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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,	§	
Plaintiff,	§	**INDEX NO. 451625/2020**
v.	§	**MOTION SEQUENCE NO. 43**
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	
Defendants.	§	

NRA'S REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF MOTION SEQUENCE 43

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PRELIMINARY STATEMENT

The NYAG opposes, in part, the NRA's motion to seal certain transcripts of deposition testimony that were designated confidential under the protective order and cited in recent discovery-motion practice.[1] Specifically, the NRA seeks to seal: (i) testimony about litigation settlement agreements that were entered into based on assurances of confidentiality (the "Settlement Agreements"); (ii) certain whistleblower information that the NYAG says was the subject of overlapping public testimony (the "Whistleblower Testimony"); and (iii) deposition transcripts that the NYAG mistakenly asserts were publicly filed (the "Deposition Transcripts"). With respect to testimony about the Settlement Agreements, the NYAG ignores the relevant evidence and, instead, cites cases that are inapposite on their face. With respect to the Whistleblower Testimony, the NYAG conflates different disclosures. With respect to the Deposition Transcripts, the NYAG severely mischaracterizes what occurred: the transcripts were never filed on the docket. The NRA's Motion to Seal should, therefore, be granted in its entirety.

ARGUMENT

A. The NYAG identifies no authority that favors dishonoring the confidentiality provisions of the Settlement Agreements—on which the NRA and its counterparties relied.

The NYAG concedes that "there is strong public interest in encouraging settlement of private disputes,"[2] but insists that no good cause exists to honor the terms of confidential settlements here.[3] However, all of the cases that the NYAG musters wherein settlements were ***not***

[1] *See* Mot. Seq. Nos. 37 and 41.

[2] NYSCEF 1160 at 3 (quoting *Matter of Hoffman*).

[3] *See* NYSCEF 1160 at 3.

sealed involve factual records devoid of cause for doing so—*e.g.*, situations where settlements were negotiated in open court, or were filed in redacted form. By contrast, ample authority exists for sealing settlement agreements, like those here, which were entered-into on the premise of confidentiality and remain nonpublic.

In *Marasco v. ExxonMobil Oil Corp.*, 75 Misc.3d 1226(A), 2022 WL 2922525 (Sup. Ct. Westchester Cnty. July 25, 2022), the terms of the settlement at issue were reached in open court and reflected in the transcribed record of judicial proceedings. *Id.* at *2 ("The parties spread the settlement on the record, which included the voir dire of plaintiff . . . by this Court."); *see also id.* at *1 (referring to the fact that the settlement agreement was "entered into in open court"). Afterwards, the defendant sought to seal the terms of the settlement agreement. *Id.* at *6. Because the agreement was made in a public forum (and the plaintiff opposed its sealing), the court in *Marasco* denied sealing relief. Here, unlike in *Marasco*, the settlement agreements were reached in a confidential setting, their terms were not announced publicly and, to date, remain confidential. Affirmation of Svetlana M. Eisenberg dated January 30, 2023 (NYSCEF 1136) at Paragraphs 12-15. Moreover, the counterparties to the agreements do not oppose the sealing relief and, to the contrary, are contractually obligated, to maintain the confidentiality of the agreements. *Id.* at Paragraphs 12-13. Finally, unlike in *Marasco*, the NRA submitted proof of good cause for the tailored sealing relief. *Id*. Specifically, the affirmation of the NRA's counsel accompanying the motion contained sworn descriptions and lengthy quotes of the settlement agreements at issue, establishing that the expectation and obligations of confidentiality were the agreements' key terms. Affirmation of Svetlana M. Eisenberg dated January 30, 2023 (NYSCEF 1136) at Paragraphs 12-13. As a result, unlike in *Matter of Hofmann*, 284 A.D.2d 92 (1st Dep't 2001)

(cited in the NYAG's memorandum of law (NYSCEF 1160 at 3)), and contrary to the NYAG's assertions (*id.*), the NRA's claim of the need for confidentiality is not "conclusory."

The NYAG also relies on *In re Levy*, 51 Misc.3d 1206(A), 2016 WL 1337150 (Sup. Ct. Dutchess Cnty. April 5, 2016)—but, there, the court actually permitted the parties to file a redacted version of their settlement agreement, acknowledging that sealing was appropriate to protect their expectations of confidentiality. *Id.* at *1 ("The parties may choose to appropriately redact the settlement agreement and file it with the Court."). The NYAG ignores that part of the opinion (NYSCEF 1160), which squarely supports the relief the NRA seeks, and, instead, relies on the portion of the court's opinion in which it refused to seal the entire record of the settled proceeding. *Id.* ("Petitioner moves for an order . . . ***sealing the Court records in this proceeding***." (emphasis added)). Here, the NRA does not seek permission to file records of an entire proceeding under seal; nor does it seek to seal previously publicly available judicial records.

