

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK: CIVIL TERM: PART 3

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3 PEOPLE OF THE STATE OF NEW YORK, BY LETITIA  
4 JAMES, ATTORNEY GENERAL OF THE STATE OF NEW  
5 YORK,

PLAINTIFF,

-against-

Index No:  
451625/2020

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

DEFENDANTS.

9 -----X

Status Conference  
Via Microsoft Teams  
December 10, 2021

11 B E F O R E:

12 THE HONORABLE JOEL M. COHEN  
13 J U S T I C E

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24 Appearances Continued on next page:

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VANESSA MILLER  
Senior Court Reporter

## Status Conference

3

1 THE COURT: All right. Well, we have a variety of  
2 issues. Let me just hit a couple quickly just so I make  
3 sure.

4 I know the parties were intending to propose a new  
5 discovery schedule, I don't know that I received it yet.

6 MS. CONNELL: Your Honor, you did.

7 THE COURT: Maybe I just missed it.

8 MS. CONNELL: Your Honor, you did, and I believe  
9 you already signed it, so that's been taken care of.

10 THE COURT: All right. Check that one off.

11 This is an overarching point, especially given that  
12 there's going to be more discovery. The issues we'll deal  
13 with today, we'll certainly go through. I think in order to  
14 be responsive to you all, I am going to raise again the  
15 question of a Discovery Master, at least, just to get you  
16 through the end of discovery. I do have a particular  
17 recommendation in mind of one of my colleagues who retired  
18 recently who is Judge Peter Sherwood, who is, in my  
19 judgment, a very good candidate for this kind of thing. So  
20 I would ask you to think seriously about that because he'd  
21 be able to -- I know I'm writing a check on his account on  
22 this point, but he would be able to be more responsive, I  
23 think, than I will be able to as best that I can just  
24 because of the docket size. You hadn't had a lot of  
25 discovery fights, but if I can read the winds correctly,

## Status Conference

4

1 that's starting to change a bit.

2 All right. So let's go through some of these  
3 issues. I have thought about them, I'll give you my  
4 thoughts and then let you, at least the side that's on the  
5 wrong side of those thoughts, can argue about it. The  
6 motion to dismiss the NRA's amended counterclaims, we  
7 obviously have a bit of a confusing situation. I am not  
8 going to prohibit the Attorney General from seeking to  
9 dismiss the counterclaims, and so that can proceed. I do  
10 understand the somewhat confusing aspect of it.

11 There was an answer with counterclaims, then there  
12 was an amended complaint. And so does that start us anew?  
13 I think the answer is arguably not because counterclaims are  
14 independent of the complaint and you can keep counterclaims  
15 alive in any event. But there was a new pleading, and I can  
16 understand what was going through the Attorney General's  
17 office's mind as to whether and when they had to respond to  
18 it. So given the general principle that things should be  
19 resolved on the merits rather than through foot faults and  
20 like, I'm going to permit that briefing to go forward.

21 And what else needs to be decided on that? I take  
22 it that waiting for my view on that has kind of stopped  
23 things.

24 Ms. Connell, do you want to --

25 MS. CONNELL: Your Honor, it's just a matter of

## Status Conference

5

1 setting a briefing schedule on that. We've said we're happy  
2 to proceed with our previously-filed motion to dismiss,  
3 that's already been on the docket for many months.

4 THE COURT: So did they change their counterclaim  
5 at all in response to the amended?

6 MS. CONNELL: Very little, your Honor. To the  
7 extent they raised any of those changes as somewhat -- as  
8 material in a way that we didn't see it, I may ask for a  
9 couple of extra pages in the reply, but --

10 THE COURT: Right. But, again, the First  
11 Department law is pretty clear that the movant has the right  
12 to apply on their existing motion to an amended pleading.

13 So I guess turning to the counterclaim plaintiffs,  
14 how long -- obviously, this has been out there for a while.  
15 How long would you need to respond? You guys are the  
16 counterclaimed plaintiffs on my left here, right?

17 MS. EISENBERG: Certainly, your Honor.

18 THE COURT: Can I just ask you to go to the mic?

19 MS. EISENBERG: Yes, I would be happy to.

20 Your Honor, to answer your question, we would like  
21 30 days to respond. However, to preserve the record, we  
22 think that the motion would be untimely, we reserve all  
23 rights to object to it on the ground. And we also think  
24 that the Attorney General defaulted, basically, and we are  
25 entitled to move for default because her reply was due three

## Status Conference

6

1 months ago.

2 THE COURT: Okay. There's actually no formal  
3 motion in front of me. The issue was raised, I'm giving you  
4 my thinking on it, which is why I assume you all sent me  
5 letters about it, and I don't think default is the  
6 appropriate response. But if you want to make a motion, you  
7 obviously preserve your record. The thing about these  
8 letters are they're not motions and there are no orders. So  
9 if you want to make a motion or make that part of your  
10 opposition, then you're perfectly fine to do it, but --

11 MS. EISENBERG: And I appreciate it very much, your  
12 Honor.

13 What about the fact that they still haven't filed a  
14 reply? Does the Court agree that their reply should've been  
15 filed?

16 THE COURT: Reply to what?

17 MS. EISENBERG: To our counterclaim.

18 THE COURT: Well, they've moved to dismissed this;  
19 right?

20 MS. EISENBERG: But they didn't seek to apply that  
21 motion to the counterclaim but for the deadline for their  
22 reply, and the rules are very clear 20 days after, you have  
23 to reply unless you move before and they didn't.

