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, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,

Defendants.

Index No. 451625/2020

DISCOVERY ORDER

In the Special Master Report on the July 7, 2022, Hearing ("July Report"), I denied the NRA's demand to take the deposition of a "corporate representative" of the Office of the Attorney General of New York ("OAG"). The OAG is counsel for plaintiff, the People of the State of New York, by Latitia James, Attorney General of the State of New York ("People"). I also granted the People's request for a protective order. I specifically denied the demand as to Topics 4-5 as foreclosed by Justice Cohen's Decision and Order dismissing the NRA's counterclaims ("Cohen Order") where he dismissed the NRA's allegation that the OAG's actions in this case amounts to unconstitutional retaliation against the NRA. In reaching that decision Justice Cohen held that the NRA failed to allege the essential causal elements of the claim of unconstitutional retaliation. He also held that, although not yet proved, there were "objectively founded" nonretaliatory grounds alleged in the People's complaint, including reports of "fraud, waste and looting within the NRA" (Cohen Order at 5).

I also denied the NRA's demand as to Topics 1-3 seeking disclosure of "all steps taken by [the OAG] (1) to identify, preserve, collect and produce Documents [and [2] . . .comply" with various discovery demands of the NRA and also to probe into the OAG's "Responses and Objections" to various NRA discovery requests.

Apart from the fact that the NRA has not met the heightened standards for obtaining discovery of counsel for an adversary and is seeking information that is protected by privileges held by the OAG in connection with its investigation, the OAG has already certified that it has produced all discoverable information gathered during its investigation and identified what was withheld and why. In light of these circumstances, I concluded that the NRA was not entitled to take the deposition of a representative of the OAG. Nevertheless, I gave defendants one last opportunity to show that there are matters as to which the NRA is entitled to inquire at a deposition.

In correspondence dated July 12, 2022, the NRA and defendant John Frazer argue they should be allowed to ask questions regarding "steps taken by the NYAG to collect documents and respond to discovery in the case". Ignoring the predicate for taking the deposition of opposing counsel, the NRA states it "aims to ask 'questions about document production' such as the provance of 'documents in the production that lack metadata'" (Letter of NRA dated July 12, 2022 at p. 3) ("NRA July 12, 2022 Letter").

The OAG has certified that it has produced all discoverable information gathered from the NRA and third parties during the investigation except for identified information withheld on grounds of privilege[1] (*see* OAG letter dated July 5, 2022 at p. 3) (OAG July 5, 2022 Letter). The

[1] The NRA explains it recently discovered that communications between NRA director Phillip Journey and the OAG was not disclosed and was not listed as privileged. The NRA implies that the OAG may not have produced all discoverable information in its investigation file. However, as the NRA states, the communication occurred "during the pendency of this case" and therefore after the investigation file was complied. In any event, the OAG has a continuing obligation to

production should have included metadata if the OAG collected any. The NRA may inquire into the issue by interrogatory rather that by deposing opposing counsel.

The NRA also seeks to inquire into "the NYAG's public statements concerning the NRA" in connection with its affirmative defense of unconstitutional animus (NRA July 12, 2022 Letter at p. 3). Inquiry as to this matter is foreclosed by Justice Cohen's Order where he held, "the narrative that the Attorney General's investigation into these undeniably serious mattes [of wrongdoing at the highest levels] was nothing more than a politically motivated – and unconstitutional – witch hunt is simply not supported by the record (*id* at p. 2) (*see* also *id* at p. 5) "There are no factual allegations suggesting that the stated concerns driving the investigation – reports of fraud, waste and looting within the NRA – were imaginary or not believed by the Attorney Generals"; and *id* at 11 "[T]he NRA's own internal investigation uncovered evidence of impropriety").

Finally, the NRA seeks to inquire about the factual predicates for general and conclusory allegations in the People's complaint. As I have noted previously, inquires into a parties allegations are best explored through contention interrogatories. And if the plaintiff fails to provide full and complete responses it risks preclusion of withheld evidence at trial.

In a separate letter also dated July 12, 2022, the NRA, requests that the OAG's request for production of an "'anonymous letter' vintaged 2007" and "an even-older document, the Frankel Report (the 2003 Report)" be denied on ground the requests are unreasonable, untimely and unsanctioned by the CPLR.

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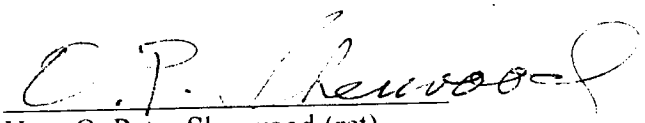
produce non-privileged information. Accordingly, the OAG shall produce the communications referred to if it has not already done so and the NRA may propound an interrogatory and document production request on the issue.

CPLR 3101(a) provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action . . ." The New York Court of Appeals has held that "the phrase must be interpreted liberally to require disclosure, upon request of any facts bearing on the controversy. . . The test is usefulness and reason" *Allen v Crowell – Collier Pub. Co.*, 21 NY 2d 403, 406 (1968). There is no dispute that the requested documents are material and necessary or may lead to discovery of matter that is material and necessary. The "vintaged", documents are readily available. In fact, counsel for the NRA conceded at oral argument that they have possession of the documents. Whether these documents will be in admissible in evidence at a trial because they concern matters alleged to be too remote in time, is not grounds for denial of a request for production. The documents shall be produced.

Dated: New York, New York
July 15, 2022



Hon. O. Peter Sherwood (ret)