

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

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

Plaintiff,

v.

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

Defendants.

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

Mot. Seq. No. 26

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

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**I.****PRELIMINARY STATEMENT**

Plaintiff People of the State of New York, by Letitia James, Attorney General, respectfully submits this memorandum of law in opposition to the motion of Defendant National Rifle Association of America (“NRA”) for review of the Special Master’s ruling that Aronson LLC (“Aronson”), the NRA’s outside independent auditor and tax preparer, should produce two documents in its possession (“the Documents”).<sup>1</sup> The Documents are drafts of schedules to the NRA’s annual IRS Form 990, discussed between the NRA and its outside tax counsel and then shared with Aronson. The Court should uphold the Special Master’s determination that Aronson must produce the Documents. As the Special Master correctly ruled, any privilege that may have attached to the underlying communication in the Documents was waived once the Documents were provided to Aronson.

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

The NRA, as a regulated charity that is chartered in and solicits contributions in New York, must file annually with the Office of the Attorney General (“OAG”) a copy of its annual IRS Information Return, the Form 990. The Form 990 provides the IRS and public with information and transparency regarding a not-for-profit entity’s finances and promotes compliance with tax laws relevant to tax-exempt organizations.<sup>2</sup> The NRA engaged Aronson as

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<sup>1</sup> The documents (NYSCEF 640 and 641) appear to be identical with the exception that 640 contains one additional instance of the document being forwarded. For the sake of consistency, the OAG will adopt the NRA’s reference to the “Documents” in plural form.

<sup>2</sup> See, e.g., IRS, *Form 990 Resources and Tools*, [https://www.irs.gov/charities-non-profits/form-990-resources-and-tools#:~:text=Form%20990%2DN%20\(e%2D,the%20public%20about%20their%20programs](https://www.irs.gov/charities-non-profits/form-990-resources-and-tools#:~:text=Form%20990%2DN%20(e%2D,the%20public%20about%20their%20programs) (last accessed May 4, 2020).

an independent auditor and to assist in the preparation of its Form 990 for fiscal year 2019, and to assist in preparing and reviewing its Form 990 for fiscal year 2020. NYSCEF 633 and 634. New York law requires that the yearly financial statement filed by a covered entity like the NRA must include “an independent certified public accountant’s audit report containing an opinion that the financial statements are presented fairly in all material respects and in conformity with generally accepted accounting principles.” Exec. Law § 172-b. Aronson has been the NRA’s independent auditor since the 2020. Aronson did not, however, sign the IRS Form 990s as the NRA’s tax preparer. Fuchs Aff. Ex. B.

Neither the NRA nor its outside counsel engaged Aronson to assist in the provision of legal advice to the NRA. Indeed, documents and testimony collected to date show that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. For example, during the recent deposition of Aronson by the OAG, Greg Plotts, Aronson’s corporate representative and the engagement partner for the NRA account, testified that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

[REDACTED]

[REDACTED]. For example, Aronson’s audit workpapers

document that in meetings with the Brewer firm, Brewer attorneys refused to answer certain questions posed by Aronson because of privilege:

Meeting with Bill Brewer and Sara Rodgers, external council for NRA with Brewer Law Firm, on October 8, 2020 (Questions led by Greg Plotts and also in attendance was David Semendinger and Will Donahue from Aronson and Craig Spray from the NRA)

- Bill and Sara discussions were limited by attorney client privilege, therefore any discussions outside of official legal matters with the update on lawsuits were not answered. NY AG Lawsuit was discussed and how it was originally improperly assigned outside of commercial track and the appointed judge originally overseeing it was an elected official. With the NRA action it was removed from this lower court and reassigned to Commercial track (where larger suits against organizations are held and less threat of political bias). October 19<sup>th</sup> the NRA will be filing to dismiss lawsuit – this decision will take 30-60 days.

....

- There were a few questions asked by Aronson on specific procedures, investigations, 990 review that the Brewer firm may have done or will be doing, and Bill made it clear that he could not respond to any of these questions under attorney client privilege.

NYSCEF 636 Ex. E.

Likewise, when Aronson requested a copy of a forensic analysis purportedly used to substantiate excess benefits conferred upon Defendant Joshua Powell and reported in the Form 990, John Frazer, the NRA's general counsel, did not provide the analysis on privilege grounds.

NYSCEF 636 Ex. F. Aronson professionals also believed there was no privilege with the NRA.

NYSCEF 636 Ex. D (Oct. 8, 2020 instant message exchange, in which Kathy Cuddapah, the then-Aronson tax partner, writes to her colleagues regarding a potential disclosure in the 990:

*"When in doubt, disclose it . . . and we don't have client privilege."* Emphasis added.).

