

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.

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Index No. 451625/2020

IAS Part Three

Hon. Joel M. Cohen

**REPLY AFFIRMATION
OF P. KENT CORRELL**

I, P. KENT CORRELL, an attorney duly admitted to practice in the courts of the State of New York, hereby affirm the following under the penalty of perjury pursuant to CPLR 2106:

1. I am the attorney of record for Defendant Wayne LaPierre in this action, and am fully familiar with the facts and circumstances in this case.

2. I make this affirmation in support of LaPierre's reply to Plaintiff's opposition to LaPierre's Cross-Motion for Leave to Amend His Answer to Replead Certain of His Affirmative Defenses pursuant to CPLR 3025(b) (NYSCEF 1336).

3. The Attorney General commenced this action in August 2020 (NYSCEF 1 and 11). In February 2021, LaPierre answered the complaint, asserting the affirmative defenses the Attorney General is now asking the Court to dismiss (NYSCEF 226) and the NRA answered the complaint asserting affirmative defenses and counterclaims (NYSCEF 230).

4. In June 2021, the Attorney General moved to dismiss counterclaims asserted by the NRA, but did not move to dismiss any of LaPierre's defenses or any of the NRA's defenses

(NYSCEF 264). In August 2021, the Attorney General filed an Amended and Supplemental Verified Complaint (NYSCEF 333).

5. In September 2021, LaPierre moved, pursuant to CPLR 3211(a)(2), (3) and (7), to dismiss the causes of action asserted against him in the new complaint (NYSCEF 355).

6. The Attorney General opposed the motion, but did not cross-move to dismiss any of LaPierre's affirmative defenses (NYSCEF 404).

7. In March 2022, this Court issued a decision and order granting in part and denying in part LaPierre's motion to dismiss (NYSCEF 609).

8. LaPierre timely answered, again asserting the defenses the Attorney General is now asking the Court to dismiss (NYSCEF 620).

9. In April 2022, within 20 days of service of that answer, LaPierre amended his answer, as of right, again asserting the defenses the Attorney General is now asking the Court to dismiss (NYSCEF 627), and, again, the Attorney General did not to move to dismiss the defenses.

10. In May 2022, after 20 months of litigation, which included extensive document production and fact depositions, as well as a bankruptcy proceeding involving multiple depositions and 12 days of trial testimony, the Attorney General served a Second Amended Verified Complaint, precipitating another round of motions to dismiss, including one from LaPierre (NYSCEF 691). Again, in opposing the motions to dismiss, the Attorney General elected not to cross-move to dismiss any of LaPierre's (or anyone else's) affirmative defenses.

11. In June 2022, this Court issued a decision and order granting the Attorney General's motion to dismiss the NRA's counterclaims (NYSCEF 707).

12. Fact discovery was substantially closed as of July 15, 2022 (NYSCEF 740).

13. This Court issued a decision on the motions to dismiss in October 2022 (NYSCEF 845).

14. LaPierre answered, again asserting the defenses the Attorney General is challenging (NYSCEF 865).

15. In October 2022, the Attorney General served LaPierre with contention interrogatories seeking disclosure with respect to LaPierre's affirmative defenses.

16. In November 2022, LaPierre served his objections and responses to the interrogatories, disclosing facts supporting his defenses (*see* NYSCEF 1352, Exhibit 1 of Correll Opposition Aff.).

17. The Attorney General did not challenge LaPierre's responses as deficient.

18. In January 2023, in response to this Court's Order Amending Caption (NYSCEF 921), LaPierre served an amended verified answer to take into account the change in the name and definition of the lead defendant, the National Rifle Association of America (NYSCEF 1023) in accordance with CPLR 3025(d). In his amended answer, LaPierre, again, asserted the defenses the Attorney General is now challenging (*id.*).

19. In February 2023, *two years* after being put on notice of LaPierre's affirmative defenses, the Attorney General belatedly moved to dismiss nine of LaPierre's affirmative defenses, under CPLR 3211(b) or, alternatively, CPLR 3212 (NYSCEF 1164).

