SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – COMMERCIAL DIVISION

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,	§	Index No. 451625/2020
	§	Hon. Joel M. Cohen
Plaintiff,	§	Motion Sequence No. _____
v.	§	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE FROM JEFFREY TENENBAUM**
Defendants.	§	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT THE NATIONAL RIFLE ASSOCIATION OF AMERICA'S MOTION TO EXCLUDE EVIDENCE FROM JEFFREY TENENBAUM

BREWER, ATTORNEYS & COUNSELORS

William A. Brewer III
Svetlana M. Eisenberg
Christopher T. Zona
BREWER, ATTORNEYS & COUNSELORS
750 Lexington Ave, 14th Floor
New York, New York 10022
Phone: (212) 489-1400
Fax: (212) 751-2849
wab@brewerattorneys.com
sme@brewerattorneys.com
ctz@brewerattorneys.com

Counsel for Defendant the National Rifle Association of America

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

COMES NOW Defendant the National Rifle Association of America ("NRA") and submits this memorandum of law in support of its motion to exclude evidence intended to be offered by Plaintiff Attorney General of the State of New York ("NYAG") through its expert witness Jeffrey Tenenbaum ("Tenenbaum").

PRELIMINARY STATEMENT

Tenenbaum is serving as the NYAG's litigation co-counsel disguised as an "expert" to present the NYAG's arguments and conclusions from the witness stand with the cloak of independent authority.[1] Tenenbaum plans to: (1) instruct the factfinder on the law, which is improper; (2) provide cherry-picked factual narratives—again, improper; and (3) impart factual and legal conclusions, which usurps the jury's role. His testimony is "not designed to inform a factual question (the usual province of expert testimony)." *In re Lasdon*, 32 Misc. 3d 1245(A), at *1 n.3 (Sur. Ct. N.Y. Cnty. Aug. 23, 2011). Indeed, Tenenbaum's Report[2] reads more like a legal brief than an expert report. *See State v. Deutsche Telekom AG*, 419 F. Supp. 3d 783, 790 (S.D.N.Y. 2019) ("where expert reports read like legal briefs and threaten to usurp judges' duty to determine the relevant law, courts may reasonably exclude such evidence at trial."). Allowing Tenenbaum to testify is tantamount to allowing the NYAG's litigation counsel to make a closing argument from the witness stand. Therefore, Tenenbaum should not be allowed to testify under any circumstances.

First, Tenenbaum's opinions are poorly veiled factual and legal conclusions that usurp the functions of the Court and factfinder. His proffered testimony is rife with inadmissible factual

[1] A clear example of this was the NYAG's assertion of work-product and litigation preparation privilege over conversations with Tenenbaum who is a ***testifying***—not consulting—expert. Tenenbaum Dep. (Ex. B) 69:19-82:2, 102:19-106:9, 116:11-127:24.

[2] The "Report" refers to the "Expert Report Of Jeffrey S. Tenenbaum," dated September 16, 2022, which is attached as part of Ex. A to the Affirmation.

narratives, impermissible interpretations and inferences, and improper factual and legal conclusions. Indeed, Tenenbaum is intent on testifying that: (1) he is an expert on the law; (2) he thoroughly reviewed the evidence; and (3) the NRA violated the law. ***None of this is admissible***.

Second, the reliability—and admissibility—of Tenenbaum's testimony is so questionable that it has no probative value. In fact, Tenenbaum's review of materials was co-opted by the NYAG—destroying his independence and objectivity—and marred by his improper "cherry-picking." This makes his opinions and conclusions wholly unreliable.

Third, Tenenbaum's expertise does not include New York-specific nonprofits and law. Thus, he should be precluded from portraying himself—and testifying—as an expert in either area.

The proper role of an expert is to "help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." *People v. Nicholson*, 26 N.Y.3d 813, 828 (2016) (citing *People v. Williams*, 20 N.Y.3d 579, 583–84 (2013)). Here, Tenenbaum is offered as a witness-litigator to regurgitate the NYAG's arguments from the witness stand and make factual and legal conclusions. ***This is entirely impermissible***. Therefore, Tenenbaum should be precluded from testifying.

RELEVANT LAW

"Admission of expert testimony is left to the sound discretion of the trial court and dependent on whether the expert testimony would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." *Id*. The court must "determine the scope and extent of the testimony to be offered in light of the evidence before the jury." *People v. Brown*, 97 N.Y.2d 500, 506 (2002).

"[A]dmissibility turns on whether, given the nature of the subject, 'the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable.'" *People v. Cronin*, 60 N.Y.2d

430, 432–33 (1983) (citing *Van Wycklyn v. City of Brooklyn*, 118 N.Y. 424, 429 (1890)). However, "[a]bsent an inability … of jurors to comprehend the issues and evaluate the evidence, the opinions of experts which intrude on the province of the jury to draw inferences and conclusions, are … improper." *Nevins v. Great Atl. & Pac. Tea Co.*, 164 A.D.2d 807, 807–08 (1st Dept 1990). In determining admissibility, a court should consider the facts of the case, purpose of the testimony, and whether the testimony would assist jurors. *People v. Taylor*, 75 N.Y.2d 277, 293–94 (1990). And the court "must determine whether 'the potential value of the evidence is outweighed by the possibility of undue prejudice to the defendant or interference with the province of the jury.'" *People v. Rivers*, 18 N.Y.3d 222, 228 (2011) (citing *People v. Bennett*, 79 N.Y.2d 464, 473 (1992)).

