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

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

Index No. _____
Hon. _____

Petitioners,

-against-

ACKERMAN McQUEEN and the NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,

Respondents.

----------X

**MEMORANDUM OF LAW IN SUPPORT OF THE ATTORNEY GENERAL'S SPECIAL PROCEEDING AND APPLICATION TO COMPEL RESPONDENT ACKERMAN McQUEEN TO COMPLY WITH AN INVESTIGATORY SUBPOENA.**

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**MISCELLANEOUS AUTHORITIES**

New York State Attorney General Letitia James, on behalf of the People of the State of New York, submits this memorandum of law, along with the accompanying Order to Show Cause; Verified Petition, dated September 30, and all exhibits thereto; the Affirmation of Monica Connell in Support of Order to Show Cause, dated September 30, 2019 ("Connell Aff.") and all exhibits thereto; the Statement of Merit Pursuant to 22 N.Y.C.R.R. § 130-1.1(c); together with all proceedings had herein, in support of this special proceeding and her application for a motion to compel and such other relief as the Court deems just, proper and appropriate under CPLR 2308.

**PRELIMINARY STATEMENT**

As part of a law enforcement investigation, the Attorney General issued a subpoena *duces tecum* to respondent Ackerman McQueen ("AMQ"). Respondent AMQ is willing to comply with the subpoena but has stated that if it releases information directly to the Attorney General in compliance with the subpoena, it may face litigation from respondent the National Rifle Association of America, Inc. (including its affiliated not-for-profit and charitable entities,[1] collectively "NRA") for breach of a contractual non-disclosure agreement as a result. As set forth below, because such a contractual clause is not enforceable to the extent that it is interpreted to interfere with a law enforcement investigation, the Attorney General is entitled to an order compelling AMQ to comply with the subpoena without requiring that it allow the NRA to condition, pre-review and approve production of responsive information.

At issue in this proceeding is the National Rifle Association of America, Inc.'s apparent attempt to convert a contractual non-disclosure agreement into a way to limit, delay and monitor a law enforcement investigation into its conduct as a New York State not-for-profit corporation.

[1] "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 NRA asserts that a confidentiality provision in its contract with vendor and third party witness AMQ means that the NRA has a right to review and approve all information to be produced by AMQ in response to the Attorney General's subpoena. This Court previously denied an application by the NRA to be present at the questioning of a witness, holding that having the NRA, as the subject of an investigation, "sit in on an investigatory deposition by law enforcement could have the serious consequence of compromising the integrity of that investigation." *See National Rifle Association of America, Inc. v. Letitia James*, Index No. 158019/2019. Verified Petition, Ex. 4. The NRA's current attempt to insert itself into AMQ's subpoena response fares no better. Because application of such a contractual provision to prevent law enforcement oversight of the NRA would violate New York's well-established law and public policy, it is unenforceable.

The Office of the New York State Attorney General ("OAG") is vested under State Law, specifically, the Not-for-Profit Corporations Law, the Estates, Powers and Trusts Law and the Executive Law, with expansive authority to oversee not-for-profit entities. OAG has broad investigatory powers in furtherance of that authority. *See Schneiderman v Tierney*, 2015 WL 2378983, at *2–3 (Sup. Ct., N.Y. Co. 2015); *Matter of Cuomo v Dreamland Amusements Inc*., 22 Misc. 3d 1107 (A) (Sup. Ct., N.Y. Co. 2009); *In re McDonell*, 195 Misc. 2d 277, 278-79 (Sup. Ct. N.Y. Co. 2002) (state legislature has given Attorney General broad supervisory and oversight responsibility over charitable assets and their fiduciaries); *see also Citizens United v. Schneiderman*, 882 F.3d 374, 379 (2d Cir. 2018) (discussing OAG's authority to include 501(c)(4) organizations within its regulatory purview).

The NRA is a not-for-profit charitable organization organized under the laws of the State of New York. It is the subject of an OAG investigation concerning, *inter alia*, 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.

As part of the investigation, the OAG is reviewing NRA's transactions with outside vendors, including its transactions with AMQ, the NRA's longtime advertising and public relations firm. As discussed in greater detail below, the NRA's public filings have raised substantial questions about its governance and expenditures, including in regard to AMQ, leading to the issuance of a subpoena. AMQ has expressed its desire to comply with the OAG subpoena, but faces a risk of litigation and liability by disclosing information without NRA approval because of a "Services Agreement" it signed with the NRA. That Services Agreement contains a "Confidentiality Provision" (hereinafter the "NDA") which provides in relevant part that:

> [AMQ] shall not disclose, directly or indirectly, to any third party any NRA membership data or mailing lists, any materials or information relating thereto, **or any other data, materials or information coming to the knowledge of [AMQ], supplied to [AMQ] by NRA, or otherwise made known to [AMQ] as a result of [AMQ's] providing services…without the prior express written permission of NRA**.

