IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

MARC A. SIMON, as Executor of the Estates of Sylvan Simon and Bernice R. Simon,

Plaintiff,

vs.

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., COLT'S MANUFACTURING COMPANY, LLC, COLT DEFENSE, LLC, JOHN DOE COMPANY, AND ROBERT BOWERS,

Defendants.

COURT OF COMMON PLEAS
ALLEGHENY COUNTY

No. GD-20-011130

DEFENDANTS COLT'S MANUFACTURING COMPANY LLC'S AND COLT DEFENSE, LLC'S MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY OBJECTIONS TO PLAINTIFF'S FIRST AMENDED COMPLAINT

FILED ON BEHALF OF: Defendants, Colt's Manufacturing Company, LLC and Colt Defense LLC

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MARC A. SIMON, as Executor of the Estates of Sylvan Simon and Bernice R. Simon, Plaintiff, vs. NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., COLT'S MANUFACTURING COMPANY, LLC, COLT DEFENSE, LLC, JOHN DOE COMPANY, AND ROBERT BOWERS, Defendants.	COURT OF COMMON PLEAS ALLEGHENY COUNTY No. GD-20-011130

DEFENDANTS COLT'S MANUFACTURING COMPANY LLC'S AND COLT DEFENSE, LLC'S MEMORANDUM OF LAW IN SUPPORT OF THEIR PRELIMINARY OBJECTIONS TO PLAINTIFF'S FIRST AMENDED COMPLAINT

Defendants Colt's Manufacturing Company LLC and Colt Defense, LLC (collectively "Colt") hereby file this Memorandum of Law in support of their Preliminary Objections ("POs") to Plaintiff's First Amended Complaint ("Complaint").

I. ARGUMENT

A. This Case is a Qualified Civil Liability Action Prohibited by the PLCAA

Sylvan and Bernice R. Simon (the "Simons") were among eleven people that Robert Bowers

murdered using a Colt AR-15 rifle ("Subject Rifle") on October 27, 2018, at a synagogue in Pittsburgh because they were Jewish. Compl. ¶¶ 1, 240, 205. Through his claims against Colt, plaintiff seeks to recover damages from it for legally selling and manufacturing the Subject Rifle based on allegations that it was defectively designed according to the risk-utility test, because the risks posed by it "exceeded any benefits from it being placed in the civilian market." Compl. ¶¶ 214, 216. Plaintiff's claims against Colt must be immediately dismissed because Congress has enacted a federal statute to prohibit such claims by providing Colt with immunity from them.

Plaintiff's claims against Colt arising from the murders committed by Robert Bowers are prohibited by the federal statutory immunity provided to Colt by the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-03 ("PLCAA"). The PLCAA prohibits the institution of a "qualified civil liability action" ("QCLA") in any state or federal court 15 U.S.C. § 7902(a). Based on its findings, 15 U.S.C. §§ 7901(a)(3)-(5), Congress made the decision to prohibit QCLAs, such as the present, from being "brought in any Federal or State court." *Id.* § 7902(a). As defined in relevant part by the PLCAA, and subject to six limited exceptions, a QCLA is a:

> civil action . . . brought by any person against a manufacturer . . . of a qualified product . . ., for damages, punitive damages, . . . or other relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party. . .

15 U.S.C. § 7903(5)(A). Based on the allegations in the Complaint, this case is a civil action brought

by a person (Marc Simon) against a manufacturer[1] (Colt) of a qualified product[2] (the Subject Rifle) for damages and other relief based on the criminal use[3] (the murder of the Simons) of the qualified product (the Subject Rifle) by a third party (Robert Bowers). Compl. ¶¶ 1, 299. The claims in the Complaint are therefore considered to constitute a QCLA, which the PLCAA prohibits from being "brought in any Federal or State court," unless one of the narrow exceptions is shown to apply.

