DALLAS | NEW YORK

BREWER
ATTORNEYS & COUNSELORS

June 13, 2022

VIA EMAIL

Hon. O. Peter Sherwood
Ganfer Shore Leeds & Zauderer LLP
Special Master for Discovery
360 Lexington Avenue
New York, New York 10017

Re: *NYAG v. NRA et al,* Index No. 451625/2020
The NRA's opposition to the NYAG's motion for a protective order dated June 3, 2022 as to depositions of (i) James Sheehan and (ii) the NYAG's Rule 11-f representative (the "Depositions")

Dear Judge Sherwood:

The National Rifle Association of America (the "NRA") respectfully requests that Your Honor deny the NYAG's motion for a protective order dated June 3, 2022 (the "Motion").

Under the applicable standard, discovery of any matter that is "necessary and material" to the defense of an action is permitted (unless privileged), and there is no basis for a protective order unless the NYAG, as the movant, shows prejudice that is "unreasonable."

The Depositions are permissible under the CPLR and the Commercial Division rules, and the NYAG has not shown that they are precluded by any prior ruling or on any privilege grounds. Nor has she shown that there is any risk of prejudice that is unreasonable. As a result, instead of granting a protective order, the Special Master should issue an order compelling the Depositions.

I.
LEGAL STANDARD

Under CPLR 3101, discovery of any matter that is "necessary and material" to the defense of an action is permitted (unless the party resisting discovery shows that the matter is privileged[1])." CPLR 3101(a). Further, parties may obtain deposition testimony of fact witnesses or representatives of any government agency or any other organization. CPLR 3101 et seq.; Commercial Division rule 11-f.

[1] *Zheng v. Bermeo*, 980 N.Y.S.2d 541, 542 (2014) ("A party asserting that material sought in disclosure is privileged bears the burden of demonstrating that the material it seeks to withhold is immune from discovery." (internal citation omitted)).

Indeed, under CPLR 3102(f), where the plaintiff, as here, is the state, defendant is still entitled to discovery. *See also* 21 Carmody-Wait 2d New York Practice with Forms Chapter 126:4, Actions by or Against the State ("CPLR 3102(f) . . . abrogates case law formerly holding that where the state is a party to an action . . . , it is not subject to pretrial examination [or other] discovery.").

Under CPLR 3103(a), a party asking the Court to "deny [or] limit[] . . . the use of any disclosure device" must show that, in the absence of relief, she will suffer "prejudice" that is "unreasonable." *See also Barneli & Cie SA v. Dutch Book Fund SPC*, 2012 WL 10007588, *1 (Sup. Ct. N.Y. Cty. Feb 10, 2012) ("The burden of showing that disclosure is improper is upon the party asserting it." (internal citations omitted)).

II.
ARGUMENT

A. Although the NYAG seeks substantial relief against the NRA, she has repeatedly refused to provide material and necessary detail about her claims.

Here, the NYAG seeks to enjoin the NRA from soliciting donations, the appointment of an independent compliance monitor at the NRA, and a damages award.[2]

Despite seeking such intrusive, significant and—in some cases—unprecedented relief, the NYAG has not identified a wide range of information about her claims against the NRA that is necessary and material to the NRA's defense against this action. For example, the NYAG alleges that the NRA engaged in allegedly improper related party transactions, provides *some* examples of such transactions, but expressly states that the examples provided are merely illustrative.[3] Similarly, the NYAG accuses the NRA of materially misleading regulatory filings, enumerates some examples of statements that were allegedly materially misleading, but—again—specifically states that the enumerated statements are simply examples.[4] Indeed, each section of her Complaint alleges a violation of the law in conclusory terms, proceeds to give examples, but then *invariably* notes that the list of examples is not exhaustive. Appendix A lists dozens of such examples.

B. The applicable rules appropriately give the NRA the basic right to learn information about claims against it before trial, but the NYAG has repeatedly refused to honor her discovery obligations in this case.

Under the applicable rules, as a matter of due process and basic fairness, to prepare for the trial, the NRA is entitled to all information that is necessary and material to its defense of this

[2] NYSCEF 646 First, Thirteenth, Fourteenth, and Fifteenth Causes of Action.

[3] E.g., NYSCEF 646, Thirteenth Cause of Action; id. at Paragraph 381.

