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

Index No. 451825/2019
Hon. Melissa Anne Crane

Petitioners,

-against-

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

Respondents.

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REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE ATTORNEY GENERAL'S MOTION TO COMPEL RESPONDENT ACKERMAN McQUEEN TO COMPLY WITH A SUBPOENA.

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New York State Attorney General Letitia James, on behalf of the People of the State of New York, submits this reply memorandum of law, together with her previously filed papers (NYCEF # 1-21) and all proceedings had herein, in further 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

The Office of the Attorney General ("OAG") has broad oversight authority over the National Rifle Association of America, Inc. ("NRA"), as a regulated charity registered in New York. Pursuant to its regulatory and law enforcement powers, the OAG is conducting an investigation of potential violations of law by the NRA. As part of that investigation, has issued subpoenas to third parties, including a subpoena dated July 8, 2019 to respondent Ackerman McQueen ("AMQ") (the "Subpoena"). The OAG is entitled to enforce compliance with those subpoenas.

Here, the NRA is attempting to interfere with the OAG's enforcement function by converting privately-contracted non-disclosure agreements ("NDAs") it requires from its third party vendors, including AMQ, into a set of virtual eyes and ears in OAG's offices as the OAG conducts its investigation. Specifically, the NRA claims that under its NDA with AMQ, AMQ must first show to the NRA any documents it intends to produce, providing the NRA with advance intelligence into OAG's investigative evidence-collection process and obtain the NRA's approval to produce. Despite the OAG's express advisements that any such contractual requirement is void as against public policy in this context, the NRA has continued to threaten litigation against AMQ if it does not follow this procedure, brazenly seeking to chill, control, and monitor any cooperation by AMQ (and the NRA's many other similarly-situated vendors) as witnesses in an authorized

regulatory investigation of the NRA. Troublingly, the NRA's tactics have so far succeeded, and AMQ has not and will not produce information to the OAG in response to the subpoena without the NRA's approval, absent a court order clarifying the applicability of the NDA.

Permitting charities like the NRA to shield their conduct through the use of NDAs would clearly frustrate OAG's regulation and oversight of such entities. The NRA, as a regulated not-for-profit, cannot dictate the terms of non-party compliance with regulatory oversight of its activities, a dangerous notion that violates well-established law. Permitting charities like the NRA to shield their conduct through the use of NDAs would clearly frustrate OAG's regulation and oversight of charities. As the OAG established, *see* OAG Memorandum of Law, NYCEF # 19 ("OAG Mem.") at pp. 14-24, the NDA should be declared void as against public policy, and for that reason alone, the OAG is entitled to prevail in this proceeding and to the order it seeks.

To the extent that the NRA asserts general or blanket claims that AMQ's production of responsive information may contain attorney-client or First Amendment privileged information, such claims are improperly asserted here. First, the application of the NDA is separate from and unnecessary for the NRA's protection of allegedly privileged documents. Second, the law provides a means for the NRA to protect asserted privileges, by a motion for an order quashing or modifying the subpoena or for a protective order. It did none of these things and its claims of privilege should be disregarded on this basis.

But even if the Court does substantively consider the NRA's privilege arguments, they should be rejected anyway. The NRA bears the burden to show that such privileges are applicable and, as set forth below, it has woefully failed to do so. The NRA has simply not come forward with the necessary showing that third party AMQ has possession of privileged information; that even if it did, AMQ's counsels' privilege review, and the ethical obligations of OAG attorneys,

would not be sufficient to protect such privilege, or that the sort of speculative and unsupported assertions of privilege the NRA has proffered here should give it the right to enforce the NDA or pre-review subpoena compliance in this context.

In light of the foregoing, the OAG is entitled to carry out its law enforcement and regulatory oversight of the NRA to ensure that the NRA and its officers are not engaging in waste of donated assets, fraud, self-dealing, related party transactions and other conduct which would violate the law and the trust of the public which donates to it, without further baseless efforts by the NRA to intrude on this process.

