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January 30, 2022

VIA NYSCEF
Honorable Joel M. Cohen
Justice of the Supreme Court of the State of New York State
Commercial Division, New York County
60 Centre Street
New York, NY 10007

Re: *People of the State of New York, by Letitia James, Attorney General of the State of New York v. The National Rifle Association of America, Inc. et al.*, Index No. 451625/2020

Dear Justice Cohen:

On behalf of the Plaintiff, the People of the State of New York, the Office of the Attorney General of the State of New York ("OAG") respectfully writes in accordance with the Court's Practices and Procedures Rule VI(B), Rule 14 of the Rules of the Commercial Division, and CPLR 3103, to move for a protective order, prohibiting Defendant National Rifle Association of America ("NRA") from deposing the OAG pursuant to its Amended Notice of Rule 11-f Oral Examination of the Office of the Attorney General of the State of New York ("11-f Notice").[1]

The NRA's Amended 11-f Notice and the OAG's Objections

The NRA served the 11-f Notice on December 31, 2021[2] seeking a deposition of the OAG on February 1, 2022. On January 20, 2022, the OAG served detailed written objections to the 11-f Notice in its entirety. The objections identified fundamental defects in the 11-f Notice, including that it is unclear as to whom it is directed. The notice purports to seek testimony from a representative of the *OAG*, which the NRA erroneously treats as the plaintiff in this action. The NRA also improperly seeks testimony on behalf of the Attorney General, in her individual and official capacities. She also is not the plaintiff in this action.

On the whole, the 11-f Notice seeks discovery from counsel for a party, and improperly seeks

[1] This application is directed to the Court because the NRA objected to the OAG's request to adjourn the 11-f deposition without prejudice to allow the issues addressed herein to be presented to the Honorable O. Peter Sherwood, whose formal appointment as Special Master for Discovery is imminent.

[2] The NRA also served certain other discovery demands to which the OAG lodged similar objections to those set forth herein. The NRA has not yet pursued enforcement of many such objectionable requests but should the Court permit the Plaintiff to file its motion, Plaintiff reserves the right to seek a protective order with respect to some or all of those demands.

information that is protected OAG work product and pursuant to other privileges, including the law enforcement and deliberative process privileges. Further, the OAG objected because many of the delineated topics (the "Matters") relate solely to the NRA's Counterclaims. This Court has repeatedly stated that discovery on the counterclaims will proceed on a separate track and recently asked for expedited briefing should the counterclaims survive dismissal.[3] Argument on the motion to dismiss the Counterclaims is on February 25, 2022. In addition, the NRA's notice improperly identifies a "Non-Exclusive List of Matters to Be Addressed at the Deposition."

On January 28, 2022, the parties held a meet and confer to discuss whether motion practice related to the Amended 11-f Notice would be necessary. The OAG notified the NRA that if an agreement could not be reached, the OAG intended to seek a protective order but proposed adjourning the 11-f deposition so that the parties could submit this and related discovery disputes to the Special Master. Further, the OAG stated that having timely notified the NRA of its objection to proceeding, it would not be in good faith for the NRA to incur expenses related to proceeding with the deposition. On January 29, 2022, the NRA refused to adjourn the deposition. The OAG promptly commenced this pre-motion process, but consents to the Court's referral of this dispute to the Special Master upon his formal engagement.

A Protective Order Should Issue Preventing a Rule 11-f Deposition of OAG

CPLR § 3103(a) provides that a court may, in its discretion, issue a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts." In determining whether a protective order should issue, a court must weigh the need for discovery against the detrimental effects of disclosure "in light of the facts of the particular case before it." *Cynthia B. v. New Rochelle Hosp. Med. Ctr.*, 60 N.Y.2d 452, 461 (1983); *Jones v. Maples*, 257 A.D.2d 53, 56-57 (1st Dep't 1999). During the pendency of a motion for a protective order, disclosure obligations related to the challenged discovery are suspended. CPLR § 3103(b). A protective order is required here because the NRA's Amended 11-f Notice improperly seeks wide-ranging discovery that is intrusive, harassing and unnecessary.

