

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,
BY LETITIA JAMES, ATTORNEY GENERAL
OF THE STATE OF NEW YORK,

Plaintiff,

v.

THE NATIONAL RIFLE ASSOCIATION
OF AMERICA, WAYNE LAPIERRE,
WILSON PHILLIPS, JOHN FRAZER, and
JOSHUA POWELL,

Defendants.
-----X

: Index No. 451625/2020
:
: IAS Part 3
:
: Hon. Joel M. Cohen
:
:

**ORAL ARGUMENT
REQUESTED**

**DEFENDANT WAYNE LAPIERRE'S MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFF'S MOTION TO EXCLUDE OR LIMIT
THE TESTIMONY OF CERTAIN DEFENSE EXPERTS**

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Motion Sequence No. 56

Defendant Wayne LaPierre (“LaPierre”), by and through his undersigned counsel, respectfully submits this memorandum of law in opposition to Plaintiff’s motion to exclude some or all of the testimony of certain defense experts (Motion Sequence No. 56) (NYSCEF 1663-1679). For the reasons set forth below, the motion should be denied.¹

PRELIMINARY STATEMENT

Plaintiff People of the State of New York, by Letitia James, Attorney General of the State of New York (“Plaintiff”) seeks to preclude Defendants The National Rifle Association of America (“NRA”), LaPierre and John Frazer (“Frazer”) from introducing the expert testimony of the NRA’s experts Alan A. Nadel (“Nadel”) and J. Lawrence Cunningham (“Cunningham”), LaPierre’s expert Michael Dennis Graham (“Graham”) and Frazer’s expert James F. Reda (“Reda”), arguing that their testimony is irrelevant, lacks a proper foundation and would not be helpful to the jury. Plaintiff’s argument is without merit because it is clear on the face of the complaint that the testimony of these experts is relevant to issues raised by the complaint, such as whether the NRA wasted assets by paying LaPierre and Frazer “excessive compensation” or by providing LaPierre with “excess benefits,” and it is clear from the NRA’s, LaPierre’s and Frazer’s expert disclosures and the challenged experts’ reports and depositions, that the experts’ opinions are proper because they would help to clarify issues calling for professional knowledge possessed by them and beyond the ken of the typical juror, and, thus meet the New York standard for admissibility of expert opinion.

¹ In accordance with Section VI., D., of the Part 3 Practices and Procedures, to avoid duplication, LaPierre hereby adopts, incorporates by reference, and, in relevant part, relies upon, the positions, facts, arguments, authorities and evidence set forth in the opposition papers filed contemporaneously herewith by the NRA and Frazer, who are similarly situated parties, *i.e.*, defendants opposing plaintiff’s motion.

STATEMENT OF FACTS

The Second Amended Verified Complaint (“Complaint”) seeks, *inter alia*, a judgment to compel “restitution” from LaPierre, Frazer and other individual defendants “to recover illegal, unauthorized or *ultra vires* compensation, reimbursements, benefits or amounts unjustly paid” to them, based on allegations that “LaPierre abused his position as a fiduciary to the NRA to obtain millions of dollars in personal benefits in the form of undisclosed, excessive compensation, which includes in-kind benefits and reimbursements from the NRA and its vendors” and that LaPierre, Frazer and others “received excessive compensation that the NRA did not accurately disclose.” See NYSCEF 646 (Complaint), at i-ii (“TABLE OF CONTENTS[:] “PART FIVE - DEFENDANTS’ VIOLATIONS OF NEW YORK LAW) *** III. The Individual Defendants Received Excessive Compensation that the NRA Did Not Accurately Disclose”); page 3 (¶ 9), pages 6-7 (¶ 15), and pages 100 – 113 (¶¶ 412-460). Moreover, specifically, in paragraph 450, the Complaint alleges: “From 2015 to 2019, the NRA reported paying LaPierre \$12,076,437 in total compensation, an average of \$2,415,287 a year,” implying that LaPierre was paid an average of \$2,415,287 a year for services performed during that five-year period, an implied assertion that is very much at issue in this case. Thus, Plaintiff’s allegations regarding “excessive compensation” and “excess benefits” comprise a substantial portion of Plaintiff’s case. Indeed, they lie at the very heart of the case.²

