

1 of 18

The NRA respectfully requests that the Appellate Division vacate and reverse the Decision and Order [NYSCEF 907 and 908] and hold that the Frenkel Report was and is privileged and therefore non-discoverable and that at no point were any of the privileges waived.

A true and correct copy of the Decision and Order [NYSCEF 907 and 908] is annexed hereto as Exhibit A. The Informational Statement is annexed hereto as Exhibit B.

Dated: December 30, 2022

Respectfully submitted,

By: /s/ Svetlana M. Eisenberg

William A. Brewer III

wab@brewerattorneys.com

Svetlana M. Eisenberg

sme@brewerattorneys.com

BREWER, ATTORNEYS & COUNSELORS

750 Lexington Avenue, 14th Floor

New York, New York 10022

Telephone: (212) 489-1400

Facsimile: (212) 751-2849

**COUNSEL FOR DEFENDANT
THE NATIONAL RIFLE ASSOCIATION OF
AMERICA**

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M-----X
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, JOSHUA POWELL,Defendants.
-----X

INDEX NO. 451625/2020

MOTION DATE 11/02/2022

MOTION SEQ. NO. 034

**DECISION + ORDER ON
MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 034) 871, 872, 873, 874,
875, 876, 877, 878, 879, 880, 881, 882, 890, 892, 893, 894

were read on this motion to REVIEW ORDER OF SPECIAL MASTER.

Upon the foregoing documents, it is

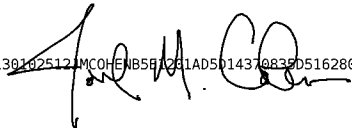
ORDERED that Defendant the National Rifle Association's ("NRA") motion (NYSCEF
871) pursuant to CPLR 3104(d) to review and reverse a discovery ruling by the Special Master is
DENIED.

The Court confirmed the Special Master's previous order mandating production of the so-called Frenkel Report (NYSCEF 860). Rather than complying with the order, the NRA sought to re-litigate in front of the Special Master the question of whether the document was subject to discovery, this time raising a privilege objection that it purported to "reserve" during the prior motion practice but did not argue to the Special Master or the Court at that time. Consistent with this Court's Order, the Special Master correctly directed (again) that the document be produced. The NRA's piecemeal approach to raising objections to producing this document is inefficient

and inappropriate. *All* objections to production should have been raised and litigated in connection with the prior motion. Those that were not argued are waived. The fact that the NRA purported to reserve the right to assert additional objections at a later date does not make it so.

In any event, even if the privilege objection is considered timely, it is unavailing. The Report was, by design, shared with a third party, namely PricewaterhouseCoopers. Any privilege that otherwise might have attached to this document was waived.

This constitutes the Decision and Order of the Court.

<u>11/29/2022</u> DATE	 20221130102512 JMC0H0NB5B7C261AD501437083FD516280C300D0 JOEL M. COHEN, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input type="checkbox"/> OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	<input type="checkbox"/> FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE

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

PEOPLE OF THE STATE OF NEW YORK, BY
LETTIA 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.

**NOTICE OF ENTRY OF
DECISION AND ORDER**

Index No. 451625/2020

Motion Seq. No. 34.

PLEASE TAKE NOTICE that attached is a true copy of a Decision and Order on Motion Sequence No. 34 by the Hon. Joel Cohen, dated November 29, 2022, which was duly entered in this action and filed in the office of the Clerk of the Supreme Court, New York County, on the 30th day of November, 2022.

DATED: November 30, 2022

Respectfully submitted,

LETTIA JAMES
*Attorney General
of the State of New York*

/s Stephen Thompson

Stephen C. Thompson
Assistant Attorney General
NYS Office of the Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-6183
Stephen.Thompson@ag.ny.gov

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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, JOSHUA POWELL,Defendants.

