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

Motion Seq. No. 44

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFF'S MOTION TO DISMISS CERTAIN OF DEFENDANTS' AFFIRMATIVE DISMISSES AND IN OPPOSITION TO THE CROSS-MOTIONS FOR LEAVE TO AMEND

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On behalf of the Plaintiff, the People of the State of New York ("Plaintiff"), the Office of Attorney General Letitia James ("OAG") respectfully submits this reply memorandum of law in further support of Plaintiff's motion to dismiss certain of Defendants' affirmative defenses pursuant to Civil Practice Law and Rules ("CPLR") 3211(b) and 3212 and in opposition to the cross-motions to amend.

PRELIMINARY STATEMENT

Plaintiff commenced this action to hold the National Rifle Association of America ("NRA"), Wayne LaPierre ("LaPierre") and certain other officers of the NRA accountable for their self-dealing, mismanagement and failure to administer the NRA's charitable assets properly. This Court has repeatedly upheld the Complaint's claims and has ruled that the Defendants' attempts to shift the focus from their own wrongdoing to an examination of the Attorney General's motives has no place in this litigation. Undeterred by the Court's rulings, including its decision dismissing the NRA's counterclaims (the "Counterclaim Decision") (NYSCEF 706), the Defendants have continued to assert affirmative defenses based on the same allegations of bias, retaliation and unclean hands that the Court has already ruled are legally deficient. In its moving memorandum, Plaintiff laid out why such defenses must be dismissed as a matter of law. As set forth in detail below, Defendants' opposition papers mischaracterize the prior holdings of this Court, misinterpret the cases they rely upon and fail to create any issues of fact or law precluding the dismissal of the affirmative defenses that are the subject of the instant motion.[1]

[1] Defendant Wilson Phillips has withdrawn his Eighth (estoppel, waiver and laches), Ninth (unclean hands) and Twenty-Ninth (catch-all) Affirmative Defenses (NYSCEF 1332 at 5), and, as result, they are no longer contested. In addition, Plaintiff hereby withdraws the portion of its motion seeking dismissal of the Contribution Affirmative Defenses, the Control Affirmative Defenses (asserting an affirmative defense that damages were caused by unspecified third parties outside of that Defendant's control) and the Mitigation Affirmative Defenses (as those terms are more fully defined in Plaintiff's moving memorandum (NYSCEF 1178 at 11-12)). All page references to NYSCEF documents are to the page numbers assigned by the NYSCEF system.

In their opposition papers, the Defendants[2] first argue that their bias allegations are relevant here, unlike on the motion to dismiss the counterclaims, for five reasons – none of which has any merit.[3] While Defendants assert that they have alleged additional facts to show a nexus between the Attorney General's purported animus and the institution of this action, as set forth below, their allegations fail to remedy this key defect and, indeed, provide even less detail than the allegations in support of the failed counterclaims.[4]

Defendants' second assertion, that the Counterclaim Decision only considered the link between the purported animus and the investigation but not the commencement of this action, similarly misses the mark. In evaluating the counterclaims, the Court analyzed whether the Complaint stated viable claims and, in fact, relied on the fact that the claims in the Complaint were viable and based on serious allegations of wrongdoing at the very top of the NRA in its decision. It makes no sense to argue, as Defendants do, that a complaint arising out of a valid investigation which uncovered substantial evidence of wrongdoing was not justified. In the Counterclaim Decision, this Court held that there was a clear non-pretextual basis for investigating – and here,

[2] Defendants LaPierre and Frazer joined in the arguments asserted by the NRA in its opposition papers. (NYSCEF 1346 n.2; NYSCEF 1334 n.1.) Defendant Powell did not put in opposition papers and, for the reasons set forth in n.1 *supra*, none of the affirmative defenses asserted by Defendant Phillips remains subject to this motion. As a result, as used herein, "Defendants" refers to Defendants LaPierre, Frazer and the NRA.

[3] Because a determination of whether the Defendants' factual allegation of bias are true is not necessary to the determination of this motion, Plaintiff will not respond to each such factual allegation, but rather will focus on whether, even if true, the allegations supporting the affirmative defenses are sufficient as a matter of law. The failure to respond to the allegations should not, however, be deemed an admission of their truth.

[4] Defendant LaPierre argues that his relevant answer is NYSCEF 1023, which Plaintiff has rejected as a nullity because it was not served with leave of Court (*see* NYSCEF 1178 at 5 n.3.) Plaintiff's arguments on this motion are, however, equally applicable to the affirmative defenses asserted in NYSCEF 1023.

bringing an action against – the NRA. This holding refutes any assertion that improper motives were a but-for cause of the complained of actions.

