NATIONAL RIFLE ASSOCIATION OF AMERICA,	
Plaintiff,	
v.	**Case Nos. CL19001757, CL 19002067, CL19002886**
ACKERMAN MCQUEEN, INC.	
and	
MERCURY GROUP, INC.	
Defendants.	

DEFENDANTS' OPPOSITION TO PLAINTIFF'S DEMURRERS AND PLEAS IN BAR

Defendants Ackerman McQueen, Inc. and Mercury Group, Inc, (collectively "AMc"), through undersigned counsel, hereby oppose Plaintiff the National Rifle Association of America's ("NRA") Demurrers to Defendants' Amended and Supplemental Counterclaim and Pleas in Bar. This Opposition is combined because the NRA's demurrers and pleas in bar overlap and involve common issues of fact and law. The NRA's efforts to eliminate AMc's claims should be denied because AMc has alleged sufficient facts to establish that the NRA breached its implied covenant of good faith and fair dealing and engaged in abuse of process by using litigation tools improperly and for an ulterior motive to the detriment of AMc. The reasons supporting our opposition are set forth below.

ARGUMENT

I. AMc has a valid claim under Count II for breach of the implied covenant of good faith and fair dealing.

Despite the legion of cases recognizing the implied duty of good faith and fair dealing in *all* Virginia contracts, the NRA moved this Court to dismiss this claim (Count II) from AMc's counterclaim. The NRA argues that this duty does not exist in Virginia other than under the UCC. This argument is flatly contradicted by the caselaw, as discussed below. The NRA disregards the well settled principle that when a contract, like the Services Agreement, vests rights in one party, the party that elects to exercise its rights has the duty not to act unfairly and dishonestly. AMc alleges unfair and dishonest conduct on the part of the NRA and thus states a valid claim for breach of the implied duty of good faith and fair dealing.

A. Virginia recognizes an implied duty of good faith and fair dealing in common law contracts.

The NRA argues that AMc cannot maintain a claim for breach of the implied duty of good faith and fair dealing because this tort only applies to UCC-governed contracts. However, the same cases that the NRA cites in support, undermine its argument and reinforce the validity of AMc's counterclaim.

For example, in *Stoney Glen, LLC v. Southern Bank and Trust Co.*, the defendant moved to dismiss a claim for breach of the implied duty of good faith and fair dealing arguing the duty does not exist in common law contracts in Virginia. 944 F. Supp. 2d 460 (2013). The court rejected this claim, holding "that Virginia does recognize an implied duty of good faith and fair dealing in common law contracts." *Id.* at 465; *Burke v. Nationstar Mortg., LLC*, E.D. Va. No. 3:14-CV-837, 2015 WL 4571313, at *7 (E.D. Va. July 28, 2015) ("Under Virginia law, every contract contains an implied covenant of good faith and fair dealing[.]"); *see also Enomoto v.*

Space Adventures, LTD., 624 F. Supp. 2d 443, 450 (E.D. Va. 2009) ("In Virginia, every contract contains an implied covenant of good faith and fair dealing. Defendant argues otherwise but its assertion is based on an erroneous interpretation of Virginia law.") (internal citation omitted); *Gordon v. Kohl's Dep't Stores, Inc.*, 172 F. Supp. 3d 840, 853 (E.D. Pa. 2016) (same); *Vance v. Wells Fargo Bank, N.A.*, 291 F. Supp. 3d 769, 774-75 (W.D. Va. 2018) (same).

The NRA's argument relies on the distortion of a subtle distinction. Virginia courts have made clear that "[a] breach of the implied duty of good faith and fair dealing must be raised in a claim for breach of contract, as opposed to a claim in tort," not independently. S*toney Glen.*, 944 F. Supp. 2d at 465. The NRA extracts quotes from Virginia cases explaining this requirement to assert the false proposition that a claim for breach of the implied duty of good faith and fair dealing can never survive if not brought to pursuant to a UCC contract. This selective quotation ignores the fact that these cases simply require the tort to be brought in the context of a breach of contract claim. AMc's claims for breach of implied duty of good faith and fair dealing do just that, as the claim itself is entitled "Breach of Contract." Thus, the cases relied upon by the NRA are inapposite. *See Burke,* 2015 WL 4571313, at *7 ("[A] breach of [implied duty of good faith and fair dealing] only gives rise to a breach of contract claim, not a separate cause of action."); *Charles E. Brauer Co., Inc. v. NationsBank of Va.*, 251 Va. 28, 33 (1996)("[T]he failure to act in good faith under §8.1-203 does not amount to an *independent tort.*")(emphasis added); *So. Bank & Tr. Co. v. Woodhouse*, 92 Va. Cir. 402, 2016 WL 9527885, at *6 (2016).[1]

