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. __**
Defendants.	§	

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

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The NRA moves for a sealing order pursuant to Section 216.1(a) of the Uniform Rules for Trial Courts and the Protective Order (NYSCEF 869) with regard to discrete portions of a handful of the materials filed by the Office of the New York Attorney General ("NYAG") on May 5, 2023, in connection with various motions. As demonstrated below and in the NRA's prior sealing motions, the reasons for the tailored sealing of the sensitive materials at issue here are compelling. Moreover, these reasons outweigh the competing considerations relating to the public's right of access to judicial proceedings. As a result, good cause exists for the relief the NRA seeks. Therefore, the NRA respectfully requests that the Court make a "written" finding (as required by Section 216.1(a) of the Uniform Rules for Trial Courts) that good cause exists for requested sealing and issue an order permitting the filing of the relevant materials under seal.

I.
BACKGROUND

The discrete pieces of evidence to which this motion pertains are (i) a submission by the NRA in a confidential arbitration proceeding; (ii) a communication regarding an HR matter concerning a former employee of the NRA, and (iii) passages in the NYAG's proposed expert witness reports revealing confidential information pertaining to (A) the terms of a confidential settlement agreement; (B) safety and security of an NRA employee; and (C) identity of whistleblowers and details of their reports. To the extent the Court is not already familiar with these matters based on previously filed sealing motions, background information about them is set forth below.

A. Confidential Arbitration

The first item to which this motion pertains derives from an arbitration in which the NRA participated between September 2019 and August 2021. That arbitration was confidential.[1] The confidential arbitration involved a dispute against a former NRA employee.[2] After obtaining the NRA's submissions in that confidential proceeding in discovery in this action,[3] the NYAG attached one such submission to its opposition to Wilson Phillips's motion to exclude testimony of the NYAG's proposed expert witness Eric Hines. (NYSCEF 1901.) In the brief, the NYAG argues that, contrary to Phillips's contention, expert witnesses should be permitted to testify about fraud indicators. (NYSCEF 1898, page 20 n.8.) As support for this argument, the NYAG cites a single page of the NRA's 49-page disclosure from the confidential arbitration, which states that the NRA's expert witness in the arbitration was expected to testify about fraud indicators. The NYAG does not cite the NRA's arbitration submission for any other purpose, and the document, which the NYAG filed in its entirety, appears to have minimal relevance to the Court's decision whether to permit Hines proposed testimony.

[1] The relevant rule states in part: "Rule 18: Confidentiality. [With exceptions inapplicable here], the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party." https://drs.cpradr.org/rules/arbitration/non-administered/2018-cpr-non-administered-arbitration-rules (last visited May 12, 2023).

[2] Affirmation of Svetlana Eisenberg dated May 12, 2023 ("Eisenberg Affirmation").

[3] When the NRA produced to the NYAG the disclosure from the confidential arbitration, the NRA designated the document Confidential under the Protective Order (NYSCEF 869).

B. Sensitive HR information pertaining to a former NRA employee

In opposing the NRA's and others' motions to exclude testimony of Erica Harris, the NYAG filed under seal information reflecting sensitive HR information pertaining to a former NRA employee. (NYSCEF Nos. 1849, 1850, 1855, 1856, 1861, 1862.) The purpose for the NYAG's submission of this record to the Court is unclear. The record, which was designated Confidential under the Protective Order when produced by the NRA,[4] bears no relevance to the issue before the Court—whether testimony of Erica Harris may be admitted. Indeed, the Argument section of the NYAG's brief does not refer to the record at issue or the information it reveals. (NYSCEF 1849, 1855, and 1861 (at pages 14 through 21).) Instead, the NYAG merely refers to it in the Background section of the brief. (*Id.*, page 10.) But even there, it is clear that the reference is irrelevant to the evidentiary issue before the Court.

The same information is referenced in the rebuttal report of the NYAG's proposed expert witness Jeffrey Tenenbaum, which the NYAG attached to the opposition to the NRA's and others' motion to exclude his testimony. (NYSCEF 1839, 1843, 1847 at pages 11, 15, 17-18.)

C. Other sensitive information

The NYAG's filings on May 5, 2023, also included rebuttal reports by the NYAG's proposed expert witnesses Jeffrey Tenenbaum and Eric Hines, which contain passages revealing the type of information that already is the subject of pending sealing motions. Namely, the reports reveal information pertaining to (A) the terms of a confidential settlement agreement between the NRA and a non-party; (B) safety and security of an NRA employee; and (C) identity of

[4] Eisenberg Affirmation.

whistleblowers and details of their reports.[5] The Court is familiar with these matters based on pending sealing motions, including Motion Sequence Nos. 43, 58, 60-63 (Notices of Motion at NYSCEF Nos. 1134, 1716, 1769, 1795, 1805, 1816).

