SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York	:	
Petitioners,	:	**Index # 451825/2019**
-against-	:	**Hon. Melissa Anne Crane**
ACKERMAN MCQUEEN and NATIONAL RIFLE ASSOCIATION OF AMERICA,	:	
Respondents.	:	

MEMORANDUM OF LAW IN SUPPORT OF THE NRA'S MOTION FOR LEAVE TO RENEW AND REARGUE AND FOR A STAY OF ANY FURTHER DOCUMENT PRODUCTION IN RESPONSE TO THE ATTORNEY GENERAL'S SUBPOENA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Respondent the National Rifle Association of America (the "NRA") submits this memorandum of law in support of its Motion for Leave to Renew and Reargue the Court's February 21, 2020 Order and For a Stay of Any Further Document Production in Response to the Attorney General's Subpoena:

PRELIMINARY STATEMENT

The NRA is an advocate for controversial positions, so it is no surprise that the NRA has enemies. Attorney General Letitia James is one of them. During her campaign for office, James called the NRA an "organ of deadly propaganda masquerading as a charity,"[1] and vowed to wield the OAG's nonprofit-supervisory power against the NRA and its financial supporters.[2] These threats were not made idly, or in isolation: Governor Andrew Cuomo similarly boasted that New York would use its regulatory power to "forc[e] the NRA into financial jeopardy,"[3] and his efforts to deliver on that promise are the subject of pending First Amendment litigation which has withstood multiple motions to dismiss.[4] When it saw these hostilities coming, the NRA did what it could to fortify itself against them, and in the process made another enemy: its now-former public relations agency, AMQ.

[1] Tish James Announces Attorney General Platform to Protect New Yorkers from Gun Violence, Tish James For Attorney General (July 12, 2018), http://www.tishjames2018.com/press-releases/2018/7/12/taking-on-the-scourge-of-gun-violence-and-keeping-new-yorkers-safe/.

[2] Tish James becomes New York's Attorney General – First Black Woman Elected to Statewide Office, Our Time Press https://www.ourtimepress.com/tish-james-becomes-new-yorks-attorney-general-first-black-woman-elected-to-statewide-office/ ("We need to again take on the NRA . . . we are waiting to take on all of the banks that finance them, their investors.").

[3] Andrew Cuomo, Facebook (Aug. 3, 2018), https://www.facebook.com/andrewcuomo/posts/the-regulations-ny-put-in-place-are-working-were-forcing-the-nra-into-financial-/10155987290088401/

[4] *National Rifle Association of America. v. Cuomo,* Case No. 1:18-cv-00566-TJM-CFH (N.D.N.Y.); *see also* Dan Clark, *Federal Judge Allows NRA Lawsuit Against NY to Continue on First Amendment Claims,* New York Law Journal, November 6, 2018.

AMQ possesses decades' worth of the NRA's most sensitive (and sometimes privileged) information, which the NRA entrusted to AMQ based on strong contractual and common-law assurances of confidentiality. When the NRA sought deeper access to AMQ's records to investigate billing irregularities, AMQ turned hostile. Ultimately, the NRA was forced to sue AMQ for specific performance of a contractual record-inspection right—and more than a year later, AMQ is still stonewalling discovery in that case.[5] AMQ is more respectful of discovery served by others, and has responded to subpoenas from civil litigants and regulators on multiple occasions.[6] In each instance, AMQ's obligation to alert the NRA about subpoenas (so that the NRA may move for a protective order or prepare a privilege log) has been the only safeguard against disclosure of the NRA's privileged material. The NRA has caught multiple privileged documents in AMQ's outgoing document productions, including conspicuous litigation-related correspondence with outside lawyers, which able counsel conducting a good-faith privilege review should have detected.[7] Although the NRA's privilege-review process has been speedy and transparent, the process does afford the NRA some insight regarding whether, and when, its confidential documents are being shared by AMQ. The OAG considers this to be an affront to the public policy of the State of New York.

In truth, contractual notice protocols like the one between the NRA and AMQ—requiring a party entrusted with confidential material to alert its counterparty if a subpoena is received, so the counterparty can take lawful steps to protect its rights—are common among sophisticated

[5] *See, e.g.*, NRA's Motion to Compel Supplemental Answers to Plaintiff's First and Second Sets of Requests of Production of Documents, *National Rifle Association v. Ackerman McQueen, Inc.*, No. 19001567, 19002067, 19002866 (Alexandria Cir. Ct.).

[6] *See* Doc. No. 26, Frazer Aff. ¶¶ 8, 13 (recounting Lockton and Department of Financial Services subpoenas).

[7] *See* Doc. No. 31 (Privilege log identifying emails with outside counsel concerning "pending and anticipated litigation during spring 2018").

parties to a wide range of contracts. Until now, no court has articulated any public-policy exception for subpoenas issued by the government. Although the Court's resulting Decision acknowledges that AMQ may possess privileged documents, it deprives the NRA of access to those documents, including for privilege-log purposes—raising serious concern from at least one civil procedure scholar.[8] The Decision also misapprehends key elements of privilege-waiver and work product doctrines, departs from New York's previous handling of First Amendment associational privileges, and expands the use of CPLR 2308 in problematic ways. This motion respectfully requests that the Court revisit these aspects of the Decision and, in the interim, either stay any further AMQ document production or provide a clarified protocol for *in camera* review.

STATEMENT OF RELEVANT FACTS

For more than thirty years, AMQ served as the NRA's most trusted creative and strategic collaborator. AMQ provided "crisis management" advice,[9] worked "in alignment with the NRA's leadership team to craft its communications strategy,"[10] entered into contracts on the NRA's behalf,[11] and stored sensitive electronic data for the NRA.[12] AMQ employees, such as Dana Loesch, were perceived by the public as the "face" and "voice" of the NRA.[13] In this capacity, AMQ not only crafted communications that relayed the NRA's legal positions, but was also required to coordinate with the NRA to mitigate legal risks including defamation and intellectual property exposure[14] and donor-privacy issues.[15] Additionally, AMQ made decisions regarding

[8] *See* Doc. No. 42, Miller Aff. ¶ 8.
[9] *See* Doc. No. 27, Services Agreement § I.A.
[10] *See* Doc. No. 29, Complaint at 2 (*National Rifle Association v. Ackerman McQueen, Inc*, CL19002067 (Alexandria Cir. Ct.)) ("Virginia Complaint").
[11] *See* Doc. No. 26, Frazer Aff. ¶ 4; Doc. No 27, Services Agreement § XI.E.
[12] *See* Doc. No. 26, Frazer Aff. ¶ 4; Doc. No 27, Services Agreement § I.E.
[13] *See* Doc. No 29, Virginia Complaint ¶ 9.
[14] *See* Doc. No. 26, Frazer Aff. ¶¶ 4-5; *See* Doc. No 27, Services Agreement § V.1.
[15] *Id.*

incurrence of expenditures, on items such as executive wardrobe for public appearances,[16] which closely implicate not-for-profit law. Because AMQ rendered services to both the NRA and its 501(c)(3) affiliate, the NRA Foundation, Inc. (the "NRA Foundation"), close coordination was required to ensure that messaging broadcast on behalf of the NRA Foundation abided by 501(c)(3) tax requirements.[17] Not surprisingly, AMQ employees routinely sought and received advice from the NRA's corporate counsel to guide the performance of their work.[18] Under Virginia law, which governed the parties' contract,[19] AMQ was the NRA's agent and fiduciary.[20]

The NRA's expectation that information shared with AMQ would be kept confidential was a core, material element of the parties' relationship. That expectation was eminently reasonable: it was codified in a strong contractual nondisclosure provision, and corroborated by a decades-long course of dealing.[21] AMQ performed numerous services for the NRA which contracting parties inherently expect will be performed in confidence—including "crisis management"

[16] *See* Doc. No. 29, Virginia Complaint ¶ 14.

