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## I.

**PRELIMINARY STATEMENT**

In this action, the Office of the Attorney General of the State of New York (the “NYAG”) seeks grave relief against the National Rifle Association of America (the “NRA” or the “Association”). Specifically, the NYAG seeks, *inter alia*, to prohibit the NRA from soliciting donations and subordinate the NRA’s leadership to a court-appointed compliance monitor who would report to the NRA’s self-declared political enemy—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. Finally, the NYAG seeks unspecified monetary damages from the NRA, a nonprofit corporation it regulates.

Despite the substantial, intrusive and—in some instances—unprecedented relief sought against it, the Association has been denied virtually any discovery that would aid its defense. Because the CPLR makes clear that discovery from “the state shall be available as if the state were a private person” (CPLR 3102(f); *see also* discussion *infra* at B(3)), in an action like this one, the NRA sought to avail itself of one of the same devices invoked by the NYAG against it: a corporate representative deposition under Rule 11-f of the Rules of the Commercial Division. After months of hearings and supplemental letter-brief submissions, the Special Master took this option off the table, ruling that the NRA would be allowed no opportunity whatsoever to examine a human being about the factual content of the NYAG’s allegations, or even the NYAG’s communications with witnesses during this case. In addition, or in the alternative, the NRA sought an individual deposition of James Sheehan, who verified the NYAG’s complaint against the NRA in this case and attested to the accuracy of the pleading “based on [his] acquaintance with the facts.” Second Amended and Verified Complaint at pg. 178. The Special Master denied

that deposition, too.

The troubling, prejudicial result is that the NRA faces expert discovery, then trial, with no opportunity whatsoever to ask the NYAG which transactions it contends are fraudulent or unlawful, which payments it contends must be rescinded, which statements it contends were materially misleading, or which assets were allegedly mismanaged. This is not the proper result under New York law. Indeed, in foreclosing the NRA's deposition efforts, the Special Master committed clear error—disregarding key facts and misapplying governing law. The NRA therefore respectfully seeks review of the Special Master's Report dated July 7, 2022 (Exhibit P) and the Special Master's Discover Order dated July 15, 2022 (Exhibit Q).

## **II.**

### **BACKGROUND**

On November 26, 2021, the NRA served a deposition notice on the NYAG seeking to take the deposition of an NYAG corporate representative pursuant to Commercial Division Rule 11-f. Exhibit A. After the NYAG objected (Exhibit B), the parties briefed the issue through various letter briefs filed before the Court and with the Special Master. Exhibits C-F. 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. Exhibit G. Also on May 19, 2022, the NRA served a notice to take the deposition of James Sheehan. Exhibit H. As stated below, Mr. Sheehan verified the NYAG's complaint against the NRA attesting to the accuracy of its allegations.

After the NYAG sought a protective order regarding the Depositions (Exhibit I), the Special Master indicated his inclination to grant it. Exhibit J. At the invitation of the Special Master, the parties briefed the issues further. Exhibits K-N. In addition or as an alternative to the

individual deposition of James Sheehan, the NRA sought a corporate-representative deposition of the NYAG on three topic areas: the NYAG's discovery response and its communications with witnesses; the NYAG's public statements about the NRA and this litigation; and, the factual bases and contents of certain illustrative and conclusory allegations in the operative complaint. Exhibit O. On July 12 and 15, 2022, the Special Master precluded the NRA from taking the Depositions. Exhibits P-Q. The NRA appeals the rulings as erroneous.

### 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.<sup>[1]</sup> 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.

In reviewing pursuant to CPLR 3104(d) the Special Master's rulings, the Court must conduct a *de novo* review. *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)

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<sup>1</sup> NYSCEF 579, Order Appointing Special Master at ¶ 8 (“Rulings by the Special Master shall be reviewed in accordance with the review accorded to referee’s decisions as set forth in CPLR § 3104(d).”).

(“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.”); CPLR 3104(d).

**B. The Special Master's rulings contain multiple errors and should be reversed.**

**1. The Special Master erred in holding that the information the NRA seeks is not material and necessary to the defense of this action.**

As the NRA argued before the Special Master, there are multiple and separate reasons why the information the NRA seeks to obtain through the Depositions is relevant to its defense of this action.

First, in this action, the NYAG, among other things, seeks to enjoin the NRA from soliciting donations, seeks the appointment of an independent compliance monitor at the NRA, and requests that the NRA pay damages. NYSCEF 646, First, Thirteenth, Fourteenth, and Fifteenth Causes of Action. Despite seeking serious relief, the complaint fails to identify a wide range of information about the NYAG's underlying claims. For example, the NYAG repeatedly alleges that the NRA engaged in allegedly unauthorized transactions in violation of N-PCL 715, provides examples of such transactions, but expressly states that the examples are merely illustrative. Exhibit R<sup>2</sup>; *e.g.*, NYSCEF 646, Thirteenth Cause of Action; *id.* at ¶ 381. It is unfair for the NRA to be forced to defend itself against the NYAG's claims without knowing the specific transactions, alleged misstatements, and other events that constitute various bases for the NYAG's allegations.

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<sup>2</sup> Exhibit R is a chart with excerpts from the NYAG's complaint detailing dozens of instances in which the NYAG accuses the NRA of a statutory violation, proceeds to specify some factual examples of the violation, and expressly notes that the examples provided are merely illustrative (that is, the NYAG purports to have other examples which she is refusing to disclose).

Second, affirmative defenses raising issues of unconstitutional animus remain live components of this case. *See* Exhibit O. Moreover, even if government animus that preceded and motivated the investigation were “not on the table” for discovery, the NRA would be entitled to ask about statements made by the plaintiff during this lawsuit, concerning allegations in this lawsuit, which would be fair deposition subject matter in any civil litigation.

