MOTION SEQUENCE NO. 32

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 RULINGS GRANTING PROTECTIVE ORDERS WITH RESPECT TO THE NRA'S NOTICES FOR THE EXAMINATION OF JAMES SHEEHAN AND AN OAG CORPORATE REPRESENTATIVE

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On behalf of the Plaintiff, the People of the State of New York ("Plaintiff"), the Office of Attorney General Letitia James ("OAG") respectfully submits this memorandum of law in opposition to the NRA's motion pursuant to CPLR 3104(d) for review of the Special Master's grant of a protective order with respect to the National Rifle Association's ("NRA") requests for examinations of representatives of the OAG.

PRELIMINARY STATEMENT

The NRA's appeal of the Special Master's protective order quashing its notices for examinations of an OAG representative and James Sheehan, Chief of the OAG's Charities Bureau, is based on a fundamental misunderstanding of the OAG's role in this case. Contrary to the NRA's contention, the OAG is not a typical party with first-hand knowledge of relevant facts. Rather, the OAG acts in its protective capacity as attorney for the People, asserting claims based on facts it learned during its investigation. The NRA has had ample discovery concerning those facts. The OAG has produced its investigative file and has disclosed the identity of all non-confidential witnesses. It also provided a certified privilege log that, *inter alia*, identified the non-confidential sources of the information it withheld. Instead of seeking discovery from those witnesses, who have relevant first-hand knowledge, the NRA has repeatedly sought to examine its opposing counsel, the OAG, which, if permitted, would invade numerous privileges and the work-product doctrine.

As the Special Master found, the NRA has not satisfied the requirements set forth in the governing precedent, *Liberty Petroleum Realty, LLC v. Gulf Oil, L.P.*, 164 A.D.3d 401 (1st Dep't 2018), for examining opposing counsel. In particular, the NRA has failed to demonstrate that the information it seeks by examining OAG representatives is: (i) material and necessary to its defense and (ii) unavailable from other sources. The NRA's argument that *Liberty Petroleum* is not

controlling here is not supported by any relevant authority; rather, it is based on a decades-old decision that was ***reversed*** on the very grounds for which the NRA cites it. Finally, the NRA's appeal of the protective order with respect to James Sheehan should be denied for the additional reason that the appeal is untimely.

BACKGROUND

On December 31, 2021, the NRA served an amended Rule 11-f notice seeking to examine an OAG representative on 23 topics ("First 11-f Notice," Ex. A to the July 27, 2022 Affirmation of Monica Connell ("Connell Aff.").) The OAG moved for a protective order with respect to the First 11-f Notice and, after a hearing on March 10, 2022, on March 23rd, the Special Master issued a report that granted the motion with respect to 17 topics, deferred ruling on 3 topics and directed the parties to meet and confer on 3 topics. (NYSCEF 656.) In particular, the Special Master granted the protective order with respect to the NRA's request to examine an OAG representative on all topics that sought the basis for the Complaint's allegations, ruling that such topics would be better addressed through contention interrogatories. (*Id.* at 2 (regarding Topics 14-22); Ex. A ¶¶ 14-22.) The NRA did not appeal the report and it is now a binding Court order ("March 23rd Order"). (NYSCEF 579 ¶ 7.)

Without meeting and conferring, on May 19, 2022, the NRA served a second notice for an 11-f deposition of the OAG, but this time did not specify examination topics ("Second 11-f Notice"). (NYSCEF 780.) That same day, the NRA also served a notice for the examination of James Sheehan ("Sheehan Notice"). (NYSCEF 781.) On June 3rd, the OAG moved for a protective order with respect to the Second 11-f Notice and the Sheehan Notice. (NYSCEF 782.) The NRA opposed the motion, arguing that the Second 11-f Notice was proper because defendants needed more information concerning the Complaint's allegations. The NRA's opposition revealed that the NRA served the Second 11-f Notice without topics in a thinly-disguised attempt to avoid

the Special Master's ruling with respect to the First 11-f Notice. For example, the NRA argued that it needed to depose an OAG representative on allegations concerning related-party transactions and false filings by the NRA where the details in the Complaint supporting the allegations were "not exhaustive." (NYSCEF 792 at 2 *&* fns. 3&4.) Both topics were, however, covered by the March 23rd Order granting the protective order with respect to Topics 15 and 21 in the First 11-f Notice. (NYSCEF 656 at 2; Ex. A.) The NRA also prepared an appendix of additional allegations in the Complaint that it wanted to question the OAG about during an examination. (NYSCEF 791, 784 at 4, 792 at 2.) Many of the appendix's allegations overlap with Topics 14-22 from the First 11-f Notice and are expressly covered by the March 23rd Order's ruling on those topics.[1] (*See id.;* NYSCEF 656 at 2; Ex. A ¶¶ 15, 18, 21; March 10, 2022 Transcript, Connell Aff., Ex. B, at 75-76.)

