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

Consistent with New York law, the NRA asserted attorney-client privilege and work product protection over several categories of records involving agents, consultants, and vendors. The Special Master rejected some of these assertions—but after in camera review, upheld others. The NYAG seeks review of the Special Master’s finding, in a ruling dated November 29, 2022 (the “November Ruling”), that thirty-three such documents were privileged (these documents, the “Disputed Documents”).<sup>1</sup> Because the NYAG fails to identify any deficiencies in the evidentiary record regarding the Disputed Documents, and fails to show that the Special Master’s ruling on the Disputed Documents disregards or contradicts applicable law,<sup>2</sup> the Special Master’s finding that the Disputed Documents are privileged should be upheld.

**II.**  
**BACKGROUND**

The NRA produced three privilege logs in this case: an initial categorical privilege log covering every document withheld, and two supplemental logs that gave additional detail on subsets of documents specified by the NYAG.<sup>3</sup> The third and last of these privilege logs (the “**July Supplemental Categorical Log**”) was served July 5, 2022.<sup>4</sup> Nearly four months later, after fact discovery closed, the NYAG challenged several facets of the July Supplemental Categorical Log

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<sup>1</sup> On January 17, 2023, the NYAG withdrew the balance of her Motion Sequence No. 38. See NYSCEF 1071. For that reason, the NRA does not address it here.

<sup>2</sup> This Court has reviewed the Special Master’s rulings under the standard articulated in *CIT Project Fin. v Credit Suisse First Boston LLC.*, 7 Misc. 3d 1002(A) (Sup. Ct. New York County 2005), which requires that the decision “be upheld if it is both supported by evidence in the record and a proper application of the law.” See *People of The State of New York v. The Nat. Rifle Ass’n of Am., Inc.*, No. 451625/2020, 2022 WL 10085854, at \*1 (N.Y. Sup. Ct. Oct. 17, 2022) (also citing federal courts’ “clear error” standard for review of Magistrate Judges’ rulings).

<sup>3</sup> See Affirmation of Svetlana Eisenberg dated January 17, 2023 (“Aff.”) ¶ 3.

<sup>4</sup> *Id.*; see also Aff. Ex. 1 (July Supplemental Categorical Log).

in an omnibus letter brief (the “**Omnibus Letter**”) dated October 20, 2022.<sup>5</sup> In relevant part,<sup>6</sup> the Omnibus Letter sought communications on the July Supplemental Categorical Log with two NRA agents: Membership Marketing Partners, LLC (“MMP”) and its affiliates (the “**MMP Entities**”) and McKenna & Associates (“**McKenna**”).

#### A. The MMP Entities

Together with relevant affiliates, MMP manages certain mailing lists, social media communications, donation outreach, and donation processing functions for the NRA.<sup>7</sup> The NRA has produced thousands of documents involving the MMP Entities,<sup>8</sup> but the July Supplemental Categorical Log describes some that are privileged. For example, the NRA withheld documents reflecting legal advice about how certain marketing materials could be used.<sup>9</sup> Under Virginia law, which in part governed their contracts with the NRA,<sup>10</sup> the MMP Entities were the NRA’s agents and fiduciaries.<sup>11</sup> The MMP Entities also had strict contractual confidentiality obligations to the NRA.<sup>12</sup>

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<sup>5</sup> S. Thompson’s Affirmation dated December 20, 2022 (“Thompson Aff.”), Exhibit C (NYSCEF 941).

<sup>6</sup> The Omnibus Letter raised other issues, and challenged communications with other vendors, that are not the subject of the NYAG’s motion. For purposes of this motion, the Disputed Documents are described at Thompson Aff. Ex. C (Omnibus Letter) (NYSCEF 941) at 11-12, in the second and third bullet points.

<sup>7</sup> Aff. Exhibit 5, Affidavit of John C. Frazer dated January 17, 2023 (“Frazer Aff.”) ¶ 6.

<sup>8</sup> See Aff. ¶ 5.

<sup>9</sup> See Aff. Ex. 1 (July Supplemental Categorical Log) at Categories H, L.

<sup>10</sup> Frazer Aff. 8.

<sup>11</sup> Frazer Aff. 8; see also *Dimos v. Stowe*, 193 Va. 831, 838 (1952) (Virginia jury instructions describing circumstances that create an agency relationship); *H-B Ltd. P'ship v. Wimmer*, 220 Va. 176, 179 (1979) (“An agent is a fiduciary with respect to the matters within the scope of his agency. A fiduciary relationship exists in all cases when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence.”). New York law treats agency similarly. See, e.g., *Schulhof v. Jacobs*, 70 N.Y.S.3d 462, 463 (1st Dep’t 2018).

