

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

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

Plaintiff,

v.

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

Defendants.

Index No. 451625/2020

**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 Litigation 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, review of the prior proceedings had herein, and my review of records maintained by this Office.

2. I submit this affirmation in opposition to the applications by the National Rifle Association of America (“NRA”) pursuant to CPLR 3104(d) for review of the Special Master’s November 29, 2022 and December 27, 2022 rulings (the “Rulings”) requiring it to produce documents relating to the NRA’s so-called “course correction” (“Course Correction”) that the NRA has asserts are privileged (the “Course-Correction Documents”).

The NRA's "Course Correction" Defense and Selective Use of Privilege to Block Full and Fair Discovery

3. The NRA has claimed, throughout the OAG investigation, its Bankruptcy proceeding, and in this action, that its internal reform efforts – its Course Correction – are a defense to the Plaintiff's claims. Discovery has revealed that the NRA employed outside counsel to handle material matters which the NRA claims constitute its corrective measures. In this action, the NRA has selectively disclosed information about such purported corrective actions, but shielded from full disclosure material information to prevent the Plaintiff from scrutinizing the sufficiency of the NRA's actions. Plaintiff has raised issues regarding the NRA's reliance upon outside counsel to perform actions that are at issue here before this enforcement action even began and continued to raise objections to the NRA's assertion of privilege throughout the litigation.

4. For example, the OAG first raised concerns during the pre-complaint investigation about the role of the NRA's counsel, Brewer, Attorneys & Counselors ("Brewer Firm") within the NRA. On December 30, 2019, the OAG wrote to the NRA's counsel, to question the potential problems that may arise from the Brewer Firm's involvement in the governance and operations of the NRA including its treatment of whistleblowers. The OAG advised the Brewer Firm that its role as discovered at that point in the investigation raised a number of issues, including the nature and extent of attorney-client and work product privileges concerning both documents and witness testimony. In essence, the Brewer Firm was advised that its role in the underlying factual matters may pierce privilege or implicate the witness advocate rule. A copy of that letter is annexed hereto as Exhibit A. The Brewer Firm provided a brief response thereafter essentially stating that it was aware of its ethical obligations. Exhibit B.

5. Continuing investigation and discovery revealed that the Defendants used the Brewer Firm and other outside counsel to carry out key portions of the NRA's "Course

Correction,” some of which are allegedly ongoing. When Plaintiff attempted to ask fundamental questions about aspects of the Course Correction, such efforts were stymied by assertions of privilege. Witnesses could not or would not testify fully as to the facts underlying the NRA’s asserted reform efforts, including what was done in regard to a particular aspect of the Course Correction, who was involved in addressing that aspect of the Course Correction, when it began, whether it was over, and any resulting actions, citing privilege.

6. As Plaintiff has previously disclosed, the specific aspects of the Course Correction which the NRA has put at issue but for which the NRA has used privilege to block discovery include:

- (1) the identification, determination and calculation of prohibited excess benefit transactions improperly obtained by Wayne LaPierre, other NRA executives and other “disqualified persons” (specifically information which would enable Plaintiff to assess whether such determinations and calculations as were made were complete and accurate);
- (2) the NRA’s internal investigations into potential misconduct and compliance issues, including into:
 - (a) Defendant Wilson Phillips’ conduct as CFO and Treasurer, his invocation of his Fifth Amendment right against self-incrimination during the Bankruptcy proceeding, and participation in prohibited excess benefits transactions;
 - (b) whistleblower retaliation, including relating to conduct by the Brewer firm;
 - (c) board member travel authorizations, expenditures and reimbursements in violation of NRA policies and IRS requirements;
 - (d) use of an NRA vendor (Ackerman McQueen) to pay for excessive expenses incurred by NRA employees and bill to the NRA such expenses in violation of NRA policies and IRS rules;
 - (e) diversions of assets, including by Defendant LaPierre’s longtime assistant;
 - (f) payments to Board member Marion Hammer; and
 - (g) conflicts of interest, including the LaPierre family’s relationship with the owners of some of the NRA’s largest vendors;
- (3) the NRA’s handling of whistleblower complaints, including the investigation of the same and treatment of complaints (which it largely delegated to the Brewer Firm) as well as the determination not to treat complaints by various NRA directors Lt. Col.

Oliver North, Richard Childress, Esther Schneider, Timothy Knight, and Sean Maloney, as whistleblower complaints;

- (4) reform of vendor relationships and compliance with contract procurement policies including those relating to major NRA vendors Membership Marketing Partners and related entities, Ackerman McQueen, Affiliated Television International, and Gayle Stanford-related entities;
- (5) NRA Audit Committee review of allegations of
 - (a) wrongdoing and undisclosed conflicts of interest by defendant Wayne LaPierre;
 - (b) related party transactions with officer or directors;
 - (c) the preparation and certification of the NRA's IRS Form 990s; and
 - (d) the allegations in the Plaintiff's Complaint; and
- (6) work done by K&L Gates, Morgan Lewis, Don Lan, Esq., the Brewer firm and other outside counsel and consultants hired as part of the NRA "course correction" and touted by the NRA as evidence of its good faith reform efforts.

Plaintiff's efforts to obtain information about these aspects of the NRA's Course Correction were blocked by the NRA's assertions of privilege.

7. The NRA's use of privilege objections as a sword and shield to block discovery was also raised by the Plaintiff and others in the NRA's Bankruptcy proceeding and the Hon. Harlan D. Hale ruled that the NRA "can't hold back information because of privilege, and then later use it in trial." A true copy of excerpts of the NRA's Bankruptcy Hearing are annexed hereto as Exhibit T, 4/6/2021, at 63:9-24, 66:14-19.

8. The NRA has not contested that it has placed aspects of its purported Course Correction at issue here and plans to introduce evidence relating to its the Course Correction as evidence in the trial of this matter. For example, the NRA has admitted that it will be relying on the steps undertaken in the Course Correction as a central part of its defense at trial. *See, e.g.*, NYSCEF 1040 (NRA's November 4, 2022 letter), at 3; NYSCEF 926 (November 14, 2022 conference before the Special Master), at 24-25.

9. Moreover, the NRA's expert witness reports cite to the Course Correction and the NRA's reliance upon outside counsel as part of its reform efforts. On September 16, 2022, the parties served initial expert reports. The NRA served five initial reports written by six experts. The proffered opinions point to the NRA's purported Course Correction and program for "continual improvement" as "sufficient" such that prospective injunctive relief is not appropriate in this case. The experts point to the NRA's retention of outside experts and counsel to support internal investigations and compliance efforts in response to the allegations of the Complaint as evidence of the NRA's good faith conduct, undercutting the need for relief. The experts also repeatedly cite matters, such as the handling of whistleblower complaints, that were delegated to the Brewer Firm, but inquiry into what steps the NRA actually took to address whistleblower complaints have been shielded from discovery by the assertion of privilege. The service of the expert reports made clear that despite its election to assert privilege in regard to most of its Course Correction efforts, the NRA intended to rely upon such alleged actions as the centerpiece of its defense in this action.

10. Indeed, the NRA's positions in the bankruptcy proceeding and the testimony of NRA representatives in this case have demonstrated the NRA's intention to place its Course Correction at the center of its defense and to use privilege offensively to block Plaintiff from testing the truth of the NRA's assertions relating to the Course Correction establish the prejudice to Plaintiff.

11. For example, the NRA and Wayne LaPierre have repeatedly asserted that the NRA has sought and obtained repayment of all excess benefits. At the Bankruptcy Hearing, the NRA's counsel argued that the NRA "set out to put our own house in order, which we did. We went out to self-report," stating that "it begins with the NRA hiring the law firm of Morgan Lewis to review

our not-for-profit compliance procedures.” And regarding excess benefits, 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 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. ...That \$300,000, though, represents the totality of excess benefits from the time period of 2015 forward.” A true copy of excerpts from that hearing are annexed hereto as Exhibit C (Bankruptcy Hearing Transcript 4-5-21 PM), at 18:13-17, 18:23-25 33:19-34:7. Plaintiff has tried repeatedly to inquire into what the NRA did to identify, calculate and remediate the excess benefits to assess the sufficiency of the NRA's actions. However, the NRA blocked full discovery by asserting privilege. Further, Defendant LaPierre has since repaid hundreds of thousands of additional dollars in excess benefits, giving the lie to the assertion that \$300,000 represents the totality of his excess benefits. Moreover, documents only recently disclosed following motion practice revealed that the NRA's tax counsel's review was extremely limited, undermining statements made during the NRA's bankruptcy hearing about how excess benefits were calculated. A true copy of an email with tax counsel Don Lan that the NRA recently produced is annexed hereto as Exhibit D. To date, the NRA has failed to produce documents showing what information was provided to the NRA's tax counsel for determining excess benefits— the NRA selectively and belatedly gave Plaintiff documents evidencing the final figures that the NRA reported on the NRA's IRS 990s and even those worksheets are in an incomplete, inadmissible and unusable form. Plaintiff was denied access to documents and/or testimony that would allow Plaintiff to test the NRA's assertions about the investigation of and calculation of excess benefits. Plaintiff has simply been denied the information necessary to test the NRA's assertion that it has thoroughly reviewed, identified and sought repayment of all excess benefits received by NRA executives.

a. testified regarding ongoing privileged investigations concerning alleged misconduct by Defendants LaPierre's and Phillip's and others but either could not

or was instructed not to reveal the content of those investigations. *Id.* at 509:11-13 793:23-797:3, 828:25-829:5.

- b. was unable or unwilling on privilege grounds to testify about alleged ongoing investigations into Defendant LaPierre's relationship with David McKenzie, the owner of several NRA vendors with whom Plaintiff has alleged LaPierre had a conflict and for information of which he was aware, he declined to answer on privilege grounds. *Id.*, at 836:8-17, 842:8-850:9;
- c. declined on privilege grounds to provide details regarding the NRA's ongoing investigations into possible private inurement or excess benefits received by anyone at the NRA. *Id.*, at 793:23-795:8;
- d. was incapable of testifying about key alleged investigations into amounts improperly reimbursed to Defendant LaPierre and his wife for gifts, travel, and makeup expenses, or passed through one of the *NRA's* vendors, other than that the investigations were being handled by outside counsel. *Id.*, at 483:22-485:6, 496:17-21, 503:2-505:20, 784:8-790:24, 902:18-903:21;
- e. testified that an investigation into the diversion of assets committed by Defendant LaPierre's former subordinate was conducted by outside counsel. *See* Exhibit G, true copy of excerpts of the deposition testimony of NRA Corporate Representative John Frazer at Bankruptcy Proceedings, at 46:4-50:2. The NRA has not produced documents about that investigation.
- f. declined to provide specifics of an alleged Course Correction-related investigation into the NRA's relationship with ATI, another vendor owned by David McKenzie. Ex. F at 536:9-537:2, 546:9-547:12, 555:23-556:14, 877:4-11. NRA Vice President

and long-time leader of the NRA Audit Committee David Coy similarly declined to answer questions about the nature of the investigation on privilege grounds. A true copy of excerpts from the deposition of David Coy are annexed hereto as Ex H, at 81:18-85:17 (Coy 2022 depo).

14. Questions to NRA officers about the NRA's purported investigations were met with similar privilege objections:

- a. NRA President and Audit Committee Chair Charles Cotton testified that he could not say whether the NRA was investigating Phillips's conduct as CFO and Treasurer "[REDACTED]." A true copy of excerpts from the deposition of Charles Cotton is annexed hereto as Exhibit I, at 261:24-262:21;
- b. Mr. Cotton and Mr. Coy also refused to discuss the details of the NRA's investigation and resolution of a key whistleblower memorandum presented to the Audit Committee in 2018 on the grounds that it was handled by the Brewer firm even though Defendants have repeatedly asserted that all issues raised in this memorandum have been completely resolved. A true copy of excerpts from the examination of Charles Cotton is annexed here to as Exhibit V, at 295:3-13. Mr. Coy testified the same. A true copy of excerpts from the examination of David Coy is annexed hereto as Exhibit U, at 118:2-119:19, 170:2-172:20;
- c. Mr. Coy declined, on privilege grounds, to testify about any investigations by the Audit Committee regarding Plaintiff's allegations concerning Defendant LaPierre. Ex. H (Coy Dep.), at 37:12-39:12, 307:18-308:15. Mr. Coy also declined, on privilege grounds, to testify about any investigations by the Audit Committee of

the vendors owned by David McKenzie. *Id.*, at 74:16-76:5, 81:18-85:17, 315:9-316:21.

15. Similarly, both Defendant LaPierre and Mr. Coy declined to answer questions about investigations concerning Gayle Stanford, the vendor who provided LaPierre's travel services for decades—including his numerous trips to the Bahamas and Europe paid for by the NRA—on privilege grounds. Ex. H (Coy Dep.), at 89:23-100:25; Ex. E (LaPierre Dep.), at 396:5-398:14.

16. The NRA elected to assert privilege to block full and fair discovery relating to aspects of its Course Correction throughout discovery and to allow Plaintiff to test the assertions made in regard to the truth and sufficiency of the review. Faced with even the NRA's corporate Representative assertion that he could not or would not answer key questions about steps the NRA has or has not taken as part of the Course Correction because counsel was involved in the same and NRA experts citing to and relying upon the NRA's Course Correction and use of outside consultants as part of their opinions, Plaintiff was left with no recourse but to seek relief in the form of an order of preclusion or other appropriate relief.

Plaintiff Moves for Relief for the NRA's Improper Use of Privilege

17. Following the Court's direction at the September 29, 2022 argument on certain Defendants' third motions to dismiss, the Court directed the parties to schedule a conference with the Court's Principal Law Clerk and the Special Master for the purpose of trying to resolve all outstanding issues with the Special Master's guidance. Following such conference and as per the Special Master's direction, on October 20, 2022, Plaintiff filed an omnibus application to the

Special Master. *See* NYSCEF 924.¹ That application addressed various outstanding discovery issues.

18. The October 20th Application's primary request for relief pertained to the NRA's improper use of privilege as a sword and a shield, citing numerous examples of where the NRA had placed the nature and results of the NRA's conduct as part of its Course Correction at issue, but then precluded discovery of the same through assertions of privilege, even when asked for purely factual information about what the NRA did, when and how. Pursuant to the Court's direction, Plaintiff's October 20th Application to the Special Master included remaining outstanding discovery issues which the Plaintiff wanted to pursue and raised a number of issues. Section I of Plaintiff's October 20th Application sought relief, either preclusion or appropriate discovery, for the NRA having blocked discovery (documentary and testimonial) using a sword and shield assertion of privilege. This portion of Plaintiff's application was not limited to any particular category of the NRA's privilege logs. Another aspect of Plaintiff's application, Section IV of its Application, challenged various categories of privileged documents withheld by the NRA as identified in the NRA's categorical Supplemental Privilege Log, including those which were to, from or copied to third parties and some other categories which also overlapped with the Course Correction.²

19. In response to the October 20th Application, the NRA did not refute that its Course Correction was part of its defense or that it had blocked inquiry into its Course Correction, as

¹ Plaintiff is filing the redacted version of its October 20th Application herewith in an excess of caution and to avoid a dispute. However, pursuant to the Protective Order entered into by the parties, Plaintiff is entitled to file and unredacted and unsealed copy and intends to do so within the next week.

² The NRA confuses these distinct aspects of Plaintiff's application by seemingly asserting that Plaintiff's sword and shield argument relates only to the NRA's supplemental Privilege Log. *See, e.g.*, Affirmation of Noah B. Peters ("Peters Aff.") (NYSCEF 1033) at ¶ 52-55. In fact, Plaintiff has been clear that the Supplemental Privilege Log does not encompass documents on key aspects of the Course Correction that are at issue and Section I of the October Application is not limited to the documents identified in the Supplemental Privilege Log.

alleged by Plaintiff. NYSCEF 1040. Rather, the NRA's response largely rested upon a legal argument that it did not waive privilege because it had not invoked the advice of counsel defense. The NRA also represented that it withheld only approximately 629 documents relating to its Course Correction and remedial efforts—approximately 0.002% of all documents it produced—based on privileges. But the NRA later admitted that representation was incorrect and “thousands” of documents had been withheld by the NRA.

The Special Master Directed the NRA to Submit Withheld Documents for In Camera Review

20. By email dated November 8, 2022, the Special Master wrote to counsel for the NRA and directed the NRA to produce for *in camera* review documents it wished to withhold:

I have completed an initial review of the Attorney General's motion, dated October 20, the NRA's opposition, dated November 4 and the relevant case law. The cases make clear that “determining document immunity claims and reviewing them are largely fact-specific processes” (see *Spectrum Systems International Corp. v. Chemical Bank*, 78 N.Y.2d 371,381 (1991)). As such fact-finders are often encouraged to conduct *in camera* reviews (see *id.*). I have determined that needs to be done here. Please re-review the documents the NRA wishes to withhold and provide for *in camera* review the documents the NRA maintains are immune from disclosure. If possible, please make them available for my review by this Friday, November 11. Also, please forward this email to all counsel ASAP.

(A true and correct copy of an email chain with the Special Master is attached as Exhibit K. The Special Master's November 8, 2022 email is reflected at page 8).

21. In an email dated November 13, 2022, the NRA responded that it required more time to submit documents for *in camera* review and that it would only be submitting a sample of such documents. See Exhibit K at 3-4. More specifically, the NRA stated that it would provide to the Special Master:

- a. privileged documents involving third parties for *in camera* review as well as a log reflecting the claimed privileges “(e.g., the third party's necessary role in the communications)”; and

- b. “samples of privileged documents related to the NRA’s efforts to ensure its compliance with its governance controls. As you will see, those documents do not involve third parties and are between the NRA and its counsel.”

Id. In its email, the NRA sought to deflect the Special Master’s *in camera* review by asserting, as it had in prior meet and confers, that it would not seek to introduce into evidence documents it had withheld as privileged. But this assertion did not remedy the problem because the NRA had blocked complete discovery -- both testimonial and documentary -- of information regarding whole topics, whole aspects of the alleged Course Correction and, as set forth in the accompanying memorandum of law, such an assertion is not dispositive of whether privilege has been waived.

22. Argument on Plaintiff’s October 20th Application was held on November 14, 2022. During argument, Judge Sherwood directed the NRA to submit for *in camera* review a representative sample of the documents pertaining to its Course Correction that it had withheld as privileged, and share an index and information relating to the protocols it followed in selecting the same with Plaintiff so Plaintiff could identify any potential issues. *See* NYSCEF 926 (November 14, 2022 Transcript), at 73-75.

In Violation of the Special Master’s Order, the NRA Submits a Small, Non-Representative and Cherry Picked Sample Without Sharing its Protocols and Sampling Methodology

23. On November 15, 2022, the NRA made a submission to the Special Master. A true copy of the transmission email is annexed hereto as Exhibit L. The submission in relation to the Course Correction Documents consisted of just eight email strings. Contrary to the Special Master’s instructions, the NRA did not tell the OAG how it identified the universe of responsive documents or how it selected the seven email chains it submitted.

24. By emails dated November 16, 2022, Plaintiff asked the NRA “to articulate how it selected the sample it has submitted to the Special Master” so that Plaintiff may “determine whether it is in fact representative of the entirety of the categories of documents it has withheld

from production.” The NRA’s response did not inform Plaintiff how the NRA had identified the universe of documents relevant here (but made it plain that the NRA had omitted certain key topics), the number of documents in that universe, or explain the protocols of how the NRA had derived the sample it submitted. A true copy of that email chain is annexed hereto as Exhibit J. The NRA flatly refused Plaintiff’s repeated requests to disclose how the NRA was identifying the set of documents relating to the Course Correction and how it was sampling the documents for submission to the Special Master.

25. On November 21, 2022, Plaintiff emailed Dawn Wilson, an associate of the Special Master, copying the Special Master, about the NRA’s stonewalling. *See* NYSCEF 1045, at 7-8.

26. On November 22, 2022, in response to an email from the NRA, Plaintiff wrote to Special Master. *See* NYSCEF 1045, at 3-5.

27. In both the November 21 and November 22, 2022 emails, Plaintiff asked that the NRA be directed to provide basic information about the population of documents searched, the methods used for the search, and the protocol for sampling to ensure a representative sample. Plaintiff highlighted the apparent insufficiency of the NRA’s submission and its refusal to make any statement on how it selected materials for submission. In addition, contrary to the NRA’s assertion, Plaintiff responded to and rejected its offer to not seek to admit at trial documents it had withheld as privileged. In emails, such as the November 22, 2022 email, as well as in meet and confers and conferences, Plaintiff reiterated that the NRA’s proposal is insufficient because Plaintiff has been prejudiced not just by the possibility the NRA will use privileged communications themselves at trial but by the NRA’s election to foreclose document and testimonial discovery on certain topics relating to its Course Correction while preserving its ability to introduce fact and expert testimony on the Course Correction at trial. The NRA has denied

Plaintiff the opportunity to test and assess such alleged reforms. At no point did Plaintiff limit its challenge to the NRA's inappropriate assertion of privilege to documents and certainly not just to documents referenced on the NRA's Supplemental Privilege Log.

28. These ongoing proceedings were occurring against the backdrop of the approaching deadline to file the note of issue. Given the pendency of this and other matters, Plaintiff wrote to the Court on November 22, 2022 to extend the date for filing the note of issue from November 29, 2022 to December 13, 2022. By order of this Court dated November 22, 2022, and upon the recommendation and approval of the discovery Special Master, that date was extended until December 13, 2022. NYSCEF 900.

The Special Master Again Directs the NRA to Submit a Sample Representative of the Universe of Documents and to Reveal Its Protocols and Sampling Methodology

29. By email dated November 23, 2022, more than a month after the Plaintiff's application, the Special Master confirmed that the *NRA had only produced seven³ email chains pertaining to its compliance reform efforts. See* NYSCEF 1045, at 2-3. On its face, the sheer size of the sample was insufficient given the NRA's past assertions that its Course Correction has been underway for at least four years and has been broad in scope. In addition, the NRA has variously represented that the total number of privileged documents pertaining to the Course Correction is anywhere in the range of 629 documents (in its November 4, 2022 letter, NYSCEF 1040), 1500-3,000 (at the November 14, 2022 argument before the Special Master, NYSCEF 926) or 271 in its last submission to the Special Master for *in camera* review.

30. In his November 23, 2022 email, Judge Sherwood stated that the "OAG argues with substantial justification that the NRA failed to describe sufficiently how it selected the documents

³ The Special Master later corrected himself and indicated that eight email chains were submitted.

for the review.” See NYSCEF 1045, at 2-3. The Special Master noted that in response to his November 8th direction to the NRA to submit a sample of the withheld documents, he received instead a small unrepresentative sample.