ARGUMENT

Notably absent from the NRA's opposition papers is any statement contesting the simple fact that during final meet and confer discussions and even now, the NRA maintains the position that its NDA may be asserted as against a law enforcement subpoena to control compliance with such subpoena. *See* Affirmation of Sarah Rogers, NYCEF # 33 ("Rogers Aff."), Ex. C. This cannot be the case. The Court should not permit the NRA to use non-disclosure agreements it required of third party vendors to shield itself from law enforcement review of potential violations of New York's Not-for-Profit Corporations Law, Estates, Powers and Trusts Law, Executive Law and well-stated public policy, or to insert itself into the OAG's investigation. OAG Mem., pp. 12-24. Further, the NRA's assertion of attorney-client and First Amendment privileges are both procedurally and substantively infirm.

II. CONTRARY TO THE NRA'S ASSERTION, THE OAG HAS ALLEGED NONCOMPLIANCE WITH ITS SUBPOENA DUE TO THE NRA'S PERSISTENT THREATS TO ENFORCE ITS UNENFORCEABLE NDA IN REGARD TO A LAW ENFORCEMENT SUBPOENA.

The NRA's first argument, that there is no need for a motion to compel because AMQ is willing to comply with the subpoena, is disingenuous. The law is clear that the NRA's NDA is

not enforceable in connection with the OAG Subpoena. *See* OAG Mem., pp. 12-24. The NRA's opposition barely addresses this point, attempting to distinguish only two of the more than two dozen cases and authorities relied upon by the State, and failing even in that limited effort. Specifically, the NRA argues that *Cosby v. Am. Media, Inc.*, 197 F. Supp. 3d 735, 742 (E.D. Pa. 2016) and *Fomby-Denson v. Dep't of Army*, 247 F.3d 1366 (Fed. Cir. 2001), are inapplicable because the NRA has not sued AMQ for reporting a crime.

But both cases plainly stand for the uniform prohibition against private contractual interference with law-enforcement and regulatory investigations, regardless of whether the illegal conduct at issue is being addressed with civil or criminal investigative processes. As already set forth in the OAG Mem., pp. 12-24, the NRA simply cannot come to this Court (or any other) and attempt to enforce the NDA in regard to any aspect of AMQ's past or prospective compliance, even voluntary compliance, with the OAG's investigation. And yet the NRA still insists that the NDA is enforceable, that it may use the NDA to control AMQ's subpoena compliance, and that the NDA precludes AMQ's production of responsive material without NRA's notice and approval of such production.

In light of the NRA's threats to enforce its NDA, AMQ cannot or will not comply with the subpoena without first complying with the NDA and allowing the NRA to review and approve productions. Allowing not-for-profit entities like the NRA to shield their conduct through the use of NDAs would clearly frustrate OAG in carrying out its regulatory and law enforcement duties.

The NRA cites only a single case in support of its argument that the petition here is defective because the OAG has not alleged non-compliance with its subpoena: *Maragos v. Town of Hempstead Indus. Dev. Agency*, 174 A.D.3d 611 (2d Dep't 2019). But that case is entirely inapposite. There, the court held that the local agency issuing the subpoena lacked the legal

authority to do so. That is not an issue here. The court also held that a motion to compel could not lie where the recipient establishes that it is "not in possession of any responsive records." That is not the situation here. AMQ indisputably has responsive information. The issue is whether AMQ can comply with the subpoena and produce such information directly to the OAG or if it must first seek and obtain NRA approval for the same.

Indeed, the NRA does not address the OAG's overarching, and dispositive, demonstration that private parties cannot contract themselves into advantages over regulatory investigators in such a way, as a matter of public policy and a matter of law. Instead, the NRA's argument appears to boil down to a "workaround" constructed from strands of agency theory. See NRA's memorandum of Law, NYCEF # 15 ("NRA Mem."), pp. 15-17. This argument is without merit. As an initial matter, the Services Agreement specifically states that AMQ is the non-exclusive source of the identified services for the NRA and provides for tremendous flexibility in when, how, and what services AMQ renders and how it will be reimbursed for the same. This would be inconsistent with AMQ being deemed an "employee" or agent of the NRA. *See, e.g., Quik Park W. 57, LLC v. Bridgewater Operating Corp.*, 148 A.D.3d 444, 445 (1st Dep't 2017)—a case relied on by the NRA in its brief. Additionally, the NRA has not and cannot distinguish those cases, cited by the OAG, *see* OAG Mem., pp. 24-25, demonstrating that outside public relations firms, even those that work closely with a party, are not agents or *de facto* employees of a corporation for the purposes of shielding allegedly privileged communications. Essentially, the NRA is saying that the NDA is enforceable but unnecessary because even without it, AMQ would be bound as a matter of fiduciary duty to allow the NRA to preview and approve subpoena compliance. Unsurprisingly, the NRA cites no authority, from any jurisdiction, to support that proposition. This may be because in the handful of cases to even remotely implicate such a notion, courts have

