VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA, **Plaintiff,** **v.** **ACKERMAN MCQUEEN, INC.** **And** **MERCURY GROUP, INC.** **Defendants.**	**Case No. CL19001757, CL19002067, CL19002886**

PLAINTIFF'S CONSOLIDATED MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S DEMURRERS TO DEFENDANTS' AMENDED AND SUPPLEMENTAL COUNTERCLAIM

NATIONAL RIFLE ASSOCIATION OF AMERICA

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Plaintiff National Rifle Association (the "NRA") submits this consolidated memorandum of law in support of its demurrer to Defendants' Amended and Supplemental Counterclaim filed on October 8, 2019, in CL19001757 and CL19002067 and Defendants' Counterclaim filed on October 2, 2019 in CL19002886 (collectively, the "Actions"), as follows:

I.

INTRODUCTION

Defendants Ackerman McQueen, Inc. and Mercury Group, Inc. (together, "AMc" or "Defendants") filed an Amended and Supplemental Counterclaim ("Amended Counterclaim") against Plaintiff NRA, including Count II for Breach of Contract (breach of the implied duty of good faith and fair dealing) and Count III for Abuse of Process. Count II and Count III of AMc's Amended Counterclaim fail to state a claim upon which relief can be granted.

As demonstrated below, AMc's Amended Counterclaim for breach of the implied duty of good faith and fair dealing fails as a matter of law because the claims are nothing more than an improper attempt to have the Court rewrite the parties' written agreement. Based on established precedent, AMc may not now use the implied duty of good faith and fair dealing to create contractual terms that simply do not exist.

AMc's Counterclaim for abuse of process also fails as a matter of law. AMc erroneously contends that the NRA's initiation of the Actions against AMc, a motion to amend the complaint, a motion to stay and for certain discovery regarding the NRA's stolen property, and the issuance of certain subpoenas constitute abuse of process. As a matter of law, the filing of an initial complaint commencing an action cannot be an abuse of process. Further, Defendants' claims are barred by the litigation privilege because they are based on communications made in the course of judicial proceedings.

The NRA, therefore, respectfully requests that its demurrers be sustained and Counts II and III of the Amended Counterclaim be dismissed with prejudice.

II.

APPLICABLE LEGAL STANDARDS

"A demurrer tests the legal sufficiency of the facts alleged in pleadings" and "will be sustained when the pleading it challenges lacks sufficient definiteness to enable the court to find the existence of a legal basis for its judgment." *Mark Five Constr., Inc. ex. rel. Am. Econ. Ins. Co. v. Castle Contractors*, 274 Va. 283, 287-88, 645 S.E.2d 475 (Va. 2007). "Despite the liberality of presentation which the court will indulge, the [pleading] must state a cause of action." *Hubbard v. Dresser, Inc.*, 271 Va. 117, 122, 624 S.E.2d 1 (Va. 2006).

Defendants' Amended Counterclaim for Breach of Contract (Count II) and Abuse of Process (Count III) do not "allege sufficient facts to constitute a foundation in law for the judgment sought" and must therefore be dismissed with prejudice. *Id.*

III.

ARGUMENT

A. Defendants' Claims For Breach Of The Implied Duty Of Good Faith And Fair Dealing Must Be Dismissed With Prejudice.

In the Amended Counterclaim, Defendants purport to assert a claim for "Breach of the Implied Covenant of Good Faith and Fair Dealing." *See* Am. Counterclaim at ¶¶ 94 to 109, pp. 18 to 20. This claim must be dismissed because it has no legal or factual merit.

1. The demurrers should be sustained because the implied duty applies only to contracts governed by the UCC and the UCC does not apply to the Services Agreement.

