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.**	**Consol. Case No. CL19001757, CL19002067, CL19002886**

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO STAY

Respectfully submitted,

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By counsel

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Plaintiff National Rifle Association of America (the "NRA" or "Plaintiff") submits this response in opposition to the motion filed by Defendants Ackerman McQueen, Inc. and Mercury Group, Inc. (together, the "Defendants" or "AMc"), in the consolidated proceedings captioned above and docketed under Case Nos. CL9001757, CL1900067, and CL19002886 ("the Virginia action"). Defendants' Motion to Stay Proceedings ("Motion to Stay") seeks a stay of the Virginia action, pending the resolution of an action in the United States District Court for the Northern District of Texas ("the Texas action"). For the reasons set forth below, the Court should deny Defendants' Motion to Stay.

I.

INTRODUCTION

Defendants' motion is without merit and should be denied because: (1) the Services Agreement between the parties contains a forum selection clause designating this Court, the Circuit Court of Fairfax County, and the United States District Court for the Eastern District of Virginia as the exclusive forums for litigating contract-related disputes; (2) Defendants fail to meet their burden to demonstrate entitlement to a stay.

Defendants now propose that the litigation pending before this Court for nearly a year and with a set trial date, should be stayed to permit purportedly "redundan[t]" causes of action to be resolved in the Northern District of Texas, where – to date – no scheduling order has been issued, no protective order has been entered, no witnesses have been deposed, no discovery disputes have been heard, and no trial date is set.

This Court should deny the Motion to Stay because it is a pretext to void the parties' binding and valid agreement to litigate their contract-related disputes exclusively in Virginia. Granting Defendants' motion would nullify a provision of the parties' contract for which they bargained and upon which the NRA is entitled to rely.

Defendants also argue to this Court that application of a "five-factor" stay analysis supports Defendants' motion to stay the instant Virginia action. Notably, Defendants argue that: (a) the Texas litigation – filed five months *after* this case – must be considered "first-filed," and (b) identical claims are alleged in the Virginia and Texas actions, even though Defendants plead a claim against the NRA in Virginia that they do not plead in Texas, and claims against the NRA in Texas that they do not plead in Virginia; and, (c) the NRA will not be prejudiced by a stay, even though the NRA would be deprived of its contractually chosen forum, and forced to abandon those components of its claims that are alleged in Virginia only.

Finally, even if the decision to grant or deny a motion to stay would normally be within the general discretion of this Court, this Court cannot grant Defendants' request to invalidate the parties' forum selection clause unless Defendants' arguments surpass a higher standard: Here, Defendants cannot prove that the forum selection clause they have failed to challenge in nearly a year of litigation is unreasonable, unfair, or the product of fraud or unequal bargaining power. Accordingly, Defendants' motion to invalidate the parties' forum selection clause—presented here in the guise of a motion to stay—must be denied.

II.

RELEVANT BACKGROUND

The Plaintiff disputes Defendants' factual history of the case to the extent it editorializes the procedural history and mischaracterizes the cost of litigation in two forums.

Defendants' recitation omits at least one important detail: the parties to this litigation signed a Services Agreement, effective April 30, 2017.[1] The pertinent clause of the 2017 Services Agreement, Section XII.B., reads:

> AMc consents and agrees that all legal proceedings relating to the subject matter of this Services Agreement shall be maintained exclusively in courts sitting within the City of Alexandria of the County of Fairfax, Commonwealth of Virginia, and AMc hereby consents and agrees that jurisdiction and venue for such proceedings shall lie exclusively with such courts. AMc furthermore consents to the exercise of personal jurisdiction by said courts over AMc.

As discussed below, granting Defendants' request for a stay of the Virginia action to permit Defendants to pursue their contract claims in their apparent venue of choice, would reward Defendants' attempt to side-step the plain terms of the Services Agreement.

III.

ARGUMENT

The Motion to Stay should be denied because Defendants agreed to pursue their contract-related claims in this forum alone. The Defendants wish to stay this action in a venue specifically selected and agreed upon by the parties, and proffer no rationale why: (1) this Court should ignore the parties' express agreement to litigate in the instant forum; (2) Plaintiff should be denied its choice of forum; or, 3) Texas is a better suited venue than the City of Alexandria, where this Court has been briefed and a trial date has been set. Additionally, Defendants have failed to carry their burden to secure issuance of a stay under the precedent of this Commonwealth. Finally, Defendants' arguments that failure to stay this action will cause needless inefficiencies are not supported by the facts.

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[1] *See* the 2017 Services Agreement, annexed hereto as Exhibit "A." The parties entered into an amendment to the Services Agreement, effective May 6, 2018, which does not affect the pertinent provision Section XIII.B. *See* Amendment No. 1, annexed hereto as Exhibit "B."

A. The Court Must Reject Defendants' Bid To Invalidate the Parties' Forum Selection Agreement.

Defendants seek this Court's blessing to violate the parties' forum selection clause, which the Supreme Court of Virginia recognizes to be "prima facie valid."[2] While the Court may exercise its discretion to grant a stay if a movant successfully demonstrates that the balance of five factors weighs in favor of a stay,[3] which Defendants have not done here, a movant must surpass a higher threshold to succeed on a *de facto* motion to invalidate a presumptively valid clause in its contract. Specifically, Defendants must be denied the relief they seeks unless Defendants prove that the forum selection provision by which they agreed to be bound is unfair or unreasonable, or affected by fraud or unequal bargaining power.[4] Defendants make no such showing. On that basis alone, Defendants' motion to challenge the enforceability of the parties' forum selection clause (styled here as a motion to stay), must be rejected.

1. Defendants Are Bound By The Parties' Forum Selection Agreement To Litigate Claims Relating To The Services Agreement In This Court.

The fact that Defendants agreed to a forum selection clause when contracting with Plaintiff is fatal to Defendants' motion.

The Services Agreement requires that "all legal proceedings" relating to the contract "shall be maintained exclusively in the Courts of the City of Alexandria or the County o[f] Fairfax, [in

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[2] *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 240 Va. 337, 342, 397 S.E.2d 804, 807 (1990).

[3] *Potomac Sav. Bank, F.S.B. v. Lewis*, 25 Va. Cir. 184, 1991 WL 835178, at *1 (1991) (citing 1 AM. JUR. 2D ACTIONS 94).

[4] *Paul Bus. Sys.*, 240 Va. at 342, 397 S.E.2d at 807 (emphasis added) (citing *M/S The Bremen v. Zapata Off-Shore Co.* ("*The Bremen*") 407 U.S. 1, 10-12, 92 S. Ct. 1907, 1913-1914 (1972); RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1988 Revisions) § 80 (Supp.1989); 31 A.L.R.4th at 415)). *See also Ash-Will Farms, L.L.C. v. Leachman Cattle Co.*, 61 Va. Cir. 165, 2003 WL 22330103, at *3 (Va. Cir. Ct., Winchester 2003) (Party seeking to challenge enforcement of a forum selection clause on basis of fraud must "establish" that the provision is affected by fraud, and "establish" means " prove.") (citing *Marklyn Controls Supply v. Pall Trinity Micro Corp. By & Through Pall Corp.*, 862 F. Supp. 140 (W.D. Tex. 1994) (where no fraud or overreaching shown, argument of unequal bargaining power was insufficient to show the clause was not the product of arms-length negotiations between sophisticated businesses); also citing *Martin v. Moore*, 263 Va. 640, 645, 561 S.E.2d 672, 675 (2002) (interpreting "establish" to mean "prove"); *Hudson v. Pillow*, 261 Va. 296, 302, 541 S.E.2d 556 (2001) (same)).

the] Commonwealth of Virginia."[5] The terms "shall" and "exclusively" render the provision "mandatory."[6] Defendants do not have the luxury of opting out of this venue, no matter how creatively they style their request to this Court to do so.