swiftly rejected it. *See, e.g.*, *United States v. Cancer Treatment Ctrs. of Am.*, 350 F. Supp. 2d 765 (N.D. Ill. 2004) ("The public interest in the production of those records trumps any fiduciary obligation or any confidentiality agreement.").

To the extent that the NRA argues that it is "willing to stipulate" to limit its right to review and approve under the NDA or does not itself believe that its review is impeding the investigation, such arguments do not resolve this motion. The Subpoena here directed AMQ to produce responsive information to the New York State Attorney General's Office. *See* Petition, Ex. 8, NYCEF # 9, p. 1. The NRA argues – again without legal authority of any kind – that the OAG cannot direct compliance with the Subpoena directly to the OAG and without obtaining NRA approval pursuant to an unenforceable NDA. NRA Mem., p. 4. It asserts that it is entitled to notice of subpoenas and to pre-review documents prior to production because, in its view, there is little risk posed by such conduct. *Id.*, p. 4 and fn. 10.

But the subject of a law enforcement investigation is not entitled to notice of issuance of subpoenas to third parties, *S.E.C. v. Jerry T. O'Brien, Inc*., 467 U.S. 735 (1984), and the NRA's assurances that it can gain no untoward advantage through the process it is insisting on cannot be credited. Even when a subpoena seeks information that was communicated to a third party with promises of confidentiality, the target has no right to advance warning that that information is the subject of an investigation. *See Id.*, at 743 ("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.").

And as the Supreme Court has explained, the purpose and importance of maintaining the confidentiality of law enforcement investigations, like OAG's investigation of the NRA here, is manifest. Specifically, notice of third party subpoenas and the information garnered in the

investigation would "substantially increase the ability of persons who have something to hide to impede legitimate investigations," would allow the subject of an investigation who is given notice of every subpoena issued to third parties the ability "to discourage the recipients from complying, and then further delay disclosure of damaging information by seeking intervention in all enforcement actions," and, "[m]ore seriously," would give the subject or potential subjects of an investigation an understanding of the progress of the inquiry, allowing an unscrupulous subject to take steps to destroy evidence or influence witnesses. *Id.*, 467 U.S. at 750.

The NRA argues that allowing it to demand the right to pre-review subpoena compliance poses no risk because it is unlikely to collude with AMQ, and that it is aware of the investigation and is thus unlikely to destroy relevant evidence. NRA Mem., p. 4 and fn. 10, *citing Nat'l Abortion Fed'n, NAF v. Ctr. for Med. Progress*, 685 F. App'x 623, 627 (9th Cir. 2017), *cert. denied sub nom. Daleiden v. Nat'l Abortion Fed'n*, 138 S. Ct. 1438 (2018), and *cert. denied sub nom. Newman v. Nat'l Abortion Fed'n*, 138 S. Ct. 1439 (2018). The NRA's argument is legally and factually without merit. It over-reads the *National Abortion Federation* case, which involved a narrow investigation over a single set of materials, and does not stand for the broad proposition that the involvement of a target in reviewing a third party's production poses no risk when the target knows of an investigation. Here, the NRA, its officers and directors are not entitled to a first look at the materials the OAG receives, and still possesses responsive information which could be lost. For example, the fact that the NRA cannot destroy AMQ's documents would not prevent the NRA from destroying evidence separately in its possession that it recognizes as inculpatory only after being prompted by the exposure of an OAG investigative avenue in the course of AMQ's subpoena compliance. As such. the NRA's insertion of itself into the investigatory process carries with it a

very real risk of impeding and harming the investigation, as the Supreme Court recognized in *S.E.C. v. Jerry T. O'Brien, Inc.*[1]

In light of the foregoing, a motion to compel is appropriate. *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). The NRA's continued assertion that the NDA governs AMQ's compliance with the subpoena should be rejected by this Court. Because the law is clear that the NRA's NDA is utterly invalid in these circumstances, OAG is entitled to an order determining that the NDA is unenforceable as volatile 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.

