld: (i) a description of the nature of the Document and its contents; (ii) the date of the Document; (iii) the Document's authors and recipients; and (iv) the legal ground for withholding it from production. If the legal ground is attorney-client privilege, please also indicate the names of the attorneys involved in the Document or Communication and the nature of their involvement (e.g., as authors). Such statement (or log) shall accompany each production. Further, for any Document withheld on any ground, the relevant production shall include placeholder pages equivalent in number to the page-length of the withheld Document.

12. You are to produce the Documents as they are kept in the regular course of business or to organize and label them to correspond to the categories in the Requests.

13. Unless otherwise specified herein or subsequently agreed to, all responsive documents must be produced in the form specified in Appendix A.

II. DEFINITIONS

1. "All" and "any" shall be construed so as to bring within the scope of the Requests all Documents which might otherwise be construed to be outside the scope.

2. "Attorney General," "You," and "Your" shall mean the Office of the Attorney General of the State of New York, and all other persons acting or purporting to act with, for, or on its or her behalf, including, but not limited to, consultants, advisors, attorneys, or any person acting in an advisory, agency, or consulting capacity, including, but not limited to: (i) Attorney General Letitia James ("James"), in her official and/or individual capacity; and (ii) where applicable, other

agencies, offices, bureaus, departments, bureaus or divisions of the State of New York or their constituent personnel.

3. “Communication(s)” shall mean any oral, written, or recorded utterance, notation, or statement of any nature whatsoever, by and to whomsoever made, including, but not limited to, correspondence, emails, text messages (including text messages sent or received over work issued or personal devices), conversations, facsimiles, letters, telegrams, cables, telexes, dialogues, discussions, negotiations, interviews, consultations, telephone calls, agreements, and other understandings, among two or more persons. The term “Communication(s)” includes written summaries of any of the foregoing Communications. Drafts of Communications—including unsent drafts which may or may not have been sent to or received by another person and hence may not thus have been “among two or more persons”—are encompassed by the term “Communication(s).”

4. “Document(s)” has the broadest meaning permitted by the CPLR and any other applicable laws and rules including, without limitation, any written, recorded, graphic, or other matter, whether sent or received or made or used internally, however produced or reproduced and whatever the medium on which it was produced or reproduced (whether on paper, cards, charts, files, printouts, tapes, discs, belts, video tapes, audiotapes, tape recordings, cassettes, or other types of voice recording or transcription, computer tapes, databases, emails, pictures, photographs, slides, films, microfilms, motion pictures, mobile devices, smart phones, or any other medium), and any other tangible item or thing of readable, recorded, or visual material of whatever nature including without limitation originals, drafts, electronic documents with included metadata, and all non-identical copies of each Document (which, by reason of any variation, such as the presence or absence of handwritten notes or underlining, represents a separate Document within the

meaning of this term). The foregoing specifically includes information stored electronically, whether in a computer database or otherwise, regardless of whether such Documents are also presently in documentary form.

5. “Investigation” shall mean any investigation, inquiry, inquest, examination, inspection, audit, survey, surveillance, interrogation, enforcement action, or other work performed or undertaken by You relating to the affairs, management, governance, accounts, membership, or conduct of the NRA, before or after commencement of the Action, including, but not limited to: (i) any investigation commenced, or sought to be commenced, during the tenure of former New York State Attorney General Eric Schneiderman; (ii) any investigation(s) or adverse action(s) against the NRA referenced by, promised by, or known to James during her campaign for New York State Attorney General in 2018; (iii) the investigation referenced in the “Document Preservation for New York State Attorney General Investigation” dated April 26, 2019, annexed hereto as Exhibit A; and/or (iv) any investigation of the NRA continuing after the commencement of the Action.

6. “NRA” shall mean the National Rifle Association of America and any person acting, or who has so acted, on its behalf, including, but not limited to, any of their current or former agents, representatives, officers, directors, employees, independent contractors, attorneys, and each and every person acting on their behalf or at their direction or on whose behalf they were acting with respect to the matters referred to herein.

7. “Campaign” shall mean the campaign or campaigns of Letitia James to be elected or reelected New York State Attorney General.

8. “Everytown” shall mean “Everytown for Gun Safety Action Fund, Inc.” or “Everytown for Gun Safety” and any person acting, or who has so acted, on their behalf, including,

but not limited to, any of their former or current agents, representatives, officers, directors, employees independent contractors, attorneys, and each and every person acting on their behalf or at their direction or on whose behalf they were acting with respect to the matters referred to herein.

9. “Person” and “persons” includes natural persons, groups of natural persons acting in a collegial capacity (e.g., a committee or counsel), firms, corporations, partnerships, associations, joint ventures, trusts, and any other incorporated or unincorporated business, governmental, public, or legal entity.

10. “Relating to,” or “concerning” shall mean relating to, concerning, reflecting, referring to, having a relationship to, pertaining to, identifying, containing, pertinent to, comprising, setting forth, showing, disclosing, describing, explaining, summarizing, evidencing, or constituting, directly or indirectly, in whole or in part, or to be otherwise factually, legally, or logically connected to, the subject matter of the particular Request; with respect to the Investigation, Documents and things “relating to” or “concerning” the Investigation shall be construed to encompass all Documents and things provided to, considered by, examined by, or prepared by You in connection with the Investigation.

11. Whenever appropriate, the singular form of a word shall be interpreted in the plural, and vice-versa, and the words “and” and “or” shall be construed either disjunctively or conjunctively, as necessary, to bring within the scope of the Requests all Documents that might otherwise be construed to be outside their scope.

III.**REQUESTS FOR PRODUCTION****REQUEST FOR PRODUCTION NO. 2:**

All Documents and Communications relating to the drafting, contents, timing, and release of any of Your public statements concerning the NRA, whether in an official or an individual capacity.

REQUEST FOR PRODUCTION NO. 3:

For each statement attributed to James and listed in Table A below, please produce all Documents and Communications related to such statements, including but not limited to:

- i. Any talking points, scripts, prepared speeches, or prepared remarks for or by James containing such statements or referencing such statements;
- ii. Any transcripts or recordings of such statements by James;
- iii. Any calendar invitations for or photographs from the events at which these statements were made; and/or
- iv. Any of the foregoing types of materials that reflect any statements or contemplated statements by James to the effect of the statements listed in Table A below—or any other statements accusing the NRA of illegal behavior—during or in furtherance of the Campaign.

Table A

	Statement or Reported Statement by Letitia James (underline indicates emphasis added)	Approximate Date/Event
A.	“The NRA is an <u>organ of deadly propaganda</u> masquerading as a charity for public good.”	July 12, 2018 Press Release ²
B.	“As Attorney General, Tish James <u>will target the NRA</u> , take on arms manufacturers and dealers, investigate financial backing of gun makers and sellers, and <u>build new models to take on interstate arms trafficking</u> .”	July 12, 2018 Press Release ³
C.	“Together, we can . . . <u>take on . . . the @nra . . .</u> ”	September 1, 2018 ⁴
D.	“[W]e CAN <u>take down the NRA</u> . We CANNOT waiver on gun control. That’s why I’m running.”	September 3, 2018 ⁵
E.	“[The NRA] are nothing more than a <u>criminal enterprise</u> . We are waiting to take on all of the banks that finance them, their investors.”	August 30, 2018, Published Interview with Our Time Press ⁶

² Tish James for Attorney General Press Release, Tish James Announces Attorney General Platform to Protect New Yorkers from Gun Violence, July 12, 2018, <https://www.tishjames2018.com/press-releases/2018/7/12/taking-on-the-scourge-of-gun-violence-and-keeping-new-yorkers-safe/> (Last Visited, October 14, 2021).

³ *Id.*

⁴ @TishJames Twitter post.

⁵ @TishJames Twitter post.

⁶ Tish James Becomes New York’s Attorney General – First Black Woman Elected to Statewide Office, Our Time Press (Nov. 8, 2018), <https://ourtimepress.com/tish-james-becomes-new-yorks-attorney-general-first-black-woman-elected-to-statewide-office/> (Last Visited, October 14, 2021).

	Statement or Reported Statement by Letitia James (underline indicates emphasis added)	Approximate Date/Event
F.	“the NRA . . . <u>is a criminal enterprise.</u> ”	September 4, 2018, Video of “Evening with the Candidates” Forum for the Democratic Attorney General Primary Candidates hosted by New York City Bar Association ⁷
G.	““NRA . . . needs to be held accountable for the destruction and the loss of lives . . . ”	September 27, 2018 ⁸
H.	“James said that she made no distinction between the lobbying and charitable arms of the NRA.”	September 27, 2018 ⁹
I.	“When I’m Attorney General I’ll <u>take on the @NRA</u> and investigate their status as a non-profit.”	October 8, 2018 ¹⁰
J.	“Tums out they [the NRA] don't like it . . . if you pledge to investigate their status as a non-profit as the next AG of NY.”	October 10, 2018 ¹¹
K.	“The NRA holds [itself] out as a charitable organization, but in fact, [it] really [is] <u>a terrorist organization.</u> ”	October 31, 2018, Published Interview with <i>Ebony</i> ¹²
L.	“Let me be clear: when I take office I will investigate the non-profit status of the NRA & take every legal step I can to help ensure another life isn't lost to senseless gun violence. #GunControlNow”	November 8, 2018 ¹³

REQUEST FOR PRODUCTION NO. 4:

All Documents and Communications concerning public roundtables, discussion groups, meetings or other public gatherings in which the NRA was referenced or discussed by James,

⁷ Available at https://www.youtube.com/watch?v=6n2_LHNEUW0 (statement at the 17:50 mark).

⁸ <http://liherald.com/stories/nassau-protests-nra-fundraiser,107617> (Oct. 25, 2018) (Last Visited, October 14, 2021).

⁹ *Id.*

¹⁰ @TishJames Twitter post.

¹¹ @TishJames Twitter post.

¹² Letitia ‘Tish’ James on Becoming New York’s Next Attorney General, EBONY (Oct. 31, 2018) <https://www.ebony.com/news/letitia-tish-james-on-becoming-new-yorks-next-attorney-general/> (Last Visited, October 14, 2021).

¹³ @TishJames Twitter post.

whether during her Campaign or as Attorney General, including but not limited to, the September 27, 2018 roundtable event in Mineola, New York referenced above in Request for Production No. 3, Table A. Concerning the September 27, 2018 roundtable event, please produce all Documents and Communications including, but not limited to: (i) drafts or recordings of James's speeches or remarks; (ii) communications related to the planning of the roundtable event and the decision to schedule it the same day as a Friends of the NRA fundraiser held in New Hyde Park, New York; (iii) communications related to whether and how holding the roundtable event was intended to or would likely help James get elected as the Attorney General for the State of New York; and/or (iv) any photographs, transcripts or recordings from the event.

REQUEST FOR PRODUCTION NO. 5:

All Documents and Communications concerning Campaign materials and/or Campaign fundraising materials, referring to the NRA—directly or indirectly—including but not limited to, any materials referencing the statements set forth in Request for Production No. 3, Table A.

REQUEST FOR PRODUCTION NO. 6:

All Documents and Communications concerning the drafting, contents, timing, and release of any of Campaign statements, Campaign fundraising statements and/or donor solicitations referencing the NRA, directly or indirectly, including but not limited to, the fundraising solicitation issued by James on or about August 6, 2020, a copy of which is annexed hereto as Exhibit B.

REQUEST FOR PRODUCTION NO. 7:

All Documents and Communications relating to the drafting, contents, timing, and release of any of Your and/or the Campaign's press releases concerning the NRA.

REQUEST FOR PRODUCTION NO. 8:

All Documents and Communications between James and former Governor Andrew Cuomo (“Cuomo”) concerning the NRA, including but not limited to, concerning Cuomo’s endorsement of James for New York State Attorney General.

REQUEST FOR PRODUCTION NO. 9:

All Documents and Communications concerning the Investigation, including but not limited to: (i) concerning authorization of the commencement of the Investigation, and (ii) evidencing the date of the commencement of the Investigation.

REQUEST FOR PRODUCTION NO. 10:

All Documents and Communications related to formal or informal interviews conducted by You or any of Your staff, attorneys or other representatives, during the Investigation, including but not limited to, transcripts of interviews, notes of interviews, exhibits used during interviews, and lists of individuals interviewed and present during the interviews, and including but not limited to, the dates of such interviews.

REQUEST FOR PRODUCTION NO. 11:

All Documents and Communications concerning continuation or termination of any Person’s business relationship with the NRA, including but not limited to, Communications between (a) You, and (b) that Person.

REQUEST FOR PRODUCTION NO. 12:

All Documents and Communications concerning any changes in the NRA’s (a) internal governance, or (b) internal policies and procedures, including but not limited to, Documents and Communications regarding any internal or external audit performed by or for the NRA of its (i) internal policies and procedures, or (ii) financial and/or accounting records.

REQUEST FOR PRODUCTION NO. 13:

All Documents and Communications concerning the NRA between You and any of the following entities—whether directly or indirectly—including but not limited to, any of the entities’ current or former officers, employees, contractors, investigators, attorneys, agents, representatives, predecessors-in-interest, or designees.

1. Edward Skyler;
2. Cuomo;
3. Office of the Attorney General for the District of Columbia;
4. New York State Department of Financial Services;
5. Michael R. Bloomberg and/or any other Campaign donor or supporter;
6. Everytown;
7. Moms Demand Action;
8. Moms Demand Action for Gun Sense in America;
9. Gays Against Guns;
10. Pod Save America;
11. Berkshire Bank;
12. Citibank;
13. Citizens Financial Group;
14. People’s United Bank;
15. Regions Financial Corp.;
16. TD Bank;
17. Truist Financial (formerly BB&T Corp.); and/or

18. Former or current members of the NRA's Board of Directors, the NRA's officers, employees, or representatives of vendors of the NRA or any witnesses whose testimony or out-of-court statements You may offer in evidence at trial or any pretrial hearing in this Action, including but not limited to, Wilson "Woody" Phillips, Joshua Powell, Wayne LaPierre, John Frazer, Christopher Cox, Oliver North, Mildred Hallow, Peter Brownell, Richard Childress, Daniel Boren, Esther Schneider, Roscoe "Rocky" Marshall, Phillip Journey, Ackerman McQueen, Inc., Aronson, LLC, RSM US LLP, J. Stephen Hart, Michael Volkov, and/or Cooper & Kirk LLP.

In complying with this request, for any meeting or other Communication, please produce, without limitation, all Documents related to:

- (a) any scheduling communications, including but not limited to, calendar invitations, sent in advance of any such meetings or Communications,
- (b) evidence of any planned, cancelled, or actual communications with these individuals or entities concerning the NRA,
- (c) email messages,
- (d) other Outlook or similar application records,
- (e) text messages or other instant messages,
- (f) voicemails,
- (g) materials used or created for, during, or after such meetings or Communications (such as PowerPoint presentations, meeting agenda(s), handouts, meeting notes, action or follow up items, or transcripts), and/or

(h) summary memoranda or similar documents prepared in conjunction with or after such meetings or other Communications.

REQUEST FOR PRODUCTION NO. 14:

All Documents and Communications in effect since January 1, 2011 concerning Your internal or publicly disclosed guidance, guidelines, directives, policies and/or procedures for seeking the involuntary judicial dissolution of not-for-profit corporations.

REQUEST FOR PRODUCTION NO. 15:

All Documents and Communications referring to or describing any entity for which You have sought involuntary judicial dissolution as a “sham.”

REQUEST FOR PRODUCTION NO. 16:

All Document preservation notices effectuating Your obligations to preserve documents and other things in light of pending or anticipated litigation against You.

Dated: New York, New York
October 14, 2021

By: /s/Svetlana M. Eisenberg
William A. Brewer III
wab@brewerattorneys.com
Svetlana M. Eisenberg
sme@brewerattorneys.com
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**ATTORNEYS FOR DEFENDANT AND
COUNTERCLAIM PLAINTIFF
THE NATIONAL RIFLE ASSOCIATION OF
AMERICA**

APPENDIX A**INSTRUCTIONS FOR PRODUCING ELECTRONICALLY STORED INFORMATION**

Document Image Format. Documents and ESI are to be produced in Tagged Image File Format (“TIFF”). If a document does not contain redactions, you are directed to produce an extracted text (.TXT) file containing searchable text for each electronic document and an Optical Character Recognition (“OCR”) text file for each imaged paper document along with image load files.

For documents that contain redactions, you are directed to provide an OCR text file for the unredacted portions of such documents.

Every TIFF file in each production must be referenced in the production’s corresponding load file.

The total number of TIFF files referenced in a production’s load file should match the number of TIFF files in the production.

Load files of the static images should be created and produced together with their associated static images to facilitate the use of the produced images by a document management or litigation support database system.

Metadata load files should contain, if available, the non-privileged metadata listed in the following table.

Field Name	Field Description	Document Type
BEGPRODBATE	Beginning Production Number	ALL
ENDPRODBATE	Ending Production Number	ALL
PROD_VOLUME	Production Volume (ex. MOF-PD001)	ALL
BEGPRODATT	Beginning Production Family Number	ALL
ENDPRODATT	Ending Production Family Number	ALL
CUSTODIAN	Custodian of records name. I.E. Doe, John.	ALL

Field Name	Field Description	Document Type
CONFIDENTIALITY	Confidentiality designations (if applicable)	ALL
PARENTID	BeginBates number for the parent email of a family (will not be populated for documents that are not part of a family)	ALL
PAGES	Total page count per document	ALL
FILENAME	Document File Type	EDOCS
FILEEXT	File extension of original document	EDOCS
LOCATION	Original file path for electronic documents or folder path from mailbox for email	ALL
SENT_DATE	Email Sent Date (MM/DD/YYYY)	EMAILS
SENT_TIME	Email Sent Time (HH:MM:SS) GMT	EMAILS
LASTMODDATE	Document Last Modified Date (MM/DD/YYYY)	EDOCS
CREATION_Date	Email: (Empty) Native: Date the document was created.	EDOCS
DATERCVD	Email: Date the email was received. Native: (Empty)	EMAILS
FILESIZE	Document file size in bytes	EDOCS
AUTHOR	Creator of document	EDOCS
SUBJECT	Email Subject	EMAILS
FROM	Author of Email	EMAILS
RECIPIENT	Recipient of Document	EMAILS
CC	Copies on Communications	EMAILS
BCC	BCC	EMAILS
NATIVELINK	Location of native file in volume if provided	EDOCS
MD5HASH	MD5HASH of Electronic Loose File or Attachments	EDOCS
MESSAGEID	Internet message identifier	EMAILS
TEXTPATH	Location of OCR Text File in volume.	ALL

You are not obligated to populate manually the fields in the table that cannot be extracted from a document, with the exception of the custodian.

Production of Native Files. Unless such materials contain privileged or redacted information, Microsoft Excel, Microsoft Project, Microsoft Access, other spreadsheets, and database files should be produced in native format. If these files, however, contain privileged or redacted information, they need not be produced in native format but shall be produced with the

extracted text and metadata fields set forth in these instructions and definitions if possible, except to the extent the extracted text or metadata fields are themselves redacted. Excel files that contain privileged information should be produced as an Excel file in a manner that does not prevent Excel functions from performing, but with privileged information redacted. Each native file produced should be accompanied with its metadata as outlined in the table above, and an image placeholder designating the document was produced in native format. The native file should be produced in a folder labeled with the Bates number of the native file document in the following format:

- a. Single file per document.
- b. Filenames should be of the form:
 - i. <Bates num><designation>.<ext>

Where <Bates num> is the BATES number of the document, <designation> any designation applicable to the document, and <ext> the appropriate extension for the document (.ppt, .xls, etc.);

Document Unitization and Load Files. For files not produced in their native format, each page of a document shall be electronically saved as an image file.

If a document consists of more than one page, the unitization of the document and any attachments and/or affixed notes shall be maintained as it existed in the original when creating the image files. The producing party shall produce a unitization file (“load file”) for all produced documents in accordance with the following formatting:

- a. Document Unitization Load File. Document productions should include Concordance document load files containing the metadata listed in the table above.

b. OCR and Extracted Text Files (.TXT Files). There should be a single text file per document containing all the document's pages. Pages must be separated by form feed character (decimal 12, hex 0xC). Filenames should be of the following form:

- i. <Bates num>.txt
- ii. Where <Bates num> is the BATES number of the first page in the document.
- iii. Text must be encoded in ASCII, except where documents contain characters requiring UTF-8 in order to be read. Such documents shall be produced in UTF-8 format.

Image Files. Image files should be single page per image and single image per file. TIFF is the default format unless the following formats are agreed to: jpeg, jpeg2000, gif, png, single image tiff, and bmp. Filenames should be of the following form:

- a. <Bates num>.<ext>
- b. Where <Bates num> is the BATES number of the page, and <ext> is the appropriate extension for the image format (.jpg, .tif, .png, etc.).

Metadata Load Files. Filenames should be of the following form:

- a. Comma Separated Value (.CSV) files (commonly .DAT files).
- b. The first line must contain the column/field names.
- c. Every row must have the same number of columns/fields (empty values are acceptable).
- d. Text must be encoded in ASCII.
- e. Values must be enclosed by ASCII character 254.
- f. Multiple entries in a field must be separated by ASCII character 174.

g. New line value in data must be indicated by ASCII character 059.

Values must be separated by ASCII character 020.

Duplicates. If you have more than one identical copy of an electronic document (i.e., the documents are exact duplicates as that term is used in the electronic discovery field), only produce a single copy of that document (as long as all family relationships are maintained). You may de-duplicate ESI across each party's custodians or sources. De-duplication will be based on MD5 hash values.

Encryption. Please make reasonable efforts to ensure that all encrypted or password-protected documents are successfully processed for review and production, and if produced in native form, that the decrypted document is produced. To the extent encrypted or password-protected documents are successfully processed according to the requirements set forth herein, you have no duty to identify the prior encrypted status of such documents. To the extent such documents are not successfully processed despite use of reasonable efforts, including reasonable efforts to obtain passwords, produce an inventory of such files that are determined to have a reasonable likelihood of containing relevant information as is apparent without decryption such as attachments to responsive files, or metadata suggestive of responsiveness, such as relevant file names, and in any case shall include any containers files such as PST or ZIP files. The inventory shall contain any required metadata and document identifying information, including family relationships, to the extent that such information can be extracted using reasonable efforts during document processing. The inventory shall be produced in accordance with the Load File specifications.

System and Program Files. System and program files, defined as the NIST, need not be processed, reviewed or produced. Additional files may be excluded by mutual agreement of the parties.

Black and White. All files shall be produced in black and white. At a party's request, the parties shall meet and confer regarding production of color image(s) for specific documents.

Bates Numbering - Document Images. Each page of a produced document shall have a unique page identifier ("Bates Number") electronically "burned" onto the image at a location that does not unreasonably conceal or interfere with any information from the source document. Any confidentiality legend, if applicable, shall be "burned" onto each document's image at a location that does not unreasonably obscure any information from the source document.

Bates Numbering - Native Format Documents. Documents produced in Native Format will be produced with a placeholder TIFF image. Each TIFF placeholder will contain the Bates Number and confidentiality designation, if any.

Production Media. Documents shall be produced by FTP site or on CD-ROM, DVD, external hard drive (with standard PC compatible interface), or other readily accessible computer or electronic media (the "Production Media"). Each item of Production Media shall be produced in a Bates labeled folder corresponding to the Bates label on the image placeholder. Each native file produced will be accompanied with its metadata.

Attachments. Email attachments and embedded files or links must be mapped to their parent by the document or production number. If attachments and embedded files are combined with their parent documents, then "BeginAttach" and "EndAttach" fields listing the unique beginning and ending number for each attachment or embedded document must be included.

Compressed Files. Compression file types (e.g., .CAB, .GZ, .TAR, .Z, and .ZIP) shall be decompressed in a reiterative manner to ensure that a zip within a zip is decompressed into the lowest possible compression resulting in individual folders and/or files.

Embedded. If a document has information from another file embedded in it (e.g., a Word document containing an embedded spreadsheet), produce the document with all embedded information, but the NRA reserves the right to request that the embedded file be produced as a standalone file.

Form of Production for Electronic Messages: Electronic messages (defined above) shall be produced in a searchable format that preserves the presentational features of the original messages, such as emojis, images, video files, animations, and the like. Electronic messages must not be converted to rasterized or non-unitized file formats such as PDF or TIFF. In general, messages should be produced in the same format as that in which they were exported for purposes of collection, search, or review. As a general rule, messages can be produced in CSV (Comma Separated Values) format.

Identifying Sources of Electronic Messages: In responding to requests for electronic messages, you should consider any software applications used by the parties and individual custodians of data as potential sources of electronic messages. Even applications that primarily serve other purposes may contain built-in messaging systems. As an example, customer relationship management software and practice management software often include messaging systems. Your search and production should take account all reasonably available sources of electronic messages.

Exhibit A



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CHARITIES BUREAU

April 26, 2019

By Overnight Mail

National Rifle Association of America
c/o NRA OGC
11250 Waples Mill Road
Fairfax, VA 22030

DOCUMENT PRESERVATION FOR NEW YORK STATE ATTORNEY GENERAL INVESTIGATION

The New York State Office of the Attorney General (“OAG”) is currently investigating conduct by the National Rifle Association of America, Inc. and Affiliated Entities¹ (collectively, the “NRA”), including related party transactions between the NRA and its board members; unauthorized political activity; and potentially false or misleading disclosures in regulatory filings. Such conduct may relate to violations of New York law, including but not limited to Article 7 of the Not-for-Profit Corporation Law, Article 7-A of the Executive Law, and Article 8 of the Estates, Powers, and Trust Law.

The OAG hereby requests that the National Rifle Association (“You”) preserve all physical and electronic data and records, including documents and correspondence (“Records” as defined more fully in Section II, below) pertaining to matters that are the subject of this investigation. This letter provides information regarding the current scope of the investigation and the scope of the obligation to preserve Records.

¹ “Affiliated Entities” include, without limitation, the NRA Foundation, Inc., NRA Civil Rights Defense Fund, NRA Freedom Action Foundation, NRA Special Contribution Fund d/b/a NRA Whittington Center, NRA Institute for Legislative Action, and NRA Political Victory Fund.

I. Current Scope of the Investigation

The scope of the investigation is subject to change based on the information collected. At the present time, You are directed to preserve all Records relating to or concerning the following subject matter areas (including communications related thereto) for the period **January 1, 2012 to the present**, and continuing thereafter:

1. Meetings of Your board of directors and any committees thereof, and any materials (e.g. board books, financial statements, budgets, memoranda) provided to or considered by the board and any committee;
2. Payments, including without limitation, compensation, reimbursements, and/or benefits, made directly or indirectly, to all board members, trustees, officers, directors, key employees, and family members or entities owned or controlled by the same;
3. Services provided by, contracts with and payments, direct or indirect, to fundraising consultants, professional fundraisers, marketing, public relations, branding, event planning, media and advertising consultants, including the contemplation or consideration thereof;
4. Membership recruitment or promotional programs, campaigns or relationships involving third parties;
5. Affinity programs with third parties, including with Lockton Affinity, LLC;
6. All transactions or consideration of transactions between You and Your board members, trustees, officers, directors, key employees, or family members or entities owned or controlled by the same;
7. All financial transactions between and among NRA Affiliated Entities;
8. Financial audits, regulatory disclosures, and/or legal compliance, including communications and information provided to outside auditors and consultants concerning the same;
9. Any coordination or communication between the NRA or NRA Affiliated Entities and any campaign for elected office;
10. All conflict of interest policies and documents concerning implementation thereof, including without limitation all conflict of interest disclosures;
11. All whistleblower policies and documents concerning implementation thereof, including any whistleblower complaints.

II. Scope of the Obligation to Preserve

“Records” is used in the broadest sense of the term and shall mean all records and other tangible media of expression of any nature, including: including hardcopy and documentary records, and other systems, as well as electronic records, video recordings, audio recordings, e-mail, text messages, instant messages, voicemail messages or social media accounts maintained directly or by or through third parties, QuickBooks records, clinical records, billings records, computer systems, removable electronic media, and other systems. “Other systems” include word

processing documents, spreadsheets, databases, calendars, telephone logs, Internet usage files, and network access information. You should also preserve the following platforms in its possession or in the possession of an entity or third party under its control and/or practically accessible by You: databases, networks, computer systems, including legacy systems (hardware and software), servers, archives, backup or disaster recovery systems, tapes, discs, drives, cartridges, cloud storage, other storage media, laptops, personal computers, and tablets.

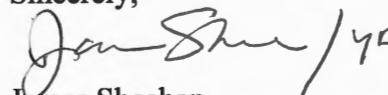
The information that should be preserved includes active data (readily accessible today), archived data (stored on backup media), and deleted data (still recoverable through the use of computer forensics).

We also request that you take affirmative steps to prevent anyone with access to your data systems and archives from seeking to modify or destroy Records on network or local hard drives (such as by deleting or overwriting files, using data shredding and overwriting applications, defragmentation, re-imaging or replacing drives, encryption, compression, or the like). Likewise, for information or data that is identified as concerning or possibly concerning the investigation, we request that you take affirmative steps to prevent account holders from deleting such information and data in any way that would prevent you from recovering it in the future if needed.

To guard against inadvertent spoliation of evidence, please forward a copy of this letter to any and all persons and entities with custodial responsibilities for the items referred to above. We specifically request that you forward a copy of this letter or an equivalent notice to all of Your current board members or past board members who may have relevant information, including information stored on any personal systems, servers, or cloud-based accounts.

If you have any questions, please contact Senior Enforcement Counsel John Oleske at (212) 416-8660.

Sincerely,

A handwritten signature in dark ink, appearing to read "James Sheehan / JS", is written over the typed name.

James Sheehan
Bureau Chief, Charities Bureau


Exhibit B



From my first day in office and every moment since, I've made a commitment to hold the powerful accountable and fight for justice. We take that fight wherever it leads. No matter how powerful or fearsome our opponent may be, when justice is on the line, we'll stand up and speak out.

For me, this is a long-held and deeply-rooted belief: **When abuses of trust and unchecked greed run amok, we'll defend what's right. And when we do, we'll win out through hard work.**

We won't listen to people who say our actions are too bold. We won't back down when people say it's not our time, that justice has to wait. **Justice cannot wait. Fairness and truth prevail.**

This movement is  a movement where our voices, united in common purpose, are holding the powerful accountable. New Yorkers in every corner of our state and people all across the country will fuel this movement forward. I'm so grateful to have you shoulder to shoulder with me in the work ahead.

I hope you'll join me today and donate \$5, or any amount you're able to give at this moment, to help strengthen our movement for justice!

In peace and power,

Tish

I STAND WITH TISH

Chip in today to show the strength
of this movement!

Chip in



EXHIBIT “6”

B R E W E R
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.

B R E W E R

Hon. O. Peter Sherwood,
Special Master
October 20, 2022
Page 2

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

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)

B R E W E R

Hon. O. Peter Sherwood,
Special Master
October 20, 2022
Page 3

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).

B R E W E R

Hon. O. Peter Sherwood,
Special Master
October 20, 2022
Page 4

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

B R E W E R

Hon. O. Peter Sherwood,
Special Master
October 20, 2022
Page 5

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
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750 Lexington Avenue, 14th Floor
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Enclosures

cc: Parties' counsel of record (via email)

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,

INDEX NO.: 451625/2020

Plaintiff,

-against-

THE NATIONAL RIFLE ASSOCIATION OF
AMERICA, WAYNE LAPIERRE, WILSON
PHILLIPS, JOHN FRAZER, and JOSHUA
POWELL,

Defendants.

AFFIRMATION OF SVETLANA M. EISENBERG

I, SVETLANA M. EISENBERG, an attorney duly admitted to practice law in the courts of the State of New York, hereby affirm the following under penalty of perjury pursuant to CPLR § 2106:

1. I am a Partner at Brewer, Attorneys & Counselors, counsel for the National Rifle Association of America (the “NRA”) in the above-captioned action.
2. I respectfully submit this Affirmation in support of the NRA motion for an order to compel the NYAG to amend and/or supplement its privilege log.
3. Attached as Exhibit A is the New York Attorney General’s May 25, 2022 Amended Commercial Division Rule 11-b Certification and Privilege Log.
4. Attached as Exhibit B is the NRA’s April 11, 2022 letter to the New York Attorney General regarding the privilege log.
5. Attached as Exhibit C is the New York Attorney General’s April 27, 2022 response.
6. Attached as Exhibit D is an excerpt of the NRA's Answer filed October 13, 2022

Dated: October 20, 2022
New York, New York

/s/ Svetlana Eisenberg
Svetlana Eisenberg

EXHIBIT A

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
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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	<p>Documents relating to communications with the following witnesses or their counsel, including document preservation notices, and document and testimonial subpoenas:</p> <p>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</p>	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	<p>Draft and final interview memoranda relating to the following witnesses:</p> <p>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</p>	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 B

B R E W E R
ATTORNEYS & COUNSELORS

April 11, 2022

VIA EMAIL

William Wang
Assistant Attorney General
New York State Office of the Attorney General
28 Liberty Street, New York, NY 10005

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

Dear Mr. Wang,

We write concerning the privilege log served by the OAG in the above-captioned matter (the “Privilege Log”). Because the Privilege Log fails to provide information sufficient to justify the privilege assertions under which 2,666 critically relevant, responsive documents have apparently been withheld, we write to identify deficiencies in the log and request that they promptly be remedied—or that the underlying documents be produced.

1) Public Interest Privilege

Each of the five Categories contained within your 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

Your Privilege Log, and the accompanying certification executed by Mr. Thompson, are devoid of any explanation as to how the public interests would be harmed by the disclosure of the documents in Categories 1-5. Please provide your justification for the application of the public

¹ *Cirale v. 80 Pine St. Corp.*, 35 N.Y.2d 113, 117, 316 N.E.2d 301, 303 (1974).

