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 Hon. Joel M. Cohen

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT WILSON H. PHILLIPS'S MOTION TO EXCLUDE EXPERT TESTIMONY OF ERIC HINES

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Defendant Wilson H. Phillips respectfully submits this memorandum of law in support of his motion to exclude testimony by Eric Hines ("Hines"), whom Plaintiff has identified as an expert witness she intends to call as part of her case in chief.

I. Preliminary Statement

Hines is a Certified Public Accountant who claims to have specialized expertise and experience in forensic accounting, compliance, and internal controls. (*See* Loegering Affirmation ("Loegering Aff.") Ex. A, Expert Report of Eric Hines, CPA, CFC, CHC ("Hines Report"), ¶¶ 4-5.) In his expert report, Hines stated that he was:

> engaged to conduct an analysis of the NRA, including Defendants' adherence to policies, procedures, and internal controls; to perform qualitative analysis of financial transactions related to alleged acts of self-dealing and mismanagement by Defendants of NRA charitable funds; and to evaluate whether the facts and circumstances for specific areas within the scope of [his] report include fraud risk indicators. (*Id.* ¶ 7.)

Based on that analysis, Hines offers three categories of opinions: (i) opinions about the NRA's control environment; (ii) opinions on "specific vendors, arrangements, and NRA business practices"; and (iii) opinions about "fraud risk indicators." (*Id.* ¶¶ 14-26.) As discussed below, most of these proffered opinions are inadmissible, as they do not in fact involve the application of any expertise but rather are little more than summaries of evidence in the record that jurors can consider and evaluate for themselves, without the need for expert assistance.

II. Legal Standard

A. The Proper Scope of Expert Testimony

Although the admission of expert testimony is generally a matter that lies within the sound discretion of the trial court (*Jean-Louis v City of New York*, 86 AD3d 628, 629 [2d Dept 2011] [relying on *Berger v Tarry Fuel Oil Co.*, 32 A.D.3d 409, 409 (2d Dept 2006)]), it is well settled that courts must exercise that discretion to limit expert testimony to those matters where an expert

witness's specialized knowledge would assist the factfinders in evaluating the evidence. (*See People v Krivak*, 2023 NY Slip Op 23063 [Cnty. Ct. Jan. 5, 2023] "[[T]he jury may not be displaced of its fact-finding function by expert testimony where there is no 'reason to suppose that such testimony will elucidate some material aspect of the case that would otherwise resist comprehension by jurors of ordinary training and intelligence'"].) "It is for the trial court in the first instance to determine when jurors are able to draw conclusions from the evidence based on their day-to-day experience, their common observation and their knowledge, and when they would be benefited by the specialized knowledge of an expert witness." (*Franco v Muro*, 224 AD2d 579, 579 [2d Dept 1996], citing *People v Cronin*, 60 N.Y.2d 430, 433 [1983]; *see also People v Kincey*, 168 A.D.2d 231, 232 [1st Dept 1990] ["[W]here there is no doubt that the jury is capable of comprehending the issues and evaluating the evidence, expert testimony which intrudes upon the province of the jury, is both unnecessary and improper"].) "Absent [juror] inability or incompetence, the opinions of experts, which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper." (*Kulak v Nationwide Mut. Ins. Co.*, 40 N.Y.2d 140, 148 [1976]; *see also People v Inoa,* 25 N.Y.3d 466, 475 [2015] [expert evidence is "not properly received where its purpose is simply to provide an alternative, purportedly better informed, gloss on the facts of the case"].)

"[A]dmissibility turns on whether, given the nature of the subject, 'the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable.'" (*People v Cronin*, 60 N.Y.2d. 430, 432-33 [1983]) To be admissible, "evidence must be relevant and its probative value [must] outweigh the risk of any undue prejudice." (*Mazella v Beals*, 27 N.Y.3d 694, 709 [2016].)

