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BREWER
ATTORNEYS & COUNSELORS

June 23, 2022

VIA EMAIL

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

Re: *NYAG v. The National Rifle Association of America, et al.,*
Index No. 451625/2020

Dear Judge Sherwood:

The National Rifle Association of America (the "NRA")[1] faces more than 600 paragraphs of salacious allegations culminating in demands for significant relief, including in the Second Amended Verified Complaint, which seeks the imposition of an independent compliance monitor and independent governance expert. That and other relief, if granted, would place the NRA under government control for an indefinite period of time, and would interfere with the Association's ability to achieve its lawful objectives for its millions of members. To combat these charges, the NRA seeks relief to which it is entitled under the New York Civil Practice Law and Rules and the Commercial Division Rules, namely, the opportunity to depose a representative of the Office of the Attorney General of New York (the "NYAG") to determine the factual bases upon which the NYAG asserts its allegations. To date, the NRA has not received any discovery from the NYAG (beyond an investigative file composed mostly of documents produced by the NRA to the NYAG and documents produced in response to various third-party subpoenas). The NRA therefore seeks to depose a corporate representative of the NYAG to learn the factual bases for the NYAG's allegations.[2]

[1] In compliance with the Special Master's expressed preference for a joint submission on behalf of all interested defendants at the last conference, defendants Wayne LaPierre and John Frazer join in this letter.

[2] The NRA hereby incorporates by reference its previous submissions on the matter, including letters dated February 3, 2022 and March 1, 2022, attached hereto as **Exhibit A** and **Exhibit B**, respectively. The June 16, 2022 hearing transcript is attached as **Exhibit C**. The NRA's June 13, 2022 letter is attached as **Exhibit D**.

I.

BACKGROUND

On December 31, 2021, the NRA served an amended notice on the NYAG seeking to take the deposition of an NYAG corporate representative pursuant to Commercial Division Rule 11-f. The NYAG provided its responses and objections on January 20, 2022. On May 19, 2022, the NRA served an additional notice on the NYAG under Commercial Division Rule 11-f seeking again to depose a corporate representative of the NYAG. Also on May 19, 2022, the NRA served a notice to take the deposition of James Sheehan. On June 3, 2022, the NYAG applied for a protective order regarding the deposition notices of the NYAG and James Sheehan. Your Honor granted the protective order as to James Sheehan on June 16, 2022, while permitting limited additional argument on the issue.

II.

ARGUMENT AND AUTHORITIES

A. *Matters on Which the NRA Seeks to Depose an NYAG Representative Remain Relevant*

Certain of the Matters in the prior Rule 11-f notice on which the NRA seeks to depose the Rule 11-f representative remain alive and relevant. For example, Matters 1-3 concern document preservation and discovery responses, querying the NYAG as to what steps they took to preserve documents and gather information. The NYAG has asked similar questions of almost all NRA witnesses, including NRA general counsel (who the NYAG has been permitted to depose). Matters 4-5 inquire about the bases for public statements by the NYAG. The transcript of a prior oral argument suggests that the Court agrees that these Matters remain relevant, even after dismissal of the counterclaims.[3]

B. *Pursuant to CPLR 3102(f), the Government Must Comply with Discovery Obligations*

The CPLR is clear that the government is not exempt from discovery obligations. CPLR 3102(f) provides that "[i]n an action in which the state is properly a party, whether as plaintiff, defendant or otherwise, disclosure by the state shall be available as if the state were a private person." *See* CPLR 3102(f). As a case cited by the NYAG herself confirms, a court has full discretion to order such an examination where, as here, the NYAG is engaged as

[3] Tr. of Hearing Held on Mar. 10, 2022 at 21:21-22:12 (Ms. Eisenberg: "Well, but if the counterclaims are dismissed, my position is that I still get to inquire into No. 5 because it's relevant to claims and defenses given [sic] [even if] the counterclaims don't survive." Special Master: "You and I are in violent agreement.").

