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

THE PEOPLE OF THE STATE OF NEW YORK, by LETITIA JAMES, Attorney General of the State of New York	:	
Petitioner,	:	**Index # 451825/2019**
-against-	:	
ACKERMAN MCQUEEN and NATIONAL RIFLE ASSOCIATION OF AMERICA,	:	
Respondents.	:	

AFFIRMATION OF ARTHUR R. MILLER IN SUPPORT OF THE NRA'S MOTION FOR LEAVE TO RENEW AND REARGUE AND FOR A STAY OF ANY FURTHER DOCUMENT PRODUCTION IN RESPONSE TO THE ATTORNEY GENERAL'S SUBPOENA

STATE OF NEW YORK)

COUNTY OF NEW YORK) ss.:

ARTHUR R. MILLER, being duly sworn, deposes and says:

1. I submit this affirmation as an expert witness retained by counsel for Respondent the National Rifle Association of America (the "NRA") in the above-captioned special proceeding, and in support of the NRA's Motion for Leave to Renew and Reargue the Court's February 21, 2020 Order and For a Stay of Any Further Document Production in Response to the Attorney General's Subpoena.

I. INTRODUCTION AND QUALIFICATIONS

2. I am a Professor at the New York University School of Law. I graduated from Harvard Law School magna cum laude in 1958, and practiced law in New York City until 1962. Since then, I have taught full time at the University of Minnesota, the University of Michigan, Harvard Law School (where I was the Bruce Bromley Professor of Law) and, since 2007, New York University School of Law (where I am a University Professor). I have taught the basic first

year course in Civil Procedure for more than 50 years and upper level courses and seminars in advanced procedure and complex litigation; these courses regularly encompass topics such as attorney-client privilege, standing (including issues relating to ripeness), and the application of procedural and evidentiary rules to novel fact patterns.

3. I am the author and co-author of more than 40 books and treatises, including Federal Practice and Procedure, the leading multi-volume treatise on practice in the federal courts, and New York Civil Practice (with Judge Jack Weinstein and the late Professor Harold Korn), a leading multi-volume treatise on New York practice. I also am the author or co-author of at least 30 law review and other articles on a range of court related issues including United States constitutional law, federal court litigation, civil procedure, sealing orders, confidentiality, and class actions. I also served as a member of the Special Advisory Group to the Chief Justice of the United States Supreme Court (Chief Justice Burger) on Federal Civil Litigation; as the Reporter and then as a Member of the Advisory Committee on Civil Rules of the Judicial Conference of the United States (by appointment of Chief Justice Burger and reappointment by Chief Justice Rehnquist); as a special consultant to the original Manual for Complex Litigation; as a member of the American Bar Association Special Committee on Complex and Multidistrict Litigation; and as a member of numerous other professional committees and organizations. I also served as Reporter for the American Law Institute's Complex Litigation Project, which led to the adoption and publication by the Institute of Complex Litigation: Statutory Recommendations and Analysis with Reporter's Study (1994), then as an Advisor to the American Law Institute's Principles of Aggregate Litigation, and was one of the draftsmen of the Uniform Interstate and International Procedure Act. I have testified before numerous United States Senate and House of Representatives subcommittees on constitutional, procedural, privacy, and other issues.

4. Throughout my years in academe, I have maintained my contacts with the Bench and the practicing bar in order to understand the actual operation and functioning of the civil justice system. Thus, I have participated in countless judicial conferences in the various United States Courts of Appeal, and in educational programs conducted by the Federal Judicial Center and

several state judicial education programs as a lecturer or a discussion leader on a wide variety of subjects, including many on aspects of jurisdiction, class actions, and complex litigation, as well as professional matters. In addition, I have appeared as a lawyer or as an expert in numerous complex litigation cases, on behalf of both plaintiffs and defendants, with regard to issues such as the propriety of class certification; the fairness, reasonableness and adequacy of settlements and attorneys' fees; subject matter and personal jurisdiction; discovery; privileges and confidentiality; choice of law; preemption; jury trial; and appealability. Those cases have involved a wide range of substantive contexts, including mass disasters, product defects, toxic substances, antitrust, security frauds, consumer deception, consumer financing, RICO, mail fraud, wire fraud, Holocaust claims, and professional responsibility. This experience includes oral argument before the United States Supreme Court, every United States Court of Appeals, numerous United States District Courts, and a number of state trial and appellate courts, including New York.

