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 ASSOCIATON OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, and JOHN FRAZER, Defendants.	Index No. 451625/2020 Hon. Joel M. Cohen

PLAINTIFF'S PRE-TRIAL MEMORANDUM FOR PHASE II

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

State Statutes

On behalf of Plaintiff, the People of the State of New York ("Plaintiff"), the Office of Attorney General Letitia James ("OAG" or "Attorney General") respectfully submits this pre-trial memorandum.

PRELIMINARY STATEMENT

After more than three years of pre-trial proceedings and extensive discovery, this Court held a six-week jury trial during which both Plaintiff and Defendants put on extensive evidence and the jury found each of the Defendants liable. The NRA now takes the remarkable position that no relief should be imposed upon it despite having been found to have violated its fundamental obligation to properly administer the assets its donors and members entrusted to it, made false regulatory filings, and violated rights of eight whistleblowers. Similarly, Wayne LaPierre ("LaPierre") and John Frazer ("Frazer") argue that no equitable relief against them is warranted despite having violated the trust they owed to the NRA's members and the public under New York law. The Court should reject Defendants' attempt to avoid the consequences of their misconduct and instead impose equitable relief, which, as Plaintiff has proposed, is specifically tailored to Defendants' wrongdoing and will ensure the proper use of charitable assets.

The evidence at trial established illegal conduct within the NRA that went on as a matter of course for years, and included deficiencies in, and pervasive violations of, NRA policies and procedures, including internal controls over vendor contracts and reimbursement of travel and entertainment expenses; conflicts of interest and related-party transactions procedures; and treatment of whistleblowers. Senior management misused the NRA's assets for the benefit of themselves, their families and friends and NRA insiders, and suppressed that fact by retaliating against those that questioned their actions and protecting those that supported them. On the whole, this created a corporate culture that ignored the law and NRA policies and procedures. The evidence also established that LaPierre and his allies—including Board of Directors ("Board")

leadership—freely engaged in wrongdoing because the NRA's Board, particularly the Audit Committee, failed to exercise proper oversight. NRA senior management and Board leaders regularly excused or ignored the misuse of funds. Defendants' evidence relating to the NRA's "course correction" did not refute the top-down, institutional disregard for required financial controls.

After hearing this evidence, the jury found that the NRA violated the Charities Laws[1] by: (i) failing to administer itself and its assets properly in violation of EPTL § 8-1.4; (ii) entering into several related-party transactions in violation N-PCL § 715; (iii) violating the whistleblower protection provisions of N-PCL § 715-b; and (iv) making false filings in violation of Executive Law §§ 172 and 175. The jury also found that: (i) LaPierre failed to fulfill his statutory duties in good faith and with ordinary care, causing $5.4 million in monetary harm to the NRA, and there was cause for his removal as Executive Vice-President ("EVP"); (ii) Wilson Phillips ("Phillips") violated his statutory duties to the NRA and caused $2 million of monetary harm; and (iii) Frazer violated his statutory duties to the NRA and made or authorized a materially false statement or omission in the NRA's filings with OAG's Charities Bureau.

The NRA does not deny that illegal conduct occurred but contends that it has engaged in a "course correction" addressing the illegal conduct. The NRA's reform efforts, however, have largely been reactive half-measures. The "course correction" began after the NRA allegedly was warned in 2017 by former Attorney General Schneiderman that the NRA would be under scrutiny. The evidence at the jury trial showed that many "corrective measures" were not in the ordinary

[1] The Estates, Powers and Trusts Law ("EPTL"), the Not-For-Profit Corporations Law ("N-PCL"), and the Executive Law are referred to collectively herein as the "Charities Laws."

course of business, but rather tactically implemented during this litigation, including on the eve of trial.

Evidence in the remedial phase of this trial will further demonstrate that until September 2023, more than six years after its reform efforts began, the NRA had not taken ***fundamental initial*** steps towards having an effective compliance program, steps that would actually address the causes of misconduct, identify risk moving forward, and limit harm to the organization. In September 2023, the NRA finally installed a compliance director (now officer) and, in January 2024, it added an internal auditor. These steps had been suggested for ***decades*** by the NRA's outside counsel and auditors but were not taken until the months leading to and in the midst of trial. Neither function is fully implemented—and the effectiveness of this nascent compliance program has not been tested.

The evidence will show that the NRA has not accepted responsibility for the jury's verdict—misinforming its membership about the jury's findings—and is still attempting to escape regulation rather than commit to reducing the continuing risk of further illegal conduct and harm to the organization. Moreover, the leadership at the NRA is in flux, with a new EVP—the third in six months—taking the helm just over a month ago, and a number of newly elected Board officers (but with longstanding directors and officers, including Bob Barr, Charles Cotton ("Cotton"), David Coy ("Coy"), Carolyn Meadows ("Meadows"), and Frazer, who were in place during the wrongdoing, still in leadership). Whether the NRA would have undertaken any reforms, and if they will be continued absent regulatory scrutiny, seems unlikely. Injunctive relief is required to ensure that an effective compliance program is in place and capable of reducing the risk of further harm.

