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. 057
	§	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 SULLIVAN, BLACKER, LERNER, AND MEHTA**
Defendants.	§	

DEFENDANT THE NATIONAL RIFLE ASSOCIATION OF AMERICA'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE DEFENSE EXPERT OPINIONS OF SULLIVAN, BLACKER, LERNER, AND MEHTA

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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 opposition to Plaintiff Attorney General of the State of New York's ("NYAG") Motion To Exclude Defense Expert Opinions Of Sullivan, Blacker, Lerner, And Mehta (Mot. Seq. 057; NYSCEF 1689-1711) ("Motion").

PRELIMINARY STATEMENT

The NYAG's arguments for the exclusion of Ryan Sullivan ("Sullivan"), Bruce Blacker ("Blacker"), Matthew Lerner ("Lerner"), and Amish Mehta ("Mehta") are unsupported by legal authority, aimed at matters of weight not admissibility, and misinterpret either the intended testimony or controlling law. In sum, they are unavailing and should be rejected.

First, the NYAG seeks the exclusion of Sullivan, a Ph.D. economist, and Blacker, a Certified Public Accountant ("CPA") with a Certified in Financial Forensics ("CFF") credential. The NYAG argues several grounds for exclusion but fails to engage in any analysis. Instead, the NYAG baldly asserts catchphrases in a desperate attempt that one might stick. But ***they all fail***. The challenge to Sullivan's and Blacker's qualifications is meritless and, to the extent it gains any traction, it goes only to weight. *Williams v. Halpern*, 25 A.D.3d 467, 468 (1st Dep't 2006). The NYAG's challenge to cumulativeness is an argument of limitation best addressed after the testimony of one of the two. *Shafran v. St. Vincent's Hosp. & Med. Ctr.*, 264 A.D.2d 553, 558 (1st Dep't 1999). The NYAG's relevance argument fails to consider the NYAG's allegations of ongoing misconduct and the overall claim that the NRA cannot properly administer its assets.[1] And, finally, the NYAG's argument about methodology is simply wrong since the principles Sullivan and Blacker discuss are well-established and provide a practical framework through

[1] References to the NRA's "assets" herein refer to only those assets the NRA holds and administers for charitable purposes that are within the scope of the NYAG's allegations.

which the allegations can be viewed. In sum, the NYAG's various arguments present no grounds for exclusion and entirely go to the weight of the intended testimony.

Next, the NYAG challenges the admissibility of Lerner, a Certified Internal Auditor ("CIA") with over 18 years of experience conducting internal audits and risk assessments for nonprofits. The NYAG bases its challenge on relevance and reliability. However, the NYAG's arguments ***completely fail***. First, the NYAG's relevance argument is premised on the fact that Lerner only considered part of the alleged timeframe. The NYAG has no legal support for its proposition here. And there is none because relevance turns on whether the proposed evidence has any tendency to make any fact of consequence more or less probable. *People v. Davis*, 43 N.Y.2d 17, 27 (1977). Lerner examined how internal controls worked at the NRA during a portion of the relevant timeframe and into the present, and he found that the controls were operating effectively. This is entirely relevant testimony and rebuts the NYAG's explicit and implicit allegations.

The NYAG's "reliability" argument does not actually challenge the reliability of Lerner's opinions. Instead, the NYAG takes issue with Lerner's reliance on information gathered by the NRA's external auditor, Aronson LLC, during its audit work for the NRA. But the work of external auditors is exactly the type of evidence normally relied on by experts, so this argument is unavailing. The remainder of the NYAG's argument on reliability is merely an attack on the weight of Lerner's testimony that contains no tangible challenge to its admissibility. The NYAG's arguments against Lerner contain nothing that supports exclusion and should be rejected.

Finally, the NYAG challenges Mehta, a CPA and assurance partner with over 25 years of experience providing accounting, auditing, and advisory services to nonprofits. The NYAG again challenges Mehta's qualifications, relevance, and reliability. However, as before, these arguments ***do not support exclusion***. Mehta's background, training, and experience more than qualify him to

provide the opinions he seeks to offer. The NYAG's arguments to the contrary are disposed of with a simple review of Mehta's experience and the accounting standards, which spell out the duties of an external financial statement auditor. The NYAG's relevance argument suffers from the same shortcomings as it does with the other experts. Namely, it fails to consider the NYAG's allegations and the definition of relevance. And the challenge to reliability misinterprets Mehta's testimony and argues for the exclusion of testimony that Mehta does not intend to provide. These arguments are unavailing, and Mehta should be allowed to testify in full.

Taken all together, the NYAG's challenges to the NRA's experts create a roadmap of the NYAG's intended cross-examination and later argument to the factfinder. But none of the arguments raised by the NYAG go toward 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). And, since the weight given to this testimony is for the factfinder to decide, these arguments for exclusion are entirely misplaced. *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 in its entirety and allow each of the NRA's proposed expert witnesses to testify fully.

ARGUMENT

I. As An Initial Matter, The NYAG Misunderstands The Purpose Of Expert Witnesses.

In its opening salvo, the NYAG fails to correctly state the purpose of expert witnesses. The NYAG argues that the only allowable expert testimony is that which "would help the Court and jury determine whether Plaintiff's allegations are true or false, or whether the alleged misconduct occurred or not." Motion at 7. This is wrong. The purpose of an expert witness 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)). Immediate relevance to the ultimate issue is not required so long as the testimony is helpful and relates to a fact of consequence or disputed issue.

II. A *Frye* Hearing Is Not Appropriate.

The NYAG also requests a *Frye*[2] hearing "to the extent this motion is not granted." Motion at 8. But nowhere does the NYAG make any argument as to why a *Frye* hearing would be appropriate. Simply put, ***it would not be***. "A *Frye* hearing is appropriate to ascertain the reliability of novel scientific evidence, specifically, to determine 'whether the accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally[.]'" *Page v. Marusich*, 51 A.D.3d 1201, 1202–03 (3d Dep't 2008) (citing *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434, 446 (2006)). *Frye* does ***not*** apply where experts base their testimony on personal training or experience rather than scientific methods or testing. *People v. Oddone*, 22 N.Y.3d 369, 376 (2013); *see Wahl v. American Honda Motor Co.,* 181 Misc.2d 396, 398–99 (Sup. Ct. Suffolk Cnty. 1999) ("Where, however the evidence is not scientific or not novel, the *Frye* analysis is not applicable"). Here, the NRA's experts are not offering any "novel scientific evidence" that needs to be analyzed under *Frye*. And the NYAG cannot point to any support for the use of a *Frye* hearing on matters related to economics principles, accounting, or internal controls. Therefore, the NYAG's request should be rejected.

III. Sullivan And Blacker Should Not Be Excluded Because Their Opinions—Together And Separately—Are Helpful And Entirely Admissible.

Sullivan, a Ph.D. economist, and Blacker, a CPA and CFF, intend to testify that an evaluation of the NRA's control efforts "is, in part, an economics and accounting issue that benefits

[2] The "*Frye* Test"—or the "general acceptance" requirement—stems from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and governs admissibility of expert scientific testimony in New York. *Sean R. ex rel. Debra R. v. BMW of N. Am., LLC*, 26 N.Y.3d 801, 809 (2016).

from principles of materiality, prudent businessperson judgments, and cost-benefit analysis." Sullivan & Blacker Report (NYSCEF 1693) ¶4. Further, they intend to opine that applying economics and accounting principles is appropriate because the principles address "real-world considerations faced by industry participants." *Id*. They conclude that, when the NRA's past conduct and subsequent actions are evaluated using these economics and accounting principles, the NYAG's allegations "represent immaterial transactions or correctable transactions." *Id*. Finally, they intend to testify that the NRA's efforts "to continually improve its policies and control environment (both internally and externally)" make the NYAG's requested relief neither beneficial nor warranted because the NRA has shown the ability to properly administer its assets. *Id*.

The NYAG seeks exclusion of Sullivan and Blacker because, according to the NYAG, they are not qualified, their opinions are cumulative, and their opinions are not relevant or helpful. Motion at 14-30. The NYAG's arguments are incorrect on the law and the facts, and only aimed at the weight—not admissibility—of the intended testimony. These arguments are wholly insufficient to justify exclusion.