24 THE COURT: Well, but the rule is is that the  
25 party can -- you're saying they didn't tell me in time that

## Status Conference

7

1 they were going to apply their motion to the new one?

2 Okay. Look, there are plenty of grounds in the CPLR for me  
3 to permit some leeway from this kind of confusion, which is  
4 a little --

5 You know, you can make whatever motion you want is  
6 the bottom line. I don't think that default is an  
7 appropriate response to what happened, but go for it.

8 MS. EISENBERG: Certainly, your Honor.

9 I think, you know, obviously, a motion for default  
10 is Draconian remedy and we would like to have to avoid to  
11 move for that, but we've been prejudiced, the NRA has been  
12 prejudiced because we don't know what she denies, what she  
13 admits, what she says she doesn't know anything about and  
14 what --

15 THE COURT: Well, but a motion to dismiss is  
16 instead of that, and if they lose their motion to dismiss,  
17 then you get an answer. That's the way it works; right?

18 MS. EISENBERG: Right. But we have a note of issue  
19 date coming up and --

20 THE COURT: Well, there's another thing in the mix  
21 here where I -- my understanding was that the parties have  
22 held off on discovery on the counterclaim until the motion  
23 to dismiss was decided, which I think -- I'm not a big fan  
24 of stays, but in this case, you've got enough to do on the  
25 main claim that I would be okay with a discovery proceeding

## Status Conference

8

1 in two tracks on that, as long as we end up being finished  
2 without too much delay.

3 I mean, I'd like to get this briefed quickly and  
4 decided quickly so we can get on with it. So you won't be  
5 prejudiced in the sense that there should not be a note of  
6 issue filed with respect -- that covers the counterclaim  
7 until we have a discovery schedule, and it expires on the  
8 counterclaim; right? So whatever your discovery schedule  
9 is, and I don't remember it as I sit here right now, does it  
10 make provision for discovery on the counterclaim?

11 MS. EISENBERG: No, your Honor. It assumes that  
12 all discovery will be done.

13 THE COURT: All right. Well, we need to amend  
14 that, because, again, there's so many letters coming my way.  
15 I believe that one of them suggested that we have an  
16 extension of the discovery time for the counterclaim.

17 MS. EISENBERG: Your Honor, respectfully, under the  
18 Commercial Division rules there is no stay. It's their  
19 burden to show why a stay is required. I can see why it was  
20 prudent to have a stay back in June, but, you know -- or  
21 July, apologies, so many months later. And what we're  
22 effectively doing is guaranteeing that there's going to be  
23 further delay and my client wants to have this case tried  
24 and be over with.

25 THE COURT: I understand. Well, you know, stays

## Status Conference

9

1 are discretionary. Again, we're dealing still with letters  
2 and me giving you comments. If you all need to make a  
3 motion for a stay or a motion to amend the discovery  
4 schedule, go ahead. I'm just telling you my strong  
5 inclination is to proceed promptly with the briefing on the  
6 motion given that the discovery, it seems to me, does not  
7 overlap really in any material way. And to the extent it  
8 does overlap, it's already being done. I would hold off on  
9 the unique discovery in connection with the counterclaim  
10 until I determine whether it's a viable claim.

11 So you can make the motion. I'm just telling you  
12 that unless you come up with something, I haven't thought of  
13 yet, that's the way I'm going to go. So it's a question of  
14 how you want to spend your time and money. Okay. But I do  
15 think you then need to either make a motion for a stay of  
16 discovery on the counterclaim along with a proposed  
17 discovery schedule. I think it would be a lot more  
18 efficient for all of you, having heard what I just said, to  
19 just come up with an amended schedule. But I don't have the  
20 ability to stop people from making motions. So there you  
21 go.

22 Let me turn to the Powell documents, which is an  
23 interesting conundrum. Is that Mr. MacDougall?

24 MR. MACDOUGALL: Yes.

25 THE COURT: Can we switch sides for a second?

## Status Conference

10

1 I'll tell you what I think makes sense and then you can -- I  
2 think that the privilege calls on NRA documents should be  
3 made by the NRA's counsel. The privilege belongs to the  
4 NRA, not to Mr. Powell, which really just leaves the logical  
5 question of a logistical question of how we do that.

6 It seems to me, Mr. MacDougall, that Akin Gump  
7 should be able to delineate in its document review any  
8 communications that might be Mr. Powell privileged, meaning,  
9 conversations between Mr. Powell and yourself or anyone  
10 else, and, certainly you can review all of that. And I  
11 assume you can also, through metadata, search for any  
12 documents where the only people on it are Mr. Powell and  
13 lawyers for the NRA. And it seems to me those documents  
14 should be sent to the NRA for review to make privilege  
15 determinations, because, effectively, it seems to me  
16 documents that Mr. Powell sent or received on his NRA e-mail  
17 belong to the NRA, not Mr. Powell. He may have custody of  
18 them and, therefore, have an obligation in discovery to  
19 produce any that are non-privileged, but that decision, in  
20 my opinion, should be made by the NRA's counsel.

21 So with that, let me let you go.

22 MR. MACDOUGALL: Yes, your Honor.

23 There's really just two equities we're trying to  
24 protect with regard to our client --

25 THE COURT: And you don't want to be disqualified,

## Status Conference

11

1 which I understand.

2 MR. MACDOUGALL: That's the first one, and that's  
3 a big one, yes, your Honor.

4 THE COURT: But the way I'm describing it, the  
5 only basis I would think that they could possibly argue is  
6 if you looked at privileged documents, but since you're not  
7 going to be doing the privilege review, you're just going to  
8 be identifying those that go to the NRA for the initial  
9 review, that issue shouldn't come up.

