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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,	§	**INDEX NO. 451625/2020**
Plaintiff,	§	
v.	§	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	
Defendants.	§	

THE NATIONAL RIFLE ASSOCIATION OF AMERICA'S TRIAL BRIEF

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The New York Attorney General ("NYAG") sued five Defendants: three former National Rifle Association of America ("NRA") executives, NRA General Counsel John Frazer, and the NRA itself, whose corporate authority and "proper administration" are entrusted to its Board of Directors. The NYAG repeatedly admits that the alleged misconduct "w[as] neither disclosed to, nor approved by, the NRA Board," and indeed "evaded" the Board's robust policies. Pl.'s Second Am. Compl. ("SAC"), NYSCEF 646 ¶¶ 6, 10. Yet its leading cause of action against the NRA—if it is not dismissed for vagueness—amounts to invasive second-guessing by the state as to "proper" corporate governance and must overcome the business judgment rule. This dooms the NYAG's EPTL § 8-1.4(m) claim: the NYAG cannot prove self-dealing or bad faith by the Board. And although the issue has been removed from the jury,[1] the NYAG cannot prove persistent violations that call for court intervention to "secure" property held for charitable purposes. *See* NYSCEF 2344.

In its Complaint, the NYAG alleges, *inter alia*, various self-dealing and related-party transactions made at the direction and for the benefit of four individuals: Wayne LaPierre, Executive Vice President; Wilson "Woody" Phillips, former Treasurer and Chief Financial Officer; and Joshua Powell, former Chief of Staff and General Director of Operations. Yet LaPierre, Phillips, and Powell have left (or are in the process of departing) the NRA. As the NYAG admitted, "the Wayne LaPierre era" at the NRA has "end[ed]." *See* New York State Attorney General, "Statement from Attorney General James on Resignation of NRA Executive Vice President and CEO Wayne LaPierre" (January 5, 2024), *available at* https://ag.ny.gov/press-release/2024/statement-attorney-general-james-resignation-nra-executive-vice-president-and.

[1] The NRA is currently engaged in an expedited appeal on whether the jury may render a verdict on "continuing violations," and reserves rights and remedies in this aspect.

Thus, the key allegations in the NYAG's Complaint, that the NRA is engaged in "persistent" and "ongoing" governance failures because of the conduct of the individual defendants, SAC ¶¶ 12, 52, 576, 593–694, all fall away. Instead, the NRA has robust rules and regulations applicable to its officers forbidding the misconduct that the NYAG alleges. The NRA's bylaws explicitly prohibit self-dealing transactions and establish clear approval procedures for such transactions. *See, e.g.*, SAC ¶¶ 98–100 (explaining NRA's bylaws require disclosure on private benefits and reimbursements absent board approval); NYSCEF 1652 at 3–12 (NRA's Conflict of Interest and Related Party Transaction Policy, tracking N-PCL's requirements concerning related party transactions).

Although the jury will not decide the issue, the NYAG's Complaint and public statements concede that the EPTL § 8-1.4(m) requires that, to obtain relief, any failures to properly administer the NRA must be ongoing and persistent. Thus, the NYAG asserts that "over the course of [LaPierre's] nearly 30-year tenure as the chief executive of the organization, and with the assistance of the other Individual Defendants and leaders on the NRA Board, [LaPierre] has consolidated his power and control over the NRA." SAC ¶ 61. But that is not true: LaPierre has relinquished his "power and control" over the NRA, and there is no likelihood that any of the wrongdoing alleged in the Complaint will recur. Thus, the NYAG's claims that LaPierre is using his "power and control" to effect "improper administration" of the NRA fall completely flat.

The remaining causes of action against the NRA also fail. The NYAG's related-party transaction claims under N-PCL § 715 fail because the transactions at issue predated the statute's requirements, failed to meet statutory criteria for review, or else were duly ratified. The NYAG's whistleblower claims under N-PCL § 715-b fail because the statute does not grant the NYAG authority to bring claims on behalf of the persons in question, and because the elements of a

whistleblower retaliation claim are not met. And the NYAG's false filings claim under Executive Law §§ 172-d(1) and 175(2)(d) fails because the NRA's filings were complete, legally-compliant, and in accordance with applicable accounting standards.

I. ARGUMENT

A. The NYAG's EPTL § 8-1.4(m) Claim is Meritless

1. The NYAG's EPTL § 8-1.4(m) Claim is Void for Vagueness

For vagueness purposes, a civil statute which authorizes "drastic measures[s]" may be analyzed "as if it impose[s] a criminal penalty." *See, e.g.*, *Arriaga v. Mukasey*, 521 F.3d 219, 223 (2d Cir. 2008). Here, the relief authorized by the statute is unbounded, and the relief sought by Plaintiff is invasive and punitive—it includes not only the imposition of a compliance monitor, but bans on First Amendment-protected activity such as soliciting NRA memberships in New York. As briefed more fully at NYSCEF 2564, the First Cause of Action should be dismissed on void-for-vagueness grounds.

2. The NYAG's Proposed Jury Instructions Exacerbate the Vagueness Problem.

The NYAG's proposed instruction on the First Cause of Action aggravates the vagueness concerns surrounding this claim. In its proposed instructions, the NYAG invites the jury to "determine whether you find that the Defendants administered the NRA and its charitable assets properly." NYSCEF 2486 at 50. It then attempts to contextualize the statute but fails to do so for four reasons. *See* NYSCEF 2564 at 12.