² *In re World Trade Ctr. Bombing Litig.*, 93 N.Y.2d 1, 8, 709 N.E.2d 452, 456 (1999).

³ *Colgate Scaffolding & Equip. Corp. v. York Hunter City Servs., Inc.*, 14 A.D.3d 345, 346, 787 N.Y.S.2d 305, 307 (1st Dep’t 2005).

⁴ *Id.*

B R E W E R

William Wang

April 11, 2022

Page 2 of 5

interest privilege to these documents, and specifically identify how public interests would be harmed by their disclosure. In addition, insofar as the public interest privilege applies to “communications,” please provide any support you rely upon to invoke the public interest privilege in Category 4 which is comprised of “memoranda” and not communications.

2) *Law Enforcement Privilege*

All Categories on your Privilege Log also identify “law enforcement privilege” as a basis for withholding. In New York, “the existence of such a privilege is questionable.”⁵ “Even assuming such a privilege exists . . . more is needed than a conclusory 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

In view of the foregoing, we ask that you please identify the specific law enforcement interests which would be harmed by the disclosure of the materials identified in Categories 1-5 of your Privilege Log. Upon receipt and analysis of your response, we intend to ask the Special Master to perform an *in camera* review of some or all of the documents you are withholding on the basis of the law enforcement privilege.

3) *Work Product Privilege*

You have claimed work product protection for, *inter alia*, 84 “interview memoranda” which comprise Category 4. The work product doctrine only applies “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.”⁸ Memoranda which summarize statements made during an interview do not qualify for work product protection. To the extent the memoranda contain some degree of legal analysis, those portions of the memoranda can be redacted.

We ask that you withdraw your blanket assertion of work product protection for the documents in Category 4 and identify the number of documents which actually contain the work product of an attorney.

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) (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.

⁸ *Brooklyn Union Gas Co. v. Am. Home Assur. Co.*, 23 A.D.3d 190, 191, 803 N.Y.S.2d 532, 534 (1st Dep’t 2005).

B R E W E R

William Wang
April 11, 2022
Page 3 of 5

4) Trial Preparation Privilege

You also contend that the interview memoranda in Category 4 are protected by trial preparation privilege. Though these memoranda may have been prepared in anticipation of trial, the trial preparation privilege has been waived since the contents of these memoranda have been placed “at issue.” “‘At 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.”⁹ In addition, “selective disclosure is not permitted as a party may not rely on the protection of the privilege regarding damaging communications while disclosing other self-serving communications.”¹⁰

To the extent these interview memoranda form the basis for the allegations in the NYAG’s Amended Complaint, it is completely inappropriate for those same memoranda to be withheld from production. Due to this withholding, the NRA has been deprived the ability to review the determine whether undisclosed statements might disprove or negate the allegations made in the Amended Complaint. The trial preparation privilege cannot be used as a sword and a shield. As such, we ask that the assertion of this privilege be withdrawn with respect to Category 4.

5) Common Interest Privilege

You have asserted applicability of the common interest privilege concerning 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.”¹¹ 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.

Please confirm that you withdraw your assertion of the common interest privilege with respect to Category 2.

⁹ *Deutsche Bank Tr. Co. of Americas v. Tri-Links Inv. Tr.*, 43 A.D.3d 56, 63, 837 N.Y.S.2d 15, 23 (2007).

¹⁰ *Id.*

¹¹ *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 627, 57 N.E.3d 30, 37 (2016).

B R E W E R

William Wang
April 11, 2022
Page 4 of 5

6) Number of Documents in Category 1

Mr. Thompson's certification contains the following statement "[d]ue to the unavailability of one attorney to consult on search terms prior to production of this privilege log, and ongoing technological issues with the OAG's document review platform, the total document number for Category 1 may increase." It has been more than four months since this certification was executed. Please submit an updated certification to provide clarity as to the number of documents withheld in Category 1.

7) 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. We require this information to assess the legitimacy of your privilege assertions – particularly since the privileges you assert can be waived as a result of the inclusion of third parties. Please provide this information for all communications you have logged. We trust you will find this request acceptable as you asked us to provide you this same information concerning the NRA's log during our meet-and-confer on April 7, 2022.

8) 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, we are concerned that your definition of "consultants" might include fact witnesses from whom the OAG derives the factual bases for the allegations in the Amended Complaint. Please 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.

9) Identity of Complainants

Category 5 consists of "[c]ommunications with and documents obtained from or relating to complaints and confidential sources." Please provide to us your definition of the term "complainants." If the individuals and entities who you consider to be "complainants" are not also "confidential sources," their identities should be disclosed.

B R E W E R

William Wang
April 11, 2022
Page 5 of 5

The foregoing does not serve as an exhaustive list of the NRA's complaints concerning the Privilege Log. The NRA is available to discuss the foregoing, reserves all rights and waives none.

Sincerely,

/s/ Philip J. Furia

William A. Brewer III

Svetlana M. Eisenberg

Philip J. Furia

Sarah B. Rogers

BREWER, ATTORNEYS & COUNSELORS

Counsel for the National Rifle Association of
America

EXHIBIT C



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

Philip J. Furia, Esq.
April 27, 2022
Page 2

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

Philip J. Furia, Esq.

April 27, 2022

Page 3

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

Philip J. Furia, Esq.

April 27, 2022

Page 4

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 thought 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

Philip J. Furia, Esq.
April 27, 2022
Page 5

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).

Philip J. Furia, Esq.

April 27, 2022

Page 6

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

Philip J. Furia, Esq.

April 27, 2022

Page 7

cc: Monica Connell, Assistant Attorney General

EXHIBIT D

**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,

-against-

THE NATIONAL RIFLE ASSOCIATION OF
AMERICA, WAYNE LAPIERRE, WILSON
PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,

Defendants.

INDEX NO.: 451625/2020

**ANSWER OF THE NATIONAL RIFLE ASSOCIATION OF AMERICA
TO THE SECOND AMENDED VERIFIED COMPLAINT**

DEFENSES AND AFFIRMATIVE DEFENSES**A. ADDITIONAL FACTUAL ALLEGATIONS**

The NRA reincorporates and re-alleges preceding paragraphs hereof as if fully set forth herein.

Beginning prior to the institution of her investigation into the NRA, continuing through until the present date, Plaintiff has engaged in a series of egregious actions designed to harm the NRA and to retaliate against the NRA for its constitutionally protected advocacy for Second Amendment freedoms. These actions, though disguised as a legitimate attempt at law enforcement are, in fact, the realization of Plaintiff's personal vendetta against the NRA and those who support the Second Amendment. Plaintiff's unclean hands are evidenced by, including but not limited to, the following actions she has undertaken:

- a) Prior to taking office and prior to commencing an investigation into the NRA, Plaintiff made highly damaging and defamatory false statements about the NRA, including referring to the NRA as a "criminal enterprise" and a "terrorist organization."
- b) In addition, Plaintiff has coordinated and conspired with Everytown for Gun Safety ("Everytown"), an entity which was founded to serve as a "counterweight" to the NRA.
- c) Unlike the NRA, which has over five million members, Everytown is largely funded by one person, staunch anti-gun advocate Michael Bloomberg.
- d) Because Everytown was founded and exists solely to further Michael Bloomberg's anti-gun agenda, Everytown is not a credible source of information about the NRA.
- e) Yet, on information and belief, because Plaintiff is also personally opposed to the NRA's constitutionally-protected Second Amendment advocacy, Plaintiff has ignored Everytown's lack of credibility and, instead has coordinated with Everytown in crafting and pursuing this action.

- f) In fact, a representative of the NYAG in sum and substance refused to deny at a deposition that if the NYAG succeeded on her now-dismissed claims to dissolve the NRA, she planned to distribute some or all of the NRA's assets to Everytown.
- g) Seeking to cause maximum damage to the NRA and to proponents of the Second Amendment, Plaintiff also coordinated with the Attorney General for the District of Columbia ("DCAG"), to induce the DCAG to commence a meritless action against both the NRA and the NRA Foundation (NRAF), a 501(c)(3) organization which supports the NRA's mission (the "DCAG Action").
- h) The DCAG commenced the DCAG Action against the NRA and the NRAF on the same date the instant action was filed.
- i) On information and belief, the DCAG Action was filed at the insistence of Plaintiff, to further her own personal vendetta against NRA.
- j) Plaintiff's involvement in the commencement and prosecution of the DCAG Action will be substantiated by discovery of communications between Plaintiff's office and the DCAG's office.
- k) The actions detailed herein, along with those other actions to be uncovered during discovery, were specifically designed to cause maximum damage to the NRA and to infringe upon and chill the First Amendment rights of the NRA and its supporters.
- l) As a result of Plaintiff's egregious conduct, the NRA's reputation has been harmed, and the NRA has suffered damages.
- m) Plaintiff's unclean hands require all allegations against the NRA to be dismissed.

B. THE NRA'S DEFENSES AND AFFIRMATIVE DEFENSES

1. The NRA reincorporates and re-alleges preceding paragraphs hereof as if fully set forth herein. The NRA asserts these affirmative defenses without waiver of other applicable

defenses or affirmative defenses not included here. The NRA reserves the right to assert additional defenses and affirmative defenses.

INTERVENING AND SUPERSEDING ACTIONS

2. The damages suffered by Plaintiff or by any third party, as well as any statutory or regulatory violations alleged, were proximately caused by intervening and superseding actions and occurrences including, but not limited to, actions of persons, entities, and/or forces over which the NRA exerted no control and for which the NRA has no responsibility.

PAYMENT, ACCORD AND SATISFACTION

3. The causes of action asserted against the NRA in the Complaint, and related requests for remedial action and other relief against the NRA are barred, in whole or in part, by payment, accord and satisfaction.

RATIFICATION

4. Plaintiff's attempt to enjoin, void or rescind alleged related-party transactions pursuant to N-PCL §§ 112(a)(10), 715(f), and EPTL § 8-1.9(c)(4) fails because, to the extent such transactions were not approved in accordance with N-PCL § 715(a)-(b), they were duly ratified in accordance with N-PCL § 715(j).

DE MINIMIS TRANSACTIONS

5. Transactions were de minimis under N-PCL 102(a)(24) and, therefore, they did not constitute "related party transactions." De minimis transactions may include, without limitation, meal or travel reimbursements or other incidental or low-dollar-value benefits conferred on related parties in connection with their work for the NRA.

DE MINIMIS FINANCIAL INTEREST

6. The alleged financial interest of allegedly related parties who participated in certain transactions was de minimis under N-PCL 102(a)(24) and, therefore, they did not constitute "related party transactions."

ORDINARY COURSE OF BUSINESS EXEMPTION

7. Transactions would not customarily be reviewed by the board or boards of organizations similar to the NRA in the ordinary course of business, were available to others on the same or similar terms, and, therefore, did not constitute “related party transactions.”

CLASS OF BENEFICIARIES EXEMPTION

8. Transactions were a benefit provided to an alleged related party solely as a member of a class of the beneficiaries that the NRA intended to benefit as part of the accomplishment of its mission. The benefit was available to all similarly situated members of the same class on the same terms. Therefore, transactions did not constitute “related party transactions.”

LACK OF AUTHORITY

9. Individuals who purported to act on behalf of the NRA in connection with certain of the transactions at issue were not authorized to enter into such transactions on behalf of the NRA.

RELATIVE CULPABILITY

10. The relative culpability of each party who is or may be liable for the damages alleged by Plaintiff should be determined in accordance with the decisional and statutory law of the state of New York, and the equitable share of each party’s liability for contribution should be determined and apportioned in accordance with the relative culpability, if any, of each such party pursuant to Article 14 of the CPLR.

GOOD FAITH

11. 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.

BUSINESS JUDGMENT RULE

12. The NRA has no liability under any of the causes of action asserted against it in the Complaint because it purports to deprive its officers, directors, employees or other agents of their statutory business judgment rule defense and thus violates the fault-based scheme codified by the New York Legislature with respect to the regulation of not-for-profit corporations and officers, directors and other persons associated with such corporations.

NON-IMPUTATION

13. The NRA has no liability under any of the causes of action asserted against it in the Complaint. To the extent officers, directors, employees, or other agents of the NRA whose conduct Plaintiff attempts to impute to the NRA did not discharge their responsibilities in good faith or with the degree of diligence, care, and skill which ordinarily prudent persons in a similar position would exercise in like circumstances, they acted ultra vires, not in the scope of their duties to the NRA, did not act in part or in whole for the benefit of the NRA or with the intent to benefit the NRA and their actions did not benefit the NRA. Their alleged misconduct cannot be imputed to the NRA.

THIRD PARTY ACTS AND OMISSIONS

14. The causes of action asserted against the NRA in the Complaint, and related requests for remedial action and other relief against the NRA, are barred to the extent acts or omissions of third parties caused the alleged injury or damages.

MOOTNESS

15. The causes of action asserted against the NRA in the Complaint, and related requests for remedial action and other relief against the NRA, are unwarranted and moot because the NRA acted at all times in good faith and because there is no substantial likelihood that the

NRA will violate the statutes, rules, or provisions specified in the Complaint's causes of action or in "Prayer for Relief."

DEMAND FUTILITY

16. Plaintiff's attempt to bring a derivative action in behalf of the NRA cannot be sustained due to its failure adequately to allege the futility of making a demand upon the NRA Board of Directors. Further, the Attorney General has not only failed to allege with particularity, but cannot allege, that a majority of the Board is conflicted with self-interest, or is controlled by self-interested persons, concerning transactions at issue. Director nominations occur through a nominating committee—which gets candidates from innumerable sources including advertisements in NRA Magazine and in response to requests made to Members for suggested Directors—or by petition, or both, after which approximately one-half of the NRA's five million members are eligible to vote for Directors of their preference. The particular circumstances presented by these nomination and election protocols

FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

17. The causes of action asserted against the NRA in the Complaint, and related requests for remedial action and other relief against the NRA, including for mandatory injunctive relief, such as the appointment of an independent compliance monitor, in whole or in part, ought to be barred by, and should be dismissed under, the First Amendment to the United States Constitution, under which state regulation of not-for-profit corporations engaged in protected speech must occur in the least intrusive manner possible. The relief sought against the NRA in this action also trespasses upon fundamental freedoms protected by the due process clause of the Fourteenth Amendment because the effect of such remedies would be to abridge the NRA's and its members' right to engage in the expression of free speech and association with other supporters and defenders of the Second Amendment to the United States Constitution in support of their

common beliefs. Such relief would also have the effect of chilling freedom of speech and assembly and curtailing the constitutionally protected freedoms to associate and freedoms to speak freely on Second Amendment and other issues. “In considering requests for equitable relief, courts . . . should consider its effect on First Amendment rights.” Dobbs, D. B., & Roberts, C. L. (n.d.). Dobbs and Roberts’s Law of Remedies, Damages, Equity, Restitution, 3d (Hornbook Series) at page 101. Here, the concern for First Amendment rights is particularly acute. After all, Attorney General James targeted the NRA because of the substance of its constitutionally protected speech. In 2018, Attorney General James pledged to “take on” the NRA and businesses that support it. She proclaimed that her “investigat[ion]” of the NRA’s “non-profit status” will “help ensure another life isn’t lost to senseless gun violence.” And, in 2021, Attorney General James again touted her “work[] to *eliminate* the NRA” as the reason New Yorkers should elect her as Governor. Yet, she now asks the Court to order the NRA to pay an independent compliance monitor and an independent governance expert to oversee the “administration of the NRA” under this Court’s and *her* supervision. NYSCEF 646 at ¶¶ 635-643, pages 174-76. There can be no doubt that, under any circumstances, such state action is “likely to affect adversely the ability of [an advocacy group] and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate” and places a “substantial restraint” on the exercise of their First Amendment rights. *NAACP v. Alabama*, 357 U.S. 449, 462-63 (1958). Here, given the NYAG’s demonstrated animus towards the NRA’s constitutionally protected speech, the First Amendment implications are profound.

DUE PROCESS

18. The causes of action asserted against the NRA in the Complaint, and related requests for remedial action and other relief against the NRA, ought to be barred and should be dismissed under the United States Constitution to the extent they seek to enjoin the NRA from

soliciting charitable donations because such relief would violate the substantive guarantees of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

DORMANT COMMERCE CLAUSE

19. The causes of action asserted against the NRA in the Complaint, and related requests for remedial action and other relief against the NRA, ought to be barred and should be dismissed under the United States Constitution to the extent they seek to enjoin the NRA from soliciting charitable donations because such relief would violate the “dormant” or (“negative”) Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution, in that it presents an unlawful infringement and restraint on interstate commerce in violation of the Commerce Clause.

LACK OF STANDING BASED ON BIAS OR MALICIOUS OR BAD FAITH INTENT

20. Plaintiff lacks standing to assert her claims and seek relief against the NRA, because, among other things, due to her bias against defendant(s) or her malicious or bad faith intent to injure the NRA, she cannot fairly and adequately represent those on whose behalf she brings her claims, such as her claim under EPTL 8-1.4(m).

COLLATERAL ESTOPPEL/RES JUDICATA

21. One or more claims or allegations asserted, or remedies sought, in whole or in part, is barred by collateral estoppel and/or res judicata.

FAILURE TO STATE A CLAIM

22. The Complaint fails to state a cause of action or claim upon which relief can be granted. For instance, the first sentence of EPTL 8-1.4(m)—the statute pursuant to which Plaintiff asserts the First Cause of Action—does not give rise to a purported claim for injunctive relief “to ensure proper administration of any trust, corporation or other relationship to which this section applies.” Rather, that statutory language merely gives the Attorney General standing to pursue causes of action that arise under—and seek relief authorized by—other statutes or law. Separately,

even if the sentence could be interpreted to give rise to a cause of action, it does not authorize the specific injunctive relief that the NYAG seeks. In fact, under the *Expressio unius est exclusio alterius* principle reiterated in *Spitzer v. Grasso*, 42 A.D.3d 126, 135, *passim*. (App. Div. 2007), because the comprehensive statutory scheme here expressly provides for the appointment of a receiver and a multitude of other express types of relief—but not the appointment of an independent compliance monitor or an independent governance expert—the applicable statutory scheme implicitly precludes the NYAG from seeking the relief she seeks. For the Attorney General to seek the appointment of an independent compliance monitor or an independent governance expert violates the fundamental principles of separation of powers. In addition, the Court has no authority to issue the mandatory injunctive relief the NYAG seeks.

ESTOPPEL, REGULATORY ESTOPPEL, WAIVER, LACHES

23. Plaintiff's claims and related requests for remedial action and other relief against the NRA are barred, in whole or in part, by the doctrines of estoppel, regulatory estoppel, waiver, and/or laches. As an example, on September 29, 2022, Assistant Attorney General Steven Shiffman, in obtaining a denial of the NRA's motion to dismiss the First Cause of Action, represented to the Court that although the NYAG seeks the appointment of an independent compliance monitor, the NYAG does not seek the appointment of an independent compliance monitor who would report to the Attorney General. Transcript of Oral Argument on September 29, 2022 at 61:13-15 ("The monitor is a different level of scrutiny. The monitor does not report to the Attorney General, the monitor will report to the Court."). On this and other bases, the NYAG is estopped from seeking, as it attempts to do in Paragraph 643 of the Complaint, the "appointment of an independent compliance monitor with responsibility to report to the Attorney General."

UNCLEAN HANDS

24. Plaintiff's claims and related requests for remedial action and other relief against the NRA are barred, in whole or in part, by Plaintiff's unclean hands.

SELECTIVE ENFORCEMENT OF NEW YORK LAW

25. Plaintiff's claims and related requests for remedial action and relief against the NRA are barred, in whole or in part, because Plaintiff has engaged in selective enforcement of New York's laws, including New York's Non-Profit Corporations Law and New York's Estates Powers and Trusts Law, in violation of the Fourteenth Amendment of the United States Constitution and in violation of the New York State Constitution.

ILLEGAL RETALIATION FOR EXERCISE OF RIGHTS OF FREEDOMS OF SPEECH

26. Plaintiff's claims and related requests for remedial action and other relief against the NRA are barred, in whole or in part, because Plaintiff has instituted this action to retaliate against the NRA and its members for their exercise of their right to freedom of speech, in violation of the First Amendment and the New York State Constitution.

ILLEGAL SUPPRESSION OF POLITICAL SPEECH

27. Plaintiff's claims and related requests for remedial action and other relief against the NRA are barred, in whole or in part, because Plaintiff's investigation and claims against the NRA were instituted based on the NRA's political viewpoint, and conducted for the purpose of suppressing the NRA's political speech.

ILLEGAL RETALIATION FOR EXERCISE OF RIGHTS OF FREEDOMS OF ASSOCIATION

28. Plaintiff's claims and related requests for remedial action and other relief against the NRA are barred, in whole or in part, because Plaintiff has instituted this action to retaliate against the NRA and its members for their exercise of their right to freedom of association, in violation of the First Amendment and the New York State Constitution.

**PLAINTIFF'S ACTION IS MOTIVATED BY HER POLITICAL ANIMUS AGAINST
THE NRA**

29. Plaintiff's claims and related requests for remedial action and other relief against the NRA are barred, in whole or in part, because Plaintiff has instituted this action to as a result of her animus against the NRA, whom she views as a political enemy.

STATUTE OF LIMITATIONS

30. Plaintiff's claims and related requests for remedial action and other relief against the NRA are barred, in whole or in part, by the applicable statute of limitations and other and equitable and statutory time limitations.

LACK OF MATERIALITY

31. Plaintiff's claims and related requests for remedial action and other relief against the NRA on its claims of alleged material statements that were untrue in public filings fail because the alleged misstatements or omissions were not material and, separately, because omissions are not actionable under the statutes on which the NYAG relies.

FAILURE TO ADD NECESSARY AND INDISPENSABLE PARTIES

32. The relief the NYAG seeks is barred due to a failure to sue and add necessary and indispensable parties whose presence is required to seek the relief the NYAG seeks.

EXTRA-TERRITORIALITY

33. The relief the NYAG seeks is barred in part to the extent the statutes upon which she relies do not apply extra-territorially outside the State of New York.

**THE NYAG DOES NOT ALLEGE THAT THE NRA HOLDS PROPERTY FOR
CHARITABLE PURPOSES IN THE STATE OF NEW YORK**

34. The relief the NYAG seeks is barred because Plaintiff does not allege that the NRA holds property for charitable purposes in the State of New York.

THE NYAG DOES NOT ALLEGE THAT THE NRA ADMINISTERS PROPERTY FOR CHARITABLE PURPOSES IN THE STATE OF NEW YORK.

35. The relief the NYAG seeks is barred because the NYAG does not allege that the NRA administers property for charitable purposes in the State of New York.

36. The NRA reserves its right to amend its Answer and/or to add any additional affirmative and/or other defenses for which a sufficient basis may be determined at a latter point in these proceedings. The NRA adopts and incorporates by reference any defenses and affirmative defenses asserted by any other defendant in this action, to the extent such defense applies to the NRA, and reserves the right to assert any other defense that may become available or appear during the discovery proceedings or otherwise in this case.

37. The NRA intends to require Plaintiff to carry her burden of proof on every element of each of her claims. The NRA, therefore, reserves the right to assert by motion or at trial denials as to Plaintiff's ability to prove the required elements of any or all claims. In the event that any affirmative defense asserted by the NRA is determined by the Court to be a denial rather than an affirmative defense, the burden of proof shall not shift to the NRA on such matters merely because the matter has been pleaded as an affirmative defense rather than a denial.

Dated: October 13, 2022

By: /s/ Svetlana Eisenberg
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EXHIBIT “7”

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

-----	x	Index No. 451625/2020
PEOPLE OF THE STATE OF NEW	:	
YORK, BY LETITIA JAMES,	:	Hon. Joel M. Cohen
ATTORNEY GENERAL OF THE STATE	:	
OF NEW YORK	:	
	:	DECISION
Plaintiff,	:	
	:	
v.	:	
	:	
THE NATIONAL RIFLE ASSOCIATION	:	
et al.,	:	
	:	
Defendants.	:	
-----	x	

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. Protein 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

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

A handwritten signature in cursive script, appearing to read "O. P. Sherwood".

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

EXHIBIT “8”

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 “9”



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.)

Hon. O. Peter Sherwood

December 8, 2022

Page 2

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).

Hon. O. Peter Sherwood
December 8, 2022
Page 3

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

Hon. O. Peter Sherwood

December 8, 2022

Page 4

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 privileges⁹ 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

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).

Hon. O. Peter Sherwood

December 8, 2022

Page 5

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

EXHIBIT “10”



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CHARITIES BUREAU

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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.

Hon. O. Peter Sherwood

October 20, 2022

Page 2

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).

Hon. O. Peter Sherwood

October 20, 2022

Page 3

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. Protein 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).

Hon. O. Peter Sherwood

October 20, 2022

Page 4

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.

³ See, e.g., NRA Corporate Representative Deposition at 280:22-282:19 (attached as Exhibit A).

⁴ See, e.g., Exhibit A at 771:20-775:10 and 793:23-797:3.

⁵ See, e.g., David Coy Deposition at 168:14-174:20; 385:22-387:5 (attached as Exhibit B); Charles Cotton Deposition at 36:2-23, 49:14-50:7 (attached as Exhibit C).

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.

Hon. O. Peter Sherwood

October 20, 2022

Page 5

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, Frazer spoke with Mr. Lan about the calculation of excess benefits, and was instructed by counsel not to speak about the substance of that conversation.¹⁰ But 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.¹¹

The NRA's investigation and attempts at remediation of other improper excess benefits received by the LaPierres, while touted as a compliance success story¹², were also shielded by

⁸ Exhibit A at 372:3-374:11; John Frazer Deposition at 188:12-21 (attached as Exhibit D).

⁹ See, e.g., Sonya Rowling Deposition at 129:9-130:12 (attached as Exhibit E) (current CFO disclaiming any knowledge of how the descriptions for amounts repaid by Ms. Hallow were calculated); Exhibit C at 427:14-433:22 (current board President disclaiming any knowledge of what information was provided to tax counsel or by whom for determining excess benefits to LaPierre).

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 that "they said here's the figure and I said well, I want -- I want this course correction to apply to everybody, including myself, and I repaid it [] including interest and taxes" but being unable to identify what expenses of his were reviewed and stating Plaintiff would have to ask the NRA), 323:8-324:18 ("I assume everything -- NRA looked at -- looked at everything during that period."), 346:13-347:25 ("have made it absolutely clear to the NRA that it's my intent to -- after they did a full to review of everything, to repay every excess benefit that NRA finds in their 360 Review and settle up with NRA" and indicating that he relied upon the NRA and outside counsel to ensure that.); 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.**").

Hon. O. Peter Sherwood

October 20, 2022

Page 6

the NRA's assertion of privilege. The Brewer firm and Mr. Lan were also responsible for collecting and reviewing documentation about LaPierre's inappropriate reimbursements for gifts he provided to NRA staff.¹³ Mr. Lan was the primary person who determined whether the gift reimbursements constituted excess benefits to LaPierre, and prepared written work product regarding his calculations with assistance from the Brewer firm.¹⁴ A similar process was followed with respect to amounts determined to be excess benefits to LaPierre for his wife's receipt of professional hair and makeup services paid for by the NRA.¹⁵ To date, Plaintiff has only two spreadsheets, believed to have been prepared by the Brewer firm, 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

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 Exhibit B at 37:12-39:10, 40:3-45:14, 56:22-58:13, 89:23-93:16, 100:4-20, 299:7-300:15, 307:18-308:14, 315:9-316:21, 327:17-330:3 (Audit Committee vice chair and current Second Vice President (1) unable to recall discussions of allegations concerning LaPierre outside of the presence of counsel, (2) relying on counsel in connection with any investigation into those allegations, and (3) being instructed not to answer about discussions in counsel's presence or any factual information learned from counsel); Exhibit C at 36:2-23, 49:14-50:7, 63:18-64:17 (Audit Committee chair and current President testifying that tax counsel handled the investigation into excess benefits by LaPierre, but being instructed not to reveal the parameters of what tax counsel was asked to do).

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

Hon. O. Peter Sherwood

October 20, 2022

Page 7

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 generally she has relied on advice from the Brewer firm and Mr. Lan as part of the NRA's "course correction."²¹ Ms. Rowling testified that she relied on Mr. Lan's advice about the treatment of certain expenditures on the Form 990, but was instructed not to testify as to the advice itself.²²

When asked for details about the investigation into and calculations of excess benefits for LaPierre, Defendant Frazer, in his capacity as a representative of the NRA, frequently pointed to outside counsel in response to inquiries about past and ongoing issues, and did not recognize the one document in Plaintiff's possession purportedly showing how certain excess benefits for LaPierre were calculated.²³ Investigations by outside counsel into excess benefits paid to LaPierre are ongoing.²⁴ Indeed, Frazer referenced ongoing "privileged investigations" concerning key issues in this action, and either could not or was instructed not to reveal the content of those investigations by counsel.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

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.*, Exhibit A at 344:18-346:3 (testifying that investigation into Defendant Phillips is ongoing but unable to provide specifics); 507:18-508:13 (testifying that litigation counsel (the Brewer firm) is still reviewing Defendant Phillips' conduct), 793:23-797:3 (preventing questioning about ongoing investigations at the NRA concerning possible private inurement), 828:8-14 (declining to discuss the details of ongoing investigations by the Brewer firm into conduct by Phillips on privilege grounds), 836:8-839:11 (preventing questioning on and declining to answer questions concerning investigations into LaPierre's relationship with David McKenzie on privilege grounds).

²⁶ *See, e.g.*, Expert Report of Matthew Lerner dated September 16, 2022, at ¶¶ 70a and 99 (attached as Exhibit J) ("I further noted, as described in sworn testimony, that the NRA engaged several external consultants and attorneys to support investigation and compliance efforts in

Hon. O. Peter Sherwood

October 20, 2022

Page 8

LaPierre's repayment of excess benefits as evidence of the NRA's compliance reforms.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

response to allegations contained in the Complaint, as well as in response to whistleblower reports. These outside consultants and attorneys included K&L Gates, Don Lan, Alex Reid, and Brewer, Attorneys & Counselors.”) (internal citations omitted); Expert Report of Amish Mehta dated September 16, 2022 at pp. 30-32 (attached as Exhibit K) (noting the hiring of Don Lan as an “indicat[ion] that the NRA took reasonable steps to ensure the accuracy of its New York State CHAR 500 filings”).

²⁷ Exhibit J at p. 15; Expert Report of Ryan Sullivan and Bruce L. Blacker 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).

Hon. O. Peter Sherwood

October 20, 2022

Page 9

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

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 special procedures related to Brewer contract).

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

Hon. O. Peter Sherwood

October 20, 2022

Page 10

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 current NRA Treasurer Sonya Rowling that the NRA was in the process of renegotiating its contract with MMP, and that those negotiations were being handled primarily by the Brewer firm.³⁵ Ms. Rowling was instructed not to reveal the substance of those negotiations to the extent they were relayed to her by the Brewer firm, which, of course, comprised the entirety of her knowledge about the negotiations.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 executed a new contract with one of MMP's affiliated entities—Allegiance—a month prior, and had a negotiated, signed term sheet with MMP in late July 2022.³⁸ Plaintiff also learned that the NRA, through the Brewer firm, allegedly conducted market testing of the relationship between the NRA and MMP and its affiliates, 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.

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).

Hon. O. Peter Sherwood

October 20, 2022

Page 11

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).

Hon. O. Peter Sherwood

October 20, 2022

Page 12

- 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.

Hon. O. Peter Sherwood

October 20, 2022

Page 13

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 “11”

B R E W E R
ATTORNEYS & COUNSELORS

December 12, 2022

VIA EMAIL

Hon. O. Peter Sherwood
Special Master for Discovery |
360 Lexington Avenue
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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:

The NRA respectfully submits this opposition to the NYAG's motion for reconsideration dated December 8, 2022. For the reasons below, the Special Master should deny the motion as procedurally improper and lacking merit.

I.
PROCEDURAL BACKGROUND

In early 2021, the NRA served its first request for production of documents on the NYAG in this action. (Exhibit A.) In doing so, the NRA sought all communications concerning the NYAG's investigation of the NRA. *Id.* The NYAG objected to the request on the grounds that it called for records protected by the attorney-client privilege and as attorney work product. (Exhibit B.)

Later in 2021, the NRA served its second request for the production of documents on the NYAG. (Exhibit C.) The NRA's Request No. 13 called for any communications between the NYAG and the DCAG concerning the NRA. *Id.* The NYAG did not produce any documents in response to this request. Instead, she objected to it on privilege and other grounds. (Exhibit D.)

In December 2021, the NYAG served her categorical privilege log along with a Commercial Division Rule 11(b) certification. (Exhibit O.¹) The NYAG stated that she

¹ The NYAG subsequently served an amended certification and privilege log in May 2022. The amended certification and privilege log are attached as Exhibit P.

B R E W E R

Hon. O. Peter Sherwood

December 12, 2022

Page 2

withheld over 1,000 communications between her office and other law enforcement agencies, including the DCAG. *Id.*

On October 20, 2022, after repeated efforts to amicably resolve deficiencies in the NYAG's privilege log and productions failed, the NRA moved to compel the NYAG to produce records of her communications with other law enforcement agencies. (Exhibit E.) The NYAG opposed the request on November 4, 2022. (Exhibit F.) She argued that the Special Master should deny the NRA's request for an order compelling production. *Id.* Importantly, the NYAG did not ask the Special Master to review the documents she withheld *in camera*. *Id.*

On November 14, 2022, the Special Master held oral argument on the NRA's motion (Transcript attached as Exhibit G), and, on November 29, 2022, ruled that the NYAG failed to show “that confidentiality is necessary as to documents in Category 2 . . . or to protect a pending investigation” (Exhibit H).