10 MR. MACDOUGALL: Well, except, your Honor, for the  
11 second issue, which is that, A, we haven't looked at them  
12 for the reason the Court just articulated, and they're a mix  
13 of e-mails, text messages. Mr. Powell was heavily involved  
14 with the Brewer firm's work. So there's a lot of chatter, a  
15 lot of recollections and reflections, and it actually  
16 crosses over into the period of time when he had his own  
17 counsel.

18 So the second concern we have is that -- and I  
19 guess the preset for this, and this may not have emerged yet  
20 in the litigation, Mr. Powell is not aligned at all with the  
21 NRA --

22 THE COURT: I got that.

23 MR. MACDOUGALL: The only thing he has in common  
24 is he's on the same side of the "V" --

25 THE COURT: But I think the kind of documents

## Status Conference

12

1 matter. E-mails, even if there's an e-mail string, I assume  
2 that the metadata will help you figure out, because the only  
3 thing you're solving for is if there's an e-mail string  
4 between, let's say, Mr. Powell and the Brewer firm, and in  
5 the middle of it, he sends an e-mail to his own counsel  
6 saying, Well, what do you think of all this, that would  
7 be -- the metadata on that would be distinguishable because  
8 it would then be the top of the chain would be an e-mail  
9 between Mr. Powell and his counsel. And it just means once  
10 you do that, you shouldn't read the rest of this and then  
11 you can take the position that that top one is privileged  
12 and not produce that to the NRA for their review.

13 I think text messages is a little more complicated.  
14 I just had a trial where exactly -- you know, whether you  
15 waived them and they're indistinguishable and the metadata  
16 probably get all confused. So the question is how do you  
17 deal with that.

18 MR. MACDOUGALL: And I think I have a proposed  
19 solution that will accommodate the Court's concerns.

20 THE COURT: Okay.

21 MR. MACDOUGALL: And this is sort of, a you know,  
22 a segue from me doing the criminal side where the thinking  
23 is that the Court is familiar with. We would have a lawyer  
24 in our firm uninvolved with the representation of Mr.  
25 Powell, a former federal prosecutor, look through everything

## Status Conference

13

1 and make the cut and not disclose to us anything that she'd  
2 found. We would turn over, at the Court's discretion,  
3 documents that are NRA-privileged documents to the NRA, and  
4 we would do that and preserve, through the metadata  
5 analysis, what belongs to Mr. Powell and what belongs to --

6 THE COURT: I mean, that seems sensible to me. I  
7 guess the question is would that person need to review  
8 documents that the metadata show are simply between Mr.  
9 Powell and NRA counsel.

10 MR. MACDOUGALL: Probably not, depending on who  
11 else is on the e-mails.

12 THE COURT: Well, yeah.

13 MR. MACDOUGALL: You know, that's why it's --

14 THE COURT: Yeah. Look, that seems to me to be a  
15 rational compromise and a practical one, which is if there  
16 is a doubt when they look at the metadata as to whether it's  
17 privileged or not, or whether it's a communication with  
18 counsel or not, having somebody who's walled off to take a  
19 look at it and make the initial question of whether it  
20 raises any issue at all. But I don't think the person  
21 should be reviewing -- or needs to be involved with  
22 documents where, on its face, it's just a communication  
23 between Mr. Powell and NRA counsel. And the ones where it  
24 may or may not be, where it may have Mr. Powell and counsel  
25 and other people, I think that's one where it would make

## Status Conference

14

1 sense to me, without harming Akin Gump's ability to  
2 continue, to have some walled-off person just look at it and  
3 say, yeah, this should go be to the NRA, this is an NRA  
4 privilege issue, or, actually, this has nothing to do with  
5 that, or -- the real concern is if it includes Mr. Powell  
6 privileged information.

7 Now it's not clear to me how a document that  
8 includes, as a recipient or a sender, Mr. Powell, NRA  
9 counsel and then other people would be privileged as against  
10 the NRA, but does the NRA have any objection to that  
11 approach?

12 MS. EISENBERG: Yes, your Honor, we do.

13 THE COURT: Can you switch positions for a second?  
14 You can be a juror for a couple of minutes if you want. If  
15 you want to sit closer, it's up to you.

16 MS. EISENBERG: Your Honor, we completely agree  
17 that it is the NRA who should be reviewing its  
18 potentially-privileged documents with privilege, if anything  
19 because, we know we have the institutional knowledge and the  
20 context to assess the communications --

21 THE COURT: Right.

22 MS. EISENBERG: -- often times.

23 THE COURT: There's no disagreement. It's just a  
24 question of how do they handle the practical question of,  
25 you know, they shouldn't necessarily pick up the entire set

## Status Conference

15

1 of his documents and send them to you because it might  
2 include privileged documents of his own.

3 MS. EISENBERG: Right. And they should be able to  
4 isolate those and give us everything that involves  
5 communications with the NRA's lawyers.

6 THE COURT: Right. And some parts can be  
7 isolated. But from my experience, especially with text  
8 strings and multiple e-mails, there may be some subset where  
9 it's not as obvious, and so we're just trying to solve for  
10 that.

11 MS. EISENBERG: Right. I think we need to  
12 understand more specifically what technology they are using  
13 and if it's, in fact, unsolvable on their end, given the  
14 technology that they use, given my experience, that is  
15 something that I have been able to solve.

16 And also just to understand what's the timing,  
17 because in their letter, they just say, like, they may be  
18 privileged. I don't understand why Mr. Powell would be  
19 forwarding privileged communications along to the NRA to a  
20 third party. So it's also their premise that those  
21 communications have privilege, but I question that.