ARGUMENT

I. Tenenbaum's Testimony Intrudes Upon The Exclusive Province Of The Court And Factfinder.

"Where the offered proof intrudes upon the exclusive prerogative of the court to render a ruling on a legal issue, the attempt by a plaintiff to arrogate to himself a judicial function under the guise of expert testimony will be rejected." *Singh v. Kolcaj Realty Corp.*, 283 A.D.2d 350, 351 (1st Dep't 2001). An expert may not testify as to legal conclusions. *Measom v. Greenwich & Perry St. Hous. Corp.*, 268 A.D.2d 156, 159 (1st Dep't 2000). Experts also cannot testify about the meaning and applicability of the law (*Franco v. Jay Cee of New York Corp.*, 36 A.D.3d 445, 448 (1st Dep't 2007)) or to "what any law requires or whether it applies to the evidence adduced" (*Flores v. Infrastructure Repair Serv., LLC,* 52 Misc. 3d 664, 667 (Sup. Ct. N.Y. Cnty. 2015)). Nor can an expert provide an interpretation of a particular statute (*Colon v. Rent-A-Ctr., Inc.*, 276 A.D.2d 58, 61 (1st Dep't 2000)), or "offer opinion as to the legal standards which he believes should have governed a party's conduct" (*Russo v. Feder, Kaszovitz, Isaacson, Weber, Skala & Bass, LLP*, 301 A.D.2d 63, 69 (1st Dep't 2002)). Indeed, "it is axiomatic that an expert is ***not***

permitted to provide legal opinions, legal conclusions, or interpret legal terms; those roles fall ***solely*** within the province of the court." *Miriam Osborn Mem'l Home Ass'n. v. Assessor of City of Rye*, 7 Misc. 3d 1004(A), at *2 (Sup. Ct. Westchester Cnty. 2005) (emphasis added).

An expert also may not "usurp[] the function of the jury." *Nevins*, 164 A.D.2d at 808. "While an expert may testify regarding acts, omissions, or conditions that would constitute a violation of a state or federal regulation, other law, or duty of care or regarding other facts bearing on the issue, an expert may not, over objection, draw the ultimate conclusion that the evidence adduced does or does not amount to a violation." *Flores*, 52 Misc. 3d at 667. It is well-established that, "[i]t is the task of plaintiff's attorney to advocate and the court's task to determine what laws apply and what they require or allow" (*Cohen v. Am. Biltrite Inc.*, 62 Misc. 3d 861, 863 (Sup. Ct. N.Y. Cnty. 2018)), while the expert's duty is to help the factfinder on matters requiring specialized knowledge or skill (*De Long v. County of Erie,* 60 N.Y.2d 296, 307 (1983)).

In the limited circumstances where an expert is permitted to testify about complex regulatory schemes, a court must only allow "carefully circumscribed testimony" that "is consistent with the court's view of the law and does not give a legal conclusion." *People v. Lurie*, 249 A.D.2d 119, 122 (1st Dep't 1998). This is because "a trial court should not rely on the testimony of a legal expert on a question of law regardless of the witness' vast experience ... [because such] 'experience is hardly a qualification ... when there is a knowledgeable gentle [person] in a robe whose exclusive province it is to instruct the jury on the law.'" *Caplan v. Winslett*, 218 A.D.2d 148, 155–56 (1st Dep't 1996) (citing *Marx & Co. v. Diners' Club Inc.*, 550 F.2d 505, 512 (2d Cir. 1977)).

In *Lurie*, an expert was necessary to explain "the complicated regulatory scheme governing co-op conversions and the corresponding disclosure requirements imposed on sponsors." *Lurie*,

249 A.D.2d at 122. In discussing the applicable law, the expert's testimony had to be "accurately stated ... as applicable to the circumstances of the case." *Id*. And the expert could not "testif[y] that defendant had committed the charged crimes or state[] ultimate legal conclusions." *Id*.

In *Miriam*, petitioner sought to offer the testimony of a law professor "concerning the meaning of the term 'charitable', both from a historical perspective as well as with a particular focus on the meaning of that term as used in Section 420-a of the New York Real Property Tax Law, in an effort to determine whether the property owned and operated by The Osborn is being used for 'charitable' purposes." *Miriam*, 7 Misc. 3d 1004(A), at *2. The court held that the "proposed testimony clearly violates the longstanding prohibition against an expert giving an opinion as to a legal conclusion." *Id*. at *4. And that, "statutory interpretation is an exclusive function of the court and, hence, [the expert's] interpretation of R.P.T.L. § 420-a would be improper as a matter of law and quite unnecessary." *Id*. at *4–5. The expert was not allowed to testify to the meaning of "charitable" or whether the property was used for "charitable purposes" under the statute. *Id*. at *5.

A. Tenenbaum Provides Numerous Impermissible Factual Narratives.

Expert witnesses "are not a vehicle to provide a factual narration." *In re M/V MSC FLAMINIA*, 2017 WL 3208598, at *3 (S.D.N.Y. July 28, 2017). Experts are "not permitted to simply recite" facts from a case that are "properly presented through percipient witnesses and documentary evidence." *In re Kyanna T.*, 19 Misc. 3d 1114(A), at *6 (Fam. Ct. Kings Cnty. 2007). An expert also may not "simply 'regurgitate[] what a party has told him' or construct[] 'a factual narrative based on record evidence.'" *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, 32 F. Supp. 3d 453, 460 (S.D.N.Y. 2014) (citing *Arista Recs. LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 424 (S.D.N.Y. 2009) and *Highland Cap. Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 469 (S.D.N.Y. 2005)). Indeed, "cherry-picking and editorializing is exactly the type of 'factual narrative' that