31. The Special Master also stated that the documents submitted *in camera* did not pertain to core topics:

[The documents] do not include several topics listed by the OAG. For example, the sample makes no reference to any whistle blower complaint, investigation of alleged misconduct within the NRA or related party transactions. It also shields all documents concerning investigations or corrective action involving any of the defendants named in the complaint and gives no hint as to how the NRA made excess benefit calculations or determined their reasonableness. These examples suggest that the search terms selected were either grossly inadequate or that the NRA elected to shield selected categories of documents from *in camera* review.

Id. In defiance of the Special Master’s directions, the NRA submitted a cherry-picked sample of eight email chains for *in camera* review to address the propriety of its assertion of privilege over critical documents.

32. Judge Sherwood gave the NRA another opportunity to submit a representative sample. He directed that the parties meet and confer to agree on the “search terms used and database searched and to agree on ESI that will adequately search for the information requested and give a fair sampling of the results. The protocol agreed to shall provide for an adequate sampling methodology and reporting of information concerning the number of hits by word, phrase or any other terms on which the parties agree. The NRA may then present a representative sample of documents it claims are protected.” *Id.*

33. In light of the upcoming note of issue date, on November 23, 2022, Plaintiff emailed the NRA to set up a meet and confer and received no response. On November 27, 2022, Plaintiff

again endeavored to set up a meet and confer. On November 28, 2022, the NRA communicated that it was not available for a meet and confer until November 30, 2022.

Despite the NRA's Disregard of His Orders, the Special Master Gives the NRA Another Chance to Submit a Representative Sample

34. On November 29, 2022, Judge Sherwood issued a decision on the pending application based upon the NRA's initial submission. NYSCEF 961. As is relevant to this application, Judge Sherwood found that the NRA

seeks to cloak essentially all of its 'course correction' and '360° review' initiatives as privileged merely because the NRA included attorneys in those efforts, save for the selected portions it chooses to disclose to the OAG as proof of the 'reasonableness' of, for example, the amount of excess benefits it has request[ed] Mr. LaPierre 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.'"

Id. at 9. The Special Master further found that the NRA had failed to carry its burden to establish that the information in question is privileged and directed the NRA to produce the allegedly privileged documents at issue, *barring one last chance to submit the materials it is withholding for in camera review and to establish that the information sought is privileged and that the NRA has not waived such privilege by putting certain matters at-issue.* *Id.* Rather than recommend a discovery sanction of preclusion or wholesale grant of production of further documents and witnesses for deposition, the Special Master gave the NRA yet another chance to establish that materials the NRA is withholding relating to its Course Correction are in fact privileged and then that the NRA has not waived such privilege.

The Special Master Again Directs the NRA to Identify a Fair Sample Of the Withheld Course-Correction Documents and Share Information Regarding Protocols and Sampling Methodology

35. On December 5, 2022, the parties had a conference with the Special Master. A true copy of that transcript is annexed hereto as Exhibit M. At that point, the note of issue was due on December 13, 2022. Plaintiff expressed that it appeared the parties were at an impasse and that Plaintiff wanted one of two things:

an order, something like that was affirmed in *Gottwald versus Sebert*, which was cited in our October 20th letter, which found that where a defendant makes a decision or a party makes a decision to shield something by privilege, it cannot at the end of discovery suddenly choose or select information to share and try and deprive what it wants to share, that [] causes disproportionate prejudice to the other side.” We think the NRA has made an election in discovery at this point and it should be held to those choices that it made, and we would ask for an order indicating the same.

Id. at 9. Plaintiff noted that, to the extent that such relief was beyond the Special Master’s referral, Plaintiff wanted the opportunity to submit further briefing and for a recommendation from the Special Master as to points where the NRA had placed a matter at issue but blocked discovery through the sword and shield use of privilege. Alternatively, Plaintiff suggested that the parties make a further attempt to agree on a process to identify the relevant universe of withheld documents, assess whether they are privileged and whether there has been a waiver, and then address the prejudice that has accrued to Plaintiff thereby. *Id.* at 9-10. At the conference, the NRA estimated the universe of documents to be approximately 1,500-3,000 documents (substantially more than its prior estimate of 692 documents). The NRA indicated an intent to proceed and produce a representative sample for review by the Special Master.

36. At the December 5, 2022 Conference, the Special Master *again* directed NRA counsel “to come up with a sample that is a fair sample of the documents that you are asserting privilege for. You can't cherry-pick them, which is my impression is that's what you did last time, and the better approach is to consult with the other side as to the protocols that you are using to

come up with a fair, random sample on those kinds of procedural steps that need to be taken.... I laid it out all for you.” Ex. M, at 46:13-23. He said we was giving the NRA “one more shot, one more opportunity. I’m not convinced that Judge Cohen is going to be as accommodating.” *Id.* In regard to documents he ordered Plaintiff to produce, he also directed Plaintiff to be transparent about our sampling process. *Id.* at 45. Accordingly, Plaintiff informed the NRA of the number of privileged documents at issue, the specific methodology for automated random selection we were using, and the number of documents we elected to use in the sample. Plaintiff made changes requested by the NRA, including staggering the random selection of documents by time periods, as requested by the NRA. Plaintiff informed the NRA and the Special Master in writing about exactly what protocols and methodology it was using to submit a sample and worked to ensure that the sample was fair and representative.

37. On December 6, 2022, the parties met and conferred and tried to reach some understanding or agreement in terms of how to identify the universe of relevant documents. Plaintiff learned that the NRA was only reviewing documents identified in its Supplemental Privilege Log. However, Plaintiff had made clear to the NRA that such review was not sufficient because the NRA’s Supplemental Privilege Log logged only a subset of the NRA’s withheld documents based on search terms that were not designed to capture central aspects of the Course Correction. For example, the Supplemental Privilege Log would not include documents relating to the NRA’s alleged ongoing investigations of misconduct by, inter alia, Wilson Phillips and Wayne LaPierre.

38. Further, Plaintiff learned that the NRA was identifying documents using relevance review and asked the NRA to identify how it was defining its Course Correction for the purposes of this review to ensure it was inclusive of those specific topics where Plaintiff had been blocked

from full discovery. However, the NRA did not, during the December 6, 2022 conference or the many subsequent email exchanges, reveal how the NRA is defining Course Correction for the purposes of the relevance review. Plaintiff asked for a hit report for the search terms or other process the NRA was using to define the body of Course-Correction Documents and received such a hit report on December 13, 2022.

39. On December 8, 2022, Plaintiff responded to an inquiry from the NRA, offering multiple proposals for how to proceed to ensure that the NRA was appropriately defining the body of Course-Correction Documents at issue. The proposals included, among other things, conferring on the adequacy of the search terms, guidelines or alternate means the NRA was using to identify the Course Correction related withheld documents. Plaintiff reiterated to the NRA that production of documents, alone, would be an insufficient remedy as the NRA had blocked Plaintiff from obtaining testimony pertaining to relevant events, actions and documents, and both fact and expert discovery had already closed.⁴ Plaintiff rejected as facially unworkable the NRA's proposal to seek jointly a two-week extension of the note of issue date to December 27, 2022 to permit the parties to define the universe of responsive materials, allow the Special Master to conduct his *in camera* review and determination whether there was an at-issue waiver, and allow Plaintiff to obtain further relief from the Court to cure the prejudice to Plaintiff. The NRA did not make an application to the Court for the extension.

⁴ The NRA proffered five expert reports written by six experts. The bulk of expert opinions offered relate or rely upon, directly or indirectly, the NRA's efforts as part of its alleged Course Correction in support of the NRA's assertion that there is no need for the prospective relief sought here. *See, e.g.*, Report of Amish Mehta, NYSCEF 969, at p. 50 ("the NRA has demonstrated, inter alia, sufficient documentation and course correction actions, a commitment to corporate governance and strong internal controls; as a result, there is no need for a Court-appointed compliance monitor or a governance expert.").

The Special Master Again Urges the NRA to Be “an Open Book” About Its Identification of a Representative Sample But the NRA Continues its Non-Compliance

40. During a conference with the Special Master on December 8, 2022, the Special Master *again* urged the NRA “to be an open book about the process for doing the search.” A true copy of the transcript of the December 8, 2022 conference is annexed hereto as Exhibit N, at 18-19.

41. On December 10, 2022, Plaintiff further communicated with the NRA, stating that the NRA’s process (as understood by Plaintiff because the details of the process had still had not been shared with or agreed upon by Plaintiff) was not acceptable to the Plaintiff and set out specific deficiencies concerning the absence of key search terms and an improper limitation of the relevant time period. A true copy of an email chain between the NRA and the Plaintiff is annexed hereto as Exhibit O, at 2-4, 7. The NRA responded the same day, arguing that its review was properly limited to the Supplemental Privilege Log and asking that for citations of where “NRA witnesses have testified that the NRA is currently conducting the following investigations which would not appear to be captured in the documents you are reviewing” and asking, erroneously, why these issues are “being raised so late, months after discovery closed?” Exhibit O, at 1. Plaintiff notes that the email requested that Plaintiff consent to “reasonable extensions” requested by the NRA but other than a request for a two-week extension made before Plaintiff was aware of a family tragedy suffered by an NRA attorney, the NRA made no requests for extensions that Plaintiff denied. Indeed, the NRA did not even respond to Plaintiff’s offer to adjourn a conference on the day when the OAG was notified of NRA counsel’s personal matter. Nor did the NRA make application to the Special Master or to the Court to obtain an extension of any date as a result.

42. On December 12, 2022, which was just one day before the note of issue was due, Plaintiff made yet another effort to comply with the Special Master’s directives to reach an

agreement with the NRA on the protocol. Plaintiff provided the NRA with a more granular and refined list of topics Plaintiff contends are at issue. Exhibit P.

43. On December 12, 2022, Plaintiff filed an order to show cause seeking leave to file a note of issue pursuant to Rule 202.21(d), with a carve out permitting such proceedings relating to Plaintiff's application for relief as a result of the NRA's assertions of privilege pertaining to certain aspects of its Course Correction. NYSCEF 922 to 932. Ultimately, the note of issue with Plaintiff's proposed carve-out was filed on December 22, 2022. NYSCEF 1003-04.

44. On December 15, 2022, more than two weeks after the Special Master's November 29, 2022 decision, the NRA still refused to disclose how it was defining relevance for the purpose of its identification of the universe of documents from which it would sample for a submission to the Special Master. It also would not clarify whether it would agree to review documents that post-dated December 2021 – the cutoff date the NRA self-designated – or whether it would expand its review to encompass the topics identified by the Plaintiff. Plaintiff's emails asking, yet again, for necessary information to assess the NRA's review process and providing specific search terms were not answered substantively. A true copy of a December 15, 2022 email is annexed hereto as Exhibit Q.

**The NRA Submits an Unrepresentative Sample Without
Revealing Its Protocols or Sampling Methodology**

45. On December 16-17, 2022, without answering Plaintiff's questions regarding the nature of its review, the time period of its review, or the method of its sampling, the NRA submitted another "sample" to the Special Master for review. The NRA defined its submission as "a sample collection of documents related to its efforts to comply with applicable laws, regulations and policies; identify and obtain repayment of potential excess benefits; train its employees and Board members on compliance matters; address whistleblower matters; and address potential related-

party transactions and compliance with laws and board policies concerning such transactions.” The “sample” the NRA submitted to the Special Master on December 16-17, 2022 consisted of 110 documents out of a universe of 271 documents. *See* NYSCEF 1034, at 2.⁵ The NRA offered no explanation why the universe of relevant Course-Correction Documents had been reduced to 271 despite the NRA’s own prior representation that the universe contained as many as 3,000 documents. It also did not explain the protocol used to select a sample from the limited universe of 271 relevant documents. Nor did it give Plaintiff sufficient information regarding the sample from which Plaintiff could determine the applicability of privilege let alone whether such privilege had been waived by the NRA’s conduct in putting the topics involved at issue.

46. On December 19, 2022, Plaintiff wrote to the Special Master with regard to the submission. A true and correct copy of Plaintiff’s letter to the Special Master is annexed hereto as Exhibit R. Plaintiff noted its extensive attempts to obtain transparency from the NRA regarding the process of identifying a universe of documents and sampling, as the Special Master had repeatedly ordered, and the NRA’s election to proceed without agreeing upon a means to identify the universe of documents, without disclosing its methodology regarding sampling, and without either agreeing upon an appropriate protocol with the Plaintiff or seeking the Special Master’s assistance with regard to the same.

The Special Master Determines that the NRA Had Failed to Submit a Representative Sample in Support of Its Assertion of Privilege

47. On December 27, 2022, the Special Master issued a decision. He found that the NRA made its submission without providing “the protocol it used for selecting, reviewing or sampling” the relevant documents, leaving him with no “assurance that the search terms used are

⁵ According to a December 22, 2022 email, the NRA may have or may have intended to submit an additional 150 documents for in camera review. Plaintiff does not know whether such documents were submitted or anything about how the NRA gathered this sample if it was submitted for in camera review.

adequate.” NYSCEF 1034. The Special Master further found that the NRA had not shown that the pool from which the sample for *in camera* review was drawn is “fairly reflective” of the universe of relevant documents. *Id.* at 2. The Special Master also found that the NRA had not divulged why it identified a much smaller pool of relevant documents than predicted by either party, submitting a sample of only 110 documents, many of which were blank, had not revealed how many documents from the relevant universe the NRA determined were not in fact privileged, and had not indicated that the sample was randomly selected. *Id.*

48. The Special Master determined that the NRA had again failed to select a representative sample from the universe of documents it seeks to protect but had, instead, selected “a small sample from a subset of documents it described as related to its compliance efforts.” Accordingly, the Special Master concluded that the NRA had failed to meet its burden of establishing privilege and directed production of the withheld documents.

49. During a conference on January 3, 2023, the Special Master confirms that his December 27, 2022 Order was directed at the Plaintiff’s October 20th Application, i.e., the Course-Correction Documents.

50. Contrary to the NRA’s submission (Peters Aff. at 56-62), Plaintiff did respond to and repeatedly, in emails, in meet and confers and in conferences, to reject the NRA’s proposal to address the privilege dispute by agreeing that it would not use communications it had withheld as privileged at trial. *See, e.g.*, NYSCEF 1045, at 4; Ex. M, at 20-22, 30-32, 33-37. The issue is not a matter of whether the NRA will introduce a specific written or spoken statement to or from an attorney. As Plaintiff has explained, Plaintiff has been prejudiced by the NRA’s decision to cloak the very activities of the NRA that make up parts of its Course Correction in privilege, prohibiting witnesses from testifying and shilding facts behind privilege, and then indicating that it will

introduce evidence about the actions the NRA took as part of its Course Correction. The proposal is wholly insufficient to cure the prejudice to Plaintiff by the NRA's selective use of privilege to block full and fair discovery of the Course Correction.

51. Finally, in the NRA's motion, Mr. Peters raises the tragedy suffered by his family. We regret the need to even address this issue but do so by annexing an email to the Special Master in this topic which the NRA did not refute. A true copy of that email is annexed hereto as Exhibit S.

Dated: New York, New York
January 18, 2023

/s/ Monica Connell

Monica Connell

EXHIBIT A



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
28 LIBERTY STREET, 19TH FLOOR
NEW YORK, NEW YORK 10005

LETITIA JAMES
ATTORNEY GENERAL

DIVISION OF SOCIAL JUSTICE
CHARITIES BUREAU
James G. Sheehan, Bureau Chief
(212) 416-8490
James.Sheehan@ag.ny.gov

December 30, 2019

Via Email and First Class Mail

William Brewer III, Esq.
Brewer Attorneys & Counselors
750 Lexington Avenue, 14th Floor
New York, NY 10022

Re: Potential Conflict Under the New York Rules of Professional Conduct

Dear Mr. Brewer:

I write to raise with you an issue of increasing concern to this office as we continue our Charities Bureau investigation of your client, the National Rifle Association of America, Inc. and its related entities (collectively, the ("NRA")).

Based on documents and other information we have gathered to date, it is our understanding that several individuals with fiduciary and/or employment duties to the NRA raised significant concerns with the NRA Board of Directors (the "Board"), with Board committees, and with senior executives relating to the Brewer firm's role as counsel to the NRA. These concerns, as we understand them, related to the selection of the Brewer firm, the retention of the Brewer firm, the terms of engagement of the Brewer firm, the rates to be charged by the Brewer firm, the documentary support for the bills submitted by the Brewer firm, the review of the bills submitted by the Brewer firm, the conduct of the Brewer firm in its representation, the existence of ethical concerns about the Brewer firm arising from its alleged conduct in Texas, the amount paid to the Brewer firm, and the conduct of the Brewer firm regarding the treatment of whistleblowers at the NRA. Accordingly, based upon our investigation thus far, the retention of the Brewer firm, its involvement in the governance and operations of the NRA, and the review and approval of its billing, are factual issues in this continuing investigation.

William Brewer III, Esq.

Page 2

This raises a number of issues. We anticipate that the Charities Bureau and your client will have differences of opinion about the nature and extent of attorney-client and work product privileges concerning both documents and witness testimony. We do not want to nor seek to invade any privilege, but the Charities Bureau is entitled to inquire where the role and conduct of the Brewer firm is at issue.

In addition, we must raise potential ethical issues that appear evident in regard to the role of the Brewer firm in this investigation. We have undertaken an analysis of some provisions in the Rules of Professional Conduct that may be of concern as the investigation proceeds.

Rule 3.7 Lawyer as Witness provides at 3.7(a)(3) that a “lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless, “ among other reasons, “disqualification of the lawyer would work substantial hardship on the client.” The commentary to this Section (a)(3) at Comment (4), states that “a balancing is required among the interests of the client, of the tribunal, and of the opposing party. The commentary discusses various factors, but the note states: “Even if there is a risk of such prejudice, in determining whether a lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer’s client. **It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness.**” (emphasis added).

The commentary at (6) states that, “in determining whether it is permissible to act as advocate before a tribunal in which the lawyer will be a witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rule 1.7 or 1.9. For example, if there is likely to be a substantial conflict between the testimony of the client and that of the lawyer, the representation involves a conflict of interest that requires compliance with Rule 1.7. . . the problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party.”

We recognize that the commentary to Rule 3.7 states that, in the first instance, “determining whether such a conflict exists is primarily the responsibility of the lawyer involved.” This letter is to provide you with our concerns and the legal and ethical analysis for those concerns to inform your determination.

In *Ultrapak v. Laninver USA Inc.*, No. 18-CV-561V, 2019 WL 244492, at *6 (W.D.N.Y. Jan. 17, 2019), the Court considered a disqualification motion under New York Rule of Professional Conduct 3.7. The Court determined that in-house counsel “was aware of and engaged in some communications” regarding the subject of the underlying dispute and likely would be required to testify about the problems that arose between the directors, and that the likelihood of his testifying “at some point in this case provides an additional reason to disqualify him.”

In this matter, should litigation be necessary, it is similarly likely that you and other members of your firm would be called to testify about the problems that arose among directors, and between directors and Mr. LaPierre. These problems include allegations of waste and unauthorized expenditure of charitable funds, excessive billing, and failure to obtain required expenditure approvals. Individual directors or officers may choose to respond to allegations of violations of

William Brewer III, Esq.

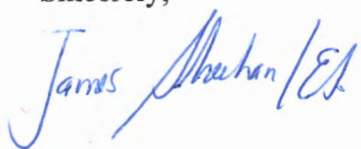
Page 3

the N.Y. NPCL by asserting a defense under Section 717(b)(2) of the NPCL based upon your advice, which would also require your testimony.

Indeed, Mr. LaPierre, in a recent media interview, discusses requests by members of the Board for your firm's invoices, and for an independent audit of your firm's bills – requests which he rebuffed. According to the media report, Lt. Col. Oliver North, in his role as President of the NRA Board, contacted your firm directly for copies of your bills. Shortly thereafter, Mr. LaPierre allegedly sent you a memo asking you to disregard North's letter. "I apologize for the confusion that this letter has created," he wrote, adding, "Please keep up the good work, and disregard this and any similar missives." Given your representation of the NRA as a corporate entity, and the alleged specific instruction of Mr. LaPierre to ignore the request from the President of the Board of the governing entity, you may also be called upon to discuss whom you spoke to and what if any action you took to address this conflict in direction.

In light of the above, we request that you consult with your client concerning your representation in this matter, and advise the client of the issues we have raised here. We are available to discuss these issues if you disagree with our assessment of the potential privilege and ethical issues.

Sincerely,

A handwritten signature in blue ink that reads "James Sheehan / EJ".

James G. Sheehan

cc: Sarah Rogers, Esq. (via email)

EXHIBIT B

B R E W E R
ATTORNEYS & COUNSELORS

January 6, 2020

VIA EMAIL

James G. Sheehan, Esq.
Bureau Chief
State of New York
Office of The Attorney General
28 Liberty Street, 19th floor
New York, New York 10005

Re: Your Letter Dated December 30, 2019

Dear Mr. Sheehan:

We received your letter dated December 30, 2019, and addressed to Mr. William A. Brewer III. Please be assured that Mr. Brewer and all other attorneys at the law firm Brewer, Attorneys & Counselors (the "Firm") are fully aware of their ethical obligations, including their obligations under Rule 3.7 of the New York Rules of Professional Conduct. We disagree with the positions you take in your letter because you are ignoring the relevant facts and the applicable legal principles. Nonetheless, we are taking all actions necessary to ensure our compliance with Rule 3.7, including receiving counsel from experts.

We appreciate your attention to this important matter. If you have any questions, please contact me.

Sincerely,


Michael J. Collins

EXHIBIT C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In Re:) **Case No. 21-30085-hdh-11**
) Jointly Administered
NATIONAL RIFLE ASSOCIATION)
OF AMERICA, et al.,) Dallas, Texas
) April 5, 2021
Debtors.) 1:30 p.m. Docket
)
) TRIAL DAY 1 - AFTERNOON DOCKET
)

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE HARLIN DEWAYNE HALE,
UNITED STATES CHIEF BANKRUPTCY JUDGE.

WEBEX APPEARANCES:

For Ackerman McQueen, Brian Edward Mason
Inc.: G. Michael Gruber
H. Joseph Acosta
Christina M. Carroll
Kelsey M. Taylor
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300 Crescent Court, Suite 400
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(214) 981-9900

For the Official Committee Louis R. Strubeck, Jr.
Of Unsecured Creditors: Scott P. Drake
NORTON ROSE FULBRIGHT US LLP
2200 Ross Avenue, Suite 3600
Dallas, TX 75201
(214) 855-8000

For the Debtors: Gregory Eugene Garman
William McCarty Noall
Talitha Gray Kozlowski
Dylan Thomas Ciciliano
GARMAN TURNER GORDON, LLP
7251 Amigo Street, Suite 210
Las Vegas, NV 89119
(725) 777-3000

18

1 That's where we begin.

2 What do we do as the National Rifle Association? I
3 believe the evidence will bear fruit that we decided to
4 ensure that we were a good corporate citizen. Mr. LaPierre
5 will testify to the 360-degree top-down review. No one was
6 spared review in the entire organization, including Mr.
7 LaPierre. But what did we do? We set out to put our house
8 in order.

