

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

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

Plaintiff,

v.

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

Defendants.

Index No. 451625/2020

Hon. Joel M. Cohen

Motion Seq. Nos. 50, 52, 54

**PLAINTIFF'S CONSOLIDATED MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' MOTIONS TO EXCLUDE THE
TESTIMONY OF EXPERT JEFFREY TENENBAUM**

LETITIA JAMES
Attorney General of the
State of New York
28 Liberty Street
New York, NY 10005

Monica Connell
Stephen Thompson
Assistant Attorneys General

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
FACTUAL BACKGROUND.....	2
I. MR. TENENBAUM IS A NATIONALLY RECOGNIZED EXPERT ON NONPROFIT GOVERNANCE	2
II. MR. TENENBAUM’S INITIAL EXPERT REPORT	3
ARGUMENT	6
I. STANDARDS GOVERNING ADMISSIBILITY OF EXPERT TESTIMONY	6
II. MR. TENENBAUM’S TESTIMONY IS ADMISSIBLE BECAUSE IT WOULD ASSIST THE TRIER OF FACT ON MATTERS OF CORPORATE GOVERNANCE, FIDUCIARY RESPONSIBILITIES, AND MANAGEMENT STANDARDS IN THE NONPROFIT SECTOR.....	9
III. DEFENDANTS’ OBJECTIONS TO MR. TENENBAUM’S TESTIMONY ARE GROUNDLESS	10
A. Mr. Tenenbaum’s conclusions are factual, not legal.....	10
B. Mr. Tenenbaum has ample expertise in the applicable standards.	11
C. The NRA’s conclusory argument that Mr. Tenenbaum lacks independence should be ignored.....	12
D. Mr. Tenenbaum’s factual recitations are necessary to formulate his opinions.	12
E. The NRA’s challenges to Mr. Tenenbaum’s reliability misstate his report.....	13
CONCLUSION.....	15

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Barbero v. CSX Transp.</i> , 185 N.Y.S.3d 895 (Sup. Ct. Albany Cnty. Feb. 6, 2023)	7
<i>Cary Oil Co. v. MG Ref. & Mktg.</i> , No. 99 Civ. 1725, 2003 WL 1878246 (S.D.N.Y. Apr. 11, 2003)	12, 14
<i>Clingman & Hanger Mgmt. Assocs., LLC v. Nobel</i> , No. 16-62028-CIV, 2018 WL 11459532 (S.D. Fla. May 8, 2018)	8, 11
<i>De Long v. Erie Cnty.</i> , 60 N.Y.2d 296 (1983)	6
<i>Greenberg v. Spitzer</i> , No. 800004/2018, 2020 WL 1561376 (Sup. Ct. Putnam Cnty. Mar. 6, 2020)	15
<i>Hurrell-Harring v. State of N.Y.</i> , 119 A.D.3d 1052 (3d Dep't 2014)	8
<i>In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.</i> , No. 05-MD-1720, 2022 WL 14862098 (E.D.N.Y. Oct. 8, 2022)	15
<i>Matott v. Ward</i> , 48 N.Y.2d 455 (1979)	11
<i>People v. Abney</i> , No. 3314/05, 2011 WL 2026894 (Sup. Ct. N.Y. Cnty. May 5, 2011)	15
<i>People v. Aphaylath</i> , 68 N.Y.2d 945 (1986)	6
<i>People v. Cronin</i> , 60 N.Y.2d 430 (1983)	7
<i>People v. Lee</i> , 96 N.Y.2d 157 (2001)	7
<i>People v. Oliver</i> , 45 Misc. 3d 765 (Sup. Ct. Kings Cnty. 2014)	6
<i>Pereira v. Cogan</i> , 281 B.R. 194 (S.D.N.Y. 2002)	8, 10-11

