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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,	§	
Plaintiff,	§	**INDEX NO. 451625/2020**
v.	§	
THE NATIONAL RIFLE ASSOSICATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	
Defendants.	§	

THE NATIONAL RIFLE ASSOCIATION OF AMERICA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR REVIEW OF THE DECISION BY THE SPECIAL MASTER FOR DISCOVERY PERTAINING TO THE NYAG'S COMMUNICATIONS WITH AN UNIDENTIFIED LAW ENFORCEMENT AGENCY CONCERNING ITS INVESTIGATION OF THE NRA

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I. PRELIMINARY STATEMENT

The NRA files this memorandum of law in support of its CPLR 3104(d) motion for review of the Special Master's ruling dated December 21, 2022. (Exhibit 1.)[1] On that date, he denied the NRA's request for an order to compel the NYAG to produce to the NRA the NYAG's communications with an unidentified law enforcement agency about her office's investigation of the NRA. *Id.* However, there is no basis for the NYAG's decision to withhold these documents from production, and the Special Master identified none. *Id.* As a result, the NRA requests that the Court vacate the Special Master's ruling and order the NYAG to produce the records.

II. BACKGROUND

In April 2019, the NYAG commenced her investigation of the NRA. During the investigation, her office engaged in communications with law enforcement agencies about the investigation. On August 6, 2020, the NYAG filed this action against the NRA. The NRA subsequently served a request pursuant to article 31 of the CPLR asking the NYAG to produce all records related to her office's investigation of the NRA. (*See* Exhibits 4; *see also* Exhibit 5.)

The NYAG produced certain such records to the NRA but refused to produce several others, including her communications concerning the investigation of the NRA with an unidentified law enforcement agency whose identity the NYAG is refusing to reveal on the mere grounds that the NYAG and the agency allegedly intended for the agency's identity to remain confidential. (*See* Exhibits 2, 3, and 8.)

Originally, in her categorical privilege log, the NYAG claimed that the records were immune from production on the grounds of (i) the public interest privilege, (ii) the investigative

[1] References to Exhibits are to exhibits to affirmation of Svetlana M. Eisenberg dated December 29, 2022.

privilege, (iii) the attorney work product privilege, (iv) the qualified privilege afforded to trial preparation material, and (v) the common interest privilege. (*See* Exhibit 2; *see also* Exhibit 3, amended categorical privilege log dated May 25, 2022.)

However, after, in response to the NRA's motion (Exhibit 6), the Special Master ruled on November 29, 2022, that the NYAG must produce these and other records (Exhibit 7),[2] the NYAG moved for reconsideration of that ruling (Exhibit 9). In support of her motion for reconsideration, the NYAG filed a letter brief and an affirmation of Assistant Attorney General Monica Connell. (*See* Exhibits 8 and 9.) In those filings, the NYAG asserted facts in support of her claim of privileges related to the other documents, which are not at issue in this motion. *Id.* However, when it came to her communications about the NRA with the unidentified law enforcement agency—the Communications at issue here—the sole proffer in support of their alleged non-discoverability was a statement in AAG Connell's affirmation that she "underst[ood]" that, when the communications were created, the unidentified law enforcement agency and the NYAG intended for the substance of those communications to remain "confidential." (Exhibit 8 and Exhibit 9). The NYAG claimed—without citing any rule or other law—that these communications were "work product." (Exhibit 8). In other words, the NYAG no longer claims that the Communications are protected as "attorney work product," "trial preparation material," and does not claim that it and the unidentified law enforcement agency shared a common interest.

In his ruling dated December 21, 2022, the Special Master overruled the NRA's objection that the motion for reconsideration was procedurally improper. (Exhibit 1). He considered the NYAG's motion and reviewed the Communications *in camera*. *Id.* He then concluded without

[2] Before ruling on November 29, 2022, the Special Master held an oral argument on November 14, 2022. A transcript of the oral argument is included as Exhibit 12.

any explanation that the Communications were "presumptively protected." *Id.* at page 4. (The Decision also addressed the NYAG's communications with DCAG, which are not at issue here and which the Special Master determined to be privileged on attorney work product and trial preparation grounds. *Id.* at page 2.)

III. ARGUMENT

A. Under the applicable legal standard, the Court should vacate the Special Master's Decision because it is not supported by evidence in the record and does not properly apply the law.

A CPLR 3104(d) motion "shall set fort . . . 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 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 GUILD: 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").

Furthermore, under article 31 of the CPLR, all documents material and necessary to the prosecution or defense of an action are discoverable unless the party resisting discovery shows that they are immune from discovery pursuant to a particular provision of the CPLR. CPLR 3101(a) ("There shall be full disclosure of *all* matter material and necessary in the prosecution or defense of an action, regardless of the burden of proof." (emphasis added)); *see also* CPLR 3101(b); 3101(c). As the NYAG concedes in her other filings, the burden is on the party asserting privilege to demonstrate that the withheld documents are privileged. (Exhibit 10).

