SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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

Plaintiff,

- v -

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

Defendants.

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INDEX NO. 451625/2020

MOTION DATE 09/24/2021, 09/24/2021, 09/27/2021

MOTION SEQ. NO. 016 017 018

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 016) 348, 349, 350, 351, 352, 353, 354, 375, 391, 433, 438

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 017) 355, 356, 357, 358, 359, 360, 361, 362, 392, 439, 440, 441, 442, 443, 444, 445

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 018) 363, 364, 365, 366, 367, 368, 369, 370, 371, 393, 404, 405, 406, 431, 446, 447, 448, 449, 450, 451, 452, 453, 454, 456, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 545

were read on this motion to DISMISS.

The Attorney General's allegations in this case, if proven, tell a grim story of greed, self-dealing, and lax financial oversight at the highest levels of the National Rifle Association. They describe in detail a pattern of exorbitant spending and expense reimbursement for the personal benefit of senior management, along with conflicts of interest, related party transactions, cover-ups, negligence, and retaliation against dissidents and whistleblowers who dared to investigate or complain, which siphoned millions of dollars away from the NRA's legitimate operations.

The Attorney General's Complaint seeks restitution and other monetary relief from four current and former NRA officers (to be repaid to the NRA), as well as their removal from NRA employment and permanent injunctions against serving as officers, directors, or trustees of any not-for-profit or charitable organization incorporated or authorized to conduct business or solicit charitable contributions in New York. However, the Complaint's boldest claims target the NRA itself. Despite elsewhere casting the organization as the *victim* of its executives' schemes, the Attorney General seeks an order "[d]issolving the NRA and directing that its remaining assets and any future assets be applied to charitable uses consistent with the mission set forth in the NRA's certificate of incorporation."

The NRA and two of the four Individual Defendants (Wayne LaPierre and John Frazer) now move to dismiss all claims asserted against them in the Complaint. For the reasons described in this decision, Defendants' motions are **granted** as to the first, second, sixteenth, and eighteenth causes of action in the Complaint, but are otherwise denied. In summary:

The Attorney General's claims to dissolve the NRA are dismissed. Her allegations concern primarily private harm to the NRA and its members and donors, which if proven can be addressed by the targeted, less intrusive relief she seeks through other claims in her Complaint. The Complaint does not allege that any financial misconduct benefited the NRA, or that the NRA exists primarily to carry out such activity, or that the NRA is incapable of continuing its legitimate activities on behalf of its millions of members. In short, the Complaint does not allege the type of *public* harm that is the legal linchpin for imposing the "corporate death penalty." Moreover, dissolving the NRA could impinge, at least indirectly, on the free speech and assembly rights of its millions of members. While that alone would not preclude statutory dissolution if circumstances otherwise clearly warranted it, the Court believes it is a relevant

factor that counsels against State-imposed dissolution, which should be the last option, not the first.[1]

The Attorney General's remaining claims against the NRA and the Individual Defendants for violations of the Not-For-Profit Corporations Law ("N-PCL"), the Estates Powers and Trusts Law ("EPTL"), and the Executive Law are sustained. Two other claims – common law unjust enrichment and violation of the Prudent Management of Institutional Funds Act, which seek essentially the same financial relief as other claims – are dismissed on statutory grounds.

BACKGROUND

A. The NRA

The National Rifle Association of America was chartered under New York law on November 17, 1871 (Amended and Supplemental Verified Complaint ["Complaint"] ¶¶ 17, 58 [NYSCEF 333]). The NRA's stated purpose, at the time, was "the improvement of its members in marksmanship, and to promote the introduction of a system of army drill and rifle practice, . . . and for those purposes to provide a suitable range . . . in the vicinity of the City of New York" (*id.* ¶ 58; *see* NYSCEF 117 at 5 [copy of certificate of incorporation]). To that end, in 1872 the New York Legislature granted $25,000 in public funds to the fledgling group, for the purchase of land at Creed Farm in Queens County (Compl. ¶ 59). This land, which came to be known as "Creedmoor," served as a rifle range for the NRA and the New York National Guard (*id.* ¶ 59).

Over 150 years later, the NRA has "established itself as one of the largest, and oldest, social-welfare charitable organizations in the country" (*id.* ¶ 60). Though today the NRA's

[1] To be clear, the Attorney General does not base her claims here in any way on the content of the NRA's advocacy. If she had, this would be a shorter opinion. The N-PCL's dissolution provisions are not (and legally could not be) designed to police or penalize the expression of political beliefs, and the Attorney General does not contend otherwise. To the extent this case involves consideration of constitutional rights, it concerns the First Amendment, not the Second.

principal place of business is in Virginia, it is still legally domiciled in New York, its ancestral home (*id.* ¶¶ 17-18). And because it is a New York not-for-profit corporation, the NRA is subject to the oversight of the New York Attorney General ("NYAG").

The NRA is registered with the NYAG's Charities Bureau to conduct business and solicit donations (*id.*). And the NRA is exempt from federal and certain state taxation pursuant to section 501 [c] [4] of the Internal Revenue Code and New York law, conditioned upon the NRA's compliance with certain statutory requirements discussed in more detail *infra* (*id.* ¶¶ 18, 60).

The scope of the NRA's activities has, of course, substantially outgrown its modest 1871 charter. As set forth in its bylaws, the NRA's stated mission now comprises five distinct objectives:

> "i. To protect and defend the Constitution of the United States, especially with reference to the God-given inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, collect, exhibit, transport, carry, transfer ownership of, and enjoy the right to use, keep and bear arms, in order that the people may exercise their individual rights of self-preservation and defense of family, person, and property, and to serve in the militia of all law-abiding men and women for the defense of the Republic and the individual liberty of the citizens of our communities, our states and our great nation;
>
> ii. To promote public safety, law and order, and the national defense;
>
> iii. To train members of law enforcement agencies, the armed forces, the National Guard, the militia, and people of good repute in marksmanship and in the safe handling and efficient use of small arms;
>
> iv. To foster, promote and support the shooting sports, including the advancement of amateur and junior competitions in marksmanship at the local, state, regional, national, international, and Olympic levels; and
>
> v. To promote hunter safety, and to promote and defend hunting as a shooting sport, for subsistence, and as a viable and necessary method of fostering the propagation, growth and conservation, and wise use of our renewable wildlife resources."

(*id.* ¶ 19).

Today, the NRA consists of several large divisions, eight officers to oversee them, a 76-member Board of Directors, and dozens of standing and special Committees, all governed by a comprehensive set of bylaws, policies, and procedures (*see generally id.* ¶¶ 63-136).

B. The Individual Defendants

1. Wayne LaPierre

The focus of the Attorney General's Complaint "is on the governance of the organization under the leadership of Wayne LaPierre" (*id.* ¶ 62). LaPierre has been the Executive Vice President of the NRA since the early 1990s and is responsible for overseeing all of the divisions and the day-to-day affairs of the NRA (*id.* ¶ 137). The NYAG alleges that LaPierre routinely abused his authority as Executive Vice President of the NRA to cause the NRA to improperly incur and reimburse LaPierre for expenses that were for LaPierre's personal benefit and violated NRA policy, including private jet travel for purely personal reasons; trips to the Bahamas to vacation on a yacht owned by the principal of numerous NRA vendors; use of a travel consultant for costly black car services; gifts for favored friends and vendors; lucrative consulting contracts for ex-employees and board members; and excessive security costs (*id.* ¶ 144).

According to the Complaint, the NRA incurs substantial costs as a result of LaPierre's private air travel (*id.* ¶ 147). LaPierre testified that it is NRA policy that he travel by private aircraft at all times, for security reasons (*id.*). He testified further that he is not aware of any limits under this policy on the kind of plane he can charter, how far he can go, or the amount of money he can spend on the flights (*id.*). LaPierre admitted under oath that he has no knowledge of a written policy permitting charter travel, and the NRA has never produced one (*id.* ¶ 148). NRA records show that between June 2016 and February 2018, the organization paid for

numerous private flights for LaPierre's wife and extended family, even when LaPierre himself was not a passenger (*id.* ¶ 149). LaPierre admitted that he authorized at least some of these flights, and the NYAG alleges that none of them were approved for security reasons, nor were they approved by the NRA Board (*id.*).

For example, in July 2017, LaPierre authorized a private flight for his niece and her daughter to fly from Dallas, TX, to Orlando, FL (*id.* ¶ 151). LaPierre testified that this "was another example where I was getting [my niece] together with my wife to work on the Women's Leadership Forum events. She had tried to travel commercial. All the commercial flights they had – there was a mechanical problem. She was stuck there at the airport until 12:30 or 1:00 at night with a child trying to fly commercial" (*id.*). The cost of the flight was more than $26,995 (*id.*).

Similarly, in January 2017, LaPierre authorized a private jet to pick up his niece's husband in North Platte, NE, on the way to Las Vegas for a convention (*id.* ¶ 153). LaPierre testified that his niece "was working the entire time" attending various donor meetings at the convention, so he authorized a flight to bring her husband "over [to] help babysit the child while the mother was working because there was nobody else to do it" (*id.*). LaPierre also authorized a private flight to fly his niece's husband back to Nebraska two days before his niece was ready to return. Asked whether this flight was in the NRA's best interest, LaPierre explained that "it's really almost very hard to get commercial flights back," and his niece's husband "had to get back to work" (*id.*). The flight cost about $15,000 (*id.*).

