

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. BACKGROUND..... 1

III. ARGUMENT..... 2

 A. The Court must conduct a probing review of the Special Master’s rulings. 2

 B. The Special Master erred in failing to direct the NYAG to identify senders and recipients of withheld documents..... 3

 C. The Special Master erred in failing to require the NYAG to specify on her privilege log the timeframe of various withheld communications. 5

 D. The Special Master erred in failing to compel the NYAG to disclose information about communications and other records post-dating August 6, 2020, and to supplement and/or amend her privilege log as required under CPLR 3101(h)..... 6

 E. The Special Master erred in failing to require the NYAG to supplement her production and privilege log with regard to her office’s communications with Everytown for Gun Safety..... 7

IV. CONCLUSION..... 11

CERTIFICATE OF CONFERENCE..... 14

CERTIFICATION OF COMPLIANCE WITH WORD COUNT 15

I.
PRELIMINARY STATEMENT

The NRA respectfully requests that the Court (A) vacate several discovery rulings dated November 29, 2022, by the Honorable O. Peter Sherwood, the Special Master for Discovery appointed by the Court in this action¹; and (B) order the NYAG to (i) update her categorical privilege log (the “Privilege Log”) to identify senders and recipients of the communications the NYAG withheld on claimed privilege grounds; (ii) update the Privilege Log to specify date ranges of the withheld documents; (iii) produce—or, at a minimum, identify—records responsive to the NRA's document requests even if they were generated after the NYAG filed this action; (iv) comply with her duty to supplement and/or amend her production and Privilege Log; (v) produce her office’s communications about the NRA with Everytown; and (vi) order such other relief as the Court deems fair, just, and appropriate.

II.
BACKGROUND

On February 3, 2021, and October 14, 2021, pursuant to CPLR 3120, the NRA served on the NYAG its requests for the production of documents (Exhibits 1 and 2).² The NYAG produced some records but withheld others. On December 3, 2021, and on May 25, 2022, the NYAG served categorical privilege log (Exhibits 4 and 5), in which she attempted to list in a

¹ The Court appointed Judge Sherwood as the Special Master for Discovery on February 7, 2022 (NYSCEF 579). Under that order, parties have the right to seek review of the Special Master’s rulings in accordance with CPLR 3104(d). NYSCEF 579 at page 5-6.

² References to Exhibits in this memorandum of law refer to exhibits attached to the affirmation of Svetlana M. Eisenberg dated December 20, 2022.

categorical fashion over 2,500 documents that she admitted were responsive but nonetheless, according to her, could not be produced because of privileges.

The certification accompanying the Privilege Log (Exhibits 4 and 5) described (i) the manner in which the Privilege Log was prepared; and (ii) the searches conducted to capture records on her log.

On October 20, 2022, the NRA moved to compel the NYAG to fix deficiencies in the Privilege Log and, where applicable, produce documents that were unjustifiably withheld. (Exhibit 6 (the “Motion”). After the NYAG opposed the relief (Exhibit 7) and after the oral argument,³ the Special Master issued a decision (Exhibit 9) granting in part and denying in part the relief that the NRA sought.

III. **ARGUMENT**

A. The Court must conduct a probing review of the Special Master’s rulings.

A CPLR 3104(d) motion “shall set forth . . . the [Special Master’s] order complained of, the reason it is objectionable, and the relief demanded.” CPLR 3104(d). Rulings by the Special Master must be supported by evidence in the record. Moreover, the Special Master must properly apply the law. *See Gateway Intern., 360 v. Richmond Capital*, 2021 WL 4947028, at *1 (N.Y. Sup., 2021).

The Court can disaffirm the Special Master’s findings of fact even if there is support in the record for those findings because the Court’s appointment of the Special Master does not

³ Transcript of the oral argument is attached as Exhibit 8 of Eisenberg Aff. dated December 20th, 2022

waive the Court's discretion, nor does it limit the Court's review. *See Those Certain Underwriters at Lloyds v. Occidental Gems*, 11 N.Y.3d 843, 845 (2008); Kyle Bisceglie, LEXISNEXIS PRACTICE GUIDE: NEW YORK E-DISCOVERY AND EVIDENCE § 9.01 (2016) ("trial court . . . *does not*, by making the reference, thereby limit its review of the referee's order").

