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

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NATIONAL RIFLE ASSOCIATION OF AMERICA,

Index No. 158019/2019

Petitioner,

v.

LETITIA JAMES, IN HER OFICIAL CAPACITY
AS THE ATTORNEY GENERAL OF
THE STATE OF NEW YORK,

Respondent.

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MEMORANDUM OF LAW IN OPPOSITION TO THE NATIONAL RIFLE ASSOCIATION OF AMERICA'S ORDER TO SHOW CAUSE AND APPLICATION FOR RELIEF UNDER CPLR 2304 AND 3103.

LETITIA JAMES
Attorney General of the
State of New York
28 Liberty Street
New York, NY 10005

Attorney for Petitioner

Emily Stern
Monica Connell
William Wang
of Counsel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

States, Laws and Rules

New York State Attorney General Letitia James submits this memorandum of law, along with the accompanying affirmation of Emily Stern and the exhibits thereto, together with all proceedings had herein, in opposition to the application by order to show cause of Petitioner National Rifle Association of America, Inc. for relief pursuant to CPLR 2304 and 3103.

PRELIMINARY STATEMENT

At issue before this Court is a blatant attempt by the NRA to interfere with and impede the Office of the Attorney General's ("OAG") investigation of the organization's own alleged misconduct. The NRA is demanding to be present during the Attorney General's investigatory examination of Lieutenant Colonel Oliver North ("North"), a key witness, who is represented in this investigation by his long-time counsel, Brendan Sullivan, Esq., of Williams & Connolly LLP.

North is a former President of the NRA and current board member, who challenged NRA top executives by raising serious concerns about the organization's compliance with the laws governing not-for-profits, the NRA's policies governing contracts for services and the magnitude and propriety of NRA expenses, including the terms of engagement and the legal fees charged by Brewer, Attorneys & Counselors ("Brewer").[1] The NRA's claim that Brewer, along with counsel for the NRA's Board, must be present at the North examination to prevent disclosure of information protected by attorney-client and work-product privileges is a mere pretext. The NRA is attempting to monitor first-hand the concerns raised by Colonel North, including those about the propriety of the Brewer firm's conduct, and the OAG's investigation into the NRA's alleged misconduct. Its position is unprecedented, without basis in fact and directly contrary to the law and public policy, which authorizes the OAG to pursue law enforcement investigations

[1] The Brewer firm is representing the NRA in this matter.

in a non-public and confidential matter, free from interference by the subject of the investigation.

As a not-for-profit, tax-exempt corporation, organized under the laws of the State of New York, the NRA and its officers and directors are obligated to comply with the requirements of the NPCL and are subject to supervision and oversight by the OAG. As set forth below, the OAG has broad authority to protect the public and ensure that not-for-profit entities are in compliance with their legal obligations. This includes authority to conduct non-public, law enforcement investigations through the use of investigatory means, including issuance of subpoenas for documents and testimony.

This case also involves protection of whistleblower rights under Section 715-b of the Not for Profit Corporation Law ("NPCL") and the NRA's own whistleblower policy. The NPCL requires protection of whistleblowers, including directors of not-for-profit corporation, from retaliation and precludes involvement by the subjects of the whistleblower complaint from participation in the assessment of the complaint.

In April 2019, the OAG put the NRA on notice that it was investigating the organization and its affiliated not-for-profit and charitable entities[2] (collectively, the "NRA") concerning allegations of financial improprieties; improper related party transactions between the NRA and affiliated entities, officers and board members; unauthorized political activity; and potentially false or misleading disclosures in regulatory filings. Such conduct, if true, could constitute serious violations of New York law governing not-for-profit organizations, including Article 7 of the Not-for-Profit Corporation Law, Article 7-A of the Executive Law, and Article 8 of the Estates, Powers, and Trust Law.

[2] "Affiliated entities" include, without limitation, the NRA Foundation, Inc., NRA Civil Rights Defense Fund, NRA Freedom Action Foundation, NRA Special Contribution Fund d/b/a NRA Whittington Center, NRA Institute for Legislative Action, and NRA Political Victory Fund.

The OAG's investigation into potential legal violations by the NRA and related entities was based upon its inquiry into information and allegations from a variety of sources. These sources included primarily the NRA's own regulatory filings, as well as litigation filings and internal NRA documents that were made available to the public. By late April 2019, these serious governance issues within the NRA were on public display at the NRA's annual meeting. North ultimately issued a public statement voicing his concerns and explaining his efforts as President of the NRA to form a crisis management committee to, among other things, initiate an independent review of the Brewer firm's engagement letter and billing practices, which efforts he alleges were stonewalled for many months. He warned the NRA's membership of a "clear crisis" in the organization that "needs to be dealt with immediately and responsibly, so the NRA can continue to focus on protecting the 2nd Amendment."[3]

As part of this investigation, on July 26, 2019, the OAG issued a subpoena to North, which sought both documents and the examination of North on Tuesday, August 20, 2019. On July 29, 2019, North's personal attorneys gave the NRA notice of the subpoena and his client's intention to comply with the OAG's demand. North's counsel assured the NRA that his client and the OAG were sensitive to and would protect against disclosure of NRA privileged information.

