

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

THE PEOPLE OF THE STATE OF NEW YORK, by
LETITIA JAMES, Attorney General of the State of New
York,

Petitioner,

- against -

ACKERMAN MCQUEEN and NATIONAL RIFLE
ASSOCIATION OF AMERICA,

Respondents.

Index No. _____

VERIFIED PETITION

Petitioner, the People of the State of New York, by Letitia James, Attorney General of the
State of New York, as and for her Petition, respectfully alleges:

PRELIMINARY STATEMENT

1. The Office of the Attorney General (“OAG”) is presently conducting an
investigation of Respondent National Rifle Association of America, Inc. (the “NRA”) pursuant
to the New York Not for Profit Corporation Law, the New York Estates, Powers and Trusts Law,
the New York Executive Law, and other applicable law governing New York State charities.

2. Commencement of the OAG’s investigation followed careful review of the
NRA’s public reports in required 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. 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. Carrying out its oversight
mandate, the OAG commenced an investigation into the NRA’s operation as a not-for-profit
entity.

3. On July 8, 2019, in connection with its investigation, OAG served a subpoena *duces tecum* on Ackerman McQueen (“AMQ”), the NRA’s long-time advertising agency, seeking documents relating to potential misconduct by the NRA, its directors and officers, and its affiliated entities. AMQ has expressed its desire to comply with OAG’s subpoena. But AMQ has also stated that it fears such compliance will subject it to legal jeopardy if it does not permit the NRA to review and exercise veto power over any intended production of documents to OAG, due to a non-disclosure agreement (“NDA”) included in a private contract between the NRA and AMQ. (Exhibit 1.)

4. The integrity of OAG’s investigation into potential misconduct by the NRA, its directors and officers, and its affiliated entities would be necessarily and irreparably compromised by allowing the investigative target to review, and potentially countermand, third parties’ prospective document productions in response to investigative subpoenas. This inescapable fact is just one reason why any private contractual arrangement that purports to require a third party to notify and gain the approval of a suspected wrongdoer before disclosing information to a law enforcement agency— such as the NRA contends is required by the NDA at issue here—is void as against public policy.

5. OAG has attempted in good faith, but unsuccessfully, to procure the NRA’s acknowledgement that its NDA with AMQ is unenforceable to the extent that it is interpreted to delay, condition, prevent, restrain, or punish AMQ (or any third-party) for complying with OAG’s investigative subpoena without allowing the NRA to preview and potentially veto the information to be provided by AMQ.

6. Therefore, the Attorney General now petitions this Court for an order: (i) compelling AMQ, pursuant to CPLR 2308, to produce documents responsive to OAG’s

subpoena without delaying those productions to accommodate any purported right of the NRA to review and/or veto said productions; and (ii) granting such other and further relief as the Court deems just proper and appropriate.

THE PARTIES

7. The Attorney General is responsible for overseeing the activities of New York not-for-profit corporations and the conduct of their officers and directors, in accordance with the New York Not for Profit Corporation Law, the New York Estates, Powers and Trusts Law, and the New York Executive Law.

8. Respondent AMQ is an Oklahoma for-profit corporation with its principal place of business in Oklahoma City, Oklahoma. AMQ served as the NRA's principal advertising and public relations agency for more than three decades prior to the termination of those parties' contractual relationship earlier this year. AMQ acted together with its wholly owned subsidiary, Mercury Group, Inc. ("Mercury"), an Oklahoma for-profit corporation.¹

9. Respondent NRA is a New York not-for-profit corporation with its principal place of business in Fairfax, Virginia. See <https://home.nra.org/about-the-nra/>.

JURISDICTION, APPLICABLE LAW, AND VENUE

10. The Attorney General brings this special proceeding on behalf of the People of the State of New York pursuant to the New York Not for Profit Corporation Law, the New York Estates, Powers and Trusts Law, the New York Executive Law, and CPLR Article 4.

¹ AMQ and Mercury are herein referred to collectively as "AMQ" both in this verified Petition and application and in the underlying subpoena.

11. Pursuant to N-PCL § 112 (b)(6), the Attorney General “may take proof and issue subpoenas in accordance with the civil practice law and rules” in connection with investigations of potential misconduct giving rise to the remedies set forth in N-PCL § 112 (a).

12. Pursuant to EPTL § 8-1.4(i), the Attorney General “may investigate transactions and relationships of trustees for the purpose of determining whether or not property held for charitable purposes has been and is being properly administered. The attorney general, his or her assistants, deputies or such other officers as may be designated by him or her, are empowered to subpoena any trustee, agent, fiduciary, beneficiary, institution, association or corporation or other witness, examine any such witness under oath and, for this purpose, administer the necessary oaths, and require the production of any books or papers which they deem relevant to the inquiry.”