Plaintiff's experts will testify about commonly accepted criteria for assessing when an organization that has engaged in illegal conduct has an effective compliance program, and when Third-Party Oversight[2] over such an organization is necessary to guard against repeated wrongdoing. Those factors counsel for the Court to impose Third-Party Oversight and enhanced reporting here. Plaintiff's experts will also testify to governance reforms warranted to address structural and practical issues that contributed to the oversight failures demonstrated during Phase I. The Court has considerable discretion in fashioning the specific reforms and the nature of oversight so that the relief is tailored, effective, and does not interfere with the NRA's ability to carry out its core mission.

Finally, given the nature and scope of their unlawful conduct, barring LaPierre from returning to the NRA in a fiduciary capacity, and restricting Frazer's role at the NRA, are essential measures to protect the organization and prevent the risk of further harm.

APPLICABLE LAW

A. Injunctive Relief Should Be Imposed Where There Is a Reasonable Likelihood of a Continuing Violation

When the Attorney General acts on behalf of the People, she "may obtain permanent injunctive relief … upon a showing of a reasonable likelihood of a continuing violation based upon the totality of the circumstances." *People v. Greenberg*, 27 N.Y.3d 490, 496-97 (2016). In *Greenberg*, the Court of Appeals recognized that "[t]he standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief." *Id.* at 497 (quoting *SEC v. Mgmt. Dynamics*, 515 F.2d 801, 808 (2d Cir. 1975)). That standard applies here,

[2] In this brief, "Third-Party Oversight" refers to the range of oversight regimes available. *See infra* 10-13.

where Plaintiff seeks to vindicate the public's interest, and has demonstrated entitlement to relief through the jury's findings of violations of the Charities Laws. *See* NYSCEF 3212.

To demonstrate a reasonable likelihood of a continuing violation, Plaintiff need not show that the NRA's violations continue unabated to date. Instead, "[a] court may grant injunctive relief even where a defendant has ceased the offending conduct upon a consideration of 'the bona fides of the [defendant's] expressed intent to comply' with the law, 'the effectiveness of the discontinuance,' and 'the character of the past violations.'" *EEOC v. United Health Programs*, 350 F.Supp.3d 199, 211 (E.D.N.Y. 2018) (quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953)); *see also Beck v. Levering*, 947 F.2d 639, 641 (2d Cir. 1991) (party need not provide "concrete proof of future wrongdoing" for permanent injunction, relying instead on past violations of law); *Mgmt. Dynamics*, 515 F.2d at 807 ("[A]ppellate courts have repeatedly cautioned that cessation of illegal activity does not ipso facto justify the denial of an injunction.").

In *United Health*, "evidence at trial established that the nature of defendants' past conduct, which was widespread and longstanding, support[ed] a finding that violations [were] likely to reoccur." 350 F.Supp.3d at 213. The court was also persuaded by the fact that "[d]efendants' highest-ranking officers and managers [including the CEO and COO] … and other individuals with supervisory authority enforced and permitted" violations of law. *Id.* Also relevant is whether a defendant accepts responsibility or instead continues to cast blame elsewhere and deny culpability. *SEC v. iShopnomarkup.com*, *Inc.*, 126 F.Supp.3d 318, 330 (E.D.N.Y. 2015).

B. The Court Has Authority to Require Governance Reforms, Additional Reporting, and Third-Party Oversight

This Court is empowered by the EPTL, the State Constitution, and the Judiciary Law to issue appropriate equitable relief, including governance reforms, enhanced reporting, and Third-Party Oversight, to ensure the proper administration of charitable organizations such as the NRA.

EPTL § 8-1.4(m) gives the Attorney General power to institute appropriate proceedings ***to secure the proper administration*** of charitable assets and the corporations that hold them. EPTL § 8-1.4(m); *see, e.g.*, *People v. Trump* ("*Trump I*"), 62 Misc.3d 500, 510-11 (Sup. Ct. N.Y. Cnty. 2018); *People v. Lower Esopus River Watch, Inc.* ("*LERW*"), 2013 WL 3014915, *27, *29 (Sup. Ct. Ulster Cnty. Apr. 8, 2013). This power serves the public interest in ensuring that charitable assets are protected, a traditional role held by OAG that Section 8-1.4 codifies and enhances. NYSCEF 759 at 64, 66 (Julius Greenfield, Practice Commentaries, EPTL § 8-1.4 (West 1968)); *People v. James*, 2013 WL 1390877, *4 (Sup. Ct. N.Y. Cnty Apr. 3, 2013) ("Given 'the significant public interest in the management and affairs of not-for-profit corporations,' the 'Attorney General has extensive supervisory and enforcement authority over [them].'" (quoting *People v. Grasso,* 54 A.D.3d 180, 191 (1st Dep't 2008))). Indeed, Section 8-1.4 expressly provides that it "shall be ***liberally construed*** so as to effectuate its general purpose of ***protecting the public interest in charitable uses, purposes and dispositions.***"[3] EPTL § 8-1.4(n).

