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

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

MEMORANDUM OF LAW IN SUPPORT OF THE NRA'S MOTION FOR REVIEW OF THE SPECIAL MASTERS DECISION DATED DECEMBER 27, 2022

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

COUNSEL FOR DEFENDANT
THE NATIONAL RIFLE ASSOCIATION OF AMERICA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

PRELIMINARY STATEMENT

The NRA seeks review of an ambiguous, sweeping ruling by the Special Master dated December 27, 2022 (the "**Ruling**"). Read narrowly, the Ruling orders production of thousands of privileged documents (the "**NYAG-Sought Population**") based on purported "selective disclosure," even though the Special Master never determined whether the selective-disclosure waiver standard was met. Read broadly, the Ruling orders the NRA to turn over ***all*** of its privileged documents (the "**Entire Population**"), including communications with litigation counsel during this litigation, none of which were sought in the underlying motion to compel. Whether it is read to cover the NYAG-Sought Population or the Entire Population, the Ruling lacks evidentiary support and is contrary to law. It should be reversed.

BACKGROUND

The events underlying the Ruling are summarized in the attached Affirmation of Noah Peters (the "**Aff.**") submitted herewith. In sum, both parties served broad categorical privilege logs (the NRA's log, the **"Categorical Privilege Log**").[1] The parties met and conferred about alleged deficiencies in each other's logs, and the NRA served two supplemental logs providing additional detail about subcategories of documents identified by the NYAG.[2]

Months elapsed, and discovery closed. There were no remaining disputes about the NRA's privilege claims broadly, but the NYAG continued to raise issues regarding a purported

[1] The NRA's Categorical Privilege Log encompassed roughly 84,000 documents. As described at Aff. ¶¶ 8-34, in response to queries from the NYAG, the NRA also served two supplemental privilege logs, including one that gave additional detail on a subset of roughly 47,000 documents returned by NYAG-specified Boolean keywords (this smaller log, the "**July Supplemental Categorical Log**").

[2] *See* Aff. ¶¶ 8-34.

sword/shield waiver as well as some third-party vendor communications.[3] The NYAG raised these in an omnibus letter motion to compel (the "**Omnibus Letter**") on Oct. 20, 2022. All of the subcategories of documents sought in the Omnibus Letter were pegged to the NRA's July Supplemental Categorical Log, and the letter made no reference to the NRA's broader Categorical Privilege Log. The Omnibus Letter argued in relevant part[4] that (i) documents relating to "'course correction' efforts" should be turned over on grounds of at-issue waiver; and (ii) third-party vendor communications in the same subject-matter categories should be turned over.[5]

Briefing and argument ensued concerning at-issue waiver, during which the NRA emphasized that it had not pleaded an advice-of-counsel defense.[6] Nonetheless, in a ruling dated Nov. 29, 2022 that appeared to conflate the burden of establishing *ab initio* privilege with an analysis of sword-shield waiver, the Special Master invited the NRA to "establish[] by competent evidence that [] particular document[s] it wishes to use in connection with a 'good faith defense' or otherwise is privileged" by "identify[ing] the item and submit[ting] it for *in camera* review along with a brief explanation of why such use does not break privilege."[7]

The NRA offered to stipulate that it would not "use," for proof of good faith or otherwise, any of the documents withheld as privileged.[8] That offer was never accepted or rejected by the

[3] *See* Aff. ¶¶ 35-39.

[4] The Omnibus Letter raised several issues, some of which were resolved and do not form part of this Motion or underlying proceedings. *See* Aff. ¶¶ 38-39. The portions of Omnibus Letter relevant here are Sections IV (alleging certain documents are improperly withheld) and Section I (laying out the at-issue waiver argument which Section IV incorporates). *See* Aff. Ex. 23 (Omnibus Letter) at 11-12.

[5] Id.

[6] *See* Aff. ¶¶ 59-60.

[7] See Aff. Ex. 6 (Nov. 29 Ruling) at 7.

[8] *See* Aff. ¶¶ 59-60.

