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,	:	
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 EXCLUDE DEFENSE EXPERT OPINIONS OF NADEL, GRAHAM, REDA, AND CUNNINGHAM

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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's Motion to Exclude Defense Expert Opinions of Nadel, Graham, Reda, and Cunningham (NYSCEF Doc. No. 1663-79) ("Pl. Mem.") particularly, as it seeks to exclude the expert report and opinion of James F. Reda dated September 16, 2022 (the "Reda Report"). For the reasons which follow, Plaintiff's motion should be denied.[1]

Background

Since the outset of the action, the Attorney General has strived to characterize the individual defendants as greedy and self-enriching. Repeatedly making public statements that the individual defendants, including Frazer, used the NRA as a "personal piggy bank" (*see, e.g.*, https://www.nbcnews.com/news/us-news/wayne-lapierre-allegedly-used-nra-personal-piggy-bank-n-y-n1236068 (attributing to the Attorney General the statement "[t]he NRA was serving as a personal piggy bank for four individual defendants")), the Attorney General peppered her complaint with multiple assertions that the individual defendants received excessive and unreasonable compensation among other benefits. Hearing that theme, the Court wrote that the allegations of the Attorney General's complaint "tell a grim story of greed, self-dealing, and lax financial oversight at the highest levels of the National Rifle Association." NYSCEF Doc No. 610 at 1.

Particular to Frazer, the complaint alleged that his compensation was excessive and unreasonable. It did not (and does not) allege that Frazer received anything else of value. *See*

[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 papers filed by the NRA and Wayne LaPierre in opposition to the instant motion. *See* Part 3 – Practices and Procedures, Part VI(D).

NYSCEF Doc. No. 646, ¶¶ 429-444. In discovery, the Attorney General confirmed there are no instances of self-dealing which benefited Frazer. *See* Affirmation of William B. Fleming dated May 5, 2023 ("Fleming Aff."), Ex. 1, Response No. 3 (providing no instances of Frazer using his position to allow himself or his family "to benefit through reimbursed expenses, related party transactions, excess compensation, side deals, or waste of charitable assets[,]" and admitting that Frazer's family did not obtain any personal financial benefit).

In response to these charges, James Reda, a 35-year seasoned, national expert in senior executive compensation, opined:

(i) that Frazer's compensation during the period 2015 to 2020 was reasonable, appropriate, and not excessive in any way for his dual roles as Corporate Secretary and General Counsel of the NRA,

(ii) that the authorized committee of the Board of Directors, the Officers Compensation Committee ("OCC") was appropriately advised by compensation consultants when deciding Frazer's compensation, and

(iii) that those compensation consultants used widely accepted methods and reasonable analysis when advising the OCC on Frazer's compensation.

See NYSCEF Doc. No. 1667 ("Reda Report") at 2. Less prominent, but likewise unchallenged, were Reda's insights that the OCC employed the "universal practice followed by compensation committees" when evaluating, with appropriate frequency, Frazer's compensation. *Id*. at 4, 7. Reda also catalogued unfavorable aspects of Frazer's compensation package including "significantly below market" retirement/deferred compensation amounts, a lack of any provision for severance compensation, the limited future employment prospects for executives who work at "polarizing organizations like the NRA," and Frazer's performance of two jobs (Secretary and General Counsel) for one salary. *Id*. at 9-11.

These additional observations negate the allegation that Frazer's compensation benefits have been excessive. They are also in conflict with the self-enrichment theme the

Attorney General still urges in her attempt to establish the wrongfulness or "fault" needed to trigger statutory liability. *Cf.* NYSCEF Doc. No. 610 at 38-41 ("[t]o hold LaPierre and Frazer liable under N-PCL 720 [a][1], the Attorney General will need to prove fault"). Reda's opinions further illuminate that the Attorney General's assertions are directed at the OCC's processes and not Frazer's conduct. They thus cannot even establish Frazer's negligence, much less his fault, and provide no basis to overcome Frazer's statutory business judgment protections. *See, e.g.,* William Meade Fletcher, 3A Fletcher Cyclopedia of the Law of Corporations § 1031 (2019 Rev. Vol. Perm. Ed.) ("Generally, a corporate director or officer will not be held liable for mere negligent mismanagement untainted by self-dealing. The primary reason for this is the protection afforded to directors and officers by the business judgment rule, which generally insulates them from negligence liability"); *Amfesco Indus. v. Greenblatt*, 172 A.D.2d 261, 264 (1st Dep't 1991) (business judgment rule applies unless decisions lack legitimate business purpose or are tainted by conflict of interest, bad faith or fraud).