[4] E.g., NYSCEF 646, Fifteenth Cause of Action; *id.* Paragraphs 566-67.

action. *E.g.*, CPLR 3101. Indeed, the rules state that the NYAG cannot avoid her discovery obligations by claiming that the plaintiff is the State. CPLR 3102(f). Moreover, the rules provide the NRA with a menu of discovery devices, including depositions of fact witnesses and a representative of the OAG.[5] In fact, the legislature recently amended the rules to authorize courts to require plaintiffs to disclose precisely the type of information that is missing from the NYAG's pleading.

Yet, the NYAG has repeatedly refused the NRA's requests to provide the missing information.[6] Just a few days ago, the NYAG refused to provide information contemplated by the new Commercial Division rule 11.[7] In doing so, she asserted—falsely—that (i) her "claims are fleshed out in detail" in the Complaint (the Complaint on its face states that details are expressly omitted);[8] (ii) the disclosure the NRA and another party seeks is "unnecessary and will serve no legitimate purpose" (the information is needed as a matter of fundamental due process and will enable to parties to prepare for the trial); and (iii) "the NRA [is] fully familiar with the issues in the case."[9]

But the NYAG cannot have it both ways. She cannot rely on conclusory allegations and give only *some* particulars of her claims against the NRA but expressly withhold others and, at the same time, resist the NRA's requests for needed information on the grounds that the NRA purportedly already has it.

C. James Sheehan's repeated representations to the Court make clear that he possesses information that is necessary and material to the NRA's defense of this action.

James Sheehan represented to the Court repeatedly that he is "acquaint[ed] with the facts" of the NYAG's action against the NRA.[10] He has stated that, except where the Complaint alleges

---

[5] CPLR art. 31; *see also, e.g.*, Rule 11-f.

[6] See Motion (listing the NRA's multiple efforts to obtain discovery and the NYAG's refusal to do so).

[7] The new Commercial Division rule is attached as Exhibit 1. See also Letter from Monica Connell to Judge Sherwood, dated June 7, 2022, Exhibit 2.

[8] *See* text accompanying Footnotes 3 and 4; Appendix A.

[9] *Id.*

[10] NYSCEF 1, 11, 333, and 646 (Exhibits 3-6). Mr. Sheehan, whose deposition is among the two the NYAG attempts to prevent now, has been the Chief of the NYAG's Charities Bureau (the "Bureau") since in or around January 2014. Therefore, in addition, he also was at—and in fact the head of—the Bureau in each of the five years that the NYAG alleges—expressly—that the NRA's filings with the Bureau were materially misleading. SAC, Fifteenth Cause of Action.

facts on "information and belief," he "know[s]" the "complaint" "is true."[11] As to allegations made on information and belief (slightly over one sixth of the assertions in the Complaint are pleaded on such basis), Mr. Sheehan represented to the Court over and over again that, based on his "acquaintance with the facts," he "believe[s] them to be true."[12]

Therefore, Mr. Sheehan clearly knows precisely the information that is missing from the NYAG's pleading and that is necessary and material to the NRA's ability to prepare to defend against the NYAG's action at trial.

D. The Special Master should overrule each of the NYAG's objections to the Depositions.

1. <u>The Special Master's prior ruling and the Court's comments during a conference are not preclusive here.</u>

Contrary to the NYAG's assertion, the Special Master's report dated March 23, 2022, does not dispose of the issues here. There, the Special Master (i) ***deferred*** ruling on six of the 23 topics listed in the NRA's previous Rule 11-f deposition notice; (ii) ***permitted contention interrogatories*** for information in nine of the topics; (iii) granted the protective order as to five topics but did so ***without prejudice*** to the NRA's ability to seek testimony on these topics if the NYAG re-asserts her dismissed dissolution claims;[13] and (iv) granted the motion for a protective order ***solely as to three*** of the 23 of the NRA's topics, which have little to nothing to do with the Depositions.[14] (In

---

Moreover, as he admits in his verifications, he oversaw and participated extensively in the NYAG's investigation of the NRA and the NRA's chapter 11 proceeding, where he appeared on behalf of the NYAG at court hearings and depositions.

[11] Exhibits 4-6.

[12] *Id.*

[13] Although the NYAG did not re-assert her dissolution claims, she did assert a new claim after March 23, 2022, as described in Footnote 14.

