SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – COMMERCIAL DIVISION

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,	§	Index No. 451625/2020
	§	Hon. Joel M. Cohen
Plaintiff,	§	Motion Sequence No. _____
v.	§	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO PRECLUDE EVIDENCE PURSUANT TO CPLR 3126**
Defendants.	§	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT THE NATIONAL RIFLE ASSOCIATION OF AMERICA'S MOTION TO PRECLUDE EVIDENCE PURSUANT TO CPLR 3126

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COMES NOW Defendant the National Rifle Association of America ("NRA") and submits this memorandum of law in support of its motion to preclude evidence intended to be offered by Plaintiff Attorney General of the State of New York ("NYAG").

PRELIMINARY STATEMENT

Though the NYAG represented that it complied with its disclosure obligations, it has not. Rather, the NYAG willfully refused to provide full and complete responses to NRA Contention Interrogatories 1, 2 and 8 (Ex. A).[1] Specifically, the NYAG made the tactical decision to withhold the factual bases for its contentions against the NRA. Therefore, the NRA requests this Court:

(1) pursuant to CPLR 3126(3), strike portions of the Complaint[2] relying on information sought in NRA Contention Interrogatories 1, 2, and 8 to which the NYAG refused to respond completely; or, alternatively,

(2) pursuant to CPLR 3126(2), preclude the NYAG from offering evidence at trial pertaining to information sought in NRA Contention Interrogatories 1, 2, and 8 to which the NYAG refused to provide complete responses; or, alternatively,

(3) pursuant to CPLR 3124, compel the NYAG to supplement its responses to NRA Contention Interrogatories 1, 2, and 8 with complete information, and, pursuant to 22 NYCRR 202.21(e), vacate the Note of Issue.[3]

Under Commercial Division Rule 11-a(d), parties ***must*** respond ***fully and completely*** to contention interrogatories. Contention interrogatories are meant to amplify the pleadings, clarify

[1] References to "Ex." herein refer to Exhibits to the Affirmation ("Aff.").

[2] References to the "Complaint" herein refer to the Second Amended Verified Complaint (NYSCEF 646). Aff. ¶16.

[3] The NYAG's Certificate of Readiness (NYSCEF 1003) misstates that there are no outstanding discovery requests.

the factual underpinnings of a party's contentions, and narrow issues for trial.[4] Contention interrogatories are considered judicial admissions which bind the answering party, and the answering party is not allowed to hold anything back in its responses.[5] ***The remedy for withholding is preclusion***. As the Special Master made clear: if the NYAG fails to provide full and complete responses to contention interrogatories it risks preclusion.[6]

The NYAG alleges that the NRA entered certain improper related-party transactions and violated its obligations regarding certain whistleblowers. In the Complaint, the NYAG identifies several transactions and occurrences, but leaves open the option to rely on additional instances not identified. The NRA sought clarification of any additional instances through discovery and then pursuant to contention interrogatories. The NRA requested the NYAG identify the ***specific*** related-party transactions and ***specific*** whistleblower violations the NYAG intended to rely on a trial.

The NYAG refused to provide this information during discovery—pointing to contention interrogatories as the proper vehicle for disclosure. However, the NYAG then ***refused*** to respond fully to the NRA Contention Interrogatories. When challenged, the NYAG ***agreed*** to provide the ***specific*** related-party transactions and whistleblower violations it intended to use at trial. Unfortunately, when the time came for disclosure, the NYAG ***reneged***. The NYAG responded with non-exhaustive lists of names purportedly involved in the transactions and violations but gave no further information. When pressed again, the NYAG refused to provide further clarification—hiding behind its filing of the Note of Issue.

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[4] *Wechsler v. Hunt Health Sys., Ltd.*, 1999 WL 672902, at *1 (S.D.N.Y. Aug. 27, 1999); *Wiseman v. Am. Motors Sales Corp.*, 101 A.D.2d 859, 859–60 (2d Dep't 1984).

[5] *Wechsler*, 1999 WL 672902, at *2.

[6] NYSCEF 769 at 3 (Aff. ¶19).

In sum, ***the NYAG willfully failed to comply with its discovery obligations***. While it is within the Court's discretion to determine the proper remedy, preclusion—the remedy suggested by the Special Master in July 2022—is appropriate. The NYAG had multiple opportunities to disclose the factual bases for its contentions, but it refused to do so. Discovery is now closed and the NYAG claims it is trial ready. Therefore, the NYAG should be limited to presenting evidence related to only those transactions and occurrences that it adequately disclosed. Allowing more substantially prejudices the NRA and rewards the NYAG for its gamesmanship.

STATEMENT OF FACTS

I. The NYAG's Allegations

The NYAG asserts claims against the NRA for violations of rules and regulations governing related-party transactions and whistleblower protections.

A. Alleged Improper Related-Party Transactions

In the First Cause of Action ("COA"), the NYAG alleges that the NRA breached EPTL §8-1.4 by "Fail[ing] to comply with the applicable law governing … related-party transactions." Complaint, at ¶641(c). Additionally, in the NYAG's Thirteenth COA, the NYAG alleges the NRA engaged in wrongful related-party transactions in violation of N-PCL §112(a)(10), §715(f), and EPTL §8-1.9(c)(4). *Id*. at ¶¶690-96.

