SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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SARA HOFFMAN,

Plaintiff,

-against-

JOEL HOFFMAN,

Defendant.

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

Index No. EF007174-2018
Motion Date: March 15, 2021

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The following papers numbered 1 to 9 were read on Defendant's motion for an order vacating a prior oral order of the Court directing Defendant to file a DRL §253 statement of removal of barriers to Plaintiff's remarriage and granting other relief, and Plaintiff's cross motion for an order directing Defendant to file the aforesaid statement of removal of barrier to remarriage and imposing sanctions:

Notice of Motion - Affirmation / Exhibits - Affidavit..... 1-3

Notice of Cross Motion - Affirmation / Exhibits - Affidavit / Exhibit ..... 4-6

Affirmation in Opposition to Cross Motion / Exhibits - Affidavit / Exhibit ..... 7-8

Reply Affirmation ..... 9

Upon the foregoing papers, it is ORDERED that the motions are disposed of as follows:

**A. Factual and Procedural Background**

Plaintiff wife commenced this action for divorce pursuant to DRL §170(7) on the grounds of irretrievable breakdown. Defendant husband counterclaimed for divorce on the same grounds, including in his "Verified Answer and Counterclaims" the requisite allegation that he "will remove all barriers to the Plaintiff's remarriage after the entry of the judgment of divorce." *See,* DRL §253(2).

The Preliminary Conference Order ("PCO"), in the section entitled "Grounds", states that "[t]he Defendant shall be granted a judgment of divorce on the grounds of irretrievable breakdown." Although the PCO Form calls for the signature of both parties and both attorneys, neither Plaintiff, nor her attorney, nor the Defendant executed the PCO that is filed on the electronic docket of this action. It bears only the signature of Defendant's attorney. Plaintiff has produced an unfiled copy of the PCO which Defendant purportedly signed (in the wrong place) out of Court, but neither she nor her attorney ever signed the PCO.

Child custody issues were resolved, and the matter proceeded to trial on financials only. At the trial of this action, Defendant was asked, "Will you go to the beis din and give your wife a get?" He responded: "When everything is done of course..." At trial's end, upon the request of Plaintiff's counsel, the Court conducted an inquest and inquired of Defendant whether he wished to be divorced. He answered "No", and stated:

> The Bes Din ask me to give her a get, I'll give her a get. He issue the get.
> We got married in the Jewish way, there would be a get in the Jewish way....

In accordance with the Preliminary Conference Order, the Court orally granted the Defendant a divorce pursuant to DRL §170(7) with "all barriers...removed." Defendant's counsel objected,

and Defendant has declined to execute a sworn statement that, to the best of his knowledge, he has, prior to the entry of final judgment, taken all steps solely within his power to remove all barriers to the Plaintiff's remarriage following the divorce. *See,* DRL §253(3).

Defendant now moves to vacate the January 12, 2021 oral directive of the Court and to withdraw his counterclaim for divorce. Plaintiff cross moves for an order compelling Defendant to file a sworn statement to the removal of barriers to Plaintiff's remarriage, and imposing sanctions.

**B. Legal Analysis**

The pending motions give rise to the question whether this Court has the authority to compel Defendant to issue a DRL §253(3) pre-judgment statement – in effect, to compel him to give the Plaintiff a Jewish religious divorce[1] – and whether the exercise of such authority in the circumstances of this case would violate the Defendant's constitutional right to the free exercise of religion.

**1. The Operation of DRL §253**

DRL §253 provides in pertinent part as follows:

> 1. This section applies only to a marriage solemnized in this state or in any other jurisdiction by a person specified in subdivision 1 or Section 11 of this chapter.
>
> 2. Any party to a marriage defined in subdivision 1 of this section who commences a proceeding to annul the marriage or for a divorce must allege, in his or her verified complaint: (I) that, to the best of his or her knowledge, that he or she has taken or that he or she will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.

[1]Since DRL §253(3) statements must be made under oath, and a false sworn statement therein subjects the maker to criminal penalties (*see,* DRL §253(8), Penal Law §210.40), the Court regards Plaintiff's application herein as tantamount to one to compel Defendant to give Plaintiff a Jewish religious divorce.

> 3. **No final judgment of annulment or divorce shall thereafter be entered unless the plaintiff shall have filed and served a sworn statement: (I) that, to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce;** or (ii) that the defendant has waived in writing the requirements of this subdivision.