First, as a foundational matter, the Notice has a critical defect. It is directed to the OAG, counsel for the Plaintiff, and incoherently and broadly defines "OAG", "You" and "Your" as encompassing:

> "[OAG], Letitia James, the plaintiff and counter-defendant and in the Action, and all other persons acting or purporting to act with, for, or on its, her or their behalf, including, but not limited to, any of its or her constituent Bureaus, such as. . . any person acting in

[3] NYSCEF 544 (Mar. 9 2021 Tr.) p. 25 ("Why don't we just …hold off on discovery on [the counter]claims for now. …certainly if these counterclaims survive a motion to dismiss here, the [NRA] will have time to finish its discovery, even if it goes beyond these dates."); NYSCEF 511 (Dec. 10 Tr.) pp. 7-8 ("my understanding was that the parties have held off on discovery on the counterclaim until the motion to dismiss was decided, … in this case, you've got enough to do on the main claim that I would be okay with a discovery proceeding in two tracks … I mean, I'd like to get this briefed quickly and decided quickly so we can get on with it.").

> an advisory, agency, or consulting capacity, including, but not limited to: (i) the current Attorney General Letitia James ("James"), in her official and/or individual capacity, and/or any former Attorney General (collectively, the "Attorney General") and (ii) where applicable, other agencies, offices, bureaus, departments, or divisions of the State of New York or their constituent personnel.

However, the plaintiff in this civil enforcement action is the People of the State of New York, by the Attorney General, through the OAG, acting in its protective law enforcement capacity.

Second, the 11-f Notice, even if limited to the OAG, improperly seeks testimony from Plaintiff's counsel without establishing that the information sought is "material and necessary," cannot be obtained elsewhere, and there is a "good faith basis" for seeking it. *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.,* 164 A.D.3d 401, 406 (1st Dep't 2018). Plaintiff has produced to the NRA its entire discoverable investigative file, comprised of documents and testimony obtained in its investigation, and a privilege log with an accompanying Commercial Division Rule 11-b Certification that provides detailed information about sources of information that is not otherwise discoverable. *See People v. Richmond Capital Group LLC*, Index No. 451368/2020 (N.Y. Supreme Ct.).[4] Upon the OAG's *prima facie* showing that a deposition "will not lead to legitimate discovery," the NRA bears the burden to establish entitlement to the deposition it seeks. *Liberty Petroleum Realty, LLC*, 164 A.D.3d at 406-08. It has not done so.

Third, the NRA's 11-f Notice seeks improperly to invade the OAG's work product and other privileges applicable herein. The Matters inquire into the OAG's thought processes, legal theories, and information about how the OAG conducted its investigation and will prosecute the enforcement action, which are not discoverable. Testimony on those subjects directly implicates law enforcement and related privileges and the OAG's deliberative process in commencing and conducting its enforcement actions. *See In re EEOC*, 207 Fed. Appx. 426, 432 (5th Cir. 2006) (attorney-client and attorney work product privileges prevented testimony and document disclosure from EEOC in the context of a lawsuit by EEOC for alleged violations of federal law); *S.E.C. v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) ("the mere request" to depose opposing counsel is good cause for a protective order, because it "involves forays into the area most protected by the work product doctrine – that involving an attorney's mental impressions or opinions."). For example, Matters 10-22 seek information that is essentially a roadmap or order of proof for the OAG's focus and theories in this action, including seeking information that is available from other sources such as non-parties or through documents already produced in the action. *See Liberty Petroleum Realty, LLC*, 164 A.D.3d at 406.

Fourth, the notice is improper with respect to the proposed Matters identified. In addition to failing to define all matters about which the NRA intends to inquire, as required by Rule 11-f(b), many of the proposed Matters are only relevant to the NRA's Counterclaims. If any or all of the Counterclaims are dismissed following argument on February 25, that will significantly limit discovery. Consideration of a Rule 11-f deposition should be adjourned until the Court rules.

[4] A copy of this decision is attached at Exhibit A.

We thank the Court for its attention to these matters.

