

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

Mot. Seq. No. 33

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

**THE ATTORNEY GENERAL'S MEMORANDUM OF LAW IN OPPOSITION TO THE
NRA'S MOTION PURSUANT TO CPLR 3104(d) FOR REVIEW OF THE SPECIAL
MASTER'S DISCOVERY ORDER GRANTING THE ATTORNEY GENERAL'S
REQUEST FOR PRODUCTION OF THE REQUESTED DOCUMENTS**

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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 order granting the OAG’s request for production of an anonymous 2007 whistleblower letter and information relating to the letter and the Audit Committee’s response thereto (collectively, the “Requested Documents”). For the reasons set forth below, the NRA’s motion should be denied.

PRELIMINARY STATEMENT

The NRA’s appeal of the Special Master’s order granting the OAG’s request for production of the Requested Documents is without merit. The NRA’s contention that the Special Master “entirely disregarded the NRA’s arguments and erred in holding that the NYAG met her burden of demonstrating that the [Requested Documents] are material and necessary to the prosecution or defense of this action” (NYSCEF 809 at 2) is not supported by the record. To the contrary, the Special Master’s decision (NYSCEF 806) is well-founded and the NRA has failed to muster any legitimate argument as to why the decision should be overturned and why the disclosure of relevant and material information limited.

FACTUAL AND PROCEDURAL BACKGROUND

On June 15, 2022, Plaintiff deposed David Coy, a longstanding member of the NRA’s leadership under Defendant Wayne LaPierre. Mr. Coy has been an NRA Board member almost continuously since 1998 and has been a member of the NRA Audit Committee since approximately 2001. Mr. Coy is currently Second Vice President of the NRA and Vice Chair of the Audit Committee. During the entirety of Mr. Coy’s tenure as an NRA Board member, Defendant Wayne LaPierre has been the NRA Executive Vice President, the Association’s highest officer, and until December 2018, Defendant Wilson Phillips was the NRA’s Chief Financial Officer and Treasurer.

Mr. Coy is one of a number of longstanding Audit Committee and Board members who have served in key roles under the NRA's current leadership over the past decades. The NRA Audit Committee is charged with, among other things, considering whistleblower complaints.

During his deposition, Mr. Coy provided sworn testimony in which he acknowledged authoring a memorandum which referenced an "anonymous letter that BOD members received prior to the April 2007 NRA Annual Meeting." NYSCEF 802 ("Coy's memorandum"). This letter (the "Whistleblower Letter") apparently raised a series of complaints about violations of the NRA's internal financial and governance controls and as such, it constituted a whistleblower complaint. *See, e.g.*, NYSCEF 802 at 2 (acknowledging, "The Audit Committee is charged with reviewing and making appropriate inquiry regarding the anonymous letter that BOD members received prior to the April 2007 NRA Annual Meeting.")

The NRA did not produce the Whistleblower Letter to the OAG in response to its Requests for Production. However, it did produce a memorandum, entitled "Audit Committee – Questions for Staff" (the "Memorandum") which was undated and which referred to the Whistleblower Letter. The Memorandum, with some metadata indicating a creation or modification date of 2017, had been produced by the NRA in December 2021 along with approximately 120,000 other documents.

Given that the circumstances surrounding the creation of the Memorandum were unclear, Plaintiff asked Mr. Coy about the same and Mr. Coy testified that he prepared the memorandum for discussion with the Audit Committee regarding the concerns raised in the Whistleblower Letter. NYSCEF 802. Mr. Coy also testified that he may have in his possession the Whistleblower Letter and related documents, including "the Frenkel report," which was referred to in the Memorandum, and which he used as part of his consideration of the Whistleblower Letter. He

stated that to testify truthfully about the Whistleblower Letter and the Audit Committee's response thereto, he would need to see if he still had the Whistleblower Letter and review other relevant information he may have. *See* Affirmation of Monica Connell ("Connell Aff."), Exhibit 1 (July 6, 2022 OAG Letter application attaching excerpts of testimony of David Coy as Ex. D thereto, pp. 211-235).

Following Mr. Coy's deposition, the OAG promptly requested production of the Whistleblower Letter and related documents. *See* NYSCEF 803, pp. 4-5 (June 21, 2022 email). Upon the NRA's refusal to produce such information after meeting and conferring, Plaintiff moved to compel by letter dated July 6, 2022. Connell Aff., Ex A. As Plaintiff's submission (Connell Aff., Ex. 1) demonstrates, the Requested Documents are clearly relevant and material. Mr. Coy's memorandum establishes that, in 2007, the Whistleblower Letter raised some of the *identical* claims of corruption, waste and lack of adequate internal controls that the Plaintiff is alleging in this action. *Id.*