9 Are there going to be facts that are moderately cringe-
10 worthy? The answer to that is yes. Not going to run from
11 them. But the important component of what you're going to
12 hear, because it has to do with the standard under 1104, is
13 that we set out to put our own house in order, which we did.
14 We went out to self-report. What we self-reported is now the
15 very evidence that's being used against us by the New York
16 Attorney General. We sought the safe harbor provisions of
17 New York State law. Yet every time we self-report, every
18 time we correct ourselves, it's now a new allegation of
19 misconduct on the part of the NRA for which they seek to
20 destroy us.

21 Your Honor, it was a corporate campaign against the NRA
22 that is more than just the actions that you have before you
23 by the New York Attorney General. Your Honor, it begins with
24 the NRA hiring the law firm of Morgan Lewis to review our
25 not-for-profit compliance procedures. Importantly, this is

33

1 Audit Committee to rescind their approval of the
2 misrepresented relationship that Oliver North had with the
3 Ackerman team? And he is no longer our president. He is not
4 a successor. He is not worthy to succeed Mr. LaPierre in
5 this organization. He is someone who is no longer with the
6 organization because of his own misconduct, his own
7 misrepresentations.

8 And the system worked. The Audit Committee worked. The
9 internal protocols worked. And we rescinded the infor... we
10 rescinded his ability to work with Ackerman McQueen when the
11 details of his contract finally were revealed.

12 Mr. LaPierre's right hand, Josh Powell. He, too, was
13 terminated. He, too, demand was made for the recovery of
14 funds that were misapplied.

15 These are not successors. These are -- these are folks
16 who were the leadership of the NRA, the management of the
17 NRA, in the parlance of 1104, who are no longer with the
18 Association.

19 Self-disclosure. Safe harbor. The NRA finds that even
20 Mr. LaPierre is subject to review. You will hear him say, no
21 one should escape review, including me. Mr. LaPierre, we
22 file a Form 990. It is, in fact, the tax IRS form that is
23 for the IRS. That form, the National Rifle Association found
24 that Mr. LaPierre had received an excess benefit to the tune
25 of just over \$300,000.

34

1 Demand was made. He paid it. He didn't negotiate it.
2 He wrote a check. He reimbursed the National Rifle
3 Association to the tune of just over \$300,000. And what else
4 did he do? He paid his taxes. He paid his taxes to the tune
5 of \$70,000-plus, which is what you'll hear. That \$300,000,
6 though, represents the totality of excess benefits from the
7 time period of 2015 forward.

8 We're going to talk about Mr. LaPierre, his travel, what
9 he's accused of doing. But what was found to be an excess
10 benefit was, in fact, repaid. And it was prepaid [sic]
11 prepetition, and it was repaid before Attorney General James
12 commences her action.

13 Now, let's get there. August 6th of 2020. The New York
14 Attorney General seeks dissolution of the National Rifle
15 Association. Your Honor, that's about 150 days before the
16 filing of this bankruptcy. Some would have you believe that
17 this case has been pending for months or years. I don't
18 think it's intentional. It's just that this is an incredibly
19 condensed time period. That case is August of 2020. The
20 very first claim in the prayer, the prayer for relief, the
21 very first remedy that they seek is dissolution. To suggest
22 that it is a red herring, to suggest that it is the bogeyman,
23 is to suggest that we do not have a duty to protect this
24 organization from dissolution or the appointment of a
25 receivership. That claim for relief goes straight to the

EXHIBIT D

Filed Under Seal

EXHIBIT E

Filed Under Seal

EXHIBIT F

Filed Under Seal

EXHIBIT G

Filed Under Seal

EXHIBIT H

Filed Under Seal

EXHIBIT I

Filed Under Seal

EXHIBIT J

From: [Connell, Monica](#)
To: [Svetlana Eisenberg](#)
Subject: RE: In camera review
Date: Wednesday, November 16, 2022 2:16:00 PM

Thank you. Was what was provided all documents or a sampling, and if a sampling, how was that done?

From: Svetlana Eisenberg <sme@brewerattorneys.com>
Sent: Wednesday, November 16, 2022 2:00 PM
To: Connell, Monica <Monica.Connell@ag.ny.gov>
Subject: Re: In camera review

Monica,

We provided to Judge Sherwood privileged communications between the NRA and its counsel that relate to the NRA's ongoing efforts to ensure compliance with applicable laws, regulations, and its own policies. In addition, we provided communications with a number of lawyers, including our firm, Don Lan, Alex Reid, and John Frazer. The subject matter of the communications included calculation of potential excess benefits, determinations of whether something is an excess benefit, vendor compliance, and conflicts of interest.

The documents were compiled by running searches for communications with referenced counsel concerning the above-referenced topics.

Regards,
Svetlana

Svetlana M. Eisenberg | Partner
Brewer, Attorneys & Counselors
750 Lexington Avenue, 14th Floor
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Office Direct: 212.224.8817
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sme@brewerattorneys.com www.brewerattorneys.com

BREWER

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From: Connell, Monica <Monica.Connell@ag.ny.gov>
Sent: Wednesday, November 16, 2022 8:53 AM
To: Svetlana Eisenberg <sme@brewerattorneys.com>
Subject: Re: In camera review

Svetlana,

I understand the time pressures. Thanks for responding. My request and my understanding was that we are supposed to be told how the NRA is sampling. Please let me know if you are going to do that.

Thanks,

Monica

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From: Svetlana Eisenberg <sme@brewerattorneys.com>
Sent: Wednesday, November 16, 2022 7:11:33 AM
To: Connell, Monica <Monica.Connell@ag.ny.gov>
Subject: In camera review

[EXTERNAL]

Monica,

Apologies for not responding yesterday. As you know, we are preparing for the upcoming depositions and making productions.

The documents provided to Judge Sherwood for in camera review are a representative sample of privileged documents to which the NYAG is not entitled. Separately and together, they demonstrate that the NYAG's waiver argument has no merit.

They cover a variety of years, lawyers, law firms, and issues.

Please let me know if you have any further questions or if it would be helpful to have a call.

Regards,

Svetlana

Svetlana M. Eisenberg | Partner
Brewer, Attorneys & Counselors
750 Lexington Avenue, 14th Floor
New York, New York 10022
Office Direct: 212.224.8817
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=====

EXHIBIT K

From: [Connell, Monica](#)
To: [Dawn M. Wilson](#); [Svetlana Eisenberg](#); [Peter Sherwood](#)
Cc: [kent@correllawgroup.com](#); [WFleming@gagespencer.com](#); [tmclish@akingump.com](#); [Thompson, Stephen](#); [SFarber@winston.com](#); [Sarah Rogers](#); [PBannon@winston.com](#); [Sargent, Nina](#); [mwerbner@werbnerlaw.com](#); [mmacdougall@akingump.com](#); [Stern, Emily](#); [samantha.block@akingump.com](#); [hevans@akingump.com](#); [Noah Peters](#); [Stern, Emily](#); [Thompson, Stephen](#)
Subject: RE: Pending motions, People v. NRA
Date: Monday, November 21, 2022 1:48:00 PM
Attachments: [2022.11.14 SM - Argument Trans ROUGH.pdf](#)
[image002.png](#)
[image003.png](#)

Dear Ms. Wilson,

Thank you for your email today. We have received only a “rough” of the transcript of the conference. I have attached a copy of that to this email. I inquired of the Court Reporter and asked for the final version. I understand we can expect to receive it today.

Plaintiff needs to raise an important issue. At the November 14, 2022 conference, the NRA indicated that it was going to provide a sample of the allegedly privileged materials for in camera review. This included assertedly privileged materials that generally fall into two categories: (1) communications with and information shared between the NRA and third parties; and (2) communications between the NRA and its counsel related to the NRA's compliance reform efforts, over which Plaintiff has alleged the NRA has waived privilege by putting such matters at issue and/or for which information the NRA has improperly used privilege as a sword and shield. These two categories were confirmed in Ms. Eisenberg's November 15, 2022 email to the Special Master. Again, it is not solely the documents that are at issue but the NRA's attempts to block Plaintiff from obtaining access to information it relies upon in asserting that it has appropriately calculated excess benefits, investigated whistleblower complaints, addressed alleged malfeasance, and implemented reforms regarding conflicts of interest and vendor procurement.

At our request, the Special Master directed, and the NRA agreed, to provide the protocol of how it selected the sample materials provided to the Special Master. The NRA has refused to do so, saying only the NRA provided “a representative sample of privileged documents to which the NYAG is not entitled. Separately and together, they demonstrate that the NYAG's waiver argument has no merit. They cover a variety of years, lawyers, law firms, and issues.” We believe that it is necessary for the NRA to articulate how it selected the sample it has submitted to the Special Master to determine whether it is in fact representative of the entirety of the categories of documents it has withheld from production. If the sample provided is not representative of the larger population of withheld documents, the results of Judge Sherwood's in camera review cannot be extrapolated to the entire population. We therefore ask that the NRA disclose how it selected the documents it submitted, as directed by Judge Sherwood.

Thank you,

Monica Connell



Monica Connell
Senior Litigation Counsel
New York State Office of the Attorney General
28 Liberty Street, 19th Floor | New York, NY 10005
Tel: (212) 416-8965 | Monica.Connell@ag.ny.gov

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From: Dawn M. Wilson <dwilson@ganfershore.com>
Sent: Monday, November 21, 2022 12:22 PM
To: Svetlana Eisenberg <sme@brewerattorneys.com>; Peter Sherwood <psherwood@ganfershore.com>
Cc: Connell, Monica <Monica.Connell@ag.ny.gov>; kent@correlllawgroup.com; WFleming@gagespencer.com; tmclich@akingump.com; Thompson, Stephen <Stephen.Thompson@ag.ny.gov>; SFarber@winston.com; Sarah Rogers <sbr@brewerattorneys.com>; PBannon@winston.com; Sargent, Nina <Nina.Sargent@ag.ny.gov>; mwerbner@werbnerlaw.com; mmacdougall@akingump.com; Stern, Emily <Emily.Stern@ag.ny.gov>; samantha.block@akingump.com; hevans@akingump.com; Noah Peters <nbp@BrewerAttorneys.com>
Subject: RE: Pending motions, People v. NRA

[EXTERNAL]

Counsel,

Judge Sherwood has completed the review of the documents submitted by the NRA for in camera review. Specifically documents 1 -33 and 87 - 94, have been reviewed and determined to be protected by the attorney-client privilege. This is a bottom line determination. A reasoned decision will be issued in coming days.

In addition, in accordance with the discussion at the hearing last week, Judge Sherwood at this time is denying the NRA's motion for legal fees related to the Aaronson document review and production, without prejudice to the NRA renewing that motion with the proper support necessary to satisfy its burden.

Will someone please forward me the transcript when it is received?

Thank you,

Dawn M. Wilson

Counsel



Celebrating Over 40 Years Serving Clients

360 Lexington Avenue
New York, New York 10017

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Fax: 212.922.9335

dwilson@ganfershore.com

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From: Svetlana Eisenberg <sme@brewerattorneys.com>

Sent: Sunday, November 13, 2022 4:07 PM

To: Peter Sherwood <psherwood@ganfershore.com>

Cc: Monica.Connell@ag.ny.gov; kent@correlllawgroup.com; WFleming@gagespencer.com; tmclish@akingump.com; Stephen.Thompson@ag.ny.gov; SFarber@winston.com; Sarah Rogers <sbr@BrewerAttorneys.com>; PBannon@winston.com; Nina.Sargent@ag.ny.gov; mwerbner@werbnerlaw.com; mmacdougall@akingump.com; Emily.Stern@ag.ny.gov; Dawn M. Wilson <dwilson@ganfershore.com>; samantha.block@akingump.com; hevans@akingump.com; Noah Peters <nbp@BrewerAttorneys.com>

Subject: RE: Pending motions, People v. NRA

Your Honor,

On behalf of the NRA, below is timing update with regard to the documents for in camera review.

First, the NRA will provide privileged documents involving third parties for in camera review on Monday (tomorrow). The NRA believes that Your Honor will find it helpful to have a document-by-document log (index) that reflects the bases of the claimed privileges in the context of these documents (e.g., the third party's necessary role in the communications). The NRA requests until midnight on Wednesday to provide that index.

Second, in preparing the third party documents for in camera review, the NRA also determined (based on the review of individual documents) that some documents (i) are not privileged, or (ii) are privileged but, given Judge Cohen's recent ruling, can be produced to the NYAG if the NYAG agrees to

the stipulation memorialized in the attached email exchange between the NRA and the NYAG. The NRA will produce, subject to the stipulation to the extent applicable, these documents to the NYAG on Tuesday.

Third, the NRA will share with Your Honor on Monday for in-camera review samples of privileged documents related to the NRA's efforts to ensure its compliance with its governance controls. As you will see, those documents do not involve third parties and are between the NRA and its counsel. Further, the NRA has no intention whatsoever of relying on, introducing, or referencing any of these privileged documents in support of or as part of any of its defenses. The NRA believes the samples provided on Monday will assist Your Honor in determining that the NYAG's waiver argument lacks merit. Of course, because the NRA is not asserting an advice of counsel defense and will not rely upon or refer to any of these documents for any defense, there is no basis for any waiver claim.

We look forward to seeing you at the hearing on the pending motions tomorrow at 10 a.m. E.S.T. (Pursuant to the Special Master Stipulation, the NRA arranged for a court reporter to join the video call. An invitation and a link were sent on 11/11 at 7:18 pm.) In the meantime, should you have any questions, please do not hesitate to let us know.

Thank you for your attention to this matter.

Regards,
Svetlana Eisenberg

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New York, New York 10022
Office Direct: 212.224.8817
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From: Svetlana Eisenberg <sme@brewerattorneys.com>

Sent: Saturday, November 12, 2022 11:48 PM

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Subject: Re: Pending motions, People v. NRA

Your Honor,

We will be able to provide a firm ETA tomorrow afternoon. I will be in touch then.

Regards,

Svetlana

Svetlana M. Eisenberg | Partner
Brewer, Attorneys & Counselors
750 Lexington Avenue, 14th Floor
New York, New York 10022
Office Direct: 212.224.8817
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sme@brewerattorneys.com www.brewerattorneys.com

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Subject: Re: Pending motions, People v. NRA

Your Honor, Unfortunately, we ran into a few issues and will not be able to provide the documents this evening.

We will be able to provide an ETA tomorrow and will send an update then.

Please accept our apologies for the delay.

Thank you.

Regards,

Svetlana

From: Peter Sherwood <psherwood@ganfershore.com>

Sent: Friday, November 11, 2022 3:55:17 PM

To: Svetlana Eisenberg <sme@brewerattorneys.com>

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Subject: Re: Pending motions, People v. NRA

Ms. Eisenberg,

I appreciate the extraordinary efforts you are making to comply with my request in a timely manner.

Best

OPS

Sent from my iPhone

Peter Sherwood

Senior counsel



Celebrating Over 40 Years Serving Clients

360 Lexington Avenue
New York, New York 10017

Main: 212.922.9250

Direct: 212.823.0925

Fax: 212.922.9335

psherwood@ganfershore.com

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On Nov 11, 2022, at 3:29 PM, Svetlana Eisenberg <sme@brewerattorneys.com> wrote:

Dear Judge Sherwood,

Thank you for your message below. It was forwarded to the parties as requested.

The NRA is working on complying with Your Honor's request. We are intending to respond today before 12 midnight.

Thank you.

Regards,

Svetlana

Svetlana M. Eisenberg | Partner
Brewer, Attorneys & Counselors
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New York, New York 10022
Office Direct: 212.224.8817
Office Main: 212.489.1400
Cell: 929.319.1731
Fax: 212.751.2849

sme@brewerattorneys.com www.brewerattorneys.com

From: Svetlana Eisenberg <sme@brewerattorneys.com>

Sent: Wednesday, November 9, 2022 10:39 AM

To: Monica Connell (OFFICIAL) <monica.connell@ag.ny.gov>; Kent Correll <kent@correlllawgroup.com>; William Fleming <WFleming@gagespencer.com>; McLish, Thomas <tmclish@akingump.com>; Farber, Seth <SFarber@winston.com>; mwerbner@werbnerlaw.com

Subject: Fwd: Pending motions, People v. NRA

Pls see email below from Judge Sherwood.

Svetlana M. Eisenberg | Partner
Brewer, Attorneys & Counselors
750 Lexington Avenue, 14th Floor
New York, New York 10022
Office Direct: 212.224.8817
Office Main: 212.489.1400
Cell: 929.319.1731
Fax: 212.751.2849

sme@brewerattorneys.com www.brewerattorneys.com

From: Peter Sherwood <psherwood@ganfershore.com>

Sent: Tuesday, November 8, 2022 5:39 PM

To: Svetlana Eisenberg <sme@brewerattorneys.com>

Subject: Pending motions, People v. NRA

Dear Miss Eisenberg,

I have completed an initial review of the Attorney General's motion, dated October 20, the NRA's opposition, dated November 4 and the relevant case law. The cases make clear that "determining document immunity claims and reviewing them are largely fact-specific processes" (see spectrum systems international corp. v. Chemical Bank, 78 NY 2d 371,381 (1991). As such fact-finders are often encouraged to conduct in camera reviews (see id). I have determined that needs to be done here. Please re-review the documents the NRA wishes to withhold and provide for in camera review the documents the NRA maintains are immune from disclosure. If possible, please make them available for my review by this Friday, November 11.

Also, please forward this email to all counsel ASAP.

Thank you,

O. P. Sherwood

Sent from my iPhone

Peter Sherwood

Senior counsel

[<image001.png>](#)

Celebrating Over 40 Years Serving Clients

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=====

EXHIBIT L

From: [Svetlana Eisenberg](#)
To: [Peter Sherwood](#)
Cc: [Connell, Monica](#); kent@correlllawgroup.com; WFleming@gagespencer.com; tmclish@akingump.com; [Thompson, Stephen](#); SFarber@winston.com; [Sarah Rogers](#); PBannon@winston.com; [Sargent, Nina](#); mwerbner@werbnerlaw.com; mmacdougall@akingump.com; [Stern, Emily](#); [Dawn M. Wilson](#); samantha.block@akingump.com; hevans@akingump.com; [Noah Peters](#)
Subject: Re: Pending motions, People v. NRA
Date: Tuesday, November 15, 2022 12:39:40 AM
Attachments: [image001.png](#)
[gslzlogo_finalsm2_53dc6904-292c-4cae-b56e-3714155393cc.png](#)

[EXTERNAL]

Your Honor,

The NRA produces two sets of documents for *in camera* review as requested.

Link: <https://filecloud.brewerattorneys.com/Public/?folder=6bf9a1a9>

First, documents Bates Numbered IN CAMERA 0001 through 0086 are from the category of documents referenced at the bottom of page 11 and the top of page 12 on the NYAG's letter dated October 20, 2022, that is, communications involving third parties. As previously noted, the NRA will provide an index for these documents on Wednesday, November 15, 2022. The index will explain the NRA's relationship with—and the role of—these third parties to make clear that the privileges were not waived.

Second, documents Bates-numbered IN CAMERA 0087 through 0094 are privileged communications between the NRA and its counsel related to the NRA's continued efforts to ensure compliance with applicable laws, rules, and policies. These documents are immune from production pursuant to subsections (b), (c), and (d) of CPLR 3101 and CPLR 4503. The NRA is producing these documents for *in camera* review. On behalf of the NRA, we reiterate that the NRA has no intention of utilizing these documents at trial or mentioning advice of its attorneys at trial. Therefore, there is no merit to the NYAG's waiver argument and, in fact, no basis for *in camera* review. An index to Documents Bates-numbered IN CAMERA 0087 through 0094 is below.

A password will be sent to Your Honor by separate email.

87	June 18, 2018	Confidential correspondence between an NRA employee and its outside counsel concerning, inter alia, collection of specified documents to inform (i) counsel's legal advice to the NRA; and (ii) provision of counsel's legal services to the NRA.
88	May 14, 2019	Confidential email exchange among an NRA Director, the NRA's General Counsel, and counsel to the NRA's Board of Directors regarding , inter alia, conflict of interest matters and related disclosures, including (i) email messages from the Director soliciting and providing information to inform legal advice to the Director and the NRA; and (ii) email correspondence from the General Counsel providing such analysis and advice to the Director and the NRA.

89	June 2021	Confidential email correspondence between the NRA's outside counsel and the NRA, including (i) email message from counsel rendering legal advice to the NRA concerning, inter alia, tax law matters; and (ii) confidential email messages from the NRA to outside counsel soliciting and providing information to inform such legal advice to the NRA.
90	July 6, 2021	Confidential email message thread involving the NRA, its outside counsel, and its General Counsel, in which counsel provide (i) legal advice to the NRA concerning, inter alia, tax law matters; and (ii) information to solicit and inform further legal advice to the NRA.
91	September 15, 2021	Confidential email exchange between the NRA's General Counsel and outside counsel concerning, inter alia, tax law matters and IRS disclosure matters, in which counsel (i) seek, (ii) provide information to inform, and (iii) provide legal advice and services to the NRA.
92	November 10-11, 2021	Confidential email thread consisting of (i) email messages from NRA's outside counsel providing legal advice to the NRA concerning, inter alia, IRS disclosure/taxation matters and (ii) email message from the NRA's General Counsel providing information to inform and soliciting further legal advice in connection with same.
93	November 13, 2021	Confidential email exchange between the NRA's General Counsel and NRA's outside counsel concerning, inter alia, tax law matters and IRS disclosure, in which counsel (i) seek, (ii) provide information to inform, and (iii) provide legal advice and services to the NRA.
94	April 27, 2022	Confidential email message exchange among the NRA's Treasurer and CFO and NRA's outside counsel concerning, inter alia, IRS disclosure matters, in which (i) an NRA employee provides information to inform and seeks legal advice to the NRA from counsel; and (ii) NRA counsel provides information to the NRA in the course of providing legal services to the NRA.

Regards,
Svetlana

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To: Svetlana Eisenberg <sme@brewerattorneys.com>

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Subject: RE: Pending motions, People v. NRA

Ms. Eisenberg,

Thanks. See you tomorrow.

