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I.**PRELIMINARY STATEMENT**

The NRA seeks review of the Special Master's determination that multiple privileges invoked by the NRA with regard to several redacted records are inapplicable or were waived when shared with the NRA's tax advisor and outside auditor Aronson LLC ("Aronson"). As the Court knows, Aronson produced over 18,000 pages of documents in response to a subpoena served by the NYAG in June 2021. However, at the NRA's instruction given for privilege reasons, Aronson produced certain documents to the NYAG with redactions. The documents at issue (the "Documents") in this motion are internal communications, detailing the personal impressions and beliefs of various internal and outside counsel concerning legal matters, such as tax-return disclosures. The Documents also include workpapers reflecting attorney-work product shared with the auditor in connection with the audit of the NRA's financial statements. As demonstrated below, the NRA counsel's confidential attorney work product and trial preparation materials are immune from disclosure under CPLR 3101. The Court should review the Master's rulings, consider the Documents *in camera* if necessary, hold that the Documents are privileged, and hold that the privileges were not waived.

II.**PROCEDURAL BACKGROUND**

The NRA respectfully refers the Court to the Procedural Background set forth in Motion No. 26, Dkt. No. 642 (the "Motion"), attached as Exhibit 2 to the Affirmation of Svetlana M. Eisenberg (Aff.). There, the NRA requested that the Court review the determination by the Honorable Peter O. Sherwood, a Special Master for Discovery (the "Master"), that privileges associated with internal drafts of tax schedules prepared by the NRA's outside tax counsel and shared with the NRA's tax preparer were waived. After the Motion was fully briefed,

the Court requested the documents at issue in the Motion for *in camera* review. In complying, the NRA also submitted for *in camera* review the two parent email messages, which (i) Aronson produced albeit in redacted form, (ii) were addressed in Judge Sherwood's Second Amended Order; and (iii) along with other documents— are at issue in this motion.

On May 12, 2022, the Special Master, after conducting an *in camera* review of redacted documents ruled (Aff. Exhibit 1) that:

- Some of the documents were properly redacted because the redacted matter is privileged; and
- Other documents that had been redacted must be produced because either they the matter that was redacted is not privileged or the privileges were waived.

The NRA now seeks review of the Special Master's determination with regard to thirty-one of the redacted Documents that the Special Master directed the NRA to unredact. The matter that was redacted in the Documents is privileged for *multiple independent reasons*, and privileges were not waived. Even if the Court agrees with the Master that an asserted privilege is inapplicable or was waived, the Court should still hold that the Documents remain redacted if there is at least one un-waived applicable privilege.

III.

FACTUAL BACKGROUND

The business relationship between Aronson and the NRA, along with other relevant factual background, is described in the Motion. At issue here are (i) email exchanges involving the NRA's outside tax counsel, the NRA's other counsel, and, later, Aronson, which took place in

the weeks leading up to the NRA's filing of its Form 990; and (ii) information shared with the outside auditors by counsel with regard to pending and threatened litigation.

IV.
ARGUMENTS BELOW

In ruling on the redacted Documents at issue, Judge Sherwood considered a Motion to Compel Production submitted by the NYAG (Aff. Exhibit 3), and the NRA's Opposition to the Motion to Compel (Aff. Exhibit 4), both of which are summarized in the Motion. In summary, the NRA argued that (i) the material redacted within the Documents is protected by three separate and independent privileges; (ii) the attorney-work product privilege is absolute; and (iii) no waiver of the attorney-work product or the trial preparation privilege occurs absent "a likelihood that the material will be revealed to an adversary." Ex. 4 at 6 (*citing Bluebird Partners. v. First Fid. Bank*, 248 A.D.2d 219, 225 (1998)).

V.
THE SPECIAL MASTER'S RULING AT ISSUE HERE

After reviewing the redacted Documents *in camera*, on May 12, 2022 (Aff. Exhibit 1), the Special Master held that redacted matter (i) was privileged in some records; and (ii) not privileged in others (either because the privileges did not apply or were waived). Exhibit 1 at 4-5. The NRA highlighted the specific rows in Exhibit 1 that pertain to the redacted documents at issue in this appeal. *Id.*

VI.
ARGUMENT

A. On a CPLR 3104(d) motion, the Court must conduct a probing review of the Master's rulings.

As set forth in the Motion, a CPLR 3104(d) motion "shall set forth . . . the [Special Master's] order complained of, the reason it is objectionable, and the relief demanded." Further,

cases applying CPLR 3104(d) make clear that—at a minimum—(i) evidence in the record must support the Master’s ruling; and (ii) he must have properly applied the law. Notably, the Court can disaffirm the Master’s findings of fact even where there is support in the record for those findings because when the Court appointed the master it did not waive its discretion and did not limit] its review.

B. In finding the redacted matter in the Documents is not privileged or that privileges were waived, the Master did not properly apply the law and failed to ensure that his rulings were supported by the evidence in the record.

