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

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| **NATIONAL RIFLE ASSOCIATION OF AMERICA,** | § | |
| | § | |
| | § | |
| **Petitioner,** | § | |
| | § | **Index No. 158019/2019** |
| **v.** | § | |
| | § | **Mot. Seq. 001** |
| **LETITIA JAMES, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,** | § | |
| | § | |
| | § | |
| **Respondent.** | § | |

**MEMORANDUM OF LAW IN REPLY TO LETITIA JAMES'S OPPOSITION TO THE NRA'S APPLICATION FOR RELIEF UNDER CPLR 2304 AND 3103**

William A. Brewer III
wab@brewerattorneys.com
Svetlana M. Eisenberg
sme@brewerattorneys.com
BREWER, ATTORNEYS & COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

*ATTORNEYS FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA*

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## I.

## PRELIMINARY STATEMENT

In the wake of violent tragedies, amid a polarized political landscape, a candidate for the New York State Office of the Attorney General made a stunning campaign promise. If elected, Letitia James said, she would "take down the NRA"—not by refuting its policy positions, but by wielding the powers of the NYAG to dismantle the NRA as a not-for-profit corporation. James was explicit about her motivation: she saw "no distinction"[1] between the NRA's public works and its ability to engage in pro-gun political speech (characterized by James as "deadly propaganda"). To silence the NRA, and neutralize it as an opposing political force, James promised that she would use her "power as an attorney general to regulate charities" to instigate a fishing expedition into the NRA's "legitimacy . . . to see whether or not they have in fact complied with the not-for-profit law in the State of New York."[2] Of course, any doubt regarding the outcome of that expedition was gone when James maligned the NRA as a "terrorist organization" and a "criminal enterprise," and vowed that financial institutions and donors linked to the NRA would be pursued by law enforcement[3] —just like supporters of Al Qaeda or the mafia.

Importantly, James made these promises without a single shred of evidence that the NRA violates any law.

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[1] *See Annual NRA Fundraiser Sparks Protests*, LI HERALD (Oct. 25, 2018), http://liherald.com/stories/nassau-protests-nra-fundraiser,107617.

[2] *See* Jorgensen, Jillian, *Letitia James Says She'd Investigate NRA's Not-For-Profit Status If Elected Attorney General*, DAILY NEWS (July 12, 2018), https://www.nydailynews.com/news/politics/ny-pol-tish-james-nra-20180712-story.html.

[3] *See Attorney General Candidate, Public Advocate Letitia James*, OUR TIME PRESS (Sept. 6, 2018), http://www.ourtimepress.com/attorney-general-candidate-public-advocate-letitia-james/ (emphasis added).

Regrettably, but predictably, James is attempting to deliver on her campaign promise. Contrary to inflammatory media accounts (some of which, the NRA believes, were instigated by persons currently before this Court), the NRA's charitable-compliance house is in order, and it does not fear a reasonable regulatory inquiry. However, the NRA does seek standard protections routinely afforded to entities subject to a regulatory inquiry. Fundamental among these: the right to object to, and limit, encroachments upon the NRA's privileges. The Office of the Attorney General ("OAG") concedes that the NRA has standing to assert its objections and to modify the subpoena on this ground (Opp. Memo. p. 19)—but inexplicably refuses to grant the reasonable modification the NRA sought. The NRA was therefore forced to seek expedited relief.

James's Opposition not only recapitulates the OAG's insistence upon taking on-the-record testimony from one of the NRA's directors without any opportunity for the NRA to object to the disclosure of privileged information— it explicitly suggests that the OAG is entitled **"to seek to elicit privileged information"** from North. (Opp. Memo. at 16.). Unsupported by any authority (and contrary to the fundamental protections inherent in our system of jurisprudence), this unprecedented assertion of state power should, standing alone, convince this Court to intervene. Of course, none of the OAG's statements or actions stand alone. Instead, all must be interpreted in view of surrounding facts, circumstances and authorities which, taken together, more than justify the relief the NRA seeks.

