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 RYAN SULLIVAN, BRUCE BLACKER, MATTHEW LERNER, AND AMISH MEHTA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATE STATUTES

MISCELLANEOUS AUTHORITIES

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 consolidated motion to exclude in their entirety the opinions of the following expert witnesses proffered by Defendant the National Rifle Association of America: Ryan Sullivan, Bruce Blacker, Matthew Lerner, and Amish Mehta.

PRELIMINARY STATEMENT

The NRA has proffered four expert witnesses—Ryan Sullivan, Bruce Blacker, Matthew Lerner, and Amish Mehta ("Financial Experts")—to testify on the NRA's internal controls, purported course correction, and Plaintiff's requested relief.[1] The NRA does not proffer experts who, through their special expertise and application of a reliable methodology, would help the Court and jury determine whether Plaintiff's allegations are true or false, or whether the alleged misconduct occurred or not. They do not offer an auditor who has audited the NRA's finances, an accountant who has actually tested the operating effectiveness of the NRA's internal controls, or a governance expert who will opine about standards of care within the not-for-profit industry. Rather, they bring in multiple, overlapping experts who do little to no analysis, auditing, or testing of their own to opine, without consideration of the evidence of misconduct, that the NRA's purported course correction is well underway, and there is no need for the prospective injunctive relief sought by Plaintiff.

These opinions demonstrate a stunning lack of foundation, are methodologically unsound, usurp the role of the court and the jury, parrot factual narratives and arguments advanced by defense counsel, and are duplicative and repetitive. The proffered experts are also unqualified to

[1] Defendants the NRA, John Frazer, and Wayne LaPierre have proffered nine expert witnesses in this case. This memorandum addresses four of those experts. Plaintiff has separately moved to exclude other experts proffered by these defendants to offer opinions on executive compensation, excess benefits and the NRA's treatment for tax purposes of the costs of LaPierre's private charter air travel.

offer the opinions they are offering; in some instances, the proffered experts explicitly admit that they lack expertise in the areas for which they offer opinions.

The risk for collateral trials within trials on the infirm "methodologies" utilized by these experts is great, as is the risk of jury confusion. For the reasons set forth below, the opinions of the Financial Experts should be excluded in their entirety. Plaintiff requests a *Frye* hearing to the extent this motion is not granted.

BACKGROUND

I. Plaintiff's Claims

This enforcement action is about decades of widespread abuse and wrongdoing within the NRA. Plaintiff's "allegations in this case, if proven, tell a grim story of greed, self-dealing, and lax financial oversight at the highest levels of the National Rifle Association. They 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. at 1, NYSCEF 610, Mar. 3, 2022. The Complaint seeks declaratory and injunctive relief against the NRA—including the appointment of an independent compliance monitor and independent governance expert—and restitution, disgorgement and other relief that is monetary in nature (to be repaid to the NRA) from four current and former NRA officers, as well as their removal from NRA employment and a fiduciary bar. *See* Second Am. Compl. ("SAC" or "Complaint"), NYSCEF 646.

As this Court has observed, the Complaint centers on the NRA's governance under Wayne LaPierre's leadership:

> The NYAG alleges that LaPierre routinely abused his authority as Executive Vice President of the NRA to cause the NRA to improperly incur and reimburse LaPierre for expenses that were for LaPierre's personal benefit and violated NRA policy, including private jet travel for purely personal reasons; trips to the Bahamas to vacation on a yacht owned by the principal of numerous NRA vendors; use of a travel consultant for costly black car services; gifts for favored friends and vendors; lucrative consulting contracts for ex-employees and board members; and excessive security costs (id. ¶ 144)."

Dec. & Order on Mot. at 5, NYSCEF 610, Mar. 3, 2022.

Defendants have proffered nine expert witnesses to testify at trial. The opinions they intend to offer are neither relevant nor helpful to the trier of fact or this Court in deciding the issues in this case. This motion addresses four of the NRA's proffered experts offering opinions on the NRA's internal controls relating to finance and governance. In a separate motion, Plaintiff addresses certain expert evidence offered on compensation, excess benefits, and the NRA's treatment for tax purposes of the costs of LaPierre's private charter air travel.

II. The NRA's Financial Experts

The NRA has proffered the following four Financial Experts:

- **Ryan Sullivan and Bruce L. Blacker.** Sullivan and Blacker submitted the same expert report in this case. They relied on the same information, used the same "methodology", and reached the same opinions. Conley Aff. Ex. A (Intensity Report).[2] As discussed move fully below, their proffered testimony is needlessly cumulative. Blacker is a Certified Public Accountant; Sullivan is an economist. Both have experience quantifying damages in intellectual property cases—a task they did not perform here. Blacker and Sullivan opine that—based on a so-called "accounting and economic framework" they invented out of whole cloth for this case—the misconduct alleged by Plaintiff is immaterial and the relief sought by Plaintiff is unwarranted and not beneficial to the NRA. The basis for this conclusion is not rooted in the application of economic or accounting principles, but rather on the recitation and bolstering of testimony from NRA fact witnesses who claim the issues raised by Plaintiff have been or are being addressed. In reaching their conclusions, they seek to opine on industry standards in the nonprofit sector, but neither has the requisite experience to do so. Their conclusions go solely to the issue of what remedy should be imposed, and have no bearing on whether the defendants should be held liable in this case.

[2] All exhibit references are exhibits to the Affirmation of Jonathan Conley filed with this memorandum.

- **Matthew Lerner.** Matthew Lerner is a certified internal auditor who intends to offer opinions on the design and operating effectiveness of the NRA's "internal controls," that is, the policies, procedures and practices designed to detect and prevent misconduct within an organization and to help to protect an organization's assets and assist in their proper management. Ex. B (Lerner Report). As discussed more fully below, Lerner admits that he did not comply with the professional standards of a certified internal auditor in his analysis, and that, in testing the operating effectiveness of the NRA's internal controls, he did not perform the testing that would typically be required. Lerner randomly chose a cut-off date of December 31, 2020, for his purported analysis with no methodological basis. Lerner's methodology is unsound, but even if his analysis had been reliable—and it was not—his opinions would still be wholly irrelevant given the limited scope of his review. Given the shortcomings in the scope and approach of Lerner's analysis, his unreliable and irrelevant conclusions would not aid the trier of fact or this Court in determining the issues of liability and remedy in this case. And Lerner's confusing, arbitrary temporal limitations to his opinion would be confusing to a jury, to Plaintiff's prejudice.

- **Amish Mehta.** Amish Mehta is Certified Public Cccountant who intends to opine on the NRA's conflict-of-interest, related-party-transaction, and whistleblower policies—subjects in which, by his own admission, he has no experience other than identifying their existence in the course of a financial-statement audit. Ex. C (Mehta Report). As discussed more fully below, he has never drafted, evaluated, or advised clients on the implementation of such policies. Like Lerner, Mehta randomly chose a narrow time frame for his analysis, limiting his "focus" to a two-year period (2019 and 2020). All of Mehta's opinions are irrelevant. It is undisputed that the NRA had written conflict-of-interest and related-party-transaction policies in 2019 and 2020. What matters is that the NRA failed to implement and enforce those policies for several years. Mehta's circumscribed review fails to address that issue. It also risks confusing the jury given that the actual relevant period of this action involves allegations of misconduct spanning several years both before and after the two years he arbitrarily selected for his review. And Mehta's conclusion that Plaintiff's requested relief is unwarranted is disconnected from the analysis he performed.

LEGAL STANDARDS

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 determine that three principal requirements are met: the expert must be qualified, the expert's opinion must be relevant and

helpful to the trier of fact, and the expert's opinion must be reliable. *Id.* at 776-77. The proponent of expert testimony bears the burden of establishing that the admissibility requirements under New York law are satisfied. *See, e.g.*, *Schechter v. 3320 Holding LLC*, 64 A.D.3d 446, 451 (1st Dep't 2009) (party seeking to qualify an expert bears the burden of establishing the expert possessed sufficient skill, knowledge, and experience).

First, the expert must "possess[] 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). New York courts have thus regularly excluded opinions by witnesses who stray beyond their expertise or experience. *See, e.g., Schechter*, 64 A.D.3d at 447 (an expert's experience in elevator maintenance and repair "does not, standing alone, establish that he can render a reliable expert opinion" on the cause of an elevator's safety device failing); *Daniele v. Pain Mgmt. Ctr. of Long Island*, 168 A.D.3d 672, 677 (2d Dep't 2019) (trial court erred in permitting a pediatrician and an anesthesiologist to testify as experts in emergency medicine); *see also Joachim v. Flanzig,* 773 N.Y.S.2d 267, 274–75 (Sup. Ct. Nassau Cnty. 2004) (defendant's expert, an accountant, "has no legal training, education, skill, knowledge or experience" and therefore "is not qualified to render an opinion … relating to the legal relationship among" the parties).

