MOTION SEQUENCE NOS. 37 & 41

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 Hon. Joel M. Cohen

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE NRA'S MOTIONS PURSUANT TO CPLR 3104(d) FOR REVIEW OF THE SPECIAL MASTER'S RULINGS DATED NOVEMBER 29, 2022 AND DECEMBER 27, 2022

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATE STATUTES

On behalf of the Plaintiff, the People of the State of New York ("Plaintiff"), the Office of Attorney General Letitia James ("OAG") respectfully submits this memorandum of law in opposition to the NRA's motions pursuant to CPLR 3104(d) for review of the Special Master's November 29, 2022 and December 27, 2022 rulings (the "Rulings") requiring the National Rifle Association ("NRA") to produce documents relating to the NRA's so-called "course correction" that it asserts are privileged (the "Course-Correction Documents").[1]

PRELIMINARY STATEMENT

One of the NRA's principal defenses to Plaintiff's claims in this action is that it should not be held liable or subject to an independent monitor because it has acted in good faith and taken corrective actions to address governance issues and other wrongdoing identified in the Complaint. (*See* NRA 11/4/22 ltr., NYSCEF 1040, at 2.) The NRA, its principals and various board members have referred to these actions as its "Course Correction." The NRA's failed bankruptcy proceeding in Dallas, Texas and discovery here revealed that the NRA's lawyers not only advised it concerning the steps it should undertake in the Course Correction, but that outside counsel also handled many aspects of its implementation.

As detailed in Point II of the Argument below and the accompanying affidavit of Monica Connell ("Connell Aff."), the NRA has repeatedly and purposefully refused to permit discovery of certain steps it took to implement the Course Correction, asserting that such inquiry concerned facts that would invade privilege. In particular, by asserting privilege during questioning in depositions, the NRA intentionally prevented the OAG from probing matters (the "Course-Correction Matters") that are central to its Course Correction defense, including, for example:

[1] The NRA filed two motions for review of the Rulings, Sequence Nos. 37 & 41, and this memorandum and supporting affirmation are offered in opposition to both motions.

(1) that the identification, determination and calculation of prohibited excess benefit transactions improperly obtained by Wayne LaPierre, other NRA executives and other "disqualified persons" were complete and accurate;

(2) that the NRA adequately investigated and responded to compliance issues, including:

(a) Wilson Phillips' conduct as CFO and Treasurer and his participation in excess benefit transactions;

(b) whistleblower retaliation, specifically relating to 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 personal expenses incurred by NRA employees;

(e) diversions of assets;

(f) Board member Marion Hammer payments;

(g) conflicts of interest, including the LaPierres' relationship with the owners of several of the NRA's largest vendors; and

(h) whistleblower and similar complaints (such as those made by then NRA directors, Lt. Col. Oliver North, Richard Childress, Esther Schneider, Timothy Knight, and Sean Maloney);

(3) that the NRA adequately reformed its vendor relationships and compliance with contract procurement policies, including those relating to Membership Marketing Partners and related entities, Ackerman McQueen, Affiliated Television International ("ATI"), and travel consultant Gayle Stanford and her related entities;

(4) that the NRA's Audit Committee conducted sufficient reviews of allegations concerning:

(a) wrongdoing and undisclosed conflicts of interest by Wayne LaPierre;

(b) related party transactions involving officers or directors;

(c) the preparation and certification of the NRA's 2019 IRS Form 990; and

(d) the allegations in the Plaintiff's Complaint;

(5) that the NRA's reliance on the work performed by K&L Gates, Morgan, Lewis & Bockius LLP ("Morgan Lewis"), Don Lan, Esq., the Brewer firm and other

> outside counsel and consultants was reasonable and evidence of its good faith reform efforts.

In addition to blocking the Plaintiff from inquiring into these matters during depositions, the NRA also withheld documents concerning these subjects as privileged. However, because the NRA's privilege log was categorical and documents relating to the Course Correction were not identified in any specific category or categories, Plaintiff was not informed which of the approximately 84,000 documents the NRA withheld were Course-Correction Documents.

In September 2022, after fact discovery closed, the NRA disclosed five proposed expert opinions. Many of the experts cited the NRA's Course Correction and retention of outside counsel as evidence of the NRA's supposed commitment to legal compliance and that its reforms have been effective, rendering prospective injunctive relief unnecessary. The proposed reports left little doubt that the NRA intended to highlight the Course Correction as a core component of its defense, while maintaining its self-serving and selective privilege assertions to shield from scrutiny the sufficiency of its Course Correction.

