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,	:	Index No. 451625/2020
Plaintiff,	:	Motion Sequence No. 44
v.	:	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	:	
Defendants.	:	

DEFENDANT JOHN FRAZER'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS CERTAIN AFFIRMATIVE DEFENSES AND IN SUPPORT OF HIS CROSS-MOTION FOR LEAVE TO REPLEAD CERTAIN AFFIRMATIVE DEFENSES

GAGE SPENCER & FLEMING LLP
410 Park Avenue, Suite 810
New York, New York 10022
(212) 768-4900

Attorneys for Defendant John Frazer

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Defendant John Frazer ("Frazer"), by and through his attorneys Gage Spencer & Fleming LLP, respectfully submits this memorandum of law in opposition to Plaintiff The Attorney General of the State of New York's ("Plaintiff" or "NYAG") Motion to Dismiss Certain of Defendants' Affirmative Defenses pursuant to CPLR 3211(b) and 3212, and in support of his cross-motion for leave to replead certain affirmative defenses under CPLR 3025(b) and (c). For the reasons which follow, Plaintiff's Motion should be denied and, if needed, Frazer's cross-motion should be granted.[1]

Background

Although the NYAG had not interviewed or otherwise contacted Frazer at any point during her 15-month investigation, on August 6, 2020, it filed a 666-paragraph Complaint alleging statutory and common law claims against him. As addressed in earlier motion papers, Plaintiff's Complaint sought (and the currently operative Second Amended Complaint (the "Complaint") seeks) draconian relief not authorized under the statutes at issue, including a lifetime bar from serving as an officer or director of a not-for-profit doing business in New York State and forfeiture of the entirety of his Board-approved compensation. Exercising appropriate caution in response to his unexpected inclusion in a politically charged case, Frazer filed an Answer asserting affirmative defenses which, whether they qualified as affirmative defenses or were merely general defenses, articulated defenses to the grossly unfair charges against him.

[1] In an effort to avoid duplication as requested by the Court, Frazer incorporates by reference, relies upon, and adopts the statements of fact, evidence, arguments, and authorities set forth in the opposition papers filed by other similarly situated defendants. *See* Part 3 – Practices and Procedures, Part VI(D). In particular, but not exclusively, Frazer defers to the discussion of the legal standards applicable to the NYAG's dual motion to dismiss and for summary judgment as they are addressed in the NRA's memorandum of law.

In the 45 months since its investigation began, the NYAG has had comprehensive discovery. Plaintiff's initial complaint followed a 15-month investigation which included document production and at least 13 witness interviews it conducted. An intervening bankruptcy proceeding precipitated further document discovery, 11 full depositions, and a 12-day trial at which 23 witnesses provided testimony. This instant action has generated a documentary record of approximately one and a half million pages, and testimony from approximately 24 fact witnesses and 11 expert witnesses, among other discovery. Unlike the NYAG, whose representatives the Special Master spared from questioning by Defendants (each of whom was limited to posing just 25 interrogatories) and who continues to be imprecise about what issues and/or transactions she intends to present in her case, Frazer and the other Defendants and witnesses have provided comprehensive testimony and documentation establishing, among other things, the bases for Frazer's affirmative defenses.

In spite of this comprehensive development of the record, the NYAG complains that Mr. Frazer's pleading does not include enough supporting detail. By the instant motion, the NYAG seeks dismissal of six of Frazer's articulated affirmative defenses contending that they are not supported by factual assertions. Whether general defenses or affirmative defenses under CPLR 3018(b), though, no specific factual support is needed, especially since they do not address anything that the NYAG doesn't already know. In earlier briefing, in oral argument discussions, and in lines of questioning and answers given at depositions, the facts supporting these defenses have been identified, have been clearly established, and are known to the NYAG. The NYAG should not be permitted to foreclose Frazer from using a favorable factual record to defend himself.