<i>Reach Music Pub., Inc. v. Warner Chappell Music, Inc.</i> , 988 F. Supp. 2d 395 (S.D.N.Y. 2013).....	12
<i>Risto v. Screen Actors Guild-American Fed’n of Tv & Radio Artists</i> , No. 18-cv-07241, 2021 WL 4143242 (C.D. Cal. July 19, 2021).....	8
<i>Robins v. City of Long Beach</i> , 192 A.D.3d 709 (2d Dep’t 2021)	6-7
<i>Selkowitz v. Nassau Cnty.</i> , 45 N.Y.2d 97 (1978)	6
<i>SLSJ, LLC v. Kleban</i> , 277 F. Supp. 3d 258 (D. Conn. 2017).....	7
<i>Snead v. Wright</i> , Nos. 19-cv-00092 & 19-cv-00209	8, 10
<i>Tindall v. H & S Homes, LLC</i> , No. 10-cv-044, 2012 WL 3241885 (M.D. Ga. Aug. 7, 2012)	8
State Statutes and Regulations	
N-PCL § 715	9
22 N.Y.C.R.R. § 202.70(g)	12

On behalf of the Plaintiff, the People of the State of New York (“Plaintiff”), the Office of Attorney General Letitia James (“OAG”) respectfully submits this consolidated memorandum of law in opposition to the National Rifle Association of America’s (“NRA”) motion to exclude expert testimony from Jeffrey Tenenbaum, and the joinder motions by Defendants Wilson Phillips, Wayne LaPierre, and John Frazer. Mot. Seq. Nos. 50, 52, 54.

PRELIMINARY STATEMENT

Central to this case is the question of what is and is not prudent and responsible fiduciary practice in the governance, management, and oversight of charitable assets of a New York charitable nonprofit. Plaintiff alleges that the NRA failed to properly administer the organization’s charitable assets and that Wayne LaPierre, Joshua Powell, Wilson Phillips, and John Frazer (collectively, the “Individual Defendants”) repeatedly ignored and violated their fiduciary duties. Relevant to and informative of whether there has been a violation of duties are the applicable standards of prudence and care of nonprofit organizations and their fiduciaries. Plaintiff contends that Defendants violated their obligations: they ignored glaring red flags, violated their own policies and internal controls, and participated in or permitted the diversion of millions of dollars away from the NRA’s mission. It will be helpful to a fact finder to hear from an expert in the charitable sector as to how far the NRA and its leadership deviated from recognized standards of prudence and care in charitable governance.

For example: is it prudent and consistent with industry standards for Defendants to freeze out directors who raise concerns about the organization’s financial condition? Is it normal for a nonprofit charity to have dozens of paid arrangements with officers, directors, their families, or affiliated entities? Is it consistent with the standard of care within the industry and with Defendants’ fiduciary obligations for a nonprofit charity to enter into verbal contracts worth tens

of millions of dollars? Would the board of directors and executive team of a nonprofit charity typically be informed prior to the entity being placed into bankruptcy?

Jeffrey Tenenbaum, a nationally respected expert on charities and nonprofits, and an experienced lawyer, consultant, board trainer and advisor, provides reliable testimony to assist the trier of fact in answering these questions here. Courts in New York frequently admit such expert testimony on the industry standards that inform fiduciary duties and standards of care as well as testimony about departures from the applicable standard of care. The typical juror has not overseen or advised a nonprofit corporation, let alone one of the NRA's size. Nor has the typical juror served on a nonprofit board. But jurors will be called on to determine whether Defendants properly administered the NRA's assets, appropriately handled conflicts of interest and related party transactions, and whether the Individual Defendants violated their fiduciary obligations, and those determinations will require them to evaluate Defendants' conduct against standards and practices for charitable fiduciaries. Mr. Tenenbaum's testimony will benefit and assist the jury through his specialized knowledge, which is not within the knowledge and experience of the average juror.

Defendants' objections to Mr. Tenenbaum's testimony are without merit. Mr. Tenenbaum's experience and expertise in current industry standards for nonprofit corporate governance are indisputable. His testimony is and will be reliable, and he is not offering any improper legal or factual conclusions. For the reasons provided below, Plaintiff respectfully requests that the Court deny Defendants' motions to exclude Mr. Tenenbaum's testimony.