Despite the importance of the information the NRA seeks to obtain through the Depositions, the Special Master held that such information is not material to its defense of this action. For the foregoing reasons, the Special Master’s holding is clearly erroneous and should be reversed.

**2. The Special Master erred in finding that the information sought by the NRA is privileged.**

The NYAG asserts a variety of privileges in its attempt to prevent the NRA from taking the depositions, including attorney-client privilege, attorney work product privilege, trial preparation, law enforcement, and public interest privileges. But, as the NRA explained in briefing before the Special Master, the claimed privileges do not apply or even exist (*see* Exhibit S), and any privilege objections should be lodged on a question-by-question basis at the depositions, not used to bar the depositions altogether.<sup>3</sup> The Special Master erred in holding that the depositions should not proceed on privilege grounds.

**3. The Special Master erred in concluding that *Liberty Petroleum* applies to or precludes the Depositions.**

In *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401 (1st Dep’t 2018), the court enumerated three factors for courts to consider in permitting depositions of opposing

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<sup>3</sup> The Special Master allowed limited oral argument on this point at oral arguments; the NRA respectfully refers the Court to its letter briefs to the Special Master for the supporting arguments, particularly Exhibit S.

counsel. Here, however, as the NRA repeatedly explained to the Special Master, the NRA is not seeking to depose opposing counsel; rather, as in *In re Rothko's Will* case cited below, it seeks to obtain information from the opposing party. Similarly, Mr. Sheehan was noticed for a deposition because, in his multiple verifications of the NYAG's complaints, he thrust himself into the role of a fact witness, repeatedly attesting to the Court that he was personally acquainted with facts alleged in the pleading and verifying them as true. As a result, contrary to the Special Master's erroneous conclusion, it is not necessary to analyze the deposition notices under *Liberty Petroleum*.

Moreover, ***even if Liberty Petroleum*** were applicable, as the NRA explained to the Special Master (*see* Exhibits T; U), each of its factors militates ***in favor*** of the depositions. First, the information sought by the NRA is material and necessary because only the NYAG possesses the factual bases underpinning the “for example” statements in the complaint. Such information is necessary for the NRA to properly prepare for trial. Second, the NRA is not seeking the deposition for any illegitimate purpose, such as to harass or intimidate the NYAG, but only to clarify the NYAG's allegations through information the NYAG possesses and to develop factual bases for its defenses. Third, only the NYAG knows the factual bases on which it states its claims; the NRA is unable to obtain that information from another source, such as by deposing alternate witnesses.

Finally, even if the NRA were required to demonstrate special circumstances to justify the Depositions, the NRA has done so here. To the extent the Special Master's rulings are based on findings that the NRA has not demonstrated such special circumstances, such rulings are erroneous and should be reversed.



**4. The Special Master erred in finding that the information the NRA seeks is best discovered through contention interrogatories.**

Under article 31 of the CPLR, the NRA has the right to utilize any discovery device available to it, and the availability of one device—such as depositions—is not precluded upon a finding that the information can be obtained through a different device—such as contention interrogatories. *See* Exhibit K. Yet, this is exactly the basis upon which the Special Master precluded the Depositions here. *See* Exhibit P at pg. 2. The Court should hold that, by doing so, the Special Master erred as a matter of law.

**C. James Sheehan admits that he possesses information that is necessary and material to the NRA's defense of this action.**

James Sheehan represented to the Court that he is “acquaint[ed] with the facts” of the NYAG’s action against the NRA and believes them to be true.<sup>4</sup> As to those facts that are pleaded “upon information and belief,” Mr. Sheehan certified that he believes them to be true. He therefore possesses information that is necessary and material to the NRA's defense against the NYAG's action. *See In re Rothko's Estate*, 342 N.Y.S.2d 220, 223 (Sur.) (Mar. 23, 1973) (permitting deposition of Assistant Attorney General because “[t]he parties against whom charges are asserted are entitled to ascertain the facts upon which the Attorney General premised his accusations”), *rev'd on other grounds, In re Rothko's Estate*, 345 N.Y.S.2d 567 (N.Y. App.

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<sup>4</sup> NYSCEF 1, 11, 333, and 646. Mr. Sheehan has been the Chief of the NYAG’s Charities Bureau (the “Bureau”) since in or around January 2014. Therefore, he was also at—and in fact the head of—the Bureau in each of the five years that the NYAG alleges—expressly—that the NRA’s filing with the Bureau were materially misleading. NYSCEF 646, Fifteenth Cause of Action. Moreover, as he admits in his verifications, he oversaw and participated extensively in the NYAG’s investigation of the NRA and the NRA’s chapter 11 proceeding, where he appeared on behalf of the NYAG at court hearings and depositions.

Div. 1973) (reversing because, unlike here, “special or unusual circumstances” were required<sup>5</sup> but not shown).

#### IV.

#### CONCLUSION

For the forgoing reasons, the NRA respectfully requests that the Court issue an order (i) compelling the depositions of (a) a Rule 11-f representative of the NYAG; and (b) James Sheehan; and (ii) granting such other relief as the Court deems just and proper.

Dated: July 18, 2022

Respectfully submitted,

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<sup>5</sup> After the opinion was issued, the legislature amended CPLR 3102(f) to eliminate the need for a court order for a deposition of a governmental witness. *See also People v. Katz*, 446 N.Y.S.2d 307, 309 (N.Y. App. Div. 1982) (in interpreting CPLR 3102(f) even prior to the amendment, noting that, in view of post-*Rothko*’s *Will* jurisprudence, the “‘special circumstances’ criterion would appear to be too restrictive”).

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

**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. In preparing this certification, I 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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