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.)

Motion Seq. No. 34

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE NRA'S MOTION FOR REVIEW

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I.
PRELIMINARY STATEMENT

Plaintiff People of the State of New York, by Letitia James, Attorney General of the State of New York, respectfully submits this memorandum of law in opposition to the motion of Defendant National Rifle Association of America ("NRA") for purported "review" of the Special Master's determination that a report prepared by Jacob Frenkel (the "Frenkel Report" or the "Report") must be produced in compliance with this Court's October 17, 2022 Order.

As an initial matter, this is a procedurally infirm attempt by the NRA to renew or reargue prior determinations of the Special Master and this Court and should be rejected on that ground alone. By ruling dated July 15, 2022, the Special Master granted Plaintiff's motion to compel production of the Frenkel Report and certain other documents, directing that they be produced. NYSCEF 877 at 3-4. This Court affirmed the Special Master's ruling that the documents, including the Frenkel Report, must be produced. NYSCEF 860 at 5. Rather than appeal and seek a stay of that Order, the NRA now seeks a second bite at the apple. The NRA hinges this request for review upon a purported new "ruling" by the Special Master that the NRA had waived the right to argue the Frenkel report is privileged. There was no such ruling—the Special Master stated during a telephone conference on October 25, 2022 that the NRA must comply with the October 17, 2022 Order. The NRA's attempt at relitigation is barred by law of the case.

Even if the Court were to reach the issue of whether the Frenkel Report is privileged, which it should not, the NRA cannot carry its burden of showing that the Report is privileged and that privilege has not been waived. The NRA's attempts to relitigate this issue are understandable; a central issue in this case concerns the long-standing deficiencies in the NRA's internal financial controls. Another core issue is the fact that senior executives within the NRA, in particular Defendants Wayne LaPierre and Wilson Phillips, were aware for decades that the NRA lacked an

adequate internal control system. For years, they turned a blind eye to the problems, including by protecting favored personnel who were exempted from the most basic financial controls, contradicting arguments made that the Defendants have a zero-tolerance policy for misconduct. [redacted]. Not surprisingly, the NRA has repeatedly, and unsuccessfully, tried to suppress the Frenkel Report from disclosure. This appeal is the fourth time that the NRA has challenged the discoverability of the Report. Each prior attempt was found by the Special Master, and this Court, to be without merit. This appeal of the Special Master's statement on October 25, 2022 that the NRA should comply with the Court's October 17, 2022 Order fares no better.

II.
FACTUAL BACKGROUND

A. Procedural background: Prior litigation leading to orders that the Frenkel Report must be produced and the NRA's refusal to produce.

On June 21, 2022, Plaintiff requested production of the Frenkel Report, along with other documents related thereto, as well as the production of a 2007 whistleblower letter and documents related thereto. NYSCEF 875 at 3-4. The NRA refused to produce those documents, objecting on the basis that the NRA was under no obligation to produce documents dated before January 1, 2015. *Id*. at 1-2 (*see* Ms. Eisenberg's responses dated June 27, 2022 and June 28, 2022).

After the NRA refused to produce the documents, Plaintiff filed an application to compel production with the Special Master and raised the issue at a July 7, 2022 argument. During the argument, the NRA acknowledged that it had the Frenkel report at hand and argued against its production. *See* NYSCEF 794 at 135-36 (Transcript of July 7, 2022). At no time during the proceedings or submissions before the Special Master did the NRA set forth any basis for claiming

privilege over the Frenkel Report. On July 15, 2022, the Special Master granted the Plaintiff's motion to compel, directing that the "documents shall be produced." NYSCEF 877 at 4.

The NRA then appealed the Special Master's July 15, 2022 ruling to this Court, and again, did not assert privilege. *See generally* Mot. Seq. No. 33. As Plaintiff noted in opposition to the review application, the NRA did not claim that any of the documents sought actually were privileged and chose not to set forth a basis for any potential privilege either before the Special Master or the Court, as a reason to overturn the Special Master's ruling. *See* NYSCEF 818 at p. 3 n.1, p.7. Instead, the NRA noted in a footnote in its memorandum that it "reserves the right" to assert privilege regarding some or all such documents. *See* NYSCEF 809, p. 1 fn. 1.

By Order dated October 17, 2022, the Court denied the NRA's appeal of Judge Sherwood's July 15, 2022 ruling that the documents be produced. *See* NYSCEF 860 at 5. Notice of entry for the Order was filed on October 18, 2022. NYSCEF 863.