Second, the expert opinion must be relevant and helpful to a trier of fact. To satisfy this requirement, the opinion must "help to clarify an issue calling for professional or technical knowledge … beyond the ken of the typical juror," *De Long v. Erie Cnty.,* 60 N.Y.2d 296, 307 (1983), and logically advance a material aspect of the case, *People v. Inoa*, 25 N.Y.3d 466, 472 (2015). Expert testimony is not relevant when the same information can be elicited through direct or cross-examination of fact witnesses or presented through argument of counsel. *See, e.g.*, *Inoa*, 25 N.Y.3d at 472 ("[W]hen … experts come to court and simply disgorge their factual knowledge

to the jury, the experts are no longer aiding the jury in its factfinding; they are instructing the jury on the existence of the facts needed to satisfy the elements of the charged offense"); *S.E.C. v. Tourre*, 950 F. Supp. 2d 666, 675 (S.D.N.Y. 2013) (It is "inappropriate for experts to become a vehicle for factual narrative" because it "does not convey opinions based on an expert's knowledge and expertise; nor is such a narration traceable to a reliable methodology." (citations omitted)).

Nor can expert testimony invade the province of the Court to decide questions of law or of the jury to draw factual inferences and conclusions. *Franco v. Jay Cee of New York Corp.*, 36 A.D.3d 445, 448 (1st Dep't 2007) ("[E]xpert testimony regarding the meaning and applicability of the law" improperly intrudes on "the province of the court."); *Nevins v. Great Atl. & Pac. Tea Co.*, 164 A.D.2d 807, 809 (1st Dep't 1990) ("Absent an inability or incompetence of jurors to comprehend the issues and evaluate the evidence, the opinions of experts 'which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper'" (citations omitted)).

Even if a court determines an expert's testimony to be relevant and not a legal conclusion, it should be excluded 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." *Id.* (*quoting People v. Feldman*, 299 N.Y. 153, 169-70 (1949)). And expert opinions that are repetitive or cumulative should be precluded "to avoid unnecessary imposition on the jury …." *Greenberg v. Spitzer*, 2020 WL 1561376, at *7 (Sup. Ct. Putnam Cnty. Mar. 06, 2020).

Third, the expert opinion must be reliable. To be reliable, the expert must employ a reliable methodology and cannot cherry-pick facts, ignore key evidence, rely principally on hearsay, or use incorrect factual assumptions. *People v. Wesley*, 83 N.Y.2d 417, 429 (1994) (the proffering party must establish the "specific reliability of the procedures followed to generate the evidence proffered and … a foundation for the reception of the evidence at trial."); *Hambsch v. N.Y.C. 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)); *Ciocca v. Park*, 21 A.D.3d 671 (3d Dep't 2005, *aff'd*, 5 N.Y.3d 835 (2005) (hearsay evidence may not constitute the sole or principal basis for the expert's opinion); *accord Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 447 (2006) (the offering party must demonstrate that "the methodologies employed by [the] experts lead to a reliable result").

An expert's conclusions must also be sufficiently connected to the data on which the expert relies. This is a "separate and distinct" foundational question "to determine whether the accepted methods were appropriately employed in a particular case." *Parker*, 7 N.Y.3d at 447. "Thus, even though the expert is using reliable principles and methods …, a court may exclude the expert's opinion if 'there is simply too great an analytical gap between the data and the opinion proffered,'" or if the opinion "is connected to existing data only by the *ipse dixit* of the expert." *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 781 (2014) (*quoting Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). An expert opinion will be deemed unacceptably speculative and conclusory when it 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 (Sup. Ct. N.Y. Cnty. 2022)

(citations omitted) (collecting cases); *see also Parker*, 7 N.Y.3d at 449 (a court need not accept testimony that is "general, subjective, and conclusory" in nature).

ARGUMENT

The NRA has proffered four experts—three accountants and an economist—to deliver the same argument to the trier of fact at trial: the NRA's purported course correction has fixed, or is fixing, any alleged financial and governance misconduct within the organization—as evidenced by "clean" financial-statement audits from the NRA's external auditors and select testimony of NRA fact witnesses—so Plaintiff's requested remedies are unwarranted. For the reasons that follow, the opinions of the NRA's Financial Experts should be excluded in their entirety.

I. The Court should exclude the opinions of Bruce Blacker and Ryan Sullivan, Ph.D. in their entirety.

The NRA intends to call Bruce Blacker and Ryan Sullivan, Ph.D. of Intensity, LLC as testifying experts in this case.[3] Bruce Blacker is a Certified Public Accountant. Blacker asserts that he "specializes in the application of accounting, economic, and financial principles to complex financial disputes," and that he "frequently performs financial analyses using large databases of information and complex computer models." Ex. A (Intensity Report) at 4. Sullivan is an economist and the President of Intensity, LLC. In addition to overseeing Intensity, LLC, Sullivan "works with companies on strategic decision making," which he has described as "involv[ing] predictive modeling, valuation, and licensing," and "in disputes … in the areas of intellectual property, technology, and competition."[4]

Blacker and Sullivan summarized the four opinions in their opening report as follows:

[3] The NRA has also engaged Blacker and Sullivan in a pending charities enforcement action in the District of Columbia, *District of Columbia v. NRA Foundation, Inc. & NRA*, 2020 CA 003453 B (D.C. Super. Ct.) ("D.C. Action").

[4] Ex. D (Sullivan trial testimony in *Ethicon Endo-Surgery, Inc.*, *et al. v. Covidien LP, et al.*) at 75:3-10.

1. **Opinion #1.** Evaluating the reasonableness of the NRA's control efforts is, in part, an economics and accounting issue that benefits from principles of materiality, prudent businessperson judgments, and cost-benefit analysis.

2. **Opinion #2.** Evidence from industry, including general auditing practices and standard IRS filing practices, demonstrates that the economic and accounting framework addresses real-world considerations faced by industry participants.

3. **Opinion #3.** When past actions and disclosures of the NRA are evaluated based on an appropriate industry standard, and considering the NRA's subsequent corrective actions, Plaintiff's allegations generally represent immaterial transactions or correctable transactions that do not warrant the requested relief.

4. **Opinion #4.** Plaintiff's requested relief is not beneficial and is not warranted.

Ex. A (Intensity Report) at p. 3 ¶ 4. In sum, Blacker and Sullivan, without assessing, evaluating, or considering past violations of New York law and NRA policies as alleged in the Complaint, offer opinions that the appointment of an independent compliance monitor is unwarranted and would not be beneficial to the NRA because Plaintiff's allegations of misconduct are immaterial or correctable.

In formulating their opinions, Blacker and Sullivan purported to create a unique "economic and accounting framework" for this case that relies on general principles of materiality, prudent business judgment, and cost-benefit analysis. (Opinion #1). Based on this "framework" and "industry evidence" from the nonprofit sector—which purportedly includes IRS filing requirements and certain auditing standards (Opinion #2)—Blacker and Sullivan conclude the relief Plaintiff seeks against the NRA is unwarranted. (Opinions # 3 and 4). *Id.*

Blacker and Sullivan's opinions should be excluded in their entirety because they are duplicative and cumulative, based on an unreliable methodology, assert legal conclusions, and parrot lay witness testimony and other cherry-picked evidence disconnected from their claimed expertise.

A. Blacker and Sullivan's opinions are duplicative and cumulative.

Blacker and Sullivan submitted the same expert reports in this case. *Id.* They relied on the same information, performed the same analysis, and reached the same opinions.[5] As set forth below, the opinions should be precluded regardless of which witness offers the opinions. But even if any portion of their proffered opinions is admitted, it would be needlessly cumulative to allow both to testify. At a minimum, one of them should be excluded from testifying at trial.

B. Sullivan and Blacker's opinions are irrelevant and unhelpful to the Court and the jury because they are based on an unreliable methodology, assert legal conclusions, and parrot and bolster NRA fact witness testimony on lay subjects that neither the Court nor the jury need expert assistance to understand.

i. Blacker and Sullivan's opinions are focused solely on Plaintiff's requested relief against the NRA.

Plaintiff brings four claims against the NRA for the improper administration of charitable assets, wrongful related party transactions, false filings, and violation of whistleblower protections. *See* SAC at pp. 160-62, 172-74. None of Blacker and Sullivan's opinions would assist a jury in determining liability for these claims.

Blacker and Sullivan do not contest any of the allegations in the Complaint. *See., e.g.*, Intensity Report at 3 ¶ 4; Ex. E (Blacker Dep.) at 40:15-41:20, 123:24-125:6, 256:9-23, 274:14-275:6. Blacker and Sullivan did not examine and do not dispute that wrongful related-party transactions occurred, that the NRA's regulatory filings contained material inaccuracies, or that NRA executives wasted NRA funds and violated NRA policy (*id.*)—issues that go to the heart of whether the NRA should be found liable in this case.

