

MOTION SEQUENCE NOS. 48 and 49

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

**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO THE
MOTIONS BY DEFENDANT THE NATIONAL RIFLE ASSOCIATION
OF AMERICA AND JOHN FRAZER TO PRECLUDE EVIDENCE
PURSUANT TO CPLR 3126**

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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 the motions by Defendants The National Rifle Association of America (“NRA”) and John Frazer (collectively, “Defendants’ Motions”) pursuant to CPLR 3126 to strike portions of Plaintiff’s Complaint, or in the alternative, to preclude, or alternatively pursuant to CPLR 3124 to compel Plaintiff to supplement its responses to NRA contention interrogatory nos. 1, 2, and 8 and Frazer contention interrogatory nos. 3, 5, and 6 and to vacate the Note of Issue pursuant to 22 NYCRR 202.21(e).¹

PRELIMINARY STATEMENT

Plaintiff has given Defendants ample notice of the particular conduct that forms the bases for its claims by, *inter alia*: (i) serving highly particularized, initial and amended complaints that include over 600 paragraphs of factual allegations in the operative amended pleading; (ii) responding to Defendants’ interrogatories, which, in the case of Defendant NRA, exceeded the number of interrogatories permitted by the Commercial Division rules; (iii) questioning at more than two dozen investigative examinations and depositions into the topics covered by the interrogatories at issue; and (iv) addressing the conduct at issue in the expert reports of Eric Hines and Jeffrey Tenenbaum. Indeed, in response to Plaintiff’s motion for partial summary judgment dismissing certain affirmative defenses, Defendant Frazer argued that there has been “comprehensive discovery” and “comprehensive development of the record” in this case. NYSCEF 1334 at p. 2.

¹ The NRA filed a motion which Defendant Frazer joined—Motion Sequence Nos. 48 (NYSCEF 1426-1440) and 49 (NYSCEF 1442-1449). This memorandum and supporting affirmation are offered by Plaintiff in opposition to both motions.

Defendants' Motions challenge Plaintiff's responses to NRA contention interrogatory nos. 1, 2, and 8, and Frazer contention interrogatory nos. 3, 5, and 6 in a tactical effort to preclude Plaintiff from presenting evidence at trial of Defendants' unlawful conduct in violation of the laws governing related party transactions ("RPTs"), whistleblowers, administration of charitable assets, and breaches of fiduciary duty. But these motions fail because they are not premised on genuine prejudice caused by a purported lack of sufficient information in response to the interrogatories. Plaintiff has specifically and definitively identified the factual and legal bases for its claims, including by naming the NRA insiders who transacted business with the NRA, identifying the whistleblowers and circumstances surrounding their complaints, and further explaining the grounds for its claims that the NRA and Frazer failed to comply with legal obligations. Defendants are misusing interrogatories, including, in the case of the NRA, by serving more interrogatories than permitted, and by demanding information in type and degree beyond what is required by law.

Defendants attempt to cloud the issue by regurgitating a laundry list of purported discovery complaints that were previously rejected and are irrelevant. NYSCEF 1427, pp. 5-6. Here, the relevant question is whether Plaintiff answered the contention interrogatories at issue fully and completely, which it did; whether Defendants believe they were frustrated in prior attempts to gain discovery is not relevant to whether Defendants have the information they need to prevent unfair surprise at trial—the point of contention interrogatories.

Defendants' Motions also fail because they are untimely and procedurally improper. Defendants concede that they had Plaintiff's responses to contention interrogatory before the Note of Issue ("NOI") was filed. If they genuinely believed Plaintiff's response were insufficient and placed them at a disadvantage, the appropriate procedure was to bring a timely motion to compel supplemental interrogatory responses to the Special Master for Discovery. Defendants instead

sidestepped the Special Master process, made no effort to get more discovery and then made a post-NOI motion seeking preclusion for failure to provide discovery. In doing so, Defendants violated the Court's Part Rules because they did not comply with this Court's pre-motion conference procedures. In addition, Defendants' Motions were belatedly brought nearly three months after the NOI was filed, long after the deadline to move vacate or modify the NOI to allow post-NOI discovery. While the NOI carved out other discovery issues that Plaintiff sought, the Note did not carve out the discovery issues presented in Defendants' Motions.

For these reasons and as demonstrated below, Defendants' Motions should be denied.

