

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,

Plaintiff,

v.

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

Defendants.

Index No. 451625/2020
(Cohen, J.)

**THE ATTORNEY GENERAL'S MEMORANDUM OF LAW IN OPPOSITION TO THE
NRA'S MOTION FOR REVIEW OF THE SPECIAL MASTER'S RULING
REGARDING THE DISCOVERABILITY OF CERTAIN REDACTED DOCUMENTS**

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I.**PRELIMINARY STATEMENT**

Plaintiff People of the State of New York, by Letitia James, Attorney General, respectfully submits this memorandum of law in opposition to the motion of Defendant National Rifle Association of America (“NRA”) for review of the Special Master’s ruling that Aronson LLC (“Aronson”), the NRA’s outside independent auditor and tax preparer, should produce certain documents in unredacted form (“the Documents”). The Documents appear to be emails containing communications between the NRA and its outside tax counsel, which were then shared with Aronson. This is a second appeal by the NRA of a ruling by the Special Master concerning the NRA’s assertion of privilege over documents maintained by its outside auditor. The first appeal concerns documents that the Special Master determined were improperly withheld in their entirety, and this appeal concerns the Special Master’s ruling that other documents were improperly redacted. The legal issues raised are largely identical; for that reason, Plaintiff asserts similar arguments here and respectfully incorporates our briefing in the first appeal.

The Court should uphold the Special Master’s determination that Aronson must produce the Documents. As the Special Master correctly ruled, certain communications were not privileged, and any privilege that may have attached to any underlying communication was waived once the Documents were provided to Aronson.

II.**FACTUAL BACKGROUND****A. Aronson is retained as an independent outside auditor and tax preparer/advisor.**

The Plaintiff respectfully refers the Court to and incorporates herein the Factual Background provided in Motion No. 26, NYSCEF 647. As described there in more detail, the

NRA engaged Aronson as an independent auditor and to assist in the preparation of its annual IRS Information Return, the Form 990, for fiscal year 2019, and to assist in preparing and reviewing its Form 990 for fiscal year 2020. NYSCEF 633, 634. The NRA, as a regulated charity that is chartered in and solicits contributions in New York, must file annually with the Office of the Attorney General (“OAG”) a copy of its Form 990 and its audited financials, signed by an independent auditor. The Form 990 provides the IRS, state regulators, and the public with information and transparency regarding a not-for-profit entity’s finances, activities, and governance, and promotes compliance with tax and other legal requirements relevant to tax-exempt charitable organizations.¹

Neither the NRA nor its outside counsel engaged Aronson to assist in the provision of legal advice to the NRA, and the NRA has not provided any evidence that Aronson was involved in any such provision. To the contrary, the NRA and its outside counsel took steps to exclude Aronson from deliberations regarding 990 disclosures until legal decisions had been reached. Once decisions were finalized, the NRA repeatedly shared those communications with the Aronson tax and audit partners. NYSCEF 647.

B. The Special Master’s Ruling and the Current Dispute

On April 12, 2022, the Special Master ruled that certain documents being withheld in their entirety by Aronson, at the direction of the NRA, should be produced because any privileges had been waived. NYSCEF 632. On April 18, 2022, the NRA filed its first appeal of the Special Master’s ruling concerning the NRA’s privilege assertions over Aronson documents, and on May 4, 2022, the Plaintiff filed its response to the appeal. That motion is pending. *See*

¹ *See* <https://www.irs.gov/charities-non-profits/form-990-resources-and-tools>.

Mot. Seq. No. 26. On May 12, 2022, the Special Master made a related ruling, in which he reaffirmed his prior order and extended his ruling to find that certain documents were improperly redacted due to erroneous assertions of privilege. NYSCEF 663. The Order included a spreadsheet logging the 82 documents at issue and providing particularized reasons for his decisions (the “Spreadsheet”). In all, the Special Master determined that 68 documents were improperly withheld in whole or part and should be produced. With respect to the documents withheld in their entirety, the Special Master held that:

Throughout the development of the tax strategy, the NRA and its counsel excluded Aronson, the NRA’s accountants and auditors (not a privileged person), thereby protecting the privilege. Having formulated a tax strategy that contained the legal guidance received, the NRA forwarded the results of the work along with privileged communications from which it had shielded Aronson during development of those results. Disclosure of the latter to Aronson has resulted in waiver and those documents shall be produced.

