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 Motion Sequence No. __ Hon. Joel M. Cohen

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO DISMISS CERTAIN OF DEFENDANTS' AFFIRMATIVE DEFENSES

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On behalf of the Plaintiff, the People of the State of New York ("Plaintiff"), the Office of Attorney General Letitia James ("OAG") respectfully submits this memorandum of law in support of Plaintiff's motion to dismiss certain of Defendants' affirmative defenses pursuant to Civil Practice Law and Rules ("CPLR") 3211(b) and 3212.

PRELIMINARY STATEMENT

Plaintiff commenced this action in August 2020 in the exercise of the Attorney General's authority and responsibility under New York law governing charities. The action seeks to hold the National Rifle Association of America ("NRA"), Wayne LaPierre ("LaPierre"), the current Executive Vice-President of the NRA, John Frazer ("Frazer"), the current Secretary and General Counsel of the NRA, Wilson Phillips ("Phillips"), the former Treasurer and Chief Financial Officer of the NRA, and Joshua Powell ("Powell"), a former senior executive at the NRA, (LaPierre, Frazer, Phillips and Powell are referred to as the "Individual Defendants" and the Individual Defendants and the NRA are referred to as the "Defendants"), accountable for self-dealing, mismanagement and waste of charitable assets.

Plaintiff's initial Complaint, and each amended version, including the operative Second Amended Verified Complaint, have identified misconduct by the NRA and the Individual Defendants in highly particularized detail. From the outset of the litigation, Defendants have attempted to distract from allegations the Court described as "a grim story of greed, self-dealing, and lax financial oversight at the highest levels of the National Rifle Association." (NYSCEF 609 at 1.)[1] With the NRA leading the effort, the defense strategy has been to attack the Attorney General's motives and authority to investigate Defendants' wrongful conduct and enforce the law. The NRA's efforts have taken the form of collateral litigation against the Attorney General in

[1] Unless otherwise stated, page numbers for NYSCEF documents refer to the page numbers assigned by the NYSCEF system.

federal court (which the NRA ultimately withdrew), a bankruptcy action dismissed for the lack of a good faith basis, unsuccessful demands for depositions of the Attorney General and her staff, and numerous motions to dismiss the action with highly charged rhetoric. This Court has repeatedly considered and rejected these diversionary tactics, including in its decisions dismissing counterclaims asserted against the Attorney General and three rounds of motions to dismiss. (*See* NYSCEF 210–215. NYSCEF 610; NYSCEF 706; NYSCEF 844–847.)

As this case now moves toward trial, Defendants continue to advance the same legal theories already rejected by this Court in the form of affirmative defenses in their respective Answers. To avoid distraction and to streamline this action for trial, Plaintiff moves to dismiss such affirmative defenses asserted by the Defendants, which are barred by law of the case, having already been rejected by this Court, or fail on other legal grounds.

As set forth in detail below, Defendants assert a variety of affirmative defenses, often as bare legal conclusions without any supporting factual allegations. Each of the Defendants has asserted at least one affirmative defense based on the Attorney General's purported unclean hands and bias, with the NRA and LaPierre asserting multiple such defenses, including defenses of selective prosecution and retaliation that are alleged to have been motivated by such alleged bias. These defenses fail as a matter of law for the same reasons that this Court granted Plaintiff's motion to dismiss the NRA's counterclaims in a June 2022 decision. This Court held that the "the NRA's factual allegations do not support any viable legal claims that the Attorney General's investigation was unconstitutionally retaliatory or selective." (NYSCEF 706 at 2.) This Court's prior determination is law of the case that precludes the Defendants from asserting their affirmative defenses arising out of alleged bias, whether asserted as unconstitutional conduct or otherwise.

Similarly precluded are the NRA's affirmative defenses based on the alleged improper extraterritorial application of certain New York charities statutes. The NRA raised its extraterritoriality argument in support of a motion to dismiss claims asserted in the Second Amended Verified Complaint under the Estates, Powers & Trusts Law ("EPTL"). The Court rejected the NRA's legal theory in September 2022. (*See* NYSCEF 844–847.) That decision, too, is law of the case, which establishes that the extraterritoriality defenses fail as a matter of law.

Finally, many of Defendants' affirmative defenses should be dismissed because they are alleged as bare legal conclusions without any supporting facts, which renders them legally deficient as a matter of law or because they assert defenses which are inapplicable against the Plaintiff.

RELEVANT PROCEDURAL HISTORY

I. RELEVANT PRIOR DECISIONS OF THIS COURT

A. The Court's Decision Dismissing the NRA's Counterclaims

On June 24, 2021, Plaintiff moved to dismiss counterclaims the NRA asserted in its Answer to the original Complaint. (*See generally* Mot. Seq. No. 13; NYSCEF 230 (NRA's original answer and counterclaims).)[2] In its counterclaims, as relevant here, the NRA alleged that the Attorney General's actions in investigating and pursuing this enforcement action were in bad faith and politically motivated. The NRA alleged that the Attorney General had violated its federal and state constitutional rights of free speech and free association by retaliating against it for engaging in protected political speech, and had engaged in selective enforcement. (NYSCEF 230 at 155–67.)