RELEVANT PROCEDURAL BACKGROUND

Defendants' Contention Interrogatories and Plaintiff's Responses

Defendant NRA served its first set of interrogatories dated January 16, 2022, numbering eight, one with multiple subparts, for a total of 13. *See* accompanying Affirmation of Sharon Sash, "Sash Aff." at Ex. A. Plaintiff served responses to those interrogatories dated February 7, 2022. Sash Aff. at Ex. B. The NRA served a second set of interrogatories dated June 9, 2022, numbering 13. NYSCEF 1431. Plaintiff served its responses to the NRA's second set of interrogatories dated July 6, 2022. NYSCEF 1434. At that point, the NRA had served a total of 26 interrogatories. Thereafter, the NRA served eight contention interrogatories dated October 19, 2022, NYSCEF 1429. This exceeded the limit of 25 interrogatories (with sub-paragraphs) set forth in Commercial Rule 11-a, yet the NRA never sought leave of Court to serve additional interrogatories. Nevertheless, on November 22, 2022, Plaintiff in good faith answered those contention interrogatories, while preserving its objection to the NRA having exceeded the limit on interrogatories. NYSCEF 1430.

Defendant Frazer served two sets of contention interrogatories, the first set dated July 15, 2022—which were premature under the Commercial Division Rules—and the second set dated October 19, 2022. NYSCEF 1445, Sash Aff. at Ex. C. Plaintiff responded to Frazer’s first set of contention interrogatories on October 25, 2022, NYSCEF 1446, and to Frazer’s second set on February 9, 2023.²

Defendant NRA first asked Plaintiff to meet and confer about contention interrogatories on December 8, 2022. NYSCEF 1436. The parties did so on December 12, 2022. Defendant NRA followed up with an email on December 14, 2022, NYSCEF 1437 at p. 12. On December 17, 2022, Plaintiff agreed to supplement its responses to NRA contention interrogatories 1, 2, and 8. *Id.* at pp. 11-12.

On December 20, 2022, Defendant Frazer reiterated his request by email that Plaintiff supplement its responses to Frazer contention interrogatories 3, 5, and 6. NYSCEF 1447. On December 29, 2022, Frazer requested a status update, NYSCEF 1448, and Plaintiff responded the same day that it would provide a response on January 6, 2023. NYSCEF 1449. On January 6, 2023, Plaintiff advised Defendant Frazer that it did not intend to supplement the responses to the contention interrogatories at issue. *Id.*

On January 9, 2023, Plaintiff served a supplemental response to NRA contention interrogatories 1, 2, and 8. NYSCEF 1437 at pp. 6-8. On January 11, 2023, Defendant NRA filed a letter with the Court about the NOI in which it referenced the contention interrogatories among other topics, noted that Plaintiff had supplemented its responses on January 9, 2023, and stated, in part, that it was “concerned that the supplemented material fails to address deficiencies previously raised.” NYSCEF 1065. Defendant NRA sent a letter to Plaintiff on January 20, 2023, stating in

² Plaintiff’s responses to Frazer’s second set of contention interrogatories are not at issue. Sash Aff. at Ex. D.

part, “Although the additional information provided by the NYAG on January 9, 2023, pertaining to her responses to the NRA’s contention interrogatories 1, 2, and 8 is helpful, it is not what the NYAG stated she would provide on December 17, 2022. . .” NYSCEF 1438. Plaintiff responded on January 23, 2023, stating:

Plaintiff is in receipt of your letter dated January 20, 2023. The NRA has not identified any particular failures by Plaintiff in the letter. Absent some specification of information that Plaintiff represented it would provide and then did not, we are unsure how to respond. If you identify a particular concern relating to the information Plaintiff agreed to provide prior to the filing of the note of issue, we will consider the same. We will note that Plaintiff provided its interrogatory responses two months ago, the note of issue was filed a month ago, and we reserve the right to object to demands for additional discovery as untimely.

NYSCEF 1437 at p. 3. Following a letter from Defendant NRA on February 1, 2023, seeking in part “a list of the wrongful related party transactions that [NYAG] intends to rely on at trial,” and “an exhaustive list of alleged whistleblowers and a complete list of actions that the NYAG contends amount to alleged violations,” NYSCEF 1439, on February 2, 2023, Plaintiff agreed to and further supplemented its response to NRA contention interrogatory no. 2, but made no further changes to its responses to NRA contention interrogatories nos. 1 and 8. NYSCEF 1437 at pp. 1-2.

The Note of Issue

By order of this Court, dated November 22, 2022, the NOI in this case was extended from November 29, 2022, to December 13, 2023. NYSCEF 900. In advance of the December 13th deadline, Plaintiff suggested to the NRA that the parties jointly request a further extension of the NOI filing date due to other outstanding discovery issues concerning privilege assertions. The NRA did not agree. *See generally* NYSCEF 923. On December 12, 2022, Plaintiff filed an order to show cause to be permitted to file the NOI with a carve out pursuant to 22 NYCRR 202.21.

NYSCEF 922-931. The parties appeared before the Court on that date and the Court extended the NOI deadline to December 20, 2022, to allow the parties to confer in an effort to resolve pending discovery issues post-filing the NOI. *See* NYSCEF 997.