The courts of this Commonwealth defer to the freedom of parties to contract,[7] including the freedom to select a forum in which to litigate potential disputes.[8] "The Supreme Court [of the United States in the *The Bremen* decision] found that forum selection clauses are presumptively valid and should be enforced unless the clause is 'unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud or overreaching.'"[9]

The NRA need not prove to the Court that the parties' contract to litigate certain disputes in Virginia is valid because "the burden is on the party objecting to enforcement of the clause to make this showing [that the clause is invalid]."[10]

2. <u>The Parties' Forum Selection Clause Is Presumptively Valid.</u>

The Supreme Court of Virginia explicitly "embrace[d]" the *The Bremen* standard in 1990:

> According to the modern view, which we now embrace, contractual provisions limiting the place or court where potential actions between the parties may be brought are **prima facie valid** and should be enforced, unless the party challenging enforcement

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[5] *See* Exhibit A, § XII.B.

[6] *See S.W. Virginia, R.P.S, L.L.C. v. C.T.I. Molecular Imaging, Inc.*, 74 Va. Cir. 117, 2007 WL 5962517 *1, *2 (2007) ("where venue is specified in a forum selection clause with mandatory language, that clause will be enforced as a mandatory forum selection clause"); *see also S & D Coffee, Inc. v. G.E.I. Autowrappers*, 995 F. Supp. 607, 609 (M.D.N.C.1997); *Docksider, Ltd. v. Sea Tech., Ltd.*, 875 F.2d 762, 762-64 (9th Cir.1989) ("This mandatory language makes clear that venue, the place of suit, lies exclusively in the designated county.").

[7] *Commonwealth Div. of Risk Mgmt. v. Virginia Ass'n of Ctys. Group Self Ins. Risk Pool*, 292 Va. 133, 143, 787 S.E.2d 151, 155 (2016) ("Our common-law tradition counsels that courts 'are not lightly to interfere' with lawful exercises of the 'freedom of contract.'") (citing and quoting *Atlantic Greyhound Lines v. Skinner*, 172 Va. 428, 439, 2 S.E.2d 441, 446 (1939) (citation omitted); citing 7 Steven Plitt *et al.*, Couch on Insurance 3d, § 98:6, at 98–16-17 (rev. ed. 2013)).

[8] *See The Bremen*, 407 U.S. 1, 12-13, 92 S .Ct. 1907, 1914-15 (1972) ("There are compelling reasons why a freely negotiated" forum clause "should be given full effect.").

[9] *Bryant Elec. Co., Inc. v. City of Fredericksburg*, 762 F.2d 1192, 1196 (4th Cir. 1985) (citing and quoting *The Bremen*, 407 U.S. at 15, 92 S .Ct. at 1916 (1972)).

[10] *Id.*

> establishes that such provisions are unfair or unreasonable, or are affected by fraud or unequal bargaining power.[11]

Each of Defendants arguments in favor of staying this matter center on the inefficiencies they forecast will arise from the maintenance of the instant litigation here in Virginia. But inefficiency is not one of four grounds which can justify invalidating or disregarding the parties' express agreement to resolve their contractual disputes here.

3. AMc Alleges No Facts To Challenge—Much Less Defeat—The Presumptive Validity Of The Parties' Forum Selection Agreement.

Under Virginia and federal law alike, forum selection clauses are presumptively valid absent certain extenuating circumstances.[12] Here, Defendants do not allege that any provision of the parties' Services Agreement is unfair, unreasonable, or affected by fraud or unequal bargaining power. Defendants must be denied the relief they seek unless Defendants prove[13] that the forum selection provision is invalid based on the presence of any such extenuating circumstance.[14] Defendants make no such showing.

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[11] *Paul Bus. Sys., Inc. v. Canon U.S.A., Inc.*, 240 Va. 337, 342, 397 S.E.2d 804, 807 (1990) (emphasis added) (citing *The Bremen*, 407 U.S. at 10, 12, 92 S. Ct. at 1913-1914; RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1988 Revisions) § 80 (Supp.1989); 31 A.L.R.4th 404, 415 (orig. publ. 1984)).

[12] *Rice Contracting Corp. v. Callas Contractors, Inc.*, E.D. Va. Dkt, No. 1:08CV1163LMB/TRJ, 2009 WL 21597, at *3 (Jan. 2, 2009).

[13] *See Ash-Will Farms*, 61 Va. Cir. 165, 2003 WL 22330103, at *3 (Winchester, 2003) (Party seeking to challenge enforcement of a forum selection clause on basis of fraud must "establish" that the provision is affected by fraud, and "establish" means " prove.") (citing *Marklyn Controls Supply v. Pall Trinity Micro Corp. By & Through Pall Corp.*, 862 F. Supp. 140 (W.D. Tex. 1994) (where no fraud or overreaching shown, argument of unequal bargaining power was insufficient to show the clause was not the product of arms-length negotiations between sophisticated businesses), also citing *Martin v. Moore*, 263 Va. 640, 645, 561 S.E.2d 672, 675 (2002) (interpreting "establish" to mean "prove") and *Hudson v. Pillow*, 261 Va. 296, 302, 541 S.E.2d 556 (2001) (same)).

[14] *Paul Bus. Sys.*, 240 Va. at 342, 397 S.E.2d at 807 (1990) (citing *The Bremen*, 407 U.S. at 10, 12, 92 S. Ct. at 1913-14; RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1988 Revisions) § 80 (Supp.1989); 31 A.L.R.4th at 415 (orig. publ. 1984)).

4. Neither Efficiency Nor Economy Bears On The Enforceability Of The Parties' Forum Section Clause.

Efficiency is not a recognized ground in Virginia, or anywhere else, to invalidate the forum selection clause of the parties. Finding that Virginia law and federal law alike compel the enforcement of a forum selection clause, the Eastern District of Virginia has specifically ruled that neither convenience nor expense are among the factors which permit a court to ignore the parties' express agreement to litigate in a chosen forum.[15] Under Virginia law, "mere inconvenience and expense are insufficient to render enforcement of a forum selection clause unreasonable."[16]

a. The purported inconvenience to AMc of complying with AMc's own contract is not a factor for this Court's consideration.

The rationale for discounting professed concerns of inconvenience is self-evident: any "extra" expense associated with a party's selection of a (relatively) less convenient forum, is "baked in" to the price of the parties' contract.[17]

Moreover, in this case, the parties' pre-selected venue is eminently reasonable. For example, the *Bryant* case cited here affirmed an Eastern District of Virginia decision that a forum selection clause is reasonable and enforceable, because the selection of the Circuit Court for the City of Fredericksburg is a logical and convenient choice due to its expertise in the law to be applied to the dispute: to wit, Virginia law. This Court is similarly an appropriate choice to enforce the law of the Commonwealth. *Bryant* further held that the movant failed to show that the forum

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[15] *See Rice Contracting Corp.*, E.D. Va. Dkt. No. 1:08CV1163LMB/TRJ, 2009 WL 21597, at *4 (Jan. 2, 2009) (applying Virginia law). *See also Coastal Mechanics Co., Inc. v. Def. Acquisition Program Admin.*, 79 F. Supp. 3d 606, 612-13, 2015 WL 153443 (E.D. Va. 2015) (applying Virginia law).