NYAG. Instead, what ensued was several weeks of negotiations with the NYAG concerning parameters that could be used to sample, for *in camera* review, the pool of "course correction" documents sought in the Omnibus Letter. A point of contention in these negotiations was the NYAG's objection to the NRA engaging in "relevance review" of potentially-implicated documents (the NYAG insisted instead that all "course correction" documents be turned over without "screening").[9] The NRA explained that there was no way to determine whether documents concerned "course correction" compliance issues without reviewing them.[10]

On December 17, 2022, the NRA submitted a sample set of documents *in camera* along with an affidavit from its general counsel (the "**Dec. 17 Sample**").[11] On Dec. 20, 2022, the NYAG submitted another letter brief to the Special Master (the "**Dec. 20 Letter**") accusing the NRA of gamesmanship and opacity in connection with its selection the Dec. 17 Sample because the NRA engaged in "relevance review" of the documents.[12] The Dec. 20 Letter referred for the first time, in a footnote, to the Categorical Privilege Log encompassing the Entire Population, but did not seek disclosure of the Entire Population. The NRA prepared a response to the Dec. 20 Letter, but the Special Master issued the Ruling before the NRA could submit its response in accordance with the briefing schedule.[13]

The Ruling found that the Dec. 17 Sample was mostly privileged.[14] Documents deemed nonprivileged consisted of email attachments that the Special Master professed difficulty

[9] *See* Aff. ¶¶ 86-92.

[10] Id.

[11] *See* Aff. ¶ 106.

[12] *See* Aff. Ex. 26 (Dec. 20 Letter) at 2, note 2.

[13] *See* Aff. ¶¶ 109-115.

[14] *See* Aff. Ex. 1 (Ruling) at 3.

correlating with their privileged "families."[15] However, the Ruling found that "granular" privilege determinations about the Dec. 17 Sample were of "no moment," because "selective disclosure" occurred. [16] In support, the Ruling cited a sword-shield case concerning an advice-of-counsel defense.[17] The Ruling then ordered the NRA to disclose "the universe of documents referenced in its Categorical Privilege Log"[18]—*i.e.*, the Entire Population, which was never the subject of the Omnibus Letter, nor any *in camera* sampling process, nor any selective-disclosure argument. The Ruling exempted some documents in the Dec. 17 Sample that were individually determined to be privileged.

During a conference about the Ruling, the Special Master referred repeatedly to the Omnibus Letter and indicated that he intended his Ruling to refer to it, but also referenced the defined term "Categorical Privilege Log" (which was not used in the Omnibus Letter).[19] . Adding to the confusion, the Special Master emphasized that he did not "reach" or resolve the selective-

[15] *See id.*, note 3; *see also* Aff. Ex. 27 (Eisenberg Affirmation describing parent/attachment contents of documents deemed nonprivileged by the Special Master). The NRA offered to supplement its submission clarifying parent/attachment associations, but the Special Master never responded. *See* Aff. Ex. 123. The Special Master also deemed some documents "blank," but these blank pages were artifacts of non-legible files embedded in email families. *See* Aff. Ex. 27 (Eisenberg Aff.) ¶ 15, 18.

[16] *See* Aff. Ex. 1 (Ruling) at 3.

[17] See id., citing Vill. Bd. of Vill. of Pleasantville v. Rattner, 130 A.D.2d 654 (1987).

[18] *See* Aff. Ex. 1 (Ruling) at 4.

[19] During the Conference, the Special Master invoked "Categorical Privilege Log" as a defined term (saying, "is a capitalized term, and so it probably finds its way either earlier in this document or in the October 20th letter. It says what it says, sir."), and said that "what [he] was referring to when [he] used those words was the October 20 letter of the AG." Aff. Ex. 127 (Conference Transcript) at 31-33. But the Omnibus Letter used the defined term ***Supplemental*** Categorical Privilege Log, referring to the July Supplemental Privilege Log, which covered a smaller subset of documents.

disclosure waiver issue—notwithstanding the language in the Ruling.[20] Instead, he said, the Ruling rested on the NRA's failure to meet its burden to establish privilege.

ARGUMENT

I. Even With Respect to the NYAG-Sought Population, the Ruling Lacks Evidentiary Basis and Contravenes Applicable Law.

A. There is no basis in the record for a finding that sampled documents are non-privileged or placed "at issue."

To meet its burden to establish privilege regarding the NYAG-Sought Population, the NRA provided not only an initial Categorical Privilege Log (consistent with the Commercial Division Rules), but supplemental logs giving additional detail on subsets of documents the NYAG inquired about. (It is not clear which of these logs the Special Master reviewed or considered). It also submitted several rounds of affidavits, and none of the averments therein were challenged by the NYAG.[21]

In response to the argument that a potential "good faith defense" relating to "course correction" compliance matters could somehow amount to "selective disclosure" and waiver—and the Special Master's direction, that the NRA submit a population for *in camera* review of documents it planned to "use"—the NRA selected the Dec. 17 Sample according to transparent criteria it explained in counsel's affirmation.[22] Importantly, the NRA did this even after affirming that it ***did not plan to "use" any of its privileged documents in support of any of its defenses***. The Special Master concurred that the Dec. 17 Sample of the NYAG-Sought Population were

[20] *See* Aff. ¶ 137.