The NRA concededly has standing to assert its privileges, and is the party best situated to do so. James does not, and cannot, cite any law that contravenes those principles or empowers her office to exclude the NRA from the proposed examination. Instead, the Opposition offers a raft of accusations and innuendo about the NRA's tax disclosures (Opp. Memo. Pages 4-6) and cites

recent, sensational media coverage of the NRA (Opp. Memo. At 6).[4] However, this Petition does not seek to litigate the merits of the OAG's accusations against the NRA, nor to prevent the OAG from a reasonable regulatory inquiry. Instead, the NRA simply requests that the investigation be subject to common-sense procedural safeguards, including a basic allowance for the NRA to lodge privilege-based objections to the disclosure of its confidential information.

Although any corporation should be entitled to attend and lodge objections at an examination of its director, the NRA's interest is especially acute here: North faces credible accusations of serious fiduciary breaches, including extortion and unauthorized "leaks" of confidential information. (*See* King Aff. ¶¶ 4-8). For this reason, an official complaint currently pending before the Ethics Committee of the NRA Board of Directors seeks North's removal from the Board and his expulsion from the NRA. (*Id.* ¶ 8). Under such circumstances, it is disingenuous to suggest, as the Opposition does, that the NRA should rely on North and his counsel to assert privileges owned by the NRA and its Board.

Against this backdrop, the NRA seeks only modest relief: it asks only that the Court allow it to assert, on-record, objections preserving its most important privileges. The Court can, and should, grant the NRA's request.

[4] Similarly, to assure the Court that she has a reasonable basis for investigating the NRA, James cites a recent consent decree among the NRA's affinity-insurance broker, Lockton, and the New York State Department of Financial Services ("DFS")(Opp. Memo. Fn. 5.) The consent order inapposite for the reason stated above—*i.e.*, because this Petition concerns the due process the NRA should be afforded at an on-the-record examination of its director, and is not the appropriate venue to litigate the underlying merits of the OAG's investigation. Moreover, DFS's actions with respect to Lockton are presently the subject of a First Amendment implicit-censorship and retaliation challenge which has already withstood a motion to dismiss. *See* Case No. 18-CV-00566 (N.D.N.Y. 2018).

## II.

## PROCEDURAL HISTORY

On August 16, 2019, after failed attempts over the span of five days to reach an agreement with the NYAG in response to the Subpoena, the NRA moved for an order to show cause why the Court should not modify pursuant to CPLR 2304 and CPLR 3103 the Subpoena to permit the NRA the opportunity to enforce its legal rights. Under CPLR 3103(b), disclosure in response to the Subpoena was suspended as a matter of law, which James does not contest. The NRA specifically requests that the Court address its argument that disclosure is suspended based on the NRA's application. Clearly, the law on which James relies in pursuit of her investigation clearly state that subpoenas she issues have to be "in accordance with the [CPLR]."[5]

After the Court invited further briefing, James filed the Opposition to the Petition, which is riddled with red herrings, hearsay-based allegations, and premature conclusions concerning the merits of NYAG's investigation. What the Opposition fails to do, however, is cite any competent evidence that the Court can take into consideration in ruling on this Petition or offer a single reason why the Subpoena should not be modified as the NRA seeks.

## III.

## STATEMENT OF FACTS

In 2018, Letitia James campaigned on promises to destroy the NRA. Throughout her election campaign, James said that if she were elected Attorney General of the state of New York, she would use her power to investigate the NRA. *See, e.g.*, Jillian Jorgensen, "Letitia James says she'd investigate NRA's not-for-profit status if elected attorney general," NY Daily News (July

[5] Executive Law Section 63.12 ("In connection with any such application, the attorney general is authorized to take proof and make a determination of the relevant facts and to *issue subpoenas in accordance with the civil practice law and rules*."); NPCL Section 112(a)(1) and (b)(6) (authorizing the AG to, among other things, "issue subpoenas in accordance with the civil practice law and rules").

12, 2018) (Eisenberg Aff. Ex. 2).[6] In October 2018, without any evidence, James called the NRA a "terrorist organization." *Id*. Ex. 1. James is now making good on her promises.