Respectfully,

/s Monica Connell
Monica Connell
Assistant Attorney General

cc: All Counsel of Record

OAG Ex. A

2021 WL 5412143 (N.Y.Sup.), 2021 N.Y. Slip Op. 32367(U) (Trial Order)
Supreme Court of New York.
New York County

**1 PEOPLE OF THE STATE OF NEW YORK, By Letitia James, Attorney General of the State of New York, Petitioner,
v.
RICHMOND CAPITAL GROUP LLC, Ram Capital Funding LLC, Viceroy Capital Funding Inc. Also Doing Business as Viceroy Capital Funding and Viceroy Capital LLC, Robert Giardina, Jonathan Braun, TZVI Reich, Michelle Gregg, Respondents.

No. 451368/2020.
November 19, 2021.

*1 Part 53
Motion Date _____
Motion Seq. No. 010

Decision + Order on Motion

Present: Hon. Andrew Borrok, Justice.

The following e-filed documents, listed by NYSCEF document number (Motion 010) 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578 were read on this motion to/for DISCOVERY.

Richmond Capital Group, LLC, Robert Giardina, and Michelle Gregg's (Richmond Capital Group, LLC, together with Mr. Giardina and Mr. Gregg, hereinafter, collectively, the **Richmond Capital Respondents)** motion to (i) compel the People of the State of New York, by Letitia James, Attorney General of the State of New York (**NYAG**) to produce unredacted notes of its oral communications with nonparty merchant witnesses, (ii) compel NYAG to produce unredacted copies of communications previously produced invoking the law enforcement privilege with such nonparty merchant witnesses, and (iii) grant the Richmond Capital Respondents leave to recall any and all nonparty merchant witnesses for deposition upon such production, is denied in its entirety. The documents requested are protected from discovery under New York law because they are either materials prepared in anticipation of litigation or are protected by law enforcement immunity, and the Richmond Capital Respondents have failed to **2 demonstrate substantial need for, or any entitlement to, such documents. The motion for recalling witnesses for deposition is denied as moot.

This proceeding arises out of NYAG's investigation into the Respondents' business of marketing, issuing, and collecting merchant cash advances (**MCA**s). NYAG alleges that these MCAs are "in fact fraudulent, usurious loans with interest rates in the triple and even quadruple digits, far above the maximum rate permissible for a loan under New York law" (Amended Petition; NYSCEF Doc. No. 426, ¶ 1). NYAG commenced this proceeding pursuant to New York Executive Law § 63(12), which gives NYAG the authority to bring a proceeding to enjoin fraudulent or illegal acts or fraud and illegality in the carrying on, conducting, or transaction of business. On June 2, 2021, the court denied the Respondents' motions to dismiss and provided the Respondents "an opportunity to do some limited discovery" (Tr. of June 2, 2021 Hearing; NYSCEF Doc. No. 472, at 40:22-23).

Pursuant to CPLR 3101(d)(2), "materials otherwise discoverable...and prepared in anticipation of litigation or for trial by or for another party...may be obtained only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Witness statements "are trial preparation materials and not absolutely privileged" (*People v*

Kozlowski, 11 NY3d 223, 245 [2008]). Production of such materials is not proper, however, where the party seeking production has failed "to seek interview with the [witnesses] at an earlier time or stated whether they ever made an independent attempt to secure the relevant statements, a requirement for obtaining an attorney's trial preparation materials" (*id.*, 245-246).

**2 **3 Law enforcement privilege is codified in NY Pub Off § 87(2)(e)(i)-(iv), which allows an agency to deny access to records or portions thereof that

> "are compiled for law enforcement purposes and which, if disclosed, would: (i) interfere with law enforcement investigations or judicial proceedings; (ii) deprive a person of a right to a fair trial or impartial adjudication; (iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or (iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures."

This privilege "is qualified and must be balanced with the substantial need for the information sought" (*Colgate Scaffolding & Equip. Corp. v York Hunter City Servs., Inc.*, 14 AD3d 345, 346 [1st Dept 2005]). Public interest privilege "permits appropriate parties to protect information from ordinary disclosure, as an exception to liberal discovery rubrics" and "envelops confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or the sources should not be divulged" (*In re World Trade Ctr. Bombing Litig.*, 93 NY2d 1, 8 [1999] [internal quotation marks and citation omitted]). "The balancing that is required goes to the determination of the harm to the overall public interest. Once it is shown that disclosure would be more harmful to the interests of the government than the interests of the party seeking the information, the overall public interest on balance would then be better served by nondisclosure" (*City of New York v Keene Corp.*, 304 AD2d 119, 122 [1st Dept 2003], *quoting* *Cirale v 80 Pine St. Corp.*, 35 NY2d 113, 118 [1974]).