5. I have also been the host of several award-winning television programs that promoted public understanding of the law.

6. My resumé, including a list of my publications, is attached hereto as Exhibit A.

7. I am being compensated at my usual hourly rate.

8. I have reviewed the Verified Petition submitted by the Office of the Attorney General (the "OAG") in the above-captioned matter, along with the memoranda and exhibits submitted in support and opposition thereto. I have also reviewed the Decision and Order in this matter, Dkt. No. 45 (Feb. 21, 2020). I have familiarized myself with this matter sufficiently so that I can give the opinions stated below.

9. I am not a member or political supporter of the NRA, and personally believe in reasonable gun control. I offer my expert opinion in this matter because I believe the Court's Decision offends fundamental tenets of civil procedure and due process. Moreover, it threatens to impair and diminish the attorney-client privilege and work product/trial preparation privileges, which are among the most sacrosanct protections afforded to litigants by New York law. As I have written elsewhere: "the policy protecting privileged communications simply is too strong to

allow subpoenas to undermine it." 9A Wright & Miller, Federal Practice and Procedure: Civil 3d § 2458 (2008). The Decision is wrong, dangerous, and invites the unwelcome interference of political bias and other illicit motivations into our judicial system. It should be reconsidered or, if necessary, overruled.

10. In particular, it is my opinion that the relief granted by the Decision contravenes the statutory scheme of the Civil Practice Law and Rules and is a radical departure from that scheme without any precedent. This is especially so given my opinion that the OAG petition was—at best—premature under CPLR § 2308. Moreover, the NRA alleged reasonable expectations of confidentiality in its dealings with Ackerman McQueen, Inc. and Mercury Group, Inc. (collectively, "AMQ") that are consistent with "party-representative" relationships repeatedly held by courts to preserve attorney-client privilege in other situations. The NRA should be given the opportunity to review the documents at issue and assemble its privilege log.

II. CPLR § 2308 DOES NOT EMPOWER THE COURT TO PROHIBIT THE NRA'S REVIEW OF AMQ'S DOCUMENTS, NOR TO NULLIFY ANY OF THE NRA'S CONTRACTUAL RIGHTS.

A. Background Regarding CPLR § 2308.

11. Compared to predecessor provisions in the New York Civil Practice Act, CPLR § 2308 unifies the procedures for enforcing different types of subpoenas and punishing disobedience thereof. What results is a discretely drawn device for: (i) eliciting documents, or testimony, which a subpoena seeks; and (ii) imposing sanctions on parties who "refuse" to comply. *See* N.Y. CPLR § 2308 (McKinney). Trial courts in New York have broad inherent discretion to manage cases pending before them, and this discretion permeates proceedings under CPLR § 2308(a), which governs judicial subpoenas. Therefore, for reasons of judicial economy, a court ruling on a § 2308(a) petition may take the opportunity to address other matters in the same case that are implicated by the subpoena or that would be sensibly resolved at the same time. However, standing alone, CPLR § 2308 is a narrow, special-purpose tool: it authorizes a court to cause

documents or information to be furnished; it does not grant or deny other forms of relief or purport to interfere or diminish established substantive rights, public policies, or privileges.

12. Accordingly, courts strictly construe the range of remedies that may be imposed pursuant to a CPLR § 2308 petition, holding that the specific penalties prescribed by statute for disobedience or noncompliance with a subpoena *duces tecum* are exclusive. *See Johnston v. City of New York*, 281 A.D. 1023 (1st Dep't 1953), *aff'd*, 306 N.Y. 947 (1954).

13. It is axiomatic that a court compelling compliance with a subpoena pursuant to CPLR § 2308(b) may not impose burdens on the subpoena recipient that are additional to, or different from, those that could lawfully be prescribed by the subpoena or ordered as statutory authorized penalties.

14. The above-described limitations on CPLR § 2308(b) are consistent with the diversity of situations to which the statute applies. Section 2308(b) provides a mechanism for court-ordered compliance not only with investigative and administrative subpoenas, but also those issued in private arbitrations. If the statute provided license for courts to explore ancillary substantive disputes beyond compliance with a subpoena, courts could intrude upon matters pending before other tribunals.