The Attorney General did not offer a rebuttal expert to refute Reda's opinions or attack his methods. She did not question his expertise or challenge his qualifications. She declined to take his deposition, to ask any questions of him, or to contest his findings. Instead, she has filed the instant motion to exclude Reda's report and opinions.

In her motion, the Attorney General now finally admits that Frazer's compensation was ***not*** excessive and unreasonable. She acknowledges that, for the period at issue, she "does not contend that NRA executive's [sic] reported compensation is outside the median range of pay for executives in comparable positions at nonprofits of comparable size." Pl. Mem. at 6. Though this concession should fully remove from the case all allegations that Frazer received any special or underserved financial benefit at all, the complaint nonetheless still expresses that Frazer received

"excessive" compensation and was "unjustly enriched" thereby.[2] *See, e.g.*, NYSCEF Doc. No. 646, Prayer for Relief, ¶ J (requesting restitution for all "excessive, unreasonable, and excess benefits" that "unjustly enriched" Frazer); *id*. at 100 (section header stating that Frazer "[r]eceived [e]xcessive [c]ompensation").[3] She also (now) alleges that Frazer's compensation is unreasonable not because it is outside the market median, but because his job performance was not considered in setting it.

Argument

I. The Trier of Fact Will Benefit From Reda's Expert Testimony Addressing the Executive Compensation Issues Remaining in the Operative Complaint

Admissibility of an expert opinion is a question committed to the sound discretion of the trial judge. *Dufel v. Green*, 84 N.Y.2d 795, 797-98 (1995). Here, the Attorney General has not challenged Reda's qualifications – his skill, training, education, knowledge or experience – to serve as an expert and issue a reliable opinion. *Cf. Schechter v. 3320 Holding LLC*, 64 A.D.3d 446, 449-50 (1st Dep't 2009). Professional and/or technical (and inflammatory) issues pertaining to executive compensation linger in this case, and Reda's input on them should be admissible as it would be helpful to the trier of fact. *See De Long v. Cnty. Of Erie*, 60 N.Y.2d 296, 307 (1983).

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[2] Despite the Attorney General's concession, Frazer's compensation, while in the median range for general counsels, was arguably actually significantly *below* the median compensation for those who perform not only the general counsel position but also the corporate secretary position. As noted in the Reda Report, the NRA traditionally compensated those two positions separately. *See* Reda Report at 11. By performing both jobs, Frazer saved the NRA hundreds of thousands of dollars. *Id*.

[3] The current Complaint thus repeats the allegations contained in its predecessor pleadings. *See* NYSCEF Doc. No. 333, ¶¶ 752 (alleging that Frazer was paid "in excess of a reasonable amount" from 2015-2019), 753 (requesting that "this Court should require . . . Frazer . . . to repay to the NRA all excessive, unreasonable, and/or unauthorized compensation paid to [him] . . . ."); *see also id*.. ¶¶ 749, 753.

As seen above, the Attorney General continues not only to assert that Frazer has been unjustly enriched by his compensation, but also to impugn the processes by which that compensation was determined. Though the Attorney General has finally conceded that Frazer's compensation was within "the median range of pay for executives in comparable positions at nonprofits of comparable size[,]" she simultaneously implies that Frazer's compensation was erroneously determined because the OCC did not consider his executive performance. *See* Affidavit of James F. Reda dated May 5, 2023 ("Reda Aff."), ¶¶ 3-4 (referencing Pl. Mem. at 6-7 *("[u]ntethered from executive performance* . . . [the expert] opinions unnecessary [sic], not helpful to the trier of fact, and likely to be confusing to the jury") (emphasis added)). As a technical matter which only an expert could effectively rebut, consideration of an executive's individual job performance is not required of compensation committees when they determine whether compensation is reasonable, and the Attorney General's suggestion otherwise is misleading. *See* Reda Aff., ¶ 5.

