

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 Sequence No. 51

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT WILSON H. PHILLIPS'S
MOTION TO EXCLUDE THE EXPERT TESTIMONY OF ERIC HINES**

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

Jonathan Conley
Monica Connell
Alexander Mendelson
Assistant Attorneys General

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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 memorandum of law in opposition to Defendant Wilson H. Phillips’s motion to exclude expert testimony of Eric Hines.

PRELIMINARY STATEMENT

As this Court has held, the long history of “greed, self-dealing, and lax financial oversight at the highest levels of the National Rifle Association” is central to the matters at issue in this case. NYSCEF 611 at 1. This conduct caused waste and diversion of the NRA’s charitable assets, often to the benefit of NRA Executive Vice President Wayne LaPierre, NRA General Counsel and Secretary John Frazer, former NRA Treasurer and Chief Financial Officer Woody Phillips, former NRA Chief of Staff Josh Powell (collectively, “the Individual Defendants”), and other insiders loyal to LaPierre. The trier of fact in this case will be asked to digest and understand internal controls designed to avoid such waste and diversion, evaluate conduct that evaded or overrode such controls, and review complex financial misconduct that occurred over a period of decades, involved multiple parties, and frequently occurred through transactions that were structured in a convoluted manner that obscured the purpose, amount, and recipient of the charitable funds conveyed.

Plaintiff has offered opinions by expert Eric Hines. Hines is a Certified Public Accountant (CPA) and is Certified in Financial Forensics (CFF). He has extensive experience in forensic accounting, assessing internal controls, and identifying indicators of possible fraudulent, abusive, or wasteful activities. Hines’s opinions go to the heart of the internal control failures and financial misconduct at the NRA under the leadership of the Individual Defendants. His opinions demonstrate a profound breakdown of the NRA’s internal control environment, detail how hundreds of millions of dollars of NRA funds were expended in violation of NRA policies and

procedures, and identify indicators of potential fraud within the NRA. His testimony is relevant to Defendants' liability and the appropriate remedies in this case.

Without the support of his co-defendants, Phillips alone asks this Court to exclude Hines's opinions. In so requesting, Phillips does not attack Hines's qualifications or his methodology, does not point to inaccuracies in his analysis, and does not contest the foundation for his conclusions. While referencing that "cherry picking" facts would be improper, Phillips does not identify any instances where Hines ignored evidence, let alone engaged in such selectivity that would make his analysis inadmissible. Instead, Phillips makes general and sweeping assertions—all incorrect—that (1) Hines's thorough analysis of the NRA's financial controls and transactions that are central to this case are, somehow, irrelevant; (2) Hines's citation to the factual evidence relied upon in forming his expert opinions—as required by expert disclosure rules and which Phillips has not challenged as insufficient—constitutes an improper factual narrative; and (3) Hines's expert opinions are not necessary because jurors could somehow perform the same expert analysis themselves.

Phillips is wrong on all counts. Hines's analysis of the NRA's control environment and business dealings that demonstrate self-dealing and override of internal controls are plainly relevant. His citations to the NRA's own documents and testimony that he considered as part of his analysis do not constitute an improper narrative. And Phillips's argument that Hines's opinions are unnecessary because the work he performed is within the understanding of a typical juror is meritless. Hines's opinions are based upon a careful analysis of voluminous and complicated financial documents and record evidence, all identified and in Defendants' possession, as well as his education, training, and decades of experience "evaluating organizational policies, procedures,

and internal controls, analyzing complex accounting and financial information, and identifying fraud risk indicators.” NYSCEF 1683 (“Hines Report”) ¶ 11.¹

Hines’s analysis is reliably based on widely accepted forensic accounting principles and his extensive experience applying those principles. His opinions will help the trier of fact determine the disputed material issues of fact in this case. Phillips’s motion should be denied.

BACKGROUND

I. This state-enforcement action chronicles a long history of internal control failures and financial misconduct at the NRA.

Plaintiff brings fifteen claims against the Defendants. *See* NYSCEF 646 (“SAC” or “Complaint”). As relevant here, Plaintiff alleges that the Defendants failed to properly administer charitable assets, engaged in wrongful related party transactions, and violated their fiduciary duties by overriding and failing to implement and ensure adherence to the NRA’s internal controls. *See, e.g.*, SAC ¶¶ 142 (“LaPierre, together with his direct reports, including Defendants Phillips, Frazer and Powell, instituted a culture of self-dealing, mismanagement, and negligent oversight at the NRA. They overrode and evaded internal controls to allow themselves, their families, favored board members, employees and vendors to benefit through reimbursed expenses, related party transactions, excess compensation, side deals, and waste of charitable assets without regard to the NRA’s best interests.”), 229 (“As detailed below and throughout this complaint, Phillips failed as Treasurer to adhere to internal financial controls”); *see also id.* ¶¶ 252, 293. Plaintiff seeks various forms of relief, including the removal of LaPierre and Frazer, an injunctive bar, an

¹ In support of his motion to exclude, Phillips filed an unredacted version of Eric Hines’s opening expert report, dated September 16, 2022. Phillips later requested that the document be withdrawn, and re-filed a redacted version of the report in its place. NYSCEF 1683. The Hines Report is the subject of a pending motion to seal, which is not yet fully briefed. *See* Mot. Seq. No. 61 (NYSCEF 1807-1813, 1829-1835). Hines’s rebuttal report is annexed to the accompanying Affirmation of Jonathan Conley (“Conley Aff.”) as Exhibit A.

accounting, monetary relief from the Individual Defendants (to be disgorged or repaid as restitution to the NRA), and the appointment of an independent compliance monitor and independent governance expert.

