

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

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INDEX NO. 451625/2020

V.

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

Defendants.

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I. PRELIMINARY STATEMENT

The National Rifle Association of America (the “NRA”) seeks review of a discovery order by the Special Master granting the Office of the Attorney General’s (the “NYAG” or the “OAG”)) request for an “anonymous letter” vintaged 2007 (the “2007 Letter”) and an even older document vintaged 2003 (the “2003 Report,” and, collectively with the 2007 Letter, the “Documents”). For the reasons set forth below, the Special Master should have denied the NYAG’s demands for decade-old documents as untimely and unsanctioned by the CPLR. In ruling otherwise, the Special Master committed multiple errors. Accordingly, the NRA respectfully submits that there are several independent bases for reversing the Special Master’s Discovery Order and issuing an order under CPLR 3103 to protect the NRA from the NYAG’s untimely and otherwise unreasonable demands.¹

II. BACKGROUND

The NYAG filed this action on August 6, 2020 (NYSCEF 1) and served her First Set of Requests for the Production of Documents in June 2021 (Exhibit A).²

After two previous extensions sought by the NYAG,³ discovery was set to close on June 1, 2022,⁴ but, at the NYAG’s request, the Special Master and the Court extended fact

¹ The objections set forth here are threshold matters. In the event the Court were to order the NRA to produce the dated records to the NYAG, the NRA reserves the right to object to the NYAG’s request for the production of the Documents on other grounds, including privileges. Of course, if the Court were to deem the Documents discoverable, the NRA would provide a privilege log for any documents withheld on privilege grounds.

² References to exhibits are to exhibits attached to the affirmation of Svetlana M. Eisenberg, dated July 22, 2022.

³ NYSCEF 463 (extending previously set date for the close of discovery and other deadlines), 607 (same), 645 (same), 740 (same).

⁴ See NYSCEF 607.

discovery past June 1, 2022, to accommodate scheduling issues with regard to depositions the NYAG wished to take. Exhibit B. Importantly, in agreeing to extend the close of fact discovery, the Special Master specifically noted at the oral argument that the NYAG could propound new discrete requests for documents only if the subsequent depositions were the first time she learned of the existence of such documents. Exhibit C at 19:15-20:7.

Previously, in December of 2021, in response to the NYAG's extensive requests, the NRA produced to the NYAG a set of notes prepared by a member of the Audit Committee of the NRA's Board. Exhibit D. Those notes expressly refer to an anonymous letter to the Board (circa 2007) and a report from an attorney (Jacob Frenkel). *Id.* The Documents did not fall within the temporal limits of the documents requested by the NYAG. Exhibit A. In any event, the NYAG did not request the Documents before June 1, 2022.

Instead, the NYAG waited until June 21, 2022 to make the request. Exhibit E.

After the NRA explained to the NYAG that the Documents are not covered by the NYAG's previous RFPs and that the new request was untimely—in fact emailed weeks after the date that with few exceptions served as the date for the close of fact discovery—the NYAG moved before the Special Master for an order compelling the NRA to produce the belatedly requested documents. Exhibit F. The NRA opposed the motion. Exhibit G. The Special Master, however, granted the NYAG's motion and ordered the NRA to produce the Documents. Exhibit H. In doing so, the Special Master entirely disregarded the NRA's arguments and erred in holding that the NYAG met her burden of demonstrating that the Documents are material and necessary to the prosecution or defense of this action.

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.⁵ 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 Special Master's Discovery Order is "objectionable" within the meaning of CPLR 3104(d) and should be vacated. In reviewing the Discovery Order, the Court must consider the issues *de novo*. The Court of Appeals stated in a 2008 opinion that when a court, as here, appoints a special referee for discovery, the appointment does not take away from—or limit—the Court's power to review the issues *de novo*, and, in fact, the Court can disagree with the referee even if the latter's findings of fact find support in the record. *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"); *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."); CPLR 3104(d).

Here, there is no support for the Special Master's rulings. Therefore, they should be reversed.

⁵ 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).").

B. The Special Master's ruling should be reversed because, in compelling the Documents' production, he erred in disregarding the NRA's objection that the NYAG's requests for the Documents are untimely.

1. The demand in the NYAG's email message dated June 21, 2022 is new.

In the email message to the NRA's counsel on June 21, 2022 regarding the Documents (Exhibit E), the NYAG contended that the Documents should have been produced in response to the NYAG's RFPs served in June 2021. Not so. With one exception, each of the RFPs the NYAG cited was expressly limited to records "created, recorded, compiled, transmitted or received" after January 1, 2015 (Exhibit A at pg. 1), whereas the Documents the NYAG now demands were prepared in 2007 and 2003. Only one of the requests the NYAG cited sought records pre-dating January 1, 2015, but the NRA objected to the request on July 15, 2021, as unduly broad and overly burdensome and notified the NYAG in writing that it will deem the request to demand only post-January 1, 2015 records. Exhibit I at pgs. 46-47. Therefore, the NYAG's request in her email message dated June 21, 2022 was new.