Plaintiff's motion should be denied. First, to the extent these constitute general defenses, no particularization is needed. *See Northway Engineering, Inc. v. Felix Industries, Inc.*, 77 N.Y.2d 332, 337 (1991) ("[t]o further preclude the defendants from asserting defenses which require only general denials, despite the existence of a genuine factual dispute, deprives the defendants of their day in court . . . ."). But even if these defenses qualify as affirmative defenses under CPLR 3018(b), no particulars are needed because they assert nothing that would surprise the NYAG. *See, e.g., Immediate v. St. John's Queens Hosp.*, 48 N.Y.2d 671, 673 (1979). Second, the challenged affirmative defenses are supported by facts in the record, which the Court must liberally construe in favor of Frazer on the motion. *Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d 721, 723 (2d Dep't 2008). Third, even if the NYAG's arguments were deemed meritorious, the Court has full discretion to, and should, in the absence of significant prejudice which is not present here, grant leave to replead those defenses. *See* CPLR 3025(b) (leave to amend should be granted "freely"), (c) (amendments to conform to the evidence available both "before or after judgment"); *Dittmar Explosives v. Ottaviano, Inc.*, 20 N.Y.2d 498, 502 (1967) (amendments permitted "during or even after trial"); accord *Murray v. City of New York*, 43 N.Y.2d 400, 405 (1977) (citations omitted)). If deemed necessary, Frazer specifically requests such leave to replead. But this ameliorative step should be unnecessary in view of the extensive development of the record. To paraphrase the Court, the time for addressing "threshold issues" is past and the focus should be on "going forward." NYSCEF Doc. No. 847 at 78.

Argument

I. The Challenged Affirmative Defenses Are Adequately Pleaded

On the question of whether to dismiss an affirmative defense, the Court of Appeals has called for the exercise of sound judgment "within the framework of, and with an appreciation

for, the underlying purpose for the rule prohibiting allegations of legal conclusions only." *Morgenstern v. Cohon*, 2 N.Y.2d 302, 306 (1957) (reversing lower courts' dismissal of an affirmative defense claimed to have been pleaded as "mere conclusions of law unsupported by allegations of ultimate fact"). When the Legislature passed the CPLR a few years later in 1962, it established its clear preference that pleadings provide notice (CPLR 3013), be concise (CPLR 3014), reduce surprise (CPLR 3018(b)), and be liberally construed (CPLR 3026). Not surprisingly, then, courts have since stated that, when moving *either* for summary judgment *or* to dismiss an affirmative defense, the plaintiff bears the "heavy burden of showing that the defense is without merit as a matter of law." *Pugh v. N.Y.C. Hous. Auth*., 159 A.D.3d 643, 643 (1st Dep't 2018); *Granite St. Ins. Co. v. Transatlantic Reins. Co*., 132 A.D.3d 479, 481 (1st Dep't 2015). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference." *Chesnut Realty Corp. v. Kaminski*, 95 A.D.3d 1254, 1255 (2d Dep't 2012) (citing *Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d 721, 723 (2d Dep't 2008)). "The pleader is entitled to the benefit of every reasonable intendment of the defenses and, if there is any doubt as to the availability of the defense, it should not be dismissed." *Klapper v. Shapiro*, 154 Misc. 2d 459, 462 (Sup. Ct. N.Y. Cty. 1992) (Moskowitz, J.) (citing *Duboff v. Board of Higher Educ.*, 34 A.D.2d 824, 824 (2d Dep't 1970)). "Statements of legal conclusion, even if inconsistent, are permissible." *Id*. (citing *River House Realty Co. v. Lico Contr.*, 172 A.D.2d 426, 427 (1st Dep't 1991)); CPLR 3014 (defenses can be inconsistent and hypothetical). As the First Department has emphasized, "the court should not dismiss a defense where there remain questions of fact requiring a trial." *534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick*, 90 A.D.3d 541, 542 (1st Dep't 2011).