[16] *Id.*

[17] *See Gita Sports Ltd. v. SG Sensortechnik GMBH & Co. KG*, 560 F.Supp.2d 432, 439 (W.D. N.C. 2008) (applying federal law and concluding that parties presumably considered the burden of litigating in a foreign forum "when they calculated the proper consideration to be paid under the contract.") (citing *Paper Exp., Ltd. v. Pfankuch Maschinen GmbH,* 972 F.2d 753, 758 (7th Cir.1992); *Lawler v. Schumacher Filters America, Inc.*, 832 F.Supp. 1044, 1053 (E.D.Va.1993); *Gordonsville Industries, Inc. v. American Artos Corp.*, 549 F.Supp. 200, 205 (W.D.Va.1982)).

selection clause at issue was unreasonable or unjust. It is respectfully submitted that *Bryant* is appropriately analogous to the case at bar, and that it would be outside the purview of this Court to rule otherwise, due to the binding precedent of the Virginia Supreme Court,[18] the Fourth Circuit Court of Appeals[19] and the United States Supreme Court,[20] which recognize the parties' freedom to agree to litigate disputes exclusively in a particular forum.

b. Neither is Defendants' argument that they would be forced to duplicate their litigation efforts a factor for this Court's consideration.

In *Rice Contracting Corp. v. Callas Contractors, Inc.*, Rice, like Defendants here, made no allegation of unfairness, fraud or overreaching.[21] Rice and Callas were corporations which entered a forum selection agreement. Movant Rice presented no evidence of unequal bargaining power. Rice sought to void the parties' forum selection clauses by arguing that enforcement of the clauses would compel Rice to bring suit in two different courts. The United States District Court for the Eastern District of Virginia concluded that neither inconvenience nor expense are factors which may render forum selection provisions unreasonable.[22] Indeed, unless a litigant would be denied its "day in court," the Court was required to enforce the forum selection provisions bargained for by the parties, notwithstanding concerns of waste of resources and duplication of efforts.[23] There, as here, the movant "will not be deprived of its day in court; indeed, if the litigation proceeds, it will have two."[24]

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[18] *Paul Bus. Sys.*, , 240 Va. at 342, 397 S.E.2d at 807, citing *The Bremen*, 407 U.S. at 10-12, 92 S. Ct. at 1913-1914.

[19] *Bryant Elec. Co., Inc. v. City of Fredericksburg*, 762 F.2d 1192 at 1196–97 (4th Cir.1985).

[20] *The Bremen*, 407 U.S. 1, 10-12, 92 S. Ct. 1907, 1913-1914 (1972).

[21] *Rice Contracting Corp.*, No. 1:08-CV-1163LMB/TRJ, 2009 WL 21597, at *3-4 (E.D. Va. Jan. 2, 2009) (citing *Gita Sports Ltd.*, 560 F. Supp.2d at 437 (applying federal law)).

[22] *Id.* at *3-4.

[23] *Id.* at *3-4.

[24] *Id.* at *3.

B. AMc Fails To Overcome The Presumption In Favor Of Permitting The Instant Litigation To Proceed.

1. Defendants Fail to Satisfy Their Burden of Persuasion on the Five Factor Analysis They Contend This Court Should Apply.

The arguments laid out above are sufficient reason for this Court to deny Defendants' motion. Nonetheless, there are numerous other failings of Defendants' motion, as outlined below.

Courts have indicated that there would need to be sufficient evidence upon which a court can make a decision with respect to the various factors to be considered in a motion to stay analysis.[25] The factors to be considered include: (1) identity of the parties; (2) identity of the issues; (3) time of filing; (4) promotion of judicial efficiency; and, (5) prejudice to either party.[26] Each factor is analyzed separately below, and with respect to each factor, the Defendants have failed to carry their burden of providing sufficient evidence in favor of imposing a stay.[27]

a. The parties to the Texas and Virginia actions are not identical.

The parties in the Virginia action and the Texas action are indisputably not identical. While it is true that every party in the Virginia action is involved in the Texas action, the opposite cannot be said. Defendants concede in their motion papers that four individual Defendants, all employees of Defendant AMc, are parties to the Texas action.

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[25] *Potomac Savings Bank, F.S.B. v. James T. Lewis*, et al, 25 Va. Cir. 184 (1991).

[26] *Vesilind v. Virginia State Bd. of Elections*, 91 Va. Cir. 490 (2016). *See also*, *Davis v. Morriss' Ex'ors*, 76 Va. 21 (1881); *Gebrekidan v. Riley*, 74 Va. Cir. 215, 216 (Alexandria 2007) (citing *Potomac Savings Bank, F.S.B. v. Lewis*, 25 Va. Cir. 184 (Fairfax 1991); *SettlementRoom L.C. v. Certified Environments, Inc., et al.*, 67 Va. Cir. 69, 73 (Fairfax 2005)).

[27] Notably, absent exceptional circumstances, a federal court will not defer to a state court action. *See Colorado River Water Conservation Dist. v. U. S.*, 424 U.S. 800, 813, 96 S. Ct. 1236, (1976); see also *Falls Church Med. Ctr., LLC v. Oliver*, 346 F. Supp. 3d 816, 825, 2018 WL 4624818 (E.D. Va. 2018) (citing *Colorado River*, 424 U.S. at 813) ("[Abstention] is only deployed in the exceptional circumstances where deferring to the state court would clearly serve an important countervailing interest."). This Court should be equally circumspect where, as here, Defendants request this Court's deference to a foreign jurisdiction.

b. The issues before the Texas and Virginia courts are not identical.

Defendants carry the heavy burden to establish that the issues are identical. Defendants here cannot meet that burden.

Various differences exist between the two actions, and the simplest way to demonstrate variation is by looking to the original pleadings. As noted in the Defendants' Memo., the Complaints in both forums are "often word for word."[28] However, the Complaints are not identical, and perhaps more significantly, allege claims to be adjudicated under different sets of law. For example, the Virginia Complaint details Defendant AMc's obligation under both the Services Agreements to adjust its pricing based on fair market value; this portion of the allegations is not in the Texas Complaint.[29] The Virginia Complaint details how out-of-pocket expenses and expense reimbursement procedures came to be; this portion of the allegations is not in the Texas Complaint.[30] The Virginia Complaint describes "certain financial assurances in the event that the NRA terminated the Services Agreement"; this portion of the allegations is not in the Texas Complaint.[31]

Significantly, Defendants' counter-claims asserted in the Virginia action are not identical to their counter-claims in the Texas action. Defendants neglect to point out to the Court that they have filed a claim in this Court – and only in this Court – for abuse of process.

Additionally, as of the filing date of this Memorandum of Law in Opposition to Defendants' Motion to Stay, Defendants have yet to file and serve their anticipated counterclaims

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[28] *See* Defendants' Memorandum of Law in Support of its Motion to Stay Proceedings in this Court Pending Resolution of Parallel Federal District Court Litigation (filed Feb. 18, 2020) ("Defendants' Memo."), p. 6.

[29] *See* Consolidated and Supplemental Amended Complaint to Conform with Evidentiary Proof, Consol. No. CL19001757 (filed Jan 30, 2020) ("Amended Complaint"), ¶ 11 (Exhibit C to Defendants' Memo.); *see gen.* Pl.s' First Amended Complaint, No. 3:19-cv-02074-G (ECF 18) (filed Oct. 25, 2019, N.D. Tex.) ("Texas Complaint").

[30] *See* Amended Complaint, ¶ 12; *see gen.*, Texas Complaint.

[31] *See* Amended Complaint, ¶ 14.

to the NRA's Amended Complaint.[32] Even if this Court is persuaded by Defendants' arguments that the proceedings here and in Texas are identical—a conclusion not supported by the facts— it is respectfully requested that, at the very least, this motion be adjourned until a date following Defendants' service of their counterclaims.

c. The Virginia action was filed nearly five months before the Texas action.

