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I.

PRELIMINARY STATEMENT

In this action, the NYAG seeks grave relief against the NRA. Specifically, the NYAG seeks, *inter alia*, to prohibit the NRA from soliciting donations and to install at the NRA an independent compliance monitor with reporting duties to the NYAG. She also seeks to remove two officers of the NRA who have been duly appointed by the NRA's 76-person Board of Directors, which in turn was elected by the NRA's members. In addition, the NYAG seeks an order from the Court forcing the NRA to pay an unidentified amount of damages.

Despite the substantial, intrusive and—in some instances—unprecedented relief threatened against the NRA, the NYAG has resisted all efforts by the NRA to gain relevant information regarding the issues to be tried in this action. In particular, the NYAG's complaint expressly makes clear that the factual allegations in the complaint are merely examples of transactions, alleged misstatements, and other actions that the NYAG intends to place at issue at trial, yet she has continuously refused the NRA's requests for greater transparency.

Under the new Commercial Division Rule 11(a), “[t]he court may direct plaintiff to [1] produce a document stating clearly and concisely the issues in the case prior to the preliminary conference [and] [2] to . . . produce a document stating each of the elements in the causes of action at issue and the facts needed to establish [plaintiff’s] case. Further, the Rule states that the court can require a plaintiff to “revisit” and update the disclosures after dismissing some but not all of the original causes of action:

(b) The court may further direct, if a defendant filed a motion to dismiss and the court dismissed some but not all of the causes of action, plaintiff . . . to ***revisit the documents to again state***, clearly and concisely, the ***issues remaining in the case***, the ***elements of each cause of action*** and the ***facts needed to establish their case***.

Therefore, Rule 11 provides a mechanism for the NRA to secure some of the information it needs to defend itself at trial. Moreover, with the recent amendment of the NYAG's complaint, in which she asserted a new First Cause of Action, and the NRA's answer not yet due, the NRA respectfully submits that the Court has discretion to apply Rule 11 in this circumstance.

Although the Special Master denied the NRA's application for Rule 11 relief, his ruling requires no deference from the Court. For the reasons stated below and in the NRA's submissions to the Special Master,¹ the NRA respectfully requests that the Court order the NYAG to provide the disclosures contemplated in Rule 11.

II.

BACKGROUND

A. Although the action was filed nearly two years ago, because of a recent amendment of the complaint, pleadings in this action have yet to be joined.

The NYAG filed this action on August 6, 2020. In the original complaint, the NYAG asserted six claims against the NRA and four claims against each of the individual defendants. On March 2, 2022, the Court dismissed four of the NYAG's claims, including three claims against the NRA. Two months later, on May 2, 2022, the NYAG asserted a new claim against the NRA under EPTL 8-1.4(m).² That claim seeks wide-ranging injunctive relief, including the appointment of an independent compliance monitor with reporting duties to the NYAG.³

¹ See attached June 1, 2022 Letter to Special Master from the NRA requesting order directing the NYAG to serve Rule 11 disclosures (exhibit A to the affirmation of Svetlana M. Eisenberg dated June 24, 2022); see also June 13, 2022 Letter to Special Master in opposition to the NYAG's motion for a protective order regarding the deposition of James Sheehan and Rule 11-f corporate representative (exhibit B).

² NYSCEF 646 at ¶¶ 635-43.

³ *Id.*, First Cause of Action.

On June 6, 2022, the NRA moved to dismiss the NYAG's First Cause of Action.⁴ The NYAG's opposition to the motion is due on July 13, 2022, and the NRA's reply in support of its motion to dismiss is due on August 8, 2022.⁵ The NRA's answer to the newly pleaded complaint is due after the Court rules on the motion to dismiss.

As a result, although the action has been pending for two years, the pleadings have yet to be joined.

B. While the NYAG's discovery is nearing its end, the NRA's has yet to begin.

While the defendants' motions to dismiss were pending, discovery was not stayed. As a result, to date, the NYAG obtained extensive discovery from the parties in the action as well as third parties. In addition to obtaining voluminous documentary discovery, the NYAG deposed 17 witnesses and is about to complete her fact witness depositions by deposing several more.