A. Sullivan And Blacker Are Each Qualified To Testify As Experts.

The NYAG's argument for the exclusion of Sullivan and Blacker based on insufficient qualifications fails. 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). However, an "expert's qualifications go to the weight rather than the admissibility of his testimony[.]" *Williams*, 25 A.D.3d at 468. Qualifications are "an element to be considered by the fact-finder in determining the weight to be accorded the expert's testimony[.]" *Stewart v. P & C Food Markets Inc.*, 236 A.D.2d 667, 668 (3d Dep't 1997); *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"). Thus, any attack on Sullivan's and Blacker's qualifications should be done through cross-examination.

i. Sullivan Is Qualified To Testify As An Expert In Economics.

Sullivan is a Ph.D. economist who "is a recognized top U.S. economic expert." Sullivan & Blacker Report ¶¶5-6, ¶11. He has extensive experience providing expert testimony and analysis in commercial litigation cases. *Id*. ¶7. And he has firsthand experience as a Board of Trustees member and Treasurer for a large nonprofit organization. *Id*. ¶¶9-10. The NYAG even concedes that "Sullivan's qualifications as an economist are not in dispute." Motion at 28. Therefore, it is uncontroverted that Sullivan can testify as an expert in the field of economics.

The NYAG primarily argues that Sullivan should not be allowed to testify as an expert because he "lacks substantive work experience in the nonprofit sector." *Id*. at 30. However, an expert can be qualified by possessing 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) . There is ***no requirement*** that an expert's qualifications be specifically tailored to the exact circumstances of the instant dispute. *See SpecFin Mgmt. LLC v. Elhadidy*, 201 A.D.3d 31, 38 (3d Dep't 2021) (expert's "lack of specific experience … goes to the weight of [expert's] testimony, not its admissibility"). And, importantly, there is ***no requirement*** that an expert possess substantive work experience. *See Pearlstein v. Blackberry Ltd.*, No. 13 Civ. 7060 (CM), 2021 WL 4131646, at *3 (S.D.N.Y. Sept. 10, 2021) ("[L]ack of practical, as opposed to academic, experience is fodder for cross-examination"). Additionally, any deficiency in experience goes ***only to weight***. *See Espinal v. Jamaica Hosp. Med. Ctr.*, 71 A.D.3d 723, 724 (2d Dep't 2010) ("[E]xpert's alleged lack of experience is a factor which goes to the weight to be given to his opinion, and not to its admissibility"); *O'Connor v. Kingston Hosp.*, 166 A.D.3d 1401, 1403 (3d Dep't 2018) ("[A]rguments about [expert's] lack of expertise go to the

weight of [expert's] testimony and expert opinions, not their admissibility"). Therefore, this argument fails on the law.

The argument also fails on the facts. Sullivan has firsthand experience with nonprofits. He was a Board member, Trustee, and Treasurer for a large nonprofit organization—the San Diego Zoo Wildlife Alliance[3]—and has worked on several matters involving charitable nonprofits.[4] Thus, even though it is not required, Sullivan does have substantive experience with nonprofits not only in an advisory capacity, but as an officer and Board member.

The NYAG also argues that Sullivan's "background as an economist does not qualify him to offer expert opinions on industry standards in the nonprofit sector, Form 990 reporting, audits, or the appropriateness of Plaintiff's requested relief against the NRA." Motion at 30. This argument shows a misunderstanding of Sullivan's testimony. Sullivan intends to testify that nonprofits, like other organizations, utilize the economics principles of materiality, prudent businessperson judgment, and cost-benefit analysis. Sullivan & Blacker Report ¶¶42-50. This testimony falls squarely within Sullivan's expertise. Sullivan also will testify that the use of audits, auditing standards, and Forms 990 demonstrate the importance of the economics principles in real-world decision-making for organizations. *Id*. ¶¶51-61. Contrary to the NYAG's argument, Sullivan

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[3] The NYAG argues this experience should be discredited because Sullivan refused to disclose certain confidential information about it. But the NYAG offers no legal support for this position. Further, contrary to the NYAG's assertion that Sullivan "repeatedly blocked *any* inquiry into the scope and nature of his experience" (Motion at 27-28 n.12), Sullivan only refused to disclose specific details about his involvement with internal audits and controls, compliance, and a fraud incident. Sullivan Dep. (NYSCEF 1698) 24:12-26:8, 35:16-38:16, 46:10-47:16. This argument is without merit and should be dismissed.

[4] The NYAG argues that this experience should be discredited because these matters did not relate to regulatory enforcement actions. Motion at 29-30. Once again, the NYAG cannot point to any legal authority for support. And there is no requirement that an expert's experience mirror the instant subject matter. At most, this argument goes to weight. *See SpecFin*, 201 A.D.3d at 38.

does not opine on the mechanics of an audit or filing a Form 990. Rather, he intends to testify that these are indicators of the importance and applicability of economics principles when considering an organization's procedures and controls.[5] Again, this is within Sullivan's expertise. And, finally, Sullivan intends to testify, through the lens of economics principles, to the reasonableness of the NRA's efforts "to monitor and oversee employees and ensure compliance with its policies" and "improve its policies and control environment." *Id*. ¶82, ¶84. Opining on whether the NRA's decisions are consistent with the economics principles is entirely within Sullivan's expertise.

In sum, Sullivan's experience in economics gives him specialized knowledge that is entirely applicable here to help the factfinder understand decisions made by the NRA during the relevant period. Economics is "the study of various principles that inform organizations making decisions regarding the use of scarce resources (*e.g.*, funds), among other things." *Id*. ¶42. The issue of scarcity affects for-profit and nonprofit organizations equally. *Id*. Each type of organization must decide how to use its scarce resources to further its objectives. *Id*. That decision-making process is guided by the economics (and accounting) principles that Sullivan is specially

[5] *See* Sullivan & Blacker Report ¶51 ("[E]vidence [from the nonprofit industry] demonstrates the importance of cost-benefit analysis and the materiality standard"), ¶52 (discussing that internal controls provide only reasonable assurances), ¶53 ("The use of audits … shows the importance of a cost-benefit / materiality framework in evaluating transactions and internal controls."), ¶54 ("The standards used in audits also demonstrate the importance of materiality"), ¶55 ("The steps taken by auditors demonstrate the importance of making business decisions based on an analysis of the costs and benefits of the different choices."), ¶57 ("Even the decision about whether to conduct an audit … is based on a cost-benefit and materiality framework and requires business and professional judgment."), ¶58 ("IRS forms and the filing processes further demonstrate the expectation that organizations may need to disclose and/or amend the reporting of certain transactions."), ¶61 ("The questions on the Form 990 and the amendment process generally demonstrate an expectation that … organizations will need to change and disclose prior filings. This expectation … further supports the observation that a cost-benefit / materiality framework … is a relevant framework for evaluating the reasonableness of an organization's policies, procedures, and internal controls.").

qualified to explain and discuss. *See id*. ¶¶43-50 (discussing applicability of economics and accounting principles to organizations' decision-making). Sullivan uses these principles to analyze the NYAG's allegations as well as the NRA's decisions and actions during the relevant period. This testimony is relevant and helpful and, importantly, rebuts the NYAG's allegations.

ii. Blacker Is Qualified To Testify As An Expert In Accounting.

As with Sullivan, the NYAG's challenge of Blacker is similarly lacking. Blacker is a CPA and CFF with an advanced accounting degree, experience in forensic accounting (including for a large nonprofit), and consulting and expert witness experience. *Id*. ¶¶14-16, Attch. A-2. Given these credentials, it is surprising that the NYAG seeks to challenge Blacker's credentials to testify about matters related to accounting, like audits.

The NYAG argues that Blacker should be excluded because: (1) he "has only worked on three other engagements involving a nonprofit entity" and never as an expert witness (Motion at 26); (2) he "has little to no training, experience, or expertise in Forms 990, IRS filing practices for nonprofits, and auditing" (*id*.); and (3) "his familiarity with the COSO[6] framework is limited to how the framework applies in the context of a financial-statement audit" (*id*. at 27).