Section 8-1.4's broad language leaves no doubt that it was enacted to enhance the Attorney General's powers, which have traditionally included the power to bring proceedings for equitable relief to protect charitable assets. EPTL § 8-1.4 (m) ("The powers and duties of the attorney general provided in this section are ***in addition to*** all other powers and duties he or she may have."); *see also People v. Nat'l Rifle Ass'n of Am.*, 222 A.D.3d 498, 498 (1st Dep't 2023) (Section 8-1.4 enhances OAG's enforcement powers); *Greenberg*, 27 N.Y.3d at 497-98 (broad remedial language in statute at issue authorized Attorney General to seek relief not specifically enumerated in statute); NYSCEF 758 at 131 (portion of legislative history of Section 8-1.4) (discussing same).

[3] Unless otherwise indicated, all emphasis is added.

Requiring the NRA to make governance reforms, provide enhanced reporting, and be subject to Third-Party Oversight is consistent with Section 8-1.4's broad grant of supervisory powers to the Attorney General and the statute's general purpose of protecting the public interest in ensuring that charitable assets are administered properly in the future. *See, e.g.*, *Trump I*, 62 Misc. 3d at 511; *LERW*, 2013 WL 3014915, *27, *29; *see also Greenberg*, 27 N.Y.3d at 497-98; *People v. Trump*, 2024 WL 733991, *66-68 (Sup. Ct. N.Y. Cnty. Feb. 16, 2024) (continuing appointment of monitor over Trump Organization post-verdict to prevent future violations of law).

The State Constitution and Judiciary Law also vest courts "with inherent plenary power to fashion any remedy necessary for the proper administration of justice." *64 B Venture v. American Realty Co.*, 194 A.D.2d 504, 504 (1st Dep't 1993) (citing N.Y. Const. art. VI, § 7) (affirming court's equitable power to appoint receiver to run nursing home); *accord Osman v. Sternberg*, 181 A.D.2d 868, 868-69 (2d Dep't 1992); *see also* CPLR § 3017(a) ("[C]ourt may grant any type of relief within its jurisdiction appropriate to the proof."). The Court's inherent equitable powers enable it to appoint receivers, accountants, and other experts to ensure that justice is served. *See, e.g.*, *Copeland v. Salomon*, 56 N.Y.2d 222, 227-28 (1982) (power to appoint receiver flows from court's inherent powers, not only statute); *In re Carter*, 2017 WL 5075786, *6 (Sup. Ct. Bx. Cnty. Nov. 2, 2017) (appointing accountant to conduct accounting deemed necessary for administration of justice, even though not expressly authorized by Business Corporation Law); *Arkin Kaplan Rice LLP v. Kaplan*, 2013 WL 3970718, *1 (Sup. Ct. N.Y. Cnty. Aug. 1, 2013) (court had "inherent power to appoint an accountant or other appropriate expert where complex financial data must be analyzed to resolve the litigation").

The equitable relief sought here is consistent with remedies the Charities Bureau typically seeks, and obtains, both in court and in settlement of regulatory enforcement matters.[4] For example, the Charities Bureau and Diocese of Buffalo recently settled an action alleging a violation of EPTL§ 8-1.4 concerning the Diocese's institutional response to allegations of sexual abuse. They entered into a stipulated order that requires governance reforms and the appointment of an independent auditor to conduct compliance audits and issue public reports for a minimum of three years. July 1, 2024 Affirmation of Monica Connell ("Connell Aff."), submitted herewith, Ex. A § II. Similarly, in a recent settlement with the Diocese of Brooklyn, the Charities Bureau and the Diocese agreed to reforms of policies and procedures to address the institution's response to and prevention of sexual abuse and the appointment of an independent monitor to evaluate the Diocese's compliance for a minimum of three years. *Id.*, Ex. B § III.

An independent monitor was appointed pursuant to a consent decree the Charities Bureau entered into with Cooper Union to address financial mismanagement, NYSCEF 762 at pp. 34-36, as well as in the settlement resolving the investigation of financial misconduct at the Metropolitan Council on Jewish Poverty, NYSCEF 763 at p. 11. In addition, a so-ordered stipulation resolving the *Trump Foundation* action required President Trump, in the event that he serves as a fiduciary of an existing New York foundation, to ensure that the organization will, *inter alia*, hire counsel with not-for-profit expertise and engage an accounting firm to monitor its grants and, if he forms a new charity, comply with additional reporting and governance requirements. *See People v. Trump* ("*Trump II"*), 66 Misc.3d 200, 202 n.2 (Sup. Ct. N.Y. Cnty. 2019). In the settlement of an

[4] Daniel Kurtz, one of the NRA's proffered experts, conceded that the remedies in regulatory settlements with OAG are compromises that represent a subset of the judicial relief OAG could obtain. *See* Connell Aff., Ex. C at 94:11-96:21. Kurtz has personally represented the subjects in several Charities Bureau settlements that included governance reforms, fiduciary bars, mandatory training, and enhanced "Oversight/Monitoring." *See, e.g.*, NYSCEF 764 at 19.

investigation of the Richenthal Foundation, the Foundation and its principals, who were represented by Mr. Kurtz, the NRA's expert, agreed to, *inter alia*, structural reforms to the board's composition, regular reporting concerning compliance with the reforms, mandated training, and the appointment of new trustees with qualifications that met OAG's approval. NYSCEF 764 ¶¶ 25-27; *see also* NYSCEF 765 and NYSCEF 766 (other Charities Bureau matters requiring similar remedies).

