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The National Rifle Association of America (the “NRA”) submits this Memorandum of Law in support of its motion for a sealing order.

**I.**  
**INTRODUCTION**

On October 25, 2022, the Special Master for Discovery ordered the NRA to produce to the NYAG a 2003 document, which was referenced in prior briefing before the Court as the Frenkel Report. *See* NRA’s Motion for Review of Special Master’s Discovery Order, dated July 22, 2022 (NYSCEF 809). The NRA maintains that the Frenkel Report (or the “Document”) is non-discoverable on several grounds, including (i) multiple privileges, (ii) lack of relevance, and (iii) the untimely nature of the NYAG’s request for the document. *Id.*

After the Special Master issued his order, in a motion currently pending before the Court, the NRA asked the Court to vacate it (NYSCEF 872; 890). Simultaneously, to accommodate the NYAG’s ability to use the document during the ongoing discovery, the NRA produced it to the NYAG subject to extensive restrictions negotiated by the parties. One such restriction is that, should the NRA prevail on appeal, the NYAG will “(i) **return the document immediately; and** (ii) **not use any work product or transcripts that refer to its contents.**” (Exhibit 1 to S. Eisenberg Affirmation dated November 25, 2022.)

On November 18, 2022, the NYAG opposed the NRA’s motion. In asking the Court to uphold the Special Master’s order, the NYAG filed the privileged and otherwise non-discoverable Frenkel Report as an exhibit, under seal. (NYSCEF 894.) In addition, she included extensive references to passages from the Document in other portions of her filing (NYSCEF 892, 893) (“The Report is very factual in nature. It notes in a footnote that. . .”; “The Report concluded that”).

In this motion, the NRA seeks permission from the Court pursuant to Section 216.1(a) of the Uniform Rules for Trial Courts for the filing of the Frenkel Report and the references in NYAG's court filings to its substance under seal.

The sealing order is necessary because (i) the Document is privileged and otherwise non-discoverable; (ii) the NRA is pursuing two appeals (one with the Court and one with the Appellate Division) regarding any rulings to the contrary; and (iii) the NYAG agreed that the NRA would produce the document to the NYAG in the interim subject to numerous restrictions, including the NYAG's promise that should the NRA prevail on appeal, the NRA will return the document to the NRA and not use it or work product derived from it.

## II.

### **FACTUAL AND PROCEDURAL BACKGROUND**

**A. In 2022, the NYAG made a belated request for Jacob Frenkel's 2003 report, which is a privileged and confidential document that is also otherwise non-discoverable.**

In 2003, outside counsel hired by the Audit Committee of the Board of Directors of the NRA prepared a privileged report summarizing the results of an investigation that he conducted at the Audit Committee's request. The report constitutes a confidential attorney-client communication and is also protected as attorney-work product under CPLR 3101(c). The date on which the report was prepared precedes—by 12 years—the timeframe at issue in this action. *See, e.g.,* Second Amended Verified Complaint, NYSCEF 646 *passim*.

The NYAG inquired about the report at the June 15, 2022 deposition of the NRA's Second Vice President, at which point the NRA asserted privileges over the contents of the report. *See* David Coy Depo. Tr. (Exhibit 3) at 224:4-9 (“I object to the question. And, Professor Coy, again, instruct you to answer it only to the extent you can without reveling privileges.”). Professor Coy informed the NYAG that the report “most definitely involved legal counsel. It was privileged. And

as counsel has directed me, I am not going to answer [questions pertaining to its contents].” David Coy Depo. Tr. (Exhibit 3) at 219:5-220:4.

Although the NYAG had notice of the report since as early as December 2021 (see S. Eisenberg Affirmation, dated November 25, 2022) and even though the NRA asserted privileges over the report at the deposition, on June 15, 2022, as the Court knows from other submissions to the Court in this action, the NYAG requested that the NRA produce the 2003 report.

The NRA opposed the request on the threshold grounds that the request was untimely and sought irrelevant information. The NRA also reserved its rights to continue to object to the discovery of the document on privilege grounds. At the time, the issue was briefed in conjunction with the NYAG's request for another dated document (from 2007).