From May 2015 to April 2019, the NRA incurred over one million dollars in expenses for private flights on which LaPierre was not a passenger (*id.* ¶ 160). The NYAG alleges these expenditures were neither authorized by nor consented to by the NRA Board (*id.*). In its annual

filings with the Attorney General for 2014 to 2018, the NRA asserted that it required substantiation prior to reimbursing these expenses, but the NYAG says it has not found any evidence that the private flights and related business uses were substantiated prior to reimbursement (*id.* ¶ 162). In fact, the NRA's then-Treasurer learned for the first time that LaPierre's wife travels alone by private charter at the NRA's expense when counsel informed him the night before he was examined by the Attorney General in June 2020 (*id.* ¶ 163).

The Complaint's allegations against LaPierre are not limited to private air travel. The Attorney General alleges a litany of purportedly improper benefits and abuses of power. Among other things:

- At LaPierre's instigation, the NRA allegedly reimbursed him for numerous expenses that were personal, including gifts to friends and favored employees (*id.* ¶ 199). Between 2013 and 2017, LaPierre was reimbursed for more than $1.2 million in expenses, including over $65,000 for Christmas gifts for his staff, various donors, and friends (*id.* ¶¶ 200-201).

- Between 2009 and 2017, LaPierre expensed over a hundred thousand dollars in membership fees for a golf club located in the Washington D.C. area (*id.* ¶ 207). LaPierre testified that he uses the golf course for both personal and business reasons (*id.*). In its annual filings with the Attorney General for 2014 to 2018, the NRA asserted that it required substantiation prior to reimbursing these expenses, but the NYAG has not found any evidence that this occurred (*id.*).

- In the last 15 years, LaPierre has allegedly directed the NRA to pay officers, directors, and former employees millions of dollars in "consulting" agreements without Board approval and in violation of the bylaw prohibition on salary or other private benefits to directors without Board authorization (*id.* ¶ 355).

- LaPierre allegedly secured for himself a lucrative post-employment contract with the NRA, which obligates the NRA to continue to pay LaPierre for years after he departs the organization – at a higher rate than his compensation as Executive Vice President (*id.* ¶¶ 435-442). The Attorney General alleges "[t]here is no evidence that the NRA Board or a designated committee reviewed or approved" this "poison-pill" contract (*id.* ¶¶ 2, 436).

- LaPierre allegedly stifled any internal dissent aimed at scrutinizing the NRA's governance and finances under his leadership. He allegedly retaliated against a former NRA President (called "Dissident No. 1" in the Complaint) when the President began

making inquiries into the Brewer firm's billing practices and the operations of the NRA (*id.* ¶ 481). Likewise, when several Board members raised similar concerns, they were "stonewalled, accused of disloyalty, stripped of committee assignments, and denied effective counsel necessary to properly discharge [their] responsibilities as board members" (*id.* ¶ 491).

2. John Frazer

John Frazer has been the Secretary and General Counsel of the NRA since 2015, and in those capacities Frazer reports directly to LaPierre (*id.* ¶ 286). Whether Frazer in fact was qualified to hold these positions is a concern raised in the Complaint. At the time of his appointment, Frazer had been licensed as an attorney for seven years, but spent most of that time working in a non-legal position at the NRA. Frazer had been in private practice, as a solo practitioner, for only 18 months when he became the NRA's General Counsel (*id.* ¶ 290). And according to the Attorney General, there is "no indication" that Frazer possessed relevant legal experience when he got the job (*id.*). LaPierre allegedly hired Frazer without seriously vetting his qualifications. LaPierre admitted he did not know that his General Counsel hadn't graduated from law school until 2008, admitted he did not know how familiar Frazer was with the relevant legal frameworks, but "assumed, as any other attorney, [Frazer] would be aware of . . . general things like that" (*id.* ¶ 291).

Once he assumed the roles of Secretary and General Counsel, Frazer was responsible for, among other things, ensuring the NRA's compliance with corporate governance requirements imposed by New York on not-for-profit organizations (*id.* ¶ 293). But Frazer allegedly failed to fulfill his obligations. Instead, from 2014 to the present, Frazer allegedly failed to make the necessary changes to board governance procedures, or to advise officers and directors of the needed changes (*id.* ¶ 294). He also allegedly failed to ensure that related party transactions were being addressed by NRA officers and directors in accordance with N-PCL 715; failed to

enforce compliance with the NRA's Conflict of Interest Policy; and failed to ensure that the NRA was in compliance with laws and policies governing whistleblowers (*id.*). For example, in connection with related party transactions, the Audit Committee Chair testified, "there were some [related party transactions] that should have been given to us, should have been captured into the [disclosure of financial interest] forms, should have been presented to us by Frazer and they weren't" (*id.*).

As discussed further in connection with the Seventeenth Cause of Action (*see* part G, *infra*), Frazer was also responsible for executing and certifying the NRA's annual CHAR 500 report with the New York Charities Bureau (*id.* ¶ 295). On an annual basis, Frazer certified under penalty of perjury that he "reviewed this report, together with all attachments," and that to the best of his knowledge and belief "they are true, correct, and complete in accordance with the laws of the State of New York applicable to this report" (*id.*). The Attorney General alleges that the NRA made materially false and misleading statements and omissions in its 2016 and 2017 filings with the Attorney General, which Frazer certified were true, correct, and complete (*id.* ¶ 296). Frazer allegedly "either knew or negligently failed to learn that the filings of the NRA with the New York Charities Bureau were not true, correct, and complete in accordance with laws of State of New York applicable to this report" (*id.*).

3. The Non-Moving Individual Defendants

The other two Individual Defendants – Wilson "Woody" Phillips and Joshua Powell – are former NRA officers. Phillips served as the Treasurer of the NRA from 1992 to 2018, and as such, was responsible for overseeing the financial affairs of the NRA (*id.* ¶ 230). The Attorney General claims, among other things, that Phillips failed to adhere to internal financial controls

and misused NRA assets to enrich himself and other NRA officers and directors (*id.*). Powell, meanwhile, was in charge of the NRA's compliance efforts despite, in NYAG's view, his own routine disregard for NRA policies and procedures as well as his abusive behavior towards NRA and vendor staff (*id.* ¶¶ 252-253). Neither Phillips nor Powell move to dismiss the Complaint as against them at this time.

C. Procedural History

1. The Attorney General Files this Action.

The Attorney General is responsible for overseeing the activities of not-for-profit corporations in the State of New York, and the conduct of their officers and directors, in accordance with the N-PCL, the EPTL, the New York Prudent Management of Institutional Funds Act ("NYPMIFA"), and the New York Executive Law (*id.* ¶ 16). After an extensive investigation, the Attorney General commenced this action against the NRA and the four Individual Defendants on August 6, 2020 (NYSCEF 1).

In late 2020, Defendants filed six separate motions to dismiss, stay, or transfer this action under CPLR 327 [a], 511 [b], 2201, and 3211 [a] [1] and [4]. Those motions sought to (1) dismiss this action under CPLR 511(b) on *forum-non-conveniens* grounds; (2) dismiss or stay this action under CPLR 3211 [a] [4] on the basis that a federal action was purportedly already pending between the parties when this action was commenced; and (3) dismiss or transfer this action to Albany County under CPLR 3211(a)(1) and CPLR 511(b) because that is where the NRA's registered agent is located. On January 21, 2021, the motions were denied (*see* NYSCEF 210–215, 220 at 67–81).

2. The NRA Files for Bankruptcy.

On January 15, 2021, the NRA and "Sea Girt LLC" filed voluntary Chapter 11 petitions for bankruptcy in the United States District Court for the Northern District of Texas (*id.* ¶ 615). Sea Girt is a for-profit, Texas-domiciled, wholly-owned shell company formed by the NRA shortly before the bankruptcy to provide a basis for venue in Texas (*id.*; *see In re Natl. Rifle Assn. of Am.*, 628 BR 262 [Bankr ND Tex 2021] [noting "Sea Girt, LLC was formed as a transition vehicle to facilitate the NRA's relocation to Texas" and that "Sea Girt, LLC has no employees or operations and was formed to accomplish a shared bankruptcy purpose with the NRA"] [copy of order available at NYSCEF 365]).

Other than the three members of the NRA's Special Litigation Committee, LaPierre did not inform any members of the NRA Board about his intention to place the NRA into bankruptcy before filing the petition (Compl. ¶¶ 616, 631). LaPierre did not inform any salaried NRA officers, either, and the only salaried NRA employee aware of LaPierre's plan, prior to filing the petition, was the Managing Director of Public Relations (*id.* ¶ 632). Even Frazer, the NRA's General Counsel, who ostensibly is responsible for handling the corporate legal affairs of the NRA, had no input on the decision to file for bankruptcy and did not know of the decision until the day the petitions was filed (*id.* ¶ 633). So too for the NRA's (now former) Treasurer, who was instructed by LaPierre, in the weeks leading up to the bankruptcy filing, to wire $5 million to the Brewer Firm Trust Account but "absolutely did not think it was for [a] bankruptcy filing" (*id.* ¶ 635). As for the current Treasurer, she first learned of the NRA's decision to file for bankruptcy when she received a company-wide announcement after the petition was filed (*id.* ¶ 636).