Defendants contend that the Virginia action should not be considered first in time because the Amended Complaint is the "more relevant marker" of the age of the action. Of course, the NRA first filed its initial complaint against Defendants in this Court, on April 12, 2019. The earliest filed complaint in the Texas action was filed almost five months later, on August 30, 2019. Courts typically rely heavily on the "first-filed" rule when considering priority between parallel actions in different jurisdictions.[33] Defendants contend that earlier filed pleadings should be ignored in a "time of filing" inquiry, because Defendants believe that a later pleading is "more relevant."[34] Defendants' counterintuitive proposition is not supported by any caselaw. Moreover, it is completely false to claim that "the discovery process has been sent back to square one."[35] For

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[32] Defendants have indicated their intention to respond to the Amended Complaint, but have yet to file a response and counter-claims. See Tr. Hearing, Feb. 6, 2020 (Exhibit B to Defendants' Memo.) 180:17 -- 181:01.

> MR. DICKIESON: One other housekeeping matter, your Honor, We have to file an opposition or a response to the amended complaint. And we'd ask for 21 days. It's not specified in the rule as to how many -- how much time we have.
> THE COURT: Yea, 21 days.

[33] *See, e.g., Allied-Gen. Nuclear Servs. v. Commonwealth Edison Co.*, 675 F.2d 610, 611 (4th Cir. 1982); *In re AutoNation, Inc.*, 228 S.W.3d 663, 670 (Tex. 2007) ("When a matter is first filed in another state, the general rule is that Texas courts stay the later-filed proceeding pending adjudication of the first suit"); *VE Corp. v. Ernst & Young*, 860 S.W.2d 83, 84 (Tex. 1993) (where identical suits are pending in different states, "the principle of comity generally requires" deference to the first-filed action); *Shooster v. BT Orlando Limited Partnership*, 766 So. 2d 1114, 1116 (Fla. 5d 2000) ("priority is given to the court in which jurisdiction first attached").

[34] Defendants' Memo., p.7

[35] Defendants' Memo., p. 7.

example, the parties have undertaken significant deposition practice in the Virginia action.[36] In the Texas action, the only deposition that can be said to have occurred is a deposition noticed and conducted in the Virginia action, which was also *cross-noticed* in the Texas action.

d. Promotion of judicial efficiency

Defendants have not demonstrated that a stay will promote judicial efficiency or serve in the interest of justice. They erroneously contend that a stay is appropriate because it will conserve judicial resources. Defendants base their argument on the flawed premise that Plaintiff's claims will be rendered moot at the conclusion of the Texas action.

(1) Defendants' favored course would waste judicial resources; not conserve them.

As an initial matter, the amended protective order in this action permits cross-noticing of depositions. No witnesses noticed for deposition in the Virginia action are separately being noticed for distinct depositions in the Texas action. To the contrary, witnesses to date have been subject to one deposition, and the parties' protective order enables them to use the transcript of such depositions in either jurisdiction. It is disingenuous at best, and purposefully misleading at worst, for Defendants to suggest that the continuance of both actions, here and in Texas, will double the number of such proceedings or otherwise multiply the burden to the judiciary.

In addition, Virginia law should be interpreted by a Virginia court whenever possible, and the parties' Services Agreement require the application of Virginia law to the claims set forth in the Virginia action.[37]

Furthermore, this Court has already scheduled a trial date and the parties have taken more than a dozen depositions in the Virginia case. No depositions have been taken in the Texas action

[36] The parties have conducted fifteen (15) depositions in the Virginia action.

[37] *See* Services Agreement, Exhibit A, § XII.A.

other than a deposition in the Virginia action which was cross-noticed in the Texas matter. The true waste of judicial resources would be a consequence of the issuance of a stay, that would necessitate eventual repetition of hearings, depositions, briefings, and conferences at some undetermined point in the future.

(2) Defendants cannot demonstrate the Virginia action will become moot at the conclusion of the Texas action.

Defendants erroneously contend that this action should be stayed because it will become moot following the resolution of litigation in Texas. Defendants bear the burden to demonstrate mootness,[38] and they have failed to carry it.

> "Generally, a case is moot and must be dismissed when the controversy that existed between litigants has ceased to exist . . . Whenever it appears or is made to appear that there is no actual controversy between the litigants, or that, if it once existed, it has ceased to do so, it is the duty of every judicial tribunal not to proceed to the formal determination of the apparent controversy, but to dismiss the case . . . ."[39]

The controversy here is not moot, and would not be moot even following the complete adjudication of the Texas action. As described *supra*, at § III.B.1.b., (a) Defendants have asserted at least one counterclaim in the Virginia action which they have not asserted in the Texas action; (b) the NRA's allegations in the Virginia action are broader in many respects than the NRA's allegations in the Texas action, and (c) Defendants have yet to file counterclaims to the Amended Complaint (as of the date of this response memorandum), such that the NRA and the Court do not

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[38] "The burden of establishing mootness is on the party alleging it." *Brown v. Cerniglia*, No. 0330-19-4, 2019 WL 7196621 *1, at *1 (Va. Ct. App. Dec. 27, 2019). *Reston Hosp. Ctr., LLC v. Remley*, 63 Va. App. 755, 767, 763 S.E.2d 238, 245 (2014) (The burden of establishing that a court lacks jurisdiction rests on 'the party who alleges that a controversy before [the court] has become moot.'") (citing *Michigan v. Long*, 463 U.S. 1032, 1042 n. 8, 103 S. Ct. 3469, 3477 n. 8, (1983) (quoting *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 645, 99 S. Ct. 1379, 1390, 59 L.Ed.2d 642 (1979))).

[39] *Daily Press, Inc. v. Commonwealth*, 285 Va. 447, 452, 739 S.E.2d 636, 639 (2013), citing, *E.C. v. Va. Dep't of Juvenile Justice*, 283 Va. 522, 530, 722 S.E.2d 827, 831 (2012) (quoting *Franklin v. Peers*, 95 Va. 602, 603, 29 S.E. 321, 321 (1898)).

yet know whether additional counterclaims unique to Virginia will be asserted by Defendants. These facts each undercut Defendants' arguments and illustrate that even after the conclusion of the Texas action, key elements of the Virginia action will remain for this Court to resolve.

Finally, the principles of *res judicata* and collateral estoppel would apply to any "identical" claims, and act as a safeguard against any re-litigation of identical claims.[40]

(3) Defendants' Predictions of Duplicate or Inconsistent Adjudications Are Without Merit.

(a) No claim of either party will be litigated more than once.

Defendants project a "logistical nightmare" for all parties and two courts adjudicating the same case. As an initial matter, two courts will not adjudicate the same claims, and it is disingenuous of Defendants to pretend otherwise. Defendants' claims that relate to the subject matter of the parties' contract will be litigated once because (a) Defendants' contract claims must be adjudicated by this Court, and only this Court, and (b) the principles of *res judicata* and collateral estoppel safeguard against duplicate adjudications. Moreover, the litigation in the United States District Court for the Northern District of Texas is immature, little discovery has taken place and no trial date has been set. Finally, the NRA anticipates that Defendants' contract-based counter-claims against the NRA will be dismissed from that venue on the basis of the parties' forum selection agreement.[41]

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[40] *See, Vanity Stores, Inc. v. Town of Kilmarnock*, 49 Va. Cir. 533 (1998) (citing *Glasco v. Ballard*, 249 Va. 61 (1995) and *Bates v. Devers*, 214 Va. 667 (1974)) ("[T]he doctrine of collateral estoppel and res judicata preclude the plaintiffs from relitigating" any issues of fact actually litigated in an earlier proceeding, or any cause of action or component thereof "which could have been litigated between the same parties" in an earlier proceeding.).