20. LaPierre opposed the motion (NYSCEF 1346), arguing that the challenged affirmative defenses were pleaded adequately and had merit. In addition, in response to the Attorney General's argument that his defenses were asserted as mere conclusions of law without any supporting factual allegations (*see, e.g.*, NYAG opening brief at 12), LaPierre cross-moved for leave to amend his answer to set forth additional factual allegations supporting his defenses

(NYSCEF 1336), attaching a blacklined version of a proposed amended answer (NYSCEF 1354), which included the following additional allegations supporting LaPierre's defenses:

AFFIRMATIVE DEFENSES AND/OR OTHER DEFENSES

Without admission that it carries the burden of proof as to any of the following, or that any of the following constitutes an "affirmative defense" within the meaning of the CPLR, Mr. LaPierre asserts the following affirmative defenses and other defenses without waiver of other applicable affirmative defenses or other defenses not included here, which he reserves the right to assert as they become known. In support of the following affirmative defenses and other defenses, upon information and belief, Mr. LaPierre alleges as follows:

This action alleges violations of New York's Not-for-Profit Corporation Law ("N-PCL"), New York's Estates, Powers and Trust Law ("EPTL"), and New York's Executive Law. The operative complaint is 179 pages long and contains 704 paragraphs of allegations, many with multiple subparts (NYSCEF 646). In the complaint, the Attorney General asserts fifteen causes of action, three of them against LaPierre, and requests judgment against the Defendants for ten forms of relief. (NYSCEF 646, at page 160-176.) The Attorney General's "Prayer for Relief" includes, inter alia, a request for judgment against LaPierre: (1) removing him for cause from his position as Executive Vice President of the NRA pursuant to N-PCL §§ 706(d), 714(c), and 717 and EPTL § 8-1.4; (2) permanently barring him from re-election and from serving as an officer or director of the NRA pursuant to EPTL § 8-1.4; (3) permanently barring him from serving as an officer, director, or trustee of any not-for-profit or charitable organization incorporated or authorized to conduct business or solicit charitable donations in the State of New York pursuant to EPTL § 8-1.4; (4) directing him "to account for [his] conduct in failing to perform [his] duties in managing the NRA's charitable assets[,] to pay full restitution to the NRA for the waste and misuse of its charitable assets, including the return of salary received while breaching [his] fiduciary duties to the NRA, plus interest at the statutory rate[,] and to pay damages to the NRA arising from the breach of fiduciary duties pursuant to N-PCL §§ 720 and EPTL § 8-1.4;" and (5) "[d]irecting [him] to pay the NRA restitution for all excessive, unreasonable, and excess benefits that were paid to and unjustly enriched [him] in violation of law and NRA bylaws and policies." (Id. Emphasis added.)

LaPierre has been working for the NRA since 1978 and has been its Executive Vice President since 1991. Every year since 2008, the NRA has filed an annual "CHAR 500" report and IRS Forms 990 with the New York State Office of the Attorney General Charities Bureau ("OAG" or "Charities Bureau") disclosing LaPierre's compensation and the organization's use of first class or charter travel, and for over a decade, as far as LaPierre knows, no one from the OAG or the Internal Revenue Service ("IRS") ever raised an issue about his compensation or the organization's provision of first class or charter travel, leading LaPierre to

believe that neither the OAG nor the IRS had any issues or concerns about his compensation or the organization's provision of first class or charter travel. On September 4, 2018, less than 10 days before the primary elections, during a debate with other Democratic Attorney General candidates, James stated that, if elected, her "top issue" would be "going after the NRA because it is a criminal enterprise." On September 6, 2018, less eight days before the primary elections, in an interview with Our Time Press, she accused the NRA of being a "terrorist organization". On October 31, 2018, a week before the general election, while being interviewed for a magazine article, James stated: "The NRA holds [itself] out as a charitable organization, but, in fact, [it] really [is] a terrorist organization." Her message was clear: If you elect me, I will use my position and public resources to try to shut the NRA down.

