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.	§	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	**Motion Sequence No. 58**
Defendants.	§	

THE NRA'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A SEALING ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

On March 20, 2023, in connection with dispositive motion briefing, the NRA and the NYAG filed several documents under seal. NYSCEF Nos. 1522 et seq; 1589 et seq. On March 27, 2023, the NRA moved for a sealing order for several of those documents, including: (i) a report prepared by Forensic Risk Alliance; (ii) a memorandum prepared by a group of accounting staff who came forward to the Audit Committee pursuant to the NRA's whistleblower policy in July 2018 (the "Top Concerns Memorandum"); and (iii) multiple American Express credit card statements (the "AmEx Statements"). NYSCEF Nos. 1716-1757.

On April 4, 2023, the NYAG largely opposed the NRA's motion. NYSCEF Nos. 1790-1791.

In response, the NRA withdraws its motion for a sealing order as it pertains to FRA's report (Item (i) above) and in further support of the balance of its motion states as follows.

I.
ARGUMENT

A. The NYAG's public filing of a similar whistleblower document in another case should not deprive the Top Concerns Memorandum of confidential treatment here.

In the moving brief, the NRA explained that both New York law and the NRA's internal policies mandate steps to protect the identity of whistleblowers and contents of their reports. NYSCEF 1717 at page 3. The document at issue here reveals the contents of several whistleblowers' reports. Therefore, the parties and the public will benefit from the sealing of the memorandum.

In her opposition, the NYAG does not dispute that the memorandum reflects the contents of whistleblowers' reports or that there is a strong public policy that generally favors sealing. NYSCEF 1790. The NYAG nonetheless opposes the motion on the ground that a similar memorandum "was made public" by the NYAG herself—*i.e.*, designated as a trial exhibit—in the

NRA's chapter 11 proceeding. NYSCEF 1791. That the NYAG entered a similar document in evidence in another proceeding should not preclude the NRA from seeking, or the Court from granting, sealing relief for this version of this document here. New York law and NRA policy mandate confidential treatment for whistleblower-related information on a number of grounds, including to encourage future good-faith reports. Sealing whistleblower materials in this case serves that policy objective—even where, as here, similar information was entered in evidence by an adverse party in another proceeding two years prior. Whistleblowers should be assured that the NRA, and New York courts, will take appropriate steps to preserve confidentiality even if similar documents or related documents are publicized by adversaries.

Notably, the NRA does not expect that, in adjudicating the pending motions, the Court will be relying in any significant way on the contents of the Top Concerns Memorandum. If the memorandum does prove pivotal to the disposition of pending or future motions, any sealing order could be revisited.

B. The Court should seal the American Express statements to the extent they reflect whereabouts and travel details pertaining to individuals other than Mr. Powell and his family.

The NRA also seeks to seal a substantial compilation of American Express credit card statements covering activity by multiple cardholders, which detail and itemize personally identifiable information, including travel and expense information, pertaining in part to individuals who are not party to this lawsuit.

In response, the NYAG groundlessly suggests that the statements "may reflect improper" or "embarrassing" expenses incurred by users "like Joshua Powell," and insists they cannot be sealed unless they contain "trade secrets, confidential business information, or proprietary information." NYSCEF 1790 at page 3. On both counts, the NYAG is wrong.

First, the NYAG suggests that the Court is without power to seal a document unless it reveals (i) trade secrets; (ii) confidential business information; or (iii) proprietary information. *Id.*[1] The NYAG then argues that because the Amex statements reveal neither of those three things, sealing relief is not warranted. But, the text of the relevant rule makes clear that the appropriate universe of materials that courts have the power to seal is much broader than the test articulated by the NYAG. Indeed, the applicable rule expressly provides no concrete examples and imposes nothing of the sort of the limitation that the NYAG seeks.[2]

All the movant has to show is that good cause exists for sealing—an inquiry that in in turn depends on a number of factors set forth in a treatise on New York procedure as follows:

> a. New York courts have interpreted section 216.1 as requiring a two-step analysis for determining a motion to seal. The first step is a showing on the movant's part that there is good cause to seal the record. Only after good cause is shown does the court engage in a balancing process, weighing the movant's cause for sealing against the public interest in access to court documents. Thus, even where there is no public interest in the subject matter of the proceedings, courts will decline to seal the record in the absence of a showing of "significant and concrete harm" to the movant.
>
> b. After an analysis of a number of factors, the court can determine what amounts to "significant harm" sufficient to constitute good cause and how it weighs against the importance of the public's right to access. Among the factors courts consider are the following:
>
> (a) the extent to which the information was relied upon by the court in exercising its judicial functions;

[1] Indeed, courts may readily seal "non-public financial information" like that here. *See, e.g.*, *Mancheski v. Gabelli Grp. Cap. Partners*, 867 N.Y.S.2d 17 (Sup. Ct. 2006) (collecting Delaware cases and noting that New York applies the same standard).