On June 10, 2022, this Court granted Plaintiff's motion in its entirety, holding that

> the NRA's factual allegations do not support any viable legal claims that the Attorney General's investigation was unconstitutionally retaliatory or selective. …

[2] The operative pleading for the purpose of Plaintiff's motion to dismiss was the NRA's Amended Verified Answer and Counterclaims, filed July 20, 2021. (NYSCEF 706 at n.1 (citing NYSCEF 325).)

> Although certain of the Attorney General's claims were dismissed by the Court on legal grounds, they were serious claims based on detailed allegations of wrongdoing at the highest levels of a *not-for-profit* organization as to which the Attorney General has legitimate oversight responsibility. And many legally viable claims remain. The narrative that the Attorney General's investigation into these undeniably serious matters was nothing more than a politically motivated – and unconstitutional – witch hunt is simply not supported by the record.

(NYSCEF 706 at 2.)

B. The Court's Decision Denying the NRA's Third Motion to Dismiss

On June 6, 2022, the NRA made its third motion to dismiss in this action, in this instance against Plaintiff's Second Amended Verified Complaint. (*See* Mot. Seq. No. 30.) As is relevant here, the NRA argued that Plaintiff had failed to state a claim against the NRA for violations of EPTL 8-1.4 because Plaintiff failed to allege that the NRA holds and administers charitable assets in New York. (NYSCEF 705 at 21–26.)

During oral argument on the motion to dismiss, the NRA argued that the EPTL could not be applied extraterritorially absent specific authorization from the legislature. (NYSCEF 847 at 23:2–10.) In response, Your Honor noted that

> [i]t would be awfully easy to evade any oversight as a New York not-for-profit corporation if all you had to do was keep your assets outside the state. … [W]hat you are saying, is that as long as they keep their assets outside the state, then the Attorney General is essentially powerless to exercise oversight over how they deal with their donations and operate their business, but that seems inconsistent with the statutory scheme where if you are, for reasons of your own choice, a New York not-for-profit corporation, the New York Attorney General has authority over you.

(*Id.* at 23:19–24:4.) The Court proceeded to deny the motion to dismiss in its entirety. (*Id.* at 75:4–79:1; NYSCEF 845.)

II. DEFENDANTS' AFFIRMATIVE DEFENSES

Each of the Defendants has asserted numerous affirmative defenses in their relevant Answers. (NYSCEF 681 at 90–91 (asserting nine (9) affirmative defenses) ("Powell Affirmative

Defenses"); NYSCEF 682 at 66–73 (asserting twenty-nine (29) affirmative defenses) ("Phillips Affirmative Defenses"); NYSCEF 864 at 110–19 (asserting thirty-three (33) affirmative defenses) ("Frazer Affirmative Defenses"); NYSCEF 865 at 101–13 (asserting forty-one (41) affirmative defenses) ("LaPierre Affirmative Defenses")[3]; NYSCEF 889 at pp. 160–71 (asserting thirty-four (34) affirmative defenses) ("NRA Affirmative Defenses").[4] Many of these affirmative defenses are restatements of the dismissed counterclaims or other legal arguments already rejected by the Court. Others are wholly unsupported by any factual allegations.

A. Bias, Selective Enforcement, Retaliation, and Unclean Hands Affirmative Defenses

Defendants assert a variety of affirmative defenses that seek to interject claims of bias or abuse of prosecutorial discretion into this action that this Court has already rejected as legally irrelevant (the "Bias Defenses"). These defenses come in two forms:

First, the NRA asserts as affirmative defenses legal theories that are substantively identical to the constitutional claims that it previously asserted against the Attorney General in her official and individual capacities. (*See* NRA Affirmative Defenses ¶¶ 20 (bias), 25 (selective enforcement), 26 (retaliation), 27 (suppression of political speech), 28 (retaliation), 29 (bias).) The NRA's pleading essentially just re-asserts the identical allegations from its dismissed counterclaims, albeit in less detail, and now packaged as affirmative defenses. (*Compare* NYSCEF

[3] Defendant LaPierre purported to file an Amended Answer on January 3, 2023, but did so without leave of court. (NYSCEF 1023.) Plaintiff informed counsel for Defendant LaPierre that it viewed the Amended Answer as a nullity on January 6, 2023. (Affirmation of Steven Shiffman, dated February 10, 2023, submitted herewith, Ex. 11.) If the Court agrees with Defendant LaPierre that he was permitted to file an Amended Answer, Plaintiff asserts the same arguments in this Memorandum of Law as against the relevant affirmative defenses in that Amended Answer. (NYSCEF 1023 at 99–110.)

[4] The NRA did not number its affirmative defenses. To avoid confusion, when citing to the NRA's Affirmative Defenses we refer to the page numbers and/or paragraph numbers in the Defenses and Affirmative Defenses section of the NRA's Answer. (NYSCEF 889 at pp. 160–71.)