At the same time it filed for bankruptcy, the NRA announced that it was not, in any conventional sense, bankrupt. In fact, in a press release accompanying the bankruptcy petition, the NRA trumpeted that it "is in its strongest financial condition in years" (*id.* ¶ 639; *In re Natl. Rifle Assn. of Am.*, 628 BR at 284 ["In an odd twist for a bankruptcy case, the NRA is financially healthy"]). The NRA explained that the bankruptcy filing was part of a "plan, which involves utilizing the protection of the bankruptcy court," and "has the Association dumping New York and organizing its legal and regulatory matters in an efficient forum" (Compl. ¶ 639). To drive the point home, LaPierre stated in the press release, "Obviously, an important part of this plan is 'dumping New York'" (*id.*). LaPierre's letter to NRA members and supporters stated, similarly, that the NRA "seek[s] protection from New York officials who illegally abused and weaponized the powers they wield against the NRA and its members" (*id.*). And he later testified in the bankruptcy proceeding that the NRA "filed the Chapter 11 to – because the New York State attorney general is seeking dissolution of the NRA . . . and we believe it's not a fair, level playing field" (*id.* ¶ 638).

3. The Bankruptcy Court Dismisses the NRA's Bankruptcy Petition for Lack of Good Faith.

On May 11, 2021, following a twelve-day trial, the bankruptcy court dismissed the NRA's bankruptcy petition, finding that the NRA had not filed for bankruptcy in good faith and, specifically, that it improperly sought to use the bankruptcy process to obtain a litigation advantage in the instant action before this Court (*id.* ¶ 641; *In re Natl. Rifle Assn. of Am.*, 628 BR at 283 ["The Court finds, based on the totality of the circumstances, that the NRA's bankruptcy petition was not filed in good faith but instead was filed as an effort to gain an unfair litigation

advantage in the NYAG Enforcement Action and as an effort to avoid a regulatory scheme."]).

The court was especially troubled by the way in which LaPierre filed for bankruptcy:

> What concerns the Court most though is the surreptitious manner in which Mr. LaPierre obtained and exercised authority to file bankruptcy for the NRA. Excluding so many people from the process of deciding to file for bankruptcy, including the vast majority of the board of directors, the chief financial officer, and the general counsel, is nothing less than shocking …

(*id.* at 285; Compl. ¶ 642).

The court also alluded to "cringeworthy facts" regarding financial improprieties, both from the past and "still ongoing":

> As counsel for the NRA acknowledged on the record, there were cringeworthy facts during this trial. ***The movants have presented evidence of the NRA's past misconduct.*** Some facts regarding the NRA's past conduct were not available to this Court because the NRA's former treasurer asserted his rights under the Fifth Amendment during large swaths of his deposition.
>
> ***Some of the conduct that gives the Court concern is still ongoing.*** The NRA appears to have very recently violated its approval procedures for contracts in excess of $100,000. Mr. LaPierre is still making additional financial disclosures. ***There are also lingering issues of secrecy and a lack of transparency.*** For example, even after hearing testimony from several witnesses, it is still very unclear why Mr. Spray, an officer everyone seemed to hold in high regard for his talent and integrity, parted ways with the NRA two weeks into this bankruptcy case. What is clear is that Mr. Spray's departure was precipitated by a call from Mr. LaPierre without involvement of the board of directors.

(*In re Natl. Rifle Assn. of Am.*, 628 BR at 283-84 [emphasis added]; Compl. ¶ 644).

Underscoring the "lingering issues" surrounding the NRA, the court issued a warning to the organization:

> [S]hould the NRA file a new bankruptcy case, this Court would immediately take up some of its concerns about disclosure, transparency, secrecy, conflicts of interest of officers and litigation counsel, and the unusual involvement of litigation counsel in the affairs of the NRA, which could cause the appointment of a trustee out of a concern that the NRA could not fulfill the fiduciary duty required by the Bankruptcy Code for a debtor in possession.

(*In re Natl. Rifle Assn. of Am.*, 628 BR at 286; Compl. ¶ 645).

Nevertheless, the court did offer some hopeful comments about the NRA's ability to undertake reforms and to "continue to fulfill its mission" (*In re Natl. Rifle Assn. of Am.*, 628 BR at 285). In rejecting a proposal to appoint a trustee or examiner, which it described as a "compromise that could provide some benefits without taking too much control from the NRA," the court noted that "[w]hile there is evidence of the NRA's past and present misconduct, the NRA has made progress since 2017 with its course correction" (*id.*). It pointed to, among other things, evidence of improved disclosure and self-reporting, and the fact that a former whistleblower (a "champion of compliance") had risen in the ranks to become the acting chief financial officer (*id*. at 284-285).

4. The Attorney General Files the Amended and Supplemental Verified Complaint.

On August 21, 2021, the Attorney General filed the Amended and Supplemental Verified Complaint (NYSCEF 333). The Complaint contains approximately 90 paragraphs of new factual allegations detailing Defendants' alleged wrongdoing in the twelve months after the commencement of this action, including their failure to adequately investigate the allegations in the Attorney General's original complaint; the NRA's disclosure in its 2019 Form 990 that numerous senior executives and board members, including LaPierre and Powell, diverted charitable assets over a period of several years from their intended purposes to enrich themselves; and the NRA's seeking Chapter 11 bankruptcy protection in Texas.

The Complaint asserts eighteen partially overlapping causes of action against the NRA (first, second, fourteenth, fifteenth, sixteenth, and seventeenth causes of action), LaPierre (third, seventh, eleventh, and eighteenth causes of action), Frazer (fourth, eight, seventeenth, and eighteenth causes of action), and non-moving Individual Defendants Phillips (fifth, ninth,

thirteenth, and eighteenth causes of action) and Powell (sixth, tenth, twelfth, and eighteenth causes of action). The NRA, LaPierre, and Frazer move to dismiss all claims asserted against them.

DISCUSSION

On a motion to dismiss under CPLR 3211, the Court must accept all factual allegations as true, afford the pleadings a liberal construction, and accord plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, allegations that are "bare legal conclusions" or that are "inherently incredible or flatly contradicted by documentary evidence" are not sufficient to withstand a motion to dismiss (*see JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 [1st Dept 2009] [internal citation omitted]). As is often stated, "the court must 'determine only whether the facts as alleged fit within any cognizable legal theory'" (*Richards v Sec. Resources*, 187 AD3d 452 [1st Dept 2020], quoting *Leon*, 84 NY2d at 87-88).

This standard applies, with equal force, to causes of action seeking dissolution: "[t]here is nothing in the nature of a corporate dissolution proceeding that distinguishes it from any other litigated proceeding" (*People by Abrams v Oliver Schools, Inc.*, 206 AD2d 143, 145 [4th Dept 1994]; *see also* N-PCL 1114 ["An action or special proceeding for the dissolution of a corporation may be discontinued at any stage when it is established that the cause for dissolution did not exist or no longer exists."]).

A. First and Second Causes of Action: Dissolution of the NRA under N-PCL 1101 [a] [2] and 1102 [a] [2]

The Attorney General seeks dissolution of the NRA under two separate provisions in the N-PCL (Compl. at 162, 165).[2] *First*, N-PCL 1101 [a] [2] authorizes the Attorney General to bring an action seeking dissolution when "the corporation has exceeded the authority conferred upon it by law, or has . . . carried on, conducted or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to public policy of the state has become liable to be dissolved" (N-PCL 1101 [a] [2]; Compl. ¶ 650). *Second*, N-PCL 1102 [a] [2] authorizes the Attorney General, assuming the rights of the NRA's members or one of its directors (*see* N-PCL 112 [a] [7]), to bring a claim for dissolution in cases where the "directors or members in control of the corporation have looted or wasted the corporate assets, have perpetuated the corporation solely for their personal benefit, or have otherwise acted in an illegal, oppressive or fraudulent manner" (N-PCL 1102 [a] [2] [D]; Compl. ¶ 664).[3]

1. The NYAG is Not Collaterally Estopped from Seeking Dissolution.

The NRA argues, first, that the bankruptcy court's "findings" about certain NRA reform efforts collaterally estop the NYAG from seeking dissolution in this case. That argument is

[2] As a threshold matter, the "single motion rule" does not bar the Defendants' motions to dismiss the Attorney General's amended pleading, which includes "approximately 90 paragraphs of new factual allegations" (NYSCEF 404 at 5 [Pl.'s mot. to dismiss]; *see* CPLR 3211 [e]; *Barbarito v Zahavi*, 107 AD3d 416, 420 [1st Dept 2013]).