II. THE NRA'S ASSERTION OF PRIVILEGE IS BOTH PROCEDURALLY DEFECTIVE AND SUBSTANTIVELY BASELESS.

The unenforceable NDA is not the proper vehicle to vindicate any alleged privileges and, in any event, the NRA's general and blanket assertions of the same cannot suffice to overcome a subpoena.

[1] The NRA alleges that allowing it to pre-review documents for privilege presents no problem as that has been the practice so far in this investigation and there has been no delay or interference. But this is not accurate. For example, pursuant to an agreement reached initially to avoid litigation, reviewed some materials produced by independent auditor RSM. But with respect to NRA review of its subpoena responses, RSM flatly rejected the NRA's demand to review the entire production because permitting it to do so would compromise auditor independence. Further, the NRA's review was also narrowly limited to potential work product privilege (not attorney-client privilege), because the NRA conceded that no attorney-client privilege could be maintained once a document was turned over to auditors. And even this narrow review caused delay in the RSM production. Additionally, the NRA simply has not reviewed all subpoenaed materials for privilege.

A. The NRA's Assertion of Privilege, in the Absence of an Application to Quash or Modify the Subpoena, is Procedurally Defective.

Pursuant to CPLR 2304, a party objecting a subpoena in whole or in part must move to "quash, fix conditions or modify" the subpoena. As the Court of Appeals has held, where one seeks to challenge a subpoena, "there is an adequate remedy at law by motion to quash, vacate or modify the subpoenas. That remedy is not only adequate; we have said that it was 'the proper remedy.'" *Carlisle v. Bennett*, 268 N.Y. 212, 218 (1935); *see also D. Friedman & Co. v. Cuban Canadian Sugar Co., Inc.*, 227 N.Y.S.2d 162 (City Ct., N.Y. Co. 1962) (holding that failure to reserve the right to move to modify or otherwise attack a subpoena constituted an estoppel and waiver of the right).

The correct procedure to pursue when there is a legitimate concern that privileged information may be disclosed is to move to quash or modify a subpoena or for a protective order, not assertion of a legally unenforceable NDA. The NRA has failed to take any of the required affirmative steps to protect its asserted privileges and so the bulk of its opposition should be disregarded on this ground alone. To the extent that the NRA believed that its NDA, or concerns about privilege, should control AMQ's subpoena compliance, it should have moved to quash or modify the Subpoena. It failed to do so and its claims of privilege in its opposition should thus be rejected.

B. The NRA's Assertion of Privilege is Unavailing.

Even had the NRA followed proper procedure in regard to its conclusory claims of privilege, such claims fail substantively, and should still be disregarded.

As an initial matter, the NRA fails to cite a single authority for the argument that its invocation of privilege renders its NDA enforceable in relation to a law enforcement investigation. There simply is no authority for such a proposition. The NDA must be read and interpreted as

consistent with New York State law. 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. *See* OAG Mem., pp. 3, 5, 18-21. Accordingly, the NRA's continued assertion that the NDA governs AMQ's compliance with the subpoena should be rejected by this Court. *See Condon,* 18 Misc. 3d at 880–81; *Robbins & Myers, Inc.*, 2011 WL 3359998, at *2.

