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. 056
	§	Oral Argument: June 8, 2023
v.	§	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE DEFENSE EXPERT OPINIONS OF NADEL, GRAHAM, REDA, AND CUNNINGHAM**
Defendants.	§	

DEFENDANT THE NATIONAL RIFLE ASSOCIATION OF AMERICA'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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COMES NOW Defendant the National Rifle Association of America ("NRA") and submits this memorandum of law in opposition to Plaintiff Attorney General of the State of New York's ("NYAG") Motion To Exclude Defense Expert Opinions Of Nadel, Graham, Reda, And Cunningham (Mot. Seq. 056; NYSCEF 1663-79, 1712-13) ("Motion").

PRELIMINARY STATEMENT

The NYAG's arguments for the exclusion of Alan Nadel ("Nadel") and J. Lawrence Cunningham ("Cunningham") are primarily focused on matters of weight rather than admissibility and generally fail on the law and facts. These challenges should be entirely overruled and both Nadel and Cunningham should be allowed to testify in full.

First, the NYAG seeks the exclusion of Nadel, a Certified Public Accountant ("CPA") and Chartered Global Management Accountant with an advanced degree in taxation who has extensive experience at the IRS, major accounting firms, and his own executive compensation and corporate governance consulting firm. The NYAG mainly challenges the relevance of Nadel's testimony about the reasonableness of compensation of NRA executives and the foundation and methodology Nadel used in coming to his conclusions related to alleged excess benefit transactions. The NYAG's relevance challenge fails because of the explicit and implicit allegations in the 2d Am. Complaint (NYSCEF 646) ("Complaint"). Nadel's intended testimony ***directly rebuts*** the NYAG's allegations of excessive compensation and waste by demonstrating the reasonableness of both the direct and total compensation paid to the NRA's executives.

As to the challenge the NYAG poses to Nadel's testimony related to alleged excess benefit transactions, this fails as well. The NYAG's argument as to methodology is misplaced since Nadel is providing non-scientific testimony and, instead, relying on his training and experience. Nadel's conclusions are not conclusory or speculative because he discusses, and references, record evidence as well as applicable regulations. And Nadel does not solely rely on any single source of

inadmissible hearsay, nor does he parrot any hearsay conclusions. Instead, he relies on multiple bases and provides explanations for his analyses. In sum, the NYAG's various disagreements with Nadel's opinions, methods, and analysis are ***not sufficient grounds for exclusion***. Instead, these challenges go to weight and should be pursued on cross-examination.

The NYAG also seeks to exclude Cunningham, a former U.S. Secret Service Special Agent with decades of security-related experience, by arguing that his testimony is not relevant, based on inadmissible hearsay, and offers legal conclusions. ***Each of these challenges fails***. The existence of a "bona fide business-oriented security concern" and overall security program are disputed issues in this case. And they are necessarily included in the determination as to whether certain security-related expenses fall under 26 CFR §1.132-5(m).[1] Therefore, testimony related to these issues is relevant. Additionally, Cunningham's conclusions are not principally based on inadmissible hearsay. The NYAG's argument in this regard misinterprets the case law. Finally, Cunningham does not make—or even attempt to make—any legal conclusions. Rather, he opines, based on his experience and reading of the plain language of the applicable regulation, about the existence of a bona fide business-oriented security concern for Wayne LaPierre ("LaPierre"), the existence of an overall security program at the NRA, and his opinion about the results of an independent security study performed in 2019.

Taken together, the NYAG's challenges to Nadel and Cunningham are based on the NYAG's subjective disagreements with each expert's testimony. The challenges, at most, go to the weight of the intended testimony rather than its admissibility. *Sadek v. Wesley*, 27 N.Y.3d 982, 984 (2016); *Wathne Imports, Ltd. v. PRL USA, Inc.*, 101 A.D.3d 83, 87 (1st Dep't 2012); *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995). The weight of expert testimony

[1] A true and correct copy of 26 CFR §1.132-5(m) is attached to the Affirmation as Ex. A.

is for the factfinder to decide. *People ex rel. Metro. Jockey Club v. Mills*, 190 Misc. 277, 282 (Sup. Ct. Queens Cnty. 1947), *aff'd*, 273 A.D. 971 (1st Dep't 1948). Therefore, the Court should deny the Motion and allow these experts to testify fully.

ARGUMENT

I. The Reasonableness Of Executive Compensation Is At Issue Which Makes Nadel's Testimony Relevant.

The NYAG argues that the reasonableness of the NRA's executives' compensation is irrelevant and, thus, should be excluded. Motion at 10-11. The NYAG asserts that its claims against the NRA relate only to: (1) the alleged failure of the NRA to follow its own procedures; (2) the alleged failure of the NRA's compensation committee and Board to consider "full" compensation; and (3) the NRA's alleged failure to accurately report the "manner of setting compensation of the full compensation" for its executives in regulatory filings. *Id*. These assertions, however, are simply incorrect.