[21] *See* Aff. ¶ 107; *see also Klosin v. E.I. du Pont de Nemours & Co.,* 561 F. Supp. 3d 343, 357 (W.D.N.Y. 2021) (reversing, for clear error, magistrate's finding that a contested "incident report" was not privileged, where litigant offered two sworn declarations attesting to litigation purpose and adversary "offered no evidence contradicting the facts" contained therein).

[22] *See* Aff. ¶¶ 105-106.

mostly privileged; taking into account email/attachment linkages, the sample is almost entirely privileged. Thus, there is no evidentiary basis for the conclusion that the NRA failed to meet its burden regarding the NYAG-Sought Population.

B. The Ruling fails to apply New York law regarding email transmissions, and misapplies New York law regarding "at issue" waiver.

To the extent that the Ruling strips privilege from documents based on their transmittal as email attachments, it is also contrary to law for its failure to apply C.P.L.R. § 4548, which prohibits such outcomes in accordance with New York's public policy promoting efficient attorney-client email communication.[23] The Ruling is also contrary to law to the extent it relies on "selective disclosure" and the *Rattner* case, given that the selective-disclosure doctrine and the cited decision require findings of at-issue waiver,[24] which the Special Master admitted he never found.

[23] *See* N.Y. C.P.L.R. § 4548 ("No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means"); *Green v. Beer*, No. 06 CIV.4156 KMW/JCF, 2010 WL 3422723, at *5 (S.D.N.Y. Aug. 24, 2010) (reversing, under "clear error" standard, magistrate's order compelling production of emails delivered by client's son, and discussing New York public policy).

[24] *Rattner* held that "[w]here a party asserts as an affirmative defense the reliance upon the advice of counsel, the party waives the attorney-client privilege with respect to all communications to or from counsel concerning the transactions for which counsel's advice was sought." 30 A.D.2d 654, 655 (2d Dep't 1987). But as the NRA noted in its Motion to Review the Special Master's November 29, 2022, ruling, the NRA is not asserting an "advice of counsel" defense and has done nothing to place its attorneys' advice "at issue." Generally, "no 'at issue' waiver is found where the party asserting the privilege does not need the privileged documents to sustain its cause of action," and the NRA has stipulated it does not so-rely on its privileged documents. *Ambac Assur. Corp. v. DLJ Mortg. Cap., Inc*., 92 A.D.3d 451, 452 (2012). **Because the Special Matter indicated he did not rule on the basis of "at issue" waiver, the NRA has not fully briefed the topic here—but requests the chance to do so if the Court deems "at issue" waiver apposite.**

II. To The Extent It Applies to the Entire Population, the Ruling Is A Grave Due Process Violation and Merits Reversal Under Any Standard of Review.

A. Application of the Ruling to the Entire Population violates the notice requirements of the C.P.L.R.

It would be an abuse of discretion for the Special Master, in response to the NYAG's "at issue" waiver claim and its challenge to certain third-party agent communications on the July Supplemental Privilege Log, to order the NRA to produce ***every single*** document on its separate, broader Categorical Privilege Log—*i.e.*, every single document over which the NRA claims privilege.[25] For the Special Master to rule adversely on the Entire Population, when the NRA was never given notice to brief, argue, or sample documents outside the NYAG-Sought Population, violates the due process framework of the C.P.L.R., which provides that a motion to compel (the type of motion made here) must be made on notice.[26] The due process violation effected by such a reading is not only glaring, but grave. **Among other things, it would require production of documents revealing litigation strategy in this lawsuit, as well as Supreme Court matters and other active litigation where the NRA is adverse to the State of New York**.[27]

B. Application of the Ruling to the Entire Population violates on-point First Department authority.

The First Department has stridently rejected an *in camera* review framework linked to broad, draconian disclosures like the one colorably ordered here. In *Long Island Lighting Co. v. Allianz Underwriters Ins. Co*. ("*LILCO*"), in response to a finding of "at issue" waiver, the

[25] *Baliva v. State Farm Mut. Auto. Ins. Co*., 275 A.D.2d 1030, 1031 (4th Dep't 2000) ("the court abused its discretion by ordering disclosure of allegedly privileged documents beyond the scope of plaintiffs' cross motion.")

[26] For this reason, a court's *sua sponte* order that a litigant served with a motion to compel produce additional items ***not*** sought in the underlying motion practice constitutes reversible error. *See, e.g.*, *Bohlke v. Gen. Elec. Co*., 293 A.D.2d 198, 201 (2002).

[27] *See* Aff. ¶ 14.

