MOTION SEQUENCE NO.

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

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO EXCLUDE DEFENSE EXPERT OPINIONS OF NADEL, GRAHAM, REDA, AND CUNNINGHAM

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On behalf of the Plaintiff, the People of the State of New York ("Plaintiff"), the Office of Attorney General Letitia James ("OAG") respectfully submits this memorandum of law in support of its motion to exclude, in whole or in part as set forth in detail below, the opinions of the following expert witnesses proffered by Defendants the National Rifle Association of America, Wayne LaPierre, and John Frazer: J. Lawrence Cunningham, Michael Dennis Graham, Alan A. Nadel, and James F. Reda.

PRELIMINARY STATEMENT

Plaintiff's operative complaint contains detailed allegations of pervasive and persistent illegal conduct by the NRA and Executive Vice President ("EVP") Wayne LaPierre, General Counsel John Frazer, former Treasurer and Chief Financial Officer Wilson Phillips and former senior executive Joshua Powell.[1] *See* Second Am. Compl. ("SAC" or "Complaint"), NYSCEF 646. These allegations "describe in detail a pattern of exorbitant spending and expense reimbursement for the personal benefit of senior management, along with conflicts of interest, related party transactions, cover-ups, negligence, and retaliation against dissidents and whistleblowers who dared to investigate or complain, which siphoned millions of dollars away from the NRA's legitimate operations." Dec. & Order on Mot., NYSCEF 610. In particular, a long-standing practice of EVP LaPierre was to charge the NRA to travel by charter and private flights, even for personal purposes for himself and his family, use luxury hotels and black car services, grant sweetheart deals to preferred vendors, and pay high-priced consulting contracts to members of his inner circle. Defendants NRA, LaPierre and Frazer also embroiled the NRA in a failed bankruptcy filing that cost the NRA millions of dollars, impacted the NRA's credit and drew negative national attention. The NRA falsely reported information in their regulatory filings,

[1] Defendants LaPierre, Frazer, Phillips and Powell shall be referred to, collectively, as the "Individual Defendants."

ignored and retaliated against whistleblowers, and failed to properly administer the NRA's charitable assets.

Facing trial on such claims, the NRA, LaPierre and Frazer have proffered, collectively, nine experts who, in large part, seek to offer opinions that are irrelevant and, in addition, lack foundation and for which there is an insurmountable analytical gap between the facts considered and the conclusions reached such that the opinions should be excluded. This motion addresses the grounds for excluding or limiting the defense experts the NRA, LaPierre and Frazer seek to offer on the topics of executive compensation, excess benefits and the NRA's treatment for tax purposes of the costs of LaPierre's private charter air travel.[2]

Defendants NRA, LaPierre and Frazer each offer a separate expert, Alan A. Nadel, Michael Dennis Graham, and James F. Reda, respectively, to opine on the reasonableness of the NRA's executive compensation. These opinions, , are irrelevant to the claims and defenses in this action and should be excluded or, alternatively, pursuant to Commercial Division Rule 30, may be obviated by a written stipulation, saving valuable Court resources and time.

Defendant NRA also proffers expert witness Alan Nadel's additional opinions regarding excess benefits.[3] These opinions should be excluded because (1) Nadel follows no methodology and performs no actual review in assessing whether the transactions in question are excess benefits

[2] Plaintiff has addressed in a separate omnibus motion the grounds for exclusion of defense experts, who claim expertise in finance and economics.

[3] An "excess benefit" or "excess benefit transaction" is "a transaction in which an economic benefit is provided by an applicable tax-exempt organization, directly or indirectly, to or for the use of a disqualified person, and the value of the economic benefit provided by the organization exceeds the value of the consideration received by the organization." It includes "all consideration and benefits exchanged between or among the disqualified person and the applicable tax-exempt organization and all entities it controls." *See* https://www.irs.gov/charities-non-profits/charitable-organizations/intermediate-sanctions. A disqualified person is "any person who was in a position to exercise substantial influence over the affairs of the applicable tax-exempt organization." *See* https://www.irs.gov/charities-non-profits/charitable-organizations/disqualified-person-intermediate-sanctions. Here, the NRA reported in IRS 990 returns at Schedule L, filed with the IRS and with the N.Y. Office of the Attorney General, Charities Bureau, disclosing that each of the Individual Defendants received excess benefits in form of payment or reimbursement for personal expenses.

or reasonable expenses, (2) Nadel's opinions rely strictly on information conveyed from legal counsel, which is impermissible, and (3) Nadel's opinions rely upon an unsupportable interpretation of Treasury Regulation §1.132-5(m)(2)(ii).