[41] The fact that certain of the NRA's contract claims are presently alleged in the Texas Court is not a waiver of the parties' forum selection clause, but an acknowledgement of the compulsory counterclaim rule in Texas which requires the NRA to assert its contract claims in that jurisdiction or risk losing its rights to relief in Texas and Virginia alike. *See* Tex. R. Civ. P. 97(a), describing characteristics of a compulsory counterclaim, including that the claim arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim. Here, AMc brought contract-related counterclaims, to which the NRA was required to respond. In strikingly similar circumstances, the Supreme Court recognized in *The Bremen*, that a litigant in the NRA's position may be compelled

(b) Defendants' predictions of waste and inefficiency are red herrings.

Defendants project spending two million dollars to litigate their claims in Virginia. Notably, Defendants do not claim that they would save that amount if this Court granted Defendants' requested stay. Indeed, whether the claims are litigated in Texas or in Virginia, funds will have to be expended; the question is whether those funds will be expended in Virginia or in Texas, not whether the funds will be expended at all. Further, Defendants do not seek to abate only their own claims, which would require no Court order; instead, they seek to stay the progress of Plaintiff's claims as well – again, in a forum to which Defendants explicitly consented.

Defendants argue that this Court should consider that Virginia counsel for Defendants, Schertler & Onorato, are only litigating the Virginia matter, and not the Texas matter. Presumably, Defendants are suggesting that it will save money on legal fees if the Virginia action is stayed because they would not have to pay two sets of counsel. Defendants assert that "[their] Virginia and Texas counsel will need to duplicate activities at every step, appearing at one another's depositions, hearings, and drafting similar pleadings."[42] Respectfully, the NRA cannot be held responsible for Defendants' decision to utilize national counsel (Dorsey & Whitney LLP, whose attorneys presently represent Defendants in the Texas action and *pro hac vice* in the Virginia action), while also utilizing Virginia counsel (Schertler & Onorato LLP) to litigate the Virginia action.

Defendants similarly misrepresent the supposed duplication of efforts that would affect nonparties in discovery. Defendants state that "[a]lready some third parties are scheduled to be

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to file an action in a foreign jurisdiction as a purely defensive measure, and that such action does not preclude the NRA "from relying on the forum clause it bargained for." 407 U.S. at *19-20.

[42] Defendants' Memo. p. 2.

deposed twice . . . ." But Defendants identify no such nonparty deposed in Virginia who is also supposedly scheduled to be deposed in a separate proceeding in Texas. Defendants further claim that other nonparties "have been subjected to multiple subpoenas." Again, the NRA knows of no nonparty witness that has been subpoenaed by the NRA in the Virginia litigation and subpoenaed again by the NRA in the Texas litigation. If Defendants can point to any such nonparty, the NRA will certainly work with that nonparty to remedy such an oversight.

(c) Should the Court grant AMc's motion to stay, certain of the parties claims will not be litigated at all.

Contrary to Defendants' professed concern that certain of the parties' claims may be litigated twice, Defendants' motion seeks to foreclose certain of the parties' claims from being litigated at all. The NRA has pled allegations and sought relief in Virginia that it does not assert or seek in Texas. For example, and as alluded to, *supra,* at § III.B.1.b., the NRA asserts allegations regarding AMc's failure to provide the NRA access to books and records in greater detail in Virginia because Virginia is the only venue in which the NRA seeks specific performance for breach of that contract provision. Defendants have also pled distinct counterclaims in Virginia from those they pled in Texas. Virginia is the only venue in which Defendants have pled a claim for abuse of process. These examples alone put the lie to AMc's conclusion that the Virginia litigation "is a perfect subset of the federal Texas litigation . . . ."[43]

e. Defendants cannot reasonably claim to be prejudiced by progression of the instant litigation.

Defendants bear the burden of establishing not that a stay would be convenient, but that the failure to grant a stay would cause Defendants undue hardship or inequity.[44] The argument

[43] AMc Memo., Mtn. Stay p. 6

[44] Defendants rely on *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (see Defendants' Memo. p. 4), but that U.S. Supreme Court decision applying federal law in fact undercuts Defendants' argument. *Landis* requires

that some deponents would be deposed twice is misleading at best. As described *supra*, the discovery and deposition proceedings are well-underway in the instant litigation and significantly overlap with anticipated discovery needs in the Texas litigation, such that any additional cost to defend a deposition in two venues is significantly overstated. Indeed, no additional attorneys need appear for such depositions. Defendants are presently represented by national counsel who may appear (and have appeared) for Defendants at a single deposition, and examine the witness regarding matters alleged in both venues. Significantly, the amended protective order signed by Defendants and entered by this Court permits cross-noticing of depositions, and therefore side-steps the specific inefficiency that Defendants protest here. Defendants' inefficiency argument is overstated, to the extent it applies at all.

2. Granting Defendants' Motion for a Stay Will Irreparably Prejudice the NRA.

Defendants contend that cost is the only prejudice it will face in the absence of a stay, and say nothing of inequity, injustice, or a future burden on this Court for duplicative use of resources following the lifting of such a stay. Defendants' case law in support is merely a case which permitted a stay based on the first-filed rule, which, as argued here, is inapplicable.[45] The *Regions* decision, Defendants' sole legal basis for arguing that the cost of two forum warrants a stay, hinged on the time of filing and not – as Defendants would have this Court believe – on a rationale related to costly litigation.[46]

The Defendants fail to demonstrate that Plaintiff the NRA will not be prejudiced if this action is stayed. Notably, Plaintiff's entire business and all of its witnesses are located in Virginia.

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that "if there is even a fair possibility" that the requested stay would adversely affect another party, "the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward." *Landis*, 299 U.S. at 255.

[45] AMc Memo., Mtn. Stay p. 9

[46] *See, generally, Regions Bank v. Wieder & Mastroianni, P.C.*, 170 F. Supp. 2d 436, 441 (S.D.N.Y. 2001) (including an analysis of the first-filed rule).

Proceedings here have progressed further than in the Texas action, and a stay would presumably require the parties to forego the opportunity to cross-notice depositions. That step backwards would effectively reverse the progress of this significantly litigated matter, and compel the Plaintiff to engage in unnecessarily duplicative discovery at a later date.

Defendants once again erroneously contend that Plaintiff the NRA has not suffered any harm from Defendants' conduct. This very motion by and of itself has been burdensome and prejudicial to the Plaintiff. Plaintiff has spent time, effort, and money opposing this instant motion, no matter that it is entirely improper due to its failure to even mention the Defendants' binding forum-selection clause. Nevertheless, Defendants accuse the NRA of dilatory tactics and abuse of process.

The Defendants cannot establish that they will be subject to unfair prejudice if this Court denies their Motion to Stay, yet the stay Defendants seek is bound to prejudice Plaintiff and waste judicial resources by delaying inevitable litigation into the future.

IV.

CONCLUSION

For all the foregoing reasons, Defendants Motion should be denied. Accordingly, Plaintiffs request that the Court deny the Motion and grant Plaintiffs all appropriate relief.

Dated: March 4, 2020

Respectfully submitted,

NATIONAL RIFLE ASSOCIATION
OF AMERICA
By counsel

[redacted]

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Counsel for the National Rifle Association of America

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2020, I caused the foregoing Plaintiff's Opposition to Defendant's Motion to Stay to be served via electronic mail and first-class mail upon:

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4811-0335-2502, v. 15

EXHIBIT A

SERVICES AGREEMENT

THIS AGREEMENT, made this 30th day of April, 2017, by and between the National Rifle Association of America (hereinafter referred to as "**NRA**"), A New York Not-For-Profit Corporation, located at 11250 Waples Mill Road, Fairfax, Virginia 22030, and Ackerman McQueen, Inc., an Oklahoma corporation, and its wholly owned subsidiary, Mercury Group Inc., an Oklahoma corporation, (hereinafter collectively referred to as "**AMc**"), whose principal office is located in Oklahoma at 1100 The Tower, 1601 N.W. Expressway, Oklahoma City, Oklahoma 73118.