[1] The NRA also asserts it "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." (Plaintiff's Demurrer Memo. at 4). However, the Supreme Court of Virginia has found that the duty exists in non-UCC (and non-insurance) contexts. In *CaterCorp, Inc. v. Catering Concepts, Inc.*, 246 Va. 22, 25, 28 (1993), the Court reversed a Demurrer ruling dismissing a breach of contract claim based on the implied duty of good faith and fair dealing owed in an employment contract. *See Stoney Glen.*, 944 F. Supp. 2d at

The NRA cites only one case that it claims stands for the proposition that the duty only applies to UCC contracts—the unreported federal district court case of *Harrison v. US Bank Nat'l Ass'n*, E.D. Va. No. 3:12-CV-00224, 2012 WL 2366163 (E.D. Va. June 20, 2012). (Plaintiff's Demurrer Memo. at 6). No Virginia state case agrees with the *Harrison* opinion, which misinterprets and relies upon *Greenwood Assocs., Inc. v. Crestar Bank*, 248 Va. 265 (1994). In *Greenwood* the plaintiff brought a separate count for "breach of [defendant's] covenant of good faith and fair dealing imposed upon it under the [UCC]." 248 Va. at 268. The Court held that "the plaintiff has failed to state a claim against [defendant] based upon any cause of action that may exist for breach of the 'obligation of good faith' *set forth* in Code § 8.1- 203," the Virginia version of the UCC. *Id.* at 270 (emphasis added). The Court's finding has no bearing on whether contracts not governed by the UCC are subject to the duty of good faith and fair dealing. The court in *Harrison* misinterpreted *Greenwood* and failed to recognize the authority in *CaterCorp*. The court in *Stony Glen* agreed as much:

> However, *Harrison* improperly reads *Greenwood.* In *Greenwood,* the Virginia Supreme Court held that the *statutory* duty of good faith, codified in Virginia's version of the UCC, Va.Code Ann. § 8.1–203, was inapplicable to a non-UCC contract—a real estate contract. *Greenwood,* 248 Va. 265. This is not the same as holding that there is no implied duty of good faith and fair dealing in such a contract. Indeed, a lower Virginia court had previously held, undisturbed, that such an implied duty existed in a real estate contract. *Stepp v. Outdoor World Corp.,* Va. Cir. 106, 1989 WL 1143875, at *4 (Va.Cir.Ct.1989); *see also Levine v. Selective Ins. Co. of Am.,* 250 Va. 282, 286, 462 S.E.2d 81, 84 (1995) (reversing a grant of summary judgment and reviving a plaintiff's breach of contract claim premised on a breach of the implied duty of good faith and fair dealing in an insurance contract).

944 F. Supp. 2d at 465 n. 7.

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465 n. 6 (acknowledging that *CaterCorp* discussed duties of good faith and fair dealing in the context of an employment contract and noting there is no intervening Virginia decision that repudiates the interpretation that duty exists in *all* contracts).

Thus, the NRA's citation to *Harrison* does not supplant Virginia and Fourth Circuit cases upon which we rely that stand for the proposition that the implied duty of good faith and fair dealing extends beyond the UCC context.

Finally, the NRA argues that AMc's counterclaims should be dismissed because they cite to the UCC for the proposition that every contract under Virginia Law contains an implied covenant of good faith and fair dealing when the UCC does not apply to the parties' Services Agreement. AMc correctly alleged that under Virginia law, every contract has the implied duty. That its statement was followed by a citation to an inapplicable code section does not negate the accurate allegation of the state of Virginia law, as demonstrated by the myriad of case law that supports the proposition. Sustaining the demurrer is not merited. See *CaterCorp*, 246 Va. at 24 ("[E]ven though a . . . complaint may be imperfect, when it is drafted so that defendant cannot mistake the true nature of the claim, the trial court should overrule the demurrer[.]") Nevertheless, if the Court finds that the UCC citation warrants an amendment, AMc will amend its counterclaims.