First, commands to "obey the law" are improper. Courts uniformly hold that "[b]road, non-specific language that merely enjoins a party to obey the law or comply with an agreement does not give the restrained party fair notice of what conduct will risk contempt." *Hughey v. JMS Dev. Corp.*, 78 F.3d 1523, 1531 (11th Cir. 1996) (cleaned up).

Second, the NYAG compounds the vagueness problems by contending that EPTL § 8-1.4(m) lacks any scienter requirement. NYSCEF 2486 at 51. With no support beyond the statute itself, the NYAG reads strict liability into the law in a manner that underscores constitutional concerns. "[T]he Supreme Court 'has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea.'" *Loc. 8027, AFT-N.H., AFL-CIO v. Edelblut*, 651 F. Supp. 3d 444, 460 (D.N.H. 2023).

Third, the NYAG proposes that the jury be instructed that it "may also consider whether that Defendant permitted, enabled or engaged, through their actions and inactions, evasion or overrides of the NRA's internal controls or permitted its charitable assets to be wasted, lost, or diverted for personal benefit or uses other than the NRA's mission." *See* NYSCEF 2568 at 67. This improperly equates the behavior of the individual defendants with that of the NRA Board. As this Court previously noted in connection with the NYAG's dissolution claim, the Complaint "cast[s] the [NRA] as the *victim* of its executives' schemes." NYSCEF 611 at 2 (emphasis in original). The NYAG's allegations, if accepted, create a paradigm under which a nonprofit could suffer harm once from a fiduciary breach, and then again under EPTL § 8-1.4(m) liability for the same acts. *See* NYSCEF 2568 at 67. This violates public policy. *See* NYSCEF 2564 at 15.

Fourth, the NYAG's allegations in support of its EPTL § 8-1.4(m) claim largely replicate its distinct causes of action under the N-PCL in an attempt to impose liability under a vague, collaterally-applicable statute under circumstances where the legislature, through the N-PCL, indicated no liability should exist.

For example, the First Cause of Action asserts "improper administration" based on "[f]ail[ure] to comply with the applicable law [*i.e.*, the N-PCL] governing conflicts of interest, related-party transactions, and self-dealing" and "fail[ure] to comply with the applicable law [*i.e.*,

the N-PCL] governing whistleblower protections." SAC ¶ 641. But the NYAG only recently attempted, and failed, to define violations of the EPTL that did not rely on the same factual underpinnings of its N-PCL claim. *See* NYSCEF 2564 at 16–17. Accordingly, a vague mandate for "proper administration" does not suffice—these are the same allegations mustered for the NYAG's N-PCL claims, reiterated under a different statute in the hope that the Court will fashion a lower standard of liability. The Court should refuse to do so.

3. The "Improper Administration" Must Be Imputable to the NRA's Board and Must Arise From Self-Dealing Or Bad Faith.

The NYAG should be required to prove "improprieties" that concern charitable assets and are imputable to the NRA itself—not rogue former officers. It is not enough to show that an NRA employee pilfered donations. Many other statutory devices exist to pursue discrete misconduct of that sort, including the exact N-PCL claims brought against individuals in this case. If EPTL § 8-1.4(m) is read to create an independent cause of action enabling open-ended, unbounded interventions by the state in the corporate governance of a nonprofit, then this independent cause of action should entail proof that the subject "improprieties" were systemic—and that the NRA Board approved or willfully blinded itself to the misconduct. Moreover, in assessing whether the Board's actions amount to "improper administration," the Court must apply the business judgment rule, which insulates management decisions against judicial intervention absent self-dealing or bad faith.

As the NYAG admits in its pleadings, the NRA's Board exercises general oversight of the NRA. SAC ¶ 66. Further, it exercises ultimate corporate authority under New York law. *See, e.g.*, *DeWald v. Amsterdam Hous. Auth.*, 823 F. Supp. 94, 102 (N.D.N.Y. 1993) (citing N.Y. Bus. Corp. Law § 701); *Aries Ventures Ltd. v. Axa Fin. S.A.*, 729 F. Supp. 289, 295 (S.D.N.Y. 1990)*; People v. Rondon*, 439 N.Y.S.2d 803, 806 (N.Y. Sup. Ct. 1981). And as this Court previously emphasized,

liability and remedies must "delineate between the NRA, on the one hand, and its leaders on the other, who acted without regard to the NRA's best interests." NYSCEF 611 at 25 (internal quotation marks omitted). Indeed, the SAC alleges misconduct that "evaded [] the NRA's own accounting and Board-established expense reimbursement process[es]," SAC ¶ 6, "violated NRA policy on contracting and business ethics," SAC ¶ 10, and "w[as] neither disclosed to, nor approved by, the NRA Board." *Id.* The NYAG has sued several individual defendants who purportedly perpetrated or oversaw that concealed misconduct, but it has also sued the NRA—and for purposes of the distinct "improper administration" claim, liability should require that the NRA itself, not a rogue employee or vendor, administered charitable assets improperly.