22 THE COURT: Well, Mr. MacDougall is in a difficult  
23 position because he hasn't read them yet. So we're just  
24 trying to get over the hurdle of them being concerned, and  
25 which I understand --

## Status Conference

16

1 MS. EISENBERG: Right.

2 THE COURT: -- if they go down this road and they  
3 read privileged stuff, then somebody may argue that -- I  
4 don't want that.

5 So let me just give you the guidance and then you  
6 should be able to work it out. I agree that for documents  
7 that are identified as potentially privileged on behalf of  
8 the NRA, that the NRA should make that decision and that any  
9 documents that Akin Gumps, when you look at them, they just  
10 have Mr. Powell and NRA counsel and just other NRA people,  
11 but that's it, that the NRA should be able to make the first  
12 call on that. There will be some judgment calls, it seems  
13 to me anyway just the messiness of documents in general,  
14 where, in good faith, somebody at Akin Gumps should be able  
15 to look at it and say, Well, look, based on the metadata,  
16 it's not clear so why don't we have this formal prosecutor  
17 look at it. And if it is, in fact, Powell privileged for  
18 whatever reason, then they can take that position, but if  
19 there's any doubt as to whether it's privileged, that call  
20 should be made by the NRA if it's an NRA privilege.

21 So I just want you to work out a logistical plan to  
22 do that. I don't think anyone should put themselves in a  
23 position to stop representing Mr. Powell just because  
24 they're trying to solve this in a responsible way; okay?  
25 So that's what I'd like you to do. If you call for

## Status Conference

17

1 something reasonable, Akin Gump should be comfortable. I'm  
2 not going to disqualify them for following my own rulings as  
3 to how to find something out. And if this prosecutor  
4 happens to see something that she looks at and says, Oh, my  
5 gosh, this was privileged, she's not part of this team  
6 anyway. So I think that's a practical way to do it.

7 MS. EISENBERG: Right.

8 If I may, your Honor, like, I don't understand why  
9 Mr. Powell may have forwarded privileged communications to a  
10 third party. It may be that he exceeded his authority.

11 THE COURT: That would be -- it's a different  
12 thing. So we can come up with lots of hypotheticals, but it  
13 could be that Mr. Powell got a non-privileged document that  
14 included the Brewer firm and Ackerman and 5,000 other people  
15 and then sent that to Akin Gump for advice. Now, whether he  
16 sent it on the NRA's server, there's other issues there.  
17 But as you and I sit here right now, we don't know what  
18 permutations might exist, it's all I'm saying. I'm trying  
19 to be practical.

20 It sounds like Akin Gump is trying to work this in  
21 a responsible way. If there is an issue as to whether it  
22 could conceivably be either privileged from Mr. Powell's  
23 perspective, or he would be at risk of not producing  
24 something that they believe is not privileged. But in the  
25 first instance, that decision should be an NRA call.

## Status Conference

18

1 MS. EISENBERG: Certainly, your Honor.

2 I think, like I said, opposing -- not opposing  
3 counsel, but co-defense counsel does not have ability to  
4 really speak about what's in those documents because he  
5 hasn't looked at them.

6 THE COURT: Correct.

7 MS. EISENBERG: But what he does have the ability  
8 to do and speak to his own client to understand a little bit  
9 better about the context in what are in these e-mails. So  
10 what I would ask for is, as we try to work through it  
11 practically which is what the NRA would like to do as well,  
12 is we'd like to get a little bit more information about the  
13 timing and who and why and so that the technical -- so that  
14 the technology can be leveraged to the fullest extent.

15 THE COURT: Okay. Well, I would imagine they  
16 would be fine having a conversation. And I would be  
17 surprised if you can't work this out. I'm just telling Akin  
18 Gump that if we do a reasonable approach, I'm not going to  
19 disqualify you if there's some inadvertent thing that  
20 happens with respect to somebody who's not on the litigation  
21 team, and I think you'll work it out.

22 MS. EISENBERG: Yes, your Honor.

23 THE COURT: All right. The next thing on my list  
24 is the --

25 MS. CONNELL: Your Honor, I'm sorry.

## Status Conference

19

1 THE COURT: Oh.

2 MS. CONNELL: Can I speak?

3 THE COURT: You have a horse in this race, okay.

4 MS. CONNELL: Your Honor, I'm not trying to throw  
5 a fly in the ointment. This sounds great. We're just  
6 trying to get these documents that we've been trying to get  
7 for six months. Fact discovery under the two-month  
8 extension we've already sought closes February 15th. We  
9 already are waiting for documents that the NRA's been  
10 reviewing for privilege from their independent auditor for  
11 six months. So I would just ask, not that the Court can do  
12 this today, but that we agree to reasonable timelines and  
13 also cautioning --

14 THE COURT: Well, this should catch up. In other  
15 words, whatever's going to happen with these documents  
16 should be no more delayed -- well, the NRA's review, I don't  
17 know what the volume is, but they presumably -- if these are  
18 documents he sent or received from his NRA dot whatever  
19 e-mail, the NRA presumably already had them in their  
20 privilege review already. And if they are using any kind of  
21 a reasonable search platform, they'll be able to tell that  
22 they've already done a review of these same things, I would  
23 imagine.

24 MS. CONNELL: That's true.

25 There is another e-mail account, at least one that

## Status Conference

20

1 was used. I hope that will work, but I just wanted to bring  
2 that to the Court's attention.

