

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

PEOPLE OF THE STATE OF NEW YORK, BY  
LETITIA JAMES, ATTORNEY GENERAL OF  
THE STATE OF NEW YORK,

Plaintiff,

v.

THE NATIONAL RIFLE ASSOCIATION OF  
AMERICA, WAYNE LAPIERRE, WILSON  
PHILLIPS, JOHN FRAZER, and JOSHUA  
POWELL,

Defendants.

Index No. 451625/2020  
Hon. Joel M. Cohen

**Motion Sequence No. 61**

**RESPONSE TO THE NATIONAL RIFLE ASSOCIATION OF AMERICA'S MOTION  
FOR A SEALING ORDER**

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Defendant Wilson H. Phillips (“Mr. Phillips”) respectfully submits this memorandum in response to the National Rifle Association of America’s Motion for a Sealing Order (NYSCEF Nos. 1805-1813) (the “Motion”).

Mr. Phillips does not oppose The National Rifle Association of America’s (“NRA”) request for a sealing order related to the expert report of Eric A. Hines (the “Hines Report”). However, Mr. Phillips files this Response to set forth the facts and circumstances relating to his Counsel’s initial filing of the Hines Report in unredacted form and Counsel’s subsequent actions to remove the unredacted Hines Report from the public docket, and to replace it with a redacted version, immediately after being informed by the NRA of the NRA’s position that the Hines Report contained confidential information and had properly been designated as Confidential by the NRA.

As this explanation of the facts and circumstances demonstrates, Counsel for Mr. Phillips acted at all times in good faith.

## **I. The Protective Order**

At the outset of discovery in this action, the Parties agreed to a Stipulation and Order for the Production and Exchange of Confidential Information, which the Court later “so ordered.” (NYSCEF 869) (*See* Loegering Aff. Ex. A) (“Protective Order”). The Protective Order identifies the various procedures for parties and nonparties to mark or otherwise designate documents or testimony as “Confidential.” (*See id.*). Paragraph 2 of the Protective Order states:

Any Party or, as appropriate, non-party, may designate Documents produced, or Testimony given, in connection with this action as “confidential,” either by notation on each page of the Document so designated, statement on the record of the deposition, or written advice to the respective undersigned counsel for the Parties hereto, or by other appropriate means. (*See id.* ¶ 2).

The Protective Order also states:

All depositions shall presumptively be treated as Confidential Information and subject to this Stipulation during the deposition and for a period of fifteen (15) days

after a transcript of said deposition is received by counsel for each of the Parties. At or before the end of such fifteen day period, the deposition shall be classified appropriately. (*See id.* ¶ 11).

The Protective Order further provides:

Any document or information that may contain Confidential Information that has been inadvertently produced without identification as to its “confidential” nature as provided in paragraphs 7 and/or 10 of this Stipulation, may be so designated by the party asserting the confidentiality privilege by written notice to the undersigned counsel for the Receiving Party identifying the document or information as “confidential” within a reasonable time following the discovery that the document or information has been produced without such designation. (*See id.* ¶ 16).

## II. The Hines Report

On September 16, 2022, Plaintiff, the Attorney General of the State of New York (“NYAG”), served its Expert Disclosure with respect to Mr. Hines (the “Expert Disclosure”) on all Parties. (*See* Loegering Aff. Ex. B, NYAG Expert Disclosure). Exhibit A to the Expert Disclosure was the Hines Report. The NYAG’s Expert Disclosure did not designate the Hines Report as Confidential, nor did the Hines Report itself contain any notations so designating it. (*See* Loegering Aff. ¶ 6).