Further, apart from the NDA, the NRA's claims of privilege fail substantively. The attorney-client privilege is narrowly confined under New York law and the burden of proving each element of the privilege rests upon the party asserting it. *See People v. Mitchell*, 58 N.Y.2d 368, 373 (1983); *Priest v. Hennessy*, 51 N.Y.2d 62, 70 (1980); *Matter of Grand Jury Subpoena Served Upon Bekins Record Storage*, 62 N.Y.2d 324, 327 (1984); *Matter of Confidential Investigation*, 9 A.D.3d 491 (2d Dep't 2004). "In that the privilege obstructs the truth-finding process and its scope is limited to that which is necessary to achieve its purpose, the need to apply it cautiously and narrowly is heightened in the case of corporate staff counsel, lest the mere participation of an attorney be used to seal off disclosure." *Rossi v. Blue Cross*, 73 N.Y.2d 588, 593 (1989), *citing Priest*, 51 N.Y.2d at 68. In order to meet its burden, a general or "blanket" claim of privilege is insufficient; the party asserting privilege must demonstrate the right to withhold the information being sought. *Big Apple Concrete Corp. v. Abrams*, 103 A.D.2d 609, 613 (1st Dep't 1984).

Notwithstanding this clear precedent, in efforts to meet and confer, the NRA mentioned attorney-client privilege but was not even able to identify any privileged materials responsive to any demand in the Subpoena.[2] Now, in response to a motion to compel, the NRA attempts to

[2] The parties disagree with regard to the substance of their multiple meet and confer discussions but there is no question

identify some bases for claiming privilege. But despite the passage of months since service of the Subpoena, multiple meet and confer discussions and a motion to compel, the NRA's assertions of privilege are still tissue-thin. John Frazer, the General Counsel for the NRA since 2015, indicates that he believes that six "communications" he identifies might be responsive to the OAG Subpoena regarding "related party transactions."[3] *See* Affidavit of John Frazer, NYCEF # 26, pp. 3-4. Frazer alleges that he gave legal advice to AMQ employees, although he does not identify all of the recipients of the six communications. While Frazer asserts that he would not have shared "the NRA's confidential information (let alone legal advice) with [AMQ] absent strong contractual and common-law assurances of confidentiality," he does not assert any non-conclusory basis to believe that these communications are responsive to the Subpoena or why his communications with non-clients are privileged. Nor is such a basis supplied in the NRA's memorandum of law.

To bolster the NRA's general assertion of privilege, Frazer cites to instances where AMQ and the NRA shared "common legal interests" (Id., ¶ 8) but fails to identify, in his affidavit or in the NRA's memorandum of law, (1) any authority establishing that such asserted common legal

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that the NRA, with no supporting authority, continues to demand that its NDA applies to third party compliance with a law enforcement subpoena. In the end, as demonstrated by counsel's self-serving email, without citation to a authority or to the factual basis for the application of a privilege, the NRA reserves to itself the right to know who the OAG subpoenas during the investigation, what documents the subpoenaed party proposes to produce the OAG, and the right to determine for itself whether its involvement in the review of subpoena compliance is intrusive to the investigation such that, in its interpretation, the NRA's NDA then would not be enforceable. Affirmation of Sarah Rogers, NYCEF # 33, Ex. C; Connell Aff., ¶¶ 12-19. It proposes, essentially, to police itself. In regard to the many problems with such process, it not just places the NRA in a position to monitor the investigation but raises the very real specter of whistleblower retaliation by the NRA. *See, e.g.*, https://onlygunsandmoney.com/2019/07/10/the-purge-continues-part-ii.html; http://frontsightpress.com/2019/07/v-for-vendetta/.

[3] Under New York law, "related party transactions" are transactions where a not-for-profit corporation, its officers, directors or other "key" people (or their family members) cause the corporation to enter into transactions for their own benefit. New York law requires that such transactions be approved by the board, following disclosure of the related party's interests and only upon a determination that the transactions are fair, reasonable, and in the corporation's best interest. The Legislature strengthened the law regulating related party transactions in recent years because of the serious risk that those charged with overseeing an organization's finances will abuse that responsibility. *See* Not for Profit Corporation Law §§ 102(a)(24) and (a)(23); Not for Profit Corporation Law § 715, Estates Powers and Trusts Law § 8-1.9.

interests would render any materials responsive to the Subpoena privileged; (2) any basis to believe the materials identified are responsive to a particular demand in the Subpoena; (3) why AMQ's attorneys' privilege review would not be sufficient in such instance[4]; and (4) why the same was not asserted in an appropriate motion to quash or modify the Subpoena or for a protective order. Finally, Frazer asserts vaguely that AMQ "operated several websites where NRA members were invited to input personal information. To the extent that [AMQ] may have maintained records of inputs received, I would have serious concerns…". Id., ¶ 9. He does not provide the number, name or years such websites may have operated, whether only members could enter information, whether such information is responsive to any demand in the Subpoena, whether such information has been maintained by AMQ or a basis for believing such information is privileged.[5]