² See Affirmation of P. Kent Correll dated May 5, 2023 (hereinafter cited as “Correll Aff.”) at ¶ 3-6 and Exhibit 1 (Press Release from the Office of the New York State Attorney General, Letitia James, New York State Attorney General (“Attorney General James Files Lawsuit to Dissolve NRA[:] AG James’ Action Will Hold Powerful Gun Group Accountable[:] Lawsuit Details Year of Illegal Self-Dealing That Funded Lavish Lifestyle of NRA Leaders *** **NRA’s Culture of Self-Dealing, Mismanagement, and Negligence** *** The lawsuit alleges that the four men instituted a culture of self-dealing, mismanagement, and negligent oversight at the NRA that was illegal, oppressive, and fraudulent. They overrode and evaded internal controls to allow themselves, their families, favored board members, employees, and vendors to benefit through reimbursed expense,

Motion Sequence No. 56

On September 16, 2022, pursuant to CPLR 3101(d) and Commercial Division Rule 13, LaPierre served his expert disclosure, indicating his intention to call Graham to offer testimony and evidence at trial to show, among other things, that the amount of compensation the NRA paid to LaPierre was reasonable, and that that would be true even if the alleged “excess benefits” were treated as “compensation,” as Plaintiff argues they should be.³ Graham holds a Bachelor of Science degree in engineering from Worcester Polytechnic Institute and a Master of Business Administration degree from Rensselaer Polytechnic Institute. (*Id.*, Exhibit 2, ¶ 4.) He is employed as a consultant at Grahall LLC (“Grahall”), an organization he founded which has grown from two partners to sixty partners in 26 cities in the U.S., Canada, India and Switzerland. (*Id.*, Exhibit 2, Exhibit A (Exhibit D: “Mr. Graham’s Qualifications to Provide an Opinion”), at 58.) Grahall is a consulting firm that advises clients on human resources, reward strategy and compensation. (*Id.*, at 57.) Graham has over 45 years of experience in the human resources and executive compensation advisory services fields leads the firm’s Compensation Advisory services. (*Id.*,

related party transactions, *excess compensation*, side deals, and *waste* of charitable assets without regard to the NRA’s best interests. *** The complaint lays out numerous ... instances in which LaPierre, Phillips, Powell, Frazer, and other executives and board members at the NRA abused their power and illegally diverted or facilitated the diversion of tens of millions of dollars from the NRA. These funds were in addition to millions of dollars the four individual defendants were already receiving in *grossly excessive salaries and bonuses that were not in line with the best practices and prudent standards for evaluating and determining compensation.*”) (bolding in original; italics added). Thus, Plaintiff has clearly injected the issue of whether the four individual defendants received “grossly excessive salaries and bonuses that were not in line with the best practices and prudent standards for evaluating and determining compensation” into this case.

³ See Correll Aff. at ¶¶ 7-26 and Exhibit 2 (Disclosure Pursuant to CPLR 3101(d) and Commercial Division Rule 13 (hereinafter cited as “Expert Disclosure”) and accompanying Exhibit A (“Expert Opinion Report on Reasonable Compensation [of] Executive Vice President of the National Rifle Association and Evaluation of the Governance Process that Determined that Compensation” of Michael Dennis Graham, Consultant, Grahall, LLC) (hereinafter cited as “Graham’s Expert Report”).

Exhibit 2, ¶ 4.) He has served on the editorial board of the Compensation and Benefits Review.