On June 16, 2022, the Special Master heard oral argument on the OAG's request for a protective order with respect to the Second 11-f Notice and the Sheehan Notice. That same day, the Special Master issued his report granting a protective order with respect to the Sheehan Notice (NYSCEF 710 at 2) and permitting the parties to supplement their briefing on the request for a protective order with respect to the NRA's request to examine an OAG representative. (*See id.*) The NRA did not appeal the June 16th report within five business days and it became an order of this Court ("June 16th Order").

On July 7th, after the parties submitted supplemental briefing, the Special Master heard oral argument. In his July 11th report, the Special Master granted a protective order with respect to the NRA's request to take an 11-f examination of the OAG, ruling that the Court's decision dismissing

[1] For example, in addition to the allegations relating to Topics 15 and 21 discussed above, many of the allegations cited on pages 7-12 of the appendix are covered by Topic 18 from the First 11-f Notice. (*See* Ex. A ¶ 18, NYSCEF 791 at 7-12.)

the NRA's counterclaims mooted the NRA's request for discovery concerning alleged unconstitutional animus by the OAG (Topics 4-5 from the First 11-f Notice). (NYSCEF 755 at 1-3.) He also ruled that the NRA's request to examine the OAG on Topics 1-3 from the First 11-f Notice, relating to the OAG's responses to discovery requests, would invade privilege and that the NRA failed to show that inquiry into the matters was material and necessary to its defenses.[2] (*Id.*) Nevertheless, the Special Master gave the NRA yet *another* opportunity to support its demand for a Rule 11-f deposition by identifying narrowly-tailored subjects from Topics 1-3 for further consideration by him. (*Id.* at 3.) Instead of submitting a narrowly-tailored list of subjects, the NRA simply reiterated its request for an 11-f examination on the same topics as before. (NYSCEF 788; *see* NYSCEF 656 at 2; NYSCEF 755 at 1-3.) On July 15th, the Special Master issued a report adhering to his decision granting the request for a protective order with respect to the NRA's 11-f notices. The NRA then filed this appeal.[3]

ARGUMENT

I. The NRA Has Failed to Show That the Information It Seeks Through an OAG Examination is Material and Necessary and Unavailable From Other Sources

In *Liberty Petroleum*, the First Department recognized that examinations of opposing counsel are disfavored and held that if a party seeks to depose opposing counsel and it is shown that the examination will invade privilege, the examinations can only go forward (subject to privilege objections) if the party then shows the information it seeks is "material and necessary," "is not available from another source" and the request is made in good faith. 164 A.D.3d at 408.

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[2] The Special Master did not address the topic relating to Everytown for Gun Safety ("Everytown") because there was a pending motion to quash with respect to Everytown. (NYSCEF 793 at 30-33; *id.* 653, 654.)

[3] The NRA cites to its letters to the Special Master in support of its appeal. To the extent the Court considers those letters, the OAG respectfully requests that the Court also consider its letters to the Special Master in support of the protective order, which are incorporated by reference. (NYSCEF 779, 782, 785; Connell Aff. Ex. C).

Here, the OAG has no relevant personal knowledge; it brought the Complaint in its protective capacity based on its investigation. As the Special Master recognized in prior unchallenged orders, examining the OAG concerning that investigation or the products of it – *i.e.*, the factual basis for the Complaint's allegations – is an examination of opposing counsel and would invade numerous privileges and the work-product doctrine. (NYSCEF 656 at 2; Ex. B at 75-76.) Thus, in order to proceed with an examination of the OAG, the NRA would have to satisfy the requirements of *Liberty Petroleum*, which it failed to do.