Without access to the Course-Correction Documents and related testimony, the OAG has been prejudiced because it will be unable to test the NRA's central defense, which is premised on assertions "that the processes it has in place are sufficient and the appointment of the Independent Compliance Monitor is … not warranted." (11/14/22 Tr., NYSCEF 926, at 24:19-23.) Accordingly, by motion dated October 20, 2022, the OAG brought the issue to the discovery Special Master, the Hon. O. Peter Sherwood, seeking an order that the NRA provide disclosure concerning its Course Correction or else risk preclusion.

In response to the OAG's motion, the Special Master directed the NRA to produce the Course-Correction Documents or a representative sample thereof, for *in camera* review to assess

whether the withheld documents were, in fact, privileged and, if so, whether the privilege had been waived by the NRA. (Connell Aff. ¶ 20; *see* 11/14/22 Tr., NYSCEF 926, at 74-76.) Thus, despite numerous conferences with the Special Master and his repeated directions (on November 14, 23, 29, December 5 and 8), to the NRA that it work with the OAG to identify the universe of relevant documents and to be transparent about its protocols and sampling methodology, the NRA failed to do so. The NRA's refusal to comply with the Special Master's orders, particularly by obscuring how it determined the universe of documents and sampled them, prevented him from being able to evaluate whether the Course-Correction Documents, other than the limited selection submitted to him, were privileged and/or if any applicable privilege had been waived. (*See* 12/27/22 Ruling, NYSCEF 1034, at 2-3.) As a result, first in his initial November 29th Ruling, and then in his final December 27th Ruling, the Special Master held that the NRA had failed to sustain its burden to demonstrate that the Course-Correction Documents were privileged. (11/29/22 Ruling, NYSCEF 1039, at 5; 12/27/22 Ruling, NYSCEF 1034, at 2-3.) He ultimately ordered their production.[2] (12/27/22 Ruling, NYSCEF 1034, at 4.)

The Special Master's Rulings that the NRA failed to establish that the Course-Correction Documents were privileged was reasonable and in accord with applicable law. It should be affirmed. As set forth in detail below, the Special Master proceeded in a logical manner in evaluating the NRA's privilege claims. He also went out of his way to accommodate the NRA, giving it multiple opportunities to comply with his orders. In addition, the Special Master's Rulings may be affirmed on the alternate ground, which was not reached given the holding denying

[2] Although the NRA asserts that the Special Master's Dec. 27th Ruling applies to all documents on its privilege logs, rather than only to the Course-Correction Documents, the Special Master made it clear that his ruling was limited to the documents sought by the OAG in its motion and not all of the approximately 84,000 documents the NRA has withheld as privileged. (*See* p. 9, *infra*.)

privilege, that the NRA waived any applicable privileges by placing its actions during the Course Correction at issue.

Whether the Court upholds the Special Master's Rulings on the same basis as in his December 27 Ruling or the alternate ground of waiver, Plaintiff respectfully requests that, in accord with the carve-out in the Note of Issue (NYSECF 1003-04), Plaintiff be permitted to pursue further proceedings to address how best to cure the prejudice to Plaintiff caused by the NRA's improper assertions of privilege with respect to the Course Correction during fact and expert discovery. If the NRA is ordered to produce the Course-Correction Documents, oversight by the Special Master will be required to ensure that the full universe of documents are produced, supplemental depositions will likely be necessary and an opportunity to amend Plaintiff's expert reports will also be necessary. This will come at great cost to the Plaintiff (which should be borne by the NRA) and will unduly delay trial in this matter. Alternatively, Plaintiff submits that an order of preclusion that prevents the NRA from relying on its Course-Correction as a defense would obviate the costs and delays of further discovery.