The NYAG's first argument is of no consequence. The NYAG does not challenge Blacker's accounting credentials, only the number of nonprofits he has worked for and the number of times he has served as an expert. These are not grounds for exclusion, and the NYAG points to no law suggesting otherwise. *See Espinal*, 71 A.D.3d at 724; *O'Connor*, 166 A.D.3d at 1403.

[6] The Committee of Sponsoring Organizations of the Treadway Commission ("COSO") is the "generally accepted framework for internal control across both commercial and not-for-profit organizations and is widely recognized as one of the definitive standards against which organizations measure the design and operating effectiveness of their systems of internal control." Lerner Report (NYSCEF 1694) ¶30.

Blacker has specialized experience in accounting and describes how accounting principles are relevant to the issues in this case. He is qualified to provide this testimony, and it is admissible.

The NYAG's second argument shows a misapprehension of Blacker's conclusions. Blacker, like Sullivan, does not opine on whether any Form 990 was filled out correctly, whether the NRA's IRS filing practices were compliant, or whether certain standards were adhered to. Instead, Blacker intends to testify about accounting principles (*i.e.*, materiality, prudent businessperson judgments, and cost-benefit analysis) which are well within his expertise. He intends to testify that the importance of these principles for nonprofits is evident from mechanisms like audits, auditing standards, and IRS filing requirements. And he intends to conclude that, when the NYAG's allegations are viewed alongside these principles, the NYAG's allegations fail.

Finally, the NYAG's argument about Blacker's discussion of the COSO framework is similarly misplaced. Blacker does not opine that the NRA's implementation of the COSO framework strengthened the NRA's internal controls. Motion at 27. Rather, Blacker concludes that the implementation of COSO—and other improvements—are indicative of the NRA employing accounting principles to improve its internal control environment. Sullivan & Blacker Report §10. This is within the expertise of an accountant, like Blacker, who is concerned with the sustainable growth of an organization and mitigation of risk. As with Sullivan, the NYAG's challenge to Blacker's qualifications also fails and should be rejected. *Adamy*, 92 N.Y.2d at 402.

B. Sullivan And Blacker Are Not Duplicative Or Cumulative Of One Another.

"It is well settled that whether evidence should be excluded as cumulative rests within the sound discretion of the trial court[.]" *Shafran*, 264 A.D.2d at 556 (citing *Berry v. Jewish Bd. of Fam. & Children's Servs.*, 173 A.D.2d 670, 671 (2d Dep't 1991)). But even where there is "potential for significant overlap," the "better remedy" is ***not exclusion*** but "limit[ing] the subsequent experts' testimony to material not covered by the first witness[.]" *Id*. at 558.

The NYAG argues that allowing both Sullivan and Blacker to testify "would be needlessly cumulative." Motion at 16. Though Sullivan and Blacker submitted a joint report, each arrived at his opinions from different perspectives and utilizing different—though related—principles. Sullivan is equipped to discuss the intersection between economics principles and the NRA on a wider scale, especially insofar as the NRA must operate within an environment of scarce resources. Alternatively, Blacker is equipped to discuss the allegations from an accounting perspective, focusing more on generally accepted accounting principles and standards.[7] Regardless of these differences, each comes to the same conclusions, which buttresses the reasonableness of the NRA's actions and decisions given the circumstances and rebuts the NYAG's allegations.

To the extent the Court believes there is a danger of substantial overlap, the Court should withhold making any determination on exclusion (or limitation) until testimony from one of these witnesses is presented. Thereafter, the Court can limit substantially overlapping testimony. However, excluding testimony now is premature. The NRA should be free to present these witnesses in whatever way the NRA believes benefits its defense.

C. Sullivan's And Blacker's Testimony About The NRA's Corrective Actions Is Helpful And Relevant.

The NYAG appears to believe that the Court should allow only testimony "disput[ing] that wrongful related-party transactions occurred, that the NRA's regulatory filings contained material inaccuracies, or that NRA executives wasted NRA funds and violated NRA policy." Motion at 16. Of course, ***this is incorrect***. Rather, "[t]he guiding principle is that expert opinion is proper when

[7] The NYAG also argues that "any representations made by Blacker or Sullivan in their respective depositions about the substance and bases of their opinions apply equally to each other." Motion at 16 n.5. This argument has no legal support. Sullivan and Blacker are not representative witnesses for one another, thus their depositions stand independent of one another.

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). And relevance is determined by whether evidence has ***any*** tendency to make ***any*** fact of consequence more or less probable. Guide to N.Y. Evid. R. 4.01(1), Relevant Evidence. Here, testimony related to the NRA's improvements since 2017 is both relevant and helpful because it directly relates to—and rebuts—the NYAG's allegations and requested relief.

i. The NYAG Alleges Continued Misconduct Which Makes The NRA's Actions After 2017 Relevant.

First, and foremost, the proposed testimony regarding the NRA's actions since 2017 directly relates to the NYAG's factual allegations in the 2d Am. Complaint (NYSCEF 646; "Complaint"). The NYAG alleges that the NRA has engaged in "[c]ontinued [b]reaches" since the initiation of this litigation. Complaint §VIII ("The Defendants' Continued Breaches Since the Attorney General's Complaint"). Further, the NYAG alleges that, "since the commencement of this action, the Defendants failed to adequately investigate the allegations in the complaint, undertook an incomplete and opaque process that failed to reliably identify excess benefits received by NRA officers and directors, and failed to adequately instruct and oversee the work of the NRA's new external audit firm."[8] *Id*. ¶13.

[8] Among other things, the NYAG alleges: "Since [August 6, 2020], the NRA … purports to have undertaken a compliance review and remediation process, but the NRA, LaPierre, and Frazer have continued the same course of misconduct in violation of New York law, IRS requirements for exempt organizations, NRA bylaws, and internal policies and procedures without objection from the NRA Board. Intentional disregard for proper corporate governance, waste of charitable assets, concealment and false reporting of improper or unauthorized transactions, actions to advance insiders' personal interests to the detriment of the NRA, and evasion of accountability have continued unabated." Complaint ¶568.

Therefore, the NYAG has made the present compliance environment at the NRA a factual issue of consequence for the jury. In doing so, the NYAG has also made the proposed testimony related to the NRA's actions since 2017 relevant to rebut and disprove these allegations. *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). The NRA must be permitted to meet these allegations head on with the proposed expert testimony.

ii. Testimony Regarding The NYAG's Requested Relief Should Be Allowed Before The Factfinder.

The requested relief here is inextricably intertwined with the NYAG's allegations.[9] At bottom, the NYAG alleges that the NRA was unable to properly administer its assets in the past and cannot do so today. Indeed, the NYAG expressly alleges that the NRA has refused to change its ways. Complaint ¶13. The necessary implication of this theory of liability is that the NRA needs to be controlled by a third-party monitor to ensure compliance. In defense, the NRA has every right to put on evidence that it can properly administer its assets such that an outside watchdog is

[9] To the extent the NYAG seeks to use this argument as a springboard into an argument about the NRA's right to a jury trial, this is not the proper forum. Likewise, to the extent the NYAG seeks to argue that evidence of the NRA's course correction should be excluded—a flawed and incorrect argument—this is not the appropriate setting.

unnecessary. *See United States v. Khan*, 787 F.2d 28, 34 (2d Cir. 1986) (holding that expert testimony was relevant to rebut defendant's implied defense and "trial strategy").

Therefore, contrary to the NYAG's assertions, Sullivan and Blacker should be permitted to testify about topics other than whether the alleged related-party transactions occurred, whether filings contained inaccuracies, whether funds were wasted, and whether policies were violated. The NYAG alleges far more sweeping, and current, misconduct that necessarily leads to the conclusion that the NRA needs an outside monitor to ensure its compliance. The NRA must be allowed to present any relevant evidence to defend itself against these claims. As part of that, Sullivan and Blacker should be allowed to testify in accordance with the conclusions in their report.

