VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, **Plaintiff,** **v.** **ACKERMAN MCQUEEN, INC.** **and** **MERCURY GROUP, INC.** **Defendants.**	Case No. CL19001757

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR PRELIMINARY INJUNCTION

NATIONAL RIFLE ASSOCIATION OF AMERICA

James W. Hundley (VSB No. 30723)
Robert H. Cox (VSB No. 33118)
Amy L. Bradley (VSB No. 80155)
BRIGLIA HUNDLEY, P.C.
1921 Gallows Road, Suite 750
Tysons Corner, Virginia 22182
(703) 883-0880 [telephone]
(703) 883-0899 [facsimile]
jhundley@brigliahundley.com
rcox@brigliahundley.com
abradley@brigliahundley.com

Counsel for the National Rifle Association of America, Plaintiff

Plaintiff National Rifle Association of America ("Plaintiff" or "NRA") files this response in opposition to the Motion for Preliminary Injunction (the "Motion") filed by defendant Ackerman McQueen, Inc. ("Defendant" or "Ackerman"), and states as follows:

I.

PRELIMINARY STATEMENT

Based on its claim for breach of contract, Ackerman seeks the entry of a mandatory preliminary injunction requiring the NRA to post a letter of credit ("LOC") in the amount of $3 million. The Motion must be denied because Ackerman is not entitled to this extraordinary relief. The Motion is defective because it is not based on admissible evidence. The only evidence that Ackerman has submitted (besides two contracts) is the Declaration of Bill Winkler which should be struck because is not based on personal knowledge, does not demonstrate that the declarant has personal knowledge of numerous statements made in the declaration, refers to documents that are not included with the declaration, contains numerous conclusionary statements, and contains legal conclusions. Additionally, Ackerman cannot demonstrate that it will suffer irreparable harm, an essential element of its request, because Ackerman will be entitled to an award of monetary damages if it prevails on its claim against the NRA. A request for preliminary injunction generally must be denied when the harm suffered can be remedied by monetary relief.[1]

Furthermore, the Motion must be denied because Ackerman cannot make a "clear showing" that it is likely to succeed on the merits of its claim. Of note, under Virginia's

[1] *See Dibase v. SX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) ("A plaintiff must overcome the presumption that a preliminary injunction will not issue when the harm suffered can be remedied by monetary damages."); *Christian Def. Fund v. Winchell & Assoc., Inc.*, No. 156665, 47 Va. Cir. 148, 1998 WL 972334, at *2 (Va. Cir. Ct. Fairfax 1998) (denying injunctive relief because "monetary damages will suffice to cover any alleged harm.").

doctrine of "prior material breach",[2] Ackerman's numerous material breaches of the parties' contract bars its claim for breach of that contract and its request for injunctive relief. In its Motion, Ackerman relies on alleged breaches by the NRA that supposedly occurred in May 2019,[3] but in its First Amended Complaint, the NRA alleges numerous breaches by Ackerman that started in August of 2018 (at the latest), and continue to this day. Given that it breached the parties contract before any claimed breach by the NRA, Ackerman cannot make a clear showing that it is likely to succeed on the merits of its contract claim.

In addition, Ackerman cannot establish that the balance of harms weighs in its favor. Given Ackerman's prior material breaches, the equities weigh in favor of the NRA. As Ackerman has no right to enforce the parties' contract it cannot establish that it has suffered any undue harm. On the other hand, the NRA's reputation and business operations will be harmed by the entry of a preliminary injunction.

Finally, the Motion should be denied because Ackerman cannot show that its requested injunctive relief will serve the public interest. This is a contractual dispute between two private parties that has no impact on the interest of the general public.

Alternatively, if the Court determines that the Motion is not facially deficient, the NRA requests an evidentiary hearing at which it will present facts establishing the Motion's legal insufficiency. The only evidence Ackerman has presented is a declaration. "It is well established that, in general, a motion for a preliminary injunction should not be resolved based on affidavits

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[2] *See Horton v. Horton*, 254 Va. 111, 115, 487 S.E.2d 200, 203-04 (Va. 1997). *See also Countryside Orthopedics, P.C. v. Peyton*, 261 Va. 142, 154, 541 S.E.2d 279, 285 (Va. 2001); (same principle); *Fed. Ins. Co. v. Starr Electric Co.*, 242 Va. 459, 468, 410 S.E.2d 684, 689 (Va. 1991) (same principle).