B. AMc sufficiently alleges elements of an implied duty of good faith claim.

The NRA also argues AMc's counterclaims should be dismissed because AMc did not properly allege a breach of the implied duty of good faith and fair dealing. In advancing this argument, the NRA uses a demurrer as a vehicle for what is really a summary judgment claim. It attempts to recharacterize AMc's claims to represent that there are no facts in dispute that would give rise to the breach of the duty of good faith and fair dealing. To the contrary, AMc's counterclaims allege facts which for purposes of this demurrer must be deemed true. The facts asserted by the NRA are disputed and the subject of discovery, including recent depositions. Through discovery AMc continues to uncover facts supporting its counterclaims. Regardless, AMc's allegations in its counterclaims are more than sufficient to survive demurrer.

"The purpose of a demurrer is to determine whether a motion for judgment states a cause of action upon which the requested relief may be granted." *Dunn, McCormack & MacPherson v. Connolly*, 281 Va. 553, 557 (2011) (quoting *Abi–Najm v. Concord Condominium, LLC*, 280 Va. 350, 356-57 (2010)). The Court does not decide the merits of a claim when ruling on a demurrer, instead the Court only determines whether the plaintiff's factual allegations are sufficient to state a cause of action. *Assurance Data, Inc. v. Malyevac*, 286 Va. 137, 143 (2013). Complaints are to be liberally construed—the Court must accept all factual allegations as true, the court must also accept as true all facts that can be reasonably inferred or fairly implied from the specific allegations. *W.S. Carnes, Inc. v. Bd. of Sup'rs of Chesterfield County,* 252 Va. 377 (1996). When a complaint "contains sufficient allegations of material facts to inform a defendant of the nature and character of the claim, it is unnecessary for the pleader to descend into statements giving details of proof in order to withstand demurrer." *CaterCorp*, 246 Va. at 24.

The NRA's claim that AMc's counterclaims do not allege an essential element of an implied duty claim is without merit. Under Virginia law, "the elements of a claim for breach of an implied covenant of good faith and fair dealing are (1) a contractual relationship between the parties, and (2) a breach of the implied covenant." *Enomoto*, 624 F. Supp. 2d at 450; *see also Stoney Glen*, 944 F. Supp. 2d at 466 (same). A claim is properly pled when alleges "bad faith an unfair dealing in a contractual relationship." *Id.* Additionally, "although the duty of good faith does not prevent a party from exercising its explicit contractual *rights,* a party may not exercise contractual *discretion* in bad faith, even when such discretion is vested solely in that party." *Stoney Glen*, 944 F. Supp. 2d at 466 (quoting *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Conn.,* 156 F.3d 535, 542 (4th Cir.1998)). The covenant is also breached "if the purported exercise of a

contractual right is dishonest, as opposed to merely arbitrary." *Stoney Glen*, 944 F. Supp. 2d at 466.

AMc's counterclaims for breach of implied duty of good faith and fair dealing allege (1) a contractual relationship between AMc and the NRA, and (2) a breach of the implied covenant by way of bad faith an unfair dealing in several concrete ways. AMc alleged that the NRA exercised its contractual rights in a dishonest and unfair way by, among other things, gaining proprietary information about AMc's business and then divulging said confidential information to third parties in order to harm AMc. *See* Counterclaim ¶¶ 79-81. These allegations alone are sufficient to overrule a demurrer.

In addition, AMc properly alleged that the NRA's bad faith actions have prevented AMc from performing under the contact. In paragraphs 106 through 108, AMc identifies the NRA's failure to make payments on past due invoices and failure to post the $3 million letter of credit as "effectively preventing AMc from performing." AMc asserts that "NRA's deliberate interference with AMc's performance under the Services Agreement is a breach of the good faith and fair dealing obligation under Virginia law." Amend. Counterclaim ¶ 108.

Contrary to the NRA's assertion, AMc is not required to allege that the NRA has prevented AMc from performing its obligations.[2] Nonetheless, it is evident that AMc has alleged with specificity NRA actions that have prevented AMc from performing its obligations. *Id.* In addition, further emphasizing the inappropriateness of the NRA's motion to dismiss at this early stage, AMc has learned that the NRA is frustrating AMc's ability to return NRA property under the Services Agreement by refusing to pay for the return, which is a precondition under the agreement.