The NRA, knowing about the subpoena for more than two weeks, nevertheless waited until the proverbial eleventh hour to seek "emergency" relief in this Court, asking that the Court issue a temporary restraining order and/or a protective order allowing its counsel, the Brewer firm, whose own conduct is at issue in North's allegations, and the NRA Board's counsel, to be present during the questioning of North in order to interpose objections based upon assertions of

[3] All cited exhibits are annexed to the supporting Affirmation of Emily Stern, dated August 19, 2019 and will be cited herein as "Stern Aff., Ex., __."

privilege. The NRA's moving papers offer no support for this extraordinary request.

At argument on the NRA's application on Friday, August 16, 2019, the Court denied the NRA's application for a temporary restraining order. What is left now is its application, presumably by a preliminary injunction, for the immediate modification of the subpoena under CPLR 2304 or a protective order under CPLR 3103.

As set forth below, because the NRA, as the subject of an investigation by the OAG, has no right to be present or to have its attorneys or its Board's attorneys (who have not made any application) be present during the questioning of witnesses, its request should be denied.

Brief Statement of Facts

Background on the OAG Investigation

On April 26, 2019, the OAG notified the NRA, through issuance of a document preservation notice, that the OAG was investigating the NRA and its affiliated entities. The notice identified initial areas of investigation, which were subject to change based on the information collected, including related party transactions between the NRA and board members, unauthorized political activity and potentially false and misleading disclosures in regulatory filings. The NRA was instructed to preserve documents for the period January 1, 2012 to the present concerning various subjects relating to the organization's governance, financial operations, regulatory and legal compliance and transactions between among the NRA and its affiliated entities, its officers, directors, their family members and entities controlled or owned by the same, among various other areas. Stern Aff., Ex. 1.

Commencement of the OAG's investigation followed careful review of the NRA's public reports in regulatory filings, including the organization's IRS Form 990 and CHAR500 official filings, and its audited financials, some of which noted substantial inaccuracies in earlier

mandated filings.[4]

For example, the NRA's Internal Revenue Service Form 990 for the period ending December 31, 2017, which the NRA filed with the OAG, differed in substantial and relevant detail from the NRA's filings in prior years. *See* Stern Aff., Ex. 6. In Schedule O to that filing, the NRA detailed business relationships the organization had with numerous NRA board members, who received compensation as employees, for providing "professional services" to the NRA and for membership recruiting. *See Id.*, Schedule O. The NRA also revealed previously undisclosed payments by the NRA and a vendor to NRA insiders. Michael Marcellin, NRA's Managing Director of Licensing and Marketing, received substantial payments from Lockton Affinity, Inc., an insurance brokerage firm that co-marketed with the NRA Carry Guard, an insurance product for defense and indemnity relating to use of firearms.[5] In addition to disclosing that Lockton paid Marcellin over $522,000 in 2017 (this was in addition to Marcellin's receipt of $713,000 in compensation from the NRA that year), the NRA also disclosed a payment to Marcellin in excess of $455,000 that was "inadvertently excluded from prior year Form 990 compensation." *Id.*, Schedule J & O.

The NRA's 2017 Form 990 made disclosures concerning the NRA's relationship with Ackerman McQueen, its long time advertising and public relations firm, which also drew attention. *See Id.*, Part VII, Section B. Ackerman was identified as one of the NRA's largest "Independent Contractors," having received more than $20 million in 2017 for public relations and advertising services. *Id.* The Form 990 further shows that Ackerman had actually received

[4] The IRS Form 990 is the federal information tax return that the NRA must file annually with the Internal Revenue Service and as part of its OAG CHAR500, an annual regulatory filing required by the OAG.
[5] In May 2018, Lockton Affinity entered into a consent order with the New York Department of Financial Services and agreed to pay a $7 million penalty to resolve the agency's enforcement action relating to Lockton's marketing of the Carry Guard insurance product. Lockton also agreed not to participate in any NRA-endorsed insurance programs in New York State. Stern Aff., Ex. 7 (DFS/Lockton consent order).

close to $39 million in compensation and other payments from the NRA that year. Separately in Schedule O, the NRA disclosed that the $20 million sum excluded over $11 million the NRA reimbursed Ackerman for out of pocket expenses, another $5.5 million the NRA paid to Mercury Group, and $2.6 million the NRA paid to Wild Skies, which the NRA explained were "companies which have different tax identification numbers from Ackerman McQueen." *Id.* Ackerman and related companies received even more from NRA affiliated entities. The NRA cryptically noted that the disclosed payments to Ackerman and related companies "excludes amounts paid by a related organization" to the NRA. *Id.*, Schedule O.