OPS

Peter Sherwood

Senior counsel



Ganfer
Shore
Leeds &
Zauderer LLP

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New York, New York 10017

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We look forward to seeing you at the hearing on the pending motions tomorrow at 10 a.m. E.S.T. (Pursuant to the Special Master Stipulation, the NRA arranged for a court reporter to join the video call. An invitation and a link were sent on 11/11 at 7:18 pm.) In the meantime, should you have any questions, please do not hesitate to let us know.

Thank you for your attention to this matter.

Regards,
Svetlana Eisenberg

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Subject: Re: Pending motions, People v. NRA

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Sent: Friday, November 11, 2022 3:55:17 PM

To: Svetlana Eisenberg <sme@brewerattorneys.com>

Cc: Monica.Connell@ag.ny.gov <Monica.Connell@ag.ny.gov>; kent@correlllawgroup.com <kent@correlllawgroup.com>; WFleming@gagespencer.com <WFleming@gagespencer.com>; tmclish@akingump.com <tmclish@akingump.com>; Svetlana Eisenberg <sme@brewerattorneys.com>; Stephen.Thompson@ag.ny.gov <Stephen.Thompson@ag.ny.gov>; SFarber@winston.com <SFarber@winston.com>; Sarah Rogers <sbr@brewerattorneys.com>; PBannon@winston.com <PBannon@winston.com>; Nina.Sargent@ag.ny.gov <Nina.Sargent@ag.ny.gov>; mwerbner@werbnerlaw.com <mwerbner@werbnerlaw.com>; mmacdougall@akingump.com <mmacdougall@akingump.com>; Emily.Stern@ag.ny.gov <Emily.Stern@ag.ny.gov>; Dawn M. Wilson <dwilson@ganfershore.com>; samantha.block@akingump.com <samantha.block@akingump.com>; hevans@akingump.com <hevans@akingump.com>

Subject: Re: Pending motions, People v. NRA

Ms. Eisenberg,

I appreciate the extraordinary efforts you are making to comply with my request in a timely manner.

Best

OPS

Sent from my iPhone

Peter Sherwood

Senior counsel



Celebrating Over 40 Years Serving Clients

360 Lexington Avenue

New York, New York 10017

Main: 212.922.9250

Direct: 212.823.0925

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psherwood@ganfershore.com

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On Nov 11, 2022, at 3:29 PM, Svetlana Eisenberg <sme@brewerattorneys.com> wrote:

Dear Judge Sherwood,

Thank you for your message below. It was forwarded to the parties as requested.

The NRA is working on complying with Your Honor's request. We are intending to respond today before 12 midnight.

Thank you.

Regards,

Svetlana

Svetlana M. Eisenberg | Partner
Brewer, Attorneys & Counselors
750 Lexington Avenue, 14th Floor
New York, New York 10022
Office Direct: 212.224.8817
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sme@brewerattorneys.com www.brewerattorneys.com

From: Svetlana Eisenberg <sme@brewerattorneys.com>

Sent: Wednesday, November 9, 2022 10:39 AM

To: Monica Connell (OFFICIAL) <monica.connell@ag.ny.gov>; Kent Correll <kent@correlllawgroup.com>; William Fleming <WFleming@gagespencer.com>; McLish, Thomas <tmclish@akingump.com>; Farber, Seth <SFarber@winston.com>; mwerbner@werbnerlaw.com

Subject: Fwd: Pending motions, People v. NRA

Pls see email below from Judge Sherwood.

Svetlana M. Eisenberg | Partner
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sme@brewerattorneys.com www.brewerattorneys.com

From: Peter Sherwood <psherwood@ganfershore.com>

Sent: Tuesday, November 8, 2022 5:39 PM

To: Svetlana Eisenberg <sme@brewerattorneys.com>

Subject: Pending motions, People v. NRA

Dear Miss Eisenberg,

I have completed an initial review of the Attorney General's motion, dated October 20, the NRA's opposition, dated November 4 and the relevant case law. The cases make clear that "determining document immunity claims and reviewing them are largely fact-specific processes" (see spectrum systems international corp. v. Chemical Bank, 78 NY 2d 371,381 (1991)). As such fact-finders are often encouraged to conduct in camera reviews (see id). I have determined that needs to be done here. Please re-review the documents the NRA wishes to withhold and provide for in camera review the documents the NRA maintains are immune from disclosure. If possible, please make them available for my review by this Friday, November 11.

Also, please forward this email to all counsel ASAP.

Thank you,

O. P. Sherwood

Sent from my iPhone

Peter Sherwood

Senior counsel

[<image001.png>](#)

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EXHIBIT M

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

Index No. 451625/2020

-----x

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

Plaintiff,

- against -

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

Defendants.

-----x

Zoom videoconference

December 5, 2022

2:59 p.m.

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

Reported By:

Todd DeSimone, RPR

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1 CONFERENCE

2 JUDGE SHERWOOD: We have some
3 important matters to discuss, that's for
4 sure. Who would like to go first, you,
5 Ms. Connell? The decision matters of
6 greatest concern, I first addressed the
7 AG's concerns and ruled on that, so why
8 don't I hear from you first.

9 MS. CONNELL: Thank you, your
10 Honor.

11 You held, and the law is clear,
12 that the NRA bears the burden of
13 establishing privilege attaching to
14 information and that it has not waived the
15 privilege. Your Honor gave the NRA the
16 opportunity of showing privilege and
17 nonwaiver. You gave them the opportunity
18 to submit a sample.

19 JUDGE SHERWOOD: Multiple
20 opportunities.

21 MS. CONNELL: Multiple
22 opportunities. We now know that they did
23 not submit a random or representative
24 sample, that what they did was select some
25 documents that they thought would be good

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1 CONFERENCE

2 for you to review and submitted them.

3 Actually, the number that they gave you of
4 629 documents withheld relating to the
5 course correction is not accurate is my
6 understanding as well.

7 JUDGE SHERWOOD: Do you know
8 what the number is?

9 MS. CONNELL: I have no idea,
10 your Honor.

11 JUDGE SHERWOOD: Ms. Eisenberg
12 will tell me later.

13 MS. CONNELL: Your Honor found
14 that the NRA did not meet its burden, but
15 instead of ordering production of all
16 responsive documents you gave them a second
17 opportunity now to meet its burden.

18 The NRA, at least to us,
19 indicated it will not submit documents for
20 in-camera review. I don't know if that's
21 its position right now. We have been
22 endeavoring to meet and confer with the NRA
23 and have met and conferred via
24 communication, via a conference, and also
25 via e-mail communications. We still don't

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2 know what the NRA considers the universe of
3 documents, the search terms it used to
4 identify withheld privileged documents at
5 issue so we could build off that to make
6 sure we all agree what that universe is.

7 Using the information the NRA
8 has given us so far, it would seem that at
9 least we are talking about approximately
10 15,000 documents. We think that's a pretty
11 gross undercount.

12 JUDGE SHERWOOD: Whoa.

13 MS. CONNELL: Exactly. Your
14 Honor, I could walk you through how we
15 arrived at that.

16 JUDGE SHERWOOD: You're scaring
17 me.

18 MS. CONNELL: Us too. So, your
19 Honor, we still don't know even now more
20 than a month after we first officially
21 raised this, a long time after we raised
22 this officially with the NRA, what the
23 realm of the universe is. The NRA has
24 stated to us, as it has stated previously,
25 that it would agree not to introduce actual

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1 CONFERENCE

2 privileged documents in evidence at trial
3 or to allow their witnesses to specifically
4 refer to advice of counsel and that kind of
5 thing. Your Honor, this doesn't take care
6 of the prejudice plaintiff has suffered or
7 of the matter which we brought to your
8 Honor, which is not a specific privileged
9 document or a specific piece of advice from
10 counsel, it is the fact --

11 JUDGE SHERWOOD: Can I cut you
12 off at this point?

13 MS. CONNELL: Sure.

14 JUDGE SHERWOOD: I'm trying to
15 understand what it is that we need to
16 decide this afternoon. I know that there
17 are issues that are of concern to you,
18 responsive to requests made by the NRA. I
19 have decided what I have decided with
20 respect to the NRA. But there may be, and
21 I'm assuming, I have assumed all along,
22 that there would be an appeal to Judge
23 Cohen.

24 But what is it that the
25 Attorney General's office would like me to

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1 CONFERENCE

2 do this afternoon? I need to get to your
3 issue and I have a question with respect to
4 that that is very important to me. With
5 respect to the disclosures you are seeking
6 from the NRA, what is it that we need to
7 address this afternoon?

8 MS. CONNELL: Your Honor, I
9 think we need further briefing on this, but
10 I think we are at sort of an impasse. We
11 need one of two things, and I will tell you
12 which one we prefer and which one we would
13 have to settle with in the alternative.

14 The first one would be an
15 order, something like that was affirmed in
16 Gottwald versus Sebert, which was cited in
17 our October 20th letter, which found that
18 where a defendant makes a decision or a
19 party makes a decision to shield something
20 by privilege, it cannot at the end of
21 discovery suddenly choose or select
22 information to share and try and
23 deprive what it wants to share, that
24 that causes disproportionate prejudice to
25 the other side. We think the NRA has made

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1 CONFERENCE

2 an election in discovery at this point and
3 it should be held to those choices that it
4 made, and we would ask for an order
5 indicating the same.

6 To the extent your Honor feels
7 that is beyond the referral to your Honor,
8 we would ask for a report and
9 recommendation on that point, and we are
10 prepared to brief it very quickly if you
11 want further briefing. We think we have
12 already sufficiently briefed it and we are
13 ready to brief it in greater detail, and
14 that's option one.

15 Option two is we really dig in
16 and get to the bottom of what have they
17 withheld and understand what has been
18 withheld as privileged, whether it in fact
19 is privileged, because, as you know, a lot
20 of documents it has been producing are
21 dedesignating, and also then see what
22 prejudice has accrued as a result of that
23 and whether we need other relief related to
24 that. So far we haven't gotten a handle on
25 that except to know that it's at least

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1 CONFERENCE

2 thousands of documents, and that we don't
3 know how the NRA is proceeding in reviewing
4 it, and that we are not comfortable yet.

5 We do have another meet and
6 confer that we plan on undertaking
7 tomorrow. We haven't picked a time
8 tomorrow, but we have agreed to have one
9 tomorrow, to try and get a little more
10 clarity on this, but our efforts so far
11 have not been good. But we really see that
12 as almost opening discovery back up on some
13 of these issues in a way that is very
14 prejudicial.

15 I would just remind your Honor
16 that we had 12 experts. We did expert
17 reports, expert rebuttal reports and expert
18 depositions already at this point. I think
19 it is one of the two and I think even with
20 the second option, plaintiff suffers pretty
21 significant prejudice.

22 JUDGE SHERWOOD: Okay.

23 Ms. Eisenberg? Now I'm simply referring to
24 the AG's request, not yours. I will get to
25 yours.

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1 CONFERENCE

2 MS. EISENBERG: Of course, your
3 Honor. Not to sound like a broken record,
4 but the NRA has no intent on relying on the
5 advice of any lawyer it received. We are
6 not interested in making selective
7 disclosures of privileged information.
8 We're not interested in saying the NRA
9 should not be liable because its lawyers
10 said X and the NRA did what its lawyers
11 said. And even as to the good-faith
12 defense, that is a defense that involves
13 reliance on professionals like accountants
14 and others that does not involve
15 attorney-client privilege. To the extent
16 we do have good-faith defense, it carves
17 out reliance on lawyers' advice.

18 So from our perspective, two
19 points are critical. First, the NRA
20 prepared a categorical privilege log in
21 March of 2022, and that was pursuant to the
22 Commercial Division rules. It was
23 appropriately accompanied by a
24 certification which I executed that
25 described the intensive and laborious

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1 CONFERENCE

2 process that we undertook to prepare the
3 privilege log. It contained multiple
4 appendices to provide the NYAG about what
5 information we withheld without divulging
6 privileged information.

7 So from our perspective, we are
8 still trying to work it out amicably with
9 the NYAG. We are 100 percent open to
10 providing an additional sample to your
11 Honor for review. The documents you
12 already reviewed you confirmed are
13 privileged. We hope to agree on a path
14 forward with the NYAG during the course of
15 this week.

16 Now, the problem is, as you may
17 recall, last time we spoke, I specifically
18 said that the 600 number that was
19 identified in our letter unfortunately is
20 not representative of the universe. So my
21 colleagues and I have been going --

22 JUDGE SHERWOOD: What is the
23 universe?

24 MS. EISENBERG: We don't know
25 the number yet. My tentative prediction

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1 CONFERENCE

2 now is between 1,500 and 3,000 documents.

3 JUDGE SHERWOOD: That's a lot.

4 MS. EISENBERG: Right. Not as
5 many as 15,000, which I think is what
6 Ms. Connell said, but yes, exactly, that's
7 a lot, and it is unfair to expect you to go
8 through all of them.

9 So what we proposed to
10 Ms. Connell over the weekend was that once
11 we have identified the universe, whether it
12 is 1,500 or 3,000, we are going to generate
13 a spreadsheet that permits her to assess
14 the components of that universe by date and
15 other objective factors that we don't feel
16 risk revealing privilege.

17 JUDGE SHERWOOD: Let me ask you
18 a question, Ms. Eisenberg. Over the months
19 that I have been involved in this, I have
20 heard from the AG many times, you know,
21 that there are certain areas of conduct
22 that they would like to probe into that you
23 have responded are involved in terms of the
24 corrective action matters that were
25 privileged under the attorney-client

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1 CONFERENCE

2 privilege.

3 The AG also had an interest in
4 better understanding and getting details
5 related to the so-called course correction
6 and the 360 review. I don't have a
7 recollection of having seen any documents,
8 communications within the NRA involving
9 either of those two, the course correction
10 or the 360 review. I have heard the label,
11 but I don't think I saw any documents that
12 were generated in connection with that. Do
13 I have that right or wrong?

14 MS. EISENBERG: I have provided
15 to you documents, your Honor, that I
16 believe are reflective of and evidence the
17 NRA's continued effort to improve its
18 compliance, and the term "course
19 correction" is sort of a label that has
20 been thrown around and used to describe
21 what witnesses will say on the stand like,
22 look, we have a policy and we make sure we
23 comply with it, and we have these trainings
24 and we went out to our vendors and asked
25 them for all this information, and so I'm

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1 CONFERENCE

2 not sure that there are documents that
3 actually say this is our course correction,
4 here is what we are going to do, but there
5 are multiple documents that evidence the
6 NRA's doing the right thing, complying with
7 policies, and enhancing their policies, and
8 some of them happen to be privileged, and
9 that's what we're talking about here.

10 So I hope that answers your
11 question, your Honor.

12 JUDGE SHERWOOD: You say that
13 you have in fact shared with the AG and
14 with me, I personalized it by saying I
15 don't recall having seen them, but in this
16 group of 1,500 to 2,000 documents that you
17 maintain are privileged, are there
18 documents that specifically reference these
19 two issues and/or address the issues that
20 you are facing and what you are doing with
21 them and that kind of stuff, or are these
22 all documents, all 1,500 of them, well, not
23 necessarily all 1,500, but large portions
24 of them, documents involving things that
25 you have uncovered but in each instance you

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2 have had lawyers involved, is that what's
3 going on?

4 MS. EISENBERG: So I will
5 answer the individual questions that I
6 heard, your Honor.

7 First, are there documents in
8 the 1,500 to 3,000 that refer to course
9 correction or compliance review? I don't
10 know if those specific terms are used. I'm
11 happy to run a search to specifically be
12 able to answer that question. But what I
13 can absolutely represent is that there are
14 documents, and those are the documents that
15 reflect the NRA's effort to improve its
16 compliance with laws, regulations,
17 policies, etc.

18 So, for example, we have
19 internal deliberations about certain
20 contracts. We have internal deliberations
21 involving lawyers, involving the
22 appropriateness of a particular payment.
23 We have the same with regard to the need to
24 disclose something on the Form 990, so on
25 and so forth. Those are the documents that

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1 CONFERENCE

2 do relate to the NRA's continued effort to
3 improve its compliance, and the NYAG has
4 access to those that are not privileged,
5 and what we are talking about here are
6 those that are, and it is only natural for
7 the NRA to have sought legal advice in
8 connection with these issues.

9 So I think that answers your
10 question, your Honor.

11 JUDGE SHERWOOD: Just to probe
12 that a little bit more, some of the things
13 that the AG has focused much of its
14 attention on are whistleblower complaints,
15 complaints regarding excess benefits, and I
16 know I've seen excess benefits documents
17 produced by your outside auditor. I
18 believe I have seen those.

19 MS. EISENBERG: Yes.

20 JUDGE SHERWOOD: But I don't
21 recall seeing any documents coming from the
22 NRA with respect to that. There are
23 interests by the Attorney General in
24 investigations, internal investigations,
25 into various I guess employee and officer,

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1 CONFERENCE

2 I will call it misconduct, those kinds of
3 things, and I'm getting the impression, and
4 correct me if I'm wrong, in each of those
5 areas you've had lawyers essentially
6 involved in all of it, and that gives you
7 the basis for saying that all of the
8 documents involving those issues, again,
9 I'm referring to the issues that the
10 Attorney General has been seeking
11 information on, all of those documents are
12 -- all of the documents related to those
13 activities are privileged. Is that about
14 right?

15 MS. EISENBERG: I don't think
16 so, your Honor. I think that there are
17 definitely documents related to each of
18 these categories that are not privileged,
19 and have been produced to the NYAG. So
20 just because this happens to be a topic on
21 which, naturally, the NRA sought and
22 obtained legal advice and there are certain
23 documents that are withheld doesn't mean
24 that we claim that any and all documents
25 related to these topics that you listed are

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1 CONFERENCE

2 privileged and should be withheld.

3 JUDGE SHERWOOD: Okay.

4 MS. CONNELL: Your Honor --

5 JUDGE SHERWOOD: We don't have
6 a sense of the extent of any of that. I
7 want to give Ms. Connell an opportunity to
8 weigh in on what you and I have just been
9 talking about.

10 MS. EISENBERG: Certainly.

11 MS. CONNELL: Thank you, your
12 Honor. Your Honor, I just want to say a
13 couple of things. The term of "course
14 correction" is not something that was
15 manufactured for this litigation by the
16 plaintiff. The NRA itself has touted
17 the --

18 JUDGE SHERWOOD: I know that,
19 but that's not my question. My question
20 really is okay, these are things that your
21 office has focused much of its time and
22 attention on, and I mentioned I think two
23 or three of them. There are probably eight
24 or nine.

25 As I said to Ms. Eisenberg,

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2 quite frankly, I don't recall seeing
3 documents that refer to that, so I'm left
4 with, let me call it, the suspicion that
5 the documents involving those issues, or at
6 least some of them, are being withheld
7 through implication of the attorney-client
8 privilege. That's the impression I get
9 from looking at the landscape, but I don't
10 know. But I'm giving you an opportunity to
11 maybe put a finer point on it.

12 MS. CONNELL: Your Honor, your
13 impression is exactly accurate. The
14 presence of counsel at Audit Committee
15 meetings blocked our discovery into what
16 was discussed at times in Audit Committee
17 meetings. The presence of counsel and the
18 involvement of counsel blocked witnesses
19 from telling us how the NRA resolved
20 certain things that it alleges it addressed
21 as part of its course correction. Their
22 witnesses refused to provide detailed
23 information on key subjects because
24 attorneys were involved. They were unable
25 to sort out what was potentially privileged

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1 CONFERENCE

2 from what wasn't and so would not answer.

3 We tried to cure it in any way.
4 What did the NRA do, don't tell us what
5 counsel said, but what did the NRA do? How
6 did the NRA handle whistleblower
7 complaints? Oh, we gave that to the Brewer
8 firm to handle. Okay, what was the result?
9 I can't separate what happened from what is
10 privileged, so I can't tell you. Is there
11 an investigation going on? Absolutely,
12 there is an investigation of this conduct.
13 Who is conducting that investigation? I
14 can't tell you because I can't separate out
15 what is privileged from what's not and we
16 think that's privileged.

17 So, you know, saying that they
18 have given us some documents on some of
19 these issues, I think that is accurate on
20 some of them, but the vast bulk of it has
21 been hidden behind this curtain of
22 privilege, and it is not just whether the
23 documents were produced, they haven't been,
24 it is whether the witnesses were blocked
25 from testifying, they were. And we really

1 CONFERENCE

2 sought hard with the corporate rep dep to
3 get some final answers and just were
4 blocked at every turn.

5 So, your Honor, you are correct
6 that the involvement of counsel here wasn't
7 just merely sort of litigation counsel
8 guiding someone through a lawsuit. The NRA
9 touts in their expert reports, not just
10 one, more than one, their use of outside
11 counsel, outside consultants, tax
12 consultants, that kind of thing. They
13 relied upon litigation counsel, other
14 counsel to perform functions that they
15 claim were part of their course correction
16 and they blocked us from disclosing that.

17 The case law we have provided,
18 your Honor, makes clear, they simply can't
19 do that. That is either an at-issue waiver
20 or they cannot be permitted to introduce
21 that evidence pertaining to what they have
22 blocked us on.

23 Your Honor, I would just note
24 that we don't agree with that definition of
25 the universe being 1,500 to 3,000 pages.

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2 JUDGE SHERWOOD: No, she said
3 1,500 to I guess 2,000 or 3,000 documents,
4 not pages.

5 MS. CONNELL: I'm sorry, your
6 Honor.

7 JUDGE SHERWOOD: You think the
8 number of documents is larger than that?

9 MS. CONNELL: Yes.

10 JUDGE SHERWOOD: Somebody else
11 wanted to weigh in, who is that?

12 MR. PETERS: Noah Peters for
13 the NRA.

14 JUDGE SHERWOOD: Yes,
15 Mr. Peters. You are on the staff of the
16 NRA?

17 MR. PETERS: No, I'm an
18 attorney.

19 JUDGE SHERWOOD: I know that.
20 The NRA hires lawyers. With whom are you
21 associated, which firm?

22 MR. PETERS: Brewer.

23 JUDGE SHERWOOD: Okay, got it.
24 I just don't recall meeting you before.

25 MR. PETERS: A pleasure to meet

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2 you, sir, your Honor. This is my first
3 time speaking.

4 So we don't want to -- we
5 obviously don't agree that there has been a
6 selective disclosure to date, but we have
7 offered an additional corporate rep dep or
8 we have put that out there, if Ms. Connell
9 would like that. We don't want to make a
10 selective disclosure is the bottom line.
11 We don't necessarily even -- we don't have
12 an appetite to do anything resembling a
13 selective disclosure. So we have offered
14 an additional corporate rep dep.

15 We have asked Ms. Connell
16 specifically, you know, if there are areas
17 where you feel that you have been blocked,
18 please let us know what those are and we
19 can give you additional deps on that.