On December 20, 2022, Defendant NRA filed a letter regarding the NOI (NYSCEF 934), indicating the NRA's position that:

Other than the important discovery being pursued by the NRA, the case is trial ready. Taking into account the OAG's investigation, the OAG has spent over three years in discovery, which included over 12 transcribed interviews, over 25 depositions (indeed multiple depositions of many witnesses), and unfettered document discovery pursuant to which the NYAG collected millions of pages of material. In addition, the NYAG took depositions of the NRA's expert witnesses. Therefore, the only discovery that remains is that listed in Appendix A, which is owed by the OAG to the NRA

Id. The letter raised objections to Plaintiff's contention interrogatory responses. *Id.* Ultimately, on December 20, 2022, Plaintiff filed a letter reporting that the parties remained unable to agree regarding the filing of the NOI and asking for relief in the form of a carve out to the NOI as requested in Plaintiff's previous submission. (NYSCEF 952)

On December 21, 2022, the Court ordered that the

OAG file Note of Issue, with any reservations for resolving pending discovery disputes it deems appropriate and permissible under the CPLR and court rules, on or before December 23, 2022. **Defendants may respond as permitted under the CPLR and court rules.**

(NYSCEF 997) (emphasis added). Thereafter, Plaintiff filed the NOI on December 22, 2022. (NYSCEF 1003-04) That filing contained a carve-out for certain continuing discovery issues relating to (a) the NRA's sword and shield use of privilege, which Plaintiff believed to be the only appropriately preserved, still-pending discovery issue, and (b) resolution of already-filed, pending appeals of orders of the Special Master. The NOI otherwise represented the parties' readiness for trial for all parties. (NYSCEF 1003-04).

The NRA did not move to vacate the NOI in accordance with the procedures and pursuant to the deadlines required under the applicable Court rules. *See* 22 NYCRR 202.21(e). Instead, on January 11, 2023 -- twenty days after the filing of the NOI, the due date for any motion to vacate the NOI -- the NRA submitted a letter objecting to the NOI. NYSCEF 1065. On January 18, 2023, Plaintiff submitted a letter asking the Court to disregard the NRA's objection letter because it did not comply with the Court's directives and the applicable rules and was procedurally and substantively infirm. NYSCEF 1106. Specifically, the NRA did not file a motion, supported by an affidavit, demonstrating "that a pretrial proceeding has not been completed for any reason beyond the control of the party" justifying the vacating of the NOI or "unusual or unanticipated circumstances" sufficient to justify the continuation of the discovery the NRA sought post-NOI, as required pursuant to Rule 202.21(d) and (e).

Further, in its letter dated January 11, 2023 (NYSCEF 1065), the NRA sought to preserve its right to seek post-NOI relief based on vague statements that it may have issues with the Plaintiff's supplemented contention interrogatory responses. The NRA and Plaintiff had already met and conferred, and Plaintiff had already clarified two of its interrogatory responses. The NRA never responded to Plaintiff's letter dated January 18, 2023 (NYSCEF 1106), and never moved to vacate the NOI, nor did it seek intervention by the Special Master regarding the contention interrogatories.

ARGUMENT

I.

PLAINTIFF'S RESPONSES TO DEFENDANTS' CONTENTION INTERROGATORIES ARE LEGALLY SUFFICIENT

A. The Applicable Law Governing Responses to Contention Interrogatories

Defendants' Motions are premised on the incorrect notion that Plaintiff is required to provide, in response to contention interrogatories, a complete road map of each and every fact that Plaintiff intends to present at trial, as well as the bases for legal conclusions. That, however, is not the law. "[W]here interrogatories seek the factual support for a party's contentions, courts have tended toward a middle ground, requiring parties to explain the factual bases for their contentions by providing the material facts upon which they will rely, *but not a detailed and exhaustive listing of all the evidence that will be offered.*" *Linde v. Arab Bank PLC*, 2012 WL 957970, at *1 (E.D.N.Y. Mar. 21, 2012) (emphasis added). Moreover, no response is required to interrogatories that concern "conclusions of fact or law and argumentative matter." *First United Fund Ltd., v. American Banker, Inc.*, 485 N.Y.S.2d 489, 494 (Sup. Ct., N.Y. Cty 1985) (denying demand for a response to interrogatory seeking a statement of "each fact which is the basis for each of the defenses pleaded in the answer") (citing *Lakeville Merrick Corp. v. Town Bd., Town of Islip*, 23 A.D.2d 584 (2d Dep't 1965); *Blitz v. Guardian Life Ins. Co. of America*, 99 A.D.2d 404 (1st Dep't 1984)), or those that are vague and overbroad. *See Law Offices Binder & Binder, P.C. v. O'Shea*, 44 A.D.3d 626, 626 (2d Dep't 2007) ("The Supreme Court also properly denied that branch of the plaintiff's motion which was to compel the defendant to answer interrogatory number 16, which asked the defendant, *inter alia*, to state the facts he relied upon in support of his denials and his special or affirmative defenses. This interrogatory was vague and overbroad, and sought privileged matter."); *Mijatovic v. Noonan*, 172 A.D.2d 806, 806, 569 N.Y.S.2d 176, 177 (2d Dep't 1991)