[17] *See* Doc. No. 26, Frazer Aff. ¶ 5; *see also* Affirmation of Sarah B. Rogers, dated May 15, 2020 ("Rogers Aff. 2") Ex. 9 (Email attaching NRA Search Parameters: Privileged Documents Search Terms), Note 1.

[18] *See* Doc. No. 26, Frazer Aff. ¶ 5.

[19] Specifically, the NRA and AMQ memorialized their relationship in successive incarnations of a Services Agreement, the most recent version of which was dated April 30, 2017 (as amended May 6, 2018, the "Services Agreement"). *See* Doc. No. 27. The Services Agreement was governed by Virginia law pursuant to Section XII thereof.

[20] *See* Doc. No. 26, Frazer Aff. ¶ 4; *see also Dimos v. Stowe*, 193 Va. 831, 838 (1952) (Virginia jury instructions describing circumstances that create an agency relationship); *H-B Ltd. P'ship v. Wimmer*, 220 Va. 176, 179 (1979) ("An agent is a fiduciary with respect to the matters within the scope of his agency. A fiduciary relationship exists in all cases when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence."). New York law treats agency similarly. *See, e.g., Schulhof v. Jacobs*, 70 N.Y.S.3d 462, 463 (1st Dep't 2018).

[21] *See* Doc. No. 26, Frazer Aff. ¶ 7; *see also* Doc. No. 39, Schropp Aff. ¶ 6 ("I would never have shared donor information with Ackerman, or involved Ackerman in donor outreach activities, if I had not been told we could rely on Ackerman (and on the NRA's contractual NDA with Ackerman) to ensure that any donors' information remained private.").

strategy advice and the maintenance of digital repositories containing privileged member and donor information.[22] Absent a reasonable expectation by the client that a crisis-management firm or information technology vendor will abide by its contractual confidentiality obligations, no market could exist for such services. Indeed, any contracting party is entitled to the objectively reasonable expectation that counterparties perform ***all*** contractual obligations—this is the essence of contract law.[23] Recent events that are now the subject of litigation between the NRA and AMQ affirm that confidentiality was material to the parties' dealings: when the NRA began to suspect "leaks" from AMQ, the relationship unraveled.[24]

In the face of subpoenas seeking NRA records from AMQ, the parties continued to abide by their subpoena-response protocol under the Services Agreement. On multiple occasions previously detailed before the Court,[25] AMQ notified the NRA about subpoenas it received, and the NRA conducted a swift privilege review of outgoing documents. The NRA prepared privilege logs detailing every document redacted or withheld, and none of the NRA's privilege-log entries were challenged.[26] With respect to the first tranche of documents produced by AMQ to the OAG on July 31, 2019, in response to the OAG's subpoena to AMQ dated July 8, 2019 (the "Subpoena"), the NRA's privilege review occurred over the course of a single weekend.[27]

Nonetheless, the OAG determined that it did not wish to receive additional tranches of documents from AMQ until, and unless, those documents could be secreted from the NRA.[28]

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[22] *See* Doc. No. 26, Frazer Aff. ¶ 9.

[23] *See Rice v. Rice*, 288 A.D.2d 112, 113 (1st Dep't 2011) (party "entitled to benefit of the bargain," including confidentiality terms).

[24] *See* Doc. No. 29, Virginia Complaint at 2.

[25] *See* Doc. No. 33, Rogers Aff. ¶¶ 5-9.

[26] *See* Doc. No. 33, Rogers Aff. ¶ 7.

[27] *See* Doc. No. 26, Frazer Aff. ¶ 14.

[28] *See* Doc. No. 14, Connell Aff. ¶ 11 ("OAG can no longer allow the NRA . . . to preview, monitor, control and potentially withhold information it is entitled to obtain by law").

Therefore, the OAG instructed AMQ to cease complying with the Subpoena pending some assurance that the NRA would be kept in the dark about the documents being produced—which would, by definition, prevent the NRA from preparing a privilege log. In a meet-and-confer teleconference with the NRA, the OAG asserted that "public policy" forbade the NRA from "interfering" with its investigation, including by reviewing its own documents (gathered from the custody of its agent) pursuant to an unambiguous contractual right.[29] In response, the NRA explained that it was not seeking to "interfere with" or "impede" the OAG's information-gathering, but required a procedural mechanism to assert its privileges.[30] Without notice regarding the issuance of new subpoenas or the nature of the documents being produced, the NRA would have no ability to move to quash, move for a protective order, prepare a privilege log, or otherwise assert its rights. The Subpoena brought this problem into stark relief: it sought essentially all documents in AMQ's possession that related in any way to the NRA, yet the NRA received no notice of the Subpoena's existence until AMQ's first tranche of responsive documents were presented for the NRA's review pursuant to the Services Agreement's NDA.[31]

In an attempt to avoid a dispute, the NRA offered only to review AMQ's materials to the extent "necessary to redact and log privileged documents," and take no action with respect to nonprivileged documents.[32] An agreement in this vein would have enabled a number of compromises: search terms, or other criteria (*e.g.*, communications on particular topics or dates, or involving particular persons) could have been used to identify potentially privileged documents

[29] *See* Doc. No. 33, Rogers Aff. ¶ 9.
[30] *Id*.
[31] *See* Doc. No. 33, Rogers Aff. ¶ 8.
[32] *See* Doc. No. 36, Email from Sarah Rogers to Monica Connell and John Oleske, dated September 27, 2019.

for the NRA's review, while factoring in the OAG's asserted interest in secrecy. Instead, the OAG rebuffed any negotiation and commenced this special proceeding on September 30, 2019.

The OAG styled its petition (the "Petition") as a motion to compel pursuant to CPLR 2308[33]—notwithstanding that AMQ never failed or refused to produce documents, but instead suspended its Subpoena compliance at the OAG's request.[34] In support of the Petition, the OAG argued that AMQ could not conceivably possess documents subject to privilege claims by the NRA.[35] In response, the NRA offered dozens of examples of privileged documents known to be possessed by AMQ—but emphasized that this list was illustrative, not exhaustive.[36] The NRA could not comb through thirty years of records and log every single privileged document in AMQ's possession, especially because AMQ possesses documents the NRA has not seen. Instead, the NRA simply sought to demonstrate, by way of illustrative examples, that AMQ's access to NRA-related records did not effect a *per se* waiver of all privileges. The NRA offered to carry the burden of preparing a privilege log covering the particular documents responsive to the Subpoena, [37] as soon as it was permitted to view them. The NRA still has not received that opportunity.