2. The NYAG has no excuse for the untimely request.

Although the NYAG contends that she could not have known about the Documents until David Coy's deposition on June 15, 2022 (Exhibit C at 126:20-127:2), that contention is inaccurate. In fact, one of the exhibits the NYAG used at Professor Coy's deposition—which the NRA produced to the NYAG in December 2021 (Exhibits D, J)—clearly and expressly refers to each of the two Documents. Therefore, the NYAG could have made this additional request months ago. *See id.* At a video conference before the Special Master, the NYAG contended in effect that she did not notice the reference to the Documents in the information produced to her in December 2021 until the time of Prof. Coy's deposition on June 15, 2022, and suggested that the belated nature of the new request is justified in light of the number of documents that the NRA

produced to the NYAG. Exhibit C at 126:20-127:2 (asserting that the document was “embedded in documents we received at the end of December”). That argument, of course, misses the point. The NYAG chose to serve on the NRA extensive, burdensome, and overly broad requests which resulted in the production of hundreds of thousands of records, all of this at great expense to the NRA. Having chosen to conduct discovery in that manner, the NYAG cannot now obtain extra time to request even more documents because it did not timely review the material it requested.

The NYAG's assertions that the document was somehow unclear are similarly a red herring. As Exhibit D demonstrates, the document the NYAG had as early as December 2021 expressly refers to each of the two Documents. Exhibit D at pg. 1 (first (unnumbered) paragraph [referring to the anonymous letter Board members received prior to the 2007 Annual Meeting] and paragraph referring to “Paragraph 6” [referring to “findings of Jacob Frenkel’s report on . . . expenditures”]).

3. The Special Master’s ruling should be reversed because, in compelling the production of the Documents, the Special Master did not address the NRA’s objection to the untimely nature of the NYAG’s new request.

In opposing the NYAG's request for an order compelling production of the Documents, the NRA argued, among other things, that, for the reasons stated above, the NYAG's request was inappropriate because it was untimely. Exhibit G at page 1. In fact, in issuing the Discovery Order, the Special Master specifically listed untimeliness as one of the NRA's objections. Exhibit H at pg. 4.

Yet, in ruling on the NYAG's motion and in his discussion of the issue during a prior video conference, the Special Master failed to address the NRA's timeliness objection. As a result, at a

minimum, the Court should remand the matter to the Special Master for a specific ruling on that objection.

C. The Special Master's ruling should also be reversed because he erred in holding that "[t]here is no dispute that the requested documents are material and necessary."

In a separate and independent argument in opposition to the NYAG's motion, the NRA argued before the Special Master that "the 2007 Letter and the 2003 Report lay well . . . outside the scope of any conceivable, relevant discovery timeframe." Exhibit G at pg. 1.

The NYAG's submission to the Special Master argued in a conclusory manner that the 2007 letter is "highly relevant" because it allegedly "indicates that in 2007, a whistleblower raised some of the identical claims of corruption, waste and lack of adequate internal controls to the entire NRA Board that the Plaintiff is alleging has more recently occurred and in some instances is still occurring within the NRA." Exhibit F at pg. 3.

This single assertion is unavailing. Whether matter is "necessary and material" to the prosecution or defense of an action under CPLR 3101(a) turns on the elements of the asserted claims and defenses. As the party seeking discovery, the NYAG must demonstrate that the Documents she seeks are necessary and material to proving or disproving an element of a claim or a defense. The NYAG made no attempt to explain how the Documents meet that standard. Exhibit F.⁶ Should the Court permit the NYAG to make a belated proffer, the NRA

⁶ To the extent the NYAG spoke about the issue at the video conference before the Special Master, her explanation there was similarly conclusory and vague. See exhibit C at pgs. 127:16-22 (asserting in a conclusory manner that the information is "very relevant"); *id.* at pgs. 127:23-128:23 (referring to unspecified "motion papers" by the NRA—which she did not cite or even mention in her written submission (Exhibit F)—that the NYAG apparently believes may be contradicted by the Documents).

seeks leave to file a reply memorandum of law in further support of this motion so that it may properly respond to the NYAG's previously unasserted arguments.

In fact, the NYAG made no attempt to establish the Documents' relevance to any element of any claim or any defense in this action. That is not surprising. Her claims are based on allegations of misconduct from 2015 through present.⁷ The framing of her own complaint renders the evidence the NYAG seeks—documents prepared in 2003 and 2007—completely *irrelevant* to such claims and defenses.

IV. CONCLUSION

For the foregoing reasons, the NRA respectfully requests that the Court (i) issue an order holding that the Documents are not discoverable and that the Special Master erred in holding otherwise; and (ii) grant any other relief the Court deems just and proper.

Dated: July 22, 2022

Respectfully submitted,

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⁷ See Second Amended and Verified Complaint, NYSCEF 646 *passim*.

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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 memorandum of law complies with the word count limit set forth in the Order for Appointment of a Special 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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