V I R G I N I A:

IN THE CIRCUIT COURT FOR THE CITY OF ALEXANDRIA

NATIONAL RIFLE ASSOCIATION OF AMERICA,	)	
Plaintiff,	)	
v.	)	**Civil Case No. CL19001757** **CL19002067**
ACKERMAN MCQUEEN, INC.,	)	
and	)	
MERCURY GROUP, INC.,	)	
Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Plaintiff National Rifle Association of America (the "NRA"), by counsel and pursuant to Rule 4:1 of the Rules of the Supreme Court of Virginia, submits this memorandum of law in opposition to the Motion for Protective Order filed by Defendants Ackerman McQueen, Inc. and Mercury Group, Inc. (together, "AMc" or "Defendants").

In support thereof, the NRA states as follows:

I. BACKGROUND

These consolidated matters arise from disputes between the NRA and Defendants. On June 29, 2019, the NRA propounded its First Set of Requests for Production of Documents and its First Set of Interrogatories. The NRA propounded its Second Set of Requests for Production of Documents and its Second Set of Interrogatories on August 1, 2019. To date, AMc has not

produced a single document or answered any interrogatory in response to the NRA's discovery requests. In contrast, the NRA has responded to all 43 of the interrogatories propounded by AMc, (even though they exceed the 30 interrogatories limit under Va. Sup. Ct. R. 4:8), has produced approximately 25,000 documents totaling approximately 48,000 pages, and is in the process of producing additional documents.

On August 14, 2019, AMc filed a motion seeking a protective order that would prevent Michael J. Collins, Esq., an attorney with Brewer Attorneys and Counselors ("BAC") who has been admitted in this case *pro hac vice*, and all other BAC attorneys and employees from accessing documents designated buy AMc as "Highly Confidential." The NRA objects to this proposed restriction. See paragraph 7.3, AMc's proposed protective order . AMc has refused to produce any documents responsive to the NRA's discovery requests until the protective order issue is resolved.

Mr. Collins was admitted *pro hac vice* over the objections of AMc. He is actively engaged as counsel in this litigation, including appearing at court hearings and taking and defending depositions of witnesses. In addition, Mr. Collins is being assisted by other attorneys and employees at BAC. AMc's proposed restriction will deny the NRA its right to be represented by the counsel of its choosing. Through a backdoor restriction, AMc is essentially seeking to disqualify BAC in this matter. However, AMc has not filed a motion to disqualify BAC, has not asserted any claims against BAC, and to date, has not sought to depose any lawyer at BAC.

In addition, paragraph 7.3 of Defendants' proposed protective order provides that documents marked as "Highly Confidential" by the Defendants may be viewed only by "one representative of the NRA who is responsible for making decisions concerning the Action. . ." Defendants' proposed protective order does not contain the same limitation on Defendants for

documents marked as "Highly Confidential" by the NRA. No reasonable justification for this difference exists, yet the Defendants refuse to equitably amend the proposed order.

II. ARGUMENT

A. Michael Collins Has Been Admitted *Pro Hac Vice* and Should Be Permitted to View All Documents and Information Produced By AMc.

Through their motion for protective order, AMc seeks to resurrect the same arguments made in its opposition to the NRA's motion for *pro hac vice* admission of Mr. Collins. The Court has already considered and rejected those arguments and admitted Mr. Collins as counsel in this litigation. To date, Mr. Collins has conducted and defended depositions and appeared at hearings in this matter. He is a full and equal member of the NRA's litigation team. As admitted counsel, Mr. Collins should be permitted to view all the discovery produced by AMc in this matter. If Mr. Collins is unable to view documents designated "Highly Confidential," his ability to participate in this litigation will be severely limited. For example, he will not be able to conduct or participate in the depositions of AMc party witnesses, prepare and defend NRA party witnesses for their depositions, or draft or respond to pleadings that cite to or include "Highly Confidential" documents.

