

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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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.	:
-----X	

Index No. 451625/2020

IAS Part 3

Hon. Joel M. Cohen

Motion Seq. No. ____

**DEFENDANT JOHN FRAZER'S MEMORANDUM OF LAW IN SUPPORT OF HIS
MOTION TO PRECLUDE EVIDENCE PURSUANT TO CPLR 3126**

Defendant John Frazer ("Frazer"), by and through his attorneys Gage Spencer & Fleming LLP, respectfully submits this memorandum of law in support of his motion to preclude evidence pursuant to CPLR 3126 which is intended to be offered by Plaintiff Attorney General of the State of New York ("Plaintiff" or "NYAG"). For the reasons which follow, Frazer's motion should be granted.

Background

As set forth in a memorandum submitted by defendant the National Rifle Association of America ("NRA") on March 14, 2023, in support of its motion to preclude evidence (NYSCEF Doc. No. 1427, Motion Sequence No. 48), a motion which Frazer hereby joins, the NRA addressed Plaintiff's willful refusal and failure to provide full and complete responses to its contention interrogatories. In its motion, the NRA requests that the Court strike portions of Plaintiff's Complaint relying on, or preclude Plaintiff from offering evidence at trial pertaining to,

information sought in certain enumerated contention interrogatories. Alternatively, the NRA asks the Court to compel Plaintiff to supplement its responses to those interrogatories with complete information.

Plaintiff has subjected Mr. Frazer to the same treatment. The NYAG provided vague and conclusory responses to certain of Frazer's contention interrogatories. In response to interrogatories seeking the specific contentions pertaining to charges asserted against him, Plaintiff has merely provided a broad listing of Mr. Frazer's purported responsibilities and the conclusory statement that he "repeatedly failed with respect to each of those duties." In view of the volume and expanse of the record in this case, and the limited discovery devices available to Frazer to learn the bases for the NYAG's charges, this is plainly inadequate. To date, the NYAG has refused Frazer's efforts to obtain clarification of those responses. In particular, though other responses were inadequate as well, Frazer has only requested supplementation of Response to Interrogatory Nos. 3, 5, and 6. Following a meet and confer and emails urging Plaintiff to supplement those three interrogatory responses, Plaintiff ultimately declared that it would not do so.

The case has presented gross disparities in the parties' relative access to information which color the importance of this dispute. The NYAG began its investigation of the NRA and the other defendants nearly four years ago. In that time, she has had access to numerous witnesses, and in fact questioned many of them more than once. Her office interviewed approximately 13 witnesses during their investigation, asked questions of NRA representatives, including Mr. Frazer, during the Rule 341 examination in the NRA's bankruptcy case, deposed Mr. Frazer both in his personal and corporate representative capacities (along with at least ten other witnesses) during bankruptcy discovery, examined Mr. Frazer and 22 other witnesses in the bankruptcy trial, and deposed Mr. Frazer, in his personal and corporate representative capacities, for nearly four

days, along with depositions of 23 other fact witnesses and eight defense experts in this action. Along with waves of questioning of witnesses to cull the facts, Plaintiff has obtained from Defendants approximately 1.5 million pages of documents. By contrast, Frazer and the other Defendants have been denied their request to depose even a single representative of Plaintiff, and have been limited to examinations of Plaintiff's three expert witnesses who have professed to have knowledge of nothing beyond the record each examined.

Accordingly, denied the usual ability of being able to examine party opponents, Defendants have been relegated to discovering the specifics of Plaintiff's charges through the solitary device of contention interrogatories. Even so, Plaintiff has resisted attempts to get her to clarify the factual bases for her contentions and/or what her charges are and will be at trial. Limited to 25 contention interrogatories, that difficult challenge becomes effectively impossible where, as Plaintiff has done in this case, a party continues to hide the ball even in responding to this limited discovery burden. It is extraordinary that, after four years of turning over every stone in the targeted organization, Plaintiff is still unable or unwilling to articulate the specific factual bases for her charges.¹ This refusal unfairly impairs Frazer's ability to prepare for trial. As the NRA

¹ Plaintiff's comprehensive approach to investigating all aspects of the NRA's organization and operation has exacerbated the problem. Originally filed in 2020, Plaintiff's Complaint already covered 5-6 years of transactions from 2015-2020. Since then, though, Plaintiff has requested and received documents and testimony concerning dates well beyond August 2020, including more current information up to the close of discovery and even beyond, and has also sought to delve into prior conduct as early as the mid-1990s. Defendants have no way of knowing, absent Plaintiff's disclosure, whether Plaintiff intends to present evidence beyond its Complaint at trial. For instance, in response to the NRA's contention interrogatories, Plaintiff indicated that she might present evidence concerning purported related party transactions which she does not identify, regarding 43 individuals (not including relatives or affiliated entities) most of whom her office did not include in any of its complaints and never asked about at any point in this case. *See* NYSCEF Doc. No. 1427 at 17.

aptly put it in its brief, “the NYAG’s conduct appears aimed at avoiding adequate notice and setting up a trial by ambush.” *See* NYSCEF Doc. No. 1427 at 17.