The NYAG's motion also does not attempt to articulate any prejudice, which is its burden to prove. *See Scholastic Inc. v. Pace Plumbing Corp*., 129 A.D.3d 75, 80 (1st Dep't 2015) ("the burden is expressly placed upon one who attacks a pleading for deficiencies in its allegations to show that he [or she] is prejudiced . . ."). Prejudice has been defined as "[s]ome special right lost in the interim, a change in position, or significant trouble or expense that could have been avoided had the original pleading contained the proposed amendment." *Armstrong v. Peat, Marwick, Mitchell & Co.,* 150 A.D.2d 189, 190 (1st Dep't 1989) (citing *Pegno Construction Corp. v. City of New York*, 95 A.D.2d 655, 656 (1st Dep't 1983) (quoting Siegel, N.Y. Prac. § 237))). Plaintiff does not claim to have been hindered in the preparation of her case or prevented from taking some action in support of her position. *Scholastic*, 129 A.D.3d at 80 (quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981)). It is dispositive that Plaintiff is silent on this point. Further, here, where the record has already amplified the basis for these affirmative defenses, and where Frazer testified and could have been (but wasn't) asked to provide information targeted to these specific affirmative defenses, Plaintiff is in no position to claim prejudice.

The NYAG challenges Frazer's Third, Fourth, Seventeenth, Nineteenth, Twenty-Ninth, and Thirty-Second Affirmative Defenses. *See* Memorandum of Law in Support of Plaintiff's Motion to Dismiss Certain of Defendants' Affirmative Defenses ("Pl. Mem.") at 6-7. The instant motion is the first indication of specific concerns Plaintiff has about particular affirmative defenses asserted by Mr. Frazer, and Plaintiff has never previously identified these six nor sought to meet and confer about them to obtain amplification.[2] Plaintiff argues that one

[2] Courts generally frown upon motions to dismiss affirmative defenses where, as here, a plaintiff has not first sought to compel information about them. *See, e.g., LoPinto v. Roldos*, 235 A.D.2d 233, 233 (1st Dep't 1997) (reversing decision that particulars regarding affirmative defenses could not be sufficiently gleaned from motion papers, and commenting that the appropriate remedy would be a request for a Bill of Particulars, not a motion to dismiss); *Emigrant*

affirmative defense (No. 4) is "conclusory," that four others (Nos. 3, 17, 19, and 29) are not factually supported "and instead state conclusions of law," and that a final affirmative defense (No. 32) asserting a "catch-all" reservation of right to assert additional affirmative defenses is "defective." *Id*. at 6-7, 19.

Third Affirmative Defense – An affirmative defense for estoppel, waiver, and laches is commonly found in pleadings, and not surprisingly was asserted by each defendant here. Pl. Mem. at 6. Plaintiff complains that Frazer's affirmative defense does not include reference to facts. *But see Klapper*, 154 Misc.2d at 462 ("[s]tatements of legal conclusion, even if inconsistent, are permissible") (citing *River House Realty Co. v Lico Contr.*, 172 A.D.2d 426); *see also* CPLR 3026 ("Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced").

As Plaintiff well knows, bases exist for these defenses. For instance, disclosures in the NRA's Form 990s filed with the NYAG support both laches and estoppel defenses. Among other disclosures accepted without objection for years, the NRA's reporting of its executive compensation predating Mr. Frazer's hiring generated no objection or response from the NYAG. Of course, her current position is that Mr. Frazer's compensation is unreasonable and excessive. Yet, when he was hired to be the General Counsel, and then elected Secretary, Frazer agreed to perform both positions for an annual compensation of $300,000, which was a substantial *reduction*

Mortg. Co., Inc. v. Markland, 2012 NY Slip Op 52245(U), ¶ 5, (Sup. Ct. Kings Cnty.) ("Plaintiff may properly demand a bill of particulars on affirmative defenses pursuant to CPLR 3041, *and thereafter move to strike them based on the defendant's failure to comply with such a demand*.") (emphasis added); *Schmidt's Wholesale, Inc. v. Miller & Lehman Constr., Inc*., 173 A.D.2d 1004, 1004 (3d Dep't 1991) ("Inasmuch as bills of particulars can be had to amplify a defense, dismissal of defenses with a subsequent requirement of repleading should be frowned upon"); *Grossman v. Osteopathic Hosp. & Clinic*, 468 N.Y.S.2d 327, 328 (Sup. Ct. Queens Cnty. 1983) (the classic purpose of a demand for a bill of particulars is to amplify the pleadings) (citing *Bergman v. Gen. Motors Corp*., 74 A.D.2d 886 (2d Dep't 1980)).

