



TABLE OF CONTENTS

I. FACTUAL AND PROCEDURAL BACKGROUND	1
A. In 2019, the NRA retained Aronson LLC as its outside auditor and tax preparer.	1
B. In 2020, various counsel for the NRA exchanged confidential privileged communications pertaining to the NRA’s Form 990 disclosure and other matters.	1
C. Later, in a confidential communication, an employee of the NRA forwarded the confidential exchange involving various NRA counsel to an Aronson employee for purposes of securing tax advice.	2
D. Although the Court held that communications shared with Aronson are not privileged, the decision has been appealed.	2
E. Despite appealing the decision, the NRA agreed to produce documents affected by the decision contingent on the NYAG’s and others’ agreement to, among other things, return the documents to the NRA if the NRA prevails on appeal.	3
F. On January 18, 2023, the NYAG filed a fully redacted version of the Document in opposition to a motion filed by the NRA.	4
G. The Protective Order in this action contemplates this motion for a sealing order.	4
II. ARGUMENT	6
A. The Court is authorized to enter a sealing order where appropriate.	6
B. Good cause exists for the sealing of the Document.	7
1. The interests of the public and the parties militate in favor of the sealing order.	7
2. The sealing order can be narrowly tailored and therefore will have little effect on the public’s access to judicial proceedings.	8
III. CONCLUSION	8

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Danco Labs., Ltd. v. Chemical Works of Gedeon Richter, Ltd.</i> , 711 N.Y.S.2d 418 (1st Dep’t 2000)	7, 8
<i>Danco Labs., Ltd. v. Chemical Works of Gedeon Richter, Ltd.</i> , 711 N.Y.S.2d 419 (1st Dep’t 2000)	6
<i>Delta Fin. Corp. v. Morrison</i> , 831 N.Y.S.2d 352 (Sup. Ct. 2006)	7
<i>Gryphon Dom. VI, LLC v APP Intern. Fin. Co., B.V.</i> , 814 N.Y.S.2d 110 (1st Dep’t 2006)	6, 7
<i>Maxim, Inc. v Feifer</i> , 43 N.Y.S.3d 313 (1st Dep’t 2016)	6
<i>Mosallem v. Berenson</i> , 905 N.Y.S.2d 575 (1st Dep’t 2010)	6, 8
<i>People v. Pena</i> , 487 N.Y.S.2d 935 (Sup. Ct. 1985)	7
Other Authorities	
22 N.Y.C.R.R. § 216.1(a)	1, 6
CPLR 3101 and 4503	7
CPLR 3101(c)	2
CPLR 3101(d)	2
CPLR 3103(b) and 4503(a)	2

On January 18, 2023, the NYAG filed in fully redacted form a Highly Confidential document (“Document”) produced to it by the NRA. The Document was produced pursuant to a stipulation that restricts its use while the NRA appeals issues related to its discoverability. Pursuant to the Protective Order entered in this action and Section 216.1(a) of the Uniform Rules for Trial Courts, the NRA seeks an order sealing the Document. There is good cause for the sealing of the Document. Such an order will serve the interests of the parties in this action and the public. And the order can be narrowly tailored.

I.
FACTUAL AND PROCEDURAL BACKGROUND

A. In 2019, the NRA retained Aronson LLC as its outside auditor and tax preparer.

In 2019, the NRA retained Aronson as its outside auditor and tax preparer. Affirmation of Svetlana M. Eisenberg dated January 25, 2023 (the “Affirmation”); Exhibit 1.¹ The agreement acknowledged Aronson’s commitment to safeguarding the NRA’s confidential information.²

B. In 2020, various counsel for the NRA exchanged confidential privileged communications pertaining to the NRA’s Form 990 disclosure and other matters.

The NYAG’s action against the NRA stems from, *inter alia*, the NRA’s preparation of its Form 990 for 2019. In Fall 2020, after the NYAG filed this action, various counsel and others at the NRA participated in confidential privileged communications designed to solicit, inform, and provide legal advice to the NRA.³ In these confidential communications, counsel discussed a variety of legal matters.⁴ The issues under discussion pertained directly to this litigation, and the analyses drafted by the attorneys included their mental impressions.⁵ As a result, the

¹ Unless otherwise noted, references to exhibits in this memorandum of law refer to exhibits appended to the Affirmation.

² Exhibit 1 at 3; *see also* Exhibit 2 at 3.

³ Exhibit D to Affirmation of M. Connell dated January 18, 2023 (filed in camera).

⁴ *Id.*

⁵ *Id.*

communications constitute materials protected as attorney-client privileged communications under CPLR 3103(b) and 4503(a), attorney work product under CPLR 3101(c), and trial preparation materials protected under CPLR 3101(d).