Finally, the NRA offers J. Lawrence Cunningham to opine on the tax treatment under Treasury Regulation 26 C.F.R. §1.132(m)(2)(ii) of the NRA's payments for LaPierre's charter flights. Cunningham is not qualified to testify as a tax expert and has admitted the same in his deposition. To the extent that Cunningham purports to serve only as an expert regarding security, not only are his opinions irrelevant, he is merely testifying to a factual narrative provided to him through hearsay from the NRA's former head of security and by Defendant's counsel and such opinions are inadmissible.

LEGAL STANDARD

I. Governing Law on Admissibility of Expert Opinions

The admissibility and limits of expert testimony fall within the sound discretion of the trial court. *People v Oliver*, 45 Misc 3d 765, 776 (Sup. Ct. Kings Cnty. 2014). As gatekeepers in determining the admissibility of expert testimony, the court "must carefully consider whether the testimony is relevant and whether it will aid the jury, and also whether the proposed witness is in fact an expert in the area the defense seeks to explore." *Id.*

The first step in determining if an expert's testimony should be excluded is whether "the expert possesses the requisite skill, training, education, knowledge, or experience to render the opinion." *Rosen v. Tanning Loft,* 16 A.D.3d 480, 481 (2d Dep't 2005) (excluding opinion testimony of licensed engineer who had no "specialized knowledge, experience, training, or education with regard to tanning equipment so as to qualify him as an expert in the area"). For non-scientific expert testimony, the primary question which courts ask is whether the expert's opinion will help to clarify an issue calling for technical knowledge possessed by an expert and

beyond that of the typical juror. *Maliqi v. 17 E. 89th St. Tenants, Inc.*, 25 Misc. 3d 182, (Sup. Ct. Bronx Cnty. 2009) (plaintiff in workplace injury action was able to call an economics expert to offer non-scientific testimony about future lost wages.). Admissible non-scientific expert testimony is defined broadly, and trial courts have discretion in determining whether a particular expert will help the jury understand a topic. *See De Long v. Erie Cty.*, 60 N.Y.2d 296 (1983) (admission of non-scientific expert testimony regarding the market value of types of services performed by average housewife in burglary victim's circumstances was not abuse of discretion).

If the expert's proferred testimony satisfies the skill, training, and knowledge test, the Court must then decide whether the expert's testimony as to a particular matter is relevant and will assist the trier of fact. This is a "separate and distinct" foundational question "to determine whether the accepted methods were appropriately employed in a particular case." *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006). Expert testimony is admissible only if the proffering party establishes the "specific reliability of the procedures followed to generate the evidence proffered and . . . a foundation for the reception of the evidence at trial." *People v. Wesley*, 83 N.Y.2d 417, 429 (1994)); *accord Parker*, 7 N.Y.3d at 447 (the offering party must demonstrate that "the methodologies employed by [the] experts leads to a reliable result").

Expert testimony that lacks a proper foundation or is conclusory or speculative should not be admitted into evidence. *Parker*, 7 N.Y.3d at 449; *see also Hambsch v. New York City Transit Auth.*, 63 N.Y.2d 723, 725-26 (1984) (expert opinion cannot be based on speculation but "must be based on facts in the record or personally known to the witness" (*quoting Cassano v. Hagstrom*, 5 N.Y.2d 643, 646 (1959))). For this reason, hearsay evidence may not constitute the sole or principal basis for the expert's opinion. *Ciocca v. Park*, 21 A.D.3d 671 (3d Dep't 2005), *aff'd*, 5 N.Y.3d 835 (2005). Courts have routinely found expert opinions to be unacceptably speculative

and conclusory in cases where the opinion is "not supported by scientific or empirical data, does not set forth the foundation for the conclusion, fails to explain the basis of the opinion, lacks an adequate foundation to support the opinion, lacks factual support or foundation, or fails to consider relevant evidence." *M. U-M. v Millenium Hilton New York One Un Plaza*, 2022 WL 3155799 at *6 (Sup. Ct. N.Y. Cnty., August 8, 2022) (citations omitted).