"The Board of a Not–For–Profit Corporation enjoys the benefit of the business judgment rule which bars judicial review of actions taken in good faith and in the exercise of honest judgment." *In re Midway Jewish Ctr.*, 16 Misc. 3d 607, 612 (N.Y. Sup. Ct. 2007).[2] Thus, absent "evidence of bad faith or self-dealing," the Court may not override the NRA's business judgment concerning the proper administration of its operations or assets. *Van Der Lande v. Stout*, 13 A.D.3d 261, 262 (1st Dep't 2004). Codified in N-PCL § 717, the business judgment rule applies unambiguously to corporate decisions alleged by the attorney general to constitute violations of nonprofit law. *People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64, 70 (2008). Importantly, a conflict of interest affecting one director or officer is not enough to overcome the business judgment rule unless the party challenging the corporation's judgment shows "coercive control" by the conflicted

[2] The weight of authority makes clear that the business judgment rule protects not only individual director and officer defendants, but also decisions by boards and committees collectively. *See, e.g.*, *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 533 (1990) ("We conclude that the business judgment rule furnishes the correct standard of review" for co-op board's enforcement decisions). This is because the business judgment rule "expresses a sensible policy of judicial noninterference with business decisions and is designed to limit judicial involvement in business decision-making so long as a minimum level of care is exercised in arriving at the decision," and prevents a court "from replacing a well-meaning decision by a corporate board with its own decision." *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 399 P.3d 334, 342 (Nev. 2017) (rejecting argument that the business judgment rule should shield individuals but not entities or their boards).

person over the Board such that "the Board's will [i]s effectively supplanted by" the will of the interested director or executive. *See, e.g.*, *Higgins v. N.Y. Stock Exch., Inc.*, 10 Misc. 3d 257, 281 (N.Y. Sup. Ct. 2005); *Marx v. Akers*, 88 N.Y.2d 189, 194 (1st Dep't 1996).

Absent disloyalty, judicial scrutiny of the Board's judgment can be triggered by a predicate breach of fiduciary care—but this does not eliminate the requirement of bad faith. This is because "mere negligence [is] insufficient" for a breach of due care in the context of the business judgment rule. 19 C.J.S. Corporations § 556. Instead, to overcome the business judgment rule, the NYAG must prove that the Board engaged in acts beyond the bounds of reason, including gross negligence[3] or an intentional or reckless dereliction of duty. *See Espinoza ex rel. JPMorgan Chase & Co. v. Dimon*, 807 F.3d 502, 506 (2d Cir. 2015) (explaining fiduciary-care standard under Delaware corporate law) (internal citations and quotation marks omitted); *see also* William Meade Fletcher, 3A Fletcher Cyclopedia of the Law of Corporations § 1031 (2019 Rev. Vol. Perm. Ed.).

Thus, where the Board is accused of being inactive or incurious, the NYAG must show that its proceedings were "so pro forma or halfhearted as to constitute a pretext or sham." *See, e.g.*, *In re Mid-State Raceway, Inc.*, 323 B.R. 40, 58 (Bankr. N.D.N.Y. 2005) (applying New York corporate law) (internal citations and quotation marks omitted). As Delaware courts have persuasively articulated under the *Caremark* doctrine, a litigant who aims to set aside the business judgment rule based on an allegedly-systemic abdication of oversight by the Board must show that either "(a) the directors utterly failed to implement any reporting or information system or controls; or (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their

[3] As the Court of Appeals has emphasized, gross negligence "differs in kind, not only degree, from claims of ordinary negligence" and "must smack of intentional wrongdoing" or "evince [] reckless indifference." *Matter of Part 60 Put-Back Litig.*, 36 N.Y.3d 342, 352 (2020) (internal citations and quotation marks omitted).

attention." *In re WonderWork, Inc.*, 626 B.R. 94, 112–13 (Bankr. S.D.N.Y. 2020) (applying *Caremark* framework to claims by bankruptcy trustee of a nonprofit corporation). The "hallmark" of such a claim "is bad faith;" *i.e.*, the directors must have known they were acting inconsistent with their fiduciary duties. *Id*. Thus, the NYAG must show that the NRA Board had notice that its action or inaction breached its fiduciary obligations.

4. Although the Jury Will Not Decide "Continuing Harm," the NYAG Must Demonstrate It as a Predicate for Ultimate Relief—And in a Jury-Triable Action to "Secure Proper Administration," Remedial Measures Must be Admitted Into Evidence.

As briefed more fully at NYSCEF 2305, a party seeking a permanent injunction must show that there is a danger of irreparable injury unless the injunction is entered and that there is an inadequacy of other remedies to afford just and equitable relief. *See* 67A N.Y. Jur. 2d Injunctions § 45 (2010); *May's Furs & Ready to Wear v. Bauer*, 282 N.Y. 331 (1940). These settled rules of equity apply to the NYAG's claims against the NRA: the NYAG must show ongoing or imminent harm to support injunctive relief. *State v. Fine*, 72 N.Y.2d 967, 968–69 (1988); *Sutton Madison, Inc. v. 27 E. 65th St. Owners Corp.*, 68 A.D.3d 512, 512–13 (1st Dep't 2009); *144-80 Realty Assocs. v. 144-80 Sanford Apt. Corp.*, 193 A.D.3d 723, 725 (2d Dep't 2021) ("Injunctive relief should be invoked only to protect against future, repeated violations of a party's rights.").

Although they will not decide whether violations continue, the text of EPTL § 8-1.4(m) demands that the jury hear so-called "course correction" evidence. It states that the NYAG "may institute appropriate proceedings . . . to secure the proper administration of any trust, corporation or other relationship to which this section applies." EPTL § 8-1.4(m). The statutory phrase "to secure the proper administration of . . ." focuses expressly on the entity's administration going forward, not in the past. Therefore, no verdict can be rendered for the NYAG on an EPTL cause of action to "secure" proper administration of property which "is being improperly administered"

unless the jury finds "improper administration" that is continuing or imminently likely to recur. *See Riverton Area Fire Prot. Dist. v. Riverton Volunteer Fire Dep't*, 566 N.E.2d 1015, 1020 (Ill. 1991) (sustaining summary judgment under a similarly-worded Illinois statute in an action against a fire protection corporation to require it to continue to providing fire-fighting services in the future). Thus, the NYAG alleges in its Complaint that the NRA is engaged in "persistent" and "ongoing" governance failures. SAC ¶¶ 12, 52, 576, 593–694.

