Motion Seq. No. 44

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,	:	IAS Part 3
v.	:	Hon. Joel M. Cohen
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	:	**ORAL ARGUMENT REQUESTED**
Defendants.	:	

DEFENDANT WAYNE LAPIERRE'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 OF HIS AFFIRMATIVE DEFENSES

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Defendant Wayne LaPierre ("LaPierre"), by and through his counsel Correll Law Group, respectfully submits this memorandum of law in opposition to that branch of the motion filed by Plaintiff, the People of the State of New York, by Letitia James, Attorney General of the State of New York ("Attorney General") seeking dismissal of certain of LaPierre's affirmative defenses (Motion Seq. No. 44).[1]

I.

PRELIMINARY STATEMENT

LaPierre respectfully requests that the Court deny that branch of the Attorney General's motion challenging certain affirmative defenses asserted in his Amended Verified Answer of Defendant Wayne LaPierre dated January 3, 2023 ("AVA") (NYSCEF 1023) on the ground that the challenged defenses are sufficiently stated, have merit and raise triable issues of fact. In the alternative, LaPierre seeks leave of court to amend his answer to replead his second, third, seventh, fifteenth, sixteenth, twenty-third, twenty-fourth and thirty-seventh affirmative defenses to add

[1] As a threshold matter, contrary to the Attorney General's assertion in footnote 3 of her Memorandum of Law in Support of Plaintiff's Motion to Dismiss Certain of Defendant's Affirmative Defenses (hereinafter cited as "AG Mem.") (NYSCEF 1178), the branch of her motion seeking to dismiss certain of LaPierre's affirmative defenses must be addressed to the Amended Verified Answer of Defendant Wayne LaPierre dated January 3, 2023 ("AVA") (NYSCEF 1023), not the Verified Answer of Defendant Wayne LaPierre dated October 21, 2022 (NYSCEF 865), because the amended pleading, once served, became LaPierre's operative pleading. *See Ramsey v. CEC Entertainment, Inc.*, 35 Misc.3d 1204(A) *3 (Sup. Ct., Kings County 2012) ("An amended pleading, once served, supersedes the initial pleading and becomes the only pleading in the case as though the initial pleading was never served.") (citations omitted). The AVA was filed as of right under CPLR 3025(d) after this Court, to correct a defect in the Attorney General's pleading, ordered that references to the "National Rifle Association of America, Inc." in all pleadings herein were deemed to refer to the "National Rifle Association of America". See Order Amending Caption dated December 12, 2022 (NYSCEF 921). The amendment of LaPierre's prior pleading was required under CPLR 3025(d) and was necessary to change LaPierre's responses to certain allegations whose meanings had changed as a result of the Court's order, thus requiring a different response, and leave of court was not required. *See* Affirmation of P. Kent Correll dated March 13, 2023 ("Correll Aff.") ¶¶ 23-30. In the alternative, LaPierre respectfully requests that the Court deem the amended answer properly filed pursuant to CPLR 2001 *nunc pro tunc*.

facts supporting the defenses and deny that branch of the Attorney General's motion seeking dismissal of certain affirmative defenses asserted by LaPierre in his AVA as moot.[2]

II.

BACKGROUND

This action against LaPierre 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

[2] In accordance with Section VI., D., of the Part 3 Practices and Procedures, to avoid duplication, LaPierre adopts, incorporates by reference, and, in relevant part, relies upon, the positions, facts, arguments, authorities and evidence set forth in the opposition papers filed contemporaneously herewith by the NRA and Frazer, who are similarly situated parties, *i.e.*, defendants opposing this motion on overlapping grounds.

[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."[3] (*Id*. Emphasis added.)

LaPierre has been working for the NRA since 1978 and has been its Executive Vice President since 1991.[4] 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.[5] Enter Letitia James: 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."[6] On September 6, 2018, less eight days before the primary elections, in

[3] This last request was based on a nonstatutory cause of action for unjust enrichment contained in the Attorney General's prior complaint, which this Court dismissed (*see* NYSCEF 609). Despite the dismissal, the Attorney General has refused to delete the words "***unjustly enriched***".

[4] Affidavit of Wayne LaPierre sworn to on March 13, 2023 ("LaPierre Aff.") ¶ 2.