The Richmond Capital Respondents have failed to identify any right to, let alone substantial need for, the notes of oral communications between NYAG and nonparty merchant witnesses. In some instances, they have failed to show that such notes even exist. The excerpt of NYAG's **4 privilege log, dated September 20, 2021 (the **Privilege Log**; NYSCEF Doc. No. 541) explicitly states that the "documents listed below are handwritten attorney notes taken by the Office of the New York State Attorney General (NYAG) contemporaneous with telephone interviews with nonparty witnesses concerning the NYAG's investigation of Respondents or concerning the above-noted proceeding." It does not claim to document every phone call between NYAG and nonparty witnesses, nor can it be assumed from the evidence produced that notes were made of every such phone call. To the extent that the Richmond Capital Respondents allege that notes have been improperly withheld because phone calls were requested for dates that do not appear in the privilege log, no evidence has been offered to show that such notes were ever made.

Richmond Capital Respondents objection to NYAG's withholding of such notes as privileged fails. The notes are plainly created in anticipation of litigation. The assertion that such an argument is "disingenuous" is unpersuasive, at best, and is contrary to established New York law (*see* Aff. of Anthony Varbero, counsel for the Richmond Capital Respondents; NYSCEF Doc. No. 539, ¶ 16). The argument that, because such notes contain quotations attributed to the Richmond Capital Respondents, they cannot be withheld, is unsupported by caselaw. As the Richmond Capital Respondents admit, these nonparty witnesses were and are available for and have been subject to deposition (*id.*, ¶ 18). The Richmond Capital Respondents have failed to demonstrate that they could not obtain the information they seek at deposition or by otherwise asking of the nonparty witnesses. Nor have they demonstrated undue hardship in obtaining the same or substantially similar information. In fact, they wholly fail to demonstrate any attempt to procure the information sought from the nonparty witnesses. Accordingly, the Richmond Capital Respondents have failed to demonstrate entitlement to materials created by NYAG in **5 anticipation of litigation, and the branch of the motion ordering production of such documents is denied.

*3 NYAG asserts that, in addition to the investigation that gave rise to this proceeding, it has "investigated and inquired into possible fraud and illegality committed by other entities in the MCA and business funding industries that are not party" to this proceeding (Nonparty Investigations) (Aff. of John Figura, Assistant Attorney General in the Office of NYAG; NYSCEF Doc. No. 557, ¶ 45). NYAG further asserts that its communications with merchants, including nonparty merchant witnesses in this proceeding, concern ongoing Nonparty Investigations (*id.*, ¶ 46). NYAG has redacted certain information in emails

with nonparty witnesses as it relates to Nonparty Investigations (*id.*, ¶ 48), and informed Respondents of the reason for such redactions by letter dated August 31, 2021 (NYSCEF Doc. No. 577, at 2 ["Petitioners have redacted from these communications references to other investigations conducted by the NYAG that do not concern respondents pursuant to the law enforcement privilege under New York law"]).

The Richmond Capital Respondents assertion that they have a "compelling need for the information" (NYSCEF Doc. No. 539, ¶ 32) fails. The sole basis for such assertion appears to be the speculative assertion that "Petitioner removed a substantive portion of this communication about the pending civil case for purposes of preventing scrutiny by the Respondents" (*id.*, ¶ 27). The Richmond Capital Respondents provide no support for their *ipse dixit* assertion. Thus, the branch of the motion ordering production of such unredacted documents is denied. The branch of the motion for leave to recall witnesses for deposition must also be denied as moot.

**6 It is hereby ORDERED that the motion of Richmond Capital Group, LLC, Robert Giardina, and Michelle Gregg to compel production of documents and for leave to recall witnesses for deposition is denied.

11/19/2021

DATE

<<signature>>

ANDREW BORROK, JSC

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