20 I don't agree with her
21 characterization that we are at an impasse.
22 We have really just started talking about
23 this together in the past few days. We
24 have given her a detailed description of
25 how we are going through the documents,

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2 basically just saying we are getting the
3 universe together of all of the documents
4 that potentially relate to the topics in
5 your letter.

6 You know, the exemplar list you
7 were referring to before, we are getting
8 that together. It is a big process. It
9 involves reviewing a lot of documents. If
10 you have any input, we would like to talk.
11 If you would like to know -- have any input
12 on search terms or anything like that, we
13 want to walk you through the methodology.

14 The bottom line here is that we
15 don't want to make a selective disclosure
16 at all, but we have really just started
17 discussing this with the New York Attorney
18 General in the past, really since your
19 ruling on November 29th, we are doing a lot
20 of work here, but we want to make any
21 issues that Ms. Connell is identifying,
22 give her what she needs on discovery.
23 We're not looking to create more issues for
24 you to decide. We would like to be able --
25 I mean, we would want to work it out with

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2 her so she gets what she needs.

3 JUDGE SHERWOOD: Mr. Peters, I
4 don't want to dwell on what I'm about to
5 say, but I will observe for you that I made
6 an effort to give you the opportunity to
7 make the showing. The law is really pretty
8 darn clear that the burden is on you, that
9 the privilege is the exception, not the
10 rule.

11 As I said, when I see so large
12 a volume of documents I am beginning to get
13 the impression, and obviously I can be
14 shown otherwise, that your view of it, when
15 I say "your view," I mean the NRA's view is
16 that if a lawyer is in the room, therefore
17 it is privileged, and that is just not the
18 law.

19 MR. PETERS: Your Honor, we
20 understand that. Believe us, we are not
21 simply shielding things because a lawyer
22 happened to be in the room. We are not
23 trying to shield -- I think witnesses on
24 the stand were certainly nervous. I know
25 during the first couple of days of

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2 Mr. Frazer's corporate rep deposition, you
3 know, when I read it over, I see a witness
4 who is very nervous. I think a lot of
5 people --

6 JUDGE SHERWOOD: I thought he
7 was darn good, by the way.

8 MR. PETERS: Okay.

9 JUDGE SHERWOOD: Look, I was
10 there for one day and I read his testimony,
11 and he is a smart guy.

12 MR. PETERS: Yes. You know,
13 I'm saying when we look at Ms. Connell's
14 motion, she has a lot of excerpts from
15 depositions, and the witnesses are perhaps
16 talking about investigations or
17 attorney-client privilege, but in some
18 cases, you know, I think that they might
19 have been nervous, they might have just
20 kind of defaulted to that, because they
21 don't understand so much what's going on in
22 terms of the different roles of counsel.

23 But our intent has not -- first
24 of all, we have no intention of mentioning
25 a bunch of different outside consultants to

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2 try to dazzle the jury or to try to make it
3 seem like that's enough or anything like
4 that. We're not trying to dangle advice of
5 counsel out there as being something that
6 we are going to rely on. So when
7 Ms. Connell feels that she was blocked in
8 certain inquiries and stuff like that, our
9 approach is we're not shielding this, we're
10 not trying to create a situation, we are
11 really not trying to create a situation
12 where a large category of documents, other
13 than seeking real legal advice in terms of
14 the litigation from litigation counsel, we
15 want to make sure that anything that is in
16 the realm of the course correction is
17 something that she feels that she has had
18 enough information to inquire into.

19 So what we are trying to do is
20 say where have you been blocked, would you
21 like -- what are the topics and what do you
22 need basically on this stuff? We are
23 getting together the potential universe of
24 course correction documents to submit a
25 sample for in-camera review, with a robust

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2 sampling methodology. If we submit
3 something, that means we are confident, we
4 are very confident that it is privileged,
5 and, you know, I think that we believe that
6 you will agree.

7 But we want to kind of make
8 this right for Ms. Connell. We don't want
9 to hide behind privileges in terms of
10 saying you can't inquire into certain
11 things. So with that being said, we don't
12 feel that -- I can tell you we have only
13 been discussing this stuff for a few days
14 with Ms. Connell. We would like to be able
15 to get to a point where she feels that she
16 has everything that she needs on these
17 topics.

18 JUDGE SHERWOOD: You realize
19 that you only have about a half a minute
20 left? I'm obviously exaggerating, but it
21 is a matter of days before you have to file
22 a note of issue.

23 Given what you just said, I
24 just don't see how you are going to be able
25 to accomplish that within the time you

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2 have, and I'm not positive that Judge Cohen
3 is going to give you additional time,
4 because there is a bit of history here. So
5 that's a question that's not for me to
6 decide, that's for him to decide. So there
7 is that.

8 Let me raise another point,
9 which I guess I didn't sufficiently
10 emphasize at the time. I was left at one
11 point with the impression that the NRA
12 believes that the attorney-client privilege
13 really applies in the realm of documents,
14 and so you are focusing on document
15 exchanges, and at one point I heard, it
16 wasn't a suggestion, it was a statement,
17 that, well, the NRA is not going to be
18 relying on documents, but witnesses will be
19 testifying.

20 Well, you know and I know, at
21 least I hope you know, that the privilege
22 refers to communications. It's not simply
23 a matter of if a document that meets all
24 the requirements to be privileged, that
25 refers to testimony as well, because it

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2 talks about communications, and so to the
3 extent that the NRA is thinking that it
4 can, I'm going to put it this way, have its
5 cake and eat it too, I think you will be
6 disappointed at trial. I really do.
7 Because, as I said, it is communications
8 that are privileged, not the form that the
9 communication takes.

10 MS. EISENBERG: Your Honor,
11 would you like us to respond?

12 JUDGE SHERWOOD: If you wish.
13 I'm just sort of giving you some insight.

14 MS. EISENBERG: I 100 percent
15 agree, we weren't trying to eat our cake
16 and have it too or draw that distinction at
17 all. A point that we have tried to make
18 over and over again, again, I don't mean to
19 sound like a broken record, is that we are
20 not putting forward documents, written
21 communications that are privileged, and we
22 are not eliciting from witnesses on the
23 stand testimony about privileged
24 communications.

25 JUDGE SHERWOOD: Okay, good

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2 enough. So what is it that you would like
3 me to do today with respect to the issue
4 we're talking about now?

5 MS. EISENBERG: I think, your
6 Honor, like Mr. Peters said, we feel that
7 we are actually on a fairly productive
8 path. We have done a whole lot of work and
9 we are nearing a sort of point where we
10 think we can really satisfy the New York
11 Attorney General's office that the sample
12 we give you is adequate, and if we can
13 enable you to take a look at a larger
14 sample that satisfies the NYAG, we feel
15 like this issue might be put to bed.

16 It sounds like, despite the
17 certification and the categorical log, your
18 Honor would like to see additional proffers
19 of why these documents are privileged ab
20 initio. We are more than happy to put that
21 forward as well to satisfy that burden.

22 So I think I echo what
23 Mr. Peters said in that through the
24 sampling process and perhaps additional
25 corporate rep testimony, to the extent the

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2 NYAG is able to really kind of work with us
3 to specify where specifically they felt,
4 quote, "blocked," we feel like we may be
5 able to amicably resolve these issues.

6 JUDGE SHERWOOD: How much time
7 are you talking about?

8 MS. EISENBERG: Your Honor, I
9 think that we will work as expeditiously as
10 possible, but you are correct that we
11 probably would be well advised to check in
12 with Judge Cohen to see if he is amenable
13 to adjourning the note of issue date by a
14 week or two.

15 MS. CONNELL: Your Honor -- I'm
16 sorry.

17 JUDGE SHERWOOD: Yes, ma'am?

18 MS. CONNELL: Your Honor, I
19 would just like to say something for a
20 second to put this in context. Mr. Frazer
21 is the NRA's general counsel. He testified
22 in the investigation of this action, in
23 deposition at the bankruptcy trial, at the
24 bankruptcy trial, he testified in
25 deposition here. Mr. Frazer, among the

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2 other leadership of the NRA, as the NRA
3 touts, includes Mr. Cotton, who is an
4 attorney and CPA and certainly pretty
5 sophisticated.

6 This has been a process
7 throughout this long history of this
8 investigation and litigation, a calculated
9 strategy of these witnesses asserting
10 privilege. It's not the mere byproduct of
11 nervousness.

12 When we pressed back against
13 it, counsel fought us on it. Counsel
14 instructed witnesses not to answer.
15 Counsel gave instructions which didn't
16 leave witnesses free to answer. We are
17 left now --

18 JUDGE SHERWOOD: I know that.
19 Remember, the one I actually showed up to
20 for one day, I made a speech about how many
21 objections there were, and I do think that
22 as a result of that and my presence, the
23 number of objections dropped precipitously.

24 MS. CONNELL: I know. I
25 honestly wished you could have attended

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2 every deposition. But, your Honor, my
3 colleague just corrected me, Mr. Frazer did
4 not testify in the investigation.

5 But, your Honor, the point that
6 I'm getting to is even now, again, I hate
7 to say this, but months into this, of
8 raising this issue, more than months, many
9 months, we have been raising it throughout
10 discovery, I don't know the universe of
11 documents that the NRA is talking about. I
12 don't believe this 1,500 to 3,000 is a fair
13 pull. You already asked them to sample. I
14 asked how they sampled over and over again,
15 and asked you to direct them again to tell
16 us how they sampled, and didn't know until
17 the other day that it was literally just a
18 cherry-picking of documents to submit to
19 your Honor.

20 Besides the point of once there
21 is a determination of privilege, that's not
22 where it ends, we have to look at whether
23 privilege has been waived. Then once we do
24 all that, we have to look at okay, well,
25 plaintiff, you deposed 30-some people, or

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2 approximately 30 witnesses, and you were
3 blocked on all of --

4 JUDGE SHERWOOD: The bottom
5 line for you, I hear that. You are
6 repeating some of the things I've said.

7 MS. CONNELL: I know, I'm
8 sorry, your Honor. But to say that this
9 could get done in two weeks, how? How can
10 that get done in two weeks, your Honor?

11 JUDGE SHERWOOD: I think
12 Ms. Eisenberg has made it pretty clear that
13 she feels she is going to have to go back
14 to Judge Cohen. I mean, that's what she
15 just said. But you wanted to weigh in to
16 say something, but I'm not sure that I know
17 what it is that's responsive to what she
18 had to say.

19 MS. CONNELL: I was just
20 wanting to mainly be heard, your Honor,
21 that this does not cure what has occurred
22 in such a short period of time. I think I
23 just wanted to make that point. We didn't
24 agree with that.

25 JUDGE SHERWOOD: Fair enough.

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2 So you guys are meeting and conferring to
3 see if you can come up with search terms,
4 to see if you can come to an accommodation.
5 I have sort of described my limit in the
6 written decision, in which I'm only giving
7 them one more shot, one more opportunity.
8 I'm not convinced that Judge Cohen is going
9 to be as accommodating. I don't know. I
10 honestly don't know.

11 But it is pretty clear to me,
12 and I'm talking to both sides now, you are
13 going to need some authorization from him
14 if you are going to go down the road that
15 Ms. Eisenberg is requesting. So you
16 probably ought to go to him pretty quickly
17 and then get back to me with respect to
18 that. I can't, in the time we have, I just
19 don't see how there is anything that I
20 really can do in such a short time.

21 You know, I assume you have a
22 court reporter here, so you can quote what
23 I have had to say, to the extent that it is
24 appropriate, before Judge Cohen, because I
25 have written enough about this.

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

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

25 JUDGE SHERWOOD: Oh, is that

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1 CONFERENCE

2 right?

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

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

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

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

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

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

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

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

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

25 MS. EISENBERG: Right. So I

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2 think from our perspective, we obviously
3 don't think the privileges that they claim
4 apply to begin with, given if your Honor
5 were inclined to allow for that, the burden
6 is on the party claiming the privilege, and
7 if the certification and the categorical
8 privilege log is not going to cut it for
9 us, then it shouldn't cut it for them
10 either.

11 JUDGE SHERWOOD: Those are two
12 different things, you realize that? That's
13 not to say that they don't have a burden,
14 the burden of proving privilege, they
15 certainly do, but obviously you are looking
16 at different facts. Where you are talking
17 about the law enforcement privilege, for
18 example, versus the attorney-client
19 privilege, that's pretty obvious I would
20 think, different considerations. I got a
21 smile, okay.

22 MS. CONNELL: Your Honor, I
23 should add one thing, and I'm sorry to
24 intrude, but the NRA challenged, in regard
25 to those Category 2 documents, they only

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2 challenged on law enforcement, public
3 interest and common interest privileges.
4 We would like to make a further submission.
5 I think we can convince you that those
6 documents are privileged.

7 JUDGE SHERWOOD: Those three
8 privileges only?

9 MS. CONNELL: No, I was going
10 to say --

11 JUDGE SHERWOOD: You want to
12 add a privilege?

13 MS. CONNELL: No, your Honor,
14 our privilege log asserted other privileges
15 for those documents which the NRA did not
16 challenge. It asserted, for example, work
17 product privilege and trial preparation
18 privilege. The NRA did not challenge
19 those, so we did not oppose those.

20 Now we are talking about a
21 smaller universe of documents in that
22 category that were only withheld based upon
23 those three privileges, and we think we can
24 show you that they do fall under those
25 categories.

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2 JUDGE SHERWOOD: Category 2 is
3 communications with other law enforcement
4 agencies.

5 MS. CONNELL: Yes, your Honor.

6 JUDGE SHERWOOD: That's what
7 that's about. I thought that it is only
8 the law enforcement privilege that applied
9 with respect to Category 2. Different
10 privileges apply to different categories as
11 I recall it.

12 MS. CONNELL: Actually, your
13 Honor, the different categories kind of
14 encompass different types of documents. So
15 Category 2 involved communications with law
16 enforcement agencies, and we indicated that
17 those were shielded by a number of
18 different privileges, not just the ones the
19 NRA challenged.

20 So there are some documents
21 that are privileged based upon these other
22 privileges, so they are still in that
23 privileged category. Then there are others
24 for those that only relate to those three
25 privileges or one of those three

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2 privileges, we believe we can show you that
3 they meet the standard to be withheld on
4 that ground.

5 JUDGE SHERWOOD: Just as I
6 gave -- let me back up.

7 The AG has the same obligations
8 that the NRA has regarding who has got the
9 burden of showing the privilege. All of
10 these privileges, it is the party that
11 asserts it that has the obligations to
12 demonstrate that the privilege applies.

13 So I'm going to give you, just
14 as I gave the NRA, the opportunity to
15 demonstrate with respect to all these
16 privileges, again, by competent evidence,
17 that the privilege should be applied.
18 Okay?

19 MS. CONNELL: Thank you, your
20 Honor. Yes. We think we can submit
21 something fairly quickly, your Honor.

22 JUDGE SHERWOOD: Fair enough.

23 MR. PETERS: Your Honor, just a
24 clarification.

25 JUDGE SHERWOOD: Yes,

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2 Mr. Peters?

3 MR. PETERS: When you say by
4 competent evidence, are you thinking of a
5 document-by-document log or are you
6 thinking of affidavits?

7 JUDGE SHERWOOD: No, I'm not
8 thinking about that at all. I'm thinking
9 you have to have somebody with knowledge of
10 the facts. They have to be able to swear
11 that the privilege applies and what
12 privilege, and you can do it by categories.
13 You are then going to have to come up with
14 a sample that is a fair sample of the
15 documents that you are asserting privilege
16 for. You can't cherry-pick them, which is
17 my impression is that's what you did last
18 time, and the better approach is to consult
19 with the other side as to the protocols
20 that you are using to come up with a fair,
21 random sample on those kinds of procedural
22 steps that need to be taken, Mr. Peters. I
23 laid it out all for you.

24 MR. PETERS: Thank you, your
25 Honor. We appreciate it.

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2 JUDGE SHERWOOD: Follow the law
3 that is described in the decision. If you
4 think I got the law wrong, tell me.

5 MR. PETERS: No, that sounds
6 good. Thank you, your Honor.

7 JUDGE SHERWOOD: So where do we
8 go from here? You are continuing to meet
9 and confer. Probably both of you need to
10 go to see Judge Cohen and you are probably
11 going to need some more time. I don't know
12 whether he is going to give it to you or
13 not, but it is up to him. You need to get
14 back to me by probably later this week and
15 tell me what you are expecting of me. I'm
16 thinking Wednesday, Thursday, Friday,
17 somewhere around there.

18 MS. CONNELL: I think we can
19 have our submission to you of the
20 privileged documents by Thursday morning at
21 the latest I think.

22 JUDGE SHERWOOD: Okay, fine.

23 MS. CONNELL: And if you would
24 like to have a conference to check in on
25 the status of how things are going, we

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2 would be open to that.

3 JUDGE SHERWOOD: I think we
4 should set a time so that you can bring me
5 up to speed as to what the calendar is
6 looking like.

7 MS. CONNELL: Okay.

8 JUDGE SHERWOOD: Do you want to
9 do that Thursday or Friday?

10 MS. CONNELL: I think given the
11 timeline, your Honor, the sooner the
12 better. Thursday looks good to us.

13 JUDGE SHERWOOD: Ms. Eisenberg?

14 MS. EISENBERG: That works for
15 me, your Honor.

16 JUDGE SHERWOOD: That works for
17 you?

18 MS. EISENBERG: Yes.

19 Mr. Peters, does Thursday work for you?

20 MR. PETERS: For another
21 conference, yes.

22 JUDGE SHERWOOD: Morning?
23 Afternoon? As it turns out, that day I'm
24 good until about 4:00. Thereafter, it is
25 the holiday season, and I have obligations.

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2 MS. CONNELL: How about 2:00?

3 JUDGE SHERWOOD: 2:00 is fine.

4 MS. CONNELL: If that works for
5 everybody.

6 JUDGE SHERWOOD: Does that work
7 for everyone?

8 MR. FARBER: Can I suggest
9 2:30, your Honor? This is Seth Farber.

10 MR. FLEMING: I'm sorry, your
11 Honor, I missed which day we were talking
12 about.

13 JUDGE SHERWOOD: We were
14 talking about checking in on Thursday and
15 trying to pick a time, and the last person
16 to talk specifically about a time suggested
17 2:30, which is fine by me.

18 MR. FLEMING: That's fine with
19 me. Thank you.

20 MR. CORRELL: This is Kent
21 Correll. That is fine with me, your Honor.

22 JUDGE SHERWOOD: Thank you,
23 sir.

24 MS. CONNELL: Your Honor, just
25 so we know in preparation for the meet and

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2 confer tomorrow, are you going to make a
3 recommendation to extend the note of issue?

4 JUDGE SHERWOOD: Not this time,
5 no. I am not recommending for or against.
6 You know, my view is that you folks have
7 had ample opportunities here and I do have
8 the view that this should be Judge Cohen's
9 call, not mine. Okay?

10 MS. CONNELL: Thank you, your
11 Honor.

12 JUDGE SHERWOOD: All right,
13 thank you all. Take care.

14 (Time noted: 3:55 p.m.)

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C E R T I F I C A T I O N

I, TODD DeSIMONE, a Registered Professional Reporter and a Notary Public, do hereby certify that the foregoing is a true and accurate transcription of my stenographic notes.

I further certify that I am not employed by nor related to any party to this action.



TODD DeSIMONE, RPR

[& - appreciate]

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New York Code

Civil Practice Law and Rules

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EXHIBIT N

Page 1

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2

SUPREME COURT OF THE STATE OF NEW YORK

3

COUNTY OF NEW YORK

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5

PEOPLE OF THE STATE OF NEW YORK BY

LETITIA JAMES, ATTORNEY GENERAL OF

6

THE STATE OF NEW YORK,

7

Plaintiff,

8

Index No.

9

v. 451625/2020

10

THE NATIONAL RIFLE ASSOCIATION OF

AMERICA, INC., WAYNE LaPIERRE,

11

WILSON PHILLIPS, JOHN FRAZER and

JOSHUA POWELL,

12

Defendants.

13

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14

2:30 p.m.

December 8, 2022

15

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17

CONFERENCE WITH SPECIAL MASTER SHERWOOD

18

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2 P R O C E E D I N G S.
3

4 JUDGE SHERWOOD: Who wants to
5 go first?

6 I guess the first thing I
7 want to know, though, before that is
8 have you been in touch with Judge
9 Cohen, and what, if anything, is
10 going on on that front?

11 MS. EISENBERG: Your Honor,
12 we reached out to Ms. Connell's
13 office to inquire whether they would
14 like to jointly file a request for
15 an extension, and it appears that
16 they are not interested in doing
17 that.

18 JUDGE SHERWOOD: I see.
19 All right, so we will deal
20 with that later.

21 So we have your letter, I
22 have your letter, Ms. Connell, I
23 have read it, so all we have to
24 address is matters that you're
25 seeking to protect based on a number

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2 of asserted privileges all related
3 to materials in category 2.

4 MS. CONNELL: Yes, Your
5 Honor.

6 JUDGE SHERWOOD: What I am
7 going to want from you is a
8 representative sample of the
9 communications that are on your
10 privilege log in that category.

11 It must include the three you
12 specifically reference separately.

13 I'm going to leave it to you
14 to decide how big the sample needs
15 to be, but please make sure it's
16 representative.

17 MS. CONNELL: Your Honor, we
18 can do a random sampling, 5 percent,
19 I think there are about 1,200
20 communications or documents in that
21 category.

22 My math isn't good, we are
23 thinking 5 percent, we can do
24 somewhat lower, but I understand
25 from our technology department that

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2 we could have them automatically
3 randomly sample.

4 JUDGE SHERWOOD: You say it's
5 about 1,200 documents?

6 MS. CONNELL: Yes, Your
7 Honor.

8 JUDGE SHERWOOD: So that's
9 about 5 percent, is about 60?

10 MS. CONNELL: Yes, Your
11 Honor.

12 JUDGE SHERWOOD: I can handle
13 that.

14 MS. CONNELL: Okay.

15 JUDGE SHERWOOD: You can even
16 cut it down to 57 plus three.

17 MS. CONNELL: I actually, for
18 some reason, I think the number is
19 actually 54, but you know --

20 JUDGE SHERWOOD: You told
21 me --

22 MS. CONNELL: I said
23 approximately 60. I wanted to be --

24 JUDGE SHERWOOD: That's fine.

25 MS. EISENBERG: Your Honor, I

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2 was just wondering if there is going
3 to be a part in the process where
4 the NRA may be able to offer some
5 input and also respond to the
6 written submission that the OAG just
7 put in.

8 Similarly, the OAG advises
9 that the CAG is wishing to be heard
10 as well if and when the DCAG is
11 permitted to submit a response.