325 at 141–47, 156–60, 164–65 *with* NRA Affirmative Defenses at pp. 160–61.) LaPierre also asserts a conclusory selective prosecution affirmative defense. (LaPierre Affirmative Defense #26.) Second, Defendants also improperly attempt to bring the Attorney General's conduct into the case by asserting the affirmative defense of unclean hands. Each Defendant has asserted this affirmative defense against Plaintiff. The defense is pled in a conclusory fashion by the Individual Defendants, who do not offer a scintilla of factual support for the assertion that Plaintiff purportedly has "unclean hands." (*See* Powell Affirmative Defense #8; Phillips Affirmative Defense #9; Frazer Affirmative Defense #4; LaPierre Affirmative Defense #3.) As noted above, the NRA has merely rehashed some, but not all, of the factual allegations it alleged in support of its counterclaims in support of its Bias Defenses, including its unclean hands affirmative defense. (NRA Affirmative Defenses ¶ 24.)

These theories underlying the Bias Defenses and their challenge of the Attorney General's motives and exercise of her authority were uniformly rejected as without legal basis when the Court dismissed the NRA's counterclaims. (NYSCEF 706 at 2, 5–13.)

B. Affirmative Defenses Lacking Factual Allegations

The Defendants each assert similar affirmative defenses that are not supported by any additional factual allegations, but instead state conclusions of law:

- Each Defendant asserts a variation on an affirmative defense for estoppel, waiver, and laches. (Powell Affirmative Defense #6; Phillips Affirmative Defense #8; Frazer Affirmative Defense #3; LaPierre Affirmative Defense #2; NRA Affirmative Defenses ¶ 23 (collectively, the "Estoppel Affirmative Defenses").)
- Each Defendant asserts a variation on an affirmative defense of contribution. (Powell Affirmative Defense #4; Phillips Affirmative Defense #5; Frazer Affirmative Defenses #s 19, 29; LaPierre Affirmative Defenses #s 18, 25, 41; NRA Affirmative Defenses ¶ 10 (collectively, the "Contribution Affirmative Defenses").)
- Each Defendant asserts a variation on an affirmative defense that damages were caused by unspecified third parties outside of that Defendant's control. (Powell Affirmative Defense #2; Phillips Affirmative Defense #2; Frazer Affirmative Defense #17; LaPierre

Affirmative Defenses #s 7, 17, 40; NRA Affirmative Defenses ¶¶ 2, 14 (collectively, the "Control Affirmative Defenses").)

- Defendants Powell and Phillips assert an affirmative defense of failure to mitigate damages. (Powell Affirmative Defense #3; Phillips Affirmative Defense #3 (collectively, the "Mitigation Affirmative Defenses").)

Furthermore, each Defendant asserts a catch-all reservation of their right to assert additional affirmative defenses. (Powell Affirmative Defenses at p. 91; Phillips Affirmative Defense #29; Frazer Affirmative Defense #32; LaPierre Affirmative Defenses at p. 101; NRA Affirmative Defenses ¶ 36 (collectively, the "Catch-All Affirmative Defenses").

For the reasons set forth below, Plaintiff is entitled to judgment dismissing the identified Affirmative Defenses.

ARGUMENT

Pursuant to CPLR 3211(b), "a party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." In contrast to a motion to dismiss pursuant to CPLR 3211(a), a motion to dismiss under CPLR 3211(b) can be made at any time. *Sadif, S.A. v. Burnham & Co.*, 20 A.D.2d 777, 777 (1st Dep't 1964); *Greco v. Christoffersen*, 70 A.D.3d 769, 771 (2d Dep't 2010); *Albin v. First Nationwide Network Mortg. Co.*, 248 A.D.2d 417, 419 (2d Dep't 1998); Siegel, N.Y. Prac. § 272 (6th ed.). When moving to dismiss an affirmative defense pursuant to CPLR 3211(b), the moving party must demonstrate that the "defenses are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense." *Bank of Am., N.A. v. 414 Midland Avenue Assocs., LLC*, 78 A.D.3d 746, 748 (2d Dep't 2010) (alteration in original) (citation omitted).

In analyzing a 3211(b) motion, "the court should apply the same standard as it applies to motions to dismiss pursuant to CPLR 3211(a)(7)," construing the pleadings liberally and accepting the facts alleged as true. *Id.* at 748–49. However, if a pleading fails to adequately allege an

affirmative defense, by, for example, failing to allege an essential element of the defense, dismissal pursuant to CPLR 3211(b) should be granted. *See, e.g., id.* at 748–50. In addition, defenses that "merely plead[]" an affirmative defense "without any supporting facts" are insufficient and should be dismissed pursuant to CPLR 3211(b). *737 Park Ave. Acquisition LLC v. Goldblatt*, 178 A.D.3d 558, 561 (1st Dep't 2019) (citing *Bank of Am.*, 78 A.D.3d at 750). Plaintiff is also entitled to the relief sought herein under CPLR 3212 for the same reasons. As shown below and in the annexed exhibits, the identified affirmative defenses have no merit and fail as a matter of law. CPLR 3212(b).