The NRA's policies and procedures are central to this case. The NRA is a large organization, overseen by a board of 76 directors, and several senior officers who are *ex officio* directors. They are assisted by a team of executives, hundreds of employees, and several internal divisions, including a subdivision, the NRA Institute for Legislative Affairs ("NRA ILA"), that operated with its own accounting staff and maintained separate books and records. More than seventy paragraphs of the Complaint are devoted to describing the NRA's structure, bylaws, and applicable policies and procedures. *See* SAC ¶¶ 62–135. Those policies and procedures have been revised periodically over the past 40 years and specific directives varied over time. They are often disaggregated among various documents. *See* Hines Report ¶¶ 74–102. For example, "policy directives regarding the requirements for review and approval of contracts are referenced in board minutes, memoranda, and formal procurement policy documents, in some cases concurrently." *Id.* ¶ 74.

The Complaint alleges in detail that the Defendants paid hundreds of millions of dollars to vendors, consultants, board members, and former employees over a period of decades without appropriate oversight and in violation of NRA policy and procedure. *See, e.g.*, SAC ¶¶ 103–113, 135–150, 242–245, 312, 332–351. These arrangements were often based on handshake deals and, when memorialized in writing, the actual expenditures to a particular entity or person often exceeded and continued beyond the agreed-upon terms reflected in the contract. *Id.* Many arrangements were byzantine in design—often involving layered, complex payment arrangements

through NRA vendors, third-party entities, or NRA subdivisions—and lacked contracts, invoices, or supporting documentation. *Id.*

For example, the Complaint describes the NRA’s longtime practice of passing out-of-pocket expenditures through its former vendor Ackerman McQueen in violation of NRA policy and without proper oversight (*e.g.*, *id.* ¶¶ 315, 325–342), and Defendants LaPierre, Phillips, and Powell, along with other executives, improperly charging personal expenses on NRA and vendor-issued credit cards (*e.g.*, *id.* ¶¶ 205, 230, 260–261, 299–300, 307, 338). For nearly thirty years, Ackerman McQueen was the NRA’s public relations and marketing firm and among its most highly paid vendors, receiving upwards of \$30 million annually. Hines Report ¶¶ 20, 174, 191; *see also id.* at Exhibit ACH.1.

As the NRA’s Treasurer and Chief Financial Officer, Defendant Phillips—the lone objector to Hines’s testimony—played a key role in authorizing and structuring financial arrangements, enforcing financial policies, and implementing the NRA’s internal controls.

II. Hines offers expert opinions relevant to the long history of internal control failures and financial misconduct at the NRA.

Eric Hines is a CPA and CFF with “over two decades of experience in forensic accounting, controls & compliance, and dispute consulting engagements.” Hines Report, Appendix 1.² He “has

² CPA credentials are obtained through specialized experience and testing covering matters involving auditing, internal controls and business processes, financial accounting, and regulatory topics. *See generally Uniform CPA Exam. Blueprints*, AICPA (July 1, 2021), <https://us.aicpa.org/content/dam/aicpa/becomeacpa/cpaexam/examinationcontent/downloadabledocument/s/cpa-exam-blueprints-effective-july-2021.pdf>. The American Institute of Certified Public Accountants (AICPA) states that the CFF credential is “granted exclusively to CPAs who demonstrate considerable expertise in forensic accounting through their knowledge, skills, and experience.” *CFF Exam*, AICPA, <https://us.aicpa.org/membership/join/cff-exam> (last visited May 5, 2023). Forensic accountants with these credentials are routinely expected to apply their “specialized knowledge and investigative skills to collect, analyze and evaluate evidential matter and to interpret and communicate findings” in performing a number of forensic services; in engagements to investigate specific concerns of wrongdoing and evaluate fraud risk, such services may include “evaluation of internal controls” and “addressing internal control deficiencies.” *Glob. CFF Exam. Content Specification Outline*, AICPA,

extensive experience working with and for Federal and State Government agencies,” including the DOJ, SEC, and state regulators. *Id.* He “frequently consults on matters involving the assessment of internal controls, government enforcement and financial reporting issues.” *Id.* Many of his engagements “involve the use of forensic data analytics to identify indicators of possible fraudulent, abusive or wasteful activities.” *Id.* Phillips’s motion does not challenge Hines’s qualifications.