As an initial matter, the NYAG uses the term "compensation" freely and liberally throughout the Complaint. However, in practice, the term "compensation" includes several elements, each of which serves a purpose and is set in a different way. Indeed, the setting of executive compensation is an entire practice sector with its own rules and standards. The concept of compensation—including what executive compensation is, what elements it includes (and does not include), the purpose of the elements, and the way in which companies generally set executive compensation—needs to be explained fully to the factfinder. These are specialized areas of understanding that are not within the ken of a typical juror. And it is critical for the factfinder to understand these topics to comprehend the nature of the NYAG's allegations against the NRA. Therefore, Nadel must be allowed to explain these topics to the factfinder.

The Complaint explicitly and implicitly alleges excessive and unreasonable compensation. Indeed, the heading for the section in which the Complaint discusses compensation has the title: "The Individual Defendants ***Received Excessive Compensation*** that the NRA Did Not Accurately Disclose." Complaint §III (emphasis added). Immediately thereafter, the Complaint includes references to purported New York and federal laws that limit executive compensation on a ***reasonableness*** scale. *Id*. ¶¶412-13. And the NYAG outright alleges: "The OCC did not carry out its duties under the NRA bylaws, New York or federal law in regard to ensuring that only ***reasonable compensation*** is paid …." *Id*. ¶425 (emphasis added). The NYAG similarly alleges that the NRA's Board "displayed a sustained and systematic failure to exercise [its] oversight function and stood by as various laws were violated by the NRA, including … payments in excess of ***reasonable compensation*** to disqualified persons." *Id*. ¶549 (emphasis added).

The NYAG also implicitly attacks the cash compensation paid to LaPierre, Phillips, and Frazer by discussing their base compensation, raises, and bonuses. *Id*. ¶¶421-22, ¶450, ¶452, ¶¶454-55. Additionally, the NYAG attacks the NRA's compensation determinations for LaPierre, Phillips, and Frazer—alleging that the NRA failed to consider "appropriate comparability data" from similar organizations. *Id*. ¶¶417-19. Taken together, contrary to the NYAG's after-the-fact argument, the NYAG alleges—directly and indirectly—that the compensation, including the cash compensation, the NRA paid its executives was unreasonable and excessive. The NYAG also couples its allegations of excessive compensation with the wider allegation of waste that the NYAG has levied against the NRA. Complaint ¶12, ¶27, ¶142, ¶549.

To defend against the NYAG's claims, Nadel will testify that, "[t]he compensation paid by the National Rifle Association to senior NRA executives was not excessive and was consistent with executive compensation paid by other large not-for-profits in the United States[.]" Nadel

Report (NYSCEF 1665) at 6. Nadel supports this opinion by articulating his approach and methodology (*id*. at 16-19) as well as his analysis (*id*. at 20-21). Further, Nadel offers comparators for ***both*** total cash and total direct compensation[2] to further demonstrate the reasonableness of the NRA's compensation to LaPierre, Phillips, Frazer, and others. *Id*. at 22-24.

Nadel's proffered testimony is ***directly relevant*** to the above-discussed allegations. Nadel will testify that the NRA did not pay excessive or unreasonable compensation to its executives, and the NRA's compensation determinations were in line with comparable organizations. This rebuts the NYAG's direct and indirect claims of excessive and unreasonable compensation, making the testimony relevant. *See Ochoa v. Jacobsen Div. of Textron, Inc.*, 16 A.D.3d 393, 394 (2d Dep't 2005) (holding that expert should have been allowed to testify where testimony was relevant to plaintiff's theory of liability); *TC Sys. Inc. v. Town of Colonie, New York*, 213 F. Supp. 2d 171, 177 (N.D.N.Y. 2002) (holding that expert testimony to rebut opponent's contention is relevant and exclusion would result in prejudice); *Scott v. WPIX, Inc.*, No. 10 CIV. 4622 (WHP), 2012 WL 2026428, at *4 (S.D.N.Y. May 17, 2012) (denying motion *in limine* to exclude testimony that "is potentially relevant" to rebut portion of allegations). Further, Nadel's testimony rebuts the NYAG's overarching allegations of waste. A determination by the factfinder that certain compensation was reasonable, as Nadel's testimony suggests, counters the NYAG's connected

[2] To the extent the NYAG argues that the compensation analysis does not include alleged excess benefits, the response is simple: these were not excess benefits and, thus, not compensation. Simply because the NYAG alleges that items were excess benefits and should be included in compensation, does not make it so. It is the NYAG's burden to prove these alleged benefits were compensation and that the total compensation paid was unreasonable and excessive. Nadel is not required to follow the NYAG's theory of the case, and, therefore, not required to include alleged excess benefits in his analysis.

argument that such compensation was, instead, wasteful.[3] *See United States v. Khan*, 787 F.2d 28, 34 (2d Cir. 1986) (holding that expert testimony was relevant to, among other things, rebut defendant's implied defense and "trial strategy"). This testimony also cuts against allegations that the NRA failed to properly administer its assets and was financially irresponsible. Namely, it suggests that the NRA made reasonable financial decisions.

