

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

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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.
-----X

Index No. 451625/2020

IAS Part Three
Hon. Joel M. Cohen

**AFFIRMATION OF
P. KENT CORRELL, ESQ.**

I, P. KENT CORRELL, an attorney duly admitted to practice in the courts of the State of New York, hereby affirm the following under the penalty of perjury pursuant to CPLR 2106:

1. I am the attorney of record for Defendant Wayne LaPierre in this action, and am fully familiar with the facts and circumstances in this case.

2. I make this affirmation in support of LaPierre's opposition to Plaintiff's Motion to Dismiss Certain of Defendants' Affirmative Defenses (the "Motion") (NYSCEF 1164) and in support of LaPierre's cross-motion for leave to replead his answer.

I.

PRELIMINARY STATEMENT

3. After fifteen months of pre-commencement investigation, involving voluminous document production and over a dozen witness interviews, including one with LaPierre, followed by another 30 months of discovery in this action, in which the defendants turned over more than a million pages of additional documents, including four months of proceedings in bankruptcy court, which included additional broad-ranging document discovery and depositions (11 to be

exact), culminating in a 12-day trial, and, after amending her complaint twice, having moved to dismiss the National Rifle Association of America's ("NRA") counterclaims, and having had the Defendants' answers and affirmative defenses in front of her all that time, the Attorney General now moves to dismiss certain of defendants' affirmative defenses, including nine of LaPierre's, purporting to be surprised and prejudiced because, according to her, she was not given fair notice as to the facts on which the defenses are based. She neglects to mention that she served contention interrogatories on LaPierre, which he appropriately responded to, providing facts in support of three of the challenged defenses, and did not object to his response as inadequate or move to compel further disclosure with respect to the facts supporting those defenses. Her instant motion is, thus, at bottom, a belated and improper demand for further disclosure, after she has already had full disclosure with respect to the NRA's counterclaims and affirmative defenses and LaPierre's parallel affirmative defenses and is already well aware of the facts on which they are based.

4. Accordingly, LaPierre opposes the branch of the Motion challenging certain of his affirmative defenses on the ground that they are sufficiently stated, have merit and raise triable issues of fact. For these reasons and the additional reasons stated below, LaPierre's requests that the Court deny the branch of Motion seeking dismissal of certain of LaPierre's affirmative defenses and grant LaPierre's cross-motion for leave to amend his answer to add facts supporting the challenged defenses.

II.

FACTS

A. The New York Attorney General Sues "The National Rifle Association of America, Inc.", LaPierre and Others and the Court Dismisses Her Dissolution, NYPMIFA and Unjust Enrichment Claims.

5. On August 6, 2020, the Attorney General filed a complaint against “The National Rifle Association of America, Inc.,” Wayne LaPierre, Wilson Phillips, John Frazer and Joshua Powell setting forth eighteen causes of action, four of them against LaPierre.¹ On August 10, 2020, the Attorney General filed a second complaint against the same defendants, correcting an error in her verification.² In the complaint, the Attorney General alleged that “[f]or 149 years, the National Rifle Association of America, Inc. (the “NRA” or the “Association”) has operated as a New York not-for-profit, charitable membership corporation.”³

6. In October and November 2020, the NRA, LaPierre and Frazer moved to dismiss stay, or transfer this action under CPLR 327(a), 511(b), 2201 and 3211(a)(1) and (4),⁴ the Court denied their motions,⁵ and they answered.⁶

7. In his answer, LaPierre stated: “LaPierre denies that ‘The National Rifle Association of America, Inc.’, named in the caption as the lead Defendant and referred to repeatedly throughout the Complaint, actually exists, and objects to the use of the name ‘The National Rifle Association of America, Inc.’ in the Complaint on the grounds that it is fictitious, creates confusion, and has made it difficult to respond to the Complaint.”⁷

¹ NYSCEF Doc. No. 1 (the original complaint).

² NYSCEF Doc. No. 11 (the corrected complaint).

³ NYSCEF Doc. No. 11 ¶ 1.

⁴ NYSCEF Doc. Nos. 70-99, 184-193, 196 (Motion Seq. # 001); 114-126, 132, 150, 207 (Motion Seq. # 003); 129-30, 199 (Motion Seq. # 004); 133-141 (Motion Seq. # 005); 170-71 (Motion Seq. # 006); and 156-169 (Motion Seq. # 007).

⁵ NYSCEF Doc. Nos. 210-215 (Decision + Order on Motion dated January 21, 2021).

