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

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

REPLY BRIEF IN SUPPORT OF THE NRA'S MOTION FOR REVIEW OF THE SPECIAL MASTER'S DECISION DATED DECEMBER 27, 2022

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INTRODUCTION

In its Motion for Review of the Special Master's December 27, 2022 ruling (the "**December Ruling**"), the NRA demonstrated that both conceivable readings of the Special Master's ambiguous order were clearly erroneous. Read "narrowly" to govern the OAG-Sought Population,[1] the December Ruling confused or disregarded multiple privilege logs, obvious email-attachment linkages, and the Special Master's own *in camera* findings to conclude that the NRA failed to establish privilege—when clearly, the NRA had. Deeming it "of no moment" that most documents ***were*** privileged, the December Ruling invoked a selective-disclosure waiver analysis that the Special Master admitted he did not conduct.[2] Read broadly to encompass the Entire Population, the December Ruling ordered sweeping relief without notice and denied the NRA a fair trial in this and other cases.[3]

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[1] Capitalized terms not defined shall have the meanings ascribed in the Motion (NYSCEF 1031). One such term is "OAG-Sought Population," referring to the numbered and lettered document categories that the OAG moved to compel in the Omnibus Letter that precipitated the December Ruling. *See* Motion at 2, *citing* Aff. Ex. 23 (Omnibus Letter) at 11-12. In its opposition, the NYAG dodges the term "OAG-Sought Population" and substitutes the expanded term "Course Correction Documents," defined to include any record "relating to the NRA's so-called 'course correction.'" *See* Opposition (NYSCEF 1082) (the "**Opposition**") at 5. Dissatisfied with the parameters laid out in its own Omnibus Letter, the NYAG seeks remand to conduct a continued fishing expedition to determine what the "Course Correction Documents" consist of. *See id.* at 5, 19. Taking into account the voluminous prelitigation discovery conducted before the NYAG launched its lawsuit, the NYAG has had nearly four years, and the benefit of 331,928 documents and 78 depositions and interviews, to determine what documents it seeks. In this lawsuit alone, the NYAG has conducted 26 fact depositions, 3 days of corporate representative depositions, and 8 expert witness depositions—more than 35 depositions in total, many stretching over multiple days. Months after discovery closed, the NYAG sought specific documents in its Omnibus Letter. That is the pool of documents subject to this motion practice.

[2] *See* Motion at 4, *citing* Ruling (Aff. Ex. 1) at 3.

[3] *See* Motion at 7,

The NYAG does not defend the broader reading of the December Ruling, but urges the Court to uphold a modified version of the narrower one, largely on grounds the Special Master did not reach. The NYAG argues that: (i) because the NRA's *in camera* sampling process was insufficiently responsive to the NYAG's dictates, the NRA failed to meet its burden regarding whatever documents populate the hazy subject-matter category the NYAG seeks (*i.e.*, "Course Correction Documents"); and (ii) alternatively, privilege was waived when the NRA testified about its own governance reforms, yet unsurprisingly refused to disclose legal advice regarding them. The Opposition then asks for either a sweeping order of preclusion that prevents the NRA from introducing evidence of new compliance and governance processes (its so-called "course-correction") at trial,"[4] or an elaborate do-over of essentially all fact and expert discovery—all on the NRA's dime.[5]

The NYAG's arguments fail, and the preclusion sanction it proposes is improper.[6] The December Ruling must be reversed.

ARGUMENT

I. The NRA Met Its Burden Regarding the OAG-Sought Population.

Virtually ignoring the NRA's three categorical privilege logs (and the document-by-document logs provided in the underlying investigation), the NYAG contends that the NRA failed to meet its burden to show privilege regarding "course correction" documents because it did not

[4] NYSCEF No. 1082 at p. 5.

[5] *Id.* at p. 19.

[6] Motions for preclusive orders are governed by CPLR § 3126, which allow for such sanctions only in cases where a party "refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed." The record contains no such finding.

"explain its methodology for selecting" its *in camera* sample."[7] In fact, the NRA explained its methodology in successive emails[8] and an affirmation under oath.[9] The NYAG's real complaint is that the NRA did not "work with"[10] the NYAG's late-breaking addition of new electronic search terms[11] and its confusing insistence that the NRA sample documents relevant to its "course correction" without doing a "relevance review" to identify them.

In truth, the parties had less than two weeks[12] to confer about the NRA's sample, and this time period was disrupted by holidays and a personal tragedy.[13] The NRA met and conferred at length and in good faith. The NRA conducted "relevance review" because the criteria for the *in camera* sample were qualitative, subject-matter ones—and although the NYAG wishes it could micromanage the NRA's review, such a process would neither be fair nor feasible. In this situation, none of the cases the NYAG cites discredit the results of the *in camera* review.[14]

II. There Is No Authority Or Basis For At-Issue Waiver.[15]

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[7] Opposition at 11.

[8] *See* Aff. ¶¶ 77-81.

[9] *See* Exhibit K to Reply Aff.

[10] Opposition at 4.