After the NYAG sought relief with regard to the Document and other discovery matters from the Special Master, he (i) found that the report was necessary and material to the prosecution of the action or could lead to discovery of such information; (ii) did not address the NRA's objection to the untimeliness of the request; and (iii) did not address the privileges the NRA expressly referenced in its reservation of rights. *See* Special Master's Discovery Order on July 15, 2022 (NYSCEF 877).

The NRA appealed the Special Master's ruling to the Court, arguing that the Special Master erred in overruling the NYAG's objection to the Document's on relevance grounds and failing to address the NRA's argument that the NYAG's request was untimely (NYSCEF 809). The NRA expressly stated that it also reserves the right to, in the event the Court were to deny the NRA's requested relief—assert additional objections to the production of the document on the ground that it was privileged. *Id.* at 1 n.1 (“The objections set forth here are threshold matters. In the event the Court were to order the NRA to produce the dated records to the NYAG, the NRA reserves the

right to object to the NYAG's request for the production of the Documents on other grounds, including privileges.).

The Court (i) ruled that the Special Master did not err in finding that the report was relevant; and, (ii) relying on a misrepresentation by the NYAG (that she only learned of the Frenkel Report at the June 2022 deposition of the NRA's Second Vice President), overruled the NRA's objection to the request on the grounds that it was untimely. (NYSCEF 859 at 5). Like the Special Master, the Court did not address any privilege-related issues. *Id.*

Subsequently, the NYAG argued that the NRA must produce the Document to the NYAG. The NRA disagreed with the NYAG's interpretation of the Special Master's and the Court's orders. The NRA explained that it reserved its rights to object to the Document's production on privilege grounds, the Special Master did not address that objection, and the Court did not address that objection either. In fact—at no point—did the NYAG argue that the document was not privileged. To the contrary, in her letter brief, filed after the NRA asserted privilege over the report at the June 2022 deposition, she stated that privilege matters would be addressed in separate briefing. *See* NYAG's July 6, 2022 Letter Application to Special Master to Compel Production n.2 ("Mr. Coy's deposition, as well as other depositions, have included improper assertions of privilege and speaking objections. Those will be the subject of a separate application.").

After the NYAG sought further relief from the Special Master, during a hearing, the Special Master ordered the NRA to produce the report. The Special Master did not specify the basis upon which he determined that the document was not privileged. The NRA appealed the Special Master's finding that the document is non-privileged in a motion currently pending with the Court. In opposing that motion, the NYAG filed the Frenkel Report with the Court, under seal (NYSCEF 894).

Separately, on November 17, 2022, the NRA filed a notice of appeal with regard to the Court's ruling dated October 17, 2022, which (i) held that the Special Master did not err in holding that the Document was relevant; and (ii) overruled the NRA's objection to the untimely nature of the NYAG's request for the Document.

In sum, the NRA maintains that the Document is not discoverable on multiple and independent grounds and, to the extent the Special Master or the Court ruled otherwise, is pursuing its appeals of such rulings (whether pursuant to CPLR 3104(d) before the Court or before the Appellate Division).

**B. When the NRA produced the Document to the NYAG, the NYAG agreed to return it to the NRA if the NRA prevails on appeal and to otherwise treat it as highly confidential and subject to a series of other restrictions.**

Although the NRA appealed rulings by the Special Master and the Court as described above, in order to accommodate the NYAG's ability to use the Document in connection with expert discovery, the NRA and the NYAG agreed that the NRA would produce the document to the NYAG on the condition that, if the "NRA prevails on appeal," the NYAG will "(i) return the document immediately; and (ii) not use any work product or transcripts that refer to its contents." Exhibit 1 to S. Eisenberg's affirmation dated November 25, 2022.