On February 21, 2020, the Court issued its Decision, granting the OAG's Petition in substantial part. Assigning the NRA "the burden to prove the basis for the privilege claims and

[33] *See* Doc. No. 40, Reply at 1.
[34] *See* Doc. No. 14, Connell Aff. ¶ 11.
[35] *See* Doc. No. 40, Reply at 2.
[36] *See* Doc. No. 33, Rogers Aff. ¶ 10.
[37] For example, during the hearing on October 31, 2019, the NRA acknowledged that the applicability of privilege may be "fact[] [intensive] . . . [and] situational" depending on who communicated, and what they discussed; however, surfacing and evaluating these details, on a document-by-document basis, is "what privilege logs are for." Accordingly, the NRA requested, "Let us log our privileges, as we have done before, unchallenged, and if the State has a problem with any of those privilege assertions, then we can meet and confer about it." Hearing Transcript at 34:23-35:4 (Oct. 31, 2019).

work-product protections through affidavits of a privilege log,"[38] the Decision purports to assess the entire possible scope of the NRA's privileges based on the affidavits, and privilege logs from prior document productions, which the NRA furnished as illustrative examples to oppose the Petition. The Decision holds that because AMQ "acted in its capacity as a public relations firm" with "its own employees and legal counsel," it could not have "assume[d] the functions and duties of an NRA employee," contravening any "functional equivalent" exception to waiver.[39] Similarly, the Decision holds that because AMQ "does not speak a 'foreign language,' like accountants" and did not act "[as] a translator essential for the NRA to understand its lawyer's advice," legal advice provided by the NRA's in-house counsel in the mixed presence of AMQ and NRA employees was *per se* nonprivileged.[40] (The Decision allows that a communication exchanged solely among NRA counsel and an AMQ employee might be privileged).[41]

The Decision provides no protection whatsoever for documents disclosing NRA member or donor personal information, holding that any First Amendment right to the privacy of such information "does not override" the OAG's "compelling" interest in preventing the NRA from learning the content of AMQ's document production.[42] In support of this reasoning, the Decision characterizes threats of retaliation against NRA members and donors as mere speculation, finding that no "concrete" threats were alleged.[43] The Decision ignores the Attorney General's public vow to pursue potential criminal charges against "all of the banks [and] . . . investors" who "finance" the NRA, [44] and also ignores the fact that a federal court has sustained pending First

[38] *See* Doc. No. 45, Decision at 4.
[39] *Id*.
[40] *Id*. at 8.
[41] *Id*. at 9.
[42] *Id.* at 10.
[43] *Id.*
[44] *See* Doc. No. 40, Reply at FN 35.

Amendment claims which allege unconstitutional retaliation by New York State against others who did business with the NRA.

Acknowledging that the NRA provided evidence of common litigation interests and the exchange of work product, the Decision orders *in camera* review of "any document that the NRA's legal counsel prepared . . . in anticipation of litigation"—but not documents prepared by businesspeople or non-lawyer representatives.[45] The Decision also holds that "public policy" voids any contractual right by the NRA to "preview" documents responsive to an OAG subpoena, and orders that *in camera* review occur "without allowing the NRA to preview" any subject documents.[46] Hence, not only does the Decision fail to provide a mechanism for identifying which documents must be reviewed *in camera*—it raises the specter of contempt if the NRA tries to "preview" the documents in order to facilitate this process. For practical purposes, the Decision precludes the NRA from offering privilege logs, affidavits, or other input to inform the *in camera* review process, because it prohibits the NRA from accessing the documents that are under review.

Facts newly surfaced in the NRA-AMQ litigation underscore the Decision's oversights and the dangers they pose. On February 12, 2020, the NRA learned for the first time that AMQ surreptitiously possessed—without the NRA's knowledge or consent—a copy of a privileged PowerPoint presentation delivered by the NRA's outside counsel during a closed executive session of the NRA Board of Directors on January 5, 2019 (the "January Presentation").[47] AMQ personnel

[45] *See* Doc. No. 45, Decision at 10.

[46] See Doc. No. 45, Decision at 11-12.

[47] *See* Rogers Aff. 2, ¶ 3 (citing Doc. No. 51, *National Rifle Association of America v. Ackerman McQueen, Inc.*, Case No. 19-cv-02074 (Northern District of Texas (Dallas)) (On April 16, 2020, the NRA filed a motion to disqualify AMQ's counsel in the Texas litigation, based on counsel's handling of the January Presentation); *see also* Affidavit of Andrew Arulanandam, dated May 14, 2020 (Arulanandam Aff.") ¶¶ 3-4; Affidavit of Travis Carter, dated May 14, 2020 ("Carter Aff.") ¶¶ 4-5.

were present on site at the meeting to coordinate the display of the digital media, but were directed to leave the room before the January Presentation was displayed, due to its highly sensitive nature.[48]

The January Presentation is unmistakably privileged: it bears the legend "ATTORNEY WORK PRODUCT / PRIVILEGED AND CONFIDENTIAL" on every page.[49] The January Presentation is titled, "Executive Briefing: Representing the NRA in the Legal, Regulatory, and Public Arena" and every slide bears the letterhead of the NRA's outside law firm.[50] The presentation discusses recent and ongoing settlement talks, analyzes applicable statutes, details discovery strategy, and discusses legal strategy regarding regulatory inquiries.[51] If AMQ could be trusted to identify documents which "NRA's legal counsel prepared in anticipation of litigation"[52] and set them aside for privilege review (as the Decision contemplates), AMQ would have done so here pursuant to its counsel's ethical obligations.

Instead, on February 12, 2020, AMQ filed a copy of the January Presentation with a Texas federal court.[53] By letter to AMQ dated February 18, 2020, the NRA demanded to know how the January Presentation was obtained by AMQ, as well as whether AMQ possessed any similar privileged presentations.[54] Over the course of February-April 2020, as the parties' letter correspondence continued, it became clear that AMQ counsel resisted according privileged treatment to the NRA's privileged documents, and appeared to be using the January Presentation

[48] *See* Arulanandam Aff. ¶ 5; Carter Aff. ¶¶ 11-12.
[49] *See* Carter Aff. ¶¶ 9-10.
[50] *Id.*
[51] *Id.* ¶ 9; *see also* Doc. No. 107 (NRA memorandum of law in support of disqualification) at 11-12, Case No. 19-cv-02074.
[52] *See* Doc. No. 45, Decision at 10.
[53] *See* Rogers Aff 2 ¶ 3.
[54] *See id.*, Ex. 1.

to inform AMQ's litigation strategy.[55] The NRA has moved to disqualify AMQ counsel in the Texas matter as a result.[56]

Another recent development in the NRA-AMQ litigation directly implicates the "functional equivalent" doctrine. On January 28, 2020, AMQ produced documents to the NRA that the NRA believes would, if reviewed by this Court, support the NRA's arguments regarding the functional-equivalent doctrine.[57] Although the documents are designated "Highly Confidential" pursuant to a protective order, the NRA believes this designation is inappropriate, and has moved to modify it so the documents can be shared to inform the Court's *in camera* review.[58]

On February 25, 2020, after it was served with notice of the Decision, the NRA rushed to protect its privileges in whatever manner appeared feasible given the Decision's direction that documents be produced to the OAG "without delay[]," and without the NRA being allowed to "preview" their contents.[59] Advising OAG and AMQ counsel that it intended to seek renewal and reargument, the NRA circulated, as an interim stopgap measure, a narrowly tailored list of search terms designed to detect documents prepared by counsel in anticipation of litigation.[60] The NRA requested that AMQ set aside documents retrieved by these terms for *in camera* review.[61] In response, the OAG accused the NRA of "attempt[ing] to further prevent or delay witness

[55] *See* Doc. No. 107 (NRA memorandum of law in support of disqualification) at 11-12, Case No. 19-cv-02074; *see also* Rogers Aff. 2, Exs. 2-8.
[56] *See* Doc. No. 106 (NRA memorandum of law in support of disqualification) at 15-16, Case No. 19-cv-02074
[57] *See* Rogers Aff. 2 ¶ 6.
[58] *See id,* Ex. 10.
[59] *See* Doc. No. 45, Decision at 12.
[60] *See* Rogers Aff. 2 ¶ 5, Ex. 9.
[61] *See id.*

compliance with a proper law enforcement subpoena and a binding Court order."[62] Nonetheless, the OAG declined to meet and confer regarding the NRA's motion for renewal or reargument, deciding that the matter had been resolved.[63]

Unfortunately, the NRA's concerns are not resolved. The Decision misapprehends key caselaw and facts, and places the "fox in charge of the . . . henhouse"[64] by granting AMQ the exclusive power to determine which NRA documents will be reviewed *in camera* and which will not. AMQ has already demonstrated that it will wield this power in bad faith.[65] Accordingly, the NRA respectfully requests leave to renew and reargue this matter, and requests an interim stay or clarification of the Decision pending renewal and reargument, as follows.