James is now refusing to permit the NRA an opportunity to protect its basic rights. Of course, the NRA does not object to the investigation nor the subpoenaing of North and does not in any way intend to impede the investigation – as long as it is carried out under rule of law and without violating the NRA's rights.

Based on North's position at the NRA, the extent of his exposure to privileged and confidential information (as exemplified by the voluminous redactions required on his document production), and the nature of the topics about which the NYAG evidently seeks testimony, the NRA reasonably fears that the NYAG's pending examination of North may elicit privileged information. For the most part, relevant privileges are not owned by North, but rather in the NRA or its Board of Directors.

Unfortunately, North is adverse to the NRA—his record of violating his fiduciary duties, which are discussed in the NRA's pending lawsuit against him in this Court does little to give the NRA confidence that "North has every incentive to act in accordance with his fiduciary duty" as James would like the Court to believe. Opp. MOL at 16.

As recounted in NRA's pending lawsuit against North (Index No.653577/2019, Complaint, dkt no. 2), beginning in mid-2018, the NRA sought to investigate the growing concerns of its leadership about financial impropriety by its former advertising agency, Ackerman McQueen, Inc. ("Ackerman"). It is now known that, at all relevant times, North was lucratively employed by Ackerman, with contractual loyalties to Ackerman that superseded his loyalties to the NRA. (*Id.* ¶

[6] All citations to exhibits are to exhibits attached to the affirmation dated August 20, 2019 of Svetlana M. Eisenberg.

). After ascending to the NRA presidency in September 2018, North increasingly leveraged the powers of his office to derail inquiries into Ackerman's alleged wrongdoing, and to scapegoat any NRA staff or professionals who pressed for greater transparency. (*Id.* ¶ ). North and Ackerman focused on dislodging any individual or group which participated in the NRA's inquiry, including NRA senior executives. (*Id.* ¶ ). When the NRA's Executive Vice President and Chief Executive Officer, Wayne LaPierre, stood against North and specifically instructed that he cease interfering in the investigation into his employer's potential abuse of the Association, North forcefully turned against him—pursuing actions which culminated in a failed executive coup at the NRA's Annual Meeting of Members in April 2019. *See* Eisenberg Aff. Ex. 3. What James describes as "whistleblowing" by North was in fact a calculated attempt to deflect scrutiny away from himself and his employer.[7] In response, Mr. LaPierre wrote a letter to the NRA Board detailing the extortion attempt and Mr. LaPierre's refusal to comply. *See* Eisenberg Aff. Ex. 3.

Given the foregoing facts, the NRA seeks an order that recognizes its rights to assert objections based on privilege to protect such information from disclosure.

## IV.

## LEGAL STANDARD

As an initial matter, the NRA notes that the OAG employs an incorrect legal standard when citing to cases discussing injunctive relief. Although the OAG would obviously prefer that the NRA be held to a heightened burden of proof, that is not the law that governs the NRA's Petition and relief sought under CPLR 2304 and 3103(b). Rather, an application to modify or fix

[7] This same conduct is the basis of an official complaint, filed by another NRA director, currently pending before the NRA's Ethics Committee. It seeks North's removal on account of his fiduciary duty breaches.

conditions of a subpoena under CPLR 2304 cannot be the subject of injunctive relief. *See Anonymous v. Axelrod*, 459 N.Y.S.2d 778, 779 (1st Dep't 1983) (injunctive relief not available to quash a subpoena and procedure under CPLR 2304 is the proper route). The NRA did not seek a temporary restraining order, nor did it seek injunctive relief, and any arguments by the OAG relating to injunctive relief must be disregarded. The NRA clearly sought "expedited relief" (and not emergency or injunctive relief) because of the examination date of Tuesday, August 20, 2019. Moreover, this Court plainly understood that the application for relief under CPLR 3103(b) automatically stays the examination from going forward pending a determination by the court on the merits of the dispute. *See Vandashield Ltd. v. Isaacson*, 46 N.Y.S.3d 18, 24 (1st Dep't 2017) ("Service of [an application] for a protective order shall suspend disclosure of the particular matter in dispute") (quoting CPLR 3103(b)) (emphasis in original). That is why this Court recognized the need to issue a decision on Monday, August 19, 2019, and why this Court observed that the NRA would likely immediately appeal a ruling denying the relief sought.