<sup>12</sup> Frazer Aff. ¶ 8.

**B. McKenna & Associates**

McKenna & Associates is a strategy-consulting firm that provided donor-relations, fundraising, and business-advisory services to the NRA.<sup>13</sup> Like MMP, McKenna had a contractual agency relationship with the NRA, which entailed strict contractual confidentiality obligations.<sup>14</sup> During 2018, when the NRA faced a regulatory investigation and commenced a related civil lawsuit relating to certain insurance programs, McKenna provided advice about the insurance-program structure<sup>15</sup> and gave input into litigation-settlement negotiations.<sup>16</sup> Outside counsel, Squire Patton Boggs, were retained by McKenna for this purpose and worked directly with the NRA and its outside counsel.<sup>17</sup> The NRA and McKenna explicitly discussed the existence of common interest litigation interests in July 2018 due to the litigation-related nature of this work and agreed to safeguard information shared in furtherance of such interests.<sup>18</sup> Although the NRA produced 2,965 communications with McKenna on other topics—including the NRA’s contract negotiations with McKenna<sup>19</sup>—the July Supplemental Categorical Log stated that these litigation-related communications were withheld.<sup>20</sup> Importantly, this was not the first time the NRA had logged privileged communications with McKenna, as the same matters discussed here were explained to the NYAG (and a document-by-document privilege log of a similar document population was provided) during the investigation that preceded this action.<sup>21</sup>

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<sup>13</sup> Frazer Aff. ¶ 10.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Aff. Exhibit 3 at pages 69, 80-82, 86 and Exhibit 4 at pages 70, 78, 80-81.

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Aff. ¶ 4.

<sup>20</sup> See Aff. Ex. 1 (July Supplemental Categorical Log) at Categories E, H, K, N (describing documents relating to “common-interest insurance issues and pending and anticipated litigation”).

<sup>21</sup> Aff. Exs. 3 and 4.

### C. The Omnibus Letter and the Special Master's *In Camera* Review

In the Omnibus Letter, the NYAG alleged that the NRA had effected “at-issue” waiver of privileges regarding certain categories of documents, including communications with MMP and McKenna contained in Categories H, L, M, O, and U (MMP) and E, H, K, and N (McKenna) of the July Supplemental Categorical Log.<sup>22</sup> The NYAG also contended that the NRA failed to establish privilege regarding the same documents.<sup>23</sup>

After removing documents that the NRA agreed to produce to the NYAG subject to a stipulation, there were thirty-three total documents in the specified categories, and the NRA provided all of them for *in camera* review.<sup>24</sup> After conducting his review, the Special Master held that all of the documents were protected by attorney-client privilege under C.P.L.R. § 4503(a).

On December 20, 2022, the NYAG moved for review of the Special Master's ruling, arguing that, despite his finding that the attorney-client privilege applied, the Court should compel the NRA to produce the Disputed Documents. Specifically, the NYAG complains that the Special Master does not articulate an adequate basis for his finding, then reasserts conclusorily that the NRA failed to meet its burden to establish privilege.<sup>25</sup> Ignoring the averments in the NRA's July Supplemental Categorical Privilege Log and the Special Master's own review of every single Disputed Document, the NYAG insists that there is “no evidence” that privilege exists, or that third-party involvement failed to waive it.<sup>26</sup> The NYAG is wrong.

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<sup>22</sup> See Thompson Aff. Ex. C (NYSCEF 941) (Omnibus Letter) at Section IV, pp. 11-12.

<sup>23</sup> *Id.*

<sup>24</sup> The November Ruling identifies 24 documents, not 33, a discrepancy that exists because some documents were duplicates. There is no dispute, though, that the NRA submitted all of the MMP and McKenna documents specified in the Omnibus Letter and the Special Master found all of them to be privileged.

<sup>25</sup> See NYAG Motion for Review (NYSCEF No. 937) at 8-9.

<sup>26</sup> *Id.* at 9.

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

#### **A. The Court should affirm the Special Master’s ruling that the Disputed Documents are subject to attorney-client privilege.**

In New York, the attorney-client privilege is codified in CPLR §§ 3101(b) and 4503(a)(1). It shields from disclosure any confidential communications between an attorney and his or her client made for the purpose of obtaining or facilitating legal advice in the course of a professional relationship. Although communications made in the presence of a third party generally are not privileged, there are three applicable exceptions here.