The Defendants' third assertion, that all that is required to state a retaliation defense is that animus be a substantial, and not a but-for cause, of the complained of action is unfounded. As set forth below, none of the cases held that but-for causation was not required as the Defendants assert and, in fact, they held the opposite. Nor do the Defendants cite any applicable authority for their fourth argument: that the retaliation defenses **must be** submitted to the jury or for their argument that the assertion of equitable defenses of unclean hands, laches and estoppel against the government may be alleged in the same manner as against private parties.

Finally, Defendants' belief as to potential errors in the Court's decision on the counterclaims is irrelevant. The Counterclaim Decision is law of the case; if, as Defendants now contend, they believed that the Court "did not appreciate the relevant timeline," (NYSCEF 1458 at 11), they should have sought reconsideration of the decision or a stay pending appeal. The NRA, LaPierre and Frazer did not seek summary judgment dismissing the claims against them, a tacit admission that they cannot establish entitlement to dismissal of such claims, undercutting any argument that the claims are without merit. Accordingly, they must be prepared to go to trial on whether the allegations against them are true and not on deficient "affirmative defenses" that are not supported by facts or law.

Furthermore, the Defendants' Estoppel Affirmative Defenses fail as a matter of law, as equitable defenses are not available against the State when the State is acting pursuant to its statutory responsibilities. And Defendants Frazer and LaPierre's cross-motions to amend should be denied as both futile and untimely.

ARGUMENT

I. THIS COURT DISMISSED THE NRA'S COUNTERCLAIMS FOR FAILING TO ADEQUATELY ALLEGE UNCONSTITUTIONAL RETALIATION OR SELECTIVE PROSECUTION ON THE MERITS AND THAT DECISION SHOULD BE FOLLOWED HERE

A. The Dismissal of the Counterclaims on the Merits is Law of the Case and Precludes the Re-litigation of Those Claims Through Their Assertion as "Affirmative Defenses"

As Plaintiff's moving memorandum demonstrated, the Counterclaim Decision is fatal to the Defendants' affirmative defenses of retaliation, selective prosecution, unclean hands and the related defenses that are premised on allegations of purported bias and animus by the Attorney General (the "Bias Defenses"). Defendants attempt to avoid the consequences of the Counterclaim Decision by characterizing the decision as one based on "venue, immunity, and mootness grounds," rather than an analysis of the merits of the retaliation and selective prosecution counterclaims that they asserted, which were based on the same general allegations of animus as the Bias Defenses. (NYSCEF 1458 at 14; *see also id.* at 17-18.) The Counterclaim Decision was not, however, merely a "procedural" one. (*Id.* at 17). Rather, the Court analyzed the merits of the counterclaims and expressly held that "the NRA's factual allegations do not support any viable legal claims that the Attorney General's investigation was unconstitutionally retaliatory or selective." (NYSCEF 706 at 2.) Thus, the Counterclaim Decision was one on the merits that is law of the case requiring dismissal of the Bias Defenses here. *See*, *e.g*, *Brownrigg v. New York City Hous. Auth.*, 29 A.D.3d 721, 722-23 (2d Dep't 2006) (reversible error for court to grant summary judgment based on same facts and law as prior determination where there were no extraordinary circumstances warranting the court ignoring the prior order).[5]

[5] The *Brownrigg* decision was relied upon in *Ahmed v. Carrington Mtge. Servs., LLC*, 189 A.D.3d 960, 962 (2d Dep't 2020), which Defendants cite. While *Ahmed* points out that law of the case is more flexible than res judicata and collateral estoppel, as the court in *Brownrigg*

While the Court's analysis focused on the propriety of the Attorney General's commencement of the investigation that led to this action, that fact does not help Defendants. In analyzing whether the investigation was proper, the Court looked to the fruits of that investigation – the claims asserted in the Complaint here – and found that "they were serious claims based on detailed allegations of wrongdoing at the highest levels of a *not-for-profit* organization as to which the Attorney General has legitimate oversight responsibility." (*Id.*) Not only did the Court find that there were many "viable" legal claims in the Complaint, it also expressly found that the viability of the Complaint's claims refuted the allegations of unconstitutional animus, pointing out that:

> **The results of the Attorney General's investigation, moreover, give credence to its stated non-retaliatory basis.** "[W]hen nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, … that retaliation is subject to recovery as the but-for cause of official action offending the Constitution" (*Hartman*, 547 US 256). The converse is true here: the "nonretaliatory grounds" were more than sufficient to justify the Attorney General's investigation. **It yielded a lengthy complaint alleging, in detail, a pattern of misconduct at the highest levels of the NRA (*see* NYSCEF 333). Many of these claims survived multiple motions to dismiss; none were frivolous.**

(*Id.* at 6.[6]) This holding on the merits of Defendants' counterclaims is law of the case that bars the affirmative defenses of retaliation and selective prosecution, as well as the unclean hands affirmative defense, which, as set forth below and in Plaintiff's moving memorandum, requires a constitutional injury. *See Briggs v. Chapman,* 53 A.D.3d 900, 901–02 (3d Dep't 2008); *People v. Trump Entrepreneur Initiative LLC,* No. 451463/13, 2014 WL 5241483, at *13 (Sup. Ct. N.Y.