"[T]he proponent of the privilege of confidentiality bears the burden of proof and must seek protection." McDonald v. Suggs, No. 5:07-CV-339-D, 2009 WL 864759, at *3 (E.D.N.C. March 30, 2009). Here, AMc bears the heavy burden of proving that it is entitled to the extraordinary, if not unprecedented, protections it seeks. See Webb v. Green Tree Servicing LLC, 283 F.R.D. 276, 278 (D. Md. 2012) (party moving for a protective order bears the burden of establishing good cause); Medlin v. Andrew, 113 F.R.D. 650, 653 (M.D.N.C. 1987) (burden of demonstrating good cause is a heavy one). AMc has not cited any authority for the relief it seeks. In addition, AMc has made only conclusory statements, unsupported by facts, about its suspicions

that a unit within BAC "competes" with AMc. AMc Memorandum in Support of Motion for Protective Order ("AMc Mem. Supp.") at p. 2. "In order to establish good cause, a proponent may not rely upon 'stereotyped and conclusory statements,' but must present a 'particular and specific demonstration of fact,' as to why a protective order should issue." Small v. Ramsey, 280 F.R.D. 264, 269 (N.D. W.Va. 2012) (quoting 8A Charles Alan Wright et al., Fed. Prac. & Proc. Civ. § 2035 (2d ed. 1994). See also Baron Fin. Corp. v. Natanzon, 240 F.R.D. 200, 202 (d. Md. 2006) (same). Thus, the motion must be denied because AMc has not satisfied their demanding burden.

AMc's sole argument for the paragraph 7.3 restriction is that BAC has a four person "Public Relation Unit" that "competes" with AMc and "has already poached substantial portions of the NRA Public Relations Work from the Defendants." AMc Mem. Supp. at p. 2. However, AMc has offered no evidence that the BAC Public Relations Unit actually competes with AMc. Its arguments are specious and do not comport with reality. For example, AMc asserts that it has terminated or furloughed approximately 50 employees as a result of BAC's activities. Thus, AMc would have this Court believe that four employees in the BAC Public Relations Unit is now doing the work of 50 AMc employees who worked exclusively on NRA matters. In fact, the four employees in the BAC Public Relations Unit only issue press releases and respond to media inquiries in connection with BAC clients. The Public Relations Unit does not operate any media outlets such as NRATV, it does not represent celebrities such as Oliver North or Dana Loesch, and it does not book or otherwise promote media appearances on behalf of the NRA or any other client. In sum, the BAC Public Relations Unit does not – indeed cannot - provide the breath and scope of services that AMc has provided to the NRA. No evidence to the contrary exists.

It must also be noted that AMc has terminated its relationship with the NRA in letters dated May 29, 2019 and June 27, 2019. Thus, even if BAC had the capacity to compete with AMc (it

does not), there can be no competition between AMc and BAC (or anyone else) for the NRA's business because AMc has abandoned the NRA as a client.

Finally, Mr. Collins does not work in the BAC Public Relations Unit. Thus, even if BAC's Public Relations Unit was an AMc competitor, the Court could craft a protective order prohibiting any "Highly Confidential" information from being provided to the Unit. AMc has rejected this reasonable alternative on the apparent grounds that Mr. Collins' position as a partner in BAC – as opposed to his position as an attorney and officer of this Court – renders him incapable of abiding by the terms of a court-issued protective order. AMc has provided no basis to support such an assertion. Indeed, under AMc's theory, a law firm could not represent a client against another law firm because the two law firms are competitors. The Court should craft a protective order that provides Mr. Collins with access to all discovery in this matter so that he can provide his client with the complete and zealous legal representation to which it is entitled.

B. All BAC Professionals Should Be Permitted Access to AMc Materials.

AMc offers no legal examples of any protective orders where a court has excluded a law firm and all of its professionals from viewing documents but not disqualified the firm as counsel. AMc is not moving to disqualify BAC attorneys because of any actual conflict of interest. They have no evidence of an actual conflict of interest between BAC attorneys and the NRA. Instead, through a backdoor protective order restriction, AMc is seeking to disqualify BAC based on an assertion that William Brewer may be a witness in this case.