When combined with Nadel's opinion that the NRA "followed appropriate and substantial procedures in setting pay levels for its senior executives" (Nadel Report at 6, 27-35), Nadel's reasonableness testimony is even more probative and helpful. Nadel will testify that, according to his training and experience, the NRA followed appropriate procedures in setting compensation. Additionally, he will testify that the resultant compensation was reasonable and comparable to compensation paid by similar organizations. Together, these opinions completely rebut the NYAG's allegations that the NRA Board of Directors failed to follow appropriate processes in setting executive compensation. Complaint ¶¶417-28. This testimony also rebuts the overarching allegation that the NRA mismanaged and improperly administered its assets held for charitable

[3] While not directly on point, the analysis in *Bensen v. Am. Ultramar Ltd.*, is informative. No. 92 CIV. 4420 (KMW) (NRB), 1996 WL 422262, at *4–6 (S.D.N.Y. July 29, 1996), *on reargument sub nom. Benson v. Am. Ultramar Ltd.*, 1996 WL 514963 (S.D.N.Y. Sept. 10, 1996). The court held that the testimony of an executive compensation expert related to "excessive" compensation was relevant and not unduly prejudicial to rebut counterclaims of corporate waste. The court stated: "The testimony will help a jury determine if the payments were wasteful because it will provide knowledge of the Compensation Committee's possible rationales … [the expert] will provide the jury with information necessary to determine whether the 1990 payments were excessive, and thus whether they violated [English Law] or resulted in unjust enrichment." *Id*. at 6. Applying a similar analysis, Nadel's testimony is relevant to the jury's determination of the NYAG's allegations of waste and mismanagement of assets. *See, e.g.*, Complaint ¶549 (alleging violations by the NRA including "payments in excess of reasonable compensation to disqualified persons, and waste of NRA assets"), ¶¶635-43 (alleging "waste of the NRA's charitable assets" and "improper administration and diminution of property held for charitable purposes").

purposes because, again, it demonstrates the NRA's leadership engaging in proper financial oversight. Therefore, Nadel's testimony is relevant and should be allowed.

II. Nadel's Opinions Regarding Alleged Excess Benefit Transactions Are Admissible And Should Be Allowed.

As it relates to alleged excess benefit transactions, Nadel intends to testify that, "[m]ost expenditures paid or reimbursed by the NRA that the Attorney General contends are 'excess benefits' for the executives are in fact reasonable expenses that should be borne by the NRA" and are not excess benefit transactions subject to an excise tax. Nadel Report at 6, 15-16. More specifically, Nadel intends to testify that: (1) "security is a major concern that can properly be addressed by enhanced security measures" (*id*. at 7) and Nadel believes this applies to LaPierre (*id*. at 9); (2) reimbursement of LaPierre's travel-related expenses, though high, "is not only appropriate, but necessary" (*id*. at 10) because "this is a direct result of his position and activities on behalf of the NRA" (*id*. at 11); and (3) the other alleged excess benefits (*i.e.*, meals, gifts, trips, etc.) were not "entirely for LaPierre's personal benefit" (Complaint ¶143) and are common business practices (Nadel Report at 11-13).

As an initial matter, Nadel possesses specialized knowledge, training, education, and experience in the fields of executive compensation, accounting, and tax.[4] Therefore, Nadel is more than qualified to offer his opinion on whether certain expenses were excess benefits or reasonable business expenses. *See Matott v. Ward*, 48 N.Y.2d 455, 459 (1979) ("[T]he expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be

[4] Nadel is a CPA and Chartered Global Management Accountant with an advanced degree in taxation. He formerly worked for the IRS and three major accounting firms (PricewaterhouseCoopers, Arthur Andersen, and Ernst & Young), and has since established his own executive compensation and corporate governance consulting firm. Nadel Report at 3-4.

assumed that the information imparted or the opinion rendered is reliable."). Accepting this, the NYAG instead challenges Nadel for his: (1) purported failure to apply an "accepted methodology in coming to his conclusions about the purported legitimate business purpose of the expenses he addresses," and (2) alleged misapplication of 26 CFR §1.132-5(m)(2)(ii). Motion at 12, 16-17. These challenges are unavailing and should be rejected.

A. Nadel's Analysis Is Based On His Experience And Expertise.

The NYAG first challenges Nadel's methodology related to his opinion on alleged excess benefits. This challenge fails because the NYAG misinterprets the relevant case law as it relates to non-scientific expert testimony.[5] Though the NYAG seeks to apply scientific standards to the NRA's experts, the standard for non-scientific testimony is the more liberal "helpfulness" standard. "The guiding principle is that expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." *De Long v. Erie Cnty.*, 60 N.Y.2d 296, 307 (1983). So long as the expert possesses proper expert credentials, employs a recognizable methodology, and connects the opinion to the facts of the case, the expert should be allowed to testify. *In re Vitamin C Antitrust Litig.*, No. 05-CV-0453, 2012 WL 6675117, at *5 (E.D.N.Y. Dec. 21, 2012) (citing *In re Com. Fin. Servs., Inc.*, 350 B.R. 520, 528–29 (Bankr. N.D. Okla. 2005)).