The Third Department has confirmed that imminent, continuing harm is a prerequisite for injunctive relief under the nonprofit statutory scheme. In *People v. Lutheran Care Network*, the NYAG sought to enjoin a nonprofit corporation from "exercising operational control over any affiliate in a manner inconsistent with the purposes of the affiliate or in violation of law." 167 A.D.3d 1281, 1283 (3d Dep't 2018). The lower court ordered the nonprofit to implement a conflict-of-interest policy in compliance with the N-PCL. The nonprofit did not challenge that order "and represent[ed] that the required policies ha[d] been adopted." *Id.* at 1283 n.2. But in opposing the injunction, the nonprofit "denied that there is any potential for any future harm," asserting that it "implemented procedures to ensure future compliance with applicable law." *Id.*

The Third Department agreed, holding that the nonprofit's new procedures "render[ed] moot nearly every aspect of [the NYAG's] demands of [the nonprofit] with respect to future conduct." *Id.* The court added that, given these changes, "[the nonprofit] is already obligated to follow the law and there is nothing in the record to suggest that it will not do so, the extraordinary relief of an injunction is unnecessary and inappropriate." *Id.* (quoting *Matter of Willkie v. Delaware County Bd. of Elections*, 55 A.D.3d 1088, 1092 (3d Dep't 2008). The court thus concluded dismissal of the cause of action was proper. *Id.*

Further, without continuing harm, a request for injunctive relief is moot. *See Electrolux Corp. v. Val-Worth, Inc.*, 6 N.Y.2d 556, 565 (1959). In *Electrolux*, for instance, the Court of Appeals affirmed the denial of a permanent injunction given that "[t]he Appellate Division took the view that this discontinuance [of the alleged harm] six months prior to the commencement of the action and the absence of any indication in the record that defendants intend to resume the practice render an injunction unnecessary and inappropriate." *Id.*; *see also 1130 President St. Corp. v. Bolton Realty Corp.*, 300 N.Y. 63, 69 (1949) (denying injunctive relief when there was no threat of harm because "[i]njunctive relief should be addressed only to acts which are threatened and imminent."). Here, the NRA has stopped, and shows no intent to resume, the practices of which the NYAG complains, rendering injunctive relief inapposite and moot. This inference is underscored by the departure of Wayne LaPierre, the officer alleged to have exercised "power and control" over the NRA. SAC ¶ 61.

This principle holds true even when the NYAG is bringing an enforcement action: the timing of the relevant harm must be at the time of trial and the lack of present harm renders an injunction moot. *People v. Volkswagen of Am., Inc.*, 47 A.D.2d 868, 868 (1st Dep't 1975) (denying NYAG injunctive relief because it "is a prospective remedy seeking to prevent future violations" and "in view of the immediate correction of the [harm] and the passage of almost three years without repetition of the offense"); *People v. Alexanders Dep't Store, Inc.*, 42 A.D.2d 532, 532 (1st Dep't 1973) (denying NYAG's belated request for injunctive relief because without "any indication of threatened or probable repetition, no useful purpose will be served by granting injunctive relief"); *State v. Carvel Corp.*, No. 42126/79, 1979 WL 3896, at *2 (N.Y. Sup. Ct. Dec. 24, 1979) (denying NYAG injunctive relief where prospect of future injury was "pure speculation and surmise" and thus was not imminent, explaining "undisputed facts clearly demonstrate that

regardless of whether he did or did not participate in the acts complained of, movant has not performed any anti-competitive activities within the past two-and-one-half years, having left the employ of defendant Carvel, and is unlikely to commit such acts in the immediate future"); *cf. SEC v. Monarch Fund*, 608 F.2d 938, 943 (2d Cir. 1979) (reversing injunction because it "was not entered until more than seven years after the alleged violations").

5. Under Proper Instructions, the NYAG's EPTL § 8-1.4(m) Fails—Because Alleged Improprieties Were Concealed from the Board, Then Redressed When Discovered.

Although the Complaint is voluminous, the vintage of the allegations is at odds with an action in which all significant relief sought against the marquee defendant, the NRA, is injunctive and prospective. *See* NYSCEF 2567 (identifying no related-party transactions after 2020). The NYAG's detailed allegations of misconduct by individuals do not extend to allegations against the Board—and it admits that the Board was unaware of the misconduct in question. *See* SAC ¶¶ 10-11, 142. When these evasions were discovered, the record—including the NYAG's own proposed documentary evidence—shows clear corrective action. For example:

- In the wake of whistleblower concerns about vague and unsupported vendor invoices in July 2018, the NRA sent 215 letters to vendors reinforcing its invoice-support requirements and undertook detailed inquiries into several vendors of primary concern. *See, e.g.*, Pl. Proposed Ex. No. PX-00563; Pl. Proposed Ex. No. PX-03232; Pl. Proposed Ex. No. PX-02370.