Plaintiff engaged Hines as an expert witness to analyze the Defendants’ adherence to NRA policies, procedures, and internal controls; to perform quantitative analysis of financial transactions related to acts of self-dealing and mismanagement alleged in the Complaint; and to evaluate whether the facts and circumstances for specific areas within the scope of his analysis include fraud risk indicators. *Id.* ¶ 7. Hines sets forth his opinions and a detailed and thorough description of the bases for his opinions in a 180-page expert report with 706 footnote citations, 41 appended tables, and an appendix listing more than 2,000 documents considered in his analysis, including the NRA’s general ledgers and bank records. *Id.* ¶ 36. In forming his opinions, Hines relied on standards and methodologies widely accepted in the forensic accounting profession, including AICPA audit standards and guidance, the Association of Certified Fraud Examiners (ACFE) Manual, the COSO Framework,³ and fraud investigation guides issued by federal Offices

<https://assets.ctfassets.net/rb9cdnjh59cm/5L2SPojifp3QF6ciyxjtwo/7cf780cce95d392bf909e3408b850648/forensic-global-CFF-credential-exam-CSO.pdf> (last accessed May 5, 2023). CPAs and forensic accountants are routinely engaged to audit, assess, review, and test internal controls design and operating effectiveness.

³ The Committee of Sponsoring Organizations of the Treadway Commission’s Internal Control Integrated Framework (the “COSO Framework”) is “‘recognized as a leading framework for designing, implementing and conducting internal control and assessing the effectiveness of internal control.’” Hines Report ¶ 52 (quoting COSO Framework Executive Summary).

of Inspectors General. *Id.* ¶¶ 8, 43–47, 491–498. Phillips does not challenge the reliability of these sources or Hines’s methodology in this motion.

In his opening report, Hines offers opinions and findings on the NRA’s control environment, which are based on and informed by his expert analysis of numerous financial arrangements between the NRA and its vendors, consultants, board members, and former employees. Hines also examined the NRA’s business practices, including expenditures on NRA-issued credit cards—comprising 40 individual card holders and tens of millions of dollars in credit-card charges over an 8-year period (*id.* ¶¶ 471–488)—and the Ackerman McQueen out-of-pocket expenditure arrangement (*id.* ¶¶ 188–218).

Hines also analyzed whether the record evidence related to the NRA’s business activities “demonstrate conditions that are consistent with fraud risk indicators (sometimes referred to as ‘red flags’ or ‘badges of fraud’) ... [which] involves benchmarking observed facts and circumstances against common characteristics of higher risk conditions, transactions, arrangements, relationships, or practices.” *Id.* ¶ 489. Based on his “experience, education, and training as a forensic accountant, and comparison of the record evidence to reference materials commonly accepted in [his] profession,” Hines found that “multiple conditions pertaining to NRA business activities discussed in [his] report are consistent with fraud risk indicators.” *Id.* ¶ 490.

Phillips does not contest Hines’s qualifications, the reliability of his opinions, or the accuracy or relevance of his analysis of the vendors, arrangements, and business practices he evaluated—all of which are discussed in the Complaint and relevant to this litigation—but attempts to dismiss Hines’s opinions as summary evidence that did not involve the application of any expertise. As set forth below, Hines applied his expertise to the facts of this case and offers opinions that are relevant and helpful to the trier of fact. Phillips’s motion should be denied.

LEGAL STANDARDS

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). The standard for admissibility of expert witness testimony is that the “expert opinion is proper 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. Cnty. of Nassau*, 45 N.Y.2d 97, 101 (1978). Expert testimony must be “sufficiently relevant to have probative value.” *People v. Aphyalth*, 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).

ARGUMENT

I. Hines’s opinions are unquestionably relevant, demonstrate the application of his expertise, and would be helpful to the trier of fact.

Plaintiff brings claims against the Defendants for failure to properly administer charitable assets, breach of fiduciary duties, wrongful related party transactions, failure to maintain whistleblower protections, and false filings. *See* SAC ¶¶ 635–704. The Complaint alleges that the Defendants “routinely circumvented internal controls; condoned or partook in expenditures that were an inappropriate and wasteful use of charitable assets; and ... abdicated all responsibility for ensuring that the NRA’s assets were managed prudently and in good faith.” *Id.* ¶ 12. The Complaint sets forth numerous instances of the Individual Defendants violating and failing to

ensure compliance with the NRA's policies and procedures governing vendor procurement, contract approval, conflicts of interest, related party transactions, and whistleblower protections. These facts, if proven, support Plaintiff's claims and requested relief. Plaintiff is entitled to prove these facts.

In forming his opinions, Hines reviewed and interpreted reams of financial documents and related evidence, performed quantitative analysis of financial transactions related to Defendants' alleged acts of self-dealing and mismanagement of NRA charitable funds, and evaluated whether the facts and circumstances for specific areas within the scope of his report presented fraud risk indicators. His opinions describe how the Defendants repeatedly failed to adhere to NRA policies, procedures, and internal controls in numerous contexts involving their business practices and arrangements with vendors, board members, consultants, and former employees. As detailed below, Hines's opinions are relevant, helpful to the trier of fact, and the result of applied expertise and experience on matters outside the understanding of the typical juror.