PROCEDURAL BACKGROUND[3]

In its October 20th Application, the OAG argued that the NRA's assertion of a good faith defense based on the Course Correction, coupled with its position precluding the OAG from probing facts that would allow it to assess the reasonableness of the steps undertaken during the Course Correction, constituted an improper "sword-and-shield" waiver of privilege. (10/20/22 OAG ltr., NYSCEF 924, at 2-8.) In making that argument, the OAG pointed out that the NRA must establish both that the documents and information it sought to withhold were privileged and

[3] We refer the Court to the Connell Affidavit for a more detailed discussion of the procedural and factual background.

that it had not waived the privilege. (*Id.*) On November 4th, the NRA opposed the OAG's motion, arguing that it had not waived privilege because it was not explicitly asserting an advice of counsel defense and would not rely on any privileged documents at trial. (11/4/22 NRA ltr., NYSCEF 1040, at 5.) The NRA did not contest that it had put at issue and intends to offer evidence of its Course Correction at trial. In its opposition, the NRA asserted that it had only "withheld approximately 629 documents relating to its course correction and remedial efforts … based on privileges." (*Id.* at 3.) By email dated November 8, 2022, the Special Master directed the NRA to submit the documents it had withheld for *in camera* review. (Connell Aff., ¶ 20.)

At a November 14th conference, the Special Master questioned the NRA concerning the volume and nature of the Course-Correction Documents. (11/14/22 Tr., NYSCEF 926, at 6-9). The NRA's categorical privilege log did not separately identify these documents, and therefore it was unknown to the Special Master and Plaintiff how many of the roughly 84,000 withheld documents concerned the Course Correction. The NRA responded that, contrary to its earlier representation, there were "thousands" of such documents and not approximately 629. (*Id.* at 12-14.) Because of the substantial number, the NRA represented that it would submit a representative sample of such documents for review and the Special Master directed the NRA to share information with the OAG concerning its methodology for selecting the sample. (*Id.* at 12-14, 74-76.)

Despite the NRA's representation and the Special Master's direction, the NRA failed to submit a representative sample to the Special Master in the submission it made after the November 14th hearing. (11/29/22 Ruling, NYSCEF 1039, at 4.) Indeed, on November 15, 2022, the NRA "cherry-pick[ed]" a set of only eight email chains relating to the Course Correction. (*Id.* at 4; 12/5/22 Tr., attached as Ex. M to the Connell Aff., at 46.) As the Special Master found, those email chains did not relate to the "matters on which the OAG has focused much of its time and

attention, *e.g.*, whistle blower complaints, investigation of alleged misconduct within the NRA, related party transactions and investigations and corrective action involving officers or directors of the NRA." (11/29/22 Ruling, NYSCEF 1039, at 4-5; *see also* Connell Aff., ¶31.) The NRA also failed to be transparent concerning its methodology for selecting the documents. (Connell Aff. ¶¶ 23-24, 27, 29-30.) By email on November 23, 2022, the Special Master again directed the NRA to meet and confer to fairly identify the universe of documents at issue and an adequate sampling methodology. (*Id*., ¶ 32.)

Because the NRA submitted such a small and unrepresentative sample, in the Special Master's first ruling on November 29th, he found that the NRA failed to meet its burden of establishing that the Course-Correction Documents were privileged and held that they were therefore "presumptively discoverable." (11/29/22 Ruling, NYSCEF 1039, at 5.) Nevertheless, as the Special Master later described it (1/3/23 Tr., NYSCEF 1055, at 30), he "bent over backwards" and "allow[ed] the NRA a further opportunity" to satisfy its burden. (11/29/22 Ruling, NYSCEF 1039, at 5.) He also deferred ruling on the "at issue" waiver argument, determining that the NRA first needed to establish that the documents were privileged before he could assess if any such privilege had been waived. (*See id.* at 5-6.) The Special Master gave the NRA until December 5th to inform him if it would be submitting additional documents for *in camera* review. (*Id*. at 7-8.)

At the December 5th conference, the NRA informed the Special Master that it believed the universe of Course-Correction Documents was in the range of 1500 – 3000, a figure that the OAG noted likely was an undercount considering the number of documents that had been withheld as privileged and the scope of subjects encompassed within the Course Correction. (Connell Aff. ¶ 35; *id.* Ex. M, (12/5/22 Tr.) at 13-14, 23-25.) The Special Master directed the NRA to submit

competent evidence establishing that the documents were privileged and to provide a random sample of the universe of documents for him to review. (*Id.*, Ex. M at 46.)[4] The parties had a follow-up call with the Special Master on December 8th, where he again directed the NRA to be transparent concerning how the universe of Course-Correction Documents was determined and how the random sample for *in camera* review was going to be selected. (12/8/22 Tr., attached to the Connell Aff. as Ex. N, at 18-23.)