The Special Master heard argument on July 7, 2022. NYSCEF 801. At that argument, the NRA confirmed that Mr. Coy considered the Frenkel report in reviewing the Whistleblower Letter and that the NRA has the Frenkel report at hand but has not produced the same. *See* NYSCEF 794 (July 7, 2022 Transcript) pp. 134-35 ("[THE SPECIAL MASTER:] I take it, Ms. Eisenberg, that you have a copy of the Frankle [sic] report. Do I have that right or not? MS. EISENBERG: I do, and it's from 2003, your Honor. It's completely irrelevant.").¹ Further, the NRA has not stated that it does not have the Whistleblower Letter. Mr. Coy also testified that he may have it now. In any

¹ It has been more than a month that the Plaintiff has been seeking the Requested Documents. The NRA notes in a footnote in its current motion that it "reserves the right" to assert privilege regarding some or all of such documents. NYSCEF 809, p. 1 fn. 1. However, it chose not to set forth a basis for any potential privilege either before the Special Master or here, as a reason to overturn the Special Master's report. Accordingly, such hypothetical argument should not be considered as a basis for granting a protective order or disturbing the Special Master's direction that the NRA produce the Requested Documents.

event, Plaintiff asked only for a narrow, focused search. It has requested that the NRA merely ask Mr. Coy and certain Audit Committee members for the anonymous letter, the board minutes or reports relating to the letter, and communications relating thereto that they can easily access. *See* NYSCEF 794 (July 7, 2022 Transcript) pp. 130-32.

At the NRA's request, the Special Master permitted the NRA to make a subsequent written submission. In its July 12, 2022 letter, the NRA sought the denial of the OAG's demands for the Requested Documents. NYSCEF 805. However, it failed to establish that the Requested Documents were unavailable or irrelevant.

On July 15, 2022, the Special Master denied the NRA's request and ordered production of the Requested Documents, finding that the documents were both readily available and undisputedly met the disclosure criteria set forth in the CPLR 3101(a). NYSCEF 806. The NRA has appealed that determination to this Court. For the reasons set forth below, it is respectfully submitted that the NRA's application should be denied.

ARGUMENT

I. The Requested Documents are Material and Necessary

CPLR 3101 sets forth the scope of disclosure during discovery. CPLR 3101(a) provides, "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." In ordering the production of the Requested Documents, the Special Master, relying on the standard set forth in CPLR 3101(a), noted, "[t]here is no dispute that the requested documents are material and necessary or may lead to discovery of matter that is material and necessary." NYSCEF 806 pp. 3-4. The Special Master's assessment of the materiality of the Requested Documents to this action is accurate.

First, the Requested Documents are material and necessary because they bear on the truth of many of the Plaintiff's allegations and the NRA's defense that it operated in compliance with New York State law and that the "top-to-bottom review of its operations and governance" was essentially unnecessary. NYSCEF 629 (NRA Amended Answer) p. 183. Mr. Coy's testimony, coupled with the memorandum he prepared following receipt of the Whistleblower Letter, establish that in 2007 and perhaps much earlier, a whistleblower raised a series of concerns about corruption, waste, and lack of adequate internal controls that closely mirror the allegations made by the OAG in this action.

The Requested Documents will provide detail on the nature of the whistleblower complaints, the NRA's consideration of the same and its response thereto. The Requested Documents demonstrate that the NRA was long on notice of many of the specific violations of which the NRA is accused in this action, but failed to address or remedy them. For example,

- According to Mr. Coy's memorandum, the Whistleblower Letter raised concerns about travel and entertainment spending generally and particularly about amounts billed by an entity known as "II & IS." Here, Plaintiff asserts claims based upon Defendants' abuse of travel reimbursement expenses generally and, in particular, regarding Defendant Wayne LaPierre's use of private charter travel booked, with the aid of Defendant Wilson Phillips, through LaPierre's private travel consultant. Among the allegations are that the Defendants asked the consultant to invoice her billing through two different entities, including one named "II & IS". This was part of a scheme to hide millions of dollars of LaPierre's private travel expenditures. *See* NYSCEF 646 (Second Am. and Verified Complaint) ¶¶ 183-97.
- Mr. Coy's memorandum reflects that the whistleblower complained in 2007 that the NRA's whistleblower policies were inadequate. NYSCEF 802, ¶ 1. It is not clear from the Memorandum if the whistleblower raised specific concerns about instances of whistleblowing and retaliation. Here, the Plaintiff has alleged that the NRA lacked a legally sufficient whistleblower policy, that key NRA directors and officers were unaware of the terms of any whistleblower policy, and that the NRA has engaged in unlawful whistleblower retaliation. *See* NYSCEF 646 ¶¶ 117-118 and 461-493; *see also* 8, 11, 45, 68, 700.
- Mr. Coy's memorandum indicates that the whistleblower raised issues about whether the NRA's contractual relationship with vendors like Ackerman McQueen and PM Consulting (a predecessor to Membership Marketing Partners or "MMP")

were properly approved, whether expenditures are properly documented, whether the NRA's internal procurement policy was being followed and whether the transactions are actually "arms length." NYSCEF 802, ¶ 10. In this action, Plaintiff has pled, and evidence establishes, that the NRA's relationships with favored vendors like Ackerman McQueen and MMP were not properly approved, documented or overseen and were not arms-length transactions. *See* NYSCEF 646 ¶¶ 313-342; 594-602.