[3] *See* Motion For Preliminary Injunction, dated June 19, 2019, at p. 4.

alone. Normally, an evidentiary hearing is required to decide credibility issues."[4] The Motion and accompanying declaration contain limited facts and are conclusory. Ackerman has not submitted any documents demonstrating the "substantial financial damage" it will suffer by a delay in the NRA's invoice payments. The facts regarding Ackerman's alleged irreparable injury are primarily within documents and information in Ackerman's custody. Accordingly, if the Court does not deny the motion outright, the NRA requests that the Court set a schedule for expedited discovery and a date for an evidentiary hearing.

II.

FACTUAL BACKGROUND

The facts are set forth in detail in the NRA's First Amended Complaint.[5]

A. NRA And Ackerman—The Services Agreement

The NRA and Ackerman have worked together closely and successfully since the 1980s.[6] However, since in or around May 2018, Ackerman has repeatedly betrayed the NRA's trust and breached its obligations under the parties' contract.[7]

The NRA and Ackerman are parties to a Services Agreement dated April 30, 2017 (as amended May 6, 2018, the "Services Agreement") which provides that certain categories of services are compensated with an agreed annual fee, while others are required to be invoiced on estimates furnished by Ackerman and approved by the NRA.[8] The Services Agreement contains

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[4] *Medeco Sec. Locks, Inc. v. Swiderek*, 680 F.2d 37, 38 (7th Cir. 1981). *See Plate v. Kincannon Place Condominium*, in Chancery No. 128638, 1993 WL 946148, at p. 1 (Va. Cir. Fairfax, July 8, 1993) ("Under Virginia law, affidavits, which are within the hearsay protection . . . may not be used as evidence when an objection has been raised.")

[5] *See* First Amended Complaint dated April 24, 2019.

[6] *See id.* at ¶¶ 9-10, p. 5.

[7] *See id.*

[8] *See* First Amended Complaint, dated April 24, 2019, at ¶¶ 10-12, pp. 5-6.

detailed guidelines identifying categories of expenses that can be invoiced to the NRA.[9] Any expenses to be invoiced must be authorized by the NRA.[10]

The NRA bargained for it's the right to inspect Ackerman's files, books and records to ensure that the NRA, a not-for-profit corporation, could appropriately monitor the use of its funds.[11] As a result, the records-examination clause of the Services Agreement (the "Records-Examination Clause") requires Ackerman to open its files for the NRA's inspection upon reasonable notice.[12]For years, the NRA conducted annual audits of certain files pursuant to the Records-Examination Clause.[13]

In recent years, the State of New York amended its Not-for-Profit Corporation Law (the "NPCL") to clarify requirements for director independence and the ratification of related-party contracts, among other items.[14] In response, beginning in or about August 2018, the NRA sent letters to hundreds of vendors—including—Ackerman that set forth updated invoice-support requirements and provided detailed guidance regarding, for example, expense reimbursement procedures.[15] These efforts by the NRA to expand its insight into Ackerman's activities and its spending resulted in the parties' current dispute.[16]

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[9] *See id.*

[10] *See id.*

[11] *See id.* at ¶ 15, p. 7.

[12] *See id.*

[13] *See id.* at ¶ 15, p. 7.

[14] *See id.* at ¶ 17, pp. 7-8.

[15] See id.

[16] *See id.*

B. Ackerman's Breaches Its Obligations Under The Services Agreement.

During early- and mid-2018, the NRA sought information from Ackerman pursuant to the Records-Examination Clause to advance the parties' mutual interests in an ongoing lawsuit.[17] At that time, Ackerman's responses became evasive and hostile.[18]

In September 2018, for the first time in the parties' decades-long course of dealing, Ackerman demanded that its outside counsel supervise any document review conducted under the Records Examination Clause.[19] During a telephone call on September 19, 2018, after Ackerman's counsel insisted that the NRA pay Ackerman's legal fees without any insight into why the fees had been incurred, the NRA's counsel observed that Ackerman's posture seemed more consistent with an adverse than a common-interest relationship. Ackerman's counsel replied: "Ackerman views the relationship as adverse."[20]

For months, the NRA continued its efforts to get Ackerman to comply with obligations under the Services Agreement. Ackerman, however, repeatedly continued to breach its obligations under the Services Agreement by refusing to comply with the NRA's reasonable requests.