In their Amended Counterclaim, Defendants cite Section 8.1A-304 of the Virginia Code for the proposition that every contract under Virginia law contains an implied duty of good faith

and fair dealing. Section 8.1A-304 is the Virginia version of Section 1-304 of the Uniform Commercial Code (the "UCC"). Section 8.1A-304 is inapplicable here because the UCC does not apply to a contract whose predominate purpose is the provision of services. *See, e.g., Pain Ctr. of SE Ind., LLC v. Origin Healthcare Solutions LLC*, 893 F.3d 454, 459-60 (7th Cir. 2003). Defendants have attached a copy of the parties' Services Agreement to their Amended Counterclaim. The predominate purpose of the Services Agreement is the provision of services; thus, the UCC has no application here.

In addition, several Virginia courts have determined that an implied duty of good faith and fair dealing does not exist under Virginia law other than in (1) contracts governed by the UCC an (2) certain insurance contracts gives the special relationship between an insured and its insurer. *See So. Bank & Trust Co. v. Woodhouse*, Nos. CL15009939-00, CL15009939-01, 92 Va. Cir. 402 (Va. Cir. Ct. Norfolk May 26, 2016) ("The Court concludes that Virginia does not recognize an independent action for breach of the implied covenant in cases that are not governed by the UCC, including this one") (citing multiple Virginia Circuit Court decisions holding that a separate action for breach of the implied duty does not exist in Virginia); *see also Harrison v. U.S. Bank Nat'l Ass'n*, No. 3:12-CV-00224, 2012 WL 2366163, at *2 (E.D. Va. June 20, 2012) ("Virginia . . . does not recognize an implied duty of good faith and fair dealing outside those governed by the Uniform Commercial Code.") (and decisions cited therein); *Burke v. Nationstar Mortgage, LLC*, Civil Action No. 3:14-CV-337, 2015 WL 4571313, at *6-8 (E.D. Va. July 8, 2013) (same); *Charles E. Brauer Co. v. NationsBank of Va., N.A.*, 251 Va. 28, 33, 466 S.E.2d 382, 385 (Va. 1996) (finding no independent tort cause of action for breach of implied duty).[1]

[1] Certain other courts disagree with these authorities. *See, e.g., Morris v. Wilmington Savings Fund Society*, 360 F.Supp.2d 363, 369-70 n. 6 (W.D. Va. 2018); *Stoney Glen, LLC v. Southern Bank and Trust Co.*, 944 F.Supp.2d

At least one court has noted that "Virginia law on the implied duty of good faith and fair dealing is not exceptionally clear." *Stoney Glenn, LLC v. S. Bank and Trust Co.*, 944 F.Supp.2d 460, 465 n. 6 (E.D. Va. 2013). The NRA has not uncovered any decision of the Virginia Supreme Court adopting an implied duty of good faith and fair dealing outside the context of certain insurance contracts and contracts governed by the UCC.[2] A number of courts in Virginia have concluded that there is no implied duty of good faith and fair dealing in employment contracts. *See Devnew v. Brown & Brown, Inc.*, 396 F.Supp.2d 665, 671 (E.D. Va. 2005); *Evans v. Fairfax County Pub. Sch. Bd.*, Case No. CL-2017-3884, 97 Va. Cir. 192, 2017 WL 10900175, at *5-6 (Va. Cir. Ct. Nov. 21, 2017) (same).

In addition, at least one court which has rejected the implied duty relied on language from the Virginia Supreme Court that "when parties to a contract create valid and binding rights, an implied covenant of good faith and fair dealing is inapplicable to those rights." *Ward's Equip., Inc. v. New Holland N. Am., Inc.*, 254 Va. 379-385, 493 S.E.2d 516, 530 (Va. 1997). *See also Evans v. Fairfax County Pub. Sch. Bd.*, Case No. CL-2017-3884, 97 Va. Cir. 192, 2017 WL 10900175, at *5-6 (Va. Cir. Ct. Nov. 21, 2017) (same). Defendants' allegations concerning breaches of an implied duty are inconsistent with the NRA's valid and binding rights under the parties' contract.[3] Based on all these authorities, the implied duty of good faith has no application here.