[5] Because Blacker and Sullivan reviewed the same information, applied the same analysis, and reached identical opinions set forth in the same, co-authored reports—*see, e.g.*, Ex. E (Blacker Dep.) at 183:7-185:14; Ex. F (Sullivan Dep.) at 111:13-112:22, 123:2-13; Ex. G (Intensity Rebuttal Report) at p. 1 ¶ 2—any representations made by Blacker or Sullivan in their respective depositions about the substance and bases of their opinions apply equally to each other.

Instead, citing steps the NRA has purportedly taken in its course correction, Blacker and Sullivan conclude that Plaintiff's requested relief against the NRA is unwarranted. But this has no bearing on the NRA's liability. Consequently, none of Blacker and Sullivan's opinions would assist a jury in determining liability for Plaintiff's four claims against the NRA. The issue of remedies is the Court's domain, and any evidence on these issues before the jury is inappropriate, prejudicial to Plaintiff, and would only lead to jury confusion. Consequently, any argument or evidence about potential remedies before the jury is improper and should be excluded.

ii. Blacker and Sullivan's opinions rely on a flawed and opaque methodology invented for this case to arrive at impermissible legal conclusions.

Blacker and Sullivan's invented methodology, to the extent there is one, is limited to describing in vague terms a "framework" derived from general accounting and economic principles and baldly stating that Plaintiff's requested relief is unwarranted. This methodology is not reliable for four principal reasons.

First, Blacker and Sullivan created their "accounting and economic" framework for this litigation, without any industry or academic source supporting their methodology. As Blacker explained in his deposition, he and Sullivan "developed a framework from an accounting and an economic perspective" for this case to evaluate the transactions identified in the Complaint, Ex. E (Blacker Dep.) at 34:19-35:8, and based on that "framework," conclude that "Plaintiff's allegations generally represent immaterial transactions or correctable transactions that do not warrant the requested relief." Intensity Report ¶¶ 4, 62. Blacker and Sullivan's purported "framework" is not comprised of identified and accepted methods of analysis from the fields of economics and accounting, which have been applied to relevant data. Rather, Blacker and Sullivan cite various economic and accounting textbooks in the section of their report describing the "framework" they created, such as *Introduction to Financial Accounting* and *Microeconomics* (*id.* ¶¶ 42-61), to

support general propositions like "economic actors … make choices about what to do and what to have because resources (*e.g.*, time and money) are scarce" (¶ 43), and "the optimal level of oversight and internal control might be one at which some level of improper conduct still is possible" (¶ 47), and "organizations generally seek to evaluate and limit the potential sources of risk where possible … while, at the same time, understanding that some risk and uncertainty remain no matter how much due diligence they perform" (¶ 49). Boiled down, Blacker and Sullivan's "framework" is nothing more than the invocation of general accounting and economic principles to argue the appointment of an independent compliance monitor and independent governance expert is unwarranted. But there is absolutely no indication that other experts in the accounting or economic industry use Blacker and Sullivan's methods to assess the governance failures and other institutional wrongdoing at issue or to determine the appropriateness of equitable relief in regulatory enforcement actions. *See, e.g.*, *Earley Info. Sci., Inc. v. Omega Eng'g, Inc.*, 575 F. Supp. 3d 242, 248 (D. Mass. 2021) (excluding expert opinion because, in part, expert's "approach appears to have been created solely for the purpose of this litigation").

Second, Sullivan and Blacker's opinions encompass legal conclusions, are predicated on an incorrect understanding of the law, and invade the province of the Court by asserting what is Plaintiff's burden. Blacker and Sullivan's opinion that Plaintiff's requested relief is unwarranted, Intensity Report ¶¶ 4, 62-106, encompasses an ultimate legal conclusion based upon the facts of the case, which is inadmissible. *Miriam Osborn Mem'l Home Ass'n v. Assessor of City of Rye*, 2005 N.Y. Slip Op. 50442(U) at *4-5 (Sup. Ct. Westchester Cnty. 2005)*;* Blacker and Sullivan also erroneously opine that it is *Plaintiff's* burden to apply the "framework" that they created to demonstrate the requested relief is appropriate. *See, e.g.,* Ex. A (Intensity Report) ¶ 62 ("NYAG's allegations generally do not account for cost-benefit analysis and materiality from an economic

and accounting perspective. When past actions and disclosures of the NRA are evaluated based on an appropriate industry standard, and considering the NRA's subsequent corrective actions, the NYAG's allegations generally represent immaterial transactions or correctable transactions that do not warrant the requested relief."); Ex. E (Blacker Dep.) at 238:8-15 ("We've developed the framework for how it should be done, to point out that the NYAG experts requested relief fails in providing us a cost benefit analysis of the requested relief. They … haven't shown that the benefit of the requested relief is greater than the cost."); *Id.* at 128:16-24 ("What I can absolutely offer an opinion on is unless the NYAG, who has the burden of proof to show that the internal controls are not operating efficiently, I have not seen anything that would indicate that they're not, other than the transactions that they've identified, that the NRA has disclosed and is correcting or taking action to correct.").

In doing so, Blacker and Sullivan wrongly assume that New York law imposes a requirement that a certain materiality threshold must be met and a cost-benefit analysis conducted to establish liability or entitlement to a remedy under the N-PCL and EPTL. In his deposition, Blacker testified that Plaintiff carries the burden to show that the NRA's internal controls are not functioning (*id.* at 128:11-24) and that the NRA overpaid vendors beyond the fair market value of services (*id.* at 178:15-21). Blacker also testified that Plaintiff must apply a cost-benefit analysis to establish that an internal audit function would be beneficial to the NRA (*id.* at 261:23-263:8). That is not the law.

Whether the NRA has improperly administered charitable assets under the EPTL, engaged in wrongful related party transactions under the N-PCL, or made materially false and misleading statements and omissions under the Executive Law does not hinge on the outcome of a cost-benefit analysis or establishing that a certain percentage of the NRA's overall revenue was misused. *See*

EPTL § 8-1.4; N-PCL § 715; Executive Law § 172-d(1). In this regard, Blacker and Sullivan seek to impose a burden on Plaintiff that does not exist under New York law. *Cohen v. Am. Biltrite Inc.*, 89 N.Y.S.3d 826, 828 (Sup. Ct. N.Y. Cnty. 2018) ("Insofar as plaintiff offers [the expert witness] to testify regarding the applicability of any law or what the law allows or requires, the court precludes any such opinion.")

Third, it is unclear how Blacker and Sullivan applied this "framework" to reach their conclusions. Blacker and Sullivan contend that Plaintiff's allegations of the NRA's unlawful and improper management of the Association's financial affairs, even if true, reflect immaterial or correctable transactions. Ex. A (Intensity Report) at p. 31 ¶ 62. But they have not identified *any* metrics or analysis used to reach that conclusion. *Id.* at pp. 31-43. Blacker and Sullivan observe that, under AICPA guidance, "judgments about materiality involve both qualitative and quantitative considerations." *Id.* at p. 27 ¶ 56. But they have conducted *no* analysis of the quantitative impact or qualitative characteristics of the financial transactions and arrangements alleged in the Complaint. *See* Ex. H (Hines Rebuttal Report) at pp. 36-43. They did not quantify any of the transactions (Ex. E (Blacker Dep.) at 48:21-49:8, Ex. F (Sullivan Dep.) at 188:7-19) or even bother reviewing the NRA's general ledgers (Blacker Dep. at 37:14-38:3) or invoices for the financial transactions at issue (*id.* at 118:8-119:10). Blacker and Sullivan are critical of Plaintiff's allegations for not taking into account a cost-benefit analysis, yet fail to elucidate which benefits and costs matter, how those benefits and costs should be quantified, or how such an analysis is relevant to the issues in this state enforcement action. *See, e.g.*, Ex. A (Intensity Report) at ¶¶ 61-81.

At bottom, a glaring disconnect exists between the premise of Blacker and Sullivan's opinions (nonprofits consider cost-benefit, prudent businessperson judgment, and materiality

principles) and the conclusions reached (Plaintiff's allegations are immaterial and requested relief is unwarranted). Blacker and Sullivan did not actually conduct a cost-benefit analysis, quantify damages, or seemingly even perform basic arithmetic. *See* Intensity Report; Ex. E (Blacker Dep.) at 16:24-25, 229:25-239:10, 261:23-263:8.

Blacker and Sullivan's opinions are largely based on the audit work of the NRA's external financial-statement auditor, Aronson LLC. [6] The NRA's other Financial Experts, Lerner and Mehta, Aronson has been the NRA's auditor since 2019. SAC ¶ 569-571. In mid-2021, following the commencement of this action, Aronson performed certain engagement acceptance and continuance procedures to determine whether to keep the NRA as a client. Blacker and Sullivan opine that Aronson's audits and procedures demonstrate that the NRA's purported course correction and other internal controls render Plaintiff's requested relief against the NRA unwarranted. Intensity Report at ¶¶ 79-81, 85-90.