An expert opinion must be relevant to be admissible. In other words, a court must find that it logically advances a material aspect of the case. *People v. Inoa*, 25 N.Y.3d 466, 472 (2015). "The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." *De Long v Erie County*, 60 N.Y.2d 296, 307 (1983). New York courts routinely exclude evidence when "its probative value is outweighed by … undue prejudice to the opposing party," and it has the result of "confusing the issues or misleading the jury." *People v. Willock*, 125 A.D.3d 901, 902 (2d Dep't 2015) (*quoting People v. Primo*, 96 N.Y.2d 351, 355 (2001)). "Evidence 'of merely slight, remote or conjectural significance' will ordinarily be insufficiently probative to outweigh these countervailing risks." *Primo,* 96 N.Y.2d at 355 (*quoting People v. Feldman*, 299 N.Y. 153, 169-70 (1949)).

An expert should be excluded if he is merely a vehicle for a factual narrative or provides the same testimony that can be provided by fact witnesses. *SEC v. Tourre,* 950 F. Supp.2d 666, 675 (S.D.N.Y. 2013); *see also U.S. v. Amuso*, 21 F.3d 1251, 1263 (2d Cir. 1994) (expert's testimony should be excluded if he "impermissibly mirrors the testimony offered by fact witnesses").

ARGUMENT

I. The Court Should Exclude the Opinions of Compensation Experts Nadel, Graham, and Reda Concerning the Purported Reasonableness of Compensation for the Individual Defendants

An expert opinion must be helpful to the trier of fact and relevant to be admissible. In other words, a court must find that it logically advances a material aspect of the case. *Inoa*, 25 N.Y.3d at 472. The compensation opinions of Nadel, Graham, and Reda should be excluded because opinions regarding the reasonableness of the Individual Defendants' compensation as compared to purportedly similar executives in allegedly comparable organizations is not relevant or helpful here.[4]

Each of these experts proffers opinions that the compensation awarded to the Individual Defendants was reasonable based on benchmarking against allegedly peer executives in peer organizations. But Plaintiff does not contend that NRA executive's reported compensation is outside the median range of pay for executives in comparable positions at nonprofits of comparable size. Untethered from executive performance and not including any analysis of the unreported and substantial excess benefits received by several of the Individual Defendants, their opinions unnecessary, not helpful to the trier of fact, and likely to be confusing to the jury.

The proffered executive compensation experts' opinions are excludable as irrelevant because they do not address the bases for Plaintiff's claims concerning compensation. The claims against the NRA and Individual Defendants concerning compensation are: (1) the NRA did not follow its own procedures in setting compensation (SAC ¶¶ 415-428); (2) the OCC and Board did not consider the full compensation, including excess benefits, like private flights for personal use, safaris, gift expenses, pass-through expenses paid by vendors and billed and paid by the NRA, and

[4] Citations to exhibits in this memorandum at to those annexed to the accompanying Affirmation of William Wang ("Wang Aff."). The reports of Alan Nadel, Michael Dennis Graham, and James F. Reda are annexed thereto as Exhibits A, B and C, respectively.

expensive meals, received by the Individual Defendants (SAC ¶¶429-444); and (3) the NRA did not accurately report either its manner of setting compensation or the full compensation to the Individual Defendants on the NRA's regulatory filings (*Id.*), all factual issues which this expert testimony does not address. Whether the NRA executives' reported compensation, without reference to their performance and their receipt of excess benefits, private travel, housing allowances, travel allowances, luxury meals, etc., was reasonable is simply not at issue.

II. The Court Should Exclude Alan Nadel's Opinions on Excess Benefit Transactions.

Nadel, the NRA's proffered expert, who, in addition to opining on executive compensation, also offers opinions in which he contends that whole categories of expenditures – specifically for purported security, transportation (including private air travel and black car services), entertainment, meals, gratuities and gifts, and even post-employment contracts and consulting agreements with NRA insiders – were reasonable and appropriate business expenses. Ex. A (Nadel Rep.) at 6. He further opines that notwithstanding the NRA's certified disclosures on IRS Form 990 for 2018 to 2020 that the NRA allowed LaPierre, the other Individual Defendants and additional NRA personnel to receive hundreds of thousands of dollars in excess benefits, a certain unquantified portion of those expenses were not excess benefits. Ex. D (Deposition of Alan Nadel ("Nadel Dep.")) at 111:21-112:5, 113:3-10.