As Reda would clarify, the primary basis for setting reasonable compensation is the market's determination of the going rate for a particular job, within a particular market based on research and salary studies, as was done by the NRA. *Id*., ¶ 6. While compensation committees do have *discretion* to consider individual performance, it does not bear on the reasonableness of compensation – which is set by the market – but merely to determine where to set an executive's compensation within a range of that market median. *Id*., ¶ 7. The law does not require otherwise, and any decision not to consider an executive's individual performance would have no effect on the question of whether or not his or her compensation was reasonable. *Id*., ¶¶ 8-9. For the reasons stated in the Reda Report, Frazer has not been unjustly enriched because he only received (at best) median-range compensation and, based on Reda's extensive experience and knowledge of best

practices, the OCC's use of compensation benchmarking based on market data for determining Frazer's compensation satisfied the "universal practice" used by compensation committees.

The expert's relevance and importance to the issues in the case continues because of the Attorney General's ongoing assertions pertaining to executive compensation. For instance, Plaintiff's Second Amended Complaint ("Complaint"), like her two predecessor pleadings, continues to cast a negative light both on Frazer's level of compensation and the process by which it was authorized. As described above, the Complaint still states that Frazer's compensation was "excessive" and that he has been "unjustly enriched." It also states that New York law only allows the NRA to pay "compensation in a reasonable amount" "for services actually rendered." Compare NYSCEF Doc. No. 646 at 100 (section header) with *id*., ¶ 412. It further implies the unreasonableness of his compensation, contrary to Reda's expert opinion, by alleging that Frazer is subject to federal excise taxes for "compensation that is unreasonable, that is, where 'the value of the economic benefit provided exceeds the value of the consideration (including the performance of services) received for providing such benefit.'" *Id*., ¶ 413 (citing 26 U.S.C. § 4958). Lastly, the Complaint charges misrepresentations concerning the NRA's adherence to IRS guidance for establishing a presumption of reasonableness of compensation. NYSCEF Doc. No. 646, ¶¶ 414-17. Though the Complaint also appears to establish the NRA's full adherence to that guidance,[4] expert testimony would establish that the NRA's Board is not required to set

[4] The Complaint suggests, if not admits, that the NRA's Officers Compensation Committee ("OCC") constituted an authorized body made up of independent individuals (*id*., ¶ 415), that the compensation decisions were made in advance (*id*., ¶ 418), that the OCC commissioned and reviewed compensation data (*id*., ¶¶ 418-19), and that it documented its conclusions. *Id*., ¶ 421; *see also* Reda Report at 7-9 (describing the OCC's compliance with these factors). Further, while the Attorney General continues to direct her charge of unjust enrichment against Frazer, the Complaint incongruously acknowledges that it was the NRA Board, not Frazer, which sets the compensation.

compensation in compliance with it and compensation is often reasonable even when the IRS guidance is not satisfied. *See* Reda Aff., ¶¶ 10-11. To that point, the Attorney General now concedes the compensation is reasonable.

II. Expert Testimony Will Be Needed to Rebut the Attorney General's Likely Introduction at Trial of Further Attacks on Frazer's Executive Compensation

The Attorney General's persistent emphasis on issues pertaining to executive compensation portends that those are likely to be presented at trial. For instance, she has presented shifting theories in support of a demand for disgorgement of Frazer's compensation. Originally, she alleged that the NRA exceeded the authority of N-PCL § 202 and violated N-PCL § 515 "by paying compensation [to Frazer] in excess of a reasonable amount." NYSCEF Doc. No. 11, ¶ 665. N-PCL §§ 202(a)(12) and 515(b) authorize corporations to pay compensation for services rendered that is "reasonable," which the Attorney General now concedes the compensation was. Those statutory provisions further govern corporations, not individuals. Yet, the Attorney General used them as the basis for a claim against Frazer "to repay to the NRA all excessive, unreasonable, and/or unauthorized compensation paid to [him]" (*id.*, ¶ 666), characterized Frazer as having been unjustly enriched, and claimed that equity and good conscience required repayment. *See, e.g., id.*, ¶¶ 650, 659-662. She further linked that claim for return of excessive and unreasonable compensation under N-PCL § 515 to a separate cause of action brought under N-PCL § 720. *Id.*, ¶ 649.