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[2] The NRA cites *Middle E. Broad. Networks, Inc. v. MBI Glob., LLC*, E.D. Va. No. 1:14-CV-01207-GBL, 2015 WL 4571178, at *1 (E.D. Va. July 28, 2015) for this proposition, but the court there considered the claim in the context of a summary judgment motion.

The NRA also falsely claims that it could not violate the implied duty of good faith because it relied on "express contractual rights." (Plaintiff's Demurrer Memo. at 7). While the Services Agreement provides the NRA with access to its propriety information, there are no "express" terms governing the NRA's duty of confidentiality or lack thereof. The NRA has no express right to disclose AMc confidential information as alleged in the Amended Counterclaim.[3] Similarly, there are no "express contractual rights" that allow NRA to frustrate AMc's ability to continue in business by avoiding the payment to AMc for multi-million dollar invoices or failing to post a $3 million letter of credit. Such bad faith actions have made it impossible for AMc to perform its work under the Services Agreement – a classic example of bad faith actions preventing performance of a contract.

AMc's allegations regarding the breach of the implied duty of good faith and fair dealing are sufficient to sustain a claim because they properly assert the existence of a contractual relationship and a breach of the covenant by way of manifestly unfair and dishonest conduct. AMc is not required at this stage to provide "details of proof in order to withstand demurrer." *See Stoney Glen*, 944 F. Supp. 2d at 466.

II. AMc has a valid claim under Count III for abuse of process against the NRA.

A. The NRA's plea in bar regarding the abuse of process claim is actually a motion for summary judgment that improperly requests that the Court resolve numerous disputed issues of fact.

Although the NRA characterizes its motion as a plea in bar, it is not. A plea in bar "is a pleading which alleges a single state of facts or circumstances (usually not disclosed or disclosed

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[3] That the Services Agreement imposes a duty of confidentiality on AMc but is *silent* as to the NRA does not create an "express" contractual right, rather more likely points to an ambiguity in the agreement. Further, even if the NRA had the discretion to divulge AMc's confidential materials, the law is clear that it cannot exercise its discretion dishonestly or in bad faith—i.e. to harm AMc. *See Stoney Glen*, 944 F. Supp. 2d at 466.

only in part by the record) which, if proven, constitutes an absolute defense to the claim." *Nelms v. Nelms*, 236 Va. 281, 289 (1988); *see Sullivan v. Jones*, 42 Va. App. 794, 802 (Va. 2004) ("The defensive plea in bar shortens the litigation by reducing it to a distinct issue of fact which, if proven, creates a bar to the plaintiff's right of recovery."). Classic examples of such grounds include statute of limitations, *res judicata*, and absence of an essential jurisdictional fact. *Nelms*, 236 Va. at 289. Here, the NRA does not allege "a single state of facts" that would bar the abuse of process claim, but instead attempts to recharacterize numerous *and* continuing improper litigation actions. *Id.*

The NRA's plea in bar seeks only to bar arguments relating to one small piece of Count II – Abuse of Process – that the issuance of subpoenas cannot support an abuse of process claim. Even if the NRA were to prevail on this issue, the Abuse of Process claim would not be barred because there are other allegations that support the abuse of process claim. Consequently, the NRA's argument regarding the issuance of subpoenas does not bar recovery on AMc's abuse of process claim. The NRA's argument misuses the vehicle of the plea in bar.

Even if a plea in bar could be used to target one piece of a broader claim, the NRA's analysis regarding the subpoenas misses the mark. For example, the NRA asserts that the purpose of the subpoenas could not have meant to issue public warnings because the NRA is proceeding with depositions relating to the subpoenas. (Plaintiff's Plea in Bar Memo. at 4). This argument does not negate the likelihood that the subpoenas were intended to intimidate NRA employees and board members; in fact, moving forward with the depositions is but further evidence that the NRA has a strategy to go after its own people under the guise of suing AMc. Notwithstanding the NRA's illogical argument, the NRA advances disputed facts which are the now the subject of discovery, including recent depositions. Seeking to have the Court decide the intent and purpose behind these

actions contradicts the Supreme Court of Virginia's instruction that a plea in bar "does not address the merits of the issues raised by the bill of complaint[.]" *Id.*

B. AMc has sufficiently alleged that the NRA used improper process after the NRA filed its first Complaint.

The NRA also attacks AMc's abuse of process claim (Count III) in its demurrer. But in so doing, it makes an argument inconsistent with its plea in bar memorandum. Indeed, the plea in bar argues that Count III only involves subpoenas for depositions, while the demurrer argues that Count III only involves the commencement of litigation. By artificially separating the facts supporting the claim, the NRA avoids addressing the larger picture: the NRA's sweeping abuse of process to turn the Court into an unwitting arm of its public relations campaign to try to shield itself from defamation liability for the scandalous and false statements filed with the Court.