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explained, the law of the case doctrine applies when an issue has been decided on the merits, but "may be ignored in extraordinary circumstances such as a change in law or a showing of new evidence." 29 A.D.3d at 722. No such extraordinary circumstances are present here warranting a departure from the Counterclaim Decision's determination on the merits of Defendants' constitutional retaliation and selective bias claims.

[6] Unless otherwise indicated, all emphasis is added.

Cty. Oct. 8, 2014), *aff'd in part, rev'd in part on other grounds,* 137 A.D.3d 409 (1st Dep't 2014); (*see also* NYSCEF 1178 at 14-20).

As detailed in Plaintiff's moving memorandum, the affirmative defenses asserted by the NRA and the other Defendants sounding in retaliation, to the extent they are supported by any factual allegations at all, are largely based on the same allegations of bias, but with much less detail, as the NRA's counterclaims. (NYSCEF 1178 at 10-11.) Their attempt to re-litigate the dismissal of the counterclaims through the assertion of these affirmative defenses is barred by the law of the case. *Briggs,* 53 A.D.3d at 901.

B. Even if Defendants Could Re-Litigate the Dismissed Retaliation Counterclaims, They Still Fail Because the Pared-Down Allegations Are Insufficient to Show the Required But-For Causation

Even if the Counterclaim Decision were not law of the case, the affirmative defenses that sound in First Amendment retaliation cannot survive. In order to excuse their failure to adequately allege that animus was the but-for cause of the filing of this action, Defendants assert that showing but-for causation is not required here because this is a civil, not criminal, action. (NYSCEF 1458 at 18-19 & n.45.) This argument is based on – at best – a misreading of the cases they cite. For example, contrary to Defendants' argument, the court in *Chizmar v. Borough of Trafford*, No. 2:09-CV-188, 2011 WL 1200100 (W.D. Pa. Mar. 29, 2011), did not hold that but-for causation was not required in a civil action; indeed, it analyzed the civil claims in the case and found that they were deficient because they failed to establish but-for causation. *Id.* at *16. The court also analyzed other claims at issue that were criminal in nature and found that in addition to the other elements necessary to establish a retaliation claim in a civil case, **including but-for causation** (which it referred to as the third element of a retaliation claim), the party asserting such a claim

relating to a criminal prosecution must also allege the absence of probable cause. *Id.* at *16-18.[7] Nowhere does the court state that but-for causation is not required in cases alleging retaliation through the initiation of civil cases.

Similarly unavailing is the Defendants' argument that a determination of whether causation exists is a question that the jury must decide. As this Court pointed out in the Counterclaim Decision, "courts may dismiss First Amendment retaliation claims at the motion to dismiss stage for failure to adequately allege but-for causation." (NYSCEF 706 at 7-8 (citing cases).) Not only can the court dismiss such claims, but doing so "serves a salutary gatekeeping function." *Id.* Indeed, the *Chizmar* case the NRA (incorrectly) cites for the level of causation that must be alleged to state a retaliation claim in fact granted summary judgment and dismissed those claims before they reached a jury. 2011 WL 1200100 at *9, *14, *16 (granting summary judgment for failure to adequately establish but-for causation).

C. The Selective Prosecution Defense Fails as a Matter of Law, Again, Because, *Inter Alia*, Defendants Have Failed to Identify Any Other Subjects That Were Treated Differently

Defendants' attempts to avoid dismissal of the selective prosecution defenses fail for similar reasons. The Court's decision dismissing the selective prosecution counterclaim was on the merits and, contrary to the NRA's argument, addressed the same issues that are raised by the selective prosecution "affirmative defense" and should be treated as law of the case. (NYSCEF 706 at 8-13.) Although the Counterclaim Decision focused on the commencement of the investigation, it analyzed that question by looking to cases alleging selective prosecutions. The

[7] The other case Defendants rely on for this point, *Gearin v. Maplewood*, 780 F. Supp.2d 843 (D. Minn. 2011), is similarly misinterpreted by them. As in *Chizmar*, in *Gearin*, the court held that but-for causation was a required element of a retaliation claim, *id.* at 856, and found that an additional element, lack of probable cause, was required to be alleged with respect to decisions to commence criminal cases. *Id.* at 861.

Counterclaim Decision thus pointed out that the "'decision to prosecute is particularly ill-suited to judicial review," and "requires a showing 'that the law has been administered 'with an evil eye and an unequal hand.'" (NYSCEF 706 at 9 (quoting *Wayte v. United States*, 470 U.S. 598 (1985) and *People by James v. Trump Org.,* 205 A.D.3d 625, 626-27 (1st Dep't), *appeal dismissed*, 38 N.Y.3d 1053 (2022)).

