

1 of 12

TABLE OF CONTENTS

I. ARGUMENT.....1

 A. The Court is authorized to enter a sealing order where appropriate.1

 B. Good cause exists for sealing the Information.....2

 1. Good cause exists for sealing passages identifying the names of
 whistleblowers and details of their reports.2

 2. Good cause exists for sealing the transcript of the deposition of the
 NRA's security expert witness and his expert witness reports
 because it reveals information related to safety and security of an
 officer of the NRA.2

 3. For the reasons previously briefed and familiar to the Court, good
 cause exists for sealing information related to the Frenkel Report.....3

 4. Good cause exists for sealing of information related to a confidential
 settlement agreement.3

 5. Good cause exists for sealing discussion of the 2007 anonymous
 letter, which was produced to the NYAG subject to the undertaking
 to return the document in the event the NRA prevails on appeal.5

II. WORKSHEET SUBMITTED PURSUANT TO THE COURT’S INDIVIDUAL
 RULES.....6

III. CONCLUSION.....9

On March 24, 2023, the Office of the Attorney General (the “NYAG”) filed motions to exclude the testimony of the NRA's expert witnesses (Motion Seq. Nos. 1663 and 1689). In connection with the motions, the NYAG filed under seal certain documents listed below (the “Documents”)), which contain or reference information previously designated Confidential or Highly Confidential by the NRA pursuant to, inter alia, the Protective Order entered in this action (NYSCEF 869). Pursuant to the Protective Order and Section 216.1(a) of the Uniform Rules for Trial Courts, the NRA respectfully requests that the Court permit sealing/redactions of certain passages in the Documents (the “Information”). For the reasons below, good cause exists for the narrowly tailored relief the NRA seeks.

I. **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).

B. Good cause exists for sealing the Information.

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

1. Good cause exists for sealing passages identifying the names of whistleblowers and details of their reports.

Certain passages within the Documents reveal the identity of potential whistleblowers or certain details of their reports. Good cause exists for redacting such information. As reflected in New York laws¹ and the NRA’s internal policies, it is important to ensure that the identity of whistleblowers and the substance of any whistleblower reports remain confidential. Here, the NRA seeks to redact only the portions of the Documents that entail such information. As a result, the interests of the parties and the public will be served by permitting the limited redactions.²

2. Good cause exists for sealing the transcript of the deposition of the NRA's security expert witness and his expert witness reports because it reveals information related to safety and security of an officer of the NRA.

The reports of the NRA's security expert witness Lawrence Cunningham and the transcript of his deposition contain information related to physical safety and security matters pertaining to Wayne LaPierre. As the passages at issue demonstrate, unless the information is filed in redacted form, there is substantial risk of its misuse to harm Mr. LaPierre. As a result, good cause exists for permitting the filing of these documents in redacted form. Attached to the

¹ N-PCL 715-b; EPTL 8-1.9.

² The NRA makes this request to seal the information without prejudice to its right to contest the NYAG’s substantive allegations in this action about alleged whistleblowing, including whether a particular communication falls within the purview of the New York statutes the NYAG cites.

affirmation accompanying this motion are copies of the three documents with translucent redactions, demonstrating that the relief the NRA seeks as to them is narrowly tailored.

3. For the reasons previously briefed and familiar to the Court, good cause exists for sealing information related to the Frenkel Report.

Materials attached to the NYAG's motions dated March 24, 2023, also reveal information pertaining to the 2003 report of Jacob Frenkel. The Court is familiar with the NRA's arguments pertaining to the need for the sealing of the that report and any documents revealing its contents. Indeed, after the NYAG only partially opposed the NRA's request to seal such information, the Court previously granted in part the NRA's motion to seal. NYSCEF 1425. In the order, the Court stated that the information pertaining to the report can be filed under seal subject to certain conditions. *Id.* Insofar as the NYAG again filed documents that reveal the report's contents, the NRA seeks a sealing order with the same conditions as the order that the Court entered previously.

4. Good cause exists for sealing of information related to a confidential settlement agreement.

On March 24, 2023, the NYAG also filed the report of its proposed expert witness Eric Hines in which he reveals the terms of a confidential settlement agreement. The NYAG also filed the transcript of a deposition of Matthew Lerner, an NRA expert witness, in which the NYAG's questioning revealed the terms of the agreement. The NRA previously briefed its motion for a sealing order regarding confidential settlement agreements, one of which is at issue here. In that motion, which is pending before the Court, the NRA explained:

Some passages in the transcripts cited by the NRA reveal the terms of settlements that the parties to the settlements are contractually obligated to keep confidential. Specifically, . . . the

second agreement, entitled “Confidential Settlement Agreement,” states:

Confidentiality. The Parties acknowledge and agree that this Agreement, its terms, and the negotiations leading hereto shall be deemed confidential and may not be disclosed beyond legal counsel and accountants, auditors, insurers or reinsurers, claims administrators, lenders, affiliates, parent companies, and directors, owners, officers, and/or employees of the Parties on a need-to-know basis, except as necessary for: (a) tax or audit purposes; (b) reinsurance; (c) to enforce the terms and conditions of this Agreement; (d) any financing entities; and (e) as otherwise required by law or regulation. Any Party served with a subpoena, discovery request, or other similar legal instrument that could lead to disclosure of the terms of this Agreement shall provide reasonable notice of same to the other Parties, which have the right to move to quash said subpoena or discovery request. In furtherance of this confidentiality agreement, the Parties shall not file this document in any proceeding, even any proceeding to enforce the terms herein, without first seeking leave of Court to do so under seal or with full consent of the other Parties hereto. The Parties agree that for any claims brought pursuant to this paragraph, damages are presumed. Subject to the above, the Parties agree that the only written statement, oral statement or media statements to be issued by the Parties shall be that: “[Party A] and [Party B] have resolved their disputes.