13. Pursuant to Executive Law § 63(12), 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” in connection with investigations of potential repeated fraudulent or illegal acts.

14. Pursuant to Executive Law § 175, the Attorney General “is authorized to take proof, issue subpoenas and administer oaths in the manner provided in the civil practice law and rules” in connection with investigations of potential misconduct in violation of Article 7-A of the Executive Law, which concerns the solicitation and collection of funds for charitable purposes.

15. Venue is properly set in New York County pursuant to CPLR §§ 503, 505, and 509, because Petitioner is resident in New York County and has selected New York County, and because Petitioner is a public authority whose facilities involved in the action are located in New York County.

16. Further, in a prior proceeding commenced by Respondent NRA challenging a different third-party non-judicial subpoena in the same Attorney General investigation of it, the NRA chose and acknowledged New York County as the venue for such proceeding. *See National Rifle Association of America, Inc. v. Letitia James*, Supreme Court, New York County Index No. 158019/2019.

FACTS

17. Until recently, and for decades past, AMQ served as the NRA's principal advertising agency. In 2017 alone, the NRA paid AMQ nearly \$40 million. (Exhibit 2.) But within the past several months, the NRA and AMQ have become legal adversaries, with no fewer than four active litigations ongoing between them, all of which relate to allegations that one or more NRA officers or directors violated their fiduciary duties in connection with financial or contractual arrangements involving AMQ. These allegations, among other things, are subjects of OAG's investigation of potential misconduct in NRA's governance and management.

18. On April 12, 2019, the NRA filed a lawsuit against AMQ in a Virginia court alleging that AMQ had violated a Services Agreement between NRA and AMQ dated April 30, 2017 and amended May 6, 2018 (the "Services Agreement"). (Exhibit 1.) *See National Rifle Ass'n of America v. Ackerman McQueen et al.*, Virginia Circuit Court, City of Alexandria, Civil Case No. CL19001757, filed April 12, 2019. The NRA asserted the same claims against Mercury, contending that "[a]t all relevant times, [AMQ] acted on behalf of both itself and Mercury pursuant to the Services Agreement . . . between [AMQ] and the NRA." *Id.*, Cplt. §3.

19. On May 3, 2019, OAG issued a document preservation notice to AMQ in order to secure potential evidence relevant to OAG's investigation of the NRA. (Exhibit 3.)

20. On May 16, 2019, during a telephonic meet-and-confer, AMQ's counsel informed OAG that AMQ wished to cooperate with OAG's investigation of the NRA, and the next day, AMQ's counsel agreed to meet at OAG's offices the following week, on May 22, 2019, in order to initiate discussions aimed at facilitating that cooperation.

21. On May 20, 2019, AMQ's counsel contacted OAG to cancel the scheduled meeting on May 22, 2019 regarding AMQ's cooperation with OAG's investigation, explaining that the NRA had taken the position that any such cooperation by AMQ would constitute a violation of an NDA contained in the Services Agreement. At that time, OAG asked AMQ to provide the relevant text of the NDA, but AMQ declined, on the grounds that even that limited disclosure could trigger an additional lawsuit by the NRA alleging a violation of the NDA.

22. On May 22, 2019, the NRA filed a second lawsuit against AMQ, this time alleging, among other things, that AMQ had violated the NDA in the Services Agreement. *See National Rifle Ass'n of America v. Ackerman McQueen et al.*, Virginia Circuit Court, City of Alexandria, Civil Case No. CL19002067, filed May 22, 2019. Again, the NRA quoted from the Services Agreement in its public filing without attaching the full document as an exhibit, but this time, the NRA quoted the NDA provision:

AMc shall not disclose, directly or indirectly, to any...data, materials or information...made known to AMc as a result of AMc's providing [contracted-for services] without the prior express written permission of [the] NRA.

Id. at ¶ 11. (Exhibit 5.)

23. On May 23, 2019, AMQ's counsel informed OAG that notwithstanding the NRA's selective disclosure of the NDA language from the Services Agreement in its May 22, 2019 complaint, the NRA was maintaining the position that AMQ's disclosure of the full Services Agreement to OAG would constitute a violation of the NDA.

24. On June 6, 2019, OAG conducted an in-person meet and confer session with counsel for the NRA concerning, among other things, the NRA's position relating to the NDA in its Services Agreement with AMQ, and any other similar NDAs the NRA might have with other third parties to whom OAG might direct its investigative inquiries. At that meeting, OAG explained its position that private contractual agreements purporting to limit or condition third parties' provision of information or documents to law enforcement and regulatory authorities are unenforceable as a matter of law.

25. On June 25, 2019, the NRA wrote to AMQ, purporting to terminate the Services Contract, and stating that "[t]he NRA demands immediate delivery of all materials" covered by the NDA, despite the NRA's knowledge that those materials were the subject of investigative requests by OAG to AMQ. (Exhibit 6.)