INDEX NO. 451625/2020MOTION DATE 11/02/2022MOTION SEQ. NO. 034**DECISION + ORDER ON
MOTION**

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 034) 871, 872, 873, 874,
875, 876, 877, 878, 879, 880, 881, 882, 890, 892, 893, 894

were read on this motion to

REVIEW ORDER OF SPECIAL MASTER.

Upon the foregoing documents, it is

ORDERED that Defendant the National Rifle Association's ("NRA") motion (NYSCEF 871) pursuant to CPLR 3104(d) to review and reverse a discovery ruling by the Special Master is **DENIED**.

The Court confirmed the Special Master's previous order mandating production of the so-called Frenkel Report (NYSCEF 860). Rather than complying with the order, the NRA sought to re-litigate in front of the Special Master the question of whether the document was subject to discovery, this time raising a privilege objection that it purported to "reserve" during the prior motion practice but did not argue to the Special Master or the Court at that time. Consistent with this Court's Order, the Special Master correctly directed (again) that the document be produced. The NRA's piecemeal approach to raising objections to producing this document is inefficient

and inappropriate. *All* objections to production should have been raised and litigated in connection with the prior motion. Those that were not argued are waived. The fact that the NRA purported to reserve the right to assert additional objections at a later date does not make it so.

In any event, even if the privilege objection is considered timely, it is unavailing. The Report was, by design, shared with a third party, namely PricewaterhouseCoopers. Any privilege that otherwise might have attached to this document was waived.

This constitutes the Decision and Order of the Court.

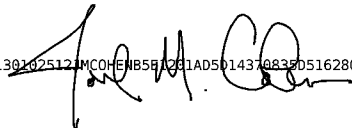
<p><u>11/29/2022</u> DATE</p>	<p>20221130102512 JMC0HENB5B1281AD50143708390516280C300D0</p>  <p>JOEL M. COHEN, J.S.C.</p>	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED <input type="checkbox"/> GRANTED <input type="checkbox"/> SETTLE ORDER <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input checked="" type="checkbox"/> DENIED <input type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> SUBMIT ORDER <input type="checkbox"/> FIDUCIARY APPOINTMENT
APPLICATION:		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:		<input type="checkbox"/> REFERENCE

EXHIBIT B

Supreme Court of the State of New York

Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.		For Court of Original Instance	
PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,		Date Notice of Appeal Filed	
- against -		For Appellate Division	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL			
Case Type	<input checked="" type="checkbox"/> Civil Action <input type="checkbox"/> CPLR article 75 Arbitration	Filing Type	<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding
<input type="checkbox"/> CPLR article 78 Proceeding <input type="checkbox"/> Special Proceeding Other <input type="checkbox"/> Habeas Corpus Proceeding	<input checked="" type="checkbox"/> Appeal <input type="checkbox"/> Original Proceedings <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Labor Law 220 or 220-b <input type="checkbox"/> Public Officers Law § 36 <input type="checkbox"/> Real Property Tax Law § 1278	<input type="checkbox"/> Transferred Proceeding <input type="checkbox"/> CPLR Article 78 <input type="checkbox"/> Executive Law § 298 <input type="checkbox"/> CPLR 5704 Review	
Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.			
<input type="checkbox"/> Administrative Review	<input type="checkbox"/> Business Relationships	<input type="checkbox"/> Commercial	<input type="checkbox"/> Contracts
<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Domestic Relations	<input type="checkbox"/> Election Law	<input type="checkbox"/> Estate Matters
<input type="checkbox"/> Family Court	<input type="checkbox"/> Mortgage Foreclosure	<input type="checkbox"/> Miscellaneous	<input type="checkbox"/> Prisoner Discipline & Parole
<input type="checkbox"/> Real Property (other than foreclosure)	<input checked="" type="checkbox"/> Statutory	<input type="checkbox"/> Taxation	<input type="checkbox"/> Torts