Finally, in *Matter of Hofmann*, 284 A.D.2d 92 (1st Dep't 2001), what the movant sought to seal was an objection to a fee application, not the terms of a settlement agreement. *Id.* at 85 (movants "have failed to make the requisite showing of good cause required . . . to seal ***the executors' objections to . . . application for attorneys' fees***" (emphasis added)). The court in *Hofmann* denied the motion because the parties' prior settlement agreement expressly preserved the objectors' right to publicly object to the movants' fees. *Id.* In contrast, here, the NRA does not seek permission to seal a motion. Moreover, although the extensive confidentiality provisions of the settlement agreements at issue here contained several exceptions, the NYAG does not dispute that they are inapplicable here. NYSCEF 1136 (Paragraphs 12-13), 1160.

Courts have long acknowledged that there are "valid reasons" to keep settlement agreements confidential, particularly where, as here, "the settlement itself was conditioned on

confidentiality and [] the settlement documents were not . . . the basis for the court's adjudication" of an issue. *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143 (2d Cir. 2004). "[H]onoring the parties' express wish for confidentiality may facilitate settlement," whereas failure to seal would render those provisions—which the NRA relied upon when it entered into the settlements—meaningless. *See id.* None of the NYAG's cases are to the contrary.[4]

B. <u>The Whistleblower Testimony is nonpublic, and should remain so.</u>

With respect to the deposition excerpt designated "ER" in the parties' motion practice (which concerns whistleblower issues), the NYAG contends that constituent information "was made public during the hearing in the NRA's bankruptcy proceedings." (NYSECF 1160 at 3). But the NRA is not seeking to seal its public bankruptcy-hearing transcripts, and the mere fact that some witnesses have testified in both public and confidential settings about overlapping whistleblower-related subject matter does not render all such testimony ineligible for sealing. (Indeed, the NYAG implicitly acknowledges this since it does not contest sealing other whistleblower-related portions of other relevant transcripts.) To the extent that there is a public interest in access to information discussed in open court during the NRA's bankruptcy, public access to such transcripts already exists.

[4] Notably, when the NYAG sought production of one of the settlement agreements, **she agreed not to challenge the confidential designation of the agreement** under the stipulated protective order. Email from Assistant Attorney General William Wang to NRA's counsel, exhibit 12 to affirmation of Svetlana M. Eisenberg dated February 14, 2023. And, therefore, the NRA's production of the agreement to the NYAG was expressly premised on the NYAG's stipulation. Email from NRA counsel to NYAG and others, Exhibit 13 to February 14, 2023 affirmation of S. Eisenberg.

C. <u>The Deposition Transcripts were not publicly filed as the NYAG asserts, so confidentiality over them was not waived.</u>

The NYAG also claims in her opposition that "[t]he NRA has . . . waived any claim of confidentiality over the remainder of the transcripts." Specifically, the NYAG claims that, "[w]hile the affirmation submitted by the NRA in support of its sealing motion provides only excerpts of the depositions cited by the NRA, the full deposition transcripts were attached to the papers submitted in support of the NRA's motions in Mot. Seq. Nos. 37 and 41." (NYSCEF 1160 at 2 n. 1). That is not true. The NRA **never** filed full deposition transcripts on the public docket. Instead, it filed cover sheets **only**. *See* NYSCEF 1112, 1113, 1114, 1116, 1117, 1118, 1119, 1120, 1123, 1124; *see also* Exhibits 1 through 11 to affirmation of Svetlana M. Eisenberg dated February 14, 2023. Therefore, the NYAG's claim that "[t]he NRA has thus waived any claim of confidentiality over the remainder of the transcripts" is false. (NYSCEF 1160 at 2 n.1).

On January 23, 2023, the NRA sent, by private email to counsel and Your Honor, links to the full depositions. But that course of action was required by the Stipulation and Order for the Production of and Exchange of Confidential Information ("Stipulation") (NYSCEF 869), and does not waive confidentiality in any way. Section 14(c) of the Stipulation specifically directs parties to "provide the other Parties and the Court with a complete and unredacted version of the filing," while simultaneously moving to seal. Thus, the Stipulation itself contemplates that sending documents by private email to the Court and other counsel did not, in any way, waive confidentiality. So too, Section 14(a) of the Stipulation specifically contemplates that private emails of this sort will not waive confidentiality. Section 14(a) directs that parties email unredacted copies of documents with confidential information of third parties to each other within 24 hours of filing such documents on the public docket.

Thus, the NRA was required by Section 14(c) of the Stipulation to email copies of unredacted documents to "the other Parties and the Court." Its actions in doing so cannot be construed, in any way, as waiving confidentiality.