For several independent reasons, Aronson's 2020 audit and special retention procedures are not a reliable source upon which to extrapolate on the NRA's control environment,[7] the most notable being that Aronson stated *unequivocally* and *in writing* each year it conducted an audit of the NRA's financial statements that it was *not* auditing or testing the efficacy of the NRA's internal controls. *Id.* Aronson has never audited the NRA's internal controls, and the Financial Experts' reliance on Aronson's work to opine on the health of the NRA's internal controls is misplaced. *Id.* More fundamentally, none of the Financial Experts tested the efficacy of the NRA's internal

[6] All four of the Financial Experts rely on and offer largely duplicative and cumulative opinions about Aronson's work. Mehta, like Blacker and Sullivan, opines that Aronson's work shows the NRA's purported course correction and other internal controls render Plaintiff's requested relief against the NRA unwarranted. Ex. C (Mehta Report) at pp. 5-6, 11-17, 20-30, 33-36, 40-50. Lerner cites Aronson's work for the opinion that the NRA's internal controls are both designed and are operating effectively as of December 21, 2020. Lerner Report at ¶¶ 43-51.

[7] Ex. H (Hines Rebuttal Report) at pp. 24-35 ¶¶ 67-92.

controls or independently assessed the quality of Aronson's work. So even if Aronson *had* tested the efficacy of the NRA's internal controls—and it did not—the Financial Experts could not base their opinions on the state of the NRA's internal controls on Aronson's work because they failed to do any due diligence to validate Aronson's findings or test the efficacy of the NRA's internal controls on their own. *Id.* The Finance Experts' reliance upon Aronson's work, should they testify, will potentially necessitate the hearing of collateral issues regarding the nature of the work Aronson performed and its limitations, particularly the very limited nature of Aronson's special procedures.

Blacker and Sullivan repeatedly base their opinions on unexamined assumptions rather than facts and data. They attempt to discount Plaintiff's allegations of Defendants' improper oversight of and conflicts of interest with various vendors by claiming—without citation to any evidence, industry standard, or other authority—that "the NRA faces more vendor scarcity than most nonprofits" because of "the NRA's political affiliations and mission," which "suggests that the NRA would not have been able to obtain vendors to perform those services for amounts that are materially less than the historical payments." Ex. A (Intensity Report) at p. 36 ¶ 69. But Blacker and Sullivan admit that they have not quantified NRA vendor payments or performed a fair-market-value analysis of the NRA's vendor relationships. Ex. E (Blacker Dep.) at 178:15-21; Ex. F (Sullivan Dep.) at 195:24-196:17. They also opine that the notion the NRA "conduct[] an internal audit to oversee internal controls" goes against "cost-benefit rationale" (*Id.* at p. 40 ¶ 75), and that the appointment of an independent compliance monitor would be "very expensive" and not beneficial to the NRA, while simultaneously acknowledging that they did not evaluate the costs or the benefits of an internal audit or a monitorship. (Blacker Dep. at 237:14-239:10, 271:21-274:13).

These opinions are not based on the application of a tested methodology. They are simply "cloak[ing] unexamined assumptions in the authority of expert analysis." *Ask Chemicals, LP v. Computer Packages, Inc.*, 593 F. App'x 506, 410 (6th Cir. 2014). Given the "analytical gap between the data and the opinions proffered," *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762, 781 (2014) (citation omitted), Sullivan and Blacker's opinions are not reliable and should be excluded.

iii. Blacker and Sullivan's opinions are not helpful to the trier of fact because they did not apply their purported expertise in accounting and economics to reach their conclusions. Instead, they are just parroting NRA fact witness testimony and making legal arguments.

None of Sullivan and Blacker's opinions are derived from a principled application of economics or accounting. They are merely reciting NRA fact witness testimony and select portions of cherry-picked documents.

Blacker and Sullivan opine that "Plaintiff's requested relief against the NRA would not be beneficial and is not warranted" because "the evidence consistently demonstrates that the NRA has taken action to improve its internal controls at both a macro and micro level." Intensity Report ¶ 106. This "evidence" includes the NRA "quantify[ing] and seek[ing] repayment" of Mr. LaPierre's excess benefits (Intensity Report ¶¶ 63-66); implementing the COSO framework[8] "[t]o better assess the NRA's internal controls" (according to Sonya Rowling deposition testimony) (*id.*

[8] The Committee of Sponsoring Organizations of the Treadway Commission ("COSO") is an independent private-sector initiative that develops "frameworks and guidance on internal control, enterprise risk management, and fraud deterrence." COSO's Internal Control Integrated Framework ("COSO framework") is "recognized as a leading framework for designing, implementing and conducting internal control and assessing the effectiveness of internal control." COSO, Internal Control Integrated Framework Executive Summary, May 2013, available at https://www.coso.org/Shared%20Documents/Framework-Executive-Summary.pdf (last accessed March 24, 2023). *See also* Ex. S (Hines Report) at pp. 17-22; Ex. H (Hines Rebuttal Report) at pp. 7-21.

¶¶ 96-97); holding compliance seminars covering the NRA's policies and procedures (according to John Frazer and Charles Cotton's deposition testimony and two PowerPoint slide decks) (*id.* ¶ 98); "taking steps to institute a compliance officer, according to John Frazer" (*id.* ¶ 101); and instituting "other improvements" in its internal controls (according to the deposition testimony of NRA fact witnesses) (*id.* ¶¶ 102-105).

This is a closing argument masquerading as an expert opinion. No accounting or economic expertise was relied on; no methodology was applied. Blacker and Sullivan did not evaluate the accuracy and completeness of the excess benefits reported in the NRA's Form 990s,[9] whether the NRA has implemented the COSO framework, or whether the NRA's internal controls are functioning. *See, e.g.*, Intensity Report; Ex. E (Blacker Dep.) at 122:15-18, 132:25-133:21, 138:18-139:6, 142:20:24; Ex. F (Sullivan Dep.) at 216:7-19. They are just repeating and endorsing certain fact witness testimony without revealing or even evaluating the bases of what was said.

Blacker and Sullivan's approach is emblematic of the unreliable opinions being offered by the proffered defense experts: they have taken NRA fact witnesses at their word, conducted a superficial review and analysis of the record, collectively ignored the long history of misconduct alleged in the Complaint, and cloaked their opinions, which are essentially assurances the NRA is "on the path towards compliance," with their credentials and expertise.

It is inappropriate for parties to use expert testimony to narrate their version of the facts to the jury, which is precisely what the NRA is trying to do here. *Tourre*, 950 F. Supp. 2d at 675 ("Acting simply as a narrator of the facts does not convey opinions based on an expert's knowledge and expertise; nor is such a narration traceable to a reliable methodology."). When experts echo a

[9] An IRS Form 990 is "the IRS' primary tool for gathering information about tax-exempt organizations, educating organizations about tax law requirements and promoting compliance." https://www.irs.gov/charities-non-profits/form-990-resources-and-tools (last accessed March 22, 2023.)

defendant's conclusory statements as if they know it to be true, it imbues the statements with an unwarranted appearance of reliability. *See, e.g.*, *CIT Grp./Bus. Credit, Inc. v. Graco Fishing & Rental Tools, Inc.*, 815 F. Supp. 2d 673, 677 (S.D.N.Y. 2011) ("Assumptions based on conclusory statements of the expert's client, rather than on the expert's independent evaluation are not reasonable."). Where, as here, the substance of the testimony is well within the understanding of a typical juror, it is unhelpful, inefficient, and prejudicial to Plaintiff to permit defense experts to regurgitate and endorse testimony of fact witnesses that they themselves have not independently validated.

C. Blacker and Sullivan are not qualified to offer the opinions they are offering.

As noted above, Sullivan and Blacker's opinions invoke *principles* of economics and accounting as broad and general concepts, but they do not actually *apply* those principles of cost-benefit analysis, materiality, and prudent businessperson judgment to the facts of this case. Instead, Sullivan and Blacker offer opinions on industry standards in the nonprofit sector, Form 990 reporting, auditing, and the appropriateness of Plaintiff's requested relief. But Sullivan and Blacker have no substantive experience on these subjects.

i. Blacker is not qualified.

Blacker is a Certified Public Accountant with experience quantifying damages in breach-of-contract and intellectual property cases. Blacker has described his specialty as being a damages quantifier in breach of contract and "intellectual property cases where [he] value[s] patents, copyrights, trade secrets, [and] trademarks …."[10] "If … there's alleged wrongful conduct and then there is damages that stem from that alleged wrongful conduct. So as a damage quantifier, I

[10] Ex. I (Blacker trial testimony in *Universal Instruments Corp. v. Micro System Engineering Inc.*, *et al.*) at 65:20-66:6.

evaluate whether there's an economic causal connection to that and, if there is, quantify what that amount would be."[11]

He has not applied his experience in accounting or damages quantification in this case.