Informational Statement - Civil

Appeal			
Paper Appealed From (Check one only):		If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.	
<input type="checkbox"/> Amended Decree <input type="checkbox"/> Amended Judgement <input type="checkbox"/> Amended Order <input checked="" type="checkbox"/> Decision <input type="checkbox"/> Decree	<input type="checkbox"/> Determination <input type="checkbox"/> Finding <input type="checkbox"/> Interlocutory Decree <input type="checkbox"/> Interlocutory Judgment <input type="checkbox"/> Judgment	<input type="checkbox"/> Order <input type="checkbox"/> Order & Judgment <input type="checkbox"/> Partial Decree <input type="checkbox"/> Resettled Decree <input type="checkbox"/> Resettled Judgment	<input type="checkbox"/> Resettled Order <input type="checkbox"/> Ruling <input type="checkbox"/> Other (specify):
Court: Supreme Court		County: New York	
Dated: 11/29/2022		Entered: 11/30/2022	
Judge (name in full): Joel M. Cohen, J.S.C.		Index No.: 451625/2020	
Stage: <input type="checkbox"/> Interlocutory <input checked="" type="checkbox"/> Final <input type="checkbox"/> Post-Final		Trial: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If Yes: <input type="checkbox"/> Jury <input type="checkbox"/> Non-Jury	
Prior Unperfected Appeal and Related Case Information			
Are any appeals arising in the same action or proceeding currently pending in the court? <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If Yes, please set forth the Appellate Division Case Number assigned to each such appeal. 2022-05185; 2022-03159; 2022-01488; 2022-05187; 2022-05432 Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:			
Original Proceeding			
Commenced by: <input type="checkbox"/> Order to Show Cause <input type="checkbox"/> Notice of Petition <input type="checkbox"/> Writ of Habeas Corpus			Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:			
Proceeding Transferred Pursuant to CPLR 7804(g)			
Court: Choose Court		County: Choose County	
Judge (name in full):		Order of Transfer Date:	
CPLR 5704 Review of Ex Parte Order:			
Court: Choose Court		County: Choose County	
Judge (name in full):		Dated:	
Description of Appeal, Proceeding or Application and Statement of Issues			
Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.			
PLEASE SEE ATTACHMENT A			

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

PLEASE SEE ATTACHMENT B

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	People of the State of New York, by Letitia James, Attorney General of the State of New York	Plaintiff	Respondent
2	The National Rifle Association of America	Defendant	Appellant
3	Wayne LaPierre	Defendant	None
4	Wilson Phillips	Defendant	None
5	John Frazer	Defendant	None
6	Joshua Powell	Defendant	None
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			

Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

Attorney/Firm Name: Monica Connell, New York State Office of the Attorney General

Address: 28 Liberty Street

City: New York City

State: NY

Zip: 10005

Telephone No: 212-416-8965

E-mail Address: monica.connell@ag.ny.gov

Attorney Type: ☐ Retained ☐ Assigned ☒ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name: William A. Brewer III and Svetlana M. Eisenberg, Brewer, Attorneys and Counselors

Address: 750 Lexington Avenue, 14th Floor

City: New York City

State: NY

Zip: 10002

Telephone No: 212-489-1400

E-mail Address: wab@brewerattorneys.com; sme@brewerattorneys.com

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name: P. Kent Correll, Correll Law Group

Address: 250 Park Avenue, 7th Floor

City: New York City

State: NY

Zip: 10177

Telephone No: 212-475-3070

E-mail Address: kent@correlllawgroup.com

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name: Seth Farber, Winston & Strawn, LLP

Address: 200 Park Avenue

City: New York City

State: NY

Zip: 10166

Telephone No: 212-294-4611

E-mail Address: sfarber@winston.com

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name: William B. Fleming, Gage, Spencer & Fleming, LLP

Address: 410 Park Avenue, Suite 810

City: New York City

State: NY

Zip: 10022

Telephone No: 212-768-4900

E-mail Address: fleming@gagespencer.com

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name: Samantha Block/Akin Gump

Address: 2001 K Street, N.W.

City: Washington

State: D.C.