from the prior year's publicly disclosed compensation paid to the two individuals serving in those positions. In 2014, the year prior to Frazer's starting his service, the NRA paid its Secretary a base compensation of $370,923 and its General Counsel an annualized base compensation of $325,333. R19, ¶¶ 40-41. By agreeing to serve in both positions for one salary, Frazer saved the NRA $396,256 from the prior year. R19, ¶ 42. Thus, for years prior to Frazer's hiring, those compensation amounts had been higher, and had been disclosed to the NYAG each year without comment, objection, or other reaction from it. *See Philippine American Lace Corp. v. 236 W. 40th Street Corp.*, 32 A.D.3d 782, 784 (1st Dep't 2006) ("laches is an unreasonable delay that prejudices a defendant[,]" even if a delay of less than a year, where a plaintiff "knew or should have known" of a fact); accord *Republic of Turkey v. Christie's Inc.*, No. 21-2485, 2023 U.S. App. LEXIS 5492, at *13 (2d Cir. Mar. 8, 2023). Here, having no indication from the NRA's regulator that it viewed even those higher compensation amounts as unreasonable and/or excessive, Mr. Frazer left his private practice behind to accept the positions for the lower compensation which he is now, incomprehensibly, being demanded to disgorge. The NYAG has unreasonably delayed to Frazer's prejudice.

There are other examples. In prior motion practice, a further estoppel or waiver was established. Again trying to effectuate disgorgement of Frazer's compensation, the NYAG had argued that it could be recovered as part of an authorized unwinding of a related party transaction under N-PCL § 715. Yet, directly refuting that position was the NYAG's *own published guidance* which established its contrary position that officer compensation was not a related party transaction. NYSCEF Doc. Nos. 438 at 4-5; 610 at 40-41. Whether a waiver or an estoppel or both, it has been established that, through its guidance, the NYAG has knowingly relinquished any right to enforce recovery of employment compensation on that ground.

At a minimum, on these mere examples alone, Plaintiff cannot meet the "heavy burden" to establish that Frazer's Third Affirmative Defense is without merit as a matter of law. *E.g.*, *Pugh v. N.Y.C. Hous. Auth.*, 159 A.D.3d at 643.

Fourth Affirmative Defense – Similarly, Frazer's "unclean hands" defense, in the context of previous motion practice and the discovery conducted, is not merely "conclusory" and should be permitted. *See Klapper*, 154 Misc.2d at 462.

CPLR 3018(b) requires the inclusion of affirmative defenses "which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading . . ." *See Posillico Envtl., Inc. v. Nat'l Grid Generation LLC*, 2012 NY Slip Op 32972(U), ¶ 3 (Sup. Ct. Suff. Cnty. 2012). New York decisional law only requires that defendants give a plaintiff fair notice of the legal theories which will be asserted as affirmative defenses. *See Immediate v. St. John's Queens Hosp.*, 48 N.Y.2d at 673; *LoPinto*, 235 A.D.2d at 233 (reversing Supreme Court's dismissal of affirmative defenses where pleadings and motion papers were "sufficient to give notice of what defendants intend to prove under their defenses"); *Schmidt's Wholesale*, 173 A.D.2d at 1004 (rejecting the argument that affirmative defenses are invalid because they are pleaded in conclusory fashion without sufficient particularity and stating that "[i]t is well-settled that pleadings should be liberally construed and should not be dismissed unless a substantial right of a party is prejudiced").