The Complaint describes the following alleged related-party transactions: "Phillip's Consulting Agreement" (*id*. at ¶¶244-50); "Powell's Related Party Transaction with His Father (*id*. at ¶¶280); "Related Party Transactions with Board Members," which includes five board members (designated Board Member No. 1 through No. 5) (*id*. at ¶¶381-411, ¶¶523-25, ¶531(i)); a "contract between Dissident No. 1 and Ackerman" from September 2018 (*id*. at ¶¶528-32); and certain contracts improperly ratified by the NRA's Audit Committee in 2019 and 2020 (*id*. at ¶¶533-34).

Of course, the NYAG refers to these as only "examples" of wrongdoing. *See, e.g.*, *id*. at ¶381 ("Some ***examples*** of the many related party transactions that the NRA executed with board members are discussed below."); ¶534 ("***Examples*** of the related party transactions and conflicts of interest that were improperly approved by the Audit Committee include"); ¶695 ("The NRA entered into numerous unlawful related party transactions in violation of N-PCL §715 and EPTL §8-1.9, ***including*** those detailed above.") (emphasis added).

B. Alleged Whistleblower Violations

In the First COA, the NYAG also alleges that the NRA breached EPTL §8-1.4 by "[f]ail[ing] to comply with the applicable law governing whistleblower protections. *Id*. at ¶641(d). And in the Fourteenth COA, the NYAG alleges violations of the whistleblower protections enumerated in N-PCL §715-b and EPTL §8-1.9. *Id*. at ¶¶697-701.

The Complaint describes the following alleged whistleblower violations: the purported retaliation by Defendant LaPierre against "Dissident No. 1" by declining to support Dissident No. 1's re-nomination as NRA President and conducting an internal expulsion proceeding against Dissident No. 1 (*id*. at ¶¶461-88, ¶700); retaliation against "those board members who publicly (either through correspondence or social media posts) expressed concern about the NRA's actions or who called for an independent audit of the NRA" by the alleged denial of their requested committee assignments in 2019 (*id*. at ¶¶489-92); and the "Audit Committee's Failure to Respond Adequately to Whistleblowers," which centered on the "Top Concerns Memo" and July 30, 2018 Audit Committee meeting (*id*. at ¶¶502-15, ¶561).

The NYAG also alleges that: "Defendant Powell retaliated against suspected whistleblowers," but does not identify who, when, or how (*id*. at ¶700); "Defendant Frazer failed to perform his responsibilities as the dedicated employee with responsibility for whistleblower reporting," but gives no specifics; "Defendant LaPierre retaliated against directors … who raised

issues covered by the policy, by opposing their reelection or by stripping them of committee assignments," but does not identify anyone outside of "Dissident No. 1" (*id.*); and "[t]he Audit Committee failed to make any record or take any action responding to whistleblower concerns," again stated without any specific references to who, when, or what concerns (*id.*).

II. The NRA Seeks Clarification Of The Bases Of Allegations.

The NRA first attempted to clarify the ***specific*** transactions and occurrences underpinning the NYAG's allegations through deposition discovery, written interrogatories, and disclosure under Commercial Division Rules 11(a) and 11(b).[7]

Between November 2021 and May 2022, the NRA sought to depose a corporate representative for the NYAG and the head of the NYAG's Charities Bureau regarding this information. NYSCEF 717 (Aff. ¶18). The NRA also sought written interrogatories on these topics. Ex. C. Further, on June 1, 2022, the NRA requested the Special Master order the NYAG disclose this information under Commercial Division Rule 11.[8] Ex. D.

In January 2022, the NYAG responded to the NRA's deposition notice. Ex. E. The NYAG made the following General Objection:

> 7. Plaintiff objects to the Notice to the extent that the Matters for Deposition therein represent an ***improper attempt by Defendant NRA to circumvent well-established limitations on the use of contention interrogatories*** before discovery has been substantially completed. Many of the Matters for Deposition request ***support for the Attorney General's allegations*** asserted in her Amended Complaint, information which, to the extent discoverable, ***should be ascertained at the close of discovery by way of interrogatories***

[7] This is the ***same*** information sought in the NRA Contention Interrogatories.

[8] This request came after the NRA requested the NYAG enter a stipulation providing for the disclosure of this information. Ex. D at 3-6.

> ***seeking the claims and contentions of the opposing parties*** pursuant to Commercial Division Rule 11-a(d).

Id. at 3-4 (emphasis added). The NYAG made similar objections to Matters 10-23. *Id*. at 17-27.

On June 3, 2022, the NYAG applied for protective orders regarding the above-referenced depositions. NYSCEF 710 at 2 (Aff. ¶17). The Special Master granted the protective orders. *Id*; NYSCEF 769 at 1-2 (Aff. ¶19).

On July 6, 2022, the NYAG submitted its responses and objections to the NRA's interrogatories served on June 9, 2022. Ex. F. The NYAG again objected that the interrogatories:

> represent an ***improper attempt by Defendant NRA to circumvent well-established limitations on the use of contention interrogatories*** before discovery has been substantially completed. Several of the Interrogatories ***request support for the Attorney General's allegations*** asserted in the Complaint, information which, to the extent discoverable, ***may only be ascertained at the close of discovery by way of interrogatories seeking the claims and contentions of the opposing parties*** pursuant to Commercial Division Rule 11-a(d).

Id. at 2-3 (emphasis added); *see id*. at Resp. Nos. 9, 11-12, 14-15, 17-18, 20-21.

The NYAG also opposed the NRA's request for Commercial Division Rule 11 disclosures. Ex. G.