W I T N E S S E T H :

WHEREAS, AMc is in the business of providing comprehensive communications services including public relations, crisis management, strategic marketing, advertising and creative, as well as owned media and internet services, and warrants and represents that it possesses the capability, necessary personnel, political strength, equipment and other related items to perform such services; and,

WHEREAS, NRA is a Membership Organization and desires to retain AMc as a nonexclusive source for services described herein for NRA upon the terms and conditions hereinafter set forth.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the parties hereto agree as follows:

I. SERVICES

A. Public Relations/Crisis Management /Strategic Marketing Services

Services include a combination of generating earned media, responsive public relations, crisis management and strategic thinking to promote a positive image of the NRA as described below:

- Public relations advice and counsel, including crisis management.
- Ongoing media relations -- solicitation and placement of features in national, regional and local media; liaison with print and broadcast news media on a daily basis for unsolicited inquiries; ongoing media training for NRA officials; Editorial Board meetings; features for outdoor publications.
- Specialized public relations writing services (news releases, columns, editorials), and distribution of same as required (e.g. via wire service or individual contact).
- Research and information retrieval as necessary for NRA issues management at NRA's request and approval.
- Coordination, scheduling and on-site assistance when necessary for NRA officials' speeches and personal appearances.

- Coordination with internal NRA public relations staff in the Executive Office, General Operations and Institute for Legislative Action.

- Development of proactive earned media in national and regional media as it relates to NRA officials' appearances at special events (i.e. National Gun Shows, YHEC, Annual Meetings, etc.).

- Coordination and scheduling appearances for NRA officials and commentators; including on-site assistance (where necessary).

- Develop, produce, and place op-ed pieces for national and regional media coinciding with Special Events and NRA Officials' appearances.

- Advise and counsel with NRA Officials on strategic issues to provoke public debate and frame NRA's point-of-view for the general public.

- Speechwriting services (pivotal speeches for major events are discussed in "Advertising/Creative Services" Section).

- Management of Talent/Spokespersons for NRATV.

- Production and staffing for NRATV.

B. Advertising/Creative Services

The services described below (with the exception of "Media Planning and Placement" which is addressed separately as a subcategory of this Section) will be provided to NRA on a project ("**Job**") basis based on the fair market value of the work as determined by NRA and AMc. When reasonable time is available, cost estimates will be submitted for approval by NRA prior to the initiation of the Job.

- Speechwriting services for NRA dignitaries to be delivered at major events (includes background research, interviews with NRA Officials/Speaker, drafts and rehearsals if appropriate).

- Conceive, copywrite, design and produce local, regional, and national print and broadcast advertising and other appropriate forms of communication to present NRA's message.

- Original photography services and film processing (on location and/or in AMc's photo studio).

- Audio/Visual and Event Management services (i.e. Annual Meetings).

- Video Taping, Editing and Production.

- Music composition and arrangement and audio production.

- Primary Research services (quantitative and qualitative).

C. Media Planning and Placement Services

Detail of AMc's compensation for Media Services are provided in the "Compensation" Section. Services rendered for such are:

- With NRA's approval, plan and order by written contract or insertion order the print space, radio and television time, or other media to be used for advertising, always endeavoring to secure the best available rates. AMc shall remain solely liable for payment, to the extent NRA has paid AMc.

- Incorporate the advertising in the required form and forward it to media with proper instructions for fulfillment of the contract or insertion order.

- Diligently check and verify broadcasts, insertions, displays, or other means used to carry the message to ensure proper fulfillment of all media purchases made by AMc on NRA's behalf.

- For direct response paid media advertising (i.e. Infomercial), provide ongoing analysis and ROI to determine most effective media markets, dayparts, and stations on a time sensitive basis for redirection or concentration of funds as evaluation indicates.

- Carefully audit invoices and make timely payment to media and suppliers for space and time purchased by AMc on NRA's behalf.

D. Owned Media Services

- Full-time online broadcasting services for NRATV.

- Support services for NRATV provided by AMc Interactive include daily creation of graphics, flash animation for daily stories and synchronization to audio/video.

- Ongoing technical support service, unification, and advice for NRAHQ site (e.g. Answer to questions on service provider issues and simple "how-tos"). Application development or re-working requiring complex execution to be estimated on a project basis for NRA approval in advance of work performance.

- Full time marketing services to promote NRATV as well as on-site promotion of NRA programs, activities, and current events.

- Production of America's First Freedom Magazine.

E. Digital Systems Operations Support

- Technology consulting including third party solutions, cloud consulting and reviewing IS efforts.

- Reliability engineering and monitoring including performance monitoring, emergency response and overall efficiency.

- Resource and capacity planning for large scale hardware and software migration initiatives.

- System and database administration, maintenance, updating, monitoring and troubleshooting.

II. COMPENSATION

A. Public Relations/Political Strategy/Strategic Marketing Services

1. During the term of this Agreement, for ongoing Public Relations, Political Strategy and Strategic Marketing, NRA will pay AMc a fee as mutually agreed upon each year.

B. Advertising/Creative/Media Planning and Placement Services

1. During the term of this Agreement, for ongoing study of NRA's business, including account service, creative development and other support functions in connection with the day-to-day administration and operation of NRA's account, NRA will pay AMc 15% commission of the gross media expenditure, or a 17.65% mark-up of the net media billing, for all media researched, planned, placed and administered by AMc on NRA's behalf.

2. For collateral advertising services and products purchased on NRA's behalf from external suppliers (such as separations, engravings, typography, printing, etc.), by a 15% commission if offered, or a 17.65% mark-up of net billing. Estimates of the cost of external services and products are prepared, when reasonable time is available, for approval in advance and are subject to no more than a +/-10% variance provided AMc is authorized to proceed with production within thirty (30) days of the date the estimate is presented. Client changes in job specifications usually will result in the preparation and submission of a revised estimate; however, NRA agrees to assume financial responsibility for all changes specified by NRA then executed by AMc with NRA's knowledge.

3. For art concepts, design layout, photography and film processing, copywriting, music composition and arrangement, audio and video production, etc., by cost quotations submitted for approval in advance, when reasonable time is available, or at the comprehensive art, storyboard, demo music, etc. stage. These quotations are based on the fair market value of the work as determined by AMc, and take into consideration, among other things, the hourly rates of the personnel assigned to the project and the required to complete the job. Written estimates are subject to no more than a +/- 10% variance provided they are approved by NRA and AMc is expressly authorized to proceed with production within thirty (30) days of the date the estimate is presented. Client changes in job specifications will

usually result in a revised estimate; however, NRA agrees to assume financial responsibility for all changes specified by NRA , then executed by AMc with NRA's knowledge.

C. Owned Media and Internet Services

During the term of this agreement, AMc will provide owned media and online broadcasting and website management, hosting and creation of NRATV, as well as full time marketing services. NRA will pay AMc a fee as mutually agreed upon each year.

D. Digital Systems Operations Support

During the term of this agreement, AMc will provide digital systems operations support. NRA will pay AMc a fee as mutually agreed upon each year.

E. Other Projects

If AMc undertakes, at NRA's request, additional or special assignments, not included within the services described in this project, the charges made by AMc will be agreed-upon in advance whenever possible. If no specific agreement was made, AMc will charge NRA a fair market price for the work performed.

III. BILLING AND PAYMENT

A. Mailing and express charges, long distance telephone calls, photocopies, deliveries, sales taxes and reasonable out-of-town travel including transportation, meals and lodging, etc. on NRA's express behalf, shall be billed at AMc's cost. All out of town travel expenses shall require prior written approval in accordance with written procedures established by the NRA Executive Vice President or his designee. Payment of travel expenses not approved in advance may result in denial of reimbursement. Expenses not listed above shall be considered to be normal business expenses of AMc and not billable to NRA unless specifically authorized in writing by the NRA Executive Vice president or his designee.