LEGAL STANDARD

A motion to renew is appropriate under CPLR 2221 where there are "new facts to support the motion, as well as a justifiable excuse for not initially placing such facts before the court."[66] A motion to reargue may be granted upon a showing that the court "overlooked or misapprehended" facts or law, or otherwise mistakenly arrived at its earlier decision.[67] Both standards are satisfied.

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[62] *See id.* ¶ 5.

[63] *See id.*, Exs. 9, 12.

[64] *In re Grand Jury Subpoenas 04-124-03 and 04-124-05,* 454 F.3d 511, 523 (6th Cir. 2006) (reversing a district court order that a denied motion, by investigative target, to conduct a privilege review of documents subpoenaed by a grand jury from a third party, and noting that relying on a government "taint team" to identify potentially privileged documents would leave "the government's fox . . . in charge of the [target's] henhouse . . . [where it may] err by neglect or malice, as well as by honest differences of opinion" in identifying privileged documents.").

[65] *See* Doc. No. 107 (NRA's motion to disqualify AMQ's counsel), Case No. 19-cv-02074.

[66] *Taft v. Lesko*, 182 AD2d 1008, 1009 (3d Dep't 1992) (internal citations omitted); *Luna v. Port Auth*., 21 AD3d 324, 326 (1st Dep't 2005) (granting renewal).

[67] CPLR 2221 (McKinney 2019); *Mansueto v. Worster*, 766 N.Y.S.2d 691, 692 (2d Dep't 2003); *Ebasco Constructors, Inc. v. A.M.S. Const. Co., Inc*. 599 N.Y.S.2d 866, 867 (2d Dep't 1993).

ARGUMENT

I. RENEWAL IS APPROPRIATE BASED ON NEWLY DISCOVERED FACTS

A. AMQ Acquired At Least One Privileged Document Without the NRA's Knowledge or Consent, And Could Possess Many More.

When it opposed the Petition, the NRA identified four categories of privileged material that AMQ might possess: (i) information acquired in agency capacity; (ii) information acquired in a "functional equivalent" capacity; (iii) information acquired in a common-interest litigation context; and (iv) materials prepared in anticipation of litigation. It is now clear that an additional category exists: privileged records, like the January Presentation, that AMQ acquired without the NRA's knowledge or consent, through still-unknown means. The Court based its decision substantially on a finding that, because AMQ was unlikely to be a "necessary" agent or a functional equivalent, any privileged communication that came into AMQ's possession was likely subject to waiver.[68] However, waiver cannot occur without the client's knowledge.[69] Thus, documents which are stolen or misappropriated,[70] accidentally entrusted to an unintended recipient,[71] or even

[68] *See* Doc. No. 45, Decision at 5-9.

[69] *See* CPLR 4502 ("Unless the client waives the privilege . . . ***any person who obtains without the knowledge of the client*** evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment[] ***shall not disclose, or be allowed to disclose, such communication***") (emphasis added); *In re Lanza*, 163 N.Y.S.2d 576, 580 (Sup. Ct.), *aff'd*, 164 N.Y.S.2d 534 (1st Dep't 1957) ("The client and the client alone may waive the privilege and consent that his disclosures be made known.");

[70] *See, e.g.*, *Sackman v. Liggett Grp., Inc.*, 173 F.R.D. 358, 365 (E.D.N.Y. 1997) (no waiver where disloyal paralegal employed by litigant corporation misappropriated a privileged document); *In re Parmalat Securities Litigation*, No. 04 MD 1653(LAK)(HBP), 2006 WL 3592936 *4 (S.D.N.Y. Dec, 1, 2006) (Unauthorized disclosure of privileged documents by an adversary does not automatically result in a waiver of the privilege immediately upon dissemination to third parties.); *In re Grand Jury Subpoena Dated March 20, 2013*, No. 13–Mc–189 (Part I) 2014 WL 2998527 *12 (S.D.N.Y Jul, 2, 2014) (Unauthorized disclosure of privileged materials does not automatically constitute a waiver of privilege.)

[71] *See Fed. Nat. Mortg. Ass'n v. Olympia Mortg. Corp.*, No. CV2004-4971(NG)(MDG), 2007 WL 1012066, at *1 (E.D.N.Y. Mar. 30, 2007) (litigant, who requested that receiver remove boxes stored in property's basement, did not waive privilege with regard to documents contained

disclosed purposefully by the attorney without the client's awareness[72] remain privileged.

None of the individuals who handled the January Presentation intended to disclose it to AMQ, and all took affirmative steps to maintain its confidentiality.[73] When the NRA tried to determine how AMQ acquired the January Presentation, including so the NRA could take steps to assess what other privileged documents AMQ might possess, AMQ would not cooperate. When confronted about their conduct, AMQ counsel bizarrely misstated obvious features of the January Presentation—such as the date that appears in bold, 24-point font on the first slide—which support the NRA's privilege claim and attempted to argue that privilege had been waived when it clearly had not.[74] These recent developments cast an ominous shadow with respect to the Decision's mandate that AMQ, not the NRA, take responsibility for identifying documents that warrant *in camera* review. Indeed, even accommodations like the one the NRA attempted in the wake of the Decision (*i.e.*, the use of search terms) pose difficulties. If AMQ acquired documents without the NRA's knowledge, the NRA is poorly situated to craft search terms that would identify them.

In sum, AMQ possesses privileged document(s) not subject to waiver, and AMQ is unable or unwilling to identify whether the documents were prepared by counsel or concern litigation. These facts upend the determinations that the NRA's privileges have been waived and, where they

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in the boxes, even though he "may have been negligent in failing to examine the contents of the boxes prior to requesting their removal," because turning over the privileged documents was unintentional); *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir.1987), *cert. granted on other grounds*, 488 U.S. 907 (1988) (no waiver, where privileged tapes were delivered to an adversary by a secretary who mistakenly believed the tapes were blank).

[72] *See, e.g., Schnell v. Schnall*, 550 F.Supp. 650, 653 (S.D.N.Y.1982) (no waiver of attorney-client privilege where attorney testified at SEC hearing without presence or authorization of client); *See Republic Gear Co. v. Borg-Warner Corp*., 381 F.2d 551, 556 (2d Cir.1967) ("[A]n attorney can neither invoke the privilege for his own benefit when his client desires to waive it nor waive the privilege without his client's consent to the waiver.").

[73] *See* Carter Aff. ¶¶ 9-13, Arulanandam Aff. ¶¶ 4-7.

[74] *See* Rogers Aff. 2, Exs. 4-6.

have not, AMQ can be trusted to set aside documents for *in camera* review. Where, as here, new facts would change the court's prior determination, leave to renew must be granted. [75]

B. Newly Produced Documents Support the NRA's Position that the "Functional Equivalent" Doctrine Applies to Certain NRA-AMQ Communications.