⁶ NYSCEF Doc. Nos. 226 (Verified Answer of Defendant Wayne LaPierre dated February 23, 2021); 229 (Verified Answer of Defendant John Frazer dated February 23, 2021); and 230 (Defendant The National Rifle Association’s Original Verified Answer and Counterclaims dated February 23, 2021).

⁷ NYSCEF Doc. No. 226 (LaPierre Answer), at 1, fn. 1.

8. In his answer, LaPierre included 33 affirmative defenses, seven of which the Attorney General is now challenging.⁸

9. On August 16, 2021, the Attorney General filed an Amended and Supplemental Verified Complaint in which she added 90 new factual allegations and continued to use the name “The National Rifle Association of America, Inc.” to identify the National Rifle Association of America in the caption and throughout the pleading.⁹

10. On September 15, 2021, the NRA, LaPierre and Frazer moved to dismiss the Amended and Supplemental Verified Complaint.¹⁰

11. On March 2, 2022, this Court dismissed the dissolution, NYPMIFA and unjust enrichment claims asserted in the Amended and Supplemental Verified Complaint.¹¹

12. On April 12, 2022, LaPierre answered the Amended and Supplemental Verified Complaint, stating: “With respect to the caption, Mr. LaPierre specifically denies that ‘The National Rifle Association of America, Inc.’ exists and therefore denies that it is a proper party-defendant.”¹² In addition, LaPierre included 42 affirmative defenses and all nine of the defenses the Attorney General is now challenging.

13. On May 2, 2022, the Attorney General filed a Second Amended Verified Complaint in which she again named the “The National Rifle Association of America, Inc.” as the lead defendant, and continued to seek restitution on the theory that the individual defendants

⁸ NYSCEF Doc. No. 226 (LaPierre Answer).

⁹ NYSCEF Doc No. 333 (Amended and Supplemental Verified Complaint).

¹⁰ NYSCEF Doc. Nos. 348–354, 375, 391, 433, 438 (Motion Seq. # 016); 355-362, 392, 439-445 (Motion Seq. # 017); and 363-371, 393, 404-06, 431, 446-454, 456, 465-479, 545 (Motion Seq. # 018).

¹¹ NYSCEF Doc. No. 609 (Decision + Order on Motion).

¹² NYSCEF Doc. No. 627 (Amended Verified Answer of Defendant Wayne LaPierre), at 1, fn. 1.

were “unjustly enriched,” as well as other relief, including forfeiture of salary and damages for breach of fiduciary duty, double damages, interest, removal of LaPierre as Executive Vice President of “The National Rifle Association of America, Inc.”, a bar on his re-election or appointment as an officer or director of “The National Rifle Association of America, Inc.”, and a lifetime ban on nonprofit service.¹³ In addition, she asserted a new cause of action against “The National Rifle Association of America, Inc.” and sought new relief – appointment of a compliance monitor and governance expert, and governance reforms.¹⁴

B. LaPierre Moves to Dismiss the Second Amended Complaint on the Ground that the Attorney General Lacks the Legal Capacity to Sue Him for Relief Other than the Relief Provided in Section 720 of the N-PCL, that the Attorney General Is Barred by the Law of the Case from Continuing to Seek Relief on a Theory of Unjust Enrichment, and that the Court Should Not Proceed in the Absence of the National Rifle Association of America, Who Should Be a Party.

14. On June 6, 2022, LaPierre moved to dismiss the Second Amended Complaint -- to address the defects in the Attorney General’s new pleading, LaPierre moves under CPLR 3211(a)(1), (2), (3), (7) and (10) to dismiss the Second Amended Complaint on the ground that the Attorney General lacks the legal capacity to sue him for relief other than the relief provided in section 720 of the Not-for-Profit Corporation Law, that the Attorney General is barred by the law of the case from continuing to seek relief on a theory of unjust enrichment, and that the court should not proceed in the absence of the NRA, who should be a party.¹⁵

¹³ NYSCEF Doc. No. 646, at 160-174 (Causes of Action) ¶¶ 635-704; and 174-76 (Prayer for Relief) ¶¶ A-J.

¹⁴ NYSCEF Doc. No. 646, at 160-62 (First Cause of Action) ¶¶ 635-643; and 175 (Prayer for Relief) ¶¶ A, B and C.

¹⁵ NYSCEF Doc. No. 691 (Notice of Motion).