C. The NRA Commences This Lawsuit.

On April 12, 2019, having exhausted its efforts to access documents pursuant to the Services Agreement, the NRA filed this action, a narrowly tailored suit seeking specific performance by Ackerman of its obligation to provide relevant books and records.[21]

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[17] *See id.* at ¶¶ 19, 20, pp. 8-9.

[18] See id.

[19] See id.

[20] See id.

[21] *See* Complaint, dated April 12, 2019.

D. Ackerman's Counterclaim.

On May 23, 2019, Ackerman and its codefendant Mercury Group, Inc. ("Mercury") (together, "AMc") filed their Answer, Plea in Bar, and Counterclaim.[22] In its Counterclaim, Ackerman alleges a breach of contract based on, among other things, the NRA's alleged failure to post a letter of credit in the amount of $3 million (the "LOC") pursuant to Amendment No. 1 to the Services Agreement dated May 6, 2018.[23] In connection with this claim, Ackerman alleges that the NRA failed to pay eight (8) invoices dated June 1, 2018.[24]

On June 13, 2019, the NRA filed its Plaintiff's Answer and Affirmative Defenses to Defendants' Counterclaim.[25] The NRA pleaded the doctrine of "prior material breach" as an affirmative defense to Ackerman's claims for breach of contract.[26]

E. The Motion For Preliminary Injunction.

In its Motion, Ackerman requests "that the Court grant its Motion for Preliminary Injunction by entering an Order which requires the NRA to post the $3,000,000 letter of credit set forth in the contract."[27] Ackerman relies on eight (8) invoices it issued to the NRA on May 1, 2019.[28] Ackerman alleges that those eight (8) invoices have a due date of May 31, 2019, total

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[22] *See* Defendants' Answer, Plea in Bar, and Counterclaim, dated May 23, 2019.

[23] *See id.* at ¶¶ 60-73, pp. 35-38.

[24] *See* Answer, Plea in Bar, and Counterclaim at ¶ 62, p. 36.

[25] *See* Plaintiff's Answer and Affirmative Defenses to Defendants' Counterclaim, dated June 13, 2019.

[26] *See id.* at p. 15 (EIGHTH DEFENSE) ("AMc's prior material breach of the Services Agreement excused the NRA's performance under the agreement.").

[27] *See* Motion for Preliminary Injunction, dated June 19, 2019, at p. 12.

[28] *See id.* at p. 4.

$1,696,466.95, and have not been paid.[29] In support of the Motion, Ackerman has submitted the Declaration of Bill Winkler, the Chief Financial Officer of both Ackerman and Mercury.[30]

III.

ARGUMENTS AND AUTHORITIES

A. Applicable Standards For A Preliminary Injunction.

As Ackerman states in its Motion, the Virginia Supreme Court has not yet set forth the factors for evaluating preliminary injunctions under Virginia law, but several Virginia state circuit courts have looked to decisions from the United States Court of Appeals for the Fourth Circuit for guidance.[31] In the Fourth Circuit, the relevant factors for evaluating a motion for preliminary injunction are:

1. The movant will suffer irreparable harm if a preliminary injunction is not entered;
2. The balance of the equities weighs in favor of the movant;
3. The movant has a substantial likelihood of success on the merits; and
4. The entry of an order granting a preliminary injunction will serve the public interest.[32]

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[29] *See id.*

[30] *See* Declaration of Bill Winkler, CFO (the "Winkler Dec.") at p. 1. The Declaration should be struck because it is not based on personal knowledge, does not demonstrate that the declarant has personal knowledge of numerous statements made in the declaration, refers to documents that are not included with the declaration, contains numerous conclusionary statements, and contains legal conclusions. For example, paragraph six of the declaration contains the improper legal conclusion that "[t]he NRA's failure to pay these invoices breaches the direct terms of the Services Agreement."

[31] *See* Motion For Preliminary Injunction, dated June 19, 2019, at p. 5.

[32] *See Dibiase v. SPX Corp.*, 872 F.3d 224, 229-30 (4th Cir. 2017).