B. All sales, use and similar taxes and all import, export and foreign taxes imposed by all applicable governmental authorities shall be billed to NRA at the amount imposed by such governmental authorities. AMc shall not be obligated to contest the applicability of any such taxes to the transactions performed pursuant to this Services Agreement.

C. Fees shall be billed on or before the 5th of each month. This billing shall include costs specified in paragraph III A.

D. Special assignments not included in this Agreement which cannot reasonably be included under the monthly fee must be approved in accordance with written procedures established by the NRA Executive Vice President or his designee, and the charges made by AMc shall be agreed upon in advance, where reasonable,

otherwise such charges shall be not greater than the usual and customary charges for such services or expenses in the industry.

E. All sums payable to AMc under this Services Agreement shall be payable at AMc's corporate headquarters in Oklahoma City, Oklahoma within 30 days of the invoice date. Any amounts not received by AMc within 60 days from the date of the invoice shall bear interest at the rate of 1.0% per month from the date of the invoice until paid. NRA shall notify AMc of any questions concerning any invoices within 10 business days after receipt.

IV. CONFIDENTIALITY

A. **AMc**

1. AMc shall not disclose, directly or indirectly, to any third party any NRA membership data or mailing lists, any materials or information relating thereto, or any other data, materials or information coming to the knowledge of AMc, supplied to AMc by NRA, or otherwise made known to AMc as a result of AMc's providing Services (hereinafter collectively, referred to as the "**Confidential Information**"), without the prior express written permission of NRA. This Services Agreement shall control AMc's providing fulfillment services to NRA.

2. AMc shall not make or cause to have made any copies of any NRA Confidential Information without the prior express written authorization of NRA.

3. AMc may use such Confidential Information only for the limited purpose of providing its Services to NRA.

4. AMc may disclose such Confidential Information to AMc's employees but only to the extent necessary to provide its Services. AMc warrants and agrees to prevent disclosure of Confidential Information by its employees, agents, successors, assigns and subcontractors.

B. AMc, its employees and agents, shall comply with any and all security arrangements imposed by NRA respecting access to Confidential Information.

C. AMc acknowledges NRA's exclusive right, title and interest in the Confidential Information, and shall not at any time do or cause to be done any act or thing contesting or in any way impairing or tending to impair any part of such right, title or interest.

D. AMc shall cease and desist from any and all use of the Confidential Information, and AMc shall promptly return to NRA, in a manner satisfactory to NRA, any and all Confidential Information, upon the earlier to occur of the following: the completion or termination of the Services Agreement.

V. INDEMNIFICATION/INSURANCE

A. AMc

1. AMc agrees to indemnify, defend and hold harmless NRA from and against any loss, liability and expenses including attorney's fees which NRA shall become obligated to pay in respect to: (a) materials prepared by AMc on behalf of NRA which gives rise to any claims pertaining to libel, slander, defamation, infringement of copyright, title or slogan, or privacy or invasion of rights of privacy; or (b) the public relations services and related activities of any person engaged by AMc as a spokesperson in connection with NRA and its purposes, objectives and activities ("**Spokesperson**") pursuant to the direction or supervision of AMc. Insurance coverage for the foregoing indemnification obligations shall be maintained by AMc.

2. NRA agrees to give AMc prompt notice of such claims and to permit AMc, through AMc's insurance carrier and/or counsel of AMc's choice, to control the defense or settlement thereof. However, NRA reserves the right to participate in the defense of any such claim through NRA's own counsel and at NRA's own expense.

3. AMc shall take reasonable precautions to safeguard NRA's property entrusted to AMc's custody or control, but in the absence of negligence on AMc's part or willful disregard of NRA's property rights, AMc shall not be held responsible for any loss, damage, destruction, or unauthorized use by others of any such property.

4. AMc shall not be liable to NRA by reason of default of suppliers of materials and services, owners of media, or other persons not AMc employees or contractors unless supplier(s) is under control of AMc or AMc should have reasonably anticipated default.

B. NRA

1. NRA agrees to indemnify, defend and hold harmless AMc, and its directors, officers, employees, agents, contractors and representatives (collectively, the "**AMc Indemnified Parties**," such directors, officers, employees, agents, contractors and representatives being hereby deemed third party beneficiaries of this indemnity provision), from and against any and all claims, demands, causes of action, suits, liabilities, losses, damages settlements, judgments, and expenses (including attorney's fees), arising from (1) any data, materials, or service performance claims furnished to any AMc Indemnified Party by NRA, or approved by NRA, from which a AMc Indemnified Party prepared any publicity materials or public relations materials, or which were used by a AMc Indemnified Party in the production of advertising which was approved by NRA; (2) any claim, action or proceeding by any person(s), entity(ies), the United States of

America, any state(s), county(ies), or municipality(ies), or any department, agency, board, bureau, commission, attorney general, or other instrumentality(ies) or political subdivision(s) of any of the foregoing, seeking (a) damages (whether actual, exemplary, or both), reimbursement or other compensation for any alleged injury(ies), death(s), or private or public losses, damages or costs related to one or more incidents of violence committed with firearms, or (b) an injunction or other equitable relief with respect to the activities of a AMc Indemnified Party performed on behalf of NRA pursuant to this Agreement or otherwise requested or approved by NRA; or (3) the public relations services and related activities of any Spokesperson pursuant to the direction or supervision of NRA. Insurance coverage for the foregoing indemnification obligations shall be maintained by NRA.

2. AMc agrees to give NRA prompt notice of any matter covered by NRA's indemnity set forth above and to permit NRA, through NRA's insurance carrier and/or counsel of NRA's choice, to control the defense or settlement thereof. However, AMc and the other AMc Indemnified Parties reserve the right to participate in the defense of any such claim through the AMc Indemnified Parties' own counsel and at the AMc Indemnified Parties' own expense.

C. NRA shall reserve the right, in NRA's best interest, to modify, reject, cancel, or stop any and all plans, schedule, and work in progress. In such event AMc shall immediately take proper and responsible action to carry out such instruction; NRA, however, agrees to assume AMc's liability for agreed upon commitments and to reimburse AMc for losses AMc may derive therefrom, and to pay AMc for all internal and external expenses incurred on NRA's behalf with NRA's authorization and to pay AMc charges relating thereto in accordance with the provisions of this Services Agreement.

VI. OWNERSHIP OF PRODUCTS

All creative works developed by AMc in fulfilling its obligations under this Services Agreement shall constitute works made for hire, and shall be the property of NRA. In the event that such works should not be "works made for hire," as such works are defined at 17 U.S.C. § 101, then AMc transfers and assigns to NRA the ownership of all copyright in such works. In the event that AMc should employ a subcontractor, AMc shall arrange for the transfer of such intellectual property to NRA. All other, and further, intellectual property and mailing lists, under any definition, whether common law or statutory, created or developed by AMc in fulfilling its obligations under this Services Agreement, are NRA's sole and exclusive property, and AMc does hereby assign all right, title and interest in same to NRA to the extent that AMc has such rights to assign and transfer. In no event shall AMc be deemed to be assigning or transferring greater rights than it has acquired from any supplier or contractor from who it may have acquired certain elements of the material prepared for NRA.

VII. NO COMPETITION

For the duration of this Service Agreement, AMc shall not represent any other entity in public relations services directly competitive with NRA without NRA's prior written approval.

VIII. EXAMINATION OF RECORDS

During the term of this Services Agreement, AMc authorizes NRA, upon reasonable notice, to examine AMc and Mercury's files, books, and records, with respect to matters covered under this Services Agreement.