C. The Court May Impose Equitable Relief, Including Bars, on LaPierre and Frazer

The jury found cause for LaPierre's removal as an NRA officer, and now the Court will decide whether he should be barred from returning as a fiduciary. A bar on service as a fiduciary is appropriate where a director "has demonstrated that he does not understand, and is likely not to follow, the obligations required of a[n] … officer of a not-for-profit corporation, and cannot be trusted with those obligations in any future role." *LERW*, 2013 WL 3014915, *27, *29. Equitable relief can be tailored to the particular circumstances, with appropriate carve-outs, and coupled with training requirements. *See, e.g.*, Transcript of Proceedings (NYSCEF 127) at 6:5-7, *People v. Mosesman*, No. 85015/2020 (Sup. Ct. Richmond Cnty. Apr. 16, 2021) (imposing permanent bars); *Trump II*, 66 Misc.3d at 202-03 & n.2 (so-ordered settlement with directors requiring training agreeable to OAG and imposing restrictions on President Trump for future service as fiduciary of New York charitable organization); So-Ordered Stipulation of Settlement (NYSCEF 12) ¶ 70, *People v. Schulman,* No. 453119/2017 (Sup. Ct. N.Y. Cnty. January 3, 2018) (five-year bar on future fiduciary service); Connell Aff., Ex. D ¶¶ 45-48 (fiduciary bars of varying lengths based on level of culpability and permitting limited carve-outs); NYSCEF 764 ¶¶ 25-26 (requiring training of trustees that breached duty of care and imposing lifetime bar on primary wrongdoer, with carve-

out permitting him to serve as employee in limited capacity). In addition, the settlement with Joshua Powell here included a bar on future fiduciary service. NYSCEF 2724 ¶ 5.

To protect the public interest in ensuring charitable organizations and their assets are administered properly, fiduciary bars must be available for officers and directors who are wrongdoers regardless of whether they voluntarily step down from their positions. Any other rule would permit wrongdoers to escape justice by stepping down from their position on the eve of trial, with no bar on returning even if later found liable at trial. This would expose the organization to the very harm that the removal provisions in the N-PCL were intended to prevent.

FRAMEWORK FOR DETERMINING APPROPRIATE REMEDIES

Plaintiff's experts at the Phase II trial will address commonly accepted frameworks for assessing an organization's compliance program and determining when Third-Party Oversight of a regulated institution is appropriate in the face of past misconduct. Plaintiff anticipates calling: (i) Jonny Frank, an expert with extensive experience with Third-Party Oversight, to testify concerning the generally accepted criteria to determine when such oversight is appropriate; (ii) Daniel Roach, a compliance expert, to testify concerning the generally accepted standards for assessing compliance programs; (iii) Eric Hines, who testified in Phase I, to opine on the effectiveness of the NRA's compliance program and the factors showing the need for Third-Party Oversight; and (iv) Jeffrey Tennenbaum, who testified in Phase I, to opine on governance reforms appropriate at the NRA.

A. Framework for Determining Need for Third-Party Oversight

Mr. Frank will testify concerning the objectives of Third-Party Oversight; the criteria for determining whether it should be imposed; the means of determining and delineating the scope and authority of such oversight; and its flexible nature. Mr. Frank's testimony will be based on his extensive experience with Third-Party Oversight, including serving as a monitor on numerous

occasions. Mr. Frank will rely on generally accepted frameworks, such as Department of Justice guidance that lays out factors (or other criteria) for determining when Third-Party Oversight is necessary and how it should be implemented.[5]

Mr. Frank will explain that Third-Party Oversight is a widely used tool to reduce risk of harm to an institution and the reoccurrence of misconduct. He will explain that, as a general matter, Third-Party Oversight should be imposed if "a corporation's compliance program and controls are untested, ineffective, inadequately resourced or not fully implemented at the time of a resolution." *See* Connell Aff., Ex. E ("DOJ Monitor Selection Memo" or "MSM") at 3.[6] Third-Party Oversight is appropriate if *any* of the relevant factors are met, but the specific contours of the oversight will vary depending on which are at issue. Mr. Frank will also explain how Third-Party Oversight can assist the Court and ensure that its resources are not overly taxed.

Mr. Frank will testify about the ten-factor framework ("DOJ Factors"), set forth in the DOJ Monitor Selection Memo, that is commonly used for determining whether Third-Party Oversight is necessary. *See* MSM at 2-3. Each of the DOJ Factors are discussed below. Mr. Frank also proposes an eleventh factor that should be considered pertaining to efficient use of the Court's resources.

Mr. Frank will also testify concerning the flexibility that exists in implementing Third-Party Oversight programs, including concerning the nature of the oversight (e.g., its structure and length) and the substantive matters to be covered. The Court can appoint an auditor, monitor, or consultant to conduct the Third-Party Oversight and can define their responsibilities as it deems

[5] Mr. Frank's specific questions for the Court to consider, disclosed as part of his expert report in this action, are attached as Exhibit N to the Connell Affirmation.