Particularly relevant here is the Counterclaim Decision's finding that the NRA failed to allege that it was "treated differently from other similarly situated charitable organizations due to impermissible considerations," which requires identifying such organizations. (*Id.* at 12 (citing *Trump Org.*, 205 A.D.3d 625, and *Jarrach v. Sanger*, No. 08-CV-2807(SJF)(ARL), 2010 WL 2400110, at *8 (E.D.N.Y. June 9, 2010).) That pleading deficiency has not been rectified with the selective prosecution affirmative defenses. Indeed, unlike the allegations in support of the selective prosecution counterclaim, which did identify purported comparable organizations (*see* NYSCEF 325 at 153-56, ¶ 38), the affirmative defenses of selective prosecution that the Defendants now assert are completely conclusory; critically, there are no supporting factual allegations and no identification of purportedly comparable organizations and individuals that were treated differently. (*See* NYSCEF 889, NRA Affirmative Defenses, ¶ 25; NYSCEF 865, LaPierre Affirmative Defense #26.) The Defendants' failure to allege that similarly situated subjects were treated differently is fatal to Defendants' selective prosecution affirmative defenses. (NYSCEF 706 at 12.)

D. Notwithstanding Defendants' Assertions, an Action to Address Corruption in a Regulated New York Non-Profit is Clearly in the Public Interest

In a weak attempt to avoid the well-established presumption of regularity afforded to prosecutor's actions, which was relied upon by the Court in the Counterclaims Decision, as well as the well-established case law limiting the use of equitable defenses against the government

(NYSCEF 1335 at 6), the NRA argues that this enforcement action is not in the public interest. That argument is completely meritless and unsupported by any applicable case law.

Indeed, this Court has already found that many of the claims in the Complaint are viable, that the Attorney General "has legitimate oversight responsibility" over the wrongdoing alleged, and that the NRA's narrative that the "Attorney General's investigation into these undeniably serious matters was nothing more than a politically motivated – and unconstitutional – witch hunt is simply not supported by the record." (NYSCEF 706 at 2; *see id.* at 5-6); *People by Schneiderman v. James*, No. 451488/2012, 2013 WL 1390877, *4 (Sup. Ct., N.Y. Cty. Apr. 3, 2013) ("Given 'the significant public interest in the management and affairs of not-for-profit corporations,' the 'Attorney General has extensive supervisory and enforcement authority over not-for-profit corporations.'") (citations omitted).

Moreover, the relief the OAG seeks here is sought pursuant to its statutory mandate under the Not-For-Profit Corporation Law ("N-PCL"), the Estates, Powers and Trusts Law ("EPTL") and the Executive Law to oversee not-for-profit organizations and the administration of charitable assets. Thus, the claims here are ones to benefit the public by obtaining restitution of charitable assets that were misused and equitable relief to ensure the proper administration of charitable assets. Contrary to the NRA's argument, its allegations of bias do not change the applicability of the cases that Plaintiff relies upon. *See, e.g.*, *People by Underwood v. Trump*, 62 Misc.3d at 500, 509 (Sup. Ct. N.Y. Cty. 2018) ("given the very serious allegations set forth in the petition, I find that there is no basis for finding that animus and bias were the sole motivating factors for initiating the investigation and pursuing this proceeding").

Here, this Court has already found that even if the NRA's allegations of bias were true, they do not affect the analysis of the NRA's constitutional claims of retaliation and selective

prosecution. (NYSCEF 706 at 7, 9-10.) Thus, for example, in dismissing the retaliation counterclaim, this Court noted that the Attorney General's "campaign trail rhetoric is relevant only if the NRA alleges a sufficient causal link between the animus and the adverse action, **which it has not**." (NYSCEF 706 at 7 n.6); *see also Trump*, 62 Misc.3d at 508-09 (allegations that a prosecutor is biased – even when supported by evidence of statements about defendants made by the prosecutor during a campaign about defendants – do not, by themselves, provide a defense; the court's responsibility is to see if the complaint's claims are adequately supported).[8]

E. Defendants' Attempt to Repackage the Counterclaims as an Unclean Hands Affirmative Defense Fails as a Matter of Law

None of the Defendants has adequately alleged an unclean hands defense here. Every case that has analyzed whether an unclean hands defense may be asserted against a government entity pursuing claims to enforce laws to protect the public – which, as set forth above, it is beyond genuine dispute that this case is – requires that the defense must be supported by allegations of a constitutional injury that prejudices the defendant in their defense of the action. Defendants fail to cite any cases that apply a different standard when the defense is asserted against the