[5] As its only legal support, the NYAG cites *M. U-M. v. Millenium Hilton New York One Un Plaza*, No. 160231/2018, 2022 WL 3155799 (Sup. Ct. N.Y. Cnty. Aug. 08, 2022), and *United States ex rel. Lutz v. Lab'y Corp. of Am. Holdings*, No. CV 9:14-3699-RMG, 2021 WL 2801736 (D.S.C. July 6, 2021), *clarified on denial of reconsideration*, No. CV 9:14-3699-RMG, 2022 WL 688988 (D.S.C. Feb. 23, 2022). The former relates to an expert's summary judgment affidavit espousing an unsupported opinion on industry standards. The latter, an unpublished District of South Carolina case, involves a damages expert's scientific calculation based on numerical data provided by counsel instead of a verifiable source. The case does not relate to non-scientific expert testimony. And the decision turns on case law specific to data-based expert opinions. *Id.* at *5. Both cases are wholly distinguishable and provide no support.

Contrary to what the NYAG argues, the "methodology of proffered non-scientific testimony need not be subjected to rigorous testing for scientific foundation or peer review." *Crowley v. Chait*, 322 F. Supp. 2d 530, 539 (D.N.J. 2004). Indeed, applying an expert's experience to the facts is considered a ***reliable methodology*** if that experience is shown to have led to the expert's conclusions. *See In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.*, No. 1:00-1898, 2008 WL 1971538, at *6 (S.D.N.Y. May 7, 2008) (holding that the "application of experience to facts" is a reliable methodology for non-scientific testimony).

Here, Nadel discusses security-related travel and other expenses. Nadel first discusses the evidence he relied on to conclude that security for NRA executives is a "major concern." Nadel Report at 7-9. This evidence does not emanate from a single source, and there is no argument that it is inherently unreliable. Nadel connects this to his conclusion about travel-related expenses by stating: "Wayne LaPierre is a high profile individual subject to significant security risks, greater than those affecting most other prominent and well-known individuals. These risks are a direct result of his position and leadership of the National Rifle Association. Whether he is traveling for personal or business reasons, the reimbursement of any such expenses by the NRA is appropriate under the circumstances." *Id*. at 10. But Nadel does not end his analysis there. Nadel goes on to discuss the tax regulations (federal and state) that relate to travel expenses and security concerns. *Id*. at 10-11, 15-16. He then makes clear that, based on his education, training, and experience (including as a former IRS agent), he believes "it was appropriate for the NRA to incur and reimburse these expenses for both Mr. and Mrs. LaPierre." *Id*. at 11. And, further, that the expenses do not comport with his understanding of "'excess benefit transactions' within the meaning of [IRC] Section 4958 and thus are not subject to the excise tax." *Id*. at 16. Nadel engages in a similar discussion about other expenses the NYAG alleges were improperly reimbursed. Nadel cites tax

regulations, his personal and professional experience, and common business practices as forming the basis for his conclusion that these other expenses were reimbursable. *Id*. at 11-13.

Nadel is not providing scientific testimony. He has the requisite qualifications to proffer his opinions on this subject. He relies on those qualifications in coming to his conclusions. And he takes the factfinder through the steps in his analysis, including the evidence he relies on, common practices, and the applicable regulations. Therefore, the NYAG's challenge to methodology fails.

B. Nadel's Opinions Are Not Speculative Or Conclusory.

Nadel's opinions are neither speculative nor conclusory. The standard for what makes an opinion speculative or conclusory is clear. In *Bustos v. Lenox Hill Hosp.*, the First Department held that an expert's medical opinion was "speculative and conclusory and without probative force" where the expert's ***only*** testimony about the alleged departure from the standard of care was stating that the maneuvers "'were excessive and caused th[e] injuries' and deviated from the appropriate standard of care." 105 A.D.3d 541, 541 (1st Dep't 2013), *aff'd*, 23 N.Y.3d 926 (2014). The expert "did not explain or in any other way support his opinion." *Id*. Similarly, in *Hartnett v. Chanel, Inc.*, 97 A.D.3d 416 (1st Dep't 2012), the First Department held that an expert's affidavit was "purely speculative" where the expert "failed to cite to any regulations, facts or data in support of his conclusion." *Id*. at 419.

Nadel's conclusions are supported by facts in the record (Nadel Report at 7-8), facts that are within Nadel's personal knowledge (*id*. at 9), and facts that Nadel fairly inferred from the evidence (*id*. at 9). *See Zhong v. Matranga*, 208 A.D.3d 439, 443 (1st Dep't 2022) (expert's opinion "must be supported either by facts disclosed by the evidence or by facts known to the expert personally … or fairly inferable[] from the evidence"), *aff'd sub nom. Min Zhong v. Matranga*, 39 N.Y.3d 1053 (2023); *People v. Serrano*, 49 A.D.3d 333, 334–35 (1st Dep't 2008) (allowing expert testimony where it is based "on facts in evidence and [expert's] personal

knowledge"). Further, his conclusions are supported by his discussion and explanation of the relevant regulations that he considered. Nadel Report at 10-12. And, as discussed previously, Nadel demonstrates traceable reasoning. Together, the analysis and opinions Nadel discusses in his report simply are not what the case law considers speculative or conclusory.