1. The Documents are protected by the attorney-work product privilege, and disclosure to Aronson did not waive the privilege.

An error in the Master’s rulings is that the redacted matter in the Documents is not protected by the attorney-work product privilege or that disclosure of the information to Aronson waived the attorney-work product privilege. Indeed, the Master’s ruling did not address the attorney-work product privilege at all, even though the NRA clearly invoked that protection in its privilege log and subsequent briefing.

As noted in the Motion, CPLR 3101(c) gives the “work product of an attorney” an absolute exemption from discovery. *Corcoran v. Peat. Marwick*, 151 A.D.2d 443, 445 (1st Dep’t 1989); CPLR 3101(c) (it “shall not be obtainable”). Attorney-work product includes, among other things, “statements, . . . , correspondence, . . . mental impressions, [and] personal beliefs conducted, prepared or held by the attorney.” *Orange County v. County of Orange*, 637 N.Y.S.2d 596, 604 (Sup. Ct. Orange County 1995).

Here, the Documents redacted at the direction of the NRA unquestionably qualify for protection under the attorney-work product privilege. The Documents contain communications detailing the personal impressions and beliefs of various counsel, including, without limitation, lawyers within the NRA's Office of General Counsel and the NRA's outside tax counsel Don Lan.

In addition, the Documents reflect opinions and impressions reflecting NRA counsel's impressions and beliefs shared with Aronson in connection with an audit of the NRA's financial statements. Moreover, as the authority cited in the NRA's brief before Judge Sherwood states, the attorney-work product "privilege is waived upon disclosure to a third party only when there is a likelihood that the material will be revealed to an adversary." Ex. 4 at 6 (*citing Bluebird Partners. v. First Fid. Bank*, 248 A.D.2d 219, 225 (1998)).

Here, there is no evidence that, by sharing the information with Aronson, the NRA created a "likelihood that the material [would] be revealed to [a litigation] adversary." Rather, in the engagement agreement with the NRA, Aronson expressly committed to maintain information shared with it by the NRA, including its counsel, confidential.¹ See Aff., Exs. 5 and 6.

Therefore, the Court should reverse the Master's ruling and hold that unredacted versions of the Documents are not discoverable. See *Bluebird Partners v. First Fid. Bank*, 248 A.D.2d 219, 225 (1998) (reversing affirmance of special master's ruling that attorney work product protection did not apply; finding no waiver; "Even though the trustees, in asserting the privilege, had the burden of proving they had not effected a waiver . . . , there [was] no evidence that the confidentiality of these records was . . . compromised or intended to be so . . .").

¹ As noted in the Motion, the involvement of agents such as accountants and tax experts not only fails to waive work product protection—the work-product cloak actually ***extends to the work of the non-lawyer agent*** in cases where the agent is an "adjunct to the lawyer's strategic thought process." E.g., *Hudson Ins. v. Oppenheim*, 72 A.D.3d 489, 490 (1st Dep't 2010); *Delta Fin. Corp. v. Morrison*, 14 Misc. 3d 428, 432 (Sup. Ct., Nassau County 2006) (litigation consultant). Other agents whose work can be designated "attorney work product" include forensic accountants, engineering firms, appraisers, and valuation experts. *915 2nd Pub Inc. v. QBE Ins. Corp.*, 107 A.D.3d 601, 601 (1st Dep't 2013) (appraisal report); *Hudson*, 72 A.D. at 490; *Oakwood Realty Corp. v. HRH Constr. Corp.*, 51 A.D.3d 747, 749 (2d Dep't 2008); *Delta*, 14 Misc. 3d at 432. Of course, the Court need not find that any of the above facts are analogous to the ones here in order to sustain the NRA's attorney work-product claim: the documents prepared by Mr. Lan were prepared by counsel himself, and merely ***shared with*** the NRA's tax preparer.

2. The Documents are protected by the trial preparation privilege, and disclosure to Aronson did not waive the privilege.

The Master also erred in holding—implicitly—that the Documents were not protected by the trial preparation privilege. In fact, as with the attorney-work product privilege, the ruling did not address the trial preparation privilege.

The trial preparation privilege, codified in CPLR 3101(d)(2), is broader than the work product doctrine. It 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.* Under the analogous federal work product doctrine, tax materials are routinely held to be prepared “in anticipation of litigation” where, as here, litigation looms or is pending regarding the returns’ contents. *See, e.g., United States v. Roxworthy*, 457 F.3d 590, 600 (6th Cir.2006) (anticipation of litigation in the form of an anticipated IRS audit); *ChevronTexaco*, 241 F. Supp. 2d at 1082 (anticipation of litigation where taxpayer “reasonably believed that it was a virtual certainty that the IRS would challenge the . . . transaction”); *United States v. Deloitte LLP*, 610 F.3d 129 (D.D.C.2010) (pretransaction tax opinion prepared before the tax return was filed and before actual litigation commenced protected by the work product doctrine). Here, when the NRA’s internal and outside counsel provided advice and prepared work product, the NRA already faced the instant litigation alleging, *inter alia*, misleading Form 990 filings; counsel’s thoughts and impressions regarding litigations strategy and exposure were inextricable from the provision of legal advice regarding disclosures and language in the NRA’s tax return.