Nadel's opinions on excess benefits should be excluded because (1) Nadel follows no sound process or methodology in reaching his conclusion, (2) his opinions are without a reliable foundation and are based almost entirely on hearsay evidence received from legal counsel, (3) his opinions are based on a misinterpretation of Treasury Regulation §1-132.5(m)(2)(ii), and (4) his opinions rest on assessment of security that strays beyond his area of expertise.

A. Nadel's Opinions Should be Excluded as Unreliable, Lacking Any Foundation or Methodology, and Relying Upon Hearsay Including Information Conveyed by NRA Counsel.

Courts have routinely found expert evidence to be unacceptably speculative and conclusory in cases where an opinion is "not supported by scientific or empirical data, does not set forth the foundation for the conclusion, fails to explain the basis of the opinion, lacks an adequate foundation to support the opinion, lacks factual support or foundation, or fails to consider relevant evidence." *M.U-M. v. Millenium Hilton New York One Un Plaza*, 2022 WL 3155799 at *6 (citations omitted).

Nadel applied no accepted methodology in coming to his conclusions about the purported legitimate business purpose of the expenses he addresses in his opinion. His process of evaluating the expenses entailed, by his own description, taking the nature of the expense alleged in Plaintiff's complaint or reported in the NRA's IRS Form 990 for 2018 or 2019 (e.g., travel, gift, meal), and considering whether there was an applicable IRS Code provision that *could* permit its treatment as a reasonable business expense. Ex. D (Nadel Dep.) at 88:14-25, 89:13-90:9, 92:23-94:2, 119:24-120:7. He conducted no independent review or analysis of particular expenses nor did he identify any process to analyze the particular expenses at issue. *Id*., at 116:3-15. He relied on second-hand hearsay information received orally from NRA counsel, which he did not independently confirm, and documents counsel selected for his review.

For example, Nadel assesses the propriety of the NRA's treatment of security, travel, gift and entertainment expenses, yet his only understanding of the NRA's methodology to calculate the excess benefits reported on its IRS 990s was advice from NRA counsel. He admitted that he "did not actually review a worksheet" that showed the NRA's calculation. *Id*., at 119:5-23. Nadel also did not conduct any testing, auditing, or verification of the transactions at issue. For example, when asked whether he verified documentation concerning a gift expense in determining that

certain transactions were improperly reported as excess benefit transactions when they were, in his opinion, reasonable business expenses, Nadel testified:

> I did not verify what he (LaPierre) – I did not verify with him or with – seeking any actual documentation, if that's what you're asking me…I am not conducting an audit, and I did not go so far as to verify or not to verify. ***I am taking what was provided to me by counsel, what I read in documents as being valid information, and based on my responses – my responses are based on what I have seen and what I have been advised***.

Id., at 121: 2-21 (emphasis added); *see also* 125:8-12. Nadel did not assess specific transactions to determine purpose, cost and reasonableness. *Id*., at 122:14-24, 123:16-124:16; 127:3-9, 128:20-25 (admitting that he did not verify whether hair and makeup expenses for Susan LaPierre were for legitimate NRA business purposes and relied on oral representations).

Nadel offered opinions that the NRA appropriately handled LaPierre's charter air travel expenses but could not identify any process he followed to reach his opinion, including whether there was a documented business purpose or whether a correct calculation was made to determine if a portion of the expense was a taxable excess benefit. Nadel acknowledged that he did not follow or use any process of his own in evaluating the transactions at issue, instead blindly accepting the NRA's purported "process" of calculating the excess benefits without reviewing documentation, worksheets or other evidence of the calculations. He relied instead on explanations provided by "the people at – at Brewer," the NRA's counsel. Ex. D (Nadel Dep.) at 139:6-16.

Nadel also admitted that with respect to his opinion on LaPierre's private travel and whether the corresponding expenses were properly and accurately reported as excess benefits or were reasonable business expenses, he did not know which specific flights were included in the NRA's calculation. *Id*., at 145:21-146:2. He also did not know how the NRA determined whether a flight was for a legitimate purpose and had not seen any documentation to describe the business purpose of the flights. *Id*., at 146:3-15; 152:4-11. He also opined on NRA payments for charter flights which were disclosed as excess benefit transactions on the NRA IRS Form 990 for 2020,

without knowing any information about these flights other than what is reported on Schedule L. *Id*., at 162:5-15; *see also* 166:12-23 (Nadel did not know whether the flights disclosed as excess benefits on the NRA IRA Form 990 for 2020 were for business or personal purposes).