While it is true that Virginia Rule of Professional Conduct 3.7[1] prohibits, in certain circumstances, a lawyer from acting as an advocate in adversarial proceedings in which the lawyer

[1] RULE 3.7. Lawyer As Witness. —

is likely to be a witness, the scope of the rule's application is not nearly as broad as the Defendants assert. The fact that a lawyer in a firm may be disqualified from serving as an advocate under Rule 3.7 does not impute disqualification to an entire firm. Imputed disqualifications are governed by Rule 1:10 of the Virginia Rules of Professional Conduct. This rule states that "[w]hile lawyers are associated in a firm, none of them shall represent a client when. . . one of them practicing alone would be prohibited from doing so by Rules 1.6 [Confidentiality of Information], 1.7 [Conflict of Interest: General Rule], 1.9 [Conflict of Interest: Former Client], or 2.10(e) [Third Party Neutral]." Rule 3.7(c) does not impute disqualification to an entire firm: "A lawyer may act as advocate in an adversarial proceeding in which another lawyer in the lawyer's firm is likely to be called as witness unless precluded from doing so by Rule 1.7 or 1.9.").

AMc argues that BAC attorneys, including Michael Collins, should be restricted from viewing "Highly Confidential" documents because they stand to benefit personally from the litigation. AMc Mem. Supp. at p. 3. AMc cites no Rule of Professional Conduct or other legal authority to support this as a valid basis for restricting any BAC attorney from viewing these documents. No authority exists because the logic of the objection is preposterous. Taken on its face, the Defendant's argument would prohibit lawyers from charging fees.

(a) A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer may be called as a witness other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client.

(c) A lawyer may act as advocate in an adversarial proceeding in which another lawyer in the lawyer's firm is likely to be called as witness unless precluded from doing so by Rule 1.7 or 1.9.

Mr. Brewer recognizes that he is a potential witness in this matter. Although his testimony will not be prejudicial to the NRA and therefore not disqualify him under Rule 3:7,[2] Mr. Brewer has exercised reasonable caution and refrained from seeking to be admitted *pro hac vice*. This decision does not preclude Mr. Brewer from assisting in the preparation of the case or even from assisting at trial in a non-advocacy role. See United States v. Perry, 30 F. Supp. 3d 514 (E.D.Va. 2014). See also Droste v. Julien, 477 F.3d 1030, 1035 (8th Cir. 2007) ("'In most jurisdictions, a lawyer who is likely to be a necessary witness may still represent a client in the pretrial stage.'"); Culebras Enterprises Corp. v. Rivera-Rios, 846 F.2d 94, 99-101 (1st Cir. 1988) ("The question is whether the prohibition against acting as 'advocate at trial' should be read as broadly prohibiting the rendition of case-related out-of-court services prior to trial. We think not."); Anderson Producing Inc. v. Koch, 929 S.W.2d 416, 422 (Tex. 1996) (Rule 3.08, which is the Texas version of Rule 3.7, prohibits a testifying lawyer only from "acting as an advocate before a tribunal, not from engaging in pretrial, out-of-court matters, such as preparing and signing pleadings, planning trial strategies, and pursuing settlement negotiations."). See generally DC Bar Ethics Opinion 228: Lawyer-Witness Preparation in Pre-Trial Proceeding, dcbar.org ("Although precluded from acting as trial counsel, a lawyer who is likely to be a necessary witness at trial ethically may assist substitute counsel in both pre-trial matters and trial preparation and may continue him/herself to represent the party in most pre-trial proceedings."); ABA Informal Op. 89-1529 (Oct. 89-1529). ("A lawyer who anticipates testifying as a witness on a contested issue at a trial may represent a party in discovery and other pre-trial proceedings provided the client consents after consultation

[2] See, e.g., Personalized Mass Media Corp. v. Weather Channel, Inc., 899 F. Supp. 239 (E.D.Va. 1995) (The moving party bears the substantial burden of demonstrating specifically how and as to what issues in the action the prejudice exists or is likely to occur); Adelman v. Kernbach, 43 Va. Cir. 544 (1997) (The mere assertion that the attorney's testimony will be prejudicial to his client in insufficient; the moving party must state how the testimony will be prejudicial).

and the lawyer reasonably believes that the representation will not be adversely affected by the lawyer's own interest in the expected testimony."). None of the prohibitions in these rules are at issue in this case.