The NRA's governance problems also came to the attention of the public, in the context of multiple lawsuits and media reports, including those by The New Yorker, the Wall Street Journal, and the New York Times.[6] For example, in Spring 2019, allegations of misuse and waste of NRA assets and a lack of oversight of Ackerman surfaced in litigation pleadings and correspondence between the NRA and Ackerman. At that time, the decades long relationship between the NRA and Ackerman had become adversarial and the parties became embroiled in litigation. Publicly available documents filed in connection with the litigation described allegedly excessive expenses by senior NRA executives for travel, clothing, meals and entertainment and a lack of transparency into Ackerman's budgets among other issues concerning the NRA/Ackerman business relationship. *See* Stern Aff., Exs. 8 and 9.[7]

Internal NRA documents (some of which were made available to the public in unredacted form and others recently produced to the OAG by North (although certain were redacted)), show that for months before North was replaced as NRA's President, he was raising concerns with the

[6] *See* Stern Aff., Exs. 3, 4, and 5.
[7] Copies of correspondence between Ackerman and NRA seeking documentation for out of pocket expenses were produced to the OAG by North. *See* Stern Aff., Ex. 8.

NRA's leadership. On April 25, 2019, North wrote to NRA's Executive Committee and proposed forming a Crisis Management Committee, which would, among other things, supervise an internal investigation to examine the "serious allegations about mismanagement" and "financial impropriety" and address other issues concerning the organization's compliance with the law governing nonprofits organizations. Stern Aff., Ex. 10(b), 10(c), 23 and 24. In this memorandum, North warns that the "The NRA Faces a Crisis," citing, among other things, the "devastating article raising serious allegations about mismanagement" in *The New Yorker*, the lawsuit filed against Ackerman "without consultation and without informing members of the NRA Board . . . or key officers of the NRA," the allegations by Ackerman of close to $500,000 in NRA covered expenditures for clothing, travel and limousines for LaPierre's benefit. Stern Aff., Ex. 10(b). North also again called specific attention to the legal fees charged by the Brewer law firm, and the authorization for such fees, which he noted "total more than $24 million over a short period." *Id.*

North's memorandum was a follow up to an April 18, 2019 letter that North and Richard Childress, NRA 1st Vice-President, sent to NRA's General Counsel and the Chair of the NRA Audit Committee expressing how they and "others are deeply concerned about the extraordinary legal fees that the NRA has incurred with Brewer . . . The amount appears to be approximately $24 million over a 13-month period" and noted the fees amounted to an average of "$97,787 per day, seven days a week, every day of every month." Stern Aff., Ex. 10(c). They reiterated a request that they made several times before to retain an outside independent expert to review the Brewer firm's relationship with the NRA. *Id.*; *see also* Exs. 23 and 24. North's nine-page, detailed letter argues that the Board's fiduciary obligations and the NRA's own policies require that they commission an independent review of the magnitude of Brewer's fees, the terms of the

Brewer's engagement, the secretive manner in which the NRA was handling the fees and an alleged lack of oversight by the NRA of the billings. North also raised concerns that the firm's lead partner, Bill Brewer, was resisting the requested independent review. *Id.*

The governance issues of the NRA were on public display in late April 2019 when the NRA met for its annual membership meeting in Indianapolis. NRA documents which were made public reflected serious and substantial questions about the NRA's compliance with applicable law and rules, and whether NRA officials were meeting their fiduciary obligations to the NRA. On April 27, 2019, LaPierre was re-elected as the chief officer of the NRA. On that date, North lost his bid to be re-elected President. He exited that position, making a public statement to the NRA membership expressing his view that the NRA's internal problems had created a "clear crisis" in the organization. Stern Aff., Ex. 12.

OAG's Subpoena to North and North's Response

North is an important witness in the OAG's investigation of the NRA's compliance with the NPCL and its own policies. Accordingly, on July 26, 2019, the OAG issued a subpoena to North. Stern Aff., Ex. 2. On July 29, 2019, by email, North's attorney, Brendan Sullivan, of Williams & Connolly LLP in Washington D.C., shared that subpoena with counsel for the NRA.[8] Mr. Sullivan informed the NRA that North was going to comply with the OAG subpoena "unless the NRA secures an order from a New York court directing [North] not to comply." Stern Aff., Ex. 14. Mr. Sullivan also expressly stated:

> The [OAG] has assured us that they will be sensitive to respecting the NRA's privilege when taking testimony. We also will be sensitive to protecting the NRA's privilege. In addition, we plan to redact materials that are compelled by the [OAG]'s subpoena to protect information that may be privileged to the NRA. *Id.*

[8] Mr. Sullivan is a senior partner at the nationally recognized law firm of Williams & Connolly LLP. His firm biography states has over 45 years of experience representing clients in complicated and highly sensitive matters, including defending clients in government investigations and prosecutions. Stern Aff., Ex. 13.