There has been ample notice provided here of Mr. Frazer's position. In motion papers, he has articulated that the NYAG is seeking relief against him not permitted by the statutes at issue here. *See* NYSCEF Doc. No. 690. Despite this notice (and the dismissal of a common law claim she tried to assert carrying a lower burden of proof than the governing statutes), the Attorney General has persisted in requesting unauthorized relief in subsequent versions of her

Complaint. Among other *ultra vires* relief, the Complaint continues to demand that Mr. Frazer (i) be permanently barred from serving any not-for-profit touching New York State in any way, (ii) disgorge his entire compensation approved through the independent actions of the Board of Directors, and (iii) be removed from his non-officer position as General Counsel. None of these remedies, nor the common law claim asserted before it was dismissed, is authorized by the governing statutes and thus plainly disregards the Court of Appeals' warning to the Executive branch that it should not seek to enforce claims and remedies which are "incompatible" with the Legislature's "comprehensive enforcement scheme." *People v. Grasso*, 11 N.Y.3d 64, 70-71 (2008). This is troubling especially given the Attorney General's well-documented and public record of expressing her political animus against a targeted political opponent in the NRA.

More importantly, the relief sought by the Attorney General is clearly equitable in nature. It is axiomatic that to ask equity, the Attorney General must also do equity. *See Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945) ("he who comes into equity must come with clean hands"); *Frankel v. Tremont Norman Motors Corp.*, 10 A.D.2d 680, 681 (1st Dep't 1960) (same). Bubbling out of her bias, the Attorney General continues to push for excessive relief which tramples on "the integrity of calculated legislative policy judgments." *Grasso*, 11 N.Y.3d at 71. Her Complaint, and the unauthorized claims and remedies it demands, is evidence of the expressed animus which preceded it, and the unclean hands affirmative defense is asserted on this basis.

The NYAG's contention that the doctrine of unclean hands may not be invoked against a governmental agency which is attempting to enforce the public interest thereby misses the point. By definition, it is not in the public's interest for an agency to flout the will of the democratically elected Legislature to seek statutorily unauthorized relief against a targeted

political opponent. That such conduct raises significant separation of powers issues, separate and apart from the speech and association issues articulated by the NRA, establishes that the prejudice to Mr. Frazer rises to a constitutional level. *See Matter of People of the State of N.Y. v. Trump Entrepreneur Initiative LLC*, 2014 NY Slip Op 32685(U), ¶ 31 (Sup. Ct.) ("[t]he doctrine of unclean hands, like other equitable defenses, may be raised against the government where the agency's misconduct [was] egregious and the resulting prejudice to the defendant r[o]se to a constitutional level") (citations and quotations omitted); *see also SEC v. KPMG LLP*, 2003 U.S. Dist. LEXIS 14301, at *8 (S.D.N.Y. Aug. 20, 2003) (same) (citations and quotations omitted). To his further prejudice, while the unauthorized relief the Attorney General has demanded has manufactured the heightened sense of gravity to the charges likely preferred by the Attorney General, it has also generated an enhanced public opprobrium which Mr. Frazer has had to endure.

Nor should the affirmative defense be dismissed on law of the case grounds, as Plaintiff urges. Plaintiff does not identify any prior decision in the case on which to base the doctrine. Plaintiff merely summarily states that the individual defendants' unclean hands defenses are "barred by the law of the case." Pl. Mem. at 15. That omission is grounds enough for denial of the motion as it does not provide the Court with any basis to apply the discretionary doctrine of law of the case. In contrast with res judicata and collateral estoppel, which are "rules of limitation" recognized in the CPLR (*see* CPLR 3211(a)(5)) and 3018(b)), the law of the case doctrine is a judicially crafted policy expressing a practice of courts, "not a limit to their power." *People v. Evans*, 94 N.Y.2d 499, 502-03 (2000) (law of the case doctrine "'directs a court's discretion,' but does not restrict its authority"); *People v. Cummings*, 31 N.Y.3d 204, 208 (2018) (same). Such an exercise of discretion would be especially inapt with respect to pleaded defenses which must be liberally construed. *See* CPLR 3026 (providing a mandatory rule of construction). The Court

should exercise its sound judgment consistent with the purposes of this and other applicable rules provided by the legislature. *Morgenstern,* 2 N.Y.2d at 306.