26. On June 26, 2019, the NRA's counsel wrote to OAG stating that the NRA did "not object, on principle, to third parties producing information to the OAG which may be subject to contractual confidentiality protections," but that the NRA "would not take any action that could be construed to waive" its NDAs with third parties, and "[i]nstead, has made efforts to activate notice-and-consent provisions contained in relevant contracts." (Exhibit 7.) In other words, notwithstanding that the disclosures in question would be made to OAG in its law-enforcement and regulatory capacity, the NRA would continue to insist that third parties notify the NRA in advance and allow it to review and potentially exercise a veto over any such disclosures to OAG.

27. Beyond this general proposition, the NRA's June 26, 2019 letter contained a remarkable assertion purporting to direct how OAG should proceed with respect to documents sought from AMQ. Specifically, the letter disclosed that the NRA had purported to terminate the Services Agreement and had demanded that AMQ return the documents in question to the NRA,

and the letter then asserted that OAG should allow NRA to regain possession of those documents from AMQ, and only then should OAG pursue those documents via requests made directly to the NRA. (Exhibit 7.)

28. After OAG had exhausted its efforts, despite AMQ's willingness, to obtain AMQ documents through voluntary means, on July 8, 2019, OAG issued a subpoena *duces tecum* to AMQ seeking documents relating to the financial and contractual relationships between AMQ and the NRA, its officers, directors, and related entities, including, without limitation, the Services Agreement. (Exhibit 8.)² Accompanying this subpoena was a cover letter reiterating OAG's position that both the subpoena and OAG's May 3, 2019 preservation notice superseded any purported contractual right of NRA to demand that AMQ surrender custody of documents relevant to OAG's investigative inquiries. *Id.*

29. On July 12, 2019, OAG and AMQ conducted a telephonic meet-and-confer regarding AMQ's prospective subpoena compliance. AMQ did not assert any objections to complying with the subpoena. To the contrary, during that discussion, AMQ's counsel expressed AMQ's commitment to comply with OAG's subpoena. Counsel, however, explained that due to the NDA in the Services Agreement, and the absence of any "carve out" language excepting subpoena compliance, AMQ still faced potential legal jeopardy if it did not disclose the subpoena and its prospective document productions to the NRA, and allow the NRA the opportunity to exercise its purported right to withhold consent to those disclosures, before producing any such materials to OAG. At that time and in the interest of avoiding litigation, OAG did not object to the NRA's requests to preview and potentially veto AMQ's planned document productions in response to OAG's July 8, 2019 subpoena.

² OAG's subpoena seeks documents maintained by both AMQ and its wholly owned subsidiary, Mercury.

30. On information and belief, AMQ provided the NRA with a copy of OAG's subpoena. The NRA did not notify OAG of any purported objections regarding the nature or scope of the requests in the subpoena. On information and belief, the NRA, however, did insist on pre-reviewing AMQ's production in response to the subpoena and AMQ complied with that demand.

31. On July 31, 2019, AMQ produced an initial tranche of 131 bates-stamped pages in response to OAG's subpoena, along with a cover letter indicating that AMQ had requested that NRA waive any purported right to review and veto AMQ's document productions, but that the NRA had denied that request. (Exhibit 9.)

33. After reviewing the contents of that production, assessing the nature of materials outstanding for production in subsequent tranches, and considering the delay and potential disruption, OAG instructed AMQ to defer any additional document productions pursuant to the July 8, 2019 subpoena if it meant first giving the NRA a right to review and approve the production. OAG has received no further documents from AMQ after the first tranche was produced on July 31, 2019. There is no dispute that AMQ has not fully complied with OAG's subpoena. OAG has determined that the NRA's involvement in AMQ's subpoena compliance process was impeding the investigation and that OAG must take measures to protect the integrity of its investigation going forward. Specifically, allowing the NRA, the subject of its investigation, to contractually demand the right to pre-screen and potentially veto document productions from AMQ and other third parties subject to similar NDAs would undermine OAG's ability to protect its investigative sources and methods, maintain the confidentiality of its investigative theories and progress, and otherwise impede OAG in carrying out its multiple statutory mandates with respect to the enforcement of New York law.