There are six narrow categories of claims that the PLCAA excludes from the definition of a QCLA and therefore does not bar. 15 U.S.C. § 7903(5)(A). General tort claims, such as negligence and public nuisance, do not fall within any of the exceptions to the PLCAA, and should be dismissed on that ground alone. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1135 (9th Cir. 2009). The only exceptions that could remotely be applicable based on the allegations in the Complaint are 15 U.S.C. § 7903(5)(A)(v) ("product defect exception") and 15 U.S.C. § 7903(5)(A)(iii) ("predicate exception").

The product defect exception generally allows an "action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner . . . ." 15 U.S.C. § 7903(5)(A)(v). However it contains an exception stating that "where the discharge of the product was caused by a volitional act

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[1] The PLCAA defines a "manufacturer," of a qualified product, as "a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code." 15 U.S.C. § 7903(2). Chapter 44 defines a manufacturer as "any person engaged in the business of manufacturing firearms . . . for purposes of sale or distribution; and the term 'licensed manufacturer' means any such person licensed under the provisions of this chapter." 18 U.S.C. § 921(a)(10). The PLCAA defines the term "engaged in the business" with reference to 18 U.S.C. § 921(a)(21). The term "engaged in the business," relative to a manufacturer of firearms, is defined as "a person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured." 18 U.S.C. § 921(a)(21)(A). As a federally licensed manufacturer of firearms, Colt is a "manufacturer" pursuant to the PLCAA. Compl. ¶ 255.

[2] The PLCAA defines a "qualified product" as "a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code) . . . that has been shipped or transported in interstate or foreign commerce." 15 U.S.C. § 7903(4). A firearm is defined as "any weapon . . . which will or is designed to or may readily be converted to expel a projectile by the action of an explosive . . . ." 18 U.S.C. § 921(a)(3)(A). As alleged in the Complaint, the Simons were murdered with the Subject Rifle, which is considered to be a qualified product pursuant to the terms of the PLCAA.

[3] Robert Bowers is currently in prison for murdering the Simons. Compl. ¶¶ 30, 299.

that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage . . . ." *Id.*

The PLCAA is clear that the product defect exception does not apply when the discharge of the firearm was caused by a volitional act that constituted a criminal offense. 15 U.S.C. § 7903(5)(A)(v). For that reason, when a similar case was filed against the manufacturer of a rifle used in an intentional criminal shooting, a federal court dismissed it *sua sponte* pursuant to the PLCAA. *Jeffries v. District of Columbia*, 916 F. Supp. 2d 42, 46 (D.D.C. 2013) (holding a case barred by the PLCAA when it was "uncontroverted that a third party discharged the assault rifle, during the commission of a criminal act," because the product defect exception "does not apply 'where the discharge of the product was caused by a volitional act that constituted a criminal offense,'" and no other exception could possibly apply). The court addressing the lawsuit against the manufacturer of the rifle used in the Sandy Hook shooting, noted that the product defect exception would not apply because the plaintiffs' injuries resulted from the discharge of the firearm by a third party during the commission of a criminal act. *Soto v. Bushmaster Firearms Int'l, Inc.*, 2016 WL 8115354, at *21 n.31 (Conn. Super. Ct. Oct. 14, 2016), *rev'd on other grounds*, 202 A.3d 262 (Conn. 2019).

In addition to the above cases addressing criminal shootings, the courts that have considered the product defect exception in cases not related to an intentional criminal shooting have all also rejected attempts by plaintiffs to use it to avoid the general prohibition on QCLAs. In *Adames v. Sheahan*, 909 N.E.2d 742, 745-46 (Ill. 2009) the Illinois Supreme Court unanimously held that the product defect exception to the PLCAA did not apply to a case in which a boy ("shooter") accidentally shot and killed his friend when he pointed a pistol with a bullet in the chamber at him and pulled the trigger, believing the pistol was unloaded because he had removed the magazine. The shooter was adjudicated delinquent for committing involuntary manslaughter and reckless discharge of a firearm. *Id.* at 746. Plaintiffs' product liability claims against the pistol's manufacturer were

dismissed pursuant to the PLCAA, with the court holding that the exception to the product defect exception applied because the boy "did choose and determine to point the [pistol] at [his friend] and did choose and determine to pull the trigger," acting in a volitional manner that constituted a criminal offense. *Id.* at 750-51, 761-63. Pursuant to the product defect exception to the PLCAA the shooter's actions were considered to be the sole proximate cause of plaintiffs' injuries. *Id.* at 763-64.