A. Hines's opinions on the NRA's internal control environment are relevant, demonstrate the application of his expertise, and are helpful to the trier of fact.

Phillips's arguments challenging Hines's opinions about the NRA's internal control environment—described as Hines's first set of opinions in Phillips's motion—are meritless.

First, Hines's opinions about the NRA's control environment are not, as Phillips argues, irrelevant. *See* NYSCEF 1681 at 7–9. While acknowledging this case includes allegations that the Defendants “violated specific laws and/or governing NRA policies or procedures,” Phillips argues that Hines's opinions about the NRA's internal control environment *as a whole* are irrelevant because Plaintiff has not alleged or asserted a cause of action that the NRA's overall system of internal controls is ineffective. *Id.* at 8. This is nonsensical. The Defendants' long history of ignoring and circumventing the NRA's policies, procedures, and internal controls is a core issue

in this case. The Complaint is replete with allegations of the Defendants, on an individual and institutional level, violating the NRA's policies, procedures, and internal controls governing travel reimbursement, procurement, contract approval, whistleblowing, conflicts of interest, and related party transactions. *See, e.g.*, SAC ¶¶ 230, 252–254, 381–411, 476, 478–479, 489–494, 503–562. These allegations—whether viewed separately or in the aggregate—obviously speak to the NRA's control environment as a whole and support Plaintiff's claims for breach of fiduciary duty, failure to properly administer charitable assets, and wrongful related party transactions. *See, e.g., In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 798–99 (Del. Ch. 2009) (holding the plaintiff stated a fiduciary duty claim where allegations “create a reasonable inference that [defendant AIG officers] knew that AIG's internal controls were broken”). Accordingly, Hines's proffered opinions about the NRA's control environment plainly has probative value. *See Aphaylath*, 68 N.Y.2d at 947.

Second, Phillips's argument that Hines's opinions are merely “a synthesis of record evidence without the application of any specialized expertise,” NYSCEF 1681 at 7, grossly mischaracterizes Hines's analysis, the complexity of the subject matter at issue, and the relevance of the opinions in this case.

Hines's opinions give the trier of fact important context on the role that internal controls play in an organization, and who within an organization is responsible for designing and maintaining them. Hines Report ¶¶ 50–58.⁴ Specifically, Hines explains that an organization's “policies, procedures, and internal controls are critical to ensuring the reliability and accuracy of financial reporting, safeguarding of assets, ensuring compliance with regulatory requirements, and managing the risk of fraud, waste, and abuse.” *Id.* ¶ 50. Hines relies on the well-accepted COSO Framework as an analytical structure for evaluating the efficacy of the NRA's internal control

⁴ While Phillips seeks to exclude these opinions, he does not address them in his motion, let alone provide a basis for their exclusion. *See* NYSCEF 1681 at 3-5.

environment, and explains that of the five components of internal control within that framework, “the board and senior management have the most influence on the control environment, which is the foundation of which an internal controls program is built.” *Id.* ¶ 55.

Hines also describes the concept of “tone at the top” within the COSO Framework, the essential role of the board of directors and senior leadership in establishing an appropriate internal control environment, and the importance of considering conflicts of interest in assessing financial transactions and internal controls to prevent fraud, waste, and abuse in nonprofit organizations. *Id.* ¶¶ 43–44, 56–58.

As described in more detail below, Hines’s opinions on the internal control environment are based on and informed by his analysis of specific vendors, arrangements, and business practices at the NRA. *See id.* ¶¶ 103–488. Based on this analysis, Hines offers the following high-level observations about the NRA’s internal control environment:

- The NRA’s control environment has been ineffective, particularly with respect to processes and controls around expenditures, including purchasing, contract review and approval, and disclosures of conflicts of interest. This “ineffectiveness” has been due, in large part, to poor Tone at the Top (“TATT”) at the NRA. TATT refers to the attitudes and cultural mindset regarding internal controls pushed down through the organization by senior officers and directors, including the Defendants.
- [Hines’s] findings show a pattern of the Defendants (those charged with setting TATT), and other NRA personnel, failing to follow established policies, procedures, and internal controls, ignoring Board policy directives, circumventing said policies, procedures, and controls, and not disclosing relevant information to interested stakeholders. [The Hines Report] includes numerous examples of such situations, particularly with respect to the company’s expenditure processes and controls involving not only purchasing, contract review and approval, but also disclosures around potential conflicts of interest.
- [Hines’s] review of the record evidence indicates that when violations of established policies, procedures, and internal controls were identified, or otherwise known, the NRA, including Individual Defendants in their roles as officers and executives (again, those charged with TATT), often failed to enforce existing policies, impose disciplinary or other accountability measures, and/or take corrective action and remediate known internal control weaknesses. Where disciplinary or accountability

measures were taken, they were inconsistently applied, depending on the individuals involved, and/or did not follow policy standards.

Id. ¶¶ 14–16 (citations omitted).