15. On September 29, 2022, the Court held oral argument on the motions to dismiss and denied the motions.¹⁶

16. On October 21, 2022, LaPierre answered the Second Amended Complaint and, again, specifically objected to the use of the wrong name for the lead defendant, and, once again, worked to draft around the fact that the Attorney General used the incorrect name throughout the complaint.¹⁷

C. The Attorney General Serves Contention Interrogatories and LaPierre Provides Facts Supporting Certain of the Affirmative Defenses the Attorney General Now Challenges as Insufficiently Pleaded.

17. On October 28, 2022, the Attorney General served contention interrogatories on LaPierre. Interrogatory No. 2 stated:

Identify each defense and affirmative defense (collectively “defense”) asserted in Your Answer or that You expect to rely upon at trial, setting forth the facts upon which You base the defense, identities of all persons who have knowledge of those facts, and all documents and other tangible things which support Your defense.

18. On November 22, 2022, LaPierre served his objections and responses to the Attorney General’s interrogatories, responding to Interrogatory No. 2, *inter alia*, as follows:

RESPONSE TO INTERROGATORY NO. 2

LaPierre incorporates the General Objections stated above as if fully stated herein. In addition, LaPierre specifically objects to Interrogatory No. 2 on the grounds that it is not a proper Commercial Division Rule 11-a(d) interrogatory (i.e., an interrogatory “seeking the claims and contentions of the opposing party”) in that it does not seek the contentions of LaPierre, but rather, seeks identification of defenses and information concerning the defenses including the facts upon which each defense is based, identities of all persons who have knowledge of those facts, and all documents and other tangible things which support each defense which goes far beyond a proper contention interrogatory in that it seeks information regarding facts, witnesses and documents with respect to 41 separate

¹⁶ NYSCEF Doc. No. 847 (TR. of Oral Argument).

¹⁷ NYSCEF Doc. No. 865 (Verified Answer of Defendant Wayne LaPierre), at 1, fn. 1.

affirmative defenses, and purports to require the premature identification of witnesses LaPierre intends to or may call at trial, in contravention of Rule 11-a(d), Rule 32 and Section VIII, A of this Court's Part 3 - Practices and Procedures. Moreover, LaPierre specifically objects to the Interrogatory on the ground that the Interrogatory, including subparts, including subparts, constitutes 164 interrogatories rolled into one, which outrageously violates the 25-interrogatory limit set by Rule 11-a(a).

Subject to the foregoing General Objections and specific objections, on information and belief, LaPierre contends, *inter alia*:

(2) with respect to his second affirmative defense, that the causes of action asserted against him in the complaint, and related requests for relief, are barred in whole or in part by the doctrine of regulatory estoppel, estoppel, judicial estoppel, law of the case, and/or laches because (a) the Attorney General failed to timely review, analyze and take appropriate action with respect to Char500 filings made by the National Rifle Association of America and provide appropriate guidance to the National Rifle Association of America and LaPierre as to the Attorney General's view as to how certain transactions should be treated by the National Rifle Association of America and LaPierre or would be treated by the Attorney General, such as transactions related to compensation of LaPierre and expenditures for charter travel, leading LaPierre to believe that all transactions reported to the New York Charities Bureau were proper and lawful and that no changes in the National Rifle Association of America's bookkeeping, accounting, or reporting policies, practices or procedures were necessary or appropriate, (b) the Court has dismissed the unjust enrichment claim asserted against LaPierre, that the Attorney General has not appealed the order dismissing the unjust enrichment claim and because the Attorney General did not bring an action against LaPierre for the relief demanded in the complaint sooner, thereby allowing practices and procedures thought to be sufficient to comply with the law to continue without any guidance, and transactions that LaPierre believed to be lawful, to continue without any input, warning or admonition or indication from the Attorney General that the Attorney General might view the practices, procedures or transactions as improper, imprudent or unlawful, in dereliction of her duty to provide guidance and assistance to not-for-profit corporations and their directors, officers and key persons in understanding and complying with New York's Not-for-Profit Corporation Law and Estates, Power and Trusts Law, and other applicable laws, rules and regulations, thus abdicating her duty to oversee and supervise the National Rifle Association of America and failing to discharge her duty as an overseer of not-for-profit corporations, and then turning around and trying to take advantage of her own failure to discharge her duty to dissolve the National Rifle Association of America and deprive LaPierre of his livelihood, when timely notice and a fair and reasonable opportunity to address and cure any alleged defect or deficiency in the National Rifle Association of

America compliance with New York law would have allowed the National Rifle Association of America and LaPierre to address any legitimate concerns the Attorney General may have had about the National Rifle Association of America's compliance vel non with New York nonprofit law;