In contrast, the NRA's efforts to obtain discovery from the NYAG have been stifled. Other than turning over what she deemed to be discoverable parts of her investigative file, the NYAG has yet to provide any disclosure requested by the NRA. For example, the NRA served deposition notices on the NYAG pursuant to Rule 11-f of the Commercial Division rules, seeking to depose a representative of the NYAG about factual bases for the NYAG's claims and her preservation and collection of documents related to this action.⁶ The NYAG refused to appear for the deposition.⁷ The NRA's cross-motion to compel the NYAG's deposition is

⁴ NYSCEF 698, Notice of Motion to Dismiss Second Amended Complaint; NYSCEF 699-705.

⁵ NYSCEF 708.

⁶ See NRA's December 31, 2021 Rule 11-f Deposition Notice to NYAG (exhibit C); NRA's May 19, 2022 Rule 11-f Deposition Notice to NYAG (exhibit D).

⁷ See Plaintiff's Responses and Objections to Defendant NRA's Amended Notice of Rule 11-F Oral Examination of the Office of the Attorney General of the State of New York (Exhibit E); January 30, 2022 Letter to Special Master (exhibit F); March 4, 2022 Letter to Special Master (exhibit G).

pending before the Special Master for discovery appointed by the Court in this case.⁸

Additionally, the NYAG objected to each and every—and did not respond to any—interrogatory the NRA served on the NYAG on January 16, 2022.⁹

As the NRA repeatedly made clear, the NYAG's complaint provides merely illustrative examples of transactions, alleged misstatements, and events on which the NYAG intends to predicate factually her claims against the NRA at the trial.¹⁰ As a result, the NRA has been denied basic information needed to prepare for trial. For example, there is no information about all allegedly unauthorized related party transactions that comprise the NYAG's Thirteenth Cause of Action, alleged regulatory filing misstatements comprising her Fifteenth Cause Of Action, or actions or omissions the NYAG claims allegedly violated the whistleblower provisions of the N-PCL (at issue in the Fourteenth Cause of Action). Nor is it clear which of the NRA's assets the NYAG claims are subject to the oversight of the independent compliance monitor she seeks.

C. In May 2022, Commercial Division Rule 11 was amended to require disclosure about, among other things, “facts needed to establish [plaintiff’s] case.”

The Commercial Division rules, which apply in this case, were amended as of May 31, 2022, to provide the Court with authority to direct a plaintiff to produce a document stating (i) clearly and concisely the issues in the case, (ii) each of the elements in the causes of action at issue, and (iii) the facts needed to establish plaintiff’s case. Specifically, Rule 11(a) states:

The court may direct plaintiff to produce a document stating clearly and concisely the issues in the case prior to the preliminary

⁸ See June 13, 2022 Letter to Special Master (Exhibit B); June 23, 2022 Letter to Special Master (Exhibit H).

⁹ Responses and Objections of Plaintiff the People of the State of New York to Defendant NRA’s First Set of Interrogatories (Exhibit I).

¹⁰ NYSECF 646, Second Amended and Verified Complaint at ¶ 381; June 13, 2022 Letter to Special Master, Appendix A (Exhibit L).

conference. . . . The court may also direct plaintiff . . . to . . . produce a document stating each of the elements in the causes of action at issue and the facts needed to establish their case.

Further, Rule 11(b) as amended states that the court can require a plaintiff to “revisit” and update the disclosure after dismissing some, but not all, of the original causes of action:

The court may further direct, if a defendant filed a motion to dismiss and the court dismissed some but not all of the causes of action, plaintiff . . . to *revisit the documents* [listed in rule 11(a)] *to again state*, clearly and concisely, *the issues remaining in the case*, the *elements of each cause of action* and the *facts needed to establish their case*.

D. In its continuous effort to obtain information needed to prepare for trial, as soon as the amended Rule 11 went into effect, the NRA applied to the Special Master for relief under the rule.

On June 1, 2022, the NRA moved before Judge Sherwood, the special master for discovery appointed by the Court in this action,¹¹ for an order pursuant to the amended Rule 11. The NRA explained that “ordering the OAG to serve disclosures pursuant to the Rule will particularly benefit the parties and the Court because (i) the case involves 5 defendants, 15 claims, and more than 700 paragraphs of allegations; (ii) the Court dismissed on March 2, 2022, three claims against the NRA and one claim against the individual defendants; and (iii) fact discovery is ongoing (through the end of June 2022), and expert witness discovery has yet to begin.”¹²

Contemporaneously with that application, the NRA moved to compel the depositions of James Sheehan, who verified the NYAG's four complaints in this case,¹³ and a Rule 11-f representative of the NYAG. The NRA explained to the Special Master that (i) while the NYAG

¹¹ NYSCEF 579.