Phillips mischaracterizes the substance of these opinions—which are drawn from a comprehensive analysis of numerous complex financial transactions and business practices set forth in over a hundred pages of detailed findings—as not requiring the application of any expertise. *See* NYSCEF 1681 at 4–5. To the contrary, these opinions are the result of Hines’s critical analysis and interpretation of record evidence based on his application of widely accepted forensic accounting principles and methodologies using his expertise. Phillips does not dispute that Hines has extensive professional experience evaluating related party transactions, conflict of interest issues, and performing and managing procedures to evaluate compliance with policies, procedures, and internal controls. Hines Report ¶ 41. And Hines reliably applied his experience and training to the facts of this case. Phillips wholly ignores and does not dispute the reliability of the principles and methods that Hines applied (and expressly cited in his report) in forming his opinions on the NRA’s internal control environment. *See* NYSCEF 1681 at 7–9.

These opinions are not based on a handful of isolated instances of a policy or procedure not being followed with a particular vendor, but rather an examination of a large body of financial transactions and business dealings involving numerous NRA vendors, consultants, former employees, and board members over an extended period of time, and the identification of patterns, common themes, and practices of ignoring or evading internal controls. These opinions will assist the trier of fact and Phillips’s argument that this analysis did not require any expertise is baseless.

Third, Phillips is wrong in claiming that Hines’s opinions on the NRA’s control environment are within the understanding of a typical juror. The subject matter of these opinions addresses methods and practices of administering the complex finances of the NRA. This entails

consideration of the concepts of internal controls and conflicts of interest; the role and importance of internal controls and compliance in an organization; the responsibilities of management and the board of directors in implementing, overseeing, and ensuring compliance with internal controls; whether the Defendants failed to follow or circumvented established policies, procedures, and internal controls; the analysis and review of complex and voluminous financial records extending over many years and involving numerous parties; whether the Defendants implemented and oversaw an effective system of internal controls; and whether the Defendants appropriately enforced NRA policies and procedures, imposed disciplinary or other accountability measures, or took corrective action and remediated known internal control deficiencies. These are complex issues that implicate concepts and standards of financial administration and accounting not within the common knowledge of a jury, as multiple courts have recognized. *See, e.g., Houserman v. Comtech Telecomms. Corp.*, 509 F. Supp. 3d 1301, 1304–05 (W.D. Wash. 2020) (expert opinion “on whether Plaintiff’s conduct violated any internal controls or accounting standards, or whether it constituted a significant deficiency” was reliable, helpful to the jury, and relevant); *see also Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1016–17 (9th Cir. 2004) (expert testimony that the defendants departed from “industry standards” or “norms” did not improperly usurp role of jury); *Sharkey v. J.P. Morgan Chase & Co.*, 978 F. Supp. 2d 250, 254 (S.D.N.Y. 2013) (explaining why “various types of conduct would be considered ‘red flags’ within the industry, and the types of fraudulent activity they suggested,” is the “type of information and testimony ... not accessible to a lay person and is admissible as expert testimony”); *Cement-Lock v. Gas Tech. Inst.*, 523 F. Supp. 2d 827, 843 (N.D. Ill. 2007) (holding that an expert opinion that “there were insufficient internal controls set up by the Defendants” was “enough to defeat summary judgment” where “the expert has provided evidence of the factual basis for his

conclusion, including particular incidents and applicable business standards, rather than merely a bare conclusion.”) (internal quotation marks and citations omitted).

B. Hines’s opinions on specific vendors, arrangements, and business practices are relevant, demonstrate the application of his expertise, and do not invade the province of the jury.

Hines’s second set of opinions, as defined by Phillips, outlines his analysis of certain NRA business practices and the NRA’s financial relationships with approximately twenty different vendors, consultants, board members, and former employees. *See* Hines Report ¶¶ 103–488. Phillips dismissively labels these opinions as “a summation of evidence in the record” and erroneously argues they do “not require[] application of expertise.” NYSCEF 1681 at 10–11. For the same reasons discussed above, Phillips’s argument is meritless because it mischaracterizes the substance of Hines’s analysis and ignores the obvious relevance of his opinions.

This is a complex case with a voluminous record. The Complaint is 704 paragraphs in length and asserts 15 causes of action against five defendants. At its center are allegations of a decades-long history of internal control failures and financial misconduct implicating numerous entities and individuals and transactions totaling hundreds of millions of dollars. A key issue in this case is whether the Defendants followed the NRA’s own policies and procedures. The Complaint alleges numerous instances of the Defendants circumventing and failing to enforce the NRA’s policies and procedures in their business practices and dealings with vendors, consultants, board members, and former employees.

The bulk of Hines’s opening report focuses on these business practices and financial arrangements. This analysis—set forth in 135 pages of detailed findings with 583 citation footnotes and numerous appended tables—comprehensively covers myriad financial transactions between the NRA and its vendors, related party transactions with board members, and questionable business practices. Hines Report ¶¶ 103–488. Hines addresses each topic in a separate section of his report,

discussing relevant arrangements and contracts, his quantitative and qualitative analyses of financial data and records, whether those arrangements followed relevant NRA policies, procedures, and internal controls, and other findings. *Id.* ¶ 102. Phillips does not attack or point to any purported mistakes, instances of cherry-picking, or improper methodology in Hines’s analysis. The substance of this analysis is not information that a typical lay juror could gather and analyze independently.