In addition, in the same stipulation (Exhibit 1), the NYAG agreed that she would:

1. Segregate and clearly mark the Document as Highly Confidential;
2. Where the "document [is used] in the . . . expert depositions, OAG will on the record highlight its intention to use the document and the protections that apply to it";
3. "[S]pecially mark the portions of the transcripts containing questioning based upon the document";
4. File under seal "[t]ranscripts reflecting contents of the document"; and
5. Otherwise comply with her obligations with regard to any documents designated by the NRA as Confidential pursuant to the Court's Protective Order dated October 25, 2022, which is attached to S. Eisenberg's affirmation as Exhibit 2.

- C. Under the Protective Order, when a party files a document under seal, the party who produced it—here, the NRA—must move for an order permitting the filing of the document under seal.

Under the Protective Order entered by the Court on October 25, 2022 and incorporated by the NRA and the NYAG in the Stipulation (Exhibit 1), where a party files (here, the NYAG) a confidential document under seal, the party who produced it (here, the NRA) must seek an order from the Court permitting an under seal filing.

Specifically, the Protective Order states:

14. Any Party . . . who seeks to file with the Court (i) any . . . documents which have previously been designated as comprising or containing Confidential Information, or (ii) any pleading, brief or memorandum which reproduces, paraphrases or discloses Confidential Information shall file the document, . . . brief, or memorandum on the NYSCEF system in redacted form until the Court renders a decision on any motion to seal (the ‘Redacted Filing’).

. . . .

(b) If the Producing Party makes a timely motion to seal [within seven (7) days of the Redacted Filing], and the motion is granted, the filing Party (or, as appropriate, non-party) shall ensure that all documents (or, if directed by the court, portions of documents) that are the subject of the order to seal are filed in accordance with the procedures that govern the filing of sealed documents on the NYSCEF system. If the Producing Party's timely motion to seal is denied, then the Party . . . making the filing shall take steps to replace the Redacted Filing with its corresponding unredacted version.

In her opposition to the NRA's CPLR 3104(d) motion, the NYAG acknowledged her obligation to file the Document and any references to it under seal. Affirmation of Y. Fuchs at Paragraph 3 (NYSCEF 869).

### **III.** **ARGUMENT**

#### **A. Legal Standard**

As the Court previously noted (NYSCEF 770 at pages 4-5), its authority to enter a sealing order is codified in Section 216.1(a) of the Uniform Rules for Trial Courts. Under that rule, the Court may seal a filing “upon a written finding of good cause, which shall specify the grounds



thereof.” *Id.* “In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties.” *Id.* (citing 22 N.Y.C.R.R. § 216.1(a)).

Despite the “broad presumption that the public is entitled to access to judicial proceedings and court records,” *Mosallem v. Berenson*, 76 AD3d 345, 348 [1st Dept 2010]), orders can be granted denying access as long as they are “narrowly tailored to serve compelling objectives,” such as a need for confidentiality that outweighs the public’s right to access. *Danco Labs., Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 6 [1st Department 2000]; see also, e.g. *Gryphon Dom. VI, LLC v APP Intern. Fin. Co., B.V.*, 28 AD3d 322, 324 [1st Dept 2006]).

“Furthermore, because confidentiality is the exception and not the rule, ‘the party seeking to seal court records has the burden to demonstrate compelling circumstances to justify restricting public access.’” *Maxim, Inc. v Feifer*, 145 AD3d 516, 517 [1st Dept 2016].

**B. Good cause exists for the partial sealing of the NYAG’s filing.**

**1. The interests of the public and the parties militate in favor of the sealing order the NRA seeks**

As noted above, in determining whether good cause has been shown, the Court shall consider the interests of the public as well as of the parties. Here, the interests of the public and of the parties each militate in favor of the sealing order.