I. THE BIAS DEFENSES SHOULD BE DISMISSED

This Court's decision dismissing the NRA's Counterclaims (NYSCEF 706), is fatal to the Bias Defenses asserted by the NRA and the Individual Defendants, which, as set forth above, are based on a rehashed subset of the NRA's previously rejected claims of bias, retaliation and selective enforcement. In the decision dismissing the Counterclaims, this Court found that "the NRA's factual allegations do not support any viable legal claims that the Attorney General's investigation was unconstitutionally retaliatory or selective." (*Id.* at 2.) As detailed below, the Court's determination that the NRA failed to adequately allege that the Attorney General acted in an unconstitutionally retaliatory or selective manner is law of the case that renders each of the Bias Defenses defective as a matter of law.

The Bias Defenses fall into four general categories: (i) selective prosecution, in violation of rights of free speech and association, as affirmative defenses (NRA Affirmative Defenses ¶ 25; LaPierre Affirmative Defense #26); (ii) illegal retaliation, in violation of rights of free speech and association, as affirmative defenses (NRA Affirmative Defenses ¶¶ 26–28); (iii) unclean hands affirmative defenses (Powell Affirmative Defense #19; Phillips Affirmative Defense #9; Frazer Affirmative Defense # 4; LaPierre Affirmative Defense # 3; NRA Affirmative Defenses ¶ 24); and

(iv) affirmative defenses of bias and animus (NRA Affirmative Defenses ¶¶ 20, 29). The NRA's Bias Defenses are each premised on a restatement of previously asserted allegations that the Attorney General's animus towards the NRA led it to selectively prosecute the NRA and/or to retaliate against it for the exercise of its constitutional rights.[5] The Individual Defendants' Bias Defenses are pled as mere legal conclusions, without any supporting factual allegations.

As detailed below, each of the Bias Defenses is barred by this Court's determination that the NRA had failed to allege that the Attorney General engaged in selective prosecution or unconstitutional retaliation against the NRA when it brought this action and, as a result, that its counterclaims must be dismissed. (NYSCEF 706.) That is law of the case, which applies to all Defendants, none of whom have alleged any additional or new facts sufficient to overcome this Court's prior ruling.

A. The Selective Enforcement and Retaliation Claims Fail as a Matter of Law for the Same Reasons, and Others, that the NRA's Counterclaims Were Dismissed

The selective enforcement and retaliation affirmative defenses are deficient for numerous reasons, both procedural and substantive. As an initial matter, neither the selective enforcement affirmative defenses nor the retaliation affirmative defenses are supported by any factual allegations and, for this reason alone, should be dismissed. *737 Park Ave. Acquisition LLC*, 178 A.D.3d at 561; *Bank of Am.*, 78 A.D.3d at 750.

In addition, in New York, selective prosecution based on unequal protection of the law is "'treated not as an affirmative defense to criminal prosecution or the imposition of a regulatory

[5] The NRA's seven Bias Defenses are: (i) "Lack of Standing Based on Bias or Malicious or Bad Faith Intent"; (ii) "Unclean Hands"; (iii) "Selective Enforcement of New York Law"; (iv) "Illegal Retaliation for Exercise of Rights [sic] of Freedoms [sic] of Speech"; (v) "Illegal Suppression of Political Speech"; (vi) "Illegal Retaliation of Exercise of Rights [sic] of Freedoms [sic] of Association"; and (vii) "Plaintiff's Action is Motivated by Her Political Animus Against the NRA." (NRA Affirmative Defenses ¶¶ 20, 24–29.)

sanction but rather as a motion to dismiss or quash the official action.'" *City of New York v. Smart Apts. LLC*, 39 Misc. 3d 221, 230 (Sup. Ct. N.Y. Cty. 2013) (quoting *303 W. 42nd St. Corp. v. Klein,* 46 N.Y.2d 686, 693 (1979)). *But see Comm'r of Dep't of Soc. Servs. of City of N.Y. v. Est. of Warrington*, 308 A.D.2d 311, 311 (2003) (reversing trial court's ruling granting discovery on selective enforcement affirmative defense on the basis that defendant failed to allege that prosecution was "tainted by constitutionally impermissible discrimination," while noting that trial court had rejected claim that selective enforcement "is not an accepted affirmative defense").

The retaliation and selective enforcement affirmative defenses are not only procedurally defective, they are also wholly lacking in merit and barred by the law of the case. In its decision dismissing the NRA's counterclaims, this Court already analyzed and rejected the arguments that the Attorney General engaged in unconstitutional retaliation or selective enforcement by bringing this action. (NYSCEF 706 at 4–13.) The Court's decision dismissing the counterclaims is law of the case that requires dismissal of the selective enforcement and retaliation affirmative defenses. *Briggs v. Chapman*, 53 A.D.3d 900, 901 (3d Dep't 2008) (law of the case doctrine precludes party from "relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue") (citation omitted); *see also Lee v. Chun Ka Luk*, 127 A.D.3d 612, 613 (1st Dep't 2015) (law of the case precluded amendment of pleading to reassert statute of limitations defense where court, on prior motion to dismiss, held that the cause of actions were timely).