Instead of complying with the Special Master's order or seeking review of the order pursuant to CPLR 3104(d)—as required by the stipulation concerning the Special Master for Discovery so-ordered by the Court (NYSCEF 579)—the NYAG asked for additional time to formulate her strategy (Exhibit I). Then, on December 5, 2022, the NYAG informed the Special Master that she would make a further submission and/or an *in camera* submission to the Special Master. (Exhibit J.)

On December 8, 2022, the NYAG filed a motion for reconsideration of the Special Master's ruling. (Exhibit K.) In her motion, the NYAG seeks reconsideration of the Special Master's ruling dated November 29, 2022, on several meritless grounds. For the reasons below, the motion should be denied.

II. ARGUMENT

A. The NYAG's motion for reconsideration is procedurally improper.

The NYAG's motion for reconsideration is procedurally improper and should be denied on that basis.

First, proceedings before the Special Master are governed by an order of the Court (NYSCEF 579), which provides that parties may submit discovery disputes to the Special Master, who will rule on each dispute in writing. (NYSCEF 579 at Paragraph 7.) The order further states that, in the event a party disagrees with the Special Master's ruling, it shall seek review of such a ruling by the Court pursuant to CPLR 3104(d). *Id.* at Paragraph 8.

B R E W E R

Hon. O. Peter Sherwood

December 12, 2022

Page 3

Here, the parties did not agree—and the Court did not order—that the NYAG may seek reconsideration of the Special Master’s rulings. *See id.* The NYAG's only remedy is to seek relief from the Court.

Furthermore, in her opposition to the NRA's motion, the NYAG asked the Special Master to deny the relief the NRA sought and did not offer to submit any documents for *in camera* review. (Exhibit F.) Only after the Special Master held that the NYAG failed to show “that confidentiality is necessary as to documents in Category 2” (Exhibit H), did the NYAG request that the Special Master conduct an *in camera* review of the documents (Exhibit K).

B. Even if the Special Master were to reach the merits of the NYAG's motion for reconsideration, the Special Master should deny it.

In support of her motion, the NYAG raises several arguments. For the reasons above and below, each argument is not only procedurally improper but also lacks merit.

1. The Special Master previously rejected the NYAG's argument that the documents the NRA seeks are irrelevant.

The NYAG argues that 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.” (Exhibit K.) She asserts that they “do not contain any factual information relating to this case that is not privileged or that has not already been disclosed to Defendants.” *Id.*

The NYAG previously made this argument in opposing the Motion. (Exhibit F.) The Special Master acknowledged the relevance objection in his decision dated November 29, 2022, *sub silentio* overruled the objection, and reached the issue of privileges. (Exhibit H at page 8 *et seq.*) The NYAG does not identify any purported error in the Special Master’s ruling to warrant his re-visiting of the issue.

2. That the DCAG commenced an action against the NRA is of no consequence here.

The NYAG also attempts to avoid production of her communications with other law enforcement agencies about the NRA on the basis that “the Decision [dated November 29, 2022] was [allegedly] based on the incorrect premise that the . . . DCAG . . . no longer has an ongoing enforcement matter with respect to the NRA.” (Exhibit K.) The NYAG asserts that because an enforcement matter is pending in the District of Columbia against the NRA, DCAG’s communications with the NYAG should be shielded from discovery. This argument is flawed for several reasons.

B R E W E R

Hon. O. Peter Sherwood

December 12, 2022

Page 4

First, the NYAG does not argue that the DCAG's investigation against the NRA was ever covert. Indeed, the NYAG asserts that DCAG sat in on the NYAG's meetings with witnesses during her investigation and served a subpoena on the NRA for documents. (Exhibit K.) The privileges the NYAG invokes exist to prevent interference with an ongoing investigation. Because the DCAG has completed her investigation—in fact proceeded to file a public lawsuit against the NRA and its affiliate based on the investigation—any possible basis for immunizing records from production cannot possibly continue to exist.

In addition, the NYAG fails to mention that the NRA successfully moved to dismiss all claims against it in the DCAG action. (Exhibit L at page 23.) While the litigation continues against a separate corporation—the NRA Foundation, which is not a party here—the sole apparent reason the NRA is still a party in the DCAG's case is because in the event the DCAG prevails on certain of his claims against the NRA Foundation, relief he would seek includes constructive trust as against assets of the NRA. (Exhibit L.²) The NYAG does not explain how the existence of a pending lawsuit in the District of Columbia shields her communications with DCAG from production.

3. The attorney work product and the trial preparation privileges do not shield the NYAG's communications with law enforcement agencies from production here.

The NYAG also asks the Special Master to reverse his prior ruling dated November 29, 2022, on the ground that “materials in Category 2 are protected by privileges, including the work product doctrine and the trial preparation privilege, that the OAG asserted them in her 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.” (Exhibit K.)

This argument fails for several reasons.

² See also Exhibit Q (DCAG's motion for leave to amend complaint) at page 7 (“The District is not expanding or altering the scope of this matter by its proposed amendments, but simply amending its initial complaint to conform to the Court's directive that the District's remedies are part of Counts I-III, not independent causes of action.”); see also Exhibit R (court order granting the DCAG's motion to amend complaint) at page 2 (“In its Omnibus Order resolving Defendants NRA and Foundation's motions to dismiss the District's Complaint, this Court granted the NRA's motion in part, dismissing Counts IV and V of the Complaint [the only two counts that named the NRA as defendant] on the basis that a constructive trust is not an independent cause of action. Instead, the Court held that a constructive trust is a remedy available to the District through Counts I-III of the Complaint [which are asserted against a different corporation, the NRA Foundation]. See Dec. 21, 2020.”).

B R E W E R

Hon. O. Peter Sherwood

December 12, 2022

Page 5

First, the OAG does not assert that she explained her purported basis for the attorney work product or trial preparation privileges in her submission to the Special Master dated October 20, 2022. Moreover, she does not dispute that such privileges may not attach and may be waived when communications are shared with third parties. (Exhibit K.)

In her opposition dated November 4, 2022 (Exhibit F) and in her motion for reconsideration (Exhibit K), the NYAG offered no basis for the Special Master to conclude that such privileges attached or that waiver did not occur here.

In any case, assuming similar privileges exist in the District of Columbia, the NYAG lacks standing to assert any attorney work product or trial preparation privileges over communications prepared by DCAG's attorneys in contemplation of DCAG's trial in a different action in a different jurisdiction.

Moreover, the NYAG concedes that she exchanged numerous communications with DCAG before the NYAG and the DCAG entered in what the NYAG calls a "common interest agreement" in February of 2020. (Exhibits M, S.) The Motion for reconsideration and Ms. Connell's affirmation do not contend that, before the written agreement, the parties had entered into an oral agreement. (Exhibit K.) Counsel for the NYAG made an assertion to this effect in an email message dated December 9, 2022 (Exhibit M), but, to date, has failed to respond to the NRA's email message inquiring about the date of the alleged oral agreement (Exhibit N).

Finally, the motion for reconsideration and the accompanying affirmation fail to assert—let alone show—that all or most of the communications in category 2 constitute NYAG's attorney work product or were prepared by the NYAG in preparation for trial and are therefore protected by CPLR 3103.

4. The Special Master should disregard and reject as meritless all argument based on the alleged "common interest agreement" between the NYAG and the DCAG.

The NYAG also argues that, "under a common interest agreement the OAG has with the DCAG [the "Agreement"], both law enforcement agencies intended to preserve the confidentiality of communications they exchanged about their respective investigations." (Exhibit K.) She claims that, on that ground, the Special Master should reverse his prior ruling. *Id.*

Like her other arguments, this one fails for multiple reasons. First, in opposing the Motion, the NYAG did not argue that the Motion should be denied because of the Agreement (Exhibit F). Having failed to so much as mention the Agreement in the opposition, the NYAG is barred from bringing it up now (Exhibit K). As the DCAG admits in his submission to the Special Master (and as addressed below), the Agreement is from February 2020, that is, more than two years before the NYAG opposed the NRA's motion. The NYAG offers no excuse for

B R E W E R

Hon. O. Peter Sherwood

December 12, 2022

Page 6

failing to mention the Agreement in her opposition. (Exhibits F, K.) The Special Master must therefore disregard this argument as untimely.

Second, the NRA served requests on the NYAG for (i) any communications, including agreements, concerning her investigation of the NRA; and (ii) any communications, including agreements, with the DCAG specifically concerning the NRA. (Exhibits A and C (Request No. 13).) The NYAG never produced the Agreement, nor disclosed its existence on a privilege log. (Exhibits O, P.) Although she failed to do so, she *now* seeks to rely on the Agreement in support of her motion for reconsideration. This improper reliance on a record the NYAG previously failed to disclose is a separate reason why the Special Master should disregard the NYAG's arguments based on the Agreement.

Third, the NYAG fails to explain how the existence of the Agreement alters the legal analysis concerning discoverability of her communications with the DCAG here. Neither the motion for reconsideration nor the attached affirmation of M. Connell dated December 8, 2022 (Exhibit K), provides any information about any obligations created in the Agreement and in fact provides no information of any kind about any of its provisions. Nor does the motion for reconsideration cite any legal authority in support of the NYAG's arguments based on the Agreement. Because the NYAG fails to prove any facts and to cite any law, she does not come close to meeting her burden.

Fourth, the NYAG improperly submitted the Agreement to the Special Master for *in camera* review but did not provide a copy of the Agreement to the NRA. Notably, she does not assert that the Agreement is privileged or otherwise non-discoverable. (Exhibit K.) To the extent the NYAG relies on the Agreement to prevent the production of her communications with the DCAG, the NRA has the right to review the Agreement to assess the merits of her argument. The Special Master should refuse to consider the Agreement because the NYAG failed to provide it to the NRA. At a minimum, the Special Master should order the NYAG to produce the Agreement to the NRA and permit the NRA to supplement this submission as necessary.

Fifth, according to the NYAG, the agreement was created in February 2020. The NYAG does not assert that all of her communications with DCAG post-date the Agreement. Although the NYAG asserted in an email message to the NRA's counsel that there had been a prior oral agreement between the NYAG and the DCAG, she failed to mention such oral Agreement in her opposition to the NRA's motion and her motion for reconsideration (Exhibits F and K). Ms. Connell's affirmation is similarly silent on the issue. (Exhibit K.) In addition, when counsel for the NRA asked the OAG about the date of the oral agreement, the NYAG did not respond. (Exhibit N.)

5. The Special Master should disregard the DCAG's submission.

In her motion for reconsideration, the NYAG informed the Special Master that the DCAG would seek permission to make a submission to the Special Master. (Exhibit K.) A few

B R E W E R

Hon. O. Peter Sherwood

December 12, 2022

Page 7

hours later, the DCAG made his submission without securing permission to do so. (Exhibit S.) The DCAG's submission contains no arguments that add to the NYAG's.

The DCAG's arguments are meritless for the reasons discussed above. In addition, the DCAG is not a party to the so-ordered stipulation concerning the Special Master for Discovery, where the parties in this action agreed that their discovery disputes may be resolved by the Special Master. In fact, in his submission, the DCAG does not represent that, should the Special Master rule against the DCAG (as occurred on November 29, 2022), the ruling would be binding or preclusive as to the DCAG.

In any case, the DCAG's attempt to weigh in on this discovery dispute is untimely. He offers no basis for his failure to seek relief when the parties briefed and the Special Master heard the NRA's motion.

C. The NYAG's arguments concerning her communications with the unidentified agency are similarly procedurally improper and meritless.

There are multiple additional reasons why the Special Master should refuse to grant the motion for reconsideration as it pertains to the NYAG's refusal to produce her communications with the second law enforcement agency.

In her motion for reconsideration, the NYAG asserts that the Special Master should find that the communications with this unidentified second agency are immune from discovery. (Exhibit K.) In her affirmation, Ms. Connell asserts that "there are approximately 3 communications with another law enforcement agency." *Id.* She goes on to say: "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." *Id.* The NYAG's request to immunize from discovery these records fails for three reasons.

First, the NYAG does not assert that the unidentified agency has a pending or contemplated enforcement action against the NRA. (Exhibit K.) Therefore, to the extent the Special Master were to re-consider his ruling for the reason that the DCAG is pursuing relief against the NRA, that reason does not apply to the NYAG's communications with the second unidentified agency.

Second, Ms. Connell does not explain in her affirmation the basis for her "*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." (Exhibit K, Affirmation of M. Connell dated December 8, 2022, at Paragraph 6 (emphasis added).) And the NYAG failed to submit an affirmation from any witnesses with personal knowledge of the matter.

Third, had the NYAG shown that individuals at the NYAG and the unidentified law enforcement agency intended for the identity of the agency or the substance of the

B R E W E R

Hon. O. Peter Sherwood

December 12, 2022

Page 8

communications to be confidential, the NYAG still fails to provide any legal support for the proposition that such “intend[ment]” is sufficient to immunize the records from discovery in this action. Indeed, the NRA produced to the NYAG countless records that it and its counterparties intended to remain confidential. Moreover, earlier in this action, the Court entered a protective order. (NYSCEF 869.) To the extent the order permits her to do so, the NYAG can designate the produced communications with the unidentified agency confidential.

Separately, the NRA requests that the NYAG explain her ambiguous statement that the number of communications with the second law enforcement agency is “approximately 3.” (Exhibit K, Ms. Connell’s Affirmation at Paragraph 6.)

Furthermore, if the Special Master were inclined to uphold the NYAG’s baseless claim of privileges over her communications with the second law enforcement agency, the NYAG should be directed to reveal the identity of the agency, the identity of the individuals at the NYAG and the other agency who participated in the communications, and the dates of such communications. Even if the substance of the communication were held to be immune from production, there is no basis for withholding the other information. Moreover, the NYAG should identify the manner of these communications (e.g., whether they were email messages, letters, or something else).

III.
CONCLUSION

For the foregoing reasons, the Special Master should deny the NYAG’s motion for reconsideration as procedurally improper and substantively meritless.

As noted in prior correspondence to the Special Master dated December 9, 2022 (Exhibit T), the NRA has no objection to the NYAG’s request to extend the deadline to seek review of the Special Master’s ruling dated November 29, 2022. The NRA similarly requests an extension on its deadline to seek review of the Special Master’s rulings from the same date.

Respectfully submitted,

/s/ Svetlana M. Eisenberg
William A. Brewer III
Svetlana M. Eisenberg
Noah B. Peters

cc: Parties’ counsel of record

(via email)

Enclosures

EXHIBIT “12”

Page 1

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.

Page 2

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(Appearances continue on following page.)

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* * *

Page 4

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 SPECIAL MASTER SHERWOOD: So, it
3 looks like we have four sets of
4 communications that we need to go
5 through. At least that is the way I
6 have organized them. I hope this
7 works for everyone.

8 There is the October 20th
9 Letter of the Attorney General and
10 responses to that. There is then the
11 letter of the NRA, Ms. Eisenberg's
12 letter of the same date and responses
13 to that.

14 With respect to privilege
15 claims asserted by the Attorney
16 General's Office then there is a
17 second letter, same date, October
18 20th, by Ms. Eisenberg, again, as to
19 fees that they are seeking
20 reimbursement for, relating to the
21 subpoena addressed to Aronson in the
22 Orders and then, there is the October
23 23rd Letter of, it looks like, Ms.
24 Con -- Ms. Connell, the attorney --
25 yes, Ms. Connell from the Attorney

Page 5

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 General's Office.

3 With respect to that last one,
4 Ms. Connell, is that still on the
5 table or -- or not?

6 MS. CONNELL: Your Honor, I
7 didn't have it on my, sort of, agenda
8 for today.

9 Let me take a look at it and
10 maybe we can begin with October 20th
11 and I will let you know.

12 SPECIAL MASTER: That is what we
13 will do.

14 I just want to know if that is
15 one of the items that will be covered
16 today. It has to do with -- let's
17 see. Oh, it's the -- this is the
18 whistleblower and Frenkel Report.

19 MS. CONNELL: Right.

20 No, Your Honor.

21 We don't need to address that
22 today.

23 SPECIAL MASTER SHERWOOD: All
24 right.

25 One down, three to go.

Page 6

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 Let's begin then with the
3 Attorney General's letter of the
4 20th. This has to do with -- hold on.
5 -- this has to do with a number of
6 matters relating to --

7 MS. CONNELL: Your Honor, it
8 has to do with the NRA's using
9 privilege as a sword and a shield in
10 regard to certain matters and it has
11 to do with materials being withheld
12 in -- in relation to the NRA's
13 independant Auditor, Aronson, and
14 materials being withheld by the NRA
15 in relation to the NRA Membership
16 Marketing Partners and its affiliates
17 and it has to do with matters that we
18 believe are inappropriately withheld
19 on the NRA's privilege log.

20 SPECIAL MASTER SHERWOOD: Okay.
21 Give me a moment to look at
22 some notes here.

23 MS. CONNELL: Sure.

24 SPECIAL MASTER SHERWOOD: All
25 right.

Page 7

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 So, this has largely to do with
3 the information relating to the
4 course correction and the NRA claims
5 that this is privileged information.

6 The AG asserts that where
7 you're using the so-called
8 "privileged information" as a sword,
9 that's not permitted and that's
10 what's being asserted here, in that
11 the NRA is asserting advice of
12 counsel and -- as a Defense in this
13 case.

14 Ms. Eisenberg says "no, we are
15 not doing that at all." And they say
16 that the privilege does apply to
17 internal investigations and the fact
18 that they make reference to it in its
19 pleading doesn't ring appropriate.

20 So, my question is: Okay. Just
21 what is it that is being withheld at
22 this point? Because I understand from
23 Ms. Eisenberg that there are a number
24 of categories of documents that --
25 that's being sought that is not being

Page 8

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 withheld, the so-called raw data, et
3 cetera.

4 So help me out, Ms. Eisenberg:
5 What is actually being withheld here?

6 MS. EISENBERG: We are --

7 MS. CONNELL: I'm sorry.

8 MS. EISENBERG: Your Honor, we
9 are withholding, Your Honor,
10 communications that are privileged,
11 pursuant to the attorney/client
12 privilege, the work product doctrine
13 and the trial preparation.

14 SPECIAL MASTER SHERWOOD: That's
15 not what I am asking. I know the
16 labels. I want to know: What's the
17 nature of the documents, not what's
18 the nature of the privilege.

19 MS. EISENBERG: The documents
20 are communications between the NRA
21 and its counsel during the various
22 years at issue in this case.

23 They are the usual
24 attorney/client communications that
25 one would expect a corporation to

Page 9

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 have with its lawyers. They pertain
3 to a whole variety of different legal
4 issues that, I guess, sequentially
5 are connected to certain actions that
6 the NRA took in this case.

7 But they are not documents or
8 communications that the NRA is
9 planning to offer at trial or feature
10 at trial or rely on at trial in any
11 way, shape or form for any of its
12 defenses.

13 SPECIAL MASTER SHERWOOD: Now,
14 these are -- are these documents that
15 are being withheld within the bundle
16 of documents that you are going to
17 produce by Wednesday for in-camera
18 review?

19 MS. EISENBERG: Yes and no,
20 Your Honor.

21 So, we draw the --

22 SPECIAL MASTER SHERWOOD: I
23 don't know what that means.

24 What you're going to tell me?

25 MS. EISENBERG: I am happy to

Page 10

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 explain.

3 So, first of all, we draw a
4 distinction between the waiver
5 argument that Ms. Connell puts
6 forward and then, the argument that
7 she makes about third parties.

8 And I think it's a really
9 important distinction and I think we
10 should discuss those issues
11 separately.

12 With regard to communications
13 where Aronson, RSM, MMP are copied,
14 that's very easy, I went through them
15 this weekend, some of them are
16 non-privileged, we are going to turn
17 them over. I think the AG already
18 has duplicates. Some of them are
19 privileged and we are going to turn
20 them over to you today and give you
21 the rest on Wednesday.

22 And I think that you will see
23 from the communications that they are
24 clearly privileged because some of
25 these third parties were involved in

Page 11

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 providing services to the NRA where
3 they were integral to the legal
4 advice being sought and rendered.

5 So, that's --

6 SPECIAL MASTER SHERWOOD: Are
7 these the Aronson documents right now
8 or are they documents relating to
9 communications where Aronson was not
10 involved?

11 MS. EISENBERG: There is --
12 there's a number of third parties
13 that Ms. Connell identified,
14 including MMP, who was in charge of
15 membership and fundraising, McKenna,
16 who was a consultant and the two
17 auditors: Aronson and RSM.

18 SPECIAL MASTER SHERWOOD: Okay.

19 MS. EISENBERG: They are a kind
20 of a bucket of its own.

21 But like I said, those are very
22 easy, either we will turn them over
23 or you will give them to you and
24 you'll see, in camera, that they are,
25 in fact, privileged.

Page 12

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 SPECIAL MASTER SHERWOOD: Okay.

3 MS. EISENBERG: So then, we
4 move on to the separate category for
5 which Ms. Connell is saying even
6 though these are communications
7 between the NRA and its lawyers, the
8 NRA, according to Ms. Connell,
9 implicitly waived privileges to those
10 because the NRA wants to tell the
11 jury about enhanced processes,
12 compliance training, repayments by
13 executives, controls in place and
14 things like that.

15 And the number of documents
16 that are privileged that relate to
17 all of these things is -- is
18 tremendous.

19 In our letter, we indicated
20 that it was around 600. Actually, on
21 sort of reassessment, there are
22 thousands of documents that are
23 privileged in that category and so,
24 it wouldn't be practical, Your Honor,
25 to put all of those in front of you.

Page 13

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 So, instead, what we will do,
3 we will give you a representative
4 sample of communications between the
5 NRA and various lawyers, where Ms.
6 Connell wants to pierce the
7 privilege.

8 For example, our firm, for
9 example, Don Lan, for example, Morgan
10 Lewis.

11 And again, because we are not
12 placing those communications at issue
13 and because, you'll see the AG has no
14 need for those communications in this
15 case.

16 We are confident, Your Honor,
17 that you will find that there has
18 been no waiver.

19 Frankly, for the record, we
20 don't even think that they have made
21 a threshold showing of waiver to even
22 necessitate an in-camera review by
23 you but we are happy to provide some
24 of these documents to you, just to
25 give you the comfort that their

Page 14

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 argument completely lacks merit.

3 SPECIAL MASTER SHERWOOD: Okay.

4 All right. Let's go back to you -- I

5 will come back to you in a moment,

6 Ms. Eisenberg.

7 But let's come back to you, Ms.

8 Connell.

9 You started to say something

10 and I sort of cut you off because I

11 wanted to talk to Ms. Eisenberg.

12 MS. CONNELL: I'm sorry, Your

13 Honor.

14 That was my misunderstanding.

15 I thought you directing that question

16 to me. You did not cut me off. I

17 think I jumped in.

18 Your Honor, one thing I would

19 like to say at the outset is that

20 it's nice to get documents now but

21 why has the NRA been withheld

22 documents --

23 SPECIAL MASTER SHERWOOD: We are

24 where we are.

25 MS. CONNELL: Okay. So, Your

Page 15

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 Honor, I want to stress it's not only
3 documents at issue. The Attorney
4 General's Office has been trying to
5 get information from the NRA through
6 depositions and other means and has
7 been precluded from doing so by the
8 NRA's assertion of privilege.

9 And what's important here to
10 understand is that we are not seeking
11 to pierce privilege on sort of normal
12 every day matters, we are seeking to
13 obtain information in fairness we are
14 entitled to because the NRA has
15 affirmatively placed certain issues,
16 certain matters at issue, in this
17 lawsuit.

18 The NRA made that election, it
19 made that choice and it also made the
20 choice to have counsel, the
21 litigation counsel for fraud
22 investigation and outside counsel
23 conduct -- handle certain work for
24 it.

25 The NRA is relying upon that

Page 16

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 work in order to assert a defense and
3 arguments in this case. So, it's not
4 merely that it got advice of counsel
5 or that it -- that it sought guidance
6 from counsel on certain issues.

7 The NRA is saying, for example,
8 that it retained outside counsel and
9 consultants and it's asserting that
10 as proof of its reform efforts,
11 saying you don't need to oppose a
12 monitor, Judge, you don't need to
13 impose injunctive relief because we
14 have been reforming.

15 We were relying on K & L Gates,
16 Morgan Lewis, Don Lan and others to
17 advise us. Even one of their experts
18 has opined that the NRA's reliance on
19 citation to these outside counsel and
20 outside consultants is evidence of it
21 setting and appropriate tone at the
22 top and complying with the COSO
23 Framework, which is the gold standard
24 for compliance reform.

25 The NRA has affirmatively

Page 17

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 placed at issue that it has
3 investigated and sought repayment for
4 excess payments received by its
5 employees.

6 Why has it done this? It wants
7 to show that there's no need for
8 perspective injunctive relief.

9 It alleges in its answer, it
10 has alleged in motion practice, it
11 has argued in motion practice and it
12 has argued at the bankruptcy, that
13 Wayne LaPierre, for example, has
14 repaid excess benefits with interest.

15 But in this regard, Your Honor,
16 the NRA has refused to let us
17 understand, or peek behind the
18 curtain, as to how it determines what
19 excess benefits were owed, whether it
20 has identified the potential universe
21 of excess benefits, calculated
22 amounts owed or whether it has fairly
23 assessed those amounts owed and this
24 is simply not sufficient.

25 This is a partial waiver

Page 18

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 because they revealed some
3 information relating to how the
4 Brewer Firm and outside counsel, Don
5 Lan, identified the amounts of excess
6 benefits that are owed.

7 But they cherry picked the
8 information and not let us really get
9 an understanding or test the accuracy
10 and sufficiency of those assertions.

11 And frankly, Your Honor, that's
12 not permitted. And I want to be
13 clear on something that Ms. Eisenberg
14 said. It is simply not necessary,
15 under New York law, to affirmatively
16 assert an Advice of Counsel defense
17 to invoke at issue waiver of
18 privileged matters.

19 The cases we have cited are
20 clear on this. The fact that they put
21 these issues affirmatively at issue
22 in this case acts as an at-issue
23 waiver and it can be applied, it can
24 be explicit or implicit.

25 So, the NRA has done this.

Page 19

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 Cases like ORCO Bank and
3 Gottwald versus Saber demonstrate
4 that you can't wait until the end of
5 Discovery and suddenly pop up with
6 some Excel spreadsheets, the way the
7 NRA has done.

8 We completed the NRA's
9 corporate rep deposition on September
10 9th, pretty long after the close of
11 fact discover but it's only now that
12 are getting some Excel spreadsheets
13 but we have been robbed of the
14 opportunity say: Okay. Who prepared
15 the spreadsheet? How did they
16 prepare it? What did they look at to
17 determine excess benefits? What
18 didn't they look at? How did they
19 calculate how much is owed? Who
20 determined whether there was a
21 business purpose and how did they do
22 that?

23 They have simply blocked the
24 Plaintiff's ability to inquire and
25 test the assertions and yet, the NRA

Page 20

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 is going to and has, throughout this
3 case and the bankruptcy case, touted
4 its attempts to identify and seek
5 payment of excess benefits as a
6 defense and evidence of its reform
7 and lack of need for injunctive
8 relief.

9 Your Honor, under the cases
10 that we have cited, we would argue
11 that the answer is late production of
12 these documents doesn't make
13 Plaintiff whole.

14 We are aware that we are where
15 we are, Your Honor, as you so
16 correctly put it and frankly, you
17 know, while we want to be made whole,
18 Plaintiff wants to get on to the
19 trial of this matter.

20 And we would assert that the
21 correct -- the correct relief here
22 would be that the NRA can't rely upon
23 arguments and issues that it has
24 denied Plaintiff disclosure of.

25 Can it say that Mr. LaPierre

Page 21

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 repaid \$600,000.00? Sure.

3 Can it say that the NRA, as it
4 has before, conducted an
5 investigation of excess benefits and
6 repaid them all?

7 No. It can't because it won't
8 let us find that out.

9 And how won't us let us find
10 that out?

11 Well, for example, when we
12 asked about investigations being
13 conducted, whether they are complete,
14 whether they are ongoing, who is
15 doing them, what are they doing?

16 We are told by the NRA's
17 corporate rep that that is a
18 privileged matter that we can't
19 inquire into. We are told by the
20 Heads of the Audit Committee and the
21 First and Second Vice President,
22 that's privileged and we can't
23 inquire into.

24 Fair enough.

25 If the NRA wants to protect

Page 22

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 this information as privileged, it's
3 entitled to do that.

4 But then, it bears the results
5 of its conduct, which is that it
6 can't come into court and open those
7 matters up to the court, other than
8 it refused to open up to us in
9 Discovery.

10 SPECIAL MASTER SHERWOOD: I
11 thought that -- maybe I'm mistaken
12 but I thought that Ms. Eisenberg said
13 that they are not going to rely on
14 their course correction or 360 review
15 as their defense.

16 But let me hear from you about
17 that, Ms. Eisenberg.

18 MS. EISENBERG: Your Honor,
19 what I said was that we are not going
20 to rely on privileged documents that
21 reflect advice from the NRA's lawyers
22 to the NRA, even if those documents
23 relate to the NRA's efforts to
24 achieve full compliance with all of
25 the laws and regulations that apply.

Page 23

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 So, the NRA, for example, has
3 been conducting training for its
4 senior-level employees and now, it's
5 available for everyone on the
6 internet and now, the Board has been
7 trained.

8 Absolutely, Your Honor, the NRA
9 should not be precluded from telling
10 the jury and the Judge that that has
11 become normal course of business at
12 the NRA.

13 What Ms. Connell wants is to
14 see privileged communications between
15 our firm and the NRA, when the
16 training presentation was being
17 prepared. That has no relevance to
18 her ability to do both the
19 effectiveness of our training.

20 If she thinks that the training
21 is ineffective, she has the slide
22 decks, she can argue that it's
23 ineffective on its face.

24 There is nothing in the
25 privileged communications related to

Page 24

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 the preparation of those
3 presentations that she needs in order
4 to prove up any of her claims or
5 disprove any of our defenses.

6 Another example: The NRA has
7 recently amended a number --

8 SPECIAL MASTER SHERWOOD: Let me
9 just ask you this: So, you're going
10 to be using course correction
11 materials that includes training and
12 so on, I assume you're going to be
13 arguing that those measures are
14 accurate.

15 Do I have that right?
16 Sufficient?

17 Do I have that right?

18 MS. EISENBERG: Yes.

19 The NRA will argue that the
20 processes it has in place are
21 sufficient and the appointment of the
22 Independant Compliance Monitor is,
23 therefore, not warranted but --

24 SPECIAL MASTER SHERWOOD: And in
25 order to do that, you're going to

Page 25

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 explain why they are sufficient;

3 right?

4 MS. EISENBERG: Right.

5 But we are not going to do it

6 by reference to findings of

7 privileged discussion -- privileged

8 investigations or subject-matter

9 privileged discussions.

10 I think it's a really important

11 distinction.

12 We are not saying --

13 SPECIAL MASTER SHERWOOD: That

14 is what I am trying to understand:

15 The distinction that you say is

16 important.

17 Just help me out --

18 MS. EISENBERG: Yes.

19 SPECIAL MASTER SHERWOOD: -- so

20 that I understand it.

21 MS. EISENBERG: Exactly.

22 As you know, Your Honor, the

23 claims by the NYAG against -- by the

24 NYAG against the NRA is that there

25 were unauthorized related-party

Page 26

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 transactions, violations of
3 whistleblower, laws and policies, and
4 incorrect filings.

5 The NRA's defense is not that
6 we didn't do anything wrong but if we
7 did it wrong, we shouldn't be held
8 liable because our lawyers told us
9 that that would be okay.

10 That is not the NRA's defense.
11 And that is sort of the classic
12 paradigm of a reliance on a -- the
13 Advice of Counsel Defense, which is
14 the Rosarium case that Ms. Connell
15 cites.

16 Our defense is that we didn't
17 engage in unauthorized or unratified
18 related-party transactions, we did
19 not violate whistleblower policies
20 and laws and we did not make
21 inaccurate statements in regulatory
22 filings.

23 And then, to the extent the
24 factfinder were to find that some
25 violations or technical infractions

Page 27

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 occurred in the past, we are also
3 going to say that targeted relief
4 that the NYAG seeks in her Claims 2
5 through 15 is more than sufficient to
6 address any concerns that the court
7 may have and that therefore, the
8 appointment, the draconian measure,
9 applying an Independant Compliance
10 Monitor is certainly not warranted.

11 We, of course, do want to tell
12 the Judge and the jury that we have
13 training and of course, we do want to
14 tell them that we have had these
15 policies for decades and, even
16 more-recently, amended the policies
17 to make them more current and more
18 state of the art.

19 Of course we want to be able to
20 tell the jury and the Judge that
21 there are eyes and principles in
22 place that a payment cannot go out
23 the door unless two different people
24 authorize it.

25 Of course we want to tell the

Page 28

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 jury that there are recusal
3 mechanisms that are in place, where
4 someone has a potential conflict of
5 interest.

6 But the point is that we either
7 have those processes or we don't. And
8 if Ms. Connell disagrees with that,
9 she can put forward evidence that she
10 thinks undercuts our witnesses when
11 they say so.

12 What Ms. Connell is trying to
13 do is pierce the privilege, where
14 there is absolutely no basis for any
15 kind of waiver and we said it very
16 clearly in our letter: We are not
17 going to refer to privileged
18 communications at trial. We are not
19 going to say that because they are
20 lawyers in the mix, we, therefore,
21 don't need a monitor. We are not
22 going to say that even if what we did
23 was wrong, shouldn't be held against
24 us because our lawyers told us.