B. Expert Testimony Cannot Provide Factual Summation

Experts are "not permitted to simply recite" facts from a case that are "properly presented

through percipient witnesses and documentary evidence." (*In re Kyanna T.*, 19 Misc. 3d 1114[A], at *6 [Fam. Ct. 2007] [relying on *LinkCo, Inc. v Fujitsu Ltd.*, 00 CIV. 7242 [SAS], 2002 WL 1585551 (S.D.N.Y. July 16, 2002)] [excluding expert opinion evidence based on an examination of documents since the testimony by fact witnesses familiar with those documents would be far more appropriate and would render the expert witness's secondhand knowledge unnecessary].) Likewise, when an expert report contains factual summation containing "cherry-picking" and "editorializing," courts routinely exclude such a factual narrative "because it invades the province of the factfinder by merely 'regurgitat[ing] the evidence.'" (*In re Lyondell Chem. Co.*, 558 BR 661, 668 [Bankr. S.D.N.Y. 2016]). "Most typically . . . experts . . . are able to provide opinions or information beyond the ken of the layperson. It is therefore inappropriate for experts to act as a vehicle to present a factual narrative of interesting or useful documents for a case, in effect simply accumulating and putting together one party's 'story' . . . ." (*Scentsational Tech., LLC v Pepsi, Inc.*, 13-CV-8645 [KBF], 2018 WL 1889763, at *4 [S.D.N.Y. Apr. 18, 2018], *affd sub nom. ScentSational Tech. LLC v PepsiCo, Inc.*, 773 Fed Appx 607 [Fed. Cir. 2019].)

III. Argument

A. Hines's First Set of Opinions Should Be Excluded, As They Are Either Irrelevant or Do Not Apply Any Expertise.

Hines's first set of opinions on the NRA's control environment, internal controls, and policies and procedures is essentially a synthesis of record evidence without the application of any specialized expertise. Hines describes these opinions as follows:

First, he states:

> [M]y analyses of the record evidence has led me to conclude that the NRA's control environment has been ineffective particularly with respect to processes and controls around expenditures, including purchasing, contract review and approval, and disclosures of conflicts of interest. This "ineffectiveness" has been due, in large part, to poor Tone at the Top ("TATT") at the NRA. (*See* Hines Report ¶ 14.)

Hines continues:

> My findings show a pattern of the Defendants (those charged with setting TATT), and other NRA personnel, failing to follow established policies, procedures and internal controls, ignoring Board policy directives, circumventing said policies, procedures, and controls, and not disclosing relevant information to interested stakeholders. (*Id.* ¶ 15.)

Finally, Hines states:

> My review of the record evidence indicates that when violations of established policies, procedures, and internal controls were identified or otherwise known, the NRA, including individual Defendants . . . often failed to enforce existing policies, impose disciplinary or other accountability measures, and/or take corrective action and remediate known internal control weaknesses. (*Id.* ¶ 16.)

None of these opinions is a proper subject of expert testimony in this case. The first – whether the NRA had an effective control environment – is irrelevant, as there is no cause of action for failure to maintain an effective control environment. Rather, the issues here relate to whether the NRA and/or the Individual Defendants violated specific laws and/or governing NRA policies or procedures. Even the First Cause of Action, which asserts that the NRA "failed to properly administer charitable assets," is based on specific instances of alleged improper conduct, not on an allegation that the NRA's control environment as a whole was ineffective. (*See* Second Amended Verified Complaint, Dkt 646, ¶ 641.)

As to the second and third opinions in this category, neither requires the application of any expertise. Rather, Hines's "findings" that Defendants "fail[ed] to follow established policies, procedures and internal controls, ignore[ed] Board policy directives, circumvent[ed] said policies, procedures, and controls, and [did] not disclos[e] relevant information to interested stakeholders" (Hines Report ¶ 15) and that Defendants failed to enforce NRA policies and procedures or take corrective action when violations were identified (Hines Report ¶ 16) consist of nothing more than Hines's reading various policies, procedures, and Board directives; reviewing record evidence; and

telling the jury that the record evidence shows that Defendants did not do what those documents required.

Such an analysis does not require any expertise; lay jurors are just as capable as Hines at, for example, reading a policy that requires approval by certain executives and then reviewing the contract review sheets in question to determine whether those executives in fact signed them. In short, rather than providing "expert" analysis, Hines's proffered testimony usurps the role of the fact finder and must be excluded. (*See Vail v KMart Corp.*, 25 A.D.3d 549 [2d Dept 2006] [trial court properly excluded proposed expert testimony on whether items would satisfy certain standards as irrelevant and misleading].)

B. Most of Hines's Second Set of Opinions Should Be Excluded Because They Are Either Improper Summation or Observations About the Evidence That Require No Expertise and Invade the Province of the Jury

Hines's second category of opinions – which results from his "analysis of specific vendors, arrangements and business practices" – overlaps with his first category and, in large part, suffers from the same defects.