Therefore, all litigation matters between them are concluded.” No other statements shall be made by the Parties concerning the [subject matter of the agreement].

Notably, the agreement is not at issue in the NYAG's motions dated March 24, 2023 (to which the Documents mentioning the agreement are attached). In addition, in producing the confidential settlement agreement in this action, the NRA designated the documents “Confidential” under the Protective Order or otherwise ensured that any nonparties producing such agreements to the NYAG and others in this action do so.

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 interests of the public, including the parties, are served by permitting the Redactions. For example, in *In re E. 51st St. Crane Collapse Litig.*, 31 Misc. 3d 406, 416, 920 N.Y.S.2d 584, 592 (Sup. Ct. 2011), the court acknowledged the “strong public policy favoring settlement of claims.” *See also Hasbrouck v. BankAmerica Housing Svcs.*, 187 F.R.D. 453, 459 (N.D.N.Y. 1999) (“While protecting the confidentiality of settlement agreements encourages settlement, which is in the public interest, permitting disclosure would discourage settlements, contrary to public interest.”). 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.*

5. Good cause exists for sealing discussion of the 2007 anonymous letter, which was produced to the NYAG subject to the undertaking to return the document in the event the NRA prevails on appeal.

After the Court ordered the NRA to produce the 2007 anonymous letter, the NRA appealed the order. (The NRA objected to the NYAG's request for the document on the ground that the letter was irrelevant and—despite ample notice—was not timely requested by the NYAG.) Although the NRA appealed the order, it agreed to produce it to the NYAG subject to the NYAG's agreement to treat it as Highly Confidential, meaning that any use of the document

is limited by the Protective Order entered in the Action and that, in addition, should the NRA prevail on appeal, the NYAG would return and destroy all digital copies of the document.

The NYAG now filed transcripts of depositions of the NRA's expert witnesses in which the NYAG's questioning reveals the contents of the letter. 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.

II.

WORKSHEET SUBMITTED PURSUANT TO THE COURT’S INDIVIDUAL RULES

As required by the individual practices of the Honorable Joel M. Cohen, the spreadsheet itemizes the passages at issue in this motion.

NYSCEF No. of relevant notice of motion	Description of document the NRA seeks permission to have filed in part under seal	Pin cites for passages at issue (page:line-page-line or page-page)	Basis
1689	Amish Mehta transcript	283:18 - 294:22	Highly Confidential document at issue on appeal (2007 anonymous letter)
1689	Lawrence Cunningham transcript	37:09 - 37:25	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	181:06 - 182:02	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	184:14 - 185:03	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	187:22 - 199:04	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	201:08 - 202:06	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	203:15 - 204:08	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	206:04 - 206:24	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	207:12 - 208:11	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	209:10 - 212:02	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	229:03 - 230:25	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	231:02 - 231:09	Safety and security of officer of the NRA

NYSCEF No. of relevant notice of motion	Description of document the NRA seeks permission to have filed in part under seal	Pin cites for passages at issue (page:line-page-line or page-page)	Basis
1689	Lawrence Cunningham transcript	232:24 - 236:25	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	237:13 - 239:03	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	239:05 - 239:12	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	244:16 - 244:18	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	244:25 - 244:25	Safety and security of officer of the NRA
1689	Lawrence Cunningham transcript	251:11 - 251:16	Safety and security of officer of the NRA
1689	Matthew Lerner transcript	172:22 - 173:09	Terms of confidential settlement agreement
1689	Matthew Lerner transcript	185:24 - 186:13	Discussion of Highly Confidential document at issue on appeal (Jacob Frenkel's report)
1689	Matthew Lerner transcript	344:10 - 345:05	Discussion of Highly Confidential document at issue on appeal (Jacob Frenkel's report)
1663	L. Cunningham affirmative expert witness report	Please see translucent redactions	Safety and security of officer of the NRA
1663	L. Cunningham rebuttal expert witness report	Please see translucent redactions	Safety and security of officer of the NRA
1663/1689	Eric Hines expert witness report dated September 2022	Please see translucent redactions	Terms of confidential settlement agreement

NYSCEF No. of relevant notice of motion	Description of document the NRA seeks permission to have filed in part under seal	Pin cites for passages at issue (page:line-page-line or page-page)	Basis
1663/1689	Various NYAG expert witness reports	Please see translucent redactions	Revealing identity of whistleblowers or the details of their reports.

III. **CONCLUSION**

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 Information (which is contained in the Documents); (ii) enter such a sealing order, and (iii) order such other relief as the Court deems fair, just, and appropriate.

Dated: March 31, 2023
New York, New York

Respectfully submitted,

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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 fewer than 7,000 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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