

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, BY
LETITIA JAMES, ATTORNEY GENERAL OF
THE STATE OF NEW YORK,

Plaintiff,

v.

THE NATIONAL RIFLE ASSOCIATION OF
AMERICA, INC., WAYNE LAPIERRE,
WILSON PHILLIPS, JOHN FRAZER, and
JOSHUA POWELL,

Defendants.

Index No. 451625/2020
Hon. Joel M. Cohen

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE NRA'S MOTION
PURSUANT TO CPLR 3104(d) FOR REVIEW OF THE SPECIAL MASTER'S DENIAL
OF THE NRA'S APPLICATION FOR AN ORDER PURSUANT TO COMMERCIAL
DIVISION RULE 11 REGARDING THE PLAINTIFF'S DISCLOSURES**

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Plaintiff, the People of the State of New York, by Letitia James, Attorney General of the State of New York, through the Office of the Attorney General (“OAG”), submits this memorandum of law in opposition to the NRA’s motion pursuant to CPLR 3104(d) for review of the Special Master’s denial of the National Rifle Association’s (“NRA”) application for an order pursuant to Commercial Division Rule 11 regarding the NYAG’s disclosures. For the reasons provided below, the NRA’s motion should be denied.

PRELIMINARY STATEMENT

The NRA’s current appeal of the Special Master’s denial of an eleventh-hour demand for a statement pursuant to Commercial Division Rule 11 is predicated on the unreasonable and baseless claims that the NRA has not had adequate notice of the issues in the case and has been deprived of the opportunity to take sufficient discovery. The Special Master appropriately exercised his discretion when he denied the NRA’s demand, which was made nearly two years into this litigation. During that time, the NRA has been steeped in the legal and factual issues presented in this case. It has had the opportunity to consider the Plaintiff’s initial and amended complaints, each of which has been supported by extensive and highly particularized factual allegations. The NRA has challenged the legal bases of the complaints in three sets of motions to dismiss the Plaintiff’s claims—two of which have been decided with one pending. The NRA has also had ample discovery. It demanded and received from the Plaintiff approximately 1.5 million pages of documents and prior testimony and disclosure of the identity of all non-confidential sources of information obtained by the OAG during its pre-complaint investigation. As the Special Master found, no legitimate purpose would be served by requiring the Plaintiff, at this late juncture, to provide the statement contemplated by Commercial Division Rule 11.

FACTUAL AND PROCEDURAL BACKGROUND

The preliminary conference in this case occurred on March 9, 2021. Since then, the parties

have engaged in extensive discovery, with the exchange of documents and other discovery devices on both sides. The NRA's contention that its discovery in this case "has yet to begin" is baseless. NYSCEF 729 at 5. The NRA received approximately 1.5 million pages of documents from the Plaintiff that the OAG obtained during its investigation (Thompson Aff. ¶ 4); Plaintiff has responded to the NRA's interrogatories to the extent they were appropriate and relevant to this case (NYSCEF 723)¹; and provided the NRA with a detailed categorical privilege log and certification that gave the NRA a list of nonparty sources of information obtained by the OAG during its investigation. (Thompson Aff. Ex. A). With fact discovery set to end on July 15, 2022, including nearly sixteen (16) months of discovery, the NRA has issued a testimonial subpoenas for only one nonparty source of information identified on the OAG's categorical privilege log, but ultimately decided not to proceed with that deposition. (Thompson Aff. ¶ 6).

In the interim, the parties engaged in motion practice over the Plaintiff's original complaint and its First Amended and Supplemental Verified Complaint. *See* Mot. Seq. Nos. 1, 3, 4, 16, 17, 18. Both complaints included allegations against the individual defendants for violations of EPTL § 8-1.4. *See, e.g.*, NYSCEF 333 at ¶¶ 685-704. The Court has ruled on both motions to dismiss, including upholding the EPTL claims against substantive arguments made by Defendants Wayne LaPierre and John Frazer. *See* NYSCEF 211, 609.

On May 2, 2022, the OAG filed a Second Amended Verified Complaint, alleging a new cause of action against the NRA for violations of EPTL § 8-1.4, but including no additional factual allegations. NYSCEF 646. The NRA, Mr. LaPierre, and Mr. Frazer have again moved to dismiss the complaint, with the NRA making substantive arguments against the new EPTL cause of action.

¹ The Plaintiff answered such interrogatories while preserving appropriate objections, including that the NRA addressed the interrogatories to the Attorney General herself and to other non-parties and sought information regarding the then-stayed, and now dismissed, counterclaims. If the NRA objected to the responses, it was free to seek relief. It did not do so.

See Mot. Seq. Nos. 28, 29, 30. Those motions are not yet fully submitted.

On June 1, 2022, the NRA and Mr. LaPierre applied to the Special Master for an order compelling Plaintiff to comply with a new amendment to Rule 11 of the Commercial Division Rules designed to make preliminary and initial discovery conferences more effective and efficient by allowing the Court to direct parties to state “clearly and concisely” the issues in the case.

On June 16, 2022, the Special Master denied the NRA’s and Mr. LaPierre’s request for the discretionary disclosure contemplated by the amendments to Commercial Division Rule 11(a) and (b), because “this action has been pending for two years and is nearing the end of discovery.” NYSCEF 725 at 2-3. The NRA has appealed that determination to this Court, with Mr. LaPierre joining the motion.

ARGUMENT

Because the Special Master’s report is supported by the record and the NRA has failed to demonstrate a need for the discretionary amended Rule 11(a) and (b) disclosure, the NRA’s and request should be denied.