(3) with respect to his third affirmative defense, on information and belief, that the causes of action asserted against him in the complaint, and related requests for relief, are barred in whole or in part, by Plaintiff's unclean hands, because, for personal and political reasons, Letitia James, first as a private citizen and then as Attorney General, has gratuitously, maliciously and baselessly maligned the National Rifle Association of America, and, by implication, him, in a deliberate attempt to cause reputational harm to the association and him and has engaged in deceit and collusion by knowingly making false statements, including certain statements under oath, in an attempt to deceive the Court and garner free publicity and attention for herself and poison the well of public opinion against the National Rifle Association of America and LaPierre, and obtain donations from billionaire donors, obtain her favored venue and poison the jury pool, by, among other things, alleging, under oath, in her complaint, that the National Rifle Association of America has an office in New York County and that the association paid LaPierre compensation in 2015 in an amount in excess of \$5,000,000, implying the false assertion that the payment was all for services rendered in 2015, and, through counsel, representing to a witness during a deposition that one of the National Rifle Association of America's vendors had paid for a vacation home in Kentucky for the LaPierre family for many years and that the National Rifle Association of America had reimbursed the vendor, which she knew was not true – a representation that lacked any good faith basis – which makes her hands unclean and precludes the Attorney General from seeking any equitable relief against LaPierre;

(7) with respect to his seventh affirmative defense, that any damages allegedly suffered by Plaintiff, the National Rifle Association of America or any other party or nonparty were proximately caused by intervening and superseding actions and occurrences including, but not limited to, actions of persons, entities, and/or forces over which LaPierre exerted no control and for which he has no responsibility such as Plaintiff (and her false, disparaging and defamatory statements about the National Rifle Association of America), certain former National Rifle Association of America vendors and persons associated with those vendors, the global pandemic, and inflation;

(17) with respect to the seventeenth affirmative defense, that Plaintiff is not entitled to an injunction or any other equitable relief with respect to him on

the basis of conduct of others over whom he had no control and for whose actions he may not be held liable, particularly where he was unaware of the conduct;

(18) with respect to the eighteenth affirmative defense, that any recovery by Plaintiff against him on any cause of action against him must be set off, reduced, abated and/or apportioned to the extent that any other intervening or superseding action, omission or occurrence caused or contributed to any damages awarded to Plaintiff, including, but not limited to, the COVID pandemic;

(25) with respect to the twenty-fifth affirmative defense, that relative culpability of each party who is or may be liable for the damages alleged by Plaintiff in the instant action should be determined in accordance with the statutory and decisional law of the State of New York, and the equitable share of each party's liability for contribution should be determined and apportioned in accordance with the relative culpability, if any, of each such party pursuant to Article 14 of the CPLR;

(26) with respect to the twenty-sixth affirmative defense, that the causes of action asserted against him in the complaint, and related requests for remedial action and other relief against him are barred, in whole or in part, by culpable conduct on the part of Plaintiff, including, without limitation, defamation, viewpoint discrimination and selective, malicious, frivolous and politically-motivated prosecution;

(40) with respect to the fortieth affirmative defense, that whatever injuries may have been sustained were caused in whole or in part, or were contributed to, by the culpable conduct and/or want of care on the part of one or more entities or individuals over whom he had no control;

(41) with respect to the forty-first affirmative defense, that the relative culpability of each party who is or may be liable for the damages alleged by Plaintiff should be determined in accordance with the decisional and statutory law of the State of New York, and the equitable share of each party's liability for contribution should be determined and apportioned in accordance with the relative culpability, if any, of each such party pursuant to Article 14 of the CPLR.

19. A true and correct copy of LaPierre's Objections and Responses to the Attorney General's contention interrogatories is attached hereto as Exhibit 1.

20. The Attorney General did not object to LaPierre's responses as insufficiently detailed.

21. The Attorney General did not request a meet and confer to discuss any purported deficiencies in LaPierre's responses.

22. The Attorney General did not move to compel to require more factual allegations or legal authority.

23. On December 12, 2022, this Court entered an Order Amending Caption (NYSCEF Doc. No. 921) stating, *inter alia*:

On October 13, 2022, the Court issued an order directing that 'the parties submit a proposed order amending the caption. The Court sees no need for further amendment or motion practice to make this minor change' (NYSCEF 855). *** OAG's straightforward request to change 'National Rifle Association of America, Inc.' to 'National Rifle Association of America' in the caption and complaint is GRANTED pursuant to CPLR 2001, which permits 'a mistake, omission, defect or irregularity ... to be corrected, upon such terms may be just ...' The change does not warrant motion practice or the additional time and expense of further amendment and service of process. The parties' efforts should, instead, be focused on completing discovery on schedule and getting this case ready for a prompt and efficient resolution. Accordingly, it is ORDERED that the caption of this action be changed such that the reference to the 'National Rifle Association of America, Inc.' is changed to 'National Rifle Association of America'; it is further ORDERED that all references to the 'National Rifle Association of America, Inc.' in the pleadings herein are deemed to refer to the 'National Rifle Association of America' ***.