*See* Verified Petition, Ex. 1, p. 6 (emphasis added). The Services Agreement contains no exception or "carve out" for law enforcement purposes. The NRA has confirmed its position that it interprets the NDA to prohibit AMQ from complying with the subpoena and producing information to the OAG absent, at a minimum, NRA's review of the material and express approval.

As set forth below, the NDA as interpreted by the NRA is void and unenforceable in relation to the OAG investigation as it is contrary to law and public policy. The OAG is authorized to conduct a confidential law enforcement investigation without interference, delay or monitoring

by a subject of the investigation. Because permitting charities like the NRA to shield their interactions with other entities and individuals through the use of such broad "Services Agreements" would clearly frustrate OAG's oversight of charities, the OAG asks for an order determining that the NDA is unenforceable as violative of law and public policy to the extent that it is interpreted to prohibit AMQ's compliance with the OAG investigation without the NRA's prior review and approval and compelling AMQ's immediate and direct compliance.

## RELEVANT STATUTORY BACKGROUND

Under New York State law, not-for-profit entities like the NRA are subject to significant oversight and the OAG has broad supervisory and investigatory authority to prevent fraud and violations of relevant law. The Attorney General is responsible, by statute and in her *parens patriae* capacity, for ensuring that not-for-profit corporations are not abused or misused and for protecting "the public interest in charitable property." *Tierney*, 2015 WL 2378983, at *3. She is "the State's chief law enforcement officer," *People v. Grasso*, 54 A.D.3d 180, 204 (1st Dep't 2008) (quotation marks omitted), and safeguards the public interest through investigations and enforcement actions to prevent, among other things, fraud and misconduct by not-for-profit, or charitable organizations.

The Attorney General therefore has expansive oversight authority of not-for-profit entities, their representations to donors and potential donors, and their use of charitable assets 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 is granted broad investigatory powers in furtherance of that authority. See *Tierney*, 2015 WL 2378983, at *2–3 (N.Y. Sup. Ct. May 18, 2015); *Dreamland Amusements Inc*., 22 Misc. 3d 1107. 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" and may take such steps as she deems "relevant to the inquiry." Estates Powers and Trusts Law § 8-1.4(i). The Attorney General has the explicit authority to subpoena entities and persons other than the not-for-profit entity which is the subject of the investigation. *See, e.g.,* Estates Powers and Trusts Law § 8-1.4(I) ("The attorney general… [is] 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." (emphasis added)); *Tierney*, 2015 WL 2378983, at *3.

Further, pursuant to Not for Profit Corporations Law § 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 Not for Profit Corporations Law § 112(a). The Attorney General also has such authority under Executive Law § 63(12), pursuant to which she 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. *See also* Executive Law § 175 (authorizing the Attorney General to "take proof, issue subpoenas and administer oaths" 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.). A subpoena issued by the Attorney General in this context is presumptively valid and to challenge the subpoena, the challenging party "has the burden of proof to establish" its invalidity. *See Tierney*, 2015 WL 2378983, at *3.

In short, "[t]here 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." *Abrams v Temple of the Lost Sheep, Inc.*, 148 Misc 2d 825, 828-29 (Sup. Ct., N.Y. Co. 1990); *Tierney*, 2015 WL 2378983, at *2–3.

## BRIEF STATEMENT OF FACTS

### A. The OAG Has Commenced an Investigation Into the NRA's Conduct and Subpoenaed AMQ In Relation to that Investigation.

On April 26, 2019, the OAG notified the NRA, through issuance of a document preservation notice, that the OAG was investigating the NRA. The notice identified initial areas of investigation, which were and remain 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. Similar preservation notices were served upon other potential custodians of relevant information.

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. 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* Verified Petition, Ex. 2.

The NRA's 2017 Form 990 made disclosures concerning the NRA's relationship with respondent AMQ. *See Id.*, Part VII, Section B. AMQ 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 AMQ had actually received 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 AMQ 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, both of which are affiliated with AMQ affiliates. AMQ and related companies received even more from NRA-affiliated entities. In its filing, the NRA cryptically noted that the disclosed payments to AMQ and related companies "excludes amounts paid by a related organization" to the NRA. *Id.*, Schedule O.

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. On July 8, 2019, OAG served a subpoena *duces tecum* on AMQ. *See* Verified Petition, Exs. 3 and 8. Until recently, and for decades past, AMQ served as the NRA's principal advertising agency. But within the past several months, the NRA and AMQ have become legal adversaries, with no fewer than four active litigations ongoing between them. *See, e.g., 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.