FACTUAL BACKGROUND

I. MR. TENENBAUM IS A NATIONALLY RECOGNIZED EXPERT ON NONPROFIT GOVERNANCE

Jeffrey Tenenbaum is the founder and the Managing Partner of the Tenenbaum Law Group PLLC. (NYSCEF 1453 Ex. A (hereinafter the "Tenenbaum Report") at 2.) He counsels hundreds

of trade and professional membership associations, public charities, foundations, international non-governmental organizations, think tanks, educational institutions, advocacy groups, arts and cultural organizations, and other types of nonprofit organizations and charities. (*Id.* at 52; *see also* NYSCEF 1453 Ex. C (hereinafter the “Tenenbaum CV”) at 1). In the past several years alone, Mr. Tenenbaum has given dozens of presentations on nonprofit governance issues to industry members and authored dozens of articles on the same. (*Id.* at 4 *et seq.*)

Mr. Tenenbaum’s practice involves counselling senior management and boards of directors on a broad range of business and governance issues. He trains nonprofit boards of directors on their fiduciary duties and the practical aspects of nonprofit board service. (Tenenbaum Report at 1; NYSCEF 1454 at 624:21-625:3; *see generally* Tenenbaum CV.) He also regularly represents clients before federal and state regulatory agencies, and in connection with governmental and internal investigations. (Tenenbaum CV at 1.) Prior to founding Tenenbaum Law Group PLLC, he chaired the Nonprofit Organizations Practice Group at Venable LLP, a national law firm based in Washington, DC. (Tenenbaum Report at 1; Tenenbaum CV at 2.) He is the author of a reference book titled *Association Tax Compliance Guide* and is frequently asked to comment on nonprofit issues in the national media. (Tenenbaum CV at 2) A full recitation of Mr. Tenenbaum’s qualifications is included in his initial expert report and accompanying CV. (*See generally* NYSCEF 1453.)

II. MR. TENENBAUM’S INITIAL EXPERT REPORT

In his report, Mr. Tenenbaum provides expert information on “fiduciary duties and the standards of conduct generally applicable to nonprofit[s] and their officers, directors and trustees.” (Tenenbaum Report at 1.) He opines on standards of care applicable to certain key areas of compliance that are important for nonprofits, such as whistleblower protections, related party transactions review and approval procedures, standards for handling and resolving conflicts of

interest, and transparency to stakeholders and regulators. He also provides his opinion on whether each of the Individual Defendants acted consistently with such duties and standards of care, and whether Defendants administered the NRA's charitable assets consistent with applicable standards. (*Id.* at 1, 4-5).

As disclosed in his report, Mr. Tenenbaum will be able to provide testimony on what a nonprofit organization is; the industry standards of care and fiduciary duties of officers, directors, and managers; and the oversight regimes to which nonprofits are subject. This is essential information for a factfinder. An average juror may not understand the various structures and terminology that will be used at trial. For example, Mr. Tenenbaum will provide the factfinder with important information about the role that audit committees play in nonprofit governance, and the different types of audits that nonprofits routinely undergo. (Tenenbaum Report at 16-17.) Mr. Tenenbaum will also speak to common practices in the nonprofit industry used to address compliance, such as the creation of a chief compliance officer role, the use of an internal audit function, and effectively implemented policies and procedures. (*Id.* at 18-20.) In his report, Mr. Tenenbaum provides a general overview of the NRA's own governance structure (*id.* at 20), and compares the NRA's policies and procedures, and their implementation by its fiduciaries, against nonprofit standards to provide the factfinder with necessary context for just how far outside the norms of good governance the NRA has fallen under the leadership of the Individual Defendants. (*Id.* at 21-29, 42-51, 52-61.) Mr. Tenenbaum also provides a critical perspective on what actions he would have *expected* to see from an organization attempting to right itself after years of dysfunctional governance. (*Id.* at 58-65.) While the Court will always ultimately define and instruct the jury on the law, Mr. Tenenbaum will be able to educate and assist the factfinder on issues including:

- The importance of charities and nonprofits in American society (*id.* at 6);
- The general way in which a nonprofit is governed, *e.g.*, by a board of directors with an executive team, and the NRA’s own structure (*id.* at 7-8, 20);
- The fiduciary duties that nonprofits are bound by, and how those duties affect the day-to-day operations of nonprofits (*id.* at 8-11);
- Certain parts of the Tax Code relevant to nonprofits and their impact on day-to-day operations of a nonprofit (*id.* at 11-15);
- The role that internal controls have in nonprofits to prevent fraud and waste, and how properly managed nonprofits implement their internal controls (*id.* at 15-20);
- The role of a nonprofit’s audit committee and independent auditor, and that a “clean” financial audit is not a validation of the efficacy of a nonprofit’s internal controls (*id.* at 16-17);
- The reporting requirements that nonprofits have at both the federal and state levels (*id.* at 17-18);
- The purpose and importance of written policies and procedures addressing conflicts of interest, related party transactions, contract management, and other key areas of nonprofit governance, and the equal importance of consistently and regularly enforcing those written policies (*id.* at 18, 21-25);
- The way in which larger nonprofits commonly establish an internal audit function designed to assess the nonprofit’s internal controls and risks (*id.* at 19);
- The way in which larger nonprofits commonly create a “Chief Compliance Officer” role responsible for broadly overseeing the nonprofit’s compliance program(s) (*id.*);
- The ways in which the NRA and the Individual Defendants failed to follow both standards for good governance and the NRA’s own written policies for dealing with conflicts of interest, related party transactions, contracting, and procurement (*id.* at 21-42);
- The importance of effective whistleblower policies and protections in nonprofits, and what a standard whistleblower program looks like compared to the NRA’s (*id.* at 42-46);
- The standards for how executive expenses and reimbursements are handled at nonprofits compared against the NRA’s regime (*id.* at 52-57);
- Particular examples of how the NRA and the Individual Defendants failed to follow both standards of good governance and the NRA’s own policies with respect to conflicts, procurement, whistleblowers, expenses, and related party transactions, including with respect to Membership Marketing Partners (*id.* at 29-34), McKenna & Associates (*id.* at 34-35), contracts and payments between the NRA and its officers and directors (*id.* at 36-42), numerous whistleblowers who raised concerns and were retaliated against by the

NRA (*id.* at 42-52), and the NRA's and the Individual Defendants' failure to comply with expense reimbursement guidelines and requirements (*id.* at 52-57); and

- The actions Mr. Tenenbaum would have expected to see to rectify the nature and extent of problems presented based on his decades of experience, compared against the NRA's own course correction (*id.* at 57-65).

The NRA, John Frazer, Wilson Phillips, and Wayne LaPierre moved to exclude Mr. Tenenbaum's report on numerous grounds that, for the reasons provided below, all fail.¹

ARGUMENT

I. STANDARDS GOVERNING ADMISSIBILITY OF EXPERT TESTIMONY

The admissibility and limits of expert testimony fall within the sound discretion of the trial court. *De Long v. Erie Cnty.*, 60 N.Y.2d 296, 307 (1983); *Robins v. City of Long Beach*, 192 A.D.3d 709, 710 (2d Dep't 2021). An "expert opinion is proper" and may be admitted "when it would help clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror." *DeLong*. 60 N.Y.2d at 307. Expert testimony is admissible not only on "highly technical" questions but, more broadly, "to clarify a wide range of issues calling for the application of accepted professional standards." *Selkowitz v. Nassau Cnty.*, 45 N.Y.2d 97, 101 (1978). Expert testimony must be "sufficiently relevant to have probative value." *People v. Aphaylath*, 68 N.Y.2d 945, 947 (1986). As gatekeepers in determining the admissibility of expert testimony, the trial court must determine that three principal requirements are met: the expert must be qualified, the expert's opinion must be relevant and helpful to the trier of fact, and the expert's opinion must be reliable. *People v. Oliver*, 45 Misc. 3d 765, 776-77 (Sup. Ct. Kings Cnty. 2014).

¹ Mr. Tenenbaum also prepared a rebuttal report in response to several proffered NRA expert witnesses. *See* Affirmation of Stephen Thompson in Support of Plaintiff's Opposition to Defendants' Motions to Exclude the Testimony of Expert Jeffrey Tenenbaum dated May 5, 2023 ("Thompson Aff.") at Ex. A. Defendants do not challenge that report, but to the extent that Defendants view any of their arguments as directed to that rebuttal report, Plaintiff incorporates its arguments herein.

In New York, expert witnesses may testify as to “the ultimate questions and those of lesser significance,” with the bounds of expert testimony addressed to the discretion of the trial court. *People v. Cronin*, 60 N.Y.2d 430, 432-33 (1983). The key inquiry is whether, without expert testimony, “the facts cannot be stated or described to the jury in such a manner as to enable them to form an accurate judgment thereon, and no better evidence than such opinions is attainable.” *Id.* at 433 (internal quotation marks and citations omitted).