NYSCEF 663 at 203.

With respect to redacted documents, the Special Master found that “The NRA also seeks to withhold non-privileged business records it provided to Aronson replies to auditor inquiries and documents prepared by Aronson or collected by it in connection with Aronson’s tax preparation and audit work” and ordered that those documents be produced in unredacted form. *Id.* at 3 (internal citations omitted).

On the Spreadsheet, the Special Master provided document-by-document explanations, noting that certain documents were, for example, “Privileged then shared,” “Form 990 work shared” and “Ordinary business communications re: tax.” The Special Master correctly held that “if the information communicated privately to the attorney was intended to be conveyed to others, such as in a tax return, the general rule is that no privilege will attach.” *Id.* at 2 (citing

United States v. Bohannon, 628 F Supp 1026, 1029 [D Conn] [Tax Ct.], [affd 795 F 2d 79 \[2d Cir 1985\]](#)).

The NRA attached to its motion a version of the Spreadsheet with highlighting, indicating that it appeals the Special Master's determination regarding 31 of the redacted documents. NYSCEF 663.

III.

ARGUMENT

A. The Court should uphold the Special Master's decision.

The Special Master, having reviewed the parties' submissions and reviewed the Documents *in camera*, correctly applied the law in determining that certain of the Documents must be disclosed. The trial court has discretion in its review of the Special Master's ruling. *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 11 N.Y.3d 843, 845 (2008); *accord GoSMILE, Inc. v. Levine*, 112 A.D.3d 469, 470 (1st Dep't. 2013).

The burden of establishing that the documents sought are covered by a privilege rests on the proponent of the privilege. *Spectrum Sys. Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377 (1991). To the extent that any underlying communications in the Documents may have been privileged – a predicate the NRA has failed to establish – any privilege was waived when the NRA knowingly provided documents or forwarded communications to Aronson. The NRA has failed to establish any basis for overturning the Special Master's determinations.

i. The NRA has failed to establish that the Documents are work product or that any such claim to protection was not waived.

The work product protection provided by CPLR 3101(c) does not apply. The NRA failed to establish that certain of the Documents are work product, and for others, that any such

protection was not waived when the NRA intentionally and repeatedly forwarded the communications to Aronson.

The Special Master ruled that certain documents were not protected to begin with, including descriptions such as “ordinary business communications re: tax,” “Auditor note to file,” or “Lawyers reply to auditor letter.” That ruling should be upheld. The NRA failed to meet its burden of establishing that those documents are covered by the work product protection. The “absolute immunity of work product . . . should be limited to those materials which are uniquely the product of a lawyer’s learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy.” *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211 (1st Dep’t 1980). The privilege is narrowly construed. *Spectrum*, 78 N.Y.2d at 377. The NRA has provided no evidence that the Special Master erred when he determined that certain documents were not protected.

To the extent any protection did attach, it was waived when high-ranking NRA personnel forwarded the communications to Aronson, as the Special Master correctly ruled. The NRA’s practice of forwarding communications to its outside tax and audit professional was repeated and intentional. *See e.g.* NYSCEF 663 at 5, Docs. 25, 33² (NRA Finance Executive Sonya Rowling forwarding communications to Aronson tax partner); Docs. 5, 6, 43 (NRA Finance Executive Rick Tedrick forwarding communications to the Aronson tax partner, the tax and audit partners, and to the ERISA partner, respectively).

Work product protection is waived “when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality.” *Bluebird Partners v. First Fid. Bank*, 248 A.D.2d 219, 225 (1998). The NRA’s

² The “Doc” number corresponds to the number in Column B of the Special Master’s Spreadsheet. NYSCEF 663 at 5-6.

repeated reliance on *Bluebird* in support of its position that the NRA did not waive its privilege when it shared communications with Aronson is misplaced. In *Bluebird*, the Court was reviewing whether legal bills relied upon for reimbursement claims could be produced in redacted form. *Id.* The Court found that there was no waiver where the bills had been shared by a predecessor trustee with a successor trustee. *Id.* That is not the case here, where communications and documents were shared with an outside tax preparer that had otherwise been purposefully walled off from communications to protect the privilege. NYSCEF 647 at 5; NYSCEF at 663 at 2. As the Special Master found based on his *in camera* review, “[h]aving formulated a tax strategy that contained the legal guidance received, the NRA forwarded the results of the work along with privileged communications from which it had shielded Aronson during development of those results. Disclosure of the latter to Aronson has resulted in waiver and those documents shall be produced.” This process is illustrated in the documents cited above, all of which date from the November 2020 time period leading up to the NRA’s filing of its 2019 990 IRS return. In these communications and others like them, the NRA intentionally shared the communications with its outside tax preparer, and was thus clearly acting in a manner “inconsistent with a desire to maintain confidentiality” and those documents must be produced.