25 I will admit there is one

Page 29

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 reference in one of the expert
3 reports where an expert says: "It
4 was reasonable for the NRA to hire a
5 tax lawyer to advise the NRA on
6 excess benefit issues."

7 We will not elicit evidence or
8 testimony to that effect.

9 That's the only example I think
10 where I agreed, if we were to put
11 forward that as -- as evidence of
12 course correction, it would be, I
13 guess, fair for them to inquire about
14 that but we are not going to do that.

15 MS. CONNELL: Your Honor --

16 SPECIAL MASTER SHERWOOD: You're
17 going to be putting forward to the
18 jury the various -- let me just use
19 what -- what you're doing on the
20 accounting side: Various checks and
21 balances, which you then argue are
22 sufficient and if -- with respect to
23 that: Where is that evidence coming
24 from?

25 Other than that you put the

Page 30

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 procedures in place as a result of
3 advice given to you by lawyers and
4 Accountants.

5 MS. EISENBERG: No.

6 Your Honor, that is not what we
7 are doing.

8 We are saying the NRA, acting
9 through its Board and through its
10 Audit Committee, had policies and
11 procedures, checks and balances and
12 various controls and in the last
13 couple of years, has enhanced them
14 even further.

15 It is not the NRA's position,
16 at trial, that lawyers conducted an
17 investigation and determined that X,
18 Y and Z needed to be done, the NRA
19 did X, Y, Z and, therefore, it's
20 sufficient.

21 I think it's completely an
22 opposite to compare this case to the
23 sexual harassment cases that Ms.
24 Connell cites, where you have a
25 person coming forward, they are being

Page 31

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 sexually harassed, the company
3 conducts an investigation and then,
4 based on that investigation, takes
5 remedial measures to prevent future
6 harassment, which, unfortunately
7 occurs, and the company says: "Well,
8 we did what was reasonable under the
9 circumstances, don't hold us liable."

10 That is completely an opposite,
11 that is not at all what is happening
12 here and just because the NRA has
13 lawyers and consults lawyers, which I
14 think being the NRA's regulator, I
15 think Ms. Connell should be pleased
16 about, does not, in and of itself,
17 mean that the NRA waived it's
18 privileges.

19 SPECIAL MASTER SHERWOOD: Okay.
20 All right.

21 MS. CONNELL: Your Honor?

22 SPECIAL MASTER SHERWOOD: Yes,
23 ma'am.

24 MS. CONNELL: This is Monica
25 Connell.

Page 32

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 SPECIAL MASTER SHERWOOD:

3 Monica, yes.

4 MS. CONNELL: I would like to
5 address a couple of things.

6 SPECIAL MASTER SHERWOOD: All
7 right.

8 MS. CONNELL: I will just note
9 that we didn't specifically tease
10 out, in our letter, the compliance
11 training.

12 That's because, by and large,
13 we have gotten the slide decks, we've
14 gotten attendance sheets about the
15 compliance training, we know what it
16 is, fair enough.

17 But the case law is clear that
18 the NRA can't do what it's doing
19 here, which is using privilege as a
20 sword and a shield and prejudicing
21 our case, when they put into issue a
22 fact that, in fairness, requires
23 Discovery of protected information.

24 And it is just simply not true
25 that the NRA is not going to rely on

Page 33

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 any way of privileged information.

3 It may not pull out a letter from the
4 Brewer Firm to Wayne LaPierre but it
5 is one hundred percent relying on
6 information it has prevented the
7 Plaintiff from obtaining.

8 And I would like to say, Your
9 Honor, in regard to the course
10 correction, the NRA has multiple
11 expert reports that opine that the
12 course correction is sufficient,
13 there's no need for the injunctive
14 relief that the Attorney General
15 seeks, that thing with the control
16 environment in the NRA is good as of
17 now and those representations and
18 that argument that the NRA puts
19 forward in its answer in the preamble
20 to its answer, we have been unable to
21 test.

22 How have we been unable to test
23 this?

24 For example, we asked the NRA:
25 Have you investigated Mr. LaPierre's

Page 34

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 Conflict of Interest with the MMP
3 entities? The entities that the NRA
4 has paid close to \$100 Million to,
5 and he accepted gifts of great value
6 from; right?

7 And what we were told initially
8 is: "No, we don't know about whether
9 there is any investigation. No, we
10 don't know whether there is an
11 investigation."

12 And then the corporate
13 representative said: "Actually,
14 there is an investigation but it's
15 privileged and you can't find out
16 about it."

17 But are they going to testify
18 that the the NRA has investigated
19 misconduct and that it's safe to
20 assume that there won't be further
21 misconduct in the NRA? Of course
22 they are. That's what their own
23 experts opine.

24 We asked the same question
25 about whether Mr. Phillips invocation

Page 35

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 of his Fifth Amendment right
3 repeatedly investigated whether his
4 excess benefits, which have not yet
5 been repaid, have been fully
6 investigated and an amount
7 determined.

8 We have not been given that
9 information, it's privileged. It's
10 one thing, Your Honor, for the NRA to
11 say: Here are the policies --

12 SPECIAL MASTER SHERWOOD: Let me
13 stop you right there.

14 MS. CONNELL: Sure.

15 SPECIAL MASTER SHERWOOD: The
16 NRA, with respect to Mr. Powell, for
17 example, they said they conducted an
18 investigation and what they
19 investigated -- investigated is
20 privilege and you're not allowed to
21 look under the covers, sort of speak?

22 MS. CONNELL: That is exactly
23 right, Your Honor.

24 And it's the same with the
25 determination of excess benefits.

Page 36

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 We can know about the amount we
3 tell you is the right amount but
4 you're not going to be able to figure
5 it out yourself or test that
6 assertion and the cases that we cite
7 make clear that is not the law.

8 SPECIAL MASTER SHERWOOD: She
9 said she is going to give you raw
10 data, I don't know what that is but
11 you will have to ask her.

12 MS. CONNELL: I don't know what
13 that is, also, Your Honor.

14 And frankly, it's November
15 14th, fact Discovery closed July
16 15th. A lot of these determinations
17 we just got a spreadsheet that lists
18 out some excess benefits
19 determinations or made in 2020.

20 Why are we learning about this
21 now and why did they block this from
22 asking these questions until now?
23 Frankly, we asked their witnesses
24 very straightforward questions: What
25 period of time did you look at? Who

Page 37

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 determined the business purpose?

3 What did you do if there was a mixed

4 purpose? What document -- did you

5 look at other documents? Who

6 determined what documents your tax

7 expert would look at?

8 SPECIAL MASTER SHERWOOD: Let me

9 ask Ms. Eisenberg about that.

10 What say you about that? Let's

11 focus on the excess benefits.

12 MS. EISENBERG: Certainly, Your

13 Honor.

14 SPECIAL MASTER SHERWOOD: Wait.

15 You have said that Mr. LaPierre

16 made a very-substantial payment to

17 the NRA to reimburse for excess

18 benefits and the AG says: "Well, we

19 don't know that the repayment was

20 adequate" and they want to figure out

21 how you got to where you were and how

22 else are they going to be able to do

23 that except to probe into what was

24 discovered, what was looked at and

25 the results you obtained, rather than

Page 38

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 simply saying: "He paid back money.
3 He paid back a half a million dollars
4 and that's the end of it."

5 This is what we determined in
6 Discovery.

7 MS. EISENBERG: Your Honor, so
8 Ms. Connell's statement severely
9 mischaracterizes the ample
10 information that her office has --

11 SPECIAL MASTER SHERWOOD: That's
12 why I am giving you a shot.

13 MS. EISENBERG: Yes.

14 So, they have a series of
15 spreadsheets, some which they have
16 from 2021 and some of which they've
17 have since September that detail what
18 was repaid? What was the amount of
19 the transaction? What was the
20 interest that was calculated? When
21 did the transaction occur? What was
22 the type of the transaction?

23 And then, they also have a copy
24 of a check. And then, they also have
25 the description in the 990 of how the

Page 39

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 NRA disclosed it there.

3 So, for Ms. Connell to sit
4 there and suggest that she has no
5 idea what is encompassed by the
6 \$600,000.00 is completely inaccurate.
7 They know exactly what was repaid and
8 therefore, if they think something
9 else should have been repaid, they
10 know it was not.

11 And for them to say: "Well, we
12 need to know what you guys discussed
13 with your tax lawyer," that is
14 completely unwarranted.

15 Either Mr. LaPierre repaid a
16 particular transaction or he did not.

17 Ms. Connell has that
18 information, she has that knowledge.

19 She has no reason to inquire
20 about what Don Lan, the tax attorney,
21 what kind of advice he gave to the
22 NRA.

23 SPECIAL MASTER SHERWOOD: Now,
24 in your view, does she have -- is she
25 entitled to know where the NRA

Page 40

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 started with respect to this?

3 By that, I mean figuring out
4 how much, potentially, Mr. LaPierre
5 owed and then, of course, you go
6 through a process to determine well,
7 what's the appropriate amount of --
8 the who came up with that number?

9 MS. EISENBERG: Two parts to
10 that: First of all, with respect to
11 the first repayment, back in 2020,
12 she has that information because the
13 spreadsheet provides not only what he
14 repaid but also other transactions
15 that were analyzed and determined
16 that he didn't need to repay them.

17 Second, for the subsequent
18 repayments: A), I don't think she is
19 entitled to that information but B),
20 she has it. Because she knows what
21 transactions have transpired; she
22 enumerates them in her complaint and
23 she says: "These transactions should
24 not have occurred."

25 So, she now knows which ones

Page 41

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 have been repaid and by implication,
3 everything that has not been repaid
4 has not been determined that it needs
5 to be repaid.

6 Now, the NRA, of course, has
7 not taken the position that any any
8 and all repayments that must occur
9 have already occurred. There are a
10 lot of different transactions and the
11 NRA is taking a careful and dire and
12 deliberate approach and if there are
13 additional payments, we will apprise
14 the NYAG of that.

15 But if, at the time of trial,
16 no additional repayments have
17 occurred, they will know what has
18 been repaid and what has not and they
19 can make --

20 SPECIAL MASTER SHERWOOD: If
21 you're still conducting
22 investigations into what has been
23 paid, what has -- what excess
24 transactions occurred and didn't
25 occur until such time that you make a

Page 42

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 determination that it is one of those
3 improper transactions, I gather your
4 -- your -- you're maintaining that
5 the AG is not entitled to know what
6 it is.

7 MS. EISENBERG: Absolutely.

8 SPECIAL MASTER SHERWOOD: They
9 are only entitled to know those --
10 about those that you -- you conclude
11 are improper transactions; right?

12 MS. EISENBERG: Right.

13 And we didn't conclude that
14 they were necessary "improper."

15 I think, as the 990 makes
16 clear, that some of them were for
17 personal reasons and therefore, the
18 simple calculation had to be repaid.

19 But some of them, it's very
20 clear that they were deemed to be
21 excess benefits for purposes of going
22 above and beyond and aerating on the
23 side of caution so I don't want it to
24 be couched in terms of an admission.

25 But yes, absolutely, more than

Page 43

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 \$600,000.00 has been repaid and Ms.

3 Connell knows exactly what that is.

4 Of course, if the NRA were to

5 determine that additional amounts

6 need to be repaid and Mr. LaPierre

7 says he will repay them, I don't

8 think the NRA should be precluded for

9 asking him for the repayments.

10 And if that were to happen, of

11 course, we would tell the NYAG about

12 it before trial.

13 SPECIAL MASTER SHERWOOD: And

14 as you go through the transactions,

15 whether something is an excess

16 benefit transaction or not is a

17 determination that the NRA makes and

18 to the extent that they look at

19 transactions, which either you

20 conclude is not an excess benefit

21 transactions or that you haven't come

22 to a decision about, the fact of

23 those, the existence of those two

24 types of transactions is not

25 discoverable.

Page 44

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 Is that what you're telling me?

3 MS. EISENBERG: In other words,
4 you're saying that of the ones that
5 haven't been repaid --

6 SPECIAL MASTER SHERWOOD: I am
7 not saying anything.

8 MS. EISENBERG: I just want to
9 make sure I understand.

10 Your question presupposes that
11 of the transactions that haven't been
12 repaid some have been determined not
13 to be excess benefits and some are
14 still under investigation.

15 And your question is: Ms.
16 Connell is not entitled to know
17 what's in the first verse the second
18 bucket.

19 Is that your question?

20 SPECIAL MASTER SHERWOOD: That
21 is exactly right.

22 MS. EISENBERG: Right.

23 I think that it slightly --
24 there's a disconnect, I think, with
25 reality.

Page 45

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 I think that, sitting here
3 right now, the NRA believes it got
4 reimbursement from Mr. LaPierre for
5 any and all transactions that should
6 have been borne by him in the first
7 place.

8 But to the extent that the NRA,
9 in the future, determines that
10 additional payments ought to occur,
11 it will notify Mr. LaPierre and
12 shouldn't be precluded from doing so.

13 But I think that if -- if the
14 question is, you know, let's say,
15 hypothetically, you have lawyers
16 looking at a particular set of
17 transactions trying to determine
18 whether or not they are excess
19 benefits and whether or not they
20 should be repaid by an executive.

21 Absolutely, that is privileged.

22 Counsel get hired by
23 corporations all the time to give
24 corporations legal advice and if that
25 were to be occurring right now, that

Page 46

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 is not information that Ms. Connell
3 is entitled to and -- but there's no
4 sword and shield and there's no
5 prejudice and there's no unfairness.
6 It's not like in Discovery, we are
7 not going to tell her what they are
8 but then, at trial, we are going to
9 say "all along, we have been
10 investigating this."

11 We understand that we have not
12 -- we are not putting the subject
13 matter of privileged communications
14 at issue at trial and that's a
15 position that we have taken and we
16 can't change our mind at trial.

17 SPECIAL MASTER SHERWOOD: Are
18 you making a distinction between
19 putting those transactions -- not
20 putting those transactions at issue
21 at trial but using them at the remedy
22 stage.

23 Is that the distinction that
24 you're making?

25 MS. EISENBERG: By those

Page 47

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 transactions are you referring to,

3 the ones that Mr. LaPierre repaid?

4 SPECIAL MASTER SHERWOOD: The
5 ones that you just talked about.

6 MS. EISENBERG: Well, I mean
7 there are transactions that occur at
8 the NRA every day and the ones that
9 the NRA has identified as being
10 "problematic," inadvertently or
11 otherwise, have been repaid.

12 And --

13 SPECIAL MASTER SHERWOOD: I
14 understand that.

15 But you're -- you appear to be
16 arguing, and you will correct me if I
17 get it wrong, that whether or not
18 these are excess benefit transactions
19 is really a determination for the NRA
20 to make and unless, and until, the
21 NRA makes that determination, you
22 can't look behind the curtain, to see
23 whether you have identified a hundred
24 percent of those transactions or just
25 83 and a half percent of those

Page 48

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 transactions.

3 Do you get my point?

4 MS. EISENBERG: I think there
5 is, again, a, sort of, disconnect.

6 The NRA identified transactions
7 --

8 SPECIAL MASTER SHERWOOD: I am
9 struggling hard to understand, trust
10 me.

11 MS. EISENBERG: Right.

12 But there's no distinction that
13 we are drawing between "liability"
14 versus, you know, "relief" because
15 one of the main claims that Ms.
16 Connell's office makes is that assets
17 were mismanaged.

18 So, a defense to that is: Even
19 though, initially, payments may have
20 been made in error, on behalf and for
21 the benefit of Mr. LaPierre, he
22 repaid those, with interest.

23 So, of course we do intend to
24 offer that evidence of repayment to
25 rebut her claim of liability.

Page 49

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 SPECIAL MASTER SHERWOOD: But
3 there are six more such transactions.

4 MS. EISENBERG: But --

5 SPECIAL MASTER SHERWOOD: Will
6 you talk about them?

7 MS. EISENBERG: Sorry?

8 SPECIAL MASTER SHERWOOD: What
9 if there are another -- I am just
10 making this up -- six additional
11 transactions, which -- for which you
12 did not demand repayment but fairly
13 could be questioned as excess benefit
14 transactions?

15 MS. EISENBERG: Right.

16 SPECIAL MASTER SHERWOOD: You're
17 saying those transactions are -- are
18 privileged and --

19 MS. EISENBERG: No.

20 SPECIAL MASTER SHERWOOD: -- you
21 have no obligation to -- that is what
22 I hear you saying.

23 Are you under no obligation to
24 disclose them and have what you have
25 been doing about them or not doing

Page 50

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 about them disclosed to the
3 Plaintiff?

4 MS. EISENBERG: Thank you, Your
5 Honor.

6 I appreciate the question and I
7 realize realize the disconnect.

8 The point is that Ms. Connell
9 knows about all of the transactions
10 of that have occurred. That's not a
11 mystery.

12 She has the general ledger.
13 She alleges in the complaint various
14 payments to, or for, the benefit of
15 various executives.

16 So that information is not kept
17 from them. And because it doesn't
18 appear on the schedules -- if the
19 hypothetical "six transactions" don't
20 appear in the schedule of things that
21 have been repaid, by definition, they
22 can say: "No demand has been made.
23 Nothing has been repaid. And they
24 can make a dig deal about it, if they
25 wish to, saying that is why an

Page 51

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 Independent Compliance Monitor is

3 required."

4 SPECIAL MASTER SHERWOOD: I got

5 it.

6 I understand what you're

7 saying.

8 MS. CONNELL: Your Honor, may I

9 address a couple of clean-up issues

10 on that?

11 SPECIAL MASTER SHERWOOD: Yes.

12 MS. CONNELL: First of all, I

13 heard counsel say that the NRA

14 believes it has received repayment

15 for all transactions for which it

16 should receive reimbursement.

17 She has stated that they have

18 -- or implied that they have

19 addressed all excess benefit

20 transactions.

21 So far, we have been talking

22 about Mr. LaPierre's flights. And we

23 don't even know that they have

24 addressed all excess benefits

25 transactions for that.

Page 52

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 They are entitled to -- this is
3 classic cherry picking.

4 SPECIAL MASTER SHERWOOD: Hold
5 on. Hold on.

6 MS. CONNELL: Sure.

7 SPECIAL MASTER SHERWOOD: She is
8 not arguing that -- well, she is
9 stating the position that they have
10 looked into this and they have
11 covered them and and beyond that,
12 you're -- you, being the Office of
13 the Attorney General, knows all of
14 the transactions, benefits received,
15 with all 16,000 transactions.

16 I just made up that number.

17 And simply by -- if you're --
18 believe that in their, among the
19 15,000 -- 16,000, are several
20 transactions that are -- let me use
21 the term -- my term -- that are
22 "suspicious," you're entitled to do
23 that.

24 But you're not entitled to
25 know, from the NRA, whether it looked

Page 53

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 into those trance -- those particular
3 transactions, to determine that are
4 -- were also -- well, to determine
5 whether they are excess benefits or
6 not.

7 You're not entitled to know
8 whether they looked at them or didn't
9 look at them.

10 MS. CONNELL: So, Your Honor,
11 the idea that we have the general
12 ledger for certain years and we only
13 have it for certain years and
14 somehow, from that general ledger, we
15 can tell what has or has not or could
16 be an excess benefit is not accurate
17 and not true.

18 Certainly, we are entitled to
19 the extent that NRA said: We have
20 identified and repaid -- it got
21 repayment for some excess benefits or
22 all excess benefits.

23 What criteria did they use?
24 This is not a determination that the
25 NRA made. When we ask about how did

Page 54

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 they arrive at this? Or when we ask
3 about what investigation are you
4 doing for luxury hotels, for
5 limousine services, for expensive
6 dinners, for which there's no
7 evidence or business purpose, we are
8 told: "That's privileged." Even as
9 to past determinations. We are told:
10 "You can't know that."

11 We can't test out the truth and
12 the accuracy of those assertions and
13 that's simply not permitted under
14 governing case law.

15 And again, we are talking,
16 primarily, about Wayne LaPierre. We
17 have been blocked from asking about
18 excess benefits, for example, to Mr.
19 Phillips.

20 SPECIAL MASTER SHERWOOD: Ms.
21 Connell, I know we are not talking
22 about -- that the case involves
23 excess benefits A), to other
24 executives or Directors of the NRA.

25 We are using Wayne LaPierre

Page 55

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 simply, so that I can get a handle on
3 -- on the issue. It, obviously, would
4 apply to the other people as well.

5 So, let's continue to use, you
6 know, Mr. LaPierre, since we are well
7 down the road, with respect to all of
8 this, using him as the example
9 (indicating.)

10 MS. CONNELL: Can I say one
11 other thing, really quickly? I'm
12 sorry.

13 SPECIAL MASTER SHERWOOD:
14 (Indicating.)

15 MS. CONNELL: We did get a
16 spreadsheet in 2021. I presented that
17 spreadsheet to the NRA corporate rep
18 and asked to walk through it and he
19 didn't know if he had ever see it
20 before. He didn't generate it and he
21 couldn't testify knowledgeably about
22 it.

23 Getting new spreadsheets, after
24 the close of Discovery, after all
25 depositions are completed, don't help

Page 56

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 me. There are charges on there we
3 don't know if they are repayment for
4 monies that have been paid --

5 SPECIAL MASTER SHERWOOD: So,
6 you received the spreadsheets after
7 the deposition of the corporate rep.

8 Is that what happened?

9 MS. CONNELL: Yes. Yes, Your
10 Honor.

11 And we can't test what is this
12 payment for? What did it cover?

13 And one example is, Your Honor,
14 there was a \$37,000.00 payment for
15 lodging for Wayne LaPierre. We have
16 tried -- we asked a question about
17 that.

18 We got into quite an argument
19 at a deposition saying it's improper.
20 We are trying to apply something. We
21 don't know what that charge is for.
22 We don't know what it is for, Your
23 Honor, and now, we have no way to
24 find out.

25 SPECIAL MASTER SHERWOOD: Okay.

Page 57

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 Well, let me ask Ms. Eisenberg
3 about that one.

4 What say you about that
5 particular one?

6 It sounds like the AG couldn't
7 have asked adequate questions about
8 that because they didn't have that
9 information at the time of the
10 deposition.

11 Is that the issue or is it
12 something else?

13 MS. EISENBERG: Well, they have
14 always known about the underlying
15 transactions and they could have
16 always asked --

17 SPECIAL MASTER SHERWOOD: I am
18 talking about the \$37,000.00 hotel
19 transaction that she gave as an
20 example, where it shows up after the
21 corporate representative depositions.

22 MS. EISENBERG: Right.

23 I believe that is the one that
24 was repaid only in September.

25 And as soon as the records

Page 58

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 related to it were generated, they

3 were turned over to the NYAG.

4 And so, I think there is

5 absolutely no merit to any claim of

6 unfairness. They always knew about

7 the underlying transactions.

8 SPECIAL MASTER SHERWOOD: About

9 this underlying transaction?

10 MS. EISENBERG: Yeah.

11 They alleged them in the

12 complaint.

13 MS. CONNELL: No.

14 SPECIAL MASTER SHERWOOD: How

15 could they have?

16 MS. EISENBERG: Because --

17 SPECIAL MASTER SHERWOOD: This

18 transaction occurred, you say, in

19 September of 2022.

20 MS. EISENBERG: No, the

21 repayment.

22 SPECIAL MASTER SHERWOOD: How

23 could she have known that?

24 MS. EISENBERG: No. No, Your

25 Honor. The repayment occurred in

Page 59

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 September, not the underlying
3 transaction.

4 The underlying transaction
5 occurred back in 2017 or 2018.

6 SPECIAL MASTER SHERWOOD: Right.

7 This is the \$37,000.00
8 transaction you're talking about?

9 I am asking you.

10 MS. EISENBERG: I don't
11 remember the amount but I do remember
12 that there is lodging in Arizona.

13 MS. CONNELL: That is not true
14 --

15 MS. EISENBERG: And there is
16 lodging in Dallas.

17 And the details that have been
18 provided to the NYAG makes clear the
19 location and the date and the amount
20 of the expense.

21 MS. CONNELL: Your Honor, we do
22 not know -- we did not know about
23 this -- about this charge and we
24 still don't know what it is about.

25 And it is important to note

Page 60

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 that the NRA, even during the
3 argument and certainly during the
4 bankruptcy and certainly implied in
5 their answer in their motion practice
6 and through their expert reports, is
7 telling us they have done, what they
8 call "a top to bottom 360 degree
9 Compliance Review Program" to say
10 that we know about something when we
11 don't know about it is just not true.

12 So, for example, what we do
13 because it is a notation on a chart
14 prepared by I don't know whom that
15 the \$37,000.00 lodging charge was
16 allegedly paid for Mr. LaPierre by
17 the NRA -- by Ackerman and then,
18 repaid by the NRA.

19 We don't know why this is only
20 being repaid now. We don't know what
21 other charges that might have been
22 repaid.

23 We are now faced with having to
24 defend this assertions that all of
25 these excess benefits have been

Page 61

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 correctly investigated, ascertained
3 and repaid, without knowing any of
4 how it was done.

5 SPECIAL MASTER SHERWOOD: That
6 is -- I got it.

7 MS. CONNELL: Okay.

8 SPECIAL MASTER SHERWOOD: The
9 next step that has to do with a
10 request to depose Aronson for another
11 three hours because of late-incoming
12 information.

13 And you want three hours and
14 you want a way to repay the cost of
15 it.

16 Ms. Eisenberg says that we will
17 give you the three hours but I think
18 she is reluctant to pay for it.

19 What do you mean by "pay for
20 it," by the way.

21 MS. CONNELL: Your Honor, just
22 the actual cost of the Court Reporter
23 and the Videographer, all of that.

24 SPECIAL MASTER SHERWOOD: Okay.

25 MS. CONNELL: And --

Page 62

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 SPECIAL MASTER SHERWOOD: You're
3 not asking the NRA to pay salaries of
4 the Assistant Attorney Generals, are
5 you?

6 MS. CONNELL: No. No. I don't
7 think so.

8 SPECIAL MASTER SHERWOOD: Just
9 for my note.

10 MS. CONNELL: Your Honor, I
11 would say that we understand that we
12 are getting more Aronson documents
13 from the NRA any day now or sometime.

14 SPECIAL MASTER SHERWOOD: All
15 right.

16 MS. CONNELL: So, we haven't --

17 SPECIAL MASTER SHERWOOD: I got
18 it.

19 So, Ms. Eisenberg, is there --
20 are you resisting the demand that you
21 pay the deposition cost, as now
22 defined?

23 MS. EISENBERG: Absolutely,
24 Your Honor.

25 The two documents that

Page 63

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 triggered this need for the AG to go
3 back to Aronson is something that the
4 NRA green-lighted a long time ago and
5 it was, actually, the NRA that
6 realized that they weren't produced.

7 And it was the NRA, who tried
8 to encourage Aronson to go ahead and
9 produce them and when the lawyer
10 wasn't able to do it promptly, we got
11 their -- Aronson's consent and did it
12 for them.

13 And this is definitely no good
14 deed goes unpunished kind of
15 situation, where the NRA has --

16 SPECIAL MASTER SHERWOOD: When
17 did those documents find their way to
18 the Attorney General's Office; before
19 or after Aronson was deposed?

20 MS. EISENBERG: After.

21 SPECIAL MASTER SHERWOOD: So,
22 why --

23 MS. EISENBERG: The --

24 SPECIAL MASTER SHERWOOD: I
25 don't understand.

Page 64

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 You didn't turn these documents
3 over, I assume they are important,
4 until after the depositions.

5 You recognize that they are
6 probably entitled to some more time.

7 Apparently, the delay was
8 because of issues on your side, or
9 Aronson's side.

10 Why is it that the -- this
11 isn't a situation where because it
12 waits, the Attorney General, you
13 should be picking up the cost of the
14 depositions?

15 And by the way, it's not a lot
16 of money.

17 MS. EISENBERG: Because the NRA
18 absolutely did nothing wrong. These
19 are Aronson documents, internal
20 documents, that it gave for us, to
21 clear for privilege.

22 We cleared them.

23 Aronson didn't produce them. We
24 didn't realize that. And when we
25 did, we brought it to Aronson's

Page 65

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 attention and when they couldn't do
3 it expeditiously, we did it for them.

4 So, there is absolutely no
5 fault of ours in the mix at all.

6 So, we --

7 SPECIAL MASTER SHERWOOD: Is
8 your view -- is it your view, then,
9 that if anyone should pay for the
10 cost of the Videographer and the
11 Court Reporter, it's Aronson and not
12 the NRA?

13 Is that --

14 MS. EISENBERG: I mean it's not
15 the NRA and --

16 SPECIAL MASTER SHERWOOD: I got
17 that.

18 MS. EISENBERG: Right.

19 SPECIAL MASTER SHERWOOD: But
20 who is it?

21 It's one of three: It's the
22 NRA, it's Aronson, it's the AG.

23 And I am trying to find out
24 whether or not your view is that it
25 should be Aronson because it was

Page 66

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 their error.

3 MS. EISENBERG: Well, I mean it
4 was their error but they are not a
5 party. I am not aware of a mechanism
6 pursuant to which Ms. Connell can
7 issue and impose such a sanction
8 against a non-party.

9 And I will say that Ms.
10 Connell's subpoena to Aronson called
11 for an inordinate amount of data and
12 Aronson did produce to her office an
13 inordinate amount of data and her
14 office did chose to go forward with
15 the deposition of Aronson, without --
16 with Discovery still trickling in.

17 And if I were her, I wouldn't
18 know of a basis upon which she can
19 ask for Aronson to pay for it.

20 Don't need to make that
21 decision. I represent the NRA and
22 there should be no basis for the NRA
23 to have to pay for it.

24 We don't object to another
25 three-hour deposition.

Page 67

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 If -- if Ms. Connell wants to
3 try to get Aronson to come forward
4 and testify again but we shouldn't
5 have to pay for it.

6 SPECIAL MASTER SHERWOOD: Okay.
7 I understand that.

8 Let's -- let's move on.

9 The next has to do with
10 documents regarding the relationship
11 of MMP and, I guess, Allegiance,
12 including documents re- -- recently
13 negotiating and so on.

14 And talk to me about that.

15 As I understand it, Ms.
16 Connell, I am asking you this
17 question: As I understand it, the
18 NRA is going to produce -- let me ask
19 you this, Ms. Eisenberg: You say
20 that the NRA will produce
21 "non-privileged" contact negotiation
22 documents.

23 Am I to understand, from that,
24 that there are contact -- there are
25 contract negotiations, documents,

Page 68

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 that you will be withholding?

3 And if you are, will you be
4 providing a privileged log with
5 respect to them?

6 MS. EISENBERG: There are no
7 contract negotiations documents that
8 we are withholding.

9 SPECIAL MASTER SHERWOOD: Okay.

10 I am just picking up on what
11 you all wrote.

12 You wrote "all non-privileged,"
13 which that opens the thought that
14 there were some privileged ones,
15 that's all.

16 MS. EISENBERG: Right.

17 I think that was inartfully
18 written.

19 And thank you for picking up on
20 that. So --

21 SPECIAL MASTER SHERWOOD: Okay.

22 Therefore -- let me just make
23 clear: With respect to the contract
24 negotiation documents and that
25 includes the back and forth, you --

Page 69

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 you're going to provide all of the
3 documents --

4 I'm sorry to do this but
5 somebody is not picking up.

6 Off the record.

7 (Whereupon, an off-the-record
8 discussion was held.)

9 SPECIAL MASTER SHERWOOD: So, is
10 that -- is that -- I take it that
11 that's where we are, with respect to
12 --

13 MS. EISENBERG: Your right.
14 Your Honor.

15 SPECIAL MASTER SHERWOOD: MMP
16 and Allegiance; is that correct?

17 MS. EISENBERG: There are --
18 there are historical communications
19 that have nothing to do with contract
20 negotiation, over which we do claim
21 common-interest privilege but they
22 don't have anything to do with
23 contract negotiation.

24 Anything that has to do with
25 contract negotiation, either already

Page 70

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 has been produced or will be
3 produced.

4 SPECIAL MASTER SHERWOOD: And
5 with respect to documents that you
6 are withholding, they are going to
7 find their way onto a privileged log,
8 am I right or not correct?

9 MS. EISENBERG: I am not sure
10 whether they actually requested those
11 documents or if they did, we will be
12 sure to log them.

13 MS. CONNELL: Your Honor, we
14 requested all documents from MMP.

15 And even prior to what we knew
16 or understood to be formal
17 negotiations, there were back and
18 forth regarding vendor compliance
19 between the Brewer Firm and counsel
20 for MMP and MMP.

21 So, Your Honor, we don't
22 understand why that would be
23 privileged at all. There is another
24 effort where the NRA is saying we
25 affirmatively -- they just amended

Page 71

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 their answer to say: "Hey, we
3 renegotiated our contract with MMP,
4 it's compliant. It's great" but they
5 precluded us from getting information
6 regarding their investigation into
7 overpayment to MMP.

8 We have been blocked from that.
9 We have been blocked from some
10 communications about their vendor
11 compliance reform efforts and
12 frankly, then, the negotiations, as
13 well.

14 So this -- this goes under the
15 Sword and Shield Argument.

16 SPECIAL MASTER SHERWOOD: Well,
17 Ms. Eisenberg, you're -- if you're
18 withholding documents related to MMP
19 and Allegiance, you're going to have
20 to put them on a privileged log.

21 All right.

22 MS. CONNELL: Your Honor, can I
23 go back to Aronson?

24 I am not sure if counsel from
25 the NRA indicated that we would need

Page 72

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 a new court order to depose Aronson
3 or --

4 SPECIAL MASTER SHERWOOD: I
5 thought that I didn't have to make an
6 order with respect to that because
7 they -- they are not resisting the
8 request for a three -- three-hour
9 deposition.