Thereafter, North's counsel agreed to a demand from the NRA to review for privilege the documents North intended to produce in advance of production to the OAG. It is the OAG's position that the NRA has no right to pre-review responses by witnesses to OAG subpoenas, particularly if, as here, the witness is represented by counsel. In order to obviate unnecessary motion practice, however, OAG accommodated the NRA's request to do so in this circumstance.

The NRA reviewed the privilege determinations North's counsel made to the witness's planned production of 65 documents, amounting to close to 900 pages. The NRA reviewed the documents in three separate installments and then reverted to North's counsel with a response as to whether it believed any of the documents should be withheld or further redacted. Stern Aff., Exs. 15-17. The NRA had no objection to producing 54 documents exactly as North's counsel had proposed. These documents were produced in two installments on August 14, 2019. Stern Aff., Exs. 15 and 16. The third production was made on August 15, 2019. It identified only eleven documents that the NRA claimed required additional modification to protect privileged information. Stern Aff., Ex. 17.

In its application to this Court, the NRA claimed that one of those documents was "wholly privileged on attorney-client privilege and work product grounds and needed to be withheld from production in its entirety." Eisenberg Aff., ¶ 16. But when North's counsel reviewed the NRA's submission concerning that document, he immediately emailed the NRA's counsel stating:

> With regard to that document, please make the Court aware that we proposed redacting nearly all of that document (except a few factual recitations). Your papers give the impression that we were simply going to produce that document unredacted, which could be misleading." Stern Aff., Ex. 18 (Cady email dated Aug 16).

The NRA further has further claimed that it "identified 37 additional redactions that needed to be applied to the draft production, but that North's counsel had not made." Eisenberg

Aff., ¶ 16. Two of those documents are critical communications by North to NRA senior executives and Board members discussed above – an April 18, 2019 letter and an April 25, 2019 memorandum – each of which appears in the North production multiple times. The NRA creates the misleading impression that it made 37 distinct additional redactions, when in actuality the NRA is counting the same redactions made to duplicate copies of these two communications. *See* Stern Aff. ¶ 16 and Ex. 17 (Eisenberg letter referencing redactions in North Docs. 13, 17, 24, 39 and 47, which are repeat copies of the North April 2019 communications).

The NRA points to North's counsel's failure to make purportedly necessary reactions as evidence that the NRA will be prejudiced if it is not permitted to attend the North examination and prevent disclosure of confidential, privileged information. However, both of the North communications from April 2019 have been publicly available in complete and *unredacted* form for months. Both documents were previously provided to the media.[9] These documents were also publicly filed in unredacted form by North in another action pending in this Court, *National Rifle Association, Inc. v. North*, 65357/2019 (N.Y. County) (Cohen, J.). *See* Stern Aff., Ex. 19. That action concerns North's entitlement to indemnification by the NRA and North proffered both documents unredacted in support of his counterclaim against the NRA. *See* Stern Aff., Ex. 10(a), (b) and (c) (annexing Affirmation of Steve Cady and accompanying Exhibits 1 and 2, as filed). The NRA has knowingly failed for over a month to take any steps to redact, seal or otherwise protect the purportedly privileged information in these documents. *See* Stern Aff., Exs. 20 and 21 (citing correspondence between the NRA and North counsel).

In all, there were only four documents from North's entire production, which had not

[9] *See* Stephen Gutowski (@StephenGutowski), TWITTER (May 11, 2019, 3:49 PM), https://twitter.com/StephenGutowski/status/1127299783813677056; Stephen Gutowski (@StephenGutowski), TWITTER (May 11, 2019, 3:11 PM), https://twitter.com/StephenGutowski/status/1127290173996269573.

been previously publicly disclosed and which the NRA contends required additional redactions.

The NRA's Eleventh Hour Objection to the North Examination Process

By letter dated Saturday, August 10, 2019, the NRA asked to be present at the questioning of North in order to protect purported attorney-client and attorney work product privileges owned by the NRA, its counsel and its Board counsel. On Monday, August 12, 2019, the OAG asked the NRA for authority for its extraordinary request and received none. The OAG informed NRA's counsel on August 13 having failed to provide any authoritative basis for its position, the OAG would not permit the NRA to attend the North examination absent a court order. Although the NRA wrote a letter to the OAG to address this issue on August 15th, which again included no authority, at no point had the OAG's position changed; the OAG would not permit the NRA to be present during North's questioning.