[8] Although the NRA asserts that the allegations of bias in the *Trump* case were not similar to those here (NYSCEF 1458 at 9, n.11), that assertion is baseless. While the opinion on the motion to dismiss simply refers to allegations of animus and "personal attacks" that allegedly tainted the proceeding, 62 Misc.3d at 509, the papers submitted on the motion were filled with quotations from then-Attorney General Schneiderman, both on the campaign trail and in office, concerning his purported animus to President Trump. (*See* Reply Affirmation of Steven dated April 3, 2023, submitted herewith ("Shiffman Aff."), Ex. A, ¶¶ 7, 20-28.) Notwithstanding these allegations, the Court determined that its job was not to examine the "motivation of a government agency in commencing an enforcement proceeding," but rather was to analyze whether the allegations stated a claim. 62 Misc.3d at 509. Similarly, in the *Trump Organization* case, the respondents argued that "public statements" made on the campaign trail about an intent to investigate tainted the investigation, but the Court ruled that a review of documents obtained during the investigation "undercuts the notion that that this … investigation is based on personal animus, not facts and law." *People by James v. Trump Org.,* No. 451685/2020, 2022 WL 489625, *4 (Sup. Ct. N.Y. Cty. Feb. 17, 2022)*, aff'd* 205 A.D.3d 625 (1st Dep't), *appeal dismissed* 38 N.Y.3d 1053 (2022).

government, but rather rely solely on cases that address the sufficiency of an unclean hands defense asserted against private parties. (*See* NYSCEF 1458 at 20-21.) That failure is not surprising since to the extent there is any disagreement in the cases analyzing the assertion of such a defense against the government, it is between those cases that hold that an unclean hands defense is **always** unavailable against the government and those that hold that it is only available **in limited circumstances**. *See SEC v. Cuban*, 798 F. Supp.2d 783, 790-95 (N.D. Tex. 2011). In seeking dismissal of the unclean hands affirmative defenses here, Plaintiff only relies on the latter line of cases (*see* NYSCEF 1178 at 17-20), which hold that the defense is only available "in strictly limited circumstances where the agency's misconduct is egregious, and the misconduct results in prejudice to the defense of the enforcement action that rises to a constitutional level and is established through a direct nexus between the misconduct and the constitutional injury." 798 F. Supp.2d at 795; (see also NYSCEF 1178 at 17-19.)

The NRA's attempt to distinguish the cases Plaintiff cites misses the mark completely. While the NRA argues that Trump Entrepreneur Initiative LLC "arose in inapposite circumstances," (NYSCEF 1458 at 23), a review of the decision makes clear that it is squarely on point, i.e., the court was analyzing the availability of an unclean hands affirmative defense in a regulatory action brought by the Attorney General.[9] 2014 WL 5241483 at *12-13. Numerous

[9] Defendants attempt to distinguish the *Trump Entrepreneur* case because the specific factual allegations there concerning the allegedly inequitable behavior are somehow different from those alleged here fails. The court's analysis of the applicable standard was not based on the specific allegations of inequitable behavior, but rather focused on the assertion of the equitable defense against the government in any case where the government was bringing an action to enforce legislative mandates. 2014 WL 55241483 at *12. Moreover, as is the case here, the court in *Trump Entrepreneur* dismissed the unclean hands affirmative defense because the Respondents had failed to allege a constitutional injury that **prejudiced them in their defense of the action**. *Id.* at *13. As Defendants pointed out, the Respondents in the *Trump Entrepreneur* case did not appeal the dismissal of the unclean hands affirmative defense – even though they appealed other aspects of the decision – and, as a result, the Appellate Division decision affirming the dismissal

other cases, including several from federal courts in New York, have found that the use of an unclean hands defense against the government is severely limited. Those decisions, which the Court in the *Trump Entrepreneur* case relied upon, were not, as the NRA baselessly alleges (NYSCEF 1458 a 23 n.52), criticized for flawed reasoning. The NRA cites to the decision in *Cuban* as the source for its assertion that the cases were criticized for poor reasoning, but the *Cuban* decision **did not criticize the cases that Justice Kern relied upon**. The court in *Cuban* merely criticized cases that held that unclean hands could **never** be asserted against the government. 798 F. Supp.2d at 790-91. Rather than criticize the line of cases Justice Kern relied upon, the court in *Cuban*, in fact, relied on some of the very same cases in holding unclean hands could only be asserted against the government in very limited circumstances. *Cuban*, 793 F. Supp.2d at 792-96 (citing, *inter alia*, *SEC v. Electronics Warehouse, Inc.*, 689 F. Supp. 53, 72-73 (D. Conn. 1988), *aff'd sub nom.*, *SEC v. Calvo*, 891 F.2d 457 (2d Cir. 1989);[10] *SEC v. KPMG LLP*, No. 03 Civ. 671 (DLC), 2003 WL 21976733, at *3 (S.D.N.Y. Aug. 20, 2003)); *Trump Entrepreneur*, 2014 WL 5241483, at *12 (citing the same cases).[11]

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of certain affirmative defenses did not address the unclean hands defense as Plaintiff mistakenly noted in its moving memorandum. That mistake does not change the analysis at all. The trial court decision in the *Trump Entrepreneur* case dismissing the unclean hands defense is, of course, good law since the Respondents did not appeal it.