Further, the NRA has failed to support its assertion that Aronson was “adjunct to the lawyer’s strategic thought process.” NYSCEF 670 at 7, n. 1. This is not a case in which accountants were engaged to assist in litigation or were otherwise acting as a “translator” to assist counsel in the provision of legal services. *See U.S. v. Kovel*, 296 F2d 918 (2d Cir. 1961); *People v. Osorio*, 75 N.Y.2d 80 (1989). The record shows that Aronson was not involved in the provision of legal advice generally or in connection with the Documents at issue. And the law is

clear that New York does not otherwise recognize an accountant-client privilege. *See First Interstate Credit All., Inc. v. Arthur Andersen & Co.*, 150 A.D.2d 291 (1st Dep’t 1989).

Further, Aronson’s role as an independent tax preparer and auditor places it in a position that voids any assertion of common interest or the equivalent. “[W]here the third party to whom the disclosure is made is not allied in interest with the disclosing party or does not have litigation objectives in common, the protection of the doctrine will be waived.” *Medinol, Ltd. v. Bos. Sci. Corp.*, 214 F.R.D. 113, 115 (S.D.N.Y. 2002) (emphasis in original). As the Court stated emphatically in *Medinol*, “as has become crystal clear in the face of the many accounting scandals that have arisen as of late, in order for auditors to properly do their job, they *must* not share common interests with the company they audit.” *Id.*, *Bank of America N.A. v. Terra Nova Insur. Co.*, 212 FRD 166, 170 (S.D.N.Y. 2022) (accord); *AMP Servs. Ltd. v. Walanpatrias Found.*, 2008 NY Slip Op 33217(U), ¶ 4 (1st Dep’t 2008) (same).

ii. The NRA has not established that the documents are covered by the trial preparation privilege, and if they were, it also waived that privilege.

The Documents are also not covered by the trial preparation privilege. Trial preparation privilege protects materials “prepared in anticipation of litigation or for trial by or for another party, or by or for that other party’s representative (including an attorney . . .).” CPLR 3101(d)(2). Such materials are protected from disclosure absent a finding of “substantial need.” *Id.*

It is only “material prepared for litigation” that warrants the qualified protection found in CPLR 3101(d)(2). *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211 (1st Dep’t 1980) (holding that a list of names and addresses of witnesses was not “material prepared for litigation”). “[W]hen an item has been secured or prepared with the mixed motivation of both internal business purposes as well as potential litigation, the item does not partake of [CPLR 3101(d)] immunity

and, therefore, is disclosable.” *Pinn v. Supermarkets General Corp.*, 104 Misc.2d 1112, 1115 (Dist. Ct. Nassau Cnty. 1980) (citing *Kandel v. Tocher*, 22 A.D.2d 513 (1st Dep’t 1965); *see also Mavrikis v. Brooklyn Union Gas Co.*, 196 A.D.2d 689, 690 (1st Dep’t. 1993) (report prepared for multiple motivations not immune from discovery). The NRA has not established that documents provided to its outside tax preparer during the preparation of a mandatory tax filing – to be submitted in the ordinary course of business to federal and state governments – were prepared solely in anticipation of any litigation, and not for the sole or “mixed motivation” of submission of the Form 990. On this ground alone, the assertion of privilege fails.