¹² See June 1, 2022 Letter to the Special Master (Exhibit A).

¹³ NYSCEF 1, 11, 333, 646.

seeks substantial relief against the NRA, she repeatedly refused to provide material and necessary detail about her claims; and (ii) the applicable rules appropriately give the NRA the basic right to learn information about claims against it *before* trial, which the NYAG repeatedly refused to honor.¹⁴

E. The NYAG opposed the NRA's application under Rule 11, arguing—inaccurately—that the disclosure is “unnecessary . . . and will serve no legitimate purpose.”

The NYAG opposed the NRA's application and argued that the relief is discretionary, the “disclosure process . . . is unnecessary,” and the “disclosure process . . . will serve no legitimate purpose.”¹⁵

In her opposition, the NYAG also claimed—inaccurately—that (i) “the NRA [is] fully familiar with the issues in the case and the elements of the Plaintiff’s operative claims”; (ii) her “claims are fleshed out in detail”; and (iii) the motions to dismiss that have been filed by the NRA “closely examined and fully briefed the elements of and issues presented by the Plaintiff’s claims.”¹⁶

F. On June 16, 2022, the Special Master denied the NRA's Rule 11 application.

In a report dated June 16, 2022, the Special Master noted that a Rule 11 order falls within the Court's discretion and “could be useful at the start of an action.”¹⁷ The Special Master, however, declines the NRA's request. In doing so, he noted that “this action has been pending for two years and is nearing the end of discovery.”¹⁸

¹⁴ Exhibit B at page 2.

¹⁵ See June 7, 2022 Letter to the Special Master (Exhibit J).

¹⁶ *Id.*

¹⁷ Special Master Report dated June 16, 2022 (Exhibit K).

¹⁸ *Id.*

III.

ARGUMENT**A. Under CPLR 3104(d), the standard of review is *de novo*.**

In this motion, the NRA seeks relief from the Court pursuant to CPLR 3104(d). That rule states in part:

Review of order of referee. Any party . . . may apply for review of an order made under this section by a referee.^[19] The application shall be by motion made in the court in which the action is pending within five days after the order is made. . . . It shall set forth succinctly the order complained of, the reason it is objectionable and the relief demanded.

The Court can review the Special Master's ruling *de novo*. *Those Certain Underwriters at Lloyds v. Occidental Gems*, 11 N.Y.3d 843, 845 (2008) (“[w]hen the . . . [C]ourt appoint[ed] a special referee it [did not waive] its discretion and [did not limit] its review;” “The Court can disaffirm the Special Master's ‘findings of fact even where there is support in the record for those findings.’”); *see also* Kyle Bisceglie, LexisNexis Practice Guide: New York E-discovery and Evidence § 9.01 (2016) (“A trial court that refers a discovery matter to a referee does not, by making the reference, thereby limit its review of the referee's order.”).

B. The Court should grant the NRA's application for Rule 11 disclosure.

As explained above, the NRA's efforts to prepare for trial have been repeatedly impeded by the NYAG. The NYAG does not deny that the examples in her complaint are merely illustrative, yet refuses to appear for a deposition, refuses to have the person who verified her complaints four times deposed, refuses to answer the NRA's interrogatories, and now refuses to provide disclosure contemplated by Rule 11.

¹⁹ NYSCEF 579, Order Appointing Special Master at ¶8 (referring to CPLR § 3104(d)).

C. The NYAG's objections to the disclosure have no merit.

1. The disclosure is “necessary” and will “serve [a] legitimate purpose.”

In her opposition to the NRA's application, the NYAG maintains that the Rule 11 disclosure is “unnecessary . . . and will serve no legitimate purpose.”²⁰ The NYAG is wrong. Under the basic principles of fundamental due process, the NRA has the right to prepare for trial. Such preparation is impossible without information without the particulars of the NYAG's claims. Therefore, the disclosure the NRA seeks is necessary and will serve a legitimate purpose.