a party in civil litigation and acting in its protective capacity. *See People v. Katz*, 446 N.Y.S.2d 307 (N.Y. App. Div. 1982); *cf. Lefkowitz v. Raymond Lee Org., Inc.*, 405 N.Y.S.2d 905, 906 (N.Y. Sup. Ct. 1978) (denying a deposition of the Attorney General in a criminal case, but noting that "[i]t cannot be disputed that where the State appears as a normal party . . . it may be deposed under the same standards, as are applicable to a private party"). In *Katz*, the court specifically stated that in a case such as this, where the NYAG argues it is operating in its protective capacity, "this Court may order such disclosure as appropriate in this type of 'protective' case as long as the disclosure ordered does not constitute an abuse of discretion as a matter of law. Thus, the moving defendants are entitled to examine the State, as if it were a private person,[4] on those matters material and relevant to the defense, unless those matters are otherwise protected from disclosure." *Id.* at 309-10. Rule 11-f too expressly permits an entity deposition of a "government, or governmental subdivision, agency or instrumentality." Comm. Div. R. 11-f(a).

The NRA (along with the other joining parties) seeks the factual bases for the NYAG's numerous allegations and claims against it and them; such factual bases are necessary and material to the NRA's and others' defenses, as they must be informed enough to prepare to counter the NYAG's yet unknown assertions. Discovery of the extent of the vague allegations against the parties satisfies the traditional touchstones: the information sought is material and necessary, it is sought in good faith, and it cannot be learned from another source. *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401, 406 (1st Dep't 2018).[5] Further, the NRA submits that a mechanism to prevent the NRA's inquiry into areas of privilege already exists—objections at the deposition itself.

C. *A Rule 11-f Deposition Is More Appropriate than Contention Interrogatories to Provide the Relevant Information the NRA Seeks*

"Courts generally resist efforts to use contention interrogatories as a vehicle to obtain every fact and piece of evidence a party may wish to offer concerning a given issue at trial. Thus, courts do not typically compel responses to interrogatories that seek a catalog of all facts or all evidence that support a party's contentions." *Linde v. Arab Bank, PLC*, 2012 WL 957970, at *1 (E.D.N.Y. Mar. 21, 2012). Here, contention interrogatories are not more appropriate than a Rule 11-f deposition given that such interrogatories "will almost inevitably produce what the defendant complains about—a mass of data that contains, 'incidental,

[4] In another case cited by the NYAG, *People by Lefkowitz v. Volkswagen of Am., Inc.*, 342 N.Y.S.2d 749, 752 (N.Y. App. Div. 1973), the court held that "[n]o special or unusual circumstances are shown to warrant granting the relief sought," but *Katz* notes that, after further development by the courts, the "'special circumstances' criterion would appear to be too restrictive." *Katz*, 446 N.Y.S.2d at 309.

[5] The NRA does not concede that *Liberty Petroleum*, which did not involve a deposition of an entity's representative, is controlling. Even if it were, the NRA meets the standard.

secondary, and perhaps irrelevant and trivial details.'" *Id.* (citing *IBP, Inc. v. Mercantile Bank of Topeka*, 179 F.R.D. 316, 321 (D. Kan. 1998). It is therefore more appropriate for the NRA to obtain this information through a Rule 11-f deposition, particularly appropriate here given that discovery has not yet closed and the NRA will be able to target discovery requests based on facts uncovered at the deposition. Moreover, the NRA will be able to properly prepare witnesses for future depositions by the NYAG.

D. ***A Rule 11-f Deposition Would Require the NYAG to Explicate the Full Factual Bases for Its Allegations, Rather than Merely Listing Examples***

As set forth in Appendix A, attached hereto, the NYAG lists multiple factual claims as a "for example," then neglects to list the other bases for her claims. The documents proffered so far by the NYAG have not shed light on the specifics of any of her claims, and the NRA needs to know sooner rather than later the universe of facts upon which the NYAG makes her case. The Rule 11-f deposition will allow for the NRA to probe specifics of certain claims, which will in turn allow for the NRA to be adequately prepared for summary judgment and trial.