In *Ryan v. Hughes-Ortiz*, 959 N.E.2d 1000, 1002-03, 1008 (Ma. Ct. App. 2012), a convicted felon on probation stole a Glock pistol, but decided to return it. When he attempted to place the pistol in its storage case while retuning it, he unintentionally and fatally shot himself. *Id.* at 1003. His estate sued Glock, Inc. alleging that the pistol was defective, but the court held that his "possession of the Glock pistol . . . constituted 'criminal or unlawful misuse' due to [his] prior felony conviction," so that the case was a QCLA for purposes of the PLCAA. *Id.* at 1002, 1006-08. It held that the product defect exception did not apply because the "relevant volitional act that caused the gun's discharge was [decedent's] unlawful possession of the Glock pistol," which "constituted a criminal offense." *Id.*

In *Gustafson v. Springfield, Inc.*, No. 1126-CA-2018 (Jan. 15, 2019) (appeal pending), the Pennsylvania Court of Common Pleas dismissed product defect case involving an unintentional shooting pursuant to the PLCAA. In that case, a boy ("shooter") found a pistol and believed that it was unloaded because the magazine was removed, even though there was a bullet in the chamber. *Id.* at 2. The shooter pointed the pistol at another boy and pulled the trigger causing his death, as a result of which he pled guilty to involuntary manslaughter in a delinquency proceeding. *Id.* The court dismissed a product liability lawsuit against the pistol's manufacturer pursuant to the PLCAA because committing an act that amounts to a crime, "amounts to . . . committing a criminal act and is thus applicable under the 'criminal misuse' portion of the PLCAA." *Id.* at 2, 5-8, 16. It held that the exception to the product defect exception applied because the firearm discharged because of a

volitional act that constituted a criminal offense, even though the discharge was unintentional. *Id.*

Travieso v. Glock, Inc., No. CV-20-00523-PHX-SMB, 2021 WL 913746, at *1 (D. Ariz. Mar. 10, 2021) also involved a situation in which a girl ("shooter") pointed a pistol with a bullet in the chamber at plaintiff and pulled the trigger, mistakenly believing that it was unloaded because the magazine had been removed. The court held that plaintiff's product liability claims were barred by the PLCAA and that the product defect exception did not apply because the shooter's actions in possessing and handling the pistol were volitional acts, and they constituted numerous criminal offenses, including possession of a handgun by a juvenile. *Id.* at *9-*10

In the present case, plaintiff's claims clearly fail to satisfy the requirements of the product defect exception to the PLCAA. Unlike the four decisions above involving unintentional shootings, Robert Bowers intentionally murdered the Simons and nine other people because of their religion. His actions are therefore considered as a matter of law to be the sole proximate cause of plaintiff's injuries. Recognizing that his claims fail to satisfy the product defect exception, plaintiff now attempts to morph his claims to satisfy the predicate exception, which applies to an action in which a firearms manufacturer "knowingly violated a State or Federal statute applicable to the sale or marketing of the [firearm], and the violation was a proximate cause of the harm for which relief is sought . . . ." 15 U.S.C. § 7903(5)(A)(iii).