10 Do I have that right, Ms.
11 Eisenberg?

12 MS. EISENBERG: We are not
13 objecting to it, that is correct.

14 SPECIAL MASTER SHERWOOD: All
15 right.

16 MS. CONNELL: I am just assume
17 that Aronson will put under the
18 existing subpoena for Aronson; is
19 that correct?

20 SPECIAL MASTER SHERWOOD: Is
21 that right, Ms. Eisenberg?

22 MS. EISENBERG: I am not in a
23 position to speak on behalf of
24 Aronson, Your Honor, I'm sorry.

25 SPECIAL MASTER SHERWOOD: Fair

Page 73

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 enough.

3 What I would do, if I were you,
4 Ms. Connell, is to set up the
5 depositions that you -- in response
6 to that and you will learn very
7 quickly if they are going to want
8 another subpoena and we will deal
9 with that, when we can.

10 MS. CONNELL: Thank you.

11 SPECIAL MASTER SHERWOOD: With
12 that, I will suggest to you, Ms.
13 Eisenberg, that whatever you can do
14 to facilitate doing this, cost
15 effectively, it would be appreciated.

16 Okay. Now, on Pages 11 and 12
17 of the October 20th letter, there
18 are, in Section 4, you say that:
19 "The NRA improperly withheld certain
20 material evidenced as privilege."

21 Now, those are all of the
22 documents that you are going to be
23 providing to me as -- for in-camera
24 review, isn't that right, Ms.
25 Eisenberg?

Page 74

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 MS. EISENBERG: So, Your Honor,
3 with regard to the three bullets, on
4 Page 11, and the first bullet, on
5 Page 12, yes.

6 To the extent that we didn't
7 de-privilege them, we will provide
8 them to you for in-camera review.

9 SPECIAL MASTER SHERWOOD: Great.
10 That takes care of that.

11 That is all I want to know.

12 MS. EISENBERG: Okay.

13 SPECIAL MASTER SHERWOOD: Let's
14 see -- that takes care of that.

15 MS. CONNELL: Your Honor, some
16 of the additional categories, on Page
17 12, lead to the course correction.
18 They are on the privileged log but
19 they fall under our sword and shield.

20 SPECIAL MASTER SHERWOOD: I
21 assume -- I assume those two, Ms.
22 Eisenberg, if they are being
23 withheld, on privileged grounds, they
24 are going to be submitted for
25 in-camera review?

Page 75

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 MS. EISENBERG: So, these, Your
3 Honor, fall into the category that I
4 flagged on the onset.

5 There are a lot of documents
6 that relate to "course correction"
7 and are purely between the NRA and
8 its counsel, without third parties
9 present.

10 I don't think it's good use of
11 your time to give you all of them but
12 we will give you representative
13 samples.

14 SPECIAL MASTER SHERWOOD:
15 Representative samples? Great.

16 MS. CONNELL: Can we get the
17 index of what they are giving you so
18 we know how they are selecting the
19 sample?

20 SPECIAL MASTER SHERWOOD: That
21 is a fair point, don't you think, Ms.
22 Eisenberg?

23 MS. EISENBERG: Of course, Your
24 Honor.

25 SPECIAL MASTER SHERWOOD: Share

Page 76

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 that with them and if there is a
3 comment that you need to make, with
4 respect to the protocols that the NRA
5 has followed, you will let me know, I
6 am sure.

7 So, let's see now.

8 (Whereupon, a short recess was
9 taken.)

10 SPECIAL MASTER SHERWOOD:
11 Documents at Page 13 of the letter.

12 MS. CONNELL: Yes, Your Honor.

13 Because this is a prospective
14 injunctive relief case, seeking
15 appointment of a monitor and certain
16 other on injunctive relief, I hope to
17 be on trial sometime in 2023, keeping
18 hope alive for that.

19 And what we are saying is that
20 to assess the appropriateness of
21 injunctive relief, at that point, we
22 we should get updates on certain,
23 very discrete categories of
24 documents.

25 SPECIAL MASTER SHERWOOD: Is it

Page 77

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 your -- do you contemplate that the
3 issues relating to injunctive relief,
4 assuming you prove you're entitled to
5 it, is going to be the subject matter
6 of the trial or is that a remedy
7 proceeding which would occur after
8 liability has been determined?

9 MS. CONNELL: Your Honor, I
10 think these documents that we are
11 seeking go to liability, they may
12 also go to remedy but they certainly
13 can speak to liability.

14 So, for example, the NRA has
15 repeatedly said the Audit Committee
16 is appropriately addressing and
17 investigating conflicts,
18 related-party transactions, that kind
19 of thing.

20 It has blocked us from inquiry
21 into what it is doing but, at least,
22 the reports and minutes, that sort of
23 thing.

24 This information would be
25 necessary to tell the State status

Page 78

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 and what is going on with the NRA or
3 if they are having a recurrence, at
4 least, with Board reports with
5 problematic conduct and that sort of
6 thing.

7 I agree with you that a
8 subsequent remedy of things might
9 require different and further
10 Discovery.

11 SPECIAL MASTER SHERWOOD: Ms.
12 Eisenberg, give me a sense of what
13 volume we are talking about for the
14 items that are covered by the four
15 bullet points, on Page 13.

16 MS. EISENBERG: Yes, Your
17 Honor.

18 So --

19 SPECIAL MASTER SHERWOOD: Is it
20 a paradox number or --

21 MS. EISENBERG: It depends on
22 how conservatively or liberally you
23 construe the items.

24 The Board reports and minutes
25 that the -- the NRA Board meets three

Page 79

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 times a year and there are minutes
3 generated to the Board by the various
4 committees and minutes prepared.

5 Those are -- those tend to be
6 actually quite extensive, which we
7 think it is yet another reason why
8 the NRA does have effective
9 processes.

10 And even though they are
11 extensive, we are happy to turn them
12 over to the NYAG, with respect to
13 future meetings, when and as they are
14 occur.

15 SPECIAL MASTER SHERWOOD: Thank
16 you.

17 And the second one: "Reports,
18 presentations, retention letters and
19 management letters from Aronson or
20 other external auditors."

21 MS. EISENBERG: Your Honor, to
22 the extent that we have those
23 records, we would be delighted to
24 turn over the official presentation
25 that is made to the Audits Committee,

Page 80

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 I think that would be quite

3 manageable.

4 I think that if con -- if the
5 request is construed to just refer to
6 what Aronson presents to the Audit
7 Committee, and the management letter
8 that it authors, and doesn't extend
9 to documents related to it, that
10 would be doable.

11 No problem.

12 SPECIAL MASTER SHERWOOD: And
13 what about the next bullet point:
14 "Documents reflecting, containing or
15 summarizing investigations,
16 determinations and actions taken by
17 the NRA as part of the course
18 correction."

19 That's what we talked about
20 before; right?

21 And your position?

22 MS. EISENBERG: Right, Your
23 Honor.

24 I think to the extent -- let's
25 say hypothetically tomorrow, you

Page 81

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 know, some good thing happens and we
3 think that it's going to help us
4 defeat the compliance monitor claim,
5 you know, as it happens, we, of
6 course, will turn it over to the NYAG
7 because if we want to present it at
8 trial, the NYAG should have notice.

9 However, all of that is subject
10 to privileges. The NRA, just because
11 it was sued by the NYAG, still
12 retains its protections and
13 privileges, under the CPLR, and so,
14 we are not undertaking to reveal
15 privileged communications and we are
16 not undertaking to, in realtime, be
17 assessing and inventorying the
18 communications or, let alone,
19 providing a privileged log to the
20 NYAG.

21 That would certainly be above
22 and beyond what is required under the
23 CPLR, would be excessive and
24 burdensome and we are not undertaking
25 to do that.

Page 82

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 SPECIAL MASTER SHERWOOD: Okay.

3 And the last one is:

4 "Documents reflecting the NRA's
5 calculations, demands for payment and
6 receipt of payments for excess
7 benefit transactions."

8 We talked about that earlier,
9 too.

10 MS. EISENBERG: Right.

11 If additional receipts of
12 payments occur or if there are
13 additional demands for payment, the
14 NRA will produce that to the NYAG
15 when, and as, that occurs.

16 SPECIAL MASTER SHERWOOD: I take
17 that with respect to past documents
18 that were generated in the past,
19 reflecting the NRA calculations and
20 its demands for payments and receipt
21 of payments for excess benefits, some
22 of those you provided and some of
23 those you have not and you don't
24 expect to be giving additional
25 documents within that category at

Page 83

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 this point.

3 Do I have that right?

4 MS. EISENBERG: No. No. No,

5 Your Honor. That's wrong.

6 We gave them everything.

7 To the extent that things have
8 been demanded and repaid, they have
9 spreadsheets showing what that
10 contains and they have checks,
11 showing the repayment and they have
12 testimony about the repayment having
13 occurred.

14 So, what -- what we are
15 withholding, on privileged grounds,
16 is privileged communications between
17 the NRA and its counsel related to
18 some of these matters.

19 But the NYAG has everything for
20 every historic repayment that has
21 occurred.

22 MS. CONNELL: Your Honor, I
23 just have to note that we strenuously
24 disagree with that.

25 That is a misrepresentation.

Page 84

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 SPECIAL MASTER SHERWOOD: I

3 know.

4 MS. CONNELL: I not only
5 object, I strenuously object.

6 SPECIAL MASTER SHERWOOD: We
7 need to move this along.

8 All right. I think we covered
9 everything in -- that is in the
10 October 20th letter.

11 Obviously, I am going to be
12 give you a decision about this.

13 You haven't heard very many
14 decisions from me about that today.

15 Okay. Now, what is next?

16 (Whereupon, a short recess was
17 taken.)

18 SPECIAL MASTER SHERWOOD: Next
19 is the NRA's letter of the 20th, as
20 well, with respect to the AG's
21 privileged logs.

22 Let's see. And there -- hold
23 on.

24 (Whereupon, a short recess was
25 taken.)

Page 85

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 SPECIAL MASTER SHERWOOD: The AG
3 says: "There are five categories of
4 documents that it claims to be
5 privileged. Communications with
6 witnesses and their counsel,
7 communications with other law
8 enforcement agencies, communications
9 with consultants, interview memoranda
10 and communications with confidential
11 informants and complainants."

12 I think some, but not all of
13 these, have been addressed earlier
14 and we need to make sure of those.

15 I sense from your response, Ms.
16 Connell -- this is the NRA'S demand
17 -- so, let me start with you, Ms.
18 Eisenberg.

19 MS. EISENBERG: Thank you, Your
20 Honor.

21 First is a threshold argument.

22 Ms. Connell makes a timeliness
23 argument, which is completely
24 disingenuous because the issues about
25 our privileged log and the third

Page 86

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 parties and documents that were
3 withheld, she could have raised as
4 early as July of this year and did
5 not and seeks a relief now.

6 And so, I think that as a
7 matter of symmetry and mutual
8 fairness, we should not be precluded
9 from seeking this relief now.

10 Second --

11 SPECIAL MASTER SHERWOOD:

12 Assuming -- assuming I disagree with
13 you and I am not saying that I am
14 disagree with you: What say you
15 about the timeliness issue? I take
16 it that is your response to the
17 timeliness -- that is your -- that is
18 your full response to the timeliness
19 issue or is there more?

20 MS. EISENBERG: There is
21 definitely more, Your Honor.

22 We have consistently and
23 acidulously informed the NYAG of our
24 concerns about the completeness of
25 their privileged log, both how it was

Page 87

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 constructed and what it -- the
3 information that it identified, in
4 addition, issues in this case have
5 not been joined until just recently.

6 The NYAG was supposed to amend
7 its complaint and then did not.

8 And the NRA answered --

9 SPECIAL MASTER SHERWOOD: When
10 did it ammend?

11 MS. EISENBERG: So, the NYAG
12 amended her complaint on May 2nd and
13 asserted a new claim against the NRA.

14 The NRA then moved to dismiss
15 that claim and so did two of the
16 individual Defendants.

17 Judge Cohen issued a ruling at
18 the end of September denying the
19 NRA's motion to dismiss and
20 addressing the other concerns raised
21 by the other Defendants.

22 And there was conversation, as
23 reflected at the oral argument,
24 before Judge Cohen, that the NYAG
25 would amend the complaint to get rid

Page 88

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 of some historical language seeking
3 restitution from the individual
4 Defendants and referring to the NRA
5 by its appropriate name.

6 Nonetheless, the NYAG later
7 informed us that she was not going to
8 do that and at that point, the NRA
9 went ahead and answered the complaint
10 and asserted defenses to the
11 newly-asserted claim that was
12 asserted back in May but we didn't
13 answer it because we moved to
14 dismiss.

15 SPECIAL MASTER SHERWOOD: Okay.
16 I have that fact.

17 MS. EISENBERG: So --

18 SPECIAL MASTER SHERWOOD: I'm
19 sorry.

20 Go ahead.

21 MS. EISENBERG: Yeah.

22 Basically, the point is that
23 the issues have been joined only
24 recently and with a new claim that
25 she asserted only in May of 2022,

Page 89

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 seeking the Independent Compliance
3 Monitor.

4 I think these issue relate to
5 the privileged log assumed additional
6 significance and on that basis, Your
7 Honor, the NRA should be heard on
8 this issue.

9 SPECIAL MASTER SHERWOOD: All
10 right.

11 So, in your letter, you
12 challenge the law enforcement
13 privilege being asserted by the AG
14 and the common-interest privilege.

15 Those are the only two
16 privileges that you are focussing on
17 in the motion to compel, do I have
18 that right?

19 MS. EISENBERG: Your Honor,
20 those are some of the issues.

21 I think that before we even get
22 to whether these apply, the point is
23 that their log is structured in a way
24 that doesn't really permit a fair
25 assessment of whether the privileges

Page 90

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 apply in the first place.

3 For example, they don't
4 identify any third parties who might
5 have been copied on their
6 communications with these parties.

7 In addition, their log seems to
8 be defective in that we have
9 testimony from an Assistant Attorney
10 General talking about a meeting
11 between every town and --

12 SPECIAL MASTER SHERWOOD: We
13 will get to that.

14 That is on my list. We will get
15 to that. That's for sure.

16 I am just, at this point,
17 trying to understand the scope of the
18 claims that you are making, with
19 respect to privilege.

20 Let me -- let me talk for a
21 second.

22 Karyn, if the time comes when
23 you need to take a break, please let
24 me know; okay?

25 THE COURT REPORTER: No

Page 91

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 problem.

3 SPECIAL MASTER SHERWOOD: It
4 has gone awhile.

5 THE COURT REPORTER: Thank you.

6 SPECIAL MASTER SHERWOOD: What
7 say you, Ms. Connell, about the law
8 enforcement privilege and the common
9 interest privilege that is on --

10 MS. CONNELL: I --

11 SPECIAL MASTER SHERWOOD: I know
12 that they were asserted back in, I
13 guess, the spring or early summer and
14 part of the decision that I made
15 related to those privileges.

16 But the context was in respect
17 to depositions of counsel for
18 Plaintiffs that the NRA was seeking.

19 Aren't we in a very different
20 position today?

21 MS. CONNELL: Actually, Your
22 Honor --

23 SPECIAL MASTER SHERWOOD: They
24 just want documents at this point.

25 MS. CONNELL: Your Honor, I

Page 92

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 think we are largely in the same
3 position, with one exception, which
4 is: The AG is in a stronger
5 position.

6 The NRA's --

7 SPECIAL MASTER SHERWOOD: Why am
8 I not surprised you say that?

9 MS. CONNELL: The NRA's
10 attempts to get information regarding
11 what was involved in the Attorney
12 General's investigation and exactly,
13 you know, what it did when, are more
14 irrelevant now than they ever have
15 been.

16 The court has dismissed the
17 NRA's counterclaims, which allege
18 that the investigation, the
19 enforcement action were driven by
20 First Amendment bias, over improper.

21 So, to the extent that it was
22 ever relevant so delve into what and
23 how the Attorney General investigated
24 the NRA, that is well behind us now.

25 SPECIAL MASTER SHERWOOD: What

Page 93

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 you're saying -- what you're saying,
3 then, is: Look, the information that
4 is being sought now is not -- is not
5 -- you're not resisting the
6 production of that information now
7 because there is some public-interest
8 privilege but rather because it's
9 simply irrelevant at this point.

10 MS. CONNELL: We still maintain
11 this information is privileged, Your
12 Honor, but also --

13 SPECIAL MASTER SHERWOOD: That
14 is not what I am understanding.

15 MS. CONNELL: Right. Right.

16 SPECIAL MASTER SHERWOOD: I
17 wasn't going to let you shroud my
18 question, by talking about whether
19 it's irrelevant.

20 I get the irrelevance argument.

21 What I don't get is the
22 argument that the public-interest
23 privilege applies here.

24 There's a -- there's a huge
25 difference between trying to depose a

Page 94

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 lawyer for the -- for the party and

3 simply seeking to obtain documents.

4 I think you will -- well, if

5 you go back and look at my ruling, it

6 was all in the context of an effort

7 to obtain the deposition of -- what

8 is his name? Mr. Sheehan?

9 MS. CONNELL: Yes.

10 SPECIAL MASTER SHERWOOD: And

11 somebody else in the Charities

12 Bureau.

13 MS. CONNELL: There were about

14 six Notices or something over all.

15 It was the waterfront there.

16 SPECIAL MASTER SHERWOOD: It's a

17 whole different matter there.

18 MS. CONNELL: Your Honor, it is

19 different to depose an attorney

20 versus to seek documents. That

21 doesn't mean the documents are not,

22 themselves, privileged, though.

23 The Attorney General is

24 entitled to the privileges that are

25 attached to her investigation and to

Page 95

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 her investigatory methods and to
3 shield from Discovery information
4 that is covered by these privileges.

5 And frankly, the information on
6 our privileged log, which was served
7 in December of 2021, and remained
8 largely unchanged is privileged.

9 There's no reason to go into --
10 and there's no reason to say that
11 this information is not covered by
12 these privileges.

13 The NRA certainly hasn't come
14 close to such a showing.

15 SPECIAL MASTER SHERWOOD: Wait a
16 minute.

17 Now you're talking about -- to
18 the extent that you are talking about
19 investigative methods and so on, I
20 understand that.

21 But I have the impression that
22 the privilege that you asserted
23 covers a larger swarth of documents
24 than those that protect the
25 investigatory --

Page 96

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 MS. CONNELL: No, Your Honor.

3 If I can: We collected a
4 tremendous amount of documents during
5 the investigation and we revealed and
6 produced all of the documents, with
7 very limited exceptions, to all
8 parties in this action.

9 And also we revealed the
10 identity of witnesses that we spoke
11 with, with only one or two names are
12 confidential informants withheld.

13 The NRA and the Defendants have
14 all the documents that we gathered,
15 as part of our investigation.

16 It would have that for a long
17 time and that is not at issue. What
18 really is at issue is picking apart,
19 internally, what the Attorney General
20 was doing, with regard to this
21 investigation, what letters she sent,
22 what internal documents she had.

23 I think they might have given
24 up on the internal memorandum of the
25 witness interview.

Page 97

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 SPECIAL MASTER SHERWOOD:

3 Category IV?

4 MS. CONNELL: Excuse me?

5 SPECIAL MASTER SHERWOOD: Is

6 that Category IV?

7 MS. CONNELL: Category IV, yes.

8 And, Your Honor, what we are
9 talking about here is a small class
10 of documents that the Attorney
11 General has identified.

12 SPECIAL MASTER SHERWOOD: Let's
13 go through that.

14 You have "communications with
15 witnesses and/or their counsel."

16 If we these witnesses -- I
17 assume, when you say "witnesses,"
18 these are individuals who you will be
19 calling as witnesses at the trial;
20 right?

21 MS. CONNELL: Um, some of them,
22 we may; some of them, we may not.

23 We produced all documents and
24 materials obtained by them. And when
25 we did an examination of them, we

Page 98

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 produced the examination of that.

3 SPECIAL MASTER SHERWOOD: You're
4 not resisting, at this point,
5 communications for their counsel --

6 MS. CONNELL: Your Honor, we
7 are.

8 We are resisting those very
9 narrow --

10 SPECIAL MASTER SHERWOOD:
11 Educate me.

12 MS. CONNELL: Sure.

13 We are resisting that very
14 narrow back and forth that, as
15 investigators, we engage in.

16 We are trying to identify and
17 obtain information from witnesses,
18 actual communications back and forth.

19 Again, any --

20 SPECIAL MASTER SHERWOOD: That
21 is paragraph -- that is Category V,
22 isn't it?

23 MS. CONNELL: Actually, it's
24 covered in Category I.

25 SPECIAL MASTER SHERWOOD: Well,

Page 99

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 I am focused on 1 but --

3 MS. CONNELL: Right.

4 SPECIAL MASTER SHERWOOD: -- I
5 am interpreting it as Category V
6 information.

7 MS. CONNELL: Document
8 preservation Notices, subpoenas,
9 correspondence and documents with
10 back and forth between the AG and the
11 witnesses or their counsel.

12 But again, we have produced the
13 substantive documents those witnesses
14 have -- have produced.

15 But the NRA has indicated it
16 wants to know who we spoke to and
17 when, that has, again --

18 SPECIAL MASTER SHERWOOD: That
19 is Category I?

20 MS. CONNELL: Yes.

21 SPECIAL MASTER SHERWOOD:
22 Category I --

23 MS. CONNELL: Yes.

24 SPECIAL MASTER SHERWOOD: -- is
25 limited to the witnesses that you are

Page 100

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 going to be presenting.

3 That's how I interpret it.

4 MS. CONNELL: No, Your Honor.

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

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

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

21 What about communications with
22 other law enforcement agencies?

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

25 MS. CONNELL: Yes, Your Honor.

Page 101

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 By and large.

3 SPECIAL MASTER SHERWOOD: Is
4 that the City attorney?

5 What is the title of the -- of
6 the --

7 MS. CONNELL: It's the Attorney
8 General.

9 SPECIAL MASTER SHERWOOD: What
10 is that>?

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

13 SPECIAL MASTER SHERWOOD: Okay.

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

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

Page 102

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

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

10 So, even though the
11 counterclaims have been dismissed,
12 the defenses raise all the same
13 issues.

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

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

Page 103

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 communications were very friendly,
3 they were texting back and forth
4 about cars and clearly, developing a
5 personal rapport that the NRA is
6 entitled to have those communications
7 because A), they go biases and
8 credibility of witnesses and frankly,
9 NYAG Office and B), they certainly
10 are not protected by any of these
11 claimed privileges.

12 SPECIAL MASTER SHERWOOD: I --

13 MS. CONNELL: Your Honor --

14 SPECIAL MASTER SHERWOOD: I
15 thought that Judge Cohen effectively
16 threw out those defenses, Ms.
17 Eisenberg.

18 MS. EISENBERG: Incorrect.

19 Nobody has ever moved to
20 dismiss those defenses and in fact,
21 they weren't pleaded until October of
22 this year.

23 And it is not -- he never ruled
24 on the viability of --

25 SPECIAL MASTER SHERWOOD: How is

Page 104

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 your bias claim now any different
3 from your constitutional claim that
4 was thrown out -- counterclaim that
5 was thrown out by Judge Cohen?

6 MS. EISENBERG: Structurally,
7 it's very different.

8 We previously asserted
9 counterclaims against the NYAG, where
10 we suit injunctive relief and money
11 damages for violations of the NRA's
12 constitutional rights.

13 Here, we are asserting these
14 defenses on clean hands and
15 constitutional defenses, as a way to
16 preclude a finding of liability, even
17 if the NYAG managed to prove of her
18 claims.

19 We are entitled for a jury
20 charge on that issue and we are
21 entitled to put forward evidence to
22 prove up our defense, which, again,
23 no one has moved to dismiss.

24 SPECIAL MASTER SHERWOOD: It
25 seems to me Judge Cohen has

Page 105

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 adequately addressed that issue and

3 -- but I understand your position.

4 I will tell you right now,

5 there's a very-high likelihood that I

6 am going to sustain the Attorney

7 General's view that the law

8 enforcement privilege -- that the

9 information that you are seeking

10 here, in terms of communications with

11 other law enforcement agencies, is

12 irrelevant.

13 MS. EISENBERG: Well, Your

14 Honor, may I insert something?

15 SPECIAL MASTER SHERWOOD: I

16 haven't -- I told you what I am

17 likely to do, I didn't say -- but

18 sure, what do you want to tell me?

19 MS. EISENBERG: Ms. Connell

20 said it's largely the D.C. AG but she

21 didn't identify other agencies.

22 Part of our defense, or the

23 whole problem with the case, is that

24 it was a whole -- a number of

25 different agencies within New York

Page 106

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 State: It was Governor Cuomo, it was
3 the Defendant of Financial Services
4 and it was the AG, who was coming
5 together to try to destroy the NRA.

6 And to the extent --

7 SPECIAL MASTER SHERWOOD: You
8 think it's improper for the New York
9 Attorney General to confer with --
10 with the Office of the Governor and
11 other governmental agencies, in
12 connection with their investigation
13 into the NRA?

14 Something is wrong with that,
15 in your mind?

16 MS. EISENBERG: That's not my
17 claim.

18 My claim is that I am entitled
19 to those documents so that I can use
20 them in defense of my client.

21 SPECIAL MASTER SHERWOOD: I
22 understand it.

23 I am likely to, as I say,
24 reject that claim.

25 MS. CONNELL: Your Honor, that

Page 107

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 also -- I'm sorry.

3 SPECIAL MASTER SHERWOOD: Go
4 ahead.

5 MS. CONNELL: The argument
6 about the relevance and the fact that
7 the NRA is mitigated from the
8 defenses here is addressed on Page 2
9 of our letter, with the citation that
10 supports us and that also applies to
11 Category I, I would argue.

12 SPECIAL MASTER SHERWOOD:
13 Category III is: "Communications
14 with consultants" that completed
15 that, is my understanding; right?

16 Do I have that right, Ms.
17 Eisenberg?

18 MS. EISENBERG: I think they
19 made the representation that none of
20 the consultants will be called at
21 trial and they didn't rely on what
22 the consultants told them in drafting
23 the complaint.

24 I think the residual there is
25 confidential complainants and there

Page 108

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 was some inconsistency whether there
3 was one or two and they also said
4 that they would not call their
5 confidential -- the person who is the
6 confidential complainant. They
7 reserve the right to do so and they
8 say they will let us know, if they
9 change their mind and that leaves us
10 --

11 SPECIAL MASTER SHERWOOD: Here
12 is what we will do with that.

13 MS. EISENBERG: -- prejudiced.

14 SPECIAL MASTER SHERWOOD: And to
15 the extent that -- and this is
16 addressed to you, Ms. Connell.

17 To the extent that the AG is
18 going to be using individual
19 witnesses, in Category I or Category
20 III, that needs to be disclosed.

21 MS. CONNELL: (Indicating.)

22 SPECIAL MASTER SHERWOOD: If
23 they are only being held as rebuttal
24 witnesses, in the narrow sense of
25 that word, that phrase, rather, you

Page 109

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 -- you need not disclose them.

3 In other words, if your -- if
4 it's -- if your in rebuttal territory
5 and the -- you're questioning the
6 credibility of some testimony, that
7 sort of thing, you know, you
8 obviously don't have to disclose that
9 up front.

10 But any other witness that you
11 are going to put on in your case, in
12 your Case in Chief, must be disclosed
13 and the sooner the better.

14 MS. CONNELL: Absolutely, Your
15 Honor.

16 We have already an answer an
17 interrogatory listing out witnesses
18 and we agree.

19 SPECIAL MASTER SHERWOOD: All
20 right.

21 And we are now down to "five
22 communications with confidential
23 informants and complainants."

24 I think I covered that already.

25 MS. CONNELL: Yes, Your Honor.

Page 110

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 SPECIAL MASTER SHERWOOD: Okay.

3 MS. EISENBERG: And there are
4 other issues about the log that we
5 list in our letters as to the dates
6 and the thoroughness about the
7 process that was used.

8 And that's addressed on --

9 SPECIAL MASTER SHERWOOD:
10 Explain to me what you mean by "the
11 dates."

12 MS. EISENBERG: Yes, Your
13 Honor.

14 SPECIAL MASTER SHERWOOD: Let me
15 just finish.

16 They have provided -- they said
17 the dates involved are the dates from
18 when they started their full-on
19 investigation through the date of the
20 complaint.

21 Now, we know that they have
22 finite obligations to update
23 information that has been sought, as
24 you -- against the NRA.

25 What I don't understand is what

Page 111

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 you think you're entitled to
3 predating the beginning documents
4 that they had -- well, what do you
5 mean by the time period prior to the
6 beginning of their informal
7 investigation?

8 MS. EISENBERG: Yes, Your
9 Honor.

10 That's not my issue. My issue
11 is that for every Category, I through
12 V, they say the timeframe is
13 coincidentally the same: September 1,
14 2018 through August 6, 2020.

15 So, --

16 SPECIAL MASTER SHERWOOD: Right.

17 MS. EISENBERG: August 6th is
18 when they filed the complaint.

19 SPECIAL MASTER SHERWOOD: Right.

20 MS. EISENBERG: September 1,
21 2018 is an arbitrarily-chosen date.

22 We know, from Assistant
23 Attorney General's Wayne's testimony
24 under oath that Letitia James didn't
25 officially authorize the

Page 112

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 investigation until April of 2019.

3 And according to him, an
4 informal investigation started in or
5 around November of 2018.

6 Mind you, the meeting with
7 every town was in February of 2019.
8 So, the dates of the specific
9 communications all of a sudden become
10 very important to test the voracity
11 of the claim that an informal
12 investigation was underway even
13 before every town came to speak with
14 the NYAG and also very important in
15 assessing the overall bias of the
16 investigation, to begin with.

17 So, what we simply ask for is
18 that instead of providing this
19 artificial September 1, 2018 start
20 date, the NYAG actually specify the
21 first date in which their
22 communications in these five
23 categories occurred.

24 Because if that date is before
25 Letitia James then became the

Page 113

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 Attorney General, that's important.

3 If it's before or after the
4 meeting with every town, that's
5 important.

6 And the date of the
7 communication is not privileged, it's
8 not protected by any of the
9 privileges that Ms. Connell asserts
10 and therefore, we are entitled to
11 that information.

12 SPECIAL MASTER SHERWOOD: And
13 what is it exactly that you want us
14 to do, with respect to the time
15 period?

16 MS. EISENBERG: Yes.

17 SPECIAL MASTER SHERWOOD: Do you
18 want us to push it back?

19 Is there a date that you have
20 in mind?

21 MS. EISENBERG: No.

22 I want them to identify --

23 SPECIAL MASTER SHERWOOD: If I
24 am not mistaken, what you're asking
25 for is the revision of the search

Page 114

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 terms.

3 You're looking for a broader
4 time period.

5 What is the beginning time
6 period that you have in mind?

7 MS. EISENBERG: No, Your Honor,
8 not in this regard.

9 I think the September 1, 2018
10 date and, of course, Ms. Connell can
11 correct me if that is wrong, that's
12 artificially chosen.

13 I don't think that that is
14 actually how far some of these
15 communications extent. And it would
16 be really odd for each of the five
17 categories to begin on September 1st.

18 So, I don't -- what I don't
19 think they have done is taken all of
20 these one-thousand-plus documents
21 sorted them chronologically and said
22 September 23, 2018 is the first
23 communication and let's put that.

24 Instead, they artificially said
25 September 1, 2018, which is not a

Page 115

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 real date.

3 SPECIAL MASTER SHERWOOD: Ms.
4 Eisenberg, there -- may be I am just
5 not well informed about how one goes
6 about searches, electronic searches.
7 Keep in mind I started out as a
8 computer programmer. So, take that
9 into account.

10 But if you remember going to do
11 a search, you would identify
12 parameters. And among the baseline
13 or, you know, basic parameters that
14 you would say are: Is there
15 parameters, with respect to the
16 timeframe?

17 MS. EISENBERG: Right.

18 SPECIAL MASTER SHERWOOD: And I
19 am asking you: Okay. You think that
20 the timeframe is too narrow, let's
21 assume that, what timeframe would you
22 like?

23 MS. EISENBERG: Your Honor, I
24 am not saying -- I appreciate the
25 question because it elucidates the

Page 116

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 disconnect and let me try to explain
3 it better: First of all, I am not
4 questioning the September 1, 2018
5 start date for their search.

6 They, in good faith, can
7 determine is that fair because they
8 know when these communications
9 started.

10 I will take Ms. Connell's word
11 for it that there was nothing before
12 that and I am not saying that there
13 was. Fine.

14 But once they run the search
15 that you just described, they wind up
16 with one thousand, or three hundred
17 of however many documents in the
18 particular category, and their
19 software can permit them to
20 chronologically sort the documents
21 and identify the first date of the
22 communication in the category and the
23 last date of the communication in the
24 category and that should be the range
25 that they specify in the column date

Page 117

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 range in their privileged log because
3 that information is actually quite
4 significant in my defense of my --
5 against the claims that they assert
6 against my client and I am entitled
7 to that information.

8 And the specific, real start
9 date of these communications is not
10 privileged and cannot be withheld
11 under any of these claimed
12 privileged.

13 SPECIAL MASTER SHERWOOD: Sorry
14 to be so dense about that. I heard
15 the words that you gave me. I tried
16 to understand them and I am not
17 understanding them.

18 I am not understanding because
19 if -- if they did the search, which
20 requires that documents that had a
21 September 1, 2018 or later date gets
22 caught, if it's part of an e-mail
23 chain, that is -- that shows
24 documents before September 1, 2018,
25 that still would be caught in the

Page 118

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 search, that's why I don't
3 understand.