460, 465-67 (E.D. Va. 2013), and other decisions, including decisions from the United States Court of Appeals for the Fourth Circuit.

[2] *See Levine v. Selective Ins. Co. of Am.*, 250 Va. 282, 286-87, 462 S.E.2d 81, 84 (Va. 1995) (insurance contract); *see also TIG Ins. Co. v. Alfa Laval, Inc.*, Civil Action No. 3:07CV683, 2008 WL 639894, at *3 (E.D. Va. March 5, 2008) (insurance contract).

[3] The decision of the Virginia Supreme Court in the *Brauer* case is inapposite because it was decided under the UCC. *See Charles E. Brauer Co. v. NationsBank of Virginia*, 251 Va. 28, 466 S.E.2d 382 (Va. 1996).

For all these reasons, the NRA's demurrer as to Count II of the Amended Counterclaim should be granted and those claims dismissed with prejudice.

2. AMc's implied duty claim should be dismissed because AMc does not allege an essential element of an implied duty claim.

Under Virginia law, the "implied covenant of good faith and fair dealing 'simply bars a party from 'acting in such a manner as to prevent the other party from performing his obligations under the contract.'" *Middle E. Broad. Networks, Inc. v. MBI Global, LLC*, No. 1:14-cv-01207-6B2-IDD, 2015 WL 4571178, at *5 (E.D. Va. July 28, 2015) (quoting *DeVera v. Bank of Am., N.A.*, No. 2:12-cv-17, 2012 WL 2400627, at *3 (E.D. Va. June 25, 2012)). In Count II of their Amended Counterclaim, Defendants do not allege that the NRA has prevented them from performing their obligations under the Services Agreement. Thus, the NRA's demurrer as to Count II of the Amended Counterclaim should be sustained.

3. The demurrers should be sustained because AMc improperly seeks to rewrite the parties' written agreement.

a. The NRA owes no implied duty of confidentiality to AMc.

Defendants allege that "[p]ursuant to the Services Agreement, Section IV, 'Confidentiality,' and Section VIII, 'Examination of Records,' the governing contract imposes confidentiality restrictions on AMc and allows NRA to review the books and records of AMc." *See* Am. Counterclaim, at ¶ 98, p. 19. In contrast, Defendants also contend that the "Services Agreement is silent and does not provide any guidance on how the NRA must treat AMc's confidential proprietary information that it receives from AMc under the 'Examination Records' clause." *See id.* Nevertheless, Defendants contend that a "good faith reading of the Services Agreement does not authorize the NRA to disclose AMc proprietary and confidential information that it gains from the Examination of Records Clause," *see id.* at ¶ 99, p. 19, and that the "NRA used its contractual rights under the Services Agreement to gain proprietary information about

AMc's business, including information about its contract with Lt. Col. Oliver North," *see id.* at ¶ 100, p. 19.

Of course, the fact that the Services Agreement provides certain confidentiality rights to the NRA, but not to Defendants, demonstrates that Defendants do not have any rights to confidentiality under the Services Agreement, and the Services Agreement does not impose any confidentiality obligations on the NRA. And, under Virginia law, the implied duty of good faith cannot be used to create any such rights or obligations – especially when doing so would be contrary to the express terms of the Services Agreement. *See Ward's Equip., Inc. v. New Holland N. Am. Inc.*, 254 Va. 379, 381-84, 493 S.E.2d 516, 518-20 (1997) ("[W]hen parties to a contract create valid and binding rights, an implied covenant of good faith and fair dealing is inapplicable to those rights"); *id.* at 385 (implied duty of good faith and fair dealing "cannot be the vehicle for rewriting an unambiguous contract in order to create duties that do not otherwise exist."); *Great Am. Ins. Co. v. GRM Mgmt., LLC*, No. 3:14CV295, 2014 WL 6673902, at *9 (E.D. Va. Nov. 24, 2014) ("an implied duty of good faith and fair dealing must yield to the express terms of the contract when the latter might be conceived as inconsistent with the former.") (discussing *Ward's Equip., Inc.*, 493 S.E.2d at 520); *Sun Hotel, Inc. v. SummitBridge Credit Invs. III, LLC*, 86 Va. Cir. 189 (Va. Cir. Ct. Fairfax Jan. 23, 2013) ("an obligation cannot be implied when it would be inconsistent with the express terms of the contractual relationship"); *see also NationsBank of Va., N.A. v. Mahoney*, No. 119920, 1993 WL 662334, at *3 (Va. Cir. Ct. Fairfax Dec. 6, 1993), *aff'd*, 249 Va. 216, 455 S.E.2d 5 (1995) ("This Court holds that § 8.1-203's good faith term cannot be implied to essentially negate or materially alter the Note and Guaranty Agreement's aforementioned express terms.").