Mr. Brewer has properly limited his involvement in this case to comport with these ethical concerns. He participates in meetings and telephone calls with client representatives and with other BAC attorneys and employees working on the case. He provides his experience and familiarity with the NRA to help the NRA's trial attorneys provide the NRA with the best possible representation in this case.

Finally, AMc suggests that the Court require BAC to construct an ethical wall between Mr. Brewer and any of the other BAC attorneys working on this case. While, as AMc notes, the Court inquired about whether Mr. Collins intended to put up a wall between him and Mr. Brewer, AMc ignores the exchange that occurred between Mr. Collins and the Court in which Mr. Collins explained that case law permits Mr. Brewer to be actively involved in the case, right up to jury trial, including taking depositions and arguing at court hearings. *See* Transcript of Hearing held on June 26, 2019, at 19-21. Immediately following this exchange, the Court granted the NRA's motion for admission of Mr. Collins *pro hac vice*.

The exchange between the Court and Mr. Collins is as follows:

> THE COURT: But isn't the case if he has any knowledge, that could – that could potentially be a conflict?
>
> MR. COLLINS: Well, it could be a conflict with the NRA, your Honor? Or a conflict with them?
>
> THE COURT: I would say with both.
>
> MR. COLLINS: Okay. Well, your Honor, with respect to them, the attorney always gains knowledge during the case. I'm not sure of any unique knowledge I have outside of this case, at all. With respect to the NRA, your Honor, the issue is -- for the attorney is the attorney's always going to know something. So what the

> Court said is since we want to be careful because disqualifications and related-type proceedings could be used as a key to motive that, unless the attorney is essential to the case, it's a fact they can't get otherwise, you don't lock out the attorney. And, your Honor, at least I know in Texas and in many other jurisdictions -- I don't know if it's any different in Virginia -- that the attorney -- if it's a bench trial, the attorney could still do this whole case. If it's a jury trial, they could do the case up to the jury trial. This Court is sophisticated enough to know the difference between attorney testimony and other testimony and not to be unduly swayed. It's only when a jury gets involved that we're concerned. And my understanding, your Honor, is the NRA knows all about the potential conflict and has no problem, whatsoever. So you put all those things together, your Honor, I'm just not sure if this even gets close to 3.7. And as far as me being a witness, they can speculate. We had the same issue that their attorneys are trying to pro hac about whether they're involved in the underlying facts, you know. We just think the best way is for both sides to get admitted, and then, if someone has got a disqualification issue, they can raise it. And yes, we'll take it seriously, your Honor. If they've got grounds for us and they explain those grounds for us, we'll take them very seriously. But, as I say, your Honor, pretty much the rule is until you actually hold a jury trial, that attorney can take the depositions, can do the hearings before the judge. And I'll answer any other questions you may have, your Honor.
>
> THE COURT: The motion is granted. The motion is granted.

Id.

BAC attorneys and other employees have worked with Mr. Collins in the representation of the NRA in a non-advocate role in this case. However, only Mr. Collins has participated in Court hearings and depositions because he is the only BAC attorney admitted *pro hac vice*. The Court should reject AMc's proposed restriction of "Highly Confidential" materials to be viewed solely by Briglia Hundley attorneys. Such a restriction unreasonably infringes upon the NRA's right to be represented by counsel of its choosing.

In addition, the NRA objects to section 7.3 because it provides that only one representative from the NRA may look at "Highly Confidential" documents without incorporating the same limitation for AMc's representatives .

WHEREFORE the NRA respectfully requests that this Honorable Court deny AMc's Motion for Protective Order, reject AMc's Proposed Protective Order to the extent it includes Paragraph 7.3, and grant the NRA all other appropriate relief.

August 26, 2019

Respectfully submitted,

[redacted]

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CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2019, I caused the foregoing Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Protective Order to be served via email and first-class mail to the following:

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