The Decision finds that AMQ "[n]ever . . . assume[d] the functions and duties of an NRA employee."[76] Accordingly, because AMQ had "clients aside from the NRA," had "its own employees and legal counsel," and did not act as a "translator" essential to the conveyance of legal advice, "the functional equivalent exception does not apply to AMQ's communications with the NRA."[77] However, documents produced by AMQ during the time since the Decision was rendered warrant consideration by the Court as part of any *in camera* review. Specifically, these documents would aid the Court's analysis of whether certain AMQ employees were so wholly dedicated to, and so enmeshed within, the NRA that they did not, in fact, serve other clients.[78] Although a protective order prevents the NRA from filing those documents alongside this motion or describing them substantively, the NRA has moved for revisions of relevant protective-order designations and believes the documents will eventually be made available.

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[75] *See, e.g.*, *DiPizio Const. Co. v. Erie Canal Harbor Dev. Corp.*, 23 N.Y.S.3d 762, 764 (4th Dep't 2015) (trial court abused discretion by denying leave to renew, where newly obtained deposition transcripts identified triable issues not previously evident at summary judgment).

[76] *See* Doc. No. 45, Decision at 6.

[77] *Id*.

[78] Although the potential existence of so-called "dedicated" employees is a matter of public record, the NRA did not previously have any documents that would have enabled a detailed analysis of this issue by the Court.

II. REARGUMENT IS APPROPRIATE DUE TO SIGNIFICANT MISAPPREHENSIONS OF FACT AND LAW.

A. The Decision Misapprehends Important Facts Regarding AMQ's Role and the Subpoena's Scope.

The Decision acknowledges that the NRA and AMQ had a "deep, decades long collaboration" during which AMQ "entered into third-party contracts and purchased goods and services on the NRA's behalf,"[79] but concludes that "[t]rust and confidence are important aspects to any business relationship" and, at the end of the day, AMQ "simply acted as a public relations firm[.]"[80] Accordingly, although the NRA's General Counsel attests that he was required to provide legal advice to AMQ employees regarding, *e.g.*, "specific provisions of contracts . . . for a program jointly developed by [AMQ] and NRA staff,"[81] the Court concludes that AMQ's sole function in these situations must have been to "convey[] the NRA's position on legal issues" to the public.[82] Not so. Where a third party "act[s] as [a party's] agent negotiating contract terms" on its behalf, courts routinely apply the agency exception to waiver, the "functional equivalent" exception, or both.[83]

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[79] Doc. No. 45, Decision at 1.

[80] *Id.* at 6.

[81] *See* Doc. No. 26, Frazer Aff. ¶ 5.

[82] Doc. No. 45, Decision at 8. Even if this were the case, courts have repeatedly held that, although discussions about how to "spin" ongoing litigation may not be privileged, discussions designed to ensure that publicists communicate legal positions and facts in an accurate, minimal-risk way are privileged. This is true even under federal courts' "necessity" standard. *See* discussion *infra* at Section C.2; *see also Gottwald v. Sebert*, 63 N.Y.S.3d at 836 (N.Y. Sup. Ct. 2017) (public relations firm may communicate with counsel in order to "expose client to further liability" for defamation); *In re Copper Mkt.* Antitrust Litig., 200 F.R.D. 213, 219 (S.D.N.Y. 2001).

[83] *See, e.g.*, *Lust v. Animal Logic Entm't US*, No. CV1700308JAKAFMX, 2018 WL 5880753, at *1 (C.D. Cal. Feb. 26, 2018) (involvement of third-party talent agent did not waive privilege, because agent was charged with negotiating contracts on studio's behalf); *In re Bieter Co.*, 16 F.3d 929, 939-40 (8th Cir. 1994).

The Decision also disregards AMQ's role providing "crisis management" strategy advice. As prescribed by the Services Agreement,[84] AMQ was instrumental in formulating—not just publicly conveying—the NRA's approach to crisis situations suffused with litigation risk.[85] Courts rightly protect communications with crisis-management professionals who are "incorporated into [the client's] staff to . . . deal with public relations problems," because "legal ramifications and potential adverse use" of crisis communications are material factors requiring legal advice.[86] The Court should accord the same protection here.

Moreover, the Subpoena does not, as the Decision recites, seek "documents relating to the NRA's potential misconduct."[87] Instead, the Subpoena is far broader, seeking virtually every scrap of information or data exchanged with, or relating to, the NRA or any of its employees or counsel or their family members.[88] The scope of the Subpoena matters because AMQ will likely be required to continue making additional productions, underscoring the need for a persistent framework to protect the NRA's privileges. The scope of the Subpoena also matters because the Decision engages repeatedly in interest-balancing and public-policy analysis, and such analysis should consider that the State could have chosen to demand a more reasonably tailored set of documents, with potentially privileged subsets carved out or accorded some intermediate review. The State did not. *Cosby v. Am. Media, Inc.*,[89] which the Decision cites, identified a public policy favoring disclosure of a discrete, salient fact: an alleged rape victim's recollections regarding her assault. No court has ever enunciated a public policy demanding that each and every document

[84] *See* Doc. No. 27, Service Agreement § I.A.
[85] *Id*.
[86] *See, e.g.*, *In re Copper Mkt.* 200 F.R.D. at 219.
[87] *See* Doc. No. 45, Decision at 3.
[88] *See* Doc. No. 9, Subpoena at 6-7 (Requests Nos. 1 and 2).
[89] *Cosby v. American Media, Inc.*, 197 F. Supp. 3d 735, 742 (E.D. Pa. 2016).

possessed by a corporation's agent be made available for secret inspection by the government, stripped of bargained-for contractual protections. This Court should not be the first.

B. The Decision Misapprehends the Elements Required For A CPLR 2308 Proceeding, and Awards Relief Not Available Under CPLR 2308.

Motions to compel with respect to non-judicial subpoenas are governed by CPLR 2308(b). Specifically, "if a person fails to comply with a subpoena which is not returnable in a court," the issuer of the subpoena "may move in the supreme court to compel compliance."[90] The rule addresses three forms of noncompliance: (i) refusal to be examined; (ii) refusal to produce a book, paper, or other thing; and (iii) refusal to subscribe a deposition after it has been correctly reduced to writing.[91] If the subpoenaed party refuses to do any of these things, CPLR 2308 empowers the court to direct the sheriff to commit him to jail.[92]

The Decision does not find (nor does the record show) that AMQ failed or refused to produce documents in response to the Subpoena—rather, the OAG refused to receive them, unless it could receive them secretly. Thus, the elements of a CPLR 2308 petition were never satisfied. It is undisputed that the OAG lacks the statutory power to issue a subpoena which, by its terms, compels AMQ to secret its document production from the NRA.[93] Nor does the OAG have statutory power to void third-party contracts whose provisions may result in document productions being shared. CPLR 2308 provides a tool to compel compliance with a lawful subpoena, not a backdoor to superimpose new mandates, such as secrecy, which lack any basis in New York law.

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[90] N.Y. CPLR § 2308 (McKinney 2008).

[91] *Id.*

[92] *Id.*

[93] *See* Hearing Tr. at 47:6-24 (Oct. 31, 2019). The OAG cites provisions of the Morton Act and the Donnelly Act which allegedly authorize secret subpoenas, but admits that the OAG does not purport to rely on these provisions due to their "constitutional infirmities." The Subpoena here was issued pursuant to the Executive Law, the Estates, Powers and Trusts Law, and the Not-For-Profit Corporation Law, none of which grant the OAG the power to prohibit AMQ from disclosing its document production. *See* Doc No. 9, Subpoena.