As the moving party, Ackerman has the burden of proof on each of these factors.[33] The Fourth Circuit has stated that a "preliminary injunction is an extraordinary remedy, to be granted only if the moving party clearly establishes entitlement to the relief sought."[34]

B. Ackerman Is Not Entitled To A Preliminary Injunction Because It Cannot Satisfy Any Of the Necessary Requirements.

1. Ackerman cannot demonstrate that it has suffered irreparable harm.

Ackerman must show that its alleged irreparable harm is both certain and immediate, rather than speculative or theoretical.[35] The United States Supreme Court has stated that "[i]ssuing a preliminary based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[36] The lack of irreparable harm is grounds for denying a request for preliminary injunction even if the other three factors merit such relief.[37]

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[33] See *Hughes Network Systems, Inc. v. InterDigital Communications Corp.*, 17 F.3d 691 (4th Cir. 1994) (quoting *Federal Leasing, Inc. v. Underwriters at Lloyd's*, 650 F.2d 495, 499 (4th Cir. 1981)).

[34] *See Dibiase*, 872 F.3d at 229-30.

[35] *See In re Volkswagon "Clean Diesel" Litigation*, CL-2016-9917, 94 Va. Cir. 189, 2016 WL 10990209 (Va. Cir. Ct. Fairfax, Aug. 30, 2016).

[36] *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed.2d 249 (2008).

[37] *See Henderson for National Labor Relations Board v. Bluefield,* 902 F.3d 432, 439 ("In sum, the district court correctly applied the *Winter* factors and, upon finding that one had not been satisfied, concluded that the Board could not establish the necessary criteria for preliminary injunctive relief."); *Freemason Street Area Ass'n, Inc. v. City of Norfolk*, CL18-7735, 4 Cir. CL187735, 2018 WL 7133882, at *1 (Va. Cir. Ct. Norfolk City, Oct. 10, 2018) ("The Fourth Circuit recently held that a district court did not err in denying preliminary injunctive relief by not evaluating other factors once it found that the Movant failed to prove irreparable injury . . .").

Ackerman cannot establish that it will suffer irreparable harm if the Motion is denied because Ackerman has an adequate remedy at law—an award of money damages.[38] Accordingly, Ackerman has not "overcome the presumption that a preliminary injunction will not issue when the harm suffered can be remedied by money damages" at the time of judgment.[39]

Ackerman erroneously contends that "both parties already have agreed through the Amendment that any failure by the NRA to pay its invoices on time, without a substantial letter of credit to draw upon, would cause irreparable harm to AMc."[40] Although Amendment No. 1 does say that the NRA acknowledges that its failure to pay an invoice within 30 days will cause substantial financial damage to AMc, it does not say that Ackerman will suffer irreparable harm.[41] The NRA's failure to pay a nominal invoice certainly could not cause irreparable harm to AMc. Ackerman's argument ignores the Fourth Circuit's decision in *Bethesda*[42] that contractual provisions concerning "irreparable harm" alone "do not control the district court's equitable discretion."[43]

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[38] *See Wright v. Castles*, 232 Va. 218, 224 (Va. 1986) (principal inquiry recording "irreparable harm" is whether an adequate remedy at law exists).

[39] *See Dibiase*, 872 F.3d at 230 ("A plaintiff must overcome the presumption that a preliminary injunction will not issue when the harm suffered can be remedied by monetary damages."); *Christian Def. Fund v. Winchell & Assoc., Inc.*, No. 15665, 1998 WL 972334, at *2 (Va. Cir. Ct., Fairfax Sept. 14, 1998) (denying injunctive relief because "monetary damages will suffice to cover any alleged harm").

[40] *See* Motion For Preliminary Injunction, dated June 19, 2019, at p. 8.

[41] *See id.*

[42] *See* Bethesda Softworks, L.L.C. v. Interplay Entm't Corp., 452 Fed. Appx. 351, 353 (4th Cir. 2011).

[43] *See id.*

Ackerman also contends that it has established irreparable harm because its business will be adversely impacted if its request is denied.[44] In particular, Ackerman alleges that "in 2018, 41% of AMc's gross revenues delivered from its work for the NRA,"[45] and that this loss of revenue "affects not just the financial survival of the company, but also the living of its employees and its good name."[46] Moreover, Ackerman contends that if an injunction is not entered, it will have to furlough approximately 40% of its workforce, including shutting down its subsidiary defendant Mercury Group, Inc. ("Mercury").[47]

Notably, Ackerman's allegations fail to acknowledge that on May 29, 2019, Ackerman issued a "Notice of Termination of the Services Agreement" to the NRA.[48] Pursuant to this notice, the Services Agreement will be terminated ninety (90) days from May 29, 2019. Accordingly, the fact that Ackerman may have to lay off employees and close Mercury is the result of its unilateral decision to terminate the Services Agreement and not any conduct by the NRA.