Phillips is wrong in arguing that Hines did not apply any expertise beyond the ken of the typical juror in forming these opinions. Specifically, Hines applied his expertise as a CPA and CFF and his particularized knowledge in internal controls and forensic accounting to analyze and interpret the financial documents, transactions, business practices, and internal controls at issue. *Id.* ¶ 8. In analyzing the record evidence, Hines relied on “standards and methodologies that are generally accepted in [his] profession and subject to review by [his] peers,” and “considered applicable professional literature commonly cited and referenced by forensic professionals for investigations, litigation consulting matters, and other engagements involving the assessment of controls and risks of financial fraud, waste, and abuse.” *Id.* ¶ 34. Phillips does not challenge the reliability of these sources in this motion.

Indeed, Hines thoroughly describes the numerous procedures he employed to form his opinions, *see id.* ¶ 36, and based his opinions and findings on a comprehensive review of the record, *see id.* Appendix 2 (listing more than 2,000 documents considered).⁵ Hines quantitatively evaluated financial transactions and business practices from multiple data sources involving numerous entities and individuals that spanned a period of several years and, in some cases,

⁵ The documents and information relied upon by Hines in forming his opinions came from or is in the possession of the Defendants.

decades.⁶ Hines qualitatively evaluated the same financial transactions and business practices, identifying common themes, trends, and patterns, and drawing conclusions based on his observations. *Id.* ¶¶ 14–16. This analysis included evaluation of related party transactions with board members and undisclosed conflicts of interest resulting in NRA employees receiving and personally benefiting from gifts and entertainment from vendors. *Id.* ¶¶ 362–422. Further, Hines more broadly explains the risks that such conflicts of interest and related party transactions pose to organizations and why policies governing those conflicts and transactions are a critical aspect of an effective system of internal controls. *See, e.g., id.* ¶¶ 40–58.

Notably, Phillips does not challenge or dispute the accuracy of Hines’s “analysis of financial and accounting records in order to determine, for example, the total amounts of certain payments or expenses,” conceding that “[s]uch testimony may arguably be based upon accounting expertise.” NYSCEF 1681 at 12 n.1. But Hines’s expertise extends beyond crunching numbers. As discussed above, Hines has extensive experience with evaluating and testing the design and operation of policies, procedures, and internal controls, performing compliance reviews, investigating and assessing potential conflicts of interest, and identifying fraud risk indicators. Hines Report ¶ 5. Hines has applied that expertise in forming his opinions in this case, and as numerous courts have held, the subject of his opinions is entirely appropriate expert testimony. *See, e.g., Houserman*, 509 F. Supp. 3d at 1304–05; *Sharkey*, 978 F. Supp. 2d at 254.

Phillips is also incorrect in suggesting that Hines’s synthesis and analysis of complex and voluminous financial information is a basis for exclusion. Courts have routinely found that expert testimony which helps the trier of fact understand complex information outside the purview of the

⁶ The multiple data sources analyzed by Hines included NRA and NRA-ILA general ledger data, Wells Fargo banking (Automated Clearing House) data, NRA-ILA internal records of IRS 1099 payees, American Express credit card statements, NRA regulatory filings and audited financial statements, vendor invoices, contracts, correspondence, and other business records. Hines Report ¶¶ 36, 405, 471.

typical juror is admissible. *See, e.g., Scott v. Chipotle Mexican Grill, Inc.*, 315 F.R.D. 33, 45 (S.D.N.Y. 2016) (“Expert testimony is, however, admissible where it ‘synthesizes’ or ‘summarizes’ data in a manner that ‘streamlines the presentation of that data to the jury, saving the jury time and avoiding unnecessary confusion. An expert also may offer commentary on documents in evidence if the expert’s testimony relates to the context in which documents were created, defining any complex or specialized terminology, or drawing inferences that would not be apparent without the benefit of experience or specialized knowledge.”) (internal quotation marks and citations omitted); *Louis Vuitton Malletier S.A. v. Sunny Merch. Corp.*, 97 F. Supp. 3d 485, 504–05 (S.D.N.Y. 2015) (permitting testimony from experts who “did more than simply add a few numbers,” but sorted, compiled, aggregated, and presented voluminous data, and who pulled together common themes from diverse sources to reach relevant conclusions requiring expertise). Phillips’s suggestion that a lay jury could independently comb through thousands of financial records and perform the same financial analysis reflected in Hines’s expert reports strains credulity.