Moreover, in the case of a document subpoena, CPLR 2308 authorizes one form of relief only: the court may order the recalcitrant party to hand over his documents, and may jail him if he continues to refuse. No provision of CPLR 2308 empowers the Court to prohibit the documents from being shared with, or shown to, an interested party, such as the NRA. Under the precedent rendered here, any party issuing a subpoena could instruct the recipient to pause its document production pending fulfillment of some exogenous condition, then use a motion to compel to imbue that condition with the force of law. Although the NRA put forth these arguments in opposition to the Petition, the Decision does not address them—a misapprehension that should be revisited.

C. The Decision Misconstrues and Misapplies New York Law Regarding Attorney-Client Privilege

1. *The scope of privilege is defined by the client's expectation of confidentiality—not by whether the presence of a third-party agent was "necessary."*

Although the presence of a third party generally results in waiver of attorney-client privilege, the Decision correctly cites controlling Court of Appeals authority, *People v. Osorio*, 75 NY2d 80 (1989), for the proposition that courts recognize an exception for communications in which the client has a reasonable expectation of confidentiality.[94] In *Osorio*, the court goes on to list examples of such communications that "generally will be privileged" due to the expectation of confidentiality that inheres in them, such as "communications made to counsel through a hired interpreter, or one serving as an agent of either attorney or client to facilitate communication."[95] However, the Court misreads *Osorio* to impose an additional requirement, also adopted by some federal courts, that the agent be "necessary" for transmission of attorney-client communications,

[94] *See* Doc. No. 45, Decision at 5. (*citing People v. Osorio*, 550 N.Y.S.2d 612, 615 (N.Y. App. Div. 1989).

[95] *Osorio*, 550 N.Y.S.2d at 615.

in the manner of a foreign-language interpreter.[96] But as one case relied upon by the Decision makes clear, the "necessity" standard has been deemed "unduly restrictive and harsh," and is often not followed within the First Department. [97] It has never been adopted by the Court of Appeals, and does not control here.

Instead, to determine the proper scope of privilege, the Court should look to *Osorio*, which explains that the ***"scope of the privilege is not defined by the third parties' employment or function" but, rather, "depends on whether the client had a reasonable expectation of confidentiality under the circumstances."***[98] In *Osorio*, the appellant was arrested, along with two co-defendants, in a car containing stolen stereo equipment and an illegal gun.[99] Osorio and another defendant both faced weapons charges, and had an "adversarial" legal relationship—Osorio argued that the gun belonged to his co-defendant, Pena, and not to him.[100] At Rikers Island following their arrest, Osorio translated a conversation between Pena and Pena's attorney "as an accommodation" due to language-barrier issues. During that conversation, Pena made admissions

[96] *See* Doc. No. 45, at 5. ("'Necessity' requires that the third party is integral to serve a specialized purpose . . . [w]here a third party's presence is merely useful or convenient, but not 'nearly indispensable,' the privilege is lost"); *id.* at 6 (communications deemed nonprivileged because "AMQ does not speak a 'foreign language,' like accountants, so it does not perform translator functions").

[97] *Deutsche Bank AG v Sebastian Holdings, Inc*., No. 161079/13, 2019 WL 132534, at *6 (N.Y. Sup. Ct. Jan. 8, 2019). The Decision cites *Deutsche Bank* for the proposition that a third-party agent must be "nearly indispensable" to a privileged communication, but the *Deutsche Bank* court affirmatively ***rejects*** that standard, explaining: "The rule is not always followed . . . [t]his court finds that the 'necessary['] standard seems unnecessarily restrictive and harsh and will not employ it." *Id.* (internal citations and quotation marks omitted) (*citing Lehman Bros. Intl. v. AG Fin. Prods., Inc*., 2016 NY Slip Op 30187(U), *10-11 (Sup. Ct. N.Y. 2016) (noting First Department cases not applying the "necessary" standard); *TC Ravenswood, LLC v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2013 NY Slip Op 31335(U), *4-5 (Sup. Ct. N.Y. County 2013); 1 Attorney-Client Privilege: State Law New York § 4:2 (Westlaw ed)).

[98] *Osorio*, 550 N.Y.S.2d at 615 (emphasis added).

[99] *Id*. at 614.

[100] *Id*.

about the gun which Osorio sought to introduce as part of his defense.[101] Notwithstanding that Osorio acted as a "translator," the Court of Appeals emphasized that the expectation of confidentiality, not the third party's function, is the lodestar of the waiver analysis. Thus, although communications with a lawyer's secretary are generally thought to be privileged, privilege is waived "in the common area of a shared office" where the client has "no cognizable expectation of confidentiality."[102] Similarly, a "translator" or "interpreter" often falls within the privilege, but translation by an adverse co-defendant or a police officer waives privilege.[103]

The Decision purports to distinguish *Gama Aviation v. Sandton Capital Partners*, a First Department case that rightly omits the "necessity" prong, on the ground that it involved trial preparation.[104] But the *Gama* court properly treated attorney-client privilege and trial-preparation privilege as two distinct, independent issues. (Indeed, attorney-client privilege applied to all of the documents logged by Gama, but trial-preparation privilege only applied to some.). In particular, the First Department held:

> Although attorney-client communications shared with a third-party generally are not privileged, ***an exception exists for one serving as an agent*** of either attorney or client. Here, the affidavit of Gama's princip[al] shows that Ittihadieh was ***acting as Gama's agent*** and that Gama had a ***reasonable expectation that he would keep the communication confidential.***
>
> Gama's privilege log asserted the trial preparation privilege (see CPLR 3101 [d] [2]) as to all documents at issue except entry 313. We find that Gama's affidavit in opposition to defendants' motion adequately explained that these documents were prepared in anticipation of litigation, and that defendants failed to show the "substantial need" and "undue hardship" required to overcome the privilege (see CPLR 3101 [d] [2]). We also find that Gama did not waive the trial preparation

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[101] *Id.*

[102] *Id.* (*citing People v. Mitchell*, 58 N.Y.2d 368, 373 (N.Y. App. Div. 1983)).

[103] *See Osorio*, 75 N.Y.2d at 84.

[104] *See* Doc. No. 45, Decision at 8. ("*Gama Aviation v. Sandton Capital Partners* is inapposite to this case, because Frazer did not provide legal advice in the context of trial preparation").

> privilege by copying these documents to its agent, Ittihadieh, who was highly unlikely to disclose confidential material to Gama's adversary.[105]

Here, the NRA offered ample evidence that AMQ acted as its agent—and the record contains no contrary evidence. The NRA-AMQ relationship exhibited every hallmark of a confidential agency arrangement, including a strong contractual nondisclosure agreement and the performance of functions—such as crisis-management advice, the negotiation of contracts on the NRA's behalf, and the hosting of sensitive electronic data—for which confidentiality is a customary imperative. The NRA respectfully requests that the Court revisit its analysis of the agency exception to waiver, follow *Osorio* and *Gama*, and reject any attempt by the OAG to compel production of otherwise-privileged documents shared with AMQ in a confidential agency capacity.

2. *Even under the erroneous "necessity" standard, many AMQ documents are privileged.*

In place of *Gama* and other First Department authority rejecting the "necessity" standard, the Decision relies on *Gottwald v. Sebert*,[106] a 2017 Supreme Court decision that details federal courts' application of the "necessity" standard to advertising agencies. Even under *Gottwald*'s application of the "necessity" test, the NRA is entitled to assert privilege over any communications where "counsel and the public relations firm needed to coordinate to ensure that public statements

[105] *See Gama Aviation Inc. v. Sandton Capital Partners, L.P.*, 951 N.Y.S.2d 519 (1st Dep't 2012*)* (emphasis added) (internal citations and quotation marks omitted).