E. ***Comparisons to Fed. R. Civ. P. 30(b)(6) Are Appropriate and Suggest Deposition of the Rule 11-f Corporate Representative is Permissible***

The Practice Commentaries to CPLR 3106 state that "[t]he commercial division rule [11-f] is akin—though not identical—to the familiar Rule 30(b)(6) of the Federal Rules of Civil Procedure, which governs depositions of corporations in federal court." N.Y. C.P.L.R. § 3106 (McKinney). In fact, the federal rule and rule 11-f are identical in respects relevant here. *Compare* Fed. R. Civ. P. 30(b)(6) (stating "Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party **may name as the deponent a . . . governmental agency** . . . .") *with* Commercial Division Rule 11-f ("Depositions of Entities; . . . (a) **A notice or subpoena may name as a deponent a . . . government, or governmental subdivision, agency** or instrumentality . . . .").

Federal courts have compelled depositions of attorneys general. *See, e.g.*, *Dallas v. Goldberg*, 2001 WL 477170, at *1 (S.D.N.Y. May 7, 2001) (allowing the plaintiffs "to depose . . . the employee or agent of the New York State Office of the Attorney General"); *Zeleny v. Newsom*, 2020 WL 3057467, at *1 (N.D. Cal. June 9, 2020) (mentioning in passing the prior deposition of an attorney general). Rule 30(b)(6) "permits parties to depose a government agency or other organization if they 'describe with reasonable particularity the matters for examination.'" *Mitchell v. Atkins*, 2019 WL 6251044, at *1 (W.D. Wash. Nov. 22, 2019). The agency must then designate a representative who 'must testify about information known or reasonably available to the organization.'" *Id.* In *Mitchell*, the court did not allow a Rule 30(b)(6) deposition of a government employee because (i) the information sought was beyond the purview of the agency; and (ii) the deposition topics improperly sought legal opinions. Here, there is no similar concern: The NRA seeks a Rule 11-f deposition to ascertain

the factual bases for the NYAG's allegations (presumably already within the possession of the NYAG) and does not seek legal opinions. Further, the NRA has described precisely the topics on which it seeks to depose the NYAG, and therefore should be allowed to move forward with the Rule 11-f deposition.

Moreover, federal cases are not "inconsistent with the rule that's set forth with[in] the Liberty Petroleum [case]." Tr. of Hearing Held on June 16, 2022 at 15:9-20 (arguing on behalf of the NYAG that Rule 30(b)(6) cases are inapposite) .

First, *Liberty Petroleum* did not involve rule 11-f or a governmental agency.

Second, Rule 30(b)(6) notices have been resisted by Attorneys General unsuccessfully based on the same arguments as those advanced by the NYAG here. Yet, they were rejected by the courts:

- *In William Beaumont Hosp. v. Medtronic, Inc.*, No. 09-CV-11941, 2010 WL 2534207, at *3 (E.D. Mich. June 18, 2010) at *22-23 (E.D. Mich. June 18, 2010), the government argued that "this subject matter is protected by the attorney-client privilege and the attorney work product doctrine and is not reasonably calculated to lead to the discovery of admissible evidence" and that "to the extent this information is discoverable, Plaintiffs should be limited to contention interrogatories." Yet, the court compelled the 30(b)(6) deposition because the "[p]laintiffs should have the opportunity to more fully probe [defendant's] [interrogatory] response using the traditional method for ascertaining facts in the litigation process-- examination of a witness."