On Friday, August 16, 2019, more than two weeks after it had become aware of the OAG's subpoena and only two business days before the return date therefore, the NRA filed is application by order to show cause. The parties appeared before the Court. The Court denied the NRA's application for a TRO and asked for the submission of any opposition papers to the remaining portions of the application on Sunday, August 18th, with any reply filed by Monday morning August 19th and the parties to appear thereafter.

STANDARD OF REVIEW

To the extent that the NRA still seeks preliminary injunctive relief, it must demonstrate: (i) a likelihood of success on the merits; (ii) that irreparable injury will result absent the preliminary injunction; and (iii) that the balance of equities tips in its favor. *See Non-Emergency Transporters of N.Y. v. Hammons*, 249 A.D.2d 124, 127 (1st Dep't 1998). The NRA must make a "clear showing" of each of these elements, and must submit proof establishing each element

with "evidentiary detail," not "speculation and conjecture." *Faberge Int'l, Inc. v. Di Pino*, 109 A.D.2d 235, 240 (1st Dep't 1985). Moreover, although the NRA contends it is seeking merely to preserve the *status quo*, what it actually seeks is a *mandatory* injunction that disturbs the *status quo* by staying the subpoena and barring the questioning of North pending an order permitting it to intrude into an investigatory examination. "A mandatory injunction should not be granted, absent extraordinary circumstances, where the status quo would be disturbed and the plaintiff would receive the ultimate relief sought, pendente lite." *St. Paul Fire and Marine Ins. Co. v. York Claims Service, Inc.*, 308 A.D.2d 347, 349 (1st Dep't 2003) (citations omitted); *see also Rosa Hair Stylists, Inc. v. Jaber Food Corp.*, 218 A.D.2d 793, 794 (2d Dep't 1995) (party bears "heavy burden of proving a clear right to mandatory injunctive relief").

ARGUMENT

I. THE NRA IS NOT LIKELY TO SUCCEED ON THE MERITS BECAUSE IT IS NOT ENTITLED TO INTRUDE UPON INVESTIGATORY INTERVIEWS AND QUESTIONING MERELY BY ASSERTING PRIVILEGE.

The NRA's application arises not in the context of civil litigation but out of its efforts to insert itself into a non-public, confidential investigation, authorized under New York law, of its own conduct. Conspicuously missing from the NRA's papers and arguments is *any* authority for the proposition that it, its counsel, or counsel for its Board, can monitor the OAG questioning of witnesses as part of an investigation of the NRA. As set forth below, it has no right to do so and its application should be denied.

A. The OAG Has Broad Supervisory and Investigatory Authority over Charitable Organizations and the NRA Has Failed to Identify a Limitation Based Upon an Assertion of the Potential for the Revelation of Privileged Material.

The Attorney General has expansive oversight authority under the Not-for-Profit Corporations Law, the Estates, Powers and Trusts Law and the Executive Law. For example,

under the Not-for-Profit Corporations Law, the Attorney General is explicitly granted responsibility for the supervision of not-for-profit corporations and she has broad investigatory powers in furtherance of that authority. See *Schneiderman v Tierney*, 2015 WL 2378983, at *2–3 (N.Y. Sup. Ct. May 18, 2015); *Matter of Cuomo v Dreamland Amusements Inc*., 22 Misc. 3d 1107 (A) (Sup Ct., NY County 2009).

In short, "there is no doubt that the Attorney General has a right to conduct investigations to determine if charitable solicitations are free from fraud and whether charitable assets are being used properly for the benefit of intended beneficiaries" pursuant to the various articles of the Not-for-Profit Corporation Law and the Estates, Powers and Trusts Law. *Tierney*, 2015 WL 2378983, at *2–3; *see also Abrams v Temple of the Lost Sheep, Inc.*, 148 Misc. 2d 825, 828-829 (Sup Ct, NY County 1990).

A subpoena issued by the Attorney General in this context is presumptively valid and to challenge the subpoena, the NRA "has the burden of proof to establish" its invalidity. *See Tierney*, 2015 WL 2378983, at *3.

The NRA fails to recognize that where, as here, the OAG is conducting an investigatory examination in the exercise of her broad authority to supervise not-for-profit corporations, the process differs substantially from an adjudicatory testimonial examination, such as a post-complaint deposition. *Matter of Abrams v. Alliance For Progress, Inc.*, 136 Misc.2d 1022, 51 NY.S.2d 533 (Sup. Ct., N.Y. Co. 1987). For example, witnesses are not entitled to a transcript of their examination. *Id.; cf. Matter of Kanterman v. Attorney General of State of N.Y.*, 76 Misc.2d 743, 350 N.Y.S.2d 516 (Sup. Ct., N.Y. Co. 1973) (citing *Sanborn v. Goldstein*, 118 N. Y. S. 2d 63 (Sup. Ct., N.Y. Co. 1952)). Indeed, where the OAG proceeding "is investigative rather than adjudicative in nature, . . . there is no constitutional right to the assistance of counsel in

administrative proceedings which are purely investigatory rather than adjudicative in nature." *Kanterman*, 76 Misc.2d at 746. (It is the OAG's practice to allow a witness to appear with counsel as a courtesy.) The NRA has not cited any authority to support the proposition that the subject of an investigation has greater rights than a witness during that witness's investigatory examination. Accordingly, the NRA does not have the right to attend nor have its counsel attend the investigatory examination.