15. To obtain relief under CPLR § 2308(b), the petitioner must show at a minimum: (i) that a valid, duly authorized subpoena was issued; (ii) that documents exist that are responsive to it; and (iii) that the subpoenaed person has failed or refused to comply. In cases in which any one or more of these elements are not satisfied, courts either dismiss CPLR § 2308(b) petitions on their merits or for lack of standing. *See, e.g.*, *Lynch v. Office of Labor Relations of City of New York*, 21 A.D.3d 831, 831 (1st Dep't 2005) (CPLR § 2308(b) petition properly dismissed for lack of ripeness, when relevance of disputed documents had not been established); *Maragos v. Town of Hempstead Indus. Dev. Agency*, 174 A.D.3d 611, 614 (2d Dep't 2019) (when subpoenaed officials claimed they lacked responsive records, petitioner "failed to adequately allege that the Town 'failed to comply' with the subpoenas," and CPLR § 2308(b) petition was properly dismissed on its merits).

16. Transparency and notice to affected parties are core animating principles of the CPLR. Given the sequence of evets in this matter, it thus does not appear that any "disobedience" or "refusal" as meant by CPLR § 2308 has occurred.

B. <u>The Record Negates AMQ's Failure or Refusal to Comply With the Subpoena.</u>

17. In this case, my review of the record leads me to understand that AMQ made an initial, timely production of documents in response to the OAG's subpoena, after which the OAG instructed AMQ to forbear from future productions if the documents would be disclosed to the NRA. Strikingly, the record in this proceeding discloses no impediment to the OAG's receipt of documents captured by its subpoena—other than the OAG's instruction that Ackerman stop producing documents until the NRA waives its contractual rights. CPLR § 2308, and analogous motion-to-compel devices under other state and federal rules, seek to redress a very specific risk: the risk that a subpoena recipient will flout its obligations by withholding documents or information. The record does not demonstrate any such risk in this case. As such, it is my opinion that the Petition was defective and premature. It does not appear that any "disobedience" or "refusal" within the meaning CPLR § 2308 occurred.

18. When the subpoena recipient's "failure" to produce documents occurs at the direction of the issuer of the subpoena, it is my opinion that no standing exists for a special proceeding under CPLR § 2308(b). The Decision's contrary interpretation of CPLR § 2308 would allow a party to contrive standing in a wide variety of situations, simply by instructing the subpoena recipient to cease producing documents until some ancillary condition can be met. The issuing party might resort to such gamesmanship in order to forum-shop, or gain a second opinion, with regard to matters properly pending before an administrative or arbitral tribunal—or matters already addressed by the legislature when it delimited the statutory authority to issue the subpoena.

C. <u>The Relief Granted by the Decision Exceeds The Exclusive Remedies Available for Subpoena Noncompliance Under CPLR § 2308.</u>

19. For the reasons discussed above, the statutory scheme encompassing CPLR § 2308(b) favors discrete, narrowly tailored relief of the type directly specified in the Civil Practice Law and Rules or the statute authorizing the relevant subpoena. If the OAG could establish standing, CPLR § 2308(b) would empower the Court to order AMQ to produce documents. However, CPLR § 2308(b) does not authorize the Court to prohibit AMQ from disclosing its production to the NRA; nor does it restrain the NRA from seeking to access the documents by lawful means, including by asserting its common-law or contractual rights; it certainly does not authorize the potential violation of established privileges. The Petition fails to provide any justification or articulate any risk to the OAG investigations from allowing the NRA from exercising its privilege, and none is apparent given that the NRA only wishes to identify and log privileged matter.

20. Under CPLR § 2308, the Court had the power to compel AMQ to produce documents—but not the power to prohibit the NRA from identifying the documents incident to production, so long as the NRA's "preview" did not interfere with timely subpoena compliance. The Decision can even be read to suggest that the NRA be barred from reviewing its own privileged documents, and preparing a privilege log, to assist the court *in camera*—a baffling arrangement that offends both well-established principles of civil procedure, orderly process, and common sense.