(internal citations omitted) (“The propriety of interrogatories depends upon the extent of the material requested, and whether that material is reasonably necessary in preparing the prosecution or defense of an action. . . . Interrogatories which call for opinions or conclusions of law, rather than relevant facts, should be stricken.”); *Forest Bay Homes, Inc. v. Kosinski*, 73 A.D.2d 684 (2d Dep’t 1979) (modifying order and vacating interrogatories where “defendants demand facts upon which respondents will rely at the trial to support certain denials or averments contained in plaintiff-respondent’s reply to defendants’ answer and counterclaim. Such demands are too vague and broad in scope, and impermissibly seek matter made in preparation for trial, which is privileged (attorney work product)”); *Translink Coordination, Inc. v. Translink America, Inc.*, 2004 WL 6039482 (Sup. Ct., N.Y. Cty. 2004) (an interrogatory that sought from respondents “all documents upon which they rely to support their contention that certain payments did not render respondents . . . insolvent” called for “respondents to provide support for a conclusion and is therefore improper”; *see also Ritchie Risk-Linked Strategies Trading (Ireland), Ltd. v. Coventry First LLC*, 273 F.R.D. 367, 369 (S.D.N.Y. 2010) (“Defendants’ requests, insofar as they seek every fact, every piece of evidence, every witness, and every application of law to fact—rather than, for example, certain principal or material facts, pieces of evidence, witnesses and legal applications—supporting the identified allegations, are overly broad and unduly burdensome.”)).

Indeed, cases relied on by Defendants (including *Linde*) support this proposition. In *Morel v. Reed*, (cited in NYSCEF 1427, p. 19), the Court stated, “[t]he breadth and specificity of this request would not serve the purpose of Rule 33(c) contention interrogatories, which is ‘to assist parties in narrowing and clarifying the disputed issues *and reducing the possibility of surprise at trial.*’” 2013 WL 12129656, at *2 (E.D.N.Y. Oct. 2, 2013) (citations omitted) (emphasis added), The *Morel* Court went on to quote *Linde*, holding that “the Court compels defendants to ‘explain

the factual bases for their contentions by providing the material facts upon which they will rely, but not a detailed and exhaustive listing of all of the evidence that will be offered.” *Morel*, 2013 WL 12129656, at *2.

Moreover, responding to contention interrogatories does not require reiteration of information that is already in Defendants’ possession through discovery and through Plaintiff’s expert reports, to which the responses to the contention interrogatories refer: “Plaintiffs will not be required to parse through documents that have already been produced to defendants, which defendants are in a position to review themselves, in order to explain the obvious.” *Trib. Co. v. Purcigliotti*, No. 93 CIV. 7222 (LAP)(THK), 1997 WL 540810, at *2 (S.D.N.Y. Sept. 3, 1997). Thus, “[w]hile a party is obligated to respond ‘truthfully and completely’ to contention interrogatories, the task of responding should not require a party ‘to review documents that have already been produced.’” *Principia Partners LLC v. Swap Fin. Grp., LLC*, No. 18 CV 7998 (AT) (DF), 2019 WL 13249027, at *2 (S.D.N.Y. July 18, 2019) (citation omitted).

B. Plaintiff Fully Responded to Defendants’ Contention Interrogatories

Plaintiff’s responses to the contention interrogatories, particularly when taken together with Plaintiff’s particularized pleadings, Plaintiff’s expert reports, and the evidence Plaintiff has obtained almost entirely from the Defendants and from current and former NRA employees, officers and directors in this action, have given Defendants sufficient notice of the factual and legal bases of Plaintiff’s claims. For the reasons set forth below, Plaintiff’s responses to the NRA contention interrogatories at issue, Nos. 1, 2 and 8 are complete, and the NRA’s motion should be denied in its entirety. Likewise, Plaintiff fully responded to Defendant Frazer’s contention interrogatories 3, 5, and 6 and his motion should also be denied.

1. NRA Contention Interrogatory No. 1

NRA Contention Interrogatory No. 1 focused on RPTs. It stated:

For each transaction that you contend is a wrongful related party transaction with regard to which you are entitled to relief—whether pursuant to your First Cause of Action, the Thirteenth Cause of Action, or otherwise—specify the legal basis for and identify with particularity all facts or evidence on which you base such contention, including but not limited to any contention that the defense set forth in N-PCL 715(j) is unavailable.