Although the statute on its face refers only to plaintiffs, the statutory requirements presumably apply as well to a defendant who prevails on a counterclaim for divorce. *See,* McKinney's Cons. Laws of New York Annotated, DRL §253, Practice Commentaries (Scheinkman) C253:5 (2020). However, nothing in the statute authorizes the Court to compel the filing of a DRL §253(3) pre-judgment statement of removal of barriers to remarriage by a plaintiff or defendant. The sanction explicitly provided by Section 253(3) for failure to file the requisite statement is the denial of relief, i.e., *that judgment of divorce shall not be entered. Id.* As Judge Scheinkman observes in the Practice Commentaries to DRL §253:

> DRL §253 is really designed to induce or compel Jewish spouses, especially men, to "voluntarily" accede to religious divorces or else be precluded from obtaining a civil divorce decree. *Id.,* C253:1
>
> [The statute] is intended to coerce parties to seek religious relief on pain of being deprived of civil relief. *Id.*
>
> [W]here there has not been any agreement by the husband to cooperate in obtaining a religious divorce, it is questionable whether there is any basis for the civil authorities to compel him to do so against his will. While it can be argued that a husband who seeks a civil divorce may find that his ability to obtain one is contingent upon his cooperation in obtaining a religious divorce for the wife, the remedy to be invoked upon the husband's failure to cooperate is to deny the civil divorce, not to order him to obtain a religious one. *Id.*

This conclusion is dictated by considerations not only of statutory construction, but also of First Amendment protection for the free exercise of religion.

**2. Constitutional Limitations on the Application of DRL §253**

This Court has had occasion to address constitutional limitations on the application of DRL §253 in *Masri v. Masri,* 55 Misc.3d 487 (Sup. Ct. Orange Co. 2017):

> The First Amendment to the United States Constitution provides *inter alia* that Congress "shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The "Free Exercise Clause" of the First Amendment applies to the states through the Fourteenth Amendment's Due Process Clause. *Cantwell v. Connecticut,* 310 U.S. 296 (1940).
>
> In *Avitzur v. Avitzur,* 58 NY2d 108, *cert. denied* 464 U.S. 817 (1983), the Court of Appeals addressed "the question of the proper role of the civil courts in deciding a matter touching upon religious concerns." *Id.,* at 111. In that case, the Court enforced the parties' binding prenuptial agreement – entered into as part of a Jewish wedding ceremony – to arbitrate any post-marital religious obligations before a specified rabbinical tribunal. *Id.,* at 111-115. Sensitive to "the constitutional prohibition against excessive entanglement between church and state" (*id.*, at 114), the Court reasoned that "[t]he present case can be decided solely upon the application of neutral principles of contract law", in that (1) the parties' agreement was akin to "an antenuptial agreement to arbitrate a dispute in accordance with the law and tradition chosen by the parties", and (2) the relief sought by the plaintiff was "simply to compel defendant to perform a secular obligation to which he contractually bound himself." *Id.,* at 114-115. The *Avitzur* Court was especially careful to observe that:
>
> > [P]laintiff is not attempting to compel defendant to obtain a Get or to enforce a religious practice arising solely out of principles of religious law. She merely seeks to enforce an agreement made by defendant to appear before and accept the decision of a designated tribunal.
>
> *Id.,* at 113 (emphasis added).
>
> On the logic of *Avitzur,* the Second Department (both pre- and post-*Avitzur*) has enforced separation agreements and stipulations of settlement wherein the spouses have agreed to obtain or cooperate in obtaining a religious divorce, either by imposing contempt remedies or by withholding civil economic relief. *See, Fischer v. Fischer,* 237 AD2d 559, 560-561 (2d Dept. 1997); *Kaplinsky v. Kaplinsky,* 198 AD2d 212, 212-213 (2d Dept. 1993); *Waxstein v. Waxstein,* 90 Misc.2d 784 (Sup. Ct. Kings Co. 1976), *aff'd* 57 AD2d 863 (2d Dept. 1977), *appeal denied,* 42 NY2d 806.[2] However, these cases do not

[2] *But cf., Margulies v. Margulies,* 42 AD2d 517 (1st Dept.), *appeal dismissed,* 33 NY2d 894 (1973) (fines imposed for violating stipulation wherein defendant agreed to appear before

address the First Amendment issues raised by a court's compelling the provision of a Get. *See, Aflalo v. Aflalo,* 295 N.J. Super. 527, 532-544 (Chancery 1996). The *Kaplinsky* Court declined to decide whether DRL §253 is unconstitutional because the issue was unpreserved for appellate review. *Id.,* 198 AD2d at 213. The *Fischer* Court merely cited to *Kaplinsky* and *Avitzur. Id.,* 237 AD2d at 560-561.