[5] *See* Correll Aff. ¶ 32 and LaPierre Aff. ¶ 8.

[6] September 4, 2018 video of the Forum for the Democratic Attorney General Primary Candidates at a NYC bar association gathering where Letitia James calls the NRA a "criminal enterprise" (URL: https://www.youtube.com/watch?v=6n2_LHNEUW0 (accessed on or about March 11, 2023))

an interview with *Our Time Press*, she accused the NRA of being a "terrorist organization".[7] 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."[8] 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

[7] Our Time Press interview of Attorney General Candidate, Letitia James on September 6, 2018 (URL: https://web.archive.org/web/20180909170122/https:/ourtimepress.com/attorney-general-candidate-public-advocate-letitia-james/ (accessed on or about March 10, 2023)).

[8] Ebony article, "Letitia 'Tish' James on Becoming New York's Next Attorney General," dated October 31, 2018 (URL: https://www.ebony.com/letitia-tish-james-on-becoming-new-yorks-next-attorney-general/ (accessed on or about March 12, 2023)).

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.

In pursuit of her corrupt mission, the Attorney General now moves, pursuant to CPLR 3211 (b), or, in the alternative, pursuant to CPLR 3212, to dismiss certain affirmative defenses raised by LaPierre, as well as certain affirmative defenses raised by the other defendants. Specifically, the Attorney General challenges the second, third, seventh, seventeenth, eighteenth, twenty-fifth, twenty-sixth, fortieth and forty-first affirmative defenses asserted in LaPierre's AVA and, alternatively, the second, third, seventh, fifteenth, sixteenth, twenty-third, twenty-fourth and thirty-seventh affirmative defenses asserted in LaPierre's SAVA.[9] *See* Memorandum of Law in Support

[9] When he amended his answer LaPierre dropped the forty-first affirmative defense, therefore it is not an issue with respect to LaPierre's current answer.

of Plaintiff's Motion to Dismiss Certain of Defendants' Affirmative Defenses ("AG. Mem.") at 4-7. In addition, the Attorney General argues that the reservation of rights set forth in LaPierre's answer should be dismissed as "defective". *See* AG Mem. at 7. LaPierre opposes the motion and cross-moves for leave of court to amend his answer to cure the alleged deficiencies.[10]

III.

SUMMARY OF ARGUMENT

The Court should deny that branch of the Attorney General's motion seeking dismissal of certain affirmative defenses asserted by LaPierre because the challenged defenses are sufficiently stated, have merit and raise triable issues of fact, and should grant LaPierre leave to replead to allege facts supporting his challenged affirmative defenses because leave to amend must be freely given and the Attorney General would suffer no prejudice.

IV.

ARGUMENT

A. Legal Standard

Article 30 of the CPLR governs pleading. CPLR 3013 provides: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause or defense." 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 …." CPLR 3025(b) provides: "A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court …. Leave shall be freely given upon such terms as may

[10] LaPierre respectfully refers the Court to the Correll Aff., which sets forth additional facts.

be just …. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." CPLR 3025(c) provides: "The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances." *See 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). CPLR 3026 provides: "Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced."

Article 32 of the CPLR governs accelerated judgment. Pursuant to CPLR 3211(b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." *Fireman's Fund Ins. Co. v. Farrell*, 57 A.D.3d 721, 723 (2d Dep't 2008) (quoting *Fleckenstein v. Nehrbas*, 21 A.D.2d 889, 889-90 (2d Dep't 1964)). As the First Department explained in *Granite State Ins. Co. v. Transatlantic Reins. Co*., 132 A.D.3d 479, 481 (1st Dep't 2015):

> In moving to dismiss an affirmative defense pursuant to CPLR 3211 (b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law (534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick, 90 AD3d 541, 541 [1st Dept 2011]). The allegations set forth in the answer must be viewed in the light most favorable to the defendant (182 Fifth Ave. v Design Dev. Concepts, 300 AD2d 198, 199 [1st Dept 2002]), and "the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (534 E. 11th St., 90 AD3d at 542). Further, the court should not dismiss a defense where there remain questions of fact requiring a trial (id.).