##### **1. The threshold elements of privilege are satisfied for all Disputed Documents.**

As the July Supplemental Categorical Log states and *in camera* review confirmed, the Disputed Documents are “confidential communications (including correspondence and drafts prepared by or at the direction of counsel) providing, requesting, reflecting, and facilitating legal advice” regarding specified subject matter.<sup>27</sup> They therefore satisfy the elements of privilege under the C.P.L.R.—but the NYAG disputes whether the involvement of third parties effected waiver. It did not.

##### **2. The record supports a finding of nonwaiver because the communications involved agents of the NRA, with whom the NRA had a reasonable expectation of confidentiality.**

Under controlling Court of Appeals authority, privilege is preserved in the presence of a third party if client has a reasonable expectation of confidentiality, including where the third party “serve[s] as an agent of either attorney or client.”<sup>28</sup> Although some courts construing this rule have insisted that the third-party agent be “necessary” to the transmittal of legal advice, in the

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<sup>27</sup> See Aff. Ex. 1 (July Supplemental Categorical Log) at Category H. Other categories are similar.

<sup>28</sup> *People v. Osorio*, 75 N.Y.2d 80, 84, 549 N.E.2d 1183, 1186 (1989); see also *Gama Aviation v. Sandton Capital Partners*, 951 N.Y.S.2d 519 (1st Dep’t 2012).

manner of a language interpreter, this authority is not controlling, and some New York courts reject it as “unduly restrictive and harsh.”<sup>29</sup> Courts have sustained privilege based on an agency relationship alone, and it would not be “contrary to law” for the Special Master to do so here.<sup>30</sup>

However, even if the Court were to require that the third-party agent’s involvement be “necessary” to facilitate legal advice, the Special Master’s ruling would stand. As *in camera* review confirmed, the conversations conducted in the Disputed Documents required third-party involvement. MMP needed to be involved because the NRA was receiving detailed legal advice about communications MMP was disseminating. Similarly, McKenna’s involvement was necessary because McKenna was helping the NRA to restructure insurance products that were currently the subject of an investigation and two lawsuits, and it was eminently plausible the NRA and McKenna would become co-litigants if litigation activity surrounding these insurance products escalated. Thus, just as the NRA argued when the issue was briefed before the Special Master,<sup>31</sup> both McKenna and MMP were “necessary to the provision of legal advice” in the contested instances—making the Special Master’s ruling correct even under the “harsh,” limited interpretation of the third-party-agent exception to waiver.

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<sup>29</sup> See, e.g., *Deutsche Bank AG v. Sebastian Holdings, Inc.*, No. 161079/13, 2019 WL 132534, at \*6 (N.Y. Sup. Ct. Jan. 8, 2019), citing *Lehman Bros. Intl. v. AG Fin. Prods., Inc.*, 2016 NY Slip Op 30187(U), \*10-11 (Sup. Ct. N.Y. 2016) (noting First Department cases not requiring that the agent’s involvement be “necessary” to the transmittal of legal advice in order to preserve privilege); *TC Ravenswood, LLC v. National Union Fire Ins. Co. of Pittsburgh, PA*, 2013 NY Slip Op 31335(U), \*4-5 (Sup. Ct. N.Y. County 2013); 1 Attorney-Client Privilege: State Law New York § 4:2 (Westlaw ed)).

<sup>30</sup> See, e.g., *Gama Aviation*, 951 N.Y.S.2d at 519.

<sup>31</sup> See NRA’s Memorandum of Law dated November 4, 2022 in opposition to the NYAG’s motion dated October 20, 2022 (referring to the July 5, 2022 privilege log, citing *Bluebird Partners. v. First Fid. Bank*, 248 A.D.2d 219, 225 (1st Dep’t 1998), and noting that “the NRA has not waived privilege over any document on which . . . vendor was copied [because] [t]here is no waiver where the presence of a third party is necessary to the provision of legal advice and the holder of the privilege has a reasonable expectation of confidentiality”).