In this case, unlike in *Avitzur* and its progeny, there is no agreement or stipulation concerning the obligations of the parties with respect to a Jewish religious divorce. Hence, this case presents the issue reserved in *Avitzur*, i.e., the constitutionality of a court's compelling a party to a civil divorce action to seek or obtain a religious divorce. In *Becher v. Becher,* 245 AD2d 408 (2d Dept. 1997), the Second Department avoided on the ground of mootness the question whether the Domestic Relations Law provisions directing the court to consider the effect of a barrier to remarriage in determining equitable distribution and maintenance are unconstitutional. *Id.,* at 408-409.

However, the Second Department has gone so far as to hold, in effect, that consideration of a Jewish husband's providing his wife a Get – or not – in fashioning awards of maintenance or equitable distribution is not an impermissible interference with religion in circumstances where the husband has withheld the Get solely to extract economic concessions, or where an adjustment was needed to redress adverse economic consequences resulting from the wife's failure to obtain the Get. *See, Mizrahi-Srour v. Srour,* 138 AD3d 801 (2d Dept. 2016); *Pinto v. Pinto,* 260 AD2d 622 (2d Dept. 1999); *Schwartz v. Schwartz,* 235 AD2d 468 (2d Dept. 1997).

In *Schwartz v. Schwartz*, *supra*, the Second Department wrote:

> The court's determination that the defendant...forfeited the right to any distributive award by his conduct involving the granting of a Get (a Jewish religious divorce) did not constitute an impermissible interference with religion. The court made no determination regarding religious doctrine. Rather, the court found that the defendant initially withheld the delivery of the Get which he ultimately gave in Israel solely to extract economic concessions from the plaintiff.

*Id.,* 235 AD2d at 469 (emphasis added). Citing *Schwartz,* the Court in *Pinto v. Pinto, supra,* held that the lower court "did not improvidently exercise its discretion in granting the plaintiff title to all of the assets listed on both of their statements of net worth if he did not deliver a religious divorce known as a Get to the plaintiff within a specified time period." *Id.* Most recently, in *Mizrahi-Srour v. Srour, supra*, the Second Department

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rabbi for Jewish divorce sustained because defendant did not obtain stay or appeal fines, but incarceration for failure to honor stipulation was not permissible); *Pal v. Pal,* 45 AD2d 738, 739 (2d Dept. 1974) (court had no authority to enforce stipulation providing for selection of rabbis to constitute rabbinical tribunal).

held:

> The plaintiff was awarded durational maintenance of $100 per week for five years, which would be increased to $200 per week if the defendant did not provide a Get (Jewish religious divorce) to the plaintiff within 60 days....The provision increasing the durational maintenance award to the plaintiff by $100 per week to adjust for the adverse economic consequences which would result to her from the defendant's refusal to grant her a Get was proper and was not an impermissible interference with religion (*see* Domestic Relations Law §§ 236[B][6][d]; 253[6]; *Mizrachi v. Mizrachi,* 82 AD3d 1178...; *Pinto v. Pinto,* 260 AD2d 622...; *Schwartz v. Schwartz,* 235 AD2d 468, 469...).

*Id.,* 138 AD3d at 802 (emphasis added).

The Second Department's ruling in *Schwartz* (and in *Pinto,* to the extent that it is truly founded on *Schwartz*) is unexceptionable. The withholding of a Get to extort financial concessions from one's spouse constitutes simony, i.e., an exchange of supernatural things for temporal advantage. When the husband himself so unambiguously subordinates his religion to purely secular ends, he may properly be said to have forfeited the protective mantle of the First Amendment, and the court may, quite rightfully and without constitutional hindrance, impose the secular remedies authorized by the Domestic Relations Law.

