

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.	:
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Index No. 451625/2020

Motion Sequence No. 44

DEFENDANT JOHN FRAZER'S COUNTERSTATEMENT OF FACTS

Defendant John Frazer ("Frazer") submits this counterstatement of facts pursuant to 22 N.Y.C.R.R. § 202.8-g(b) and Commercial Division Rule 19-a(b) in opposition to Plaintiff People of the State of New York, by Letitia James, Attorney General of the State of New York's ("Plaintiff" or "NYAG") Motion to Dismiss Certain of Defendants' Affirmative Defenses, and in support of Frazer's cross-motion for leave to replead, and responds to Plaintiff's Statement of Undisputed Material Facts as follows:

1. On August 6, 2020, Plaintiff commenced this action by service of summons and complaint. (NYSCEF 1.)

Response: Not disputed.

2. On February 23, 2021, Defendant National Rifle Association of America ("NRA") answered, asserting counterclaims arising out of, *inter alia*, purported bias, unconstitutional selective prosecution and retaliation by the Attorney General in violation of its

federal and state constitutional rights of free speech and free association (the “Counterclaims”). (NYSCEF 230.)

Response: Disputed. Statement No. 2 does not pertain to Defendant Frazer who denies knowledge sufficient to form a belief as to its truth.

3. On June 24, 2021, Plaintiff moved to dismiss the Counterclaims. (NYSCEF 264.)

Response: Disputed. Statement No. 3 does not pertain to Defendant Frazer who denies knowledge sufficient to form a belief as to its truth.

4. On July 20, 2021, Defendant National Rifle Association of America amended its answer, and re-asserted its Counterclaims. (NYSCEF 325.)

Response: Disputed. Statement No. 4 does not pertain to Defendant Frazer who denies knowledge sufficient to form a belief as to its truth.

5. On May 2, 2022, Plaintiff filed the operative Second Amended Verified Complaint (the “Operative Complaint”). (NYSCEF 646.)

Response: Not disputed.

6. On June 6, 2022, Defendants National Rifle Association of America, Wayne LaPierre and John Frazer moved to dismiss the Operative Complaint, asserting, inter alia, that the Operative Complaint improperly sought to extraterritorially apply certain New York charities statutes. (NYSCEF 684–705.)

Response: Disputed. John Frazer did not assert that the Complaint “improperly sought to extraterritorially apply certain New York charities statutes,” and refers the Court to his motion to dismiss for the assertions therein. (NYSCEF 690).

7. The same day, Defendants Joshua Powell and Wilson Phillips answered the Operative Complaint, asserting the affirmative defenses therein. (NYSCEF 681–682.)

Response: Disputed. Statement No. 7 does not pertain to Defendant Frazer who denies knowledge sufficient to form a belief as to its truth.

8. On June 10, 2022, this Court issued a Decision and Order dismissing the Counterclaims on the grounds stated therein and finding that “the NRA’s factual allegations failed to support any viable legal claims that the Attorney General’s investigation was unconstitutionally retaliatory or selective.” (NYSCEF 706 at 2.)

Response: Not disputed.

9. On October 21, 2022, Defendants John Frazer and Wayne LaPierre answered the Operative Complaint, asserting the affirmative defenses therein. (NYSCEF 864–865.)

Response: Not disputed.

10. November 2, 2022, Defendant National Rifle Association of America answered the Operative Complaint, asserting the affirmative defenses therein. (NYSCEF 889.)

Response: Disputed. Statement No. 10 does not pertain to Defendant Frazer who denies knowledge sufficient to form a belief as to its truth.

11. On September 29, 2022, this Court issued a Decision and Order denying Defendants’ motion to dismiss the Operative Complaint on the grounds asserted therein, including rejecting Defendants’ extraterritoriality argument. (NYSCEF 844–847.)

Response: Disputed. John Frazer did not assert an “extraterritoriality argument,” and refers the Court to his motion to dismiss for the assertions therein. (NYSCEF 690).

ADDITIONAL MATERIAL FACTS WHICH MAY OR MAY NOT BE DISPUTED

In addition to the foregoing, Plaintiff states that the following additional material facts may or may not be disputed and as to which there may exist genuine issues to be tried:

1. Prior to Mr. Frazer's 2015 hiring, the roles of Secretary and General Counsel at the NRA were served by two different individuals. *See* Affirmation of William B. Fleming dated March 13, 2023 ("Fleming Aff."), Ex. 1 (Expert Report of James F. Reda) at 11.

2. Frazer agreed to serve both positions for an annualized compensation of \$300,000. *See id.* at 11.

3. In 2014, the year preceding Frazer beginning work in both positions, the NRA Secretary had received base compensation of been paid \$370,923, and the General Counsel had received base compensation of \$244,000 through September 2014 which, annualized, computed to an obligation of \$325,333. *See id.* at 11.

4. By combining the positions, the NRA reduced the organization's annual base compensation obligation by \$396,256 from the prior year. *Id.*

5. The Treasurer's office was responsible for the preparation of the NRA's Form 990. *See* Fleming Aff., Ex. 2 (Deposition of Wilson H. Phillips) at 157:18-159:8. Employees in the Treasurer's office, in particular Emily Cummins, Svetlana Olchevski, Arif Rahman, and their supervisors, were principally responsible for the preparation of the NRA's Form 990s. *See* Fleming Aff., Ex. 3 (Deposition of the NRA by a Corporate Representative) at 398:15-399:9; Ex. 4 (Deposition of Michael Erstling) at 284:24-285:14; Ex. 2 at 158:13-25; Ex. 5 (Deposition of Sonya Rowling) at 41:24-43:21.

6. The process of forming the Form 990s started with gathering the data from the NRA's audited financial statements which are then incorporated into the Form 990 by the Treasurer's office. Fleming Aff., Ex. 6 (Deposition of John Frazer) at 94:17-95:19.

7. Described as a document that is "becoming more and more complex," the Form 990 is a filing which the NRA's current tax advisor Aronson has advised should be completed with the advice and counsel of tax professionals, as the NRA did. *See* Fleming Aff., Ex. 7 (Deposition of Greg Plotts) at 370:12-371:25.

8. Tax accountants from the professional services firms of RSM McGladrey and Aronson, as well as outside tax attorneys, reviewed, analyzed, advised, and/or prepared the NRA's Form 990s. *See id.*; Fleming Aff., Ex. 8 (Deposition of Craig Spray) at 275:12-276:17 [REDACTED]

[REDACTED]

[REDACTED] Ex. 2 at 157:18-159:8.

9. Spray and Phillips relied on their staff and the outside professionals when signing the Form 990s. *See* Fleming Aff., Ex. 8 at 275:7-277:4 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Ex. 2 at 159:9-161:3 ("I relied upon, uh, Emily Cummins and [RSM tax advisor] Jim Sweeney probably among the best in the country at filling out these forms"); *see also* Fleming Aff., Ex. 5 at 93:11-94:5.

10. The Treasurer's office was dedicated to improving its process for completing the Form 990 each year. *See* Fleming Aff., Ex. 8 at 273:16-274:6 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Dated: New York, New York
March 13, 2023

/s/ William B. Fleming

William B. Fleming

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Counsel for Defendant John Frazer

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2023, a true and correct copy of the foregoing Defendant John Frazer's Counterstatement of Facts was served on all counsel of record by NYSCEF.

By: /s/ William B. Fleming