[2] Section 216.1(a) of the Uniform Rules for Trial Courts (stating that "a court shall not enter an order in any action . . . sealing the court records . . . except upon a written finding of good cause, which shall specify the grounds thereof").

> (b) whether the information is of the type that is traditionally considered to be of a private nature or relates to the interest of minors or third parties;
>
> (c) whether the information will cause competitive harm to a party;
>
> (d) whether there is a legitimate public interest in the underlying subject matter of the litigation or simply "mere curiosity";
>
> (e) whether a party seeks disclosure for tactical purposes, such as attempting to coerce a settlement;
>
> (f) whether the information, particularly if it is derogatory, has been proven, or is merely an allegation and whether the person or persons who are the subject of any derogatory information will have an opportunity to rebut it; and
>
> (g) whether the parties produced the information in reasonable reliance upon a previously entered order ensuring confidentiality.[3]

Each of the relevant factors listed above favors the relief that the NRA seeks. First, as noted above, other than references to Josh Powell in the Amex statements, it is unlikely that any portion of these documents will be relied on by the Court in exercising its judicial functions. It is undisputed that none of the contents of the AmEx Statements are conceivably relevant to this motion practice, except for expenses incurred by Mr. Powell—which are detailed in the parties' memoranda of law and supporting affidavits, and are not sealed. Thus, the NRA only seeks to seal personally identifying information and financial information having nothing to do with the alleged improper expenses disputed here.

Second, the information within the American Express statements includes information of the type that is traditionally considered to be of a private nature; it also includes information related to the interest of minors or third parties. In addition, the NYAG has not articulated a basis upon

[3] 4 N.Y.Prac., Com. Litig. in New York State Courts § 28:5 (5th ed.), Chapter 28. Sealing of Court Records, by George F. Carpinello, § 28:5. Relevant considerations (internal citations omitted).

which the public has an interest in the underlying subject matter in the context of the substantive motion in connection with which the materials were filed. Finally, when the NRA produced the information such as the American Express statements at issue here, it produced it in reasonable reliance upon a stipulated order ensuring confidentiality. NYSCEF 869.

Moreover, even if the NYAG's restrictive reading of Section 216.1(a) of the Uniform Rules for Trial Courts were correct (it is not), the information at issue easily qualifies as confidential business or proprietary information. For example, it reveals information about events that officers and directors of the NRA attend, organizations to which they belong, and their travel patterns, including where they stay, who travels with them to provide security, and where security personnel stay.

C. At a minimum, the Court should permit redaction and sealing of specified portions of the AmEx Statements, consistent with materials appended to the accompanying affirmation dated April 11, 2023

If the Court denies the NRA's motion as to the American Express statements, the Court should nonetheless permit the NRA to apply redactions to protect minors' names and other personally identifiable information—relief to which the NYAG expressly consents. NYSCEF 1790 at page 3, n.1.

The Court should also permit the NRA to redact information pertaining to the travel and hotel use patterns of the NRA security team.[4]

[4] For example, the records at issue reveal locations and arrival/departure dates for lodging accommodations for NRA security personnel.

The NYAG does not expressly consent to this relief in her opposition.

II.
CONCLUSION

For the foregoing reasons, except to the extent the sealing motion is withdrawn (as noted above), the Court should enter the sealing order the NRA seeks. The NYAG concedes that the Court has the power to enter a sealing order. Because the NYAG's arguments in opposition to the relief the NRA seeks have no merit, the Court should reject them. In addition, pursuant to the applicable rule—Section 216.1(a) of the Uniform Rules for Trial Courts—the Court should issue a written finding of good cause for the sealing and specify the grounds thereof. The Court should also issue such other relief as the Court deems fair, just, and appropriate.

Dated: April 11, 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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