On January 31, 2023, in compliance with Section 14 of the Stipulation and Order for the Production of and Exchange of Confidential Information (NYSCEF 869), the NRA filed the selected portions of the relevant depositions, with appropriate redactions, as attachments to its Motion to Seal. *See* NYSCEF 1137-1149. But that action did not somehow waive confidentiality over portions of those depositions that were never filed on the docket.

As noted above, the NYAG claims that the NRA has "waived any claim of confidentiality over the remainder of the transcripts." (NYSCEF 1160 at 2 n. 1). But "[w]aivers must typically be intentional or knowing acts." *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 443 (S.D.N.Y. 1995) (internal quotation marks omitted). Thus, courts will only find confidentiality waived by an inadvertent disclosure "under circumstances of such extreme or gross negligence as to warrant deeming the act of disclosure to be intentional;" that is, "the privilege is waived with respect to mistakenly produced documents only if the producing party failed to take reasonable steps to maintain their confidentiality." *Id.* (internal quotation marks omitted); *see also In re Nat. Gas Commodity Litig.*, 229 F.R.D. 82, 85 (S.D.N.Y. 2005) ("When a party inadvertently discloses privileged material, however, the privilege will not be deemed waived unless the conduct of the producing party or its counsel evinced such extreme carelessness as to suggest that it was not concerned with the protection of the privilege."); *United States v. Gangi*, 1 F. Supp. 2d 256, 264 (S.D.N.Y. 1998); *accord New York Times Newspaper Div. of New York Times Co. v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169, 172, 752 N.Y.S.2d 642, 645-46 (1st Dep't 2002); *John Blair Commc'ns, Inc. v. Reliance Cap. Grp., L.P.*, 182 A.D.2d 578, 582 N.Y.S.2d 720, 721 (1st

Dep't 1992); *Manufacturers & Traders Tr. Co. v. Servotronics, Inc.*, 132 A.D.2d 392, 399, 522 N.Y.S.2d 999, 1004 (4th Dep't 1987) ("The fundamental questions in assessing whether waiver of the privilege occurred are, whether the client intended to retain the confidentiality of the privileged materials and whether he took reasonable precautions to prevent disclosure.").

In assessing whether confidentiality was waived by inadvertent disclosure, federal courts look to: "(1) the reasonableness of the precautions taken to prevent inadvertent disclosure, (2) the time taken to rectify any error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) overriding issues of fairness." *Bank Brussels Lambert*, 160 F.R.D. at 443. New York courts similarly look to whether there was intent to retain the confidentiality of the document; reasonable steps to prevents its disclosure; prompt objection to the disclosure after discovering it; and whether the party claiming waiver will suffer prejudice by a protective order. *Baliva v. State Farm Mut. Auto. Ins. Co.*, 275 A.D.2d 1030, 1031 (4th Dep't 2000).

Here, the NYAG cannot point to any disclosure of the full deposition transcripts except by private email to the Court and other parties, a step which is required by the Stipulation and in no way waives confidentiality pursuant to the terms of that document. The NYAG cites no case where a party waived confidentiality of a document merely by emailing it to the judge in the case and members of his staff. The NRA took reasonable steps to preserve the confidentiality of the depositions by declining to file the transcripts on the public docket and merely emailing unredacted copies to the Court and other parties, as directed by Section 14(c) of the Stipulation. Those steps show clearly that it did not intend, in any way, to waive confidentiality; otherwise, it would have filed the depositions on the public docket. The NYAG has not informed the NRA of its implausible waiver theory before its February 9, 2023 Partial Opposition (NYSCEF 1160 at 2 n.1); the NRA is timely objecting by this reply. Further, the NYAG will suffer no prejudice whatsoever if

confidentiality is deemed not to be waived; while the NRA will suffer prejudice by public disclosure of confidential portions of those documents.

In short, the NYAG's "gotcha" theory of waiver has no basis in the law and is contradicted by the Stipulation and the NRA's careful efforts to preserve the confidentiality of the full deposition transcripts.

CONCLUSION

For the foregoing reasons, the Court should reject the NYAG's arguments as inapplicable to the facts at hand and permit the NRA to file select portions of the relevant transcripts in redacted form.

Dated: February 14, 2023
New York, New York

By: */s/ Svetlana M. Eisenberg*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record, on this 14th day of February 2023.

s/ Svetlana M. Eisenberg
Svetlana M. Eisenberg

COUNSEL FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA

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 brief complies with the word count limit set forth in the Order permitting filing of a reply brief, because it contains 2,300 words. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

s/ Svetlana M. Eisenberg
Svetlana M. Eisenberg