Here, however, there is not the slightest evidence that the Defendant has withheld a Get from Plaintiff to extract concessions in matrimonial litigation or for other wrongful purposes. According to Plaintiff's own evidence, Defendant has invoked religious grounds for refusing to cooperate in obtaining a Jewish religious divorce, i.e., that Plaintiff by going to secular court has waived her right to rabbinical arbitration concerning the Get.

The Second Department's ruling in *Mizrahi-Srour* goes beyond *Schwartz*. There is no intimation on the face of the Court's opinion that the defendant husband was abusing his religiously grounded authority to withhold a Get. That his (presumably) legitimate exercise of this religious prerogative resulted in adverse economic consequences to his wife was evidently sufficient in that Court's view to warrant the application of Domestic Relations Law remedies, in the face of a "free exercise" challenge, to adjust for said adverse economic consequences. However, the *Mizrahi-Srour* Court supplied no constitutional analysis in support of its conclusion that increasing maintenance on account of the husband's failure to provide a Get "was not an impermissible interference with religion."

The First Amendment concerns implicated by DRL §236B(6)(o) and *Mizrahi-Srour* are elaborated at some length in *Aflalo v. Aflalo, supra,* 295 N.J. Super. 527 (Chancery

1996). In that case, the plaintiff wife urged the court to order the defendant husband "to cooperate with the obtaining of a Jewish divorce upon pain of [the husband] having limited or supervised visitation of [the parties' daughter] or by any other coercive means." *Id.*, at 532. The *Aflalo* court observed that to pass muster under the Free Exercise Clause,

> a law must have both a secular purpose and a secular effect. That is, a law must not have a sectarian purpose; it must not be based upon a disagreement with a religious tenet or practice and must not be aimed at impeding religion. *Braunfeld [v. Brown],* 366 U.S. at 607...; *Sherbert v. Verner,* 374 U.S. 398, 402-403...(1963).

It was of the view that "the relief [the wife] seeks from this court so obviously runs afoul of the threshold tests of the Free Exercise Clause that the court need never reach the delicate balancing normally required in such cases." *Id.*, at 534. It wrote:

> The court is not unsympathetic to [the wife's] desire to have [the husband's] cooperation in the obtaining of a "get". She, too, is sincere in her religious beliefs. Her religion, at least in terms of divorce, does not profess gender equality. But does that mean that she can obtain the aid of this court of equity to alter this doctrine of her faith? ....

*Id.*, at 535. After extended analysis, the court answered:

> It may seem "unfair" that [the husband] may ultimately refuse to provide a "get". But the unfairness comes from [the wife's] own sincerely-held religious beliefs. When she entered into the "ketubah" she agreed to be obligated to the laws of Moses and Israel. Those laws apparently include the tenet that if [the husband] does not provide her with a "get" she must remain an "agunah". That was [the wife's] choice and one which can hardly be remedied by this court. This court has no authority – were it willing – to choose for these parties which aspects of their religion may be embraced and which must be rejected. Those who founded this Nation knew too well the tyranny of religious persecution and the need for religious freedom. To engage even in "well-intentioned' resolution of a religious dispute requires the making of a choice which accommodates one view and suppresses another. If that is permitted, it readily follows that less "well-intentioned" choices may be made in the future ....
>
> The tenets of [the wife's] religion would be debased by this court's crafting of a short-cut or loophole through the religious doctrines she adheres to; and the dignity and integrity of the court and its processes would be irreparably injured by such misuse...

*Id.*, at 542-543.

It is clear from the legislative history that it was precisely this purported "unfairness" of a Jewish husband's refusal to provide a Get that drove the enactment of the DRL §253 requirement of removal of barriers to remarriage:

> ....Although the statute is phrased in ostensibly neutral language, its avowed purpose is to curb what has been described as the withholding of Jewish religious divorces, despite the entry of civil divorce judgments, by spouses acting out of vindictiveness or applying economic coercion. *See* Governor's Memorandum of Approval, McKinney's 1983 Session Laws of New York, pp. 2818, 2819. The statute seeks to provide a remedy for the "tragically unfair" situation presented where a Jewish husband refuses to sign religious documents needed for a religious divorce. *Id.*
>
> Though this is the purpose of the statute, the statute makes no express reference to Jewish religious divorces or Jewish religious tribunals. The absence of references to Jewish religious practices was hardly unintentional. The statute represents an obvious encroachment by the civil authorities into religious matters, particularly with respect to perceived unfairness in the religious divorce doctrines of one particular religion. In an attempt to skirt some of the difficult constitutional questions raised in the context of the relationship between church and state, the drafters of the statute wrote in neutral language and avoided any express singling out of Jewish practices. However, even approached with linguistic backhand, the contention has been raised that the entire statute is unconstitutional. The existence of constitutional questions was noted by the Governor when the original legislation was presented for signature. However, he was determined to sign the legislation because of the absence of "impelling precedent" and confidence in the courts to resolve the constitutional questions. *See* Governor's Memorandum of Approval, McKinney's 1983 Session Laws of New York, pp. 2818, 2819.