After winning election based on that promise, she set out to do exactly that. Instead of acting ethically and recusing herself from matters involving the NRA and allowing them to be handled by impartial and independent counsel outside the office of the OAG, to avoid impropriety and the appearance of impropriety, she took charge of matters involving the NRA personally, allocated an enormous amount of public resources to an investigation of the NRA and, in an attempt to deceive the Court and the public, crafted a contrived and false narrative about the NRA and LaPierre, grossly inflating the amount of his compensation, in a complaint setting forth allegations telling what this Court has described as "a grim story of greed, self-dealing and financial oversight at the highest levels of the National Rifle Association." See Decision and Order on Motion dated March 2, 2022 (NYSCEF 609).

In an attempt to support this false and misleading narrative, James and her massive team of lawyers, over a dozen of them, also included in their complaint material misrepresentations of fact in an attempt to deceive the Court as to the location of the NRA's office, alleging, under oath, that "the office of the NRA is in New York County" when they knew that was not true—when they knew full well that the NRA did not have an office in New York County. The purpose of this misrepresentation was to allow James to secure the venue of her choice—one with a pool of jurors she apparently hoped would share her animus, bias, prejudice and open hostility toward the NRA.

Thus, acting ultra vires, and with a glaring and irreconcilable conflict of interest, in pursuit of her own interest and personal gain, rather than any legitimate government or public interest, James stands before this Court with dirty hands asking for what she calls "equity"—removal of LaPierre from his position as head of the NRA, depriving him of his livelihood and life savings, through forfeiture of all compensation earned from his work for the NRA over the last 45 years, and, last but not least, imposition of a lifetime ban on nonprofit service by LaPierre, anywhere—relief that she is not authorized to seek and that this Court does not have the power to grant—relief designed not to secure compliance with New York's nonprofit law or ensure proper administration of the NRA's assets, but,

rather, to destroy the NRA and put an end to its mission, by taking LaPierre, a leader in Second Amendment advocacy, out of the game, violating his First Amendment rights to freedom of association and freedom of speech, and silencing him forever.

The New York State Office of the Attorney General, the Charities Bureau, and the State of New York slept on their right to challenge Mr. LaPierre's compensation as excessive and to challenge the NRA's provision of charter travel to Mr. LaPierre as unlawful. Since at least 2008, the NRA has been filing annual reports with the OAG Charities Bureau showing the amounts of compensation the NRA was paying to Mr. LaPierre and, with one exception (2013), showing that the NRA was providing first class or charter travel. The OAG Charities Bureau was aware of the amounts of compensation and the fact that the NRA was providing first class or charter travel to certain persons for at least 11 years before the Attorney General commenced this action seeking relief against LaPierre, including equitable relief. This awareness should have put the attorney general on notice as to its potential claims against LaPierre relating to compensation and charter travel. By failing to investigate, or make any inquiry at all, the attorney general's delay became unreasonable. Under New York's Not-for-Profit Corporation Law and New York's Estates, Powers and Trusts Law, the Attorney General asserts that LaPierre's acceptance of the compensation he was offered (and had no hand in determining) was unlawful and that his use of charter travel was unlawful, but for more than a decade before this action was brought the OAG ignored the information the NRA gave the OAG, apparently viewing the compensation as reasonable and expressing no concern about the NRA's use of charter travel. As a result, the OAG was aware or should have been aware of its potential claims against LaPierre relating to his compensation and charter travel in 2009. And, by 2016, when the NRA filed its CHAR 500 for 2015, showing both the use of charter travel and that the NRA had paid LaPierre over \$5,000,000 in total compensation in 2015 (albeit with most of that being a mandatory payout from his retirement plan that he had earned over the course of the prior 38 years of his employment by the NRA), the OAG was aware or should have been aware of those facts. And that is exactly the purpose behind the Legislature's policy choice to require not-for-profit corporations to make these filings each year—so that the attorney general can ask, and get the information it needs to do its job, promptly, and without unreasonable delay.

Rather than reading the Char500s and Forms 990s filed by the NRA, the Charities Bureau, the OAG, James and her predecessors Andrew Cuomo, Eliot Spitzer, Eric Schneiderman, and Barbara Underwood, sat on their hands despite information in the NRA's CHAR 500's and Form 990's that put them on notice of the amount the NRA paid to Mr. LaPierre each year as compensation for the services he provided to the NRA and of the fact that the NRA was providing first class or charter travel to some persons. The Attorney General's failure to bring her claim against Mr. LaPierre for unlawful compensation and unlawful charter travel (or even investigate it) until 2020 was unreasonable.

