

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,

INDEX NO.: 451625/2020
Motion Seq. No. 23

Plaintiff,

-against-

THE NATIONAL RIFLE ASSOCIATION OF
AMERICA, WAYNE LAPIERRE, WILSON
PHILLIPS, JOHN FRAZER, and JOSHUA
POWELL,

Defendants.

and

THE NATIONAL RIFLE ASSOCIATION OF
AMERICA,

Defendant-Counterclaim Plaintiff,

-against-

LETITIA JAMES, ATTORNEY GENERAL OF
THE STATE OF NEW YORK, IN HER
OFFICIAL AND INDIVIDUAL CAPACITIES,

Plaintiff-Counterclaim Defendants.

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S ORDER TO SHOW
CAUSE TO COMPEL DEFENDANT NATIONAL RIFLE ASSOCIATION AND
NONPARTY CHRISTOPHER COX TO COMPLY WITH SUBPOENA DUCES TECUM**

William A. Brewer, III
Svetlana M. Eisenberg
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David J. Partida
BREWER, ATTORNEYS & COUNSELORS

**ATTORNEYS FOR DEFENDANT
THE NATIONAL RIFLE ASSOCIATION
OF AMERICA**

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The National Rifle Association of America (the “NRA”) respectfully submits this memorandum of law in opposition to Plaintiff New York Attorney General Letitia James’ (“OAG”) motion to compel the NRA and nonparty Christopher Cox (“Cox”) to produce confidential arbitration materials in response to the OAG’s subpoena duces tecum directed to Cox.

I. **STATEMENT OF FACTS**

The International Institute for Conflict Prevention and Resolution (“IICPR”) is an international provider of alternative dispute resolution services.¹ Its arbitration rules provide that arbitrations conducted under its auspices are “confidential” “except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law.”² In fact, to assure arbitration participants confidentiality, the IICPR rules impose a duty upon the arbitration participants and the arbitrator to maintain confidential not only materials directly related to the arbitration proceedings, such as pleadings, briefing, orders or awards, but also discovery exchanged by the parties in the arbitration.

In 2019, Cox and the NRA entered into an employment agreement in which they agreed that certain disputes between them would be resolved in a confidential Virginia-sitused IICPR arbitration pursuant to its rules, including the confidentiality rule quoted above. In the agreement, the parties agreed that their rights under the agreement would be determined under Virginia law. Subsequently, a dispute between Cox and the NRA arose, which, as prescribed in

¹ Affirmation of Svetlana M. Eisenberg, dated December 22, 2021, in opposition to Plaintiff’s Order to Show Cause to Compel Defendant NRA and Cox to comply with NYAG’s subpoena duces tecum, Paragraph (hereinafter “Affirmation”).

² Rule 18 of Non-Administered IICPR Arbitration Rules (Effective March 1, 2018) (Affirmation Exhibit 1).

the agreement, they resolved through a confidential IICPR arbitration in accordance with the IICPR rules.

In the context of this lawsuit against the NRA and other defendants, the NYAG served on Cox—a third party—a subpoena, which, among other things, calls for materials related to the confidential arbitration. Although the subpoena calls for other categories of documents, Cox—through counsel—indicated that his draft production consists solely of documents related to the arbitration, including documents related to its various stages and discovery exchanged in the arbitration.³

II. **PROCEDURAL POSTURE**

In a series of meet and confer meetings, the NRA explained to the NYAG its position that, given the authorities cited below, the materials gathered for production by Cox are not discoverable under the IICPR rules and New York law. The NRA made clear that it does not object to Cox's production of records that were produced to or by him in the arbitration to the extent those records are independently responsive to a different part of the subpoena. In other words, the NRA agrees that a document that is otherwise discoverable does not become shielded from discovery by virtue of having been produced in the confidential arbitration. In an effort to further narrow the disputed issues here, the NRA recently also agreed to not object to the production of historical underlying documents even though Cox tagged them for the production merely because they constitute discovery exchanged in the arbitration. As a result, the materials at issue in connection with the NYAG's motion are materials pertaining to the arbitration, including any pleadings, disclosures, arbitrator rulings, and documents in connection with any resolution of the arbitration.

³ Affirmation at Paragraph 11.

III. **ARGUMENT**

A. Consistent with a well settled public policy, courts have categorically protected materials from confidential IICPR and other arbitrations from disclosure from civil discovery disclosure.