(*Id.*)

Graham regularly advises clients in the area of executive compensation and benefits and has advised on compensation and benefits in a range of industries for both public and private companies, including both for profit and not-for-profit corporations, in many countries around the world. (*Id.*, Exhibit 2, ¶ 5.) He has been retained by the Internal Revenue Service in connection with the determination of reasonable compensation in a variety of cases, including two major cases where millions of dollars of compensation were deemed to have been unreasonably paid to the CEOs of the organizations in question. (*Id.*) He served as the IRS's expert in those cases. (*Id.*) In addition to issuing reasonableness opinions, Graham provides executive compensation analysis and opinions to support determinations under corporate bylaws and certain regulatory statutes addressing executive and employee compensation. (*Id.*) Graham's experience includes serving as the Worldwide Director of Compensation and Benefits for both Bausch & Lomb and Albany International. (*Id.*, ¶ 6.) In his 37-year consulting career he has advised over a thousand organizations on compensation and benefits programs and issues and has served as Practice Director for five major consulting firms. (*Id.*) In addition, he has served as a consulting expert in litigation matters involving compensation and benefits and as a testifying expert in litigation matters involving compensation and benefits. (*Id.*)⁴

Graham is expected to testify regarding the compensation received by LaPierre in connection with services performed for the NRA, the process by which the compensation was determined and fixed and whether the amount of compensation was reasonable and commensurate

⁴ Further information regarding Graham's professional skill, training, education, knowledge and experience is provided in LaPierre's Expert Disclosure and in Graham's Expert Report at Exhibits D, E and F.

with services performed. *See* Correll Aff., Exhibit 2 (Expert Disclosure), ¶ 2. In addition, he is expected to testify regarding methodologies for determining the reasonableness of compensation and other benefits as well as custom and practice in the fields of corporate management and executive compensation and benefits that inform his opinion about the amount of compensation LaPierre received and the reasonableness of the compensation, the reasonableness of the other benefits he received, and the process by which the compensation and benefits were determined. (*Id.*)

In his report, Graham offers the opinion that the compensation and benefits LaPierre received in connection with his work for the NRA, as alleged in the Complaint, were reasonable and commensurate with services performed and were determined and fixed in accordance with, or in substantial compliance with, custom and practice in the field of executive compensation and benefits, the Not-for-Profit Corporation Law (“N-PCL”), and the Bylaws of the Association. (*Id.* ¶ 3.) The substance of Graham’s opinion is detailed in his expert report at pages 5-9. (*Id.*)

Graham’s opinion is based on (1) his experience and expertise in the areas of corporate and not-for-profit executive compensation and benefits (2) the pleadings in this action (which are verified); (3) the deposition transcripts and exhibits in this action; (4) documents produced in this action; and (5) applicable professional standards. (*Id.* ¶ 8). The documents upon which Graham has specifically relied are listed in Exhibits G and H of his report. (*Id.*)

In his supplemental report, Graham states that, based on his receipt of additional information bearing on the issue of whether the compensation paid by the NRA to LaPierre was reasonable, he performed an additional analysis and concluded that LaPierre’s compensation was

even farther below the 50th percentile benchmark shown in his initial report, further showing that LaPierre's compensation was reasonable.⁵

In his rebuttal report, Graham addresses certain statements made by Plaintiff's experts Erica Harris, Eric Hines and Jeffrey Tenenbaum on the subject of reasonable compensation, noting that neither Plaintiff nor her designated experts had provided any expert opinion of substance, or any evidence, that the amount of LaPierre's compensation was "more than was reasonable," and addressed Plaintiff's conflation of the term "excessive compensation" with the term "reasonable compensation" expressing the opinion that Plaintiff's use of those terms was both inappropriate and technically incorrect.⁶

In addition, he addresses the issue, raised by Plaintiff in her expert disclosure, of whether all of the allegedly "normal" compensation elements of base salary, bonuses and perquisites appeared appropriately in the NRA's filed Form 990s. (*Id.* at 5.) Graham expressed the opinion that even if travel expenses were treated as compensation, as Plaintiff contends they should be, the total compensation paid by the NRA to LaPierre would still not be "unreasonable." (*Id.*)

Further, Graham explains that the number presented by Plaintiff as the amount of "total compensation" received by LaPierre in 2015 for services performed in 2015 was inflated because it included a payment of \$3,463,368 from a 457(f) non-qualified deferred compensation plan" which was the result of a substantial number of years of contributions and fund appreciation by

⁵ See Correll Aff. ¶¶ 27-29 and Exhibit 3 ("Supplemental Disclosure Pursuant to CPLR 3101(d) and Commercial Division Rule 13") and Exhibit A ("Supplemental Expert Report" of Michael Dennis Graham, Consultant, Grahall, LLC, dated October 6, 2022), at 2.