C. Later, in a confidential communication, an employee of the NRA forwarded the confidential exchange involving various NRA counsel to an Aronson employee for purposes of securing tax advice.

After receiving legal advice from the NRA's outside counsel on an IRS reporting matter, an employee of the NRA sought to obtain advice on the same issue from one of Aronson's employees.⁶ In his email message, he relayed the outside counsel's advice and asked for the Aronson employee's opinion on the same subject.⁷ He included in his email message to Aronson the prior email message from the attorney (Don Lan), along with the preceding confidential privileged discussion (described above), which provided context for the attorney's advice.⁸

D. Although the Court held that communications shared with Aronson are not privileged, the decision has been appealed.

On September 29, 2022, the Court heard the NRA's and the NYAG's arguments on whether privileged communications remain privileged once they are shared with Aronson.⁹ The NRA argued that the communications kept their privileged status and that, even if the disclosure to Aronson were deemed to waive the attorney-client privilege, there was no basis for holding that the independent attorney work product or the trial preparation privileges were also waived.¹⁰ That is particularly so where, here, the communication was shared with Aronson in connection with a

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ NYSCEF No. 847 at 4-13.

¹⁰ *Id.* at 5-8; *see also* NYSCEF Nos. 630 and 642.

tax preparation matter. The Court rejected the NRA's argument and held that documents lose their privileged status once they are shared with Aronson.¹¹

The NRA filed a notice of appeal of the Court's decision and order.¹² The NRA's deadline to perfect that appeal is May 2, 2023.

E. Despite appealing the decision, the NRA agreed to produce documents affected by the decision contingent on the NYAG's and others' agreement to, among other things, return the documents to the NRA if the NRA prevails on appeal.

Although the NRA appealed the Court's holding,¹³ it worked with the NYAG and other parties to reach a stipulation by which the NRA would produce the documents affected by the holding to the NYAG and other parties in the action in return for the NYAG's and others' agreement to, among other things, return the documents to the NRA if the NRA prevails on appeal.

Specifically, the parties stipulated that any such document would be produced under the Highly Confidential designation and that the NYAG and others would be obligated to:

[1] segregate and clearly mark it as Highly Confidential.

[2] *If the NRA prevails on appeal*, . . . (i) return the document immediately; and (ii) not use any work product or transcripts that refer to its contents;

[3] Transcripts reflecting contents of the document will be filed under seal (i.e., redacted to the extent they reveal its contents); and

[4] All protections applicable to confidential documents under the [Protective Order/Stipulation] apply in addition to the obligations listed above.¹⁴

¹¹ NYSCEF No. 843.

¹² NYSCEF No. 888.

¹³ NYSCEF No. 888.

¹⁴ Exhibit 4; Exhibit 3.

On November 15, 2022, the NRA produced to the NYAG the Document described above. The production was expressly predicated on the NYAG's agreement to return the Document to the NRA should the NRA prevail in its appeal.

F. On January 18, 2023, the NYAG filed a fully redacted version of the Document in opposition to a motion filed by the NRA.

On January 18, 2023, the NYAG filed her opposition to the NRA's motion for review of certain rulings by the Special Master for Discovery appointed in this case.¹⁵ In connection with this filing, the NYAG filed, among other things, an affirmation of Monica Connell and a series of exhibits, including the Document.¹⁶ The Document was attached to Ms. Connell's affirmation dated January 18, 2023 as Exhibit D.

In accordance with the stipulation entered into by the parties, the NYAG's public filing on NYSCEF included a placeholder slipsheet for the exhibit.¹⁷ Separately, the NYAG emailed to chambers an unredacted copy of the exhibit.¹⁸

G. The Protective Order in this action contemplates this motion for a sealing order.

As noted above, the parties agreed as part of the stipulation that any Highly Confidential documents would be subject to the protections of the Protective Order entered in this case. The Protective Order is based on a separate prior stipulation reached by the parties, and it was entered by the Court on October 25, 2022 (NYSCEF 869).

¹⁵ NYSCEF 1082.

¹⁶ NYSCEF 1082-1105.

¹⁷ NYSCEF No. 1087.

¹⁸ Email message from S. Thompson to Chambers copying parties' counsel dated January 18, 2023.

As it relates to the matter at hand, the Protective Order states that when a party files a confidential document under seal, the party who produced the document must seek an order from the Court to allow a filing under seal:

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.¹⁹

On January 18, 2023, the NYAG filed the Document “in [fully] redacted form,” and the NRA therefore moves, in accordance with the Protective Order, to seal the Document. As demonstrated below, there is good cause for the narrowly tailored sealing order the NRA seeks. (Other materials filed by the NYAG on January 18, 2023, were also filed in redacted form. The

¹⁹ NYSCEF 869.