In any event, the proper standard to be applied to the NRA's Petition and application is that such matters are within the province of this Court's discretion, consistent with its powers to supervise disclosure. *See Lipin v. Bender*, 620 N.Y.S.2d 744, 747 (N.Y. 1994). This Court is expressly empowered under CPLR 2304 to impose "[r]easonable conditions" on a motion to modify a subpoena. The NRA recognizes that it has the burden to establish the need for a protective order, as well as to establish the applicability of the privileges that it seeks to protect on its Petition with respect to the Subpoena. *See In re Will of Soluri*, 975 N.Y.S.2d 712 (Surr. Ct. Nassau Cty. 2013) (*citing Koump v. Smith*, 25 N.Y.2d 287, 294 (1969)); *Mavrikis v. Brooklyn Union Gas Co.*, 601 N.Y.S.2d 612, 613 (1st Dep't 1993) (*citing Koump v. Smith*, 25 N.Y.2d 287, 294 (1969)). The NRA also notes that OAG's citation to *Schneiderman v. Tierney*, 2015 WL

2378983 (Sup. Ct. N.Y. Cty. 2015) is inapposite because that case dealt with a motion to quash a subpoena. The NRA is not moving to quash the Subpoena and does not argue that the Subpoena was not validly issued. Any reliance by the OAG on *Schneiderman* is misplaced and it has no bearing on the issues before this Court.

**V.**

**ARGUMENT**

**A. The relief the NRA seeks is contemplated by CPLR 2304 and 3103**

Under CPLR 2304, "Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify." Under CPLR 3103, "(a) Prevention of abuse," "[t]he court may at any time on its own initiative, or on motion of any party or of any person from whom or about whom discovery is sought, make a protective order denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable . . . disadvantage, or other prejudice to any person or the courts."

Although she argues that investigative examinations are different from post-complaint depositions, she does not argue that the CPLR does not apply to the Subpoena.

**B. The cases James cites are inapposite.**

The only two cases about privileges that James cites are both inapposite. The issue in CFTC v. Weintraub, 471 U.S. 343 (1985), was whether, once a corporation files for relief under the Bankruptcy Code, the decisionmaking authority with respect to the corporation's privileges passes from the pre-bankruptcy entity's management to the Chapter 7 trustee. Weintraub, 471 U.S. at 351-58. The Supreme Court held that it was the Chapter 7 trustee who assumed such authority upon his or her appointment. The Court's holding has no bearing on the right outcome here. Inexplicably, the OAG goes on to cite the case for the proposition that North can reveal the NRA's privileged information as long as he is doing so for the NRA's benefit. OAG Memo. at

18 (citing Weintraub at 348-49). Weintraub, however, does not support the conclusion for which James cites it.

Next, James cites a 1998 report and recommendation by Magistrate Peck *adopted by the* District Court in *Wechsler v. Squadron, Ellenhof, Plesent & Sheinfeld, LLP*, 994 F. Supp. 202 (S.D.N.Y. 1998) for the proposition that North has the right to disclose privileged information to James as long as he thinks that he is acting in the NRA's best interests. (Opp. Memo. Page 17 Fn. 11).

The breadth of this proposition is astonishing, particularly because it is not supported by the case James cites. The only two things that *Wechsler* and this case have in common is that it talks about directors and privileges. Any commonality stops there. In *Wechsler*, the court, in applying the *Wagoner* rule, had to decide whether a trustee appointed in bankruptcy had standing to sue a law firm that was complicit in the fraud perpetrated on the debtor's shareholders. This in turn depended on whether any insiders of the debtor were unaware of the fraud and, if so, whether any actions they might have taken would have been effective in ending it. In pleading the second prong, the trustee alleged that the directors could have reported the illegal activity to the SEC. In response, the defendant argued that the attorney-client privilege would have prevented the directors from going to the SEC. The Court held that while they would potentially be liable for fiduciary duty breaches if they had done so against the interests of the corporation, directors "may" reveal privileged information to the SEC to report fraud. James relies on this unremarkable holding to oppose the NRA's right to object on privilege grounds in North's examination. There is no basis, however, for such an inferential leap.