[3] This provision largely tracks the language in New York's Business Corporation Law (BCL) concerning the dissolution of for-profit corporations: "The attorney-general may bring an action for the dissolution of a corporation . . . [if] [t]he corporation has exceeded the authority conferred upon it by law, or has violated any provision of law whereby it has forfeited its charter, or carried on, conducted or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to the public policy of the state has become liable to be dissolved" (BCL 1101). In their briefs, the parties on both sides rely upon cases concerning dissolution of for-profit corporations under the BCL as well as not-for-profit corporations under the N-PCL.

unpersuasive. Indeed, it would undermine the bankruptcy court's core finding that the NRA improperly sought to use the bankruptcy proceedings to frustrate the Attorney General's action *in this case*.

"Collateral estoppel comes into play when four conditions are fulfilled: (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (*Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015] [internal quotation marks and citation omitted]; *see also Lowe v Feiring*, 205 AD2d 505, 505-06 [2d Dept 1994] [applying collateral estoppel to issue "determined in a bankruptcy proceeding"]). Simply put, "[p]reclusive effect . . . will only be given where the particular issue was actually litigated, squarely addressed and specifically decided" (*Crystal Clear Dev., LLC v Devon Architects of New York, P.C.*, 97 AD3d 716, 717–18 [2d Dept 2012] [internal quotation marks and citation omitted]; *see Alaimo v McGeorge*, 69 AD3d 1032, 1034 [3d Dept 2010] ["For collateral estoppel to apply, it is 'critical that the issues are identical.'"], quoting *People v Roselle*, 84 NY2d 350, 357 [1994]). "The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination" (*Simmons-Grant v Quinn Emanuel Urquhart & Sullivan, LLP*, 116 AD3d 134, 138 [1st Dept 2014] [internal quotation marks and citation omitted]). The NRA fails to meet this burden.

The "particular issue" here – whether the NYAG can assert a claim against the NRA for dissolution under the N-PCL – was not "actually litigated," "squarely addressed," or "specifically decided" in the bankruptcy proceeding (*Crystal Clear Dev.*, 97 AD3d at 717–18; *Omansky v Gurland*, 4 AD3d 104, 108 [1st Dept 2004] [finding "there is no identity of issues

between the present action and the prior determinations and collateral estoppel does not apply"]). To the contrary, the bankruptcy court specifically *disclaimed* any preclusive effect its decision might have on the merits of the dissolution claim here: it was "not in any way saying it believes the NYAG can or cannot make the required showing to obtain dissolution of the NRA" (*In re Natl. Rifle Assn. of Am.*, 628 BR at 281). And for good reason. The bankruptcy court was applying the standards relevant to the federal Bankruptcy Code, not this State's N-PCL (*see id.* at 271; *compare with Lowe v Feiring*, 205 AD2d 505, 505-06 [2d Dept 1994] ["It is clear that the invalidity of the confession of judgment was necessarily decided in the bankruptcy proceeding" where bankruptcy court "applying New York common law, concluded that the confession of judgment was void"]). As such, the bankruptcy court's findings of fact and conclusions of law do not purport to address whether the standards for judicial dissolution under the N-PCL have been satisfied.

What's more, the NRA's argument selectively ignores the aspects of the bankruptcy court's ruling adverse to the NRA. After all, the court dismissed the NRA's filing for lack of good faith, "as an effort to gain an unfair litigation advantage in the NYAG Enforcement Action and as an effort to avoid a regulatory scheme" (*In re Natl. Rifle Assn. of Am.*, 628 BR at 283). It alluded to "cringeworthy facts" about the NRA's past misconduct (*id.*; *see also id.* at 284 ["Some facts regarding the NRA's past conduct were not available to this Court because the NRA's former treasurer asserted his rights under the Fifth Amendment during large swaths of his deposition."]). It found that "[s]ome of the conduct that gives the Court concern is still ongoing," citing "very recent[ ] violat[ions]" of the NRA's internal procedures and "lingering issues of secrecy and a lack of transparency" (*id.* at 283-84). And it characterized LaPierre's machinations in filing for bankruptcy – "the surreptitious manner in which [he] obtained and

exercised authority" to do so – as "nothing less than shocking" (*id.* at 284). Highlighting these concerns, the bankruptcy court warned that "should the NRA file a new bankruptcy case, this Court would immediately take up some of its concerns about disclosure, transparency, secrecy, conflicts of interest of officers and litigation counsel, and the unusual involvement of litigation counsel in the affairs of the NRA" (*id.* at 286). Read in full, the bankruptcy court's decision is hardly a basis for the NRA to claim absolution, let alone collateral estoppel.

The question, then, is whether the NYAG's factual allegations, taken as true, give rise to a viable claim to dissolve the NRA. As described below, they do not.

2. The NYAG Fails to Allege that Dissolution is an Appropriate Remedy.

a. The Standards for Judicial Dissolution.

Under the N-PCL, the Court is given discretion to determine whether dissolution is the appropriate remedy in a claim brought under either section 1101 or 1102 (*see* N-PCL 1109 [a]). The N-PCL also guides the exercise of that discretion. When the action is a purely private one, brought by the "directors or members" of the corporation, "the benefit to the members of a dissolution is of paramount importance" (*id*. § 1109 [b] [2]). When the action is "brought by the attorney-general," however, "the interest of the ***public*** is of paramount importance" (*id*. § 1109 [b] [1] [emphasis added]). The statute's emphasis on public (rather than private) interest in assessing government-initiated dissolution proceedings echoes case law in this State going back more than one hundred years.

"The state which gave the corporate life may take it away" (*In re Brooklyn El. Ry. Co.*, 125 NY 434, 440 [1891]). "[C]orporate death," in the form of judicial dissolution, "represents the extreme rigor of the law" (*People v N. Riv. Sugar Ref. Co.*, 121 NY 582, 608 [1890]; *People*

by Abrams v Oliver Schools, Inc., 206 AD2d 143, 145 [4th Dept 1994] ["The remedy of dissolution has been described as 'a judgment . . . of corporate death,' which 'represent[s] the extreme rigor of the law'"], quoting *N. Riv. Sugar*, 121 NY at 608; *see California v American Stores Co.*, 495 US 271, 289 [1990]). And, as such, "[i]ts infliction must rest upon grave cause, and be warranted by material misconduct" (*N. Riv. Sugar*, 121 NY at 608; *see People v Abbott Maintenance Corp.*, 11 AD2d 136, 139 [1st Dept 1960], *affd*, 9 NY2d 810 [1961]).

Not every instance of "material misconduct" warrants the extreme sanction of dissolution. Over time, judicial dissolution at the hands of the State has been a remedy reserved for corporate misconduct that "has produced, or tends to produce, injury to the public" (*N. Riv. Sugar*, 121 NY at 608). This foundational principle "appear[ed] to be settled" long ago. In 1890, the Court of Appeals affirmed the dissolution of the North River Sugar Refining Company, which the NYAG had sought to dissolve for its participation in the "sugar trust." The Court framed the remedy of dissolution as a penalty for public, not private, wrongs:

> It appears to be settled that ***the State as prosecutor must show on the part of the corporation accused some sin against the law of its being which has produced, or tends to produce, injury to the public.*** The transgression must not be merely formal or incidental, but material and serious; and ***such as to harm or menace the public welfare***. For the State does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action. Corporations may, and often do, exceed their authority where only private rights are affected. When these are adjusted, all mischief ends and all harm is averted. But ***where the transgression has a wider scope and threatens the welfare of the people, they may summon the offender to answer for the abuse of its franchise or the violation of its corporate duty.***

(*id.* [emphasis added]). So framed, the Court went on "to determine whether the conduct of the defendant in participating in the creation of the trust . . . tended to the public injury" (*id.* at 622). The Court found that it did. "[C]orporate grants are always assumed to have been made for the

public benefit," and agglomerating separate corporations into a vast trust "destroy[ed]" the purpose of those constituent corporations, "as to affect unfavorably the public interest" (*id.* at 625).

Since then, courts have continued to focus on public harm in determining whether a corporate entity should be dissolved for malfeasance in an action brought by the Attorney General (*see, e.g.*, *People v Milk Exch.*, 133 NY 565, 567 [1892] [noting "it is to the public interest that the corporation should be dissolved" in sustaining claim against corporation charged with pursuing "a fraudulent, unlawful and corrupt combination and scheme on the part of the milk dealers in New York city to control the price of milk"]; *Abbott Maintenance Corp.*, 11 AD2d at 139 ["In the end, the question whether the court will adjudge the corporate charter forfeited on suit of the People who gave the charter, will depend on the magnitude and public importance of the unlawful or improper practices complained of."], *affd,* 9 NY2d 810 [1961]; *Oliver Schools*, 206 AD2d at 148 ["[e]mploying the standards from *North Riv.* . . . we conclude that there was no abuse of discretion by the Attorney-General in seeking OSI's dissolution, nor by the court in granting the Attorney-General's summary judgment motion"]).