Plaintiff seeks to satisfy the predicate exception to the PLCAA by claiming that Colt violated the National Firearms Act and 18 U.S.C. § 922(b)(4)[4] by selling "machineguns" to the general public

[4] 18 U.S.C. § 922(b)(4) states in relevant part that "it shall be unlawful for any . . . licensed manufacturer . . . to sell or deliver … to any person any … machinegun (as defined in section 5845 of the Internal Revenue Code of 1986) … except as specifically authorized by the Attorney General consistent with public safety and necessity." Section 5845 defines a machinegun in relevant part as "any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b). By contrast, a "semi-automatic rifle" is defined as "any repeating rifle which utilizes a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round, and which *requires a separate pull of the trigger to fire each cartridge*." 18 U.S.C. § 921(a)(28) (emphasis added).

and the Shooter. Plaintiff claims that the Subject Rifle is a machinegun because it can be fired "automatically" by bump firing, modifying it, or installing an accessory. Compl. ¶¶ 157-68, 171-76. Based on the factual allegations in the Complaint, however, the Subject Rifle is not a machinegun because there are no allegations that at the time it was sold by Colt it was capable of firing "automatically more than one shot" "by a single function of the trigger" as defined by 26 U.S.C. § 5845(b), nor could plaintiff make such an assertion without violating Rule 1023.1(c). *Staples v. United States*, 511 U.S. 600, 602 n.1 (1994) (holding that automatically refers to a "weapon that fires repeatedly with a single pull of the trigger. That is, once its trigger is depressed, the weapon will automatically continue to fire until its trigger is released or the ammunition is exhausted."); *Gun Owners of America, Inc. v. Garland*, __ F.3d __, 2021 WL 1138111, at *16-*19 (6th Cir. Mar. 25, 2021) (holding that the term "function of the trigger" refers to the mechanical process of depressing the trigger, as opposed to the user's action in bump firing, and therefore that a firearm is not a machinegun if its "trigger [] must be released, reset and pulled again before another shot may be fired."). The Subject Rifle is not alleged to have been modified or had a bump stock installed on it, but rather to have been in the same condition as which it was sold by Colt – i.e., an ordinary semi-automatic rifle. Compl. ¶ 217, 222-23, 262. It is not a machinegun as defined by federal law.

Plaintiff also claims that Colt violated the Connecticut Unfair Trade Practices Act, C.G.S. § 42-110b, et seq. ("CUTPA") by "marketing" the "Colt AR-15 to the general public." Compl. ¶ 189. The operative provision of CUTPA simply states that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." C.G.S. § 42-110b(a). Despite a 311 paragraph Complaint, citing to numerous advertisements by Colt, plaintiff fails to allege that any one of them (or any other actions by Colt) constituted either "unfair methods of competition" or were either unfair or deceptive, and fails to even plead a cause of action for violation of CUTPA. Similarly, plaintiff fails to allege that Robert Bowers chose to obtain the

Subject Rifle because of an advertisement or other action by Colt. Simply making a conclusory allegation that a statute was violated, and failing to even explain why Connecticut law bears any connection to this case, does not satisfy Pennsylvania's fact pleading requirements. Accordingly, plaintiff's claims fail to satisfy the predicate exception to the PLCAA. The entire Complaint should be dismissed with prejudice pursuant to the PLCAA, POs ¶¶ 19-39, but certain claims and allegations should be dismissed/stricken for additional reasons as discussed below.

B. The Sale of Firearms is Not a Public Nuisance

Count IV of the Complaint raises a claim for public nuisance alleging that Colt unreasonably interfered with an alleged "right of every individual to be safe and free from the danger posed by unreasonably dangerous and defective assault rifles." Compl. ¶ 276. Even if not barred by the PLCAA, plaintiff's public nuisance claim would still have to be dismissed. To recover on a private cause of action for public nuisance, plaintiff must show "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821(b)(1). The Third Circuit previously rejected claims that the sale of firearms created a public nuisance, and noted that no Pennsylvania case has ever allowed a public nuisance claim against manufacturers of "lawful products that are lawfully placed in the stream of commerce." *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 420-22 (3rd Cir. 2002) (citation and quotation omitted). Accordingly, plaintiff's public nuisance claim must be dismissed with prejudice because there is no general public right to be free from the danger posed by "assault rifles." POs ¶¶ 40-42.