Blacker has no experience with the issues presented in this case. In his 30-year career as an accountant, Blacker has only worked on three other engagements involving a nonprofit entity—the pending D.C. Action against the NRA and its affiliate, the NRA Foundation, and two engagements involving nonprofits in the healthcare sector (one of which occurred nearly 20 years ago). Ex. C (Blacker Dep.) at 104:16-109:2, 109:15-112:5. Blacker testified that, aside from the D.C. Action and the nearly 20-year-old engagement, he has never been engaged in a case involving a nonprofit under regulatory investigation or action. *Id*. at 146:18-147:7. Blacker also admits that, in his career as an accountant, he has never worked on an engagement involving an independent compliance monitor or governance expert. *Id.* at 271:21-272-6.

Blacker's engagement with the NRA is the first time that he has been engaged as an expert witness for a nonprofit organization. *Id.* 148:22-149:12. And Blacker has never testified in court as an expert witness in any matter involving nonprofit governance. *Id.* at 154:17-155:22. Indeed, in his deposition, Blacker was unable to say whether the NRA was a charitable organization. *Id.* at 108:17-109:2.

In the same vein, Blacker has little to no training, experience, or expertise in Form 990s, IRS filing practices for nonprofits, and auditing. Blacker has never consulted, advised, or been asked for advice by a client on Form 990 reporting. *Id.* at 175:19-176:17. He has just one year of experience preparing tax returns, which was 33 years ago, in 1990, and was unable to identify a

[11] Ex. J (Blacker trial testimony in *Uriteknologia de Mexico S.A. de C.V. v. Uritek (USA), Inc.*) at 58:23-59:16

single continuing education course he has taken in the last 10 years on IRS regulations or tax issues. *Id.* at 19:15-23. In his deposition, Blacker could recall reviewing Form 990s in only two other engagements—the pending D.C. Action and a matter nearly 20 years ago involving a charitable healthcare organization. *Id.* at 145:7-146:17. Blacker has never prepared a Form 990 or had training in the preparation of Forms 990. *Id.* at 21:7-12. Nor has Blacker ever performed a financial-statement or internal-control audit. *Id.* at 172:13-173:9.

Blacker is similarly unqualified to opine on the COSO framework and the NRA's purported implementation of it. Blacker testified that his familiarity with the COSO framework is limited to how the framework applies in the context of a financial-statement audit. *Id.* at 131:19-132:17. Blacker and Sullivan's opinions, however, address the COSO framework in a different context—namely, the NRA's purported implementation of the COSO framework to "strengthen its internal controls." Intensity Report at p. 49 ¶¶ 95-97. And Blacker admitted at his deposition that the implementation of internal controls under the COSO framework is a distinct specialty that he is not an expert in. Blacker Dep. at 131:19-132:17.

Blacker's background does not equip him with sufficient qualifications to opine on industry standards in the nonprofit sector, Form 990 reporting, audits, or the appropriateness of Plaintiff's requested relief.

ii. Sullivan is not qualified.[12]

Sullivan is an economist with extensive experience in quantifying damages in patent infringement cases. Ten years ago, Sullivan estimated he had been retained "well over 100 times"

[12] Sullivan lists his board experience with the San Diego Zoo as a qualification in his expert report, Intensity Report ¶¶ 9-10, and relied on it heavily when asked about his qualifications to opine on audits, internal controls, accounting issues, and regulatory compliance in the nonprofit sector. *See, e.g.*, Ex. F (Sullivan Dep.) at 69:15-72:17, 76:11-77:8, 167-178:7. But Sullivan should not be credited for that experience in evaluating his qualifications to testify in this matter because he repeatedly blocked *any* inquiry into the

in matters dealing with patent damages.[13] He has also "done a ton of work" consulting in the area of licensing intellectual property, having worked "well in excess of 100 engagements … helping companies license in technology … setting up a royalty structure, patent monetization programs, valuations and things of that nature."[14] And accordingly, the vast majority of Sullivan's experience as an expert witness has involved quantifying damages in patent infringement cases.[15] As of 2019, by Sullivan's own estimate, he had offered expert opinions in over 70 patent infringement cases.[16]

This case does not involve patents. It is a state regulatory enforcement action brought by the New York Attorney General's Office against a charity and current and former nonprofit executives for violations of state nonprofit law. While Sullivan's qualifications as an economist are not in dispute, his qualifications in the subject areas he seeks to opine on in this case are insufficient.

As noted above, Sullivan intends to opine on industry standards in the nonprofit sector on a range of topics, including IRS requirements on Form 990 filings and excess-benefit transactions, auditing standards and practices for financial-statement audits, the COSO framework, and the appropriateness of Plaintiff's requested relief. *See* Ex. A (Intensity Report) at pp. 25-56 ¶¶ 51-106. But Sullivan is not an accountant and has no experience conducting audits. Ex. E (Sullivan Dep.) at 166:4-23. Nor has Sullivan had any training or certifications relating to the COSO framework. *Id.* at 169:11-18**.** Other than the NRA engagement, Sullivan has no experience as an expert witness in matters involving charitable nonprofits and conflict-of-interest issues (*id.* at

scope and nature of his experience due to "confidentiality" obligations. *See id.* at 46:10-47:16, 75:12-76:6, 168:8-169:4.

[13] Ex. K (Sullivan Trial Testimony in *Finjan, Inc. v. McAfee, Inc.*, Sept. 5, 2013) at 2977:7-11.

[14] Ex. L (Sullivan Trial Testimony in *Bio-Rad Laboratories, Inc. v. 10X Genomics, Inc.*) at 3.

[15] Ex. A (Intensity Report) at Attachment A-1 (Sullivan C.V.).

[16] Ex. M (Sullivan Declaration in *Juno Therapeutics, Inc. v. Kite Pharma*, Nov. 30, 2019).

98:20-99:4), related party transactions (*id.* at 99:18-100:3), or the adequacy of internal financial controls (*id.* at 103:17-22). Nor does Sullivan have any prior experience working on matters where a charitable organization was under regulatory investigation or action. *Id.* at 105:24-106:17.

Sullivan testified that approximately a decade ago he was engaged in two matters regarding related-party transactions and the accuracy of internal financial controls, but could provide no detail about the matters. *Id.* at 101:15-20, 103:23-104:15. He testified that "one of them dealt with financial reporting, and the other one was more of what I would consider governance related issues." *Id.* at 100:24-101:6. But when pressed, Sullivan was unable to provide any additional information about these engagements due to "confidentiality obligations" and "a limited recollection." *Id.* at 101:10-14. The only information Sullivan was able or willing to provide was that they involved charities. *Id.* at 101:21-102:22. Sullivan similarly pointed to those two matters when asked about his experience with internal-control issues in the nonprofit sector, but could provide no information beyond a vague recollection that they touched on those issues. *Id.* at 103:23-104:15.

When asked about his experience working on matters involving charitable nonprofits, Sullivan identified three matters: (1) his work on behalf of the National Basketball Association in 2016 serving as the lead economist negotiating a collective bargaining agreement between the NBA and NBA Players' Union; and his work as an expert witness in (2) *Juno Therapeutics Inc.*, *et al.*, *v. Kite Pharma, Inc.*, C.D. Cal. at 760:5-8, ECF 605, 2:17-cv-07639-GW-KS [*Juno*], and (3) *Trustees of Columbia University v. Symantec Corp.*, 3:13-cv-00808 (E.D. Va.) [*Symantec Corp.*]. *Id.* at 72:25-78:22.

Asked how this work informed his opinions in this case, Sullivan testified:

> [I]t provides additional context on the operations of large organizations and the business challenges they confront and how they make those decisions, how they

> work through contracting issues, um, in ultimately seeking to get to resolution on those contract issues where there can be differences in incentives and interests by the various organizations and constituencies, and ultimately evaluating the costs and the benefits associated with entering into an agreement of that nature and the terms of that.

Id. at 73:14-74:6. Notwithstanding his testimony to the contrary, Sullivan's work as an economist negotiating a collective bargaining agreement between the NBA and the NRA Players' Association has no overlap with the issues presented in this litigation. The same holds true for Sullivan's experience in *Juno*[17] and *Symantec Corp.*,[18] both of which were patent infringement cases. *Id.* at 77:9-78:22. None of the matters referenced by Sullivan involved issues relevant to this regulatory enforcement action.

Sullivan lacks substantive work experience in the nonprofit sector and his background as an economist does not qualify him to offer expert opinions on industry standards in the nonprofit sector, Form 990 reporting, audits, or the appropriateness of Plaintiff's requested relief against the NRA.