[14] Exhibit D to the Motion. As the NRA represented to the NYAG (which is reflected in the Motion at 3), the NRA recognizes the Special Master's ruling and has no intention of delving into topics 6, 7, or 8 from the ruling dated March 23, 2022, although, as to topic 8 (her office's communications about the NRA with Everytown and other parties hostile to the NRA's political speech), the NRA seeks leave to apply for reconsideration of topic 8 as appropriate for a deposition on the grounds that the NYAG amended her claim since March 23, 2022. The amendment added no new facts but asserted a new claim (the First Cause of Action), in which she seeks intrusive, unnecessary, and unprecedented equitable relief. Specifically, the NYAG now seeks, *inter alia*, the appointment of an "independent compliance monitor," the appointment of an independent governance expert, an oversight role for herself over the monitor, and other mandatory injunctive relief.

fact, it is not clear on what basis the NYAG asserts in the Motion (at page 5) that, on March 23, 2022, "Your Honor issued a decision on March 23, 2022, granting the motion for a protective order in ***all material*** respects.")

Therefore, even if the law of the case doctrine were applicable (it is not),[15] there is ***no*** basis for the NYAG's claim that the Special Master's prior report precludes the depositions at issue here.[16]

Nor is there a basis for the NYAG's reliance on passing remarks by Judge Cohen on December 10, 2021, which did not address the issues raised here.[17]

2. <u>The NRA has made the requisite showing of need.</u>

Contrary to the gravamen of the NYAG's argument, the NRA "***has*** . . . made the required showing to be entitled to discovery from opposing counsel." That a witness has functioned as the other side's lawyer or is otherwise exposed to privileged information belonging to the other side does not preclude his deposition.

Here, Mr. Sheehan has represented to the Court repeatedly that based on his "acquaintance with the facts" he "believes" the NYAG's complaint to be "true" to the extent it is asserted in information and belief and that he otherwise "knows" the "Complaint is true."[18] Given that the NYAG is yet to provide information that is material and necessary to the NRA's defense of this action, even if the NRA were required to demonstrate a special or a substantial need for Mr. Sheehan's and the NYAG's testimony based on his status as an attorney and good faith, the requisite need clearly exists and there can be no question that the Depositions are noticed in good faith. See *Matter of Winston*, 238 A.D.2d 345, 346 (1997) ("Surrogate's Court did not err in granting the respondents' request to depose the petitioner's advisors, including his attorney, as the respondents established both a good faith basis for the deposition and that the information sought

---

[15] The case the NYAG cites in fact makes clear why the law of the case does not, contrary to the NYAG's claim, "prevent[] the NRA from deposing the OAG." After all, the "issue" before the court now must have been "determined," whereas the issues in dispute here were not even before the Special Master. As a result, they could not have been "judicially determined." *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975).

[16] In fact, the passages the NYAG quotes from the hearing before Your Honor make clear that Your Honor merely observed that depositions of opposing counsel are, as a rule, "disfavored." The Special Master did not hold that, as a matter of law, they are categorically impermissible. Here, the NRA provides ample reasons why the Depositions must, as a matter of fundamental due process, go forward.

[17] Transcript of December 10, 2021 hearing at pages 7-9, 28-30.

[18] E.g., NYSCEF 646.

was ***relevant and necessary*** for their case."); *Planned Indus. Centers, Inc. v. Eric Builders, Inc.*, 378 N.Y.S.2d 760, 761 (N.Y. App. Div. 1976) ("It is well settled that when an attorney functions as an agent or negotiator in a commercial venture he may be examined."); *Glen 4912 Corp. v. Strauss*, 353 N.Y.S.2d 495, 497 (N.Y. App. Div. 1974) ("[W]hen an attorney functions as an agent or negotiator in a commercial venture he may be examined."); *In re Macku's Est.*, 285 N.Y.S.2d 973, 974 (1967) ("In our opinion, respondent's attorney is a hostile witness with knowledge of pertinent facts and petitioner should be permitted to examine him before trial.").

