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**VIA ECF**

Hon. Melissa A. Crane
New York County Supreme Court
71 Thomas Street
New York, NY 10013

**Re:** ***People of the State of New York v. Ackerman McQueen and the National Rifle Association*, Index No. 451825/2019**

Dear Judge Crane,

We write in response to the letter dated November 14, 2019, and proposed sur-reply submission, filed by the National Rifle Association ("NRA") in connection with the Attorney General's pending motion to compel subpoena compliance in the above-entitled special proceeding. (Docket Nos. 41-43).

As a threshold matter, the NRA's submission is an untimely, unauthorized, post-argument sur-reply, barred by both the CPLR and the Local Rules, and should properly be disregarded as a matter of procedure regardless of its contents. *See* CPLR 2214; 1 Weinstein, Korn & Miller §15.03 ("no further papers (*e.g.*, sur-reply) are permitted without leave of court"); Local Rule 14(c) ("The CPLR does not provide for sur-reply papers, however denominated. Papers or letters regarding a motion should not be presented to the court…after argument in the Part, if any, except with the advance permission of the court. ***Materials presented in violation of this Rule will not be read.***") (emphasis added)).[1]

[1] Unauthorized sur-replies are not contemplated by the CPLR and are properly rejected by the courts. CPLR 2214. "The problems created by open-ended supplemental submissions are manifest.… Our court system is dependent on all parties engaged in litigation abiding by the rules of proper practice." *Ostrov v. Rozbruch*, 91 A.D.3d 147, 154 (1st 2012)(rejecting submission of unauthorized material following the closing of briefing)(internal citations and quotations omitted); *see also Flores v. Stankiewicz*, 35 A.D.3d 804, 805 (2d Dep't 2006)("The Supreme Court should not have considered the plaintiff's alleged documentary proof as it was submitted in counsel's self-entitled "Supplemental Affirmation in Opposition," which was, in effect, an improper sur-reply."); *Mu Ying Zhu v. Zhi Rong Lin*, 1 A.D.3d 416, 417 (2d Dep't 2003)(holding that "the Supreme Court properly declined to consider the physician's affidavit improperly submitted by the plaintiff for the first time in a sur-reply."); *Matter of Kushaqua Estates, Inc. v. Bonded Concrete, Inc.*, 215 A.D.2d 993,994 (3d Dept.1995)("Supreme Court could properly refuse

But the substance of the NRA's submission is much more troubling than its unapologetic flouting of procedural rules. Specifically, the NRA wants to supplement the record of this fully-submitted motion, post-argument, with a purported "expert" opinion from law professor Arthur Miller on the proper interpretation of New York law.

This is, of course, strictly forbidden. *Colon v. Rent-a-Center, Inc,*, 276 A.D.2d 58, 61 (1st Dep't 2000) ("Expert opinion as to a legal conclusion is impermissible. Likewise, the interpretation of a statute is purely a question of law, and is the responsibility of the court.") Indeed:

> The rule prohibiting experts from providing their legal opinions or conclusions is so well-established that it is often deemed a basic premise or assumption of evidence law -- a kind of axiomatic principle. In fact, every circuit has explicitly held that experts may not invade the court's province by testifying on issues of law.

*In re Initial Pub. Offering Sec. Litig.*, 174 F.Supp.2d 61, 64 (S.D.N.Y. 2001) (*citing United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991) and opinions from all other federal circuits; quotation omitted).[2]

Both the NRA's counsel and Professor Miller—who is an admitted attorney in this state—should know better. Professor Miller had a similar unsolicited "legal opinion" stricken on at least one prior occasion *for this very reason*. *See Kidder, Peabody & Co. v. IAG Int'l Acceptance Group, N.V.*, 14 F.Supp.2d 391, 404 (S.D.N.Y. 1998) ("To the extent that Professor Miller would seek to opine…about the elements of New York contract and attachment law…his testimony would usurp the role of the trial judge").[3]

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to consider respondents' surreply which not only was submitted without permission from the court, but was not restricted to the issues raised in petitioner's reply affidavit and contained new factual information."); *Sept. Food Sys. LLC v. BRE/Wellesley Properties, L.L.C.*, 25 Misc. 3d 1202(A), 899 N.Y.S.2d 63 (Sup. Ct. 2007), aff'd sub nom. *Sept.'s Food Sys., LLC v. BRE/Wellesley Properties*, LLC, 52 A.D.3d 680 (2d Dep't 2008)(rejecting and refusing to consider unauthorized sur-reply papers).

[2] *See also United States v. Everyman*, 660 F. Supp. 775, 781 (S.D.N.Y. 1987) ("Supplying such affidavits under these circumstances seems rather presumptuous, considering that the [law professor] affiants have not been asked by the Court for their views on the law and how the motion should be decided…. The [law professors] might have been better advised to have been guided by a reasonable degree of skepticism…when being solicited for submission of their extracurricular opinions of law").

[3] Indeed, it is hard to see how Professor Miller could have missed the point, given that Senior Judge Haight, who decided *Kidder*, published three more opinions re-affirming this principle while not only citing to *Kidder* but also referring to Professor Miller by name each time. *See SLSJ, LLC v. Kleban*, 277 F. Supp. 3d 258, 277-278 (D. Conn. 2017); *Feinberg v. Katz*, 2007 U.S. Dist. LEXIS 94967, *19-21 (S.D.N.Y. Dec. 21, 2007); *Topps Co. v. Cadbury Stani S.A.I.C.*, 2005 U.S. Dist. LEXIS 39540, * 17 (S.D.N.Y. Oct. 5, 2005). Professor Miller's own writings also indicate his familiarity with this axiom. *See* 1 Weinstein, Korn & Miller §15.03 ("Any legal citation or argument

As another court aptly noted of proffered law-professor affidavits opining on the law:

> In our adversarial system, lawyers make arguments, judges write legal opinions ***-- and there is no such thing as an expert opinion when it comes to interpreting a statute unless that opinion belongs to a court.*** [The law professors] are free to consult with the moving defendants, sign their brief, or both. They may attend the conferences and argue on their behalf. They could have submitted an amicus brief arguing how the law *should be* interpreted, although the time for such a submission has passed. But it remains this Court's exclusive duty and province "to say what the law is."

*In re IPO*, 174 F.Supp.2d at 69 (*quoting Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L. Ed. 60 (1803) (emphasis added)).

This Court is fully capable of applying the CPLR to the OAG's pending application to compel without a legal opinion from Professor Miller or any other purported expert on the applicable law. It is therefore respectfully submitted that the Court should disregard the NRA's procedurally and substantively defective submission in its entirety, without prejudice to OAG's right to seek additional relief, including potential sanctions, for the NRA's frivolous conduct.

Respectfully submitted,

*/s Monica Connell*
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cc: Emily Stern, Co-Chief, Enforcement Section
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should be contained in a separate memorandum of law…***because an attorney or party cannot swear to the truth of a legal argument.***") (emphasis added).