B. The Special Master erred in failing to direct the NYAG to identify senders and recipients of withheld documents.

The NRA sought an order compelling the NYAG to list senders and recipients of the withheld communications. (Exhibit 6 at page 5.) The Motion noted that records withheld by the NYAG in "Category 1⁴], 2⁵], 3 and 5 consist, at least in part, of communications with various persons and entities," but that "[t]hese categories do not identify the actual senders and recipients of the communications." (Exhibit 6 at page 3.). The NRA explained that the NYAG must disclose the "identi[ty of] the actual senders and recipients of the communications" to permit the NRA "to assess the legitimacy of the NYAG's privilege assertions," particularly because "the privileges the NYAG asserts can be waived as a result of the inclusion of third parties." *Id.* As a result, the NRA asked "[t]he Special Master [to] direct the NYAG to provide [the identity of actual senders and recipients of the communications] for . . . documents that have been withheld." *Id.*

In opposition, the NYAG argued that, with regard to Category 2, the "OAG has stated that the privilege relates to its communications with the DCAG." (Exhibit 7 at page 4). She

⁴ The NYAG has since been ordered to produce and produced previously withheld documents from category 1.

⁵ The Special Master held that there was no reason for confidential treatment of documents withheld in category 2, but the NYAG moved for reconsideration of that holding, which the NRA opposed. The matter is currently sub judice.

also asserted that, while the Privilege Log did not identify the specific individuals with whom her office communicated, such information is “not necessary to evaluate the assertion of the privilege.” *Id.*

Contrary to the quoted assertion, a recent submission by the NYAG reveals that communications in category 2 are *not* limited to communications with the DCAG. (Exhibit 10). Rather, several are with another agency which the NYAG is refusing to identify. *Id.* This revelation is shows why the NYAG's generic descriptions in her categorical log (e.g., communications with law enforcement agencies) are insufficient to assess the basis for the NYAG's claimed privileges. Indeed, the NYAG does not claim that the NYAG and the unidentified agency share a common interest.

Moreover, the NYAG does not assert that the communications she withheld are entirely between or among government employees working for the NYAG, the DCAG or the third agency.

The NYAG argued—without merit—that sharing communications with third parties does not waive public interest or investigative privileges. (Exhibit 7 at page). If the NYAG did not care to preserve the confidentiality of her communications with others in law enforcement, she cannot shield them from discovery.

When the Special Master issued his Decision, he did not address the NRA's request. (Exhibit 9). Consequently, the NRA requests that the Court order the NYAG to amend her privilege log to disclose senders and recipients of the withheld information.

C. The Special Master erred in failing to require the NYAG to specify on her privilege log the timeframe of various withheld communications.

The NRA also requested that the Special Master order the NYAG to identify on the Privilege Log the timeframe (that is, date ranges) for the documents withheld by the NYAG in the various categories. In the Motion, the NRA noted that the NYAG invariably asserted that the timeframe for the records she withheld is “September 1, 2018 through August 6, 2020 [the date on which the NYAG filed this action].” (Exhibit 6 at page 4). The NRA pointed out that “[t]his . . . manner of indicating the timeframe” is “artificial” and “provides no useful information to the NRA” because it “merely indicates the timeframe restrictions the NYAG used to search for responsive documents it believes to be privileged.” *Id.*

The NYAG opposed the request saying that “[the NRA] fail[ed] to explain why it needs to know the specific dates the OAG engaged in certain privileged activities.” (Exhibit 7 at 4). The NYAG has it backwards. *Id.* Privilege logs are used in lieu of production to permit the party claiming the privilege to assert a sufficient basis for the purported privilege and to enable the party seeking the information to contest that assertion. Therefore, the NYAG cannot justify her failure to reveal this important information about the records. After all, the privileges she asserts may or may not apply depending on the date of the communication.