The trial court must be careful not to exclude testimony that would aid a lay jury “merely because, to some degree, it invades the jury’s province.” *People v. Lee*, 96 N.Y.2d 157, 162 (2001) (“Essentially, the trial court assesses whether the proffered expert testimony would aid a lay jury in reaching a verdict.”) (internal quotation marks and citation omitted); *see also SLSJ, LLC v. Kleban*, 277 F. Supp. 3d 258, 264 (D. Conn. 2017) (“[D]oubts about the usefulness of an expert’s testimony should be resolved in favor of admissibility.”) (internal citations omitted). Even where the jury may have some familiarity with a matter, testimony directed to that matter which goes beyond their ordinary experience is permissible and should be included. For example, In *Lee*, the New York Court of Appeals held that testimony regarding accuracy of witness identification was beyond the ken of the typical juror, “despite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification.” *Lee*, 96 N.Y.2d at 162 (decided on other grounds).

Courts routinely permit testimony regarding standard business practices in an industry or sector, including whether specific acts or omissions constitute departures of the standard of care under the circumstances presented in a given case. *See, e.g. Robins*, 192 A.D.3d at 7104; *Barbero v. CSX Transp.*, 185 N.Y.S.3d 895, 900 (Sup. Ct. Albany Cnty. Feb. 6, 2023). This practice applies for business standards generally, and in the context of fiduciary duty and corporate governance

more specifically. *Hurrell-Harring v. State of N.Y.*, 119 A.D.3d 1052, 1053 (3d Dep’t 2014) (permitting expert testimony on the professional standards applicable to the operation of indigent defense systems).

Federal court rulings are also instructive here. In the case of *Pereira v. Cogan*, 281 B.R. 194 (S.D.N.Y. 2002), the court found that the expert’s description and examples of “what he believes good corporate practices require according to industry and custom” would be potentially useful to the trier of fact. *Id.* at 200. The court agreed that the expert, a lawyer, was not providing a legal opinion but rather provided those examples based on his years of experience in the corporate governance field and his observations of “good corporate practices.” *Id.*; accord *Risto v. Screen Actors Guild-American Fed’n of Tv & Radio Artists*, No. 18-cv-07241, 2021 WL 4143242, at *8 (C.D. Cal. July 19, 2021) (permitting testimony “regarding the prevailing standards for good governance of a non-profit entity and, to the extent that federal and state laws and regulations inform that standard, [and discussion of] those relevant statutes and regulation”); *Tindall v. H & S Homes, LLC*, No. 10-cv-044, 2012 WL 3241885, at *12 (M.D. Ga. Aug. 7, 2012) (holding that testimony about “deviation from normal or standard business practices” was factual, rather than legal, in nature, and collecting cases); *Clingman & Hanger Mgmt. Assocs., LLC v. Knobel*, No. 16-62028-CIV, 2018 WL 11459532, at *7 (S.D. Fla. May 8, 2018) (permitting expert to “testify regarding industry custom and practices and how those customs and practices are shaped by the relevant law”); *Snead v. Wright*, Nos. 19-cv-00092 & 19-cv-00209 consolidated, 2022 WL 4095907, at *3 (D. Alaska Sept. 7, 2022) (permitting expert to “explain[] the applicable industry standards and best practices garnered from his experience in the industry and how [defendant’s] actions and decisions failed to comport with these standards and practices”).

II. MR. TENENBAUM'S TESTIMONY IS ADMISSIBLE BECAUSE IT WOULD ASSIST THE TRIER OF FACT ON MATTERS OF CORPORATE GOVERNANCE, FIDUCIARY RESPONSIBILITIES, AND MANAGEMENT STANDARDS IN THE NONPROFIT SECTOR

The Court should permit Mr. Tenenbaum to provide testimony on the standards of care for fiduciaries and the customs and practices in the nonprofit sector, and to opine on whether Defendants' actions departed from those duties and standards, because his testimony meets the applicable standard for admissibility.

A lay juror would not be familiar with the standards of care for charitable nonprofit organizations regarding topics such as conflicts of interest, contract procurement, oversight of expenditures for fundraising and donor development, related party transactions, treatment of whistleblower complaints, oversight of executive spending on travel and entertainment, and the administration of a charity's finances more generally. In this case, the jury will be presented with facts demonstrating that Defendants' actions constitute violations of fiduciary duties, with Defendants likely asserting that their actions were within acceptable bounds. (*See, e.g.*, NYSCEF 864 at 116-17 (Frazer answer alleging that he acted in good faith at all times); NYSCEF 889 at 164 (NRA answer alleging same).) Many of these facts, however, raise issues requiring specialized knowledge of fiduciary standards and practices in the charitable nonprofit world that are outside the knowledge and experience of the average juror.