3 THE COURT: Yeah. Look, I have not gotten my hand  
4 into how long this is taking, which is why Judge Sherwood,  
5 or somebody, would be an excellent candidate to watch over  
6 this. That does sound like a long time, but I'm sure the  
7 defendants have all sorts of reasons why it has been.

8 So the short answer is I am not looking at what we  
9 just talked about where Akin Gump is creating a sort of a  
10 crack in the regular schedule. Everything should move  
11 quickly and I can imagine that Akin Gump will cooperate to  
12 get that to happen.

13 MS. CONNELL: I hope so, your Honor. But I would  
14 want the parties to understand --

15 THE COURT: Well, hope springs eternal.

16 MS. CONNELL: The second thing is there is a  
17 concern -- and just the fact that the e-mail has the Brewer  
18 firm on it doesn't mean it's privileged. The prior firm  
19 does a lot of non-privileged --

20 THE COURT: I completely agree. The only question  
21 is who makes the initial determination on privilege and  
22 that, as you know, is the client. Not the -- you know, it's  
23 a company, not the individual.

24 MS. CONNELL: We're happy we have a system where  
25 we'll get all the documents, and I'll note that exception.

## Status Conference

21

1 THE COURT: I wouldn't get happy yet because it  
2 hasn't happened, but let's hope.

3 MS. CONNELL: Thank you, your Honor.

4 THE COURT: The Cox arbitration documents, I don't  
5 know who's going to -- who are the combatants on this. It  
6 does seem to me that a subpoena in a lawsuit is, "unless  
7 otherwise required by law". So that the fact that people  
8 agree to confidentiality in an arbitration does not mean it  
9 is immune from subpoena. It may be something that would be  
10 protected by the confidentiality order in this case so that  
11 it doesn't go beyond the parties. But that's my initial  
12 lean is that if it's relevant to a lawsuit, it can still be  
13 discoverable.

14 I don't even know who the --

15 MR. SAXON: Your Honor, this is Matt Saxon for Mr.  
16 Cox from the law firm of Winston & Strawn.

17 THE COURT: Okay.

18 MR. SAXON: Just to set a little bit of  
19 background, Chris Cox was the head of the NRA's lobbying  
20 group for about 20 years. He was, effectively, the  
21 number-two person in the organization. He resigned in the  
22 summer of 2019, was involved in arbitration with the NRA,  
23 and then he was subpoenaed in this action by the New York  
24 Attorney General, and the NRA objected to him producing  
25 documents from the underlying arbitration.

## Status Conference

22

1                   Cox has no objection to producing the documents,  
2                   but is caught in the middle a little bit of a dispute  
3                   between the NRA and the NYAG. On the one hand, we need to  
4                   protect our client against any claim from the NRA that he  
5                   violated any confidentiality provision. On the other hand,  
6                   we want to comply with the subpoena, obviously. And as you  
7                   may have seen in our letter, we question the NRA's factual  
8                   basis for claiming confidentiality based on some of the  
9                   things they said publicly about the underlying arbitration,  
10                  and I'm happy to get into that. I know it's been a long  
11                  morning, so --

12                  THE COURT: Well, I don't know that the  
13                  document-by-document thing is ripe just yet; right? Right  
14                  now, there's just an overarching question about whether the  
15                  confidentiality provision, or restriction in connection with  
16                  the arbitration, broadly prohibits the Attorney General from  
17                  subpoenaing the information; am I correct that that's the  
18                  broader question?

19                  MR. SAXON: Correct, your Honor.

20                  THE COURT: And the confidentiality agreement, or  
21                  order, whatever it is in the arbitration, does have an  
22                  exception for situations where production would be required  
23                  by law, otherwise required by law; right?

24                  MR. SAXON: That's correct, your Honor.

25                  THE COURT: And typically, in confidentiality

## Status Conference

23

1 agreements, at least in my experience, that means if you're  
2 ordered by a Court to produce this, then you produce it.

3 MR. SAXON: Yes, we agree with that. And we cited  
4 some cases in our letter that support that position, your  
5 Honor.

6 THE COURT: Okay.

7 MS. EISENBERG: Thank you, your Honor.

8 THE COURT: Let's see what the NRA's views are.

9 MS. EISENBERG: First, if I may just go back for  
10 one second.

11 As far as the Aronson documents, the representation  
12 made by opposing counsel creates the impression that we have  
13 been delaying certain productions, or late, but I certainly  
14 disagree with that, but I know that the Judge doesn't want  
15 us to get into that right now. Just for the record, I  
16 dispute that impression that was created.

17 THE COURT: Okay.

18 MS. EISENBERG: Now, in terms of Mr. Cox's  
19 documents, to be clear, the NRA from fairly early on said  
20 that we have no objection to Mr. Cox or the NRA producing  
21 the documents that were produced in the arbitration by Mr.  
22 Cox through the NRA or by the NRA to Mr. Cox, and the  
23 Attorney General expressly rejected that offer. So what  
24 they're really asking for --

25 THE COURT: You're talking about the underlying

## Status Conference

24

1 documents that were exchanged?

2 MS. EISENBERG: Right. Like, when he worked with  
3 the NRA and he e-mailed people about --

4 THE COURT: Right. Well there would be no  
5 argument --

6 MS. EISENBERG: Sorry?

7 THE COURT: There would be no argument not to  
8 produce that anyway.

9 MS. EISENBERG: Right, right.

10 THE COURT: They're not really conceding anything  
11 and neither are you because that --

12 MS. EISENBERG: Right.

13 THE COURT: The fact that something is exchanged  
14 in an arbitration doesn't imbue it with more confidentiality  
15 than it would either have or not have. I assume you're  
16 talking about the litigation documents during the  
17 arbitration briefing and the like?