4 MS. EISENBERG: That is not
5 what I am saying, Your Honor.

6 My point is that I don't think
7 that they actually started having
8 these communications on September 1,
9 2018.

10 I understand that --

11 SPECIAL MASTER SHERWOOD: I
12 heard that.

13 MS. EISENBERG: I am entitled
14 to know --

15 SPECIAL MASTER SHERWOOD: Okay.
16 I heard that.

17 What Sherwood is saying is that
18 there are documents that have
19 post-September 1, 2018 start dates
20 but it may well include an e-mail
21 chain that goes before that date.

22 You just finished telling me
23 that you don't have any -- any
24 quarrels with the search being made
25 as of September 1, 2018, that's why I

Page 119

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 am not understanding what you're

3 trying to tell me.

4 MS. EISENBERG: Yes.

5 SPECIAL MASTER SHERWOOD: That's

6 the problem.

7 MS. EISENBERG: There are two

8 different issues: First, what is the

9 search parameter, starting on

10 September 1st --

11 SPECIAL MASTER SHERWOOD: You

12 don't have any problems with that;

13 right?

14 MS. EISENBERG: Sorry.

15 SPECIAL MASTER SHERWOOD: And

16 you don't have any problems with

17 that; right?

18 MS. EISENBERG: Right.

19 Because I assume that Ms.

20 Connell, in good faith, used that

21 date as the right date.

22 SPECIAL MASTER SHERWOOD: That

23 is not an issue here.

24 MS. EISENBERG: Right.

25 And then, if you do a

Page 120

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 traditional privileged log, you're
3 supposed to say: Who sent an e-mail
4 to whom? What was generally about
5 what is privileged and the date;
6 right?

7 SPECIAL MASTER SHERWOOD: Yes.

8 MS. EISENBERG: Okay. So, here,
9 they gave us a categorical privileged
10 log and they didn't give us the dates
11 for the individual documents.

12 SPECIAL MASTER SHERWOOD: That
13 is typical, in category, in responses
14 to ESI requests.

15 MS. EISENBERG: Okay.

16 SPECIAL MASTER SHERWOOD: When
17 you're asking for a category,
18 category X, could have 1,000
19 documents within that folder.

20 So, what do you want? Do you
21 want 1,000 pages?

22 MS. EISENBERG: If you look at
23 their privileged log, if you look at
24 the second column, called "date
25 range," the date range is the same

Page 121

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 for each of the categories and it
3 starts on September 1, 2018 and that,
4 effectively --

5 SPECIAL MASTER SHERWOOD: That's
6 a good thing.

7 Why is that a good thing?

8 Because it says everything was
9 in the folder comes within the date
10 range of September 1, 2018 and August
11 30, 2021, whatever that date is;
12 okay?

13 And there maybe 1,000
14 documents.

15 MS. EISENBERG: Right.

16 But that's --

17 SPECIAL MASTER SHERWOOD: I
18 don't understand what -- what you're
19 trying to tell me, with respect to,
20 you know, that response to your, you
21 know, to your Discovery requests,
22 where the response is a categorical
23 one.

24 You're not going to get -- it's
25 a good thing that in each and every

Page 122

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 one, as a date range, September one 1
3 August 31. Because if, for some of
4 them, they say "no, not September 1,
5 2018 but January 31, 2019," that
6 makes the situation worse for you,
7 not better.

8 MS. EISENBERG: Well, Your
9 Honor, I want the truth.

10 I want to know when they
11 started the communications and their
12 privileged log doesn't reveal that
13 information because they chose a --
14 they -- they put in the date that
15 they used for searches and not the
16 real date and they must disclose the
17 real start date.

18 SPECIAL MASTER SHERWOOD: All
19 right.

20 Thank you.

21 I will reject that -- that
22 claim, for the reasons that I have
23 been saying, explaining to you.

24 The real dates are in the
25 document within the category.

Page 123

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 MS. EISENBERG: Every town.

3 SPECIAL MASTER SHERWOOD: What
4 about every town?

5 MS. EISENBERG: So --

6 SPECIAL MASTER SHERWOOD: Just
7 remember -- just remember that Judge
8 -- again, I am keeping in mind what
9 has been disclosed and what remains
10 the same.

11 MS. EISENBERG: The Judge never
12 dismissed the defenses.

13 The defenses were just
14 reasserted, no one moved to dismiss
15 them and the analysis is very
16 different from the counterclaims.

17 But the point is that every
18 town is conspicuously missing from
19 the privileged log. It's not
20 mentioned.

21 Yet, we know that they had this
22 one-hour meeting that was
23 prescheduled and likely,
24 communications afterwards.

25 And this privileged log is

Page 124

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 woefully deficient because it doesn't
3 indicate, or reflect, any
4 communication with every town, which
5 is impossible.

6 SPECIAL MASTER SHERWOOD: What
7 they are saying is that every town is
8 not a witness.

9 MS. EISENBERG: Well, it
10 doesn't matter, Your Honor.

11 We are entitled to any and all
12 communications that they had with --

13 SPECIAL MASTER SHERWOOD: None?
14 Really?

15 MS. EISENBERG: During the
16 investigation.

17 SPECIAL MASTER SHERWOOD: Cite
18 me a case that says that.

19 And you don't have to give it
20 to me right now but give me some
21 cases where it says where a
22 government agency has conducted an
23 investigation, you're entitled to
24 Discovery of every -- every
25 individual and every entity that they

Page 125

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 have communicated with, in connection
3 with their investigation.

4 MS. EISENBERG: I will look for
5 that case but even if --

6 SPECIAL MASTER SHERWOOD: Find
7 me a case.

8 Because it certainly doesn't
9 appear -- appear in your letter.

10 MS. EISENBERG: And the other
11 point is that -- it's not any one,
12 it's every town, which was specific
13 in --

14 SPECIAL MASTER SHERWOOD: Same
15 point. Same point.

16 Show me a case.

17 MS. EISENBERG: -- before the
18 NRA.

19 SPECIAL MASTER SHERWOOD: Show
20 me the case.

21 All you have to do is just, you
22 know, show me a case.

23 MS. EISENBERG: Okay. Will do.

24 Thank you.

25 SPECIAL MASTER SHERWOOD: All

Page 126

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 right.

3 What else is there to discuss,
4 with respect to the NRA's letter?
5 Anything else?

6 MS. EISENBERG: Well, I think
7 that to the extent that they continue
8 to have communications with witnesses
9 or other agencies, I think they
10 should have to update their log, I
11 think --

12 SPECIAL MASTER SHERWOOD: I
13 think we said that updating is
14 required on both sides.

15 MS. CONNELL: Your Honor, we
16 did object to generally updating
17 everything after the commencement of
18 litigation from our side.

19 We didn't require updating
20 everything from the NRA, only
21 documents relevant to liability,
22 asking counsel to log in every
23 document to anybody is unduly
24 burdensome and not generally required
25 under the case law and the NRA hasn't

Page 127

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 shown a case showing otherwise.

3 And we object to that.

4 SPECIAL MASTER SHERWOOD: And
5 that's a very -- I understand the
6 argument and I recognize that.

7 But to the extent that there is
8 new information that you received
9 from a witness --

10 MS. CONNELL: Yeah.

11 SPECIAL MASTER SHERWOOD: --
12 that seems credible --

13 MS. CONNELL: Absolutely.

14 I'm sorry. I misunderstood
15 you.

16 Certainly, we have been
17 updating and and producing everything
18 that we get from witnesses, subpoena
19 recipients, other parties,
20 absolutely.

21 SPECIAL MASTER SHERWOOD: That's
22 all.

23 MS. CONNELL: That's it.

24 SPECIAL MASTER SHERWOOD: Okay.

25 Let's see: Number 3 is

Page 128

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 Aronson. And that's -- that's fee.

3 So, Ms. Eisenberg, tell me
4 about this.

5 MS. EISENBERG: Certainly, Your
6 Honor.

7 Under the CPLR and under the
8 Commercial Division Rule, it's very
9 clear that where a party subpoenas
10 records from a non-party --

11 SPECIAL MASTER SHERWOOD: Let me
12 cut you off. Let me cut you off.

13 There's no question that they
14 are under an obligation to reimburse
15 Aronson for the reasonable costs of
16 their production.

17 So, you are about to tell me
18 that, I know that.

19 So, the argument here has to do
20 with how much? They say that they
21 are not obligated to reimburse
22 Aronson for work done, in order to
23 protect the NRA's privilege.

24 And they also have arguments
25 about, you know, just how much you're

Page 129

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 seeking.

3 There's one document in your --
4 in the materials that I think was
5 provided from February of 2021. I
6 think it is, that shows that Aronson
7 billed you for \$125,475.50 and that
8 goes through sometime in February of
9 '21.

10 You now say they're obligated
11 -- the -- the fee that they are
12 seeking is a round number of
13 \$325,000.00.

14 So, you haven't carried your
15 burden of showing that you are
16 entitled to that number because you
17 haven't presented any information
18 that one would -- would be required
19 in any communication for this round
20 number of \$325,000.00.

21 And that is before we get to
22 the question of whether you're
23 obligated -- whether the AG can be
24 obligated to reimburse Aronson for
25 fees done in connection with the AG's

Page 130

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 search.

3 And one last thing: It is true
4 that the Commercial Division Rules,
5 Index A, relates to ESI, does
6 recognize that there may be
7 circumstances where you're entitled
8 to privilege claims done by the third
9 -- third parties.

10 I haven't seen any cases that
11 says that's true or non-ESI searches.

12 So, I have laid that out for
13 you.

14 MS. EISENBERG: Okay.

15 SPECIAL MASTER SHERWOOD: And I
16 am all ears.

17 MS. EISENBERG: Right.

18 So, all of it was ESI, or, at
19 least, predominantly ESI, or to the
20 extent they had any hard paper, hard
21 copy paper was promptly scanned and
22 reviewed as ESI.

23 It's very clear that Aronson
24 works electronically and they had
25 these work papers and Excels, where

Page 131

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 they share through some kind of a
3 shared platform and I am confident
4 that the majority of it is ESI and
5 therefore, within the ambit of the
6 rule.

7 Second --

8 SPECIAL MASTER SHERWOOD: Who is
9 obligated to make the distinction?

10 Who has the burden?

11 You -- Aronson has the burden
12 or the AG has the burden?

13 MS. EISENBERG: Your Honor,
14 that is not, fairly, in dispute,
15 that's not an issue that they ever
16 raised, that it's not ESI.

17 It's very clear most of it is
18 ESI but if I need --

19 SPECIAL MASTER SHERWOOD: You
20 haven't answered my question.

21 MS. EISENBERG: Well, I think
22 that --

23 SPECIAL MASTER SHERWOOD: Whose
24 burden is it is my question.

25 MS. EISENBERG: I think the

Page 132

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 burden would be on them because under
3 the rule, they are presumptively
4 required to pay for ESI, they know
5 it's ESI and if they want to prove
6 the burden.

7 SPECIAL MASTER SHERWOOD: I
8 respectfully disagree. I respectfully
9 disagree.

10 The entity, or person, who is
11 seeking attorneys' fees has the
12 burden, the obligation, to show that
13 they are seeking, you know, their
14 request of fees is reasonable, which
15 includes showing that the amount of
16 time and effort made is reasonable
17 and also showing that the hourly rate
18 is reasonable.

19 Those are the elements of a
20 post dock.

21 I don't know of a single case
22 that puts the burden on an entity
23 other than an entity that is seeking
24 the reimbursement.

25 MS. EISENBERG: That's a

Page 133

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 different issue.

3 ESI versus --

4 SPECIAL MASTER SHERWOOD: No.

5 No. No.

6 That's across the board.

7 ESI and non-ESI.

8 No. That is -- you know, that
9 is a well-established point.

10 MS. EISENBERG: Your Honor, but
11 the NYAG knows most of it is ESI and
12 they haven't raised the issue.

13 And if it's necessary for us to
14 submit an affidavit to the effect
15 that most of it is ESI, we would be
16 happy to procure this is.

17 SPECIAL MASTER SHERWOOD: Ms.
18 Eisenberg, this is your motion, you
19 have the obligation to make out the
20 prima facie case.

21 This is nothing new.

22 MS. EISENBERG: Your Honor,
23 with regard to the amount, I am an
24 Officer of the Court and I
25 represented to you that the amounts

Page 134

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 that the NRA has reimbursed Aronson

3 to date is excess of \$300,000.00.

4 Again, if it is necessary to

5 submit the invoices for that amount,

6 we are happy to do.

7 But the amount that the NRA has

8 reimbursed Aronson has never been in

9 dispute.

10 What the NYAG has disputed is

11 its obligation to pay in the first

12 place and that is the issue that

13 we've brought to Your Honor.

14 SPECIAL MASTER SHERWOOD: Okay.

15 Ms. Connell?

16 MS. CONNELL: Your Honor, we

17 actually have said specifically that

18 we acknowledge responsibility to pay

19 for costs reasonably incurred, in

20 complying with the subpoena by a

21 third-party.

22 That's not the question.

23 But what is reasonable?

24 And that is on the burden. The

25 burden is on the person that is

Page 135

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 seeking repayment and --

3 SPECIAL MASTER SHERWOOD: That's
4 what I just said.

5 MS. CONNELL: Right.

6 We have not seen documents or
7 evidence to support what amount we
8 could determine is reasonable here.

9 And in addition, Your Honor,
10 it's important to note, even under
11 Appendix A, to the Commercial
12 Division Rules, where a third-party
13 is expending money to protect a
14 party's privilege, that cost is borne
15 by the party.

16 We have outlined the NRA's
17 conduct here, with regard to
18 asserting its privilege. It actually
19 took from, I think, all August of
20 2021 to even now, we are getting
21 Aronson documents.

22 So, we have had motion practice
23 twice about this and we have been
24 engaged in this long, protracted,
25 very costly and unnecessary,

Page 136

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 cumbersome practice that the NRA
3 chose to engage in, to redact and
4 identify privileged documents.

5 That's on the NRA.

6 What we had asked for, and what
7 we raised, is that -- that the --
8 that we identify what is a reasonable
9 amount.

10 Same, we have paid -- we have
11 paid Aronson \$325,000.00 does not
12 allow us to assess what a reasonable
13 amount is.

14 We know that the Appendix also
15 states --

16 SPECIAL MASTER SHERWOOD: What
17 Ms. Eisenberg needs to do, what NRA
18 needs to do, in its application is
19 what you do in all of these cases,
20 which is: You provide documentary
21 evidence of invoices that gives
22 detail, that is standard stuff, that
23 lawyers and Accountants provide when
24 they bill their clients.

25 And we need to know what the

Page 137

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 hourly rates are and who did what
3 when.

4 That -- that's the standard
5 stuff, that's what is required.

6 And I am telling this to you
7 but I am hoping that -- and I know
8 that -- Ms. Eisenberg is listening
9 because that's what she is going to
10 have to do.

11 As she said, she is an Officer
12 of the Court and we say and it's
13 interesting it's over \$300,000.00,
14 the request was for \$325,000.00.
15 Never once has the NRA presented
16 evidence that it paid \$325,000.00 for
17 -- to Aronson, in connection with
18 this production.

19 So, the request is sufficient
20 in -- in that respect. And we get to
21 the next level, which has to do with
22 what is reimbursable and what's not.

23 Now, there is -- and you
24 presented a fair amount of case law
25 that says that you are not entitled

Page 138

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD
2 to be reimbursed for doing somebody
3 else's work.

4 And it is not the case.

5 I haven't seen any cases that
6 would go the other way.

7 But that's not to say that the
8 NRA is not entitled to seek
9 reimbursement for the fees that they
10 paid to Aronson, in connection with
11 Aronson's work, in connection with
12 their obligation to the NRA to keep
13 its documents confidential.

14 It would not surprise me if
15 there was, in the Retainer Agreement
16 between Aronson and the NRA, that
17 there's a Confidentiality Provision
18 and to the extent that the -- that
19 Aronson did a privileged search, with
20 respect to ESI, I think that's fair
21 grounds for argument, with respect to
22 it.

23 And so, there you are.

24 Now, why am I spending all of
25 this time explaining what I think the

Page 139

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 law is?

3 Because I don't think we should
4 be spend a whole lot of time fighting
5 over this. I have outlined to you
6 some of my sense of what the law is
7 and how it should be approached.

8 And what I would urge both
9 sides to do is sit down and figure
10 out what is the reasonable amount of
11 fees to which the NRA is entitled to
12 be reimbursed, having fronted the
13 money that it gave legitimately to
14 Aronson.

15 And before you, Ms. Eisenberg,
16 go to the trouble of presenting -- of
17 preparing the level of details that I
18 would require, or I should be making
19 a decision, that two sides will come
20 up with some kind of an accounting,
21 then, if you can't, you will do what
22 you have to do and I will do what I
23 have to do; okay?

24 MS. EISENBERG: Thank you.

25 SPECIAL MASTER SHERWOOD: I

Page 140

1 ORAL ARGUMENT BEFORE SPECIAL MASTER SHERWOOD

2 think we are at the end.

3 Is there anything else that we
4 have to deal with?

5 MS. CONNELL: No.

6 MS. EISENBERG: Thank you very
7 much, Your Honor.

8 SPECIAL MASTER SHERWOOD: So,
9 let us conclude and obviously, I will
10 give you a -- I will give you a
11 decision.

12 MS. EISENBERG: Thank you.

13 MASTER SHERWOOD: I would like
14 to get a transcript in a condensed
15 version and it needs to have an
16 index.

17 (Whereupon, at 12:12 P.M., the
18 oral argument was concluded.)

19
20 ° ° ° °

21

22

23

24

25

Page 141

C E R T I F I C A T E

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

I, KARYN CHIOUSANO, 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 CHIOUSANO

[& - addition]

Page 1

&	2	31 122:3,5 325,000.00 136:11 137:16 325,000.00. 129:13,20 137:14 360 22:14 60:8 37,000.00 56:14 57:18 59:7 60:15	a
& 2:9 3:4,9,14 16:15	2 27:4 107:8 200 3:16 2017 59:5 2018 59:5 111:14 111:21 112:5,19 114:9,22,25 116:4 117:21,24 118:9,19,25 121:3,10 122:5 2019 112:2,7 122:5 2020 36:19 40:11 111:14 2021 38:16 55:16 95:7 121:11 129:5 135:20 2022 1:12 58:19 88:25 141:21 2023 76:17 20th 4:8,18 5:10 6:4 73:17 84:10 84:19 21 129:9 21st 141:20 23 114:22 23rd 4:23 28 2:6 2nd 87:12	4 4 73:18 410 3:5 451625/2020 1:7 5 5600 2:20 6 6 111:14 600 12:20 600,000.00 21:2 39:6 43:2 6th 111:17 7 750 2:11 75209 2:21 8 810 3:5 83 47:25 9 990 38:25 42:15 990's 102:9 9th 19:10	a.m. 1:13 ability 19:24 23:18 able 27:19 36:4 37:22 63:10 absolutely 23:8 28:14 42:7,25 45:21 58:5 62:23 64:18 65:4 109:14 127:13,20 accepted 34:5 account 115:9 accountants 30:4 136:23 accounting 29:20 139:20 accuracy 18:9 54:12 accurate 24:14 53:16 achieve 22:24 acidulously 86:23 ackerman 60:17 acknowledge 134:18 acting 30:8 action 92:19 96:8 141:16 actions 9:5 80:16 acts 18:22 actual 61:22 98:18 addition 87:4 90:7 102:20 135:9
1	2019 112:2,7 122:5 2020 36:19 40:11 111:14 2021 38:16 55:16 95:7 121:11 129:5 135:20 2022 1:12 58:19 88:25 141:21 2023 76:17 20th 4:8,18 5:10 6:4 73:17 84:10 84:19 21 129:9 21st 141:20 23 114:22 23rd 4:23 28 2:6 2nd 87:12		
1 3:11 99:2 111:13,20 112:19 114:9,25 116:4 117:21,24 118:8,19,25 121:3,10 122:2,4 1,000 120:18,21 121:13 100 34:4 10003 2:16 10005 2:6 10022 2:12 3:6 10036 3:11 10166 3:16 102 2:16 10:00 1:13 10th 2:16 11 73:16 74:4 116-314 2:20 12 73:16 74:5,17 125,475,50 129:7 12:12 140:17 13 76:11 78:15 14 1:12 14th 36:15 15 27:5 15,000 52:19 15th 36:16 16,000 52:15,19 16th 2:6 18034 141:23 1st 114:17 119:10	3 127:25 30 121:11 300,000.00 137:13 300,000.00. 134:3		

[additional - argument]

Page 2

additional 41:13 41:16 43:5 45:10 49:10 74:16 82:11,13 82:24 89:5 address 5:21 27:6 32:5 51:9 addressed 4:21 51:19,24 85:13 105:2 107:8 108:16 110:8 addressing 77:16 87:20 adequate 37:20 57:7 adequately 105:2 admission 42:24 admit 28:25 advice 7:11 11:4 16:4 18:16 22:21 26:13 30:3 39:21 45:24 advise 16:17 29:5 aerating 42:22 affidavit 133:14 affiliates 6:16 affirmatively 15:15 16:25 18:15,21 70:25 ag 7:6 10:17 13:13 37:18 42:5 57:6 63:2 65:22 85:2 89:13 92:4 99:10 100:24	105:20 106:4 108:17 129:23 131:12 ag's 84:20 129:25 agencies 85:8 100:22 105:11 105:21,25 106:11 126:9 agency 124:22 agenda 5:7 ago 63:4 agree 78:7 109:18 agreed 29:10 agreement 138:15 ahead 63:8 88:9 88:20 107:4 akin 3:9 akingump.com 3:13 alive 76:18 allege 92:17 alleged 17:10 58:11 102:17,18 allegedly 60:16 alleges 17:9 50:13 allegiance 67:11 69:16 71:19 allow 136:12 allowed 35:20 ambit 131:5 amend 87:6,25 amended 24:7 27:16 70:25 87:12	amendment 35:2 92:20 america 1:9 2:11 3:10 ammend 87:10 amount 35:6 36:2,3 38:18 40:7 59:11,19 66:11,13 96:4 132:15 133:23 134:5,7 135:7 136:9,13 137:24 139:10 amounts 17:22 17:23 18:5 43:5 133:25 ample 38:9 analysis 123:15 analyzed 40:15 answer 17:9 20:11 33:19,20 60:5 71:2 88:13 109:16 answered 87:8 88:9 131:20 anybody 126:23 apart 96:18 apparently 64:7 appear 47:15 50:18,20 125:9,9 appearances 2:23 appendix 135:11 136:14 application 136:18 applied 18:23	applies 93:23 107:10 apply 7:16 22:25 55:4 56:20 89:22 90:2 applying 27:9 appointment 24:21 27:8 76:15 appreciate 50:6 115:24 appreciated 73:15 apprise 41:13 approach 41:12 approached 139:7 appropriate 7:19 16:21 40:7 88:5 appropriately 77:16 appropriateness 76:20 april 112:2 arbitrarily 111:21 argue 20:10 23:22 24:19 29:21 107:11 argued 17:11,12 arguing 24:13 47:16 52:8 argument 1:15 4:1 5:1 6:1 7:1 8:1 9:1 10:1,5,6 11:1 12:1 13:1 14:1,2 15:1 16:1
---	---	--	---

[argument - audit]

Page 3

17:1 18:1 19:1 20:1 21:1 22:1 23:1 24:1 25:1 26:1 27:1 28:1 29:1 30:1 31:1 32:1 33:1,18 34:1 35:1 36:1 37:1 38:1 39:1 40:1 41:1 42:1 43:1 44:1 45:1 46:1 47:1 48:1 49:1 50:1 51:1 52:1 53:1 54:1 55:1 56:1,18 57:1 58:1 59:1 60:1,3 61:1 62:1 63:1 64:1 65:1 66:1 67:1 68:1 69:1 70:1 71:1 71:15 72:1 73:1 74:1 75:1 76:1 77:1 78:1 79:1 80:1 81:1 82:1 83:1 84:1 85:1 85:21,23 86:1 87:1,23 88:1 89:1 90:1 91:1 92:1 93:1,20,22 94:1 95:1 96:1 97:1 98:1 99:1 100:1 101:1 102:1,17 103:1 104:1 105:1 106:1 107:1,5 108:1 109:1 110:1 111:1 112:1 113:1 114:1 115:1	116:1 117:1 118:1 119:1 120:1 121:1 122:1 123:1 124:1 125:1 126:1 127:1,6 128:1,19 129:1 130:1 131:1 132:1 133:1 134:1 135:1 136:1 137:1 138:1,21 139:1 140:1,18 arguments 16:3 20:23 128:24 arizona 59:12 aronson 4:21 6:13 10:13 11:7 11:9,17 61:10 62:12 63:3,8,19 64:19,23 65:11 65:22,25 66:10 66:12,15,19 67:3 71:23 72:2,17,18 72:24 79:19 80:6 128:2,15,22 129:6,24 130:23 131:11 134:2,8 135:21 136:11 137:17 138:10 138:16,19 139:14 aronson's 63:11 64:9,25 138:11 arrive 54:2 art 27:18 artificial 112:19	artificially 114:12,24 ascertained 61:2 asked 21:12 33:24 34:24 36:23 55:18 56:16 57:7,16 136:6 asking 8:15 36:22 43:9 54:17 59:9 62:3 67:16 113:24 115:19 120:17 126:22 assert 16:2 18:16 20:20 117:5 asserted 4:15 7:10 87:13 88:10,11,12,25 89:13 91:12 95:22 104:8 asserting 7:11 16:9 104:13 135:18 assertion 15:8 36:6 assertions 18:10 19:25 54:12 60:24 asserts 7:6 113:9 assess 76:20 136:12 assessed 17:23 assessing 81:17 112:15 assessment 89:25	assets 48:16 assistant 62:4 90:9 111:22 association 1:9 2:10 assume 24:12 34:20 64:3 72:16 74:21,21 97:17 115:21 119:19 assumed 89:5 assuming 77:4 86:12,12 attached 94:25 attempts 20:4 92:10 attendance 32:14 attention 65:2 attorney 1:4 2:3 2:5 4:9,15,24,25 6:3 8:11,24 15:3 33:14 39:20 52:13 62:4 63:18 64:12 90:9 92:11,23 94:19,23 96:19 97:10 101:4,7,11 101:24 102:22 105:6 106:9 111:23 113:2 attorneys 2:4,9 2:10,15,19 3:4,9 3:15 132:11 audit 21:20 30:10 77:15 80:6
--	--	--	--

[auditor - cases]

Page 4

auditor 6:13 auditors 11:17 79:20 audits 79:25 aught 45:10 august 111:14 111:17 121:10 122:3 135:19 authorize 27:24 111:25 authors 80:8 available 23:5 avenue 2:11 3:5 3:16 aware 20:14 66:5 awhile 91:4	basis 28:14 66:18,22 89:6 bears 22:4 beginning 111:3 111:6 114:5 behalf 48:20 72:23 belabor 100:19 believe 6:18 52:18 57:23 believes 45:3 51:14 benefit 29:6 43:16,20 47:18 48:21 49:13 50:14 51:19 53:16 82:7 benefits 17:14 17:19,21 18:6 19:17 20:5 21:5 35:4,25 36:18 37:11,18 42:21 44:13 45:19 51:24 52:14 53:5,21,22 54:18 54:23 60:25 82:21 better 109:13 116:3 122:7 beyond 42:22 52:11 81:22 bias 92:20 104:2 112:15 biases 103:7 bill 136:24 billed 129:7 block 3:12 36:21	blocked 19:23 54:17 71:8,9 77:20 blood 141:16 board 23:6 30:9 78:4,24,25 79:3 102:24 133:6 booker 3:12 borne 45:6 135:14 bottom 60:8 break 90:23 brewer 2:9 18:4 33:4 70:19 brewerattorne... 2:13 broader 114:3 brought 64:25 134:13 bryant 3:11 bucket 11:20 44:18 building 3:15 bullet 74:4 78:15 80:13 bullets 74:3 bundle 9:15 burden 129:15 131:10,11,12,24 132:2,6,12,22 134:24,25 burdensome 81:24 126:24 bureau 94:12 business 19:21 23:11 37:2 54:7	c c 2:2 3:2 141:2,2 calculate 19:19 calculated 17:21 38:20 calculation 42:18 calculations 82:5,19 call 60:8 108:4 called 7:7 8:2 66:10 107:20 120:24 calling 97:19 camera 9:17 11:24 13:22 73:23 74:8,25 care 74:10,14 careful 41:11 carried 129:14 cars 103:4 case 1:7 7:13 8:22 9:6 13:15 16:3 18:22 20:3 20:3 26:14 30:22 32:17,21 54:14,22 76:14 87:4 102:16 105:23 109:11 109:12 124:18 125:5,7,16,20,22 126:25 127:2 132:21 133:20 137:24 138:4 cases 18:19 19:2 20:9 30:23 36:6 124:21 130:10 136:19 138:5
b			
b 40:19 103:9 back 14:4,5,7 38:2,3 40:11 59:5 63:3 68:25 70:17 71:23 88:12 91:12 94:5 98:14,18 99:10 103:3 113:18 balances 29:21 30:11 bank 3:10 19:2 bankruptcy 17:12 20:3 60:4 based 31:4 baseline 115:12 basic 115:13 basically 88:22			

[categorical - communications]

Page 5

categorical 120:9 121:22	60:15 104:20	48:15 85:4	comfort 13:25
categories 7:24	charges 56:2	90:18 101:20	coming 29:23
74:16 76:23	60:21	104:18 117:5	30:25 106:4
85:3 112:23	charities 94:11	130:8	commencement
114:17 121:2	chart 60:13	class 97:9	126:17
category 12:4,23	check 38:24	classic 26:11	comment 76:3
75:3 82:25 97:3	checks 29:20	52:3	commercial
97:6,7 98:21,24	30:11 83:10	clean 51:9	128:8 130:4
99:5,19,22	cherry 18:7 52:3	104:14	135:11
107:11,13	chief 109:12	clear 18:13,20	committee 21:20
108:19,19	chiusano 1:18	32:17 36:7	30:10 77:15
111:11 116:18	141:7,24	42:16,20 59:18	79:25 80:7
116:22,24	choice 15:19,20	64:21 68:23	committees 79:4
120:13,17,18	chose 66:14	128:9 130:23	common 69:21
122:25	122:13 136:3	131:17	89:14 91:8
caught 117:22	chosen 111:21	cleared 64:22	communicated
117:25	114:12	clearly 10:24	125:2
caution 42:23	chronologically	28:16 103:4	communication
certain 6:10 9:5	114:21 116:20	client 8:11,24	113:7 114:23
15:15,16,23 16:6	circumstances	106:20 117:6	116:22,23 124:4
53:12,13 73:19	31:9 130:7	clients 136:24	129:19
76:15,22	citation 16:19	close 19:10 34:4	communications
certainly 27:10	107:9	55:24 95:14	4:4 8:10,20,24
37:12 53:18	cite 36:6 124:17	closed 36:15	9:8 10:12,23
60:3,4 77:12	cited 18:19	coda 3:21	11:9 12:6 13:4
81:21 95:13	20:10	cohen 87:17,24	13:12,14 23:14
103:9 125:8	cites 26:15 30:24	103:15 104:5,25	23:25 28:18
127:16 128:5	city 101:4	coincidentally	46:13 69:18
certify 141:9,14	claim 48:25 58:5	111:13	71:10 81:15,18
cetera 8:3	69:20 81:4	collected 96:3	83:16 85:5,7,8
chain 117:23	87:13,15 88:11	columbia 101:12	85:10 90:6
118:21	88:24 104:2,3	column 116:25	97:14 98:5,18
challenge 89:12	106:17,18,24	120:24	100:21,23
change 46:16	112:11 122:22	come 14:5,7 22:6	102:23 103:2,6
108:9	claimed 103:11	43:21 67:3	105:10 107:13
charge 11:14	117:11	95:13 139:19	109:22 112:9,22
56:21 59:23	claims 4:15 7:4	comes 90:22	114:15 116:8
	24:4 25:23 27:4	121:9	117:9 118:8

[communications - conversation]

Page 6

122:11 123:24 124:12 126:8 company 31:2,7 compare 30:22 compel 89:17 complainant 108:6 complainants 85:11 107:25 109:23 complaint 40:22 50:13 58:12 87:7,12,25 88:9 107:23 110:20 111:18 complete 21:13 completed 19:8 55:25 107:14 completely 14:2 30:21 31:10 39:6,14 85:23 completeness 86:24 compliance 12:12 16:24 22:24 24:22 27:9 32:10,15 51:2 60:9 70:18 71:11 81:4 89:2 compliant 71:4 complying 16:22 134:20 computer 115:8 con 4:24 80:4 concerns 27:6 86:24 87:20 concierge 3:20	conclude 42:10 42:13 43:20 140:9 concluded 140:18 condensed 140:14 conduct 15:23 22:5 78:5 135:17 conducted 21:4 21:13 30:16 35:17 124:22 conducting 23:3 41:21 conducts 31:3 confer 106:9 confident 13:16 131:3 confidential 85:10 96:12 107:25 108:5,6 109:22 138:13 confidentiality 138:17 conflict 28:4 34:2 conflicts 77:17 conley 2:7 connected 9:5 connection 106:12 125:2 129:25 137:17 138:10,11 connell 2:7 4:24 4:25 5:4,6,19 6:7,23 8:7 10:5 11:13 12:5,8	13:6 14:8,12,25 23:13 26:14 28:8,12 29:15 30:24 31:15,21 31:24,25 32:4,8 35:14,22 36:12 39:3,17 43:3 44:16 46:2 50:8 51:8,12 52:6 53:10 54:21 55:10,15 56:9 58:13 59:13,21 61:7,21,25 62:6 62:10,16 66:6 67:2,16 70:13 71:22 72:16 73:4,10 74:15 75:16 76:12 77:9 83:22 84:4 85:16,22 91:7,10 91:21,25 92:9 93:10,15 94:9,13 94:18 96:2 97:4 97:7,21 98:6,12 98:23 99:3,7,20 99:23 100:4,25 101:7,11 103:13 105:19 106:25 107:5 108:16,21 109:14,25 113:9 114:10 119:20 126:15 127:10 127:13,23 134:15,16 135:5 140:5 connell's 38:8 48:16 66:10 102:14,17	116:10 consent 63:11 conservatively 78:22 consistently 86:22 conspicuously 123:18 constitutional 101:21 104:3,12 104:15 constructed 87:2 construe 78:23 construed 80:5 consultant 11:16 consultants 16:9 16:20 85:9 107:14,20,22 consults 31:13 contact 67:21,24 containing 80:14 contains 83:10 contemplate 77:2 context 91:16 94:6 continue 2:23 55:5 126:7 continued 3:2 contract 67:25 68:7,23 69:19,23 69:25 71:3 control 33:15 controls 12:13 30:12 conversation 87:22
--	---	--	--