The Court has “broad discretion” to supervise the discovery process, which includes the review of a report issued by a Special Master pursuant to CPLR 3104. *See GoSMILE, Inc. v. Levine*, 112 A.D.3d 469, 470 (1st Dep’t 2013).

Commercial Division Rule 11 was amended to add Rule 11(a) and (b), which granted courts in the Commercial Division the discretion to require an early case statement at the outset of discovery that would aid in the effort to streamline discovery. The new rule provides as follows:

- (a) The court *may* direct plaintiff to produce a document stating clearly and concisely the issues in the case *prior to the preliminary conference*. . . .
- (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.

(emphasis added). The purpose of the amendments made to Rule 11 is to

allow[] the court to direct early case assessment disclosures and analysis prior to and after the preliminary conference. The goal of these recommendations is to *streamline the discovery process* so that discovery is aligned with the needs of a case and not a search for each and every possible fact in the case.

See Memorandum to the Administrative Board of the Courts from the Commercial Division Advisory Council, dated June 30, 2021 (emphasis added) (Thompson Aff. Ex. B).

The NRA's suggestion that it does not have the information it needs to adequately defend itself at trial—and that the pre-preliminary conference disclosure device contemplated by amended Commercial Division Rule 11(a) and (b) will remedy this alleged problem—is absurd.

At the outset of discovery in this litigation, the Plaintiff produced to all parties its non-privileged investigatory file—comprised of approximately 1.5 million pages of documents and testimony produced to the OAG by the NRA, the individual Defendants, numerous nonparty subpoena recipients, and witnesses during the OAG's investigation. (Thompson Aff. ¶ 4). Additionally, the OAG provided the NRA with a comprehensive categorical privilege log and certification that identified potential nonparty sources of information obtained by the OAG during its investigation. (Thompson Aff. Ex. A). That categorical privilege log and certification was cross referenced in the OAG's responses to the NRA's first interrogatories. NYSCEF 723. To date, the NRA has served a testimonial subpoena on only one source of information identified on the OAG's categorical privilege log, but ultimately declined to take it. (Thompson Aff. ¶ 6)

The NRA claims in a summary fashion that its “efforts to obtain discovery from the NYAG have been stifled.” (NYSCEF 729, p.3.) This is untrue, but even if it were not, the relief the NRA

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seeks in this appeal would not remedy its failure to seek appropriate discovery.² The relief available under Rule 11(a) and (b) is merely an order directing plaintiff to produce a document “stating clearly and concisely the issues in the case” at the outset of discovery. But the Complaint here is far from a bare pleading that fails to state clearly the issues in the case. As this Court has recognized,

The Attorney General’s allegations in this case, if proven, tell a grim story of greed, self-dealing, and lax financial oversight at the highest levels of the National Rifle Association. They describe in detail a pattern of exorbitant spending and expense reimbursement for the personal benefit of senior management, along with conflicts of interest, related party transactions, cover-ups, negligence, and retaliation against dissidents and whistleblowers who dared to investigate or complain, which siphoned millions of dollars away from the NRA’s legitimate operations.

(NYSCEF 609 at 1). This Court has repeatedly highlighted the detailed nature of the Complaint here, for example, holding that “[t]he Attorney General adequately pleads [] claims for breach of fiduciary duty. In several hundred paragraphs of specific factual allegations, the Amended Complaint describes, in meticulous detail, LaPierre’s exploitation of the NRA for his financial benefit, his abuse of power, and his general disregard for corporate governance.” *Id.* at 28; *see also id.* at 14.

Finally, the factual basis for and the elements of the EPTL claim that was added in the OAG’s Second Amended Complaint is currently the subject of motion practice by the NRA. *See*

² The NRA has made repeated demands for improper discovery from the OAG, against which the Plaintiff has largely prevailed in its objections. These efforts include seeking the depositions of OAG personnel on irrelevant or privileged topics, including from a corporate representative of the OAG (two separate times), the Chief of the OAG Charities Bureau, an OAG paralegal, three other non-attorney employees, the Attorney General’s Chief of Staff, and the Attorney General herself. (Thompson Aff. ¶¶ 8-11). The NRA has also sought, through Requests to Admit and Requests for Production, the identities of OAG attorneys who have worked on the NRA investigation and litigation and their billing records. (Thompson Aff. Exs. C and D). The Special Master has granted the Plaintiff’s applications for protective orders with respect to these discovery demands and the NRA has not appealed those decisions. *See, e.g.*, NYSCEF 656, 710. However, certain topics upon which the NRA seeks OAG testimony are currently pending before the Special Master.

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Mot. Seq. No. 30. The NRA attacks the substance of that claim, discrediting any argument that the NRA does not have the information necessary to defend against it.

CONCLUSION

For the foregoing reasons, the Special Master's decision, well-supported in the record, was a valid exercise of his discretion. The NRA has failed to put forward any justification to overturn that decision or to justify its need for the requested Rule 11 disclosures. Accordingly, Plaintiff asks that the NRA's application be denied and the Special Master's determination be upheld, along with such other and further relief as the Court deems just and proper.

Dated: July 5, 2022
New York, New York

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Of Counsel

Attorney Certification Pursuant to Commercial Division Rule 17

I, Stephen Thompson, an attorney duly admitted to practice law before the courts of the State of New York, certify that Plaintiff's Memorandum of Law in Opposition to the NRA's Motion Pursuant to CPLR 3104(d) for Review of the Special Master's Denial of the NRA's Application for an Order Pursuant to Commercial Division Rule 11 Regarding the Plaintiff's Disclosures complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the memorandum of law contains 1,859, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law and affirmation.

Dated: July 5, 2021

New York, New York

/s/ Stephen Thompson

Stephen C. Thompson