In response to Contention Interrogatory No. 1, Plaintiff articulated several legitimate objections, including that the interrogatory was overbroad and unduly burdensome, and otherwise responded fully, listing related parties and stating in part:

Notwithstanding the foregoing objections and without waiver of the same, Plaintiff incorporates by reference the allegations in the Second Amended Complaint, the evidentiary record, the responses to other Interrogatories herein, and the expert reports of Eric Hines and Jeffrey Tenenbaum, dated September 16, 2022 and October 7, 2022 (collectively, “Plaintiff’s Expert Reports”) and states that the related party transactions occurring from 2015 through the present violated New York Not for Profit Corporation Law (“N-PCL”) § 715, Estates Powers and Trusts Law (“EPTL”) § 8-1.9 and the NRA’s policies, including the Statement of Corporate Ethics, Related Party Transaction Policy, Conflict of Interest Policy, and Procurement and Purchasing Policies the (“NRA’s Relevant Policies”), because, *inter alia*, they were not properly approved by the Board or the Audit Committee in advance; such transactions were not determined by the Board or the Audit Committee to be fair, reasonable and in the NRA’s best interest at the time of such determination; the Board or the Audit Committee failed to consider alternative transactions to the extent available; the Board or the Audit Committee failed to contemporaneously document in writing the basis for the approval, including its consideration of any alternative transactions; where related party transactions were retrospectively ratified, the Board or Audit Committee failed to conduct a sufficient review to find in good faith that the transaction was fair, reasonable and in the corporation’s best interest at the time the corporation approved the transaction; where related party transactions were retrospectively ratified, the Board or Audit Committee failed to document in writing the nature of the violation and the basis for the board’s or committee’s ratification of the transaction and failed to put into place procedures to ensure that the NRA complies with the NRA’s internal requirements and the law pertaining to related party transactions in the future. Further, the directors, officers and key persons who had an interest in the related party transactions failed to disclose the material facts concerning the same in good faith to the board, or an authorized committee thereof.

NYSCEF 1430. Following a meet and confer, on January 9, 2023, Plaintiff supplemented its response, and provided a definitive list of 43 individuals with whom the NRA engaged in RPTs, which are the transactions Plaintiff intends to rely at trial.

Defendant NRA's complaint is not credible that Plaintiff's responses leave it in the dark about the specific transactions at issue. Plaintiff's response named 43 individuals, who are "related parties" under the statutory definition. Each of these individuals had financial transactions with the NRA. For Defendants to claim that they nevertheless require a "consolidated list of transactions and occurrences with some degree of specificity (*i.e.*, timeframe, parties, and description)", NYSCEF 1427 at p. 20, is belied by the record. The NRA is aware of the transactions it had with each of these insiders. It provided Plaintiff with information about these transactions in the business records and other discovery it provided to Plaintiff in this action. Plaintiff should not be required to "to parse through documents that have already been produced ..., which defendants are in a position to review themselves, in order to explain the obvious." *Trib. Co. v. Purcigliotti*, 1997 WL 540810, at *2; *Principia*, 2019 WL 13249027, at *2. Defendant NRA is not, as it claims, "severely prejudice[d]" by Plaintiff's "withhold[ing] [of] this information," nor will it be "in the dark until trial". NYSCEF 1427 at p. 20. Moreover, Plaintiff did not "renege[] on its agreement" or provide information that is "neither responsive nor helpful," *Id.* at p. 21. Rather, Plaintiff's interrogatory responses provided the NRA with sufficient information to alert it to readily identifiable RPTs that are the bases for Plaintiff's claims.

Likewise, Plaintiff provided a listing of the factual and legal bases for its contentions that the transactions were wrongful, *e.g.*, that the NRA did not comply with the statutory requirements of N-PCL § 715, by failing to obtain advance Board approval that the transactions were fair and reasonable and in the best interests of the NRA and upon consideration of alternative transactions to the extent available. Accordingly, Plaintiff fully responded to NRA contention interrogatory no. 1.

2. NRA Contention Interrogatory No. 2

NRA Contention Interrogatory No. 2 focused on whistleblowers, and stated:

For each alleged “violation of the whistleblower protections of N-PCL 715-b or EPTL 8-1.9”² that you contend occurred, specify the legal basis for and identify with particularity all facts or evidence on which you base such contention.

Again, Plaintiff articulated legitimate objections, including that the interrogatory was overbroad and unduly burdensome, and responded fully, stating:

The NRA failed to adopt, and oversee the implementation of, and compliance with a legally-compliant policy under with N-PCL § 715-b and EPTL§ 8-1.9 before January 2020, including but not limited to a policy containing procedures for the reporting of violations or suspected violations of laws or policies, procedures for preserving the confidentiality of reported information; a requirement that the NRA appoint a designee to administer the whistleblower policy; a requirement that the person who is the subject of a whistleblower complaint not be present at or participate in board or committee deliberation or vote on the matter relating to such complaint; and a requirement that a copy of the policy be distributed to all trustees, officers, employees and volunteers, with instructions on how to comply with the procedures set forth in the policy. Both before and after January 2020, when the NRA adopted a new whistleblower policy, the NRA failed to implement and enforce whistleblower protections in compliance with New York law and under its own policies.