**B. The NRA Has Used the NDA in an Effort to Block, Delay, and Monitor AMQ's Compliance with the Subpoena.**

Since it was notified of the instant investigation, the NRA has sought to prevent, delay or limit disclosure of relevant materials and testimony sought from third parties. For example, on or about August 16, 2019, the NRA commenced a special proceeding by order to show cause demanding the right to attend the OAG's investigative interview of former NRA President Lt. Col. Oliver North, and to object to his statements. *See National Rifle Association of America, Inc. v. Letitia James*, Index No. 158019/2019. This Court held that "[h]aving the NRA or its Board sit in on an investigatory deposition by law enforcement could have the serious consequence of compromising the integrity of that investigation" and denied the application. *See* Verified Petition,

Ex. 4. The NRA immediately sought a stay from the Appellate Division, First Department, which denied the application; the NRA ultimately withdrew its challenge to this Court's decision. In that instance, the NRA unsuccessfully sought to be present and to monitor testimony sought by the OAG. Now it is using a non-disclosure agreement in a private contract in a matter which hinders third party compliance with OAG subpoenas. The NRA's conduct has had the effect of delaying AMQ's compliance and preventing the OAG from getting information in a manner that does not compromise the integrity of the investigation.

Neither AMQ nor the NRA has objected to the OAG's subpoena or disputed the relevancy of the information requested from AMQ.[2] In fact, on May 16, 2019, during a telephonic meet-and-confer regarding subpoena compliance, AMQ's counsel informed the OAG that AMQ intended to cooperate with OAG's investigation and subpoena.

On May 20, 2019, AMQ's counsel contacted the OAG to cancel a scheduled meeting regarding AMQ's cooperation, 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. Verified Petition at ¶ 21. 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 the filing of an additional lawsuit by the NRA. *Id*. Ultimately, OAG obtained the Services Agreement through

[2] At no point has the NRA raised any objection to the subpoena based upon the assertion that AMQ may produce proprietary or "trade secret" information. In any event, such objection would not be well placed. The unauthorized disclosure of a trade secret is generally not actionable and is likely privileged where disclosure advances a significant public interest, for example, where disclosure "is relevant to public health or safety, or to the commission of a crime or tort, or to other matters of substantial public concern." Restatement (Third) of Unfair Competition § 40 (1995). OAG investigations are routinely conducted in a non-public and confidential manner. This is essential to ensure that the OAG can gather relevant information without interference or risk that information will be compromised or altered or subject to undue influence from the subjects of the investigation. The information gained as part of such investigations is maintained securely and protected from general dissemination or sharing unconnected to the investigation.

another source and, in any event, the text of the NDA has been made public by the NRA in litigation.

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. In its pleading, the NRA quoted the NDA:

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

*See* Verified Petition, Ex. 5, at ¶ 11.

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.

On June 6, 2019, OAG conducted an in-person meet and confer session with NRA counsel concerning, among other things, the NRA's position relating to the NDA in its Services Agreement with AMQ and any other similar NDA 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.

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 and a preservation notice by OAG to AMQ. *See* Verified Petition, Ex. 6.

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." *See* Verified Petition, Ex. 7. Beyond this general proposition, however, the NRA's June 26, 2019 letter contained a remarkable assertion regarding how OAG should proceed with respect to documents sought from AMQ; the NRA had purported to terminate the Services Agreement and had demanded that AMQ return the documents in question to the NRA, and 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. *Id.* The NRA did not assert any legally cognizable interest or privilege in any documents purportedly covered by the NDA.

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. 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. *See* Verified Petition, Ex. 8.

On July 12, 2019, OAG and AMQ conducted a telephonic meet-and-confer regarding AMQ's prospective subpoena compliance. During that discussion, AMQ's counsel reiterated AMQ's intention to comply with OAG's subpoena, but also explained that due to the NDA in the Services Agreement, and the absence of any "carve out" language excepting subpoena compliance, AMQ was placed in potential legal jeopardy if it did not disclose its prospective document

productions to the NRA, and allow the NRA time to exercise its purported right to withhold consent to those disclosures, before producing any such materials to OAG. At that time, OAG instructed AMQ to accede, for the time being, to the NRA's requests to preview and potentially veto AMQ's planned document productions in response to OAG's July 8, 2019 subpoena.

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. *See* Verified Petition, Ex. 9.

After reviewing the contents of that production and assessing the nature of materials outstanding for production in subsequent tranches, the OAG instructed AMQ to defer any additional document productions pursuant to the subpoena so that the OAG could take measures to protect the integrity of its investigation going forward. Based upon efforts to meet and confer with AMQ, it is clear that it has substantial responsive information which it has not yet produced. Neither AMQ nor the NRA has asserted any privilege or legal right to withhold information in regard to the materials sought from AMQ.

In light of the foregoing, the OAG determined that allowing the NRA, the subject of its investigation, to have any continuing role in pre-screening and potentially editing and limiting document productions from third parties would undermine OAG's ability to protect its investigative sources and methods, maintain the confidentiality of its investigative theories and progress, and otherwise obstruct OAG in carrying out its multiple statutory mandates with respect to the enforcement of New York law.

On September 27, 2019, OAG spoke to AMQ's Counsel in a final attempt to resolve this matter and confirmed that AMQ 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. Connell Aff., ¶¶12-19.