Not only was the Attorney General responsible for an unreasonable delay, but that delay prejudiced LaPierre. Over the 11 years between 2009, when the NRA's use of first class or charter travel was disclosed in its CHAR 500/Form 990 filing for 2008, and 2020, when the Attorney General brought this action against LaPierre challenging his compensation and charter travel, witnesses have died, including the person who served as the NRA's Director of Security from 2008 to 2012 who conducted threat assessments and advised LaPierre that use of charter travel was necessary for security purposes, and directors who were involved in determining the amount of LaPierre's compensation. In addition, documents relating to the fixing of LaPierre's compensation, threats to LaPierre, and the decision of the NRA to provide charter travel to LaPierre, have become difficult to locate, and some may no longer exist. Certainly, the mustering of testimony and documents establishing the security threats that created the need for the NRA to provide charter travel to LaPierre would now be far more difficult than it would have been if the OAG had acted promptly on the information provided to it by the NRA in its 2008 CHAR 500 and Form 990, and subsequent filings. The passage of time without action by the OAG on the compensation and charter travel issues the Attorney General now belatedly seeks to raise has deprived LaPierre of key witnesses, forming inequity. That the testimony of Steven Shulman, who represented the NRA as outside counsel (through several firms, including Cadwalader, Wickersham & Taft) from 1978 (the year Mr. LaPierre started at the NRA) until his death in 2011, and Gordon Russell, who served as the NRA's head of security from 1994 until his death in 2014, regarding the NRA's need for charter travel will necessarily remain unknown demonstrates why the OAG's 11-year delay in bringing a claim based on Mr. LaPierre's compensation or charter travel was prejudicial. The decreased ability of Mr. LaPierre to vindicate himself that results from the death of these witnesses is good grounds for a defense of laches. Indeed, it appears that no witness remains who could testify on behalf of LaPierre as to the threat levels before 2008 that created the need for Mr. LaPierre to use charter travel for security reasons or the manner in which that the threats were assessed and documented, or as to any steps Shulman and Russell took to ensure that the NRA's policy regarding charter travel was compliant with IRS rules and New York law.

In discharging his duties as Executive Vice President of the NRA, Mr. LaPierre, who at all times was acting in good faith, was entitled to rely on information, opinions, reports or statements from other persons as to matters which he believed to be within their professional or expert competence, and Shulman and Russell were such a persons. To require Mr. LaPierre to face the Attorney General's charges that the NRA's policy and practice with regard to charter travel was not established in accordance with IRS rules and regulations, New York's Not-for-Profit Corporation Law and New York's Estates, Powers and Trusts Law back in 2008, 15 years ago, without having Shulman and Russell to testify on his behalf, would be unfair. Mr. LaPierre accepted the NRA's provision of charter travel with the belief that the provision of charter travel was being provided in

accordance with the law and IRS rules, and acted with the belief that the NRA's payment of compensation to him in the amounts the NRA had determined was lawful and that the NRA's provision of charter travel was lawful, and Mr. LaPierre requests that the Court find that the Attorney General is estopped and barred by the doctrine of laches from pursuing any claim against him based on the theory that his acceptance of the compensation offered to him by the NRA and paid to him by the NRA was unlawful or that his acceptance of the charter travel provided to him by the NRA was unlawful.

If the Attorney General had challenged Mr. LaPierre's compensation and charter travel promptly after receiving the NRA's 2008 filings, Mr. LaPierre could have directed that an appropriate legal review be conducted to ensure that the NRA was complying with all applicable laws, rules and regulations and, based on that advice, taken steps to address the Attorney General's concerns and altered his conduct to the extent necessary or appropriate to address any legitimate concerns. By sitting on its hands, the Charities Bureau and the OAG deprived him of the opportunity to change his behavior, if necessary, to comply with the law, making it unfair for the Attorney General to complain that he should have behaved differently. If, after receiving the NRA's 2008 filing disclosing the use of first class or charter travel, the OAG had promptly identified any defect in the NRA's policy of providing Mr. LaPierre with charter travel promptly, the NRA could have cured it and avoided the purported problem of which the Attorney General now complains.