NYSCEF 1430. Plaintiff’s interrogatory response detailed a list of defects in the NRA’s whistleblower policies. Plaintiff also identified whistleblowers by name, using the word “including” at the beginning of the list, and then articulated a list of retaliatory actions taken against those whistleblowers, stating:

The NRA permitted whistleblower retaliation, intimidation and harassment in a variety of ways, including by commencing an action to remove one whistleblower as a member, allowing defendant John Frazer, in his role as Secretary and General Counsel, to circulate emails written by former NRA President Carolyn Meadows denigrating and criticizing whistleblowers, removing and/or failing to grant committee assignments to whistleblowers, permitting the maintenance of “burn books” about employees, allowing former NRA President Marion Hammer and current NRA Vice President Willes Lee to exchange emails with other Board members approving of whistleblower retaliation, making public criticisms of whistleblowers, and terminating the employment of a whistleblower. The NRA also failed to timely and properly investigate and address whistleblower complaints.

NYSCEF 1430. Upon the NRA's complaint that the response was not sufficiently definitive, particularly pointing to the word "including" as objectionable, Plaintiff supplemented its response on January 9, 2023, providing a list of whistleblowers upon which Plaintiff intends to rely at trial. On February 2, 2023, Plaintiff, while preserving its objections, agreed to "further supplement our response to Interrogatory No. 2 by removing the words *"in a variety of ways, including"* in the list of whistleblower violations already set forth therein." NYSCEF 1437 at p. 12. Plaintiff thus provided Defendants with both a list of the people whom Plaintiff considers to be whistleblowers *and* described the circumstances that Plaintiff contends are the bases for violations of the statute, upon which Plaintiff intends to rely at trial. There is nothing further that Plaintiff should be required to add, as once again, this information is already in Defendants' possession.

3. NRA Contention Interrogatory No. 8

NRA Contention Interrogatory No. 8 asked, "For each instance where the Second Amended Complaint asserts a general allegation and provides merely a non-exhaustive/illustrative list of specific instances of alleged misconduct (*e.g.*, Second Amended Complaint Paragraphs 155, 695), identify all other specific instances that you contend occurred or exist but that are not identified in the Second Amended Complaint." Plaintiff objected to the interrogatory on numerous grounds, including that it was vague and unduly burdensome. NYSCEF 1430. Nevertheless, in an attempt to resolve a dispute, Plaintiff agreed to supplement that response, without waiving any rights or objections. On January 9, 2023, Plaintiff provided a definitive list of persons with whom RPTs had occurred and a definitive list of whistleblowers, and again on February 2, 2023, informed Defendants that it removed the words "in a variety of ways, including" in its list of whistleblower actions. NYSCEF 1437 at p. 2. The general and non-specific natures of NRA Contention Interrogatory No. 8 did not require Plaintiff to provide any further information beyond what it has

provided in response to more specific requests, contention interrogatories nos. 1 and 2, discussed above.

4. Frazer Contention Interrogatory Nos. 3, 5, and 6

Defendant Frazer complains that Plaintiff failed to “provide specifics regarding each instance where the Attorney General contends Mr. Frazer failed to discharge a duty”, NYSCEF 1443 at p. 6; *see also* NYSCEF 1447 (Fleming email dated December 20, 2022). As shown below, Plaintiff fully responded to Frazer Contention Interrogatory Nos. 3, 5, and 6, subject to its objections that Interrogatory Nos. 5 and 6 improperly seek legal conclusions.

Frazer Contention Interrogatory No. 3 stated:

Identify with particularity the facts supporting your contention, if it is your contention, that Frazer instituted a culture of self-dealing, mismanagement, and negligent oversight at the NRA, and that he overrode or evaded internal controls to allow himself, his family, favored board members, employees and vendors to benefit through reimbursed expenses, related party transactions, excess compensation, side deals, or waste of charitable assets without regard to the NRA’s best interests, as alleged in Paragraph 142 of the Complaint.

Frazer Contention Interrogatory No. 5 stated:

Identify with particularity the facts supporting your contention, if it is your contention, that Frazer’s official conduct included “neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge,” as required by N-PCL § 720(a)(1)(A).

Frazer Contention Interrogatory No. 6 stated:

Identify with particularity the facts supporting your contention, if it is your contention, that Frazer’s official conduct included “acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties,” as required by N-PCL § 720(a)(1)(B).