courts routinely exclude because it invades the province of the factfinder by merely 'regurgitat[ing] the evidence.'" *In re Lyondell Chem. Co.*, 558 B.R. 661, 668 (Bankr. S.D.N.Y. 2016) (citing *In re Fosamax Prod. Liab. Litig.*, 645 F. Supp. 2d 164, 192 (S.D.N.Y. 2009)); *see S.E.C. v. Tourre*, 950 F. Supp. 2d 666, 675 (S.D.N.Y. 2013) ("narration of facts of the case may easily invade the province of the jury, providing a separate basis for exclusion."). The "selection, organization, and characterization of excerpts from the discovery record is 'no more than counsel ... will do in argument.'" *Id*. (citing *Primavera Familienstifung v. Askin*, 130 F. Supp. 2d 450, 530 (S.D.N.Y.), *amended on reconsideration in part*, 137 F. Supp. 2d 438 (S.D.N.Y. 2001), *and abrogated by Casey v. Merck & Co.*, 653 F.3d 95 (2d Cir. 2011)).

Tenenbaum engages in impermissible factual narratives throughout his Report. When discussing his first opinion, Tenenbaum offers three "Examples of Particular Failures." Report, at 29-42. Tenenbaum does not even try to disguise these factual narratives—labeling two as "Fact Descriptions." *Id*. at 30, 34-35. And, the third, while not so labeled, contains the same editorialized narrative. *Id*. at 37-42. Tenenbaum includes similar narrations with each of his opinions. *See id*. at 47-48 ("Complaints Raised by and Retaliation Against Lt. Col. Oliver North"), 49-50 ("Complaints Raised by and Retaliation Against Various Board Members"), 50-51 ("Complaints Raised by and Retaliation Against Craig Spray"), 55-57 ("The NRA's Expense Reimbursement Framework"), 63-65 ("The NRA's 2021 Bankruptcy Filing is an Example of the NRA's Dysfunction and Breaches of Fiduciary Duty").

These editorialized regurgitations of the evidence are improper and inadmissible. Indeed,

> such an assembly embedded with advocacy is not what this Court needs from an expert—the lawyers can do all of that in opening or closing statements and proposed conclusions of fact and law. Simply put, ***this narrative*** may have been helpful for the lawyers to understand their case, or for the clients, but it ***is not helpful to the Court, and is also improper***.

M/V MSC FLAMINIA, 2017 WL 3208598, at *8 (emphasis added). Allowing Tenenbaum to testify consistent with his Report will be nothing more than "a vehicle for the proffering party's factual narrative" that "usurp[s] the role of the jury." *El Ansari v. Graham*, 2019 WL 3526714, at *7 n.8 (S.D.N.Y. Aug. 2, 2019). This simply cannot be allowed.

B. Tenenbaum Improperly Offers Sweeping Conclusions About The Evidence.

Tenenbaum also makes sweeping conclusions about the state of the evidence—telling the factfinder that there is "no evidence" of certain events to bolster his own conclusions.[3] Courts express "discomfort about uncontrolled expert testimony that provides sweeping conclusions." *United States v. Dukagjini*, 326 F.3d 45, 53 (2d Cir. 2003). Not only are these types of statements often speculative, but they are also unfairly prejudicial and confusing. They create the illusion that Tenenbaum has reviewed all the evidence that will be presented at trial and is summarizing the body of evidence for the jury. But it is ***exclusively*** the role of the factfinder to determine what evidence has been presented and its meaning. *See People v. Inoa*, 25 N.Y.3d 466, 475 (2015) (expert evidence is "not properly received where its purpose is simply to provide an alternative, purportedly better informed, gloss on the facts of the case."). At a minimum, these types of sweeping statements must be excluded.

C. Tenenbaum's Testimony Includes Impermissible Legal Interpretations.

It is well-established that experts are not permitted to testify as to what any particular law requires. *Colon*, 276 A.D.2d at 61; *Flores,* 52 Misc. 3d at 667; *United States v. Stewart*, 433 F.3d

[3] *See* Report, at 33 ("There is no evidence …"), 34 ("there is no evidence …"), 35 ("There is no evidence …"), 38 ("There is no evidence …), 39 ("There is no evidence …"; "there is no evidence …"; "there is no evidence …"), 40 ("There is no evidence …"; "There is no evidence …"), 41 ("there is no evidence …"), 59 ("There is no evidence … There is no evidence … There is no evidence …"), 60 ("there is no evidence … Nor is there evidence …").

273, 311 (2d Cir. 2006). An expert cannot provide interpretations of the law for the factfinder. *Measom*, 268 A.D.2d at 159; *LaPenta v. Loca-Bik Ltee Transp.*, 238 A.D.2d 913, 914 (4th Dep't 1997). Nor can an expert testify as to whether certain laws apply to the evidence adduced. *Flores,* 52 Misc. 3d at 667; *Ross v. Manhattan Chelsea Assocs.*, 194 A.D.2d 332, 333 (1st Dep't 1993). These duties reside ***exclusively*** with the Court, which will instruct the jury of the law when appropriate. *Miriam*, 7 Misc. 3d 1004(A), at *2; *see Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992) ("an expert may be uniquely qualified by experience to assist the trier of fact, he is not qualified to compete with the judge in the function of instructing the jury.").

Tenenbaum intends to do exactly what the law prohibits. Tenenbaum is forthright in purporting that his expertise includes "the relevant laws that apply to nonprofits, with a focus on the legal duties of nonprofit officers, directors, and key employees." Report, at 2. And that, "I hold myself out to be an expert on the applicable standards of care that apply in this case." Tenenbaum Dep. 346:22-24. He also admits that he intends to interpret and define the applicable laws and legal concepts as he understands them. *Id*. at 383-393. And he intends to testify about the meaning and requirements of the laws in this case. *Id*. at 545:2-12. Indeed, as Tenenbaum admits, doing this is "all part and parcel of my report." *Id*. at 391:20-392:4, 531:22-24.