IX. AUTHORIZED CONTACTS

AMc is authorized to act upon written communications received from the NRA Executive Vice President or his designee. He or his designee are the only persons within NRA who have the actual authority to issue such communications.

X. MISCELLANEOUS

A. Severability. If any provision of this Services Agreement shall be held to be void or unenforceable for any reason, the remaining terms and provisions hereof shall not be affected thereby.

B. Binding Effect; Agents. The provisions of this Services Agreement shall inure to the benefit of and bind the heirs, legal representatives, successors and assigns of the parties hereto. In performing the Services described above and in taking any action necessarily incident thereto, AMc may utilize the services of AMc's employees and/or such agents or independent contractors approved by NRA as AMc deems appropriate.

C. Section Headings. Section headings contained in this Services Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation thereof.

D. Integrated Agreement. This Services Agreement, together with any Exhibits hereto, constitute the entire agreement between NRA and AMc relating to the matters covered by this Services Agreement at the time of its signing. This Services Agreement supersedes all prior agreements, including letter agreements and memoranda of understanding.

E. Survival. The terms, covenants, and conditions of Section IV and Section V shall survive the termination or expiration of this Services Agreement.

XI. TERMINATION

A. This Services Agreement shall become effective upon the execution hereof.

B. This Services Agreement shall continue in full force and effect for an initial period of eight (8) months ending 12-31-2017. After the initial period of eight (8) months, NRA or AMc may at their sole and exclusive discretion, terminate this Services Agreement, without any cause whatsoever, upon ninety (90) days written notice. Without such written notice, it is the intention of the parties that the Services Agreement will automatically renew. Any written notice to cancel this Contract shall be effective ninety (90) days from the date the Party giving notice to cancel tenders such written notice to the other Party. In the event of said termination, all further obligations of each party to perform shall cease, except as otherwise specifically provided in this Services Agreement. In said case NRA shall, pursuant to Section III, reimburse AMc for expenses incurred on NRA's behalf up to the date of termination.

C. This Services Agreement may be terminated by NRA immediately upon written notice if: (1) AMc fails to diligently and in good faith perform any of its obligations contemplated hereunder; (2) AMc breaches any term, promise or covenant hereunder; (3) AMc files for bankruptcy; (4) there occurs any assignment for the benefit of creditors or the placement of any of AMc's assets in the hands of a trustee or receiver; (5) AMc becomes insolvent or bankrupt; (6) AMc is dissolved. If NRA so terminates this Services Agreement, NRA shall have no obligation to make payments except that NRA shall, pursuant to Section III, reimburse AMc for expenses incurred up to the date of said notice of termination.

D. This Services Agreement may be terminated by AMc immediately upon written notice if (1) NRA fails to diligently and in good faith perform any of its obligations contemplated hereunder; (2) NRA breaches any term, promise or covenant hereunder; (3) NRA files for bankruptcy; (4) there occurs any assignment for the benefit of creditors or the placement of any of NRA's assets in the hands of a trustee or receiver; (5) NRA becomes insolvent or bankrupt; or, (6) NRA is dissolved.

E. Upon the expiration or termination of this Services Agreement, AMc shall immediately return to NRA, to such place and in such manner as NRA may specify, any and all of NRA's property, materials, documents, Confidential Information, etc., that may be in AMc's possession. All charges for accumulating said materials shall be approved and paid in advance of receipt by the NRA. For all non-cancellable contracts entered into between AMc and third parties for the benefit of the NRA (herein "**AMc-Third Party NRA Contracts**"), the NRA agrees to pay AMc upon such expiration or termination the balance of the compensation payable under such AMc-Third Party NRA Contracts as of the date of expiration or termination so that AMc can fulfill its obligations under said Contracts after expiration or termination. If any AMc-Third Party NRA Contract(s) are cancelable upon payment of a fee and the NRA requests that such Contract(s) be cancelled, the NRA agrees to pay AMc the cancellation fees payable under such Contracts as a condition of AMc cancelling such Contract(s).

F. In consideration of the dedication of a substantial number of personnel and resources to provide the services under this Agreement (and the necessity to

EXHIBIT B

(R)

AMENDMENT NO. 1 TO SERVICES AGREEMENT

This Amendment No. 1 to Services Agreement (this "Amendment") is dated as of May 6, 2018, and is entered into by and between the National Rifle Association of America ("NRA") and Ackerman McQueen, Inc. ("AMc").

WITNESSETH:

WHEREAS, NRA and AMc are parties to that certain Services Agreement (the "Services Agreement") dated April 30, 2017; and;

WHEREAS, NRA and AMc desire to amend the Services Agreement;

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the parties hereto agree as follows:

1. Defined Terms. All initial capitalized terms used herein but not defined herein shall have the meanings set forth in the Services Agreement.

2. Amendment of Paragraph III E. Paragraph III E of the Services Agreement is hereby amended to add the following provisions at the beginning of paragraph III E:

> All service fee billing under this Services Agreement for talent and employees who work through AMc for NRA and its affiliates, including, but not limited to, Dana Loesch and _____, shall be invoiced by AMc no later than the fifth day of each calendar month, which invoice shall be payable by NRA to AMc at AMc's corporate headquarters in Oklahoma City, Oklahoma within 30 days of the invoice date. NRA acknowledges that its failure to pay such an invoice within 30 days will cause substantial financial damage to AMc. Accordingly, if at any time NRA fails to timely pay the invoice, NRA agrees that it shall post a $3,000,000 letter of credit (the "LOC") for the benefit of AMc. The LOC shall continue in existence for the term of the Agreement and shall be maintained at $3,000,000 at all times. The LOC may only be drawn upon to pay in full invoices for service fee billings outstanding more than 30 days.

3. Amendment of Paragraph XI E. Paragraph XI E shall be amended and restated in its entirety to read as follows:

> Upon the expiration or termination of this Services Agreement, AMc shall immediately return to NRA, to such place and in such manner as NRA may specify, any and all of NRA's property, materials, documents, Confidential Information, etc., that may be in AMc's possession. All charges for accumulating said materials shall be approved and paid in advance of receipt by the NRA. For all non-cancellable contracts entered into between AMc and third parties for the benefit of the NRA (herein "**AMc-Third Party NRA Contracts**"), the NRA agrees to pay AMc upon such expiration or termination the balance of the compensation payable under such AMc-Third Party NRA Contracts

(including, but not limited to, the AMc-Third Party NRA Contracts with Dana Loesch and OLIVER NORTH) as of the date of expiration or termination so that AMc can fulfill its obligations under said Contracts after expiration or termination. If any AMc-Third Party NRA Contract(s) are cancellable upon payment of a fee and the NRA requests that such Contract(s) be cancelled, the NRA agrees to pay AMc the cancellation fees payable under such Contracts as a condition of AMc cancelling such Contract(s).

4. Integrated Agreement. This Amendment and the Service Agreement, and the Exhibits thereto, constitute the entire agreement between NRA and AMc relating to the matters covered hereto and thereto.

5. Miscellaneous. Paragraphs X and XII of the Services Agreement are hereby incorporated by reference as if set forth in full in this Amendment.

6. Effect. In the event of a conflict between this Amendment and the Services Agreement, the provisions of this Amendment shall control. To the extent not amended by this Amendment, all of the provisions of the Services Agreement shall remain in full force and effect.

IN WITNESS WHEREOF, and intending to be legally bound hereby, and further intending to bind their employees, agents, successors and assigns, the parties have executed this Amendment the day and date above written.

National Rifle Association of America (NRA)

[redacted]

Wilson H Phillips Jr.
Print Name/Title TREASURER

Ackerman McQueen, Inc.

[redacted]

Pete R Brownell
Print Name/Title

[redacted]

ATTEST:

[redacted]