"To prevail in a cause of action for abuse of process a plaintiff must plead and prove: '(1) the existence of an ulterior purpose; and (2) an act in the use of the process not proper in the regular prosecution of the proceedings.'" *Montgomery v. McDaniel*, 271 Va. 465, 469 (2006) (quoting *Donohoe Constr. Co. v. Mount Vernon Assocs.*, 235 Va. 531, 539 (1988)). The NRA moves to dismiss AMc's counterclaim for abuse of process (Count III) primarily upon the second element—improper use of process. In evaluating this argument at the demurrer stage, the Court should assume that the NRA has an ulterior purpose in this litigation. With respect to the second criteria of improper use of process, the NRA argues that AMc's allegations attempt to recharacterize valid litigation actions as improper, while disregarding that most of these actions are *per se* incapable of supporting an abuse of process claim. However, as set forth in more detail below, the NRA takes a myopic view of the allegations, arguing against strawmen instead of addressing the gravamen of AMc's abuse of process allegations.

The NRA argues that the abuse of process claim fails because "as a matter of black letter law, the commencement of a lawsuit *cannot serve as the basis for a claim of abuse of process*." (Plaintiff's Demurrer Memo. at 9) (emphasis in original). While this principle may be true, the NRA disregards that AMc premises its claim *not* on the filing of the first lawsuit, but rather on the NRA's continuing pattern of improper actions for an ulterior purpose that occurred *after* filing the first lawsuit. *See Abdul-Akbar v. Watson*, 901 F.2d 329, 333 (3d Cir. 1990) (holding in the context of an injunction request that "a frivolous complaint is one thing; a continuing abuse of process is another. . . . When a district court is confronted with a pattern of conduct from which it can only conclude that a litigant is intentionally abusing the judicial process and will continue to do so unless restrained[.]"); *Lietzke v. Cty. of Montgomery*, Ala, M.D. Ala. No. CIV.A. 2:07CV814-MHT, 2007 WL 3342559, at *3 n. 3 (M.D. Ala. Nov. 9, 2007) (noting that a *pro se* plaintiff's "repeated filings constitute an abuse of process"); *Nat'l Motor Club of Mo., Inc. v. Noe*, 475 S.W.2d 16, 23 (Mo. 1972) (reversing dismissal of the counterclaimant's abuse of process claim because the allegation that "the only purpose and intent of [the plaintiff] in proceeding in three separate lawsuits against defendants is to vex and harass them" was sufficient to state a claim). This pattern includes filing a second lawsuit, a third lawsuit, and now a fourth lawsuit, as well other allegations postdating the filing of the first suit, and thus distinguishes this case from the authorities relied upon by the NRA.

In sum, these allegations of abuse are:

1. ***Amended Complaint (Press Release)*** – Despite the first lawsuit concerning a solitary breach of contract claim regarding the review of AMc records, the NRA amended its complaint to include totally unrelated allegations regarding Oliver North. This action "was intended to serve an ulterior motive of spreading false statements about the North-

AMc Contract immediately prior to the NRA's annual meeting where Lt. Col. North was slated to be reappointed as President of the NRA." Counterclaim ¶¶ 116-118. In so doing, the NRA sought to improperly use this courthouse's docket as an instrument of its media machine to spread false information.

2. ***Second Lawsuit*** – Rather than seeking leave from the Court to amend its first lawsuit yet another time, the NRA circumvented the request by filing a second lawsuit. Yet again, the suit was designed to serve as a glorified press release. In fact, "the NRA leaked the Second Lawsuit to the Wall Street Journal before AMc or its attorneys were even told the Second Lawsuit was filed or that any alleged contract breach had occurred." *Id.* at ¶ 122. AMc has alleged facts - some of the allegations were deemed confidential and were redacted from the public record – that the pretext of the second lawsuit against AMc was to allow the NRA to place its own people under oath in depositions and ask them about leaks to the press. Thus, both the amended complaint and the second lawsuit, and the NRA's subsequent discovery used this Court's legal processes for an improper purpose other than which they were designed. *See* Counterclaim ¶ 130.