True to his word, in section after section of the Report, Tenenbaum provides his personal interpretations of New York law. Tenenbaum defines legal terms (*i.e.*, "Fiduciary Duties", "Duty of Care", "Duty of Loyalty", "Duty of Obedience") without reference to New York law. Report, at 7-11. He also provides personalized definitions of terms like "charitable" (*id*. at 6), "key persons" (*id*. at 8), "private benefit doctrine" (*id*. at 12), "private inurement rule" (*id*. at 13), and "disqualified persons" (*id*. at 14). Further, Tenenbaum summarizes various New York-specific

laws. *See id*. at 22-23 ("New York's Not-for-Profit Corporation Law"), 23-24 ("related party transactions" and related New York laws).

This testimony is precisely the type excluded in *Miriam*, where the expert was not allowed to define the term "charitable"—the same term Tenenbaum seeks to define here—as it was used in the applicable property tax code. *Miriam*, 7 Misc. 3d 1004(A), at *5; *see United States v. Scop*, 846 F.2d 135, 140–42 (2d Cir.), *on reh'g*, 856 F.2d 5 (2d Cir. 1988) (discussing inadmissibility of expert's testimony regarding terms that "are not self-defining" but subject to "judicial interpretations"). It is this Court's ***exclusive province*** to determine the applicable law and define any legal terms for the jury. *Franco*, 36 A.D.3d at 448; *Caplan*, 218 A.D.2d at 155–56. Additionally, Tenenbaum is neither a tax lawyer nor an IRC expert. Therefore, he also lacks the expertise and foundation to provide definitions for terms specific to the IRC.

Additionally, Tenenbaum interprets New York laws that purportedly apply to the NRA even though he is not an expert in New York nonprofits or a licensed New York attorney. For example, Tenenbaum asserts that certain "minimum requirements" exist for New York nonprofits related to conflict of interest policies. Report, at 21-23. Tenenbaum comes to this conclusion based on his interpretation of the New York Not-for-Profit Corporation Law. Tenenbaum does the same when discussing "related party transactions." *Id*. at 23-24. However, in Tenenbaum's discussion of each, he gives no indication that the underlying statutes are so complex and specialized that his "expert" interpretation is necessary or helpful. Indeed, the Court is perfectly capable of explaining these legal regimes to the factfinder. Admitting this testimony would be reversible error. *Berger v. Tarry Fuel Oil Co.,* 819 N.Y.S.2d 556, 557 (2d Dep't 2006).

Another example of Tenenbaum's inadmissible legal interpretations is in Section IV of "Background," where Tenenbaum makes the following (improper) conclusion:

> The NRA, as an entity, did not establish or maintain an adequate control environment. … in my judgment and based on 26 years of legal experience in this area, these internal controls were lacking, subverted, and/or weak at the NRA.

Report, at 16. While the conclusion itself is improper, it also necessarily required Tenenbaum to interpret New York law as to the meaning of an "adequate control environment" as he believes it applies in this case. Tenenbaum uses this personalized interpretation of New York law to espouse his opinion as to the adequacy of the NRA's internal controls. This is inadmissible and improper.

Later, Tenenbaum again cannot resist devolving into improper conclusions that necessarily require inadmissible legal interpretations. *Id*. at 19-20. Playing the role of judge and jury, Tenenbaum unilaterally determines that, "the Individual Defendants each engaged in conduct inconsistent with an effective compliance program." *Id*. at 20. This legal conclusion—which is inadmissible on its own—includes his personal interpretation of what an "effective compliance program" under New York's regulatory regime requires. This interpretation of the law is improper.

D. Tenenbaum Intends To Offer Impermissible Factual And Legal Conclusions.

Tenenbaum's Report reads like a motion for summary judgment on behalf of the NYAG. Tenenbaum admits that his intent is to "point[] out a number of areas where the NRA's policies and practices did not rise to the level of what is required under the New York statutes." Tenenbaum Dep. 393:4-8. And to "dr[a]w factual conclusions" about the NRA and its alleged conduct, and how that "compared" to the applicable laws. *Id*. at 410:19-411:8. Tenenbaum even admits that he will testify that "there were clear violations in my opinion of law, or policy, and of common in kind of established typical customary nonprofit industry and practice." *Id*. at 545:20-24, 544:2-9.[4]

[4] Taken together, these admissions alone are sufficient basis for this Court to order the wholesale preclusion of Tenenbaum's testimony.

In his Report, Tenenbaum discusses purported failures of the NRA and other Defendants related to conflicts of interest and related-party transactions. Tenenbaum wastes no time conclusively asserting that the NRA failed to follow its own policies—a determination properly left to the factfinder. Report, at 25. Tenenbaum goes further with an emphatic conclusion on the ultimate issue that is better suited for a closing argument:

> Defendants each repeatedly violated the NRA's Conflict of Interest and Related Party Transaction Policy and corporate ethics policies. The Audit Committee failed to adequately review and approve conflicts of interest and failed to adequately document its deliberations and approvals. LaPierre, Phillips, and Powell failed to disclose their conflicts of interest as required by the policy. And Frazer failed to enforce the NRA's Conflict of Interest and Related Party Transaction Policy and corporate ethics policies even after becoming aware of violations of the policies. Moreover, even after discovering numerous transactions giving rise to conflicts of interest that did not receive proper review or approval, the NRA failed to make changes to the NRA's controls and procedures in connection with such errors as required by the policy.