Numerous federal courts, which the NYAG concedes are persuasive,[19] and government litigants have found the need for the government agency's deposition to exist in comparable circumstances. *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011) (compelling Rule 30(b)(6) deposition over SEC's objections based on its role as a government enforcement plaintiff); SEC v. Merkin, 283 F.R.D. 689, 698 (S.D. Fla. 2012) (following *Kramer* and, after striking topics the court deemed irrelevant, ordering that the deposition of the government proceed on a question-by-question basis with privilege objections to be interposed by the SEC as needed); SEC v. McCabe, No. 2:13-v-0061, 2015 WL 2452937, at *3 (D. Utah May 22, 2015) (denying the motion for a protective order; "Rule 30(b)(6) expressly applies to a government agency and provides neither an exemption from Rule 30(b)(6), nor 'special consideration concerning the scope of discovery, especially when [the agency], as here, voluntarily initiates an action'"); *see also FTC v. Directv, Inc.*, 2016 WL 1741137, at *2 (N.D. Cal. May 3, 2016) (denying deposition of FTC trial counsel, but citing prospect of a Rule 30(b)(6) deposition of the FTC as a viable alternative); U.S. v. Dist. Council of N.Y.C., No. 90-5722, 1992 WL 208284, at *1-2 (S.D.N.Y. Aug. 18, 1992) (noting that the United States Department of Justice voluntarily submitted to a Rule 30(b)(6) deposition in a civil RICO enforcement action); *EEOC v. AIG, Inc.*, 1994 WL 376052, at *1 (S.D.N.Y. July 18, 1994) (the EEOC voluntarily produced supervisor of the assigned investigator as its designee for a Rule 30(b)(6) deposition).

These multiple opinions also show that there is no basis for the NYAG's assertion that the Depositions "would ***unavoidably*** implicate attorney work product, among other privileges."

3. Authorities on which the NYAG relies otherwise are inapposite or support the NRA's motion to compel the Depositions.

The cases the NYAG cites are either inapposite or, in fact, directly support the relief the NRA seeks here.

For instance, in *Liberty Petroleum Realty*, the Court of Appeals stated that to depose opposing counsel, the subpoenaing party must show, as the NRA has done here, that "the information sought is material and necessary," and "must demonstrate good cause, in order to rule out the possibility that the deposition is sought as a tactic intended solely to disqualify counsel or

[19] See, e.g., Motion at 4, 6.

for some other illegitimate purpose. . . . [and] the party seeking the deposition must show that the deposition is necessary because the information is not available from another source."

In *Richmond Capital*, 2021 WL 5412143, at *1-2, unlike here, the court dealt solely with "records" "prepared in anticipation of litigation or . . . protected by law enforcement immunity," and, otherwise, expressly found that the parties "failed to demonstrate substantial need for . . . such documents." Id. (making clear that the "interests of the party seeking information" must be considered and, in fact, affect the "overall public interest"). Likewise, in *Volkswagen*, 41 A.D.2d at 827, the Court found finding that the information sought, unlike here, was irrelevant or characterized as "work product for impending litigation" and that "no special or unusual circumstances [were] shown."

Morelli, 143 F.R.D. at 44 is also distinguishable in part because, there, the SEC represented to the Court that information "ha[d] been provided in this action to date." Here, the NYAG cannot make such a representation.

4. <u>The NYAG's assertions of privileges are meritless.</u>

Although the NYAG asks to preclude the depositions on privilege grounds, she has not made the necessary showing to invoke these privileges in such a manner. In fact, it is not clear that some of the privileges on which the NYAG even exist. *In re 91st St. Crane Collapse Litig.*, 2010 WL 6428504, at *3-4 (N.Y. Sup. Ct. 2010) (stating that, unlike in FOIL context, the "public interest privilege" and the "law enforcement privilege" do not apply in litigation) (citing Siegel, N.Y. Prac. § 346, at 556 [4th ed])).

To the extent that the NYAG attempts to invoke privileges, they do not shield the NYAG from the two depositions altogether. *Liberty Petroleum Realty, Inc. v. Gulf Oil, L.P.*, 164 A.D. 3d 401, 408 (N.Y. App. Div. 2018) (the party asserting a privilege must attend the deposition and object to specific questions that seek privileged information). Indeed, it is well settled that what privileges protect is the substance of communications and the internal legal analyses, work product, and impressions. [20] The underlying facts are not protected. Mr. Sheehan, according to him, is acquainted with "the facts" of this case, knows the complaint "is true," and, where the complaint is pleaded on information and belief, believes it to be true. As a result, there is no basis of prohibiting his deposition on privilege grounds.

[20] *E.g.*, *Spectrum Sys. v. Chem. Bank*, 78 N.Y.2d 371, 380 (1991).

BREWER

III.
CONCLUSION

For the foregoing reasons, the Special Master should deny the NYAG's motion for a protective order and, instead, compel James Sheehan and the NYAG's Rule 11-f witness to appear for their depositions.

Respectfully,
/s/ *Svetlana M. Eisenberg*

William A. Brewer III
Svetlana M. Eisenberg
Blaine E. Adams
BREWER, ATTORNEYS & COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

ATTORNEYS FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA

cc: Parties' Counsel of Record

Enclosures