For example, one issue is whether Defendant John Frazer, who, as Secretary and General Counsel of the NRA, fulfilled his fiduciary duties when he failed to follow and implement appropriate policies and procedures for identifying and addressing numerous related party transactions with board members. (*See, e.g.*, NYSCEF 646 ¶¶ 381-411, 552-561, 649-653, 690-696.) This is not only a question of whether there were violations of law (specifically, N-PCL § 715), but it also requires a jury to understand what a related party transaction is, why related party

transactions present heightened risk to charities, why they are subject to special procedures, and what the standards are in the nonprofit sector for the consideration and approval of such transactions.

As another example, the Attorney General alleges that the NRA's actions against Lt. Col. Oliver North (and others) constituted improper retaliation against whistleblowers. (NYSCEF 646 ¶¶ 461-491, 697-701.) To determine whether Defendants violated the N-PCL and their fiduciary duties, jurors will have to understand standard practice in the nonprofit sector when it comes to the handling of whistleblower complaints.

Mr. Tenenbaum's report addresses both general standards and his opinion as to whether Defendants violated those standards. (Tenenbaum Report at 8-11, 21-52.) Courts routinely permit such testimony. *See, e.g., Pereira*, 281 B.R. at 200 (permitting lawyer to testify on industry standards and customs); *Snead*, 2022 WL 4095907, at *3 (same).

III. DEFENDANTS' OBJECTIONS TO MR. TENENBAUM'S TESTIMONY ARE GROUNDLESS

A. Mr. Tenenbaum's conclusions are factual, not legal.

In an effort to treat Mr. Tenenbaum's report as a "motion for summary judgment" (NYSCEF 1451 at 10), the NRA improperly reads legal conclusions into Mr. Tenenbaum's standard expert opinions about the NRA's practices as compared to the industry norms of which Mr. Tenenbaum is an expert.

For example, the NRA accuses Mr. Tenenbaum of "interpret[ing] New York law as to the meaning of an 'adequate control environment,'" "espous[ing] his opinion as to the adequacy of the NRA's internal controls," and defining "effective compliance program." (NYSCEF 1451 at 10.) But "adequate control environment," "internal controls," and "effective compliance program" are

not elements of legal standards—they are industry terms that a lay juror is unlikely to be familiar with, about which Mr. Tenenbaum’s expert opinion is intended to educate the factfinder.

The fact that Mr. Tenenbaum references applicable statutes that inform the duties of New York nonprofits and their officers is of no moment—experts may “testify regarding industry custom and practices and how those customs and practices are shaped by the relevant law.” *Clingman*, 2018 WL 11459532, at *7.

B. Mr. Tenenbaum has ample expertise in the applicable standards.

It is undeniable that Mr. Tenenbaum has experience in the field of nonprofit governance, and has the “requisite skill, training, education, knowledge or experience” needed to make his opinion reliable. *See Matott v. Ward*, 48 N.Y.2d 455, 459 (1979). (*See generally* Tenenbaum CV.) The NRA acknowledges, as it must, that Mr. Tenenbaum has substantial relevant experience from serving nonprofits as his clients. Such experience provides a reliable basis for his opinions on nonprofit governance and management. *See Pereira*, 281 B.R. at 200.

Mr. Tenenbaum also has ample experience with New York nonprofits, contrary to the NRA’s unfounded statement that he has “limited experience” with New York nonprofits and law. (NYSCEF 1451 at 26). Indeed, while accusing Mr. Tenenbaum of “cherry-picking,” (*id.* at 23-24), the NRA does precisely that when it selectively cites to Mr. Tenenbaum’s deposition testimony in an effort to undermine his expertise on New York nonprofits. For example, the NRA misleadingly claims Mr. Tenenbaum has only a “handful” of clients incorporated in New York (*id.* at 27)—but Mr. Tenenbaum testified that he *currently* has approximately fifteen clients incorporated in New York. (NYSCEF 1454 at 327:2-15.) This is only a “handful” when set against Mr. Tenenbaum’s nationwide practice, which includes approximately five hundred and fifty clients. (*Id.* at 327:2-9.) Moreover, Mr. Tenenbaum need not opine specifically on New York law, but will rather offer helpful testimony on what is and is not normal in the nonprofit sector.