On this basis, the original complaint asserted a claim under the common law to challenge Frazer's compensation as unjust enrichment. *See* NYSCEF Doc. No. 404 at 30-31 ("[t]he Attorney General brings her claim for unjust enrichment under N-PCL § 515, which permits charitable corporation [sic] to pay only reasonable compensation to its directors and officers").

The Court dismissed the Attorney General's "non-statutory theory of recovery" as inconsistent with the governing statutory scheme. *See* NYSCEF Doc. No. 610 at 38-39.

Subsequently, in response to motion practice challenging the Attorney General's unjust enrichment claim and theory, she presented a new theory. Likely concerned that her common law claim was doomed given the First Department's and Court of Appeals' identical conclusion that the statutory scheme was "comprehensive," the Attorney General sought disgorgement of Frazer's compensation on the statutory basis that it was a related party transaction under N-PCL § 715. NYSCEF Doc. No. 404 at 31. The Court rejected this argument as well, recognizing that the Attorney General's complaint had not included a cause of action against him based on N-PCL § 715 and that her Office's own guidance did not consider employment compensation to be a related party transaction. NYSCEF Doc. No. 610 at 40-41.

Not giving up in the wake of that setback, the Attorney General shifted to yet another theory, not mentioned in the earlier motion practice, asserting that Frazer was a "faithless servant" whose compensation should be forfeited as damages for purported common law breaches of the fiduciary duty she contends inheres within N-PCL § 720. *See* NYSCEF Doc. No. 768 at 26-28. In the process of trying, again, to graft common law remedies onto a comprehensive statutory scheme, the Attorney General ignored the fact that the New York legislature removed from a predecessor statute the no-longer-available remedy of compelling payment from officers for waste caused. *See* NYSCEF Doc. No. 847 at 73-75 (citations omitted).

Now, most recently on the instant motion, the Attorney General concedes that Frazer's compensation was within the market median but presses the claim that the OCC (and the expert) did not consider his individual executive job performance. As discussed above, though, expert testimony would establish that such a consideration is discretionary and has no bearing on

the appropriate setting of reasonable compensation. Reda Aff., ¶ 7. Expert testimony would be relevant and necessary to address for the benefit of the factfinder both this and other possible attacks on Frazer's compensation, as well as to rebut other untenable compensation theories.

In sum, notwithstanding the Attorney General's welcome acquiescence to the reality that Frazer's compensation was not excessive or unreasonable, she continues to include in her Complaint characterizations that it is excessive and unjust, and ultimately to insist on remedies that would allow its forfeiture. Accordingly, there remains a need for expert input on matters surrounding compensation, to clarify misconceptions caused by Plaintiff, and to protect Frazer from a prejudicial presentation by Plaintiff of compensation issues in the case. Thus, to respond fairly to the Attorney General's certain attempts to present issues of executive compensation to a jury, Frazer's expert's opinion remains relevant and should not be excluded.

Conclusion

For the reasons stated, the NYAG's motion to exclude the expert opinion of Frazer's expert witness, James Reda, should be denied.

Dated: New York, New York
May 5, 2023

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By: */s/ William B. Fleming*

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To: PEOPLE OF THE STATE OF
NEW YORK, by LETITIA JAMES,
Attorney General of the State of New York (via NYSCEF)

CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2023, a true and correct copy of the foregoing Memorandum of Law in Opposition to Plaintiff's Motion to Exclude Defense Expert Opinions of Nadel, Graham, Reda, and Cunningham (NYSCEF Doc. No. 1663-79) 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 2695 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
May 5, 2023

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