Nadel did not review or verify any of the backup documentation supporting any of the transactions in question. In fact, Nadel relied on calculations made by other professionals, not his own. In his deposition, he testified:

> Q. Do you know how the amount of $43,743.83 was calculated?
>
> A. I was advised it was calculated – as I mentioned before, using the value of – the personal value of the trips being a trip being calculated in – in accordance with the SIFL rates.

Ex. D (Nadel Dep.) at 161:12-18.

In essence, Nadel is simply acting as a mouthpiece to impermissibly report counsel's opinion and their and other professionals' findings. As the Court held in *United States ex rel. Lutz v. Lab'y Corp. of Am. Holdings*: "[t]he bottom line is that the burden of proof is on the party offering expert testimony to demonstrate that the opinions presented are based on reliable data, the expert is utilizing reliable principles, and methods and the principles are reliably applied. [The proffered expert's] testimony is undermined by the absence of reliable data and the reliance on assumptions provided by Relators' counsel rather than as a result of the application of professional expertise." 2021 WL 2801736, at *5 (D.S.C. July 6, 2021), *clarified on denial of reconsideration*, 2022 WL 688988 (D.S.C. Feb. 23, 2022). As in *Lutz*, Nadel did not undertake an independent reviewing of the transactions and expenses applying a method that would be used in his professional area of expertise.

As illustrated above, the court should exclude Nadel's testimony as speculative, unreliable and conclusory because Nadel cannot established that his opinion is based on reliable methodology

given that he performed no independent analysis of his own or of the NRA's determination of whether the expenses at issues were properly and accurately reported as excess benefit transactions. Instead, because Nadel's opinions are based on assumptions provided by legal counsel, Nadel's opinions on the NRA's treatment of expenses should be excluded.

B. Nadel's opinion that excess benefit transactions relating to charter flights were actually reasonable expenses is based on a misinterpretation of Treasury Regulation 26 C.F.R. §1.132-5(m)(2)(ii) that he is unqualified to provide.

1. Relevant Factual Background

Since at least 2010, LaPierre, his family and friends have flown private charter jets both for business and personal reasons, at the cost of $11 million paid for by Defendant NRA. *See* Ex. E (Hines Report) at ¶ 278; Ex. F (Gayle Stanford Dep.) at 14:6-20. LaPierre contends that his private air travel is required because of security concerns. He, however, has not flown private exclusively during this period, voluntarily taking personal trips on commercial airlines for vacations, in many instances for vacations paid for by NRA vendor David McKenzie. Ex. G (Wayne LaPierre Dep.) Day 1 at 243:21–244:19. He also has not followed like security restrictions on his other activities, such as attending major sporting events in public stadiums without security detail, and driving himself from home to work every day without a driver or an escort. Ex. H, (Wayne LaPierre Bankruptcy Dep.) at 9:13-15.

The NRA has long had a travel expense policy (Ex. I, NRA Travel and Business Expenses Reimbursement Policy, NRANYAGCOMMDIV-00092307 et seq.) which does not permit or encompass private or charter travel. The Board has never approved LaPierre's private travel arrangement or passed a resolution permitting the practice.

The tax consequences of private and charter air travel for the executive receiving such travel benefits from his employer is governed by Treasury regulation 26 C.F.R. §1.132-5(m)(2), which requires the provision of charter or private flights to meet certain strict standards that are

set forth within the regulation. If these standards are not met, expenses associated with such travel are attributable to the employee as income for tax purposes. As set forth below, under §1.132-5(m)(2), a bona fide business-oriented security concern justifying an employer's payment for private plane travel will be deemed to exist if the employer establishes an overall security program as defined in §1.132-5(m)(2)(iii) prior to authorizing such travel, or that there is an independent security study in place pursuant to subsection (iv) which indicates that an overall security program is not necessary when there is a qualifying independent security study in place which is consistently followed. At issue here is whether and to what extent LaPierre received the cost of those private flights as income under the relevant tax regulation without the NRA having complied with §1.132-5(m)(2). This is a question of tax law. The NRA has attempted to prove compliance with the regulation's mandates through the testimony of Nadel, who offers inadmissible opinions, as set forth below, and through the testimony of J. Lawrence Cunningham, a security and premises liability expert who admittedly lacks the appropriate training, education and expertise to so opine. *See* Point III, infra.