II.
APPLICABLE LEGAL STANDARD

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 prior 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).

[5] 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.

III.
ARGUMENT

A. Good cause exists for sealing the NRA's submission from its confidential arbitration.

Compelling reasons exist for sealing the NRA's confidential arbitration submission. As the Court is aware from prior briefing, the arbitration was conducted pursuant to the rules of the International Institute for Conflict Prevention & Resolution. This was because, in their prior agreement, the parties to the arbitration had agreed to resolve any disputes related to the agreement pursuant to such rules. Those rules, among other things, state that the arbitration proceedings shall be treated as confidential.[6] Accordingly, when the NRA submitted its expert disclosure in the arbitration, it designated it—and expected it to remain—confidential. Similarly, when the NRA produced it to the NYAG in this action, the NRA designated it confidential pursuant to the Protective Order.[7]

Courts recognize the strong public policy for encouraging litigants to address disputes through alternative dispute resolution ("ADR"), rather than judicial proceedings. It is similarly well settled that a major reason parties opt for ADR is precisely because—unlike judicial proceedings—ADR proceedings are confidential. *Guyden v. Aetna, Inc.*, 544 F.3d 376, 385 (2d Cir. 2008) (referring to "confidentiality" as "a paradigmatic aspect of arbitration"); *Food Delivery Holding 12 S.A.R.L. v. DeWitty & Assocs. CHTD*, No. 1:21-MC-0005, 2021 WL 860262, at *2 (D.D.C. Mar. 8, 2021) (same; quoting *Guyden*; granting motion to seal); *cf. Grp. Health Plan, Inc. v. BJC Health Sys., Inc.*, 30 S.W.3d 198, 205 (Mo. Ct. App. 2000) (noting that "[f]ew parties would

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[6] https://drs.cpradr.org/rules/arbitration/non-administered/2018-cpr-non-administered-arbitration-rules ("[T]he parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential.")).

[7] The Court previously ruled that the IICPR rule did not preclude production of materials from the confidential arbitration in discovery.

be willing to submit confidential materials to an arbitrator knowing that those materials could then be freely discovered"—a concern that is intensified here because, in the absence of a sealing order, the confidential disclosure will be made public).

Here, the NYAG filed with this Court the NRA's disclosure regarding its expert witness in the confidential arbitration. (NYSCEF 1901.) The NYAG's sole purpose for filing it was to provide an example of a case in which a litigant other than the NYAG proffered proposed expert witness testimony regarding fraud indicators. (NYSCEF 1898, page 20 n.8.) The NYAG does not cite it for any other purpose. Yet, a simple Westlaw search demonstrates that litigants' attempts to offer expert witness testimony regarding fraud indicators are common as are judicial opinions regarding such testimony's admissibility under the particular circumstances of each case. Notably, the NYAG filed the document in opposition to a motion to exclude its expert witness Eric Hines. That motion was filed not by the NRA, but by a different party (Woody Phillips), who was not a party to the confidential arbitration and who was not the proponent of the expert witness. As a result, the NRA's disclosure in the confidential arbitration is only minimally—if at all—relevant to whether the Court should grant the exclusion relief that Phillips seeks. *See Gambale v. Deutsche Bank AG*, 377 F.3d 133, 143 (2d Cir. 2004) (presumption of public access markedly weaker where the information at issue was reflected in a court transcript but was not used by the court for adjudication of litigation).

In determining whether good cause exists, courts consider the reasons for the sealing, the public's right of access to judicial proceedings, and the relationship between the material a party seeks to seal and the dispute before the Court. *Id.* Where the Court's resolution of a dispute hinges on the document that a party seeks to seal, sealing is less likely to be appropriate because sealing will deprive the public of an opportunity to understand the basis for the Court's ruling. *Id.* ("We

have observed that, consistent with this rationale for public access, the presumptive right to 'public observation' is at its apogee when asserted with respect to documents relating to 'matters that directly affect an adjudication.'"). Conversely, where the Court can resolve the dispute—as here—without considering the document, the basis for sealing is particularly strong.

Accordingly, the Court should issue a sealing order permitting the filing of the disclosure from the confidential arbitration under seal.

B. Good cause exists for sealing the email message from the NRA's Director of Human Resources to a former employee regarding a sensitive HR matter.