B. The Special Master erred in concluding that the Communications are presumptively non-protected.

In refusing to order production of the Communications, the Special Master erred. The evidence in the record does not support his ruling. Similarly, Judge Sherwood did not properly apply the law. Specifically, he concluded that the Communications are "presumptively protected" but failed to explain the basis for this conclusion. Indeed, the NYAG submitted no evidence—let alone competent evidence required by the Special Master in a prior ruling[3]—to support her assertion that the Communications are non-discoverable. Worse, she did not even assert that the Communications are privileged. (Exhibits 8 and 9).

C. The NYAG does not show that the Communications with the unidentified law enforcement agency are privileged.

As noted above, the only basis for the NYAG's withholding the Communications from production is the following passage from Ms. Connell's affirmation:

> It is my *understanding* that the identity of the other agency and content of the communications were intended to be kept confidential by both the OAG and that agency.
>
> The documents include *work product* that *was intended* to be *confidential* and if necessary, Plaintiff is prepared to provide the communications with the confidential law enforcement agency to Your Honor for *in camera* review.

The quoted language is notable for what it does and does not say. First, Ms. Connell admits that she has no personal knowledge about the purported factual basis for withholding the documents. Therefore, the Court should order the NYAG to produce the Communications. Second, she claims that her "understanding" is that the identity of the agency and the content of

[3] Exhibit 7.

the Communications were intended to be kept confidential by the OAG and the agency. However, that conclusory claim fails to identify any individuals who supposedly so intended, nor does it assert that Ms. Connell personally spoke to them about the matter.

Third, Ms. Connell states only that she understands that the intention was that the communications would be "confidential." Notably, in contrast to her assertion about communications with the DCAG (Exhibit at page 2-3), she does not assert that the NYAG's Communications with the unidentified law enforcement agency were intended to be "privileged." Id. The CPLR does not immunize from disclosure documents that are merely confidential. CPLR 3101. Instead, to shield them from disclosure, the OAG must show that they are privileged as attorney-client communications under CPLR 3101(b), attorney's work product under CPLR 3101(c), or trial preparation material under CPLR 3101(d).[4] Here, the NYAG fails to show that any privilege applies and in fact fails to even assert a single cognizable privilege.

Fourth, Ms. Connell states that her understanding is that the "documents *include work product*." Notably, she does not say that the documents include "attorney's work product" (compare CPLR 3101(c)); nor does she assert that the entirety of the Communications consists of "work product" (whatever that may mean).

D. Judge Sherwood reviewed the Communications *in camera* but did not find that they are privileged.

Similarly notable is Judge Sherwood's ruling with regard to the Communications. Although he reviewed them *in camera*, he does not hold that the communications with the unidentified law enforcement agency constitute attorney work product or trial preparation material.

[4] Of course, the party resisting discovery may also assert privileges codified elsewhere or recognized at common law. Here, however, the NYAG asserts no privileges with regard to the Communications of any kind and merely claims—cryptically—that they are "confidential" "work product."

(Exhibit .) And he expressly finds that they do not constitute materials protected on investigative or public interest privilege grounds. (Exhibit at page.)

E. Judge Sherwood disregarded each of the NRA's arguments concerning the NYAG's unwarranted decision to withhold her communications with the unidentified law enforcement agency about the NRA.

In opposing the NYAG's motion for reconsideration, the NRA argued that there are multiple independent bases for compelling the NYAG to produce the Communications. (Exhibit 11).

First, the NRA pointed out that the "NYAG does not assert that the unidentified agency has a pending or contemplated enforcement action against the NRA." (Exhibit 11). "Therefore," the NRA argued, "to the extent the Special Master were to re-consider his ruling [as to the NYAG's communications with DCAG] for the reason that the DCAG is pursuing relief against the NRA, that reason does not apply to the NYAG's communications with the second unidentified agency." Id. In issuing his Decision dated December 21, 2022, the Special Master indeed predicated his re-consideration of his prior ruling on the fact that the DCAG has a pending enforcement action against an affiliate of the NRA. Yet, he did not address the NRA's argument that there was no basis for finding—not even a facial claim by the NYAG—of a common interest agreement between the NYAG and the unidentified law enforcement agency. Nor did he hold that the Communications constitute attorney's work product or trial preparation material. *Id.*

Second, as here, the NRA pointed out that "Ms. Connell does not explain in her affirmation the basis for her 'understanding that the identity of the other agency and content of the communications were intended to be kept confidential by both the OAG and that agency'" and that "the NYAG failed to submit an affirmation from any witnesses with personal knowledge of the matter." (Exhibit 11). In his ruling, the Special Master entirely disregarded these arguments as well. (Exhibit 1)

Third, the NRA argued that, "had the NYAG shown that individuals at the NYAG and the unidentified law enforcement agency intended for the identity of the agency or the substance of the communications to be confidential, the NYAG still fails to provide any legal support for the proposition that such 'intend[ment]' is sufficient to immunize the records from discovery in this action." The Special Master's decision does not address this argument.