⁶ See Correll Aff. ¶¶ 30-35 and Exhibit 4 (Disclosure of Expert Rebuttal Reports Pursuant to CPLR Rule 3101(d) and Commercial Division Rule 13 and Exhibit A ("Expert Rebuttal Report[.] Mr. LaPierre's Compensation as the Executive Vice President of the National Rifle Association and Evaluation of the Governance Process that Determined that Compensation" of Michael Dennis Graham, Consultant, Grahall, LLC dated October 7, 2022) (hereinafter cited as "Rebuttal Report"), at 4-5.

the NRA for LaPierre, noting that, “[w]hen determining reasonable compensation, this payment is required by the IRS to be divided over the course of years during which the contribution to the deferred compensation were made by Mr. LaPierre, not when they were received by him (not in 2015, the year when he turned 65).” (*Id.* at 5).

In short, Graham offers the opinion that LaPierre was underpaid as compared to the competitive market, even if the value of charter travel is treated as compensation.

In sum, the issue of whether the NRA paid LaPierre excessive compensation and provided him with “excess benefits” in violation of the Not-for-Profit Corporation Law (“N-PCL”) or the Estates Powers and Trusts Law (“EPTL”) is central to the case, and resolution of that issue necessarily requires expert testimony on the issue of what amount of “compensation” and “benefits” is “reasonable.” LaPierre is entitled to defend himself by having a highly qualified compensation and benefits expert help educate the jury as to what constitutes “compensation,” what constitutes “benefits,” and what amount of “compensation” and “benefits” is “reasonable” and commensurate with the services LaPierre performed for the NRA.

Accordingly, LaPierre respectfully requests that this Court deny Plaintiff’s motion to the extent it seeks to preclude him from introducing the expert testimony of his compensation and benefits expert, to the extent it seeks to preclude the NRA from introducing the expert testimony of its compensation and benefits and security experts, and to the extent it seeks to exclude Frazier from introducing the expert testimony of his compensation and benefits expert, whose expert opinions are all proper because they would help to clarify issues calling for professional knowledge possessed by the experts and beyond the ken of the typical juror.

LEGAL STANDARD

“The admission of an expert opinion is a matter within the sound discretion of the court” (*Oboler v. City of New York*, 31 A.D.3d 308, 308 (1st Dep’t 2006) (citation omitted); *Norddeutsche Landesbank Girozentrale v. Tilton*, 2022 WL 2101615 (N.Y. Sup.), 2022 N.Y. Slip Op. 31854(U) (Trial Order) *1 (citing *Oboler*). “The guiding principle is that the 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. Cnty. of Erie*, 60 N.Y.2d 296, 307 (1983)); *Norddeutsche Landesbank Girozentrale*, *supra*, at *1 (citing *De Long*). “For a witness to be qualified as an expert, the witness must possess the requisite skill, training, education, knowledge or experience from which it can be assumed that the opinion rendered is reliable” (*Schechter v. 3320 Holding LLC*, 64 A.D.3d 446, 449 (1st Dep’t 2009) (citation omitted); *Norddeutsche Landesbank Girozentrale*, *supra*, at *1-2 (citing *Schechter*). Any objection to an expert’s qualifications goes to the weight rather than the admissibility of the expert’s testimony. *Williams v. Halpern*, 25 A.D.3d 467, 468 (1st Dep’t 2006). Any defects in the opinions of an expert 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.” *Sadek v. Wesley*, 27 N.Y.3d 982, 984 (2016). “[I]t falls to the opponent of the testimony to bring out weaknesses in the expert’s qualifications and foundational support on cross-examination.” *Adamy v. Ziriakus*, 92 N.Y.2d 396, 402 (1998). Where opposing parties present expert testimony in support of their positions, “it is the province of the jury to determine the experts’ credibility.” *Monroy v. Glavas*, 57 A.D.3d 631, 632 (2d Dep’t 2008).