As explained above, in connection with the NYAG's opposition to the NRA's motion to exclude testimony of the NYAG's proposed expert witness Erica Harris, the NYAG filed a confidential email message from the Executive Director of the NRA's Human Resources Department to a former NRA employee, who is not a party in this action. The email message discusses a sensitive HR matter pertaining to the employee. Accordingly, when the NRA produced it to the NYAG, the NYAG designated it Confidential under the Protective Order. For reasons that are unclear, the NYAG appended it to the opposition, which in turn reveals (in the brief and the affirmation) the substance of the communication. Because the record discloses sensitive HR information, but will not affect the Court's resolution of the evidentiary dispute, the Court should grant the sealing order the NRA seeks. The privacy rights of non-parties "are a venerable common law exception to the presumption of access." *United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995) ("In determining the weight to be accorded an assertion of a right of privacy, courts should first consider the degree to which the subject matter is traditionally considered private rather than public. Financial records of a wholly owned business, . . . embarrassing conduct with no public ramifications, and similar matters will weigh more heavily against access than conduct affecting a substantial portion of the public.").

The email message and the references to it in the NYAG's filings should therefore be sealed.

C. Good cause exists for sealing passages in NYAG's proposed expert witness reports revealing confidential information pertaining to the terms of a confidential settlement agreement.

One of the reports filed under seal by the NYAG—the rebuttal report of Eric Hines dated October 7, 2022 (the "Hines Rebuttal Report")—reveals the terms of a confidential settlement agreement ("CSA") that settled litigation between the NRA and certain of its vendors ("Vendor Litigation I") in the United States District Court for the Northern District of Texas.[8] After Vendor Litigation I settled, the NRA sued the vendors for breach of the CSA ("Vendor Litigation II").[9] The United States District Court for the Northern District of Texas, which has exclusive jurisdiction over the CSA, sealed the entire record in Vendor Litigation II, after *in camera* review of the CSA's terms.

The NRA previously moved for a sealing order before this Court with regard to a similar passage in Hines's affirmative report, which reveals the same confidential information. Motion Sequence No. 61, NYSCEF 1806; see also Motion Sequence Nos. 43 and 60 (seeking sealing of, among other things, the same information, albeit revealed through other records filed by the NYAG).[10] For the reasons stated in the NRA's prior motion and in this Motion, the relevant passage in Hines's Rebuttal Report should be sealed.

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[8] *National Rifle Association of America v. Ackerman McQueen, Inc., et al*, Case No. 3:19-cv-02074-G (N.D. Texas).

[9] *National Rifle Association of America v. Ackerman McQueen, Inc., et al*, Case No. 3:22-cv-1994-G (N.D. Texas).

[10] For the assertion in his rebuttal report that the NRA seeks to seal Hines cites a record produced and designated as Confidential by the NRA. Moreover, in a meet and confer about the

As was the case before, the discrete passage the NRA seeks to file under seal has no bearing on the dispute before the Court in connection with which the NYAG filed Hines's Rebuttal Report. The NYAG submitted the Hines Rebuttal Report in opposition to Wilson Phillips's motion to exclude Hines' testimony. The opposition, however, contains no arguments that in any way relate to the passage that the NRA seeks to seal, as described more fully below.

The CSA is a core issue in Vendor Litigation II but is a collateral, irrelevant distraction in the matter before this Court. The purported conclusions regarding the CSA in Hines' reports have no basis in fact and little relevance to issues herein.

If the NYAG wants to use the CSA or have its witnesses testify about it in this action, the appropriate course of action is to petition the District Court for the Northern District of Texas for relief from the sealing order *from the court that (i) presided over Vendor Litigation I, (ii) retained jurisdiction over the CSA, and (iii) issued the sealing order referenced above. See, e.g.*, *Fotheringham v. Riversource Life Ins. Co. of New York*, 148 A.D.3d 1519, 1521 (2017) (New York must give "full faith and credit" to federal court order); *In re Rehab. of Frontier Ins. Co.*, 27 A.D.3d 274, 275 (2006) (same).

The NRA has been prejudiced as a result of the chain of events caused by the NYAG's demands for a copy of the irrelevant CSA; the misuse and continued attempted misuse of that highly confidential and sensitive information in Hines's reports; and the negligent or reckless handling of the Hines report's discussion of the CSA by Wilson Phillips's counsel. This situation, *inter alia*, invites the Defendants in Vendor Litigation II to attempt to try the case in the media based on inflammatory insinuations divorced from the reality of the NRA's claims, the NRA's

NYAG's request for the production of the record, the NYAG agreed not to contest the NRA's confidentiality designation of the record under the Protective Order. Eisenberg Affirmation.

pursuit of a remedy, the recognition by the District Court for the Northern District of Texas of the sensitive nature of the CSA, and the public policy of Texas, which encourages settlements. In fact, counsel for a Defendant in Vendor Litigation II informed the NRA today that he has filed a motion to vacate the sealing order issued by the Northern District of Texas in Vendor Litigation II, based on Wilson Phillips's counsel's improper public disclosure of the Hines Report.[11] *See*, *e.g.*, *McLaughlin v. G.D. Searle, Inc*., 38 A.D.2d 810, 811 (1st Dep't 1972) (holding that plaintiff is entitled to relevant and necessary information but material confidential in nature or information subject to abuse if widely disseminated should be accorded judicial safeguards where possible); *Breest v. Haggis*, 127 N.Y.S.3d 699 (N.Y. Sup. Ct. 2020) (same).