A long line of New York attorneys general knew or should have known of the amounts of compensation the NRA was paying to Mr. LaPierre and that the NRA was using charter travel, and of their right to challenge Mr. LaPierre's compensation and use of charter travel, for many years before commencing this action and first asserting that Mr. LaPierre's compensation was excessive and unlawful and that his use of charter travel was unnecessary and unlawful. During the period of the Charities Bureau's inaction, the NRA's Officers Compensation Committee continued to follow the process they had been following for years, the NRA's Board of Directors continued to approve the amounts of compensation recommended by the Officers Compensation Committee, and the NRA continued to provide charter travel to or for Mr. LaPierre because of his special need for security, acts that the Attorney General now says were unlawful and constituted violations of New York nonprofit law, acting as though she is surprised that these amounts of compensation were being paid and that charter travel was being used when her Office knew all along. If the Attorney General were to prevail on its excessive compensation and charter travel claims and succeed in clawing back all of the compensation the NRA paid Mr. LaPierre and getting LaPierre banned for life from nonprofit service, Mr. LaPierre would lose his livelihood, his life's savings and his right to freedom of association and free speech, all on the basis of trumped up claims belatedly asserted by this Attorney General after her predecessors sat on their hands for 43 years. If the Charities Bureau had contacted Mr. LaPierre and expressed concern about his compensation, he could

have looked at the matter, sought appropriate professional advice from a compensation expert and compensation counsel, and taken appropriate steps to make sure the NRA was complying fully with the N-PCL and the EPTL, but because the Charities Bureau expressed no concern, Mr. LaPierre naturally assumed, and believe, that the Charities Bureau had no concerns about his or use of charter travel.

James is clearly acting outside the scope of her authority, not to protect a public interest, but to protect her own interest in keeping a patently improper and corrupt campaign promise she made to garner media attention, get free publicity, and solicit campaign donations and votes from her base.

See NYSCEF 1354 at 99-107.

21. In her reply papers, the Attorney General withdrew that portion of her motion seeking dismissal of several of the challenged affirmative defenses (*see* NYSCEF 1771, at 1, note 1), leaving only the three that she continues to challenge, i.e., the Second, Third and Twenty-Fourth affirmative defenses in LaPierre's proposed amended answer.

22. Thus, having been on notice of LaPierre's affirmative defenses since February 2021, and having waited two years, until February 2023, to challenge any of them as deficient, the Attorney General now claims that LaPierre's cross-motion for leave to amend should be denied on the ground that his delay in moving to amend his answer to add factual allegations supporting the defenses has resulted in unfair surprise and prejudice, and should be denied as untimely. In the alternative, she argues that the cross-motion should be denied because amendment would be futile.

23. In light of the foregoing, LaPierre respectfully submits that, for the reasons stated in his memorandum in opposition to the Attorney General's motion to dismiss certain of defendants' affirmative defenses and in support of his cross-motion for leave to amend his answer, the memoranda in opposition to the Attorney General's motion submitted by the NRA and Frazer, and the additional reasons set forth below, the Attorney General's arguments in

opposition to LaPierre's cross-motion should be rejected, LaPierre's cross-motion should be granted, and that branch of the Attorney General's motion seeking dismissal of the affirmative defenses asserted by LaPierre that the Attorney General continues to challenge should be denied.

Executed this 17th day of April 2023 in New York, New York.

/s/ P. Kent Correll

P. Kent Correll

CERTIFICATE OF COMPLIANCE

I, P. Kent Correll, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Reply Affirmation of P. Kent Correll complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the Affirmation contains 3,802 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affirmation.

Dated: New York, New York
April 17, 2023

/s/ P. Kent Correll

P. Kent Correll

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record on this 17th day of April 2023.

/s/ P. Kent Correll
P. Kent Correll