These are just some examples. The fact that the NRA leadership has long had notice of these issues and failed to cure them undercuts the NRA's defenses that it was unaware of misconduct and that the allegations outlined in the Complaint herein are untrue, isolated or the product of misconduct by a few executives without the knowledge of NRA leadership.

Likewise, the Requested Documents are material and necessary because they plainly rebut the NRA's defense that its compliance program was initiated and overseen by the "tone from the top," namely Defendant LaPierre. *See, e.g.*, LaPierre Transcript, June 27, 2022, p. 130 ("it's in the tone of my attitude towards this whole thing. We are going to get it correct and I don't care who it offends. I don't care if it was some of the most-trusted vendors. I don't care if they were -- if I lost every friend that I ever made, we are going to get it right. And this was the tone that I was setting for the whole Association."). Concerns about LaPierre's travel expenditures, conflicts of interest, and negotiations with favored vendors were clearly of long duration and continued after the Whistleblower Letter.

Because the Requested Documents are plainly relevant to the prosecution of this action, the Special Master's order should be upheld and the Documents should be produced.

II. The Requested Documents are Readily Available

In his July 15, 2022 order granting the OAG's demand for production of the Requested Documents, the Special Master correctly cited to the fact that the documents "are readily available." A document is "readily available" unless the producing party demonstrates an undue burden in its production. *Silverman v. Shaoul*, 30 Misc. 3d 491, 495 (Sup. Ct. N.Y. Co. 2010).

Here, the NRA is unable to make that showing; it has not, because it cannot, show that it would be unduly burdensome for it to produce a limited number of documents to which it has access. Accordingly, complying with the Special Master's order to produce the Requested Documents would be neither burdensome nor costly for the NRA. Not only can the documents be easily produced by the NRA, but the NRA has also not cited to any basis for it to withhold the documents based on privilege. As such, the NRA cannot resist their production on those grounds.

III. The OAG Could Not Have Known About the Existence of the Requested Documents Earlier and the OAG's Present Demand for Such Documents was Appropriate

In opposing production of the Requested Documents, the NRA argues that the OAG "could have made this additional request months ago." NYSCEF 809 at 4. This argument is without merit and is clearly unsupported by the record.²

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, regardless of the burden of proof." New York has a strong public policy of open discovery of relevant materials. *Forman v. Henkin*, 30 N.Y.3d 656, 661 (2018). The Court of Appeals has emphasized that "[t]he words, 'material and necessary', are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason." *Id.*, quoting (*Allen v. Crowell-Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968)).

² Plaintiff need not have specifically demanded the Requested Documents earlier as the existence and import of them only became clear upon Mr. Coy's testimony. In any event, it did. They fall within multiple of Plaintiff's requests for production, specifically 2, 4, 15, 16, 17, 26, 38 (especially subsection (h)) and 62. Although most of those demands are limited in time, request 38 encompasses documents, including any Communications from 1997 to the present, relating to concerns about the NRA's business dealings with entities owned in whole or in part by the McKenzie family, including but not limited to MMP.

It was entirely appropriate for the OAG to make its demand for the Requested Documents at the time and in the manner that it did. Mr. Coy's memorandum was produced in December 2021 along with over 120,000 other documents. *See* NYSCEF 557, pp. 2 and 11. It was produced with conflicting metadata that Mr. Coy and the NRA claim is erroneous. Mr. Coy's June 15, 2022 testimony about the import, existence and availability of the Requested Documents justified the Plaintiff in demanding for the same at that time.

Further, in his deposition, Mr. Coy testified that he would need to review the Whistleblower Letter and other information that he may have in order to be able to provide truthful testimony on the subject. Plaintiff promptly made a targeted request for the specific documents about which he testified. Far from being remiss, Plaintiff did not seek to enforce broad blanket demands but instead made a timely and focused demand for clearly material and relevant information.

The Special Master's determination that the Requested Documents were material and relevant and should be produced is well supported by the law and record here and is in line with New York's policy on open discovery.

CONCLUSION

For the foregoing reasons, the Special Master's decision calling on the NRA to produce the Requested Documents was well-founded and proper. The Requested Documents are both highly relevant and readily available and the NRA has failed to put forward any justification to overturn the decision. 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, proper, and appropriate.

Dated: August 3, 2022
New York, New York

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/s/ Monica Connell

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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 Plaintiff's Memorandum of Law in Opposition to the NRA's Motion Pursuant to [CPLR 3104\(d\)](#) for Review of the Special Master's Discovery Order Granting the Attorney General's Request for Production of the Requested Documents 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 2686 words, 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: August 3, 2022
New York, New York

/s/ *Monica Connell*

Monica Connell