Id. at 27.

Tenenbaum continues:

> Each of the Defendants had responsibilities under the law and NRA policy with respect to conflicts of interests and related party transactions, and the evidence shows that each failed to meet those responsibilities. Each individual Defendant had knowledge of conflicts of interest and repeatedly failed either to appropriately report them or to review and approve such conflicts as required by the NRA's Conflict of Interest and Related Party Transaction Policy. In addition, the NRA entered into multiple related party transactions without the approvals required under the NRA's Conflict of Interest and Related Party Transaction Policy. Lastly, the Defendants failed to follow the procedures set forth in the NRA's Approval Procedures for Purchase Agreements and Contracts in Excess of $100,000.

Id. at 29.

All of this testimony is impermissible. This is not probative or helpful to the factfinder. And this is not part of Tenenbaum's area of specialized knowledge. Tenenbaum has come to these

determinations based on his personal interpretation and application of the applicable laws to the facts in this case—usurping the role of the factfinder. This is pure argument and entirely improper.

Tenenbaum's discussions of purported "examples" are littered with improper testimony. In discussing the "MMP Entities" (*id*. at 29-34), Tenenbaum unilaterally determines that LaPierre had "divided loyalties" and, under Tenenbaum's interpretation of the law, "should have disclosed his conflicts of interest and recused himself from any decision-making related to the agreement." *Id*. at 31. He further concludes that: (1) "the evidence does not support" LaPierre's defense; (2) LaPierre "withheld information from the Audit Committee" and "put his personal interests above those of the NRA and violated NRA policy"; (3) Phillips had a duty to report and failed to; and (4) Frazer "neglect[ed]" certain of his duties. *Id*. at 31-32. Tenenbaum goes on to determine that, "[t]he MMP Contracts and lack of disclosure thereof violate a number of NRA policies." *Id*. at 33. And:

> LaPierre, Phillips and Frazer all failed to fulfill their fiduciary duties with respect to the NRA's relationship with the MMP Entities. The NRA, in turn, failed to ensure that its procedures were followed to fulfill its duty to administer its charitable assets properly. LaPierre and Phillips both failed to report LaPierre's conflicts of interest and related party transaction to the Audit Committee and failed to follow the NRA's policies governing procurement. Frazer failed to enforce the NRA's conflict of interest, related party, and procurement policies, and failed to bring LaPierre's conflict to the Audit Committee once he learned of the conflict, at the very latest, during the NRA's bankruptcy proceedings. The NRA has failed to adequately investigate or address LaPierre's conflict of interest and related party transaction and has failed to enforce its own policies governing conflicts of interest and procurement.

Id. at 34.[5] Tenenbaum does this again related to the McKenna contract. *Id*. at 34-35.

[5] The NRA has standing to move to exclude testimony against these individuals because the First, Thirteenth, Fourteenth, and Fifteenth Causes of Action against the NRA are predicated on these individuals' malfeasance.

Tenenbaum conducts the same impermissible analysis when discussing alleged related-party transactions. Almost immediately, Tenenbaum usurps the factfinder's role by asserting that, "[t]he NRA repeatedly failed to adhere to its own internal controls," engaged in a "pattern of disregard for its own rules," and the NRA's Audit Committee engaged in a "pattern of insufficient reviews." *Id*. at 37. He goes on to unilaterally determine that the examples he described were "violative of the standard of care applicable to NRA officers and directors." *Id*. at 42.

Again, ***none of this testimony is admissible***. Tenenbaum is not the factfinder and is not tasked with testifying about whether the NRA violated a law. He is supposed to be assisting the factfinder to understand nonprofit organizations. Specifically, Tenenbaum cannot make findings of fact. *M/V MSC FLAMINIA*, at *3. He cannot discuss the application of the relevant law to the facts. *Flores*, 52 Misc. 3d at 667. And he cannot conclude that a violation occurred. *Id*. This testimony "merely tells the jury what result to reach." *TC Sys. Inc. v. Town of Colonie, New York*, 213 F. Supp. 2d 171, 182 (N.D.N.Y. 2002). That is impermissible.

Tenenbaum's improper testimony extends to his opinions—all of which are poorly veiled legal conclusions. In his second "opinion," Tenenbaum states, "Based on my review of the record, the NRA's response to these concerns was a violation of its policies and standard whistleblower protection practices." Report, at 47. Tenenbaum then uses impermissible factual narratives to support this improper "opinion." *Id*. at 47-52. Tenenbaum concludes by stating:

> Lastly, and not only in violation of the standard of care but also NRA's own policies, the actions resulted in retaliation, specifically in the form of not assigning or stripping board members of NRA committee assignments, commencing litigation to end a lifetime membership, public intimidation, and ridicule and/or removal from leadership positions within the organization. The Individual Defendants did not, as would have been expected and consistent with the standard of care, caution those within the NRA to not retaliate, resulting in retaliation.

Id. at 52.

As an initial matter, Tenenbaum mischaracterizes the basis of his opinion. He has not reviewed the "record," but cherry-picked evidence to allow him to make these conclusions. Further, Tenenbaum's conclusions are the result of his own inferences and legal conclusions. *See, e.g.*, Tenenbaum Dep. 411:10-412:8, 413:3-16. This is improper and inadmissible. *See Kulak v. Nationwide Mut. Ins. Co.*, 40 N.Y.2d 140, 148 (1976) ("opinions of experts, which intrude on the province of the jury to draw inferences and conclusions, are both unnecessary and improper"); *People v. Wright*, 283 A.D.2d 712, 714 (2d Dep't 2001) (error to allow expert testimony that "was the product of a logical inference drawn from the other facts properly presented"). And it is improper for an expert to conclude, ***in his own opinion***, that the evidence adduced constitutes a violation of a law or standard of care. *Flores,* 52 Misc. 3d at 667.