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[17] In *Juno*, Sullivan was engaged by Juno Therapeutics and a nonprofit hospital, Memorial Sloan-Kettering. *Id.* at 86:2-14. In his curriculum vitae, Sullivan describes the *Juno* matter, in relevant part, as "patent litigation involving cancer immunotherapy." Intensity Report at Attachment A-2. At his deposition, Sullivan testified that Memorial Sloan-Kettering's status as a not-for-profit was relevant to his opinion in that case, but was unable to say how the hospital's nonprofit status mattered, or if his opinions would have been impacted if Memorial Sloan-Kettering had been a for-profit entity. Sullivan Dep. at 86:15-90:14. At trial in *Juno*, Sullivan testified that he had been "asked to provide my expert research and analysis to the Court to provide guidance in determining what the appropriate reasonable royalty would be for the use of the '190 Sadelain patent by Kite." Ex. N (Sullivan testimony in *Juno* trial, Dec. 6, 2019), at 760:4-8. In testimony spanning two days, Sullivan never mentioned or referenced Sloan Kettering's nonprofit status. *Id.*

[18] In *Symantec Corp.*, Sullivan was engaged by the Trustees of Columbia University in a patent dispute. Similar to *Juno*, Sullivan maintained at his deposition that Columbia's charitable status was relevant in that case because "one of the issues … was how a non-profit operates as it relates to entering into agreements with for-profit entities, and how that may or may not be different when -- when one is looking at exchanges of property or payment for rights as it would be in contrast to agreements between two for-profit entities." *Id.* 82:15-25. But again, as Sullivan's trial testimony in *Symantec Corp.* made clear, the scope of his work was limited solely to "calculating damages … due to the infringement of" two patents, and the damages arising from that infringement. Ex. O (Sullivan Trial Testimony in *Symantec Corp.*) at 1698:18-23, 1765:9-1768:13.

II. The Court should exclude Matthew Lerner's opinions in their entirety.

The NRA has proffered Matthew Lerner as an expert witness to opine on the design and operating effectiveness of the NRA's internal controls. Lerner is a certified internal auditor who asserts that he has an expertise in the assessment of the design of internal controls; assessment of the operating effectiveness of systems of internal controls; and assessments of other organizational risk management and governance matters.

A. Lerner's opinions are irrelevant to the issue of the NRA's liability.

Lerner's opinion is limited to "evaluat[ing] the system of internal controls presently in place within the NRA as of December 31, 2020," Lerner Report ¶ 45, which involved reviewing documents relating to Aronson's audit of the NRA's financial statements for the 2020 fiscal year, and NRA witness testimony "regarding their observations of the results of control assessments or internal reviews" conducted during the period beginning approximately March 2018 through December 2020. Ex. B (Lerner Report) ¶ 44. Lerner opines that "as of December 31, 2020," the NRA's internal controls he considered "appear to" have been operating effectively. Ex. P (Lerner Dep.) at 22:2-13. However, Lerner admits he neither looked at nor considered the significant, years-long history of prior overrides and evasions of NRA internal controls, nor did he assess how the internal controls were operating as of the time of his report in September 2022. Thus, to the extent he performed an analysis, it failed to consider relevant facts before and after the time period he considered (and, because of the limitations of his work, during the time period). Lerner's election to ignore the historical conduct of the Defendants and their continuing conduct makes his opinions irrelevant to the allegations before the Court or the need for the injunctive relief sought

by the Plaintiff.[19] The time period and cutoff date selected by Lerner are arbitrary and not useful to address Plaintiff's claims in the action.

Lerner's opinion that the NRA's internal controls were designed[20] and operating effectively as of December 31, 2020, is irrelevant to whether the NRA should be held liable for the improper administration of charitable assets, wrongful related party transactions, false filings, or the violation of whistleblower protections that occurred *before* December 31, 2020 or to the effectiveness of those controls *after* December 31, 2020. Both time periods and the existence and adherence to internal controls is critical to liability in this action. Ex. P (Lerner Report) ¶ 45.

Plaintiff's claims concern serious deficiencies in the NRA's operations dating back, in some instances, decades, but at a minimum during the period 2015 to the present. Plaintiff's claim under the EPTL concerns conduct that occurred both before and after Dec. 31, 2020. A snapshot of controls in place at one point in that period is not helpful to address liability. Similarly, Plaintiff's related-party-transaction claim under NPCL § 715 and false filings claim under Executive Law §§ 172 concern conduct (transactions and filings) that occurred *before* December 31, 2020. Liability under these statutes does not rest on whether there were sufficient internal

[19] Ex. H (Hines Rebuttal Report) ¶¶ 28-29.

[20] Lerner's opinions about design effectiveness are, essentially, his reporting of what policies the NRA had in place for the relevant period to the best of his knowledge. Ex. K (Lerner Dep.) at 93:10-105:21, 106:22-107:13. Certainly, fact witnesses can testify to and the NRA's policy manuals can document what policies were in place without putting the gloss of an expert's assessment of "design effectiveness" on them.

controls in place at the time of the conduct in question, but even if it were a factor to consider, the existence of controls after the conduct occurred is entirely irrelevant.

B. Lerner's methodology is unreliable because he did not comply with professional standards in testing the NRA's internal controls, chose a random cut-off date for his analysis without a methodological basis, ignored admittedly relevant information, and asserts legal conclusions.

Lerner testified that as a certified internal auditor, there are professional standards. Ex. P (Lerner Dep.) at 12:3-20. But he stated that as he didn't perform an internal audit, he did not think he was bound by those standards. *Id.* at 14:14-15:9; 18:15-20, 89:6-12. Lerner admitted that it is not part of his normal work and he has never before offered an expert opinion about the adequacy of internal controls. *Id.* at 89:13-22; 92:5-8. Yet that is what he did here. Lerner offers opinions on the design effectiveness of the NRA's internal controls and their operating effectiveness as of December 31, 2020. However, by his own admission, he did not perform the testing of operating effectiveness that would typically be required to assess operating effectiveness. As he admits

> Operating effectiveness refers to determining if the applicable control has, in fact, been operating over a period of time covered under a review period (commonly a 12-month window). Tests of operating effectiveness typically include a mix of inquiry of appropriate personnel, observation of the organization's operations, inspection of relevant documentation, and re-performance of the control. (PCAOB Audit Standard No 13, par 21-22). In the case of matters associated to the in-scope Causes of Action [21] within the Complaint, my scope was limited to reading transcripts of testimony at trial or in deposition, review of produced documents and interviews of NRA personnel.

Lerner Report at n.19.

In rendering his opinions, Lerner relied upon "special procedures" performed by Aronson LLC, the NRA's financial statement auditor. *See, e.g.*, Ex. P (Lerner Report) ¶ 60. Those special

[21] Lerner defines "in-scope Causes of Action" as Plaintiff's four causes of action asserted against the NRA for breach of EPTL § 8.1-4, wrongful related-party transactions under N-PCL §§ 112(a)(10), 715(f), and EPTL § 8-1.9(c)(4), violation of whistleblower protections under N-PCL § 715-b and EPTL § 8-1.9, and false filings under Executive Law §§ 172-d(1) and 175(2)(d). Lerner Report ¶ 43.

procedures were performed by Aronson as part of its retention review process in 2020. Lerner relies upon the fact that Aronson's tests "did not identify any exceptions, which indicates that the internal controls associated with the following processes were operating effectively during the period under audit." *Id.* ¶ 61.

To the extent that Lerner opines on the mere existence and "design" of policies,[22] his expert testimony is unnecessary. Fact witnesses can testify as to the existence of the policies in effect during the relevant periods at the NRA. The bulk of relevant policies were in place in writing for much of the last decade. Lerner could not testify to any relevant changes in these policies. The content of the policies can be established through witnesses with actual knowledge and documentary evidence. Thus, the existence of such policies is not something for which expert opinion is needed.

To the extent that Lerner speculatively opines that "the NRA's overall design of systems of internal controls appears to have been established as of December 31, 2020 *to provide reasonable assurance of future compliance* with applicable laws and regulations and to address the key risks associated with the allegations within the in-scope Causes of Action in the Complaint," (Ex. B (Lerner Report) ¶ 49), there is no basis for the same. The policies were largely in place for most of the time period covered by the Complaint and did not prevent the violations alleged there, and Lerner neither assessed nor evaluated the truth of such allegations. Ex. P (Lerner Dep.) at 94:4-107:19 (highlighting Lerner's lack of methodology in assessing the "design effectiveness" including, for example, his lack of knowledge and any reassessment of the NRA's

[22] As Lerner defines it, "Adequacy of design of internal controls refers to assessing whether the organization's controls, if they are operated as prescribed by persons possessing the necessary authority and competence to perform the control effectively, satisfy the organization's control objectives and can effectively prevent or detect error, fraud, or a compliance failure." Ex. B (Lerner Report) at n.18.

travel policy and whether it included a private and charter travel provision as of December 31, 2020).