In offering his second opinion on various NRA vendor arrangements and business practices, Hines first summarizes the arrangements and business practices at issue. (*See e.g.* Hines Report ¶¶ 103-113 [describing the agreements and business arrangements with MMP and multiple affiliated entities], 174-182 [describing the agreements and business arrangements with Ackerman McQueen], 219-223 [describing the agreements and business arrangements with Under Wild Skies, Inc.].) Then, Hines assesses whether, and to what extent, the NRA's agreements and business arrangements with a vendor or third party conform to NRA policies. (*See e.g.* Hines Report ¶¶ 172-173 [concluding that the NRA's "long-term commitments" to MMP were "not subject to applicable reviews, approvals, and internal control steps in accordance with NRA policies"], 246-299 [concluding that the NRA's arrangement with and payments to Gayle Stanford, a travel consultant,

did not comply with established NRA policies, processes, and controls], 459-470 [concluding the NRA's agreements with McKenna & Associates did not comply with the NRA's procurement policy and that certain Defendants did not comply with the NRA Conflict of Interest and Related Party Transaction policy].)

The first part of this proffered testimony – the recitation of the details of the NRA's relationship with various vendors – is essentially a summation of evidence in the record. Yet it is well settled that factual narratives by a purported expert that acts as a summation of the evidence is improper and should be precluded. (*People v Inoa*, 25 N.Y.3d 466, 473 [2015] [expert should not have been able to testify as an "apparently omniscient expositor of the facts of the case"]; *see also e.g. LinkCo, Inc. v Fujitsu Ltd.*, No. 00 CIV. 7242 [SAS], 2002 WL 1585551, at *2 [S.D.N.Y. July 16, 2002] [excluding expert that did "no more than counsel for [plaintiff] will do in argument, i.e., propound a particular interpretation of [defendant]'s conduct"]; *Highland Cap. Mgmt., L.P. v Schneider*, 379 F. Supp. 2d 461, 469 [S.D.N.Y. 2005] ["[A]n expert cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence"].) Instead, evidence on these subjects can and should be "properly presented through percipient witnesses and documentary evidence." (*In re Kyanna T.*, 19 Misc. 3d 1114[A], at *6 [Fam. Ct. 2007].)

The second part of this proffered testimony – his opinion on whether the NRA and certain Individual Defendants complied with various NRA policies and procedures – is also inadmissible, as such an opinion does not rely on any expertise on matters beyond the ken of a typical juror. (*See Scentsational Tech., LLC*, 2018 WL 1889763, at *4 ["Most typically . . . experts . . . are able to provide opinions or information beyond the ken of the layperson. It is therefore inappropriate for experts to act as a vehicle to present a factual narrative . . ."]). In other words, Hines's analysis of Defendants' alleged adherence or nonadherence to the NRA's policies and procedures is not a task

that requires application of expertise. Rather, whether the NRA and certain Defendants adhered to NRA policies and procedures requires nothing more than reading the policies and rules at issue and evaluating whether the evidence in the record demonstrates that Defendants violated them. (*See People v Colon*, 238 AD2d 18, 21 [1st Dept 1997] ["The provision of such [expert] 'guidance' in a situation where the need of it had not been established constituted a palpable intrusion upon the rightful and exclusively held prerogative of the fact finder to draw conclusions from the evidence"].)

Hines's explanation of his analysis and resulting opinions regarding the NRA's relationship with Membership Marketing Partners, LLC ("MMP") illustrates the problem. Hines reports:

> I have been asked by Counsel to analyze the factual record related to arrangements with the [Membership Marketing Partners, LLC] MMP Entities and ATI against the backdrop of the relevant NRA policies, procedures, and internal controls . . . and provide opinions as to whether the NRA and relevant individuals adhered to internal policies. (*Id.* ¶ 114.)

But, in undertaking that "analysis," Hines does not apply any expertise. To the contrary, he merely reads what the policies state, reviews evidence in the record, and "opines" that the policies were violated; for example, Hines reports that the NRA Procurement Policy required approvals by designated NRA officials for certain contracts (*id.* ¶ 115) and, after reviewing the signatures on contract review sheets for a particular MMP contract, states that, "[b]ased on my analysis of these facts, the MMP contract signed in December of 2011 was done without proper approval under the NRA's Procurement Policy." (*Id.* ¶ 122.)