18 MS. EISENBERG: Right. And I'm not willing to  
19 concede the point that it's not work product or whatever.  
20 But we offered to do that, we offered to turn over the  
21 underlying documents, historical e-mails and texts. What we  
22 object to is what you said, briefs, motions, things like  
23 that. And we have a number of objections, including the law  
24 that we cited. I appreciate the Court's comments about that  
25 exception and I will take that into consideration.

## Status Conference

25

1 THE COURT: Let me just make sure I understand.  
2 Mr. Saxon, can you just go on mute for a second? I think  
3 we're getting some feedback from your line.

4 So what is it exactly -- if the underlying  
5 evidence, the documents back and forth, is something that  
6 will just have to be produced and it's either covered by the  
7 confidentiality order in our case or it isn't, what is it  
8 about the Court or the arbitration papers that is  
9 qualitatively different? Presumably, the only thing that's  
10 confidential are the facts, not the legal arguments.

11 MS. EISENBERG: No, it is the legal arguments  
12 precisely because the NRA -- Mr. Cox agreed contractually  
13 that any dispute arising out of his employment agreement  
14 would be arbitrated through a confidential arbitration.

15 THE COURT: Okay.

16 MS. EISENBERG: And there's law that says that you  
17 have to respect that. There's public interest in respecting  
18 parties' expectation that it will remain confidential even  
19 in the face of a subpoena.

20 THE COURT: All right. Just give me one second.

21 Do you not agree that the required-by-law exception  
22 has been interpreted to apply that to include compliance  
23 with the subpoena?

24 MS. EISENBERG: No, your Honor. Whatever cases  
25 have been cited are distinguishable, and the cases that we

## Status Conference

26

1 cite are on point, and under those cases, it's not required  
2 by law.

3 THE COURT: All right. Well, look, my lean would  
4 be, in the absence of a motion, that it's probably  
5 discoverable, that this sounds like one where you need to  
6 have motion practice because it's a legal issue. It may be  
7 a bit thorny.

8 If the AG just wants to give me their position.

9 MS. CONNELL: I do, your Honor. Thank you.

10 Your Honor, as an initial matter, we believe the  
11 NRA has waived any confidentiality here. It produced  
12 materials from the arbitration. In the bankruptcy, it  
13 failed the bankruptcy proceeding, and it caused Mr. Cox to  
14 produce the materials from the bankruptcy proceeding to the  
15 unsecured creditors committee in the bankruptcy proceeding.  
16 So it has waived confidentiality. There's not good-faith  
17 basis to assert that.

18 The second thing is that there's a number of cases  
19 that Mr. Cox and the AG had asserted that the  
20 required-by-law provision clearly covers this, we literally  
21 litigated this issue with the NRA and won. They cannot use  
22 privacy and confidentiality agreements to avoid their  
23 regulator and to avoid process-like subpoenas, and they've  
24 been doing that to slow discovery in this action and we need  
25 it to proceed.

## Status Conference

27

1 THE COURT: Well, I would just make a motion to  
2 compel. I mean, the motion to compel -- I haven't heard  
3 anything that makes me disagree with what you just said, but  
4 without a motion, I can't issue an order.

5 MS. CONNELL: Your Honor, may I ask for -- I will  
6 submit the --

7 THE COURT: You can do it by order to show cause.

8 MS. CONNELL: Okay.

9 THE COURT: You can have an expedited briefing  
10 hopefully that you can agree on. But this should be, like,  
11 no more than a week a side to write papers. Let's get it  
12 resolved quickly.

13 MS. CONNELL: Perfect. Thank you, your Honor.  
14 That's what I wanted to ask for.

15 THE COURT: All right. See how quickly we're  
16 getting through these issues? If only the rest of the case  
17 can go this fast.

18 The next thing I have on my list is the Attorney  
19 General's responses and objections to the NRA's second set  
20 of document requests.

21 MS. EISENBERG: Yes, your Honor.

22 THE COURT: Does this relate to the counterclaim?

23 MS. EISENBERG: No, your Honor.

24 THE COURT: It doesn't.

25 MS. EISENBERG: We disagree on that issue.

## Status Conference

28

1 THE COURT: All right. But it relates to the  
2 counterclaim; right?

3 MS. EISENBERG: Well, that's their position.  
4 That's not our position.

5 THE COURT: All right.

6 MS. EISENBERG: So, your Honor, just to frame the  
7 issue, at the end of August of 2019, Letitia James made the  
8 statement that the NRA is a criminal enterprise. She  
9 repeated that statement in early September. We served a  
10 series of requests on the New York Attorney General related  
11 to those and other statements. In other words, if she had a  
12 basis for making that statement --

13 THE COURT: Were these statements before she was  
14 Attorney General?

15 MS. EISENBERG: Exactly.

16 THE COURT: Okay. And so what -- okay.

17 MS. EISENBERG: And so what we want to know is what  
18 was the basis for her accusing my client of engaging in  
19 crime on an enterprise level. If she had a basis for it, we  
20 want to see what it was. If she did not, then the answer  
21 should be simple. We don't have any of the documents.

22 THE COURT: Why would -- for the main claim in  
23 this case, which is she's the Attorney General beginning on  
24 a certain date, what's the relevance of whatever she said in  
25 terms of with respect to the merits of this case?