12 Naturally the NRA would
13 appreciate an opportunity to respond
14 to that as well.

15 JUDGE SHERWOOD: Well, I
16 think -- well, let me ask you this,
17 Ms. Eisenberg, wouldn't it be more
18 efficient if I would simply -- let
19 me back up.

20 Do you have -- are you likely
21 to have an objection with respect to
22 the manner in which the items are
23 selected?

24 What I asked for were three
25 documents that went to some or

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2 came -- that involved some unknown
3 agency, and then there are 1,200 or
4 so between -- back and forth between
5 the AG and DC.

6 They are offering to give me
7 5 percent randomly selected,
8 presumably through some computer
9 generated methodology.

10 That seems just fine to me,
11 but if you have got an objection
12 with respect to that approach, I
13 want to hear it.

14 MS. EISENBERG: Certainly,
15 Your Honor.

16 I asked Ms. Connell for
17 information about what specifically
18 was being submitted and how it was
19 going to get sampled.

20 Two days ago she was not in a
21 position to provide me with
22 information, and then this morning I
23 asked by e-mail, she stated that if
24 it's going to be a sample, they
25 agree that we should be provided

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2 with information about how it would
3 be prepared.

4 So, literally, just about an
5 hour before this call, and my
6 finding out that their proposed
7 methodology is 5 percent, so coming
8 to this hearing a few things come to
9 mind already, but rather than burden
10 you with my off the cuff reaction, I
11 would appreciate an opportunity to
12 think it through, confer with my
13 colleagues and refer it within a
14 day.

15 JUDGE SHERWOOD: That's fine.

16 MS. EISENBERG: Thank you.

17 JUDGE SHERWOOD: That's fine,
18 but just off the top of my head if
19 it is indeed random, it shouldn't be
20 a problem, but look, you are more
21 deep into the weeds here than I am,
22 that's for sure, so --

23 MS. EISENBERG: Thank you.

24 JUDGE SHERWOOD: How much
25 time do you need?

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2 MS. EISENBERG: For the
3 sampling methodology, just 24 hours,
4 we are happy to respond back.

5 JUDGE SHERWOOD: You will get
6 back to me by midday tomorrow?

7 MS. EISENBERG: Yes, Your
8 Honor, will do by 12:00 p.m. Friday.

9 Now, I also haven't had a
10 chance to study what Ms. Connell put
11 in, but I did see a couple of
12 arguments to which the NRA would
13 appreciate an opportunity to respond
14 in writing, including the assertion
15 that the identity of the other
16 agency is confidential.

17 What would be the most
18 convenient way for Your Honor to
19 accept our response?

20 JUDGE SHERWOOD: You can
21 simply send your response, e-mail it
22 to Ganfer Shore, to me, and I won't
23 be in my office tomorrow, but I will
24 have computer -- I will have e-mail
25 access.

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2 So if it shows up around
3 noon, I will be able to take a look
4 at it in the afternoon.

5 MS. EISENBERG: Your Honor,
6 is there a way we could have until
7 Monday to respond?

8 JUDGE SHERWOOD: You want --
9 well, I'm concerned about what --
10 you know, the time that is left.

11 Can you get it to me by
12 Monday morning?

13 MS. EISENBERG: Yes, Your
14 Honor.

15 JUDGE SHERWOOD: I am not
16 going to work on it over the
17 weekend.

18 If you think you need until
19 Monday morning, I will give you that
20 time, sure.

21 MS. EISENBERG: Thank you,
22 Your Honor, we will get it to you by
23 9:00 a.m. on Monday.

24 THE COURT: Okay.

25 MS. EISENBERG: Thank you

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1 STATE OF NY v. NRA CONFERENCE
2 very much.

3 JUDGE SHERWOOD: Now, is
4 there anything else on your side,
5 Ms. Connell?

6 MS. CONNELL: No, Your Honor.
7 We had some documents that we
8 had requested from the NRA and we
9 have been talking to them in terms
10 of relief from you, I just don't
11 believe there is -- for the relief
12 we are seeking imminently we may
13 write to you on Monday about some
14 outstanding document requests, but
15 I'm hopeful we may hear from the NRA
16 tomorrow or over the weekend on
17 them, or be able to resolve them in
18 some way.

19 JUDGE SHERWOOD: Okay.

20 MS. CONNELL: In terms of the
21 joint request for an extension of
22 the note of issue, Your Honor, that
23 was a two week request.

24 We don't see what's at issue
25 being resolved in that time, and we

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2 do foresee an application to Judge
3 Cohen.

4 JUDGE SHERWOOD: Give me the
5 last sentence again?

6 MS. CONNELL: We do foresee
7 an application to Judge Cohen.

8 JUDGE SHERWOOD: Calling for
9 additional time?

10 MS. CONNELL: For additional
11 time or some sort of relief, yes.

12 JUDGE SHERWOOD: Understood,
13 understood.

14 With respect to -- are you
15 going to be able to get started on
16 doing the random search before we
17 hear back from the NRA, or how do
18 you want to -- how do you want to
19 approach that issue?

20 I mean if it's truly a random
21 search, I'm probably not going to
22 have problems with it, but if there
23 are some nuances in it, then I'm
24 going to pause.

25 MS. CONNELL: Your Honor, it

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2 will be truly a random search, it
3 will be conducted by our technology
4 group.

5 I'm not going to have a hand
6 in it, I don't believe any attorney
7 will have a hand in it, but I'm
8 happy when we submit it to tell you
9 more.

10 JUDGE SHERWOOD: What I
11 would --

12 MS. CONNELL: Which I will
13 share with the NRA.

14 JUDGE SHERWOOD: Be very
15 responsive to Ms. Eisenberg with
16 respect to what the process is and
17 so on, please be an open book about
18 that.

19 MS. CONNELL: Absolutely.

20 JUDGE SHERWOOD: Okay.

21 Anything else, Ms. Eisenberg?

22 MS. EISENBERG: Yes, Your
23 Honor, just by way of a status
24 report, Ms. Connell and her team and
25 Mr. Peters and I spoke at length on

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2 Tuesday, which was two days ago,
3 this was subsequent to an e-mail
4 message I sent to Ms. Connell over
5 the weekend advising her what the
6 NRA is doing to prepare the records
7 so that the sample can be run.

8 I thought we had a productive
9 discussion during the call on
10 Tuesday.

11 First I described the process
12 through which we are -- the process
13 that we are undertaking right now,
14 which frankly is quite extensive and
15 expensive, but we are doing it
16 nonetheless.

17 And I thought perhaps, you
18 know, that was helpful to the OAG.

19 And then Ms. Connell and her
20 team requested a set of hit reports
21 on search terms.

22 In other words --

23 JUDGE SHERWOOD: I know that.

24 MS. EISENBERG: They may be
25 content with the 5 to 10 percent

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2 sampling, or they might say oh,
3 well, if a document refers to a
4 particular term we care about it
5 more, so we want to make sure that
6 that's included.

7 And so our team is proceeding
8 on parallel tracks, and we are
9 accommodating both requests and we
10 are aiming to have it all done on
11 Monday so that hopefully if Ms.
12 Connell's office is available, we
13 can speak again, which we really do
14 hope that a sample will be generated
15 that everyone agrees is adequate.

16 JUDGE SHERWOOD: Okay, so you
17 are going to share -- meet and
18 confer, or maybe you have done it
19 already, with respect to search
20 terms, you are going to report on
21 hit count, and you may have to go
22 refine the search terms or the size
23 of the sample once you know what the
24 hit count is?

25 MS. EISENBERG: Correct.

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2 JUDGE SHERWOOD: If you come
3 up with a hit count that's 10,000
4 documents, I'm not interested.

5 MS. EISENBERG: Of course. I
6 think both side recognize that there
7 is a limit to which your kindness
8 can be extended and, we don't want
9 to burden you with more than a
10 certain amount of records.

11 It's very clear from our
12 discussions that both sides
13 understand that, and so it's just a
14 matter of having maybe one or two
15 more calls so that we can truly
16 satisfy the interest that the NYAG
17 has expressed and making sure that's
18 random.

19 I also have one other update
20 which is not related to this topic,
21 if I may.

22 JUDGE SHERWOOD: Okay.

23 Before we leave this one,
24 before we leave this one, I would
25 admonish you, I would say the same

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2 thing I just said to Ms. Connell,
3 which is I would urge you to be an
4 open book about the process for
5 doing the search.

6 MS. EISENBERG: Absolutely.

7 JUDGE SHERWOOD: And be able
8 to understand it.

9 MS. CONNELL: Before we leave
10 this topic, may I speak on it for
11 one moment, or would you prefer to
12 let Ms. Eisenberg --

13 JUDGE SHERWOOD: No, no, no,
14 we are talking about sampling here.

15 MS. CONNELL: Right.

16 So, I thought Tuesday's
17 discussion was helpful, very
18 helpful.

19 What we learned is that the
20 NRA is taking its supplemental
21 privilege log, which narrowed the
22 documents in areas of privilege that
23 it's looking at from its previous
24 privilege log and was doing a
25 relevance review.

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2 And it estimated the
3 documents it would find that were
4 relevant and privileged would number
5 between 1,500 and 3,000.

6 We asked for the hit report,
7 which the NRA I think is shooting to
8 get to us on Monday, but the search
9 terms in the supplemental privilege
10 log do not cover all of the topics
11 that we believe we have been
12 precluded from inquiring into, so we
13 need to add those -- add new search
14 terms and do that.

15 Which we do have to get to
16 the NRA, but we wanted to have an
17 idea, we would be proceeding trying
18 to do that while we got, or at the
19 same time they are getting the hit
20 report, because then -- but I wanted
21 to be clear, Your Honor, on two
22 things.

23 What they are generating, we
24 have asked what they are using to
25 determine relevance or what topics

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2 they are looking at, what keywords,
3 anything and we are still waiting to
4 hear that.

5 We don't agree yet that that
6 1,500 to 3,000 is relevant or
7 representative and we know it is not
8 an all-inclusive sample, or universe
9 of documents from which to sample.

10 So I want to be absolutely
11 clear on that.

12 I know the NRA is working
13 quickly, but at the same time, this
14 is a universe of documents that we
15 have been fighting about for a long
16 time.

17 And, Your Honor, even once
18 they -- we do agree on the universe
19 of documents and of sampling, I
20 think random sampling of a
21 reasonable number would be agreeable
22 to us.

23 I want to be clear we then
24 have an issue of whether they waived
25 privilege in relation to those

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1 STATE OF NY v. NRA CONFERENCE
2 documents that they have -- those
3 issues are matters that they have
4 put at issue in this litigation as
5 per the October 20th letter and
6 application.

7 And again, Your Honor,
8 producing these documents alone does
9 not mitigate the prejudice to the
10 Plaintiff.

11 We have been through this a
12 number of times. I don't think you
13 need me to repeat this.

14 THE COURT: The last item,
15 and this one is down the road, you
16 are not waving any claims that you
17 might have, but I do -- would urge
18 you to be open and reasonable in
19 communicating with the IRA -- the
20 NRA, the NRA in coming up with a
21 protocol and search terms that is
22 practical.

23 I'm going to pay a lot of
24 attention to practicalities here.

25 If you end up demanding

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1 STATE OF NY v. NRA CONFERENCE
2 things that strike me as
3 unreasonable or very burdensome,
4 even at this late date, I'm going to
5 listen to that.

6 So, you know, my admonition
7 applies to both sides.

8 All right?

9 Okay, let's get back to you,
10 Ms. Eisenberg.

11 MS. EISENBERG: Your Honor, I
12 disagree with some of the
13 characterizations in Ms.
14 Connell's --

15 JUDGE SHERWOOD: Let's not
16 spend time on that.

17 MS. EISENBERG: I figured as
18 much, but I just wanted to put it --

19 THE COURT: Okay.

20 MS. EISENBERG: So, Your
21 Honor, just to flag for you so it's
22 not a surprise, this might get
23 amicably resolved, at least we can
24 hope so, but the NYAG responded to
25 the NRA's contention interrogatories

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1 STATE OF NY v. NRA CONFERENCE
2 which were served 30 days before the
3 end of discovery as contemplated by
4 the rules, and unfortunately upon
5 review of those responses the NRA
6 believes that they are deficient.

7 Therefore, we reached out to
8 Ms. Connell's office to see if they
9 are available to meet and confer
10 with us about the concerns that we
11 have, and in the event that the
12 parties are not able to amicably
13 resolve that, I didn't want you to
14 be surprised later.

15 JUDGE SHERWOOD: Well, thank
16 you for giving me the heads up, but
17 I'm around.

18 When you -- with respect to
19 this application, give me a sense of
20 timing.

21 By when do you think you
22 might be coming to visit, so to
23 speak, and I am obviously asking
24 because we are coming up on the
25 holidays.

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1 STATE OF NY v. NRA CONFERENCE

2 MS. EISENBERG: Certainly,
3 Your Honor.

4 I think it's going to be a
5 function just of when we can meet
6 and confer with Ms. Connell.

7 I appreciate that she is busy
8 and we are busy with a couple of
9 different things, so just by best
10 intentions we might not be able to
11 meet and confer right away.

12 If we can, I suspect that the
13 parties should be able to figure out
14 what, if anything, is not getting
15 amicably resolved within a matter of
16 a couple of days.

17 So we can submit an
18 application by --

19 JUDGE SHERWOOD: And you can
20 tee that up, okay.

21 That's fine, but obviously
22 I'm sure everybody is keeping in
23 mind the fact that there are a
24 number of days that people are
25 simply not going to be paying

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1 STATE OF NY v. NRA CONFERENCE
2 attention to these kinds of things.

3 MS. EISENBERG: Understood.

4 JUDGE SHERWOOD: Anything
5 else?

6 MS. CONNELL: Your Honor, in
7 light of the NRA's objections, which
8 we received just prior to this
9 conference, we may also be objecting
10 to their interrogatory responses.

11 THE COURT: To you?

12 MS. CONNELL: To us. A
13 totally unpredictable fight about
14 contention interrogatory responses
15 Your Honor, I'm afraid.

16 JUDGE SHERWOOD: Okay, all
17 right.

18 Are we done for the day?

19 MS. EISENBERG: Thank you,
20 Judge.

21 MS. CONNELL: I believe we
22 are, Your Honor.

23 JUDGE SHERWOOD: Thank you,
24 all.

25 MS. CONNELL: Thank you,

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1 STATE OF NY v. NRA CONFERENCE
2 Judge.

3 Your Honor, I believe the
4 DCAG is going to make a filing
5 today, if that's permissible to you.

6 THE COURT: That's
7 permissible, sure.

8 MS. CONNELL: Okay, thank
9 you.

10 MS. EISENBERG: Monica, when
11 are they making it?

12 MS. CONNELL: I don't know
13 what time they said today.

14 MR. PETERS: They just sent
15 it.

16 MS. CONNELL: Okay.

17 MS. EISENBERG: Thank you.

18 JUDGE SHERWOOD: Hi,
19 Mr. Peters, how are you?

20 MR. MAGGIORE: Good, thank
21 you.

22 JUDGE SHERWOOD: All right,
23 bye-bye.

24

25

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STATE OF NY v. NRA CONFERENCE

C E R T I F I C A T E

I, STEPHEN J. MOORE, a Shorthand
Reporter and Notary Public of the State of
New York, do hereby certify:

That the transcript as
hereinbefore set forth, is a true and
accurate record of the proceedings.

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



STEPHEN J. MOORE, RPR, CRR

[& - bye]

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EXHIBIT O

From: [Noah Peters](#)
To: [Connell, Monica](#); [Svetlana Eisenberg](#); [Thompson, Stephen](#); [Conley, Jonathan](#)
Subject: RE: NYAG v. NRA et al
Date: Saturday, December 10, 2022 6:53:27 PM

Dear Monica:

Thank you for offering to accommodate my personal tragedy (the death of my daughter last week). As our team continues to work nights and weekends to produce a sample for in-camera review, we would appreciate you consenting to reasonable extensions that we request.

Moving forward, we note that your unwillingness to provide guidance regarding the documents or information about which you think the NRA waived its privileges inhibits any meaningful opportunity to efficiently resolve your concerns. In fact, your listing of examples of documents that you assume exist and over which you claim the NRA somehow waived privilege is counterproductive. Indeed, the scope of your complaint has become even less clear over time.

For example, this is the first we are hearing that you are seeking documents beyond those listed in the Supplemental Categorical Log. Your letter dated October 20, 2022 cites that log as and provides no hint that you believe privileged documents beyond those that were logged in the Supplemental Categorical Log have somehow been placed "at issue."

As you know, the search terms used to create the Categorical Log were agreed-to between the parties five months ago. Seeking to reopen this issue at this time is extremely disruptive and seems designed to delay our attempts to provide the Special Master a sample of in-camera documents. Please provide us any additional search terms ASAP and we will attempt to utilize them.

You state that "NRA witnesses have testified that the NRA is currently conducting the following investigations which would not appear to be captured in the documents you are reviewing." Please explain what deposition testimony supports these allegations? And why are these issues being raised so late, months after discovery closed?

Again, we are working overtime to accommodate your requests.

Best,

Noah Peters | Counsel
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B R E W E R

ATTORNEYS & COUNSELORS

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From: Connell, Monica <Monica.Connell@ag.ny.gov>

Sent: Friday, December 9, 2022 11:10 PM

To: Svetlana Eisenberg <sme@brewerattorneys.com>; Thompson, Stephen <Stephen.Thompson@ag.ny.gov>; Conley, Jonathan <Jonathan.Conley@ag.ny.gov>

Cc: Noah Peters <nbp@brewerattorneys.com>

Subject: RE: NYAG v. NRA et al

Svetlana,

On Thursday, Noah communicated to us the terrible tragedy his family has suffered—please let us know whether and how we can be accommodating.

Below, we memorialize our understanding of the current state of affairs regarding the NRA's review of documents in preparation for submission of an interim sample to the Special Master for his in camera review, and set out our issues with that review and its scope. We do not believe that it is possible to complete this process, nevertheless resolve the larger issues, by Tuesday. Given that, please let us know if you would like to discuss some possible accommodations.

In the meantime, we must note that even as to this initial sample, you have not defined how you arrived at it or how you are sampling it. During our December 6 meet and confer, you advised our Office that you and your colleagues were in the process of reviewing documents identified in the NRA's supplemental privilege log, and estimated that approximately 1,500 to 3,000 of those withheld documents related to the NRA's purported course correction. You described this as a "document by document review" designed to "ensure they relate to the NRA's efforts to improve compliance." We have asked you to explain what criteria, if any, you are using to determine whether the documents "relate to the NRA's efforts to improve compliance." You have not answered that question. To evaluate your review, we need to know how it is being conducted so that a sample of these documents can be provided to the Special Master for his review.

We also want to understand how the NRA proposes to sample the same. While we believe a 5-10% sample of this initial batch may be sufficient, that depends upon the final number of documents and we want to understand how the sampling is being done, as per the Special Master's direction.

In addition, we are reiterating that your review fails to capture the full universe of documents concerning the NRA's purported course correction that have been withheld as privileged, and that the number of documents at issue far exceed the approximately 3,000 identified to date. As we explicitly stated in our October omnibus letter to the Special Master, the categories of "course correction"-related documents identified on the NRA's supplemental privilege log were intended to be examples, and do not encompass all documents the NRA has withheld as privileged where the OAG believes the NRA has waived its privilege by putting the documents at issue.

For example, NRA witnesses have testified that the NRA is currently conducting the following

investigations which would not appear to be captured in the documents you are reviewing:

- Mr. Phillips' activities with respect to vendor oversight or financial management;
- Mr. Phillips' violation of internal control policies;
- Mr. Phillips' conduct given his invocation of his Fifth Amendment rights in the bankruptcy hearing;
- the relationship between Mr. LaPierre and Mr. McKenzie and the impacts that relationship may have on NRA business;
- Mr. LaPierre's failure to disclose the use of Mr. McKenzie's yachts prior to January 2021;
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- instances of possible private inurement.

The NRA also reported in its Form 990s for 2019 and 2020 that there were other transactions in 2019 and prior calendar years that were still under review. But the search terms used to identify documents for the NRA's supplemental privilege log do not adequately capture these purported reviews. Indeed, there is not even a search term or root word for investigate or investigation included.

Other "course correction"-related activities that are not adequately captured by the search terms used to construct the supplemental privilege log include

- Investigation of whistleblower complaints or a determination that certain complainants were not whistleblowers;
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We believe that a full understanding of the documents at issue requires a return to the NRA's full privilege log and the search terms used to construct it. We are looking at the search terms to identify a reasonable universe of documents at issue here, and anticipate providing you with at least an initial list to obtain hit numbers on Monday.

Furthermore, the Special Master is under the impression that the NRA has provided the "raw data" underlying excess benefit calculations, but as we discussed on Tuesday, the NRA has not. We identified other areas where we are missing responsive documents. NRA witnesses have also testified that the NRA relied on outside consultants and counsel to review and calculate excess benefit transactions for several NRA executives and board members, including Woody Phillips, Josh Powell, Chris Cox, David Lehman, Joe DeBergalis, and Oliver North, as well as for the diversion of assets by Millie Hallow reported in the NRA's 2019 Form 990. But there are no terms targeting the review conducted with respect to these transactions and individuals.

In addition, fact discovery in this case ended this past summer. Yet the documents you are reviewing exclude documents dated after December 2021. As we discussed, this excludes areas the NRA is aware of pertaining to the course correction, including the negotiation of the MMP/Allegiance contract and the Audit Committee's consideration thereof and the various investigations. This issue also needs to be resolved.

Regards,

Monica

From: Svetlana Eisenberg <sme@brewerattorneys.com>

Sent: Thursday, December 8, 2022 1:03 PM

To: Connell, Monica <Monica.Connell@ag.ny.gov>; Thompson, Stephen <Stephen.Thompson@ag.ny.gov>; Conley, Jonathan <Jonathan.Conley@ag.ny.gov>

Cc: Noah Peters <nbp@brewerattorneys.com>

Subject: Re: NYAG v. NRA et al

Monica,

Thank you for your email message.

Your email message below misstates several key points.

First, with regard to the meet and confer call two days ago, the NRA offered to have the call to answer any questions the NYAG may have about the process referenced in the NRA's email message dated December 4, 2022. It was clear that the purpose of the call was to discuss sampling methodology, and that is exactly what the call accomplished. First, during the call, you requested, and the NRA agreed to provide you with an extensive hits report for each of the terms in each of the 28 categories on the NRA's supplemental categorical privilege log. You stated that you would likely use the hits report to identify records you would like the NRA to submit for in camera review. Second, the NRA explained the process it has undertaken, and, after the call, you advised that 5-10% of the identified population may be an adequate sample.