In a final attempt to meet and confer on this issue with the NRA, on September 26, 2019, the OAG called NRA counsel. NRA counsel confirmed the NRA's position that the NDA prevents AMQ from providing responsive information to the OAG in compliance with the Subpoena absent the NRA's review and express written permission. Counsel did not cite any authority for this point but asked to have a day to consider and look into the matter. On September 27, 2019, the OAG and NRA counsel spoke again by phone. Counsel acknowledged precedent limiting the use of contractual non-disclosure agreements in regard to law enforcement investigations, but interpreted 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. When pressed as to whether the NRA was asserting that the NDA controlled AMQ's production of documents to the OAG, counsel affirmed that that was the NRA's position and indicated that the NRA would "continue to insert itself to review documents." Accordingly, the OAG has no option except to seek relief from the Court. *Id.*

During the call, the NRA raised a right to object to third party AMQ's production of responsive documents 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. When pressed as to whether the NDA and the assertions of privilege are in fact separate and separable issues, counsel declined to agree that they were separate. In sum, the NRA confirmed its position that it interprets the NDA to prohibit AMQ from complying with the subpoena by directly producing responsive information to the OAG absent, at a minimum, the NRA's review of the material and express

approval for production. It has also raised blanket and vague assertions of privilege. Connell Aff., ¶¶ 12-19.

At 9:25 p.m. on September 27, 2019, counsel sent a self-serving 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., Exhibit 2.) Despite having had almost four months to research and consider this issue, counsel failed to identify a single case which would support the application of the NDA to the Subpoena at issue here or to specifically identify the basis for any privilege, other than to cite two readily distinguishable federal cases relating to attorney client privilege, discussed below. Connell Aff., ¶¶ 12-19.

Accordingly, the OAG now asks the Court to issue an appropriate order pursuant to CPLR § 2308, so as to ensure that AMQ can and will promptly comply with OAG's investigative requests without further prevention, limitation or delay occasioned by the NRA's assertion of rights pursuant to unenforceable NDAs in private contracts.

## ARGUMENT

### THE NDA OF THE SERVICES AGREEMENT IS VOID AND UNENFORCEABLE AS CONTRARY TO LAW AND PUBLIC POLICY TO THE EXTENT THAT IT PURPORTS TO LIMIT, CONDITION OR CONTROL DISCLOSURES TO OAG FOR LAW ENFORCEMENT AND REGULATORY PURPOSES.

At issue in this motion is whether a confidentiality provision in a private contract can preclude compliance with a law enforcement investigation. More specifically, can a charitable entity contractually preclude others from participating in government investigations of its conduct or otherwise condition such compliance? The answer is no.

While the NRA is certainly free to contract with vendors and service providers to protect its interests, it cannot use such private contracts to attempt to negate a law enforcement subpoena or conceal its activities from regulatory review. Under the NRA's interpretation of the NDA, it is

empowered to prevent or condition AMQ's ability to provide information to law enforcement in compliance with an OAG subpoena. Because this construction of the NDA would violate New York's well-established law and public policy, it cannot be interpreted or enforced in such a manner.

**A. Contractual Provisions Must Be Interpreted as Consistent With the Law and Public Policy and those That Violate the Law or Public Policy Are Unenforceable.**

It is a fundamental principal of contract law that "agreements against public policy are illegal, void, and unenforceable, and courts will not recognize rights purportedly arising from them." 22 N.Y. Jur. 2d Contracts § 149. *See also* 22 N.Y. Jur. 2d Contracts § 161 ("Contracts that have a tendency to obstruct or interfere with the administration of justice are contrary to public policy."); *Lanza v. Carbone*, 130 A.D.3d 689, 691 (2d Dep't 2015)(holding that contracts that "offend public policy" or are illegal are unenforceable); *Dockstader v. Reed*, 121 A.D. 846, 848 (1st Dep't 1907)(refusing to enforce restrictive covenant as against public policy). "Where the enforcement of private agreements would be violative of [public] policy, it is the obligation of courts to refrain from such exertions of judicial power." *Hurd v. Hodge*, 334 U.S. 24, 34–35 (1948). Indeed, the Court of Appeals has recognized the "familiar rule" that courts will not recognize or enforce rights arising from contracts which are contrary to public policy. *Szerdahelyi v. Harris*, 67 N.Y.2d 42, 48 (1986); *see also City of New York v. 17 Vista Assocs*., 192 A.D.2d 192, 198 (1993), *aff'd as modified*, 84 N.Y.2d 299 (1994).