Despite repeated requests from the OAG, the NRA failed to comply with the Special Master's direction to be transparent about its review or its sampling process. (Connell Aff. ¶¶ 41-42, 44-46.) On December 17th, the NRA submitted approximately 110 documents (out of an alleged universe of 271) to the Special Master for review, but, in direct violation of the Special Master's directive, "did not provide the protocol it used for selecting, reviewing or sampling the documents submitted." (12/27/22 Ruling, NYSCEF 1034 at 2; Connell Aff. fn. 4.) Although the NRA did provide the Special Master with a list of the search terms it used to generate the submission, it "elected to eschew [his] recommendation to meet and confer regarding a protocol for a search and agreement on search terms," leaving him with "no assurance that the search terms used [were] adequate." (*Id.* at 1-2.) The NRA did not provide the search terms to Plaintiff, which meant that Plaintiff had no visibility into how the NRA identified the 271 Course-Correction Documents it claims it is withholding.

As a result of the NRA's failure to explain its methodology or demonstrate that the sample it provided was "fairly reflective of the range of subjects within the universe of documents being withheld" despite repeated orders to do so, the Special Master ruled on December 27th that the

[4] The Special Master similarly directed the OAG to do the same with respect to certain documents it withheld as privileged that the NRA was moving to have produced and the OAG complied with that direction. (*Id.* at 45; Connell Aff. ¶ 36.)

NRA "failed to establish that the universe of documents it seeks to withhold is protected" by privilege, and granted the OAG's motion. (*Id.* at 2-3.) This second ruling provided that the NRA must produce the "universe" of documents on its privilege log, referring to the universe of Course-Correction Documents that the OAG sought in the October 20th motion to which the ruling related, which the Special Master clarified in a January 3, 2023 conference with the parties.[5] (*See* 1/3/23 Tr., NYSCEF 1055, at 33 ("[w]hat I was referring to when I used those words was the October 20 letter of the AG. That's what I was referring to."); *see also id.* at 6-8-.) The Special Master also denied the NRA's request for additional time to engage in discussions to try to reach a negotiated solution because he had already given the NRA "multiple opportunities to do that." (*Id.* at 29.)

ARGUMENT

I. THE SPECIAL MASTER'S DETERMINATION THAT THE NRA FAILED TO ESTABLISH THAT THE COURSE-CORRECTION DOCUMENTS WERE PRIVILEGED WAS REASONABLE AND SUPPORTED BY THE RECORD

It is well established that, under New York law, privileges are "narrowly construed," with the party asserting the privilege having the burden of establishing it. *McGowan v. JPMorgan Chase Bank, N.A.*, 2020 WL 1974109, *3 (S.D.N.Y. Apr. 24, 2020) (applying New York law and quoting *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991)).[6] "It is also the burden of the party asserting a privilege to establish that it has not been waived." *Id.* (citing *John Blair Comms., Inc. v. Reliance Cap. Grp.*, 182 A.D.2d 578, 579 (1st Dep't 1992)). The Special Master's procedure in first

[5] Because the Special Master clarified that his Ruling did not apply to any documents other than the Course-Correction Documents sought by the OAG, and the OAG is not seeking all documents over which the NRA asserted privilege, the OAG need not address the NRA's argument that the December 27th Ruling should not apply to what it calls the "Entire Population" of its privileged documents. In addition, because the OAG has no access to the documents provided for *in camera* review, and the NRA has not provided a document-by-document privilege log, the OAG cannot respond to the NRA's arguments about whether certain documents are privileged (*see* NYSCEF 1031 at 5-6).

[6] New York law on attorney-client privilege is generally similar to federal law and both federal and state law recognize the doctrine of at issue waiver. *McGowan*, 2020 WL 1974109, *2 n.3, *7.

analyzing whether any privilege applied before determining if any applicable privileges had been waived was reasonable and consistent with how courts analyze challenges to privilege assertions. *See, e.g.*, *Brown v. Barnes & Noble, Inc.*, 474 F. Supp.3d 637, 648-53 (S.D.N.Y. 2019) (first reviewing documents *in camera* to determine applicability of privilege before turning to waiver analysis); *Brownell v. Roadway Package Sys., Inc*., 185 F.R.D. 19, 24-25 (N.D.N.Y. 1999) (same).