- In *Serrano v. Cintas Corporation.*, No. CIV. 4-40132, 2007 WL 2688565, at *2 (E.D. Mich. Sept. 10, 2007), the government resisted a deposition, claiming it was an "attempt to elicit general opinion testimony in irrelevant and improper areas, and thus, the deposition is not a legitimate use of Rule 30(b)(6)." *Id.*; *see also* 2:06-cv-12311-SFC-RSW Dkt No. 71 (E.D. Mich May 15, 2007) (EEOC's brief arguing that its knowledge of the facts was "derivative," and not "first-hand" and that the party seeking the deposition was "uniquely situated with respect to knowledge" and already had a copy of the government's "investigative file"). Yet, the court denied the motion for a protective order barring a 30(b)(6) deposition. *Serrano v. Cintas Corporation.*, No. CIV. 4-40132, 2007 WL 2688565, at *2.

- In *United States ex rel. Fry v. Health Alliance of Greater Cincinnati*, No. 1:03-cv-167, 2009 WL 5227661, at *3 (S.D. Ohio Nov. 20, 2009), the government contended that "Defendants [sought] to depose government counsel." Yet, the court ruled that, "[r]ather they 'seek a representative of the [government] to explain under oath how it calculated

> the hundreds of millions of dollars it seeks in this case, and to detail evidence the [government] has to support those allegations." *Id.* (also rejecting the government's argument that the topics set forth in the 30(b)(6) notice [were] topics to which only a government attorney can testify" because "the fact that government attorneys are the only individuals with the requisite knowledge to answer Defendants questions does not prevent them from preparing a designee to answer the questions").

See also "A PRACTICAL GUIDE Defending Against State Attorney General Litigation," Jessica D. Miller and Jordan Schwartz, 55 No. 9 DRI For Def. 50 (noting that while "[a] handful of courts have barred depositions of government agency lawyers on these bases" and "[w]hile attorneys general have relied on these cases in opposing a defendant's efforts to take 30(b)(6) depositions, this caselaw represents the minority approach" and "[s]everal other courts have recognized that defendants have a right to depose public agencies that sue them").

Finally, even if the parties seeking discovery were required to show necessity as the NYAG claims (Tr. of Hearing Held on June 16, 2022 at 15:9-24), they have done so here. *See, e.g.*, Letter from the NRA to Judge O. Peter Sherwood (June 13, 2022), as well as appendix A attached thereto.

F. *James Sheehan Should Be Deposed*

"To depose a high-ranking government official, a party must demonstrate exceptional circumstances justifying the deposition—for example, that the official has *unique first-hand knowledge* related to the litigated claims or that the necessary information cannot be obtained through other, less burdensome or intrusive means." *Branch v. State Univ. of New York Downstate Med. Ctr.*, 2021 WL 2157823, at *1 (S.D.N.Y. May 27, 2021) (emphasis added). Here, Mr. Sheehan admitted that he has "unique first-hand knowledge related to the litigated claims" when he verified four of NYAG's complaints, signed "To my knowledge," given that each complaint contains many allegations that are not based "upon information and belief," but rather stated as fact. The NRA does not oppose designating Mr. Sheehan as the Rule 11-f corporate representative. In fact, for the sake of expediency, such a determination may be the most efficient means by which the defendants may discover the underlying factual bases for each of the NYAG's claims.

III.

CONCLUSION

The NRA reiterates that, in a high-profile, quasi-death penalty case, it must be allowed before the close of discovery to question the NYAG about her allegations against the NRA. To date, the NYAG has been lax in its delivery of responsive documents, with such documents

trailing off towards the end of 2020, and the NRA has not been permitted to further discover information required to prepare its defense. The NRA further reiterates that contention interrogatories are inadequate to provide the information the NRA seeks because they are only applicable at the close of discovery. Allowing the NRA to depose, as a Rule 11-f witness, James Sheehan or another individual designated by the NYAG would permit the NRA to determine upon which factual bases certain of the NYAG's claims rely, in turn allowing the NRA to prepare a fulsome defense. The NRA does not object to the deposition of James Sheehan as the Rule 11-f deponent.

Respectfully submitted,

/s/ William A. Brewer III

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