The financial transactions alleged in the Complaint and analyzed by Hines are complex. So too is the interplay between those transactions and the NRA’s policies, procedures, and internal controls. Phillips argues that a typical juror is capable of deciding whether the right people signed off on a contract. But the issues and claims in this case are far more complex than that, and there is no question that Hines’s proffered opinions would be helpful to the trier of fact. This is particularly true given the complexity of the structure of many of the transactions and the payments being made to or from multiple sources. For instance, in many cases, the NRA paid vendors and consultants for the same services through separate contractual agreements, or indirectly through other NRA vendors, entities, or subdivisions of the NRA. *See, e.g., id.* ¶¶ 103–113, 135–150, 492

(MMP Principal paid separately through MMP, Concord, Allegiance, and ATI); 174–182 (Ackerman McQueen paid separately by NRA and through wholly owned subsidiary, Mercury Group); 228–235, 492 (UWS Principal paid separately by NRA and through UWS); 242–245, 267, 279, 492 (Gayle Stanford paid separately by NRA, NRA-ILA, and Ackerman McQueen); 332–351 (Michel Marcellin paid separately by NRA and Lockton Affinity through commissions on royalties Lockton owed the NRA); 405–418 (Marion Hammer paid separately by NRA, NRA-ILA, and through grants to a nonprofit entity under her control). Notwithstanding Phillips’s arguments to the contrary, Hines’s comprehensive quantitative and qualitative analysis of these financial transactions is beyond the ken of the typical juror.

The same holds true regarding Hines’s opinions on the NRA’s internal control environment as a whole. Hines is not just looking at certain financial arrangements in isolation; he is applying his expertise to analyze—both quantitatively and qualitatively—series of transactions that occurred over many years, applying relevant policies, procedures, and internal controls, and then synthesizing that information to analyze it. His analysis uses established analytical structures and methods to reach his opinions that there are systemic, institutionalized patterns of evasion or disregard of internal controls at the NRA. This analysis is squarely relevant here and is not information that a lay juror could gather and analyze on their own.

As an illustrative example, Phillips points to Hines’s analysis of MMP—one of the approximately twenty different vendors and consulting arrangements that Hines examined—arguing that Hines “merely reads what the policies state, reviews evidence in the record, and ‘opines’ that the policies were violated.” NYSCEF 1681 at 11. But even a cursory review of the 24-page section of Hines’s report analyzing the NRA’s relationship with MMP makes clear that

Phillips's characterization of Hines's opinions does not accurately reflect the complexity of the subject matter or the depth and sophistication of the analysis. Hines Report ¶¶ 103–173.

At the outset, Phillips's reference to a single entity, "MMP," is misleading. The NRA's vendor relationship with MMP involves four related entities with the same principal owner: Membership Marketing Partners, LLC ("MMP"), Concord Social & Public Relations, LLC ("Concord"), Allegiance Creative Group, LLC ("Allegiance"), and Associated Television International ("ATI"). *See id.* ¶ 103. The NRA had a vendor relationship with ATI from 1993 to 2019 and has had vendor relationships with MMP, Concord and Allegiance (the "MMP Entities") since December 2011. *Id.* The MMP Entities share the same owners, management, date of incorporation, and office address (located in the same building as NRA headquarters). *Id.*

In forming his opinions about this vendor relationship, Hines analyzed sixteen separate contracts and amendments that the NRA entered into with the MMP Entities and ATI between 2011 and 2021. *Id.* ¶¶ 135–138. He also analyzed the NRA's financial transactions with the entities based on bank records, the NRA's general ledgers, and other financial records, and quantified payments to the entities; analyzed whether the NRA and relevant individuals complied with relevant NRA policies, procedures, and internal controls in connection with the NRA's relationship with the entities, including the NRA Statement of Corporate Ethics, Code of Ethics, Procurement Policy, Contract Review Policy, Financial Disclosure Questionnaire, Conflict of Interest and Related Party Transaction Policy, and Travel and Business Expense Reimbursement Policy; evaluated record evidence of LaPierre's relationship with the MMP Principal;⁷ and


⁷ This included record evidence of LaPierre (i) attending "celebrity retreats" organized and paid for by MMP's Principal in the Bahamas; (ii) staying on luxury yachts owned by the MMP Principal in both the Bahamas and Europe on multiple occasions, at no cost, and often with family members; (iii) taking private flights to and from the Bahamas paid for by the NRA; (iv) providing gifts to the MMP Principal and family members with NRA funds; and (v) frequently meeting with the MMP Principal in person. Hines Report ¶ 151.

assessed whether the record evidence related to the MMP Entities and ATI arrangements presented fraud risk indicators. Based on his analysis, Hines identifies numerous and particularized attributes of the transactions and explains their significance in the context of appropriate systems of financial management and controls. *See id.* ¶¶ 103–173. These opinions are not, as Phillips dismissively and inaccurately describes them, the product of reading the NRA’s Procurement Policy, “review[ing] the signatures on the contract review sheet,” and “assess[ing] whether the MMP contract was signed without necessary approvals.” NYSCEF 1681 at 11. To the contrary, Hines’s opinions are rooted in a thorough review and analysis of extensive record evidence and the application of widely-accepted accounting principles and methods. Phillips’s mischaracterization of Hines’s opinions as summary evidence divorced from any expertise finds no refuge in the detailed analysis and findings of Hines’s expert reports and should be rejected.