2. The NYAG's factual assertions about the completeness of her disclosures to date are inaccurate.

In her opposition to the NRA's application, the NYAG also claimed—inaccurately—that (i) “the NRA [is] fully familiar with the issues in the case and the elements of the Plaintiff’s operative claims; (ii) her “claims are fleshed out in detail”; and (iii) the motions to dismiss that have been filed by the NRA “closely examined and fully briefed the elements of and issues presented by the Plaintiff’s claims.”²¹

As Appendix A demonstrates,²² the NRA cannot possibly be “fully familiar with the issues in the case” because the NYAG's complaint expressly is limited to *merely illustrative* examples of transactions, alleged misstatements, and other events that underlie her causes of action and claims for relief.²³ The NYAG cannot have it both ways. She cannot rely on conclusory allegations and share only *some* particulars of her claims but expressly withhold

²⁰ June 7, 2022 Letter to the Special Master (Exhibit J).

²¹ *Id.*

²² *See* Appendix A (Exhibit L).

²³ *E.g.*, NYSCEF 646, Thirteenth Cause of Action; *id.* at Paragraph 381; NYSCEF 646, Fifteenth Cause of Action; *id.* Paragraphs 566-67.

others and, at the same time, resist the NRA's requests for needed information on the grounds that the NRA purportedly already has it.

Moreover, certain features of this action render the need for the Rule 11 disclosure particularly acute. Among other things, the case involves five defendants, fifteen claims, and more than 700 paragraphs of allegations.

3. That the action was filed two years ago is not a reason to deny the NRA's application.

In her opposition to the NRA's application before the Special Master, the NYAG emphasized that the case has been pending for nearly two years and that the amended Rule 11 is concerned with what happens at the outset of a litigation.²⁴ In making that argument, however, the NYAG ignored completely Subsection (b) of the rule, which, because of her recent amendment of the complaint and the NRA's pending motion to dismiss her new First Cause of Action, is particularly relevant. Specifically, the Rule states:

(b) The court may further direct, if a defendant [as here] filed a motion to dismiss and the court dismissed some but not all of the causes of action, plaintiff and counterclaim plaintiff to *revisit the documents to again state*, clearly and concisely, the *issues remaining in the case*, the *elements of each cause of action* and the *facts needed to establish [plaintiff's] case*.

The rule thus contemplates the need for repeated disclosure where the constellation of alleged facts and operative claims has evolved since the commencement of the case. Here, the NYAG amended just last month her complaint in this action, asserting a claim under EPTL 8-1.4(m) against the NRA.²⁵ As noted above, in the new claim, the NYAG seeks intrusive, unnecessary, and unprecedented injunctive relief against the NRA, including the

²⁴ June 7, 2022 Letter to the Special Master (Exhibit J).

²⁵ NYSCEF 646.

appointment of an independent compliance monitor.²⁶ On June 6, 2022, the NRA moved to dismiss the NYAG's First Cause of Action on multiple independent bases. As a result, the NRA's answer to the NYAG's new operative complaint is not yet due.²⁷ Consequently, even if the rule were intended to apply only at the stage when the pleadings have been joined, given the somewhat anomalous procedural posture of this case, granting the relief the NRA seeks is entirely consistent with the rule.

IV.

CONCLUSION

For the foregoing reasons, the Court should order the NYAG to provide the Rule 11 disclosure as soon as possible and order such other relief as the Court deems fair and appropriate. In accordance with the Court's direction to the parties to avoid duplicative motions and briefing where possible, defendant Wayne LaPierre, having made the same request to Judge Sherwood²⁸ and his request having been denied, joins in this motion, adopting the NRA's position and arguments.

Dated: June 24, 2022

Respectfully submitted,

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²⁶ NYSCEF 646, First Cause of Action.

²⁷ See CPLR § 3211(f) (extending time to serve responsive pleading after service of notice of entry of order on motion to dismiss).

²⁸ Exhibit N.

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Certification of Compliance with Word Count

I, Svetlana M. Eisenberg, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing brief complies with the word count limit set forth in the Order for Appointment of a Master for Discovery dated February 7, 2022, because the memorandum of law contains fewer than 3,000 words, excluding exhibits. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

By: Svetlana M. Eisenberg
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