Tenenbaum's third "opinion" is also almost entirely inadmissible. Report, at 52-57. Tenenbaum tells the factfinder that: (1) he reviewed the evidence; (2) he knows the law; (3) the NRA failed to meet the standard of care; and (4) the NRA's failure "resulted" in illegal actions. *Id*. Worse still, Tenenbaum claims that his conclusion cannot be questioned. *Id*. at 52. It is not an expert's job to inform the factfinder of the evidence, standard(s) of care, or law. Nor is it allowable to conclude as to whether a party met a standard of care, violated the law, or caused an injury. And it is unfairly prejudicial for that same expert to declare his "opinion" unassailable.

Within his discussion of this "opinion," Tenenbaum makes further (improper) declarations about the standards of care (*id*. at 54) and engages in several improper factual narratives—ending each with his own conclusion. *See id*. at 55-57 ("Based on the evidence I've reviewed, the NRA failed to …"; concluding that "the NRA clearly paid excessive compensation to LaPierre, engaged in private inurement, and engaged in excess benefit transactions"; concluding that LaPierre "abuse[d]" the "NRA's funds for personal travel"; concluding that LaPierre "violated his fiduciary

duties"). Tenenbaum even admits that he is "opining" on whether "the facts that [he] read about and observed" meet applicable legal standards. Tenenbaum Dep. 531:13-17.

Tenenbaum continues the same trend in his discussion of his fourth "opinion":

> The NRA did not meet the applicable standards for properly administering its charitable assets because it did not safeguard those assets against misuse and waste. The NRA's purported course corrections do not adequately remediate its failures, leaving too many opportunities for Defendants to continue violating the law and the NRA's internal policies and procedures resulting in the misuse of funds intended for nonprofit purposes.

Report, at 5. Tenenbaum states that, "I have reviewed the evidence and consider the NRA's purported course correction to be inadequate." *Id*. at 57-60. This testimony is not helpful and, therefore, not probative. Rather, it is determinative, conclusory, and, thus, not admissible.

Finally, in his fifth "opinion," Tenenbaum again devolves into a closing argument. After an improper narrative about the NRA's bankruptcy filing—a subject about which Tenenbaum has no expertise—Tenenbaum concludes that the evidence "demonstrates" that: (1) "the NRA's governance failures continued even several years after any purported course correction began"; (2) "LaPierre breached his duty of care and loyalty to the organization" which "cost the NRA tens of millions of dollars and had other unintended negative side effects"; and (3) "Frazer did not adequately fulfill the role of Secretary and General Counsel." *Id*. at 64-65. These conclusions obviously invade the province of the Court and factfinder and are not admissible.

E. Tenenbaum's Tendency To Transition Into Impermissible Testimony Makes Preclusion Appropriate.

Tenenbaum's tendency to shift into improper conclusions occurs repeatedly in the Report.[6]

[6] *See, e.g.*, Report, at 15-16 (transitioning from discussing internal controls to improper conclusion that, "[t]he NRA … did not establish or maintain an adequate control environment."), 19-20 (transitioning from discussing compliance programs to improper conclusion that, "the Individual

Tenenbaum either does not understand the bounds of admissible testimony or deliberately intends to give improper conclusions to aid the NYAG's case irrespective of admissibility. Regardless, Tenenbaum shows a propensity to espouse personal (improper) legal interpretations and conclusions at every opportunity. It is likely that, while testifying, Tenenbaum will do the same.

If Tenenbaum is allowed to testify, the jury will view him as an "expert" and "authority" on nonprofits. Accordingly, the jury will afford his testimony additional weight. Should Tenenbaum engage in the same pattern of providing improper conclusions at every turn, that bell cannot be "unrung." There is no curative instruction that can undo the prejudice caused by Tenenbaum testifying to his improper conclusions. As the U.S. Supreme Court recognized, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton v. United States*, 391 U.S. 123, 135 (1968). While not a criminal trial, the NRA faces a similar situation. The limitations of jurors—namely, to unhear such prejudicial testimony—cannot and should not be ignored. The only way to avoid this danger and preserve the propriety of this trial is to preclude Tenenbaum from testifying.

II. Tenenbaum Lacks Independence And Cherry-Picked Evidence To Review Making His Testimony Unreliable And Inadmissible.

A. Tenenbaum Lacks Independence And Objectivity.

An expert is entrusted to serve as an authority about his or her subject matter. *Dougherty v. Milliken*, 163 N.Y. 527, 533 (1900). "The single most important obligation of an expert witness

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Defendants each engaged in conduct inconsistent with an effective compliance program."), 25-27 (transitioning from discussing the NRA's compliance program to improper conclusion that, "Defendants each repeatedly violated the NRA's … policies"), 28-29 (transitioning from discussing the NRA's procurement policy to improper conclusion that, "the NRA … materially failed to comply with the NRA's procurement policy").

is to approach every question with independence and objectivity." Steven Lubet, *Expert Witnesses: Ethics and Professionalism*, 12 Geo. J. Legal Ethics 465, 467 (1999). If an expert lacks either, his opinion is unreliable and of no probative value. *Id.*

Here, Tenenbaum characterizes himself as an independent expert. Tenenbaum Dep. 420:14-17. ***He is not***. His review of materials was controlled by the NYAG. He ignored relevant and material documents that conflicted with his intended conclusions. He intends to put his own "gloss" on the evidence and make sweeping statements to improperly influence the factfinder. And he intends to draw numerous legal conclusions on behalf of the NYAG. Taken together, Tenenbaum lacks independence and objectivity which makes his testimony unreliable and of no probative value. Therefore, Tenenbaum should not be allowed to testify.