As the Court of Appeals has made clear, analyzing whether privilege has been properly asserted is a "fact-specific determination" that will often require "*in camera* review." *Spectrum Sys*., 78 N.Y.2d at 378. Thus, it is beyond reasonable dispute that the Special Master's order requiring the NRA to produce a representative sample of the Course-Correction Documents for *in camera* review was a reasonable means of evaluating its claims of privilege in the first instance. This is especially true given the large volume of withheld documents and that the categorical privilege log neither identified the documents at issue individually or as a single group. *See, e.g., In re Allergan plc Securities Litig.*, 2021 WL 4121300, *2 (S.D.N.Y. Sept. 9, 2021); *see generally Data Tree v. Romaine*, 9 N.Y.3d 454, 464 (2007) (remitting matter for *in camera* inspection of a representative sample of documents to determine if a Freedom of Information Law exemption applied); *Brooklyn Legal Servs. v. New York City Taxi & Limousine Comm'n*, 202 A.D.3d 469, 470-71 (1st Dep't 2022) (same). But, in order to extend the determination as to the privileged status of the sample to the complete set of documents at issue, there must be sufficient evidence that the sample is representative of the larger group. *See, e.g.*, *McNamee v. Clemens*, 2014 WL 12775660, *4 (E.D.N.Y. Jan. 30, 2014) (where, *inter alia*, documents submitted for *in camera* review were not representative, court could not determine if additional documents were privileged). Indeed, it would be illogical to apply a privilege determination for a set of reviewed documents to other documents that were not reviewed if there was no showing that the two sets of documents were sufficiently similar.

Here, since the NRA had the burden of establishing the privilege of all Course-Correction Documents, it also had the burden of establishing that the sample of documents it submitted for *in camera* review was fairly representative. The NRA failed to satisfy this burden when it did not comply with the Special Master's order to explain its methodology for selecting the proffered set of documents to show it was a representative and random sample of the documents. This failure prevented the Special Master from determining if any documents that had *not* been submitted were privileged. (12/27/22 Ruling, NYSCEF 1034, at 2-3.) As a result, the Special Master's determination that the Course-Correction Documents, other than those submitted for *in camera* review, were not privileged was reasonable. *See, e.g.*, *Anonymous v. High School for Env't Studies,* 32 A.D.3d 353, 356-59 (1st Dep't 2006) (failure to comply with orders requiring, *inter alia,* allegedly privileged documents to be produced for *in camera* review "amounts to a waiver of any claim of privilege for the documents sought"); *Davis v. City of New York*, 2012 WL 612794, *6 (S.D.N.Y. Feb. 27, 2012) (privilege waived where party failed to comply with order to provide additional information regarding its privilege claims).

Contrary to the NRA's assertion, (NYSCEF 1031 at 7-8), the Special Master did not employ a "spot check system" where a single mistaken assertion of privilege would waive privilege over all withheld documents. *See Long Island Lighting Co. v. Allianz Underwriters Inc.*, 301 A.D.2d 23, 29 (1st Dep't 2002). The spot check system there involved a drastic sanction for a single error; here, in contrast, the Special Master was not imposing a sanction for an error, but rather held that the NRA's deliberate refusal to submit a representative sample prevented him from analyzing its claims of privilege and, as a result, that the NRA failed to satisfy its burden of demonstrating privilege. (12/27/22 Ruling, NYSCEF 1034, at 2-3.)

II. THE NRA HAS WAIVED ANY PRIVILEGES APPLICABLE TO THE COURSE-CORRECTION DOCUMENTS BY PLACING LEGAL ADVICE RELATING TO THE COURSE CORRECTION AT ISSUE

The Special Master's November 29th and December 27th Rulings may be affirmed on the alternate ground that any privileges applicable to the Course-Correction Documents have been waived by the NRA placing the advice it received with respect to the Course Correction at issue, even though it argues that it is not asserting an advice of counsel defense. This includes the 110 Course-Correction Documents that the Special Master reviewed and determined were mostly privileged (without reaching the waiver argument). (*See* 12/27/22 Ruling, NYSCEF 1034, at 2-3.) A party will waive privilege by placing the advice of counsel "at issue" in a litigation, even if the party does not expressly intend to rely on attorney-client communications in support of its claims.[7] *McGowan,* 2020 WL 1974109 at *6; *see id.* at *6 n.8 ("at issue" waiver of attorney-client privilege and work-product "are governed by the same doctrine"). Thus, even if there is no express reliance on attorney advice, "the privilege may implicitly be waived when [a party] asserts a claim that in fairness requires examination of protected communications." *Id.* (quoting *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991)).