Moreover, the NRA could not violate any implied duty of good faith merely by relying on its express contractual rights under the Services Agreement to obtain AMc's purported confidential information. *See Skillstorm, Inc. v. Elec. Data Sys., LLC*, 666 F. Supp. 2d 610, 620 (E.D. Va. 2009) ("Likewise, a party does not breach implied duties where it exercises its rights created under the contract."); *Hershberger v. Bank of Am., N.A.*, 92 Va. Cir. 470, at *2 (Caroline Cnty. 2013) ("no implied duty exists because all of the rights and remedies are contained within the contract.").

Similarly, Defendants erroneously contend that the "NRA compounded its bad faith and unfair dealing by requiring that AMc remain silent in the aftermath of the false and misleading statements made about its contract with Oliver North." *See* Am. Counterclaim, at ¶ 103, p. 19. Again, Section IV of the Services Agreement entitled "Confidentiality" imposes clear and unambiguous duties of confidentiality on AMc, but imposes no such duties on the NRA.

In essence, Defendants are asking the Court to rewrite the Services Agreement to provide them with confidentiality rights not contained in the parties' written contract, but the Court does not have the power to do so. *See Dominick v. Vassar*, 235 Va. 295, 300, 367 S.E.2d 487, 489 (Va. 1988). Accordingly, the NRA's demurrer as to Defendants' confidentiality allegations in Count II should be sustained.

b. <u>The NRA owes no implied duty to use AMc's services.</u>

Defendants contend that the NRA has transferred substantial amounts of the services that AMc provided to the NRA to a competing firm. *See* Am. Counterclaim, at ¶ 13, p. 3. Defendants also contend that the NRA used its contractual rights under the Services Agreement to "gain proprietary information about AMc business." *See* Am. Counterclaim at ¶ 100, p. 59.

These allegations do not state a claim for breach of the implied duty of good faith and fair dealing because they have no connection to the Services Agreement. They are not based on any provisions or rights set forth in the Service Agreement, and the Services Agreement does not

prohibit any of the alleged conduct in question. In particular, the Services Agreement does not prohibit the NRA from transferring business to another provider or provide Defendants with the exclusive right to perform media and related public relations services for the NRA. In addition, as previously discussed, the NRA owes no duty of confidentiality to AMc. Thus, Defendants' allegations do not state a claim for breach of the implied duty of good faith and fair dealing.

c. The NRA cannot breach the implied duty when its alleged breaches are based on express terms in the parties' written agreement.

First, Defendants contend that the NRA has failed to make payments in connection with certain invoices. *See* Am. Counterclaim, at ¶ 106, p. 20. This allegation must be struck because it is duplicative of Defendants' claim for breach of contract in the Amended Counterclaim. *See id.*; *Charles E. Brauer Co.*, 466 S.E.2d at 385 (affirming dismissal of the debtor's breach of the implied covenant of good faith and fair dealing claim as duplicative of the breach of contract claim. "The breach of the implied duty under the U.C.C. [§ 8.1-203] gives rise only to a cause of action for breach of contract."); *Rogers v. Deane*, 992 F. Supp. 2d 621, 633 (E.D. Va. 2014) ("Where there is a claim for breach of contract, the inclusion of a claim for breach of the implied covenant of good faith and fair dealing as a separate claim is duplicative of the breach of contract claim; it does not provide an independent cause of action.").