[copied - defenses]

Page 7

copied 10:13 90:5 copy 38:23 130:21 corporate 19:9 21:17 34:12 55:17 56:7 57:21 corporation 8:25 corporations 45:23,24 correct 20:21,21 47:16 69:16 70:8 72:13,19 114:11 correction 7:4 22:14 24:10 29:12 33:10,12 74:17 75:6 80:18 correctly 20:16 61:2 correll 2:14,17 correlllawgrou... 2:17 correspondence 99:9 coso 16:22 cost 61:14,22 62:21 64:13 65:10 73:14 135:14 costly 135:25 costs 128:15 134:19 couched 42:24 counsel 7:12 8:21 15:20,21,22	16:4,6,8,19 18:4 18:16 26:13 45:22 51:13 70:19 71:24 75:8 83:17 85:6 91:17 97:15 98:5 99:11 126:22 counselors 2:9 counterclaim 104:4 counterclaims 92:17 102:11 104:9 123:16 county 1:2 141:5 couple 30:13 32:5 51:9 course 7:4 22:14 23:11 24:10 27:11,13,19,25 29:12 33:9,12 34:21 40:5 41:6 43:4,11 48:23 74:17 75:6,23 80:17 81:6 114:10 court 1:2 22:6,7 27:6 61:22 65:11 72:2 90:25 91:5 92:16 133:24 137:12 cover 56:12 covered 5:15 52:11 78:14 84:8 95:4,11 98:24 109:24	covers 35:21 95:23 cplr 81:13,23 128:7 credibility 103:8 109:6 credible 127:12 criteria 53:23 cumbersome 136:2 cuomo 106:2 current 27:17 curtain 17:18 47:22 cut 14:10,16 128:12,12 d d.c. 100:24 105:20 dallas 2:21 59:16 damages 104:11 data 8:2 36:10 66:11,13 date 1:12 4:12 4:17 59:19 110:19 111:21 112:20,21,24 113:6,19 114:10 115:2 116:5,21 116:23,25 117:9 117:21 118:21 119:21,21 120:5 120:24,25 121:9 121:11 122:2,14 122:16,17 134:3 dates 110:5,11 110:17,17 112:8	118:19 120:10 122:24 day 15:12 47:8 62:13 141:20 de 74:7 deal 50:24 73:8 140:4 decades 27:15 december 95:7 decision 43:22 66:21 84:12 91:14 139:19 140:11 decisions 84:14 decks 23:22 32:13 deed 63:14 deemed 42:20 defeat 81:4 defective 90:8 defend 60:24 defendant 1:11 2:10,15,19 3:4,9 106:3 defendants 87:16,21 88:4 96:13 defense 7:12 16:2 18:16 20:6 22:15 26:5,10,13 26:16 48:18 104:22 105:22 106:20 117:4 defenses 9:12 24:5 88:10 101:19 102:12 102:15,16 103:16,20
---	--	---	--

[defenses - documents]

Page 8

104:14,15 107:8 123:12,13 deficient 124:2 defined 62:22 definitely 63:13 86:21 definition 50:21 degree 60:8 delay 64:7 deliberate 41:12 delighted 79:23 delve 92:22 demand 49:12 50:22 62:20 85:16 demanded 83:8 demands 82:5 82:13,20 demonstrate 19:3 denied 20:24 dense 117:14 denying 87:18 depends 78:21 depose 61:10 72:2 93:25 94:19 deposed 63:19 deposition 19:9 56:7,19 57:10 62:21 66:15,25 72:9 94:7 depositions 15:6 55:25 57:21 64:4,14 73:5 91:17 described 116:15	description 38:25 destroy 101:22 106:5 detail 38:17 136:22 details 59:17 139:17 determination 35:25 42:2 43:17 47:19,21 53:24 determinations 36:16,19 54:9 80:16 determine 19:17 40:6 43:5 45:17 53:3,4 116:7 135:8 determined 19:20 30:17 35:7 37:2,6 38:5 40:15 41:4 44:12 77:8 determines 17:18 45:9 developing 103:4 difference 93:25 different 9:3 27:23 41:10 78:9 91:19 94:17,19 104:2,7 105:25 119:8 123:16 133:2 dig 50:24 dinners 54:6	dire 41:11 directing 14:15 directors 54:24 disagree 83:24 86:12,14 132:8,9 disagrees 28:8 disclose 49:24 109:2,8 122:16 disclosed 39:2 50:2 108:20 109:12 123:9 disclosure 20:24 disconnect 44:24 48:5 50:7 116:2 discover 19:11 discoverable 43:25 discovered 37:24 discovery 1:16 19:5 22:9 32:23 36:15 38:6 46:6 55:24 66:16 78:10 95:3 121:21 124:24 discrete 76:23 discuss 10:10 126:3 discussed 39:12 discussion 25:7 69:8 discussions 25:9 disingenuous 85:24 dismiss 87:14,19 88:14 102:15 103:20 104:23 123:14	dismissed 92:16 102:11 123:12 disprove 24:5 dispute 131:14 134:9 disputed 134:10 distinction 10:4 10:9 25:11,15 46:18,23 48:12 131:9 district 101:12 division 128:8 130:4 135:12 doable 80:10 dock 132:20 doctrine 8:12 document 37:4 99:7 122:25 126:23 129:3 documentary 136:20 documents 7:24 8:17,19 9:7,14 9:16 11:7,8 12:15,22 13:24 14:20,22 15:3 20:12 22:20,22 37:5,6 62:12,25 63:17 64:2,19,20 67:10,12,22,25 68:7,24 69:3 70:5,11,14 71:18 73:22 75:5 76:11,24 77:10 80:9,14 82:4,17 82:25 85:4 86:2 91:24 94:3,20,21 95:23 96:4,6,14
--	--	---	--

[documents - entity]

Page 9

96:22 97:10,23 99:9,13 106:19 111:3 114:20 116:17,20 117:20,24 118:18 120:11 120:19 121:14 126:21 135:6,21 136:4 138:13 doing 7:15 15:7 21:15,15 29:19 30:7 32:18 45:12 49:25,25 54:4 73:14 77:21 96:20 138:2 dollars 38:3 don 13:9 16:16 18:4 39:20 door 27:23 draconian 27:8 drafting 107:22 draw 9:21 10:3 drawing 48:13 driven 92:19 duly 141:11 duplicates 10:18	easy 10:14 11:22 educate 98:11 effect 29:8 133:14 effective 79:8 effectively 73:15 103:15 121:4 effectiveness 23:19 effort 70:24 94:6 132:16 efforts 16:10 22:23 71:11 eisenberg 2:12 4:18 7:14,23 8:4 8:6,8,19 9:19,25 11:11,19 12:3 14:6,11 18:13 22:12,17,18 24:18 25:4,18,21 30:5 37:9,12 38:7,13 40:9 42:7,12 44:3,8 44:22 46:25 47:6 48:4,11 49:4,7,15,19 50:4 57:2,13,22 58:10,16,20,24 59:10,15 61:16 62:19,23 63:20 63:23 64:17 65:14,18 66:3 67:19 68:6,16 69:13,17 70:9 71:17 72:11,12 72:21,22 73:13 73:25 74:2,12,22 75:2,22,23 78:12	78:16,21 79:21 80:22 82:10 83:4 85:18,19 86:20 87:11 88:17,21 89:19 101:14,17 103:17,18 104:6 105:13,19 106:16 107:17 107:18 108:13 110:3,12 111:8 111:17,20 113:16,21 114:7 115:4,17,23 118:4,13 119:4,7 119:14,18,24 120:8,15,22 121:15 122:8 123:2,5,11 124:9 124:15 125:4,10 125:17,23 126:6 128:3,5 130:14 130:17 131:13 131:21,25 132:25 133:10 133:18,22 136:17 137:8 139:15,24 140:6 140:12 eisenberg's 4:11 either 11:22 28:6 39:15 43:19 69:25 election 15:18 electronic 115:6 electronically 130:24	elements 132:19 elicit 29:7 ellen 3:7 else's 138:3 elucidates 115:25 emily 2:8 employees 17:5 23:4 encompassed 39:5 encourage 63:8 enforcement 85:8 89:12 91:8 92:19 100:22 105:8,11 engage 26:17 98:15 136:3 engaged 135:24 enhanced 12:11 30:13 entities 34:3,3 entitled 15:14 22:3 39:25 40:19 42:5,9 44:16 46:3 52:2 52:22,24 53:7,18 64:6 77:4 94:24 101:15 103:6 104:19,21 106:18 111:2 113:10 117:6 118:13 124:11 124:23 129:16 130:7 137:25 138:8 139:11 entity 124:25 132:10,22,23
e			
e 2:2,2 3:2,2 117:22 118:20 120:3 141:2,2 earlier 82:8 85:13 early 86:4 91:13 ears 130:16 east 2:16			

[enumerates - finish]

Page 10

enumerates 40:22	57:20 60:12 77:14 90:3	explain 10:2 25:2 110:10 116:2	138:20
environment 33:16	excel 19:6,12	explaining 122:23 138:25	fairly 17:22 49:12 131:14
error 48:20 66:2 66:4	excels 130:25	explicit 18:24	fairness 15:13 32:22 86:8
esi 120:14 130:5 130:11,18,19,22 131:4,16,18 132:4,5 133:3,7 133:7,11,15 138:20	exception 92:3	extend 80:8	faith 116:6 119:20
esq 2:7,7,8,12,17 2:21 3:6,7,12,12 3:17,17	exceptions 96:7	extensive 79:6 79:11	fall 74:19 75:3
established 133:9	excess 17:4,14 17:19,21 18:5 19:17 20:5 21:5 29:6 35:4,25 36:18 37:11,17 41:23 42:21 43:15,20 44:13 45:18 47:18 49:13 51:19,24 53:5,16,21,22 54:18,23 60:25 82:6,21 134:3	extent 26:23 43:18 45:8 53:19 74:6 79:22 80:24 83:7 92:21 95:18 106:6 108:15,17 114:15 126:7 127:7 130:20 138:18	far 51:21 114:14
et 8:2	excessive 81:23	external 79:20	farber 3:17
evidence 16:20 20:6 28:9 29:7 29:11,23 48:24 54:7 101:25 104:21 135:7 136:21 137:16	excuse 97:4	eyes 27:21	farmer 3:20
executive 16:20	executive 45:20	f	fault 65:5
executives 12:13 50:15 54:24	executives 12:13 50:15 54:24	f 141:2	feature 9:9
existence 43:23	existence 43:23	face 23:23	february 112:7 129:5,8
existing 72:18	existing 72:18	faced 60:23	fee 128:2 129:11
expect 8:25 82:24	expect 8:25 82:24	facie 133:20	fees 4:19 129:25 132:11,14 138:9 139:11
expeditiously 65:3	expeditiously 65:3	facilitate 73:14	feld 3:9
expending 135:13	expending 135:13	fact 7:17 11:25 18:20 19:11 32:22 36:15 43:22 88:16 103:20 107:6	fifth 35:2
expense 59:20	expense 59:20	factfinder 26:24	fighting 139:4
expensive 54:5	expensive 54:5	fair 21:24 29:13 32:16 72:25 75:21 89:24 116:7 137:24	figure 36:4 37:20 139:9
expert 29:2,3 33:11 37:7 60:6	expert 29:2,3 33:11 37:7 60:6		figuring 40:3
experts 16:17 34:23	experts 16:17 34:23		filed 111:18
			filings 26:4,22
			financial 106:3
			find 13:17 21:8,9 26:24 34:15 56:24 63:17 65:23 70:7 125:6
			finding 104:16
			findings 25:6
			fine 116:13
			finish 110:15

[finished - great]

Page 11

finished 118:22	four 4:3 78:14	101:8,12,24	goes 63:14 71:14
finite 110:22	framework	106:9 113:2	100:13 115:5
firm 13:8 18:4	16:23	general's 4:16	118:21 129:8
23:15 33:4	frankly 13:19	5:2 6:3 15:4	going 9:16,24
70:19	18:11 20:16	63:18 92:12	10:16,19 20:2
first 10:3 21:21	36:14,23 71:12	102:22 105:7	22:13,19 24:9,12
40:10,11 44:17	95:5 103:8	111:23	24:25 25:5 27:3
45:6 51:12 74:4	fraud 15:21	generally 120:4	28:17,19,22
85:21 90:2	frazier 1:10 3:5	126:16,24	29:14,17 32:25
92:20 112:21	frenkel 5:18	generals 62:4	34:17 36:4,9
114:22 116:3,21	friendly 103:2	generate 55:20	37:22 42:21
119:8 134:11	front 12:25	generated 58:2	46:7,8 67:18
five 85:3 109:21	102:5 109:9	79:3 82:18	69:2 70:6 71:19
112:22 114:16	fronted 139:12	getting 19:12	73:7,22 74:24
flagged 75:4	full 22:24 86:18	55:23 62:12	77:5 78:2 81:3
fleming 3:4,6	110:18	71:5 135:20	84:11 88:7
flights 51:22	fully 35:5	gifts 34:5	93:17 100:2,19
floor 2:6	fundraising	give 6:21 10:20	105:6 108:18
focus 37:11	11:15	11:23 13:3,25	109:11 115:10
focused 99:2	further 30:14	36:9 45:23	121:24 137:9
focussing 89:16	34:20 78:9	61:17 75:11,12	gold 16:23
folder 120:19	141:14	78:12 84:12	good 33:16
121:9	future 31:5 45:9	120:10 124:19	63:13 75:10
followed 76:5	79:13	124:20 140:10	81:2 116:6
following 2:23	g	140:10	119:20 121:6,7
form 9:11 102:9	gage 3:4	given 30:3 35:8	121:25
formal 70:16	gagespencer.c...	96:23 141:13	gotten 32:13,14
forth 68:25	3:7	gives 136:21	gottwald 19:3
70:18 98:14,18	gates 16:15	giving 38:12	governing 54:14
99:10 103:3	gather 42:3	75:17 82:24	government
141:11	gathered 96:14	go 4:4 5:25 14:4	124:22
forward 10:6	general 1:4 2:3,5	27:22 40:5	governmental
28:9 29:11,17	4:9 33:14 50:12	43:14 63:2,8	106:11
30:25 33:19	52:13 53:11,14	66:14 71:23	governor 106:2
66:14 67:3	64:12 90:10	77:11,12 88:20	106:10
104:21	92:23 94:23	94:5 95:9 97:13	great 34:5 71:4
found 102:25	96:19 97:11	103:7 107:3	74:9 75:15
		138:6 139:16	

[green - inappropriately]

Page 12

green 63:4 grounds 74:23 83:15 101:21 138:21 group 2:14 guess 9:4 29:13 67:11 91:13 guidance 16:5 gump 3:9 guys 39:12	held 1:17 26:7 28:23 69:8 108:23 help 8:4 25:17 55:25 81:3 hereinbefore 141:11 hereunto 141:19 hey 71:2 high 105:5 hire 29:4 hired 45:22 historic 83:20 historical 69:18 88:2 hold 6:4 31:9 52:4,5 84:22 honor 5:6,20 6:7 8:8,9 9:20 12:24 13:16 14:13,18 15:2 17:15 18:11 20:9,15 22:18 23:8 25:22 29:15 30:6 31:21 33:9 35:10,23 36:13 37:13 38:7 50:5 51:8 53:10 56:10,13,23 58:25 59:21 61:21 62:10,24 69:14 70:13,21 71:22 72:24 74:2,15 75:3,24 76:12 77:9 78:17 79:21 80:23 83:5,22 85:20 86:21	89:7,19 91:22,25 93:12 94:18 96:2 97:8 98:6 100:4,5,12,25 101:17 102:21 103:13 105:14 106:25 109:15 109:25 110:13 111:9 114:7 115:23 118:5 122:9 124:10 126:15 128:6 131:13 133:10 133:22 134:13 134:16 135:9 140:7 hope 4:6 76:16 76:18 hoping 137:7 hotel 57:18 hotels 54:4 hour 66:25 72:8 102:7 123:22 hourly 132:17 137:2 hours 61:11,13 61:17 huge 93:24 hundred 33:5 47:23 116:16 hypothetical 50:19 hypothetically 45:15 80:25	identified 11:13 17:20 18:5 47:9 47:23 48:6 53:20 87:3 97:11 identify 20:4 90:4 98:16 105:21 113:22 115:11 116:21 136:4,8 identity 96:10 iii 107:13 108:20 implication 41:2 implicit 18:24 implicitly 12:9 implied 51:18 60:4 important 10:9 15:9 25:10,16 59:25 64:3 112:10,14 113:2 113:5 135:10 impose 16:13 66:7 impossible 124:5 impression 95:21 improper 42:3 42:11,14 56:19 92:20 106:8 improperly 73:19 inaccurate 26:21 39:6 inadvertently 47:10 inappropriately 6:18
h			
half 38:3 47:25 hand 141:20 handle 15:23 55:2 hands 101:20 104:14 happen 43:10 happened 56:8 happening 31:11 happens 81:2,5 happy 9:25 13:23 79:11 133:16 134:6 harassed 31:2 harassment 30:23 31:6 hard 48:9 130:20,20 hauer 3:9 hayley 3:12 heads 21:20 hear 22:16 49:22 heard 51:13 84:13 89:7 117:14 118:12 118:16			
		i	
		idea 39:5 53:11	

[inartfully - issues]

Page 13

inartfully 68:17	18:3,8 22:2	89:14 91:9 93:7	investigations
include 101:19	32:23 33:2,6	93:22	7:17 21:12 25:8
118:20	35:9 38:10	interested	41:22 80:15
includes 24:11	39:18 40:12,19	141:17	investigative
68:25 132:15	46:2 50:16 57:9	interesting	95:19 100:14
including 11:14	61:12 71:5	137:13	investigators
67:12	77:24 87:3	internal 7:17	98:15
incoming 61:11	92:10 93:3,6,11	64:19 96:22,24	investigatory
inconsistency	95:3,5,11 98:17	internally 96:19	95:2,25
108:2	99:6 101:16	internet 23:6	invocation 34:25
incorrect 26:4	105:9 110:23	interpret 100:3	invoices 134:5
103:18	113:11 117:3,7	interpreting	136:21
incurred 134:19	122:13 127:8	99:5	invoke 18:17
independant	129:17	interrogatory	involved 10:25
6:13 24:22 27:9	informed 86:23	109:17	11:10 92:11
independent	88:7 115:5	interview 85:9	110:17
51:2 89:2	infractions	96:25	involves 54:22
index 75:17	26:25	inventorying	irrelevance
130:5 140:16	initially 34:7	81:17	93:20 102:18
indicate 124:3	48:19	investigated	irrelevant 92:14
indicated 12:19	injunctive 16:13	17:3 33:25	93:9,19 105:12
71:25 99:15	17:8 20:7 33:13	34:18 35:3,6,19	issue 8:22 13:12
indicating 55:9	76:14,16,21 77:3	35:19 61:2	15:3,16 17:2
55:14 108:21	104:10	92:23	18:17,21,22
individual 87:16	inordinate 66:11	investigating	32:21 46:14,20
88:3 108:18	66:13	46:10 77:17	55:3 57:11 66:7
120:11 124:25	inquire 19:24	investigation	86:15,19 89:4,8
individuals	21:19,23 29:13	15:22 21:5	96:17,18 104:20
97:18	39:19	30:17 31:3,4	105:2 111:10,10
ineffective 23:21	inquiry 77:20	34:9,11,14 35:18	119:23 131:15
23:23	insert 105:14	44:14 54:3 71:6	133:2,12 134:12
informal 111:6	integral 11:3	92:12,18 94:25	issued 87:17
112:4,11	intend 48:23	96:5,15,21 100:7	issues 9:4 10:10
informants	interaction	106:12 110:19	15:15 16:6
85:11 96:12	100:8	111:7 112:2,4,12	18:21 20:23
109:23	interest 17:14	112:16 124:16	29:6 51:9 64:8
information 7:3	28:5 34:2 38:20	124:23 125:3	77:3 85:24 87:4
7:5,8 15:5,13	48:22 69:21		88:23 89:20

[issues - letters]

Page 14

102:13 110:4 119:8 items 5:15 78:14 78:23 iv 97:3,6,7	kent 2:17,17 kept 50:16 kind 11:19 28:15 39:21 63:14 77:18 131:2 139:20 knew 58:6 70:15 know 5:11,14 8:15,16 9:23 20:17 25:22 32:15 34:8,10 36:2,10,12 37:19 39:7,10,12,25 41:17 42:5,9 44:16 45:14 48:14 51:23 52:25 53:7 54:10,21 55:6,19 56:3,21,22 59:22 59:22,24 60:10 60:11,14,19,20 66:18 74:11 75:18 76:5 81:2 81:5 84:3 90:24 91:11 92:13 99:16 108:8 109:7 110:21 111:22 115:13 116:8 118:14 121:20,21 122:10 123:21 125:22 128:18 128:25 132:4,13 132:21 133:8 136:14,25 137:7 knowing 61:3 knowledge 39:18	knowledgeably 55:21 known 57:14 58:23 knows 40:20,25 43:3 50:9 52:13 133:11 l l 16:15 labels 8:16 lack 20:7 lacks 14:2 laid 130:12 lan 13:9 16:16 18:5 39:20 lane 2:20 language 88:2 lapierre 1:9 2:15 17:13 20:25 33:4 37:15 39:15 40:4 43:6 45:4,11 47:3 48:21 54:16,25 55:6 56:15 60:16 lapierre's 33:25 51:22 large 32:12 100:11 101:2 largely 7:2 92:2 95:8 105:20 larger 95:23 late 20:11 61:11 law 2:14,19 18:15 32:17 36:7 54:14 85:7 89:12 91:7	100:22 105:7,11 126:25 137:24 139:2,6 laws 22:25 26:3 26:20 lawsuit 15:17 lawyer 29:5 39:13 63:9 94:2 lawyers 9:2 12:7 13:5 22:21 26:8 28:20,24 30:3,16 31:13,13 45:15 136:23 lead 74:17 learn 73:6 learning 36:20 leaves 108:9 ledger 50:12 53:12,14 legal 9:3 11:3 45:24 legitimately 139:13 letitia 1:3 2:5 101:22 111:24 112:25 letter 4:9,11,12 4:17,23 6:3 12:19 28:16 32:10 33:3 73:17 76:11 80:7 84:10,19 89:11 107:9 125:9 126:4 letters 79:18,19 96:21 100:10,11 110:5
j			
james 1:4 2:5 101:22 111:24 112:25 january 122:5 jim 3:20 john 1:9 3:5 johnson 3:7 joined 87:5 88:23 jonathan 2:7 josh 3:10 joshua 1:10 journey 102:23 judge 16:12 23:10 27:12,20 87:17,24 103:15 104:5,25 123:7 123:11 july 36:15 86:4 jumped 14:17 jury 12:11 23:10 27:12,20 28:2 29:18 104:19			
k			
k 16:15 karyn 1:18 90:22 141:7,24 keep 115:7 138:12 keeping 76:17 123:8			

[level - master]

Page 15

level 23:4 137:21 139:17 lewis 13:10 16:16 lexington 2:11 liability 48:13,25 77:8,11,13 104:16 126:21 liable 26:8 31:9 liberally 78:22 liberty 2:6 lighted 63:4 likelihood 105:5 limited 96:7 99:25 limousine 54:5 list 90:14 110:5 listening 137:8 listing 109:17 lists 36:17 litigation 15:21 126:18 llp 3:4,9,14 location 59:19 locations 1:17 lodging 56:15 59:12,16 60:15 loegering 3:17 log 6:19 68:4 70:7,12 71:20 74:18 81:19 85:25 86:25 89:5,23 90:7 95:6 110:4 117:2 120:2,10 120:23 122:12 123:19,25 126:10,22	logs 84:21 long 19:10 63:4 96:16 135:24 look 5:9 6:21 19:16,18 35:21 36:25 37:5,7 43:18 47:22 53:9 93:3 94:5 101:18 120:22 120:23 125:4 looked 37:24 52:10,25 53:8 looking 45:16 114:3 looks 4:3,23 lost 100:18 lot 36:16 41:10 64:15 75:5 139:4 lovers 2:20 luxury 54:4	management 79:19 80:7 mark 2:21 marketing 6:16 marriage 141:16 master 1:16 4:1 4:2 5:1,12,23 6:1,20,24 7:1 8:1,14 9:1,13,22 10:1 11:1,6,18 12:1,2 13:1 14:1 14:3,23 15:1 16:1 17:1 18:1 19:1 20:1 21:1 22:1,10 23:1 24:1,8,24 25:1 25:13,19 26:1 27:1 28:1 29:1 29:16 30:1 31:1 31:19,22 32:1,2 32:6 33:1 34:1 35:1,12,15 36:1 36:8 37:1,8,14 38:1,11 39:1,23 40:1 41:1,20 42:1,8 43:1,13 44:1,6,20 45:1 46:1,17 47:1,4 47:13 48:1,8 49:1,2,5,8,16,20 50:1 51:1,4,11 52:1,4,7 53:1 54:1,20 55:1,13 56:1,5,25 57:1 57:17 58:1,8,14 58:17,22 59:1,6 60:1 61:1,5,8,24 62:1,2,8,14,17	63:1,16,21,24 64:1 65:1,7,16 65:19 66:1 67:1 67:6 68:1,9,21 69:1,9,15 70:1,4 71:1,16 72:1,4 72:14,20,25 73:1 73:11 74:1,9,13 74:20 75:1,14,20 75:25 76:1,10,25 77:1 78:1,11,19 79:1,15 80:1,12 81:1 82:1,2,16 83:1 84:1,2,6,18 85:1,2 86:1,11 87:1,9 88:1,15 88:18 89:1,9 90:1,12 91:1,3,6 91:11,23 92:1,7 92:25 93:1,13,16 94:1,10,16 95:1 95:15 96:1 97:1 97:2,5,12 98:1,3 98:10,20,25 99:1 99:4,18,21,24 100:1,17 101:1,3 101:9,13 102:1 103:1,12,14,25 104:1,24 105:1 105:15 106:1,7 106:21 107:1,3 107:12 108:1,11 108:14,22 109:1 109:19 110:1,2,9 110:14 111:1,16 111:19 112:1 113:1,12,17,23 114:1 115:1,3,18
	m		
	ma'am 31:23 mail 117:22 118:20 120:3 main 48:15 maintain 93:10 maintaining 42:4 majority 131:4 making 46:18,24 49:10 90:18 139:18 manageable 80:3 managed 104:17		

[master - needs]

Page 16

116:1 117:1,13 118:1,11,15 119:1,5,11,15,22 120:1,7,12,16 121:1,5,17 122:1 122:18 123:1,3,6 124:1,6,13,17 125:1,6,14,19,25 126:1,12 127:1,4 127:11,21,24 128:1,11 129:1 130:1,15 131:1,8 131:19,23 132:1 132:7 133:1,4,17 134:1,14 135:1,3 136:1,16 137:1 138:1 139:1,25 140:1,8,13 material 73:20 materials 6:11 6:14 24:11 97:24 129:4 matter 20:19 21:18 25:8 46:13 77:5 86:7 94:17 124:10 141:18 matters 6:6,10 6:17 15:12,16 18:18 22:7 83:18 mckenna 11:15 mean 31:17 40:3 47:6 61:19 65:14 66:3 94:21 110:10 111:5	means 9:23 15:6 measure 27:8 measures 24:13 31:5 mechanism 66:5 mechanisms 28:3 meeting 90:10 112:6 113:4 123:22 meetings 79:13 meets 78:25 members 102:24 membership 6:15 11:15 memoranda 85:9 memorandum 96:24 mentioned 123:20 merely 16:4 merit 14:2 58:5 102:18 met 102:2,5 methods 95:2,19 metlife 3:15 million 34:4 38:3 mind 46:16 106:15 108:9 112:6 113:20 114:6 115:7 123:8 minute 95:16 minutes 77:22 78:24 79:2,4 mischaracterizes 38:9	misconduct 34:19,21 mismanaged 48:17 misrepresentat... 83:25 missing 123:18 mistaken 22:11 113:24 misunderstand... 14:14 misunderstood 127:14 mitigated 107:7 mix 28:20 65:5 mixed 37:3 mmp 10:13 11:14 34:2 67:11 69:15 70:14,20,20 71:3 71:7,18 moment 6:21 14:5 money 38:2 64:16 104:10 135:13 139:13 monica 2:7 31:24 32:3 monies 56:4 monitor 16:12 24:22 27:10 28:21 51:2 76:15 81:4 89:3 morgan 13:9 16:16 motion 17:10,11 60:5 87:19 89:17 133:18	135:22 move 12:4 67:8 84:7 moved 87:14 88:13 102:15 103:19 104:23 123:14 multiple 33:10 mutual 86:7 mwerbner 2:22 mystery 50:11 n n 2:2 3:2 name 88:5 94:8 names 96:11 narrow 98:9,14 108:24 115:20 national 1:9 2:10 nature 8:17,18 necessary 18:14 42:14 77:25 133:13 134:4 necessitate 13:22 need 4:4 5:21 13:14 16:11,12 17:7 20:7 28:21 33:13 39:12 40:16 43:6 63:2 66:20 71:25 76:3 84:7 85:14 90:23 101:18 109:2 131:18 136:25 needed 30:18 needs 24:3 41:4 108:20 136:17 136:18 140:15
---	--	--	--

[negotiating - occurred]

Page 17

negotiating 67:13	notices 94:14 99:8	80:17 81:10 82:14,19 83:17 87:8,13,14 88:4 88:8 89:7 91:18 92:24 95:13 96:13 99:15 101:23 102:8 103:5 106:5,13 107:7 110:24 125:18 126:20 126:25 134:2,7 136:2,5,17 137:15 138:8,12 138:16 139:11	103:9 104:9,17 112:14,20 133:11 134:10 nyag's 102:7 nyna 3:21
negotiation 67:21 68:24 69:20,23,25	notify 45:11		o
negotiations 67:25 68:7 70:17 71:12	november 1:12 36:14 112:5 141:20		o 1:16
new 1:2,2,3,4,19 2:3,4,5,6,6,12,12 2:16,16 3:6,6,11 3:11,16,16 18:15 55:23 72:2 87:13 88:24 105:25 106:8 127:8 133:21 141:4,5,8	nra 4:11 6:14,15 7:4,11 8:20 9:6 9:8 11:2 12:7,8 12:10 13:5 14:21 15:5,14,18 15:25 16:7,25 17:16 18:25 19:7,25 20:22 21:3,25 22:22 23:2,8,12,15 24:6,19 25:24 29:4,5 30:8,18 31:12,17 32:18 32:25 33:10,16 33:18,24 34:3,18 34:21 35:10,16 37:17 39:2,22,25 41:6,11 43:4,8 43:17 45:3,8 47:8,9,19,21 48:6 51:13 52:25 53:19,25 54:24 55:17 60:2,17,18 62:3 62:13 63:4,5,7 63:15 64:17 65:12,15,22 66:21,22 67:18 67:20 70:24 71:25 73:19 75:7 76:4 77:14 78:2,25 79:8	nra's 6:8,12,19 15:8 16:18 19:8 21:16 22:21,23 26:5,10 30:15 31:14 82:4 84:19 85:16 87:19 92:6,9,17 102:24 104:11 126:4 128:23 135:16	oath 111:24 object 66:24 84:5,5 126:16 127:3 objecting 72:13 obligated 128:21 129:10,23,24 131:9 obligation 49:21 49:23 128:14 132:12 133:19 134:11 138:12 obligations 110:22 obtain 15:13 94:3,7 98:17 obtained 37:25 97:24 102:21 obtaining 33:7 obviously 55:3 84:11 109:8 140:9 occur 38:21 41:8 41:25 45:10 47:7 77:7 79:14 82:12 occurred 27:2 40:24 41:9,17,24 50:10 58:18,25 59:5 83:13,21
never 103:23 123:11 134:8 137:15			
newly 88:11			
nice 14:20			
non 10:16 66:8 67:21 68:12 128:10 130:11 133:7			
normal 15:11 23:11			
notary 1:18 141:7			
notation 60:13			
note 32:8 59:25 62:9 83:23 135:10			
notes 6:22			
notice 81:8 100:10			
		number 6:5 7:23 11:12 12:15 24:7 40:8 52:16 78:20 105:24 127:25 129:12 129:16,20 nyag 25:23,24 27:4 41:14 43:11 58:3 59:18 79:12 81:6,8,11,20 82:14 83:19 86:23 87:6,11,24 88:6 102:3	

[occurred - particular]