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

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

facts that place privileged communications at issue to deprive the opposing party of the means to test those factual assertions through discovery of those communications."). In such circumstances, the assertion of the claim or defense waives the privilege as to all communications concerning the relevant transaction. *Village Board*, 130 A.D.2d at 655. To hold otherwise would permit a party to selectively disclose only "self-serving communications" while "rely[ing] on the protection of the privilege regarding damaging [ones]," which courts have repeatedly found to be impermissible. *Id.; see, e.g.*, *Banach v. Dedalus Found., Inc.*, 132 A.D.3d 543, 544 (1st Dep't 2015) (use of a portion of board minutes placed contents at issue and required disclosure of full unredacted minutes); *Orco Bank, N.V. v. Proteinas Del Pacifico, S.A.*, 179 A.D.2d 390, 390-91 (1st Dep't 1992) (party waived privilege by making selective disclosure of its counsel's advice); *BMW Group v. Castlerom Holding Corp.*, 2018 WL 2432181, *7-8 (Sup. Ct. N.Y. Cnty. May 30, 2018) (finding waiver with respect to investigator and expert, where, among other things, party used excerpts of communications and documents to support its position but asserted privilege in an attempt to shield the remainder of the materials).

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

Critically, even where it does not selectively disclose the underlying privileged documents, a party may not "rely on the thoroughness and competency of its investigation and corrective actions and then try and shield discovery of documents underlying the investigation by asserting the attorney-client privilege or work-product protections." *Angelone v. Xerox Corp.*, 2011 WL

4473534, *3 (W.D.N.Y. Sept. 26, 2011); *accord Polidori v. Societe Generale Groupe*, 39 A.D.3d 404, 406 (1st Dep't 2007). In *Angelone*, the court found that the defendant's reliance on its own internal investigation and corrective measures waived privilege with respect to all documents and communications "considered, prepared, reviewed, or relied on by [defendant] in creating or issuing" the report of its internal investigation. 2011 WL 4473534 at *3. Similarly, in *Polidori*, the First Department found that the defendant's assertion that it investigated and took "immediate and adequate measures" to stop the wrongdoing waived work product protections because that "position puts in issue whether the corrective actions taken by defendant were reasonable in light of what it learned from the investigation." 39 A.D.3d at 406. Finally, a party cannot use its own litigation counsel to perform factual investigations and rely on those investigations in support of its claims or defenses without waiving "any otherwise applicable privilege as to the disclosed investigations." *Joint Stock Co. "Channel One Russia Worldwide" v. Russian TV Co., Inc.*, 2020 WL 12834595, *2 (S.D.N.Y. May 1, 2020).

The NRA cannot overcome Plaintiff's waiver argument with contentions that it is not asserting an advice of counsel defense and does not intend to introduce privileged documents into evidence at trial. (NYSCEF 956 at 2; *see also* NYSCEF 1031 at 6, n.24.) Such contentions are not dispositive of whether the NRA has waived privilege by placing privileged information "at issue." *See, e.g., McGowan*, 2020 WL 1974109, *6; *Brown v. Barnes & Noble, Inc.*, 474 F. Supp.3d 637, 649-50, 652-53 (S.D.N.Y. 2019) (defendant impliedly waived privilege by asserting a good faith defense even though it asserted that it had not relied on counsel; collecting cases where there was an implied waiver). "The waiver doctrine … does not apply exclusively to situations where a party explicitly relies – or states that it intends to rely – on attorney-client communications." *McGowan*, 2020 WL 1974109, *6 (citations omitted). In other words, "[a] defendant may not avoid waiver

by attempting to frame its good faith defense as 'not formed on the basis of legal advice.'" *Brown*, 474 F. Supp.3d at 650 (citations omitted). Rather, "waiver can 'occur even if the asserting party does not make direct use of the privileged communication itself when that party avers material facts at issue related to the privileged communication, and where the validity of those facts can only be accurately determined through an examination of the undisclosed communication.'" *McGowan*, 2020 WL 1974109, *7 (citations omitted); *Bowne v. AmBase Corp.*, 150 F.R.D. 465, 488 (S.D.N.Y. 1993) ("even if a party does not attempt to make use of a privileged communication, he may waive the privilege if he asserts a factual claim the truth of which can only be assessed by examination of a privileged communication").