In New York, confidential arbitration materials are not discoverable pursuant to a CPLR Article 31 subpoena. *See Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 41 A.D.3d 362, 365 (1st Dep't 2007) ("The motion court also properly rejected the Special Referee's recommendation that respondent produce documents and testimony from a confidential arbitration proceeding in Belgium, to which Occidental was not a party. . . . Given the important public interest in protecting the rights of parties who submit to confidential arbitration, the court correctly concluded that no aspect of the [confidential] arbitration, to which Occidental is not a party, may be subject to compulsory disclosure in this litigation."); *Transport Workers Union, Local 100 v. New York City Transit Auth.*, 57 A.D.3d 684, 684 (2d Dep't 2008) (protecting arbitration confidentiality and discouraging judicial interference with the process or outcome). The importance of maintaining confidentiality of arbitration is grounded in the fact that "[c]onfidentiality is a paradigmatic aspect of arbitration." *Pasternak v. Dow Kim*, 2013 WL 1729564, *3 (S.D.N.Y. 2013) ("[T]he fact that [F.R. Civ. P. 45 subpoena] seeks testimony and other materials from a confidential arbitration is a barrier that cannot be overcome.") (citing *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir.2008)). Because of this "bedrock principle," "[c]ourts have consistently observed that there is an 'important public interest in protecting the rights of parties who submit to confidential arbitration.'" *Id.* (quoting *Occidental Gems, Inc.*, 41 at 365. Indeed, the Second Circuit has further warned against courts accepting generalized attacks on arbitration confidentiality because they go against the current federal law favoring arbitration. *See, e.g., Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008) (citing *Gilmer v. Interstate/Johnson Lane*

Corp., 500 U.S. 20, 26 (1991)) (“Confidentiality clauses are so common in the arbitration context that [an] attack on the confidentiality provision is, in part, an attack on the character of arbitration itself. The Supreme Court has warned against such generalized attacks on arbitration.”).

Here, the arbitration between Cox and the NRA was confidential. The IICPR rules pursuant to which the arbitration was conducted unequivocally state that, unless narrowly drawn exceptions apply, the arbitration is confidential:

Unless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party. To the extent possible, any specific issues of confidentiality should be raised with and resolved by the Tribunal.⁴

The meaning of IICPR’s confidentiality rule and its exceptions was construed recently in *Pasternak*. There, the court considered the above-quoted rule, but denied a litigant’s motion to compel compliance with his F.R. Civ. P. 45 subpoena for materials related to the arbitration. The court observed: “*Nothing in the rules* or any case law of which the Court is aware permits a non-party to a confidential arbitration to obtain materials from that arbitration.” 2013 WL 1729564, *4(emphasis added). Relying in part on the First Department’s decision in *Occidental Gems*, the court stated that the “subpoena, if enforced, would effectively require the Court to ignore the rules that governed the [IICPR] Arbitration.” *Id.* (also stating “The Court is not willing to do so.”)

B. The Authorities cited by the NYAG are non-binding and non-persuasive

The authorities the NYAG cites are inapposite. Specifically, *Peskoff v. Farber*, an opinion by a Magistrate Judge in the United States District Court for the District of Columbia had nothing to do with arbitrations, let alone arbitrations that are confidential. Rather, the court adjudged

⁴ Rule 18 of Non-Administered IICPR Arbitration Rules (Affirmation Exhibit 1).

discoverability of information in the context of a confidential settlement agreement. As a result, unlike here, the “bedrock principle” of arbitration confidentiality, which is recognized by state and federal courts in New York, was not at issue. Similarly, in *Veleron Holding, B.V. v. Stanley*, No. 12 CIV. 5966 CM, 2014 WL 1569610, at *1 (S.D.N.Y. Apr. 16, 2014), the issue was the sealing of records and pleadings filed in the litigation after a party pointed out that the same subject matter was also at issue in a confidential arbitration. The court, in *Veleron*, held: “[A] private agreement to arbitrate a dispute does not cloak documents and other evidence relevant to that dispute with a ‘shield of invisibility,’ or immunize them either from public disclosure in connection with other, related proceedings or from publication in connection with those other proceedings.” *Id.* The NRA agrees. That is why, from day one, the NRA advised the NYAG that it has no objection—subject to its review for privileges and First Amendment redactions—to Mr. Cox’s production of historical underlying documents exchanged in the arbitration. Similarly, *Kamyr, Inc. v. Combustion Eng’g, Inc.*, 554 N.Y.S.2d 619, 620 (1st Dep’t 1990), by its terms, and as the NYAG herself concedes, applies only to the “evidentiary material” in the arbitration. *See* OAG’s Letter to Hon. Joel M. Cohen, Oct. 7, 2021 at 2 (“The NRA seeks to immunize from disclosure documents from its arbitration with Mr. Cox. Exhibit C. But “[e]videntiary material at an arbitration proceeding is not immune from disclosure” (citing *Kamyr*)).