Argument

Frazer served his first contention interrogatories on July 15, 2022 (*see* Affirmation of William B. Fleming (“Fleming Aff.”) dated March 17, 2023, Ex. A), and, at the NYAG’s request, agreed to extend her time to respond twice until October 25, 2022. In response to Interrogatory Nos. 3, 5, and 6, the NYAG gave the following identical response to all three:

Plaintiff incorporates by reference the allegations in the Second Amended Complaint, the responses to other Interrogatories herein, and Plaintiff’s Expert Reports. Plaintiff does not contend that Frazer’s family benefited from Frazer’s mismanagement and negligent oversight of the NRA. Defendant Frazer is and has been the Secretary to the Board and General Counsel of the NRA during all relevant times. Defendant Frazer is a component of the NRA’s compliance reform efforts and in setting the “Tone at the Top” the NRA has referred to in connection with its compliance reform efforts. Further, Defendant Frazer owes fiduciary duties to the NRA. Under New York law and in accordance with the NRA’s bylaws and policies—including the Statement of Corporate Ethics, the Conflict of Interest and Related Party Transactions Policy, the Whistleblower Policy, the Procurement Policy, the Approval Procedures for Purchase Agreements and Contracts in Excess of \$100,000, and all policies outlined in the NRA’s Policy Manual as maintained by the Office of the Secretary, and the NRA Employee Handbook—Defendant Frazer is responsible for **administering, overseeing, reporting on, supervising, ensuring compliance with, and following all requirements related to financial transactions, expense reimbursements, contracts, whistleblowers, conflicts of interest, related party transactions, board elections, regulatory filings, and the proper administration of the NRA’s charitable assets**. As detailed in the Second Amended Complaint, responses to these Interrogatories, Plaintiff’s Expert Reports, and the record evidence containing testimony of NRA executives, directors, employees and vendors, and business records and communications, **Defendant Frazer repeatedly failed with respect to each of those duties**.

See Fleming Aff., Ex. B (Plaintiff’s Responses and Objections to Defendant Frazer’s First Interrogatories Seeking the Claims and Contentions of Plaintiff), Responses to Interrogatory Nos. 3, 5, and 6 (emphasis added). The bolded language assigns Mr. Frazer responsibility for essentially

every aspect of the governance and financial operations of the National Rifle Association. Then, having foisted such broad responsibility on him, the NYAG claims simply that he “repeatedly failed with respect to each of those duties.” Not only are her responses conclusory and utterly uninformative, but the Attorney General has also, as she did when responding to the NRA’s contention interrogatories, utilized the disfavored practice of incorporating by reference auxiliary documents, referring Frazer to “bylaws and policies” and her own “Second Amended Complaint,” among others. *See* NYSCEF Doc. No. 1427 at 16-17.

On December 12, 2022, the parties met and conferred to discuss Mr. Frazer’s concerns about the breadth of those responses and total uncertainty about what particular failures the NYAG would plan to allege and present at trial. *See* Fleming Aff., Ex. C (email dated December 20, 2022, from counsel for Frazer to Assistant Attorney General Sharon Sash). On December 20, we followed up on the meet and confer by asking the NYAG to clarify the three interrogatory responses by particularizing “the failures you reference but do not identify in the last sentence.” *See id.* Again, on December 29, 2022, having received no response, we followed up to urge a response. *See* Fleming Aff., Ex. D (email dated December 29, 2022, from counsel for Frazer to Assistant Attorney General Sharon Sash). Finally, on January 6, 2023, the NYAG responded and conveyed that “Plaintiff does not agree to amend or supplement its responses to Frazer interrogatories 3, 5, and 6” *See* Fleming Aff., Ex. E (email dated January 6, 2022, from Assistant Attorney General Sharon Sash to counsel for Frazer).

The NYAG’s original responses are plainly inadequate, and its refusal to supplement them is willful. Based on the authorities referenced in the NRA’s similar motion for preclusion, and for the reasons provided therein, the Court should (i) strike from the Complaint allegations relying on the information sought by Frazer in his Contention Interrogatory Nos. 3, 5,

and 6, (ii) preclude Plaintiff from offering evidence at trial pertaining to that information, or alternatively, (iii) compel the NYAG to respond completely to those three interrogatories (including, at a minimum, to provide specifics regarding each instance where the Attorney General contends Mr. Frazer failed to discharge a duty) and, pursuant to 22 NYCRR 202.21(e), vacate the Note of Issue.

The same reasoning provided in the NRA's recent motion to preclude applies to the NYAG's contention interrogatory responses to Frazer. Accordingly, to avoid duplication as requested by the Court, Frazer incorporates by reference, relies upon, and adopts the arguments and authorities set forth in the NRA's Memorandum of Law in Support of Motion to Preclude Evidence Pursuant to CPLR 3126. *See* Part 3 – Practices and Procedures, Part VI(D).

Conclusion

For the reasons stated, Frazer's Motion to Preclude Evidence Pursuant to CPLR 3126 should be granted.

Dated: New York, New York
March 17, 2023

GAGE SPENCER & FLEMING LLP

By: /s/ William B. Fleming
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To: PEOPLE OF THE STATE OF
NEW YORK, by LETITIA JAMES,

Attorney General of the State of New York (via NYSCEF)

CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2023, a true and correct copy of the foregoing Memorandum of Law in Support of John Frazer's Motion to Preclude Evidence Pursuant to CPLR 3126 was served on all counsel of record by NYSCEF.

By: /s/ William B. Fleming

ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, William B. Fleming, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that the Memorandum of Law in support of Defendant John Frazer's Motion to Preclude Evidence Pursuant to CPLR 3126 complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court because the memorandum of law contains 1692 words, excluding 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 memorandum of law.

Dated: New York, New York
March 17, 2023

By: /s/ William B. Fleming
William B. Fleming