The issues in *Wechsler* could not be more different from those here. Here, North already has said that he wants to keep privileged information privileged. Up until her opposition, at least,

James was saying the same thing. So the only issue was what was the most reasonable way to do so.

In Wechsler, the premise was whether a director would have gone to the SEC had he learned of the misconduct even though the disclosure would have required him to reveal privileged information.

**C. James's opposition relies on unsupported facts**

Unable to offer a single authority for opposing the NRA's efforts to protect its rights, James spends pages in her opposition smearing the NRA with her conclusions about its allegedly inaccurate disclosures and citing press reports of North's alleged concerns. Of course, the Court is not permitted to rely on any of these wildly misinformed and unsubstantiated allegations in ruling on the NRA's petition. Representations of counsel are insufficient to establish the truth of the matters asserted. And, in any event, the recitation of North's contrived allegation is irrelevant.

**D. James's categorical refusal to allow <u>any</u> counsel at the examination betrays the intransigence of her position here**

Although James spends pages discussing why NRA counsel should not be allowed to attend the examination, she makes not a single excuse for why the same outcome should apply to independent counsel retained to represent the NRA Board of Directors. Nonetheless, invariably, James also insists upon excluding Board counsel from the examination. This insistence underscores the unreasonableness of James's position, and reveals that particularized criticisms of the NRA's chosen counsel are mere fig leaves. As the NYAG has made plain, it does not want the NRA, or the NRA's Board of Directors, to be represented by any lawyer(s) whatsoever at the upcoming examination. .

**E. The Court's comments at the Friday hearing**

To address the Court's comments on Friday, the NRA respectfully submits that the analogy to clawback agreements and predictive coding is inapposite. After all, if a party failed to apply a redaction because of its own error or desire to be efficient, it has to live with the consequences. But while documents can be clawed back, investigating attorneys' memories cannot be erased. The pivotal difference between the situation to which the Court analogized is that, unlike the Court's scenario, here, James is forcing the NRA to live with someone else's mistake.

To address the Court's skepticism about the risk of privileged information being inadvertently divulged during an examination—as opposed to in a document production, the NRA reiterates the point made on the record on Friday that, if anything, the risk is the same if not greater. Objections at a deposition have to be made in the moment and often are split-second decisions. As any NITA seminar will teach, an objecting attorney has to always sit on the edge of his or her seat because once the witness has spoken, the testimony cannot be unspoken or unheard. In contrast, attorneys conducting document review often have the luxury of conducting their document review in a deliberate manner and to make privilege calls after gathering the necessary factual information and conducting legal research to inform those calls. Moreover, unlike testimony, documents can be returned, and receiving counsel have an ethical obligation to avert their eyes if they begin to review what appears to be a privileged document. See e.g., *Lipin v. Bender*, 84 N.Y.2d 562, 572 (1994) (dismissal of suit appropriate under CPLR 3103 because among other things party's access to privileged information resulted in "knowledge [that] of course can never be purged").

**F. James's other arguments have no bearing on the outcome here.**

***1. The Petition was timely.***

Contrary to the NYAG's characterization of the NRA's petition, the NRA's objection is timely. The NRA moved for relief within twenty days of being put on notice, on July 29, 2019, which is the time limit under CPLR 3122 to object to a deposition notice. On top of that, CPLR 2304 and 3103 place no specific time limit constraints on the objecting party's right to seek relief. Nothing precluded James from telling the NRA of her intent to interview North earlier. In fact, at first, clearly, the NYAG had chosen not to notify the NRA at all. It cannot be heard to complain about a purported delay that was in part caused by her own omission.

In addition, on Monday, August 12, 2019, during the first meet and confer between the parties, counsel for the NRA gave unequivocal notice to counsel for the NYAG that, if the parties could not reach an amicable resolution, the NRA would seek to vindicate its rights in court.