[10] The NRA's reliance on *Electronics Warehouse* (NYSCEF 1458 at 23 n.52) is misplaced since the court in *Electronics Warehouse* explained that "equitable defenses against government agencies are strictly limited" and, in particular, that "**unclean hands 'may not be invoked against a government agency** which is attempting to enforce a congressional mandate in the public interest.'" 689 F. Supp. at 73. Here, the Attorney General is attempting to enforce a statutory mandate to oversee charitable organizations and ensure that they operate in accordance with the N-PCL, EPTL and the Executive Law.

[11] Although research has not revealed other New York state cases analyzing the application of unclean hands defenses against the government, courts in New York routinely apply the rule that, as a general matter, equitable defenses may not be asserted against the government. *See, e.g.*, *In re Parkview Assocs. v. City of New York*, 71 N.Y.2d 274, 282 (1988) ("'[g]enerally, estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties'"); *Cannavo v. Olatoye*, 161 A.D.3d 620, 621 (1st Dept. 2018) ("this is not a rare or

Finally, the NRA's assertion that the question of unclean hands would be decided by a jury (NYSCEF 1458 at 22 n.50) ignores the fact that in New York, equitable claims and defenses are tried by the court. Indeed, the plain statutory language of the CPLR provides that even in actions where a party is entitled to a trial by jury by "express provision of law," "equitable defenses and counterclaims shall be tried by the court." CPLR § 4101.

II. DEFENDANTS' EXTRA-TERRITORIALITY DEFENSES HAVE ALREADY BEEN REJECTED BY THIS COURT.

The NRA's attempt to avoid the impact of this Court's decision sustaining the claims in the Second Amended Complaint and rejecting the NRA's argument that Plaintiff was improperly attempting to assert jurisdiction over NRA assets that were not held or administered in New York is meritless. In its moving memorandum, Plaintiff explained why the NRA's extraterritoriality affirmative defenses are deficient as a matter of law and barred by the law of the case. (NYSCEF 1178 at 22-24.) The NRA now asserts that Plaintiff is mischaracterizing the nature of the defenses it asserted. That assertion is puzzling.

In its briefs in support of its third motion to dismiss, the NRA asserted that Plaintiff could not assert claims with respect to assets that were not held or administered in New York. (NYSCEF 705 at 21-26, NYSCEF 831 at 13-14). Plaintiff's papers rebutted that argument (NYSCEF 768 at 19-20, 20 n.9), and the Court agreed, denying the motion to dismiss. (NYSCEF 847 at 23:19-27:25, 77:5-78:15; NYSCEF 851.) Although the NRA does not use the word extra-territoriality in two of the affirmative defenses, the arguments raised in those two defenses – that the NRA does not allege that the NRA holds assets in New York and that it does not administer property here –

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extraordinary case in which the doctrine of estoppel or laches should be applied against a government agency"); *Kenton Assocs., Ltd. v. Division of Housing and Community Renewal*, 225 A.D.2d 349, 350 (1st Dept. 1996) (equitable doctrines of laches and estoppel may not be invoked against the government).

are precisely the same arguments it used in its rejected extra-territoriality argument. (*See* NYSCEF 889, NRA Affirmative Defenses, ¶¶ 33-35; NYSCEF 705 at 22 ("nowhere does the NYAG allege that the NRA holds or administer property for charitable purposes in New York"); *see id.* at 21-26; NYSCEF 831 at 13-14.) For the reasons detailed in Plaintiff's moving memorandum, those defenses are barred by the law of the case and should be dismissed. (NYSCEF 1178 at 22-24.)

III. THE DEFENDANTS' ESTOPPEL DEFENSES FAIL AS A MATTER OF LAW

The NRA, Frazer, and LaPierre continue to argue that they have equitable defenses of laches and estoppel in this regulatory enforcement action, but fail to cite to any authority in support of their position or counter to the controlling authority cited by Plaintiff. The only authority offered by any of the three is *Republic of Turkey v. Christie's Inc.*, 62 F.4th 64 (2d Cir. 2023). But *Republic of Turkey* involved a foreign government, which is not immune to estoppel and laches in the same way as Plaintiff in this regulatory enforcement action, where the State is the domestic sovereign. *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 132-36 (1934) (holding that the Soviet Union, suing in the United States, was not exempt from laches or the statute of limitations in the same way as the domestic sovereign); *see also Lake v. New York City Emps.' Ret. Sys.*, 202 A.D.3d 682, 684 (2d Dep't 2022) ("The limitation on invoking estoppel against governmental bodies stems from considerations of sovereign immunity, protection of the public fisc, and separation of powers.") (internal quotation marks omitted).