Zip: 20006

Telephone No: 202-887-4217

E-mail Address: samantha.block@akingump.com

Attorney Type: ☒ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice

Party or Parties Represented (set forth party number(s) from table above):

**Attachment A to Information Statement
Filed by the National Rifle Association of America
Pursuant to 22 N.Y.C.R.R. 1250.3(a)**

Page 2— “Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.”

The NRA appeals from the decision and order on motion (entered on November 30, 2022) by Hon. Joel M. Cohen [NYSCEF 907-908] for review—pursuant to CPLR 3104(d)—of an order by the Special Master for Discovery that the NRA must produce a report prepared by Jacob Frenkel, its outside counsel. The Supreme Court denied the NRA's motion for review of the Special Master's order and held that all privileges had been waived because the privilege objections were not timely asserted. The Supreme Court also stated that “even if the privilege objection is considered timely, it is unavailing” because “[t]he Report was, by design, shared with a third party” and that “any privilege that otherwise might have attached to this document was waived.”

The NRA respectfully requests that the Appellate Division

1. vacate and reverse the Decision and Order from which the NRA appeals [NYSCEF 907-908];
2. hold that the NRA did not waive but expressly preserved its privileges when it stated that its briefing at issue was limited to the threshold issues of relevance and the untimeliness of the NYAG's request;
3. hold that the document is privileged—under the attorney-client and the attorney's work product privilege—even if it was shared with a third party (the NRA's auditor at the time);

4. hold that no privileges were waived given the circumstances even though the report
was provided by the NRA to its auditor;
5. hold that the document is non-discoverable and;
6. order such other relief as the Appellate Division deems fair, just and appropriate.

**Attachment B to Information Statement
Filed by the National Rifle Association of America
pursuant to 22 N.Y.C.R.R. 1250.3(a)**

Page 3– “Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.”

A. The issues proposed to be raised on the appeal are:

1. Whether the court below erred in:

- a. Denying the NRA's motion pursuant to CPLR 3104(d) for review of the Special Master's ruling that the Frenkel Report is discoverable and should be produced; and
- b. Holding that, “even if the privilege objection is considered timely, it is unavailing” because “[t]he Report was, by design, shared with a third party” and that “any privilege that otherwise might have attached to this document was waived.”

B. The grounds for reversal or modification to be advanced are:

1. The lower court erred by:

- a. Holding that by limiting its argument to threshold issues of relevance and untimeliness of the NYAG's request for the Frenkel Report, the NRA waived its objection to the discoverability of the document on any privilege grounds; and
- b. Holding that by sharing the report with its auditor, the NRA waived the attorney-client and the attorney's work product privileges applicable to the report.

C. The specific relief sought on appeal is:

1. The NRA requests that the Appellate Division:

- a. Vacate and reverse the Decision and Order;
- b. Hold that, given the procedural context in which the matter arose, the NRA's express reservation of rights, and the NYAG's own statement that she would litigate the matters of privilege in a separate motion, the NRA did not waive any privileges with regard to the report by limiting its briefing to the threshold issues of relevance and untimeliness of the NYAG's request;
- c. Hold that the NRA expressly preserved its privileges because it (i) asserted them at a deposition; (ii) stated in its briefing at issue that the briefing was limited to the threshold issues of relevance and untimeliness of the NYAG's

request; and (iii) in the same briefs, expressly reserved the right to also object to the request for the production of the report on privilege grounds;

- d. Hold that by sharing the report with its auditor, given the circumstances, the NRA did not waive the attorney-client privilege applicable to the report;
- e. Hold that by sharing the report with its auditor, given the circumstances, the NRA did not waive the attorney's work product privilege applicable to the report;
- f. Hold that the report is not discoverable; and
- g. Order any such other relief as the Appellate Division deems fair, just and appropriate.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal and related documents was electronically served via the Court's electronic case filing system upon all counsel of record on December 30, 2022.

Svetlana M. Eisenberg
Svetlana M. Eisenberg