**B. Contractual Provisions Which Purport to Prohibit a Party from Reporting a Crime or Cooperating with Law Enforcement Violate Public Policy And Are Unenforceable.**

It is widely recognized that contractual provisions which would preclude a party from reporting a crime or cooperating with law enforcement are void as against public policy. *See, e.g*., 6A Arthur L. Corbin, *Corbin on Contracts* § 1421, at 355-56 (1962) ("A bargain the purpose of

which is the stifling of a prosecution is in all cases contrary to public policy and illegal even though it may not itself be a crime. This is true . . . whether the prosecution has or has not been started at the time the bargain is made. Bargains of this kind are in various forms, including promises not to prosecute or not to give evidence to the prosecuting officers . . . ."). "A bargain in which either a promised performance or the consideration for a promise is concealing or compounding a crime or alleged crime is illegal." *Restatement (First) of Contracts § 548(1)* (1932).

For example, in *Cosby v. Am. Media, Inc*., 197 F. Supp. 3d 735, 742 (E.D. Pa. 2016), the court held that a settlement agreement's provision "purport[ing] to prevent its signatories from voluntarily disclosing information about crimes to law enforcement authorities," was unenforceable as against public policy. This was so even though the disclosure in *Cosby* was not compelled; the court held that the existence of a government subpoena was irrelevant to this analysis —witnesses can disclose *voluntarily* without being subject to contractual liability. Such provisions simply won't be enforced by the Court. *Id.* at 742-43 (holding that "to the extent that the [settlement agreement] purports to prevent its signatories from voluntarily disclosing information about crimes to law enforcement authorities, it is unenforceable as against public policy" and dismissing breach of contract claims arising from such based on disclosures to law enforcement officials.").

Similarly, in *Fomby-Denson v. Dep't of Army*, in dismissing a breach of contract claim where one party voluntarily reported a potential crime to law enforcement in alleged violation of a contractual NDA, the court held that "it is a long-standing principle of general contract law that courts will not enforce contracts that purport to bar a party…from reporting another party's alleged misconduct to law enforcement authorities for investigation and possible prosecution." 2474 F.3d 1366, 1375 (D.C. Cir. 2001). As part of its analysis, the *Fomby* court looked at whether the public

policy at issue is "well-defined and dominant." *Id*. It determined that there was a clearly defined and dominant public policy against obscuring the commission of crimes or potential crimes. It thus declined to interpret the subject contract's confidentiality agreement as barring voluntary reporting to law enforcement. *Id.*, at 1378.

Relying upon *Fomby*, in *Quinio v. Aala*, the federal district court for the Eastern District of New York unhesitatingly adopted such analysis and recognized that "courts throughout the country" have held that the public policy interests in encouraging the reporting of possible crimes is "of the highest order" and "indisputably well-defined and dominant in the jurisprudence of contract law." 344 F. Supp. 3d 464, 476 (E.D.N.Y. 2018), *quoting Fomby*, 24 F.3d at 1375, and *citing Branzburg v. Hayes*, 408 U.S. 665, 696–97 (1972) ("it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy"). Indeed, courts have recognized the public policy interests in encouraging and not suppressing reporting of potential crimes to law enforcement. *See Quinio*, 344 F. Supp. 3d at 476, gathering cases and citing *Lachman v. Sperry–Sun Well Surveying Co.*, 457 F.2d 850, 853 (10th Cir. 1972) ("It is public policy in Oklahoma and everywhere to encourage the disclosure of criminal activity").

These cases are in accordance with the foundational public policy that law enforcement must have access to relevant information. Recognizing that absent a "full disclosure of all the relevant facts, confidence in the fair administration of justice would cease to exist," the law narrowly limits attempts to foreclose such access. *In re Six Grand Jury Witnesses*, 979 F.2d 939, 943 (2d Cir. 1992). This bedrock principal was set forth in *United States v. Nixon*, 418 U.S. 683, 709–10 (1974), in which the Supreme Court affirmed the denial of former President Richard Nixon's motion to quash a special prosecutor's third party subpoena *duces tecum* which directed

him to produce tape recordings and documents regarding his communications with aides and advisors. In so holding, the Supreme Court emphasized that "the need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." As part of its analysis, the Court noted that "the public . . . has a right to every man's evidence," and "exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Id*. (internal citations and quotations omitted). Allowing a contractual provision to be interpreted to limit law enforcement access to relevant information is thus directly contrary to well-established public policy.

**C. Contractual Provisions Which Are Inconsistent with Statutory Schemes, Perpetuate a Civil Wrong Against a Non-Signatory or the Public, or Attempt to Interfere with Reporting to Government Regulators Violate Public Policy.**

The enforceability of the NDA here is not dependent on whether the investigation at issue is pursuing criminal or only criminal charges. Courts will not enforce contractual provisions which are contrary to law or public policy in other contexts. For example, in *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948), the Supreme Court affirmed that contractual provisions containing racially restrictive covenants were unenforceable in the courts and void as against public policy. In so holding, the Court made clear that its analysis was not dependent upon whether the subject contractual provision violated a particular statute, though there was a statute which prohibited such covenants, but whether it was inconsistent with the "public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents" and "basic" equal protection rights. *Id.*