3. ***Subsequent Third and Fourth Lawsuits*** – The NRA has now filed third and fourth lawsuits, yet again bypassing the normal process for amending a complaint. "Each new filing allows the NRA to amplify its defamatory claims that AMc is involved in 'extortion,' 'theft' of NRA property, or some other outrageous claim that the NRA seeks to claim it can assert under the privilege attendant to court pleadings." *Id.* at ¶ 139.

4. ***Frivolous and Scandalous Motion*** – Two days after the Second Complaint was filed the NRA filed a Request for Emergency Hearing and Emergency Motion for Entry of an Order Staying this Action. This pleading included the words "Emergency" and "Theft"

in its all caps heading but failed to allege facts that demonstrated either an "emergency" or a "theft." *Id.* at ¶ 123. The pleading was a complete sham and served to tarnish the business reputation of AMc and send a signal that the NRA would stop at nothing to damage its longtime public relations firm. After the public damage was inflicted on AMc, the NRA quietly withdrew its "Emergency" motion without ever scheduling a hearing and without any announcement to the press that the so-called "Emergency" did not exist. *Id.* at ¶ 123. Neither the NRA's plea in bar nor its demurrer even addressed the abuse of process represented by this sham motion.

5. ***Subpoenas*** - Before this Second Lawsuit was even at issue, the NRA issued subpoenas for high profile depositions of NRA Board Members and NRA members. The NRA was initially content to send the subpoenas and then take no steps to move on the depositions. Subsequent to the assertion of the abuse of process claim, the NRA attorneys sought to deflect the notion that the subpoenas were shams by actually moving ahead with some of the depositions. While the depositions did occur, it is clear that they served no purpose in this litigation other than to intimidate other Board members and to facilitate an investigation of its own employees.[4] *Id.* at ¶ 128. None of the NRA's depositions led to any evidence that AMc was involved in any leaks to the press, as alleged by the NRA. Instead, the depositions facilitated the NRA's internal investigation of its own employees. The threat of this improper use of process continues to inflict verifiable financial harm on

[4] The NRA also asserts that the issuance of the subpoenas has not harmed AMc and thus the subpoenas cannot support the abuse of process claim. The simple fact that the NRA has used the subpoena power improperly is harm enough. *Ely v. Whitlock*, 238 Va. 670, 676 (1989). AMc should not have to waste time and money to attend the NRA's investigation of its own board members. But also the NRA fails to acknowledge that this public intimidation tactic harms AMc by burying the truth and furthering the smear campaign against AMc.

> AMc by forcing AMc into litigation where the there are no allegations of actual leaks of confidential information by AMC but the NRA can use the litigation to pursue its ulterior motive to uncover NRA employees and board members who may have been involved in an effort to oust Wayne LaPierre as Executive Vice President. It is an abuse of process to use this litigation to aid NRA's internal investigations.

These allegations fully support an abuse of process claim because they show a continuing pattern of using litigation tools improperly and for an improper ulterior motive. *See Yee v. Superior Court*, 31 Cal. App. 5th 26, 34 (Ct. App. 2019), *reh'g denied* (Jan. 30, 2019), *review denied* (Mar. 27, 2019) ("Misuse of the discovery process can result in liability for abuse of process."). Filing multiple complaints in an effort to avoid asking the court for permission to amend the first complaint is *per se* improper, especially when doing so continues the abusive tactics present in the first amended complaint. The same holds true for the NRA's filing of a scandalous motion it never intended to have decided, as well as noting depositions for an ulterior purpose. Thus, the NRA has repeatedly "used legal process in a manner not proper in the regular prosecution of the proceedings[.]" *7600 Ltd. P'ship v. QuesTech, Inc.*, 39 Va. Cir. 268 (1996).

AMc's Amended Counterclaim demonstrates the escalation of this pattern and further solidifies the claim. The NRA filed yet a third lawsuit against AMc in this courthouse and a fourth lawsuit in Texas. In so doing, it avoided going through a meet and confer session on potential new claims and then filing a motion with the Court to amend the Complaint. As with the NRA's previous filings, these contained baseless claims of "theft" and "extortion" designed to inflict maximum damage to AMc. Most recently, the NRA ratcheted up the use of improper procedures even more. Two business days before the deposition of Wayne LaPierre, the NRA's counsel sent an email stating that they would be issuing sixteen notices of deposition on AMc's

current clients, former clients, and others. Amended Counterclaim at ¶ 128. The purpose of this notice was to intimidate AMc by threatening to interfere with AMc's business relationships under the cover of this litigation. These most recent acts, in conjunction with AMc's initial facts alleged, sufficiently state a claim for abuse of process.