Lastly, *People v. Ackerman McQueen*, 2020 WL 1878107 (Sup. Ct. N.Y. Cnty. Feb. 21, 2020), upon which the OAG also relies is similarly inapposite. That case dealt with an investigative subpoena issued under a different statute having nothing to do with confidential arbitration materials. The non-disclosure mandate arose from a commercial agreement between the NRA and its longtime public relations and crisis management consultant Ackerman McQueen. The entities had not participated in an arbitration, and the records sought by the NYAG in that

subpoena did not require the court to consider concerns about arbitration confidentiality, which motivated the holdings the NRA cites above. In addition, the court in *Ackerman* held that the NDA did not allow the NRA to pre-review the subpoenaed documents. *Ackerman*, 125 N.Y.S.3d at 838. Here, the question is not about pre-review. The question in this case is whether confidential documents stemming from a confidential arbitration are discoverable in the first place. Moreover, the NRA is appealing that court's interpretation of the relevant statute,⁵ which, in any event, does not constitute binding precedent on this Court.

C. The NRA has not waived any claim to confidentiality.

“In order to establish waiver under New York law, defendant must show intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it.” *O'Neil v. Ratajkowski*, No. 19 CIV. 9769 (AT), 2021 WL 4443259, at *12 (S.D.N.Y. Sept. 28, 2021) (citing *Flo & Eddie, Inc. v. Sirius XM Radio Inc.*, 80 F. Supp. 3d 535, 541 (S.D.N.Y. 2015)).

Here, there is no evidence of a knowing or voluntary relinquishment of any right. No waiver arises from the fact that the NRA and Cox jointly agreed to share pleadings from the confidential arbitration with counsel for the Unsecured Creditors' Committee (the “UCC”) in the NRA's chapter 11 proceeding. Notably, it was the UCC's professionals, not the UCC, who asked to see copies of the operative arbitration pleadings.⁶ And when the NRA asked Cox whether he had any objection to the NRA's sharing the pleadings with the UCC's professionals, he advised that he did not.⁷ (The OAG's statement in its brief (at page 3) that “the NRA required Mr. Cox to

⁵ *People v. Ackerman McQueen*, Case No. 2021-00330 (Appellate Division, First Department)..

⁶ Affirmation at Paragraph 6.

⁷ *Id.* .

provide all the arbitration materials to [UCC]” is inaccurate, as the NRA previously advised the NYAG and which Cox's counsel confirmed.⁸⁾

Moreover, the Committee’s professionals worked pursuant to the UCC’s Bylaws, which, like a protective order, strictly limited use of the shared information. In fact, when the NRA shared the information, it understood that the professionals would not share the pleadings even with the members of the UCC.⁹ In any event, the sharing of the records with the UCC’s professionals occurred in or around April 2021.¹⁰ The arbitration did not conclude until August 2021. Therefore, even if the disclosure to the UCC’s professionals effected waiver as to the records shared with them—which it did not—that waiver does not extend to the records filed and generated after the April date. Similarly, that the NRA produced in its chapter 11 proceeding a document from the arbitration cannot be used as a basis for the NYAG’s assertion that the NRA waived its rights under the IICPR rules as to the rest of the arbitration docket.

D. The NRA has the right to review documents prepared by Cox for production for privilege and First Amendment redactions/issues.

The NRA's review of Cox’s draft production to date has identified multiple documents disclosing the identity of NRA donors that must be redacted before the documents are produced to the NYAG..¹¹ The NRA asked Mr. Cox’s counsel whether he or they conducted an independent review of his draft production for such confidential, nondiscoverable and sensitive information.¹² Cox’s counsel stated that they had not and, instead, were relying on the NRA to do so.¹³ The NRA

⁸ Affirmation at Paragraph 7.

⁹ Affirmation Paragraph 8; see also Affirmation Exhibit 2 (excerpt of the UCC’s Bylaws regarding restrictions on use and dissemination of documents shared with the UCC and its professionals).

¹⁰ Affirmation Paragraph 9.

¹¹ Affirmation Paragraph 15.

¹² *Id.*

¹³ *Id.*

is reviewing the underlying historical documents produced in the arbitration and prepared by Cox for production and intends to complete that review shortly.

E. The Court should permit Cox to file under seal and redact materials filed with the Court to protect the confidentiality of the Arbitration.

For the reasons set forth above, the NRA respectfully urges the Court to grant Cox's request for permission to file certain documents under seal and/or in redacted form in order to protect, on the basis of IICPR's confidentiality rule, references to developments in the confidential arbitration.

**IV.
CONCLUSION**

For the reasons set forth above, the Court should deny the NYAG's motion to compel.

Dated: December 22, 2021

Respectfully submitted,

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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 memorandum of law in opposition to the OAG's motion to compel the NRA and nonparty Christopher Cox to produce documents in response to the OAG's subpoena duces tecum directed to Mr. Cox. 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 2,270 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.

By: /s/ Svetlana M. Eisenberg _____
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