*First*, the NRA argues, among other things, that the document is privileged as an attorney-client communication and as attorney-work product. Numerous courts have recognized the society’s strong interest in encouraging such confidential communications and material and immunizing them from disclosure. *See, e.g., People v. Pena*, 487 N.Y.S.2d 935, 937 (Sup. Ct. 1985) (“privileges are designed to protect relationships deemed socially desirable”); *Delta Fin. Corp. v. Morrison*, 831 N.Y.S.2d 352 (Sup. Ct. 2006) (“Privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the

client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained.”). Although the Special Master determined that the Document is not privileged, the NRA appealed that ruling. (NYSCEF 872.) Should the Court overrule the Special Master’s finding, the sealing order will assist in ensuring that the protections of CPLR 3101 and 4503 are fully enforced.<sup>1</sup>

***Second***, the NRA objected to the discoverability (and, therefore, admissibility) of the Document on the additional grounds that the Frenkel Report is not relevant under CPLR 3101(a) and was requested in an untimely fashion by the NYAG. Although Your Honor upheld the Special Master’s relevance ruling and overruled the NRA’s objection based on the timing of the NYAG’s request, should the Appellate Division overrule the Court’s order, the sealing order will help ensure that the Document, if ultimately determined to be non-discoverable, retains its confidential nature.

Importantly, here, the Document was and remains confidential, was not provided to the NYAG ***other than pursuant to the negotiated stipulation***, and is not available to the public.

In considering motions for sealing orders, courts have recognized that the need for confidentiality can outweigh the “public’s right to access.” *Danco Labs., Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 6 [1st Department 2000]; *see also, e.g.* *Gryphon Dom. VI, LLC v. APP Intern. Fin. Co., B.V.*, 28 AD3d 322, 324 [1st Dept 2006].

***Third***, the NYAG and the public benefitted from the disclosure of the Document to the NYAG pursuant to the aforementioned stipulation (Exhibit 1), which restricted the NYAG’s ability to use the Document while the appeal is pending and requires the NYAG to return the document

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<sup>1</sup> That the NYAG argues that the Frenkel Report is not privileged because it apparently was shared with PwC (the NRA’s outside auditor at the time) does not change the analysis here. Although the Court previously ruled that sharing privileged materials with an auditor strips them of privileges, the NRA respectfully disagrees and filed a Notice of Appeal with respect to that ruling on November 2, 2022 (NYSCEF 888).

in the event the NRA prevails on appeal. (Exhibit 1.) In the absence of a sealing order, the protections negotiated by the NRA through its stipulation with the NYAG would have little meaning.

**2. The sealing order can be narrowly tailored and therefore will have little effect on the public's access to judicial proceeding.**

In determining whether to grant a sealing order, courts consider the “broad presumption that the public is entitled to access to judicial proceedings and court records.” *Mosallam v. Berenson*, 76 AD3d 345, 348 [1st Dept 2010]. Here, should the NYAG prevail on appeal and if the document is found to be non-privileged and discoverable, the public will be able to access the document along with any other evidence that is determined to be discoverable and admissible in this case.

Finally, in the event the NRA does not prevail on pending appeals, the NRA does not object to the Court's limiting the sealing order it seeks to stay in effect only while the NRA's appeals as to privileges and/or other discoverability issues are pending. As a result, the order the NRA seeks is “narrowly tailored to serve [the aforementioned] compelling objectives.” *See Danco Labs., Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 AD2d 1, 6 [1st Department 2000].

**IV.  
CONCLUSION**

Accordingly, the NRA requests that the Court grant its motion to seal (i) the Frenkel Report, which the NYAG appended under seal to her filing (NYSCEF 894); and (ii) any references to contents of the report in other portions of the NYAG's filing (NYSCEF 892, 893). In addition, the NRA requests that the Sealing Order remain in effect permanently should the NRA prevail on one or more of its appeals related to the Document's privileges and non-discoverability. Finally, as noted above, the NRA has no objection to the order stating that the NYAG may refile the

materials publicly if, once the NRA exhausted its appeals related to the aforementioned issues, the Document is held, despite the NRA's objections, to be non-privileged ***and*** otherwise discoverable.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document is being electronically served via the Court's electronic case filing system upon all counsel of record, on this 25th day of November, 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 Memorandum of Law in Support of the NRA's Motion for a Sealing Order complies with the word count limit set forth in the Commercial Division Rules, because the memorandum of law contains fewer than 7,000 words.

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  
Svetlana M. Eisenberg