## Status Conference

29

1 MS. EISENBERG: It goes to the credibility and the  
2 motivation of the accuser, your Honor. It kind of harkens  
3 back to the --

4 THE COURT: Well, again, why is that relevant?

5 MS. EISENBERG: Because that's who the accuser is  
6 and her credibility is at issue.

7 THE COURT: Well, the office of the Attorney  
8 General is the accuser -- well, is the plaintiff just to not  
9 use charged terms. You know, I get it that there's a  
10 counterclaim around some of that, but --

11 MS. EISENBERG: Even if we didn't have a  
12 counterclaim, our defense is that it's a  
13 politically-motivated lawsuit and this is somebody who went  
14 ahead and accused the NRA of being a criminal enterprise  
15 before seeing a single shred of evidence --

16 THE COURT: Well, let me ask you a hypothetical:  
17 Let's assume you have a politically-motivated decision to  
18 file a lawsuit that has merit; is that a defense? In other  
19 words, if the lawsuit has merit, why does it matter why it  
20 was brought? If it doesn't have merit, why does it matter  
21 why it was brought?

22 MS. EISENBERG: Well, our point is that it doesn't  
23 have merit, and --

24 THE COURT: So you'd win anyway.

25 MS. EISENBERG: Well --

## Status Conference

30

1 THE COURT: The question is when will her  
2 statements be, in any way, a deciding factor. Either the  
3 claim has merit, in which case, whatever statements were  
4 made before she was Attorney General -- it's hard to  
5 understand why that would change the result. In other  
6 words, otherwise, if those statements had never been made  
7 and those views had never been held, the Attorney General's  
8 office, the State of New York, would win. It's unclear to  
9 me why statements in advance would change that result.

10 Is there some case you can cite as to why that  
11 would be true?

12 MS. EISENBERG: Well, I don't have a case, your  
13 Honor, but it's just, to me, it's through common sense. If  
14 she had evidence that went to the issues at issue in this  
15 case, whether it was negative evidence or exculpatory  
16 evidence, it certainly relates to her claims here, and if  
17 she didn't, it relates to her credibility. So for that  
18 reason, our position is that the requests that we have  
19 served are certainly germane to the Attorney General's  
20 complaint against the NRA. But, in any case, that's another  
21 reason why, separately, we request for a stay in the  
22 counterclaims because it seems to be very one-sided.

23 MR. CORRELL: Your Honor, may I speak to that  
24 point? Shall I go to the mic?

25 THE COURT: Yes, please. Otherwise, then the

## Status Conference

31

1 folks on the screen can't hear you.

2 MR. CORRELL: You asked for a case, the case is  
3 cited in my reply papers, it's Pokoik versus Norsel  
4 Realities, 55 Misc. 3d 1208(A), Supreme Court New York County  
5 2017, and it was affirmed, it was modified. It's on Page 14  
6 of my reply brief, but the problem is it says, "New York  
7 Courts have held that because derivative actions bind absent  
8 interest holders, they take on the attributes of a class  
9 action and a plaintiff must therefore demonstrate that he  
10 will fairly and adequately represent the interests of the  
11 shareholders and the corporation and that he is free of  
12 adverse personal interest or animus. If a plaintiff cannot  
13 demonstrate such representation, the derivative causes of  
14 action will be dismissed." So there are derivative --

15 THE COURT: So you're saying it's relative,  
16 there's one derivative action at least that I'm aware of.

17 MR. CORRELL: I'm pointing out that there -- I'm  
18 concerned, my client is also concerned, about having someone  
19 driving a derivative claim on behalf of a corporation that  
20 hasn't demonstrated animus to the corporation and is seeking  
21 to dissolve the corporation in the same action.

22 THE COURT: Ms. Connell?

23 MS. CONNELL: Thank you, your Honor.

24 First, I just want to go back to something. The  
25 discovery on the counterclaims was initially stated at the

## Status Conference

32

1 March 9th conference here with the NRA's agreement, okay.

2 And just to address Mr. Correll's point, Mr.  
3 Correll has not moved or filed counterclaims or sought  
4 discovery on these issues. And in regard to the relevance  
5 of these demands, these demands that we're talking about  
6 seek information like all the documents relating to  
7 statements he made on this date or that date as a  
8 campaigning politician for the position of the AG. The  
9 Office of the Attorney General brought these claims, we have  
10 produced our investigatory file to the parties. The  
11 documents we have, everything we looked at, they have. So  
12 the relevance of statements made on the campaign trail  
13 relate only to claims against the Attorney General's office.  
14 It cannot be said that we have not made specific factual  
15 allegations of wrongdoing to support these claims.

16 And the idea that there may be -- their claims  
17 against the Attorney General may suffice as a counterclaim,  
18 that's separate entirely, but they have to litigate these  
19 claims and see if they rise or fall on the proof we put  
20 before the Court, and we've pled adequate claims. These  
21 demands were made to the Attorney General in her official  
22 and individual capacity as we learned through meet and  
23 confers. They relate almost solely to the counterclaims.  
24 There were two exceptions, which we at the Office of the  
25 Attorney General responded to. And so, your Honor, I think

## Status Conference

33

1           there's no ground to go forward on these.

2                   THE COURT:    Yeah.  Well, there's another one where  
3           I can't issue an order because nobody's moved to compel at  
4           this point and/or moved for a protective order.  So I can  
5           only arm twist so much.  And at this point, I don't really  
6           get it.  I mean, I am interested in this question of  
7           when -- to the extent that the Attorney General's office is  
8           suing in a derivative capacity, might that give some grounds  
9           for saying, because you don't see it a lot.  But whether  
10          somebody is in an appropriate representative is an issue.  
11          I'm not saying that it raises this issue, but it's an  
12          interesting point.