C. Nadel's Opinions Are Not Based Solely On Inadmissible Hearsay.

The argument that Nadel's opinions are inadmissible because he based them, in part, on "second-hand hearsay information received orally from NRA counsel" (Motion at 12) is without merit. Experts ***can*** rely on facts provided by others, including counsel. *See Zhong*, 208 A.D.3d 439, 443; *State v. William F.*, 985 N.Y.S.2d 861, 864 (Sup. Ct. N.Y. Cnty. 2014) (discussing the four sources of information an expert "may generally rely upon").[6] ***Wholesale reliance*** on a hearsay conclusion, however, is not allowed. Specifically, an expert may not rely on a single hearsay source as the "principal basis" for the expert's conclusion. *People v. Wlasiuk*, 32 A.D.3d 674, 681 (3d Dep't 2006). In *Borden v. Brady*, 92 A.D.2d 983 (3d Dep't 1983), the court held the expert's opinion was improper because the expert adopted a hearsay medical report's finding "on the crucial issue of the permanency of plaintiff's injuries" which was the ***same*** issue the expert was opining on. *Id*. at 984. That said, hearsay conclusions ***can*** serve as "a link in the chain of data which led the expert to his or her opinion." *Wlasiuk*, 32 A.D.3d at 681. They simply cannot be adopted entirely and then repeated without further analysis.

That said, Nadel's conclusions would be inadmissible if he relied ***solely*** on statements from counsel which ***concluded*** that certain expenses were not excess benefits. And then he repeated that

[6] *See* Fed. R. Evid. 703 ("An expert may base an opinion on facts or data in the case that the expert ***has been made aware of*** or personally observed.") (emphasis added). Though New York does not have a comparable rule of evidence to Fed. R. Evid. 703, the Court of Appeals adopted the "same" rule in *People v. Sugden*, 35 N.Y.2d 453, 460–61 (1974).

same conclusion to the factfinder without any analysis. That is not the case here. Nadel asked factual questions about certain expenses and received additional facts from counsel. Nadel Dep. (NYSCEF 1668) 138:16-140:3. From those facts, Nadel performed an analysis relying on his own education, training, and experience and came to his ***own conclusions***. This is entirely admissible.

Moreover, as the NYAG concedes (Motion at 12), Nadel did not solely rely on a single source for his conclusions. He spoke with counsel, interviewed relevant individuals, reviewed deposition testimony, and reviewed various documents. Nadel Report at 2-3, Ex. A, Ex. B. There is nothing to support the NYAG's contention that Nadel is "acting as a mouthpiece" for counsel.

D. Nadel Is Not Required To Personally Test Or Verify The Underlying Evidence.

The NYAG's argument that Nadel did not independently test or verify certain pieces of evidence is not sufficient to secure exclusion. *See Pereira v. Quogue Field Club of Quogue*, 71 A.D.3d 1104, 1106 (2d Dep't 2010) (rejecting as "without merit" the argument that expert testimony is inadequate because expert did not perform examination). Experts are not required to personally test or verify evidence. *See People v. Miller*, 91 N.Y.2d 372, 380 (1998) (holding that an expert's testimony was not speculative where the expert did not personally perform the tests); *In re Ariel R.*, 98 A.D.3d 414, 419 (1st Dep't 2012) (same). This argument goes ***only*** to weight. *See Tinao v. City of New York*, 112 A.D.2d 363, 364 (2d Dep't 1985) ("[That] expert did not perform the subject examinations affects, at most, the weight of his testimony, not its admissibility."). Similarly, assertions about Nadel's lack of familiarity with the record are ***not*** grounds for exclusion. *See Sample v. Yokel*, 94 A.D.3d 1413, 1414 (4th Dep't 2012) (finding lower court erred by discrediting expert testimony based on lack of familiarity with property because that goes to weight not admissibility). These arguments should each be rejected.

E. Nadel's Opinion On Security-Related Travel Is Admissible.

The crux of the NYAG's argument to exclude Nadel's opinion on LaPierre's security-related travel is the NYAG's disagreement with Nadel's understanding of 26 CFR §1.132(m). Motion at 17.[7] However, simply because the NYAG calls Nadel's interpretation "facially invalid and unsupported by any authority" does not make it so. Indeed, other than the NYAG's apparent disagreement with Nadel's analysis, the NYAG offers no argument under applicable law for excluding Nadel's opinion on this matter. Of course, the NYAG's opinion is not the standard for admissibility. Therefore, this argument should be dismissed.