- The NRA ultimately eliminated more than 50 vendors and millions in expenses. This effort, overseen by the Audit Committee, advanced despite false assurances and veiled threats from a key vendor whose expense-passthrough practices, the NYAG admits, were previously hidden from the Board. *See* Pl. Proposed Ex. PX-02300 (insisting there is "no basis for concern" about invoiced expenses, then warning the NRA against "creating paper trails"). Overall, the NRA has reduced its expenditures by over one-third since 2018, remarkable for a large non-profit the size of NRA—and utterly at odds with the allegations of systemic mismanagement asserted in the Complaint.

- The NYAG challenges several transactions with Board members which predated the requirements of N-PCL § 715. The NYAG admits that none of these

board-member payments were disclosed to the Audit Committee in the first instance, all were later reviewed by the Audit Committee, and all except one were eventually discontinued. *See* SAC ¶¶ 384-411; NYSCEF 2567.

- Consulting arrangements with former employees were also reviewed and eliminated, with additional special procedures conducted by the NRA's outside auditor to ensure such payments were reasonable or had come to an end. *See* Pl. Proposed Ex. No. PX-00041.

- Salary reductions were implemented during Covid-19 and remain in effect for most senior officers even after salaries for staff were restored. *See* Peters Aff. Ex. A (discussing 20 percent salary reduction).

- LaPierre's previous post-employment contract, which the NYAG alleges was improper, dates to 2013 and was never signed by the officers of the Board. SAC ¶ 435. It was superseded by a compensation package the NYAG concedes is reasonable, which was approved by the full Board in January 2021. SAC ¶ 441; NYSCEF 917 ¶ 441.

- It is undisputed that Defendant Phillips was replaced as Treasurer and CFO by Craig Spray, whom the NYAG credits with implementing changes and reforms, and later by whistleblower Sonya Rowling. Phillips' purported post-employment consulting contract was never approved by the Audit Committee and was discontinued after the Audit Committee mandated that it be restructured and subject to a business-case-analysis requirement. *See* Peters Aff. Ex. B.

- Beginning in 2018, the NRA instituted mandatory compliance seminars for senior staff. *See* Pl. Proposed Ex. No. PX-00648; Pl. Proposed Ex. No. PX-02258.

- The NRA updated its travel, expense, whistleblower and procurement policies. *See* Pl. Proposed Ex. No. PX-02341.

- The NRA retained new tax counsel, tax consultants, and auditors, who have worked closely with the Audit Committee. *See* Peters Aff. Ex. C.

- The NRA hired a Compliance Manager, who will report to the Board. *See* Peters Aff. Ex. D.

- In January 2024, LaPierre departed the NRA.

Indeed, the NYAG's post-2020 allegations seem concentrated almost entirely on the NRA's decision to seek bankruptcy protection under Chapter 11—which the NYAG cannot contend violates any provision of New York nonprofit law. Requiring and lacking evidence of

"ongoing" governance problems, *see* NYSCEF 2149, the NYAG tried to obtain some from a post-note-of-issue deposition of Willes Lee, and failed. Lee testified that NRA leadership was consistently guided only by the best interest of the NRA and described the breadth of new litigation targeting the NRA as "disgusting"—testimony that does not create an implication of present or ongoing misconduct. *See* Peters Aff. Ex. E.

a. *Even if the NYAG proves its allegations under its own liability-imputation framework, the "adverse interest" exception would absolve the NRA of liability.*

Importantly, even the NYAG's proposed standard for imputation of executive misconduct to corporate defendants, the NYAG's allegations should properly have been brought (and could only be proved) against the individuals, not the NRA. This is because the "adverse interest" exception articulated in *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 466 (2010) shields a corporation defrauded by agents who act to its detriment and for their own benefit. *See, e.g.*, *Symbol Techs., Inc. v. Deloitte & Touche*, *LLP*, 69 A.D.3d 191, 197 (2d Dep't 2009) (concluding managers' revenue-inflation and earnings-manipulation were "not in the interest of [the corporation] and were done solely to advance the personal interests of the Identified Managers and for their personal financial benefit"). The adverse-interest exception undoubtedly applies to cases of "looting or embezzlement," *Kirschner*, 15 N.Y.3d at 466, but can also apply where a corporate officer's self-interest misconduct incidentally benefits the corporation. *See, e.g.*, *Cobalt Multifamily Investors I, LLC v. Shapiro*, No. 646(KMW) (MHD), 2009 WL 4408207, at *4 (S.D.N.Y. Dec. 1, 2009) (holding adverse interest exception applies even though investor funds initially deposited in corporate accounts: "the investor funds were either promptly spent or transferred to other bank accounts for the personal benefit of the Individual Defendants"). In *Cobalt*, one of the individual defendants used "hundreds of thousands of dollars" of funds to pay for "numerous expensive sports cars," for construction work on his home, and for access to a condominium in Miami Beach,

Florida. *See id.* at *4. The court concluded those allegations support that an "intent to totally abandon [the corporation's] interest." *Id.*

Where corporate officers misuse corporate funds, veiling personal indulgences such as business trips under the guise of corporate objectives, the NYAG cannot show that the individual wrongdoers' looting or waste furthered the NRA's business in any way. *Compare Cobalt*, 2009 WL 4408207, at *4 (no benefit where agent used corporate funds for luxury cars), *with Kirschner*, 15 N.Y.3d at 459 (corporation benefits from overstating earnings and price fixing). In fact, the wrongdoers' actions occurred in violation of the NRA's policies and at the expense of the NRA. The NRA's business is defined in its Bylaws and consists of the following:

1. To protect and defend the Constitution of the United States . . . ;
2. To promote public safety, law and order, and the national defense;
3. To train members of law enforcement agencies . . . ;
4. To foster, promote and support the shooting sports . . . ; [and]
5. To promote hunter safety . . . and wise use of our renewable wildlife resources.