III. THE NRA ALLEGES EXPECTATIONS OF CONFIDENTIALITY IN ITS DEALINGS WITH ACKERMAN THAT ARE CONSISTENT WITH "PARTY-REPRESENTATIVE" RELATIONSHIPS ROUTINELY FOUND TO PRESERVE PRIVILEGE.

21. As Professor Wigmore points out in his treatise, a "client's freedom of communication requires a liberty of employing other means than his own personal action." 8 Wigmore, Evidence, McNaughton rev. 1961, § 2317, p. 618. Therefore, the common law extends the attorney-client privilege to communications from the client via an agent—often dubbed a "party representative." *See, e.g.,* Comment e, A.L.I., Restatement (Third) of the Law Governing Lawyers, 2000, § 70. Over the course of the twentieth century, as litigation became increasingly

document-intensive and the privilege was claimed routinely by corporations, tensions and divisions arose regarding the scope of the "party representative" designation, including whether it encompassed merely the corporate "control group" or, by contrast, all corporate employees and certain third parties such as contractors.

22. In *Upjohn Co. v. United States*, 449 U.S. 383 (1981), the Supreme Court, in an opinion by Justice Rehnquist, appeared to reject the "control group" test significantly in favor of a broader application of the privilege. Subsequent decisions and commentaries have attempted to apply the privilege to persons whose legitimate function as corporate decision-makers or "representatives" required their involvement in privileged communications, while preventing corporations from expediently hiring witnesses as agents in order to "paper up" the privilege. In New York, these instincts have found expression in two privilege-waiver-exception doctrines that sometimes overlap: the waiver exception for a third-party "employee or agent," and the waiver exception for a third party who is the "functional equivalent" of an employee.

23. The elements of, and caveats to, both doctrines vary, but consistent considerations include: (i) whether the client has a reasonable expectation of confidentiality; and (ii) whether the involvement of the third party facilitated[1] achievement of a legal or high-level business-strategy objective, rather than serving to shield communications having nothing to do with a party's analysis or assertion of its legal rights. The analysis is, naturally, fact-sensitive and functional, rather than formal. Thus, for example, a public relations firm may serve as a privileged "party representative" if it must coordinate with corporate counsel to avoid libel or other legal exposure

[1] A number of federal cases within the Second Circuit, including those collected and cited in *Gottwald*, 58 Misc.3d at 629-636, insist that the agent's involvement be "necessary" to the transmittal of legal advice. Several of these cases, referencing *People v. Osorio*, 75 N.Y.2d 80 (1989), analogize the agent's role to that of a translator or interpreter. Although the same caution expressed in *Upjohn* counsel against expanding the privilege to anyone and everyone who executes an NDA, it is my opinion that the "necessity" prong employed in some cases (and the Decision) is too restrictive. Rather, a better formulation is the one above: the agent's involvement should be necessary to *facilitate* the achievement of an important legal or strategic goal. That is most consistent with the policies underlying the attorney-client privilege. For example, a Chief Executive Officer should feel free to consult jointly with his firm's lawyers and its publicists regarding crisis communications, an outcome that even federal courts deploying the "necessity" prong acknowledge. *See, e.g., In re Copper Market Antitrust Litig.*, 200 F.R.D. 213, 219-220 (S.D.N.Y. 2001). The temptation to eviscerate the attorney-client privilege by declaring the privilege to be wholly waived whenever an agent other than a "translator" is present is deeply concerning and much too limiting, particularly when issues relating to speech or public communication are involved.

or engage in constitutional protected speech, but not if the purpose of the communication is merely to optimize "spin." *See Gottwald v. Sebert*, 58 Misc.3d 625, 636-37 (N.Y. Sup. Ct. 2017).

24. In this case, the NRA alleges that AMQ served as one of its closest, most trusted collaborators for more than thirty years on matters of strategic importance, entered into contracts on its behalf, represented it in public fora and business transactions, and produced public communications that needed to be calibrated to reflect legal considerations, such as donor-privacy, intellectual property, and Second Amendment matters. It is, therefore, quite conceivable that situations arose when AMQ employees met the "party representative" or "functional equivalent" test, particularly if certain AMQ employees were "dedicated" to NRA matters full time.

25. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed this 6th day of May 2020.

Arthur R. Miller