[4] Frazer avers that he identified information that AMQ would have produced but which the NRA deemed privileged *in another litigation*. He points to the NRA privilege log produced in that other litigation, which identifies only 20 documents out of an untold number of pages produced, which were allegedly privileged, only 3 of which were withheld while the rest were partially redacted. OAG does not concede that such documents in the other litigation are in fact privileged. In fact, the privilege log counsel referred to, Frazer Aff., Ex. E, fails to comply with even the most fundamental requirements of such a log as it does not clearly identify the author, recipient, subject matter and privilege asserted for each allegedly privileged document. Nevertheless, such citation does not aid the NRA in its assertion of privilege here. In this case, according to the NRA, AMQ owes a fiduciary duty to it not to release privileged information. Respondent Ackerman McQueen is represented by two established firms, Carter Ledyard & Milburn LLP and McDermott Will & Emery LLP who are capable of performing a privilege review. In the event that these counsel "missed" a privileged document, Assistant Attorneys General are bound by their ethical duties as attorneys with regard to privileged matters erroneously disclosed. The NRA has simply failed to provide any reason to believe that standard privilege review will not be sufficient.

[5] The NRA complains about the "secrecy" of the OAG investigation. For example, the NRA asserts that the OAG has wrongfully forbidden AMQ and other third parties from revealing the existence of a subpoena from the NRA, *see, e.g.* Frazer Aff., ¶ 15. This is this is simply false. First, the NRA concedes, as it must, that investigators have no obligation to inform the subject of an investigation of third party subpoenas. NRA Mem., p. 3. But even so, the OAG does not forbid revelation of such information and, indeed, AMQ informed the NRA of the subpoena here. At the same time, OAG routinely determines, in its discretion, to request that subpoena recipients maintain the subpoenas and information sought as confidential. For example, the NRA cites to the Frazer Aff., Ex. F and the Verified Petition, Exhibit 8, as evidencing the OAG's "instruction" or "insistence" that subpoena recipients not disclose subpoenas. *See* NRA Mem., fn. 4 and 49. But these citations don't prove that the OAG issued such an order. In what is hopefully an inadvertent error or clerical oversight, the NRA quotes from the AMQ Subpoena (which includes form language identical to that served upon the NRA's independent auditor, RSM) as "instructing AMQ 'not to disclose the existence of this subpoena, its contents, or any subsequent communications with the Office of the Attorney General,'" *see* NRA Mem., fn. 49, but omitted the full sentence, leaving off the crucial phrase from the Subpoena "You are requested not to disclose the existence of this subpoena, its contents, or any subsequent communications with the Office of the Attorney General, while the investigation is pending…." *See* Petition, Ex. 8, p. 1. In any event, RSM and AMQ both notified the NRA of the Subpoena. Yet, as discussed, *supra* at pp. 6-8, the reasons for maintaining the confidentiality

The NRA's assertion of attorney-client privilege is perfunctory and not compliant with its legal burden. The NRA asserts the truism that public policy promotes the free exchange of information with an attorney, for which assertion it cites one case, *Prizel v. Karelson, Lawrence & Nathan*, 74 F.R.D. 134, 138 (S.D.N.Y. 1977). *See* NRA Mem., p. 20. This case does not stand for the proposition that counsel's communications with third parties are privileged or that privilege cannot be waived. The NRA fails to cite a single case which would support the argument that the blanket, conclusory and speculative assertions of privilege are sufficient to justify the application of the NDA as it relates to a subpoena compliance, or to entitle it to pre-review and approve the production of third party subpoena compliance. In fact, New York State law is quite different, as the NRA well knows.