The NRA moved to compel this information, but the Special Master denied that request. NYSCEF 769 at 3. Importantly, however, the Special Master warned that: "inquir[i]es into a part[y's] allegations are ***best explored through contention interrogatories***. And ***if the plaintiff fails to provide full and complete responses it risks preclusion*** of withheld evidence at trial." *Id*. (emphasis added).

Thereafter, this Court denied the NRA's request for review of the Special Master's determinations. NYSCEF 858 (Aff. ¶21). But this Court appeared to ***agree*** that the information sought by the NRA "could [be] discover[ed] … through contention interrogatories." *Id*. at 3.

On October 19, 2022, the NRA propounded to the NYAG, pursuant to CPLR 3130, CPLR 3131 and Commercial Division Rule 11-a(d), the NRA Contention Interrogatories. Ex. A. The NRA requested complete responses to the following interrogatories:

> **Contention Interrogatory No. 1**
>
> For ***each transaction*** that you contend is a wrongful related party transaction with regard to which you are entitled to relief—whether pursuant to your First Cause of Action, the Thirteenth Cause of Action, or otherwise—specify the legal basis for and ***identify with particularity all facts or evidence on which you base such contention***, including but not limited to any contention that the defense set forth in N-PCL 715(j) is unavailable.
>
> **Contention Interrogatory No. 2**
>
> For ***each alleged*** "***violation*** of the whistleblower protections of N-PCL 715-b or EPTL 8-1.9" that you contend occurred, specify the legal basis for and ***identify with particularity all facts or evidence on which you base such contention***.
>
> ...
>
> **Contention Interrogatory No. 8**
>
> For ***each instance*** where the Second Amended Complaint asserts a general allegation and provides merely a non-exhaustive/illustrative list of specific instances of alleged misconduct (e.g., Second Amended Complaint Paragraphs 155, 695), ***identify all other specific instances that you contend occurred or exist*** but that are not identified in the Second Amended Complaint.

Id. at 4-6 (emphasis added).

On November 22, 2022, the NYAG served its "Responses And Objections Of Plaintiff The People Of The State Of New York To Defendant NRA's Contention Interrogatories" ("NYAG Responses") on the NRA. Ex. B.

In response to NRA Contention Interrogatory 1, which requests the NYAG specify ***each transaction*** the NYAG alleges was improper, the NYAG responded:

> ***Improper related party transactions*** … ***include the NRA's transactions with*** Wayne LaPierre; Wilson Phillips; Joshua Powell; John Frazer; Marion Hammer; David Keene; Dave Butz; Lance Olson; Sandra Froman; Michael Marcellin; Kyle Weaver; Wayne Sheets; Bart Skelton; Scott Bach; Robert Dowlut; Colleen Gallagher; Susan LaPierre; Douglas Hamlin; Tom King; Edward J. Land; Jr.; Carolyn Meadows; Lt. Col. Oliver North; Ted Nugent; Shemane Nugent; James W. Porter II; Kayne Robinson; Mercedes V. Schlapp; Tyler Schropp; Tom Selleck; and Robert Marcario.

Id. at 4-6 (emphasis added). The NYAG does not provide any information by which any allegedly improper transaction can be identified—not even a timeframe or general description. Importantly, the NYAG does not state that the list it provides is exhaustive, only that its factual bases "include" "transactions with" the named individuals.

In response to NRA Contention Interrogatory 2, which requests the NYAG identify ***each*** alleged whistleblower and ***whistleblower violation***, the NYAG responded:

> ***Whistleblowers include*** Esther Schneider, Lt. Col. Oliver North, Craig Spray, Richard Childress, Tim Knight, Allen West, Sean Maloney, Emily Cummins, Phillip Journey, Rocky Marshall, members of the FSD who came forward with the Top Concerns memo, and whistleblowers identified anonymously in David Coy's 2007 memorandum, as well as other complainants whose identities were not revealed by the NRA. ***The NRA permitted whistleblower retaliation, intimidation and harassment in a variety of ways, including by*** commencing an action to remove one whistleblower as a member, allowing defendant John Frazer, in his role as Secretary and General Counsel, to circulate emails written by former NRA President Carolyn Meadows denigrating and criticizing whistleblowers, removing and/or failing to grant committee assignments to whistleblowers, permitting the maintenance of "burn books" about employees, allowing former NRA President Marion Hammer and current NRA Vice President Willes Lee to exchange emails with other Board members approving of whistleblower retaliation, making public criticisms of whistleblowers, and terminating the employment of a whistleblower. ***The NRA also failed to timely and properly investigate and address whistleblower complaints***.

Id. at 6-9 (emphasis added). Again, the NYAG is woefully incomplete and open-ended in its response—caveating the response with the terms "include" and "including." This is clearly a deliberate tactical choice by the NYAG to not provide a complete response.

And, in response to NRA Contention Interrogatory 8, which seeks "all other ***specific instances***" of alleged misconduct, the NYAG stated, in part:

> Paragraph 695 of the Second Amended Complaint alleges that the NRA entered into numerous unlawful related party transactions … ***including*** those detailed within the 704 paragraph Second Amended Complaint. ***Additionally such related party transactions are detailed in the records of the NRA produced in this action and evident from the evidentiary record in this action***. Finally, Plaintiff specifically ***refers Defendant NRA to the answer provided in response to Contention Interrogatory No. 1*** for a description of related party transactions that violated law and NRA Relevant policies.