Contrary to the NYAG's assertions, Nadel testified that, "[j]ust based on my experience with the IRS and based on the programs I have seen over the years, I believe this would readily satisfy the Commissioner of the IRS." Nadel Dep. 209:15-19. Further, he stated that he ***has*** seen payments for private flights justified only through the satisfaction of 26 CFR §1.132-5(m)(2)(ii)—supporting his understanding of the regulation. Thus, while the NYAG (and its proffered expert) disagrees, Nadel has every right to testify, based on his extensive background and experience in accounting and tax, about the tax treatment of LaPierre's security-related travel. The NYAG can provide competing testimony on this topic. *See Shillingford v. New York City Transit Auth.*, 147 A.D.3d 465, 465 (1st Dep't 2017) ("[P]laintiff's expert merely disagreed with defendants' expert's

[7] Without any legal support or authority, the NYAG asserts that it "believes" the determination of whether 26 CFR §1.132-5(m)(2)(ii) is satisfied is a matter of law. Motion at 17 n.5. This assertion is surprising given the apparent factual nature of the regulation. Indeed, the elements of the regulation each require findings of fact. *See, e.g.*, 26 CFR §1.132-5(m)(2)(i) ("[A] bona fide business-oriented security concern exists only if the facts and circumstances establish a specific basis for concern regarding the safety of the employee."), §1.132-5(m)(2)(ii) (requiring a determination of whether employer "establishe[d]" an "overall security program" for the employee). Such findings of fact are the province of the jury. *See Brown v. Taylor*, 221 A.D.2d 208, 209 (1st Dep't 1995) ("Fact-finding is within the province of the jury, not the trial court.").

methodology and conclusions, presenting a battle of the experts for the jury to resolve[.]"); *In re Zyprexa Prod. Liab. Litig.*, 489 F. Supp. 2d 230, 285 (E.D.N.Y. 2007) ("The mere fact that an expert's testimony conflicts with the testimony of another expert or scientific study does not control admissibility."). And the NYAG also can cross-examine Nadel as the NYAG did during Nadel's deposition. *See generally* Nadel Dep. 192-210. However, there is nothing inadmissible about Nadel's testimony. He is more than qualified to opine on tax treatment based on his advanced degree in taxation, accounting certifications, advisory experience on tax matters, firsthand experience with 26 CFR §1.132-5(m), and IRS background.

F. The NYAG's Challenges To Nadel Fail.

Taken together, the NYAG's challenges to the foundation and reliability of Nadel's analysis and opinion are lacking. These arguments are ***not sufficient*** for exclusion. *See Sadek*, 27 N.Y.3d at 984 (2016) ("[A]ny defects in the opinions of plaintiff's experts or the foundation on which those opinions are based should go to the weight to be accorded that evidence by the trier of fact, not to its admissibility in the first instance."); *Wathne*, 101 A.D.3d at 87 ("[P]erceived flaws in … expert's analysis are relevant to the weight a jury should give to the expert's report and testimony; they do not present sufficient grounds for ruling that analysis inadmissible."); *McCullock*, 61 F.3d at 1044 ("Disputes as to the strength of [expert's] credentials, faults in his use of … a methodology, or lack of textual authority for his opinion, go to the weight, not the admissibility, of his testimony."); *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988) (holding that "criticisms" of an expert's methods and conclusions "go to the weight of the evidence, which … was for the jury to determine"). This is especially true where, as here, Nadel has extensive expertise in executive compensation and tax, which are the subjects on which he intends to testify. At most, the NYAG can explore perceived deficiencies on cross-examination.

III. Cunningham Is Qualified As A Security Expert And His Testimony Is Relevant And Admissible.

Cunningham—a former U.S. Secret Service Special Agent and longtime security consultant—is unquestionably an expert in the field of security. As part of his extensive background and experience, he has worked with companies on developing security programs, including those that comply with 26 CFR §1.132-5(m). Cunningham Dep. (NYSCEF 1676) 224:25-227:14. He intends to opine about the nature of the security concerns that the NRA and LaPierre have faced since 2012 and the NRA's overall security program. Cunningham Report (NYSCEF 1674) §V. Specifically, Cunningham provides opinions about the existence of a bona fide business-oriented security concern for LaPierre and its basis, the NRA's overall security program, the NRA's 2019 independent security study, and whether the NRA's overall security program met the criteria from the 2019 study prior to 2019 and since. *Id*. ¶¶19-24.

A. Cunningham Can Testify About The Existence Of A Bona Fide Business-Oriented Security Concern.

The NYAG is correct that Cunningham is not—and does not purport to be—a tax expert. And he is not opining on any area that requires tax expertise. The NYAG takes issue with Cunningham reading 26 CFR §1.132-5(m) and, based on his review of evidence, finding circumstances that create a "specific basis for concern regarding the safety of an employee," including the circumstances described in 26 CFR §1.132-5(m)(2)(i). The NYAG argues that this is an impermissible legal conclusion for which Cunningham has no expertise. Motion at 18-19. However, it is unclear what tax expertise is required to read that section of the regulation and determine if a "threat of death or kidnapping … or serious bodily harm" for LaPierre existed. This is a question of fact. And the determination of whether such a bona fide business-oriented security

concern existed would be helped by testimony from a security expert. Of course, that is Cunningham's area of expertise.