[11] *See* Aff. ¶¶ 99-103.

[12] This time period contrasts starkly with the cases on which the NYAG relies. *See, e.g.*, *Brown v. Barnes & Noble, Inc.*, 474 F. Supp. 3d 637, 644 (S.D.N.Y. 2019) (recounting that "it took the parties more than six months to negotiate and agree on an ESI protocol," but this delay was neither unusual nor indicative of bad faith).

[13] *See* Aff. ¶¶ 89-90.

[14] Litigants in *Anonymous v. High Sch. for Env't Stud.*, 32 A.D.3d 353, 359 (2006) and *Davis v. City of New York*, 2012 WL 612794, *6 (S.D.N.Y. Feb. 27, 2012) willfully defied court orders and provided scant or zero privilege-log information.

[15] The NRA noted that it did not fully brief the at-issue waiver question because the Special Master did not reach it (and due to the word limit for these submissions) *See* Motion at 6, n. 24.

The NYAG baldly asserts that the NRA bases its defense on "legal advice" it received, thus placing privileged communications "at issue."[16] Not so. Moreover, the NYAG's contention that it has been blocked from inquiring into "course correction" matters is simply untrue—and relies on snippets of deposition transcripts that omit later, lengthy responses.[17]

Tellingly, the NYAG fails to cite a single case where "at issue" waiver was found based on a non-profit's invocation of New York Not-for-Profit Corp. Law § 717.[18] As the NRA has noted, "If merely invoking this provision placed all attorney-client communications 'at issue,' it would mean that non-profit corporations would effectively have no attorney-client or work-product privileges at all."[19] That is because "a corporation and its officers would face the Hobson's choice of either waiving privileges, or else foregoing their right to seek counsel in connection with their obligations[.]"[20] Hence, the receipt of legal advice can be offered as evidence of "good faith" business judgment ***without*** effecting waiver.[21] Notably, the NRA has not gone that far here—it

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[16] Opposition at 16.

[17] *See* Reply Aff. ¶¶ 3-22. Copious documents have been produced on the same topics.

[18] The cases the NYAG does cite are distantly inapposite. *Vill. Bd. of Vill. of Pleasantville v. Rattner* involved an advice-of-counsel defense. 130 A.D.2d 654 (2d Dept. 1987). *Dedalus* ordered disclosure of redacted contents of a single document after the litigant affirmatively relied on other portions. 132 A.D.3d 543, 544 (1st Dept. 2015). In *Orco*, the plaintiff provided no evidence of its reliance on purportedly fraudulent representations, other than statements about "reli[ance] upon the advice of its lawyers." 179 A.D.2d 390 (1st Dept. 1992). In *BMW Group v. Castlerom Holding Corp.*, privilege was waived after counsel testified under oath in support of an injunction. No. 650910/2013, 2018 WL 2432181, at *2 (N.Y. Sup. Ct. May 30, 2018). *Angelone v. Xerox Corp*. involved documents underlying a report that the defendant placed at-issue under clearcut employment-law precedent. No. 09-CV-6019, 2011 WL 4473534, at *2 (W.D.N.Y. Sept. 26, 2011); *see also Polidori v. Societe Generale Groupe*, 39 A.D.3d 404, 406 (1st Dept. 2007)(same).

[19] NYSCEF No. 956 at 8.

[20] *Id*. at 8-9.

[21] *See, e.g.*, *In re Comverge, Inc. Shareholders Litig*., No. 7368-VCP, 2013 WL 1455827 at *3 (Del. Ch. April 10, 2013) (collecting cases).

has made no selective, offensive use of legal advice, nor even the mere fact that legal advice was received.

The NYAG insists that § 717 only protects individual employees,[22] not the NRA, but cites no authority to this end—and has never moved to dismiss the NRA's § 717 defense, nor withdrawn its derivative claims against the NRA premised on individuals' conduct. Of course, if the NYAG is correct that the NRA has no cognizable "good faith" defense under § 717, then its argument that this defense effects waiver dissolves as well. In any event, there has been no selective disclosure by the NRA, and certainly no willful disregard of court orders justifying the sweeping preclusion sanction the NYAG seeks.

CONCLUSION

The December Ruling should be reversed in its entirety.

Dated: January 23, 2023

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[22] NYSCEF No. 1082 at 16 n. 9.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record, on this 23d day of January, 2023. Sealed exhibits were sent via email to opposing counsel and the Court.

/s/ Noah Peters
Noah Peters

ATTORNEY FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA

CERTIFICATE OF CONFERENCE

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

/s/ Noah Peters
Noah Peters

ATTORNEY FOR THE
NATIONAL RIFLE ASSOCIATION
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CERTIFICATION OF COMPLIANCE WITH WORD COUNT

I, Noah Peters, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing brief filed by NRA pursuant to CPLR 3104(d) for review of the Special Master's December 27 decision complies with the word count limit set forth in the Order permitting filing of a reply brief, because the memorandum of law contains fewer than 1500 words, excluding exhibits. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

By: Noah Peters
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