The NRA's retaliation affirmative defenses are based on allegations that the Attorney General's claims were asserted to retaliate against the NRA for its exercise of free speech and free association. (NRA Affirmative Defenses, ¶¶ 26–28.) These are precisely the same allegations,

albeit now alleged with fewer supporting factual allegations,[6] that this Court found were "fatally flawed" because they did not allege but-for causation. (NYSCEF 706 at 8.) As this Court pointed out, to state a retaliation claim "'[i]t is not enough to show that an official acted with a retaliatory motive and that the plaintiff was injured—the motive must cause the injury.'" (*Id.* at 4 (quoting *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019).) To do so here, the NRA would have to show that the actions taken against it would not have occurred absent the impermissible retaliation, which it could not do because the record in this case conclusively demonstrates that the Attorney General had "objectively well founded" non-retaliatory grounds for commencing the investigation that led to this action. (*Id.* at 7.)

The selective enforcement affirmative defenses fail for the same reason as the selective enforcement counterclaims were dismissed: the NRA and LaPierre—the only Defendants asserting such a defense—have failed to "overcome the presumption that the Attorney General acted lawfully" in pursuing the claims here by showing that the law was "'administered with an evil eye and an unequal hand'" by singling them out for impermissible reasons and treating them differently than similarly situated parties. (NYSCEF 706 at 9–13 (quoting *People by James v. Trump Org., Inc.*, 205 A.D.3d 625, 626–27 (1st Dep't 2022)); *Warrington*, 308 A.D.2d at 311–12 (reversing decision permitting discovery on selective enforcement defense where defendant failed "to present 'any evidence that plaintiff's prosecution of this action is tainted by constitutionally impermissible discrimination'") (quoting *Comm'r of Dep't of Soc. Servs. of City of N.Y. v. Jones*, 306 A.D.2d 161, 162 (1st Dep't 2003)). Not only did this Court determine that the NRA had failed to overcome the presumption that the Attorney General acted properly in bringing her claims here, but it also

[6] The NRA's operative answer, the Amended Answer of the National Rifle Association of America to the Second Amended Verified Complaint, no longer includes the dismissed counterclaims or the factual allegations alleged in support of them. (NYSCEF 889.)

found that the NRA had failed to allege that it was "treated differently from similarly situated charitable organizations due to impermissible considerations." (NYSCEF 706 at 10, 12.) Defendants have not remedied these deficiencies in the amended Answers they served after this Court dismissed the NRA's counterclaims. Indeed, the NRA's selective enforcement affirmative defense is supported by, at best, a handful of allegations that are duplicative of a subset of the factual allegations the Court found were insufficient to support the NRA's counterclaims. (*Compare* NRA Affirmative Defenses at pp. 160–61 *to* NYSCEF 325 at pp. 141–47, 156–60, 164–65.) LaPierre's selective enforcement affirmative defense is asserted as a mere conclusion of law without any supporting factual allegations. (LaPierre Affirmative Defense #26.)

For these reasons, the selective enforcement and retaliation affirmative defenses fail as a matter of law and should be dismissed. *737 Park Ave. Acquisition LLC*, 178 A.D.3d at 561; *Bank of Am.*, 78 A.D.3d at 750.

B. The Unclean Hands Affirmative Defenses Fail as a Matter of Law and Are Barred under this Court's Prior Decision

As a general matter, "the doctrine of unclean hands may not be invoked against a governmental agency" in a regulatory enforcement action or prosecution. *People v. Trump Entrepreneur Initiative LLC*, No. 451463/13, 2014 WL 5241483, at *12 (Sup. Ct. N.Y. Cty. Oct. 8, 2014) (citations omitted), *aff'd in relevant part*, 137 A.D.3d 409, 419 (1st Dep't 2014) (holding that "the IAS court correctly dismissed the seven affirmative defenses at issue");[7] *SEC v. Rosenfeld*, No. 97 Civ. 1467 (RPP), 1997 WL 400131, at *2 (S.D.N.Y. July 16, 1997); *SEC v.*

[7] The *Trump Entrepreneur Initiative* decision is the only applicable state case we have found that analyzes the unclean hands defense in the context of a regulatory action, such as this one. That decision, which was affirmed by the First Department in relevant part, relies on several federal court decisions involving regulatory actions, including the *Electronics Warehouse* decision cited in the text. *See Trump Entrepreneur Initiative*, 2014 WL 5241483, at *12.

Electronics Warehouse, Inc., 689 F. Supp. 53, 73 (D. Conn. 1988), *aff'd sub nom.*, *SEC v. Calvo*, 891 F.2d 457 (2d Cir. 1989).