Second, you assert that it was only during the call that you "finally" understood that the NRA was conducting a "relevance review." This mischaracterizes the conversation. On December 4, 2022, I sent you an email message in which I described the process as a document-by-document review. After you asked the question again, I confirmed on Tuesday that the NRA is conducting a document-by-document review. Separately, your repeated reference to a "relevance review" is wrong. The documents the NRA is reviewing, as you know, hit on (i) a subset of the NYAG's 110+ relevance terms that the NYAG identified for the NRA's supplemental categorical privilege log; and (ii) the NRA's

privilege filter. The NRA is now reviewing these documents to ensure they relate to the NRA's efforts to improve compliance.

Third, there is no merit to your suggestion that the NYAG made multiple proposals and that the NRA rejected them all. To the contrary, after the NYAG requested that the NRA supply Judge Sherwood with a larger sample, the NRA agreed to undertake the review described in my email message dated December 4, 2022. In addition, when the NYAG requested to see a hits report, the NRA right away agreed to generate one. That the hits report might not be ready until Monday is a function of the number of categories (28) and an even greater number and complexity of the combination search terms. The NRA is attempting to amicably resolve all issues, and any suggestion to the contrary is simply incorrect.

The reference to depositions in your email message is also puzzling. The NRA has repeatedly stated to the NYAG that it will consider making a corporate representative available for additional testimony and simply asked the NYAG to identify the instances of alleged “selective disclosure” that the NYAG alleges. To date, other than your reference to my instruction to John Frazer not to reveal the substance of his privileged communications with the NRA's outside counsel, you have not provided any examples.

We are looking into the issues you raised on the call on December 6, 2022, including the Bates numbers for the produced documents related to the negotiation of the NRA-Allegiance contract. The NRA will provide an answer by 12 noon on Monday, December 12, 2022.

Finally, on November 29, 2022, the Special Master ordered the NYAG to produce over 2,000 records. More than a week later, the NYAG has not done so—nor has it provided any documents to the Special Master for in camera review. What is more, rather than committing to a date for the production, you simply stated that the NYAG “believe[s]” she “will produce . . . documents on Monday.” Furthermore, although you represented to the Special Master that you would likely produce documents for his in camera review this morning, this morning, you advised him that the production will not occur this morning. Notably, in your email message to the Special Master, you failed to identify a date by which you will provide the documents to him.

In short, we understand that these matters take time and for that reason proposed to jointly seek an extension of the Note of Issue date. We hope that

the parties can work cooperatively to resolve any remaining issues.

Regards,
Svetlana

Svetlana M. Eisenberg | Partner
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BREWER

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From: Connell, Monica <Monica.Connell@ag.ny.gov>

Sent: Thursday, December 8, 2022 9:47 AM

To: Svetlana Eisenberg <sme@brewerattorneys.com>; Thompson, Stephen <Stephen.Thompson@ag.ny.gov>; Conley, Jonathan <Jonathan.Conley@ag.ny.gov>

Cc: Noah Peters <nbp@brewerattorneys.com>

Subject: RE: NYAG v. NRA et al

Svetlana,

The call on Tuesday was helpful, but we did not resolve the issues that were the subject of Plaintiff's October 20, 2022 application and the Special Master's November 29, 2022 order and the NRA did not respond to questions we posed.

First, it was only during the call that we finally understood that the NRA was conducting a relevance review of documents from its supplemental privilege log. We asked you to identify how the NRA is defining relevance for the purpose of this review and you have not yet answered that question. (We had previously proposed that the NRA identify the steps it will take as part of its course correction and we can narrow down the potential areas where we believe there has been a waiver and/or where the record shows we have been blocked from discovery by assertions of privilege but the NRA has not responded to that proposal.) We suggested that, pending our receipt of a description of how the NRA is performing its relevance review, perhaps the fastest way forward would be submission of the documents you have already identified as relevant to the course correction and privileged for review. We have not received a response to this. As another possible means forward, Plaintiff proposed that you give us a hit report for the search terms in the supplemental log and we will look at those search terms, add any that we think are missing and try to craft a reasonable estimation of the universe of relevant documents. We don't have that yet and you have indicated that we may not have it until 5 pm Monday.

Moreover, Plaintiff has informed the NRA repeatedly that production of the documents to the Plaintiff, alone, will not solve the problem here. We were blocked from obtaining relevant testimony pertaining to events, actions and documents. Further, 12 experts rendered reports and gave depositions on the record as it is. Accordingly, the NRA's proposal of a two week extension of the note of issue date to December 27, 2022 to permit the parties to define the universe of responsive materials, the Special Master to review them and determine whether there was an at-issue waiver, and to then allow Plaintiff to obtain relief from the prejudice caused is facially unworkable.

Further, all of this is setting aside the other issues we raised on the call, like those pertaining to disclosure of excess benefit determinations and negotiation of the MMP/Allegiance contract. When will we receive answers and/or the rest of those documents?

Finally, in regard to your inquiry about the Plaintiff's production, we believe we will produce documents from Category 1 on Monday. In regard to Category 2, we stated that we intend to make a supplemental submission to the Special Master today and will do so. We agree that in the event we submit a sample of documents for in camera review, we will inform you of any sampling methodology used.

Regards,
Monica

From: Svetlana Eisenberg <sme@brewerattorneys.com>

Sent: Wednesday, December 7, 2022 11:13 AM

To: Connell, Monica <Monica.Connell@ag.ny.gov>; Thompson, Stephen <Stephen.Thompson@ag.ny.gov>; Conley, Jonathan <Jonathan.Conley@ag.ny.gov>
Cc: Noah Peters <nbp@brewerattorneys.com>
Subject: NYAG v. NRA et al

[EXTERNAL]

Monica, Stephen, and Jonathan,

Thank you for meeting and conferring with us yesterday. We believe the call was productive.

We want to summarize the negotiations as we understand it. Please let us know if you have a different understanding. In addition, the NRA does believe that it is prudent to secure an extension of the Note of Issue date from Judge Cohen to ensure that the NRA and the NYAG have adequate time to resolve pending disputes related to the documents the parties believe the other side should produce. We suggest December 27, 2022.

First, there are 2,000+ category 1 and 2 documents withheld by the OAG on its privilege log. The Special Master held on November 29, 2022, that they should be produced and, on the call this week, agreed to review them in camera at least to some extent. We understand that your office tentatively believes that it will (i) produce some or all documents from category 1; and (ii) provide for in camera review some or all documents from category 2. Naturally, once the OAG determines not to provide all of the documents to the Special Master, the NRA will have questions and input into any sampling methodology. Given the time all these steps will necessarily require, the NRA believes a short extension of the Note of Issue deadline, currently set for December 13, 2022, is warranted. Please let us know if you disagree or if you see a way to complete all of the above before the Note of Issue date.

Second, with regard to the privileged documents that the NRA listed on its supplemental categorical privilege log that relate to the NRA's efforts to improve compliance, as I informed you on Sunday, the NRA is conducting a document-by-document review, which I described on the call yesterday, and contemplates that the process will be completed by Monday December 12, 2022. At that point, the NRA and the NYAG can determine whether the sample that the NRA submits for Judge Sherwood's in camera review consists of randomly selected documents or documents that hit on search terms selected by the NYAG.

Finally, the deadline to seek review of rulings in Judge Sherwood's order dated November 29, 2022, is December 12, 2022. We propose that the parties seek an order from Judge Sherwood staying that deadline to enable the parties to focus on the issues above.

Please let us know if it would be helpful to speak.

Regards,

Svetlana

Svetlana M. Eisenberg | Partner
Brewer, Attorneys & Counselors

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EXHIBIT P

From: [Connell, Monica](#)
To: [Noah Peters](#); [Svetlana Eisenberg](#); [Thompson, Stephen](#); [Conley, Jonathan](#)
Subject: RE: NYAG v. NRA et al
Date: Sunday, December 11, 2022 11:25:00 PM

Noah,

As the Special Master has indicated, any extension we consent to would need to be made to and approved by Judge Cohen. The NRA has not indicated to us any intention to make an application to Judge Cohen. Previously, the NRA suggested a two-week extension of the note of issue date but we were clear that that would not be sufficient even to address gathering the universe of documents, nevertheless having the Special Master review them for privilege, addressing whether there was an at-issue waiver, and then assessing what further steps could address prejudice to Plaintiff. That is still true. Clearly more time for this process is needed, if the prejudice can be addressed in this way at all. But it must start with asking Judge Cohen and perhaps Judge Sherwood for more time for this process.

We propose that the easiest solution would be for an application to be made, pursuant to Rule 202.21, to permit the filing of the note of issue and certificate of readiness under the condition that this issue remains outstanding, both the ongoing discovery and Plaintiff's ability to seek related relief. That would allow the NRA and Plaintiff more time to try to make progress in the current process, to the extent that is possible. A request for a conference could be made at the same time to get this issue in front of Judge Cohen and obtain his guidance. That is how Plaintiff believes the parties should move forward.

In the meantime, your email makes several inaccurate assertions and mischaracterizes what has brought us to this point. We understand that you are new to the case but the NRA's conduct has prejudiced Plaintiff. For the record, our objection to documents and information regarding the course correction/remedial measures is a longstanding one of which your colleagues are well aware. Furthermore, both Plaintiff and Judge Sherwood have noted that the sample provided by the NRA a month ago was not representative sample of issues raised. In regard to the universe of documents relating to the course correction/remedial measures undertaken by the NRA and for which the NRA has blocked inquiry, we have been highlighting that the documents identified by the NRA did not accurately reflect the full universe of withheld documents and that the universe was much larger than what we understood the NRA to be doing.

Rather than engage in unhelpful back and forth, and while we believe that this process at this time is inherently prejudicial, we should do what the Special Master instructed and try to identify the universe of documents pertaining to the course correction topics that the NRA put at issue and about which the NRA blocked inquiry and which it is withholding as privileged. Topics we believe are not appropriately covered in the NRA's current review include: (1) the determination and calculation of excess benefits by Wayne LaPierre and other NRA executives (specifically that the determinations and calculations were complete and accurate); (2) the NRA's investigations including into Woody Phillips conduct as CFO and Treasurer including his receipt of private inurement, whistleblower retaliation specifically relating to the Brewer firm, board member travel, use of an NRA vendor (Ackerman McQueen) to pay for personal expenses incurred by NRA employees,

diversions of assets, Marion Hammer payments, and conflicts of interest including the LaPierre family's relationship with the owners of several of the NRA's largest vendors; (3) the NRA's handling of whistleblower complaints, including the investigation of the same and treatment of complaints (which it largely delegated to litigation counsel) as well as those complaints not deemed to be made by whistleblowers, including Oliver North, Richard Childress, Esther Schneider, Timothy Knight, and Sean Maloney; (4) reform of vendor relationships and compliance with contract procurement policies including particularly relating to MMP entities, Ackerman McQueen, ATI, and Gayle Stanford-related entities; (5) Audit Committee review of allegations of wrongdoing and conflict of interest by Wayne LaPierre, the signing of the NRA's 2019 Form 990 filing, and allegations in the Complaint; and (6) work done by K&L Gates, Morgan Lewis, Don Lan, the Brewer firm and the other outside counsel and consultants hired as part of the course correction and touted by the NRA as evidence of its good faith reform efforts.

The documents the NRA is reviewing now don't even include those that would captured by such fundamental search terms as investigat* which would most likely have to be limited by additional terms capturing the ongoing investigations including, perhaps, the vendors and consultants identified in the Top Concerns memo; Ackerman and "out of pocket"; McKenzie (or Stanton); yacht or illusion; LaPierre and (travel or flight or gift or reimburse*); Susan LaPierre; McKenzie-affiliated entities (MMP, Allegiance, Concord, ATI); "Credit card" or American Express; Crime Strike; Cummins and Brewer; Hallow and expense*; Powell and expense*; (Cox or Lehman) and Sloane; Phillips and (5th or bankruptcy); Top w/3 review; 360-degree; "executive session" and compliance. As we previously told you, we are working on a complete list but this will include a large number of search terms and we are trying to be targeted in our approach.

As you know, this is an iterative process. To ensure search terms are reasonably targeted to capture responsive documents requires time to review and refine search terms based on hit reports. On Tuesday, as a starting point, we requested that the NRA provide us with a hit report breaking down by category the documents identified in the NRA's Supplemental Privilege Log, which we have still not received.

More importantly, even for the initial production the NRA indicated it will make tomorrow, the NRA has not identified how it is defining what is "relevant" for the purposes of its relevance review or how it is conducting its sampling.

Monica

From: Noah Peters <nbp@brewerattorneys.com>

Sent: Saturday, December 10, 2022 6:53 PM

To: Connell, Monica <Monica.Connell@ag.ny.gov>; Svetlana Eisenberg <sme@brewerattorneys.com>; Thompson, Stephen <Stephen.Thompson@ag.ny.gov>; Conley, Jonathan <Jonathan.Conley@ag.ny.gov>

Subject: RE: NYAG v. NRA et al

Dear Monica:

Thank you for offering to accommodate my personal tragedy (the death of my daughter last week). As our team continues to work nights and weekends to produce a sample for in-camera review, we would appreciate you consenting to reasonable extensions that we request.

Moving forward, we note that your unwillingness to provide guidance regarding the documents or information about which you think the NRA waived its privileges inhibits any meaningful opportunity to efficiently resolve your concerns. In fact, your listing of examples of documents that you assume exist and over which you claim the NRA somehow waived privilege is counterproductive. Indeed, the scope of your complaint has become even less clear over time.

For example, this is the first we are hearing that you are seeking documents beyond those listed in the Supplemental Categorical Log. Your letter dated October 20, 2022 cites that log as and provides no hint that you believe privileged documents beyond those that were logged in the Supplemental Categorical Log have somehow been placed “at issue.”

As you know, the search terms used to create the Categorical Log were agreed-to between the parties five months ago. Seeking to reopen this issue at this time is extremely disruptive and seems designed to delay our attempts to provide the Special Master a sample of in-camera documents. Please provide us any additional search terms ASAP and we will attempt to utilize them.

You state that “NRA witnesses have testified that the NRA is currently conducting the following investigations which would not appear to be captured in the documents you are reviewing.” Please explain what deposition testimony supports these allegations? And why are these issues being raised so late, months after discovery closed?

Again, we are working overtime to accommodate your requests.

Best,

Noah Peters | Counsel

Brewer, Attorneys & Counselors

1717 Main Street, Suite 5900

Dallas, Texas 75201

Direct: 214.653.4872

Cell: 434.466.4641

nbp@brewerattorneys.com | www.brewerattorneys.com

B R E W E R
ATTORNEYS & COUNSELORS

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From: Connell, Monica <Monica.Connell@ag.ny.gov>

Sent: Friday, December 9, 2022 11:10 PM

To: Svetlana Eisenberg <sme@brewerattorneys.com>; Thompson, Stephen <Stephen.Thompson@ag.ny.gov>; Conley, Jonathan <Jonathan.Conley@ag.ny.gov>

Cc: Noah Peters <nbp@brewerattorneys.com>

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- Mr. Phillips' violation of internal control policies;
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hearing;

- the relationship between Mr. LaPierre and Mr. McKenzie and the impacts that relationship may have on NRA business;
- Mr. LaPierre's failure to disclose the use of Mr. McKenzie's yachts prior to January 2021;
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- Reimbursement of expenses relating to apartments and living expenses by senior executives;
- The NRA's reliance on outside counsel to ensure its compliance with New York law and to investigate allegations raised by the NYAG in this litigation, including but not limited to Don Lan or Peter Flocos and their respective firms, or the firms Charles River Associates and Kenrick Group (acquired by HKA in 2019) that Mr. Frazer identified in his capacity as the NRA's Corporate Representative

We believe that a full understanding of the documents at issue requires a return to the NRA's full privilege log and the search terms used to construct it. We are looking at the search terms to identify a reasonable universe of documents at issue here, and anticipate providing you with at least an initial list to obtain hit numbers on Monday.

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Regards,

Monica

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Sent: Thursday, December 8, 2022 1:03 PM
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Cc: Noah Peters <nbp@brewerattorneys.com>
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Thank you for your email message.

Your email message below misstates several key points.

First, with regard to the meet and confer call two days ago, the NRA offered to have the call to answer any questions the NYAG may have about the process referenced in the NRA's email message dated December 4, 2022. It was clear that the purpose of the call was to discuss sampling methodology, and that is exactly what the call accomplished. First, during the call, you requested, and the NRA agreed to provide you with an extensive hits report for each of the terms in each of the 28 categories on the NRA's supplemental categorical privilege log. You stated that you would likely use the hits report to identify records you would like the NRA to submit for in camera review. Second, the NRA explained the process it has undertaken, and, after the call, you advised that 5-10% of the identified population may be an adequate sample.

Second, you assert that it was only during the call that you "finally" understood that the NRA was conducting a "relevance review." This mischaracterizes the conversation. On December 4, 2022, I sent you an email message in which I described the process as a document-by-document review. After you asked the question again, I confirmed on Tuesday that the NRA is conducting a document-by-document review. Separately, your repeated reference to a "relevance review" is wrong. The documents the NRA is reviewing, as you know, hit on (i) a subset of the NYAG's 110+ relevance terms that the NYAG identified for the NRA's supplemental categorical privilege log; and (ii) the NRA's privilege filter. The NRA is now reviewing these documents to ensure they relate to the NRA's efforts to improve compliance.

Third, there is no merit to your suggestion that the NYAG made multiple proposals and that the NRA rejected them all. To the contrary, after the NYAG

requested that the NRA supply Judge Sherwood with a larger sample, the NRA agreed to undertake the review described in my email message dated December 4, 2022. In addition, when the NYAG requested to see a hits report, the NRA right away agreed to generate one. That the hits report might not be ready until Monday is a function of the number of categories (28) and an even greater number and complexity of the combination search terms. The NRA is attempting to amicably resolve all issues, and any suggestion to the contrary is simply incorrect.

The reference to depositions in your email message is also puzzling. The NRA has repeatedly stated to the NYAG that it will consider making a corporate representative available for additional testimony and simply asked the NYAG to identify the instances of alleged “selective disclosure” that the NYAG alleges. To date, other than your reference to my instruction to John Frazer not to reveal the substance of his privileged communications with the NRA's outside counsel, you have not provided any examples.

We are looking into the issues you raised on the call on December 6, 2022, including the Bates numbers for the produced documents related to the negotiation of the NRA-Allegiance contract. The NRA will provide an answer by 12 noon on Monday, December 12, 2022.

Finally, on November 29, 2022, the Special Master ordered the NYAG to produce over 2,000 records. More than a week later, the NYAG has not done so—nor has it provided any documents to the Special Master for in camera review. What is more, rather than committing to a date for the production, you simply stated that the NYAG “believe[s]” she “will produce . . . documents on Monday.” Furthermore, although you represented to the Special Master that you would likely produce documents for his in camera review this morning, this morning, you advised him that the production will not occur this morning. Notably, in your email message to the Special Master, you failed to identify a date by which you will provide the documents to him.

In short, we understand that these matters take time and for that reason proposed to jointly seek an extension of the Note of Issue date. We hope that the parties can work cooperatively to resolve any remaining issues.

Regards,
Svetlana

Svetlana M. Eisenberg | Partner
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From: Connell, Monica <Monica.Connell@ag.ny.gov>
Sent: Thursday, December 8, 2022 9:47 AM
To: Svetlana Eisenberg <sme@brewerattorneys.com>; Thompson, Stephen <Stephen.Thompson@ag.ny.gov>; Conley, Jonathan <Jonathan.Conley@ag.ny.gov>
Cc: Noah Peters <nbp@brewerattorneys.com>
Subject: RE: NYAG v. NRA et al

Svetlana,
The call on Tuesday was helpful, but we did not resolve the issues that were the subject of Plaintiff's October 20, 2022 application and the Special Master's November 29, 2022 order and the NRA did not respond to questions we posed.

First, it was only during the call that we finally understood that the NRA was conducting a relevance review of documents from its supplemental privilege log. We asked you to identify how the NRA is defining relevance for the purpose of this review and you have not yet answered that question. (We had previously proposed that the NRA identify the steps it will take as part of its course correction and we can narrow down the potential areas where we believe there has been a waiver and/or where the record shows we have been blocked from discovery by assertions of privilege but the NRA has not responded to that proposal.) We suggested that, pending our receipt of a description of how the NRA is performing its relevance review, perhaps the fastest way forward would be submission of the documents you have already identified as relevant to the course correction and privileged for review. We have not received a response to this. As another possible means forward, Plaintiff proposed that you give us a hit report for the search terms in the supplemental log and we will look at those search terms, add any that we think are missing and try to craft a reasonable estimation of the universe of relevant documents. We don't have that yet and you have indicated that we may not have it until 5 pm Monday.

Moreover, Plaintiff has informed the NRA repeatedly that production of the documents to the Plaintiff, alone, will not solve the problem here. We were blocked from obtaining relevant testimony pertaining to events, actions and documents. Further, 12 experts rendered reports and gave depositions on the record as it is. Accordingly, the NRA's proposal of a two week extension of the note of issue date to December 27, 2022 to permit the parties to define the universe of responsive materials, the Special Master to review them and determine whether there was an at-issue waiver, and to then allow Plaintiff to obtain relief from the prejudice caused is facially unworkable.

Further, all of this is setting aside the other issues we raised on the call, like those pertaining to disclosure of excess benefit determinations and negotiation of the MMP/Allegiance contract. When will we receive answers and/or the rest of those documents?

Finally, in regard to your inquiry about the Plaintiff's production, we believe we will produce documents from Category 1 on Monday. In regard to Category 2, we stated that we intend to make a supplemental submission to the Special Master today and will do so. We agree that in the event we submit a sample of documents for in camera review, we will inform you of any sampling methodology used.

Regards,
Monica

From: Svetlana Eisenberg <sme@brewerattorneys.com>

Sent: Wednesday, December 7, 2022 11:13 AM

To: Connell, Monica <Monica.Connell@ag.ny.gov>; Thompson, Stephen <Stephen.Thompson@ag.ny.gov>; Conley, Jonathan <Jonathan.Conley@ag.ny.gov>

Cc: Noah Peters <nbp@brewerattorneys.com>

Subject: NYAG v. NRA et al

[EXTERNAL]

Monica, Stephen, and Jonathan,

Thank you for meeting and conferring with us yesterday. We believe the call was productive.

We want to summarize the negotiations as we understand it. Please let us know if you have a different understanding. In addition, the NRA does believe that it is prudent to secure an extension of the Note of Issue date from Judge Cohen to ensure that the NRA and the NYAG have adequate time to resolve pending disputes related to the documents the parties believe the other side should produce. We suggest December 27, 2022.