Citing *Hurd*, in *Lachman*, the Tenth Circuit refused to enforce an NDA in a contract where such enforcement would have the effect of preventing revelation of a civil wrong against another. 457 F.2d at 852. There, plaintiffs had contracted with a survey company for a directional survey of an oil and gas well. The contract forbade the surveyor from communicating about the survey or well to any third party. But upon finding that the well "was bottomed on a neighboring tract of land the oil and gas rights to which belonged to third parties," the surveyor notified the owners of the neighboring tract. The Tenth Circuit found the NDA void and unenforceable insofar as it contravened the state's interest in preventing a civil wrong against a third party. *Id.* at 853 ("To hold [the surveyor] bound by its contractual obligation to maintain silence would in this case require the court to assist the appellants in obtaining oil and gas to which they were not entitled"). The court invalidated the contract only insofar as it purported to prevent revelation of the tort. *See also Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 74 (2d Cir. 1982) (citing *Lachman* and affirming decision that contractual "hold harmless" clause was unenforceable on public policy grounds where it would have the effect of perpetuating "a civil wrong against a third person or persons.").

It is also routinely recognized that confidentiality agreements which purport to prohibit reporting suspected misconduct by a financial entity to regulatory authorities are unenforceable on public policy grounds in order to encourage reporting of wrongdoing and protect the public. *See, e.g., Cariveau v. Halferty*, 83 Cal. App. 4th 126, 128 (Cal. App. 4th Dist. 2000); *see also S.E.C. v. Jerry T. O'Brien, Inc*., 467 U.S. 735, 743 (1984)(holding that subject of a non-public investigation by the SEC is not entitled to notice of third-party subpoenas and noting that "[i]t is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or

records thereof to law enforcement authorities."); Securities and Exchange Commission ("SEC") Rules § 240.21F-17 (Prohibiting any action which would "impede" communications with the SEC about misconduct including threatening to enforce a confidentiality agreement).

Courts have similarly refused to enforce agreements which would override statutory schemes, such as the freedom of information laws, as violative of public policy. *See, e.g., Mulgrew v. Bd. of Educ. of the City Sch. Dist. of the City of N.Y.*, 31 Misc. 3d 296 (Sup. Ct., N.Y. Co. 2011), *aff'd* 87 A.D.3d 506 (1st dep't 2011), leave to appeal denied, 18 N.Y.3d 806 (2012); *Matter of LaRocca v Board of Educ. of Jericho Union Free School Dist*., 220 AD2d 424, 427 (2d Dep't 1995); *Vill. of Brockport v. Calandra*, 191 Misc. 2d 718, 724, (Sup. Ct., N.Y. Co. 2002), *aff'd*, 305 A.D.2d 1030 (1st Dep't 2003). *See also Atkins v. Guest*, 158 Misc 2d 426 (Sup. Ct. N.Y. Co. 1993) (subpoena overrides doctor patient privilege).

New York State has recently enacted various measures to address the negative effects of confidentiality provisions to address the public policy interest in preventing discrimination. For example, General Obligations Law § 5-336 was recently amended to include explicit prohibitions on the enforcement of contractual non-disclosure agreements in relation to certain discrimination claims and, in any event, mandates that such agreement would be "void to the extent that it prohibits or otherwise restricts the complainant from: (i) initiating, testifying, assisting, complying with a subpoena from, or participating in any manner with an investigation conducted by the appropriate local, state, or federal agency."

In a case factually similar to this one, in *State ex rel. Balderas v. ITT Educ. Servs., Inc.*, 421 P.3d 849, 854-55 (N.M. 2018), the court was faced with the question of whether enforcement of a contractual confidentiality clause was void as against public policy where its enforcement would "prevent the State's efforts to investigate and enforce the UPA [New Mexico's Unfair

Practices Act] against one of the parties to the contract." In performing its analysis, the Court concluded that the legislature had vested State with broad authority to protect the public through investigation and enforcement of the UPA and to bring actions based upon non-compliance and thus concluded that it would be contrary to public policy to allow the defendant, ITT, to "shield itself from the State's investigation" through enforcement of the confidentiality clause. *Id. See also Lana C. v. Cameron P.*, 108 P.3d 896, 892 (Alaska 2005) ("Our holding is in keeping with other jurisdictions that have found that settlements or agreements preventing an individual from providing evidence relevant to litigation or investigations are contrary to public policy and therefore unenforceable").

In sum, contractual confidentiality provisions will not be enforced where they violate public policy particularly as it relates to statutory schemes intended to protect the public.