13                   MS. CONNELL:   I do think it's an interesting  
14          point, your Honor.  But, certainly the elected Attorney  
15          General is vested by statute with the authority to vindicate  
16          the interest of the State of New York, in protecting  
17          charitable assets from waste from being basically stolen,  
18          from being misused.  That's what the legislature has  
19          enacted; that's whom the people have elected, and we have  
20          given them the evidence that we've relied upon to bring  
21          these claims.

22                   THE COURT:    That's an excellent statement of the  
23          countering point, but people bringing derivative actions can  
24          be tested for adequacy.  And, look, this is one where I just  
25          need a motion, and maybe Justice Sherwood or maybe myself

## Status Conference

34

1 can unravel that. But again, these kinds of things, if you  
2 want to wrap them up and have them decided quickly, I'm all  
3 for that, and --

4 MS. CONNELL: Thank you, your Honor.

5 THE COURT: And the privilege log issue is the  
6 last one, but I take it that is mooted, that there has been  
7 no privilege log provided.

8 MS. EISENBERG: Yes, your Honor. But may I  
9 approach?

10 THE COURT: Fire away. You still have a few  
11 minutes left, but only a few.

12 MS. EISENBERG: Thank you, your Honor.

13 The privilege log for the production that was made  
14 at the beginning of this year was given to us last week on  
15 the eve of this argument --

16 THE COURT: Nothing like a hearing to cause people  
17 to move.

18 MS. EISENBERG: Yes. Now, it was a categorical  
19 privilege log which did not comply with the Commercial  
20 Division rules because they specifically called for the  
21 parties to meet and confer about whether or not the  
22 categorical privilege log is going to be the approach. And  
23 we're certainly willing to be practical and maybe amenable  
24 to the categorical approach in some instance. We certainly  
25 do not believe that the wholesale categorical approach is

## Status Conference

35

1 relevant, specifically because of the reasons that we were  
2 discussing a minute ago about the allegations that the NRA  
3 is criminal enterprise in August of September of 2018 before  
4 the Attorney General became the Attorney General and saw a  
5 single piece of evidence. So if and when she was talking to  
6 lawyers about matters related to this investigation, we're  
7 certainly entitled to know the dates and the parties with  
8 whom --

9 THE COURT: You mean before she was Attorney  
10 General?

11 MS. EISENBERG: Before she became Attorney General.  
12 If she was talking to Governor Cuomo, for example --

13 THE COURT: Well --

14 MS. EISENBERG: -- about the NRA.

15 THE COURT: I don't know why that would be  
16 privileged anyway. But when she was a private citizen,  
17 you're saying?

18 MS. EISENBERG: Yes.

19 THE COURT: Well, look, I really don't want to try  
20 to come up with hypothetical documents for this. You know,  
21 generally speaking, people start with the categorical and  
22 move to individual when we need to, otherwise, you all  
23 would. And believe me, on your side, you probably have a  
24 lot more privileged documents than they do and you're the  
25 last people who are going to want to have to go document by

## Status Conference

36

1 document unless you're already doing that.

2 I don't feel like I have enough to sort of give  
3 you, no, I will forbid them from doing categorical. One of  
4 the nice parts of the rules was to permit that kind of  
5 thing, really on both sides, to avoid what we've all gone  
6 through in our professional lives spending thousands of  
7 hours categorizing things. I'm hopeful you can find a way  
8 to say, Look, X, Y and Z broad categories is fine, we have  
9 some concerns about this category and we would like to have  
10 you be more granular on that and then you would have a  
11 specific thing to bring to my or Judge Sherwood's -- have I  
12 mention him enough yet -- his attention, to have somebody  
13 say, Well, look, here's what I think on this NRA thing. I  
14 would certainly urge you all to do that here, and not sort  
15 of -- it's not one way or the other, because that site  
16 swings both ways, as they say. So, again, I'm trying to be  
17 helpful.

18 MS. EISENBERG: You are. Thank you very much for  
19 your comments, your Honor.

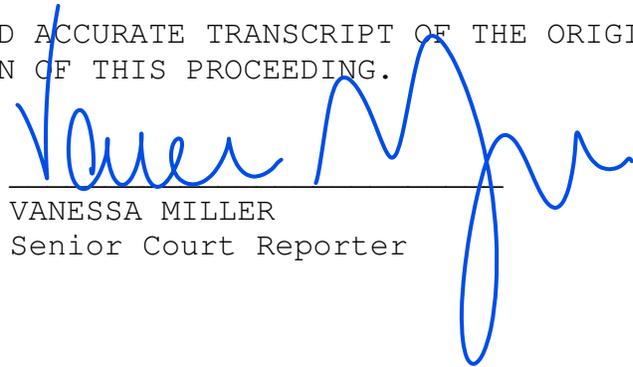
20 THE COURT: All right. I think that's all the  
21 issues that I had on my list. I see either people agreeing  
22 with that. So either people are exhausted or they agree  
23 that we've covered everything.

24 -- I want to thank everybody. Very efficient and  
25 well done argument. And as I said, I'll take the motions

1 under submission. And if there needs to be motions arising  
 2 out of these discovery things, then let me know. And I  
 3 would like you to get back to me within a few days as to  
 4 whether you're amenable to having Justice Sherwood operate  
 5 as a Discovery Master, I'd appreciate it -- so let's say by  
 6 Wednesday of next week.

7 Thanks very much.

8 \*\*\*\*\*  
 9 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL  
 10 STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.



11 VANESSA MILLER  
 12 Senior Court Reporter

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