2. Nadel's Opinions on Excess Benefits Relating to Charter Travel.

Nadel opines on the NRA's reporting of excess benefits relating to its provision of charter travel for LaPierre, his family and friends for business and personal purposes. In so rendering this opinion, Nadel misapplies 26 C.F.R. §1.132-5(m)(2)(ii), which sets out under what circumstances such payments -when made for a "bona fide business-oriented security concern"- may be excludable from taxable compensation by the employee. 26 §C.F.R. 1.132-5(m)(2)(1). For the Court's reference, 26 §C.F.R. 1.132-5(m)(2), which defines "bona fide security concern" is set forth in relevant part as Addendum 1 to this memorandum.

Section 1.132-5(m)(2)(ii) states that "no bona fide business-oriented security concern [permitting payment for certain security related travel expenses] will be deemed to exist" unless the employer establishes that an overall security program under §1.132-5(m)(2)(iii) or an independent security study has been implemented in compliance with §1.132-5(m)(2)(iv). Yet despite this plain statement, Nadel takes a position that §1.132-5(m)(2)(ii) can be satisfied without regard to subsections (iii) and (iv).[5] Asked whether the NRA met the requirements of subsection (iii), Nadel conceded They may not have." Ex. D (Nadel Dep.) at 203:21-204:4. Confronted with his concessions that the requirements of an overall security program under subsection (iii) was not met and that an independent security study under subsection (iv) was not even performed until 2019, Nadel's response is that "whether or not they were met, I don't -- is not important. I think -- once we satisfied the requirements of little ii, we are finished." *Id.*, at 205:6-18. Nadel's unsupported conclusion that §1.132-5(m)(2)(ii) can be satisfied without satisfying subsections (iii) or (iv) is facially invalid and unsupported by any authority. *Id.*, at 209: 11-19 *see also* 207:5-20.

III. The NRA's Proffered Expert on the Tax Treatment of LaPierre's Private Travel Should Be Excluded

The NRA has proffered as an expert witness J. Lawrence Cunningham, a former secret service agent. Cunningham is an asserted security and premises liability expert. Although he admits that he has no tax training, education, or expertise, in this case, Cunningham offers opinions relating to the tax treatment of private flights taken by Defendant LaPierre. Cunningham also offers his interpretation of an IRS regulation in concluding that the NRA satisfied certain IRS requirements for an employer to pay for the private or charter travel of an employee without all or part of those payments representation potential excess benefits or compensation to that

[5] Plaintiff believes the determination of whether §1.132-5(m)(2)(ii) has been satisfied is ultimately a determination to be made by the Court.

employee—an opinion that plainly usurps the role of the Court, is ungrounded in any foundation, expertise or methodology, and is predicated on a facially invalid reading of the law. To the extent that Cunningham testifies about security threats to LaPierre, he is simply conveying information given to him by the NRA's former head of security, and his testimony would constitute inadmissible hearsay. Further, such testimony has no relevance to the claims at issue in this litigation, other than in regard to the tax treatment of such expenses, on which Cunningham lacks any expertise. *See* Ex. J (Cunningham Report) at 6, ¶¶ 19, 20.

A. Cunningham is Not Qualified as a Tax Expert and His Opinions State an Improper Legal Conclusion.

Despite readily admitting "I'm not a tax expert" in his deposition, Cunningham offers opinions relating to the application of an IRS regulation to the facts of this case in both his opening and rebuttal reports. Ex J. (Cunningham Report); Ex. K (Cunningham Rebuttal Report). In his opening report, Cunningham opines that the NRA's payment for private or charter flights for LaPierre, his wife, and his family complies with 26 C.F.R. 1.132-5(m)(2)(i). For example, in his opening report, Cunningham states:

> 19. I believe that the NRA had an existing, ongoing, and increasing bona fide business-oriented security risk since at least 2012 through 2018, which was met by security strategy, plans and countermeasures to address the significant threats facing the organization and specifically, Mr. LaPierre.
>
> 20. During this time period, the NRA was in compliance with paragraph (m)(2)(i), as defined in Title 26, Code of Federal Regulations, Treasury Regulation Section 1.132-5 [26 CFR1.132-5] . . . .

Ex. J (Cunningham Report) p. 6, paras 19, 20.