**D. The NRA's Interpretation of the NDA Violates Public Policy by Preventing, Conditioning, and Delaying AMQ's Cooperation with Law Enforcement, Discouraging Cooperation with Law Enforcement, and Violating New York's Statutory Scheme Mandating the Robust Oversight of Not-for-Profit Entities to Prevent Public Frauds and is Thus Unenforceable to Prevent Disclosures to OAG As Part of Its Investigation.**

Not-for-profit and charitable organizations do not have shareholders or owners to whom they must answer. Instead, the Attorney General is the primary law enforcement officer in the State vested with broad discretion to oversee such entities, to enforce compliance with the law, to protect the public trust, to ensure that donations and property held for charitable purposes are being properly used for their intended beneficiaries, and to prevent waste and fraud. *See Schneiderman v Tierney*, 2015 WL 2378983, at *2; *Abrams v. Temple of the Lost Sheep, Inc.*, 148 Misc. 2d at 828–29; *Spitzer v. Lev*, No. 400989/2002, 2003 WL 21649444, at *3 (Sup. Ct., N.Y. Co. 2003). New York State's public policy in ensuring the robust regulation of tax exempt charitable entities

like the NRA is beyond question, as is the OAG's authority to supervise and investigate such entities when misconduct is suspected.

The NRA's baseless assertion that the NDA governs AMQ's compliance with the subpoena should be rejected by this Court. *See Condon v. Inter-Religious Found. for Cmty. Org., Inc.*, 18 Misc. 3d 874, 880–81 (Sup. Ct., N.Y. Co.), aff'd, 51 A.D.3d 465 (2008) (declining to adopt narrow interpretation of executive order which would interfere with government investigation and granting motion to compel compliance with subpoena); *Robbins & Myers, Inc. v. J.M. Huber Corp.*, 2011 WL 3359998, at *2 (W.D.N.Y. Aug. 3, 2011) (granting motion to compel and sanctioning party for interfering with third party subpoena compliance). Its position that it can interpret and enforce the NDA to preclude or condition witness cooperation with the OAG investigation absent the its express permission clearly violates New York law and public policy on a number of grounds.

As noted above, the OAG has a broad statutory and public policy mandate to actively supervise not-for-profit corporations like the NRA to prevent fraud and abuse. For example, the Not for Profit Corporations Law governs all facets of the operation of not-for-profit corporations in New York State. Such entities have discrete and limited purposes and are subject to stringent requirements, particularly relating to the distribution of collected funds. *See, e,g.*, NPCL §§ 202, 204, 205, 715, 716. Article 8 of the Estates Powers and Trusts Law authorizes the Attorney General to supervise the operation and administration of entities, trusts and persons holding and administering charitable assets, like the NRA. Estates Powers and Trusts Law §§ 8-1.4. In furtherance of this obligation, the Attorney General is vested with the authority to "represent the beneficiaries of such [charitable] dispositions," to "enforce the rights of such beneficiaries by appropriate proceedings in the courts," to supervise and to "institute appropriate proceedings . . .

to secure the proper administration of any [charitable] trust." *See generally id.* § 8-1.1 *et. seq*. Article 7-A of the Executive Law authorizes the Attorney General to supervise charitable organizations that solicit in New York. Among other things, Article 7-A requires the Attorney General to monitor such organizations to ensure that, *inter alia*, a charity does not solicit contributions under false pretenses and that it uses the contributions it receives in a manner that is "substantially consistent" with the its stated purposes. *See generally* Executive Law § 172-d.

As an initial matter, the OAG has issued a law enforcement subpoena to AMQ as part of its investigation into possible violations of law by the NRA. The NRA's attempts to use a contractual NDA to preclude AMQ from complying with the subpoena and providing information to the OAG are clearly contrary to that "fundamental" public policy precluding contractual provisions that prohibit disclosure of information to law enforcement and interference in law enforcement investigations. It is respectfully submitted that the OAG is entitled to the relief sought on this ground alone. *See* Points A and B, *supra*. But it is not the only manner in which the provision violates public policy.

The NRA's interpretation of the NDA as limiting the provision of information to law enforcement further violates public policy to the extent that it discourages rather than encourages the reporting of potentially criminal or tortious conduct to law enforcement through the threat of litigation for its breach. *See, e.g.*, *Lachman*, 457 F.2d at 853 ("It is public policy in Oklahoma and everywhere to encourage the disclosure of criminal activity"); *Fomby*, 247 F.3d at 1376 (recognizing public policy in encouraging reporting to law enforcement and discussing "dilemma" and "precarious position" created for a party "bound by contract to silence" and unable to provide information to law enforcement without facing potential action for breach of contract).

Additionally, the OAG is vested with broad authority to oversee and investigate the

conduct of not-for profit entities to prevent fraud, ensure compliance with all relevant laws and advance the public interest. To the extent that the NDA is construed to shield the NRA's conduct from its regulating entity, it would clearly violate the State's public policy, set forth in the Not for Profit Corporations Law, the Estates Powers and Trusts Law and the Executive Law which provide for robust oversight of charitable entities and grant broad OAG regulatory powers.