[6] Although the DOJ Monitor Selection Memo was created for use with criminal matters, Mr. Frank will explain that the factors therein are also widely accepted as factors to look to in civil matters like this one.

appropriate. Importantly, the Court can limit the scope of the Third-Party Expert's role to certain areas of the NRA's operations to avoid interference with the NRA's mission and its First Amendment rights. The selection process for the Third-Party Expert can also be structured to allay fears of such interference—by, for example, allowing the NRA to propose several candidates for the position, with the Attorney General given the right to object to unacceptable candidates, and the Court making the ultimate appointment.

B. Framework for Assessing and Implementing an Effective Compliance Program

Mr. Roach will testify concerning the structure and content of an effective compliance and ethics program. He will explain that the Federal Sentencing Guidelines for Organizations ("FSGO"), *see* Connell Aff., Ex. F, provide an important benchmark for compliance experts to use in evaluating corporate compliance programs. His testimony will aid the Court both in assessing the current state of the NRA's compliance program and in determining whether additional reforms are needed to ensure that its compliance program works effectively prospectively.[7] The FSGO requires a review of an organization's compliance program for satisfaction with eight required elements:

(1) The adoption of standards and procedures to address the organization's risks;

(2) A governing body (e.g., the Board of Directors) that (i) is knowledgeable about the content and operation of the compliance and ethics program and (ii) exercises reasonable oversight over the implementation and effectiveness of the program;

(3) That processes are in place to evaluate conduct and ensure that individuals who have engaged in misconduct or failed to execute the compliance program are not given substantial authority;

[7] Mr. Roach will also testify about ways to leverage the NRA's own resources to avoid duplication of effort, improve and educate the NRA on compliance functions, and efficiently implement oversight.

(4) Training programs that reach board members, employees/staff, and key contractors;

(5) Monitoring/auditing programs and reporting mechanisms (e.g., hotlines) designed to detect misconduct, as well as regular evaluation of their effectiveness;

(6) Promotion of the program through the use of (i) appropriate incentives to execute the program and (ii) effective discipline of wrongdoers or those whose failure to exercise proper oversight contributed to the wrongdoing;

(7) Appropriate responses to detected wrongdoing, including remediation, appropriate discipline and modifications to the program designed to prevent additional failures; and

(8) Periodic risk assessments.

Mr. Roach will also discuss how to apply these factors and offer recommendations for an effective compliance program moving forward based on the need for enhanced oversight following misconduct.

ARGUMENT

A. This Court Should Impose Third-Party Oversight

In Phase I, Plaintiff introduced extensive evidence of the NRA's inadequate control environment, evasions and overrides of internal controls, and illegal conduct, culminating in a jury verdict against the NRA and several of its senior leaders. In Phase II, Plaintiff will introduce evidence concerning the nascent, untested, and incomplete nature of the NRA's new compliance program. That evidence, and Plaintiff's experts' testimony, will establish that this Court should require the NRA to make key governance reforms and impose Third-Party Oversight of the NRA and its remediation efforts, leveraging the NRA's new compliance program to ensure that the NRA has effective internal controls and an adequate compliance program. Below, Plaintiff addresses each of the DOJ Factors that support the requested relief.

1. Voluntary Self-Disclosure

Factor 1 considers whether the NRA "voluntarily self-disclosed the underlying misconduct." MSM at 2. A voluntary self-disclosure must be, *inter alia*, independent of the organization's "preexisting obligations to disclose" and "prior to an imminent threat of disclosure or government investigation." Connell Aff., Ex. G ("CEP") § 5(a).

The NRA did not voluntarily self-disclose its misconduct. On the contrary, OAG revealed the NRA's misconduct largely in the course of its investigation and subsequent enforcement action. *See* Tr.[8] 4414:12-4416:6. The NRA only began disclosing misconduct to its regulators after this action began in August 2020. These disclosures—and any attempts to remediate the underlying misconduct—were also reactive. Specifically, they took place ***after*** the NRA was allegedly warned by former Attorney General Eric Schneiderman to essentially get its house in order, and ***after*** the media began publishing investigative reports about financial misconduct by the NRA and its officials. *See, e.g.*, Tr. 1652:15-17, 1667:19, 2322:21-24, 2617:13-2618:24, 2711:21-24 (assorted disclosures); Tr. 247:15-248:14, 254:18-25, 263:10-14, 263:23-25, 1750:9-17, 2293:19-2294:4, 4203:4-4204:6, 4288:25-4289:19, 4327:24-4329:12 (alleged Schneiderman call and media reports). As a result, Factor 1 clearly points in favor of Third-Party Oversight.

2. Risk Assessment, Compliance Program, and Internal Controls

Factor 2 considers whether "after a thorough risk assessment, the [NRA] has implemented an effective compliance program and sufficient internal controls to detect and prevent similar misconduct in the future." MSM at 2.