Seventeenth, Nineteenth, and Twenty-Ninth Affirmative Defenses – Plaintiff makes the cursory argument that each defendant, including Frazer, "asserts a variation on an affirmative defense" both of contribution and that damages were caused by unspecified third parties. Pl. Mem. at 6. Plaintiff contends that these defenses are "not supported by any additional factual allegations." *Id*. But these defenses too, and their facts, are well known to Plaintiff as they have been addressed in motion practice and in depositions. *See, e.g.,* Siegel, New York Practice, Third Edition, § 223 ("[i]n a given case a defense may be preserved through conduct even though not included in the answer" when explored otherwise and "surprise is thereby removed from the case").

In several places in the Complaint, Plaintiff isolates Frazer as bearing responsibility for tasks principally handled by others. For example, the Complaint charges Frazer for alleged falsities included in the NRA's federal Form 990 tax return. As discussed in previous briefing and addressed exhaustively in discovery, the NRA is a complex organization that uses numerous inside and outside accountants and tax professionals who put together and exhaustively reviewed its audited financial statements and tax returns. *See* Defendant John Frazer's Counterstatement of Facts, Additional Material Facts, ¶¶ 5-8. Even the NRA's corporate Treasurers, who signed the Form 990s on the NRA's behalf, justifiably relied on those individuals. *Id*., ¶ 9 ("as CFO, you always have to rely on others to, to disclose information"). Thus, in response to the NYAG's contentions about falsities contained therein – which one former Treasurer continues to believe were materially absent (*see id*., ¶ 10 ("I think the document [i.e., the tax return] is very good")) – Frazer should have the ability to demonstrate the extent to which he justifiably relied on the

professionals who created the documents in their expert competence, among others. Similarly, where applicable to explain his role, Frazer rightfully should be permitted to highlight where committees of the Board of Directors made decisions within their designated authority and business judgment in order that the factfinder may be presented with the full array of relevant facts which also have been well established by the voluminous record. *Cf. 534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick*, 90 A.D.3d 541, 542 (1st Dep't 2011) ("[w]hile not listed under the sections specifically titled for each defense, defendant pled factual allegations in the body of his answer sufficient to give notice of what he intends to prove under his defenses")**.** The proper inquiry on a motion to strike defenses is whether the party actually has a defense and, if there is any doubt as to the availability of a defense, it should not be dismissed. *See id*. ("the court should not dismiss a defense where there remain questions of fact requiring a trial"); *Becker v. Elm Air Conditioning Corp.*, 143 A.D.2d 965, 966 (2d Dep't 1988); *Duboff*, 34 A.D.2d at 824; *Klapper*, 154 Misc.2d at 462.

Thirty-Second Affirmative Defense – Citing to *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 79 (1st Dep't 2015), Plaintiff contends that Frazer's separately numbered affirmative defense reserving his right to add affirmative defenses depending on developments in the proceedings is an impermissible "catch-all" affirmative defense. To the contrary, the First Department made clear that "we have no doubt that defendant *was permitted* to plead its affirmative defenses hypothetically – which it apparently attempted to do by 'reserving' those defenses unto itself – but only insofar as those defenses were concise, separately numbered, and sufficient stated[.]" *Id*., 129 A.D.3d at 79-80 (emphasis added) (citing CPLR 3013, 3014 (providing the required form for pleadings to give sufficient notice to an adversary)). In the end, the Court clarifies that the operative test is one of prejudice. *Id*., 129 A.D.3d at 80. Accordingly,

Defendants should be permitted to raise affirmative defenses to conform to the evidence provided that there is no prejudice imposed on Plaintiff.

Scholastic makes clear that it is not a reservation of rights that is offensive, but that the particular presentation of affirmative defenses in that case was fatal. Here, Frazer's affirmative defenses clearly comply with CPLR 3013 and 3014, unlike Plaintiff's Complaint. *See* NYSCEF Doc. No. 864 at 1, n.1. In any event, both the CPLR and decisional law are clear that affirmative defenses can be added to conform to the evidence even after trial. CPLR 3025(c) (amendments to conform to the evidence available both "before or after judgment"); *Dittmar Explosives v. Ottaviano, Inc.*, 20 N.Y.2d 498, 502 (1967) (amendments permitted "during or even after trial"). Thus, as permitted by law, a reservation of rights to add additional affirmative and/or other defenses based on development over the course of proceedings might have been unnecessary, but it was not improper and is not worthy of dismissal.