These do not constitute grounds for exclusion of Mr. Tenenbaum. Defendants will be entitled to cross examine Mr. Tenenbaum if they wish to challenge his qualifications. *See, e.g., Cary Oil Co. v. MG Ref. & Mktg.*, No. 99 Civ. 1725, 2003 WL 1878246, at *3 (S.D.N.Y. Apr. 11, 2003) (ruling that Plaintiff could engage in “vigorous cross-examination” to challenge the qualifications of an expert witness) (internal quotation marks and citation omitted).

C. The NRA’s conclusory argument that Mr. Tenenbaum lacks independence should be ignored.

The NRA falsely accuses Mr. Tenenbaum, without citation to any evidence or testimony, of lacking independence and objectivity. (NYSCEF 1451 at 22-23.) This argument should be ignored for the bald, conclusory statement that it is—Mr. Tenenbaum has not served as an expert witness for the OAG in the past, and has experience serving as an expert witness on another matter. (*See* Tenenbaum Report Ex. E.)

D. Mr. Tenenbaum’s factual recitations are necessary to formulate his opinions.

The NRA accuses Mr. Tenenbaum of providing “impermissible factual narratives” (NYSCEF 1451 at 12) when what he has in fact done was provide “a complete statement of all opinions [he] will express *and the basis and the reasons for them*” and “*the data or other information considered* by [Mr. Tenenbaum] in forming [his] opinion(s),” as required by Commercial Division Rule 13(c)(A) and (B). *See* 22 N.Y.C.R.R. § 202.70(g); *cf. Reach Music Pub., Inc. v. Warner Chappell Music, Inc.*, 988 F. Supp. 2d 395, 404 (S.D.N.Y. 2013) (“Here, however, the factual assertions contained in [the expert’s] report simply provide the foundation for [the expert’s] opinion as to the custom and practice in the industry in the situation he describes.”). Mr. Tenenbaum’s report is not itself evidence, but the disclosure device by which Mr. Tenenbaum was required to, and did, provide a record of the facts that formed the basis for his opinions.

E. The NRA's challenges to Mr. Tenenbaum's reliability misstate his report.

The NRA seeks to exclude Mr. Tenenbaum's testimony in its entirety on the wholly unsupported basis that Tenenbaum's testimony in four particular areas was "cherry-picked," or that he failed to review relevant documents with respect to those categories. (NYSCEF 1451 at 23-25). The four categories are: (1) Audit Committee documents; (2) the NRA's compliance training; (3) LaPierre's compensation; and (4) LaPierre's use of private jet travel. (*Id.*). The NRA's cursory arguments all fail for the simple reason that Mr. Tenenbaum did not cherry pick or fail to consider the documents that the NRA cites. He in fact did review voluminous documents, which included extensive Audit Committee documents, NRA training materials, and relevant compensation documents, contrary to the NRA's assertions. (NYSCEF 1451 at 24-25). The fact that he disagrees with the NRA's interpretation of those documents is not evidence of cherry-picking, but rather demonstrates the importance of expert testimony to help the jury evaluate the NRA's conduct against the proper standards. Mr. Tenenbaum testified that he specifically requested numerous documents from the OAG to aid in rendering his opinion. (NYSCEF 1454 at 188:6-189:15; 373:25-376:12.) The full list of the documents that Mr. Tenenbaum considered is annexed as Exhibit B to his report. (NYSCEF 1453.)

With respect to the particular categories of that the NRA focuses on, first, Mr. Tenenbaum specifically cites to and comments on the Audit Committee's minutes and reports. (*See, e.g.,* Tenenbaum Report at 35-42 (discussing post-hoc ratifications in Audit Committee minutes and noting consideration of a collection of Audit Committee minutes from 2015 through 2022).) The NRA has no basis for claiming that Mr. Tenenbaum ignored these reports in forming his opinion. Indeed, Mr. Tenenbaum specifically addressed the minutes concerning a related party transaction with former NRA vendor McKenna & Associates that the NRA cites as an example of something Mr. Tenenbaum allegedly ignored. (*Compare* NYSCEF 1451 at 24 *with* Tenenbaum Report at 35.)

