

**B R E W E R**  
ATTORNEYS & COUNSELORS

June 29, 2022

**VIA NYSCEF**

Hon. Joel M. Cohen  
Supreme Court of the State of New York  
60 Centre Street  
New York, NY 10007

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

Dear Justice Cohen:

On behalf of the National Rifle Association of America (the “NRA”), pursuant to Rules of the Commercial Division, we seek (i) permission to extend, under Rule 11-d(f), the duration of the deposition of non-party Peter Brownell, former President and Board member of the NRA; or (ii) in the alternative, an order declaring that no portion of Brownell’s deposition can be used against the NRA at an evidentiary hearing or in connection with summary judgment over its objection.

Co-defendant Powell indicated that he does not object to the continuation of Brownell’s deposition. The other defendants and the NYAG consent to the continuation. Brownell objects to the continuation. The NYAG opposes the declaratory relief the NRA seeks in the alternative.

**I. FACTUAL BACKGROUND**

In her complaint against the NRA and others, the NYAG asserts four claims against the NRA and multiple claims against co-defendants. The NYAG seeks, inter alia, damages and intrusive, unnecessary and—in some cases—unprecedented injunctive relief against the NRA, including the appointment at the NRA of an independent compliance monitor (with a responsibility to report to the Court and the NYAG).

Brownell appeared for a deposition on October 1, 2021, pursuant to the NYAG’s subpoena (Exhibit A<sup>1</sup>). At the outset, counsel for the NRA advised all that she intended to cross-examine Brownell following the NYAG’s questioning. Exhibit B at 10:5-13 (“I do anticipate that, depending on the substance of your questioning, I . . . would like an opportunity to cross-examine Mr. Brownell.”). However, the NYAG’s examination of Brownell exhausted the entire seven-hour limit under Rule 11-d(a)(2). After the seven hours, the NRA’s counsel stated that the NRA needs to cross-examine Brownell. Exhibit C at 321:22-23 (“I do have quite a few cross-examination questions.”). In response, Brownell’s counsel refused to allow further questioning and objected to “any further depositions of Mr. Brownell in this case.” Exhibit D at 325:19-25.

At his deposition, Brownell testified about matters that go to the core of the NYAG’s claims against the NRA. For example, as a former member of the Officers’ Compensation and Finance

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<sup>1</sup> Exhibits are attached to the affirmation of Svetlana M. Eisenberg, dated June 29, 2022.

Committees of the NRA's Board of Directors, Brownell was questioned about the Board's role in the approval of Wayne LaPierre's compensation and the information on which the relevant committee relied in its determinations. In her Complaint, the NYAG claims that Wayne LaPierre's compensation was excessive and seeks various remedies on that basis.

Moreover, Brownell was asked about the NRA's transactions with a company he owned (Crow Shooting), which the NYAG alleges constitute unauthorized related party transactions in alleged contravention of N-PCL 715. Brownell was asked about alleged lack of disclosure of his ownership stake in Crow Shooting and the alleged inadequacy of the NRA's regulatory disclosures about the transactions.

There is a high likelihood that the NYAG will rely on portions of Brownell's testimony at the summary judgment stage and at trial. Mr. Brownell resides in Iowa. As a result, it is far from clear that he will appear at the trial in person. Regardless, the NRA requires an opportunity to cross-examine him fairly contemporaneously with his deposition while his memory is still relatively fresh. Of course, given that the NRA was denied the opportunity to cross-examine him, use of his testimony against the NRA would be patently unfair.

The NRA attempted to continue the deposition of Brownell without involving the Court, but to no avail. On October 4, 2021, the NRA wrote to Brownell's counsel to request dates for the continuation of the examination. Exhibit E. In response, Mr. Brownell's counsel advised that he had no additional response other than what he already provided at the deposition. Exhibit F. After the NRA made a second attempt to schedule a continuation of the deposition, on May 2, 2022, Brownell's counsel wrote that his position remains the same. Exhibit G.