See SAC ¶ 19 (acknowledging and reproducing NRA's stated mission). The NYAG does not and cannot allege that any of these corporate interests or purposes benefitted from the wrongdoing alleged. Instead, the NYAG admits otherwise: *See, e.g.*, SAC ¶ 143 ("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 ***entirely for LaPierre's personal benefit*** and ***violated NRA policy***.") (emphasis added); *id.* ¶ 190; *id.* ¶ 203 ("[LaPierre's] reimbursements violated NRA's Travel Expense Reimbursement policy, which requires that all NRA employees and volunteers "incur the lowest practical and reasonable expense" when travelling on NRA-related business."); *id.* ¶ 260 ("Powell routinely violated the NRA's expense reimbursement

requirements."); *id.* ¶ 272; *id.* ¶ 353 ("LaPierre and Phillips violated the NRA's internal policy concerning contracts over $100,000"); *id.* ¶ 347 ("[T]hese trips were not authorized by resolution of the NRA Board or an authorized committee.").

The NRA has meticulously laid out rules and regulations for its officers forbidding the precise misconduct at issue. *See, e.g.*, *id.* ¶¶ 98–100 (explaining NRA's bylaws require disclosure on private benefits and reimbursements absent board approval). The NRA bylaws themselves explicitly prohibit self-dealing transactions and clear approval procedures for such transactions. *See, e.g.*, *id.* ¶ 143 ("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 ***entirely for LaPierre's personal benefit*** and ***violated NRA policy***.") (emphasis added); *id.* ¶ 190; *id.* ¶ 203 ("[LaPierre's] reimbursements violated NRA's Travel Expense Reimbursement policy, which requires that all NRA employees and volunteers "incur the lowest practical and reasonable expense" when travelling on NRA-related business."); *id.* ¶ 260 ("Powell routinely violated the NRA's expense reimbursement requirements."); *id.* ¶ 272; *id.* ¶ 353 ("LaPierre and Phillips violated the NRA's internal policy concerning contracts over $100,000"). The misconduct alleged by the NYAG would not only have been frowned upon by the NRA, but expressly forbidden. It cannot be attributed to the NRA.

B. The NYAG's N-PCL § 715 "Wrongful Related Party Transactions" Claim Is Meritless

1. Elements of a Related Party Transaction Under N-PCL § 715

Under the N-PCL, a "related party transaction" is a definition-heavy phrase that requires that multiple elements all be satisfied. N-PCL § 102(a)(24). If a transaction alleged to violate N-PCL § 715 does not meet each of these elements than it cannot qualify as an actionable related party transaction.

To qualify as a "related party transaction" under N-PCL § 715, a transaction must involve a "director, officer or key person of the corporation" or its affiliates. N-PCL § 102(a)(23).[4] Despite this requirement, several of those transactions identified by the plaintiff as allegedly violating N-PCL § 715 do not involve a related party. *See* NYSCEF 2567.

For a transaction to be considered under N-PCL § 715, it cannot be de minimis. N-PCL § 102(a)(24). To say that a transaction is de minimis is different from saying it is "not substantial." *Gurary v. Nu-Tech Bio-Med, Inc.*, 303 F.3d 212, 223 n.3 (2d Cir. 2002). Rather, whether a transaction is de minimis "depend[s] on the size of the corporation's budget and assets and the size of the transaction." Office of the New York State Attorney General Charities Bureau, *Conflicts of Interest Policies Under the Not-for-Profit Corporation Law* (2015); Office of the New York State Attorney General Charities Bureau, *Conflicts of Interest Policies Under the Not-for-Profit Corporation Law* (2018). For a corporation such as the NRA—which has an annual budget of tens of millions—many transactions that would exceed the de minimis threshold for other nonprofits would constitute only a trifling amount in terms of the NRA's expenditures. *See, e.g., Bowles v. Nw. Poultry & Dairy Prod. Co.*, 153 F.2d 32, 34 (9th Cir. 1946) (finding that regulatory violations giving rise to the suit were de minimis as they only accounted for 1% of the company's transactions); *Drug Mart Pharm. Corp. v. Am. Home Prod. Corp.*, No. 93-CV-5148 (ILG), 2012 WL 3544771, at *6 (E.D.N.Y. Aug. 16, 2012) (finding a loss of 0.27% of customer transactions to be de minimis), *aff'd sub nom*. *Cash & Henderson Drugs, Inc. v. Johnson & Johnson*, 799 F.3d 202 (2d Cir. 2015); *Avande, Inc. v. Evans*, No. 2018-0203-AGB, 2019 WL 3800168, at *12 (Del.

[4] Relatives of such persons, or an entity partly owned by such persons or their relatives, also constitute a related party. N-PCL § 102(a)(23).

Ch. Aug. 13, 2019) (concluding that one transaction constituting 0.075% of all expenses was de minimis).

A transaction that occurs in the ordinary course of business cannot, as a matter of law, be considered a related party transaction. N-PCL § 102(a)(24). A transaction can be said to have been carried out "in the ordinary course of business if it is consistent either with the corporation's past practices in similar transactions, or with common practices in the sector in which the corporation operates." Office of the New York State Attorney General Charities Bureau, *Conflicts of Interest Policies Under the Not-for-Profit Corporation Law* (2015); Office of the New York State Attorney General Charities Bureau, *Conflicts of Interest Policies Under the Not-for-Profit Corporation Law* (2018).