As noted, this searching standard survived the advent of the N-PCL, which expressly emphasizes the "paramount importance" of the "public interest" (N-PCL 1109 [b] [1]). The law resists a mechanical application of the statutory terms set out in N-PCL 1101 and 1102. "It is settled that there is no absolute right to dissolution of a corporation," even when the conditions described in sections 1101 or 1102 are strictly satisfied (*Siegel*, 2020 NY Slip Op 32555[U], *6 ["[W]hile N-PCL 1102 enumerates the circumstances under which a judicial dissolution of a corporation may be presented to court, not every application can be granted"], citing *Application of John Luther & Sons Co.*, 52 AD2d 737, 738 [4th Dept 1976] [denying petition for dissolution

under N-PCL 1102 because "a remedy far short of dissolution of the corporation on such ground would be in order"]; *see In re Radom & Neidorff, Inc.*, 307 NY 1, 7 [1954] ["Even when majority stockholders file a petition because of internal corporate conflicts," "[t]here is no absolute right to dissolution"] [analyzing General Corporation Law]).

The final determination "lies in the discretion of the court" (*Siegel*, 2020 NY Slip Op 32555[U], *6 [action under N-PCL 1102]; *Oliver Schools, Inc.*, 206 AD2d at 147 [action brought by NYAG under BCL 1101]). And that discretion, in turn, relies on well-established precedent defining the parameters for dissolution. So, "[i]n the final analysis, the standard set forth in the *North Riv.* case remains the law – before the Attorney-General can obtain judicial dissolution of a corporation, there must be a grave, substantial and continuing abuse, ***involving a public rather than a private right***, by the corporation" (*Oliver Schools, Inc.*, 206 AD2d at 147 [emphasis added]).

Consumer fraud is emblematic of the kind of public harm that may justify dissolution. In *People v Abbott Maintenance Corp.*, 11 AD2d 136 [1st Dept 1960], for example, the NYAG "made out a case prima facie for dissolution" against a corporation, Abbott, charged with misleading "a substantial number of people" through "deceptive advertising, widely disseminated in the public press" (*id.* at 139). "[I]n the guise of offering employment opportunities in floor waxing," Abbott lured customers into buying over-priced floor waxing equipment (*id.*). The "employment opportunities" advertised were largely illusory: the company's "main purpose" was selling the machines (*id.*). The court reversed the dismissal of the dissolution claim against Abbott because "[t]he consequences of these practices could be found to be so general and widespread in scope of advertising solicitation, and in response to such solicitation that they transcend private controversy" (*id.*).

In the same vein, the First Department granted summary judgment to the Attorney General on her claim for dissolution of a corporation found to have "engaged in repeated and persistent fraud in that they tricked individuals, many of whom were small business owners, into entering into unconscionable equipment finance leases (EFLs) for credit card processing equipment" (*People by James v N. Leasing Sys., Inc.*, 193 AD3d 67, 70 [1st Dept 2021], *lv to appeal dismissed sub nom. People v N. Leasing Sys., Inc.*, 37 NY3d 1088 [2021]). The company preyed on vulnerable members of the public, including those who were "over 65 years old, disabled, new immigrants, or not proficient in English" (*id.* at 71; *see People by James v N. Leasing Sys., Inc.*, 70 Misc 3d 256, 279 [Sup Ct, New York County 2020] ["reject[ing] the Northern Leasing respondents' contention that the lessees' complaints are business disputes that do not evince a public menace"]; *see also Oliver Schools*, 206 AD2d 143 at 148 [prevailing on dissolution claim where "uncontroverted evidence established that [the school] had been using refund money rightfully belonging to its former students to solve its own cash flow problems"]).

Dissolution may also be appropriate when the corporation's existence is a sham, or exists primarily to carry out illegal activity. This concept, too, is not new. In 1892, the Court of Appeals approved the dissolution of a corporation that "never exercised its powers or franchises since it was incorporated," and existed solely "to do other and alleged illegal acts under cover of the corporation" (*Milk Exch.*, 133 NY at 567). Much more recently, in *People v Zymurgy, Inc., et al.*, 233 AD2d 178 [1st Dept 1996], the First Department sustained the Attorney General's dissolution claim where (1) the company acted as a front for a pedophilia organization, (2) the respondents admitted there were never any board meetings, and (3) potential child sex crimes were implicated (*id.* at 179; *see also State v Coalition Against Breast Cancer, Inc.*, 975 NYS2d 712 at *1 [Sup Ct, Suffolk County 2013] [action by NYAG for dissolution and other relief

against a "sham charity"]). And in *Leibert v Clapp*, 13 NY2d 313 [1963], the court allowed the Attorney General's dissolution claim to proceed against a corporation where "the directors and those in control of [the corporation]" were accused of "continuing the existence of the corporation solely for their own benefit at the expense of the minority shareholders" (*id.* at 316; *see also id.* at 317 ["[I]t is alleged, inter alia, that the primary, if not the sole, purpose of preserving [the corporation's] separate existence is to effect an unlawful diversion of large portions of its earnings to its parent corporation and other members of the group"]).

b. The Attorney General Fails to Allege Facts Sufficient to Satisfy the Standard for Judicial Dissolution.

Held up against these rigorous standards, the NYAG's claim for dissolution of the NRA cannot be sustained. The malfeasance alleged in the Complaint – if proven – is undoubtedly troubling, but the Attorney General does not allege that the NRA's mismanagement under LaPierre and others "has produced, or tends to produce, injury to the public" (*N. Riv. Sugar*, 121 NY at 608). The main victim of the NRA's alleged dysfunction has been, according to the Complaint, the NRA and its members (*see, e.g.*, Compl. ¶ 580 [alleging "actions to advance insiders' personal interests to the detriment of the NRA"]; *id.* ¶¶ 669, 675 [LaPierre's and Frazer's "breaches of fiduciary duty have damaged the NRA"]; *see also* Prayer for Relief § G [seeking "full restitution to the NRA"]). The Complaint does not allege that the misconduct ascribed to the Individual Defendants benefited the NRA, or that the NRA exists primarily to carry out such illegal activity, or that the NRA is incapable of continuing its core charitable mission if the Individual Defendants are removed from their positions.[4] The Attorney General

[4] In this regard, the bankruptcy court's finding that the NRA can "continue to fulfill its mission" is instructive though not, for the reasons discussed *supra*, preclusive (*In re Natl. Rifle Assn. of Am.*, 628 BR at 285).

cites no case in which she or her predecessors have sought – much less obtained – dissolution under analogous circumstances.

In arguing for dissolution, the Attorney General's allegations fail to delineate between the NRA, on the one hand, and its leaders on the other, who acted "without regard to the NRA's best interests" (*see id.* ¶ 143 ["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 . . . without regard to the NRA's best interests."]; *id.* ¶ 646 ["Despite a conflict of interest and his lack of authority to do so, LaPierre unilaterally determined to place the NRA into bankruptcy to evade a regulatory action in which he was named as a defendant . . . cost[ing] the NRA tens of millions of dollars"]). Conflating the Individual Defendants with the NRA writ large for purposes of dissolution is inappropriate here for the reasons discussed *supra*. It also ignores the allegations that the wrongdoers in control of the NRA do not necessarily speak for other NRA members, some of whom have tried to instigate reform within the organization but have been met with resistance from entrenched leadership (*see, e.g.*, *id.* ¶ 491).

The Attorney General insists that "[b]y statute, [she] is entitled to seek judicial dissolution of a charitable entity that has violated the law" (NYSCEF 404 at 20). That is true. But a court may not apply that kind of hair-trigger standard in determining whether dissolution is an appropriate remedy in a given case (*N. Riv. Sugar Ref. Co.*, 121 NY at 609 ["The transgression must not be merely formal or incidental, but material and serious; and such as to harm or menace the public welfare."]; *Abbott Maintenance Corp.*, 11 AD2d at 139 ["The term 'violation of any provision' of law [in GCL] must be read more broadly than a mere violation of one or more of the list of the statutory provisions which govern corporate organization and function"]; *see Oliver Schools*, 206 AD2d at 146 [highlighting examples of 19th-century cases

which declined to dissolve corporations despite technical violations of law]). Violating the law may be a precondition for dissolving a corporation, to be sure, but such allegations are not enough to obtain the remedy.

Finally, the Attorney General's dissolution claims warrant particularly careful scrutiny because they implicate First Amendment concerns. The NRA is a prominent advocacy organization that represents the interests of millions of members who have stuck with it despite the well-publicized allegations in this and other cases. The State-sponsored dissolution of such an entity is not something to be taken lightly or without a compelling need (*Zaretsky v New York City Health and Hospitals Corp.*, 84 NY2d 140, 145 [1994] ["The rights of free speech and free association flowing from the First Amendment are protected liberty interests"]). In other First Amendment contexts, courts have insisted that State regulation of speech be "narrowly tailored to serve a significant governmental interest" or be the "least restrictive means for serving a compelling government interest," depending on whether the regulation is content-neutral (*Town of Delaware v Leifer*, 34 NY3d 234, 243-44 [2019] [citations omitted]). Indeed, "[n]arrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—[b]ecause First Amendment freedoms need breathing space to survive" (*Americans for Prosperity Found. v Bonta*, 141 S Ct 2373, 2384, 210 L Ed 2d 716 [2021] [internal citation omitted]). Although those cases are distinguishable (there is no regulation of speech at issue here), the overarching principles are nevertheless informative to the exercise of discretion. The remedy of dissolution is, in the Court's view, disproportionate and not narrowly tailored to address the financial

malfeasance alleged in the Complaint, which is amply covered by the Attorney General's other claims.[5]

For the foregoing reasons, the motion to dismiss the First and Second Causes of Action is **granted**.