C. Virginia's Litigation Privilege is Inapplicable to AMc's Abuse of Process Claims.

The NRA demurrer argues that AMc's abuse of process claim fails because the NRA is protected by the litigation privilege given the communicative nature of the challenged conduct. As an initial matter, AMc notes that the NRA does not cite to a single case in the Commonwealth of Virginia in which the litigation privilege has even been applied to an abuse of process claim. Instead, the NRA relies on cases from jurisdictions with a broader formulation of the litigation privilege. *See EMI Sun Village, Inc. v. Catledge*, 779 Fed. Appx. 627, 632 (11th Cir. 2019); *Ritchie v. Sempra Energy*, 703 F. Appx 501, 504-05 (9th Cir. 2017).

But even disregarding this shortcoming, the NRA's argument also fails on its own terms by mischaracterizing both the Virginia law regarding the privilege and AMc's abuse of process claims. "In the Commonwealth, '[i]t is well settled that *words* spoken or written in a judicial proceeding that are relevant and pertinent to the mater under inquiry are absolutely privileged' against actions on the basis of defamation." *Mansfield v. Bernabei*, 284 Va. 116, 121-22 (2012) (quoting *Donohue Constr. Co. v. Mt. Vernon Assocs.*, 235 Va. 531, 537 (1998)) (emphasis added). "For absolute judicial privilege to attach, the communications at issue must be 'material, relevant or pertinent' to the issues of the judicial proceeding." *Mansfield*, 284 Va. at 122. Thus, the privilege, as interpreted by Virginia courts only applies to communications—spoken or written words – if the communications are material and relevant.

But more importantly, the NRA attempts to both broaden the litigation privilege to include "communicative conduct"— conduct not protected by Virginia courts—and at the same time narrow AMc's abuse of process claims to communications. As discussed, the litigation privilege narrowly applies to actual statements in the form of words. In fact, in Virginia, the doctrine appears largely in the context of libel and slander actions. *See Mansfield*, 284 Va. at 126 (applying the litigation privilege to bar a defamation claim); *Penick v. Ratcliffe*, 149 Va. 618, 621-27 (1927) (applying the litigation privilege to bar a libel action); *Donohue Constr. Co.*, 235 Va. at 537 (applying the litigation privilege in a slander suit); *Lindeman v. Lesnick*, 268 Va. 532, 535 (2004) (analyzing the litigation privilege in the context of a defamation suit). To the extent the NRA claims the privilege encompasses "communicative conduct" such as filing multiple lawsuits and issuing subpoenas, it has no support in Virginia law. The NRA conception of the privilege is not the conception recognized in Virginia and would threaten to envelop the tort of abuse of process. *See MacDermid, Inc. v. Leonetti*, 79 A.3d 60, 62 (Conn. 2013) (declining to extend the litigation privilege to abuse of process claims).

Defendants' abuse of process claim is not a claim for defamation, nor is it premised on written or spoken words. Instead, Defendants' claim is premised on *acts* by the NRA that contained an ulterior motive and were improper. It was the act of filing the Amended Complaint that was improper because it was intended to disrupt the upcoming annual NRA meeting. The NRA continued this pattern with the act of filing the Second, Third, and Fourth Complaints as a tactic to garner press and avoid seeking leave to file an amended complaint. Similarly, it was the act of filing a frivolous motion with an ulterior motive of gaining press that was improper. The NRA continued these improper acts with depositions of its own members intended to instill fear rather than obtain any meaningful discovery. In sum, the NRA has abused the process through the

acts of making numerous filings that had an ulterior motive and were improper. These acts were not communications for the purpose of the litigation privilege. They were improper acts at the core of an abuse of process claim.

III. AMc has the legal right to file counterclaims against the NRA.

The NRA argues in its Plea in Bar that the Court should stay all proceedings related to AMc's counterclaims because AMc does not have a Certificate of Authority (COA) to operate in Virginia pursuant to Virginia Code § 13.1-758. However, this argument fails for several reasons.