34. On September 27, 2019, the OAG spoke to counsel for AMQ by phone in a final attempt to resolve this issue. AMQ's counsel again confirmed AMQ's position that it is willing to comply with the Subpoena and produce responsive information directly to the OAG but for the NRA's continued insistence that it must preview and grant permission for the release of such information pursuant to the NDA

35. In a final attempt to meet and confer on this issue with the NRA, on September 26, 2019, the OAG called NRA counsel and asked the NRA to confirm whether it was still maintaining its position. NRA's counsel confirmed that it was "absolutely 100%" the NRA's position that the NDA was binding upon AMQ and prohibits it from providing information responsive to the OAG's subpoena absent the NRA's express written consent. Counsel confirmed that despite the OAG's request that they identify some authority for the same, counsel could point to none. Counsel asked to have a day to speak to NRA leadership and to look into the matter. *See* the Affirmation of Monica Connell, dated September 30, 2019 ("Connell Aff."), at ¶¶ 12-19.

36. On September 27, 2019, the OAG and NRA counsel spoke again by phone. This time counsel acknowledged precedent limiting the use of contractual non-disclosure agreements in regard to law enforcement investigations, but stated that the NRA took the position that such authority to only limit the enforcement of NDAs where the subject of the investigation determines that the NDA is impeding the investigation. Here, the NRA does not deem that the NDA is impeding the OAG's investigation. During the call, the NRA raised a right to object to the AMQ's production of responsive documents by third party AMQ as barred by attorney-client, attorney work product, common interest, and First Amendment privileges. Counsel was

unable to identify any specific document or categories of documents which would be responsive to a demand in the Subpoena.

37. At 9:25 p.m. on September 27, 2019, NRA counsel sent an email to the OAG again asserting the NRA's intention to seek to enforce the NDA in relation to AMQ's compliance with the Subpoena. Connell Aff., ¶¶ 12-19 and Exhibit 2. Despite having had almost four months to research and consider this issue, in the email, counsel failed to identify a single case which would support the application of the NDA to the Subpoena at issue here. Nor did NRA counsel specifically identify any factual or legal basis for the assertion of a blanket privilege, other than to cite two readily distinguishable federal cases relating to attorney client privilege. As set forth in the accompanying Memorandum of Law, NRA counsel has not presented facts that establish a legally cognizable basis for their blanket assertion of privilege.

38. Accordingly, OAG now asks the Court to issue appropriate orders pursuant to CPLR § 2308, so as to ensure that AMQ can and will promptly comply with OAG's investigative requests without further interference occasioned by the NRA's assertion of rights pursuant to an unenforceable NDA provisions in a private contract. Specifically, OAG seeks an order compelling AMQ to comply with OAG's July 8, 2019 subpoena without the need to allow the NRA to pre-review and approve any information released in compliance with the subpoena and without delaying or altering any aspect of that compliance so as to conform to any purported obligations under the NDA contained within the NRA Services Agreement.

CLAIM FOR RELIEF
Compelling Subpoena Compliance – CPLR § 2308

39. The Attorney General repeats and re-alleges the preceding paragraphs, as though fully set forth herein.

40. OAG's July 8, 2019 subpoena to AMQ was issued pursuant to a legally-authorized investigation for which there is a factual basis, and the requests in the subpoena are reasonably related to that investigation.

41. AMQ has interposed no objections of its own to compliance with OAG's subpoena, and its fear of being subject to collateral litigation by the NRA for producing documents to OAG, however genuine, is not a cognizable basis for delaying or withholding further document productions to OAG.

42. The NRA has not identified any legally cognizable basis for withholding from OAG any AMQ documents responsive to OAG's subpoena.

43. As a result, AMQ should be ordered to comply with OAG's July 8, 2019 subpoena without delaying or altering any aspect of that compliance so as to conform to any purported obligations under the NDA contained within the Services Agreement with the NRA.
Prayer for relief

WHEREFORE, Petitioner respectfully requests that a judgment and order be entered:
(i) compelling AMQ to comply with OAG's July 8, 2019 subpoena without the need to allow the NRA to pre-review and approve any information released in compliance with the subpoena and without delaying or altering any aspect of that compliance so as to conform to any purported obligations under the NDA contained within the NRA Services Agreement; and (ii) granting such other and further relief as it deems just, proper and appropriate.

New York, New York
September 27, 2019

Respectfully submitted,

LETITIA JAMES
Attorney General of the State of New York
Attorney for Petitioner
By: *Ms Monica Connell*
Monica Connell

John Oleske
Assistant Attorneys General
28 Liberty Street
New York, New York 10005
(212) 416-8965
Monica.Connell@ag.ny.gov

VERIFICATION

Monic Connell, an Attorney admitted to the Bar of this State, hereby affirms and certifies that:

I am an Assistant Attorney General, in the Office of Letitia James, Attorney General of the State of New York, who appears on behalf of the People of the State of New York as Petitioner in this proceeding. I have read the foregoing Petition and know the contents thereof. The same are true to my person knowledge and based upon the records maintained by the Office of the Attorney General, except as to matters therein stated to be alleged on information and belief and as to those matters, I believe them to be true.

Dated: New York, New York
September 26, 2019

/s/ Monica Connell

Monica Connell