McKinney's Cons. Laws of New York Annotated, DRL §253, Practice Commentaries (Scheinkman) C253:1 (2016).

Noting the potential constitutional infirmity of DRL §253 in terms directly applicable to Plaintiff's request that maintenance be so calibrated per DRL §236B(6)(o) as to apply financial pressure on Defendant to induce him to provide a Jewish religious divorce, the Hon. Alan D. Scheinkman wrote:

> DRL §253 is really designed to induce or compel Jewish spouses, especially men, to "voluntarily" accede to religious divorces or else be precluded from obtaining a civil divorce decree. Viewed as such, it is questionable whether the statute can withstand constitutional challenge.

> It cannot be doubted that marriage is a personal relation and the state may fix the rights, duties, and obligations which arise out of the relationship, including the terms on which the relationship may be terminated. *Maynard v. Hill,* 125 U.S. 190...(1888). The state may allow civil divorce, even though one spouse object to the decree on the basis of religious conviction and even though a religious divorce cannot be or has not been obtained. *See Williams v. Williams,* 543 P.2d 1401 (Okla. Sup. Ct. 1976), *appeal dismissed, cert. denied* ...426 U.S. 901.... Religious practices, even those relating to religious marriage practice, may be regulated, if offensive to overriding public policy. *See Reynolds v. United States,* 8 Otto 145, 98 U.S. 145...(1878)(criminal prosecution for bigamy).
>
> This statute does not purport to prohibit a religious practice on public policy grounds. Instead, it is intended to coerce parties to seek religious relief on pain of being deprived of civil relief. While it may perhaps be permissible for secular courts to compel a party to perform a contractual obligation, though imposed in a religious writing (as allowed by the *Avitzur* decision), it seems doubtful that a civil statute can compel, by mandating the withholding of relief, a party to a civil action to undertake religious proceedings or submit to religious authorities and practices. The statute may be susceptible to the conclusion that it interferes with the free practice of religion and transgresses the separation of church and state.

McKinney's Cons. Laws of New York Annotated, DRL §253, Practice Commentaries (Scheinkman) C253:1 (2016) (emphasis added).

In view of the foregoing, this court holds that in the circumstances presented here, increasing the amount or the duration of Defendant's post-divorce spousal maintenance obligation pursuant to DRL §236B(6)(o) by reason of his refusal to give Plaintiff a Jewish religious divorce or "Get" would violate the First and Fourteenth Amendments to the United States Constitution. There is no evidence that the Defendant has withheld a Get to extract concessions from Plaintiff in matrimonial litigation or for other wrongful purposes. The religious and social consequences of which Plaintiff complains flow not from any impropriety in Defendant's withholding a "Get", but from religious beliefs to which Plaintiff no less than Defendant subscribes. To apply coercive financial pressure because of the perceived unfairness of Jewish religious divorce doctrines to induce Defendant to perform a religious act would plainly interfere with the free exercise of his (and her) religion and violate the First Amendment. The court accordingly declines Plaintiff's invitation to apply DRL §236B(6)(o) in determining Defendant's maintenance obligation.

*Masri v. Masri, supra,* 55 Misc.3d at 492-499.

### 3. The Significance of the Preliminary Conference Order

Here, of course, it is Plaintiff's position that Defendant agreed to remove the barriers to Plaintiff's remarriage, and may therefore, consistent with the constitutional constraints discussed above, be compelled by applying neutral principles of contract law to abide by his agreement. Plaintiff acknowledges that there was no settlement agreement or open court stipulation, relying instead on Defendant's verified counterclaim for divorce and the statement in the Preliminary Conference Order that "[t]he Defendant shall be granted a judgment of divorce on the grounds of irretrievable breakdown." Defendant counters that the matter of grounds for divorce was never addressed in open court, and that the formal trappings of the PC Order are insufficient to make it enforceable as a written agreement requiring him to file a DRL §253(3) pre-judgment statement of removal of barriers to Plaintiff's remarriage.