2. Transactions by Non-Related Parties Hallow and McCulloch

Millie Hallow is not a related party under the N-PCL as she is not, nor was she at any point, a "director, officer or key person" of the NRA. N-PCL § 102(a)(24). Rather, Hallow was the NRA's Managing Director of Executive Operations. In this role, Hallow was responsible for various functions: liaising between the EVP and other officers and board members, editing speeches and publications, and outreach responsibilities. *See* NYSCEF 2429 at 9–10. These support activities, while important in their own right, are a far cry from the "responsibilities or powers similar to those of officers and directors" or the management "of a substantial part of [the NRA's] activities" that are the mark of a "key person." Office of the New York State Attorney General Charities Bureau, *Conflicts of Interest Policies Under the Not-for-Profit Corporation Law* (2018).

Cole McCulloch cannot be considered a related party under the N-PCL as he is not a "director, officer or key person" of the NRA. N-PCL § 102(a)(24). Indeed, the NYAG acknowledged this before the Court. *See* NYSCEF 2544 at 141:25-142:02.

3. Pre-2014 Transactions

The requirements pertaining to related party transactions imposed by N-PCL§ 715 were first enacted as part of the New York Non-Profit Revitalization Act of 2013. 2013 N.Y. Sess. Law ch. 549. These requirements, and others created by the new law, were not effective until July 1, 2014. *Id*. at § 132. Resultingly, any transactions that would violate the duties imposed by § 715 that occurred before the effective date did not, as a matter of law, violate what were then non-existent duties. *See generally* NYSCEF 2402 at 7–10. The NYAG does not intend to seek liability for any contract executed before this date. NYSCEF 2544 at 143:08–143:14.

Similar to those contracts completed prior to the effective date of N-PCL § 715, contracts entered into, but not completed, prior to July 1, 2014, are not actionable under the statute. The NYAG has similarly conceded that such transactions are not "actionable party-related transaction under [§] 715." *Id*. at 146:01–146:05.

4. Ratification

That a non-for profit has entered into a related party transaction in a manner other than that sanctioned by N-PCL §715(a) or (b) does not inherently implicate a violation of the N-PCL. Paragraph (j) of the same section provides a defense of ratification for "violation of any provisions of" § 715. Under this provision, the board of a nonprofit may, prior to the initiation of an action regarding the same, ratify related party transactions by (1) finding in good faith that the transaction was "fair, reasonable and in the corporation's best interest" when approved, (2) document in

writing in the nature of the violation and the basis for the board's ratification, and (3) put into place procedures to ensure future compliance with § 715. N-PCL § 715(j).

C. The NYAG's N-PCL § 715-b "Whistleblower" Claims Are Meritless

1. The Claims Fail as a Matter of Law.

Under N-PCL § 715-b, "the board of every corporation that has twenty or more employees and in the prior fiscal year had annual revenue in excess of one million dollars shall adopt, and oversee the implementation of, and compliance with, a whistleblower policy to protect from retaliation persons who report suspected improper conduct." N-PCL § 715-b. Section (b) of the statute sets forth the requirements for such whistleblower policies. N-PCL 715-b(b).

To make a claim under N-PCL § 715-b(a) for a "violation of New York's whistleblower protection statute, the complaint filed must allege what law or adopted policy of the non-profit that its directors and officials have violated and state with particularity the fraud committed." § 118:3. Types of not-for-profit corporations in New York State, 4E N.Y.Prac., Com. Litig. in New York State Courts § 118:3 (4th ed.); *see also Moon v. Moon*, 833 F. App'x 876, 880 (2d Cir. 2020).

In addition, courts have held that the NYAG lacks statutory authority to bring a derivative whistleblower suit on behalf of anyone who is not a director, officer, or member of the subject organization. *Ferris v. Lustgarten Found.*, 189 A.D.3d 1002, 1006 (2d Dep't 2020). N-PCL § 715-b(a) is designed to protect directors, officers, and members of qualifying New York not-for-profits who "in good faith report[] any action of suspected action taken by or within the corporation that is illegal, fraudulent or in violation of any adopted policy of the corporation." N-PCL § 715-b(a).

N-PCL § 715-b further specifies that a whistleblower policy "shall provide that no director, officer, key person, employee or volunteer of a corporation who in good faith reports any action

or suspected action taken by or within the corporation that is illegal, fraudulent or in violation of any adopted policy of the corporation shall suffer intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequence." *Id.* § 715-b(a). In its Proposed Jury Instructions, the NYAG asserts that "[r]etaliation for these purposes includes actions which you find would be sufficient to discourage whistleblowers from coming forward." *See* Pl.'s Proposed Rule of Law Instruction 18. However, this definition of "retaliation" is broader than New York Labor Law § 740(e), caselaw interpreting the bounds of retaliatory action under N-PCL § 715-b, and the NYAG Charities Bureau's own published guidance on the statute's application.