The NRA has never taken the position that it will not pay Ackerman for services properly provided to the NRA. The NRA has been asking for backup for certain invoices it has received and answers to questions it has concerning Ackerman's billing practices.[49] Ackerman, however, has refused to provide that information.[50] In this respect, too, Ackerman's alleged harm is self-inflicted.

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[44] *See* Motion For Preliminary Injunction dated June 19, 2019, at pp. 7-9.

[45] *See id.* at p. 8.

[46] *See id.* at pp. 8-9.

[47] *See id.* at pp. 8-9.

[48] *See id.* at p. 5.

[49] *See id.*

[50] *See id.*

Ackerman cites two Fourth Circuit decisions and one from the United States District Court for the Eastern District of Virginia, but these cases do not support its position. In *Hughes Network Systems, Inc. v. InterDigital Communications Corp.*,[51] the Fourth Circuit recognized the established rule that harm is not irreparable if it can be compensated through damages.[52] The *Hughes* court stated that irreparable harm may exist when the moving party's business cannot survive absent a preliminary injunction[53] or when damages may be unobtainable because the defendant is insolvent.[54] Despite acknowledging these points, the *Hughes* court stated that a more appropriate remedy may be to seek summary judgment.[55] Ultimately, the *Hughes* remanded for further proceedings and did not determine whether the movant had demonstrated irreparable harm.[56]

In *Bethesda Softworks, L.L.C. v. Interplay Entertainment Corp.*,[57] the Fourth Circuit gave a narrow reading to the *Hughes* decision. Based on *Bethesda*, *Hughes* stands for the proposition that narrow exceptions to the general rule that irreparable harm does not exist when money damages may be awarded are limited to preserving the court's ability to render a meaningful judgment on the merits at the end of the case.[58] This is not the relief Ackerman is seeking so its reliance on the *Hughes* decision is misplaced. Ackerman has presented no evidence that its

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[51] 17 F.3d 691, 694 (4th Cir. 1994).

[52] See id.

[53] See id.

[54] See id.

[55] *See Hughes,* 17 F.3d at 694.

[56] See id.

[57] 452 Fed. Appx. 353-54 (4th Cir. 2011).

[58] *See id.*

"business cannot survive absent a preliminary injunction."[59] Accordingly, the *Hughes* decision is inapposite.

The decision in *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned By Sandra Townes Powell*,[60] also has no application here. In *Mountain Valley*, the Fourth Circuit stated it is "[o]nly when a temporary delay in recovery somehow translates to permanent injury— threatening a party's very existence by, for instance, driving it out of business before litigation concludes— could it qualify as irreparable."[61] The *Mountain Valley* decision is distinguishable because it involved a situation where the law "expressly treats prospective economic injuries flowing from a delay in pipeline construction as a form of irreparable "injury."[62]

Ackerman has not established that it will be driven completely out of business if the Court does not enter the preliminary injunction it seeks.[63] In addition, the Motion does not present any unique circumstances such as those in *Mountain Valley* (*i.e.*, special legal principles governing pipelines). Thus, the *Mountain Valley* decision is irrelevant.

Similarly, the decision in *Cornwell v. Sachs*,[64] is inapposite. The *Cornwell* court stated that "if the moving party's business could not survive absent a preliminary injunction . . . or if the defendant may become insolvent, irreparable harm may arise.[65] The *Cornwell* court determined that the movant had demonstrated irreparable harm because the movant established that the

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[59] See id.

[60] 915 F.3d 197, 217-18 (4th Cir. 2019).

[61] See id.

[62] *See id.*

[63] *See* Motion For Preliminary Injunction dated June 19, 2019.

[64] 99 F.Supp.2d 695 (E.D. Va. 2000).

[65] *See id.* at 703.

nonmovant had already engaged in activity which harms the movant (*i.e.*, movant established a likelihood of success on the merits) and that the nonmovant was judgment proof.[66] As stated above, Ackerman does not contend that the NRA's solvency is an issue. In addition, unlike the *Cornwell* movant, Ackerman has no likelihood of success on the merits.