In addition, when the NYAG produced category 1 documents, which she previously had withheld, it became clear that the first record in that category was created in or around May 2019, that is, nine months after the beginning of the date range listed on the Privilege Log.

Moreover, in or around August and September 2018, then candidate Letitia James claimed that, if elected Attorney General, she would destroy the NRA because she disagrees

with the substance of the NRA's constitutionally protected speech. (Exhibit 12). Of course, shortly after she became Attorney General, just as she had promised her supporters, Attorney General James commenced her investigation of the NRA. The NRA is entitled to learn in discovery whether the communications that the NYAG is withholding preceded her election.

Although the issue was discussed at length at the oral argument (Exhibit 8 at 101-113:17-11), in his decision, the Special Master did not address the issue. (Exhibit 9). The effective denial of the NRA's request constitutes error. Therefore, the Court should order the NYAG to specify the dates of the withheld communications.

D. The Special Master erred in failing to compel the NYAG to disclose information about communications and other records post-dating August 6, 2020, and to supplement and/or amend her privilege log as required under CPLR 3101(h).

The NRA also sought an order from the Special Master compelling the NYAG to produce or log responsive records created after the NYAG filed this action. (Exhibit 6 at page 5). In her opposition, citing cases from other jurisdictions, the NYAG asserted that “logs for *privileged* documents the OAG created or obtained after the commencement of litigation would represent a departure from standard practices and are not normally exchanged” and that “courts typically refuse to require them unless there is a specific reason that they are needed.” (Exhibit 7 at page 4).

At the oral argument, the Special Master initially agreed with the NRA. (Exhibit 8 at page 126-127:6-23). However, afterwards, the Special Master indicated that he would deny the NRA's request. *Id.*

When the Special Master issued his Decision, however, it did not address this request. (Exhibit 9). As a result, the NRA respectfully requests that the Court require the NYAG to

supplement or amend her production and/or privilege log with any responsive records that post-date her filing of this action.

Indeed, the NYAG demanded that the NRA produce records that post-date the NYAG's filing of this action on the theory that more recent records are relevant to the NYAG's claims for injunctive relief. The same logic applies to the NRA's requests, many of which are intended to identify evidence of bias based on the nature and timing of certain witnesses' communications with the NYAG. Indeed, more recent records are potentially more probative.

E. The Special Master erred in failing to require the NYAG to supplement her production and privilege log with regard to her office's communications with Everytown for Gun Safety.

In the Motion, the NRA also argued that the NYAG's privilege log is deficient because it purports to list the individuals and entities with whom (or whose counsel) the NYAG exchanged communications in connection with her investigation of the NRA, yet the log—like the NYAG's document production—includes no communications of any kind with Everytown. (Exhibit 6 at page 4-5).

In opposing the Motion, the NYAG did not claim that such communications do not exist; rather asserted—without merit—that her search for such records was adequate. (Exhibit 7 at page 4-5).

As the OAG's rule 11-b certification reveals, what the NYAG searched for is limited to four search terms: (i) "Everytown for Gun Safety," (ii) "operations@everytown.org," (iii) "Jason Lilien" (Everytown's outside counsel), and (iv) "jlilien@loeb.com" (Everytown's outside counsel's email address). The certification also reveals that, inexplicably, the NYAG did *not* search for (i) communications with the four individuals at Everytown who attended

Everytown's meeting with the NYAG about the NRA's Form 990 shortly before the NYAG authorized an investigation into the NRA (Exhibit 13 at 54-55:6-21); (ii) communications with any other email address at the Everytown.org or Loeb.com domain; or (iii) any text messages between or among the relevant individuals. (Exhibit 5 at page 3). Indeed, the certification does not assert that *any* text messages were searched. *Id.*

Naturally, in its Motion, the NRA requested that Judge Sherwood direct the NYAG to run a more robust search for the NYAG's communications with Everytown and either produce such records to the NRA or at a minimum itemize them on her privilege log. (Exhibit 6 at page 4-5).