Supreme Court imposed a "Spot Check System" under which the "Supreme Court would conduct an in camera 'spot check' of an unspecified number of the documents turned over, and, if any document reviewed in the spot check were found to have been erroneously withheld . . . [the plaintiff] would be ordered to produce all withheld documents to defendants." 301 A.D.2d 23, 29 (1st Dep't 2002).

The First Department rejected the "Spot Check System," holding that:

> Even if the court's ruling on the [at issue waiver] were not in error, however, we would vacate the Spot Check System on the ground that the advance sanction involved—deeming the erroneous withholding of even a single document to waive privilege as to all withheld documents, without regard to the circumstances of the erroneous withholding—is so unduly punitive as to constitute an abuse of the court's discretion in the supervision of discovery. *Id*. at 34.

Here, the Special Master's chosen procedure—reviewing a sample of documents *in camera* for initial privilege, and then ordering the NRA to turn over ***all*** documents over which it claimed privilege, regardless of whether they had anything to do with the alleged "at issue" waiver, if he found any defects in the sample—was even more arbitrary and punitive than the "Spot Check System" reversed as arbitrary and punitive in *LILCO*. Upholding the Ruling would nullify the Commercial Division's preference for categorical privilege logs by subjecting any party who relied on one to a punitive, unlawful "spot check" system wherein privilege could be destroyed over every categorically-logged document if an *in camera* sample generated any complaints.

C. Application of the Ruling to the Entire Population cannot be justified as a discovery sanction.

Although the NYAG did not move for sanctions and the Special Master did not indicate he was imposing any, it is notable that the application of the Ruling to the Entire Population cannot be justified even as a punishment for alleged "eschew[al]" of meet-confer negotiations regarding

search terms— an inaccurate accusation the Special Master makes.[28] In fact, the NRA met and conferred extensively with the NYAG and was in the process of continuing to do so when the Special Master rendered the Ruling (before the NRA could submit its response to the NYAG's latest letter).

In any event, significant discovery sanctions require a finding of willfulness,[29] and the Special Master made none. Nor does the record support such a finding; instead, it shows that the NRA met and conferred in good faith with the NYAG regarding a search-term protocol but was simply not able to come to an agreement in the short timeframe it had to produce its *in camera* sample. And even if the NRA had willfully (there was no finding of willfulness) refused to meet and confer (the NRA did not refuse), the disclosure of privileged documents to an adversary is not a proper discovery sanction under the C.P.L.R.[30] Indeed, ordering disclosure of all privileged documents would be even more prejudicial than the harshest sanctions envisioned by the Rules (such as the striking of a claim or defense)—because it could deny the NRA a fair trial in this and multiple other lawsuits.

CONCLUSION

For the foregoing reasons, the Ruling should be reversed. In the alternative, to the extent that the Ruling is upheld and deemed to apply to the Entire Population, the NRA should be given leave to prepare a document-by-document log of the Entire Population and granted reimbursement

[28] *See* Ruling at 1.

[29] *See Han v. New York City Transit Auth.*, 169 A.D.3d 435, 94 N.Y.S.3d 26, 27 (1st Dep't 2019) ("the record considered as a whole does not support a finding of willfulness on the part of the defendant so as to justify the severe sanctions imposed. Therefore, the motion court's order was an abuse of discretion.").

[30] *See* C.P.L.R. § 3126 (listing available sanctions).

of the expense of doing so, consistent with N.Y. Comp. Codes R. & Regs. tit. 22 § 202.70.11-b(b)(2).

Respectfully Submitted,

/s/ *Noah B. Peters*

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

COUNSEL FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA

Dated: January 9, 2023

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record, on this 9th day of January 2023.

/s/ Noah B. Peters
Noah B. Peters

CERTIFICATE OF CONFERENCE

I, Noah B. Peters, hereby certify that, pursuant to the applicable rules, counsel for the NRA met and conferred in writing with counsel for the NYAG on numerous occasions, including in connection with a conference before the Special Master for Discovery on January 3, 2022. The parties were unable to amicably resolve this dispute.

/s/ Noah B. Peters
Noah B. Peters

CERTIFICATION OF COMPLIANCE WITH WORD COUNT

I, Noah B. Peters, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing memorandum of law filed by the NRA pursuant to CPLR 3104(d) for review of the Special Master's decision dated December 27, 2022, complies with the word count limit set forth in the Order for Appointment of a Master for Discovery, dated February 7, 2022. Specifically, the memorandum of law contains fewer than 3,000 words.

In preparing this certification, I relied on the word count function of the word-processing system used to prepare this memorandum of law.

By: Noah B. Peters
Noah B. Peters

COUNSEL FOR THE
NATIONAL RIFLE ASSOCIATION
OF AMERICA