ARGUMENT**I. The Expert Opinions of Nadel, Graham, Reda and Cunningham Are Proper because They Would Help Clarify Issues Calling for Professional Knowledge Possessed by Them and Beyond the Ken of the Typical Juror.**

Plaintiff argues that the Court should exclude the opinions of Nadel, Graham and Reda concerning the “purported” reasonableness of compensation paid to LaPierre, Frazer and the other two individual defendants (the “Individual Defendants”) because: (1) “an expert opinion must be helpful to the trier of fact and relevant to be admissible” (explaining that, “in other words, a court must find that it logically advances a material aspect of the case”); (2) opinions regarding the reasonableness of the Individual Defendants’ compensation as compared to purportedly similar executives in allegedly comparable organizations is [sic] not relevant or helpful here,” since “Plaintiff does not contend that NRA executive’s [sic] reported compensation is outside the median range of pay for executives in comparable positions at nonprofits of comparable size;” (3) the opinions of Nadel, Graham and Reda are “[u]ntethered from executive performance” and do not include “any analysis of the unreported and substantial excess benefits received by several of the Individual Defendants;” (4) the opinions are “unnecessary, not helpful to the trier of fact, and likely to be confusing to the jury;” (5) the opinions are excludable as irrelevant, since they do not address the bases for Plaintiff’s claims concerning compensation—i.e., that (a) “the NRA did not follow its own procedures in setting compensation,” (b) “the OCC and Board did not consider the full compensation, including excess benefits ... received by the Individual Defendants,” and (c) “the NRA did not accurately report either its manner or setting compensation or the full compensation to the Individual Defendants on the NRA’s regulatory filings;” and, finally, (6) “Whether the NRA executives’ reported compensation, without reference to their performance and their receipt of

excess benefits, private travel, housing allowances, travel allowances, luxury meals, etc., was reasonable is simply not at issue.” (NYSCEF 1712 at 6-7).

There are two problems with Plaintiff’s argument: *first*, as the Court of Appeals has held (and as this Court has acknowledged), on a motion to preclude a party from introducing expert testimony, “[t]he guiding principle is that the 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” (*see De Long and Norddeutsche Landesbank Girozentrale, supra*); and *second*, here, the expert testimony of Nadel, Graham and Reda would help to clarify issues calling for professional knowledge, possessed by them and beyond the ken of the typical juror, including, among others, the issue of whether the compensation and benefits LaPierre received in connection with his work for the NRA, as alleged in the complaint, were reasonable and commensurate with services performed and were determined and fixed in accordance with, or, in substantial compliance with, custom and practice in the field of executive compensation and benefits, the Not-for-Profit Corporation Law and the Bylaws of the Association.⁷

⁷ See Correll Aff., Exhibit 2 (Graham’s Expert Report), ¶3. In *De Long*, the Court of Appeals affirmed an order of the Appellate Division, which affirmed an order of the trial court allowing expert testimony on the issue of what constituted “fair and just compensation” under EPTL § 5-4.3. In *Norddeutsche Landesbank Girozentrale*, the defendants sought to preclude plaintiffs from introducing the testimony of a law professor who, in his report, offered three opinions. Applying the legal standard set forth above, the Court granted the motion with respect to one of the opinions and denied it with respect to the other two. The cases relied on by Plaintiff are clearly distinguishable on their facts, since they did not involve highly qualified experts in a recognized field of professional practice offering testimony on issues at the heart of the case, i.e., on the reasonableness of compensation and benefits and the process by which they were determined.

CONCLUSION

For the reasons stated above, and the additional reasons stated by the NRA and Frazer in their opposing briefs, the Court should deny Plaintiff's motion to exclude some or all of the testimony of defense experts Nadel, Graham, Reda and Cunningham.

Dated: New York, New York
May 5, 2023

Respectfully submitted,

/s/ P. Kent Correll

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RULE 17 CERTIFICATE OF COMPLIANCE

I, P. Kent Correll, an attorney duly admitted to practice law before the courts of the State of New York, certify that the memorandum of law complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)), because the memorandum of law contains 3,278 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law and affirmation.

Dated: New York, New York
May 5, 2023

/s/ P. Kent Correll

P. Kent Correll, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record on this 5th day of May 2023.

/s/ P. Kent Correll
P. Kent Correll