The NYAG cites *Hokenson v. Sears, Roebuck & Co.*, 159 A.D.3d 1501 (4th Dep't 2018), as support for the exclusion of Cunningham. However, the circumstances here are vastly different. That product liability case dealt with design and/or manufacturing defects. *Id*. at 1501. The plaintiff's expert, in an affidavit for summary judgment, opined about defects in defendants' ladder—the ultimate issue in the case. *Id*. at 1502. The expert, however, had ***no*** experience in the design or manufacture of ladders. *Id*. Here, Cunningham is not opining on the ultimate issue. Further, Cunningham has extensive experience in security-related matters, including identifying bona fide business-oriented security concerns and creating overall security programs. He also has experience with 26 CFR §1.132-5(m). Cunningham Dep. 29:19-31:19, 80:6-12, 151:17-152:10, 182:11-184:13, 227:11-14. Thus, Cunningham is hardly similar to the expert in *Hokenson*.

Outside of the distinguishable facts, *Hokenson* also does not stand for what the NYAG suggests. Neither the lower court nor the Fourth Department excluded the expert's opinion as the NYAG asserts. Motion at 19. Instead, the lower court and Fourth Department found that "the affidavit of plaintiff's expert was insufficient to raise a triable issue of fact." *Hokenson*, 159 A.D.3d at 1502. Clearly, each court ***did*** consider the expert's opinion, but gave the opinion little ***weight*** because of the expert's lack of qualifications. This falls in line with the general rule that perceived lack of qualifications of an expert goes to weight not admissibility. *See Adamy v. Ziriakus*, 92 N.Y.2d 396, 402 (1998) ("[I]t falls to the opponent of the testimony to bring out weaknesses in the expert's qualifications and foundational support on cross-examination"); *Williams v. Halpern*, 25 A.D.3d 467, 468 (1st Dep't 2006) ("[E]xpert's qualifications go to the weight rather than the admissibility of his testimony."); *Stewart v. P & C Food Markets Inc.*, 236 A.D.2d 667, 668 (3d

Dep't 1997) (qualifications are "an element to be considered by the fact-finder in determining the weight to be accorded the expert's testimony").

B. Cunningham's Testimony Is Obviously Relevant.

The NYAG argues that Cunningham's testimony is irrelevant at two points in the Motion (§III.B and §III.D), but the underlying challenge is unchanged. Principally, the NYAG claims that whether LaPierre faced a security concern is not in dispute and it can be testified to by fact witnesses. *Id*. at 20, 23. This argument misstates Cunningham's intended testimony. Indeed, Cunningham's testimony is ***directly relevant*** to the factfinder's determination as to whether certain expenses qualified for working condition fringe treatment under 26 CFR §1.132-5(m).

As an expert in security, Cunningham intends to testify about whether an ongoing bona fide business-oriented security concern for LaPierre existed between 2012 and the present, which is relevant to disputed issues regarding 26 CFR §1.132-5(m).[8] He further intends to testify about whether the security concerns he identified were of the same nature and type as the examples identified in 26 CFR §1.132-5(m)(2).[9] He will also testify about whether an overall security program was established for the NRA and LaPierre, whether it remains in existence, and its level of effectiveness.[10] And he will testify about whether an independent security study was performed

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[8] 26 CFR §1.132-5(m)(1) states: "If, however, for bona fide business-oriented security concerns, the employee purchases transportation that provides him or her with additional security, the employee may generally deduct the excess of the amount actually paid for the transportation over the amount the employee would have paid for the same mode of transportation absent the bona fide business-oriented security concerns." 26 CFR §1.132-5(m)(2)(i) defines "bona fide business-oriented security concerns" as "exist[ing] only if the facts and circumstances establish a specific basis for concern regarding the safety of the employee."

[9] 26 CFR §1.132-5(m)(2) discusses examples of "factors indicating a specific basis for concern regarding the safety of an employee."

[10] 26 CFR §§1.132-5(m)(2)(ii) and (iii) each discuss requirements for finding that an overall security program exists.

and its findings, whether he agreed with the study's assessment, and whether the security program the study assessed existed before and after the 2019 study was conducted.[11] These are all disputed factual issues that the factfinder will need to decide at trial.

In sum, this testimony is relevant to the allegations related to alleged excess benefits, excessive compensation, waste, and treatment under 26 CFR §1.132-5(m). Cunningham's testimony goes beyond simply stating that security threats existed. Instead, Cunningham addresses various factual issues raised by 26 CFR §1.132-5(m), including the existence of a bona fide business-oriented security concern, overall security program, and independent security study. The factfinder will be asked to resolve these issues when considering the NYAG's allegations. And, for the avoidance of doubt, this subject matter is not within the ken of a normal juror. Therefore, Cunningham's testimony is helpful and should be allowed in full.