## **II. ARGUMENT**

### **A. A deposition is not admissible against a party who did not have an opportunity to cross-examine the deponent.**

The "general rule is that a deposition is not admissible as evidence in chief unless the opposing party has had an opportunity to cross-examine the deponent." *Owens v. Sokol*, 409 N.Y.S.2d 25, 26 (2d Dep't 1978); Siegel, N.Y. Prac. § 358 (6th ed.) ("The general rule . . . is that a deposition is not admissible as evidence in chief against a party unless that party had . . . opportunity to cross-examine the deponent."); *Farmer v. Meat*, No. 25119/96, 2001 WL 36406057 (N.Y. Sup. Ct. Jan. 12, 2001) (precluding use of a deposition at trial because "an incomplete deposition is inadmissible at the time of trial"). Similarly, the Guide to New York Evidence states in Part II of Rule 8.36 that the use of a deposition transcript at trial is permitted "provided [that, among other things] the contesting party had the opportunity to . . . cross-examine the witness." (The objective of the Guide, as set forth in Rule 1.01, "is to bring together in one document, for the benefit of the bench and bar, New York's existing rules of evidence, setting forth each rule with a

note on the sources for that rule.”<sup>2</sup>)

**B. The Court should alter the limit on the time/duration of the deposition.**

Under Rule 11-d(a)(2) of the Commercial Division rules, “depositions shall be limited to 7 hours per deponent.” However, under Rule 11-d(f), “the court may alter the limits on . . . the duration of an examination” “[f]or good cause shown.” Here, for the reasons set forth above, good cause exists to alter the duration of the deposition to a total of 10.5 hours. The topics about which Brownell testified were substantive and go to the heart of the NYAG’s case against the NRA.

**C. In the alternative, the NRA requests an *in limine* order declaring that Mr. Brownell’s deposition cannot be used against the NRA over its objection.**

In the alternative, to avoid an otherwise unfair result, the NRA asks the Court to issue an *in limine* order declaring that, because the NRA had no opportunity to cross-examine the witness, the transcript of his deposition cannot be used against the NRA over its objection at an evidentiary hearing or at summary judgment. The Court has authority to provide such *in limine* relief without the need for formal motion practice. *Wilkinson v. Brit. Airways*, 292 A.D.2d 263, 264 (1st Dep’t 2002) (“there is no requirement that an *in limine* motion be made in writing and be in accordance with CPLR 2214”).

## **II. CONCLUSION**

For the foregoing reasons, the NRA respectfully requests that the Court (i) compel the witness to appear for the continuation of his deposition in this action; or (ii) in the alternative, declare that no portion of his deposition testimony can be used against the NRA over its objection.

To the extent that the alternative relief the NRA seeks is a ruling *in limine* and exceeds the scope of the authority of the Special Master for Discovery, it appears that this dispute—at least in the first instance—is properly heard by the Court.

The NRA respectfully requests that the Court issue an order directing any party in interest to file any opposition to the relief the NRA seeks by no later than July 7, 2022.

Respectfully submitted,

/s/ Svetlana M. Eisenberg  
William A. Brewer III  
Svetlana M. Eisenberg  
Blaine E. Adams

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<sup>2</sup> See Guide to New York Evidence, <https://www.nycourts.gov/JUDGES/evidence/> (last visited June 29, 2022).

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**Certification Pursuant to**  
**Commercial Division Rule 202.20-f**

I, Svetlana M. Eisenberg, pursuant to Commercial Division Rule 202.20-f, certify that my colleague Phil Furia and I, on behalf of the NRA, attempted to meet and confer with counsel for Peter Brownell on October 13, 2021 and May 2, 2022.

However, counsel for Mr. Brownell stated: “[O]ur position remains the same that Mr. Brownell’s deposition was concluded back on Oct. 1, 2021.”

Additionally, I corresponded with counsel for the Office of the Attorney General for the State of New York on June 29, 2022. Ms. Connell indicated that the NYAG does not consent to the declaratory relief the NRA seeks in the alternative.

**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 letter complies with the word count limit set forth in Commercial Division Rule 202.8-b. The letter contains fewer than 7,000 words, excluding exhibits. In preparing this certification, I relied on the word count of the word-processing system used to prepare this letter.

By: Svetlana M. Eisenberg  
Svetlana M. Eisenberg

**COUNSEL FOR THE  
NATIONAL RIFLE ASSOCIATION  
OF AMERICA**