To the limited extent the defense can be asserted, the defendant must adequately allege that: (i) the government misconduct is so egregious that it caused a constitutional injury, and (ii) the misconduct prejudices the defendant in its defense of the litigation. *Trump Entrepreneur Initiative LLC*, 2014 WL 5241483, at *12–13 (striking defense because defendants did not allege misconduct "that rises to a constitutional level" and did not show how the alleged wrongdoing prevented defendants from putting on a defense); *Electronics Warehouse*, 689 F. Supp. at 73. Both elements must be satisfied; to properly assert an unclean hands defense, the unconstitutional conduct cannot merely be a motivation for bringing the case, it must also impair the defendant's ability to put on a defense. *Trump Entrepreneur Initiative*, 2014 WL 5241483, at *12–13; *SEC v. Cuban*, 798 F. Supp.2d 783, 795–97 (N.D. Tex. 2011) (striking unclean hands defense because, among other things, "Cuban does not allege that the SEC's conduct in any way impaired his ability to defend the enforcement action—for example, that he was thereafter unable to obtain truthful, favorable evidence from the witness"); *Rosenfeld,* 1997 WL 400131, at *2; *Electronics Warehouse*, 689 F. Supp. at 73 (striking defense where there was no claim that defendant's ability to litigate the action had been prejudiced).

Here, the Defendants' unclean hands affirmative defenses fail on both counts. The NRA fails to allege any injury to it in its defense of this action from the alleged retaliation and bias that it contends supports its unclean hands defense. (*See* NRA Affirmative Defenses at pp. 160–61 & ¶ 24.) Similarly, each of the Individual Defendants fails to allege *any facts at all* to support their unclean hands affirmative defense, let alone any facts that show that their ability to defend this action has been impaired in any way. (Powell Affirmative Defense #19; Phillips Affirmative

Defense #9; Frazer Affirmative Defense #4; LaPierre Affirmative Defense #3.) Since prejudice to the defendant in putting on its defense—and not merely in having to defend the case—is required to sustain an unclean hands defense, Defendants' failure to allege any such injury requires dismissal of that defense as to each defendant here. *Trump Entrepreneur Initiative*, 2014 WL 5241483, at *12–13; *Cuban*, 798 F. Supp.2d at 795–97; *Electronics Warehouse*, 689 F. Supp. at 73; *Rosenfeld,* 1997 WL 400131, at *2.

In addition, as this Court previously held, the NRA did not allege a constitutional injury based on the allegations of bias the NRA pled in support of its dismissed counterclaims. (NYSCEF 706 at 13 ("NRA's counterclaims fail to adequately allege the deprivation of a constitutional right"); *see also id.* at 2, 7–8, 11.) In so holding, this Court expressly found that "the NRA's factual allegations do not support any viable legal claims that the Attorney General's investigation was unconstitutionally retaliatory or selective." (*Id.* at 2.) The NRA has not asserted new or different factual allegations sufficient to support its unclean hands affirmative defense. This Court's prior determination that the Attorney General's investigation was not unconstitutionally retaliatory or selective is equally applicable to the Individual Defendants, whose conduct was examined as part of the same investigation and who, in any event, have not alleged any facts to support their unclean hands affirmative defense. As a result, this Court's ruling that the NRA has failed to allege a constitutional injury is law of the case that is equally applicable to all Defendants. *See, e.g., Briggs*, 53 A.D.3d at 901; *Lee*, 127 A.D.3d at 613.

Since each of the Defendants has failed to allege a constitutional injury, their unclean hands affirmative defenses fail as a matter of law and should be dismissed. *See, e.g.*, *Trump Entrepreneur Initiative*, 2014 WL 5241483, at *12–13 (to assert unclean hands defense against government a constitutional injury must be alleged adequately); *Cuban*, 798 F. Supp.2d at 796; *Electronics*

Warehouse, 689 F. Supp. at 73. The defenses are also barred by the law of the case. *See, e.g.*, *Briggs*, 53 A.D.3d at 901; *Lee*, 127 A.D.3d at 613. Finally, the Individual Defendants' unclean hands affirmative defenses should be dismissed for the additional reason that they have each merely alleged the defense as a legal conclusion without any supporting facts. *737 Park Ave. Acquisition LLC*, 178 A.D.3d at 561; *Bank of Am.*, 78 A.D.3d at 750.

C. The Bias Affirmative Defenses Are Also Repetitions of the Previously Dismissed Counterclaims and Fail as a Matter of Law

The NRA asserts two affirmative defenses alleging that the case should be dismissed because the Attorney General is biased and has a particular animus against the Association. (*See* NRA Affirmative Defenses ¶¶ 20, 29.) Neither affirmative defense purports to allege a constitutional injury, and both fail to state a legally cognizable defense. A prosecutor's alleged bias is irrelevant; "[a]s has often been said, that a prosecutor dislikes someone does not prevent a prosecution." *People v. The Trump Org., Inc.*, No. 451685/2020, 2022 WL 489625, at *4 (Sup. Ct. N.Y. Cty. Feb. 17, 2022), *aff'd*, 205 A.D.3d 625 (1st Dep't), *appeal dismissed*, 38 N.Y.3d 1053 (2022); *see also* NYSCEF 706 at 7 (in which this Court pointed out that "an objectively reasonable investigation – here, one uncovering credible evidence of wrongdoing – is not rendered unconstitutional solely by the investigator's subjective state of mind"). As Justice Scarpulla recently explained:

> It is not within the province of the courts to subjectively determine the motivation of a government agency in commencing an enforcement proceeding, or to dismiss the proceeding because of the political disagreements of the parties. Instead, it is my responsibility to review the petition to see if it has legal and factual support, and if it does, to resolve it.