However, even if the documents were prepared in anticipation of litigation, the OAG has a substantial need for the Documents and discovery of the subject matter under CPLR 3101(d)2, which is not available from an alternate source. Among the core issues in this matter are improper spending by NRA executives, the breakdown of internal controls at the organization that permitted such abuses, and the false information provided on filings regarding that spending and the internal controls. Defendants have asserted, among other things, that the spending was proper, or in the alternative that certain categories of improper expenditures have been fully reimbursed and appropriately reported as excess benefit transactions on its Form 990. *See, e.g.*, NYSCEF 629 at 219, 336. The NRA’s process by which it identified excess benefit transactions, including which transactions were included, who provided the information, and who decided what and how the transactions would be reported, is critical to the evaluation of the NRA’s defenses. As such, the Court should determine that the Plaintiff has a substantial need for these documents and order their production.

iii. The NRA waived any attorney-client privilege.

The NRA has not established that the Special Master erred in finding that any attorney-client privileged was waived. It is axiomatic that “a client waives the privilege if a communication is made in confidence but subsequently revealed to a third party. *Id.* (internal quotation marks and citations omitted). *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016)

A limited exception to waiver of attorney-client privilege exists “where the presence of [a] third part[y] is deemed necessary to enable the attorney-client communication and the client has a reasonable expectation of confidentiality.” *Id.* Some New York courts have referred to this as the “agency privilege,” drawn from *United States v. Kovel*, 296 F.2d 918 (1961). *See, e.g., Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc. 2d 99, 110 (Sup. Ct. N.Y. Cnty. 2003). Where, as here, what the NRA sought from Aronson “is not legal advice but only accounting service, ... or if the advice sought is the accountant's rather than the lawyer's, no privilege exists.” *Kovel*, 296 F.2d at 922. There is no evidence that the NRA shared the information with Aronson to facilitate the provision of legal advice. It is undisputed that Aronson was not retained by the NRA's counsel, but directly by the NRA to perform its annual independent audit and assist in the preparation of its Form 990. The NRA has not demonstrated that the NRA's outside counsel and Aronson worked together, much less that Aronson was necessary to or facilitated NRA counsel's provision of legal services. *See People v. Trump*, No. 451685/2020, NYSCEF Doc. No. 302 (Sup. Ct. N.Y. Cnty. Dec. 15, 2020) (holding that communications with outside auditor were not “necessary to [law firm's] provision of legal services,” and thus no privilege attached) (attached at NYSCEF 636 Ex. 5). The agency privilege is inapplicable here.

The NRA's repeated argument that for the exception to apply, there need only be the client's "expectation of confidentiality" (*see* NYSCEF 642 at 12 n.6; NYSCEF 637 at 3; NYSCEF 670 at 9, 10) misstates the relevant law. The law is clear that the communication needs to *facilitate* legal advice. *Ambac*, 27 N.Y.3d at 635-36. The case relied upon by the NRA, *People v. Osorio*, 75 N.Y.2d 80 (1989), also makes clear that the exception, drawing from the federal *Kovel* standard, requires that the communication be made "to facilitate communication" with counsel, not just that it was intended to be confidential. *Osorio*, 75 N.Y.2d at 84; *see also Stenovich*, 195 Misc. 2d at 110 (finding that the respondent's contention that "outside agents maintained the confidentiality of communications" was "not a substitute for respondent's duty to establish facts sufficient to support the privilege and its purported defense to waiver of that privilege").

Finally, to the extent that the NRA intends to rely on an advice of counsel defense in arguing that certain disclosures in the IRS Form 990 were proper, any such communications involving counsel must be disclosed. *Vill. Bd. of Vill. of Pleasantville v. Rattner*, 130 A.D.2d 654, 655 (2d Dep't 1987) ("Where a party asserts as an affirmative defense the reliance upon the advice of counsel, the party waives the attorney-client privilege with respect to all communications to or from counsel concerning the transactions for which counsel's advice was sought.").

In light of the foregoing, the NRA has failed to carry its burden to establish that any attorney client privilege applies here.

IV.
CONCLUSION

The NRA has failed to establish any basis for overturning the Special Master's ruling regarding production of the Documents. The Plaintiff respectfully requests that the Court order the production of the Documents and such other and further relief as the Court deems just and proper.

Dated: May 27, 2022
New York, New York

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Attorney Certification Pursuant to Commercial Division Rule 17

I, Yael Fuchs, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Memorandum of Law in Opposition to the NRA's Motion for Review of the Special Master's Ruling Regarding the Discoverability of Certain Aronson 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 2967 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: May 27, 2022

New York, New York

/s/ Yael Fuchs

Yael Fuchs