Second, Defendants contend that the NRA breached its implied duty of good faith and fair dealing because it has "taken steps to interfere with AMc's ability to wind down the Services Agreement during the 90-day termination period following AMc's notice of termination pursuant to Section XI.B. of the Services Agreement." *See* Am. Counterclaim, at ¶ 104, p. 19. This allegation cannot state a claim for breach of the implied duty of good faith and fair dealing. The principle that a contracting party may not interfere with the other party's performance is based on the premise that the party cannot take such action and then still complain about the other party's

lack of performance. Here, however, Defendants had no post-termination performance duties under the Services Agreement except to return the NRA's property. And, Defendants do not allege that the NRA interfered with that post-termination obligation.

Nor could Defendants present any such allegations in their Amended Counterclaim. Defendants initially sent their notice of termination pursuant to section XI.B. of the Services Agreement on May 29, 2019. Section XI.B. of the Services Agreement provides that "[i]n the event of said termination, all further obligations of each party to perform shall cease, except as otherwise specifically provided in the Services Agreement." Then, on June 25, 2019, the NRA served Defendants with its notice of termination pursuant to section XI.C. of the Services Agreement, and on June 27, 2019, Defendants served another notice of termination pursuant to section XI.D. of the Services Agreement. Under sections XI.C. and XI.D. of the Services Agreement, the termination of the Services Agreement is effective immediately. Pursuant to section XI.E., upon termination of the Services Agreement, AMc "shall immediately return to NRA . . . any and all of NRA's property, materials, documents, Confidential Information, etc., that may be in AMc possession." Thus, Defendants cannot state a claim for breach of the implied duty based on the NRA's alleged interference with AMc's sole post-termination obligation to return the NRA's property.

Third, Defendants erroneously contend that "[i]nstead of negotiating 'in good faith' the termination fees that are owed by the NRA under Section XI.F. of the Services Agreement, the NRA has ceased making payments of invoices that are now past due." *See id.*, at ¶ 105, p. 20. Defendants ignore that section XI.F. of the Services Agreement further provides that "[s]uch termination fees shall be negotiated *in good faith* by the parties." (emphasis added). Thus, the implied duty of good faith and fair dealing is irrelevant to this allegation because section XI.F.

expressly states that the parties shall negotiate in "good faith." Accordingly, this allegation of Count II must be struck because the language of the parties' contract governs this issue.

For all the foregoing reasons, the NRA's demurrer as to Count II of the Amended Counterclaim should be sustained because they fail to state claims for relief as a matter of law.

B. Defendants' Claims For Abuse Of Process Must Be Dismissed With Prejudice.

1. The commencement of litigation cannot be an abuse of process.

Defendants contend that the commencement of the Actions constitutes an abuse of process. *See* Am. Counterclaim at ¶ 113, pp. 21. These allegations fail to state a claim because the commencement of a lawsuit cannot serve as the basis for an abuse-of-process claim as a matter of law.

This fundamental principle is universally applied to prevent interference with the right under the First Amendment to the United States Constitution to petition the Courts, as well as to avoid conflict with the more stringent requirements of the tort of malicious prosecution. *See Donohoe Constr. Co. v. Mount Vernon Assocs.*, 369 S.E.2d 857, 862 (Va. 1988) ("The gravamen of the tort lies in the abuse or the perversion of the process after it has been issued. Consequently, it is not necessary to allege or prove that the process was maliciously issued.") (internal quotations omitted); *Triangle Auto Auction, Inc. v. Cash*, 238 Va. 183, 186, 380 S.E.2d 649 (Va. 1989); *7600 Ltd. P'ship v. QuesTech, Inc.*, No. 19 Cir. L148381, 39 Va. Cir. 268 (Va. Cir. Fairfax May 22, 1996) ("Under Virginia law, an abuse of process can only apply after process has been issued, i.e., after a case has been initiated. Initiating and prosecuting a baseless suit or splitting claims to initiate and prosecute separate suits . . . cannot constitute abuse of process."). Claims for abuse of process are, therefore, disfavored and strictly construed. *See Mocek v. City of Albuquerque*, 813 F.3d 912, 936 (10th Cir. 2015) ("This tort [of abuse of process] should be construed narrowly in order to protect the right of access to the courts and as such it is disfavored in the law") (internal quotations