C. Numerous Allegations Should be Stricken as Scandalous/Impertinent

Pa.R.C.P. 1028(a)(2) allows the filing of preliminary objections for the inclusion of "scandalous or impertinent" matters in a pleading. Allegations are scandalous and impertinent when they are "immaterial and inappropriate to the proof of the cause of action." *Common Cause/Penn. v. Commw.*, 710 A.2d 108, 115 (Pa. Commw. Ct. 1998). Any and all allegations directed against the

NRA must be stricken because there is no cause of action against the NRA in the Complaint and those allegations have no bearing on the causes of action set forth against the other parties. Compl. at 7 n.2 ("Plaintiff is not yet permitted to assert his claims against the NRA in this pleading"). Allegations about events that post-date the incident in question are clearly impertinent. Finally, as set out in further detail in the POs, numerous allegations in the Complaint are patently impertinent to the causes of action alleged and must be stricken. POs ¶¶ 43-56. Accordingly, Paragraphs 3-6, 9, 31-48, 59-66, 68-71, 76-117, 120-21, 124, 126, 140, 183-84, 193, 201-04, 213-31, 267, 272, & 292(g) of the Complaint must be stricken with prejudice because they constitute scandalous and/or impertinent matter.

D. Several Paragraphs Should be Stricken Because They Improperly Contain Multiple Allegations

Pa.R.C.P. 1022 provides that each paragraph in a pleading "shall contain as far as practicable only one material allegation." Pa.R.C.P. 1019(a) states that "[t]he material facts on which a cause of action or defense is based shall be stated in a concise and summary form." "Where there are multiple defendants, the complaint should separately allege the nature or type of liability relied upon against each defendant." *Garland v. Hallman*, 2006 Pa. D. & C. Dec. LEXIS 535 (Adams 2006). Allegations in a complaint violate Rule 1022 if they make it difficult or impossible for a defendant to frame a reply. *Gary Lorenzon Contractors Inc. v. Allstates Mech. Ltd.*, 52 Pa. D. & C.4th 567, 575 n. 8 (2001 Philadelphia). Claims must be presented in self-sufficient, separate paragraphs, which include allegations pertaining to the particular claim and relief sought. *Commonwealth v. Parisi*, 873 A.2d 3, 9 (Pa. Comm. 2005). Paragraphs 1-5, 24, 26, 28, 41, 45-46, 79, 82-83, 87, 94, 97, 106, 107 (note 5), 110, 112-16, 120, 124, 138, 143, 164, 168, 177, 182, & 215 of the Complaint use an impermissible "shotgun approach" by asserting multiple material allegations in each paragraph in violation of Pa.R.C.P. 1022 and 1019(a). POs ¶¶ 57-59. Accordingly, these paragraphs must be stricken.

E. The Complaint Fails to State a Viable Claim Against Colt for Punitive Damages

Pennsylvania requires the complaint allege specific conduct by each party that was outrageous

in nature and that demonstrates intentional, willful, wanton, or reckless behavior to justify punitive damages. *SHV Coal v. Continental Grain*, 587 A.2d 702 (Pa. 1991). Reckless conduct occurs when one knows, or reasonably should know, of facts that greatly increases the risk of physical harm to another, and intentionally proceeds to act, or to fails to act, in disregard of that risk. *Id.* at 704-705. Pennsylvania implements "a very strict interpretation of 'reckless indifference to the rights of others.'" *Burke v. Maassen*, 904 F.2d 178, 181 (3d Cir. 1990). A claim alleging even grossly negligent conduct is not sufficient to support punitive damages. *Feld v. Merrian*, 485 A.2d 742 (Pa. 1984). As detailed in the POs, plaintiff's demand for punitive damages is not supported by facts to support a claim for punitive damages against Colt, so this claim must be stricken with prejudice. POs ¶¶ 60-64.