Id. at 16-17 (emphasis added). Once more, the NYAG uses the term "including" rather than a term of limitation when referring to alleged transactions. Significantly, the NYAG again makes the tactical choice to provide an obviously incomplete response by pointing the NRA to the "records of the NRA" and "evidentiary record" for specifics as to its own contentions rather than enumerating the information requested. This is a disfavored practice. *Sec. & Exch. Comm'n v. Ripple Labs, Inc.*, 2021 WL 5336970, at *1 (S.D.N.Y. Oct. 21, 2021) (citing *Trueman v. N.Y. State Canal Corp.*, 2010 WL 681341, at *3 (N.D.N.Y. Feb. 24, 2010)). Further, the NYAG refers to its response to NRA Contention Interrogatory 1 which is similarly nonresponsive.

On December 8, 2022, the NRA sent a deficiency letter to the NYAG notifying the NYAG that its responses "fail to comply with the NYAG's discovery obligations under the applicable rules." Ex. H at 1. Specifically, the NRA highlighted the NYAG's refusal to provide a comprehensive list of the specific transactions and occurrences that form the basis for its allegations. *Id*.

The parties met and conferred on December 12, 2022. Following the conference, the NRA sent an email to the NYAG with the following requests:

> Third, wherever the NYAG Responses to the NRA's interrogatories refer to the complaint, such references are problematic for two reasons[:]
>
> > First, the pleading specifically and repeatedly states that it contains merely a non-exhaustive lists of occurrences or transactions that the NYAG asserts were improper. Referring to the complaint for that reason is not a meaningful response.
> >
> > Second, the reference is problematic to the extent there are transactions or occurrences that are alleged in the complaint that the NYAG no longer plans to put at issue at trial. As you know, a purpose of contention interrogatories is to narrow issues for trial.
>
> Fourth, wherever the NRA's interrogatories request the NYAG to specify transactions or occurrences which the NYAG intends to put at issue at trial (or asks for the identity of individuals whose conduct the NYAG intends to put at issue at trial) in connection with her various claims (related party transactions, conflicts of interest, etc.), your responses repeatedly state that such transactions, occurrences etc. "include" enumerated transactions, occurrences and so on.
>
> At this stage of the case, the NYAG must advise the NRA of the transactions and occurrences on which she intends to proceed at trial. Providing a non-exhaustive list is improper.

Ex. I at 12-14 (Dec. 14, 2022 Email).

The NYAG responded that, "We do not agree that the plaintiff's responses are deficient." *Id*. at 11-12 (Dec. 17, 2022 Email). Still, the NYAG agreed to: (1) "supplement its responses to Interrogatory Nos. 1 and 8 to ***provide a list of the wrongful related party transactions that Plaintiff intends to rely on at trial***"; and (2) "supplement its response to Interrogatory Nos. 2 and 8 to ***provide a list of the actions that Plaintiff contends are violations of legally mandated protections for whistleblowers***, which we intend to rely on at trial." *Id*. at 11 (emphasis added).

On January 9, 2023, the NYAG "clarifie[d]" the NYAG Responses. *Id*. at 6-8 (Jan. 9, 2023 Email). This included: (1) a list of 43 names titled "Related party transactions concerning the following current or former officers, directors, and key persons, or relatives thereof, or entities affiliated therewith"; and (2) a list titled "Whistleblowers" with 14 names and two references to auxiliary documents.[9] *Id*. at 7-8. However, the NYAG provided ***neither*** a "list of the wrongful related party transactions" ***nor*** a "list of the actions that Plaintiff contends are violations of legally mandated protections for whistleblowers" as it had previously agreed to do. *Id*. at 11.

On January 20, 2023, the NRA notified the NYAG that its clarification was insufficient. Ex. J. The NYAG responded that, "Plaintiff provided its interrogatory responses two months ago, the note of issue was filed a month ago, and we reserve the right to object to demands for additional discovery as untimely." Ex. I at 3 (Jan. 23, 2023 Email).

The NRA again responded that: (1) the NYAG failed to provide a list of the transactions it intended to rely on at trial as it agreed to do; (2) the NYAG included individuals in its "clarification" that are "unmentioned in the pleadings, depositions, discovery responses, or even in the NYAG's multiple expert witness reports"; and (3) the NYAG failed to provide a list of the whistleblower violations it intended to rely on at trial as it agreed to do. Ex. K at 1-2.

The NYAG then "further supplement[ed] our response to Interrogatory No. 2 by removing the words 'in a variety of ways, including' in the list of whistleblower violations already set forth

[9] The NRA understands this list to be ***exhaustive*** and nothing suggests otherwise. Thus, any attempt by the NYAG to expand this list should be rejected.

therein,"[10] but warned that it "does not intend to further supplement its responses." Ex. I at 1-2 (Feb. 2, 2023 Email).

III. Discovery Is Closed.

Discovery closed on November 18, 2022. NYSCEF 829 at 4 (Aff. ¶20). The NYAG filed the Note of Issue and Certificate of Readiness on December 22, 2022, certifying that, "There are no outstanding requests for discovery." NYSCEF 1003 (Aff. ¶22).[11] The NRA responded on January 11, 2023, asserting that the Addendum fails to reference the ongoing dispute related to the NYAG Responses and "reserve[ing] the right to move for relief." Ex. L at 1-2.