Against this backdrop, the NRA has failed to cite a single shred of authority in support of its extraordinary request that as the subject of an OAG investigation, its counsel, the Brewer law firm (or the separate counsel it has retained for the Board), must be permitted to attend and object at the questioning of Oliver North.

B. The NRA's Assertion of the Risk of Privileged Material Being Revealed is Speculative and Unavailing.

At argument and in its papers, the NRA asserted that it must be present at North's examination because North's attorney purportedly did not conduct a proper privilege review and would have allowed disclosure of information that the NRA deems privileged and confidential.[10] Specifically, the NRA asserted that out of 899 pages of documents, there was one that it believed should have been withheld as entirely privileged and "37 additional redactions." *See* NRA's Moving Memorandum of Law (NYSCEF Doc. # 3) ("NRA Mem."), p. 6. But this is, strictly speaking, not accurate. As discussed above, North's counsel clarified to the NRA counsel, "[y]our papers state that you identified a document in our proposed production that 'should be withheld in its entirety.' With regard to that document, please make the Court aware that we

[10] The OAG does not believe that the NRA has any right to do a privilege review of the documents North and his counsel have supplied in response to the investigatory subpoena but agreed to their review in order to avoid motion practice. This agreement was without any admission that such a right exists or agreement that a similar arrangement would apply in the future.

proposed redacting nearly all of that document (except a few factual recitations). Your papers give the impression that we were simply going to produce that document unredacted, which could be misleading." *See* Stern Aff., ¶ 18. Notably, the NRA did not offer to produce the document in question to the Court for *in camera* review in order to support its assertion of reckless production of privileged materials. Nothing has prevented it from producing both the redacted and unredacted document for *in camera* review and it should perhaps do so in its reply.

In regard to the additional "37 redactions," this is hardly an overwhelming number in over 899 pages. Even assuming for the sake of argument that the redactions were actually required to protect privileged material, upon further review it is clear that the bulk of them are caused by repeated production of the same document, thus even 37 is an inflated figure. Accordingly, the NRA's assertion that North's counsel will be unable to identify privileged materials is not supported by the factual record.

Further, two of most important documents in the production – North's April 18, 2019 letter and his April 25, 2019 memorandum – which NRA insisted required further redaction to protect adequately the NRA's interests, have been publicly available for months in unredacted form. Even if North had disclosed those documents without the precise privilege redactions that the NRA claims are necessary, there is no prejudice to the NRA. The unredacted documents are readily available on the internet and from the electronic filings in the NRA's pending lawsuit against North, *National Rifle Association v. Oliver North*, Index No. 653577/2019. *See* Stern Aff., Exs. 19-21. The NRA has not moved to seal or redact the unredacted copies of those documents since they were filed in early July 2019. *Id.;* Exs. 10(b) and (c).

Moreover, the instant application concerns only oral testimony. As the Court appropriately noted, this is different than the production of documents: the witness can be

instructed to avoid discussion of privileged matters and be cut off if he veers into privileged areas. Although not required, OAG has agreed that it will not seek to elicit privileged information. Of course, Assistant Attorneys General are bound by their ethical duties as attorneys with regard to privileged matters. Further, OAG has represented to the NRA that in this instance it will give North warnings, as we do in most cases, including that he not reveal privileged information.

In regard to the NRA's expressed fears that North is in an adversarial posture to the organization because of a lawsuit, NRA Mem., p. 9, this, too, is unavailing. The NRA and North are engaged in litigation in this Court, *National Rifle Association v. Oliver North*, Index No. 653577/2019. That lawsuit involves North's entitlement to indemnification for attorneys' fees in regard to certain matters and pertains to whether or not he has violated his fiduciary duties. North is a current member of the Board as such must act within his fiduciary duty to the organization. Far from supporting the NRA's argument, the lawsuit against North emphasizes that North has every incentive to act in accordance with his fiduciary duty to the organization in order to obtain indemnification for his attorneys fees. Further, in regard to the subpoena at issue here, North has already demonstrated no intent to reveal privileged information because he (1) notified the NRA of the subpoena and (2) produced only redacted information to the OAG.

Finally, there is no reason to believe that the witness, North, lacks the sophistication or ability to follow directions not to disclose privileged information. Further, he is represented by Brendan Sullivan, Esq., a partner at Williams & Connolly, a highly sophisticated attorney with over 45 years of experience representing clients in complicated and highly sensitive matters. Mr. Sullivan is capable of advising his client on the privilege issues. North will thus have his own counsel from a nationally recognized firm present at his questioning, assisting him in regard to

privileged information.