B. Tenenbaum's Improper Cherry-Picking Makes His Testimony Unreliable.

"Where an expert's ultimate assertions are speculative or unsupported by any evidentiary foundation, the opinion is of no probative force." *Persaud v. City of New York*, 307 A.D.2d 346, 347 (2d Dep't 2003) (citing *Diaz v. New York Downtown Hosp.*, 99 N.Y.2d 542, 544 (2002)).

The reliability of an expert's opinion can be challenged when the expert engages in improper cherry-picking. Cherry-picking occurs when an expert selects materials to rely on that skew the results of the analysis and generate a desired conclusion. *Daniels-Feasel [v.] Forest Pharms., Inc.*, 2021 WL 4037820, at *5 (S.D.N.Y. Sept. 3, 2021). This can render the expert's testimony unreliable and inadmissible. *See Kurtz v. Costco Wholesale Corp.*, 818 F. App'x 57, 62 (2d Cir. 2020) ("cherry-picking data to artificially generate a particular result may render a model so unreliable that it is inadmissible"); *United States v. Paracha*, 2006 WL 12768, at *20 (S.D.N.Y. Jan. 3, 2006), *aff'd*, 313 F. App'x 347 (2d Cir. 2008) (recognizing the inherent unreliability of expert testimony that relies on "cherry-pick[ed]" information); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 299 F. Supp. 3d 430, 484 (S.D.N.Y. 2018) (concluding that expert's

inclusion of certain material skewed the results and rendered the opinions "unreliable"). Likewise, ignoring contradictory evidence can also cause an expert's testimony to be inadmissible and subject to preclusion. *See Selig v. Pfizer, Inc.*, 185 Misc. 2d 600, 607 (Sup. Ct. N.Y. Cnty. 2000), *aff'd*, 290 A.D.2d 319 (1st Dep't 2002) (precluding expert testimony where proffered expert came to his conclusions by, among other things, "ignor[ing] evidence to the contrary"); *Daniels-Feasel*, 2021 WL 4037820, at *5 ("exclusion of proffered testimony is warranted where the expert fails to address evidence that is highly relevant to his or her conclusion").

Tenenbaum failed to review four categories of documents: (1) Audit Committee documents; (2) compliance training documents; (3) Compensation Committee documents; and (4) security-related documents. This failure creates significant doubt as to the reliability of Tenenbaum's work and is evidence of improper cherry-picking.

The Audit Committee documents demonstrate that the NRA ***did*** review and revise agreements with third parties to comply with applicable regulations. *See, e.g.,* Sullivan & Blacker Rebuttal (Ex. C), at 19-21 ¶¶43-49 (discussing the Audit Committee's 2018 and 2019 review of transactions with McKenna). Obviously, these documents are relevant and material to the NRA's course corrections and compliance, while they also contradict Tenenbaum's conclusions. However, Tenenbaum never reviewed or considered them. Instead, he cherry-picked out-of-date practices from before 2017 to support his conclusions.

Similarly, Tenenbaum's refusal to consider documents related to the NRA's ethics and compliance training necessarily skewed his opinions. Tenenbaum opines that, "the NRA's board of directors should require all board members, officers, and staff – including all executives – to participate in annual ethics and compliance training." Report, at 63. But the NRA ***did*** hold such

trainings since 2018. Sullivan & Blacker Rebuttal, at 31-32 ¶¶76-77. Tenenbaum just refuses to acknowledge this and appears intent on convincing the jury the opposite is true.

Tenenbaum also failed to consider documents from the Compensation Committee before concluding that the "NRA did not adequately measure or oversee the compensation it paid to LaPierre and for years paid LaPierre excessive levels of compensation." Report, at 52. But the Compensation Committee's 2017 report demonstrates that, in determining salary recommendations, the Committee reviewed published reports, advice from outside counsel and consultants, employee benefits available to executives, and each executive's compensation and benefits history. And the Committee repeated this process from 2017-2022. Lerner Rebuttal (Ex. D), at 16-18 ¶72. Tenenbaum did not review any of these materials, which makes his conclusion here skewed and, thus, unreliable.

Finally, Tenenbaum concludes that the "NRA's stated position" regarding LaPierre's need for private charter travel "is not defendable." Report, at 56. But he ignored a significant volume of documents related to security threats to LaPierre. *See, e.g.,* Mehta Rebuttal (Ex. E), at 8-17 ¶¶15-17, ¶¶21-28 (discussing security concerns for LaPierre). Notwithstanding that Tenenbaum is unqualified to analyze security concerns, his failure to review these documents makes his conclusion "without foundation and wholly speculative." *Samuel v. Aroneau*, 270 A.D.2d 474, 475 (2d Dep't 2000).

In sum, Tenenbaum's opinions and conclusions as they relate to each of these four areas should be excluded as unreliable.

III. If Allowed To Testify At All, Tenenbaum Should Not Be Allowed To Testify About New York Nonprofits And New York Nonprofit Law.