In addition, Ackerman has not demonstrated irreparable harm because it has presented no evidence that it has attempted to resolve its purported financial predicament through other avenues.[67] "The glaring failure to pursue other reasonable alternatives to avoid the harm it claims is imminent fundamentally undermines its contention of irreparable injury."[68] This issue is especially important here where Ackerman's financial predicament is due to its decision to terminate the Services Agreement instead of complying with its contractual obligations.

Finally, Ackerman has failed to demonstrate that it will suffer irreparably based on harm to its reputation. Ackerman is required to make a "showing" that is "concrete and corroborated, not merely speculating,"[69] and it has failed to do so.

For all these reasons, Ackerman has not established that it will suffer irreparable harm.

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[66] *See id.* at 706-08.

[67] *See Contech Casting, LLC v. ZF Steering Systems, LLC*, 931 F.Supp.2d 809 (E.D. Mich. 2013).

[68] *See id.*

[69] *See Trudeau v. Johnson*, 209 F.Supp.3d 207, 220 (D.D.C. 2016).

2. Ackerman has failed to demonstrate that the balance of harms weighs in their favor.

As the moving party, Ackerman must make a "clear showing" that the balance of equities weighs in its favor.[70] Ackerman has no likelihood of success on the merits. Accordingly, the equities weigh heavily in favor of the NRA. The NRA will suffer harm if an injunction is entered. In particular, the entry of a preliminary injunction based on Ackerman's false, malicious, and outlandish allegations will cause significant harm to the NRA's reputation and its ability to operate its business. Thus, the Motion should be denied.

3. Ackerman is not entitled to a preliminary injunction because it cannot show that it has a substantial likelihood of success on the merits.

Based on the record Ackerman has submitted, the Motion should be denied because Ackerman has not made a clear showing that it is likely to succeed on the merits.[71] Ackerman is seeking a mandatory preliminary injunction that does not preserve the status quo. The Fourth Circuit has stated that a request for a mandatory preliminary injunction is subjected to a more exacting standard of review than a preliminary injunction that maintains the status quo.[72] In connection with mandatory preliminary injunctions, the likelihood of success "must be shown" by "a clear and convincing probability of success."[73] Indeed, "'if there is a doubt as to the probability of plaintiff's ultimate success,' a request for preliminary mandatory relief 'must be denied.'"[74]

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[70] *See The Real Truth About Obama, Inc. v. Federal Election Com'n*, 575 F.3d 342, 345 (4th Cir. 2009), *vacated on other grounds*, 559 U.S. 1089 (2010).

[71] *See Winter n. Nat'l Res. Def. Council, Inc.*, 555 U.A. 7, 129 S. Ct. 365, 374, 376, 172 L. Ed. 2d 249 (2008).

[72] *See Cornwell v. Sachs*, 99 F.Supp.2d 695, 704 (E.D. Va. 2000) (quoting *Tiffany v. Forbes Custom Boots, Inc.*, No. 91-3001, 1992 WL 67358, at *6-7 (4th Cir. Apr. 6, 1992) (*per curiam*)).

[73] *See Cornwell*, 99 F.Supp.2d at 704.

[74] *See id.* (quoting *Tiffany*, 1992 WL 67358, at *6)).

Based on the doctrine of prior material breach under Virginia law, Ackerman cannot establish that it has a substantial likelihood of success. Ackerman has committed material breaches of the Services Agreement starting no later than August 2018.[75] These material breaches occurred at least nine months before the NRA's alleged breaches claimed by Ackerman. Under Virginia law, a "party who commits the first breach of contract is not entitled to enforce the contract."[76] Based on this established principle, the Motion should be denied because Ackerman breached the parties' contract long before Ackerman alleges that the NRA breached those same agreements.[77] Accordingly, Ackerman cannot make a "clear showing" that it is likely to succeed on the merits.

4. <u>Ackerman has not demonstrated that the entry of a preliminary injunction will further the public interest.</u>

Ackerman has not established that the entry of a preliminary injunction will further the public interest. The requisite public interest is insufficient if expressed in general and abstract terms.[78] The United States Court of Appeals for the Third Circuit has stated that: "Although it is axiomatic that our laws protect private property and set standards for business competition and that obedience to such laws is in the public interest, these broad principles have no relevance as a separate factor in determining whether the interlocutory order is appropriate."[79] The relevant issue

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[75] *See* First Amended Complaint dated April 24, 2019, at ¶¶ 31-38, pp. 16-17.