The NRA argues that "'[a]t issue' waiver occurs only 'when [a] party *has asserted a claim or defense* that *he intends to prove by use of the privileged materials*.'" (NYSCEF 956 at 2 (citing *Deutsche Bank Tr. Co. of Americas v. Tri-Links Inv. Tr.*, 43 A.D.3d 56, 64 (1st Dep't 2007).) The court in *Deutsche Bank*, however, did not state that "'[a]t issue' waiver occurs ***only***" when privileged communications are relied on to prove a party's case (*id.* (emphasis added)); the NRA added the word "only" to mischaracterize the holding. *See Deutsche Bank*, 43 A.D.3d at 64. The NRA's citation to *In re Cnty. of Erie*, 546 F.3d 222, 229 (2d Cir. 2008) ("*Erie")* also misses the mark. There is nothing in that case that requires the reliance on privileged advice to be express, such as by using privileged materials at trial, rather than implied. *See id.* at 228-29. Indeed, the court acknowledged that a good faith or state of mind defense, such as the one at issue in *Bilzerian*, *supra*, could impliedly waive privilege without express use of the privileged communications, but pointed out that the case before it did not involve a "good faith or state of mind defense." *See id.;*

Heitzenrater v. Officemax, Inc., 2015 WL 10987110, *1-*3 (W.D.N.Y. June 22, 2015) (rejecting the argument that *Erie* requires express reliance on legal advice).[8]

The assertion of a good faith defense, where the party's good faith is based on legal advice it received, such as the NRA's Course-Correction Defense here, is the quintessential means of placing advice at issue without expressly relying on such advice.[9] *See McGowan*, 2020 WL 1974109, *6-7 (collecting cases). A good faith defense may place attorney advice at issue impliedly because the advice the party received, and the state of their knowledge, is directly relevant to whether or not they acted reasonably or in good faith. *See id.* This is precisely what the NRA is doing.

There is no dispute that the NRA will be relying on the steps undertaken in the Course Correction as a central part of its defense at trial. It confirmed that in the proceedings before the Special Master. (Connell Aff. ¶¶ 3-15; 11/4/22 NRA ltr., NYSCEF 1040, at 3; 11/14/22 Tr., NYSCEF 926, at 24-25). And, the NRA's expert witnesses relied extensively on the NRA's alleged Course Correction efforts in opining that, as of December 2020, the NRA was purportedly in compliance with its obligations under New York law. (Connell Aff. ¶ 9.)

[8] The NRA's reliance on *Manufacturers and Traders Trust Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 399 (4th Dep't 1987), (NYSCEF 956 at 2), is misplaced because that case focused on whether an inadvertent disclosure waived privilege, not the proposition that "'at issue' waiver only occurs where a party intends to use privileged communications."

[9] The OAG does not, as the NRA contends (NYSCEF 956 at 6-7), assert that raising good faith as an affirmative defense constitutes a waiver of privilege. To effect a waiver of privilege, the good faith defense must be one that is based on ***legal advice*** and require probing the legal advice to test the party's good faith. Contrary to the NRA's argument, not all invocations of N-PCL § 717 involve reliance on legal advice. In any event, that statute relates solely to the actions of the officers, directors and key employees of not-for-profit corporations, not to the corporations themselves. N-PCL § 717. In addition, the NRA's citation to *McGowan* does not help its argument. *McGowan* stated that the ***mere*** recitation of a good faith defense in an answer will not constitute a waiver, but it held that if the defendant intended to rely on that good faith defense, it would have to produce the documents at issue. *McGowan*, 2020 WL 1974109 at *8 (also ruling that the defendant would be precluded from offering related evidence if it did not state it would rely on the defense).