The salient issue is that when the written policies were in effect at the NRA, widespread violations of such policies were ongoing. This is a question of the "operating effectiveness" of the NRA's policies, which Lerner did not personally evaluate, relying instead—against the standards of his profession—on hearsay from the NRA's financial statement auditor. Lerner's failure to apply an accepted methodology, his failure to consider relevant evidence and instead to cherry-pick what would be considered render his conclusions and predictions as to the operating effectiveness of the NRA's internal controls unreliable, inconsistent with accepted methodologies in his field, irrelevant and unhelpful to the trier of fact. Lerner concedes that in assessing internal controls, the existence or design of internal controls may be irrelevant because "a system of internal control can be circumvented if people collude. Further, if management is able to override controls, the entire system may fail." *Id.* at p. 6 n.8 (citing Committee of Sponsoring Organizations of the Treadway Commission, Internal Control Integrated Framework, Full Report, (American Institute of Certified Public Accountants, May 2013) p. 4); *see also* Ex. P (Lerner Dep.) at 334.

In this case, Plaintiff has alleged systemic, widespread collusion and management evasion and override of internal controls. Yet Lerner did not investigate, evaluate, or consider those facts in rendering his opinion on operating effectiveness. Lerner acknowledged that in the Complaint, "Plaintiff alleges management override of various internal controls within the NRA" but when asked whether he investigated whether those allegations were true, he admitted "No." Ex. P (Lerner Dep.) at 335:13-336:6. Instead, without conducting his own testing, audit, or evaluations, Lerner opines that there "appears to be" sufficient internal controls within the NRA to prevent future occurrence of such violations.

III. The Court should exclude Amish Mehta's opinions in their entirety.

Amish Mehta is a Certified Public Cccountant proffered by the NRA to opine generally that, as of 2019 and 2020, the NRA had sufficiently robust policies in place to address related party transactions, conflicts of interest, and whistleblower complaints. *See* Ex. P (Mehta Report). He further opines that the NRA "took appropriate steps in its regulatory filings," that NRA's Audit Committee properly carried out its functions and that there is no need for a court-appointed independent compliance monitor or independent governance expert. *Id.*

The Court should exclude Mehta's opinions in their entirety because they are not relevant or reliable. Mehta's experience is in conducting financial statement audits for nonprofit corporations. However, conducting financial statement audits does not make one an expert in non-profit governance generally or in the specific policies Mehta purports to address. As detailed below, Mehta's deposition testimony establishes that he is simply not qualified to opine on the strength of the NRA's conflict-of-interest, related-party-transaction, and whistleblower policies, the NRA's compliance with such policies, whether such policies complied with New York regulatory requirements, the performance of Audit Committees, or the need for a court-appointed independent compliance monitor and independent governance expert.

Mehta summarized the five opinions in his opening report as follows:

(1) The NRA has sufficiently robust policies and procedures in place to detect and address potential related party/conflict-of-interest matters.

(2) The NRA has established protocols to handle whistleblowing. Such protocols encourage anyone with a good faith concern to come forward and report matters of concern.

(3) The NRA took appropriate steps in its preparation of its regulatory filing and has further enhanced its policies and procedures to comply with the CHAR500 reporting requirements of New York State.

(4) The Audit Committee of the NRA's Board of Directors properly discharged its responsibilities in connection with retaining, monitoring and communicating with the NRA's outside auditors.

(5) The NRA has demonstrated a commitment to corporate governance and strong internal controls; as a result, there is no need for the appointment of a Court-appointed compliance monitor or a governance expert.

Id. at 4-5.

A. Mehta is not qualified to offer the opinions he intends to offer.

Mehta is not qualified to opine on any issues relating to the NRA's conflict-of-interest, related-party-transaction, and whistleblower policies. At his deposition, Mehta admitted he has no substantive experience on these subjects:

- Mehta has never advised clients or offered expert testimony on issues relating to conflicts of interest, related party transactions or whistleblowers (Ex. Q (Mehta Dep.) at 9:8-10, 36:10-17; 38:10-23).
- Mehta has no experience in evaluating or assessing the adequacy of conflict-of-interest, related-party-transaction, or whistleblower policies (*id.* at 38:10-23 61:14-62:6, 64:24-65:10; 251:20-252:10).
- Mehta admits he is not an expert on the efficacy of whistleblower programs and does not know how one would go about evaluating the efficacy of a whistleblower program (*id.* at 62:25-63:10, 64:19-23, 217:3-16, 224:2-10).
- Mehta has never drafted a conflict-of-interest, related-party-transaction, or whistleblower policy (*id.* at 36:10-17, 61:14-62:6, 63:11-64:14).
- Mehta is not familiar with New York law governing conflict-of-interest, related-party-transaction, and whistleblower policies for not-for-profit organizations, does not know what New York law requires with respect to such policies, and is not familiar with the New York Attorney General's guidance on conflict-of-interest policies (*id.* at 39:20-40:13, 62:7-24, 64:24-65:10).

Mehta testified that his expertise in conflict-of-interest, related-party-transaction, and whistleblower policies is limited to how they "related to the auditing standards and what we perform in the financial statement" audit *(id.* at 61:2-10), which, for whistleblower programs, involves checking to see if the organization has "a Whistleblower Policy and program in place" (*id.* at 62:25-63:10).

Mehta's opinions extend well beyond the limits of his professed expertise. He offers opinions that the NRA has "sufficiently robust policies and procedures in place to detect and address potential related party/conflict-of-interest matters" and "demonstrated a commitment to corporate governance and strong internal controls," such that an independent compliance monitor and independent governance expert is not needed. These opinions are plainly outside the scope of a financial statement audit's review of an organization's internal policies. Financial statement audits do not (1) audit the efficacy of an organization's internal controls, (2) evaluate the implementation or efficacy of related-party-transaction, conflict-of-interest, or whistleblower policies, (3) look beyond the applicable fiscal year for the financial statements being audited, or (4) reach conclusions on an organization's "commitment to corporate governance and strong internal controls." *See, e.g.*, Hines Rebuttal Report at 24-35. Because Mehta's opinions on the NRA's policies go beyond the bounds of his expertise, they should be excluded.

Mehta's experience with IRS and New York regulatory filing requirements are similarly lacking and cannot provide a sufficient basis for his opinions regarding the NRA's compliance with its regulatory filing requirements. Mehta testified that he has never prepared an IRS Form 990 or an IRS Form 4720,[23] and did not recall having ever prepared a CHAR500.[24] Ex. Q (Mehta Dep.) at 296:8-24, 335:3-13. He did not speak to anyone at the NRA regarding the preparation of the NRA's CHAR500 or Form 990 filings. *Id.* at 296:19-24. While Mehta's opinion on the NRA's processes for preparing its regulatory filings is based in part on the fact that the NRA hired outside

[23] The IRS Form 4720 is used by certain tax-exempt entities and their managers to, in relevant part, report excess benefit transactions. *See* https://www.irs.gov/pub/irs-pdf/i4720.pdf (last accessed March 22, 2023).

[24] A CHAR500 is New York State's Annual Filing Report form for charities. *See* https://www.charitiesnys.com/annual_filing.html (last accessed March 22, 2023.)

counsel, Mehta testified at his deposition that he does not know what counsel reviewed. *Id.* at 297:20-298:4.

As described below, Mehta's opinion on the appropriateness of an independent compliance monitor and independent governance expert is an improper legal conclusion. But even if the opinion did not invade the province of the Court—which it plainly does—Mehta is nevertheless unqualified to offer it because he has no experience with court-appointed monitors, court-appointed governance experts, or with evaluating an organization's "commitment to corporate governance" (*id.* at 369:14-16, 370:12-16, 375:6-376:19).

Given Mehta's lack of substantive experience on the subjects for which he intends to offer opinions, his testimony should be excluded in its entirety.

B. Mehta's opinions are irrelevant to the issues of liability and remedies in this case.

Mehta's review of the NRA's related-party-transaction, conflicts-of-interest, and whistleblower policies and the Audit Committee's purported actions was limited to 2019 and 2020. This review principally involved reviewing Audit Committee meeting minutes, the NRA's Form 990s, and Aronson's audit work from that period. *See* Ex. C (Mehta Report). But like Lerner, Mehta has not evaluated and does not dispute Plaintiff's allegations of the NRA's significant, years-long history of prior overrides and evasions of its internal controls, nor did his limited assessment consider relevant facts before and after the two-year time period he considered (and, because of the limitations of his work, during the time period). Mehta's election to ignore the historical conduct of the Defendants and their continuing conduct renders his opinions irrelevant to the issues before the Court or the need for the injunctive relief sought by the Plaintiff.[25] He

[25] Hines Rebuttal Report ¶¶ 28-29.

performed no meaningful analysis and simply serves as a mouthpiece to convey the NRA's factual position.

As discussed above, Mehta's opinions are not helpful to the trier of fact because it is uncontested that the NRA has historically had conflict-of-interest and related-party-transaction policies and the existence of those policies can be introduced through fact witnesses. What matters is that the NRA failed to implement and enforce those policies for several years, which Mehta's circumscribed review fails to address. For example, Mehta was unequivocal that he did not know what if any documents the Audit Committee had reviewed when reviewing related party transactions, and that he was not opining as to whether a given related party transaction was in fact compliant with NRA policy. *See, e.g.* Ex. Q (Mehta Dep.) at 92:14-24, 131:12-133:3, 157:11-21.