Similarly, the Special Master's opinion does not mention and does not rule on the NRA's requests that (i) "the NYAG explain her ambiguous statement that the number of communications with the second law enforcement agency is 'approximately 3'"; (ii) "the NYAG should be directed to reveal the identity of the agency, the identity of the individuals at the NYAG and the other agency who participated in the communications, and the dates of such communications" because "[e]ven if the substance of the communication were held to be immune from production, there is no basis for withholding the other information"; and (iii) "the NYAG . . . identify the manner of these communications (e.g., whether they were email messages, letters, or something else)."

Notably, the Special Master makes no observations and draws no conclusions whatsoever about the Communications. All the Decision does is quote from the NYAG's "representation" about what was intended about the confidentiality of the identity of the unidentified agency and the substance of the communications. Specifically, on page 3 in footnote 2, Judge Sherwood merely states:

> There are three records received from another law enforcement [sic]. The OAG represents that the contents of the communications and the identity of the other agency were intended to be kept confidential by both the OAG and that agency.

Without finding that the documents are privileged, the Special Master had no basis for concluding that they are "presumptively protected." Therefore, he erred in failing to compel the NYAG to produce the Communications.

IV. CONCLUSION

For the reasons above, there is no basis for the NYAG's continued withholding of the Communications. The Special Master erred in denying the NRA's request for an order to compel their production. The evidence in the record and the applicable law do not support Judge Sherwood's ruling that the Communications are "presumptively protected" from discovery. As a result, the NRA respectfully requests that the Court vacate the Special Master's Decision dated December 21, 2022, and order the NYAG to produce to the NRA her communications with the unidentified law enforcement agency. In the alternative, if the Court were inclined to permit the NYAG to continue to withhold the Communications, the NYAG should be ordered to provide the information about the identity of the agency and other information enumerated in Section III.E above.[5]

[5] On December 20, 2022, the NYAG filed a motion for review of the Special Master's ruling pursuant to CPLR 3104(d) to the extent he (i) overruled the NYAG's objection to the request for the Communications on relevance grounds; (ii) determined that the Communications are not protected by the investigative privilege; (iii) determined that the Communications are not protected by the public interest privilege; and (iv) ordered the Communications to be produced.

The Special Master afterwards changed his instructions—permitting the NYAG to continue to withhold the Communications—but, as explained above, did not explain the reason for the outcome with regard to the Communications.

The NRA's deadline to oppose the motion dated December 20, 2022—unless it is withdrawn—is January 10, 2023. If the NYAG argues that even if the Court were to vacate the Special Master's Decision dated December 21, 2022, it should hold that the records are non-discoverable on either of the three aforementioned grounds, the NRA believes such arguments to be without merit. If the NYAG does not withdraw her assertions of error in these respects, the

Respectfully submitted,

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NRA will explain why they lack merit in its opposition to the NYAG's motion for review, which is due on January 10, 2023.

The NYAG previously argued that the NRA's October 20, 2022 motion was untimely. The Special Master overruled that objection, and the NYAG did not appeal.

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 29th day of December 2022.

/s/ Svetlana M. Eisenberg
Svetlana M. Eisenberg

CERTIFICATE OF CONFERENCE

Pursuant to 22 New York Codes, Rules and Regulations (NYCRR) §§ 202.7 and 202.20-f, I attempted to confer 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 29, 2022, I reached out to Ms. Connell and others at the OAG by email requesting an opportunity to meet and confer about the matters at issue in this motion. Counsel advised that they were not available due to the holidays but offered to consider any questions in writing. I subsequently sent an email message to Ms. Connell asking if the OAG would agree to produce the NYAG's communications with the unidentified law enforcement agency. She has not had an opportunity to respond. In addition, the NYAG previously opposed numerous times the NRA's request to Judge Sherwood that the NYAG produce records withheld on category 2 of her categorical privilege log, which includes her communications with the unidentified law enforcement agency at issue here. As a result, I believe that the parties are unable to resolve this dispute.

/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 memorandum of law filed by the NRA pursuant to CPLR 3104(d) for review of the Special Master's decision dated December 21, 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
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