Phase I established that the NRA had a weak control environment, poor tone at the top ("TATT"), and deficient or ineffective internal controls. Together, these issues increase the risk

[8] "Tr." refers to the Phase I transcript.

of further illegal conduct by the NRA and of further harm to the organization. In particular, the Phase I evidence showed: (i) that the NRA's repeated violation of its policies, procedures, and internal controls resulted in significant waste of its assets; (ii) impermissible conflict of interest and related-party transactions; (iii) whistleblower violations; and (iv) materially false statements or omissions in regulatory filings. *See, e.g.*, NYSCEF 3273 at 14-22 (evidence of LaPierre's and Phillips's misconduct); NYSCEF 3276 at 9-26 (evidence of NRA's violations of whistleblower protections and improper related-party transactions); NYSCEF 3279 at 17-26 (evidence of materially false statements or omissions in NRA's regulatory filings). Notably, these issues continued to plague the NRA even after it initiated its so-called "course correction." *See, e.g.*, NYSCEF 3273 at 19 (evidence relating to LaPierre's post-"course correction" decision to put NRA into bankruptcy); *id.* at 14-16 (evidence that NRA's conflict-of-interest-ridden relationship with MMP continued for years into "course correction" and contracts with MMP were not renegotiated until 2022).

In Phase II, the evidence will establish that, despite its "course correction," the NRA did not retain its first dedicated compliance personnel until the eve of and during trial; that the NRA's internal controls have not yet been sufficiently tested; and that the NRA has still not taken fundamental steps to implement an effective compliance program. In turn, the evidence will establish that additional reforms to the NRA's compliance program and internal controls are necessary—and that, in the absence of Third-Party Oversight, the type of misconduct revealed during Phase I is reasonably likely to reoccur. For example, the evidence will show that:

- ***The NRA has not performed a root cause analysis.*** As Plaintiff's experts will testify, a root cause analysis is a critical remediation tool. Indeed, according to DOJ guidance, remediation ***necessarily*** includes "[d]emonstration of thorough analysis of causes of underlying conduct (i.e.,

a root cause analysis)." *See* CEP ¶ 5c; *see also* Connell Aff., Ex. H ("ECCP") at 19 ("thoughtful root cause analysis of misconduct" is "hallmark" of effective compliance program). The evidence will show that the NRA's most significant risk assessment to date was completed on the eve of trial; it was deficient; and it failed to reflect a root cause analysis of the specific misconduct at issue during Phase I. Without a root cause analysis,[9] the NRA cannot be sure it has in place policies and procedures designed to address the source(s) of past misconduct—and it cannot be sure that that it has properly identified the remediation efforts needed to prevent future misconduct.

- ***The NRA continues to have poor TATT.*** Phase I established that LaPierre engaged in repeated misconduct during his tenure as EVP, setting a poor TATT for the rest of the organization. For example, in violation of NRA policy, LaPierre routinely flew on private jets; was driven around in black cars; and stayed in luxury hotels. *See* NYSCEF 3273 at 18-19. Although the NRA now maintains it was victimized by LaPierre, *see, e.g.* Tr. 4585:5-4586:10, the evidence will show that the NRA has never sanctioned LaPierre. On the contrary, although the NRA knew about LaPierre's misconduct for years, the NRA allowed him to stay on as EVP until the eve of trial, at which time LaPierre resigned of his own accord for health-related reasons. In fact, in announcing LaPierre's resignation, the NRA praised LaPierre for his many contributions to the organization over the years. The evidence will also show that the NRA also failed to seek sanctions against LaPierre after the jury found that he breached his statutory duties to the NRA and caused it over $5.4 million in harm. The NRA has yet to clearly distance itself from LaPierre. Among other things, the evidence will show that the NRA has not: tried to collect its multimillion dollar damages

[9] Although the NRA may argue that OAG's enforcement action has been a root cause analysis in substance if not in name, this argument misses the mark. OAG has revealed significant misconduct, but a root cause analysis does more; it is a formal exercise to determine what factors permitted the misconduct to occur and then create a corrective action plan.

award from LaPierre; tried to recoup the millions of dollars in attorneys' fees it paid on LaPierre's behalf in this action; or ruled out the possibility of paying for LaPierre's continued legal fees.

- ***The NRA has yet to accept responsibility for its misconduct.*** The evidence will show that the NRA has failed to accept responsibility for the conduct that led to the jury's verdict, mischaracterizing that verdict in both its messaging to staff and membership. For example, Cotton, who remains a member of the Board, the Audit Committee, and other key committees, told members at the NRA's 2024 Annual Meeting that the Phase I trial was ***not*** against the NRA itself, but rather against only the individual Defendants. In addition, although the jury found Frazer liable for breach of his duties and making or authorizing false statements or omissions in regulatory filings, the NRA failed to sanction Frazer. Instead, he was nominated and re-elected as Secretary. Frazer was relieved as General Counsel this May, but the NRA's new EVP testified that the change was to return to the previous separation of Secretary and General Counsel roles, not in response to the jury's verdict. Connell Aff., Ex. I at 75:19-78:3. The NRA has also not sanctioned, and in fact has kept in senior leadership roles, Tyler Schropp ("Schropp"), its longtime Executive Director of Advancement, who exploited the NRA-Ackerman McQueen "out-of-pocket" expense scheme[10]; and Lisa Supernaugh, the NRA's Managing Director of Executive Operations, who, as Phillips's assistant, facilitated billing practices that circumvented the NRA internal controls. *See, e.g.*, Tr. 2263:6-24, 2918:19-25, 2930:5-14.