## **B. The Present Dispute Regarding Privilege**

On June 21, 2021, Plaintiff served Aronson with a nonparty subpoena for documents. The NRA insisted that it be given the opportunity to review responsive documents before Aronson's production to the OAG to assert any privileges and to redact donor/member identifying information. Aronson agreed to the process, and has repeatedly represented that any documents that Aronson has withheld from its production on privilege grounds were withheld at the direction of the NRA and/or the National Rifle Association of America Foundation ("NRAF").

The NRA/NRAF privilege review was unduly protracted and caused delays in the discovery process, forcing multiple adjournments of the Aronson deposition. In addition, the NRA originally improperly directed Aronson to withhold approximately 400 documents on privilege grounds. Fuchs Aff. at par. 5. Following several meetings between Plaintiff and the NRA, the NRA withdrew its assertion of privilege over all but 23 documents withheld in their entirety and 58 that were redacted. NYSCEF 639.

Plaintiff objected to the assertion of privilege over those documents, and on March 18, 2022, presented the dispute to Justice Sherwood, the Special Master for Discovery in this matter (the “Special Master.”) *See* NYSCEF 636. The NRA opposed the OAG’s motion by submission to the Special Master dated March 24, 2022. *See* NYSCEF 637. With respect to the Documents at issue, the NRA argued that the drafts of the 990 schedules were “discussed with attorneys for purposes of legal advice” and “shared with Aronson in its tax-advisory capacity.” *Id.* at 1. On April 11, 2022, after reviewing the documents *in camera*, the Special Master ruled that all but five of the documents should be produced, including the documents at issue here. NYSCEF 632.

The Documents appear to be drafts of Schedules L and O to the NRA’s 2019 Form 990, and communications related thereto. NYSCEF 640 and 641. Schedule L of the Form 990 is used by organizations “to provide information on certain financial transactions or arrangements between the organization and disqualified person(s) under [IRC] section 4958 or other persons....”<sup>3</sup> The NRA’s Schedule L for 2019 disclosed ten such groups of transactions, including between the NRA and all four individual Defendants. Fuchs Aff. Ex. B. at pdf pp. 45-50. Schedule O is used to provide additional explanations regarding certain disclosures within the body of the Form 990. The NRA’s 2019 Schedule O provided significant disclosures

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<sup>3</sup> See Instructions for Schedule L, available at <https://www.irs.gov/pub/irs-pdf/i990sl.pdf> (last visited May 4, 2022).

regarding, among other things, transactions among interested persons, changes to the bylaws, the degree to which the board reviews the 990, compensation received by board members, and the compensation provided to Lt. Col. Oliver North. *Id.* At 54-56.

### III.

#### ARGUMENT

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

The Special Master, having reviewed the parties' submissions and reviewed the Documents *in camera*, correctly applied the law in determining that the Documents must be disclosed. To the extent that the original communication from Attorney Lan to the NRA may have be privileged – a predicate the NRA has failed to establish – any privilege was waived when the NRA knowingly provided the document to Aronson, its independent auditor and tax advisor. The NRA has failed to establish any basis for overturning the Special Master's determination that any applicable privilege was waived. The trial court has discretion in its review of the Special Master's ruling. *Those Certain Underwriters at Lloyds, London v. Occidental Gems, Inc.*, 11 N.Y.3d 843, 845 (2008); *accord GoSMILE, Inc. v. Levine*, 112 A.D.3d 469, 470 (App. Div. 1st Dept. 2013).

##### i. The NRA waived any attorney-client privilege when it shared the documents with Aronson.

The NRA has not established that any attorney-client privileged was not waived. It is axiomatic that

[t]he party asserting the privilege bears the burden of establishing its entitlement to protection by showing that the communication at issue was between an attorney and a client for the purpose of facilitating the rendition of legal advice or services, in the course of a professional relationship, that the communication is predominantly of a legal character, that the communication was confidential and that the privilege was not waived.

*Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016) (internal quotation marks omitted). It is narrowly construed. *Id.* “[A] client waives the privilege if a communication is made in confidence but subsequently revealed to a third party. *Id.* (internal quotation marks and citations omitted).