ARGUMENT

I. The NYAG Was Obligated To Specify The Transactions And Occurrences On Which Its Allegations Are Based.

New York law is clear: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR 3013. "Indeed, it is elementary that the primary function of a pleading is to apprise an adverse party of the pleader's claim and to prevent surprise. Absent such notice, a defendant is prejudiced by its inability to prepare a defense to the plaintiff's allegations." *Cole v. Mandell Food Stores, Inc.*, 93 N.Y.2d 34, 40 (1999) (internal citations omitted). A plaintiff ***must*** "disclose the ***specific transactions and occurrences*** alleged to give rise to liability on defendants' part and relate them to the specific causes of action asserted by plaintiff." *Deep v. Urbach, Kahn & Werlin LLP*, 19

[10] However, this response fails to identify the basis for the NYAG's claim that, "The NRA also failed to timely and properly investigate and address whistleblower complaints." Ex. B at 9 (NYAG Response to NRA Contention Interrogatory 2).

[11] The NYAG also filed an Addendum citing two ongoing discovery proceedings—neither related to the NRA Contention Interrogatories. NYSCEF 1004 at 3 (Aff. ¶23).

Misc. 3d 1142(A), at *2 (Sup. Ct. Albany Cnty. 2008) (emphasis added). Otherwise, the allegations "fail[] to provide an adequate basis upon which defendants can frame a meaningful response, thereby prejudicing their substantial rights." *Id*. at *3.

As described above, the NYAG identified specific transactions and occurrences in the Complaint and NYAG Responses but called those mere examples. Beyond that, the NYAG has not provided any specific information about additional transactions or violations such that the NRA can prepare its defense. When asked to clarify, the NYAG provided a non-exhaustive list of people purportedly involved with transactions directly or indirectly. Ex. I at 7-8. And the NYAG provided a list of alleged whistleblowers and referenced two ancillary documents naming others but did not identify a single violation. *Id*. at 8. Neither disclosure provides ***any specific information*** that allows the NRA to identify the specific transactions and occurrences the NYAG intends to rely on at trial.

This Court should not allow the NYAG's case-in-chief to extend beyond the instances of alleged misconduct for which the NYAG has given notice. Allowing the NYAG to do so will substantially prejudice the NRA because it cannot prepare a meaningful defense without knowing the specifics of the claims—especially given the number of allegations in this case. The NYAG had since 2020 to perfect its pleadings and make the necessary disclosures. It now asserts that it is ready for trial and complied with its disclosure obligations. By its own admission, the NYAG's case—including the factual bases for its contentions—is in place. Therefore, this Court should preclude the NYAG from presenting evidence related to transactions and occurrences not enumerated in the Complaint or NYAG Responses.

II. The NYAG Refused To Specify The Transactions And Occurrences On Which Its Allegations Are Based And, Thus, Should Be Precluded From Offering Certain Evidence.

A. Contention Interrogatories

CPLR 3101(a) states: "There shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." New York courts "have emphasized that '[t]he words, material and necessary, are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity. The test is one of usefulness and reason[.]'" *Forman v. Henkin*, 30 N.Y.3d 656, 661 (2018) (citing *Allen v. Crowell–Collier Publ. Co.*, 21 N.Y.2d 403, 406 (1968)).

As part of discovery, "any party may serve upon any other party written interrogatories." CPLR 3130. Commercial Division Rule 11-a(a) also allows written interrogatories. The responding party must answer each interrogatory "separately and fully." CPLR 3133(b). The party must "provide all responsive information in their possession." *Site Safety, LLC v. Gunnala*, 68 Misc. 3d 1213(A), at *6 (Sup. Ct. N.Y. Cnty. 2020). Full disclosure is required "to prevent unfair surprise at trial." *Wiseman*, 101 A.D.2d at 859.

Commercial Division Rule 11-a(d) also allows "interrogatories seeking the claims and contentions of the opposing party." Contention interrogatories are "one of many discovery tools designed to assist parties in narrowing and clarifying the disputed issues and reducing the possibility of surprise at trial. Such interrogatories may seek a variety of information from a party to the litigation, including identification of a party's legal positions regarding a given issue and the evidence on which those contentions are based." *Wechsler*, 1999 WL 672902, at *1. Contention interrogatories are reasonable where they seek "the bases for the legal theories upon which plaintiff

has elected to premise his cause of action" and "to clarify and amplify plaintiff's allegations." *Wiseman*, 101 A.D.2d at 859–60.

Responses to contention interrogatories stand in "sharp contrast" to discovery responses because they "necessarily reflect the views of a party to the litigation" and represent a "disclosure of arguments or positions being taken in the litigation." *Wechsler*, 1999 WL 672902, at *2. Responses are "'judicial admissions' that generally estop the answering party from later seeking to assert positions omitted from, or otherwise at variance with, those responses." *Id.*; *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.*, 2014 WL 494522, at *2 (S.D.N.Y. Feb. 6, 2014).[12] A party also must make timely amendments to responses or face preclusion. *Id.* at *4.

As a matter of law, a plaintiff is required to identify its claims and contentions clearly and point to the facts, witnesses, or documents that support its claims. *See Wechsler*, 1999 WL 672902, at *2 (citing *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449, 456 (2d Cir.1975)) ("the party answering a contention interrogatory is obligated 'to respond truthfully and completely'. Toward that end, the answering party is usually afforded ample opportunity … to craft answers that provide a full and accurate disclosure."). The answering party "must either provide the information to [the opposing party] as requested or must forego introduction of evidence establishing any further factual details sought by [the opposing party] as underlie the factual averments in the [pleading]." *Schlitter v. City of New York*, 89 A.D.2d 979, 980 (2d Dep't 1982).[13]

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[12] *See Guadagno v. Wallack Ader Levithan Assocs.*, 950 F. Supp. 1258, 1261 (S.D.N.Y. 1997), *aff'd*, 125 F.3d 844 (2d Cir. 1997) (responses to contention interrogatories have a preclusive effect because treated as judicial admissions); *Unigene Lab'ys, Inc. v. Apotex, Inc.*, 2010 WL 2730471, at *3 (S.D.N.Y. July 7, 2010), *aff'd*, 655 F.3d 1352 (Fed. Cir. 2011) ("The Defendants are, of course, limited by their response to the contentions interrogatories.").