omitted); *United States v. Pendergraft*, 297 F.3d 1198, 1206 (11th Cir. 2002) ("These sanctions include tort actions for malicious prosecution and abuse of process, and in some cases recovery of attorney's fees, but even these remedies are heavily disfavored because they discourage the resort to courts.").

Based on all these established authorities, Defendants' claims for abuse of process must be dismissed to the extent that they are based on the commencement of the Actions. *See Berry v. Clark*, 42 Va. Cir. 1, at *2 (Va. Cir. Ct. Richmond 1997) (abuse of process claim failed where party "failed to allege any wrongful act . . . after the original pleadings were filed"); *Seeber v. Martin*, 1992 WL 884593, at *1 (Va. Cir. Ct. Fairfax 1992); *see also* RESTATEMENT (THIRD) OF TORTS: LIABILITY OF ECONOMIC HARM § 26, Tentative Draft (2018); *Tibbetts v. Yale Corp.*, 47 F. App'x 648, 654 (4th Cir. 2002).

In addition, Defendants contend that their abuse-of-process claims are based on the NRA's filing of its Motion for Leave to File Amended Complaint (the "Motion"). *See* Am. Counterclaim at ¶ 117, p. 22. As a matter of law, the filing of a motion for leave to file an amended complaint cannot be an abuse of process because it is not "process." *See Ubl v. Kachouroff*, 937 F. Supp. 2d 765, 770-72 (E.D. Va. 2013) (attorney's execution of declaration was not "process."); *In re American Continental Corporation/Lincoln Sav. & Loan Securities Litigation*, 845 F. Supp. 1377, 1386 (D. Ariz. 1993), *affirmed*, 102 F.3d 1524 (9th Cir. 1996), *rev'd on other grounds*, 523 U.S. 26, 118 S. Ct. 956, 140 L. Ed. 2d 62 (1998) (motion for leave to file amended complaint is not "process"). *See also* Ronald Mallen, *1 Legal Malpractice § 6:47* (2019 ed) ("A motion for leave to file a complaint or for admission of an attorney to a court to argue an appeal is not such a process.") (footnotes omitted). Thus, Defendants' abuse-of-process claims based on the Motion fail to state a claim for relief.

2. The litigation privilege bars AMc's abuse-of-process claims.

Under Virginia law, the "litigation privilege" is an established defense. *See Mansfield v. Bernabei*, 284 Va. 16, 727 S.E.2d 69 (Va. 2012); *Watt v. McKelvie*, 219 Va. 645, 651, 248 S.E.2d 826 (1978) (third-party statements made during the course of a judicial proceeding and relevant to the subject matter of the litigation are absolutely privileged and "may not be used to impose civil liability upon the origination of the statements."); *Lockheed Info. Mgmt. Sys., Co. v. Maximus, Inc.*, 259 Va. 92, 101, 524 S.E.2d 420 (2000); *Ranney v. Nelson*, No. 218653, 2004 WL 1318882, at *2 (Va. Cir. Ct. Fairfax Apr. 20, 2004). The Virginia Supreme Court has stated that "the maker of an absolutely privileged communication is accorded complete immunity from liability even though the communication is made maliciously and with knowledge that it is false." *Lindeman v. Lesnick*, 268 Va. 532, 537-38, 604 S.E.2d 55 (Va. 2004); *see also Massey v. Jones*, 182 Va. 200, 204, 28 S.E.2d 623, 626 (Va. 1944); *Boyce v. Pruitt*, 80 Va. Cir. 590, 2010 WL 7375630, at *4 (Va. Cir. July 28, 2010) ("One who speaks or writes with absolute privilege does so with impunity, free from risk of liability, even for malicious statements or knowing falsehoods.").