F. Certain Paragraphs Should be Stricken Because They are Based on, and Quote from, Writings that are Not Attached to the Complaint

Pa.R.C.P. 1019(i) provides that when "any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part thereof, but if the writing or copy is not accessible to the pleader, it is sufficient so to state, together with the reason, and to set forth the substance in writing."[5] As detailed in PO ¶¶ 65-70, the Complaint contains numerous citations and quotations from advertisements, announcements, and articles allegedly sponsored by Colt, without attaching copies of them as exhibits to the Complaint as required by Rule 1019(i). As such, Paragraphs 21, 37, 152-55, 190-91, 196-99, 204, & 230 of the Complaint must be stricken. Similarly, the Complaint quotes from, and relies on for its claims, writings allegedly from the NRA, Robert Bowers, various government agencies, and the media without attaching copies of the referenced writings. Paragraphs 49-53, 68, 73, 75, 77-79, 81-82, 84, 86-89, 92-93, 95-96, 99, 101-05, 110-11, 114-15, 124, 140, 144, 154-56, 169, 205-06, 215-16, 223-24, 227, & 231 should be stricken on that basis.

[5] *See Williams v. Nationwide Mut. Ins. Co.*, 750 A.2d 881, 884 (Pa. Super. Ct. 2000) (holding that insured's complaint was fatally flawed because it did not attach pertinent parts of the insurance policy); *Adamo v. Cini*, 656 A.2d 576, 579 (Pa. Commw. Ct. 1995) (observing that "ordinarily, a complaint should be stricken for failure to attach an essential document").

G. Four Paragraphs of the Complaint Should be Stricken Because They Improperly Attempt to Preserve Unpled Theories of Liability

Broad, general allegations in a complaint, such as references to "other acts of negligent conduct as shall be discovered during the course of discovery," are properly stricken because they represent an "improper attempt by the plaintiff to preserve all un-pleaded theories of liability" against defendants. *Mitchell v. Remsky*, 39 Pa. D. & C.4th 122, 125 (Pa. C.P. 1998) (citing *Connor v. Allegheny General Hospital*, 501 Pa. 306, 310-11, (1983)). The inquiry is whether an allegation allows plaintiff to pursue a different theory by amending his complaint to bring a new cause of action. *Reynolds v. Thomas Jefferson Univ. Hosp.*, 450 Pa. Super. 327, 340-43 (1996). *See also Graham v. Campo*, 990 A.2d 9, 14 (Pa. Super. 2010). Paragraphs 175 and 189 of the Complaint are "boilerplate" allegations that leave open the possibility of alternative pleading based on their allegation that Colt violated "laws" and then giving one example of the various laws that Colt allegedly violated. Prejudice to Colt would result from having to prepare a defense to the alleged violation of the one law specified in each of these allegations, only to later be required to prepare a defense to different law brought in through the "amplification" backdoor. Colt should not be forced to waste time and money in defending against an alleged violation of a specific law that may later be abandoned in favor of some "amplified" theory. Accordingly, the reference to alleged violations of multiple laws, only one of which is identified in Paragraphs 175 and 189 of the Complaint must be stricken. Paragraph 161 should also be stricken because it alleges that the AR-15 is a machinegun because it can be "simply modified" through "methods, including but not limited to." Paragraph 260 should similarly be stricken because it attempts to include more than the specified defects though the use of the term "[a]mong other defects." POs ¶¶ 71-82.

II. RELIEF REQUESTED

For the reasons set forth herein Colt respectfully requests that this Court sustain its POs.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

We hereby certify that on this 7th day of April 2021, a true and correct copy of the foregoing Preliminary Objections and Memorandum of Law in Support were served by e-mail / first-class mail, postage-prepaid upon the following:

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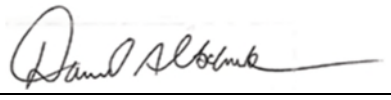
CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Defendant

Signature: 

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