D. The NYAG's Attacks on Sullivan's And Blacker's Methodologies Lack Merit.

The NYAG argues: (1) "Blacker and Sullivan created their 'accounting and economic' framework for this litigation, without any industry or academic source supporting their methodology" (Motion at 17); (2) "Sullivan['s] and Blacker's opinions encompass legal conclusions, are predicated on an incorrect understanding of the law, and invade the province of the Court by asserting what is Plaintiff's burden" (*id*. at 18); (3) "it is unclear how Blacker and Sullivan applied this 'framework' to reach their conclusions" (*id*. at 20); and (4) "Blacker and Sullivan repeatedly base their opinions on unexamined assumptions rather than facts and data" (*id*. at 22). These arguments are entirely misplaced and should be dismissed.

i. <u>Sullivan And Blacker Rely On Well-Established Economics And Accounting Principles.</u>

The NYAG's argument about methodology is unavailing. Unsurprisingly, the only legal support the NYAG found is a federal case from the District of Massachusetts dealing with expert testimony about data/statistical modeling, which is wholly distinguishable from here. Motion at 18 (citing *Earley Info. Sci., Inc. v. Omega Eng'g, Inc.*, 575 F. Supp. 3d 242, 248 (D. Mass. 2021)).

Sullivan and Blacker intend to discuss widely accepted economics and accounting principles as part of a framework through which to view the NYAG's allegations and NRA's actions. They rely on their education, training, and experience to discuss these principles and explain that they apply to for-profit and nonprofit organizations. Sullivan & Blacker Report §7. The "framework" they discuss is an application of their expertise and experience with various principles to the facts of the case. These principles are well-cited and fully discussed. And the application of experience is recognized as a reliable methodology for experts to use in non-scientific testimony. *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 in non-scientific testimony).

To the extent the NYAG believes the framework is not the correct lens through which to view the allegations, that is a subject for cross-examination. As the First Department held:

> The ***perceived flaws in plaintiff's 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. [The expert]'s analysis and conclusions should be challenged through cross-examination; the ***jury must decide whether or not his methodology was appropriate***.

Wathne, 101 A.D.3d at 87 (emphasis added); *see Sadek*, 27 N.Y.3d at 984 ("[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."); *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"). Thus, exclusion is unwarranted.

ii. Sullivan And Blacker Do Not Offer Legal Conclusions.

The NYAG argues: (1) Sullivan's and Blacker's conclusion that the requested relief is unwarranted is an "ultimate legal conclusion" (Motion at 18); (2) Sullivan and Blacker "erroneously opine that it is Plaintiff's burden to apply the 'framework' that they created" and "wrongly assume that New York law imposes a requirement that a certain materiality threshold must be met and a cost-benefit analysis conducted to establish liability or entitlement to a remedy under the N-PCL and EPTL" (*id*. at 18-19); (3) "it is unclear how Blacker and Sullivan applied this 'framework' to reach their conclusions" (*id*. at 20); and (4) "Blacker and Sullivan repeatedly base their opinions on unexamined assumptions rather than facts and data" (*id*. at 22).

Once again, these arguments are meritless and show a misunderstanding of the testimony and law. First, the testimony about the appropriateness of the NYAG's requested remedy is not a legal conclusion. Sullivan and Blacker opine that, when viewed through an economics and accounting lens, the NRA can properly administer its assets without the assistance of an outside monitor. This is a far cry from Tenenbaum's entirely improper testimony that the NRA has committed certain violations of law. *See, e.g.*, Tenenbaum Report (NYSCEF 1453) at 11 ("A brief summary and discussion of these laws is necessary to be able to describe how the Individual Defendants violated them."). Sullivan and Blacker should be allowed to testify that, based on their analysis of the NRA's improvements and corrective actions, the NRA has demonstrated the ability to administer its assets properly and lawfully without the assistance of a third-party monitor.

The NYAG's second line of argument is simply a disagreement with Sullivan's and Blacker's opinions.[10] The NYAG's disagreement, however, does not warrant exclusion. Sullivan

[10] The NYAG also tries to argue that it is not the NYAG's burden to prove that the NRA's internal controls were not functioning or that the NRA overpaid certain vendors. Motion at 19. As these

and Blacker opine that the NYAG ***should*** have considered certain principles in the allegations. Nowhere does either testify that the NYAG was required to apply the principles or that the principles are a part of the N-PCL, EPTL, or Executive Law. Their testimony is simply that these principles exist, apply to nonprofits, should have been considered by the NYAG, and, if they are considered, the NRA is not deficient in its ability to administer its assets. This testimony is entirely admissible and stands in stark contrast to the NYAG's proposed experts who authoritatively state that New York laws and IRS requirements were violated. *See, e.g.*, Tenenbaum Report at 11, 27, 32, 37, 47; Harris Report (NYSCEF 1323) at 7, 24.

The NYAG next argues that there is a disconnect between the framework and Sullivan's and Blacker's conclusions. The NYAG believes this argument is sufficient for exclusion—though no legal authority is referenced.[11] Once more, the NYAG is incorrect. First, Sullivan and Blacker fully explain the economics and accounting framework they intend to apply. Sullivan & Blacker Report §7. They explain how evidence from the nonprofit sector indicates that their framework is appropriate. *Id*. §8. Then they analyze the NYAG's allegations through the economics and accounting framework. *Id*. §9. And they also analyze the NRA's continued efforts to improve compliance. *Id*. §10. After that analysis, they conclude that, "Plaintiff's allegations generally represent immaterial transactions or correctable transactions that do not warrant the requested relief." *Id*. ¶4. Though the NYAG suggests there is a disconnect, Sullivan's and Blacker's methodology and analysis are clear and logical.

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allegations are either made directly or clearly implied in the Complaint, it is, in fact, the NYAG's burden to prove its allegations. *See, e.g.*, Complaint ¶¶312-411, ¶494, ¶498, ¶641.

[11] To the extent the NYAG relies on *Parker v. Mobil Oil Corp*. and *Cornell v. 360 W. 51st St. Realty, LLC*, 22 N.Y.3d 762 (2014), such reliance is misplaced. Motion at 13, 23. Each involved experts testifying about specific medical causation which is entirely different from here.

For example, Sullivan and Blacker analyze alleged excess benefit transactions. *Id*. §9.2. Sullivan and Blacker explain that these transactions did not require a restatement of the NRA's audited financial statements. *Id*. ¶64. From that, they conclude that, when viewed through an economics or accounting framework, these transactions were not material. And, indeed, this conclusion is buttressed by the fact that the NRA has repeatedly received clean audits.

Sullivan and Blacker also discuss, at length, the repayment of multiple transactions and disclosure on Forms 990, which led them to conclude that the NRA was engaged in "ongoing improvement efforts." *Id*. ¶66. Together, this led Sullivan and Blacker to their opinion that the NRA can properly administer its assets.

Sullivan and Blacker engage in a similar analysis related to the NRA's agreements with certain vendors. *Id*. at §9.3. Sullivan and Blacker, relying on the principle of materiality, opine that the proper lens to view these agreements is by analyzing them "against the amounts that the NRA would have paid to obtain the[] services elsewhere." *Id*. ¶68. Sullivan and Blacker do not opine that the agreements were immaterial, only that any analysis of materiality should not be done in a vacuum as the NYAG has done. Therefore, the NYAG's criticism here is unfounded.

Likewise, Sullivan and Blacker analyze the NRA's whistleblower protections, regulatory filings, and reliance on Aronson's audit work through the lenses of a cost-benefit analysis and materiality. *Id*. at §§9.4-9.6. Contrary to the NYAG's suggestion, though, Sullivan and Blacker describe why the cost-benefit analysis undermines the NYAG's allegations. As it relates to conducting an internal audit, they describe that the NRA engaged external auditors who were required to evaluate and comment on the NRA's internal controls. *Id*. ¶75. As it relates to regulatory filings, Sullivan and Blacker conclude that it was a more prudent business (and cost-benefit) decision to rely on the external auditor's opinion that the NRA's financial statements were

not materially misstated. *Id*. ¶78. Sullivan and Blacker conclude that, contrary to the allegations, internal audits are unnecessary because an external auditor was already engaged. *Id*. §9.6.