- ***The NRA's compliance has not been fully implemented.*** The evidence will show that, more than six years into its "course correction," the NRA has still yet to complete the bedrock, foundational steps to build an effective compliance program. Although outside professionals

[10] In fact, it was not until the eve of and during trial that the NRA even sought to identify Schropp's excess benefit transactions and obtain repayment. *See* Tr. 3501:9-3504:15, 3565:17-19.

repeatedly advised the NRA to hire compliance personnel and/or create an internal audit function since as early as 2003, Tr. 2781:2-4, 2789:7-9; 2788:4-2790:5, the NRA did not hire its first dedicated compliance professionals until late 2023 and early 2024. The organization's new compliance program is still in its infancy, and its effectiveness is yet to be established. For example, the overall effectiveness of the new NRA whistleblower program has yet to be proven. Likewise, the NRA's new internal auditor has only conducted limited testing of internal controls, and, as of June 2024, this testing has not been completed. Moreover, the compliance program is still being built out and the new compliance professionals testified that they are hoping that additional staff will be hired. *See, e.g.*, Connell Aff., Ex. J at 84:16-86:10, 132:17-134:19; *id.*, Ex. K at 76:17-77:10, 122:7-123:14, 297:15-298:10. The evidence will also show that with NRA leadership in flux—it has its third EVP in the past six months, and newly elected Board officers and directors—it is unclear who will emerge to lead the NRA over the long haul, the tone they will set with respect to compliance, and their willingness to invest real resources to implement and improve the compliance program.

3. Testing of Compliance Program and Internal Controls

Factor 3 considers whether the NRA has "adequately tested its compliance program and internal controls to demonstrate that they would likely detect and prevent similar misconduct in the future." MSM at 2. As noted above, whatever efforts the NRA has made since 2023 to test its compliance program and internal controls, those efforts are necessarily deficient because, *inter alia*, the NRA has yet to perform a root cause analysis of known misconduct and create a corresponding remediation plan. *See supra* 15-16.

The evidence will also show that the NRA has yet to engage an independent third party to perform an internal controls or forensic audit. Despite the NRA's reliance on work by Aprio, the NRA's financial statement auditor, Aprio has not audited the NRA's internal controls and it has

not opined (and will not be opining) on the effectiveness of those controls. In fact, Aprio expressly informed the NRA of the limitations on its audit with respect to internal controls. Connell Aff., Ex. L at 51:10-54:7.

4. Pervasiveness of Misconduct and Involvement of Senior Management

Factor 4 considers whether the misconduct was pervasive or "was approved, facilitated, or ignored by senior management, executives, or directors[,] including by means of a corporate culture that tolerated risky behavior or misconduct." MSM at 2-3.

Phase I established the underlying misconduct was pervasive across the NRA—and that it implicated persons across its senior management, executive, and Board ranks. *See, e.g.*, NYSCEF 3273 at 13-22 (LaPierre and Phillips); NYSCEF 3279 at 7-15, 17-26 (Frazer). Critically, the misconduct at issue repeatedly implicated the ineffectiveness of the NRA's Audit Committee, the committee charged with overseeing the NRA's corrective actions for organizational misconduct. In particular, Phase I revealed a chronic failure on the part of the Audit Committee to adequately oversee the NRA's compliance with both its legal obligations and its own policies, including: repeated failures to timely review and approve related-party transactions; a failure to take corrective action after LaPierre belatedly disclosed conflict-of-interest-ridden gifts from the NRA's largest vendor; and, despite a purported zero-tolerance policy, a failure to formally sanction NRA employees like LaPierre, Schropp, and Millie Hallow for their excess benefit transactions. *See, e.g.*, NYSCEF 3276 at 7-11, 13-14 (describing various failures and other issues on the part of the Audit Committee). Of note, two long-time key members of the Audit Committee remain at its helm today: Chairman Cotton and Vice-Chairman Coy. *See* Tr. 1637:10-1638:3, 2772:21-2773:18; 2815:18-22. Cotton was also one of the members of LaPierre's inner circle who signed off on the NRA's secretive and improper effort to escape regulation by filing bankruptcy. *See* Tr. 1698:10-1704:15.

5. Misconduct Due to Exploitation of Inadequate Compliance Program

Factor 5 considers whether the misconduct involved "the exploitation of an inadequate compliance program or system of internal controls." MSM at 3. As explained throughout this memorandum, Phase I established the misconduct at issue took place in large part because NRA personnel, and third parties, exploited deficiencies in the NRA's compliance program (to the extent such a program existed) and internal controls. *See supra* 14-17, 19.

6. Compliance Personnel's Active Involvement in Misconduct or Failure to Respond to Red Flags

Factor 6 considers the "active participation of compliance personnel or the failure of compliance personnel to appropriately escalate or respond to red flags." MSM at 3.