Hines did not need any expertise to read that Procurement Policy or to review the signatures on that contract review sheet, and his assessment of whether the MMP contract was signed without necessary approvals is one that jurors could perform as readily as he does. However, expert testimony on matters that are within the knowledge or experience of a typical juror "usurp[s] the

function of the jury," rather than assisting it, and must be precluded. (*See Franco v Muro*, 224 ADd 579, 579 [2d Dept 1996] [precluding testimony on "a subject [not] calling for technical knowledge possessed by an expert and beyond the ken of the typical juror"].)[1]

C. Hines's Third Set of Opinions on So-Called "Fraud Risk Indicators" Should Be Excluded Because the Proffered Testimony Is Both Irrelevant and an Improper Invitation to Speculate

Hines's proffered testimony on so-called fraud risk indicators, which is the subject of his third opinion, is wholly gratuitous. In this third opinion, Hines concludes that there are "multiple conditions pertaining to NRA business activities . . . consistent with fraud risk indicators." (*See* Hines Report ¶ 490.) In particular, Hines states that (i) certain arrangements with NRA vendors are consistent with the fraud risk indicator of overly complex transactions (*id.* ¶¶ 491-492); (ii) certain NRA transactions and arrangements with vendors and other third parties are consistent with the fraud risk indicator of poor documentation and lack evidence of proper authorization (*id.* ¶¶ 493-494); (iii) arrangements between the NRA and its vendors were consistent with the fraud risk indicator of missing, inadequate, and/or alteration of documentation regarding the nature, amounts, and substance of financial transactions (*id.* ¶¶ 495-496); and (iv) certain arrangements between the NRA and its vendors are consistent with the fraud risk indicator of failure to properly disclose conflicts of interest. (*See id.* ¶¶ 497-498.)

But the complaint does not include any claim for fraud, and "whether the record evidence related to the NRA business activities . . . demonstrate[s] conditions that are consistent with fraud risk indicators (sometimes referred to as 'red flags' or 'badges of fraud')," as Hines asserts, is irrelevant to the claims that are at issue in this case. (*See id.* ¶ 489.) Notably, Hines does not state

[1] Some of Hines's proffered testimony consists of analysis of financial and accounting records in order to determine, for example, the total amounts of certain payments or expenses. *See e.g.* Hines Report ¶¶ 191-206, 228-229, 251-275. Such testimony may arguably be based upon accounting expertise and is not the subject of this motion to exclude.

that his expertise allows him to conclude that any of this record evidence in fact indicates that any fraud, waste, or abuse actually occurred; rather, his expert opinion is that such evidence is "often indicative of heightened risk" of such violations. (*See e.g. id.* ¶¶ 491, 493, 495, 497.) Such testimony is, therefore, little more than a dressed-up argument that certain evidence in the record is "suspicious." But expert testimony that evidence is suspicious is an improper invitation to speculate – an invitation that is made worse by having the imprimatur of a so-called expert attached to it. (*See People v Reinat,* 271 AD2d 622, 624 [2d Dept 2000] [holding that expert testimony of police officer improperly invited jury to speculate].) And, to the extent that Plaintiff wants to argue that the record evidence that Hines points to as "fraud indicators" supports the conclusion that Defendants engaged in conduct that is in fact the subject of claims in the case, that is an argument for Plaintiff's counsel to make in summation. However, Plaintiff cannot properly present such argument in the guise of expert testimony as part of its case in chief.

IV. Conclusion

For these reasons, Defendant Wilson Phillips respectfully requests that this Honorable Court exclude the testimony intended to be offered by the NYAG through Eric Hines: (1) his entire first set of opinions on the NRA's control environment, including his opinions related to the effectiveness of the NRA's control environment and his opinions as to whether the NRA and the Individual Defendants failed to follow NRA's policies and procedures; (2) his second set of opinions, except for those portions of those opinions that consist of analysis of financial and accounting records in order to determine the total amounts of certain payments or expenses; and (3) his entire third set of opinions on "fraud risk indicators."

Dated: March 24, 2023
New York, New York

Respectfully submitted,

By: */s/ Seth C. Farber*

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CERTIFICATE OF COMPLIANCE

1. I am an attorney at the law firm of Winston & Strawn LLP, am admitted to practice in the State of Texas, and am admitted *pro hac vice* in this action and have appeared on behalf of Defendant Wilson Phillips.

2. This Memorandum of Law in Support of Defendant Wilson H. Phillips's Motion to Exclude Expert Testimony of Eric Hines was prepared in the processing system Microsoft Word, with Times New Roman typeface, 12-point font.

3. Pursuant to the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70(g)), I certify that this memorandum of law complies with the word count limit set out in Rule 17, as it contains 3,028 words (excluding the parts of the brief exempted by Rule 17).

Dated: March 24, 2023
Dallas, Texas

By: */s/ Rebecca Loegering*
Rebecca Loegering