[106] Although the First Department affirmed that the documents disputed in *Gottwald* were not privileged, it did so on unrelated grounds—specifically, that the documents "[did] not reflect a discussion of legal strategy." *Gottwald v. Sebert,* 79 N.Y.S.3d 7 (1st Dep't. 2018). Whether a document was initially privileged (due to the type of advice it contained) and whether privilege was waived (due to the involvement of a third party) are distinct analyses.

do not expose the client to further liability (*e.g.*, further defamation liability), and the communications' purpose was to craft statements with a view toward that concern."[107]

The record proves that communications broadcast on the NRA's behalf by AMQ could, and did, expose the NRA to exactly this type of liability—*e.g.*, the *Kapoor* trademark lawsuit.[108] Indeed, the parties laid out a framework in the Services Agreement for defense and indemnification of claims against the NRA "pertaining to libel, slander, defamation, infringement of copyright, title or slogan, or invasion of privacy or rights of privacy,"[109] or arising from Ms. Loesch's Spokesperson activities,[110] precisely in view of these risks.

Thus, NRA counsel needed to coordinate carefully with AMQ for exactly the reasons noted in *Gottwald.* But confusingly, the Decision provides no protection for the types of communications described as privileged by *Gottwald*, unless they coincidentally consist of work product prepared by counsel in anticipation of litigation.[111] Instead, the Decision contradicts *Gottwald* by holding that when AMQ coordinated with NRA counsel to avoid intellectual property and donor-disclosure liability, privilege was waived.[112] Strikingly, the Court holds that the NRA's counsel cannot even communicate with its spokesperson, Dana Loesch, regarding the NRA's legal posture and concerns, because attempting to engage in privileged communications with someone who performs "public outreach" makes Loesch "a sword and a shield."[113] The NRA respectfully urges

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[107] *Gottwald v. Sebert*, 63 N.Y.S.3d 818, 826 (N.Y. Sup. Ct. 2017), *aff'd*, 79 N.Y.S.3d 7 (1st Dep't 2018).

[108] See Doc. No. 26, Frazer Aff. ¶ 8.

[109] See Doc. No. 27, Services Agreement § V.A.1.

[110] *Id.*

[111] *See* Doc. No. 45, Decision at 11 (confining *in camera* review to a single communication by John Frazer, along with "documents that the NRA's legal counsel prepared in anticipation of litigation").

[112] *See* Doc. No. 45, Decision at 5.

[113] *See* Doc. No. 45, Decision at 7.

the Court to reconsider. At a minimum, under *Gottwald*, documents reflecting coordination among counsel and AMQ for purpose of mitigating legal risks attached to AMQ's public communications should be treated as privileged.

3. *The "functional equivalent" doctrine can apply to consultants whose employer has other clients, other employees, and its own counsel.*

The Decision appears to reject the application of the "functional equivalent" doctrine on two grounds: *first*, that AMQ did not "speak a 'foreign language'[or] . . . perform translator functions;[114] and, *second*, that AMQ "had clients aside from the NRA . . . [and] its own employees and legal counsel," preventing it from "assum[ing] the functions and duties of an NRA employee."[115] The first ground is inapposite: the requirement of a "translator" function is a common articulation of the "necessity" prong of the agency waiver analysis, but is not germane to the "functional equivalent" doctrine. Instead, the "functional equivalent" analysis hinges on whether a third-party contractor is "so thoroughly integrated into the corporation's structure that he or she is a *de facto* employee of the company."[116]

In this case, the "functional equivalent" standard is easily met, notwithstanding that AMQ had its own offices, counsel, and non-NRA clients. In *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213, 215 (S.D.N.Y. 2001), the United States District Court for the Southern District of New York held that employees of Robinson Lerer & Montgomery ("RLM"), "one of the nation's best-known and most powerful public relations agencies,"[117] became "functional equivalents" of

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[114] *See* Doc. No. 45, Decision at 6 ("AMQ does not speak a 'foreign language,' like accountants . . . Therefore, the functional equivalent doctrine does not apply to AMQ's communications with the NRA").

[115] *Id.*

[116] *Frank v. Morgans Hotel Grp. Mgmt. LLC*, No. 154100/2016, 2020 WL 217702, at *2 (N.Y. Sup. Ct. Jan. 13, 2020) (internal citations and quotation marks omitted) (risk management consultant retained by hotel was "functional equivalent" of an employee).

[117] Stuart Elliott, THE MEDIA BUSINESS: ADVERTISING—ADDENDA; Robinson Lerer To be Taken Over, N.Y. Times, March 1, 2000. Similarly, outside the public relations

a client corporation's employees because, in the face of an antitrust scandal, the preparation of crisis public-relations responses became "a corporate function that was necessary" to navigate legal hostilities and "heavy press scrutiny"[118]—a set of conditions endemic at the NRA. The *Copper Market* court emphasized that, just like AMQ, RLM "possessed authority to make decisions on behalf of [the company] concerning its public relations strategy."[119] Similarly important was the fact that RLM employees "sought advice from [the company's] counsel"—just as AMQ employees sought and received advice from John Frazer,[120] and the NRA's outside counsel,[121] on numerous occasions.

The record likewise establishes that the NRA entrusted AMQ with major corporate functions, including crisis response,[122] donor outreach,[123] production and placement of political ads (one of the NRA's core lobbying activities),[124] and the retention and compensation of important figures such as Ms. Loesch. In light of these facts, the "functional equivalent" doctrine applies. And, as discussed above, documents anticipated to be made available to the NRA (which are subject to a pending dispute regarding protective-order designations in another case) will further inform the Court's *in camera* review of documents the NRA believes are subject to the functional-equivalent doctrine.

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industry, the functional-equivalent doctrine has been applied to major third-party firms with their own offices, counsel, and client rosters, such as Goldman Sachs. *See, e.g.*, *Fosbre v. Las Vegas Sands Corp.*, No. 210CV00765APGGWF, 2016 WL 183476, at *1 (D. Nev. Jan. 14, 2016).

[118] *In re Copper Mkt.*, 200 F.R.D. at 219.

[119] *Id.*

[120] *See* Doc. No. 26, Frazer Aff. ¶ 6.

[121] *See* Doc. 31 (Privilege log identifying emails with outside counsel concerning "pending and anticipated litigation during spring 2018").

[122] *See* Doc. No. 27, Services Agreement § I.A.

[123] *See* Doc. No. 39, Schropp Aff. ¶ ¶ 5-6.

[124] *See* Doc. No. 27, Services Agreement § I.B.

D. <u>The Decision Wrongly Circumscribes the Work Product Doctrine to Documents Prepared By Counsel—Omitting Documents Prepared By Parties And Their Representatives.</u>

The work product doctrine (sometimes referred to as trial preparation privilege), codified in New York by CPLR 3101(d)(2), protects all materials "prepared in anticipation of litigation or for trial by or for . . [a] party[] or . . . [the] party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent."[125] The Decision acknowledges that AMQ may possess documents constituting the NRA's litigation-preparation work product, but only orders *in camera* review of documents prepared in anticipation of litigation by the NRA's counsel—not by NRA businesspeople or non-attorney "representatives".[126] The NRA respectfully requests that the Court revisit the Decision and allow for *in camera* review of materials prepared in anticipation of litigation by the NRA and its representatives, even if the preparers were not attorneys.