According to the NYAG Charities Bureau, "retaliation" or an "adverse employment consequence" include those identified in the Revitalization Act (intimidation, harassment and discrimination) and can also include failure to promote, adverse impact on compensation, termination, discharge, suspension, demotion, other change in responsibilities, whether formal or informal, and other negative consequences. *See* N-PCL § 715-b(a); EPTL § 8-1.9(e)(1); *see also* OAG Guidance Document 2015-5, V. 1.0 (Apr. 13, 2015); s*ee also Ferris,* 138 N.Y.S.3d at 520. Courts have held that, where undisputed evidence shows the actions taken by an employer were not retaliatory and another viable explanation for the conduct was clear, an employee is not protected under N-PCL § 715-b. *See Joshi v. Trustees of Columbia University*, 515 F. Supp. 3d 200, 219-220 (S.D.N.Y. 2021), *aff'd*, 2022 WL 3205883, at *2 (2d Cir. Aug. 9, 2022).

Even if the NYAG could bring whistleblower claims under N-PCL § 715-b on behalf of each of the individuals identified in its contention-interrogatory response, it would be unable to show that each: (1) alleged a violation of law or adopted policy of the NRA (2) in good faith and (3) the NRA failed to adhere to its whistleblowing policy under the statute by retaliating against

these individuals. The chart set forth in Peters Aff. Ex. F details the NYAG's inability to prove any violation of whistleblower protections with respect to any of the named individuals.

D. The NYAG's "False Filings" Claim Under Executive Law §§ 172-d(1) and 175(2)(d) Is Meritless

The NYAG's Fifteenth Cause of Action alleges that the NRA and Frazer made materially false statements in the NRA's 2015, 2016, 2017, 2018, and 2019 CHAR500 filings submitted to the Charities Bureau of the Attorney General's Office. SAC ¶¶ 562–67, 702–04. It contends that, as a result, the NRA should be enjoined from soliciting or collecting funds on behalf of any charitable organization operating in the State of New York. *Id.* ¶ 704. The NYAG is wrong.

Ignoring the text of the CHAR500 certification ("to the best of my knowledge"), the NYAG pushes the Court to adopt a strict liability standard with respect to "false filings." But importantly, registration forms are "signed under penalties for perjury," which contemplate ***intentional*** misstatements. *See* Executive Law §§ 172-d. Indeed, courts interpreting identically-worded certifications, including those executed by attorneys, are cautioned to avoid "be[ing] unnecessarily hypertechnical and overly harsh on a party who unintentionally fails to make certain that all technical, non-substantive requirements of execution are satisfied. *Carr v. City of Chicago*, No. 85 C 8322, 1986 WL 6931, at *3 (N.D. Ill. June 6, 1986).

Under the plain language of Executive Law §§ 172-d(1) and 175(2), not all statements or omissions on filings with the Attorney General require disclosure. Rather, only statements or omissions deemed to be "material" are actionable. N.Y. Exec. Law §§ 175-d(1), 175(2)(d). Materiality requires a showing "that in all probability the omitted or misrepresented facts would, in view of the circumstances, have assumed actual significance in the deliberations of" the NRA's Board or Audit Committee. *See People v. Essner*, 124 Misc. 2d 830, 835 (N.Y. Sup. Ct. N.Y. Cnty. 1984) (emphasis added) (citation omitted).

Here, the evidence at trial will show that the NYAG is attempting to impose § 172-d(1) and § 175(2) liability on the NRA for accurately disclosing information on its CHAR500s in the wrong place, scrivener's errors such as inadvertently failing to check a box on Schedule J of its Form 990, and proactively disclosing previously-undisclosed transactions. None of these reach the threshold of a material misstatement. *See* N.Y. Exec. Law §§ 175-d(1), 175(2)(d). The NRA will present testimony from personnel involved in the preparation of the NRA's annual audited financial statements, Forms 990, and CHAR500 filings, which will show that the alleged omitted or misrepresented facts took on no actual significance. *See* Peters Aff., Ex. M at 6 (former Treasurer Craig Spray testified that he believed, and continues to believe, that the NRA Forms 990 were "materially correct").

Further, the forms were completed "to the best of the NRA's knowledge and belief" at the time of completion. The Treasurer's office was responsible for the preparation of the NRA's Form 990. *See* NYSCEF 2362 at 157:18–23. The Treasurer's office employees—in particular, Emily Cummins, Svetlana Olchevski, Arif Rahman, and their supervisors—were principally responsible for the preparation of the NRA's Form 990s. *See* NYSCEF 1137 at 398:15-399:9; Peters Aff. Ex. G; Peters Aff., Ex. L. In completing the forms, these individuals relied on data from the NRA's audited financial statements, tax accountants from the professional services firms of RSM McGladrey and Aronson, and outside tax attorneys, who reviews, analyzed, advised, prepared, and signed the NRA's 2015 to 2018 Forms 990 as the "paid preparer." *See* Peters Aff., Ex. M ("so we had both auditors and tax consultants help us populate and/or reviewing that document [the Form 990] at a very detailed level"); NYSCEF 2362 at 157:18–159:8. The evidence will demonstrate that no member of the NRA's Board or Audit Committee knew, at the time of the filings in

question, that the CHAR500 forms could have been incomplete, false, or misleading, let alone in a material sense.

II.
CONCLUSION

For the reasons set forth *supra*, the Court should direct the jury to rule for the NRA as a matter of law on all claims against it.

Dated: January 6, 2024

New York, New York

Respectfully submitted,

By: */s/ Noah Peters*

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT REQUIREMENT

I certify that the foregoing memorandum of law filed on behalf of the National Rifle Association of America complies with the applicable word count limit. Specifically, the memorandum of law contains fewer than 7,000 words.

In preparing this certification, I relied on the word count function of the word-processing system used to prepare this memorandum of law.

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