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

The NRA's argument that for the exception to apply, there need only be the client's “expectation of confidentiality” (*see* NYSCEF 642 at 12 n.6; NYSCEF 637 at 3) misreads the



relevant law and should be rejected. The law is clear that the communication needs to be to facilitate legal advice. In *Ambac*, the Court of Appeals was clearly articulating the state of New York law on waiver. The case relied upon by the NRA, *People v. Osorio*, 75 N.Y.2d 80 (1989), also makes clear that the exception, drawing from the federal *Kovel* standard, requires that the communication be made “to facilitate communication” with counsel. *Osorio*, 75 N.Y.2d at 84. In that opinion, the Court simply elaborated on the expectation of confidentiality prong because that was the element at issue in the case, not, as the NRA asserts, because it was excluding the requirement that the communication be made to facilitate the provision of legal advice. *Id.*; see also *Stenovich*, 195 Misc. 2d at 110 (finding that the respondent’s contention that “outside agents maintained the confidentiality of communications” was “not a substitute for respondent's duty to establish facts sufficient to support the privilege and its purported defense to waiver of that privilege”).

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

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

**ii. The NRA has failed to establish that the Documents are work product.  
In any event, any such claim to privilege is waived.**

The work product privilege provided by CPLR 3101(c) does not apply because the NRA has failed to establish that the Documents are work product, and any such privilege was waived when the NRA intentionally provided the Documents to Aronson.

The “absolute immunity of work product . . . should be limited to those materials which are uniquely the product of a lawyer’s learning and professional skills, such as materials which reflect his legal research, analysis, conclusions, legal theory or strategy.” *Hoffman v. Ro-San Manor*, 73 A.D.2d 207, 211 (1st Dep’t 1980). Here, the NRA has failed to establish how draft Form 990s, which are frequently prepared and filed by CPAs and non-attorneys, are “uniquely the product of a lawyer’s learning and professional skills.” *Id.*

In any event, work product protection is waived “when there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality.” *Bluebird Partners v. First Fid. Bank*, 248 A.D.2d 219, 225 (1998). Here, no privilege attaches because when the NRA forwarded the exchange to Aronson personnel, it was not in connection with any provision of legal advice, nor was it an inadvertent disclosure. Simply put, the NRA was apprising Aronson of the ongoing conversation, *see* NYSCEF 640, and was thus acting in a manner “inconsistent with a desire to maintain confidentiality” of the Documents and the Lan communication.

Further, the NRA has failed to establish that Aronson was “adjunct to the lawyer’s strategic thought process.” NYSCEF 642 at 10 n.4. As explained above, Aronson was not involved in the provision of legal advice generally or in connection with these Documents. Further, Aronson’s role as an independent tax preparer and auditor places it in a position which voids any assertion of common interest or the equivalent. “[A]s has become crystal clear in the

face of the many accounting scandals that have arisen as of late, in order for auditors to properly do their job, they *must* not share common interests with the company they audit.” *Medinol, Ltd. v. Bos. Sci. Corp.*, 214 F.R.D. 113, 116 (S.D.N.Y. 2002) (emphasis in original).

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

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

It is only “material prepared for litigation” that warrants the qualified privilege found in CPLR 3101(d)(2). *Hoffman*, 73 A.D.2d at 211 (holding that a list of names and addresses of witnesses was not “material prepared for litigation”). “[W]hen an item has been secured or prepared with the mixed motivation of both internal business purposes as well as potential litigation, the item does not partake of [CPLR 3101(d)] immunity and, therefore, is disclosable.” *Pinn v. Supermarkets General Corp.*, 104 Misc.2d 1112, 1115 (Dist. Ct. Nassau Cnty. 1980) (citing *Kandel v. Tocher*, 22 A.D.2d 513 (1st Dep’t 1965)).

The NRA has not established that documents provided to its outside tax preparer during the preparation of a mandatory tax filing were prepared solely in anticipation of any litigation, and not for the sole or “mixed motivation” of submission of the Form 990. In fact, the NRA has identified in its privilege log that it has withheld drafts of the NRA’s tax filings, which were, of course, at the very least prepared with the mixed motive of filing tax returns. *See* NYSCEF 636 Ex. A at n.1. On this ground alone, the assertion of privilege fails.

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

*[Remainder of page intentionally left blank]*

**IV.****CONCLUSION**

The NRA has failed to establish any basis for overturning the Special Master's ruling regarding production of the Documents at issue. The Plaintiff respectfully requests that the Court order the production of the Documents.

Dated: May 4, 2022  
New York, New York

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/s/ Yael Fuchs

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**Attorney Certification Pursuant to Commercial Division Rule 17**

I, Yael Fuchs, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Memorandum of Law in Opposition to the NRA's Motion for Review of the Special Master's Ruling Regarding the Discoverability of Certain Aronson Documents complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the memorandum of law contains 2,881 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law and affirmation.

Dated: May 4, 2022

New York, New York

/s/ Yael Fuchs

Yael Fuchs