The NRA attempts to distinguish the cases offered by Plaintiff by arguing that this case was not brought in the "public interest," and tries to put Plaintiff's motive at issue. (NYSCEF 1458 at 27-28.) But motive is not the determining factor – rather, the only issue is whether this action was brought pursuant to Plaintiff's statutory authority. *City of New York v. City Civ. Serv. Commn.*, 60 N.Y.2d 436, 449 (1983) ("[E]stoppel may not be applied to preclude a State or municipal agency from discharging its statutory responsibility."). And this Court has already determined that

Plaintiff's claims, if proven true, are meritorious, and are within the scope of the Attorney General's authority to pursue. (NYSCEF 610 at 1.) This action is thus squarely within the scope of cases involving the discharge of statutory responsibility that immunize Plaintiff from estoppel and laches defenses.[12]

And the NRA's suggestion that the State's immunity to laches comes from stale authority (NYSCEF 1458 at 26) is also without merit, as the rule remains alive and well. *See*, *e.g.*, *Lake*, 202 A.D.3d at 684 (2022 case upholding denial of petition seeking estoppel and laches against city retirement system); *Donn Gerelli Assocs. Ins. Agency*, *Inc. v. Lawsky*, 151 A.D.3d 424 (1st Dep't 2017) (upholding judgment denying application of equitable doctrine of laches against state official).

The absurdity of applying laches and estoppel in this case is made plain by LaPierre's arguments in support thereof: he insists that, because the Charities Bureau did not pick up on false representations about LaPierre's use of charter travel in the NRA's Form 990s from 2008 until the filing of the Complaint, the Charities Bureau was derelict in its duty and should not be able to maintain this action. (NYSCEF 1346 at 15-22.) As alleged in the Complaint, it was not the simple use of charter travel that gave rise to this action, but the NRA's false statements about its maintenance of a policy governing that travel, Defendants' actions to obscure the costs and use of such private travel, Defendants' false reporting regarding compensation connected to private travel, and LaPierre's wanton misuse of charter flights for personal travel. (NYSCEF 646 ¶¶ 146-164, 181-197, 216-218, 334-337, 346-348, 429-431, 448-451, 456-458.) What LaPierre wants is a

[12] Defendants offer no explanation of how they relied to their detriment on any actions that Plaintiff took. Indeed, the only specific example that they cite is to a statement made during oral argument on the motions to dismiss made by Plaintiff's counsel. But they make no effort to explain how estoppel should apply to that statement, let alone how it was relied upon.

reward for evading regulatory scrutiny for as long as he did – a reward he is not entitled to and that public policy demands he be denied. Frazer's similarly meritless argument that laches applies because the NRA's 990s included reports of his compensation going back to 2015 should be denied. (NYSCEF 1344 at 11-13.)[13]

In any event, a laches defense is also not available where a suit is brought within the applicable statute of limitations, as this suit was. *See B.N. Realty Assocs. v. Lichtenstein*, 21 A.D.3d 793, 799 (1st Dep't 2005).

The NRA's, Frazer's, and LaPierre's Estoppel Affirmative Defenses should thus be dismissed.

IV. THE DEFENDANTS' CONCLUSORY AFFIRMATIVE DEFENSES SHOULD BE DISMISSED

The Defendants' arguments that their conclusory affirmative defenses should survive all fail, because: (1) Plaintiff sought, but was denied, additional information about the factual underpinnings of the Defendants' affirmative defenses; (2) Plaintiff suffers prejudice from the lack of factual information, as evidenced by LaPierre's *ex nihilo* introduction of two new (deceased) witnesses in support of his defenses; and (3) "catch-all" affirmative defenses are barred as a matter of law.

First, Frazer argues that Plaintiff should have, but failed, to seek more information concerning his conclusory affirmative defenses, including by seeking a bill of particulars, before moving to dismiss them. (NYSCEF 1334 at 10-11.) Frazer forgets that Plaintiff served contention interrogatories on him, in which Plaintiff sought "the facts upon which [Frazer bases his]

[13] Frazer suggests that Plaintiff has previously taken the position that Frazer's compensation should be treated as a related party transaction under the applicable statutes in the N-PCL. (NYSCEF 1344 at 12.) But Plaintiff has never taken that position, and Frazer cites only to his own briefing on the issue and this Court's holding on the second round of motions to dismiss.

defense[s]." (Shiffman Aff., Ex. B, at 5-6.) Frazer objected and declined to respond on burden grounds. (*Id.*) And, of course, a party is not entitled to serve both interrogatories and a bill of particulars. CPLR 3130(1).