Page 18

112:23 occurring 45:25 occurs 31:7 82:15 october 4:8,17 4:22 5:10 73:17 84:10 103:21 odd 114:16 offer 9:9 48:24 office 2:3 4:16 5:2 15:4 38:10 48:16 52:12 63:18 66:12,14 100:24 102:2,4,5 102:7,14,22 103:9 106:10 officer 133:24 137:11 official 79:24 officially 111:25 oh 5:17 101:17 okay 6:20 7:20 11:18 12:2 14:3 14:25 19:14 26:9 31:19 56:25 61:7,24 67:6 68:9,21 73:16 74:12 82:2 84:15 88:15 90:24 100:19 101:13 110:2 115:19 118:15 120:8,15 121:12 125:23 127:24 130:14 134:14 139:23 once 116:14 137:15	ones 40:25 44:4 47:3,5,8 68:14 ongoing 21:14 onset 75:4 open 22:6,8 opens 68:13 opine 33:11 34:23 opined 16:18 opportunity 19:14 oppose 16:11 opposite 30:22 31:10 oral 1:15 4:1 5:1 6:1 7:1 8:1 9:1 10:1 11:1 12:1 13:1 14:1 15:1 16:1 17:1 18:1 19:1 20:1 21:1 22:1 23:1 24:1 25:1 26:1 27:1 28:1 29:1 30:1 31:1 32:1 33:1 34:1 35:1 36:1 37:1 38:1 39:1 40:1 41:1 42:1 43:1 44:1 45:1 46:1 47:1 48:1 49:1 50:1 51:1 52:1 53:1 54:1 55:1 56:1 57:1 58:1 59:1 60:1 61:1 62:1 63:1 64:1 65:1 66:1 67:1 68:1 69:1 70:1 71:1 72:1 73:1 74:1 75:1	76:1 77:1 78:1 79:1 80:1 81:1 82:1 83:1 84:1 85:1 86:1 87:1 87:23 88:1 89:1 90:1 91:1 92:1 93:1 94:1 95:1 96:1 97:1 98:1 99:1 100:1 101:1 102:1 103:1 104:1 105:1 106:1 107:1 108:1 109:1 110:1 111:1 112:1 113:1 114:1 115:1 116:1 117:1 118:1 119:1 120:1 121:1 122:1 123:1 124:1 125:1 126:1 127:1 128:1 129:1 130:1 131:1 132:1 133:1 134:1 135:1 136:1 137:1 138:1 139:1 140:1,18 orco 19:2 order 16:2 24:3 24:25 72:2,6 128:22 orders 4:22 organized 4:6 outcome 141:17 outlined 135:16 139:5	outset 14:19 outside 15:22 16:8,19,20 18:4 overall 112:15 overpayment 71:7 owed 17:19,22 17:23 18:6 19:19 40:5
			p
			p 2:2,2 3:2,2 p.m. 140:17 page 2:23 74:4,5 74:16 76:11 78:15 107:8 pages 73:16 120:21 paid 34:4 38:2,3 41:23 56:4 60:16 136:10,11 137:16 138:10 paper 130:20,21 papers 130:25 paradigm 26:12 paradox 78:20 paragraph 98:21 parameter 119:9 parameters 115:12,13,15 park 3:5,11,16 part 80:17 91:14 96:15 100:7 105:22 117:22 partial 17:25 particular 39:16 45:16 53:2 57:5 116:18

[parties - prevented]

Page 19

parties 1:17 10:7 10:25 11:12 75:8 86:2 90:4,6 96:8 127:19 130:9 141:15 partners 6:16 parts 40:9 party 25:25 26:18 66:5,8 77:18 94:2 128:9,10 134:21 135:12,15 party's 135:14 pay 61:18,19 62:3,21 65:9 66:19,23 67:5 132:4 134:11,18 payment 20:5 27:22 37:16 56:12,14 82:5,13 payments 17:4 41:13 45:10 48:19 50:14 82:6,12,20,21 peek 17:17 people 1:3 2:4 27:23 55:4 percent 33:5 47:24,25 period 36:25 111:5 113:15 114:4,6 permit 89:24 116:19 permitted 7:9 18:12 54:13 person 30:25 102:6 108:5	132:10 134:25 personal 42:17 103:5 perspective 17:8 pertain 9:2 peter 1:16 philip 102:23 phillips 1:9 2:20 3:15 34:25 54:19 phrase 108:25 picked 18:7 picking 52:3 64:13 68:10,19 69:5 96:18 pierce 13:6 15:11 28:13 place 12:13 24:20 27:22 28:3 30:2 45:7 90:2 134:12 placed 15:15 17:2 placing 13:12 plaintiff 1:5 2:4 20:13,18,24 33:7 50:3 plaintiff's 19:24 plaintiffs 91:18 planning 9:9 platform 131:3 pleaded 103:21 pleading 7:19 please 90:23 pleased 31:15 plus 114:20 point 7:22 28:6 48:3 50:8 75:21	76:21 80:13 83:2 88:8,22 89:22 90:16 91:24 93:9 98:4 100:20 118:6 123:17 125:11 125:15,15 133:9 points 78:15 policies 26:3,19 27:15,16 30:10 35:11 pop 19:5 position 30:15 41:7 46:15 52:9 72:23 80:21 91:20 92:3,5 105:3 post 118:19 132:20 potential 17:20 28:4 100:6 potentially 40:4 powell 1:10 3:10 35:16 practical 12:24 practice 17:10 17:11 60:5 135:22 136:2 preamble 33:19 preclude 104:16 precluded 15:7 23:9 43:8 45:12 71:5 86:8 101:20 predating 111:3 predominantly 130:19	prejudice 46:5 prejudiced 108:13 prejudicing 32:20 preparation 8:13 24:2 prepare 19:16 prepared 19:14 23:17 60:14 79:4 preparing 139:17 prescheduled 123:23 present 3:20 75:9 81:7 presentation 23:16 79:24 presentations 24:3 79:18 presented 55:16 129:17 137:15 137:24 presenting 100:2 139:16 presents 80:6 preservation 99:8 100:9 president 21:21 presumptively 132:3 presupposes 44:10 pretty 19:10 prevent 31:5 prevented 33:6
---	---	---	---

[previously - quite]

Page 20

<p>previously 104:8 prima 133:20 primarily 54:16 principles 27:21 prior 70:15 111:5 privilege 4:14 6:9,19 7:16 8:12 8:18 13:7 15:8 15:11 28:13 32:19 35:20 64:21 69:21 73:20 74:7 89:13,14 90:19 91:8,9 93:8,23 95:22 105:8 128:23 130:8 135:14,18 privileged 7:5,8 8:10 10:16,19,24 11:25 12:16,23 18:18 21:18,22 22:2,20 23:14,25 25:7,7,9 28:17 33:2 34:15 35:9 45:21 46:13 49:18 54:8 67:21 68:4,12,14 70:7,23 71:20 74:18,23 81:15 81:19 83:15,16 84:21 85:5,25 86:25 89:5 93:11 94:22 95:6,8 100:16 113:7 117:2,10 117:12 120:2,5,9 120:23 122:12</p>	<p>123:19,25 136:4 138:19 privileges 12:9 31:18 81:10,13 89:16,25 91:15 94:24 95:4,12 103:11 113:9 probably 64:6 probe 37:23 problem 80:11 91:2 105:23 119:6 problematic 47:10 78:5 problems 119:12 119:16 procedures 30:2 30:11 proceeding 77:7 process 40:6 110:7 processes 12:11 24:20 28:7 79:9 procure 133:16 produce 9:17 63:9 64:23 66:12 67:18,20 82:14 produced 63:6 70:2,3 96:6 97:23 98:2 99:12,14 producing 127:17 product 8:12 production 20:11 93:6 128:16 137:18</p>	<p>program 60:9 programmer 115:8 promptly 63:10 130:21 proof 16:10 prospective 76:13 protect 21:25 95:24 128:23 135:13 protected 32:23 103:10 113:8 protections 81:12 protocols 76:4 protracted 135:24 prove 24:4 77:4 104:17,22 132:5 provide 13:23 69:2 74:7 136:20,23 provided 59:18 82:22 110:16 129:5 provides 40:13 providing 11:2 68:4 73:23 81:19 112:18 provision 138:17 public 1:18 93:7 93:22 141:7 pull 33:3 purely 75:7 purpose 19:21 37:2,4 54:7</p>	<p>purposes 42:21 pursuant 8:11 66:6 push 113:18 put 12:25 18:20 20:16 28:9 29:10,25 32:21 71:20 72:17 104:21 109:11 114:23 122:14 puts 10:5 33:18 132:22 putting 29:17 46:12,19,20</p> <tr> <td colspan="4" style="text-align: center;">q</td></tr> <tr> <td colspan="4"> <p>quarrels 118:24 question 7:20 14:15 34:24 44:10,15,19 45:14 50:6 56:16 67:17 93:18 115:25 128:13 129:22 131:20,24 134:22 questioned 49:13 questioning 109:5 116:4 questions 36:22 36:24 57:7 quickly 55:11 73:7 quite 56:18 79:6 80:2 117:3</p> </td></tr>	q				<p>quarrels 118:24 question 7:20 14:15 34:24 44:10,15,19 45:14 50:6 56:16 67:17 93:18 115:25 128:13 129:22 131:20,24 134:22 questioned 49:13 questioning 109:5 116:4 questions 36:22 36:24 57:7 quickly 55:11 73:7 quite 56:18 79:6 80:2 117:3</p>			
q											
<p>quarrels 118:24 question 7:20 14:15 34:24 44:10,15,19 45:14 50:6 56:16 67:17 93:18 115:25 128:13 129:22 131:20,24 134:22 questioned 49:13 questioning 109:5 116:4 questions 36:22 36:24 57:7 quickly 55:11 73:7 quite 56:18 79:6 80:2 117:3</p>											

[r - rep]

Page 21

r	reassessment	reforming 16:14	relating 4:20 6:6
r 2:2 3:2 141:2	12:21	refused 17:16	7:3 11:8 18:3
raise 102:12	rebecca 3:17	22:8	77:3
raised 86:3	rebut 48:25	regard 6:10	relation 6:12,15
87:20 131:16	rebuttal 108:23	10:12 17:15	relationship
133:12 136:7	109:4	33:9 74:3 96:20	67:10
range 116:24	receipt 82:6,20	114:8 133:23	relevance 23:17
117:2 120:25,25	receipts 82:11	135:17	107:6
121:10 122:2	receive 51:16	regarding 67:10	relevant 92:22
rapport 103:5	received 17:4	70:18 71:6	126:21
rate 132:17	51:14 52:14	92:10	reliance 16:18
rates 137:2	56:6 127:8	regulations	26:12
raw 8:2 36:9	recess 76:8	22:25	relief 16:13 17:8
real 115:2 117:8	84:16,24	regulator 31:14	20:8,21 27:3
122:16,17,24	recipients	regulatory 26:21	33:14 48:14
reality 44:25	127:19	reimbursable	76:14,16,21 77:3
realize 50:7,7	recognize 64:5	137:22	86:5,9 104:10
64:24	127:6 130:6	reimburse 37:17	reluctant 61:18
realized 63:6	record 13:19	128:14,21	rely 9:10 20:22
really 10:8 18:8	69:6,7 141:12	129:24	22:13,20 32:25
25:10 47:19	records 57:25	reimbursed	107:21
55:11 89:24	79:23 128:10	134:2,8 138:2	relying 15:25
96:18 114:16	recurrence 78:3	139:12	16:15 33:5
124:14	recusal 28:2	reimbursement	remained 95:7
realtime 81:16	redact 136:3	4:20 45:4 51:16	remains 123:9
reason 39:19	refer 28:17 80:5	132:24 138:9	remedial 31:5
79:7 95:9,10	reference 7:18	reject 106:24	remedy 46:21
reasonable 29:4	25:6 29:2	122:21	77:6,12 78:8
31:8 128:15	referring 47:2	relate 12:16	remember 59:11
132:14,16,18	88:4	22:23 75:6 89:4	59:11 115:10
134:23 135:8	reflect 22:21	related 23:25	123:7,7
136:8,12 139:10	124:3	25:25 26:18	remind 102:20
reasonably	reflected 87:23	58:2 71:18	remotely 1:17
134:19	reflecting 80:14	77:18 80:9	rendered 11:4
reasons 42:17	82:4,19	83:17 91:15	renegotiated
122:22	reform 16:10,24	141:15	71:3
reasserted	20:6 71:11	relates 130:5	rep 19:9 21:17
123:14			55:17 56:7

[repaid - saber]

Page 22

repaid 17:14 21:2,6 35:5 38:18 39:7,9,15 40:14 41:2,3,5 41:18 42:18 43:2,6 44:5,12 45:20 47:3,11 48:22 50:21,23 53:20 57:24 60:18,20,22 61:3 83:8 repay 40:16 43:7 61:14 repayment 17:3 37:19 40:11 48:24 49:12 51:14 53:21 56:3 58:21,25 83:11,12,20 135:2 repayments 12:12 40:18 41:8,16 43:9 repeatedly 35:3 77:15 report 5:18 reporter 61:22 65:11 90:25 91:5 reports 29:3 33:11 60:6 77:22 78:4,24 79:17 represent 66:21 representation 107:19 representations 33:17	representative 13:3 34:13 57:21 75:12,15 represented 133:25 request 61:10 72:8 80:5 132:14 137:14 137:19 requested 70:10 70:14 requests 120:14 121:21 require 78:9 126:19 139:18 required 51:3 81:22 126:14,24 129:18 132:4 137:5 requires 32:22 117:20 reserve 108:7 residual 107:24 resisting 62:20 72:7 93:5 98:4,8 98:13 respect 4:14 5:3 29:22 35:16 40:2,10 55:7 68:5,23 69:11 70:5 72:6 76:4 79:12 82:17 84:20 90:19 91:16 113:14 115:15 121:19 126:4 137:20 138:20,21	respectfully 132:8,8 response 73:5 85:15 86:16,18 121:20,22 responses 4:10 4:12 120:13 responsibility 134:18 rest 10:21 restitution 88:3 result 30:2 results 22:4 37:25 retained 16:8 retainer 138:15 retains 81:12 retention 79:18 reveal 81:14 122:12 revealed 18:2 96:5,9 review 9:18 13:22 22:14 60:9 73:24 74:8 74:25 reviewed 130:22 revision 113:25 rid 87:25 rifle 1:9 2:10 right 5:19,24 6:25 11:7 14:4 24:15,17 25:3,4 31:20 32:7 34:6 35:2,13,23 36:3 42:11,12 44:21 44:22 45:3,25 48:11 49:15	57:22 59:6 62:15 65:18 68:16 69:13 70:8 71:21 72:10,15,21 73:24 80:20,22 82:10 83:3 84:8 89:10,18 93:15 93:15 97:20 99:3 105:4 107:15,16 108:7 109:20 111:16 111:19 115:17 119:13,17,18,21 119:24 120:6 121:15 122:19 124:20 126:2 130:17 135:5 rights 104:12 ring 7:19 road 55:7 robbed 19:13 rosarium 26:14 round 129:12,19 rsm 10:13 11:17 rule 128:8 131:6 132:3 ruled 103:23 rules 130:4 135:12 ruling 87:17 94:5 run 116:14 s s 2:2 3:2 saber 19:3
---	---	--	--

[safe - sherwood]

Page 23

safe 34:19	searches 115:6,6	87:18 111:13,20	24:1,8,24 25:1
salaries 62:3	122:15 130:11	112:19 114:9,17	25:13,19 26:1
samantha 3:12	second 4:17	114:22,25 116:4	27:1 28:1 29:1
sample 13:4	21:21 40:17	117:21,24 118:8	29:16 30:1 31:1
75:19	44:17 79:17	118:19,25	31:19,22 32:1,2
samples 75:13	86:10 90:21	119:10 121:3,10	32:6 33:1 34:1
75:15	120:24 131:7	122:2,4	35:1,12,15 36:1
sanction 66:7	section 73:18	sequentially 9:4	36:8 37:1,8,14
sargeant 3:21	see 5:17 10:22	series 38:14	38:1,11 39:1,23
saw 101:25	11:24 13:13	served 95:6	40:1 41:1,20
saying 12:5 16:7	23:14 47:22	services 11:2	42:1,8 43:1,13
16:11 25:12	55:19 74:14	54:5 106:3	44:1,6,20 45:1
30:8 38:2 44:4,7	76:7 84:22	set 45:16 73:4	46:1,17 47:1,4
49:17,22 50:25	127:25	141:11,20	47:13 48:1,8
51:7 56:19	seek 20:4 94:20	seth 3:17	49:1,2,5,8,16,20
70:24 76:19	138:8	sets 4:3	50:1 51:1,4,11
86:13 93:2,2	seeking 4:19	setting 16:21	52:1,4,7 53:1
115:24 116:12	15:10,12 76:14	severely 38:8	54:1,20 55:1,13
118:5,17 122:23	77:11 86:9 88:2	sexual 30:23	56:1,5,25 57:1
124:7	89:2 91:18 94:3	sexually 31:2	57:17 58:1,8,14
says 7:14 29:3	105:9 129:2,12	sfarber 3:18	58:17,22 59:1,6
31:7 37:18	132:11,13,23	shape 9:11	60:1 61:1,5,8,24
40:23 43:7	135:2	share 75:25	62:1,2,8,14,17
61:16 85:3	seeks 27:4 33:15	131:2	63:1,16,21,24
121:8 124:18,21	86:5	shared 131:3	64:1 65:1,7,16
130:11 137:25	seen 130:10	sheehan 94:8	65:19 66:1 67:1
scanned 130:21	135:6 138:5	102:4	67:6 68:1,9,21
schedule 50:20	selecting 75:18	sheets 32:14	69:1,9,15 70:1,4
schedules 50:18	senior 23:4	sherwood 1:16	71:1,16 72:1,4
scheduling	sense 78:12	4:1,2 5:1,23 6:1	72:14,20,25 73:1
100:11	85:15 108:24	6:20,24 7:1 8:1	73:11 74:1,9,13
scope 90:17	139:6	8:14 9:1,13,22	74:20 75:1,14,20
search 113:25	sent 96:21 120:3	10:1 11:1,6,18	75:25 76:1,10,25
115:11 116:5,14	separate 12:4	12:1,2 13:1 14:1	77:1 78:1,11,19
117:19 118:2,24	separately 10:11	14:3,23 15:1	79:1,15 80:1,12
119:9 130:2	september 19:9	16:1 17:1 18:1	81:1 82:1,2,16
138:19	38:17 57:24	19:1 20:1 21:1	83:1 84:1,2,6,18
	58:19 59:2	22:1,10 23:1	85:1,2 86:1,11

[sherwood - special]

Page 24

87:1,9 88:1,15	136:1,16 137:1	single 101:25	6:1,20,24 7:1
88:18 89:1,9	138:1 139:1,25	132:21	8:1,14 9:1,13,22
90:1,12 91:1,3,6	140:1,8,13	sit 39:3 139:9	10:1 11:1,6,18
91:11,23 92:1,7	shield 6:9 32:20	sitting 45:2	12:1,2 13:1 14:1
92:25 93:1,13,16	46:4 71:15	situation 63:15	14:3,23 15:1
94:1,10,16 95:1	74:19 95:3	64:11 122:6	16:1 17:1 18:1
95:15 96:1 97:1	short 76:8 84:16	six 49:3,10 50:19	19:1 20:1 21:1
97:2,5,12 98:1,3	84:24	94:14	22:1,10 23:1
98:10,20,25 99:1	shortly 102:3	slide 23:21 32:13	24:1,8,24 25:1
99:4,18,21,24	shot 38:12	slightly 44:23	25:13,19 26:1
100:1,17 101:1,3	show 17:7	small 97:9	27:1 28:1 29:1
101:9,13 102:1	125:16,19,22	sme 2:13	29:16 30:1 31:1
103:1,12,14,25	132:12	software 116:19	31:19,22 32:1,2
104:1,24 105:1	showing 13:21	somebody 69:5	32:6 33:1 34:1
105:15 106:1,7	83:9,11 95:14	94:11 138:2	35:1,12,15 36:1
106:21 107:1,3	127:2 129:15	soon 57:25	36:8 37:1,8,14
107:12 108:1,11	132:15,17	sooner 109:13	38:1,11 39:1,23
108:14,22 109:1	shown 127:2	sorry 8:7 14:12	40:1 41:1,20
109:19 110:1,2,9	shows 57:20	49:7 55:12 69:4	42:1,8 43:1,13
110:14 111:1,16	117:23 129:6	72:24 88:19	44:1,6,20 45:1
111:19 112:1	shred 101:25	100:5 107:2	46:1,17 47:1,4
113:1,12,17,23	shroud 93:17	117:13 119:14	47:13 48:1,8
114:1 115:1,3,18	side 29:20 42:23	127:14	49:1,2,5,8,16,20
116:1 117:1,13	64:8,9 126:18	sort 5:7 12:21	50:1 51:1,4,11
118:1,11,15,17	sides 126:14	14:10 15:11	52:1,4,7 53:1
119:1,5,11,15,22	139:9,19	26:11 35:21	54:1,20 55:1,13
120:1,7,12,16	signature 141:23	48:5 77:22 78:5	56:1,5,25 57:1
121:1,5,17 122:1	significance 89:6	109:7 116:20	57:17 58:1,8,14
122:18 123:1,3,6	significant 117:4	sorted 114:21	58:17,22 59:1,6
124:1,6,13,17	simple 42:18	sought 7:25 11:4	60:1 61:1,5,8,24
125:1,6,14,19,25	101:18	16:5 17:3 93:4	62:1,2,8,14,17
126:1,12 127:1,4	simply 17:24	102:21 110:23	63:1,16,21,24
127:11,21,24	18:14 19:23	sounds 57:6	64:1 65:1,7,16
128:1,11 129:1	32:24 38:2	speak 35:21	65:19 66:1 67:1
130:1,15 131:1,8	52:17 54:13	72:23 77:13	67:6 68:1,9,21
131:19,23 132:1	55:2 93:9 94:3	102:8 112:13	69:1,9,15 70:1,4
132:7 133:1,4,17	112:17	special 1:15 4:1	71:1,16 72:1,4
134:1,14 135:1,3		4:2 5:1,12,23	72:14,20,25 73:1

[special - sure]

Page 25

73:11 74:1,9,13	125:1,6,14,19,25	started 14:9 40:2	submitted 74:24
74:20 75:1,14,20	126:1,12 127:1,4	110:18 112:4	subpoena 4:21
75:25 76:1,10,25	127:11,21,24	115:7 116:9	66:10 72:18
77:1 78:1,11,19	128:1,11 129:1	118:7 122:11	73:8 100:10
79:1,15 80:1,12	130:1,15 131:1,8	starting 119:9	127:18 134:20
81:1 82:1,2,16	131:19,23 132:1	starts 121:3	subpoenas 99:8
83:1 84:1,2,6,18	132:7 133:1,4,17	state 1:2,3,4,19	128:9
85:1,2 86:1,11	134:1,14 135:1,3	2:3,4,5 27:18	subsequent
87:1,9 88:1,15	136:1,16 137:1	77:25 106:2	40:17 78:8
88:18 89:1,9	138:1 139:1,25	141:4,8	substantial
90:1,12 91:1,3,6	140:1,8	stated 51:17	37:16
91:11,23 92:1,7	specific 112:8	statement 38:8	substantive
92:25 93:1,13,16	117:8 125:12	statements 26:21	99:13
94:1,10,16 95:1	specifically 32:9	states 136:15	sudden 112:9
95:15 96:1 97:1	134:17	stating 52:9	suddenly 19:5
97:2,5,12 98:1,3	specify 112:20	status 77:25	sued 81:11
98:10,20,25 99:1	116:25	step 61:9	sufficiency 18:10
99:4,18,21,24	spencer 3:4	stern 2:8	sufficient 17:24
100:1,17 101:1,3	spend 139:4	stop 35:13	24:16,21 25:2
101:9,13 102:1	spending 138:24	straightforward	27:5 29:22
103:1,12,14,25	spoke 96:10	36:24	30:20 33:12
104:1,24 105:1	99:16 100:6	strauss 3:9	137:19
105:15 106:1,7	spreadsheet	strawn 3:14	suggest 39:4
106:21 107:1,3	19:15 36:17	street 2:6,16	73:12
107:12 108:1,11	40:13 55:16,17	strenuously	suit 104:10
108:14,22 109:1	spreadsheets	83:23 84:5	suite 2:20
109:19 110:1,2,9	19:6,12 38:15	stress 15:2	summarizing
110:14 111:1,16	55:23 56:6 83:9	stronger 92:4	80:15
111:19 112:1	spring 91:13	structurally	summer 91:13
113:1,12,17,23	ss 141:4	104:6	support 135:7
114:1 115:1,3,18	stage 46:22	structured 89:23	supports 107:10
116:1 117:1,13	standard 16:23	struggling 48:9	supposed 87:6
118:1,11,15	136:22 137:4	stuff 136:22	120:3
119:1,5,11,15,22	start 85:17	137:5	supreme 1:2
120:1,7,12,16	112:19 116:5	subject 25:8	sure 6:23 21:2
121:1,5,17 122:1	117:8 118:19	46:12 77:5 81:9	35:14 44:9 52:6
122:18 123:1,3,6	122:17	submit 133:14	70:9,12 71:24
124:1,6,13,17		134:5	76:6 85:14

[sure - today]

Page 26

90:15 98:12 105:18 surprise 138:14 surprised 92:8 suspicious 52:22 sustain 105:6 svetlana 2:12 swarth 95:23 sword 6:9 7:8 32:20 46:4 71:15 74:19 sworn 141:11 symmetry 86:7	tease 32:9 technical 26:25 technique 100:15 tell 9:24 12:10 27:11,14,20,25 36:3 43:11 46:7 53:15 77:25 105:4,18 119:3 121:19 128:3,17 telling 23:9 44:2 60:7 118:22 137:6 tend 79:5 term 52:21,21 terms 42:24 105:10 114:2 territory 109:4 test 18:9 19:25 33:21,22 36:5 54:11 56:11 112:10 testify 34:17 55:21 67:4 testimony 29:8 83:12 90:9 109:6 111:23 141:13 texas 2:21 texting 103:3 thank 50:4 68:19 73:10 79:15 85:19 91:5 122:20 125:24 139:24 140:6,12 thing 14:18 33:15 35:10 55:11 77:19,23	78:6 81:2 109:7 121:6,7,25 130:3 things 12:14,17 32:5 50:20 78:8 83:7 think 10:8,9,17 10:22 13:20 14:17 25:10 29:9 30:21 31:14,15 39:8 40:18 42:15 43:8 44:23,24 45:2,13 48:4 58:4 61:17 62:7 68:17 75:10,21 77:10 79:7 80:2 80:4,24 81:3 84:8 85:12 86:6 89:4,21 92:2 94:4 96:23 100:18 101:15 106:8 107:18,24 109:24 111:2 114:9,13,19 115:19 118:6 126:6,9,11,13 129:4,6 131:21 131:25 135:19 138:20,25 139:3 140:2 thinks 23:20 28:10 third 10:7,25 11:12 75:8 85:25 90:4 130:8,9 134:21 135:12	thoroughness 110:6 thought 14:15 22:11,12 68:13 72:5 103:15 thousand 114:20 116:16 thousands 12:22 threatened 101:22 three 5:25 61:11 61:13,17 65:21 66:25 72:8,8 74:3 78:25 116:16 threshold 13:21 85:21 threw 103:16 thrown 104:4,5 time 1:13 36:25 41:15,25 45:23 57:9 63:4 64:6 75:11 90:22 96:17 111:5 113:14 114:4,5 132:16 138:25 139:4 timeframe 111:12 115:16 115:20,21 timeliness 85:22 86:15,17,18 times 79:2 title 101:5 tmclish 3:13 today 5:8,16,22 10:20 84:14 91:20
t			
t 141:2,2 table 5:5 take 5:9 69:10 82:16 86:15 90:23 115:8 116:10 taken 41:7 46:15 76:9 80:16 84:17,25 114:19 takes 31:4 74:10 74:14 talk 14:11 49:6 67:14 90:20 talked 47:5 80:19 82:8 talking 51:21 54:15,21 57:18 59:8 78:13 90:10 93:18 95:17,18 97:9 targeted 27:3 tax 29:5 37:6 39:13,20			

[told - various]

Page 27

told 21:16,19 26:8 28:24 34:7 54:8,9 105:16 107:22 tomorrow 80:25 tone 16:21 top 16:22 60:8 touted 20:3 tower 3:10 town 90:11 102:6 112:7,13 113:4 123:2,4,18 124:4,7 125:12 traditional 120:2 trained 23:7 training 12:12 23:3,16,19,20 24:11 27:13 32:11,15 trance 53:2 transaction 38:19,21,22 39:16 43:16 57:19 58:9,18 59:3,4,8 transactions 26:2,18 40:14,21 40:23 41:10,24 42:3,11 43:14,19 43:21,24 44:11 45:5,17 46:19,20 47:2,7,18,24 48:2,6 49:3,11 49:14,17 50:9,19 51:15,20,25 52:14,15,20 53:3 57:15 58:7	77:18 82:7 transcript 140:14 transpired 40:21 tremendous 12:18 96:4 trial 8:13 9:9,10 9:10 20:19 28:18 30:16 41:15 43:12 46:8,14,16,21 76:17 77:6 81:8 97:19 107:21 trickling 66:16 tried 56:16 63:7 117:15 triggered 63:2 trouble 139:16 true 32:24 53:17 59:13 60:11 130:3,11 141:12 trust 48:9 truth 54:11 122:9 try 67:3 106:5 116:2 trying 15:4 25:14 28:12 45:17 56:20 65:23 90:17 93:25 98:16 119:3 121:19 turn 10:16,19 11:22 64:2 79:11,24 81:6 turned 58:3 twice 135:23	two 11:16 27:23 40:9 43:23 62:25 74:21 87:15 89:15 96:11 108:3 119:7 139:19 type 38:22 types 43:24 typical 120:13 u um 97:21 unable 33:20,22 unauthorized 25:25 26:17 unchanged 95:8 unclean 101:19 undercuts 28:10 underlying 57:14 58:7,9 59:2,4 understand 7:22 15:10 17:17 25:14,20 44:9 46:11 47:14 48:9 51:6 62:11 63:25 67:7,15,17 67:23 70:22 90:17 95:20 105:3 106:22 110:25 117:16 118:3,10 121:18 127:5 understanding 18:9 93:14 107:15 117:17 117:18 119:2	understood 70:16 undertaking 81:14,16,24 underway 112:12 unduly 126:23 unfairness 46:5 58:6 unfortunately 31:6 universe 17:20 unnecessary 135:25 unpunished 63:14 unratified 26:17 unwarranted 39:14 update 110:22 126:10 updates 76:22 updating 126:13 126:16,19 127:17 urge 139:8 use 29:18 52:20 53:23 55:5 75:10 106:19 usual 8:23 v v 98:21 99:5 111:12 value 34:5 variety 9:3 various 8:21 13:5 29:18,20
---	---	---	--

[various - zef]

Page 28

30:12 50:13,15 79:3 vendor 70:18 71:10 verse 44:17 version 140:15 versus 19:3 48:14 94:20 133:3 viability 103:24 vice 21:21 videographer 3:21 61:23 65:10 view 39:24 65:8 65:8,24 105:7 violate 26:19 violations 26:2 26:25 104:11 volume 78:13 voracity 112:10	61:13,14 73:7 74:11 81:7 91:24 105:18 113:13,18,22 120:20,21 122:9 122:10 132:5 wanted 14:11 wants 12:10 13:6 17:6 20:18 21:25 23:13 67:2 99:16 warranted 24:23 27:10 waterfront 94:15 way 4:5 9:11 19:6 33:2 56:23 61:14,20 63:17 64:15 70:7 89:23 104:15 138:6 141:17 wayne 1:9 2:15 17:13 33:4 54:16,25 56:15 wayne's 111:23 we've 32:13 134:13 wednesday 9:17 10:21 weekend 10:15 went 10:14 88:9 werbner 2:19,21 werbnerlaw.com 2:22 wfleming 3:7 whatsoever 102:19	whereof 141:19 whistleblower 5:18 26:3,19 william 3:6 wilson 1:9 2:20 3:15 wind 116:15 winston 3:14 winston.com 3:18 wish 50:25 withheld 6:11,14 6:18 7:21 8:2,5 9:15 14:21 73:19 74:23 86:3 96:12 117:10 withholding 8:9 68:2,8 70:6 71:18 83:15 witness 96:25 109:10 124:8 127:9 141:10,13 141:19 witnesses 28:10 36:23 85:6 96:10 97:15,16 97:17,19 98:17 99:11,13,25 100:6,9 103:8 108:19,24 109:17 126:8 127:18 woefully 124:2 word 108:25 116:10 words 44:3 109:3 117:15	work 8:12 15:23 16:2 128:22 130:25 138:3,11 works 4:7 130:24 worse 122:6 written 68:18 wrong 26:6,7 28:23 47:17 64:18 83:5 106:14 114:11 wrote 68:11,12
			x
			x 1:3,11 30:17,19 120:18
			y
			y 30:18,19 yeah 58:10 88:21 127:10 year 79:2 86:4 103:22 years 8:22 30:13 53:12,13 york 1:2,2,3,4,19 2:3,4,5,6,6,12,12 2:16,16 3:6,6,11 3:11,16,16 18:15 105:25 106:8 141:4,5,8
			z
			z 30:18,19 zef 3:21
w			
w 2:20 wait 19:4 37:14 95:15 waits 64:12 waived 12:9 31:17 waiver 10:4 13:18,21 17:25 18:17,23 28:15 walk 55:18 want 5:14 8:16 15:2 18:12 20:17 27:11,13 27:19,25 37:20 42:23 44:8			