First, Defendants contend that the "NRA used this Court's public proceeding as a vehicle to defame AMc and its employee, Lt. Col. Oliver North, and to accomplish other ulterior purposes," by filing its motion to amend. *See* Am. Counterclaim, at ¶ 120, p. 23. In addition, Defendants contend that the "proposed Amendment was intended to serve an ulterior motive of spreading false statements about the North-AMc Contract . . . ." *See id.* As a matter of law, these alleged bases for Defendants' abuse-of-process claims are barred by the litigation privilege because they are based on the communicative nature of the actions in question. *See EMI Sun Village, Inc. v. Catledge*, No. 16-11841, 2019 WL 2714325, at *6 (11th Cir. June 28, 2019); *Ritchie v. Sempra Energy*, 703 F. App'x 501, 504-05 (9th Cir. 2017).

Moreover, this aspect of Defendants' claims is barred by the doctrines of waiver and forfeiture because they consented to the relief requested in the Motion and the filing of the Amended Complaint.

Second, Defendants contend that on May 24, 2019, the NRA "compounded its abuses of the procedures of this Court by filing a pleading entitled Plaintiff's Emergency Motion for Entry Of An Order Staying This Action So That Plaintiff May Conduct Limited Discovery Into Defendants' Theft Of Plaintiff's Property." *See* Am. Counterclaim, at ¶ 123, pp. 23. Defendants contend that "[t]his 'Emergency' pleading was disclosed to the public and the press as part of the NRA's smear tactic directed against AMc, seeking to implicate AMc in a criminal act without any basis in fact." *See id.*, at ¶¶ 124 to 125, p. 23. Defendants then allege that this situation resulted in an "outrageous libel." *See id.*, at ¶ 126, p. 24. This aspect of Defendants' abuse-of-process claims is barred by the litigation privilege because it attacks the communicative nature of the conduct in question. The litigation privilege, therefore, bars any recovery for this so-called "outrageous libel." *See* at ¶ 126, p. 24.

Third, as the final aspect of its abuse-of-process claims in its Second Counterclaim, Defendants allege that "the NRA issued subpoenas for high profile depositions of NRA Board Members . . . ." *See id.*, at ¶¶ 127 to 129, p. 24. Defendants contend that the subpoenas were issued to these individuals "to issue a public warning to the NRA's own board members . . . ." *See id.*, at ¶ 129, p. 24. This aspect of their abuse-of-process claims is barred by the litigation privilege because, once again, Defendants are attacking the communicative nature of the conduct in question. *See Northern Virginia Real Estate, Inc. v. Martins*, 283 Va. 86, 111-12, 720 S.E.2d 121 (Va. 2012) (litigation privilege "safeguards include such things as the power to issue subpoenas.")

Finally, in the Amended Counterclaim, Defendants accuse the NRA of acting with evil motives. The Amended Counterclaim is littered with invective, inappropriate, and improper *ad hominem* attacks. Nonetheless, for purposes of the NRA's demurrers, the important point is that allegations of improper motives are irrelevant to the application of the litigation privilege because, again, the Virginia Supreme Court has stated that "the maker of an absolutely privileged communication is accorded complete immunity from liability even though the communication is made maliciously and with knowledge that it is false." *Lindeman*, 268 Va. at 537-38.