But when Plaintiff has attempted to glean the nature, scope, and extent of the NRA's Course Correction-related efforts during depositions, the NRA has consistently blocked those inquiries on privilege grounds. Indeed, NRA Second Vice President and Audit Committee Vice Chair David Coy declined to answer questions about the Course Correction on privilege grounds. (*Id.* ¶¶ 10-16.) The record is replete with examples.[10] The following are just a few:

The NRA has repeatedly claimed that as part of its corrective measures, it is investigating the wrongdoing alleged in the Complaint, but it has refused to provide information other than the purported fact of the investigations. Defendant Frazer, acting as the NRA Corporate Representative (the "Corporate Representative"):

- 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.* ¶ 13(a).);
- 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. (*Id.* ¶ 13(b).);
- 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.* ¶ 13(c).);
- 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.* ¶ 13(d).);
- testified that an investigation into the diversion of assets committed by Defendant LaPierre's former subordinate was conducted by outside counsel. (*Id.* ¶ 13(e).) The NRA has not produced documents about that investigation. (*Id.*);
- declined to provide specifics of an alleged Course Correction-related investigation into the NRA's relationship with ATI, another vendor owned by David McKenzie. (*Id.* ¶ 13(f).) Mr. Coy similarly declined to answer questions about the nature of the investigation on privilege grounds. (*Id.*)

[10] *See* Connell Aff., ¶¶ 6-15.

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

- 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]." (*Id.* ¶ 14(a).);
- Mr. Cotton and Mr. Coy also refused to discuss the details of the NRA's investigation 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. (*Id.* ¶ 14(b));
- Mr. Coy declined, on privilege grounds, to testify about any investigations by the Audit Committee regarding Plaintiff's allegations concerning Defendant LaPierre. (Id. ¶ 14(c).) Mr. Coy also declined, on privilege grounds, to testify about any investigations by the Audit Committee of the vendors owned by David McKenzie. (*Id.*)

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. (*Id.* ¶ 15.)

The NRA has asserted that it completely recouped excess benefits paid to Defendant LaPierre, but the Corporate Representative declined on privilege grounds to answer questions about important details regarding how the NRA's tax counsel calculated LaPierre's excess benefits. (*Id.* ¶ 11.) Following motion practice, documents disclosed after the Corporate Representative deposition closed on September 9, 2022 show that contrary to the NRA's assertion, the NRA's tax counsel's review was extremely limited. (*Id.*) The NRA has failed to produce further documents reflecting what information was used to determine LaPierre's excess benefits—all Plaintiff has are the results of that determination. (*Id.*)

These are just examples. Plaintiff will set forth greater detail in its motion for preclusion or other relief. Fairness requires that Plaintiff be permitted to inquire into the details relating to the examples above in order to test the NRA's assertions concerning the sufficiency of the Course Correction to address the governance and other issues detailed in the Complaint and that, as a result, the NRA be found to have waived any applicable privileges.

III. FURTHER REMEDIES ARE NECESSARY TO CURE THE PREJUDICE TO PLAINTIFF

As demonstrated above, the Special Master's determination that the NRA has failed to establish privilege with respect to the Course-Correction Documents should be upheld, but affirmance of his Rulings will not remedy the prejudice to Plaintiff for having been denied access to these crucial documents during fact and expert discovery. Plaintiff should be permitted to pursue further proceedings including remand to the Special Master for a determination of: (a) the documents that relate to the Course-Correction Matters that the NRA must produce to Plaintiff (based on search terms designed to identify such documents approved by the Special Master); (b) what additional discovery, including depositions, that Plaintiff is entitled to related to the production of the Course-Correction Documents; (c) whether Plaintiff will have the opportunity to amend expert disclosures and resume expert depositions; (d) the costs of additional deposition discovery to be borne by the NRA; and (e) such other and further relief as the Court deems just and proper. In addition, Plaintiff should be permitted to make a motion seeking preclusion with respect to the Course-Correction Matters based on the NRA's failure, prior to the close of discovery, to produce the Course-Correction Documents and permit questioning on the Course-Correction Matters.

CONCLUSION

For the foregoing reasons, the Special Master's Rulings should be upheld, Plaintiff should be entitled to pursue further proceedings to remedy the prejudice caused by the NRA's actions during discovery, and the Court should award such other and further relief as it deems just and proper.

Dated: January 18, 2023
New York, New York

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Attorney Certification Pursuant to Commercial Division Rule 17

I, Steven Shiffman, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law contains 6415 words, excluding the parts exempted by Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)). A request for enlargement of the word count limitations set forth in Rule 17 and the word count limit set forth in the Order for Appointment of a Master for Discovery, dated February 7, 2022, to 6,500 words was granted by the Court on January 17, 2023. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: January 18, 2023
New York, New York

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