B. Third and Fourth Causes of Action: Breach of Fiduciary Duty Under N-PCL 717 and 720 and Removal Under N-PCL 706 [d] and 714 [c]

In her Third and Fourth Causes of Action, the Attorney General alleges that LaPierre and Frazer, respectively, violated the fiduciary duties they owed to the NRA under N-PCL 717 and 720 (*see* Compl. ¶¶ 667-676). The Attorney General alleges that LaPierre "us[ed] his powers as an officer and ex officio director of the NRA to obtain illegal compensation and benefits, to convert NRA funds for his own benefit, and to dominate, control, and direct the NRA to obtain private benefit for himself, his family members and for certain other insiders, including Defendants Phillips and Powell in contravention of NRA bylaws, policies and procedures, and applicable laws" (*id.* ¶ 668). Frazer, meanwhile, is alleged to have "violated his professional responsibility to his client, the NRA, by failing to provide competent representation, in that he

[5] As the NRA has pointed out (NYSCEF 371 at 1 & n.1), some support for its position in this regard has come from unlikely sources, at least from a political perspective (*see, e.g.*, Editorial, *The Right Penalty for the NRA?*, The Washington Post, Aug. 9, 2020 ["But dissolution? We have been vehement critics of the NRA . . . and we would not mourn its demise. But other nonprofits that have had corrupt leadership were given the chance to clean house and institute reforms. A 148-year-old organization with, it claims, 5 million members would seem to merit a similar second chance."], available at https://www.washingtonpost.com/opinions/is-this-really-the-right-penalty-for-the-nra/2020/08/07/f81778fc-d8e2-11ea-930e-d88518c57dcc_story.html; David Cole (National Legal Director, American Civil Liberties Union), *The NRA Has a Right to Exist*, The Wall Street Journal, Aug. 26, 2020 ["The American Civil Liberties Union rarely finds itself on the same side as the National Rifle Association in policy debates or political disputes. Still, we are disturbed by New York Attorney General Letitia James's recent effort to dissolve the NRA"], available at https://www.wsj.com/articles/the-nra-has-a-right-to-exist-11598457143).

failed to act with reasonable diligence in representing the NRA and to use the thoroughness and preparation reasonably necessary for the representation of the NRA throughout his tenure, including by failing to make sufficient inquiry into and analysis of the factual and legal problems under his responsibility, and by failing to use methods and procedures meeting the standards of competent practitioners" (*id.* ¶ 674). For the damage they allegedly caused the NRA (*id.* ¶¶ 669, 675), the Attorney General seeks restitution from both Defendants, including the return of their salaries (plus interest). The NYAG also seeks, under N-PCL 706 and 714, to remove both Defendants from their positions in the NRA and to bar them from "re-election or reappointment as an officer or director" in the organization (*id.* ¶¶ 671, 676).

The Attorney General adequately pleads both claims for breach of fiduciary duty. In several hundred paragraphs of specific factual allegations, the Amended Complaint describes, in meticulous detail, LaPierre's exploitation of the NRA for his financial benefit, his abuse of power, and his general disregard for corporate governance (*e.g.*, *id.* ¶¶ 137-229, 311-341).

Defendants' reliance on *People ex rel. Spitzer v Grasso*, 11 NY3d 64, 71 [2008] (discussed further in part H, *infra*) is misplaced. In *Grasso*, the Court dismissed certain *non*-statutory claims asserted by the Attorney General because they imposed a lower burden of proof than the corresponding N-PCL provisions did (*Grasso*, 11 NY3d at 71–72). But *Grasso* does not stand for, and Defendants cite no other authority for, the proposition that the Attorney General must allege a specific level of fault for the *statutory* cause of action alleged here.

As for Frazer, ten paragraphs of the Amended Complaint are spent describing his allegedly incompetent supervision of the NRA's compliance with New York law, and his failure to ensure the accuracy of the NRA's annual filings with the Attorney General (*id.* ¶¶ 286–296). Frazer's alleged misconduct regarding supervision of the NRA's conflict-of-interest and related-

party-transaction policies, his failure to appropriately handle related party transactions, and his failure to follow proper procedures regarding procurement, are also detailed in the Complaint (*id.* ¶¶ 402, 405, 476, 478–479, 490–494, 503–536, 553–562). Even assuming the heightened pleading standard under CPLR 3016 [b] applied to these claims (as Frazer contends), the scope and specificity of these allegations easily satisfy those standards (*see GSCP VI EdgeMarc Holdings, L.L.C. v ETC Northeast Pipeline, LLC*, 192 AD3d 454, 456 [1st Dept 2021] ["purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of."]).

Therefore, the motions to dismiss the Third and Fourth Causes of Action are **denied**.

C. Seventh and Eighth Causes of Action: Breach of EPTL § 8-1.4

In her Seventh and Eighth Causes of Action, the Attorney General alleges that LaPierre and Frazer, respectively, failed to properly administer charitable assets in accordance with EPTL § 8-1.4 (Compl. ¶¶ 685-692). The allegations in support of these claims, as well as the Defendants' arguments in opposition to them, largely overlap with the Third and Fourth Causes of Action. For the same reasons discussed *supra*, the Attorney General's allegations are sufficient to make out a claim that LaPierre and Frazer improperly administered the NRA's charitable assets. Therefore, the motions to dismiss the Seventh and Eighth Causes of Action are **denied**.

D. Eleventh and Fourteenth Causes of Action: Wrongful Related-Party Transactions under N-PCL 112 [a] [10], 715 [f], and EPTL § 8-1.9 [c] [4]

In her Eleventh and Fourteenth Causes of Action, the Attorney General alleges that LaPierre and the NRA, respectively, entered into unlawful related party transactions, including

LaPierre's post-employment contract (*see* Compl. ¶¶ 702, 718). Both claims are sustained. To the extent the business judgment rule applies to these claims, "[p]re-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate where those pleadings suggest that the directors did not act in good faith" (*Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 667 [1st Dept 1993]). Here, the Complaint sufficiently alleges Defendants' failure individually and collectively – as a persistent dereliction of duty – to exercise good-faith business judgment (*e.g.*, Compl. ¶¶ 2, 9, 143-229, 750). And LaPierre's argument under *Grasso* fails for the reasons stated *supra*.

Therefore, the motions to dismiss the Eleventh and Fourteenth Causes of Action are **denied**.

E. Fifteenth Cause of Action: Violation of the Whistleblower Protections of N-PCL 715-b and EPTL § 8-1.9

In her Fifteenth Cause of Action, the Attorney General alleges that the NRA violated the N-PCL, the EPTL, and its own policies by permitting Powell and LaPierre to retaliate against whistleblowers, and for failing to supervise Frazer's allegedly incompetent performance of his responsibilities in carrying out the NRA's whistleblower policy (Compl. ¶¶ 720–724). The NRA calls these allegations "conclusory." They are not. The Complaint devotes 27 paragraphs to describing the ways in which LaPierre, with help from other NRA employees and board members, froze Dissident No. 1 out of his leadership position after Dissident No. 1 questioned and sought to investigate certain expenses (*id.* ¶¶ 462–489). Indeed, as alleged in the Complaint, the NRA's retaliation has included seeking to revoke Dissident No. 1's membership status and instigating a lawsuit to achieve that goal (*id.* ¶ 489).

The Complaint also alleges, among other things, that the NRA refused to assign four board members to any committees of the board after they requested an investigation into issues that included allegations raised in the Complaint (*id.* ¶¶ 490–494; *see also id.* ¶ 516 [alleging "the NRA refused to undertake an investigation into allegations of harassment, including by the Brewer firm, raised by one of the NRA Whistleblowers"]; *id.* ¶¶ 511-513, 541 [alleging "the NRA's Audit Committee, the board committee with primary supervisory authority over the NRA's whistleblower policy, failed to adequately document what steps, if any, it took in response to whistleblower complaints, and failed to provide information about the whistleblowers to its independent auditor"]).

The NRA contends that the whistleblower claim is barred by "the clear and dispositive findings of the Texas federal bankruptcy court" (NYSCEF 371 at 26). To the extent this is another argument for collateral estoppel, it is rejected for the reasons discussed in Part A.1, *supra*. And to reiterate, the bankruptcy court did not purport to make findings that were "dispositive" to this action, nor did the bankruptcy court's findings have that effect. The bankruptcy court found it "encouraging" that one former whistleblower, Sonya Rowling, "has risen in the ranks of the NRA" (*In re Natl. Rifle Assn. of Am.*, 628 BR at 284). Also encouraging was the fact that Rowling and another whistleblower "testified that the concerns they expressed in the 2017 Whistleblower Memo are no longer concerns" (*id.*). But the bankruptcy court's findings related to these whistleblowers do not address – much less refute – the Attorney General's allegations about retaliation against other whistleblowers over the years. Even the recent "encouraging" acts did not fully assuage the concerns of the bankruptcy court, which noted "lingering issues of secrecy and a lack of transparency" (*id.*).