II. In the Alternative, Frazer Should Be Given Leave to Replead His Affirmative Defenses

Should the Court agree with Plaintiff's argument that Frazer's affirmative defenses are deficient, the Court should abstain from the drastic remedy of dismissal and instead grant Frazer leave to replead his Answer to cure any deficiencies. *See Scholastic Inc.,* 129 A.D.3d at 81 (dismissal of affirmative defense "would be an excessively severe result"); *Moran Enterprises, Inc. v. Hurst*, 96 A.D.3d 914, 917 (2d Dep't 2012). CPLR 3025 mandates that leave to amend or supplement a pleading be freely given, and Frazer should be permitted, if necessary, to amend or supplement his Answer to correct any deficiencies in his affirmative defenses. *See* CPLR 3025(b) (stating leave to amend a pleading "shall be freely given upon such terms as may be just").

Leave to amend or supplement would be consistent with the principle that litigants should be given the opportunity to "renew" their affirmative defenses when, as here, discovery has

been completed. *See, e.g., Melendez v. City of New York*, 249 A.D.2d 197 (1st Dep't 1998) (plaintiffs' motion to dismiss affirmative defenses denied with leave to renew following completion of discovery); *Colonresto v. Good Samaritan Hospital*, 128 A.D.2d 825, 829 (2d Dep't 1987) ("[i]t is premature at this prediscovery state of the action to make a determination to dismiss an affirmative defense"); *Anonymous v. Anonymous*, 2 Misc.3d 1002(A), at *11 (Sup. Ct. N.Y. Cnty. 2004) ("Since discovery in this matter has been limited . . . any basis to dismiss the defendant's affirmative defense . . . is premature. As such, plaintiff's application to dismiss defendant's . . . affirmative defense is denied at this juncture").

CROSS-MOTION FOR LEAVE TO REPLEAD

To the extent that the request above for leave to amend is ineffective procedurally or in any other way, Mr. Frazer cross-moves for leave to replead his Third, Fourth, Seventeenth, Nineteenth, and Twenty-Ninth Affirmative Defenses to add facts supporting each. To assist the Court, and so as not to overburden the record, we have annexed hereto as Exhibit A only those excerpted portions of Frazer's Answer which contain the proposed amendments or supplementation, in redline form. For the reasons provided in greater depth above, leave to replead should be granted in accord with the policy of this State to grant such leave freely. *See* CPLR 3025(b) (leave to amend should be granted "freely"), (c) (amendments to conform to the evidence available both "before or after judgment"); *Dittmar Explosives v. Ottaviano, Inc.*, 20 N.Y.2d 498, 502 (1967) (amendments permitted "during or even after trial").

Conclusion

For the reasons stated, the NYAG's motion to dismiss Frazer's affirmative defenses should be denied with prejudice or, alternatively, Frazer should be given leave to replead any defectively pleaded affirmative defenses in proper form. If necessary, Frazer's cross-motion for

leave to replead his Third, Fourth, Seventeenth, Nineteenth, and Twenty-Ninth Affirmative Defenses should be granted.

Dated: New York, New York
March 13, 2023

GAGE SPENCER & FLEMING LLP

By: */s/ William B. Fleming*

William B. Fleming
Ellen V. Johnson
410 Park Avenue, Suite 810
New York, New York 10022
Tel. (212) 768-4900
Email: wfleming@gagespencer.com
ejohnson@gagespencer.com
Counsel for Defendant John Frazer

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 13, 2023, a true and correct copy of the foregoing Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss Certain Affirmative Defenses and in Support of His Cross-Motion for Leave to Replead Certain Affirmative Defenses 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 Dismiss Plaintiff's Second Amended Complaint 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 4609 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 13, 2023

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