The NYAG's last argument is that Sullivan's and Blacker's opinions are based on "unexamined assumptions." Motion at 22. While the NYAG attacks Sullivan and Blacker for relying on Aronson's audit work, including its findings and observations—claiming, without support, that such reliance requires due diligence or independent testing[12]—relying on this type of evidence is ***exactly*** what experts are expected to do.

First, the Aronson audits are part of the record evidence. Experts are entitled to—and, in fact, expected to—rely on such evidence. *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, this is the type of material ordinarily relied on by experts in the fields of economics and accounting. *See* 32 C.J.S. Evidence §826 (2023) ("[T]he work papers of one auditor that digests the sort of information which experts in the field usually rely on is admissible as the foundation for another auditor's expert testimony."). Experts are allowed to rely on such evidence even if it is not itself admissible. *See People v. Czarnowski*, 268 A.D.2d 701, 702 (3d Dep't 2000)

[12] To the extent the NYAG argues that Sullivan and Blacker must perform firsthand testing, this is incorrect. There is no such requirement, and this is not a basis for exclusion. At most, this goes to weight. *See People v. Miller*, 91 N.Y.2d 372, 380 (1998) (holding that expert's testimony was not speculative where the expert did not personally perform tests); *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); *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.").

(allowing expert testimony based on material "of the kind ordinarily accepted by experts in the field"). Thus, the NYAG's argument falls short.[13]

Finally, the NYAG's reliance on *Ask Chemicals, LP v. Computer Packages, Inc.*, 593 F. App'x 506 (6th Cir. 2014), is misplaced. This case is not from this jurisdiction and focuses on a damages expert who "wholesale adopt[ed]" the plaintiff's estimates of lost profits for the damages calculation. *Id*. at 510. Sullivan and Blacker are not opining on damages (which requires mathematical calculations), and they have not wholesale adopted anything in place of their own analysis and conclusions. Rather, they are relying on evidence normally relied on in the field and, using their experience, opining on the meaning of clean audited financial statements after an external audit. Therefore, *Ask Chemicals* offers the NYAG no help in this regard.

iii. The NYAG's Argument As To Alleged Factual Narratives Is Also Wrong.

The NYAG apparently misunderstands the case law on improper factual narratives. It is ***not*** improper for an expert to reference evidence he relied upon to form his opinion—this is typical and expected. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720 (MKB), 2022 WL 14814183, at *57 (E.D.N.Y. Oct. 26, 2022) (allowing expert to refer to record evidence when formulating and stating opinion). However, offering an extended factual narrative that merely recites the evidence ***is*** improper. *See In re Lyondell Chem. Co.*, 558 B.R. 661, 667–68 (Bankr. S.D.N.Y. 2016) (discussing improper narrative testimony).

[13] The NYAG's argument that reliance on Aronson's audit work would create a trial within a trial is without merit. The NYAG's opinion about Aronson's audit work is immaterial as to whether the audits are admissible and can be relied on by an expert. The NYAG shows nothing to suggest that Aronson's audit work is inherently unreliable or that this not the type of material normally relied on by experts. The NYAG's opinion is not a ground for exclusion.

Tellingly, the NYAG cannot point to any actual narrative in the Sullivan & Blacker Report. Instead, the NYAG strings together citations from the report where Sullivan and Blacker simply discuss evidentiary support for their findings. Motion at 23-24. There is nothing improper about this. It is ***not*** improper for an expert to cite the evidence upon which he relies, so long as he does not regurgitate the factual contentions of a party. *See Highland Cap. Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 469 (S.D.N.Y. 2005) (holding that while an expert "must of course rely on facts or data … an expert cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence"). Examples of improper narratives can be found in Tenenbaum's expert report where he writes multi-page "fact descriptions" summarizing the NYAG's evidence and culminating in legal and factual conclusions. Tenenbaum Report at 30, 34-35. Sullivan and Blacker do not do this. This argument completely fails.

iv. The Subject Of Sullivan's And Blacker's Testimony Is Not Within The Common Knowledge Of A Juror.

Contrary to the NYAG's unsupported argument, economics and accounting principles like materiality, prudent businessperson judgments, scarcity, and cost-benefit analysis are ***not*** within the ken of a typical juror. Sullivan and Blacker explain how and why these principles intersect with the nonprofit sector, how they can be used to analyze the NYAG's allegations, and the result of that analysis. None of this is common knowledge. This subject matter is exactly the sort expected to be explained by an expert. Taken together, Sullivan and Blacker should be qualified as experts in their respective fields and allowed to testify to the conclusions laid out in their report.

IV. Lerner's Testimony Is Relevant And Reliable.

At bottom, the NYAG alleges that the NRA was, and is, incapable of properly managing its assets. The NYAG also intends to rely on expert testimony about allegedly insufficient policies and procedures, alleged diversion and private inurement, and alleged deficiencies in the NRA's

internal controls. Lerner is a CIA working for one of the largest accounting firms in the world, Grant Thornton LLP, and he specializes in assisting nonprofits with internal audits, risk assessments, due diligence reviews, and regulatory reporting. Therefore, it is difficult to understand the NYAG's request to exclude Lerner from testifying about the NRA's control environment during a portion of the relevant timeframe.

A. Lerner's Testimony Is Relevant.

i. Testimony Relating To Any Portion Of The Alleged Timeframe Is Relevant.

The NYAG asks this Court to exclude Lerner's testimony because he did not opine on the period that the NYAG has determined to be "critical to liability in this action." Motion at 32. The NYAG apparently believes that, because Lerner did not opine on the NRA's control environment over the entire timeframe alleged, he should not be allowed to testify at all. Of course, this is not the law, and the NYAG submits no legal support for such an assertion. To the contrary, relevant evidence is "evidence having ***any tendency*** to make the existence of ***any fact*** that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Davis*, 43 N.Y.2d at 27 (emphasis added); *see* Guide to N.Y. Evid. R. 4.01(1).

The NYAG alleges that misconduct dates back many years and has continued after the initiation of this lawsuit. Complaint ¶13, §VIII, ¶¶635-43. In so doing, the NYAG places at issue the sufficiency of the NRA's control environment throughout that period and to the present. Thus, testimony about the NRA's internal controls for ***any*** part of that timeframe is relevant. *See People v. Inesti*, 95 A.D.3d 690, 692 (1st Dep't 2012) (holding that evidence of defendant's conversations at various points during timeframe was relevant to disprove psychiatric defense alleged to exist throughout timeframe). Further, Lerner does not oversell his review or opinions such that exclusion would be appropriate. He clearly defines his scope of review, which adequately frames his

conclusions for the factfinder. *See* Lerner Report ¶45 ("My scope of work was to evaluate the systems of internal controls presently in place within the NRA as of December 31, 2020, based on the evidence provided"). Therefore, Lerner's testimony about internal controls since 2020 is relevant and should be allowed.

ii. The Sufficiency Of The NRA's Internal Control Environment Is Relevant.

The NYAG also appears to argue that testimony regarding the sufficiency of the NRA's internal control environment is not relevant. *See* Motion at 32-33 (arguing that "[l]iability under these statutes does not rest on whether there were sufficient internal controls in place at the time of the conduct in question"). This assertion fails for two primary reasons.

First, the NYAG has placed the NRA's internal controls at issue. The Complaint contains multiple allegations regarding alleged deficiencies in the NRA's internal controls. *See, e.g.*, Complaint ¶494 (alleging the NRA has a "culture of noncompliance and disregard for the internal controls"), ¶498 (alleging "the Audit Committee failed to oversee the organization's internal controls."), ¶641 (alleging "violation or evasion of the NRA's … internal controls"). Beyond the allegations in the Complaint, the NYAG intends to place such alleged deficiencies in the NRA's internal controls at issue during its case-in-chief. This is clear from the reports of the NYAG's proposed experts. *See, e.g.*, Tenenbaum Report at 15-20 (discussing nonprofits' "duties" regarding internal controls), 25-42 (discussing alleged failures in the NRA's internal controls); Hines Report (NYSCEF 1711) ¶¶14-17 (summarizing opinions about the NRA's internal control environment), §VII ("The NRA's Control Environment And Internal Controls"), §VIII ("NRA Policies, Procedures, And Internal Controls"). Because the sufficiency of the NRA's internal controls is disputed, Lerner's testimony is responsive and, thus, relevant. *Ochoa*, 16 A.D.3d at 394; *TC Sys.*, 213 F. Supp. 2d at 177; *Scott*, 2012 WL 2026428, at *4.