Query, then, whether the facts of this case are such that it falls within the parameters of *Avitzur v. Avitzur, Fischer v. Fischer,* and *Kaplinsky v. Kaplinsky, supra.*

It is not insignificant that *Avitzur* involved a "binding prenuptial agreement," and *Fischer* and *Kaplinsky* both involved stipulations of settlement incorporated into judgments of divorce. General Obligations Law §5-311 provides that "[e]xcept as provided in Section 236 of the Domestic Relations Law, a husband and wife cannot contract to alter or dissolve the marriage..." DRL §236(B)(3) provides:

> An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded....

The Court of Appeals has held that "the requisite formality explicitly specified in Domestic Relations Law §236(B)(3) is essential." *See, Matisoff v. Dobi,* 90 NY2d 127, 132 (1997).

*Matisoff* notwithstanding, the Second Department has held that open court stipulations of settlement in matrimonial cases are enforceable despite a failure to meet the formal requirements of DRL §236(B)(3). *See, e.g., Balkin v. Balkin,* 43 AD3d 967, 968 (2d Dept. 2007); *Pretterhofer v. Pretterhofer,* 37 AD3d 446 (2d Dept. 2007); *Harrington v. Harrington,* 103 AD2d 356, 359-361 (2d Dept. 1984). In *Harrington,* the Second Department observed that stipulations entered into in open court were binding and enforceable prior to the enactment of the Equitable Distribution Law, that Section 236(B)(3) was not intended to impede the accepted practice of settling matrimonial actions via stipulations in open court without the necessity of a full trial, and that the Legislature did not intent to abrogate CPLR §2104 with respect to matrimonial actions settled in open court. *See id.,* 103 AD2d at 360-361. The *Harrington* Court concluded:

> Therefore, Section 236 (Part B, subd. 3) of the Domestic Relations Law should not be utilized to prohibit an oral stipulation made in open court, but should be more reasonably interpreted "as **encouraging agreements between the parties before and during the marriage provided that they are in writing and properly subscribed and acknowledged or entered into in open court**" (*Josephson v. Josephson,* [121 Misc.2d 572, 577]).

*Harrington, supra,* 103 AD2d at 361 (emphasis added).

Inasmuch as the PC Order here purports to be a settlement between the parties of the grounds for their divorce, but was neither subscribed or acknowledged in accordance with Section §236(B)(3) nor entered into in open court, it affords the Court no basis per *Avitzur* and its progeny for compelling Defendant to file a DRL §253(3) pre-judgment statement of removal of barriers to Plaintiff's remarriage.

**4. Conclusion**

Insofar as the Court's oral directive on January 12, 2021 may be construed as an order compelling Defendant to file a DRL §253(3) pre-judgment statement of removal of barriers to Plaintiff's remarriage, such order is neither authorized by DRL §253 nor permitted by the First Amendment to the United States Constitution. Accordingly, Defendant's motion to vacate that portion of the Court's January 12, 2021 Order is granted, and Plaintiff's cross-motion to compel Defendant to file a Section 253(3) statement, and to impose sanctions, is denied.

Furthermore, since Defendant refuses to file a DRL §253(3) statement, no judgment may be entered on his counterclaim for divorce. *See,* DRL §253(3). Therefore, that portion of the Court's January 12, 2021 Order which granted Defendant a divorce pursuant to DRL §170(7) is vacated.

As for Defendant's motion to withdraw his counterclaim for divorce, a voluntary discontinuance is unwarranted if unfair prejudice would result to the movant's adversary. *See, Kane v. Kane,* 163 AD2d 568, 570 (2d Dept. 1990). Although Defendant refuses to proceed on his own cause of action, his verified counterclaim for divorce stands as an admission of the existence of grounds for divorce, and precludes him from contesting Plaintiff's application for a divorce. Accordingly, Defendant's motion to withdraw his counterclaim for divorce is denied.

IT IS SO ORDERED !

The foregoing constitutes the decision and order of the Court.

Dated: March 22, 2021 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.