In conclusion, speaking to corporate officers, directors and employees is routine in OAG enforcement investigations. The NRA's speculative and paper thin arguments about the potential for revelation of privileged information cannot justify the relief it seeks.

C. New York Law Explicitly Permits Corporate Employees and Officers to Speak to Government Investigators.

A corporate officer is free to speak to government officials investigating suspected fraud or illegal conduct without revealing privileged information and without corporate counsel present. *Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, LLP*, 994 F. Supp. 202, 204 (S.D.N.Y. 1998).[11]

Further, New York's ethical rules explicitly contemplate and permit situations where a corporate officer or employee may speak to the Government without the corporation's attorney present. For example, even where a corporation has counsel, communications between a corporate employee or officer and a government entity are excluded from the general prohibition that an attorney may not speak to a "represented party" outside the presence of his or her attorney. *See* NY Code of Professional Responsibility, Rule 4.2. As the comments make clear, "Communications authorized by law," *i.e.*, permissible under the rule, may "include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement (as defined by law) of criminal or civil enforcement proceedings." *See* Rule 4.2, Comment 5. Comment 7 to Rule 4.2 explicitly provides that even in "the case of a

[11] A corporate director may cooperate, and may even act as a whistleblower, and speak to government investigators. In *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348–49. (1985), the court held that as a matter of law, an officer of a corporation "could have revealed privileged [corporate] information to the SEC. Nothing in the attorney-client privilege should prevent [him] from 'blowing the whistle' to the SEC, including revealing privileged information, although such conduct could have subjected [him] to liability to Towers for breach of fiduciary duty." The corporation's remedy in such instance, if the revelation is wrongful, appears to be taking action based upon the officer's purported breach of fiduciary duty.

represented organization, "[i]f an individual constituent of the organization is represented in the matter by the person's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule…". The mere assertion that a corporate officer or member, like North, may have access to privileged information thus does not prohibit him from speaking with the OAG as part of an investigation.

In any event, even were North to reveal privileged information to the OAG, which he has a legal right to do, were such revelation wrongful, the NRA's remedy is to challenge his actions as violating his fiduciary duties. It is not to be present at witness interviews when it is the subject of the investigation at issue. As a director of the NRA, North has a fiduciary duty to act in the NRA's best interests and not to reveal privileged information for his own, as opposed to the corporation's, benefit. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348–49. (1985); *Wechsler v. Squadron, Ellenoff, Plesent & Sheinfeld, LLP*, 994 F. Supp. 202, 213 (S.D.N.Y. 1998).

D. To the Extent that this is An Article 78 Proceeding, it Fails Because the OAG's Determination is Rational and Not Arbitrary or Capricious.

To the extent that this proceeding is properly brought as an Article 78 (NRA Mem., p. 3), it is subject to dismissal as well. A court's function in an Article 78 proceeding is limited to determining whether a rational basis exists for the action of an administrative body or officer. *Colton v. Berman*, 21 N.Y.2d 322, 334 (1967). "Rationality is what is reviewed under . . . the arbitrary and capricious standard." *Pell v. Bd. of Educ*., 34 N.Y.2d 222, 231 (1974); *see* CPLR § 7803(3). It is well settled that courts should not substitute their opinions for the agency's opinion, but should simply determine whether there is a rational basis for the agency's challenged determination. *See, e.g., Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009); *Pell*, 34 N.Y.2d at 231–33; *Purdy v. Kriesberg*, 47 N.Y.2d 354, 358 (1970); *Colton*, 21 N.Y.2d at 334;

Pazana v. N.Y.C. Dep't of Hous. Pres. & Dev., 101 A.D.3d 517, 518 (1st Dep't 2012) (finding that agency's determination had rational basis). "If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency." *Peckham*, 12 N.Y.3d at 431.

Here, the OAG's determination that the subject of an investigation should not be present, even through counsel, during the questioning of a witness is manifestly rational. To decide otherwise would be to allow the subject of an investigation to monitor and participate in that investigation in a way that is highly likely to hamper and limit the government's effectiveness in investigating potential violations of the applicable laws.