Second, on its own, the sufficiency of the NRA's internal control environment is relevant to the overarching allegation that the NRA has improperly administered its assets and remains incapable of properly doing so. The primary purpose of internal controls is to help safeguard an organization and further its objectives. COSO defines internal control as "[a] process, effected by an entity's board of directors, management, and other personnel, designed to provide reasonable assurance regarding the achievement of objectives relating to operations, reporting, and compliance." Lerner Report ¶31. Internal controls are meant to minimize risks, protect assets, ensure accuracy of records, promote operational efficiency, and encourage adherence to policies, rules, regulations, and laws. Therefore, the sufficiency of the NRA's internal control environment has some tendency to make it more or less probable that the NRA has failed, or continues to fail, to properly administer its assets. And, if such failures have occurred, the sufficiency of the internal control environment has some tendency to make it more or less probable that the NRA, itself, was at fault (as opposed to other individual actors). Lerner further discusses the relevance and applicability of his analysis—as well as internal controls generally—throughout his report. *See* Lerner Report ¶¶48-58 (summarizing each opinion as it relates to each allegation).

Taken together, Lerner's testimony related to the NRA's internal control environment is relevant to the allegations—both generally and specifically—and as rebuttal to the NYAG's intended case-in-chief. Lerner, therefore, should be allowed to testify in full.

B. Lerner's Testimony Is Necessary And Reliable.

The NYAG's second argument for the exclusion of Lerner appears to be related to reliability. The NYAG argues: (1) Lerner did not perform his own testing and relied on Aronson's audit work; (2) Lerner's testimony about the existence of policies is unnecessary; (3) Lerner did not assess the truth of the allegations; and (4) Lerner did not investigate certain of the NYAG's specific allegations. *See* Motion §II.B.

i. Lerner Is Not Required To Perform Firsthand Testing.

The NYAG asserts, without basis, that Lerner must "personally evaluate" the controls through an internal audit for him to provide his opinions. Motion at 35. First, this is ***not*** a basis for exclusion. Quite simply, an expert is not required to undertake firsthand examinations. *Miller*, 91 N.Y.2d at 380; *Pereira*, 71 A.D.3d at 1106; *Tinao*, 112 A.D.2d at 364. Rather, this type of criticism is for cross-examination because it goes only to the weight.

Further, this argument misses the point. Lerner is ***not*** testifying that the NRA's internal controls did or did not prevent certain alleged violations—that is a conclusion the factfinder must come to and is inappropriate for expert testimony. Instead, Lerner intends to testify that, upon his review of the control environment, the controls were designed to provide reasonable assurance of adherence to the relevant regulations. Lerner Report ¶¶48-58. Lerner laid out the evidence he relied on to come to these conclusions both generally and specifically. *See id*. ¶¶48-58 (discussing opinions and underlying evidence generally), ¶¶63-119 (specifically discussing the interplay between pieces of evidence and the COSO framework). The evidence that Lerner relies on includes sworn testimony, interviews, audited financial statements, audit work papers, tax filings, and relevant policies and procedures. *Id*. ¶47, ¶¶63-68, ¶74, ¶86, ¶¶116-19. This evidence is in the record, within Lerner's personal knowledge, and the type of evidence an expert would typically rely on. Moreover, this is the type of evidence that an internal auditor would review and rely on during an internal audit. Therefore, Lerner's reliance on this evidence is entirely permissible.

ii. Lerner Testifies About The Design Adequacy Of The NRA's Controls Not Merely Their Existence.

The NYAG also argues that Lerner "opines on the mere existence and 'design' of policies." Motion at 34. Interestingly, Lerner only discusses "design," which he defines as whether the controls "operated as prescribed … satisfy the organization's control objectives and can effectively

prevent or detect error, fraud, or a compliance failure." Lerner Report ¶43 n.18. Contrary to the NYAG's suggestion, Lerner does not opine that controls merely exist. Lerner states that his opinions address "the adequacy of the *design* of the NRA's systems of internal controls" and "the *operating effectiveness* of the NRA's systems of internal controls." *Id*. ¶43. And Lerner's opinions and bases demonstrate that. He explains that he reviewed the evidence to assess whether policies and procedures were in place and whether they provide a reasonable assurance that the internal controls were operating effectively. *Id*. ¶¶49-51, ¶¶53-55, ¶¶57-58, §VIII.

In any case, the NYAG's assertion that an expert is not necessary to testify about the existence of controls is incorrect. A lay person cannot be expected to understand the array of policies and procedures that exist at a nonprofit charitable organization, how they are intended to operate, and why they are necessary to the internal control environment. Therefore, even if Lerner were to testify only that certain policies and procedures exist and contribute to the NRA's internal control environment, such testimony would still be relevant and helpful. The NYAG's allegations, taken together, suggest that the NRA has entirely inadequate internal controls and mismanages its assets. The NRA can rebut these claims with any evidence that has any tendency to suggest the opposite is true. This includes the mere existence of internal controls, and certainly expert testimony about their design and operating effectiveness.

iii. The NYAG's Call For Lerner To Evaluate The "Truth" Of The Allegations Is A Request For Improper Testimony.

The NYAG confusingly argues that Lerner should not testify about the NRA's control environment but should assess the "truth" of the NYAG's allegations. Motion at 34-35. Determining the "truth" of the allegations is the role of the factfinder. An expert witness is not permitted to opine on whether the allegations are "true." *See Nevins v. Great Atl. & Pac. Tea Co.*, 164 A.D.2d 807, 808 (1st Dep't 1990) (trial court erred by allowing expert testimony about the

ultimate issue). An expert's proper role is to help the factfinder understand an issue so the factfinder can make the final determination. *De Long*, 60 N.Y.2d at 307. Lerner does just that.

V. Mehta Is Qualified And His Opinions Are Relevant And Reliable.

A. Mehta Is Qualified As An Expert In Accounting And Auditing.

The NYAG makes the argument that Mehta, a CPA and assurance partner for Marcum LLP with over 25 years of experience, is somehow not qualified to testify about the NRA's internal control environment and its policies for maintaining effective internal controls. Motion at 37-39. The argument revolves around an alleged "lack of substantive experience." *Id*. at 39. However, once again, this challenge fails on the law and the facts.

i. Though Lack Of Substantive Experience Is Not A Basis For Exclusion, Mehta Does, In Fact, Possess Substantive Experience.

As an initial matter, any perceived lack of "substantive" or "specific" experience is ***not*** a ground for exclusion. *Espinal*, 71 A.D.3d at 724; *O'Connor*, 166 A.D.3d at 1403; *SpecFin*, 201 A.D.3d at 38; *Pearlstein*, 2021 WL 4131646, at *3. Experience and qualifications are best challenged through cross-examination. *Adamy*, 92 N.Y.2d at 402. These matters go entirely to the weight of proposed testimony, not its admissibility. Therefore, this challenge fails on the law.

The NYAG's attack on Mehta's experience also is incorrect on the facts. The NYAG cherry-picks testimony from Mehta's deposition and ignores contrasting testimony where Mehta describes his substantive experience. Mehta testified that he has experience reviewing related-party transactions as part of his auditing work. Mehta Dep. (NYSCEF 1709) 32:22-33:16, 61:4-10. Likewise, Mehta testified that he has experience reviewing and commenting on conflict-of-interest policies. *Id*. at 36:20-37:8. He also testified that, within his role as an auditor, he has interacted with organizations regarding organizations' whistleblower policies. *Id*. at 63:4-10, 64:15-18. And he testified that he has experience with the COSO Framework because it is the

"underlying framework that we utilize in understanding, developing and understanding of a client's internal control environment." *Id*. at 67:25-68:4.