C. The NYAG's Challenge To The Foundation Of Cunningham's Opinions Has No Merit.

The NYAG's argument that Cunningham impermissibly bases his opinion on hearsay is wrong on the law as well as the facts. First, an expert may not utilize hearsay as the "principal basis" for an opinion on the same issue, but hearsay can "form a link in the chain of data" leading to an expert's conclusion. *Wlasiuk*, 32 A.D.3d at 681; *Borden*, 92 A.D.2d at 984. Even the NYAG concedes that Cunningham does not principally rely on hearsay. *See* Motion at 23. All experts "heavily" rely on hearsay, which includes evidence from the record, witness interviews, and out-of-court testimony. As the Second Circuit has stated: "It is rare indeed that an expert can give an

[11] 26 CFR §1.132-5(m)(2)(iv) discusses the requirement for an independent security study and the necessary findings to prove that an overall security program exists.

opinion without relying to some extent upon information furnished him by others." *Reardon v. Manson*, 806 F.2d 39, 42 (2d Cir. 1986).

As with the challenge to Nadel on the same basis, the NYAG continues to misinterpret the relevant law. The law disallows principal reliance on hearsay conclusions (*Wlasiuk*, 32 A.D.3d at 681; *Borden*, 92 A.D.2d at 984) such that the expert becomes a conduit for inadmissible hearsay (*MTBE*, 980 F. Supp. 2d at 442). That is not the case here. There is no hearsay conclusion that Cunningham adopts and repeats without analysis. The information Cunningham relies on, including his discussions with the NRA's Director of Security, do ***not*** include conclusions about the existence of a bona fide business-oriented security concern, the existence of an overall security program, or compliance of the security program with IRS regulations. The NYAG practically admits the same by quoting a passage from Cunningham's deposition where he describes the information he received. Motion at 23. There is no indication that hearsay conclusions formed the principal basis for Cunningham's opinions. Moreover, Cunningham relies on more than a single source to form his conclusions. Cunningham Dep. 60:6-22. Therefore, this challenge also fails.

D. Cunningham's Opinions Are Not Improper Legal Conclusions.

The NYAG tries to argue that Cunningham's opinions are improper because they "seemingly imply" that the NRA meets the standards in 26 CFR §1.132-5(m).[12] Motion at 21. This argument fails for several reasons. First, Cunningham does not opine that any of the expenses of LaPierre's security-related travel were or were not excess benefits. Therefore, he does ***not*** assert any improper legal conclusion. Rather, he draws conclusions about the existence of a bona fide

[12] Of course, this line of argument admits the relevance of Cunningham's testimony by conceding that 26 CFR §1.132-5(m) is at issue.

business-oriented security concern to LaPierre, the existence of an overall security program, and the independent security study in 2019 and its findings. These do not amount to legal conclusions.

Additionally, Cunningham testified only that he considered 26 CFR §§1.132-5(m)(2)(ii), (iii) and (iv) in coming to his conclusions, not that he was opining on any of those sections.[13] Cunningham Dep. 16:23-19:3. And, he caveated that testimony with the fact that he considered those sections not as a tax expert but as a security expert with relevant experience. *Id*. at 62:16-63:11. The NYAG disagrees with Cunningham's analysis, but that is not grounds for exclusion. *See Sadek*, 27 N.Y.3d at 984 (2016); *Wathne*, 101 A.D.3d at 87; *McCullock*, 61 F.3d at 1044; *Gaste*, 863 F.2d at 1068.

In the end, the Court—not the NYAG—will instruct the jury on the applicable law. *Caplan v. Winslett*, 218 A.D.2d 148, 156 (1st Dep't 1996) (citing *Marx & Co. v. Diners' Club Inc.*, 550 F.2d 505, 512 (2d Cir. 1977)). And since Cunningham (unlike Tenenbaum) does not intend to tell the jury what the law is or how to interpret it, the NYAG's argument here falls flat. The weight given to Cunningham's intended testimony is for the factfinder to decide. *See Metro. Jockey*, 190 Misc. at 282 ("[E]xpert testimony is not conclusive and its weight is for the trier of the facts to determine."). Therefore, the exclusion of Cunningham is not appropriate.

CONCLUSION

For the foregoing reasons, the NRA respectfully requests this Honorable Court deny the NYAG's Motion in its entirety.

[13] Cunningham does not discuss any "interpretation" of 26 CFR §1.132-5(m) in his affirmative testimony except to describe that he considered the regulation's plain language.

Respectfully submitted,

Dated: May 5, 2023
New York, New York

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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 6,517 according to the "Word Count" function of Microsoft Word, the word-processing system used to prepare the document.

Per the Court's direction of March 23, 2023, the word limit for Plaintiff's motions directed at experts (Mot. Seq. 056 and 057) was expanded to 24,000 words. The NRA's two memoranda of law in opposition to the NYAG's motions directed at experts, when combined, contain 18,302 words, and comply with the Court's expanded word limit of 24,000.

Dated: May 5, 2023
New York, NY

/s/ Christopher T. Zona
Christopher T. Zona

CERTIFICATE OF SERVICE

I, Christopher T. Zona, hereby certify that, on May 5, 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: May 5, 2023
New York, NY

/s/ Christopher T. Zona
Christopher T. Zona