Cunningham is not qualified as a tax expert and his opinions state an improper legal conclusion. He clearly fails the first step of the expert analysis, an assessment of whether "the expert possesses the requisite skill, training, education, knowledge, or experience to render the opinion." *Rosen,* 16 A.D.3d at 481 (excluding opinion testimony of licensed engineer who had no

"specialized knowledge, experience, training, or education with regard to tanning equipment so as to qualify him as an expert in the area"). New York courts have regularly excluded opinions by witnesses who stray beyond their expertise or experience. *See, e.g., Hokenson v. Sears, Roebuck & Co.,* 159 A.D.3d 1501, 1502 (4th Dep't 2018)(affirming the exclusion of opinions by an occupational safety and health consultant who was not qualified to opine about alleged defects in a ladder). Here, Cunningham readily admits that he is not a tax expert:

> Q. There is nothing in your profile related to the rendering of tax opinions; is that correct?
>
> MS. EISENBERG: Objection.
>
> A. That is correct.
>
> Q. Okay. That is because you're not an expert in that area; correct?
>
> A. I am not a tax expert.
>
> Q. Okay. You have never been recognized as an expert in any court in tax, have you?
>
> A. No, I have not.

Ex. L (Cunningham Dep.) at 27:2-13: Cunningham made that assertion numerous times. *See, e.g., Id*. at 27:22–29:18. To the extent that Cunningham opines on whether the requirements of 26 C.F.R. §1.132-5(m) are met, such opinion is not defensible and should be excluded because Cunningham's expertise in security and premises liability do not qualify him as an expert to opine on interpretations of IRS Treasury regulations such as 26 §C.F.R. 1.132-5(m).

B. Cunningham's Opinions Are Irrelevant And His Interpretation Of The Regulation Is Facially Invalid.

The Cunningham Reports do not clearly describe all that Cunningham purports to opine upon, but his deposition testimony clarified what he was tasked with:

> Q. Were you asked specifically to render an opinion that shows compliance with that treasury regulation?

> MS. EISENBERG: Objection.
>
> A. That's -- to me, that's a broad question. I was asked to render an opinion that there was a viable threat of bodily harm, a bona fide threat of serious body harm.

Ex. L (Cunningham Dep.) at 18:19-19:3.

Separated from compliance with 26 §C.F.R. 1.132-5(m), a statement of alleged security threats faced by Wayne LaPierre is irrelevant to any issue in this case. Whether LaPierre or anyone else within the NRA has suffered threats of bodily harm is not at issue. LaPierre and former NRA head of security Jim Staples can testify regarding any threats he received even if this were at issue. Instead, what is at issue is whether the NRA met the requirements of 26 §C.F.R. 1.132-5(m)(2) such that its position with regard to the tax treatment of the millions of dollars it paid for charter flights for LaPierre, his family and friends is correct. Such a showing depends upon the interpretation and application of §1.132-5(m)(2)(ii), *i.e.,* whether the NRA had in effect for the entire period from 2012 to the present an overall security program or an independent security study which was reasonable and consistently applied. Thus, whether LaPierre faced a "viable threat of bodily harm" is, by itself, irrelevant to determining whether his private flights meet the express, specific requirements of the regulation. Cunningham seems to have understood that to a degree, stating in his deposition that:

> Q. Your -- your opinion offers that the NRA is in compliance with the first one, that there's a bona fide security concern; is that correct?
>
> A. Yes, it is. But I would like to add to that. To make that decision -- to make that opinion, I had to consider the other three Romanettes.

Ex. L (Cunningham Dep.) at 18:3-11.

Indeed, Cunningham also opines:

> Opinion 2: I believe the NRA security department's strategy, plans and countermeasures provide a robust overall securty [sic] program to address the significant threats facing Mr. LaPierre.

Ex. J (Cunningham Report) at 9. and

> Moreover, the NRA has managed a robust security program to address significant threats to Mr. LaPierre since at least 2012.

Ex. K (Cunningham Rebuttal Report) at 2.

These statements would seemingly imply that in Cunningham's opinion, the NRA also meets the requirements of §1.132-5(m)(2)(ii) and (iii) (again, conclusions he is not qualified to make by training or experience to make), despite the fact that under questioning, Cunningham admitted that the NRA's security program does not satisfy the express provisions of §1.132-5(m)(2)(iii), specifically with respect to a bodyguard/chauffeur. Cunningham admits the same in his deposition:

> Is there a bodyguard, chauffeur per se? No. But more similar methods --they have similar methods to accomplish the same thing with all of the components I discussed earlier.