The motion to dismiss the Fifteenth Cause of Action is **denied**.

F. Sixteenth Cause of Action: Breach of NYPMIFA, Article 5-A of the N-PCL

The Sixteenth Cause of Action, based on the NRA's alleged failure to "manage its institutional funds" in accordance with NYPMIFA (Compl. ¶ 728), is dismissed.

NYPMIFA defines "institutional fund" as simply "a fund held by an institution," excluding "program-related assets" (N-PCL 551 [e]). The statute does not separately define what "program-related assets" comprise. It is evident from neighboring provisions in the statutory scheme, though, that "institutional fund" primarily means assets earmarked for investment, or restricted by the terms of a donor's gift, or both. Section 552, for example, provides guidance about "managing and investing an institutional fund," "[s]ubject to the intent of a donor expressed in a gift instrument" (N-PCL 552 [a]). Going further, section 552 instructs that "[i]n managing and investing an institutional fund," the institution "must" consider, among other things, "the role that each investment or course of action plays within the overall ***investment portfolio of the fund***" (N-PCL 552 [e] [emphasis added]). The Attorney General's own published guidance about NYPMIFA speaks about "institutional funds" in the context of investment strategy (*see* NYSCEF 368 at 10 [*A Practical Guide to the* [NYPMIFA], pub. March 2011] ["The Act . . . reflect[s] the view that a prudent investment strategy requires institutions to invest their endowments ***and other institutional funds*** for 'total return,' which may result in increases (or decreases) in principal, income or both."] [emphasis added]).

New York cases interpreting NYPMIFA buttress the view that an "institutional fund" concerns "investments" (*In re Diocese of Buffalo, N.Y.*, 621 BR 91, 93 [Bankr WD NY 2020] ["investments in the St. Joseph Fund satisfy the statute's definition of an 'institutional fund'"]), or donor instruments like an endowment (*Rockefeller Univ.*, 2016 NY Slip Op 31556[U], *7

[Sup Ct, New York County 2016] [university "established its entitlement to relief pursuant to N-PCL 552(e) by demonstrating that the restrictions in Martin's will have become impracticable, wasteful, and, in light of current investment theory and practice, an impediment to the prudent management and investment of the proceeds"]).

The Attorney General's allegations concerning NYPMIFA do not specify any particular "institutional fund," grouping together "investments, cash balances, funds derived from pledging NRA assets, funds obtained by pledging the credit of the NRA, income derived from rents to third parties, and funds held by or paid out to vendors" (Compl. ¶ 577). Even if some portion of these funds are encompassed by the statute ("investments"), others appear on their face to be "program-related assets" going to operational expenses ("funds . . . paid out to vendors"). Likewise, when the Attorney General alleges a "total reduction in [the NRA's] unrestricted assets" in excess of $77 million" (*id.* ¶ 578), it is impossible to ascertain what proportion of that amount, if any, comprise "institutional fund[s]" under NYPMIFA. For her part, the Attorney General sees "program-related assets" as "a narrow category," consisting primarily of "a charity's headquarters or similar real property," but cites to no statutory language or case law supporting that interpretation.

Because the Complaint does not adequately identify an "institutional fund" supporting a claim for violation of NYPMIFA, the motion to dismiss the Sixteenth Cause of Action is **granted**.

G. Seventeenth Cause of Action: False Filings under Executive Law §§ 172-d [1] and 175 [2] [d]

In her Seventeenth Cause of Action, the Attorney General alleges that "[t]he NRA made materially false and misleading statements and omissions in the annual reports the organization

filed with the Attorney General," and that Frazer, as Secretary, "signed and certified such reports notwithstanding the number of falsehoods therein, of which he was or should have been aware" (Compl. ¶ 731). These annual "CHAR 500" reports are required to be registered and filed with the Attorney General's Charities Bureau under Article 7-A of the Executive Law (*id.* ¶¶ 295-296, 655). The CHAR 500 reports must include copies of an organization's annual IRS Form 990 and, for organizations such as the NRA, copies of the organization's audited financial statements (*id.* ¶ 655). CHAR 500 reports require two signatures – from the organization's President or Authorized Officer, and from its Chief Financial Officer or Treasurer (*id.* ¶ 564). Their signatures certify, under penalties of perjury, that the report, including all attachments, is "true, correct, and complete in accordance with the laws of the State of New York applicable to this report" (*id.*). From 2015 to 2019, Frazer signed these reports and therefore attested to their accuracy (*id.* ¶ 296; *see* NYSCEF 353 at 1 [2018 CHAR 500 report signed by Frazer]).

Executive Law § 172-d [1] makes it unlawful for any "person" to "[m]ake any material statement which is untrue in," among other things, a "financial report . . . required to be filed pursuant to" Article 7-A of the Executive Law. And where such a violation occurs, the Attorney General is given the authority, under Executive Law § 175 [2] [d], to bring "an action or special proceeding . . . against a charitable organization and any other persons acting for it or on its behalf to enjoin such organization and/or persons from continuing the solicitation or collection of funds or property or engaging therein or doing any acts in furtherance thereof."

The Attorney General asserts this claim against both the NRA and Frazer, seeking to enjoin both from "soliciting or collecting funds on behalf of any charitable organization operating in this State," and to enjoin Frazer, specifically, from "serving as an officer, director or

trustee of any not-for-profit or charitable organization incorporated or authorized to conduct business in the State of New York" (*id.* ¶ 732).

1. As against the NRA

The allegations against the NRA satisfy the elements set out in the statute. The NRA does not, for now, contest the falsity of the filings submitted to the Attorney General. The NRA also does not contest that Frazer was acting as an authorized agent of the NRA when he signed the filings submitted to the Attorney General. And contrary to the NRA's suggestion, the statute does not require the Attorney General to allege that "the NRA's Board knew of, approved, or participated in any alleged 'false statements' in the NRA's filings" (NYSCEF 371 at 32) in order to hold the NRA liable. The NRA cites no authority to support that proposition. The Executive Law applies to individuals and organizations alike (*see* Executive Law § 172-d [1] [prohibiting any "person" from making false "material statement"]; *id.* § 171-a [defining "person" to include "[a]ny individual, organization, group, association, partnership, corporation, or any combination of them"]; *id.* § 175 [2] [d] [permitting NYAG to bring "an action or special proceeding . . . against a charitable organization and any other persons acting for it or on its behalf"]). And a corporate entity, like the NRA, "can operate only through their designated agents and employees" (*People v Byrne*, 77 NY2d 460, 465 [1991]). At this stage, therefore, the Attorney General has made out a claim against the NRA based on the allegations that the NRA, through its authorized agents, submitted "materially false and misleading" reports.

It is unnecessary to determine at this stage whether the broad remedy sought by the Attorney General – an injunction against "continuing the solicitation or collection of funds or property or engaging therein or doing any acts in furtherance thereof" – would be appropriate.

2. As against Frazer

The complaint also states a cause of action against Frazer. In opposition, Frazer advances two main arguments: (1) that the allegations in the complaint fall short of the heightened pleading standard under CPLR 3016 [b], and (2) that N-PCL 717 [b] shields Frazer from liability because he relied on competent individuals at the NRA in attesting to the truthfulness of the filings he signed.

Neither argument provides grounds for dismissal at this stage. Frazer's first argument equates material falsity under Executive Law § 172-d [1] with common-law fraud. Under that view, because the Attorney General's claim sounds in fraud, it is subjected to the heightened pleading requirements of CPLR 3016 [b]. But Frazer has not identified any authority holding that CPLR 3016 [b] applies to a claim brought under Executive Law § 172-d [1]. Falsity and fraud are not the same thing (*see, e.g.*, *Feinberg v Marathon Patent Group Inc.*, 193 AD3d 568 [1st Dept 2021] [holding that claim under section 11 of the Securities Act, which imposes liability in connection with a registration statement that "contain[s] an untrue statement of a material fact" (15 USC §77k [a], "should not be seen through the prism of fraud and/or misrepresentation" and therefore "the heightened pleading standard should not [be] applied"]).

Moreover, the Executive Law exhibits an intent *not* to saddle a claim brought under § 172-d [1] with the additional requirements for fraud. Whereas Executive Law § 172-d [1] prohibits making materially false statements, section 172-d [2] prohibits "fraudulent or illegal" conduct. And under that latter section, "[t]o establish fraud neither intent to defraud nor injury need to be shown" (*id.* § 172-d [2]). If a claim for "fraudulent" conduct need not demonstrate fraudulent intent, it is incongruous that a claim for mere falsity somehow would.