NRA reviewed them, and, without waiving any rights, determined that there is no need to seek a sealing order as to materials other than the Document.²⁰)

II.

ARGUMENT

A. The Court is authorized to enter a sealing order where appropriate.

The Court may enter a sealing order under Section 216.1(a) of the Uniform Rules for Trial Courts “upon a written finding of good cause, which shall specify the grounds thereof.” *Id.* “[I]n 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)); *see also* NYSCEF 770 at pages 4-5 (the Court recognizing its authority to enter a sealing order in connection with a separate motion). Notwithstanding the “broad presumption that the public is entitled to access to judicial proceedings and court records,” *Mosallem v. Berenson*, 905 N.Y.S.2d 575, 578 (1st Dep’t 2010), sealing orders can be granted if 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.*, 711 N.Y.S.2d 419, 423 (1st Dep’t 2000); *see also Gryphon Dom. VI, LLC v APP Intern. Fin. Co., B.V.*, 814 N.Y.S.2d 110, 113 (1st Dep’t 2006). “[B]ecause 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*, 43 N.Y.S.3d 313, 315 (1st Dep’t 2016).

²⁰ For example, the NYAG appended to Ms. Connell’s affirmation excerpts of depositions taken in this action portions of which have been designated confidential by the NRA pursuant to the Protective Order. However, because the excerpts appended to that affirmation do not coincide with any of the NRA’s confidentiality designations, the NRA has no objection to the NYAG’s filing those excerpts unredacted.

B. Good cause exists for the sealing of the Document.

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

Here, the interests of the public and of the parties each militate in favor of the sealing order.

The NRA argued before the Court and on appeal that the Document is privileged as an attorney-client communication, as attorney-work product, and as trial preparation material. Numerous courts have recognized the society's strong interest in encouraging confidential privileged communications 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 Court disagreed with the NRA's arguments, the NRA appealed the relevant decision. Should the Appellate Division agree with the NRA, the sealing order the NRA seeks will assist in ensuring that the protections of CPLR 3101 and 4503 are fully enforced. Importantly, here, the Document was and remains confidential, ***was produced to the NYAG only pursuant to the negotiated stipulation***, and is not available to the public.

In considering motions for sealing orders, courts recognize that the need for confidentiality can outweigh the "public's right to access." *Danco Labs., Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 711 N.Y.S.2d 418, 423 (1st Dep't 2000); *see also Gryphon Dom. VI, LLC v. APP Intern. Fin. Co., B.V.*, 814 N.Y.S.2d 110, 113 (1st Dep't 2006). Here, the NYAG and the public benefitted from the disclosure of the Document to the NYAG pursuant to the

stipulation, which restricted the NYAG's ability to use the Document while any appeal is pending and requires the NYAG to return the Document in the event the NRA prevails on appeal. As a result, motion practice pertaining to a stay was avoided, and judicial and other resources were conserved. In the absence of a sealing order, the protections negotiated by the NRA through its stipulation with the NYAG would have little meaning. As a result, good cause exists for the sealing the NRA seeks.

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

In determining whether to seal a document, courts consider the "broad presumption that the public is entitled to access to judicial proceedings and court records." *Mosallem v. Berenson*, 905 N.Y.S.2d 575, 578 (1st Dep't 2010). Here, if, on appeal, the Document is found to be non-privileged, the current restrictions associated with its use will no longer be in effect. At that point, the NYAG can re-file the Document publicly.

The NRA does not object to the Court's limiting the sealing order it seeks to remain in effect only while the NRA's appeals pertaining to the Document 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.*, 711 N.Y.S.2d 418, 423 (1st Dep't 2000).

III.
CONCLUSION

For the foregoing reasons, the NRA respectfully requests that the Court (i) reach a written finding consistent with the applicable rule that good cause exists to enter a sealing order with regard to the Document; (ii) enter such a sealing order, and (iii) order such other relief as the Court deems fair, just, and appropriate.

Dated: January 25, 2023
New York, NY

Respectfully submitted,

By: /s/ Svetlana M. Eisenberg
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

CERTIFICATION OF COMPLIANCE WITH WORD COUNT REQUIREMENT

I certify that the foregoing memorandum of law filed on behalf of the National Rifle Association of America complies with the applicable word count limit. Specifically, the memorandum of law contains 2306 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

Svetlana M. Eisenberg

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