The Court has the "sound discretion" to determine whether a witness is qualified to testify as an expert. *Meiselman v. Crown Heights Hosp.*, 285 N.Y. 389, 398 (1941); *de Hernandez v.*

Lutheran Med. Ctr., 46 A.D.3d 517, 517 (2d Dep't 2007). "[T]he expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." *Matott v. Ward*, 48 N.Y.2d 455, 459 (1979). And the expert's skill, training, education, knowledge, or experience ***must*** be in the "area upon which he is called to render an opinion." *Haring v. Still Waters Rest., Inc.*, 18 Misc. 3d 1122(A), at *2 (Sup. Ct. Nassau Cnty. 2008).

Tenenbaum asserts that he is an expert in:

> how nonprofit organizations are organized, operated, governed, subject to federal tax exemption and state nonprofit corporation statutes, managed to account for legal risks associated with their activities, and subject to scrutiny for their employment, executive compensation and benefits, conflicts of interest, expense reimbursement, procurement and contracting, and oversight practices, as well as their protection of charitable assets.

Report, at 3. He claims to be "an expert in the laws and rules and norms and best practices and common practices regarding nonprofit legal issues, in a wide variety of areas of law" (Tenenbaum Dep. 494:11-495:4), and "an expert on the applicable standards of care that apply in this case" (*id.* at 346:22-24). Notably, however, Tenenbaum has little experience as an expert witness. *Id.* at 112:11-12.

Tenenbaum's description of his expertise is misleading. First, Tenenbaum cannot serve as an expert on the applicable law because the Court is the only expert on the law. *Cohen*, 62 Misc. 3d at 863. Second, Tenenbaum has limited experience with New York nonprofits and law., and it comes almost entirely from serving nonprofits as his clients. Report, at 2-4. Therefore, at most, he possesses some secondary knowledge of certain areas related to nonprofits. But that does not equate to a reliable level of expertise to testify as an authority on New York nonprofits and law.

A. Tenenbaum Lacks The Requisite Experience To Testify About New York's Nonprofit Regulatory Scheme.

Tenenbaum admits that New York's nonprofit regulatory scheme is "unique" and "very different." Tenenbaum Dep. 328:6-9, 497:19-25. To qualify as an expert in this area the expert needs sufficient experience dealing with nonprofits operating within that scheme. But Tenenbaum's experience with New York nonprofits—and New York's regulatory scheme—is limited. *See id*. at 501:6-13 (only a "general familiarity" with New York laws). Tenenbaum is not—and has never been—a licensed New York attorney. *Id*. at 66:12-20, 319:25-320:7.[7] And he only has a handful of New York clients—most are neither incorporated in New York nor subject to its laws. *Id*. at 327:2-15. Tenenbaum is, therefore, far less familiar with New York's regulatory scheme than an expert should be. *See id*. at 342:13-20 ("most familiar" with Washington D.C. nonprofit laws). And he has no experience with certain New York laws that he opines on, including the New York Estates, Powers and Trusts Law (Report, at 43 n.193). Tenenbaum Dep. 329:17-331:2.

If permitted to testify at all, the scope of Tenenbaum's testimony should be limited to the general operations and oversight of national nonprofits. New York's regulatory scheme is, as Tenenbaum admits, complex, unique, and very different. And Tenenbaum's "general familiarity" with New York nonprofit law does not rise to the level of an expert. Therefore, Tenenbaum should not be allowed to testify about either.[8] *See Crawford v. Koloniaris*, 199 A.D.2d 235, 236 (2d Dep't

[7] Tenenbaum is only admitted in the District of Columbia. Report, at Ex. C.

[8] *See, e.g.,* Report, at 6 (discussing "charitable" organizations under New York law), 7 (discussing New York laws that "regulate nonprofits"), 7-11 (discussing New York legal duties and obligations for nonprofit directors, officers, and key persons), 17-18 (discussing New York nonprofit filing requirements), 22-24 (discussing New York requirements for conflict-of-interest policies and related-party transactions), 43, 45 (discussing New York whistleblower laws).

1993) (accident reconstruction expert lacked foundation to testify about police procedures); *Paciocco v. Montgomery Ward*, 163 A.D.2d 655, 657 (3d Dep't 1990) (expert lacked foundation to testify about "industry-wide safety standard" where only had general experience).

CONCLUSION

For the foregoing reasons, the NRA requests this Court exclude all evidence from Tenenbaum and preclude Tenenbaum from testifying as part of the NYAG's case.

Respectfully submitted,

Dated: March 17, 2023
New York, New York

/s/ Christopher T. Zona

William A. Brewer III
Svetlana M. Eisenberg
Christopher T. Zona
BREWER, ATTORNEYS & COUNSELORS
750 Lexington Ave, 14th Floor
New York, New York 10022
Phone: (212) 489-1400
Fax: (212) 751-2849
wab@brewerattorneys.com
sme@brewerattorneys.com
ctz@brewerattorneys.com

COUNSEL FOR DEFENDANT THE NATIONAL RIFLE ASSOCIATION OF AMERICA

CERTIFICATION OF COMPLIANCE

I hereby certify pursuant to Rule 17 of the Rules of Practice for the Commercial Division of the Supreme Court of the State of New York that the total number of words in the foregoing document, exclusive of the caption, table of contents, table of authorities and signature block, is 6,998 according to the "Word Count" function of Microsoft Word, the word-processing system used to prepare the document, and thus that the document complies with the word count limit set forth in Rule 17.

Dated: March 17, 2023
New York, NY

/s/ Christopher T. Zona
Christopher T. Zona

CERTIFICATE OF SERVICE

I, Christopher T. Zona, hereby certify that, on March 17, 2023, a true and correct copy of the foregoing document was electronically transmitted and served upon all counsel of record via this Court's electronic case filing system.

Dated: March 17, 2023
New York, NY

/s/ Christopher T. Zona
Christopher T. Zona