First, there are 2,000+ category 1 and 2 documents withheld by the OAG on its privilege log. The Special Master held on November 29, 2022, that they should be produced and, on the call this week, agreed to review them in camera at least to some extent. We understand that your office tentatively believes that it will (i) produce some or all documents from category 1; and (ii) provide for in camera review some or all documents from category 2. Naturally, once the OAG determines not to provide all of the documents to the Special Master, the NRA will have questions and input into any sampling methodology. Given the time all these steps will necessarily require, the NRA believes a short extension of the Note of Issue deadline, currently set for December 13, 2022, is warranted. Please let us know if you disagree or if you see a way to complete all of the above before the Note of Issue date.

Second, with regard to the privileged documents that the NRA listed on its supplemental categorical privilege log that relate to the NRA's efforts to improve compliance, as I informed you on Sunday, the NRA is conducting a document-by-document review, which I described on the call yesterday, and contemplates that the process will be completed by Monday December 12, 2022. At that point, the NRA and the NYAG can determine whether the sample that the NRA submits for Judge Sherwood's in camera review consists of randomly selected documents or documents that hit on search terms selected by the NYAG.

Finally, the deadline to seek review of rulings in Judge Sherwood's order dated November 29, 2022, is December 12, 2022. We propose that the parties seek an order from Judge Sherwood staying that deadline to enable the parties to focus on the issues above.

Please let us know if it would be helpful to speak.

Regards,

Svetlana

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EXHIBIT Q

From: [Conley, Jonathan](#)
To: [Svetlana Eisenberg](#); [Noah Peters](#)
Cc: [Connell, Monica](#); [Stern, Emily](#)
Subject: People v. NRA
Date: Thursday, December 15, 2022 4:02:05 PM
Attachments: [NYAG Proposed Search Terms.xlsx](#)

Svetlana and Noah,

Thank you for the hitlist you provided on Tuesday. Our understanding is that you have reviewed, or are in the process of reviewing, withheld documents identified in the NRA's supplemental privilege log and intend to submit a sampling of documents that meet certain criteria to the Special Master to review *in camera*. Despite repeated requests, you have not told us what criteria you're using for this review. Nor do we know when you plan to make this submission, which was due on Monday, or what sampling methodology you intend to use, which the Special Master expressly directed you to do both at the November 14th argument and in his November 23, 2022 email.

In any event, as we've outlined in past correspondence and in past meet and confers, we do not believe your review sufficiently captures the full universe of withheld documents relating to the NRA's purported course correction. In an effort to capture what we believe are relevant documents, we've put together an initial list of proposed search terms. We ask that you run these proposed terms against the full universe of documents the NRA has withheld as privileged and provide us with a hitlist. This will allow us to refine the search terms and ensure that we are targeting responsive documents. We welcome your input on ways to refine the search terms. Given that you have access to and familiarity with the documents the NRA has withheld as privileged, your input could be especially helpful in this process. We also think narrowing the list of custodians identified in the NRA's original privilege log could potentially lower the hits generated by the proposed search terms, but as a starting point, we'd like to see a hitlist for the attached terms.

To be clear, we do not believe this should further delay your submission of documents for the Special Master's *in camera* review that, by his directive, were supposed to be submitted days ago.

Please let us know (1) when you intend to make a submission to the Special Master, (2) what the substance of that submission will be, (3) whether you will provide a hitlist for the attached proposed search terms, and if so, (4) when we can expect it.

We also would like to follow up on our question about the time period the NRA is applying for its search. Fact discovery continued through the summer. It is our understanding that the NRA is claiming that its course correction is ongoing. Yet we believe that for the most part the NRA cut off document production in December 2021. We want to make sure you are including all documents concerning the course correction even if they post-date December 2021. Of course, to the extent that the NRA intends to introduce evidence of events occurring after December 2021, it should share discovery regarding the same.

Regards,

Jonathan

Jonathan D. Conley | Assistant Attorney General

New York State Office of the Attorney General

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EXHIBIT R



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 19, 2022

VIA EMAIL

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

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

Dear Judge Sherwood:

On behalf of the Plaintiff, the People of the State of New York ("Plaintiff"), the Office of the Attorney General of the State of New York ("OAG") respectfully submits this letter in response to the Saturday, December 17, 2022 submission of the National Rifle Association of America ("NRA"). The NRA's submission was purportedly made in response to Your Honor's November 29, 2022 Decision (the "Decision") pertaining to the NRA's failure to establish privilege in regard to matters it had placed at issue, particularly relating to its asserted good faith defense.

The NRA's belated submission of documents for *in camera* review does not comply with Your Honor's Decision. *See* Ex. 1. Because the NRA remains in violation of the Decision and has failed to meet its burden of establishing that the documents it withheld are, in fact, privileged and that privilege has not been waived, we respectfully request that Your Honor direct the NRA to immediately produce all withheld documents relating to its purported "course correction."

At the December 5 conference, Your Honor directed NRA counsel "to come up with a sample that is a fair sample of the documents that you are asserting privilege for. You can't cherry-pick them, which is my impression is that's what you did last time, and the better approach is to consult with the other side as to the protocols that you are using to come up with a fair, random sample on those kinds of procedural steps that need to be taken. ... I laid it out all for you." Ex. 2 at 46:13–23. Three days later, on December 8, Your Honor stressed the same point again, directing

NRA counsel to be transparent in its sampling process. *See* Ex. 3 at 16:4–7 (“... I urge you to be an open book about the process for doing the search.”).¹

Over the past weeks, we have repeatedly asked NRA counsel to provide information on the universe of responsive materials, the NRA’s contemplated sampling process, and the parameters for the universe of documents sampled. *See, e.g.*, Ex. 4 at 2–4 (Dec. 4, 2022 OAG Email);² Ex. 4 at 1 (Dec. 5, 2022 OAG Email);³ Ex. 5 (Dec. 10, 2022 OAG Email);⁴ Ex. 6 at 1–2 (Dec. 11, 2022 OAG Email);⁵ Ex. 7 (Dec. 15, 2022 OAG Email).⁶

¹ Notably, Plaintiff was completely transparent in its sampling of documents for *in camera* review. In providing a sample of the approximately 1200 Category 1 documents pursuant to your Order, Plaintiff disclosed the total number of documents, the method used to extract a random sample, and the number of emails to be provided, with families. Plaintiff then responded to the NRA’s requests to perform random sampling striated by dates to reach a sampling that was agreeable to both parties.

² The OAG asked NRA counsel on December 4, 2022: “You also say that you are reviewing such documents for those relating ‘to the NRA’s efforts to improve compliance, including in the areas referenced on page 8 of the Letter.’ We would like to speak to clarify what this encompasses (for example, how is the NRA defining whistleblower and what time periods are covered by this production). **If you are not reviewing all documents in those categories, what protocol are you using? Just those relating to certain search terms? Which search terms? How is the NRA defining its efforts to improve compliance? We would object to an undefined relevance review, especially if we do not know how the NRA will define its compliance review efforts or what your protocol is.** The number of documents you refer to seem to be a small subset of withheld documents from the identified categories. **It’s just not clear what the NRA is doing/has done so far or what the relevant universe of withheld documents are.**” (emphasis added).

³ The OAG asked NRA counsel on December 5, 2022: “Also, can you please let me know what search terms or parameters you used to identify the universe of documents we are discussing?”

⁴ The OAG asked NRA counsel on December 10, 2022: “[W]e must note that even as to this initial sample, you have not defined how you arrived at it or how you are sampling it. During our December 6 meet and confer, you advised our Office that you and your colleagues were in the process of reviewing documents identified in the NRA’s supplemental privilege log, and estimated that approximately 1,500 to 3,000 of those withheld documents related to the NRA’s purported course correction. You described this as a ‘document by document review’ designed to ‘ensure they relate to the NRA’s efforts to improve compliance.’ **We have asked you to explain what criteria, if any, you are using to determine whether the documents ‘relate to the NRA’s efforts to improve compliance.’ You have not answered that question. To evaluate your review, we need to know how it is being conducted so that a sample of these documents can be provided to the Special Master for his review. We also want to understand how the NRA proposes to sample the same.** While we believe a 5–10% sample of this initial batch may be sufficient, that depends upon the final number of documents and we want to understand how the sampling is being done, as per the Special Master’s direction.” (emphasis added).

⁵ The OAG asked NRA counsel on December 11, 2022: “More importantly, even for the initial production the NRA indicated it will make tomorrow, the NRA has not identified how it is defining what is ‘relevant’ for the purposes of its relevance review or how it is conducting its sampling.”

⁶ The OAG asked NRA counsel on December 15, 2022: “Our understanding is that you have reviewed, or are in the process of reviewing, withheld documents identified in the NRA’s supplemental privilege log and intend to submit a sampling of documents that meet certain criteria to the Special Master to review *in camera*. Despite repeated requests, you have not told us what criteria you’re using for this review. Nor do we know when you plan to make this submission, which was due on Monday, or what sampling

Notwithstanding Your Honor's repeated directives and our repeated requests, NRA counsel has failed to provided Plaintiff with any material information regarding its review or sampling process, or indeed any substantive response to our questions.

On Saturday, December 17, the NRA submitted 110 documents to Your Honor for *in camera* review as well as "the approximately 161 documents that make up the rest of the pool of documents from which the sample were generated." Frazer Aff. ¶ 4. Setting aside that this number is low and underinclusive given the significant number of documents the NRA has withheld—and thousands less than even the NRA's estimates from a week ago—the NRA has not disclosed either to Plaintiff or in its submission to Your Honor its protocol for selecting, reviewing, or sampling the documents it submitted. It has not revealed whether a sampling was conducted, and if so, what methodology was used to conduct it, or how many samples they drew before they selected this one. In an accompanying affirmation, NRA counsel states that in the process of reviewing documents identified in the NRA's Supplemental Privilege Log, the NRA "identified several documents that it determined are not privileged," Eisenberg Aff. ¶ 12, and that "many documents on the NRA's Supplemental Categorical Privilege Log do not relate to compliance efforts," *id.* ¶ 11. It appears NRA counsel then separately collected and reviewed a "pool of compliance-related privileged records identified by the NRA," *id.* ¶ 12, and has submitted some subset of those documents to Your Honor to review. Notably absent from NRA counsel's Affirmation is any description of what the NRA has reviewed, the criteria it used in that review, the size of the universe of documents it deems to "relate to compliance efforts," the number of documents that it has determined are not privileged, or the number of documents it has determined are unrelated to compliance efforts. Nor has NRA counsel explained how their estimate of 1500–3000 privileged documents, an estimate they made on December 5, *see* Ex. 2 at 13:22–14:2, became 271 documents.⁷

In her Affirmation, Ms. Eisenberg states that "NRA undertook an ongoing document-by-document review of all documents captured on the NRA's Supplemental Categorical Privilege Log" through the use of "professionals employed by my Firm" Eisenberg Aff. ¶ 10. The NRA should have given these professionals guidance for the review but has failed to provide that information to the Plaintiff and Special Master, as required.

methodology you intend to use, which the Special Master expressly directed you to do both at the November 14th argument and in his November 23, 2022 email. ... Please let us know (1) when you intend to make a submission to the Special Master, (2) what the substance of that submission will be, (3) whether you will provide a hitlist for the attached proposed search terms, and if so, (4) when we can expect it."

⁷ The NRA's Categorical Privilege Log identifies 83,131 unique documents the NRA withheld as privileged. *See* Ex. 8 at 5. NRA counsel has submitted a sample from a universe of 271 documents that it deems related to the NRA's purported course correction for *in camera* review. But because of the vague category descriptions in the NRA's privilege log and the lack of information provided by NRA counsel regarding its methodology in collecting the documents submitted for *in camera* review, it is impossible to determine what universe of documents the NRA is drawing from or even what universe of documents the NRA maintains the documents submitted for *in camera* review represents. Plaintiff certainly has not been provided information supporting the assertion of privilege or to assess whether the privilege has been waived by the NRA.

NRA counsel has done what Your Honor directed them not to do—submit an unrepresentative sample of documents from an unknown universe of information using an unknown methodology. What is clear is that NRA counsel has again reviewed a body of documents, determined that a lot of those documents were not actually privileged, and then hand selected documents that it is confident *are* privileged for Your Honor to review *in camera*. It is impossible to make an informed judgment about the documents withheld by the NRA based on this undefined, unrepresentative sample of apparently cherry-picked communications.

The NRA is just wrong to the extent that it indicates that it need only review the documents withheld in its Supplemental Privilege Log. Plaintiff has repeatedly informed the NRA that that method does not capture responsive documents like, for example, investigations it now asserts as being undertaken as part of its course correction. The NRA also attempts to obscure the time period covered by the documents it is reviewing. Although fact discovery was scheduled to end this past summer and some of the specific topics raised by Plaintiff relate to actions taken by the NRA in 2022, upon information and belief the documents searched by the NRA almost entirely date only from a period ending in December 2021.

The NRA has the burden of establishing the legal and factual basis for its privilege assertions. Your Honor found that the NRA’s first attempt at a submission for *in camera* review appeared “grossly inadequate.” Ex. 9 (Nov. 23, 2022 email). Your Honor’s Decision found that the NRA failed to establish a legal and factual basis for its privilege claims but gave the NRA yet another opportunity to establish privilege through the identification of the universe of relevant withheld documents and submission of a representative sample. Despite being given ample opportunity to make that necessary showing, the NRA has again failed to meet its burden. And it has done so in a manner that has wasted the time and resources of Your Honor and Plaintiff, and that has delayed resolution of this issue. The NRA’s gamesmanship is inappropriate and further prejudices Plaintiff. Furthermore, even if the NRA were to finally work to identify the universe of relevant documents, provide sufficient information on privilege, and submit a representative sample, this would not resolve whether the NRA has waived privilege by placing the matters at issue unless Your Honor deems all privileged information relating to the NRA’s course correction conduct to be at issue. Finally, even production of the relevant documents, which the NRA has been delaying, does not cure the prejudice caused by its decision to cloak relevant facts and activities behind purported privilege and block relevant testimony regarding the same. The NRA’s decision to prolong even the provision of a representative sample causes a ripple effect and worsens the prejudice.

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiff’s October 20 omnibus letter, Plaintiff respectfully requests that Your Honor direct the NRA to immediately produce all withheld documents relating to its purported “course correction” and schedule a conference to define the terms of the same, together with such other and further relief as you deem just, proper and

appropriate.⁸

Respectfully,

/s/ Monica Connell

Monica Connell

Assistant Attorney General

cc: All Counsel of Record

⁸ As set forth in our October 20 omnibus letter, even if the NRA were ordered to produce all withheld documents relating to the purported course correction at this late stage of the litigation, it would not cure the prejudice caused to Plaintiff. Plaintiff therefore reserves all rights to seek additional and separate relief relating to this issue.

EXHIBIT S

From: [Connell, Monica](#)
To: [Svetlana Eisenberg](#); [Michelle R. Stephens](#); kent@correllawgroup.com; [William Fleming](#); [McLish, Thomas](#); [Farber, Seth](#); [Stern, Emily](#); [Shiffman, Steven](#)
Cc: [Peter Sherwood](#)
Subject: RE: People of the State of New York v. The National Rifle Association: Index No.: 451625/2020
Date: Wednesday, December 28, 2022 12:09:00 PM
Attachments: [image001.png](#)
[image003.png](#)

Dear Judge Sherwood,

Plaintiff writes in response to the NRA's letter submission of yesterday. We note, as an initial matter, that the NRA's submission purports to be in response to Plaintiff's December 20, 2022 letter to Your Honor. Plaintiff's December 20, 2022 letter was not a new motion that entitled the NRA to submit opposition. Rather, we were addressing the NRA's continued refusal to offer any transparency in what it represented was its ongoing identification and sampling of documents in response to your November 29th Decision. If Your Honor is going to consider the NRA's submission, which does not address the deficiencies in its process, we ask for time to respond to the serious misstatements therein. In particular, we ask to be permitted to submit a response after the New Year holiday as key OAG personnel are out of the office this week. Specifically, we would ask to have until 5 p.m. on January 5, 2022.

In addition, Your Honor, we regret that we are constrained to respond to Ms. Eisenberg's baseless and unbecoming allegation that the OAG refused to respond to Mr. Peter's request for "leeway so that he would have time to attend to funeral arrangements and console his grieving wife," falsely asserting that "the NYAG rebuffed these requests, refusing to meet-and-confer with the NRA in good faith." This is just untrue. At no point following Mr. Peters' tragic loss did Ms. Eisenberg or anyone else from the Brewer firm reach out to Your Honor or the Court to ask for an extension of deadlines imposed by the Court and Your Honor but, instead, the Brewer firm continued to make submissions to Your Honor and the Court and chose not to raise the matter. Indeed, the Brewer firm rebuffed the OAG's offers of accommodation, including the offer made on December 8, 2022, the day we first learned of this loss, to adjourn the conference with your Honor that afternoon. I personally called Mr. Peters and Ms. Eisenberg and left messages asking what if anything we could do. In any event, we are prepared to address this spurious and shocking allegation in greater detail if Your Honor deems the same necessary. We regret that even this email is necessary.

Thank you for your attention to these matters,

Monica Connell



Monica Connell
Senior Litigation Counsel
New York State Office of the Attorney General
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From: Svetlana Eisenberg <sme@brewerattorneys.com>

Sent: Tuesday, December 27, 2022 4:59 PM

To: Michelle R. Stephens <mstephens@ganfershore.com>; Connell, Monica <Monica.Connell@ag.ny.gov>; kent@correlllawgroup.com; William Fleming <WFleming@gagespencer.com>; McLish, Thomas <tmclish@akingump.com>; Farber, Seth <SFarber@winston.com>

Cc: Peter Sherwood <psherwood@ganfershore.com>

Subject: Re: People of the State of New York v. The National Rifle Association: Index No.: 451625/2020

[EXTERNAL]

Dear Judge Sherwood,

The NRA believes it had until 5 pm today to respond to the NYAG's letter dated Dec. 19, 2022 (filed on Dec. 20, 2022).

The NRA's response is attached.

Exhibits are at the link below.

<https://filecloud.brewerattorneys.com/Public/?folder=758d9882>

PW: Ops12272022

Regards,
Svetlana

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From: Michelle R. Stephens <mstephens@ganfershore.com>

Sent: Tuesday, December 27, 2022 4:04 PM

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Cc: Peter Sherwood <psherwood@ganfershore.com>

Subject: People of the State of New York v. The National Rifle Association: Index No.: 451625/2020

Good Afternoon Counsel,

The Decision relating to the NRA's December 16, 2022 motion is attached.

Thank you,

O. Peter Sherwood

Michelle R. Stephens

Legal Assistant



Celebrating Over 40 Years Serving Clients

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EXHIBIT T

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE:) Case No. 21-30085-hdh11
) (Jointly Administered)
) Chapter 11
)
NATIONAL RIFLE ASSOCIATION) Courtroom 1
OF AMERICA AND SEA GIRT LLC,) 1100 Commerce Street
) Dallas, Texas 75242-1496
Debtors.)
) April 6, 2021
) 9:04 a.m.
) (MORNING SESSION)

TRANSCRIPT OF HEARING RE: MOTION FOR APPOINTMENT OF EXAMINER
FILED BY CREDITOR PHILLIP JOURNEY (114); MOTION TO DISMISS
CASE FILED BY CREDITOR ACKERMAN MCQUEEN, INC. (131); MOTION TO
DISMISS CASE FILED BY INTERESTED PARTY ATTORNEY GENERAL OF THE
STATE OF NEW YORK (155); MOTION TO APPOINT TRUSTEE FILED BY
INTERESTED PARTY ATTORNEY GENERAL OF THE STATE OF NEW YORK
(163); MOTION TO APPOINT TRUSTEE FILED BY CREDITOR DISTRICT OF
COLUMBIA OFFICE OF THE ATTORNEY GENERAL FOR THE DISTRICT OF
COLUMBIA (214); MOTION TO DISMISS CASE MOTION IN SUPPORT OF
STATE OF NEW YORK'S MOTION TO DISMISS FILED BY CREDITOR
DISTRICT OF COLUMBIA OFFICE OF THE ATTORNEY GENERAL FOR THE
DISTRICT OF COLUMBIA (423)
BEFORE HONORABLE JUDGE HARLIN DeWAYNE HALE
UNITED STATES CHIEF BANKRUPTCY COURT JUDGE

ECRO: Shanette D. Green

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Cotton - Direct/Ciciliano

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1 was going on. I had personal meetings with Mr. LaPierre, how's
2 it going, you know, what's going on, that kind of stuff. But
3 this was in the very initial stages of saying "Where do you
4 start?" I mean New York not for profit law, I think is three,
5 four, five volumes, something like that. My understanding is
6 it had been amended a lot, and recently. Where do you start?
7 So it was really kind of getting this locomotive started, if
8 you will, during that time frame.

9 Q And you mentioned you hired a not for profit law firm --
10 or a not for profit -- a law firm that specializes in not for
11 profit law. What law firm was that?

12 A Morgan Lewis.

13 MR. KATHMAN: Your Honor, at this point, I'm going to
14 object to this line of questioning. This is what we were
15 talking about on Wednesday where the debtor shouldn't be
16 allowed to use the privilege as a sword and a shield. We
17 specifically asked in Mr. Cotton's investigative deposition
18 last year what steps they took, and what firm they hired, and
19 then when we inquired as to what went into that advice, we were
20 blocked by the attorney-client privilege, so this is precisely
21 what we were talking about on Wednesday.

22 If they want to protect the privilege, that's fine.
23 But now they can't use it as a sword and shield to talk about
24 what they did to rely on it.

25 THE COURT: Response?

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1 THE COURT: Yeah, and I hope that my ruling was
2 consistent --

3 MR. KATHMAN: Your Honor, I'm sorry, we're not
4 hearing you; I don't know if it's just me.

5 THE COURT: I hope that my ruling was consistent with
6 what you just said. As to the Morgan Lewis report that's in
7 evidence, I said that they can ask him questions about that.

8 MR. KATHMAN: Okay. I'm sorry, Your Honor, I don't
9 know if it was -- if I was the only one that couldn't hear you,
10 or if everybody couldn't hear you. I missed the first maybe
11 ten or 15 seconds of that.

12 THE COURT: All right, let's do it again. I'm sorry
13 on this end.

14 All right, as I said last week, you can't hold back
15 information because of privilege, and then later use it. I
16 will permit the witness to testify if they talked to counsel,
17 and who that counsel was. I will permit him to testify if they
18 did, if they relied on counsel, and what they did in reliance
19 on counsel.

20 As to the Morgan Lewis report that's in evidence
21 right now, it's already in evidence. The witness may be asked
22 questions about that.

23 Are you able to hear me?

24 MR. CICILIANO: No, it was my turn to be on mute.

25 THE COURT: Yeah. Are you able to --

EXHIBIT U

Filed Under Seal

EXHIBIT V

Filed Under Seal