E. The NRA Fails to Point to a Single Authority that Would Support the Extraordinary Relief That It Seeks.

Lacking any support of the actual relief that it seeks, the NRA's application instead asserts authority for uncontested and irrelevant points. For example, it cites *Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) for the uncontroversial proposition that attorney-client privilege is an important legal principle. *See* NRA's Moving Memorandum of Law (NYSCEF Doc. # 3) ("NRA Mem."), p. 8. *Upjohn* also stands for the proposition that a corporation's attorney-client privilege may extend to certain communications to and from a corporate employee or officer.[12] The NRA also asserts the uncontroversial propositions that a person other than one to whom a subpoena is directed may have standing to move to quash a subpoena, where

[12] But as *Upjohn* also held, the privilege is case-dependent and, more importantly, extends only to the attorney client communications and not to the underlying facts. *Upjohn Co*., 449 U.S. at 395 ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."). The *Upjohn* court further held that the Government "was free to question the employees who communicated with [in house counsel] and outside counsel. Upjohn has provided the IRS with a list of such employees, and the IRS has already interviewed some 25 of them." *Id.*

the information sought is proprietary or privileged, *citing Hyatt v. State Franchise Tax Bd.*, 105 A.D.3d 186, 194–95 (2nd Dep't 2013) and *State Comm'n on Governmental Operations of City of N.Y. v. Manhattan Water Works, Inc.*, 10 A.D.2d 306, 308 (1st Dep't 1960). But that is not in question. Neither case establishes the NRA's right to sit in on and monitor investigatory interviews and examinations.

In fact, in *Hyatt*, the subpoena was not quashed but was modified to, *inter alia*, exclude privileged materials ("communications of a legal nature"), something the OAG has already agreed to do here, and the Court denied the petitioner's motion pursuant to CPLR 3103. 105 A.D.3d at 206. In *Manhattan Water Works*, the motion to quash was denied because the Court held that to "prohibit the production and examination of the relevant records of the respondent at this stage of the investigation would abort the efforts of the commission. It cannot perform its assigned function unless it is permitted to ascertain whether waste and inefficiency in the awarding and performance of public contracts actually exist."[13] 10 A.D.2d at 308.

What is absolutely missing from the NRA's motion is a single case or authority that would support its request to be present at the investigatory questioning of North. Given the above, on this ground alone, its application should be denied and this special proceeding dismissed.

II. THE NRA WILL NOT SUFFER IRREPARABLE INJURY BY BEING EXCLUDED FROM NORTH'S QUESTIONING.

To succeed on a preliminary injunction application, the movant must demonstrate that it will suffer "imminent" and "irreparable" harm if the injunction does not issue. *Rubinstein v. Bullard*, 285 A.D.2d 366, 367 (1st Dep't 2001). The NRA fails to meet this heavy burden

[13] The NRA's reliance upon *Holmes v. Winter*, 22 N.Y.3d 300 (2013) (NRA Mem., p. 8) is mystifying since that case was explicitly narrow, addressed conflicts of laws issues and the application of New York's shield law which is applicable in regard to confidential sources and journalists. The case is inapposite.

because the "harm" the NRA claims to be suffering is conclusory and speculative and not a cognizable legal injury.

The NRA has not submitted any evidence to establish that North will reveal privileged information despite the safeguards that are in place or that its presence at the questioning is the only remedy. It has simply failed to carry this burden.

III. THE BALANCE OF THE EQUITIES TIPS DECIDEDLY AGAINST THE NRA.

The balance of the equities tips against issuance of an order permitting the NRA, through the Brewer firm, or its Board, to participate in and be present at North's questioning as it is highly likely that such presence will hamper the OAG in carrying out is duties to ensure that the NRA is complying with the law as a not-for-profit corporation and not misusing charitable donations. *See Rodriguez v. DeBuono*, 175 F.3d 227, 233 (2d Dep't 1999) ("Whenever a request for a preliminary injunction implicates public interests, a court should give some consideration to the balance of such interests . . .") (internal quotations and citation omitted); *DePina v. Educ. Testing Serv.*, 31 A.D.2d 744, 745 (2d Dep't 1969) (recognizing that "[i]n ruling on a motion for a preliminary injunction, the courts must weigh the interests of the general public" and holding preliminary injunction improper in part because of public interest considerations) (internal quotations and citation omitted).

To the contrary, the public interest is *disserved* by allowing the NRA to compromise the OAG's investigation in light of the very serious and substantial allegations that NRA officials have engaged in self-dealing and the organization has misused charitable donations. As a not-for-profit corporation in New York, the NRA must use its funds within the bounds of the law to carry out the stated aims of its mission. The public is entitled to know that organizations that receive the benefit of tax exempt status and to which they donate their funds are using those

funds appropriately. The public interest weighs decidedly against the NRA's efforts to insert itself and interfere with the investigation against it and particularly to be present at the questioning of Oliver North.

CONCLUSION

For all the foregoing reasons, OAG respectfully requests that the Court deny the NRA's petition in its entirety and dismiss this proceeding, together with such other and further relief as it deems just, proper and appropriate.

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LETITIA JAMES
Attorney General of the State of New York

By: /s
Emily Stern
Monica Connell
William Wang
Assistant Attorneys General
28 Liberty Street
New York, New York 10005
(212) 416-6241
emily.stern@ag.ny.gov