In ruling on the motion, the Special Master did not assess the adequacy of the NYAG's search; he, instead, denied the NRA's motion based on his apparent agreement with the NYAG's argument that “[a]s a threshold matter,” “given the Court’s prior rejection of the NRA’s claims of constitutional violations,” “communications between the OAG and Everytown have no relevance to this matter.”

The Special Master committed multiple errors in denying the NRA's request.

First, he disregarded the fact that the NYAG admitted that her communications with Everytown are relevant to a claim or a defense in this case. After all, the certification accompanying the NYAG's Privilege Log specifically states that the NYAG searched for communications with some email addresses associated with the Everytown.org domain and with the domain of the law firm that serves as Everytown's outside counsel. Therefore, the NYAG's relevance objection has been waived.

Second, in any case, the Special Master erred in assuming that the information the NRA seeks related to the NYAG's communications with Everytown can only be relevant to the NRA's defenses. After all, the NYAG's corporate representative testified that the NYAG's Charities Bureau's Chief met with Everytown about the NRA's Form 990 for 2017 shortly before the NYAG commenced her investigation into the NRA in 2019, including but not limited to possible misstatements in that regulatory form. The NYAG offers no basis for distinguishing between Everytown on the one hand and all the other individuals and entities to whom the NYAG spoke in connection with or in the leadup to her investigation. On November 29, 2022, the Special Master ordered the NYAG to produce all of her office's communications with witnesses and their counsel, which were previously withheld by the NYAG on purported privilege grounds. The Court should order the NYAG to produce her office's communications with Everytown and its counsel on that basis as well.

Third, the Special Master erred in concluding that the NRA's defenses and affirmative defenses to which the evidence the NRA seeks can be relevant are not viable. There are numerous defenses—some constitutional and some not (e.g., unclean hands)—to which the evidence relates. Therefore, even if dismissal of the counterclaims were dispositive of the constitutional defenses (which it is not), there is no basis for concluding that its dispositive of the NRA's common law defenses, such as unclean hands.

Even apart from the NRA's defenses, the requested discovery is non-privileged, relates to the potential bias of the NYAG and its witnesses, and may reveal facts showing the basis for the NYAG's investigation. *Dominicci v. Ford*, 119 A.D.3d 1360, 1361, 989 N.Y.S.2d 733, 735 (4th Dep't 2014) (“Questions concerning the bias, motive or interest of a witness are relevant and should be freely permitted and answered”) (internal quotation marks omitted); see also

Alexander M. v. Cleary, 188 A.D.3d 1471, 1476 (3d Dep't 2020) (petitioner was entitled to discovery regarding investigator's potential bias).

Even apart from the NRA's defenses, the requested discovery is non-privileged, relates to the potential bias of the NYAG and its witnesses, and may reveal facts showing the basis for the NYAG's investigation. *Dominicci v. Ford*, 119 A.D.3d 1360, 1361, 989 N.Y.S.2d 733, 735 (4th Dep't 2014) ("Questions concerning the bias, motive or interest of a witness are relevant and should be freely permitted and answered") (internal quotation marks omitted); see also *Alexander M. v. Cleary*, 188 A.D.3d 1471, 1476 (3d Dep't 2020) (petitioner was entitled to discovery regarding investigator's potential bias).

Furthermore, in holding that the defenses are not viable in light of the Court's dismissal of the counterclaims, the Special Master exceeded his authority. As the order regarding the Special Master makes clear, his authority is limited to the resolution of discovery disputes. The Special Master has no authority to dismiss claims or defenses. Whether or not the Court's dismissal of the counterclaims is dispositive on the issue of the NRA's defenses is a matter the Court will decide if the NYAG moves to dismiss the defenses.