**E. The NRA's Conclusory, Unsupported and Blanket Assertion of Privilege Does Not Render Its NDA Enforceable in Relation to a Law Enforcement Investigation.**

The NRA, in its public filings and lawsuits, has represented AMQ not as a part of the NRA, but as a for profit corporation and an independent contractor. *See, e.g.,* Exs. 2 (NRA disclosures, pages 8,) and 5, at ¶¶ 2 and 3. On May 3, 2019, OAG served a preservation notice to AMQ. (Exhibit 3.) On June 6, 2019, the OAG met with the NRA and clearly asserted its position that private confidentiality or NDA agreements were not applicable in relation to the OAG's investigation. In the intervening months, the AG and NRA have discussed this issue a number of times. Not once has the NRA provided any authority for the enforceability of the NDA here nor for its attempts to act as a gatekeeper in regard to information relevant to the investigation. While the OAG has endeavored to work with the NRA to address the NRA's concerns and to avoid the need for serial litigations, the matter has reached a head.

In response to a final meet and confer on this issue, on the evening of Friday, September 27, 2019, the NRA sent an inflammatory email which conflates issues of privilege with the enforceability of an NDA in this context. (Connell Aff., Exhibit 2.) The law is clear that the NDA cannot be interpreted or enforced in the manner asserted by the NRA. To the extent that the NRA makes blanket and baseless assertions of privilege as a means to prevent AMQ's direct compliance with the subpoena, these efforts, too, fail.

First, they are irrelevant to the issue of the enforceability of the NDA. Second, a blanket

and conclusory assertion of a privilege or privileges is insufficient to counter or overcome a subpoena. *Golenbock & Barell v. Abrams*, 1984 WL 15691, at *2 (Sup. Ct., N.Y. Co. 1984) (rejecting a broad assertion of attorney client and work product privileges in response to investigatory subpoena and holding that a "blanket assertion" of privilege is generally "unacceptable."). An attorney's conclusory assertions of privilege, rather than competent evidence of the same, are insufficient to assert the existence of a privilege. *Smith v. Ford Found.*, 231 A.D.2d 456 (1st Dep't 1996) (granting motion to compel and rejecting claim of privilege which was supported only by conclusory assertions and no evidentiary foundation); *see also Martino v. Kalbacher*, 225 A.D.2d 862, 863 (3rd Dep't 1996); *Delta Fin. Corp. v. Morrison*, 17 Misc. 3d 1113(A) (Sup. Ct., Nassau Co. 2007). Finally, the NRA has provided no factual basis or legal support for its assertion of privilege in support of the NDA. [3] The burden is always on the party asserting the privilege to prove that it applies. Accordingly courts have rejected claims that outside public relations firms, even those that work closely with a party and allegedly have "particular and unique expertise in the area of public relations," will constitute *de facto* employees of a corporation

[3] In its September 27th email, the NRA cites two federal cases, *Safeco Ins. Co. of Am. v. M.E.S., Inc.*, 289 F.R.D. 41, 46 (E.D.N.Y. 2011), on reconsideration in part, 2013 WL 12362006 (E.D.N.Y. Feb. 12, 2013), and *Export–Import Bank of the United States v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 113 (S.D.N.Y.2005). It asserts, apparently attempting to argue that all employees of AMQ, and AMQ as a whole, are the "functional equivalent of an employee of the NRA, that "[i]t is well settled that an agent who 'assumes the functions and duties of an employee' such that he or she is a 'de facto employee' of the client may be party to privileged communications without effecting waiver." (Connell Aff., Exhibit 2.) But both cases are readily distinguishable and inapposite. Neither involves an investigatory subpoena or state regulation and both involve detailed and narrow requests for an extension of privilege based upon an evidentiary showing. In fact, in *Export-Import Bank*, the court declined to recognize a third party as the "functional equivalent" of an employee for privilege purposes despite a significant showing, and held "[t]he attorney-client privilege should not be expanded without considerable caution because the privilege 'stands in derogation of the public's 'right to every man's evidence.'" *Id.*, at 114, *citing In re Horowitz*, 482 F.2d 72, 81 (2d Cir.1973)(quoting 8 Wigmore, Evidence § 2192 (McNaughton rev.1961), at 70).

for the purposes of shielding allegedly privileged communications. *See, e.g.*, *Universal Standard Inc. v. Target Corp.*, 331 F.R.D. 80, 90 (S.D.N.Y. 2019)(rejecting functional equivalence argument in context of dispute over specific communications included on privilege log); *see also LG Elecs. U.S.A., Inc. v. Whirlpool Corp.*, 661 F. Supp. 2d 958, 960 (N.D. Ill. 2009) (finding that public relations professionals were not the "functional equivalent" of employees for the purposes of the privilege and declining to expand the privilege because it "is in derogation of the search for the truth" so "must be strictly confined.")(internal citations and quotations omitted).

Given the above, it is respectfully submitted that the NDA cannot be interpreted, enforced or invoked to prevent or condition AMQ's compliance with the OAG's subpoena. The OAG respectfully requests an Order directing AMQ 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 NRA Services Agreement.

## CONCLUSION

For all the foregoing reasons, OAG respectfully requests that the Court issue an order: (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.

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