First, the NRA disregards that while the statute states that a foreign corporation without a COA "may not maintain a proceeding," it clarifies that this refers to "a proceeding commenced by a foreign corporation." AMc did not commence any of the proceedings. Rather, the NRA filed a succession of complaints against AMc in this Court and AMc filed counterclaims in asserting its defense. This clarification is critically important because at least some of those counterclaims were compulsory under Virginia law. The NRA's reading of the statute would prevent an unregistered foreign corporation from bringing compulsory counterclaims, thus subjecting to it suit yet forever preventing it from seeking relief. This contradicts basic civil procedure.

The NRA does not cite to a single case that addresses whether a foreign corporation can defend itself with a compulsory counterclaim without obtaining a certificate of authority. But the cases that have addressed the issue have flatly rejected the NRA's position. In *Clayton Carpet Mills, Inc. v. Martin Processing, Inc.*, 563 F. Supp. 288 (N.D. Ga. 1983), the court addressed the same issue under a similar statute and held that:

> [I]f a foreign corporation, which did not possess a certificate of authority before the commencement of an action against it, was barred by § 14–2–331(b) from asserting a compulsory counterclaim, it would be permanently deprived of the right to assert

> this claim against the plaintiff. This Court doubts that the Georgia legislature intended such a far-reaching consequence when it enacted § 14–2–331(b).

Id. at 290; *see also E & E Indus., Inc. v. Crown Textiles, Inc.*, 80 N.C. App. 508, 510-11 (1986) ("The issue here is whether a nonqualifying corporation such as defendant, against which an action is brought in this State, may bring a compulsory counterclaim in that action. We hold that it may.") In fact, both of these cases involved counterclaims seeking the collection of amounts due from an invoice issued under the disputed contract. The logic and reasoning of *Clayton Carpet Mills, Inc.* and *E & E Indus., Inc.* are equally applicable to the instant case. Thus, the Court should reject the NRA's invitation to violate basic civil procedure.

Second, although AMc does not have a COA in Virginia, Mercury Group does.[5] More to the point, as both the subsidiary to AMc and the brick and mortar entity that interacts with the NRA, Mercury Group is the "corporation transacting business in the Commonwealth" required by the statute. The NRA's hyper-technical reading of the statute disregards these facts and would prevent a parent company from availing itself of a defensive counterclaim in Virginia courts even though its subsidiary is firmly situated as a valid, duly registered company and is a party to the litigation.

Finally, the NRA's request to have the case partially stayed until AMc obtains a COA is neither feasible, nor necessary. The Virginia Supreme Court holds that "[t]hough an entity need not obtain an SCC certificate prior to instituting the proceeding, we have consistently interpreted these provisions to require the party to obtain 'a certificate from the State Corporation Commission ***before the trial court enter[s] its final order.***'" *World Telecom Exch. Commc'ns, LLC v. Sidya*, No. 160666, 2017 WL 3084091, at *3 (Va. July 20, 2017) (emphasis in *World Telecom*) (quoting

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[5] The Mercury Group, Inc. is a corporation in good standing in Virginia as indicated on the Virginia State Corporation Commission website. It has the corporate ID -- F123610.

Nolle v. MT Tech. Enters., LLC, 284 Va. 80, 91 (2012)). Anything less would be a logistical nightmare in this case as discovery related to AMc's prosecution of the counterclaims would be stayed despite the fact that discovery related to Mercury Group's counterclaims would not be stayed. The remedy of a stay is unworkable. Defensive discovery by AMc substantially overlaps with discovery related to the NRA's claims. Thus, even if the Court holds that AMc needs a COA, the Supreme Court of Virginia envisions a timing that would not interrupt the progression of this case. The NRA's request to break with the Supreme Court of Virginia and stymie or scramble the progression of the case should be rejected.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Defendants request that the Court deny the Plaintiff's Demurrers and Pleas in Bar.

Respectfully submitted,

ACKERMAN MCQUEEN, INC. and
MERCURY GROUP, INC.
By Counsel

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[redacted]

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2019, the foregoing pleading was served on the following counsel electronic mail and first-class mail upon:

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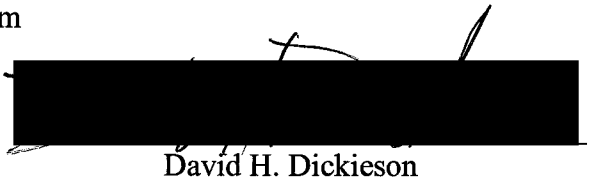

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