3. **With respect to MMP, the record supports a finding of nonwaiver because MMP employees were the “functional equivalent” of NRA employees.**

Courts applying New York law have also found privilege preserved in the presence of a third party where the third party is the “functional equivalent” of a client employee, for purposes of confidential communications. For example, in *In re Copper Market Antitrust Litigation*, 200 F.R.D. 213, 215 (S.D.N.Y. 2001), the court held that employees of a public relations agency became “functional equivalents” of a client corporation’s employees because, in the face of an antitrust scandal, the preparation of crisis public-relations responses became “a corporate function that was necessary” to navigate legal hostilities and “heavy press scrutiny”—a set of conditions endemic at the NRA. In this case, the MMP Entities were integral to the dissemination of highly regulated election and fundraising communications that required them to work hand-in-hand with NRA employees at the direction of NRA counsel to ensure compliance with applicable law. Thus, the “functional equivalent” doctrines provides yet another legal basis for the Special Master’s ruling regarding attorney-client privilege.

4. **With respect to McKenna, the record supports a finding of nonwaiver based on the common interest doctrine.**

All of the privilege-log entries concerning McKenna specifically assert a common interest connected with pending and anticipated litigation.<sup>32</sup> Indeed, the NRA and McKenna explicitly discussed that they had common litigation interests arising from their common legal interests.<sup>33</sup> These common legal interests existed in connection with the DFS investigation, *Cuomo* litigation, and *Lockton* litigation in 2018. Thus, the common interest doctrine provides yet another basis, in the law and the record, for the Special Master’s ruling regarding attorney-client privilege.

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<sup>32</sup> See Aff. Ex. 1 (July Supplemental Categorical Log) at Categories E, H, K, N.

<sup>33</sup> Frazer Aff. ¶ 10.

**B. Even if the Special Master clearly erred applying attorney-client privilege (he did not), the Disputed Documents would be protected as work product.**

Although the Special Master did not reach the issue, the Disputed Documents are also protected from disclosure by the separate attorney work product privilege. Under CPLR § 3101(c), “[t]he work product of an attorney shall not be obtainable.” Attorney work product consists of “documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer’s learning and professional skills, such as those reflecting an attorney’s legal research, analysis, conclusions, legal theory or strategy.”<sup>34</sup> Like the attorney-client privilege, the attorney work-product privilege is unqualified and absolute.<sup>35</sup>

As the NYAG concedes in another part of her brief (in which she resists discovery of her own records on attorney work product grounds), 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, under conditions that are inconsistent with a desire to maintain confidentiality.”<sup>36</sup>

The July Supplemental Categorical Log asserts work product for all of the contested document categories, and *in camera* review confirmed that assertion was accurate. Every single one of the Disputed Documents reveals the mental impressions and opinions of an attorney rendering legal advice. Moreover, the involvement of the NRA's vendors—bound by obligations of confidentiality—in these communications did not create a likelihood that the material will be revealed to [a litigation] adversary. Indeed, the communications reflect that the participants in the communications acted with a desire to maintain confidentiality.

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<sup>34</sup> *Brooklyn Union Gas Co. v. Am. Home Assur. Co.*, 23 A.D.3d 190, 190-91 (1st Dep’t 2005).

<sup>35</sup> *Corcoran v. Peat. Marwick*, 151 A.D.2d 443, 445 (1st Dep’t 1989) (“an attorney’s work product is absolutely exempt from discovery”); CPLR § 3101(c) (It “shall not be obtainable.”).

<sup>36</sup> NYAG’s memorandum of law (NYSCEF 937) at page 8 n.9 (citing *Bluebird Partners, L.P. v. First Fid. Bank, N.A.*, 248 A.D.2d 219, 225 (1st Dep’t 1998)).

Therefore, the attorney work product privilege is an independent second basis for denying the NYAG's motion.

**IV.**  
**CONCLUSION**

For the foregoing reasons, the NRA seeks permission to submit the documents for the Court's in camera review. Whether or not the Court opts to review them in camera, for the foregoing reasons, it should affirm the Special Master's finding that they are protected from disclosure by the attorney-client privilege. Should the Court review the documents in camera, the Court should also find that they are non-discoverable as attorney work product. In either case, the Court should deny the NYAG's motion to compel the NRA to produce the documents.

Dated: January 17, 2023

Respectfully Submitted,

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**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 filed by the NRA complies with the word count limit set forth in the Order for Appointment of a Master for Discovery, dated February 7, 2022. Specifically, the memorandum of law contains fewer than 3,000 words. In preparing this certification, I relied on the word count function of the word-processing system used to prepare this memorandum of law.

By: Svetlana M. Eisenberg  
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