C. Mehta's opinion that Plaintiff's requested relief is unwarranted is an improper legal conclusion disconnected from the analysis he performed.

Mehta's opinion regarding the appropriateness of an independent compliance monitor and independent governance expert should be excluded. The issue of remedies is the Court's domain, and any evidence on these issues before the jury is inappropriate, prejudicial to Plaintiff, and would only lead to jury confusion. Mehta is wholly unqualified to opine on the usefulness or appropriateness of monitors since he has no experience with monitors or governance experts, much the less organizations facing active regulatory scrutiny. *See* Ex. Q (Mehta Dep.) at 369:14-16; 370:12-16. Further, his opinion that a monitor is not necessary because the NRA has "demonstrated a commitment to corporate governance" is not based on any standards or experience evaluating an organization's commitment to corporate governance. *Id.* at 375:6-376:19.

D. Mehta's testimony should be excluded in its entirety as unreliable.

Mehta's offered testimony should also be excluded on the grounds that it is unreliable for numerous reasons. He offers broad opinions but chose a narrow time frame (2019 and 2020) for

his analysis without a rational basis, let alone a basis predicated on generally accepted standards. Ex. Q (Mehta Dep.) at 203:16-17 (for opinion 2 on whistleblowing). He arrives at certain conclusions with no applied methodology or analysis. Further, he ignores Plaintiff's allegations and record evidence of misconduct that spans several years.

Mehta has no basis upon which to conclude the NRA has sufficiently robust policies and procedures in place now or at any point in time to address conflicts of interest and related party transactions. Mehta admits he did not test the NRA's conflict-of-interest or related-party-transaction policies for effectiveness or conduct any audit work with respect to them. *Id.* at 84:11-86:20.

Mehta testified that he did not know what information or materials the NRA's Audit Committee reviewed when discussing related party transactions, relying solely on the Audit Committee's minutes and the work of NRA's external auditor in conducting their audit of the NRA's financial statements for 2019 and 2020. Ex. Q (Mehta Dep.) at 92:14-93:19. Neither source addresses what, if anything, the Audit Committee reviewed. And Mehta acknowledged that he is not offering an opinion on whether any of the NRA's related party transactions—including those referenced in the Complaint and those purportedly "ratified" after the fact by the Audit Committee—were, in fact, compliant with NRA policy. *See, e.g.*, *id.* at 131:12-133:3, 157:11-21,191:6-18, 194:18-196:3. In fact, Mehta was unable or unwilling to say what documents the Audit Committee should even be reviewing to evaluate a proposed related party transaction. *Id.* at 135:9-137:4.

Mehta based his opinion that the policies are enforced in part on the existence of compliance trainings. *Id.* at 112:20-113:15. But the fact that training seminars were held is not in dispute, and Mehta is not providing an opinion on the effectiveness of the trainings (*id.* at

126:10:14), nor is he qualified to do so. He has never provided training on these topics (*id*. at 37:9-38:3, 61:14-62:6, 63:11-64:14), and has no experience evaluating the effectiveness of trainings (*id.* at 120:19-23). He did not attend any of the trainings (including one provided in September 2022, well into his retention) (*id.* at 123:18-125:14), speak with those who provided the trainings or attended the trainings (*id.*), or ask for or review feedback on the trainings (*id.*). In fact, when asked to answer hypothetical questions from the training slide deck regarding related party transactions and conflicts of interest, Mehta was not able to do so and asserted that the training materials did not provide enough information for him to formulate an answer. *Id.* at 509:2-515:24.

Mehta's opinions regarding the NRA's whistleblower policy are similarly disconnected from any methodology or review of the record. Mehta testified that he is not opining on whether there were violations of the NRA's whistleblowing policy or New York law on whistleblowing (*id.* at 204:11-20), or whether the NRA's whistleblowing policy was compliant with New York law (*id.* at 205:10-14).

Mehta opines that "[t]he NRA's Audit Committee's Reports to the NRA's Board of Directors make several references reflecting that the Audit Committee receives, investigates, resolves, and otherwise aptly handles whistleblower matters," Ex. P (Mehta Report) at 19, but Mehta's sole basis for this opinion is his partial review of Audit Committee minutes that merely reference the whistleblower policy and whether complaints were raised. Mehta did not review any Audit Committee minutes of meetings that took place before 2019, and, as Mehta acknowledged, the meeting minutes for the two-year period he did review (2019 to 2020) did not reflect the substance of whistleblower complaints brought to the Committee's attention, what (if anything) the Audit Committee did to investigate complaints, and what steps (if any) it took in response. Ex. Q (Mehta Dep.) at 206:3-207:23, 277:2-282:9.

For example, when Mehta was asked about the Audit Committee's minutes for a January 11, 2020 meeting[26]—which state, in relevant part, "[t]here was one instances [sic] of whistleblowing reported to the Committee since the prior Committee meeting, where this incident was investigated and it was determined to be unfounded"—he made it clear his opinion on the Audit Committee's handling of whistleblower complaints was based on nothing more than blind acceptance of what the minutes stated:

> Q. Do you know what this instance of whistleblowing was about?
> (Witness reviews document.)
>
> A. I do not.
>
> Q. Do you know what the Audit Committee did to investigate it?
> (Witness reviews document.)
>
> A. It says right here: "The incident was investigated and was determined to be 'unfounded.'"
>
> Q. Do you know what the investigation consisted of?
>
> A. I do not.
>
> Q. So, on what basis are you opining that it was handled aptly?
>
> A. Based on the documentation in the Audit Committee minutes.
>
> Q. Based on the statement in [the minutes]?
> (Witness reviews document.)
>
> A. That's correct.
>
> Q. Anything else, other than that?
>
> A. No.

Ex. Q (Mehta Dep.) at 278:18-279:17.

Mehta's testimony also demonstrates an astonishing lack of knowledge about the allegations at issue in this litigation and the factual record. As this Court observed in its decision denying the NRA's motion to dismiss Plaintiff's claim for violation of whistleblower protections, "[t]he Complaint devotes 27 paragraphs to describing the ways in which LaPierre, with help from

[26] *See* Ex. R (Mehta Dep. Ex. 5 - Audit Committee minutes).

other NRA employees and board members, froze Dissident No. 1 out of his leadership position after Dissident No. 1 questioned and sought to investigate certain expenses" and "alleges, among other things, that the NRA refused to assign four board members to any committees of the board after they requested an investigation into issues that included allegations raised in the Complaint." NYSCEF 611 at 30-31 (citations omitted). While Mehta reiterates the Audit Committee's conclusion that the complaints of the NRA's former President, referred to as Dissident No. 1 in the Complaint, were not brought in good faith (Mehta Report at 20), he admits that he is not offering an opinion on whether that conclusion is accurate. *Id.* at 238:3-239:5. And although allegations relating to complaints of retaliation made by whistleblowing board members in 2019 are outlined in detail in the Complaint and occurred during the two-year period Mehta purportedly reviewed, Mehta testified that he was unaware of the allegations, did not recall reviewing any documents about concerns the board members raised to the NRA, and did not know about the facts and circumstances being referred to. *Id.* at 256:15-248:14, 263:8-264:10.

At his deposition, Mehta only recalled reviewing one whistleblower complaint during his analysis of the facts in this case, and did not recall asking to review any other complaints. *Id.* at 215:23-216:21. And even there, with respect to the single whistleblower complaint he reviewed, Mehta did not know what, if anything, the Audit Committee did to address the complaint or the concerns it raised. *Id.* at 355:18-358:13.

Mehta's superficial review of the record and rubberstamping of the Audit Committee's actions (without even knowing what those actions were) is unreliable and unhelpful to the trier of fact and this Court.

CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court grant this motion and issue an order excluding the expert opinions of Ryan Sullivan, Bruce Blacker, Matthew Lerner, and Amish Mehta in their entirety, together with such other and further relief as the Court deems just, proper and appropriate.

Dated: March 24, 2023
New York, New York

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Attorney Certification Pursuant to Commercial Division Rule 17

I, Jonathan Conley, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing memorandum of law contains ____ words, excluding the parts exempted by Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)). In preparing this certification, I have relied on the word count of the word processing system used to prepare this memorandum of law.

On March 23, 2023, the Court granted Plaintiff's request for an enlargement of the word limit to 24,000 words in total for Plaintiff's two memoranda filed in support of motions to exclude certain defense expert witnesses. Plaintiff's two memoranda of law—the foregoing memorandum of law (12,913 words) and Plaintiff's other memorandum (6,139 words) that was filed earlier today (NYSCEF 1677)—contain 19,052 words in total and comply with the applicable word count limit set by the Court.

Dated: March 24, 2023
New York, New York

/s/Jonathan Conley
Jonathan Conley