[76] *See Horton v. Horton*, 254 Va. 111, 115, 487 S.E.2d 200, 203-04 (Va. 1997). *See also Countryside Orthopedics, P.C. v. Peyton*, 261 Va. 142, 154, 541 S.E.2d 279, 285 (Va. 2001) (same principle); *Fed. Ins. Co. v. Starr Electric Co.*, 242 Va. 459, 468, 410 S.E.2d 684, 689 (Va. 1991) (same principle).

[77] The NRA pleads the doctrine of prior material breach as an affirmative defense to Ackerman's claim for breach of contract

[78] *See Continental Group, Inc. v. Amoco Chemicals Corp.*, 614 F.2d 351, 357-58 (3d Cir. 1980).

[79] Ackerman cites the *HotJobs.com, Ltd.* decision for the proposition that it "is in the public interest to make it clear that Virginia courts will not hesitate to enforce contracts freely entered into by the parties thereto." *HotJobs.com, Ltd. V. Digital City, Inc.*, 53 Va. Cir. 36, 2000 WL 33333529, at *7 (Va. Cir. March 8, 2000). The court cited no authority for this proposition. In

is whether the entry of the requested preliminary injunction will further the public interest.[80] It is irrelevant that the preliminary injunction will not disserve the public interest.[81]

Ackerman has presented no evidence that entry of the preliminary injunction it seeks will further the public interest. In fact, no public interest is implicated because this matter involves a purely private contractual dispute between the NRA and Ackerman. Ackerman's argument is based on the flawed premise that it has made a "clear showing" that it is likely to succeed on the merits which, *ipso facto*, implicates the public interest.[82] As demonstrated above, however, based on its prior material breaches, Ackerman has no likelihood of success on the merits. Even if this were not so, the public interest would not be implicated because this matter involves a private contract the breach of which can be fully addressed through monetary damages.

C. If the Court Does Not Find the Motion to be Deficient as a Matter of Law, the Court Should Conduct an Evidentiary Hearing Prior to Ruling on the Motion.

Ackerman's Motion and accompanying Winkler Affidavit contain limited facts and are conclusory. Ackerman does not submit any documents supporting the "substantial financial damage" it will suffer by a delay in the NRA's payment of the invoices. This is insufficient to

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addition, based the court's rational, every garden variety private dispute between private parties involving tort or contract claims will impact the public interest.

[80] *See* Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, Civil 3d, FEDERAL PRACTICE AND PROCEDURE § 2984.4, at pp. 219-24 (2013) ("If the court finds there is no public interest supporting preliminary relief, that conclusion also supports denial of any injunction, even if the public interest would not be harmed by one.").

[81] *See id.*

[82] *See Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374, 376, 172 L.Ed.2d 249 (2008); *Real Truth About Obama, Inc. v. Federal Election Commission*, 575 F.3d 342, 346 (4th Cir. 2009) ("*Winter* decision requires that the moving party show that it will likely succeed on the merits of trial") *vacated on other grounds*, 559 U.S. 1089 (2010).

support entry of an injunction.[83] Also, a motion for a preliminary injunction should not be resolved based on affidavits alone.[84]

In its opposition to the Motion, the NRA has set forth genuine issues of material fact as to whether Ackerman will suffer irreparable injury if the Court does not issue a preliminary injunction. Under its contractual rights, the NRA is seeking additional evidence of the work performed in the disputed May invoices. The NRA believes that a significant portion of the work cited in the May invoices is not for "talent and employees who work through AMc for NRA and its affiliates," the only type of work covered by the amended Paragraph III.E of the Services Agreement that provides for the Letter of Credit. "[I]f there are genuine issues of material fact raised in opposition to a motion for preliminary injunction, an evidentiary hearing is required. Particularly when a court must make credibility determinations to resolve key factual disputes in favor of the moving party, it is an abuse of discretion for the court to settle the question based on documents alone, without an evidentiary hearing." [85]

Therefore, if the Court does not deny the Motion on its face, the Court should set a discovery schedule and then hold an evidentiary hearing.

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[83] *See JTH Tax, Inc. v. Grabert*, 8 F. Supp.3d 731, 739-40 (E.D. Va. 2014) (evidentiary hearing required where plaintiff's allegations of irreparable harm were speculative and facts relevant to the injunction determination were undeveloped).