In response to Frazer Contention Interrogatory Nos. 3, 5, and 6, after interposing appropriate objections, including that the interrogatories were overbroad and improper, and for

nos. 5 and 6, call for a legal conclusion, Plaintiff provided this substantive response to no. 3, in relevant part:

Defendant Frazer is and has been the Secretary to the Board and General Counsel of the NRA during all relevant times. Defendant Frazer is a component of the NRA's compliance reform efforts and in setting the "Tone at the Top" the NRA has referred to in connection with its compliance reform efforts. Further, Defendant Frazer owes fiduciary duties to the NRA. Under New York law and in accordance with the NRA's bylaws and policies—including the Statement of Corporate Ethics, the Conflict of Interest and Related Party Transactions Policy, the Whistleblower Policy, the Procurement Policy, the Approval Procedures for Purchase Agreements and Contracts in Excess of \$100,000, and all policies outlined in the NRA's Policy Manual as maintained by the Office of the Secretary, and the NRA Employee Handbook—Defendant Frazer is responsible for administering, overseeing, reporting on, supervising, ensuring compliance with, and following all requirements related to financial transactions, expense reimbursements, contracts, whistleblowers, conflicts of interest, related party transactions, board elections, regulatory filings, and the proper administration of the NRA's charitable assets. As detailed in the Second Amended Complaint, responses to these Interrogatories, Plaintiff's Expert Reports, and the record evidence containing testimony of NRA executives, directors, employees and vendors, and business records and communications, Defendant Frazer repeatedly failed with respect to each of those duties.

The responses to nos. 5 and 6 were substantially similar. NYSCEF 1446. Plaintiff interposed robust answers to Defendant Frazer's contention interrogatories, listing the conduct that Plaintiff intends to rely on at trial.

Defendant Frazer is not entitled to an order compelling any further response. Put simply, Plaintiff was not required to respond to overbroad interrogatories or those that concern conclusions of fact or law or that require it to state each fact that is the basis for each of its claims. *First United Fund Ltd.*, 485 N.Y.S.2d at 494; *Lakeville Merrick Corp.*, 23 A.D.2d at 584; *Blitz*, 99 A.D.2d at 405. Indeed, Defendants lodged similar objections to Plaintiff's interrogatories. Sash Aff. at Exs. E, F. Nor was Plaintiff required to set forth the facts that it will rely upon at trial as such demands are too vague and broad in scope, and impermissibly seek privileged matter including trial preparation materials and attorney work product. *Forest Bay Homes, Inc.*, 73 A.D.2d at 684.

Moreover, Defendant Frazer's accusation that Plaintiff "continues to hide the ball even in responding to [a] limited discovery burden" of "25 contention interrogatories," NYSCEF 1443 at p. 3, is meritless. Defendants have access to the same information as Plaintiff has and have been given notice of the factual and legal bases support Plaintiffs' claims through Plaintiff's detailed complaint, expert reports, as well as responses to the contention interrogatories at issue.

II.
PRECLUSION OR THE STRIKING OF PLEADINGS ARE
DRASTIC REMEDIES UNWARRANTED HERE

Even if Plaintiff's responses were not sufficient – which they are – Defendants have not and cannot meet the high standard for the penalties provided under CPLR 3126, which are reserved for willful disclosure violations and those that are contrary to preexisting court orders. Contrary to Defendants' assertions, Plaintiff did not "renege[]" on "provid[ing] the specific related-party transactions and whistleblower violations it intended to use at trial." NYSCEF 1427 at p. 2. Plaintiff provided the related parties and whistleblower violations, through its initial and supplemental contention interrogatory responses. Nor has Plaintiff "refused to provide further clarification—hiding behind its filing of the Note of Issue." NYSCEF 1427 at p. 2. Most fundamentally, Plaintiff has not "willfully failed to comply with its discovery obligations." NYSCEF 1427 at p. 3. Plaintiff lodged appropriate objections, answered interrogatories, including more than the numerical limitations in the Commercial Division rules, and provided Defendants with the information required. There has been no "willful" failure to provide discovery, nor is there a violation of a court order that would entitle Defendants to the relief they are seeking. Defendants' Motions were strategically maneuvered as an excuse to seek preclusion. Moreover, Defendant NRA's Memorandum of Law (NYSCEF 1427) glosses over Plaintiff's supplementations.

CPLR 3126 provides in relevant part that any party that “refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed” may be subject to such “order with regard to the failure or refusal as are just,” including orders resolving the matter at issue in favor of the party obtaining the order, precluding the admission of evidence, or striking a pleading. Here, there was no refusal to comply with a court order – indeed, there was no prior order because Defendants did not seek relief from the Special Master or the Court to cure the purportedly inadequate responses.

In addition, the responses were truthful and complete, and Plaintiff nevertheless supplemented them in a good faith effort to resolve any dispute between the parties, thus there was no willful failure to disclose. Accordingly, even if the Court found the answers deficient, neither preclusion nor the striking of portions of the Complaint is warranted.