People v. Trump, 62 Misc. 3d 500, 508–09 (Sup. Ct., N.Y. Cty. 2018) (denying motion to dismiss based on Attorney General's alleged "animus toward and personal attacks on" defendants that purportedly tainted the proceeding).

Nor is there any merit to the NRA's allegation that the Attorney General's purported bias deprives her of standing to assert claims under EPTL § 8-1.4(m) because allegedly "she cannot fairly and adequately represent those on whose behalf she brings her claims." (NRA Affirmative Defenses ¶ 20.) Section 8-1.4(m) expressly gives the Attorney General direct standing to bring appropriate proceedings to ensure the proper administration of charitable assets and there is no requirement that the Attorney General show that she fairly and adequately represents any other party in order to assert claims under that section. *Cf. Lefkowitz v. Lebensfeld*, 51 N.Y.2d 442, 446–47 (1980) (distinguishing the Attorney General's power to bring claims to ensure the proper administration of charities under EPTL § 8-1.4 from the Attorney General's standing under EPTL § 8-1.1(f) to step into the shoes of a charity to sue unrelated third parties without first satisfying the requirements to bring a derivative action). In addition, to the extent that the NRA is asserting that the Attorney General lacks standing to bring claims pursuant to the N-PCL and Executive Law, the plain language of those statutes makes it clear that she has such authority. N-PCL §§ 112(a)(10) (reciting the Attorney General's power to bring actions with respect to related party transactions), 715(f) (same), 715-b (requiring the adoption of a whistleblower policy); Exec. Law § 175 (setting forth the Attorney General's power to prosecute violations of Article 7 of the Executive Law).

Finally, to the extent that the NRA continues to assert that the Attorney General's purported bias bars the relief that is sought in the Complaint (NRA Affirmative Defenses ¶ 17), that argument should be rejected because, as set forth above, any such bias is irrelevant to whether the Attorney General has stated a claim.[8] In addition, the NRA makes no attempt to explain how any purported bias on behalf of the Attorney General would affect the relief that the Court could impose here.

[8] The NRA made such an argument in support of its Third Motion to Dismiss, which, as noted, was denied by this Court. (NYSCEF 845.)

For example, the NRA makes no effort to explain how appointing a monitor to ensure compliance with applicable laws by, for example, ensuring that it files accurate reports and satisfies statutory requirements for addressing related party transactions and conflicts of interests and responding to whistleblowers, could somehow interfere with its First Amendment rights. The NRA's vague allegations of potential injury are insufficient to defeat the claims here. *See Abrams v. New York Found. for the Homeless*, 190 A.D.2d 578, 578 (1st Dep't 1993) ("The mere utterance of First Amendment privileges … cannot shield defendants from the scrutiny of the Attorney General"). Moreover, the Court can tailor the scope of any remedies it imposes to ensure that those remedies do not infringe on any constitutional rights.

II. THE NRA'S EXTRATERRITORIALITY DEFENSES SHOULD BE DISMISSED BECAUSE THEY ARE BARRED BY THE LAW OF THE CASE AND FAIL TO STATE A DEFENSE

The NRA asserts three affirmative defenses alleging that Plaintiff is attempting to enforce statutes that do not apply extraterritorially. (NRA Affirmative Defenses ¶¶ 33–35.) Not only are these arguments directly contradictory to the plain language of the EPTL, this Court has already rejected them.

The NRA made the same arguments in its third motion to dismiss, which were denied by this Court. (*See generally* Mot. Seq. No. 30.) As Plaintiff argued in opposition to that motion, and as stated in the Second Amended Verified Complaint, the Attorney General has enforcement and supervisory powers over the NRA because it is a charitable not-for-profit corporation organized under the laws of this State, holding charitable assets. (NYSCEF 768 at 13–26; NYSCEF 646 ¶¶ 1, 17, 29, 31.) Section 8-1.4(a)(1) defines trustees to include "any … corporation … holding and administering charitable purposes … over which the attorney general has enforcement or supervisory powers." Section 8-1.4(a)(2) defines a trustee as "any non-profit corporation organized

under the laws of this state for charitable purposes." As a charitable corporation formed under the laws of this State and domiciled here, and, as a result, subject to the enforcement powers of the Attorney General, the NRA fits squarely within both definitions. *See* N-PCL §§ 102(a)(5) (defining domestic corporations), 103(a) (N-PCL applies to domestic not-for-profit corporations). The EPTL gives the Attorney General power over all trustees that fit within its definition of that term, as the NRA clearly does, without any additional requirements concerning where the assets they administer are located.

The NRA's tortured reading of the statute to require that Plaintiff only enforce its supervisory powers of those portions of the NRA's assets that are held and administered ***in New York*** is not supported by any case law or legislative history. As this Court noted during oral argument on the most recent round of motions to dismiss, such a reading of the statute would make it "awfully easy to evade any oversight as a New York not-for-profit corporation if all you had to do was keep your assets outside the state." (NYSCEF 847 at 23:19–21.) Moreover, as Plaintiff pointed out during oral argument on the NRA's third motion to dismiss, the EPTL's focus is on the supervision of the ***trustees*** who administer charitable assets and the Attorney General's power with respect to such trustees, rather that the location of the assets that those trustees administer. (*Id.* at 56:22–58:10.)