C. Hines’s opinions on fraud risk indicators are relevant, an appropriate subject of expert testimony, and would be helpful to the trier of fact.

Phillips argues that Hines’s testimony on “so-called fraud risk indicators”⁸ is “wholly gratuitous.” NYSCEF 1681 at 12. Phillips reasons that “the complaint does not include any claim

⁸ To the extent Phillips suggests that Hines invented this concept or coined this term, he did not. Fraud risk indicators “(sometimes referred to as ‘red flags’ or ‘badges of fraud’),” are “concepts common to CPAs, and particularly forensic accounting specialists,” and are generally understood to be “trends, or anomalies in transaction or account balances or relationships between financial and non-financial information that might be considered indicia of fraud.” Hines Report ¶ 45 (citing AICPA Forensic & Valuation Services Practice Aid, pg. 64). As Hines observes, “[t]here are several commonly accepted reference sources that describe fraud risk indicators that may be present in circumstances where fraudulent financial reporting, business practices, or misappropriation of assets exist,” including without limitation “the AICPA audit standards ..., fraud investigation guides for OIGs of U.S. government agencies, and the ACFE Fraud Examiners Manual.” *Id.* ¶ 47 & n.26.



for fraud,” so “whether the record evidence related to the NRA business activities demonstrates conditions consistent with fraud risk indicators” “is irrelevant to the claims that are at issue in this case.” *Id.* at 12. This argument is meritless. The law does not require expert testimony to speak directly to the ultimate issue for the jury. The appropriate measure is whether the proffered expert opinion has probative value. *Aphaylath*, 68 N.Y.2d at 947.

Here, Hines’s opinions on the presence of fraud risk indicators are plainly relevant to whether Defendants failed to properly administer charitable assets and breached their fiduciary duties, and supports an inference that Defendants’ past misconduct, if proven, places the NRA’s charitable assets at risk of being wasted or misused in the future.

Courts have consistently found this type of “red flag” expert testimony to be admissible in numerous contexts. *Sharkey*, 978 F. Supp. 2d at 254 (holding that the expert was “permitted to testify as to those matters and transactions which, as an accountant, might trigger concern under [the Sarbanes Oxley Act] (so called “red flags”), and why”); *see also Krinsky v. Israel Disc. Bank of New York*, 2016 WL 540741, at *1 & n.2 (C.D. Cal. Feb. 9, 2016) (rejecting defendant bank’s objection to Plaintiff’s expert testimony that certain evidence in case “are considered red flags for money laundering activity”); *S.E.C. v. U.S. Env’t, Inc.*, 2002 WL 31323832, at *3 (S.D.N.Y. Oct. 16, 2002) (expert testimony that “certain trading patterns would raise ‘red flags’” is “precisely the type of testimony regarding the ‘practices and usages of a trade’ that the [Second Circuit] found permissible and indeed helpful” (quoting *Marx & Co. v. Diners’ Club Inc.*, 550 F.2d 505, 510–511 (2d Cir. 1977))).

Phillips’s stray observation that Hines does not opine on whether the Defendants committed fraud is misplaced. Opining on whether fraud occurred is a legal conclusion and would

conflict with ethical standards.⁹ And as discussed above, Hines's expert opinions about fraud risk indicators are relevant to the NRA's control environment and Defendants' failures to take adequate measures to oversee, protect and ensure the proper use of the NRA's charitable assets.

CONCLUSION

For the foregoing reasons, the Court should deny Phillips's motion to exclude the expert testimony of Eric Hines, together with such other and further relief as the Court deems just, proper, and appropriate.

Dated: May 5, 2023
New York, New York

LETITIA JAMES
Attorney General of the State of New York

/s/ Jonathan Conley
Jonathan Conley
Monica Connell
Alexander Mendelson
Assistant Attorneys General
NYS Office of the Attorney General
28 Liberty Street
New York, New York 10005
(212) 416-8108
Jonathan.Conley@ag.ny.gov

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

⁹ See AICPA - Statement on Standards for Forensic Services (SSFS No. 1) ("The ultimate decision regarding the occurrence of fraud is determined by a trier of fact; therefore, a member performing forensic services is prohibited from opining regarding the ultimate conclusion of fraud. This does not apply when the member is the trier of fact. A member may provide expert opinions relating to whether evidence is consistent with certain elements of fraud or other laws based on objective evaluation."), available at <http://www.aicpa-cima.com/resources/download/statement-on-standards-for-forensic-services> (last visited on April 7, 2023).

Attorney Certification Pursuant to Commercial Division Rule 17

I, Jonathan Conley, an attorney duly admitted to practice law before the courts of the State of New York, certify that Plaintiff's Memorandum of Law in Opposition to Defendant Wilson H. Phillips's Motion to Exclude the Expert Testimony of Eric Hines 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 affirmation contains 6,956 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 affirmation.

Dated: New York, New York
May 5, 2023

/s/ Jonathan Conley
Jonathan Conley