Ex. L (Cunningham Dep.) at 215:3-7. The regulation at (m)(2)(iii) requires that for there to be an overall security program, security must be

> **provided to protect the employee on a 24-hour basis**. The employee must be protected while at the employee's residence, while commuting to and from the employee's workplace, and while at the employee's workplace. In addition, **the employee must be protected while traveling both at home and away from home**, whether for business or personal purposes. **An overall security program must include the provision of a bodyguard/chauffeur who is trained in evasive driving techniques; an automobile specially equipped for security; guards, metal detectors, alarms, or similar methods of controlling access to the employee's workplace and residence;** and, in appropriate cases, flights on the employer's aircraft for business and personal reasons.

(emphasis added). To escape this obvious problem that the NRA does not comply with these requirements, Cunningham next asserts that in his reading of the regulation, the word "or" provides the NRA with flexibility. Cunningham offers that the highlighted clause applies to the entire paragraph, rather than to the last clause following the semicolon ("guards, metal detectors, alarms or similar methods of controlling access to the employee's workplace and residence"):

> A. Okay. Yes, this requires explanation. What you did not read was the "or" in my last sentence. "Or similar methods of controlling access to the employee's workplace and residence, and in appropriate cases lights on the employee's aircraft for business and personal reasons."

Ex. L (Cunningham Dep.) at 66:2-10.

Cunningham further testifies:

> A. So, there was a little bit of flexibility in my view in Romanette (iii) that will allow for that.
>
> Q. Sir, does Romanette (iii) require a -- the provision of a bodyguard/chauffeur who is trained in evasive-driving techniques?
>
> MS. EISENBERG: Objection.
>
> A. No. If you read the "or." It says "or." "Or similar methods of controlling access to the employee workplace and residence, and the appropriate places flights of the employer's aircraft for business and personal reasons. So, no. Not necessarily.

Id. at 73:6-23. *See also id*. at 67:21-22, 70:7-12, 74:25-75:10.

This nonsensical reading of the regulation by someone with no tax expertise and no experience in the law or statutory interpretation is facially invalid, and for that reason, the opinion should also be excluded.

C. Cunningham conducted no independent review of NRA's security system, relying solely on hearsay.

Hearsay evidence may not constitute the sole or principal basis for the expert's opinion. *Ciocca,* 21 A.D.3d 671. Cunningham attested that much of his opinion about the overall strength

of the NRA's security systems was derived from conversations with James Staples, the NRA's director of security:

> …. Also, in talking to Mr. Staples and so forth, they had elements of a security bubble and a 24/7 component of security all the time. They adjusted it as they went. This -- and, again, I'm not a lawyer -- I certainly didn't write this, but this is a little bit myopic, quite honestly. This person does not understand what dynamic protection security is all about this, whoever wrote this. There's a little wiggle room here for the Commissioner in the "or" but candidly, um, they do not meet the requirements set forth. Well, very, very strictly speaking and a quick read, you might say that. I'm of a different opinion.

Id. at 212:20-213:13. Cunningham did not conduct an independent study of the NRA's security system, although he testified that he reviewed other security studies, and at critical parts, actually disagreed with the conclusions of those studies. Accordingly, Cunningham's opinion of the NRA's security system relies heavily on hearsay and should be excluded on that basis as well.

D. Cunningham's Testimony Is Limited To Whether LaPierre Faced A Security Threat, Which Is Fact Testimony And Improper For Expert Opinion.

An expert should be excluded if he is merely a vehicle for a factual narrative or provides the same testimony that was otherwise provided by fact witnesses. *Tourre*, 950 F. Supp.2d at 675; *Amuso*, 21 F.3d at 1263 (expert's testimony should be excluded if he "impermissibly mirrors the testimony offered by fact witnesses"). The crux of Cunningham's testimony is that LaPierre faced security threats. As Cunningham testified to "I was asked to render an opinion that there was a viable threat of bodily harm, a bona fide threat of serious body harm." Ex. L (Cunningham Dep.) at 18:19-19:3. LaPierre's security status is not at issue in this case. Whether LaPierre received security threats is not a relevant issue and to the extent that any of those become concerns, LaPierre or NRA Security Director James Staples can testify directly about the issue and no "expert" is

needed to transmit those facts with the gloss of greater gravitas by way of his purported expert credentials. Cunningham's opinions should be excluded in full.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant this motion in its entirety, together with such other and further relief as the Court deems just, proper and appropriate.

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New York, New York

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