In denying the NRA's third motion to dismiss, this Court rejected the NRA's extraterritoriality argument with respect to the application of EPTL 8-1.4,[9] holding that "the statutory language … is plenty broad enough to support the claim." (NYSCEF 847 at 77:5–20.)

[9] The NRA's affirmative defenses based on extraterritoriality, which assert that it is not alleged that the NRA holds or administers charitable property in New York (NRA Affirmative Defenses ¶¶ 33–35) appear to be focused on the EPTL. To the extent that the NRA is arguing that the N-PCL or Executive Law do not apply to it, that argument is refuted by the express language of those statutes. *See* N-PCL § 103(a); Exec. Law §§ 172, 175 (giving the Attorney General power to bring actions with respect to charitable organizations required to register under the EPTL or those that solicit in this state).

Thus, these three affirmative defenses are barred by the law of the case. *Lee*, 127 A.D.3d at 613.

III. EACH DEFENDANT HAS FAILED TO ALLEGE FACTS IN SUPPORT OF THEIR AFFIRMATIVE DEFENSES, REQUIRING DISMISSAL

Affirmative defenses must be plead with supporting factual allegations and cannot state mere conclusions of law. *170 W. Vill. Assocs. v. G & E Realty, Inc.*, 56 A.D.3d 372, 372–73 (1st Dep't 2008). Furthermore, "catch-all" affirmative defenses are defective, and "neither plaintiff nor the court ought to be required to sift through a boilerplate list of defenses … to divine which defenses might apply to the case." *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 79 (1st Dep't 2015). With the exception of Defendant Powell, each of the Individual Defendants assert dozens of affirmative defenses, many of them plainly inapplicable to this case. And each of the Individual Defendants assert bald affirmative defenses without any supporting factual allegations. And while the NRA alleges certain facts in support of its bias claims, which are insufficient for reasons discussed *supra* at Section I, it has no factual allegations in support of its other affirmative defenses. In particular, the Estoppel Affirmative Defenses, Contribution Affirmative Defenses, Control Affirmative Defenses, and Mitigation Affirmative Defenses are asserted in conclusory fashion without supporting facts.

Because the Defendants have failed to support these affirmative defenses with specific factual allegations, each defense should be dismissed. *See Kachalsky v. Nesheiwat*, 55 Misc.3d 130(A), 2017 WL 1224989, at *1 (2d Dep't March 31, 2017) (dismissing affirmative defense of laches, unclean hands, waiver and/or estoppel that was "pleaded as a single-sentence conclusion of law"); *see also Morgenstern v. Cohon*, 2 N.Y.2d 302, 307 (1957) (reversing dismissal of affirmative defense where party plead additional facts in support of defense, noting that a conclusory defense on its own "clearly … would be insufficient"). Furthermore, the Catch-All Affirmative Defenses are defective as a matter of law. *Scholastic*, 129 A.D.3d at 79.

IV. THE ESTOPPEL AFFIRMATIVE DEFENSES CANNOT BE ASSERTED AGAINST THE STATE

The Defendants' Estoppel Affirmative Defenses, which include the equitable affirmative defenses of estoppel, waiver, and laches, should be dismissed because those defenses are not available against the State when the State is acting in the public interest. *City of New York v. City Civ. Serv. Comm'n*, 60 N.Y.2d 436, 449 (1983) ("[E]stoppel may not be applied to preclude a State or municipal agency from discharging its statutory responsibility."); *Capruso v. Vill. of Kings Point*, 23 N.Y.3d 631, 641–42 (2014) ("[A]s a matter of law, laches cannot bar the State's cause of action. It is settled that the equitable doctrine of laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a public interest.") (internal quotation marks and citation omitted); *Jamestown Lodge 1681 Loyal Ord. of Moose, Inc. v. Catherwood*, 297 N.Y.S.2d 775, 776 (3d Dep't 1969) ("Laches, waiver, or estoppel may not be imputed to the State in the absence of statutory authority.").

Here, Plaintiff, acting on behalf of the People of the State of New York, is seeking to enforce statutes that the Legislature has delegated to Plaintiff to protect the public interest in well-functioning, corruption-free not-for-profits and charities. The Defendants have no estoppel, waiver, or laches defenses against Plaintiff in this action, and the Estoppel Affirmative Defenses should be dismissed.

CONCLUSION

For the reasons set forth above, Plaintiff's motion to dismiss pursuant to CPLR §§3211(b) and 3212 should be granted and the Court should award such other and further relief as it deems proper.

Dated: February 10, 2023
New York, New York

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Attorney Certification Pursuant to Commercial Division Rule 17

I, Steven Shiffman, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law contains 6593 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: February 10, 2023
New York, New York

Steve Shiffman
_____
Steven Shiffman