[13] *See Corriel v. Volkswagen of Am., Inc.*, 127 A.D.2d 729, 730 (2d Dep't 1987) ("plaintiff's failure to provide the information in his possession would preclude him from later offering proof

The purpose is to apprise defendants and prevent "unfair surprise at trial." *Schlitter*, 89 A.D.2d at 980; *Pinto v. Pyramid Tire, Inc.*, 130 A.D.2d 723 (2d Dep't 1987); *see Nutting v. Ford Motor Co.*, 189 A.D.2d 1086, 1088 (3d Dep't 1993) (disclosure is required to "prevent unfair surprise at trial" or else the party must "forego introduction of evidence"). Courts recognize that the "failure to disclose may … severely hamper the defense to the entire action." *Frazier*, 141 Misc. 2d at 537.

B. NRA Contention Interrogatories 1, 2, And 8

The NYAG alleges improper related-party transactions and whistleblower violations but provides only examples and expressly leaves itself the option to present other instances at trial. The NRA pursued clarification, seeking the ***specific*** transactions and whistleblower violations the NYAG will rely on to support its allegations, but the NYAG refused to provide such information. ***It is incumbent on the NYAG to identify this information with specificity and particularity***.

i. NRA Contention Interrogatories 1 And 8

In the NYAG Responses, the NYAG provided a list of 30 names and stated that it intended to offer evidence related to "the NRA's transactions with" them. Ex. B at 6 (NYAG Response to NRA Contention Interrogatory 1). The NYAG did not define what the phrase "transactions with" means or provide any context for the transactions themselves. Moreover, the NYAG used non-exhaustive language (*i.e.* "including") and engaged in the disfavored practice of referring to and

regarding that information at a trial."); *Cornish v. Eraca-Cornish*, 107 A.D.3d 1322, 1325 (3d Dep't 2013) (not abuse of discretion to preclude evidence when party fails to provide meaningful responses); *Caton v. Doug Urb. Const. Co.*, 109 A.D.2d 1100, 1101 (4th Dep't 1985) *aff'd*, 65 N.Y.2d 909 (1985) (precluding plaintiffs from establishing an element of claim because of "failure to respond adequately"); *Frazier v. City of New York*, 141 Misc. 2d 536, 537 (Sup. Ct. N.Y. Cnty. 1988) (precluding plaintiff from offering evidence when failed to respond to interrogatories).

incorporating auxiliary documents. *Ripple Labs*, 2021 WL 5336970, at *1. Taken together, the NYAG Responses demonstrate willful nondisclosure and nonresponsiveness.

After being confronted about its deficient disclosure, the NYAG promised to supplement its responses with a list of related-party transactions. Ex. I at 11. ***The NYAG never did***. Instead, the NYAG provided a list of 43 names and stated that it intended to offer evidence of "[r]elated party transactions ***concerning*** the following current or former officers, directors, and key persons, ***or relatives thereof, or entities affiliated therewith***[.]" *Id*. at 7 (emphasis added). There is not a single reference to a specific transaction in this disclosure. Nowhere does the NYAG specify a timeframe, party name, description, or any other information that apprises the NRA of the bases for the NYAG's contentions. Nor does the NYAG limit its disclosure to the 43 names but extends it to include transactions "concerning" unnamed "relatives" and "affiliated" entities. And the NYAG fails to even define the term "concerning." ***This tactical response is deliberately deficient***. It fulfills neither the NYAG's earlier agreement nor its disclosure obligations.

Clearly the NYAG knows the specific transactions that it intends to rely on to sustain its contentions at trial. The NYAG has had two-and-a-half years to prepare its case, discovery is closed, and the NYAG claims to be trial ready. It is unacceptable that the NYAG is still hiding the ball as to the factual foundations of its charges against the NRA. The purpose of contention interrogatories is to identify specific bases for a party's contentions so the requesting party can prepare for trial. The NYAG's response completely frustrate that purpose. Indeed, the NYAG's conduct appears aimed at avoiding adequate notice and setting up a trial by ambush.

ii. NRA Contention Interrogatories 2 And 8

In the NYAG Responses, rather than identify whistleblower violations with specificity, the NYAG incorporated by reference ancillary documents, provided a non-exhaustive list of whistleblowers, identified two documents allegedly naming additional whistleblowers, and cited

"other complainants whose identities were not revealed by the NRA." Ex. B at 8 (NYAG Response to NRA Contention Interrogatory 2). Additionally, the NYAG disclosed—without detail—that, "The NRA also failed to timely and properly investigate and address whistleblower complaints." *Id*. at 9. Though the NYAG gave several specific instances of retaliation, those are overshadowed by the balance of the NYAG's nonresponsive disclosure.

After the NRA challenged the NYAG Responses, the NYAG agreed "to provide a ***list of the actions that Plaintiff contends are violations*** of legally mandated protections for whistleblowers, which we intend to rely on at trial." Ex. I at 11 (emphasis added). However, the NYAG's supplement did not mention a single violation. Instead, it included a list of names and two references to other documents. *Id*. at 8. Once again, this disclosure fails to provide notice of the bases for the NYAG's contentions.