The NRA's general, blanket assertion of a privilege relating to donor information fares no better. The NRA claims, in a conclusory fashion, a First Amendment privilege connected to donor information. *See* NRA Mem., p. 20. The affidavit Tyler Schropp, NYCEF # 39 ("Schropp Aff."), supplied by the NRA, fails to make the necessary showings to establish that NRA interference is needed to protect a cognizable privilege. Schropp makes only general and non-specific allegations. He cites to unspecified donor events that AMQ allegedly organized, apparently speculating that (1) AMQ kept any donor information it had if indeed it had any; (2) such information is responsive to the Subpoena; (3) that such information is privileged regardless of who possesses it; (4) that such information would be made public or used for any purpose other than to ensure the NRA's compliance with New York law; and (5) that such information can only be protected via enforcement of the NDA. Shropp references "compelled bulk disclosure," as well as other unsupported allegations, as potentially frightening NRA donors. But, again, he fails to make any

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of an ongoing law enforcement investigation are a matter of common sense firmly established and validated by Supreme Court precedent.

showing that such a disclosure will occur or will have the effect he fears and fails to take FOIL protections from publication into account.

In addition to failing to make a factual showing, the NRA fails to provide legal support for the proposition that AMQ's compliance with the Subpoena would violate the First Amendment. The NRA's reliance on *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc*., 547 U.S. 47, 69 (2006), is misplaced as the case is factually inapposite and, in any event, the Supreme Court there found that the challenged law did not violate the First Amendment right of expressive association. *Rumsfeld*'s citation to *Brown v. Socialist Workers '74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101-102 (1982) is also unavailing as, unlike the situation in *Socialist Workers*, the OAG is not seeking to enforce a law mandating political candidates of a minority party to publically disclose all contributors and expenditures.

The other case cited by the NRA is *NAACP v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958). But that case, too, is readily distinguishable. There, the NAACP challenged a law and state action which had no legitimate government purpose but mandated public identification of all rank-and-file members of a group in the face of an "uncontroverted showing" that such members had faced to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." 357 U.S. at 462-63. In *Citizens United v. Schneiderman*, 882 F.3d 374, 385 (2d Cir. 2018), the Second Circuit considered and reject a similar claim of First Amendment privilege and reliance upon the *NAACP* case as the NRA asserts here. There, the Court held that a "bare assertion that the Attorney General has a vendetta against Appellants … is a far cry from the clear and present danger that white supremacist vigilantes and their abettors in the Alabama state government presented to members of the NAACP in the 1950s." *Id*. Further, the Second Circuit held that "unlike the Court in NAACP, we have already concluded that the Attorney

General's [not-for-profit] regulations are substantially related to the important interest in keeping non-profit organizations honest. .... We have no problem concluding that the regulations in front of us do not impermissibly chill the speech of Appellants or their donors." *Id.*

Here, the NRA speculates that *some* donor information *may* be revealed to the OAG, not the public, during the OAG's investigation and that that may affect unknown donors in unknown ways. It has failed to make the required showing that the "alleged harms are sufficiently likely and of a sufficient magnitude that they outweigh the governmental interest in policing charities for fraud and self-dealing." *Id.*, 882 F.3d at 385. It has not come forward with any evidence that its members will be harmed by revealing donor information to the OAG as a regulatory body to the extent that such information pertains to related party transactions. And, given even just publicly known information, there is a basis to investigate the possibility that the NRA and/or certain officers and directors engaged in waste, self-dealing and related-party transactions.[6] In short, the NRA's general and speculative assertion of a First Amendment privilege is insufficient to meet its burden for the application of a privilege.

Given the above, it is respectfully submitted that the NDA of the NRA's Services Agreement 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

[6] Questions about the NRA's governance have been the subject of substantial press coverage. *See, e.g.*, https://www.newyorker.com/news/news-desk/secrecy-self-dealing-and-greed-at-the-nra; https://www.wsj.com/articles/leaked-letters-reveal-details-of-nra-chiefs-alleged-spending-11557597601; https://www.newyorker.com/news/news-desk/the-nras-longtime-cfo-was-caught-embezzling-before-joining-the-organization-former-colleagues-say; https://www.newyorker.com/news/news-desk/an-internal-memo-raises-new-questions-about-self-dealing-at-the-nra; https://www.cnn.com/2019/06/10/politics/national-rifle-association-board-members-paid/index.html.

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.

Dated: New York, New York
October 30, 2019

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