"[I]f there is any doubt as to the availability of a defense, it should not be dismissed." *See Duboff v. Bd. of Higher Ed. of City of New York*, 34 A.D.2d 824, 824 (2d Dep't 1970) (holding that issue should not have been summarily decided); *Krantz v. Garmise*, 13 A.D.2d 426, 429 (1st Dep't 1961) ("The matter set out in the answer as an affirmative defense should be weighed in the light of the

allegations of the complaint. The truth of the allegation is assumed, and the pleading liberally construed. If there is any doubt as to the availability and applicability of the defense or a mere belief that the proof might fall short of the defense, it should not be stricken.") (citations omitted).

CPLR 3212 ("Motion for Summary Judgment") provides:

> (a) Any party may move for summary judgment in any action …. ***
>
> (b) A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion.

B. The Court Should Deny that Branch of the Attorney General's Motion Seeking Dismissal of Certain of LaPierre's Defenses Because the Defenses Are Sufficiently Stated, Have Merit and Raise Triable Issues of Fact.

LaPierre's challenged affirmative defenses are substantially identical to the NRA's and Frazer's challenged defenses, therefore, to avoid duplication, LaPierre incorporates and adopts by reference, the positions and arguments stated by the NRA and Frazer in their briefs on the issue of whether the challenged defenses are adequately pleaded, sufficiently stated, have merit and raise triable issues of fact.[11]

[11] *See* "Memorandum of Law of the [NRA] in Opposition to the NYAG's Motion to Dismiss Certain Affirmative Defenses" and "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." The argument applies equally, and with the same force and weight, to LaPierre's challenged affirmative defenses. In addition, LaPierre respectfully submits the following additional argument for the Court's consideration.

With respect to LaPierre, specifically, the Attorney General is asking this Court to dismiss eight of LaPierre's affirmative defenses – including his defenses of laches, estoppel, waiver and unclean hands, despite the existence of triable issues of fact, including, among others, when the Charities Bureau first became aware of the amounts the NRA was paying LaPierre as compensation for services performed for the NRA and of the fact that the NRA was providing LaPierre with charter travel, why the Attorney General waited so long to assert claims against LaPierre based on his compensation and use of charter travel, why James did not, consistent with ethical rules, recuse herself from matters relating to the NRA and LaPierre and let someone else handle those matters, why James and her associates included material representations of fact in the complaint they used to commence this action, grossly inflating LaPierre's compensation, and lying about the location of the NRA's office, and why James and her associates included a request for judgment against LaPierre for relief that she was not authorized to seek and this Court does not have the power to grant, including forfeiture of all compensation earned while employed by the NRA and a lifetime ban on nonprofit service.

The Court should deny the Attorney General's motion as to LaPierre because the defenses he has asserted and the Attorney General has challenged are properly and sufficiently pleaded and "stated," predicated, *inter alia*, upon theories of laches, estoppel, waiver, unclean hands, and culpable conduct of others, all of which find some support in the allegations in the complaint and will depend upon the facts adduced upon trial, particularly upon the facts as to the circumstances under which the Letitia James, personally, the OAG, in its official capacity, and the Charities Bureau of the OAG, in its official capacity, over the period relevant to this lawsuit, received, reviewed, analyzed, and acted upon, or failed to act upon, the "CHAR 500" reports filed annually by the NRA, upon the facts as to the circumstances under which James, before she became an

attorney general, made statements about the NRA expressing animus toward the NRA and an intention to destroy it, upon the facts as to the circumstances under which, instead of recusing herself and allowing an impartial and independent attorney to handle matters relating to the NRA and LaPierre, used her position and government resources to assemble a massive team of lawyers, paralegals, purported experts and others to concoct a contrived and false narrative designed to create the false and misleading impression that LaPierre had received compensation in amounts that were unreasonable, excessive and unlawful, and had unlawfully accepted charter travel provided by the NRA, in an attempt to deceive the Court and the public and justify dissolution of the NRA and banishment of LaPierre from the world of nonprofit advocacy forever, or appointment of a monitor who would be in a position to conduct surveillance on the NRA, LaPierre and the NRA Board of Directors, members, donors, suppliers and allies and provide intelligence to James that she could use to pursue her mission of destroying the NRA and silencing LaPierre, and whether, putting together the complaint in this action, she and others acting in concert with her under her control, direction and supervision engaged in deceit and attempted to deceive the Court by including material representations of fact concerning LaPierre's compensation, to create a false narrative about LaPierre and "tell a grim story of greed", as well as material misrepresentations of facts concerning the location of the NRA's office and the contents of the NRA's certificate of incorporation to secure the venue of her choice in a county with a jury pool she believed would be friendly to her and hostile to LaPierre, and thus raise issues of fact that preclude the granting of the relief now sought by the Attorney General.