Similarly, Mehta has substantive experience advising on tax and regulatory filings. He served as an engagement partner for clients for whom his team prepared and filed tax forms, including Forms 990 and CHAR500, which he personally reviewed. *Id*. at 33:24-34:3, 34:22-35:16, 165:14-166:7, 294:23-295:18. He also has reviewed on numerous occasions Forms 990 for organizations disclosing related-party transactions. *Id*. at 35:17-36:9. Though Mehta testified these forms were prepared by the tax department, as an auditing partner, he had to review and advise on the forms as part of his responsibilities. *Id*. at 35:12-16.

The NYAG also argues that Mehta is "unqualified" to testify about the appropriateness of the appointment of a compliance monitor or governance expert (Motion at 39[14]) because Mehta has no experience with a court-appointed compliance monitor or governance expert. But courts do not consider lack of specific experience grounds for exclusion. *Espinal*, 71 A.D.3d at 724; *O'Connor*, 166 A.D.3d at 1403; *SpecFin*, 201 A.D.3d at 38; *Pearlstein*, 2021 WL 4131646, at *3. Moreover, Mehta's role as an external auditor requires him to understand an organization's internal control environment. Without that understanding, Mehta would be unable to provide assurance that an organization's financial statements are not materially misstated. The review of internal controls that Mehta is expected to perform as part of his audit work is similar to that which a

[14] The NYAG repeats this argument in §III.C of the Motion. Therein, the NYAG also argues—by passing reference and without support or analysis—that Mehta's opinion about the monitor and governance expert "is inappropriate, prejudicial to Plaintiff, and would only lead to jury confusion." Motion at 40. This argument should be dismissed because it is left entirely undeveloped. Importantly, there is no indication how Mehta's opinion is inappropriate, unfairly prejudicial, or confusing. There is nothing confusing or inappropriate about Mehta's opinion. He is addressing the crux of the NYAG's allegations—that the NRA requires an outside monitor to ensure it properly administers its assets.

compliance monitor or governance expert would do. Thus, Mehta's 25 years of experience make him distinctly qualified to understand what a monitor or governance expert would be looking for and whether, given the NRA's current internal controls, the appointment of either is appropriate.

ii. Financial Statement Auditors, Like Mehta, Are Experienced In Reviewing Internal Controls.

To the extent the NYAG argues that Mehta's opinions are "plainly outside the scope of a financial statement audit's review of an organization's internal policies" (Motion at 38), this is incorrect. Similarly, the assertion that financial statement audits do not look beyond the date of the financial statements (*id.*) is wrong.

During financial statement audits, auditors consider whether internal controls are designed and operating effectively,[15] identify and assess the risk of material misstatement in the financial statements,[16] and identify and report significant deficiencies and material weaknesses in internal

[15] *See* AICPA, AU-C §200.A43, *Overall Objectives of the Independent Auditor* (2021) (Ex. A at 18) (auditor's responsibility to evaluate "control risk" in connection with the risk of material misstatement of the financial statements, which is the "effectiveness of the design, implementation, and maintenance of internal control by management to address identified risks that threaten the achievement of the entity's objectives relevant to preparation and fair presentation of the entity's financial statements"); AICPA, AU-C §330.08, *Performing Audit Procedures in Response to Assessed Risks and Evaluating the Audit Evidence Obtained* (2021) (Ex. D at 2-3) (requiring auditor to "design and perform tests of controls to obtain sufficient appropriate audit evidence about the operating effectiveness of relevant controls").

[16] *See* AICPA, AU-C §315, *Understanding the Entity and Its Environment and Assessing the Risks of Material Misstatement* (2021) (Ex. C) (discussing "auditor's responsibility to identify and assess the risks of material misstatement in the financial statements through understanding the entity and its environment, including the entity's internal control").

controls.[17] Further, financial statement auditors are required to review the findings for each of an organization's prior years and follow up on any issues post-audit.[18]

The NYAG seeks to downplay the significance and depth of the review conducted by external auditors during financial statement audits. The Generally Accepted Auditing Standards ("GAAS")—the standards which control independent audits—***require*** auditors to investigate and review internal controls and policies associated with related-party-transactions, conflicts of interest, and whistleblowers. GAAS require that external financial statement auditors thoroughly understand an organization's internal controls to properly identify and assess the risks of material misstatements in the financial statements.[19] GAAS also require auditors to review related-party

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[17] *See* AICPA, AU-C §265, *Communicating Internal Control Related Matters Identified in an Audit* (2021) (Ex. B) (discussing "auditor's responsibility to appropriately communicate to those charged with governance and management deficiencies in internal control that the auditor has identified in an audit of financial statements"); AU-C §265.08 (Ex. B at 2) ("The auditor should determine whether, on the basis of the audit work performed, the auditor has identified one or more deficiencies in internal control.").

[18] *See* AU-C §315.A33 (Ex. C at 17) (in discussing the auditor's requirement to understand the entity and its environment, the auditor must review prior periods because "[s]ignificant changes … may give rise to, or change risks of, material misstatement"); AICPA, AU-C §560, *Subsequent Events and Subsequently Discovered Facts* (2021) (Ex. F) (discussing "auditor's responsibilities relating to subsequent events and subsequently discovered facts").

[19] *See* AU-C §265.02 (Ex. B at 1) ("The auditor is required to obtain an understanding of internal control relevant to the audit when identifying and assessing the risks of material misstatement. In making those risk assessments, the auditor considers internal control in order to design audit procedures that are appropriate in the circumstances but not for the purpose of expressing an opinion on the effectiveness of internal control. The auditor may identify deficiencies in internal control not only during this risk assessment process but also at any other stage of the audit."); AU-C §315.01 (Ex. C at 1) ("[A]uditor's responsibility to identify and assess the risks of material misstatement in the financial statements through understanding the entity and its environment, including the entity's internal control."); AU-C §315.03 (Ex. C at 1) ("The objective of the auditor is to identify and assess the risks of material misstatement … through understanding the entity and its environment, including the entity's internal control, thereby providing a basis for designing and implementing responses to the assessed risks of material misstatement.").

relationships and transactions as part of a financial statement audit.[20] Likewise, GAAS require auditors, as part of the auditors' responsibility to understand and evaluate internal controls, to review and understand an organization's conflict-of-interest and whistleblower policies.[21]

Mehta's demonstrated experience in auditing and governance and his training as a CPA qualifies him to opine on: the effectiveness of the NRA's internal controls; whether the NRA took appropriate measures regarding the material accuracy of its financial statements; the NRA's tax and regulatory filings; whether the actions taken by the NRA's Audit Committee with its external auditors were customary; and whether the NRA can properly administer its assets. Mehta should be allowed to offer each of the opinions in his report.

B. Mehta's Opinions Are Relevant And Helpful.

The NYAG next attacks Mehta on what appears to be relevance grounds but does so without support or analysis. Taking these passing remarks in turn, ***each fails***. First, the NYAG asserts that Mehta failed to consider the entire period of the NYAG's alleged timeframe. Again, there is no requirement that expert testimony address all alleged misconduct for the expert's testimony to be relevant. This would only be an issue of admissibility if Mehta offered an opinion on a period for which he reviewed no material or ignored significant contrary evidence. Such is

[20] *See* AICPA, AU-C §550, *Related Parties* (2021) (Ex. E) (discussing "auditor's responsibilities relating to related party relationships and transactions in an audit of financial statements").

[21] *See* AU-C §550.A18 (Ex. E at 13-14) (instructing auditor to review policies and procedures related to related-party transactions, conflicts of interest, and whistleblowing as part of requirement to understand internal controls and mitigate the risk of material misstatement in financial statements); AU-C §§550.A23–.A31 (Ex. E at 16-18) (discussing auditor's review of materials related to related-party transactions and conflicts of interest); AU-C §550.A37 (Ex. E at 20) (instructing auditor to review related-party contracts and whistleblower reports "to obtain an understanding of the business relationships … and to determine the need for further appropriate substantive audit procedures").

not the case here. The timeframe Mehta considered is relevant to the NYAG's allegations and, therefore, admissible. *See Inesti*, 95 A.D.3d at 692; *Ochoa*, 16 A.D.3d at 394; *TC Sys.*, 213 F. Supp. 2d at 177; *Scott*, 2012 WL 2026428, at *4. And, to the extent the NYAG takes issue with Mehta's analysis and the scope of his review, that goes to weight not admissibility. *See Sadek*, 27 N.Y.3d at 984; *Wathne*, 101 A.D.3d at 87; *McCullock*, 61 F.3d at 1044; *Gaste*, 863 F.2d at 1068.