N-PCL 717 [b], to the extent it is applicable, does not immunize Frazer. Under that statute, "[i]n discharging their duties, directors, officers and key persons, when acting in good faith, may rely on information, opinions, reports or statements" provided by other competent professionals in the organization (*see* N-PCL 717 [b]). But "[p]ersons shall not be considered to be acting in good faith if they have knowledge concerning the matter in question that would cause such reliance to be unwarranted" (*id.*). And that is what the Attorney General alleges here. The complaint asserts, with numerous specific examples, that Frazer's knowledge about misconduct at the NRA vitiated any purported reliance on other NRA professionals. Frazer was allegedly aware of concerns about financial mismanagement at the NRA raised by whistleblowers and board members (Compl. ¶¶ 490, 505); he was allegedly aware, as the officer primarily charged with overseeing the NRA's whistleblower policy, that the policy was not being adequately enforced due in part to his own failures (*id.* ¶¶ 559, 567); and he allegedly failed in his responsibility of presenting the NRA's Audit Committee with the information necessary for it to consider conflicts of interest and related party transactions (*id.* ¶¶ 517-536). Therefore, the detailed allegations in the complaint at least raise fact questions about whether Frazer was acting in good faith when he signed the reports.

The motion to dismiss the Seventeenth Cause of Action is **denied**.

H. <u>Eighteenth Cause of Action: Unjust Enrichment (Derivatively in Favor of the NRA) – N-PCL 623 and New York Common Law</u>

Finally, in her Eighteenth Cause of Action, the Attorney General brings a claim for common law unjust enrichment on behalf of the NRA against the Individual Defendants. For the reasons set forth below, this claim is dismissed.

The plain language of the N-PCL "reveals a legislative policy decision to provide officers and directors of not-for-profit corporations with the 'business judgment' protections afforded their for-profit counterparts" (*People ex rel. Spitzer v Grasso*, 11 NY3d 64, 71 [2008]; *see* N-PCL 717 [b] [persons who perform their duties in "good faith" "shall have no liability by reason of being or having been directors or officers of the corporation"]).

In *Grasso*, the Attorney General brought a lawsuit against the former chairman of the New York Stock Exchange, then a not-for-profit corporation, charging that the compensation paid to him was excessive (*id.* at 66). Specifically, the NYAG asserted two kinds of claims against Grasso – statutory claims authorized under the N-PCL, and "non-statutory claims … premised on provisions of the N-PCL but clothed in the common-law," specifically the theory of unjust enrichment (*id.* at 68). The Court of Appeals held that the NYAG lacked authority to maintain the non-statutory causes of action. "[A] side-by-side comparison of the challenged claims and the statutory claims," the Court noted, showed that the NYAG had "crafted [non-statutory] causes of action with a lower burden of proof than that specified by the statute, overriding the fault-based scheme codified by the Legislature and thus reaching beyond the bounds of the Attorney General's authority" (*id.* at 70). Whereas "the statutory claim would require the Attorney General to overcome a business judgment defense," the "nonstatutory causes of action [were] devoid of any fault-based elements," making them "fundamentally inconsistent with the N-PCL" (*id.* at 71-72).

Here, the Attorney General's Eighteenth Cause of Action runs afoul of the principles set out in *Grasso*. As in *Grasso*, the Attorney General tries to assert a non-statutory theory of recovery, based on unjust enrichment, alongside her statutory claims. And, as in *Grasso*, the

Attorney General's non-statutory claim for unjust enrichment imposes "a lower burden of proof than that specified by the statute" (*id.* at 70).

Begin with the Attorney General's statutory claims for breach of fiduciary duty. These claims, brought under N-PCL 720 [a] [1], seek to hold the Individual Defendants "to account and pay restitution and/or damages, including returning the salary [they] received while breaching his fiduciary duties to the NRA" (Compl. ¶ 670; *see also id.* ¶ 676 [Frazer]). To hold LaPierre and Frazer liable under N-PCL 720 [a] [1], the Attorney General will need to prove fault. Liability under that section requires "[t]he neglect of, or failure to perform, or other violation of" their duties (N-PCL 720 [a] [1] [A]-[B]), and the Attorney General will need to overcome the business judgment rule (N-PCL 717; *People ex rel. Spitzer v Grasso*, 42 AD3d 126, 140 [1st Dept 2007] ["[T]he N–PCL reflects an apparent conclusion by the Legislature about what sound public policy requires in any action brought against directors or officers under N–PCL 720(a)(2), 720(a)(1)(A) or 720(a)(1)(B)—i.e., that such a fault-based requirement should be essential to their liability."], *affd*, 11 NY3d 64 [2008]).

None of the elements of a claim for unjust enrichment, by contrast, require proving fault (*e.g.*, *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 517-18 [2012] [elements of claim are "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered"]). So, as in *Grasso*, the unjust enrichment claim here improperly sidesteps the "the fault-based scheme codified by the Legislature" (*Grasso*, 11 NY3d at 70).

The core principle in *Grasso* precludes the unjust enrichment claim even though, in this case, it is brought derivatively on behalf of the corporation, not directly under the Attorney General's *parens patriae* authority as in *Grasso*. The concerns raised in *Grasso* about

overstepping legislative bounds were not cabined to any particular form of action. Under the N-PCL, "a fault-based requirement should be essential" to proving liability "***in any action*** brought against directors or officers" (*Grasso*, 42 AD3d at 140 [emphasis added]). And "a private right of action may not be implied from [the N-PCL] where it is 'incompatible with the enforcement mechanism chosen by the Legislature,'" regardless of whether "[t]he plaintiff here is the Attorney General as opposed to a private party" (*Grasso*, 11 NY3d at 70). In this derivative action, the Attorney General purports to represent NRA members (Compl. ¶¶ 735-736). Since the rule in *Grasso* applies to the Attorney General and private parties alike, the rule must necessarily apply to the Attorney General exercising the rights of private parties.

Next, the Attorney General insists she is not "required to allege fault to successfully assert this cause of action," citing amendments to the N-PCL enacted in 2013 that purportedly fashioned a strict-liability standard for related-party transactions under N-PCL 715 (NYSCEF 404 at 30-31). In the Attorney General's view, these amendments "demonstrate that the Legislature did not intend to impose a purely fault-based scheme" (*id.* at 31). There are several problems with this argument. For one thing, if the Attorney General is suggesting that the 2013 amendments overruled *Grasso*, she cites no authority to support that sweeping conclusion. Nor does the Attorney General cite to any changes made to N-PCL 717 or 720, the provisions at the heart of *Grasso*, which afford directors and officers the protections of the business judgment rule. That leads to the second major problem with the Attorney General's argument. Whatever changes were made in 2013 to the law of related-party transactions, the Attorney General is not alleging, at least in the Eighteenth Cause of Action, that LaPierre's or Frazer's compensation was a related-party transaction (*see also* NYAG Charities Bureau Guidance at 43 ["Transactions related to compensation of employees, officers or directors … are not considered related party

transactions"], *available at* https://www.charitiesnys.com/pdfs/sympguidance.pdf)). Rather, her statutory tether is N-PCL 515 (Compl. ¶ 736), the same provision the Attorney General unsuccessfully sought to bootstrap to the common-law claims in *Grasso* (*see* 11 NY3d at 68).

To be sure, the Attorney General's detailed allegations in the Amended Complaint go well beyon what the elements of a common-law unjust enrichment claim require. But under *Grasso*, it is the *elements* of the claim that count – that is, the minimum the Attorney General would have to prove to prevail at trial (*Grasso*, 11 NY3d at 71 ["[T]he four nonstatutory causes of action are devoid of any ***fault-based elements*** and, as such, are fundamentally inconsistent with the N–PCL"] [emphasis added]; *see also Grasso*, 42 AD3d at 141-42 ["[T]he authority to assert a cause of action hardly entails the authority to amend the elements of a cause of action."]).

The burden of proof is defined by the cause of action, not by the plaintiff. And the Attorney General has chosen to employ a cause of action "devoid of any fault-based elements" (*Grasso*, 11 NY3d at 71). She cannot rectify that fundamental problem by volunteering to prove more than what the cause of action requires. Ultimately, under the Attorney General's approach, LaPierre and Frazer could be found liable under the Eighteenth Cause of Action based only on the bare elements of unjust enrichment, bypassing the fault-based regime set up by the Legislature.

Therefore, the motion to dismiss the Eighteenth Cause of Action is **granted**.

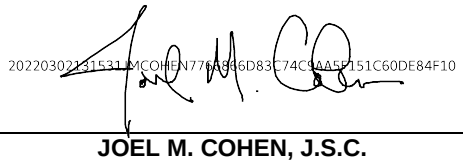
* * * *

Accordingly, it is

ORDERED that the motions to dismiss are GRANTED to the extent that the claims for dissolution (first and second causes of action), breach of the NYPMIFA (sixteenth cause of

action), and unjust enrichment (eighteenth cause of action) are dismissed; and the motions are otherwise DENIED.

This constitutes the Decision and Order of the Court.



3/2/2022
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		**CASE DISPOSED**			X	**NON-FINAL DISPOSITION**	
		GRANTED		**DENIED**	X	**GRANTED IN PART**	**OTHER**
APPLICATION:		**SETTLE ORDER**				**SUBMIT ORDER**	
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**				**FIDUCIARY APPOINTMENT**	**REFERENCE**