Laches

The Attorney General asks this Court to dismiss LaPierre's affirmative defense of laches. As the Second Circuit explained, very recently, in *Republic of Turkey v Christie's Inc.*, 2023 WL 2395412, at *4 (2d Cir. Mar. 8, 2023):

> Laches is an equitable defense, precluding the claims of a plaintiff who is "guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant." To prevail, a defendant must establish "(1) the plaintiff knew of the defendant's misconduct; (2) the plaintiff inexcusably delayed in taking action; and (3) the defendant was prejudiced by the delay." The first of these elements may be established where a plaintiff "should have known" of the injury. Philippine Am. Lace Corp. v. 236 W. 40th St. Corp., 32 A.D.3d 782, 822 N.Y.S.2d 25, 27 (1st Dep't 2006)

(some citations omitted).

As the First Department explained *Philippine Am. Lace Corp. v. 236 W. 40th St. Corp.*, 32 A.D.3d 782, 784 (1st Dep't 2006):

> Laches is an unreasonable delay by a plaintiff that prejudices a defendant. Because the effect of delay may be critical to an adverse party, "delays of even under a year have been held sufficient to establish laches" (Matter of Schultz v. State of New York, 81 N.Y.2d 336, 348, 599 N.Y.S.2d 469, 615 N.E.2d 953 [1993]; see also Matter of Pardesi v. Schembri, 245 A.D.2d 204, 665 N.Y.S.2d 898 [1997] [claim barred by laches where delay of more than one year]; 90–92 Wadsworth Ave. Tenants Assn. v. City of New York Dept. of Hous. Preserv. & Dev., 227 A.D.2d 331, 656 N.Y.S.2d 8, [1996, as amended 1997] [claim barred where delay of almost one and a half years]).

(Citation omitted).

In *Republic of Turkey*, pursuant to its patrimony laws, the Republic of Turkey brought an action against Christie's Inc., Michael Steinhardt, and the "Stargazer", a six-thousand-year-old marble figurine, alleging that the idol was unlawfully excavated and smuggled out of its borders and seeking a declaratory judgment that all rights, title and interest to the Stargazer vested in Turkey. *Republic of Turkey*, at *1. After an eight-day bench trial, the district court concluded that Turkey failed to prove by a preponderance of the evidence its ownership interest in the Stargazer

and entered a declaratory judgment that all rights title, and interest to the idol vested in Steinhardt. *Id*. In addition, the district court found that Turkey slept on its rights and that the defendants had established the equitable defense of laches. *Id*. The Second Circuit affirmed the judgment of the district court as to laches. *Id*.

Here, similarly, the New York State Office of the Attorney General, the Charities Bureau, and the State of New York slept on their right to challenge LaPierre's compensation as excessive and to challenge the NRA's provision of charter travel to LaPierre as unlawful, giving rise to the equitable defense of laches with respect to the Attorney General's claims against LaPierre challenging his compensation and use of charter travel. 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 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. When the Legislature commands that not-for-profit corporations go to the trouble and expense of filling out these forms and filing them with the OAG, the least the OAG can be expected to do is to look at them and make reasonable inquiry if anything seems amiss, especially if it believes that limiting executive compensation and charter travel at not-for-profit corporations is part of its mandate or in the public interest. 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.

In short, New York attorneys general have a duty to oversee and supervise New York nonprofit organizations and take prompt action upon receipt of information indicating that there might be a violation of New York law. That duty includes the duty to read the reports filed with the Charities Bureau and, where information is provided that indicates a need to take action, to take appropriate action. But rather than doing their duty, 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 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 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 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 LaPierre's compensation or charter travel

was prejudicial. The decreased ability of 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 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, 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 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. 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 the Court should find that the Attorney General is estopped and barred by the doctrine of laches from pursuing any claim against LaPierre 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 LaPierre's compensation and charter travel promptly after receiving the NRA's 2008 filings, 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 LaPierre with charter travel promptly, the NRA could have cured it and avoided the purported problem of which the Attorney General now complains.