The NYAG also suggests that Mehta "performed no meaningful analysis," but this is belied by his multi-page analysis and explanation of Aronson's audits and special procedures. Mehta Report (NYSCEF 1695) §VII. Insofar as the NYAG argues that Mehta should have re-audited the NRA's financial statements for the relevant years, that is a subject for cross-examination. *See Miller*, 91 N.Y.2d at 380; *Pereira*, 71 A.D.3d at 1106; *Tinao*, 112 A.D.2d at 364. Instead, Mehta can adequately rely on previous audit work, which is the type of evidence normally relied on in the field. 32 C.J.S. Evidence §826. The NYAG's disagreement with Mehta's analysis, again, does not affect its admissibility and is not grounds for exclusion. *See Sadek*, 27 N.Y.3d at 984; *Wathne*, 101 A.D.3d at 87; *McCullock*, 61 F.3d at 1044; *Gaste*, 863 F.2d at 1068.

The NYAG's suggestion that Mehta's testimony is a "mouthpiece to convey the NRA's factual position" appears to allege improper factual narration. Motion at 39-40. To the extent the NYAG is putting forth such an argument, it has no merit. Mehta takes the factfinder through the basis for his opinion, pointing out the relevant policies, procedures, and other evidence he considered. This is not what the case law describes as an improper factual narrative. *See Payment Card*, 2022 WL 14814183, at *57; *Lyondell*, 558 B.R. at 667–68. Moreover, quite simply, Mehta's proposed testimony does not include any factual narration whereby Mehta is narrating the NRA's case. Thus, this argument should be set aside.

Finally, though the NYAG conclusively declares that all that "matters is that the NRA failed to implement and enforce those policies for several years" (Motion at 40), this is not the standard for relevance. *See* Guide to N.Y. Evid. R. 4.01(1). The NYAG is welcome to make this argument to the factfinder, but it has no place in a motion seeking exclusion. To the extent the NYAG believes the only relevant timeframe is in the past, it should have reflected this in its allegations. Instead, the NYAG set forth wide-ranging allegations spanning many years and continuing to the present. Thus, the NYAG must deal with the consequences. Namely, that the NRA is allowed to present all otherwise admissible evidence that has any tendency to make any fact of consequence during the entire timeframe more or less probable. *See Inesti*, 95 A.D.3d at 692; *Ochoa*, 16 A.D.3d at 394; *TC Sys.*, 213 F. Supp. 2d at 177; *Scott*, 2012 WL 2026428, at *4. As such, Mehta's testimony is relevant and admissible.

C. Mehta's Testimony Is Reliable And Should Be Allowed In Its Entirety.

The NYAG's final argument is couched as an attack on Mehta's reliability and to impeach the bases for Mehta's opinions. But this argument goes entirely to the weight of Mehta's testimony rather than its admissibility. And the argument itself misinterprets Mehta's opinions. Thus, the challenge should be dismissed.

Mehta opines that: (1) "The NRA has sufficiently robust policies and procedures in place to detect and address potential related party/conflict of interest matters"; (2) "The NRA has established protocols to handle whistleblowing" and those protocols encourage reporting of "good faith concerns"; (3) "The NRA took the appropriate steps in the preparation of its regulatory filings and has further enhanced its policies and procedures to comply with the CHAR 500 reporting requirements of New York State"; (4) "The Audit Committee of the NRA's Board of Directors properly discharged its responsibilities in connection with retaining, monitoring and

communicating with the NRA's outside auditors"; and (5) "The NRA has demonstrated a commitment to corporate governance and strong internal controls[.]" Mehta Report at 4-5.

The NYAG's first argument is that Mehta "has no basis upon which to conclude the NRA has sufficiently robust policies and procedures" because he did not test the effectiveness of said policies. Motion at 41. The case law is clear that firsthand testing is not required and is not a basis for exclusion. *See Miller*, 91 N.Y.2d at 380; *Pereira*, 71 A.D.3d at 1106; *Tinao*, 112 A.D.2d at 364. Additionally, this argument fails because Mehta is not offering an opinion on the operating effectiveness of the NRA's internal controls. Rather, he is concluding that, based on his training and experience, he believes the NRA's policies and procedures are sufficient to detect and address related-party transactions and conflicts of interest. In coming to this conclusion, Mehta describes the evidentiary basis for his opinion, which undercuts any argument that his opinion is not based on the evidence. *See* Mehta Report §VII.A.[22]

The NYAG also argues that Mehta's opinions should be excluded because he partially relies on the existence of compliance training. The NYAG first asserts that "the fact that training seminars were held is not in dispute." Motion at 41. This is a relevance—not reliability—argument. Regardless, the NYAG ignores its own proposed expert's assertion that a "responsible course correction" would "require regular [compliance] training." Tenenbaum Report at 61, 63. Obviously, therefore, whether the NRA holds regular compliance training is disputed. Additionally, as the NYAG concedes, Mehta is not opining on the effectiveness of this training, so it is of no consequence that Mehta does not know the subject matter of each training session.

[22] The NYAG also confusingly argues that Mehta cannot conclude that certain transactions were compliant with the NRA's policies because Mehta did not review the documents presented to the Audit Committee. Motion at 41. Of course, the NYAG concedes that Mehta does not intend to offer that opinion. *Id*. Thus, this argument is self-defeating and should be set aside.

Instead, the existence of the training supports Mehta's conclusions that the NRA has demonstrated a commitment to governance and internal controls by instituting regular training.

The NYAG makes a similar argument as to Mehta's opinion related to the NRA's whistleblower policy. The NYAG first concedes that Mehta "is not opining on whether there were violations of the NRA's whistleblowing policy or New York law on whistleblowing … or whether the NRA's whistleblowing policy was compliant with New York law[.]" Motion at 42. This, of course, is true. However, the NYAG then argues that Mehta "blind[ly] accept[ed]" the Audit Committee's meeting minutes related to the handling of whistleblowing complaints. There is an obvious disconnect in this argument. Mehta's review of materials (Mehta Report §VII.B) is sufficient to support his conclusion that, based on his training and experience, the "NRA has established protocols to handle whistleblowing" and those protocols encourage reporting of "good faith concerns." *Id*. at 4. Because Mehta is not offering a further opinion, the NYAG's argument here should be disregarded.[23]

In sum, the NYAG's argument that Mehta's review of the record was "superficial" and led to his "rubberstamping of the Audit Committee's actions" shows a miscomprehension of Mehta's intended testimony and opinions. Indeed, the NRA does not offer his testimony regarding the propriety of alleged related-party transactions or its Audit Committee's handling of any whistleblower complaint. Those are matters for trial. And Mehta's opinions are hardly "superficial" as is evident in the multi-page descriptions of the evidence he relied on. To the extent

[23] Though the NYAG argues that Mehta "reiterates the Audit Committee's conclusion that the complaints of … Dissident No. 1 in the Complaint, were not brought in good faith" (Motion at 44), the NYAG misses the point. Mehta discussed this as an example to explain a "key component" of the whistleblower policy. Mehta Report at 20. But Mehta offers no opinion on whether the complaint was brought in good faith. *Id*.

the NYAG believes Mehta misconstrued evidence or unduly limited his review—or disagrees with Mehta's analysis—those are grounds for cross-examination not exclusion. *Sadek*, 27 N.Y.3d at 984; *Adamy*, 92 N.Y.2d at 402; *Wathne*, 101 A.D.3d at 87; *McCullock*, 61 F.3d at 1044; *Gaste*, 863 F.2d at 1068.

CONCLUSION

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

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 11,785 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