It was improper and prejudicial for the Special Master to anticipate the filing of a motion to dismiss and then dispose of any arguments that the NRA would have raised in response to that motion in a single sentence. The Special Master's sua sponte dismissal of the NRA's affirmative defenses was contrary to law. *Rossi v. Flying Horse Farm, Inc.*, 131 A.D.3d 1033, 1036 (2d Dep't 2015) ("the Supreme Court erred in, sua sponte, directing the dismissal of the defendant's ninth affirmative defense"); *Town of Hempstead v. Lizza Indus., Inc.*, 293 A.D.2d 739, 740, 741 N.Y.S.2d 431, 432 (2d Dep't 2002) ("The Town did not move to dismiss

the defendant's affirmative defense of the statute of limitations as to the second cause of action alleging trespass . . . Thus, the Supreme Court erred in granting this unrequested relief.”); *Flores v. New York City Hous. Auth.*, 151 A.D.3d 695, 696 (2017) (the Supreme Court should have vacated order by Referee concerning a bill of particulars because the referee “lacked authority to determine the motion” concerning the bill of particulars, which is not part of any discovery procedure); *Casale v. Metro. Transp. Auth.*, 886 N.Y.S.2d 70 (Sup. Ct. 2009), *aff'd*, 75 A.D.3d 486, 906 N.Y.S.2d 531 (2010) (“Court should set aside the decision if it finds that the special master clearly exceeded his authority.”); NYSCEF 579; *see also* Exhibit 14 at page 1 (agreeing with the NRA that the Special Master’s power does not extend to permit him to bar a party from offering evidence at trial).

Until and unless the Court dismisses the defenses, there is no basis for disregarding them in ruling on relevance objections.

The Court should therefore order the NYAG to search more thoroughly for communications with Everytown and to produce such records. Indeed, in a prior ruling, the Special Master ordered the NYAG to produce her communications with witnesses and their counsel to the NRA. The NYAG did so on December 12. She should not be permitted to withhold her communications with Everytown because her search for such communications was inadequate.

IV. **CONCLUSION**

The Court should hold that the Special Master erred in denying the relief sought by the NRA. Therefore, the Court should vacate the Special Master’s decision to that extent and grant the relief listed above.

Dated: December 20, 2022

Respectfully Submitted,

By: /s/ Svetlana M. Eisenberg

William A. Brewer III

wab@brewerattorneys.com

Svetlana M. Eisenberg

sme@brewerattorneys.com

Noah Peters

nbp@brewerattorneys.com

BREWER, ATTORNEYS & COUNSELORS

750 Lexington Avenue, 14th Floor

New York, New York 10022

Telephone: (212) 489-1400

Facsimile: (212) 751-2849

COUNSEL FOR DEFENDANT

**THE NATIONAL RIFLE ASSOCIATION OF
AMERICA**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record, on this 20th day of December, 2022.

/s/ Svetlana M. Eisenberg
Svetlana N. Eisenberg

CERTIFICATE OF CONFERENCE

In compliance with 22 New York Codes, Rules and Regulations (NYCRR) §§ 202.7 and 202.20-f, I conferred with the Office of the Attorney General of the State of New York in a good faith effort to resolve the issues raised by the motion. Specifically, on December 12, 2022, I advised M. Connell that the NRA intends to seek review certain aspects of the Special Master's rulings dated November 29, 2022. Efforts to resolve this dispute amicably did not lead to a resolution.

/s/ Svetlana M. Eisenberg
Svetlana M. Eisenberg

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 filed by the NRA pursuant to CPLR 3104(d) for review of certain portions of the Special Master's decision dated November 29, 2022, complies with the word count limit set forth in the Order for Appointment of a Master for Discovery, dated February 7, 2022. Specifically, the memorandum of law contains fewer than 3,000 words.

In preparing this certification, I relied on the word count function of the word-processing system used to prepare this memorandum of law.

By: Svetlana M. Eisenberg
Svetlana M. Eisenberg

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