Following the NYAG’s September 16, 2022 production of the Hines Report without any confidentiality designation, no Party notified the NYAG to inform the NYAG that the Hines Report should have been so designated or to request that the Hines Report be reproduced with appropriate confidentiality designations. (*See* Loegering Aff. ¶ 7). More than 2 months later, however, a staff member of the NRA’s counsel sent an email dated November 18, 2022 to the Court Reporter for Mr. Hines’s deposition and counsel for the Parties entitled “NYAG v. NRA et al: Hines Deposition – Confidentiality Designations Pursuant to Protective Order” (the “November 18 Email”). (*See* Loegering Aff. ¶ 8 and Ex. C) (*See also* NYSCEF 1808) In that email, the staff member wrote:

The NRA reviewed the transcript of Eric Hines’s deposition for any confidentiality

designations pursuant to the Protective Order.

Portions of the testimony are dependent on, relate to, or are based on Exhibits 1 and 2, which are Mr. Hines's report and rebuttal report.

Those reports, in turn, refer to information produced to the NYAG subject to the protections of the Protective Order.

As a result, the NRA designates any testimony based on the reports as confidential under the protective order. Naturally, the reports should be treated confidential pursuant to the protective order as well. (*See id.*)

### **III. The Motion to Exclude the Hines Report**

On March 24, 2023, Mr. Phillips filed his Motion to Exclude Expert Testimony of Eric Hines. (NYSCEF 1680-1683) (*See Loegering Aff.* ¶ 9). In preparing exhibits to be attached to the Motion to Exclude, Counsel for Mr. Phillips referred to the Expert Disclosure and accompanying Hines Report produced by the NYAG, neither of which, as noted above, contained any markings indicating that the Hines Report contained Confidential Information. (*See Loegering Aff.* ¶ 10 and Ex. B). Counsel for Mr. Phillips therefore believed that the Hines Report was not subject to a confidentiality designation and, accordingly, attached an unredacted copy of the Hines Report as Exhibit A to the Affidavit in Support of Mr. Phillips's Motion to Exclude. (*See Loegering Aff.* ¶¶ 10,11).

Twelve days later, on April 5, 2023, Counsel for the NRA contacted Counsel for Mr. Phillips, drew the attention of Counsel for Mr. Phillips to the November 18 Email and to the NRA's position that the Hines Report contained Confidential Information, and requested that Mr. Phillips (i) contact the Court to seek the withdrawal of the unredacted Hines Report from the public docket and (ii) refile the Hines Report with the redaction of a sentence in paragraph 75 on page 64 of that Report. (*See Loegering Aff.* ¶ 12, Ex. D) (*See also* NYSCEF 1809, 1810).

Counsel for Mr. Phillips immediately did so, and the unredacted Hines Report was removed from the public docket and replaced with a redacted version on that same day. (*See Loegering Aff.*

¶¶ 13,15) (NYSCEF 1683, 1810). Counsel for Mr. Phillips informed Counsel for the NRA that these steps had been taken, and Counsel for the NRA replied with an acknowledgment thanking Counsel for Mr. Phillips for having done so. (*See* Loegering Aff. ¶ 14; Ex. E).

#### **IV. Conclusion**

Mr. Phillips does not oppose the NRA's requested relief for a sealing order. In addition, as explained above, Mr. Phillips and his Counsel acted at all times in good faith and in compliance with their understanding of their obligations under the Protective Order.

Dated: May 2, 2023  
New York, New York

Respectfully Submitted,

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*Counsel for Defendant Wilson Phillips*

**CERTIFICATE OF COMPLIANCE**

1. I am an attorney at the law firm of Winston & Strawn LLP, I am admitted to practice in the State of Texas and am admitted *pro hac vice* in this action and have appeared on behalf of Defendant Wilson Phillips in this action.

2. This Response to the NRA's Request for a Sealing Order, was prepared in the processing system Microsoft Word, with Times New Roman typeface, 12-point font.

3. Pursuant to the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70(g)), I certify that this memorandum of law complies with the word count limit set out in Rule 17, as it contains 1,083 words (excluding the parts of the brief exempted by Rule 17).

Dated: May 2, 2023  
Dallas, Texas

By: /s/ Rebecca Loegering  
Rebecca Loegering