Much of the caselaw cited by Defendants is inapposite or involved conduct that was in violation of repeated court orders. *See, e.g., De Leo v. State-Whitehall Co.*, 126 A.D.3d 750, 752, 5 N.Y.S.3d 277, 279 (2d Dept. 2015) (internal citations omitted) (“[b]efore a court invokes the drastic remedy of striking a pleading ..., there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious Willful or contumacious conduct can be inferred from the party's repeated failure to respond to demands or to comply with discovery orders”); *Kontos v. Koakos Syllogos "Ippocrates," Inc.*, 11 A.D.3d 661, 783 N.Y.S.2d 653, 654 (2d Dept. 2004) (internal citations omitted) (“[w]here a party defends a failure to comply with a notice to produce witness information by claiming that he or she does not possess such information, ‘failure to provide the information in his [or her] possession would preclude him from later offering proof regarding that information’”); *see also Ng v. HSBC Mortg. Corp.*, No. 07-CV-5434 RRM/VVP, 2010 WL 889256, at *21 (E.D.N.Y. Mar. 10, 2010) (refusing to impose “severe”

sanction of dismissal of pleading despite repeated violations of discovery orders); *Corriel v. Volkswagen of Am., Inc.*, 127 A.D.2d 729, 730 (2d Dept. 1987) (“plaintiff’s answers were in an incorrect form and lacked the requisite verification. The plaintiff failed to respond to a number of interrogatories, responded in several instances by the word ‘Declined’ and answered many of the remaining interrogatories in a nonresponsive or general manner. Under these circumstances, the Supreme Court should have granted that branch of the appellant’s motion which was to compel the plaintiff to properly respond to the interrogatories”); *Frazier v. City of New York*, 141 Misc. 2d 536, 537 (Sup. Ct., N.Y Cnty. 1988) (where plaintiff failed to respond to interrogatories at all and offered no opposition to the motion, the court granted the motion “to the extent the plaintiff will be precluded from giving evidence at trial relating to the interrogatories, unless the plaintiff responds to them within twenty days of service of this order with notice of entry thereon”).

The extreme sanction of preclusion is not warranted here. Like the *De Leo* case cited by Defendant NRA, “defendants did not move for relief pursuant to CPLR 3126 *until the plaintiff filed a note of issue—which she was required to do pursuant to the compliance conference order* No pattern of willful failure to respond to discovery demands or comply with disclosure orders was demonstrated”. *De Leo*, 126 A.D.3d at 752 (emphasis added).

Finally, “[t]he sanction [of preclusion] should be ‘commensurate with the particular disobedience it is designed to punish, and go no further than that,’” *Han v. New York City Transit Auth.*, 169 A.D.3d 435 (1st Dept. 2019) (quoting Patrick M. Connors, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 3126:8 at 497); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Global Strat Inc.*, 22 N.Y.3d 877, 880 (2013) (same). In sum, there is no violation of a court order or willful failure to disclose that would justify imposition of sanctions under CPLR 3126.

There is also no basis to order additional responses to the interrogatories at issue pursuant to CPLR 3124. Plaintiff has supplied Defendants with the information they need to defend their claims, and Defendants cannot legitimately claim that they will be surprised at trial. Contrary to Defendant NRA's argument, Plaintiff has identified each related party transaction it intends to rely on at trial—it identified the 43 people with whom the NRA transacted—and Defendants are in control of the remainder of that information—including “timeframe, and general nature” of the transactions. Defendant NRA was the counterparty in such transactions and is surely aware of them as it was the NRA that provided information of its own transactions with those 43 people. NYSCEF 1427 at pp. 22-23. Plaintiff likewise identified, via its supplementation, each whistleblower violation it intends to rely on at trial, including the whistleblowers themselves and the list of violations. NYSCEF 1427 at p. 23. Again, these are the NRA's whistleblowers and their own conduct. There is no “gamesmanship” by the Plaintiff here.

III.

DEFENDANTS' MOTIONS ARE UNTIMELY AND DEFENDANTS FAILED TO FOLLOW THE COURT'S RULES FOR DISCOVERY MOTION PRACTICE

Defendants' Motions are procedurally deficient and should be denied for those independent reasons. Plaintiff filed the NOI on December 22, 2022. NYSCEF 1003. Defendants have not timely moved to vacate that NOI. Indeed, Defendants had Plaintiff's interrogatory responses *before* the filing of the NOI, but waited until months later to file the instant motions. Defendants were required to first avail themselves of the Special Master's review and failed to do so.

Having elected not to seek relief from the Special Master, Defendants thereafter filed these motions without first requesting a Commercial Division Rule 14 conference pursuant to Rule VII (B) of this Court's Part Rules. For these reasons alone, Defendants' Motions should be denied.

CONCLUSION

For the foregoing reasons, Defendants' Motions to Preclude should be denied in their entirety, and the Court should award such other and further relief as it deems just and proper.

Dated: May 5, 2023
New York, New York

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Attorney Certification Pursuant to Commercial Division Rule 17

I, Sharon Sash, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law contains 6619 words, excluding the parts exempted by Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 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 Sharon Sash
Sharon Sash