

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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, JOSHUA POWELL,

Defendants.

INDEX NO. 451625/2020

MOTION DATE 06/24/2022,
07/18/2022,
07/22/2022

MOTION SEQ. NO. 031 032 033

**DECISION + ORDER ON
MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 031) 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 745, 746, 747, 748, 749, 750

were read on this motion to REVIEW ORDER OF SPECIAL MASTER.

The following e-filed documents, listed by NYSCEF document number (Motion 032) 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 810, 811, 812, 813, 814

were read on this motion to REVIEW ORDER OF SPECIAL MASTER.

The following e-filed documents, listed by NYSCEF document number (Motion 033) 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 816, 817, 818

were read on this motion to REVIEW ORDER OF SPECIAL MASTER.

Defendant the National Rifle Association (“NRA”) moves pursuant to CPLR 3104(d) to review certain determinations of Special Master O. Peter Sherwood (Ret.) (“Special Master”).

Plaintiff the People of the State of New York by the Attorney General (“Plaintiff” or “NYAG”) oppose. The motions are DENIED.

BACKGROUND

The NRA challenges three rulings of the Special Master. *First*, the NRA moves to compel Plaintiff to provide information under newly revised Rule 11(a) of the Rules of the

Commercial Division. *Second*, the NRA moves to compel the depositions of an NYAG representative and the Chief of the Charities Bureau, James Sheehan, Esq. (“Sheehan”). *Third*, the NRA moves to annul the Special Referee’s Order compelling the production of certain documents on the grounds that the NYAG’s request was untimely.

DISCUSSION

A. Legal Standard

The Special Master’s rulings will be upheld unless that are “clearly erroneous or contrary to law” (*Gateway Intern., 360, LLC v Richmond Capital Group, LLC*, 2021 WL 4947028 [N.Y. Sup Ct, New York County 2021] *quoting CIT Project Fin. v Credit Suisse First Boston LLC.*, 7 Misc 3d 1002(A) [Sup Ct New York County 2005]). “The Referee’s decision will be upheld if it is both supported by evidence in the record and a proper application of the law” (*Id. citing Those Certain Underwriters at Lloyd’s, London v Occidental Gems, Inc.*, 11 NY3d 843 [2008] [other citations omitted]).

B. The Motions Are Denied

The Court has reviewed the record before the Special Referee and concludes that the challenged decisions should be confirmed.

Request For Statement Pursuant to Commercial Division Rule 11(a)

Rule 11 of the Rules of the Commercial Division (22 NYCRR 202.70) was amended by Administrative Order AO/117/22 dated May 16, 2022 (effective May 31, 2022) to provide, in relevant part, as follows:

- (a) The court may direct plaintiff to produce a document stating clearly and concisely the issues in the case prior to the preliminary conference. If there are counterclaims, the court may direct the party asserting such counterclaims to produce a document stating clearly and concisely the issues asserted in the counterclaims. The court may also direct plaintiff and counterclaim plaintiff to

each produce a document stating each of the elements in the causes of action at issue and the facts needed to establish their case.

- (b) The court may further direct, if a defendant filed a motion to dismiss and the court dismissed some but not all of the causes of action, plaintiff and counterclaim plaintiff to revisit the documents to again state, clearly and concisely, the issues remaining in the case, the elements of each cause of action and the facts needed to establish their case.

This Part's Rules adopt the above procedure insofar as it "requires certain information to be exchanged *in advance of the Preliminary Conference*"

(<https://www.nycourts.gov/LegacyPDFS/courts/comdiv/NY/PDFs/Practices-Part-3.pdf>

[emphasis added]). The Court agrees with the Special Master that a Rule 11(a) statement is neither necessary nor useful at this more advanced stage of the case, and that it would not be a prudent use of the parties' time and resources.

Request for Depositions of a Rule 11-f NYAG Representative and Mr. Sheehan

The Special Master accepted numerous submissions and held extensive argument on July 7, 2022, concerning the NRA's request to depose a representative of the NYAG and Mr. Sheehan (Eisenberg Aff. Ex. U [NYSCEF 794]). The Special Master's Discovery Order dated July 15, 2022 (Eisenberg Aff. Ex. Q [NYSCEF 790]) found 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" and determined that the NRA "ignore[ed] the predicate for taking the deposition of opposing counsel" in its submissions. The Special Master also determined that certain matters were foreclosed by prior orders and that the NRA could discover other information through contention interrogatories.

A request to depose opposing counsel is “rare” and “disfavored,” and a movant must establish “the information they seek in deposing defendants’ counsel is material and necessary, that they have a good faith basis for seeking it and that the information is not available from another source” (*Liberty Petroleum Realty, LLC v Gulf Oil, L.P.*, 164 AD3d 401, 408 [1st Dept 2018][citations omitted]; *see also Verdi v Dinowitz*, 204 AD3d 627, 628 [1st Dept 2022] [“The court properly granted defendant’s motion to quash the subpoenas served on three of his counsel. The information sought was irrelevant or available from other sources, including numerous nonparty witnesses who had been deposed and had provided documents”]). Contrary to the NRA’s argument, the fact that *Liberty Petroleum* did not involve Commercial Division Rule 11-f or a governmental agency does not warrant a departure from its guidance and holding. None of the representations made or cases cited by the NRA in its submissions to the Special Master (NYSCEF 777, 778, 784, 786, 787, 788, 791, 792) establish that the deposition of an attorney from the NYAG’s office is warranted.

The NRA’s argument that Mr. Sheehan is a viable deponent because he verified the NYAG’s pleadings is similarly unavailing. CPLR 3020(d)(2) permits for a verification on behalf of a governmental entity “by any person acquainted with the facts” which is “a standard which is not synonymous with ‘personal knowledge’” (*Blake v State*, 134 Misc 2d 892, 893 [Ct Cl 1987] [citations omitted]). The fact that Mr. Sheehan verified the NYAG’s pleadings standing alone is insufficient to warrant a deposition (*Thomas v Good Samaritan Hosp.*, 237 AD2d 429, 429 [2d Dept 1997]). The Court finds that the Special Master’s ruling is neither clearly erroneous nor contrary to law.

Production of Documents is Warranted

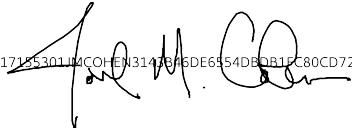
The NRA argues that the Special Master's July 15, 2022 Discovery Order (Eisenberg Aff. Ex. H (NYSCEF 806)) compelling production of an anonymous 2007 "whistleblower" letter and the 2003 Frankel Report is improper because the NYAG's requests were untimely, and the documents have not been proven to be material and necessary (Moving Brief at 2 [NYSCEF 809]). The NYAG argues that it learned of the documents during the June 15, 2022, deposition of David Coy (Connell Aff. Ex. A [NYSCEF 817][Coy Transcript]) and timely requested the documents (Opposition Brief at 1-4 [NYSCEF 818]).

The Special Master determined that the "whistleblower" letter and Frankel Report are material and necessary. The Court finds that the Special Master's ruling is neither clearly erroneous nor contrary to law.

* * * *

Accordingly, it is **ORDERED** that the motions to review the Special Master's determinations are **DENIED**.

This constitutes the decision and order of the Court.

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