In addition, the Master erred to the extent he ruled implicitly that the trial preparation privilege was waived. The “privilege governing trial preparation materials ‘is waived upon

disclosure to a third party [only] where there is a likelihood that the material will be revealed to an adversary, under conditions that are inconsistent with a desire to maintain confidentiality.” Ex. 4 at 6. For the reasons stated in the certification attached to the NRA’s privilege logs (Aff. Ex. 7), the disclosure here did not create such a likelihood.

Rather, the NYAG merely argued in conclusory terms that the documents are not protected by the trial preparation privilege and that the NYAG has substantial need for the information because “there are no other means of discovering what information the NRA supplied to Aronson, and this information is relevant to [certain of] the OAG’s claims.” Aff. 3 at 6. In any case, as noted, Judge Sherwood’s ruling did not reach the issues of the applicability or waiver of the trial preparation privilege.

3. The Documents are protected by the attorney-client privilege, and disclosure to Aronson did not waive the privilege.

Although the Court does not need to reach the issue, the redacted matter in the Documents also qualifies for protection under the attorney-client privilege. The attorney-client privilege, codified in CPLR 4503(a), enables one seeking legal advice to communicate with counsel for this purpose secure in the knowledge that the contents of the exchange will not later be revealed against the client’s wishes. *See People v. Mitchell*, 58 N.Y.2d 368, 373 (N.Y. App., 4th Dept 1983). The privilege “belongs to the client and attaches if information is disclosed in confidence to the attorney for the purpose of obtaining legal advice or services.” *People v. Osorio*, 549 N.E.2d 1183, 1185 (N.Y. App. 1st Dep’t. 1989).

The communications redacted by the NRA satisfy the elements of attorney-client privilege, to the extent they contain (i) legal advice to the NRA and its representatives by various counsel in connection with various tax language and disclosures; and (ii) confidential communications soliciting, informing, and/or providing such advice.

There is no waiver of the attorney-client privilege where communications are “made to counsel through . . . one serving as an agent of either . . . client to facilitate communication” because “[t]he scope of the privilege is not defined by the third parties’ employment or function, [but instead] . . . on whether the client had a reasonable expectation of confidentiality under the circumstances.” Aff., Ex. 4 at 3.

Here, in 2020, the NRA hired outside tax counsel and Aronson to assist it in the preparation of its Form 990, and the professionals worked together—along with the various employees of the NRA—on preparing the return. As previously demonstrated in the Motion, based on the engagement agreement with Aronson, the NRA’s expectation of confidentiality was reasonable.

VII.

CONCLUSION

The NRA respectfully requests that the Court review the Documents *in camera* if necessary, find that the Documents are protected under one or more of the three applicable privileges, and hold that such privileges were not waived. In the alternative, the Court should remand the matter to the Master for a ruling with regard to the attorney work product and trial preparation privileges. The Court should also order such other relief as the Court deems just and appropriate.

Dated: May 19, 2022

Respectfully submitted,

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**THE NATIONAL RIFLE ASSOCIATION OF
AMERICA**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record, electronic mail upon counsel for Aronson on this 19th day of May 2022. I also intend to promptly send a copy of this filing to counsel for Aronson via First Class U.S. Mail.

/s/ Svetlana M. Eisenberg

Svetlana M. Eisenberg

CERTIFICATE OF CONFERENCE

In compliance with 22 New York Codes, Rules and Regulations (NYCRR) §§ 202.7 and 202.20-f, I conferred with the Office of the Attorney General of the State of New York in a good faith effort to resolve the issues raised by the annexed motion by email. On or about May 12, 2022, I advised AAG Fuchs that the NRA intends to appeal certain aspects of the Special Master's rulings. AAG Fuchs did not indicate that an amicable resolution of the dispute is possible. The parties also had attempted to resolve this dispute amicably previously, including during meet and confers involving myself and AAG Yael Fuchs in March 2022.

/s/ Svetlana M. Eisenberg

Svetlana M. Eisenberg

Certification of Compliance with Word Count

I, Svetlana M. Eisenberg, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing brief filed by the NRA pursuant to CPLR 3104(d) for review of the Special Master's ruling regarding discoverability of certain documents complies with the word count limit set forth in the Order for Appointment of a Master for Discovery dated February 7, 2022, because the memorandum of law contains fewer than 3,000 words, excluding exhibits. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

By: Svetlana M. Eisenberg
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**ATTORNEY FOR THE
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