As noted above, the NRA only recently created a dedicated compliance function with two full-time compliance employees. *See supra* 17-18. Phase I did establish, however, that the NRA personnel who were nominally supposed to be overseeing its compliance efforts during the relevant period, *see* Tr. 1640:8-1642:24, 1635:23-1637:9, 638:22-639:12, 1085:2-10, failed to adequately do so. These failures implicated members of the Board; persons serving on the Audit Committee; Phillips; and Frazer. Plaintiff established that these individuals were themselves either actively engaged in misconduct or failed to detect or adequately respond to misconduct when it was brought to their attention. *See supra* 14-16, 19.

7. Adequate Investigative and Corrective Measures

Factor 7 considers the adequacy of the remediation and the appropriateness of the discipline of personnel involved, including those with oversight responsibilities. MSM at 3.

The evidence will show that the NRA's remediation efforts to date are inadequate or incomplete. First, the NRA has yet to create a remediation plan based on a root cause analysis. *See supra* 15-16. Moreover, while the NRA has been investigating several discrete issues linked to

Phase I (e.g., the nature of Marion Hammer's most recent consulting contract with the NRA), those investigations are still pending or are otherwise unresolved. In addition, as set forth above, the NRA failed to sanction those who violated the NRA's internal controls, including LaPierre and Phillips. *See supra* 16-17, 19.

As for corrective measures, the evidence has shown, *see supra* 14, and will show that the NRA's efforts have been entirely reactive in nature and inadequately tested, with no tangible evidence that new leadership at the NRA will set a TATT that remediates the proven misconduct on a going-forward basis. For example, while the NRA is seeking to institute a supplier code of conduct for all vendors to sign, it is too early to assess what, if any, results will come of this change in terms of compliance issues.

8. Change in Risk Profile and Unique Risks or Compliance Challenges

Factor 8 considers whether the risk of recurrence of the misconduct is minimal or non-existent because the NRA's risk profile has substantially changed. MSM at 3. Factor 9 considers whether the NRA faces any unique risks or compliance challenges. *Id.*

The jury found that the NRA failed to properly administer itself and its charitable assets. The evidence will show that the NRA's response to that verdict has been to deny the import of the Phase I evidence, the verdict, and even the many admissions of wrongdoing made by NRA personnel. To the extent the NRA has sought to strengthen its compliance program and internal controls, those activities are recent—and it remains to be seen whether or not they will meaningfully reduce the likelihood of future misconduct. *See supra* 17-18.

9. Regulatory Oversight

Factor 10 considers whether the NRA is subject to oversight from industry regulators or is receiving a monitor from another enforcement authority or regulator. MSM at 3. The NRA is indeed subject to routine oversight from regulators including OAG and the IRS. *See supra* 14. But,

this oversight is of limited scope, and was insufficient to detect much of the misconduct that occurred within the NRA for years. Moreover, the evidence will show that the NRA is actively seeking to avoid OAG's oversight by, for example, pursuing a change of its status from a charitable to noncharitable corporation under New York law. *See* Connell Aff., Ex. M. The NRA is also not currently subject to Third-Party Oversight from another enforcement authority or regulatory body. This factor thus points in favor of oversight or is at least neutral.

* * *

In sum, the evidence will show that the DOJ Factors weigh decisively in favor of Third-Party Oversight. This Third-Party Oversight is the best way to ensure the NRA properly and fully remediates the misconduct established in Phase I, and that it creates a compliance program and internal controls designed to substantially reduce the likelihood of future misconduct.

B. Proposal for Relief[11]

1. The NRA

To ensure that the NRA has an effective and supported compliance program, and to reduce the risk of further harm and illegal conduct within the NRA, Plaintiff proposes three forms of remedial relief:

(1) Tailored Third-Party Oversight, conducted by a person or entity nominated by the NRA and appointed by the Court, with input from OAG, to work with the NRA's new compliance personnel, oversee independent testing of the NRA's internal controls and compliance program, and conduct a governance audit and make recommendations to the NRA and the Court. The oversight would be limited to certain "In-scope" matters and carve-out oversight of mission

[11] Plaintiff's proposal for relief is outlined in more detail in Exhibit O to the Connell Affirmation.

activities of the NRA. It would easily be funded by earmarking specifically for this purpose part of the monetary awards imposed by the jury against LaPierre and Phillips;

(2) Implementation of the governance reforms recommended by the governance audit; and

(3) Enhanced reporting requirements, including certification by NRA leadership of the NRA's regulatory filings and reporting to the Board and NRA members on certain "In-scope" compliance matters.

2. The Individual Defendants

Given the evidence introduced against them and the jury's verdict, and based upon evidence Plaintiff will present in Phase II, the Court should impose a lifetime bar on LaPierre from serving in a fiduciary role in the NRA or its affiliated entities and certain related activities. Further, the Court should impose various conditions on Frazer's role at the NRA, including mandating training and imposing limitations on the scope of activities, such as with respect to signing the NRA's regulatory filings.

CONCLUSION

For the reasons set forth above and in the accompanying submissions, the Court should impose the equitable relief requested by Plaintiff against the NRA, LaPierre, and Frazer, and should grant such other and further relief as the Court deems just.

Dated: July 1, 2024
New York, New York

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Attorney Certification Pursuant to Commercial Division Rule 17

I, Monica Connell, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law contains 6,991 words, excluding the parts exempted by Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: July 1, 2024
New York, New York

/s/ Monica Connell
Monica Connell