Moreover, the NYAG's characterization of the time lapse between last week's Monday and Friday as a tactic is disingenuous. Counsel met and conferred on Monday, and counsel for the NRA spent the next few days diligently reviewing North's proposed production to James, realizing that the NYAG needed ample time for document review in preparation for North's examination. In fact, the NYAG concedes that the NRA sent documents on a rolling basis, which the NRA did in a good faith effort to facilitate prompt disclosure while protecting its rights. Immediately after the documents review concluded, NRA counsel wrote a letter to the NYAG, citing legal authority—cases from the United States Supreme Court—in support of its position, which the NYAG chose to reject. The NRA then promptly moved for relief.

Simply put, the NYAG was on notice of the motion at least four days before it was filed and it had been told that the NRA would seek relief from the Court if the NYAG was unwilling to respect its rights. As a result, any claims of prejudice are mere distractions.

And when counsel for the NYAG was asked how the office would be prejudiced by a few-day postponement of the examination, the only reason the NYAG could cite was travel arrangements from New York to Washington D.C. The NYAG began its investigation in late April 2019. It can hardly complain that a delay of a few days would prejudice its investigation.

***2. Counsel for the NRA accurately summarized the extent of issues in North's proposed production***

James accuses counsel for the NRA of making a statement to the Court that is not "strictly speaking accurate" about the "37 additional redactions." The statement was and remains accurate. The fact that the 37 redactions spanned a universe of documents that contained several duplicates does not obviate or lessen the NRA's concern over North's inability to protect its privileges. If anything, the concern is heightened because North's counsel had more than one chance to get it right but did not.

If duplicates are counted once, the number of additional redactions was still significant 19, not to mention the wholly privileged document that needed to be withheld. *See* Eisenberg Affirmation para. 6.

And as it pertains to the document that had to be withheld altogether and that North's counsel would have otherwise produced partially unredacted, again, counsel for OAG are attempting to disingenuously suggest that the NRA somehow exaggerated the extent of improper disclosure that would have occurred but for its review. Attached as Ex. 4 to the affirmation of Svetlana M. Eisenberg is a fully redacted copy of the memorandum at issue. Depicted in yellow

is the text that North's counsel had failed to redact. As the Court can observe, despite the OAG's attempt to minimize the extent of North's counsel oversight is not insignificant.

Finally, the fact that some of the NRA's privileged information was leaked online is irrelevant to the NRA's claims of privilege. And, as counsel for the OAG well knows from North's production to the OAG, the NRA has expressly objected to North's attaching leaked documents in unredacted form as a violation of his fiduciary duties.

## VI.

## CONCLUSION AND REQUEST FOR RELIEF

WHEREFORE the NRA requests that the Court grant its expedited application for an Order to Show Cause why an Order should not be issued, pursuant to CPLR 2304 (motion to quash, fix conditions, or modify) and 3103 (protective orders):

(a) modifying the Subpoena from the NYAG, dated July 26, 2019 or issuing a protective order, to allow the NRA's attorneys and the NRA's Board counsel to be present for any examination by the NYAG of North, or any testimony by North, in response to the Subpoena, to enable the NRA's attorneys to object to the disclosure of information immune from disclosure under the attorney-client, work product, or any other applicable privilege or immunity; and

(b) suspending the NYAG's examination of North pursuant to CPLR 3103(b); and

(c) granting such other relief that the Court deems fair and appropriate.

By: */s/ Svetlana Eisenberg*
William A. Brewer III
wab@brewerattorneys.com
Svetlana M. Eisenberg

sme@brewerattorneys.com
BREWER, ATTORNEYS &
COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

*ATTORNEYS FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA*

**CERTIFICATION PURSUANT TO 22 N.Y.C.R.R. § 130-1.1a**

Svetlana Eisenberg, an attorney duly admitted to practice before the Courts of the State of New York, hereby certifies that, pursuant to 22 N.Y.C.R.R. § 130-1.1a, the foregoing Memorandum of Law is not frivolous nor frivolously presented.

Dated: August 19, 2019
New York, New York

/s/ *Svetlana Eisenberg*
Svetlana Eisenberg

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