[84] *Medeco Sec. Locks, Inc. v. Swiderek*, 680 F.2d 37, 38 (7th Cir. 1981). *See Consolidation Coal Co. v. Disabled Miners of S.W. Va.*, 442 F.2d 1261, 1269-70 (4th Cir. 1971); 11A Charles Allen Wright, et al., *Federal Practice and Procedure* § 2949 (ed. 2014) (noting that while an evidentiary hearing is not always required, there is a "strong preference . . . for oral evidence in preliminary injunction proceedings and that most courts require an evidentiary hearing where there are disputed facts).

[85] *Cobell v. Norton*, 391 F.3d 251, 261 (D.C. Cir. 2004). *See Arrowpoint Capital Corp. v. Arrowpoint Asset Management, LLC*, 793 F.3d 313, 324 n.11 (3d Cir. 2015) ("[B]ecause consideration of the injunction motion evidently was influenced in some significant degree by credibility issues and factual disputes, the District Court should have conduced one").

D. Ackerman Must Post A Bond.

As demonstrated above, Ackerman is not entitled to a preliminary injunction. Even if the Court disagrees, Ackerman may not obtain a preliminary injunction without posting a bond[86] because posting a bond is mandatory under Virginia law.[87]

Based on established law, the NRA is entitled to a bond in the full amount of its likely damages.[88] The amount of the bond must be sufficient "to pay the cost and damages sustained by any party found to have been incorrectly joined . . . ."[89] Here, the bond must be no less than $3 million plus the costs incurred in obtaining the LOC, plus any amounts that the NRA has to pay later to replenish the LOC as Ackerman has indicated its intent to draw on the LOC immediately.[90]

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[86] *See* Virginia Code § 8.01-631(A).

[87] *GeoMet Operating Co., Inc. v. CNX Gas Co. LLC*, 661 S.E.2d 139, 140 (Va. 2007) (vacating trial court order granting injunctive relief because the order, inter alia, did not comply with § 8.01-631 regarding the posting of bond by the party obtaining injunctive relief); *Guan v. Ran*, 825 S.E.2d 306, 308 (Va. Ct. App. 2019) ("Until the movant 'gives bond with security,' the injunction does not 'take effect.' Accordingly, Guan is not yet enjoined from any action and is not an aggrieved party for purposes of review.") (citing § 8.01-631(A)).

[88] *See Carr v. Citizens Bank and Trust Co.*, 228 Va. 644, 651 (Va. 1985)("In an action on an injunction bond, a plaintiff may recover all damages that are the natural and proximate result of the issuance of the injunction."); *Plate v. Kincannon Place Condominium*, No. 128638, 1993 WL 946148, at *1 (Va. Cir. Ct. July 8, 1993) ("In determining the amount of the injunction bond, then, a court must assess an amount for damages which may naturally result from the injunction and the injunction, and an action to dissolve such injunction.").

[89] *See* Motion for Preliminary Injunction, dated June 19, 2019, at pp. 4-5.

[90] See id.

IV.

CONCLUSION

For all the reasons stated above and such as argument as may be presented in open court, Plaintiff National Rifle Association of America requests that the Court deny the Motion For Preliminary Injunction and grant Plaintiff National Rifle Association of America all other appropriate relief.

Dated: June 24, 2019

Respectfully submitted,

NATIONAL RIFLE ASSOCIATION
OF AMERICA
By Counsel

[redacted]

James W. Hundley (VSB No. 30723)
Robert H. Cox (VSB No. 33118)
Amy L. Bradley (VSB No. 80155)
BRIGLIA HUNDLEY, P.C.
1921 Gallows Road, Suite 750
Tysons Corner, Virginia 22182
(703) 883-0880 [telephone]
(703) 883-0899 [facsimile]
jhundley@brigliahundley.com
rcox@brigliahundley.com
abradley@brigliahundley.com

Counsel for the National Rifle Association of America

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2019, I caused the foregoing Plaintiff's Memorandum in Opposition to Defendant's Motion for Preliminary Injunction to be served via electronic mail and first-class mail upon:

David Schertler
David Dickieson
Schertler & Onorato, LLP
901 New York Avenue, N.W., Suite 500
Washington, DC 20001
dschertler@schertlerlaw.com
ddickieson@schertlerlaw.com

Counsel for the Defendants

[redacted]
James W. Hundley (VSB No. 30723)
Robert H. Cox (VSB No. 33118)

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