Second, Mr. Tenenbaum reviewed information pertaining to training, including Defendant John Frazer's testimony that, for example, general compliance training within the NRA is non-mandatory. Thompson Aff. Ex. B (7/12/2022 Frazer Dep.) at 61:5-64:21. Mr. Tenenbaum's opinion on adequate training was part of a list of "responsible course correction" items that, in his expert opinion, an organization like the NRA would have undergone given the misconduct the NRA has experienced and perpetuated for many years. (Tenenbaum Report at 61-63.) To the extent the NRA believes that training it offered comports with Mr. Tenenbaum's recommendations, it may cross-examine him on that issue. *Cary Oil Co.*, 2003 WL 1878246, at *3.

Third, Mr. Tenenbaum considered documents related to compensation, including the Bylaws with regard to setting executive compensation, IRS 990s reporting compensation paid to LaPierre and others, and documents relating to executive receipt of excess benefits. (Tenenbaum Report at 20, 50-57.) The NRA accuses Mr. Tenenbaum of failing to consider Officer Compensation Committee documents, but those documents were irrelevant to Mr. Tenenbaum's opinion about Defendant LaPierre's *non-Board-approved* compensation in the form of personal expenses that were either paid on his behalf by the NRA or reimbursed to him, luxury travel and accommodations, and his receipt of working condition fringe benefits such as NRA-funded private flights. (Tenenbaum Report at 52-57.)

Finally, the NRA misstates Mr. Tenenbaum's testimony regarding LaPierre's travel. Mr. Tenenbaum opines on the industry standards for executive travel by private jets and the proper process for substantiating the need for private jet travel and addressing approvals and costs for the same, including the use of such company-paid private jets for personal purposes. (Tenenbaum Report at 55-57.)

Defendants have failed to demonstrate why Mr. Tenenbaum's testimony should be excluded in whole or in part.²

CONCLUSION

In conclusion, for the foregoing reasons, Plaintiff respectfully requests that Defendants' motions to preclude the expert testimony of Jeffrey Tenenbaum be denied, and that the Court order such other and further relief as the Court deems necessary.

Dated: May 5, 2023
New York, New York

LETITIA JAMES
Attorney General of the State of New York

/s/ Stephen Thompson
Monica Connell
Stephen Thompson
Assistant Attorneys General
NYS Office of the Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-6183
Stephen.Thompson@ag.ny.gov

² While Plaintiff believes that all of Mr. Tenenbaum's proffered testimony is admissible, if the Court believes that portions of his testimony are not helpful or may exceed the acceptable basis for expert opinions, the Court has many options other than wholesale exclusion. For one, the Court can address any disputes at trial as the testimony unfolds. *See Greenberg v. Spitzer*, No. 800004/2018, 2020 WL 1561376, at *4, *6 (Sup. Ct. Putnam Cnty. Mar. 6, 2020) (permitting expert testimony on corporate governance with limitations, and permitting accounting expert testimony while reserving the possibility of narrowing the testimony at trial). The Court also has the authority to determine the scope of an expert's testimony and can choose to exclude or permit specific portions of that testimony. *See People v. Abney*, No. 3314/05, 2011 WL 2026894, at *40 (Sup. Ct. N.Y. Cnty. May 5, 2011) (granting motion to introduce expert evidence in part and denying in part). The excluded testimony can be as narrow as specific portions of paragraphs of the report. *See In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, No. 05-MD-1720, 2022 WL 14862098 at *26 (E.D.N.Y. Oct. 8, 2022) (granting a motion to exclude specific paragraphs of an expert report while otherwise denying the motion to exclude).

MEGHAN FAUX, *Chief Deputy Attorney General for Social Justice*
JAMES SHEEHAN, *Chief of the Charities Bureau*
EMILY STERN, *Co-chief of the Enforcement Section, Charities Bureau*
Of Counsel

Attorney Certification Pursuant to Commercial Division Rule 17

I, Stephen Thompson, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law contains 5,408 words, excluding the parts exempted by Rule 17 of the Commercial Division of the Supreme Court (22 N.Y.C.R.R. § 202.70(g)). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: May 5, 2023
New York, New York

/s/ Stephen Thompson
Stephen Thompson