Texas and New York law strongly favors enforcing settlement agreements. *See, e.g.*, *Miller v. Republic Nat'l Life Ins. Co*., 559 F.2d 426, 428 (5th Cir. 1977); Tex. Civ. Prac. & Rem. Code § 154.002 ("It is the policy of this state to encourage the peaceable resolution of disputes."); *Booth v. 3669 Delaware, Inc*., 92 N.Y.2d 934, 935 (1998).

Courts in Texas and New York recognize that the need for confidentiality can outweigh the "public's right to access." *See, e.g., Paxton v. City of Dallas*, 509 S.W.3d 247, 266 (Tex. 2017); *Danco Labs., Ltd. V. Chemical Works of Gedeon Richter, Ltd.*, 711 N.Y.S.2d 419, 423 (1st Dep't 2000). As discussed in this Motion, that is the situation here. Allowing the litigants in the dispute to do an end-run around the sealing order issued by the District Court for the Northern District of Texas and put the CSA in the public domain is a slippery slope that would cause parties to avoid settlement lest it be used as an admission of liability. That result is directly contrary to the public interest in encouraging settlements, reducing the volume of litigation, and avoiding

[11] The NRA has not yet seen a copy of the motion to vacate because the entire record is sealed in Vendor Litigation II and the movant has not yet sent the NRA a courtesy copy of the filing, despite the NRA's requests for one.

vexatious litigation. The public interest in encouraging settlements, and the specific interest of the NRA in keeping its confidential settlement agreement confidential, outweigh any public interest in the terms of this CSA. Moreover, denial of the NRA's motion to seal is contrary to the public policy of New York and Texas favoring the finality of settlements. *See, e.g.*, *Transp. Ins. Co. v. Faircloth*, 898 S.W.2d 269, 280 (Tex. 1995); *Matinzi v. Joy*, 465 N.Y.S.2d 731, 733, *aff'd*, 60 N.Y.2d 835 (1983). Instead, it would allow litigants to misuse settlement agreements by insinuating and arguing that they constitute an admission of liability of whatever malfeasance suits the agenda of the accuser.

D. Good cause exists for sealing passages in the NYAG's proposed expert witness reports revealing confidential information pertaining to safety and security of an NRA employee.

The rebuttal expert witness report of the NYAG's proposed expert witness Jeffrey Tenenbaum quotes portions of the report of the NRA's security expert witness Lawrence Cunningham. The NRA moved to seal these and other portions of Cunningham's report and deposition testimony in Motion Sequence No. 60.

The NYAG filed Tenenbaum's rebuttal report in opposition to the NRA's motion to exclude testimony of Tenenbaum. For the reasons articulated in the NRA's motion to seal passages from Cunningham's report/testimony, the derivative passages in Tenenbaum's rebuttal report should be sealed as well. *See also Danco Labs.*, 711 N.Y.S.2d 419, 426 (affirming lower court's order to the extent it contemplated sealing/redaction of abortion providers to protect their safety in the face of "ostensible" threats). As with other materials at issue in this motion, the references at issue bear minimally if at all on the admissibility dispute.

E. Good cause exists for sealing passages in the NYAG's proposed expert witness reports revealing confidential information pertaining to identity of whistleblowers and details of their reports.

Finally, Jeffrey Tenenbaum's rebuttal report reveals the identity of whistleblowers and details of their reports. The NRA previously moved for a sealing order with regard to similar information in Motion Sequence Nos. 43, 58, 60, 62; NYSCEF Nos. 1134, 1716, 1769, 1816. For the reasons stated in those motions, the Court should seal the relevant passages in Tenenbaum's rebuttal report, particularly because the passages revealing this information have marginal relevance at best to the evidentiary dispute before the Court. *See Gambale*, 377 F.3d 133, 143 (presumption of public access weak where information was not used by the court in adjudicating litigation); *see also United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir.1995) (noting that "the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud," all matters of little concern where, as here, the few passages addressed in the motion to seal here are unlikely to affect the Court's adjudication of the evidentiary dispute).

IV.
CONCLUSION

For the reasons above, the NRA respectfully requests that the Court issue a sealing order with regard to the materials discussed above.

Dated: May 12, 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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