In response to this Court's October 17th Order, Plaintiff asked the NRA to produce the requested documents expeditiously, so they could be reviewed prior to the close of expert discovery. Without moving for a stay of the Order, the NRA simply refused to produce the Frenkel Report, now asserting that it was privileged. Affirmation of Yael Fuchs in Support of Plaintiff's Opposition to the NRA's Motion for Review ("Fuchs Aff.") ¶ 18.

On October 23, 2022, as a precursor to being forced to proceed with a motion for contempt or other appropriate relief, and in compliance with the Court's direction and rules, Plaintiff wrote to the Court's principal Law Clerk, Samuel Blaustein, Esq., and the Special Master regarding the NRA's refusal to comply with this Court's Order and asked for a conference to resolve the matter. The parties conferred with the Special Master on October 25, 2022 and he stated his view that

under his and the Court's rulings, the Frenkel report had to be produced. Fuchs Aff. ¶ 19. There was no formal briefing, and no written ruling.

On October 26, 2022, the NRA produced the Frenkel Report subject to the agreement originally proposed by Plaintiff to treat the document as Highly Confidential. Fuchs Aff. ¶¶ 3, 20.[1]

On November 2, 2022, the NRA filed this motion styled as a motion to review the Special Master's October 25th "determination" that the NRA "waived its privilege assertions with regard to the Frenkel Report," pursuant to CPLR 3104(d). NYSCEF 872 at p. 3. Plaintiff now opposes this motion.

B. Factual background regarding the Frenkel Report: [redacted]

[1] The NRA is wrong to suggest that a footnote in Plaintiff's application to the Special Master demonstrates that Plaintiff understood that the NRA's privilege assertions concerning the Frenkel Report would be briefed separately. NYSCEF 872 at 7. That is not the case—Plaintiff was referring broadly to inappropriate speaking objections and privilege assertions during depositions, which have resulted in a separate motion currently pending before the Special Master.

[redacted]

III.
ARGUMENT

A. The NRA's procedurally infirm attempt to relitigate rulings by the Special Master and this Court is barred by the law of the case doctrine, and fails to meet the requirements for a motion to renew.

This Court and the Special Master have already determined that the Frenkel Report "shall be produced," and that ruling is the law of the case and should not be relitigated. *See e.g. Certain Underwriters at Lloyd's London v. North Shore Signature Homes, Inc*., 125 A.D.3d 799, 800 (2d Dep't 2015). The NRA had a full and fair opportunity to make privilege arguments in response to Plaintiff's original motion to compel production of the Frenkel report, but failed to do so.

Furthermore, the NRA's application is, in effect, a motion to renew. "[T]he rule is that generally, if the relief sought upon a motion is the same as that sought upon a prior motion, and the second motion is only distinguished in that different grounds are set forth, then the second motion is, in fact, in the nature of renewal." *Osserman v. Osserman*, 92 A.D.2d 932, 933 (2d Dep't 1983) (citations omitted). Here, the relief sought by the NRA is the same as the relief it sought in

connection with the Court's October 17th order: preventing disclosure of the Frenkel Report. It is only the grounds for withholding the Frenkel Report that are different.

Motions to renew are governed by CPLR 2221(e), which provides that the moving party must, in relevant part, "base[] [the motion] upon new facts not offered on the prior motion that would change the prior determination" and demonstrate "reasonable justification for the failure to present such facts on the prior motion." Here, the NRA was free to assert that the Frenkel Report was privileged before the Special Master in July or before this Court in its subsequent application to review the Special Master's ruling. It was free to ask the Special Master or the Court to review the document *in camera*. It did not do either and did not carry its burden to establish the document was not discoverable because it was privileged.

Accordingly, the NRA may not challenge the Court's decision on the motion to compel production of the Frenkel Report here.

B. Even if the Court reaches it, the NRA's application fails because the NRA has not carried its burden to establish that the Frenkel Report is privileged and that it has not waived the privilege.

If the Court permits relitigation of the discoverability of the Report, the NRA's application still fails because any potentially applicable privilege was waived when the NRA knowingly provided the Report to PWC, its independent auditor. This Court has also twice ruled on the applicability of privileges under CPLR 3101 to the NRA's communications with its outside auditors. On both occasions, the Court upheld the Special Master's ruling that the NRA had either waived or failed to establish the existence of any applicable privileges when it shared its communications with its independent auditors. NYSCEF 709, 843, & 847 at 13:1-13.

To the extent this Court is reviewing a "ruling" by the Special Master, this Court has discretion in its review. *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 (1st Dep't 2013).