The NRA argues that *Liberty Petroleum* is inapplicable here because the OAG is an opposing party, relying on the lower court's decision in *In re Rothko's Estate,* 73 Misc.2d 548, 550-53 (Sur. Ct.), *rev'd sub nom.*, *In re Rothko's Will,* 42 A.D.2d 558 (1st Dep't 1973). (NYSCEF 796 at 6.) The history of *Rothko's Estate*, however, refutes their argument. In *Rothko's Estate*, the Attorney General appeared in a Surrogate's Court proceeding to represent the ultimate charitable beneficiaries of a will's bequests, asserting claims that the executors had engaged in self-dealing. *Id.* at 551. The executors sought to examine the attorney who verified the Attorney General's cross-petition, arguing, as the NRA does here, that the Attorney General was a party. *Id.* at 550. The Surrogate's Court agreed, rejecting the Attorney General's argument that it was acting solely as counsel. *Id.* at 550-53. However, that decision ***was unanimously reversed*** on this point. In reversing, the First Department explained that:

> While nominally a party, in fact the Attorney General appears only as the statutory representative of ultimate beneficiaries of charitable bequests under the will.… As such, he may be examined only upon a showing of special or unusual circumstances and none are demonstrated (*People ex rel. Lefkowitz v. Volkswagen of America, Inc.*, 41 A.D.2d 827, 342 N.Y.S.2d 749 (1st Dept. 1973).

42 A.D.2d at 558; *see also State v. Grecco*, 2008 WL 1766377 (Sup. Ct. Suff. Cty. Mar. 20, 2008) ("It is well settled that where the State's Attorney General is acting … as Parens patriae, … neither

the Attorney General nor his staff will be subject to being deposed" absent "special circumstances") (citations omitted); *Lefkowitz v. Raymond Lee Organization, Inc.*, 94 Misc.2d 875, 877-79 (Sup. Ct. N.Y. Cty.), *aff'd*, 66 A.D.2d 656 (1st Dep't 1978).

Although the standard has evolved from requiring "special circumstances" to requiring a showing that the information is material and necessary and unavailable from other sources, New York courts uniformly apply a heightened standard when evaluating requests to depose opposing counsel. *See, e.g.*, *Liberty Petroleum*, 164 A.D.3d at 405-08;[4] *People v. Trump Entrepreneur Initiative LLC*, 2014 WL 5241483, *14 (Sup. Ct. N.Y. Cty. Oct. 8, 2014), *aff'd in relevant part,* 137 A.D.3d 409 (1st Dep't 2016). Where, as here, a party seeks to depose the government concerning the basis for the allegations in a complaint when its knowledge comes from its investigation, courts in New York routinely bar such examinations. *See, e.g., S.E.C. v. Contrarian Press,* 2020 WL 7079484, *2-*3 (S.D.N.Y. Dec. 2, 2020) (barring an examination of the SEC seeking the "specific facts and evidence" supporting the contentions in the SEC's Complaint)*; Rothko's Will*, 42 A.D.2d at 558; *State v. Carvel Corp. Franchise Licensors, Inc.*, 1980 WL 669602 (Sup. Ct. N.Y. Cty. Aug. 14, 1980). To the extent further elaboration of the basis for the Complaint's allegations is needed, as the Special Master held, contention interrogatories are better suited to providing that information without invading privilege. *See, e.g.*, *Contrarian Press*, 2020 WL 7079484, *2-*3.

[4] *People v. Katz*, 84 A.D.2d 381 (1st Dep't 1982), is not to the contrary. In *Katz*, the court reversed a decision permitting an examination of the Attorney General because there was an insufficient record to show that the examination was necessary, but held that on remand the court could order an examination "on those matters material and relevant ... unless those matters are otherwise protected from disclosure." *Id.* at 384. *Liberty Petroleum*, which was decided by the First Department decades after *Katz* is consistent with *Katz.* Read together, they establish that an examination of the Attorney General acting in her protective capacity is not permissible if it will likely invade privilege unless there is a showing that the information sought is material and necessary and cannot be obtained from other sources. *Id.*; *Liberty Petroleum*, 164 A.D.3d at 408.

The NRA fails to offer any explanation for what non-privileged information it would be able to obtain from an examination that it could not obtain from its own review of the investigative file that the OAG has produced to it, its own questioning of NRA and third-party witnesses and discovery from third-party sources the OAG identified. Indeed, the only information that the NRA would be able to obtain through an examination is how the OAG marshalled the information in the investigative file (which it produced to the NRA) and through discovery in this action and its mental impressions concerning how that information supports its claims. *See, e.g., Contrarian Press,* 2020 WL 7079484, *2-*3. However, probing that information through an examination of the OAG would impermissibly intrude on numerous privileges and the work-product doctrine and warrants the grant of a protective order.[5] *See id.*