Here, New York attorneys general knew or should have known of the amounts of compensation the NRA was paying to LaPierre and that the NRA was using charter travel, and of their right to challenge LaPierre's compensation and use of charter travel, for many years before commencing this action and first asserting that 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 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 LaPierre and getting LaPierre banned for life from nonprofit service, 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 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, LaPierre naturally assumed, and believe, that the Charities Bureau had no concerns about his or use of charter travel. Accordingly, the Court should deny that branch of the Attorney General's motion which is to dismiss LaPierre's laches defense because the Attorney General failed to make a prima facie showing of her entitlement to judgment as a matter of law. *See Trahan v. Galea*, 48 A.D.3d 791, 792 (2d Dep't 2008) ("The Supreme Court properly denied that branch of the plaintiff's motion which was, in effect, for summary judgment dismissing the defendants' affirmative defenses. The plaintiff failed to make a prima facie showing of her entitlement to judgment as a matter of law. Triable issues of fact exist, inter alia, as to whether her claim is barred by laches.") (citation omitted).

Indeed, the case for application of the doctrine of laches here is even stronger than it was in the *Republic of Turkey* case because there the government of Turkey was clearly acting within the scope of its authority to protect a public interest; whereas, here, 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.

These facts also support LaPierre's defenses of estoppel, waiver, law of the case and unclean hands.

C. The Court Should Grant LaPierre Leave to Replead to Allege Facts in Support of His Affirmative Defenses Because Leave to Amend Must Be Freely Given and the Attorney General Would Suffer No Prejudice.

CPLR 3025 mandates that leave to amend a pleading be freely given, and LaPierre should be permitted to amend and supplement his answer to correct any defects or deficiencies in his affirmative defenses. *See* CPLR 3025(b) ("Leave shall be freely given…."). To avoid unnecessary, wasteful and pointless briefing and oral argument on the sufficiency and merit of the challenged defenses set forth in LaPierre's current answer, to avoid the drastic remedy of dismissal, and because leave to amend must be freely given, amendment would cure the alleged deficiencies in LaPierre's challenged defenses,[12] and the Attorney General would suffer no prejudice if leave to amend were granted, the Court should grant LaPierre leave to replead. *See Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 81 (1st Dep't 2015) (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). This is LaPierre's first request for leave to replead his affirmative defenses pleaded. (The Attorney General has amended her pleading twice.) LaPierre's cross-motion for leave to amend his pleading is proper and timely and granting LaPierre leave to replead would allow him to allege facts in support of his affirmative defenses, providing the Attorney General with notice of the facts LaPierre intends to rely upon to support the challenged defenses.

[12] *See* [Proposed] Second Amended Verified Answer of Wayne LaPierre attached as Exhibit 3 to accompanying Correll Aff.

VI.

CONCLUSION

For the reasons stated above, the Court should grant LaPierre's cross-motion and deny the branch of the Attorney General's motion seeking dismissal of certain of LaPierre's defenses as moot. But if the Court declines to do so, the Court should deny the branch of the Attorney General's motion seeking dismissal of certain of LaPierre's defenses on the ground that the challenged defenses are sufficiently stated, have merit and raise triable issues of fact.[13]

Dated: New York, New York
March 13, 2023

Respectfully submitted,

/s/ P. Kent Correll

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[13] *Warwick v. Cruz*, 270 A.D.2d 255 (2d Dept 2000) (reversing order of trial court granting branch of plaintiff's motion which was to dismiss certain affirmative defenses contained in its answer and denying that branch of the plaintiff's motion stating: "Upon a motion to dismiss a defense, a defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed. If there is any doubt as to the availability of a defense, it should not be dismissed. Affording the appellant every reasonable intendment of the pleading, dismissal of the fourth and sixth affirmative defenses was improper under the circumstances.").

RULE 17 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 Memorandum of Law 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 memorandum of law contains 6,457words, 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 memorandum of law and affirmation.

Dated: New York, New York
March 13, 2023

/s/ P. Kent Correll
P. Kent Correll, Esq.

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 13th day of March 2023.

/s/ P. Kent Correll
P. Kent Correll