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

Any attorney-client privilege that may have attached to the Frenkel Report was waived when the NRA provided the Report to its outside auditors. This Court has already decided this issue with respect to communications shared with its current outside auditors, Aronson LLC. *See* Mot. Seq. Nos. 26 and 27 (the "Aronson Privilege Disputes"); NYSCEF 709, 843 & 847 at 13:1-13.

As was the case in the Aronson Privilege Disputes, the NRA has not and cannot meet its burden to establish that any attorney-client privilege was not waived. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 624 (2016). The attorney-client privilege is narrowly construed. *Id*. "[A] client waives the privilege if a communication is made in confidence but subsequently revealed to a third party." *Id*. (citations omitted).[2]

Here, as was the case with the Aronson Privilege Disputes, PWC was not an agent of the NRA's lawyers, so no *Kovel*-type privilege applies. *United States v. Kovel*, 296 F.2d 918, 922 (2d Cir. 1961); *Stenovich v. Wachtell, Lipton, Rosen & Katz*, 195 Misc.2d 99, 110 (Sup. Ct. N.Y. Cty. 2003). [redacted]. *See Kovel*, 296 F.2d at 922; *People v. The Trump Org.*, No. 451685/2020, 2020 WL 7360811, at *3 (Sup. Ct. N.Y. Cty. Dec. 15, 2020) (holding that

[2] The NRA quotes from *Bluebird Partners, L.P. v. First Fid. Bank, N.A.*, 248 A.D.2d 219 (1st Dep't 1998) for the proposition that the attorney-client privilege is waived "upon disclosure to a third party only when there is a likelihood that the material will be revealed to an adversary." NYSCEF 872 at p. 8 (quoting *Bluebird Partners*, 248 A.D.2d at 225). But the court in *Bluebird Partners* was addressing work product protection under New York law, not the attorney-client privilege. 248 A.D.2d at 225.

communications with outside auditor were not "necessary to [law firm's] provision of legal services," and thus no privilege attached to the communications); *People v. Osorio*, 75 N.Y.2d 80, 84-85 (1989). The NRA has failed to demonstrate that PWC acted as an "'adjunct to [a] lawyer's strategic thought process[],'" and so no agency exemption to waiver applies. *Hudson Ins. Co. v. Oppenheim*, 72 A.D.3d 489, 490 (1st Dep't 2010) (citations omitted).

Contrary to the NRA's assertion, the language in the Frenkel Report regarding waiver does not support its argument. The report makes clear that attorney-client privilege was waived. Fuchs Aff., Ex. A at p. 2. The NRA cites to the statement in the Report that "the Audit Committee has not waived the privilege with respect to any other entity or person." NYSCEF 872 at p. 8. This statement is without legal effect; the NRA has not cited any legal authority for the proposition that it can exempt itself from New York law governing waiver of privileges by declaring that it has not so waived its privilege. *See generally Maricultura Del Norte* v. *WorldBusiness Cap*., *Inc*., No. 14-cv-10143, 2016 WL 9735720, at *6 (S.D.N.Y. Dec. 7, 2016) (noting that a party cannot reserve a right it does not have).

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 Frenkel Report is work product and, in any event, any such claim is waived.

The NRA has not carried its burden of establishing that the Frenkel Report is covered by the work product doctrine and protected from disclosure by CPLR 3101(c). 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). While the NRA argues in conclusory fashion that the Frenkel Report "discusses

counsel's findings, legal conclusions, and strategy/recommendations," NYSCEF 872 at p. 8, the NRA ignores that [redacted]

To the extent the Court finds that the work product doctrine did cover the Frenkel Report, any protection conferred by that doctrine was waived when the NRA intentionally provided the Frenkel Report to PWC. 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*, 248 A.D.2d at 225. As with Aronson, PWC'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. Boston Sci. Corp*., 214 F.R.D. 113, 116 (S.D.N.Y. 2002) (emphasis in original); *see also* NYSCEF 847 at 13:1-13 (holding that the NRA waived any work product privilege it had by sharing documents with its independent auditor).

For the foregoing reasons, the NRA has failed to establish that the Frenkel Report was privileged, or that it did not waive the privilege when it shared the Report with PWC.

IV.
CONCLUSION

The NRA has failed to establish any basis for relitigating the discoverability of the Frenkel Report or, if such relitigation is permitted, for overturning this Court's and the Special Master's prior orders requiring production of the Frenkel Report. The Plaintiff respectfully requests that the Court deny the NRA's application and grant such other relief as the Court deems proper.

Dated: November 18, 2022
New York, New York

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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 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 2,986 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: November 18, 2022
New York, New York

/s/ Yael Fuchs
Yael Fuchs