24. The Order Amending Caption did not prescribe the filing of an answer to the amended complaint.

25. On January 3, 2023, LaPierre filed an amended verified answer (NYSCEF Doc. No. 1023) in response to the Court's Order Amending Caption to account for the amendments effected by the Court's order and the effect that had on the meaning of some of the allegations, i.e., those that contained a reference to the "National Rifle Association of America, Inc." which required LaPierre to change some of his denials to admissions in order to prevent his responses

to some of the allegations from being incorrect in light of the amendment of the Complaint. A true and correct copy of the Amended Verified Answer of Defendant Wayne LaPierre (hereinafter referred to as “AVA”) is attached hereto as Exhibit 2.

26. In his AVA, LaPierre trimmed down the number of affirmative defenses from forty-two to thirty-seven, including deleting the forty-first affirmative defense being challenged by the Attorney General in her Motion. *See* Exhibit 2 at pages 99 to 110.

27. The Attorney General cannot claim any prejudice from Mr. LaPierre’s amendment of his answer to correct for the change in the name of the lead defendant and the changes in the references to the lead defendant throughout the body of the complaint.

28. On February 10, 2023, Plaintiff filed its Motion to Dismiss Certain of Defendants’ Affirmative Defenses (NYSCEF Doc. No. 1164).

29. The Attorney General did not attach a true and correct copy of Mr. LaPierre’s AVA to the Affirmation of Steven Shiffman in Support of Plaintiff’s Motion to Dismiss Certain of Defendants’ Affirmative Defenses. *See* NYSCEF Doc. No. 1165 (Shiffman Affirmation). However, the Attorney General makes reference to it in her memorandum of law, giving the document number on the e-filing system. *See* NYSCEF Doc. 1178 (Plaintiff’s Memorandum of Law in Support of Plaintiff’s Motion to Dismiss Certain of Defendants’ Affirmative Defenses) at page 5, footnote 3.

30. In the footnote, without citation to any authority for her position, the Attorney General states that LaPierre “purported to file an Amended Answer on January 3, 2023, but did so without leave of court,” implying that leave of court was required. It was not. CPLR 3025(d) governs responses to amended pleadings. It provides, in relevant part: “Except where otherwise prescribed by law or order of the court, there shall be an answer ... to an amended ... pleading if

an answer... is required to the pleading being amended Service of such an answer ... shall be made within twenty days after service of the amended ... pleading to which it responds.”

31. Along with his opposition to the Motion, Mr. LaPierre has cross-moved to amend his answer to add allegations to the challenged affirmative defenses. A true and correct copy of the [Proposed] Second Amended Verified Answer (“PSAVA”), blacklined to show the additions, is attached hereto as Exhibit 3.

32. In support of his opposition to the Attorney General’s Motion to dismiss certain affirmative defenses and in support of his cross-motion to amend his answer to supplement certain challenged affirmative defenses, Mr. LaPierre respectfully directs the Court’s attention to the Charities’ Bureau website on which copies of the Char500s and accompanying Form 990s of the NRA are posted and may be accessed and respectfully requests that the Court take judicial notice of the documents as official public records.

https://www.charitiesnys.com/RegistrySearch/show_details.jsp?id={7DFC840A-50AC-42D4-8BA4-4169910FEFA6} In addition, for the Court’s convenience, attached to this affirmation are true and correct documents I obtained from the website as Exhibits 4-16.

33. The Attorney General’s issuance of official regulatory guidance with respect to compliance with New York nonprofit law stating that “transactions related to compensation of employees, officers and directors are not considered related party transactions” estops the Attorney General from taking a contrary position in this action.

Executed this 13th day of March 2023 in New York, New York.

/s/ P. Kent Correll

P. Kent Correll

CERTIFICATE OF COMPLIANCE

I, P. Kent Correll, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Affirmation of P. Kent Correll, Esq. complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the Affirmation contains 4,183 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affirmation.

Dated: New York, New York
March 13, 2023

/s/ P. Kent Correll

P. Kent Correll

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record on this 13th day of March 2023.

/s/ P. Kent Correll
P. Kent Correll