In its amended counterclaims, Defendants have presented several new and even more ridiculous allegations. For example, Defendants allege that the "NRA's legal actions against the New York Attorney General's Office has interfered with AMc's compliance with the Services Agreements task of returning documents to the NRA." *See* Am. Counterclaim at ¶ 138, p. 26. This allegation does not state a claim for abuse of process because it does not allege the use of any processes of this Court. *See, e.g., City of Angoon v. Hodel*, 836 F.2d 1245, 1247-48 (9th Cir. 1988) ("essence of an abuse of process claim is the misuse of the court's power"); *Wells v. Waukesha Co. Marine Bank*, 135 Wis.2d 519, 537, 401 N.W.2d 18, 25 (Wis. Ct. App. 1986) ("Even the broadest conceptions of "process," involving the entire range of procedures incident to litigation, have involved the use of procedures which require that the person to whom they are directed perform or refrain from performing some prescribed act.").

Defendants also contend that the NRA is using the consolidated lawsuits to "threaten its [NRA's] own members" and that the "AMc lawsuits were merely the procedural vehicle that allowed the NRA to threaten its members." *See* Am. Counterclaim at ¶ 129, p. 24; Counterclaim at ¶ 130, p.37. Of course, Defendants do not have standing to assert claims on behalf of NRA members or collect damages for harm allegedly caused to them. *See, e.g., Keepe v. Shell Oil Co.*,

220 Va. 587, 591, 260 S.E.2d 722, 724 (Va. 1979). *See also Ferris Law Offices v. Sonic-Mahatton Fairfax, Inc.*, No. CL-2010-6854, 81 Va. Cir. 283, 2010 WL 7765580, at *2 (Oct. 21, 2010).

Similarly, Defendants contend that the "pretext of a lawsuit against AMc has allowed the NRA to put its own people under oath and ask them about leaks to the press." *See* Am. Counterclaim at ¶ 130, p. 26; Counterclaim at ¶ 131, p. 37. This allegation also provides no support for Defendants' abuse of process claim because once again, it at best is trying to assert claims on behalf of others and Defendants do not have standing to do so.

In addition, Defendants allege that the NRA has abused the processes of this Court by not using (or "bypassing") the processes of this Court and filing a lawsuit in Texas. *See* Am. Counterclaim at ¶¶ 136-137, pp. 27-28; Counterclaim at ¶¶ 137-138, p. 39. The decision to "bypass" and not use the processes of this Court cannot be abuse of the processes of this Court. In any event, this Court does not have the power or jurisdiction to adjudicate a claim for abusing the process(es) of a Texas court. Moreover, as demonstrated above, the filing of a lawsuit cannot be abuse of process as a matter of law. *See supra* at p. 12. At best, this claim could be a claim for malicious prosecution which cannot be filed unless and until the defendant prevails on the plaintiff's claim. Moreover, a claim for malicious prosecution requires the lack of probable cause. Of course, the fact that the NRA did not serve those third-party subpoenas on any third parties means as a matter of law, that the NRA did not abuse any processes of this Court because it does not involve use of process. *See, e.g., Long v. Long*, 136 N.H. 25, 31, 611 A.2d 620, 624 (N.H. 1992) ("Other courts have similarly held that where a court's authority is not used, there is no 'process.'")

Furthermore, Defendants erroneously contend that the NRA has abused this Court's processes because it sent a number of third-party subpoenas to counsel for Defendants even though

the NRA did not serve any of those subpoenas on any third parties. *See* Am. Counterclaim at ¶¶ 127 to 129, p. 24. As a matter of law, these allegations fail to state a claim for relief because they do not involve the use of the Court's processes.

Finally, Defendants contend that each new filing allows the NRA to amplify its defamatory claims. *See* Am. Counterclaim ¶ 131, p. 25. Of course, these allegations fail to state a claim based on the litigation privilege discussed above.

IV.

CONCLUSION

For all the foregoing reasons, the Court should sustain the NRA's demurrers as to Counts II and III of Defendants' Amended Counterclaim and grant the NRA such other and further relief as justice may require or allow.

Dated: October 31, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2019, I caused the foregoing to be served via electronic mail and first-class mail upon:

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