E. <u>The Decision Errs In Its Treatment of the NRA's First Amendment Associational Privilege.</u>

Where, as here, an OAG subpoena would impair the First Amendment associational rights of a controversial advocacy group, strict scrutiny is required to ensure that the subpoena is "narrowly tailored to serve the compelling state interest" justifying the investigation.[127] The Second Department's widely cited 2017 opinion in *Evergreen Assoc., Inc., v. Schneiderman*[128]

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[125] N.Y. CPLR § 3101 (McKinney 2014). Although materials prepared by non-attorneys can be discovered upon a showing of "substantial need . . . [and an inability] to proceed without undue hardship" absent access to them, the record discloses no basis to apply this exception here—especially because the OAG is conducting an investigation, not preparing a case for trial. In any event, even if the OAG could show "substantial need" and "undue hardship," the Court would be required to "protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney ***or other representative of a party*** concerning litigation," which the Decision does not do. *See* CPLR § 3101(d)(2) (emphasis added). Of course, at relevant times, AMQ was a non-attorney "representative" of the NRA.

[126] *See* Doc. No. 45, Decision at 9-10.

[127] *Evergreen Ass'n, Inc. v. Schneiderman*, 54 N.Y.S.3d 135, 143 (2d Dep't 2017).

[128] *Id.*

provides a roadmap for such an analysis. In *Evergreen*, the OAG subpoenaed a chain of nonprofit, anti-abortion "crisis pregnancy centers" under auspices similar to those cited here: an investigation of alleged "fraud or illegality."[129] The *Evergreen* subpoena was narrower than the one served on AMQ (for example, it did not seek credit card numbers or communications with individuals' family members), but nonetheless called for names of pregnancy-center staff and certain medical facilities with whom they dealt.[130] Although it found a valid investigative basis for the subpoena, the Second Department held that because Evergreen pleaded a negative impact on at least one hospital relationship, and "contended that [the subpoena] w[ould] have a chilling effect on its associations," the First Amendment was implicated—triggering strict scrutiny.[131] Ultimately, the Court significantly narrowed the subpoena, and required that documents responsive to the subpoena be tendered for *in camera* review to ensure that only information squarely responsive to the articulated investigative purpose would be disclosed.[132]

Here, as in *Evergreen*, the NRA contends that the bulk disclosure called-for by the Subpoena would have a chilling effect on its associations. Far from mere "speculation," the NRA recounts numerous conversations with current major donors—too many to count—who express concerns about unconstitutional retaliation by New York State[133] and insist on remaining anonymous.[134] In *Evergreen*, only one commercial relationship had been allegedly chilled by the State's actions; in this case, the Subpoena arrives against the backdrop of explicit threats by the

[129] *Id.* at 142.
[130] *Id.* at 139.
[131] *Id. at* 145.
[132] *Id*. at 147
[133] *See* Doc. No. 39, Schropp Aff. ¶ 8 ("Such concerns are raised so frequently by donors that it would be difficult for me to count the number of conversations my office has had regarding these topics").
[134] *See id.* ¶¶ 3-4.

Attorney General to pursue the NRA's financial backers (on the ground that they support "deadly propaganda"), and high-profile First Amendment litigation alleging misconduct by the Governor in the same vein.

Importantly, unlike the petitioner in *Evergreen*, the NRA does not seek to prevent the OAG from obtaining most of the documents sought—it only seeks to redact donor names. Thus, the state interest which must be weighed against the NRA's First Amendment rights is not the government's ability to access relevant documents, but the government's ability to conceal the documents from the NRA. Counsel are aware of no case in which the government was held to have a "compelling interest," for strict-scrutiny purposes, in preventing its investigative subject from learning the content of a document productions. Moreover, even if such an interest exists, any remedy crafted by the Court must be "narrowly tailored" to preserve donor privacy under the First Amendment. The Decision ignores the narrow-tailoring prong of strict scrutiny, and makes no provision whatsoever to protect the associational rights of NRA members or donors. The NRA respectfully requests that the Court reconsider its ruling.

III. THE COURT SHOULD STAY ANY FURTHER DOCUMENT PRODUCTION, AND/OR CLARIFY THE DECISION'S *IN CAMERA* REVIEW PROCEDURE, PENDING RENEWAL AND REARGUMENT.

The Court may grant a stay pursuant to CPLR 2201 "in a proper case, upon such terms as may be just." Stays pending reargument or renewal are an appropriate exercise of the court's discretion.[135]

It is the NRA's understanding that, as of February 25, 2020, AMQ had identified eight documents in its outgoing production to the OAG which hit on the NRA's narrowly tailored search

[135] *See, e.g. Morrison v. Lord & Taylor, M-3980, M-4043,* 1995 N.Y. App. Div. LEXIS 9065 (1st Dep't 1996); *Alexander v. Cavagnaro*, 4 A.D.2d 878, 878 (2d Dep't 1957); *In re Von Wiegen*, 105 A.D.2d 593 (3d Dep't 1984).

terms, and intended to provide such documents for *in camera* review. The NRA respectfully requests that the Court stay its review, and stay any further document productions by AMQ, until renewal and reargument can be fully briefed. In the alternative, if the Court chooses to proceed with its *in camera* review, the NRA requests that the Court clarify the Decision to allow the NRA access to the documents submitted *in camera*, so that the NRA may prepare a privilege log or affidavits to inform the *in camera* review process and meet its burden regarding privilege.

Disclosure of documents that later prove to be privileged constitutes irreparable harm.[136] By contrast, the OAG will suffer no prejudice if its receipt of eight likely-privileged documents, or future likely-privileged documents, is delayed to allow for some rudimentary process to protect privilege—one of the NRA's most important legal rights.[137]

CONCLUSION

For the foregoing reasons, the NRA respectfully requests that the Court grant the NRA's motion for (i) leave to renew and reargue; and (ii) a stay of any *in camera* review, and any further document production by AMQ, pursuant to the Court's Decision dated February 21, 2020 or, in

[136] *See, e.g.*, *Brooks v. Montgomery*, No. 95-CV-542 (RSP/542), 1996 WL 663972, at *1 (N.D.N.Y. Nov. 7, 1996); *see also In re von Bulow*, 828 F.2d 94 (2d Cir. 1987) (granting mandamus to review ordered production of allegedly privileged material); *Chase Manhattan Bank, N.A. v. Turner & Newall*, PLC, 964 F.2d 159 (2d Cir. 1992) (same); *In re Long Island Lighting Co., 129 F.3d 268* (2d Cir. 1997) (same)*; In re Cty. of Erie*, 473 F.3d 413 (2d Cir. 2007)(same).

[137] Indeed, the OAG issued the Subpoena on July 8, 2019, then instructed AMQ to defer its document production for months on end for the sake of secrecy. The OAG could have compromised with the NRA at any time to permit a privilege review if it required urgent access to AMQ's documents, but made no such overture—the NRA offered in October to conduct a review "only as necessary to redact and log privileged documents." Doc. No. 36, Email from Sarah Rogers to Monica Connell and John Oleske, dated September 27, 2019. Notably, when the NRA conducted its privilege review of AMQ's first production in July 2018, the OAG only had to wait two days for the documents; thereafter, the OAG chose to wait six months, rather than permit subsequent productions to be privilege-reviewed by the NRA.

the alternative, a clarification of the Decision to allow the NRA a mechanism to prepare a privilege log of documents submitted for *in camera* review.

Dated: May 15, 2020

By: */s/ Sarah B. Rogers*

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