Second, LaPierre's sudden citation to former, deceased NRA staff members and advisors in support of his alleged laches defense highlights the prejudice Plaintiff suffers due to the lack of specific factual allegations in the Defendants' affirmative defenses.[14] Plaintiff also served LaPierre with contention interrogatories seeking the factual bases for his affirmative defenses. (*See* Shiffman Aff., Ex. C.) Nowhere in response did LaPierre identify these two alleged witnesses. (*See id.*) He now claims without any clear support that these two deceased witnesses are key to his defenses and, with discovery closed, states that "the mustering of testimony and documents . . . would now be far more difficult than it would have been if the OAG had acted promptly." (NYSCEF 1346 at 18.) LaPierre has the burden on this affirmative defense, and he has had more than three years since the beginning of the Attorney General's investigation to "muster" the documents and evidence in support of it. Even assuming that the identified persons were witnesses with important information relevant to Plaintiff's claims – an assertion that Plaintiff contests and which is belied by the record here – had Plaintiff known that LaPierre intended to rely on two dead witnesses to support his affirmative defense, Plaintiff would have sought targeted discovery, including seeking information regarding what knowledge these witnesses allegedly had, whether information pertaining to them was subject to preservation, and asked witnesses questions about the same. *See Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 80 (1st Dep't 2015) ("A

[14] Plaintiff does not, and need not, address the numerous vitriolic statements in LaPierre's memorandum of law concerning Plaintiff's alleged deceitfulness and corruption (NYSCEF 1346 at 4-5), except to note that this supposedly ultra vires action has survived three rounds of motions to dismiss. (*See* NYSCEF 210-212, 610, 851.)

party suffers prejudice where he or she has been hindered in the preparation of his [or her] case or has been prevented from taking some measure in support of his [or her] position.") (internal quotation marks omitted).

Finally, Frazer's argument that he was entitled to reserve to himself all potential affirmative defenses without specifically enumerating them because he did so in a separately numbered affirmative defense is unavailing. (NYSCEF 1334 at 17-18). A catch-all reservation of rights does not provide sufficient notice as required by CPLR § 3013 and CPLR § 3014. "[A] party cannot employ a catch-all provision in an attempt to preserve any and all potential defenses/objections for future use without affording notice to the opposing party." *Scholastic*, 129 A.D.3d at 79 (quoting *Matter of Kowalczyk v. Monticello*, 107 A.D.3d 1365, 1366 (3d Dep't 2013)).

The Defendants' conclusory affirmative defenses should be dismissed.

V. FRAZER'S AND LAPIERRE'S MOTIONS FOR LEAVE TO AMEND SHOULD BE DENIED AS FUTILE

Where a proposed amendment would be futile or devoid of merit, leave to amend a pleading should be denied. *Herrera v. Highgate Hotels, L.P.*, 213 A.D.3d 455, 456-57 (1st Dep't 2023). For the reasons provided above and in Plaintiff's opening memorandum of law, the Defendants' Unclean Hands and Estoppel Affirmative Defenses are deficient as a matter of law, and leave to amend the pleadings with respect to those defenses would be futile. Furthermore, Plaintiff would be prejudiced by the amendment at this late hour, after the close of discovery, in this action – as shown by LaPierre's revelation of new facts not to be found anywhere in the current record, including in LaPierre's own interrogatory responses, the Defendants would use leave to amend to expand the scope of this action unnecessarily and prejudicially *See Ness Techs. SARL v. Pactera Tech. Int'l Ltd.*, 180 A.D.3d 607-08 (1st Dep't 2020) (affirming denial of leave to amend where defendant "failed to explain why it waited until the brink of the discovery deadline to file its

motion" and where "defendant's proposed new allegations . . . would inevitably entail substantial discovery and resulting delays."); *Lattanzio v. Lattanzio*, 55 A.D.3d 431, 431-32 (1st Dep't 2008) ("The motion court did not improperly deny leave to defendants to further amend their answer, because 'the factual basis of the proposed amended answer was known at the time of the original answer'" and "[p]laintiffs demonstrated that they would be prejudiced if leave to further amend were granted because discovery had been closed").

CONCLUSION

For the reasons set forth above, it is respectfully submitted that Plaintiff's motion pursuant to CPLR §§ 3211(b) and 3212 should be granted, except with respect to the portion of the motion that Plaintiff has withdrawn (*see* n.1, *supra*), together with such other and further relief as the Court deems just and proper.

Dated: April 3, 2023
New York, New York

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Of Counsel

Attorney Certification Pursuant to Commercial Division Rule 17

I, Steven Shiffman, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law contains 6,470 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.

Dated: April 3, 2023
New York, New York

Steve Shiffman
_____
Steven Shiffman