Similarly, the NRA cannot demonstrate that it needs to examine the OAG on public statements about the NRA that purportedly evidence "unconstitutional animus" because this Court's decision dismissing the NRA's counterclaims renders those matters irrelevant. The NRA nevertheless asserts that its affirmative defenses based on "unconstitutional animus remain live components of this case," (NYSCEF 796 at 5), apparently referring to its unclean hands defense, but does not explain how such alleged animus relates to any remaining issue in the case. Under *Liberty Petroleum*, the NRA's failure to elaborate on why it needs an examination on these topics provides a sufficient basis for the grant of a protective order. Moreover, an unclean hands defense, to the extent it can be asserted against the government at all, must be premised on a constitutional injury that prejudices the defendant in its defense of the litigation. *See, e.g., Trump*, 2014 WL

[5] Deposing a non-attorney employee would not cure the problem since that person's knowledge would be based on what they learned during the investigation working with attorneys or from being prepared for the examination by attorneys. *See, e.g.*, *Contrarian Press,* 2020 WL 7079484 at *3; *U.S. v. District Council*, 1992 WL 208284, *11-*13 (S.D.N.Y. Aug. 18, 1992).

5241483, *12-*13 (striking defense that did not allege a constitutional violation and did not show how the alleged wrongdoing prevented defendants from putting on a defense); *S.E.C. v. Cuban*, 798 F. Supp.2d 783, 795-97 (N.D. Tex. 2011) (same). Here, the NRA fails on both counts. This Court's prior ruling held that the NRA has not alleged a constitutional injury. (NYSCEF 706 at 13 ("NRA's counterclaims fail to adequately allege the deprivation of a constitutional right"); *see id.* at 2, 7-8, 11.) Additionally, the NRA fails to allege that any alleged animus has affected its ability to put on a defense. (*See* NYSCEF 629 at 167-69, 175.)[6] As a result, the NRA's attempt to examine the OAG on public statements reflecting potential animus was properly rejected as unnecessary and irrelevant to any remaining issues in the case.

II. The June 16th Order Is Law of the Case Precluding the Sheehan Examination

The Court has already issued a protective order with respect to the NRA's request to examine Mr. Sheehan. (NYSCEF 710 at 2.) That ruling in the June 16th Order is law of the case and may not be challenged by the NRA now. *Briggs v. Chapman*, 53 A.D.3d 900, 901 (3d Dep't 2008). In any event, contrary to the NRA's assertion, Mr. Sheehan does not have "unique first-hand knowledge," (NYSCEF 784 at 6), that justifies an examination of him. He verified the Complaint because the "plaintiff is a body politic" that the Attorney General represents and his knowledge of its factual basis is based solely on his role in the investigation, his review of the investigative file and the NRA's annual filings, as well as his participation in the NRA's bankruptcy proceeding. (NYSCEF 646 at 178-79.) The NRA has all these materials, participated in the bankruptcy proceeding, and has also been provided with a certified log setting out the sources of Plaintiff's information. Moreover, it has taken or had the opportunity to take testimony

[6] The NRA has not yet filed an answer to the Second Amended and Verified Complaint and currently has no operative affirmative defenses. The Amended Answer referred to herein is only cited as the NRA's most detailed statement of the unclean hands affirmative defense in order to demonstrate that the defense fails.

during discovery from the underlying sources of information in this action, including the witnesses the OAG identified months ago. As result, it has an alternate source for information it seeks and the protective order with respect to the Sheehan Notice was properly granted.[7] (*See* pp. 4-7, supra.)

CONCLUSION

For the foregoing reasons, the protective orders with respect to the NRA's requests to examine an OAG representative and James Sheehan were properly issued in accordance with applicable law. Accordingly, Plaintiff respectfully requests 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 27, 2022
New York, New York

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[7] Permitting the examination to go forward with the OAG objecting on privilege grounds is not a permissible alternative since the NRA has not satisfied its burden under *Liberty Petroleum*. *See*, *e.g.*, *S.E.C. v. Rosenfeld*, 1997 WL 576021, *4 (S.D.N.Y. Sept. 16, 1997) (allowing deposition with SEC objecting would place too great a burden on the SEC and the Court).

Attorney Certification Pursuant to Commercial Division Rule 17

I, Monica Connell, 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 Master for Discovery, dated February 7, 2022, because it contains 3,000 words, excluding the parts exempted by Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)). 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 27, 2022
New York, New York

Monica Connell