The NYAG supplemented again in February 2023 (Ex. I at 1-2), but this disclosure still failed to address the final sentence of its response to NRA Contention Interrogatory 2. Ex. B at 8-9. Critically, there also is no explanation as to how the list of whistleblowers comports with the alleged violations cited in the Complaint and NYAG Responses. This creates confusion as to what specific violations regarding what whistleblowers the NYAG intends to rely on.

The NYAG certainly knows the specific occasions that underlie its First and Fourteenth COAs. Discovery is closed. The NYAG has affirmatively stated that it is ready for trial. There is no excuse for the withholding of this information at this stage. The ***only*** reason is willful noncompliance, gamesmanship, or both.

C. NRA Contention Interrogatories 1, 2, And 8 Are Relevant, Material, And Neither Overly Broad Nor Burdensome.

The information requested in NRA Contention Interrogatories 1, 2, and 8 is unquestionably relevant and material. First, the NYAG never objected to any of requests for relevance or

materiality. Ex. B at 4-9, 16-17. Further, each request asks the NYAG to provide the specific occasions that support its contentions which is exactly the type of disclosure that contention interrogatories are designed to elicit. *See Rinaldi v. Vill. Voice, Inc.*, 47 A.D.2d 180, 182 (1st Dep't 1975) ("Specific acts intended to be established in support of the [pleadings] may be obtained … by disclosure."); *United States v. Full Play Grp., S.A.*, 2021 WL 5038765, at *14 (E.D.N.Y. Oct. 29, 2021) (ordering disclosure of the "particular allegedly tainted transactions"). And this is "the type of general information that defendants need to adequately defend themselves and must rely on such information to craft motions and a defense strategy." *Hamelin v. Faxton-St. Luke's Healthcare*, 274 F.R.D. 385, 391 (N.D.N.Y. 2011). Requesting this information by interrogatory is also the "more practical" means—as opposed to in deposition discovery—as the Special Master noted. *Mitre Sports Int'l Ltd. v. Home Box Off., Inc.*, 304 F.R.D. 369, 376 (S.D.N.Y. 2015); NYSCEF 769 at 3. Importantly, the NRA Contention Interrogatories are the NRA's "last resort" to "flush[] out the bases" for the NYAG's claims. 4 N.Y. Prac., Com. Litig. in New York State Courts § 31:10 (5th ed.).

The requested information also is not overly broad. The NYAG chose to take the position that the transactions and occurrences in the Complaint are mere "examples." The NRA merely seeks details as to what transactions and occurrences the NYAG believes support its contentions.

And the requested information is not unduly burdensome. A request would be unduly burdensome if it asked to "identify with specificity the bases of Your contentions, including without limitation an itemization of each and every fact and legal ground, and each and every document, witness, deposition transcript citation and any other evidence, that You rely upon for Your contention." *Morel v. Reed*, 2013 WL 12129656, at *2 (E.D.N.Y. Oct. 2, 2013). However, the NRA did not request "every fact and piece of evidence" the NYAG intends to offer at trial. *Id.*

Rather, the NRA sought a consolidated list of transactions and occurrences with some degree of specificity (*i.e.* timeframe, parties, and description).[14] Basically, the NRA sought an explanation of "the factual bases for their contentions by providing the material facts upon which they will rely, but not a detailed and exhaustive listing of all of the evidence that will be offered." *Linde v. Arab Bank, PLC*, 2012 WL 957970, at *1 (E.D.N.Y. Mar. 21, 2012).

Allowing the NYAG to withhold this information severely prejudices the NRA. The NYAG's actions have already prevented the NRA from inquiring further about these instances during discovery. Now, the NYAG wants to keep the NRA in the dark until trial. This is exactly the type of amplified greater because the NYAG's allegations are buried in a 182-page complaint with over 700 paragraphs.

The NYAG had an obligation to identify its contentions clearly and point to the specific transactions and occurrences underlying them. The NYAG chose to ignore this. It should not be allowed to benefit from this decision. ***Preclusion is the appropriate remedy***.

D. The NYAG's Willful Withholding Requires Preclusion.

While "a court has broad discretion in determining the nature and degree of the penalty to be imposed where a party has refused to comply with discovery demands" (*Pearl v. Pearl*, 266 A.D.2d 366, 366 (2d Dep't 1999)), preclusion under CPLR 3126 is warranted here.

CPLR 3126 contemplates preclusion—or similar remedies—where a party willfully fails to comply with its discovery obligations. Whether conduct is willful "can be inferred from the party's repeated failure to respond to demands or to comply with discovery orders" *De Leo v.*

[14] This is analogous to the request made in *United States v. Carter Prod., Inc.*, 28 F.R.D. 373 (S.D.N.Y. 1961). There, the court ordered a full response to an interrogatory requesting: "Enumerate the transactions and occurrences, whether oral or written, upon which the Government now believes it will rely to sustain the charges of violations of the Sherman Act …" *Id*. at 376–77.

State-Whitehall Co., 126 A.D.3d 750, 752 (2d Dep't 2015). And "the nature and degree of a penalty to be imposed on a motion pursuant to CPLR 3126 is left to the discretion of the Supreme Court[.]" *Richards v. RP Stellar Riverton, LLC*, 136 A.D.3d 1011, 1011 (2d Dep't 2016).

Here, the NYAG repeatedly refused to honor its obligations and engaged in gamesmanship over the disclosure of this material. Initially, the NYAG refused to respond to discovery requests related to the bases of its allegation because the information "should be ascertained at the close of discovery by way of interrogatories seeking the claims and contentions of the opposing parties pursuant to Commercial Division Rule 11-a(d)." *See, e.g.*, Ex. E at 3-4; Ex. F at 2-3.[15] The Special Master agreed but warned the NYAG of the danger of noncompliance. NYSCEF 769 at 3.

However, when the time came for disclosure in response to the NRA Contention Interrogatories, the NYAG ***refused*** to provide full and complete responses. Only in response to deficiency letters did the NYAG finally agree to provide the requested information. ***But this was an empty promise***. The NYAG reneged on its agreement and, instead, made disclosures that were neither responsive nor helpful. Now the NYAG is hiding behind the fact that discovery is closed and a Note of Issue has been filed to continue to refuse full disclosure. Ex. I at 3.

Taken together, the NYAG Responses do not amplify the pleadings, clarify the factual allegations, or narrow the issues. The NYAG's allegations have not changed since May 2022, but the NYAG continues to play games. This conduct is indicative of willful nondisclosure and deserving of preclusion. *Ng v. HSBC Mortg. Corp.*, 2010 WL 889256, at *21 (E.D.N.Y. Mar. 10, 2010) (precluding plaintiff from calling certain witnesses or testifying about certain information where plaintiff failed to provide complete answers to interrogatories). The NYAG engaged in this conduct with full knowledge of the risk of preclusion it faced. *See* NYSCEF 769 at 3 ("if plaintiff

[15] The NYAG also objected to most of the NRA's specific requests on this same basis.

fails to provide full and complete responses [to contention interrogatories] it risks preclusion"). But it chose to do so anyway. Now, the NYAG should be held to account and not allowed to cure its deficient disclosures—that time has long passed. *See Kontos v. Koakos Syllogos "Ippocrates," Inc.*, 11 A.D.3d 661 (2d Dep't 2004) (precluding witness affidavit where proffering party failed to disclose information about witness prior to note of issue).

The NYAG should only be allowed to present evidence related to: (1) the specific related-party transactions identified in the Complaint and NYAG Responses; and (2) the whistleblower violations described with specificity in the Complaint and NYAG Responses. All references to undisclosed related-party transactions and whistleblower violations should be stricken from the pleadings and the NYAG should be precluded from offering any evidence about such instances at trial.

III. Alternatively, This Court Should Compel The NYAG To Respond Fully To NRA Contention Interrogatories 1, 2, And 8.

The requesting party may move to compel compliance or a response to interrogatories. *See* CPLR 3124 ("If a person fails to respond to or comply with any … interrogatory … the party seeking disclosure may move to compel compliance or a response."). Such motions should be granted where the interrogatories are "relevant" and "not burdensome or unduly broad." *Curtis Properties Corp. v. Greif Companies*, 236 A.D.2d 237, 239 (1st Dep't 1997). As described previously, NRA Contention Interrogatories 1, 2, and 8 are relevant, material, and neither broad nor burdensome. *See* Argument §II.C.

Should the Court wish to provide the NYAG yet another opportunity to comply with its obligations—an opportunity the NYAG does not deserve—the Court should order immediate and complete disclosure. Indeed, the NYAG should be ordered to: (1) identify ***each related-party transaction*** it intends to rely on at trial, including the transactions' parties, timeframe, and general

nature; and (2) identify ***each whistleblower violation*** it intends to rely on at trial, including the whistleblower's identity, timeframe, and description of the violation. Should the NYAG continue its gamesmanship and fail to fully disclose this information, this Court should preclude all related evidence. *Schlitter*, 89 A.D.2d at 980; *Corriel*, 127 A.D.2d at 730; *Caton*, 109 A.D.2d at 1101; *Frazier*, 141 Misc. 2d at 537.

CONCLUSION

For the foregoing reasons, the NRA requests this Court:

(1) pursuant to CPLR 3126(3), strike portions of the Complaint relying on information sought in NRA Contention Interrogatories 1, 2, and 8 to which the NYAG refused to respond completely; or, alternatively,

(2) pursuant to CPLR 3126(2), preclude the NYAG from offering evidence at trial pertaining to information sought in NRA Contention Interrogatories 1, 2, and 8 to which the NYAG refused to respond completely; or, alternatively,

(3) pursuant to CPLR 3124, compel the NYAG to respond completely to NRA Contention Interrogatories 1, 2, and 8, and, pursuant to 22 NYCRR 202.21(e), vacate the Note of Issue.

Respectfully submitted,

Dated: March 14, 2023
New York, New York

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CERTIFICATION OF COMPLIANCE

I hereby certify pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court of the State of New York that the total number of words in the foregoing document, exclusive of the caption, table of contents, table of authorities and signature block, is 6,988 according to the "Word Count" function of Microsoft Word, the word-processing system used to prepare the document, and thus that the document complies with the word count limit set forth in Rule 17.

Dated: March 14, 2023
New York, New York

/s/ Christopher T. Zona
Christopher T. Zona

CERTIFICATE OF SERVICE

I, Christopher T. Zona, hereby certify that, on March 14, 2023, a true and correct copy of the foregoing document was electronically transmitted and served upon all counsel of record via this Court's electronic case filing system.

Dated: March 14, 2023
New York, New York

/s/ Christopher T. Zona
Christopher T. Zona