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

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

DEFENDANT THE NATIONAL RIFLE ASSOCIATION'S
MOTION TO DISMISS AMENDED COMPLAINT

William A. Brewer, III
Sarah B. Rogers
Mordecai Geisler
David J. Partida
BREWER, ATTORNEYS & COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

ATTORNEYS FOR DEFENDANT
THE NATIONAL RIFLE ASSOCIATION
OF AMERICA

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PRELIMINARY STATEMENT

The relief sought in this lawsuit is without precedent. The New York Attorney General ("NYAG") seeks to dissolve a 150-year-old non-profit organization and to silence the constitutionally guaranteed political speech of its 5 million members based on conclusory allegations against two current, and two former NRA executives, and 5 unnamed Board members, with ***no*** allegations of complicity, acquiescence—or even knowledge—by the Board. That the NYAG seeks draconian relief on such paltry grounds underscores that the motive of this lawsuit is to advance a political vendetta and not to achieve legitimate interests of the State, its people, the NRA or its 5 million members.

Even if the allegations against current and former executives are taken as true (as they must be, for purposes of this Motion), the NRA and its Board would be the ***victims*** of the alleged wrongdoing—not perpetrators. Thus, no provision of New York law justifies punishing the NRA or its members. For good reason, the NYAG's abuse of the N-PCL's dissolution provisions to selectively target the NRA has been condemned across the political spectrum.[1] This Court should not countenance it.

Despite the benefit of a full investigation, multiple amendments, sweeping discovery in the NRA's federal bankruptcy case, and a twelve-day trial in the federal bankruptcy court featuring twenty-three witnesses, the NYAG fails to allege any wrongdoing perpetrated or approved by the

[1] *See, e.g.*, (Editorial, *The Right Penalty for the NRA?*, WASH POST (Editorial, 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.); *id*. (David Cole, *The NRA Has a Right to Exist*, WALL ST. J. (Opinion, Aug. 26, 2020), https://www.wsj.com/articles/the-nra-has-a-right-to-exist-11598457143("The American Civil Liberties Union rarely finds itself on the same side as the National Rifle Association in policy debates or politicaldisputes. Still, we are disturbed by New York Attorney General Letitia James's recent effort todissolve the NRA").).

NRA's Board sufficient to meet its burden to plead specific, non-conclusory allegations implicating a ***majority*** of the Board, or any decisions of the Board that are not subject to business judgment protection.[2] The NYAG's allegations are nothing but speculative, conclusory allegations about supposed misconduct by individual executives with no allegations against the majority of the NRA's Board. Further, a federal bankruptcy court found after a review of voluminous evidence, that the NRA has undertaken a sustained effort to improve its internal compliance procedures and is in position to continue fulfilling its mission.[3]

The NYAG's vague and conclusory allegations concern purported self-dealing transactions involving two current and two former NRA executives and the compensation of 5 (out of 76) Board members which are further alleged to have been ***hidden*** from the NRA's Board. Importantly, the NYAG fails to allege that the purported misconduct was perpetrated intentionally, fraudulently, or systemically by a majority the NRA's Board.

"[B]efore 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."[4] "[E]gregious" conduct, which "go[es] far beyond charges of waste, misappropriation and illegal accumulations of surplus" is required to sustain a dissolution claim.[5] The NYAG's conclusory allegations of executive self-dealing, misappropriation, overspending,

[2] *See Pallot v. Peltz*, 289 A.D.2d 85, 86 (1st Dep't 2001) ("Plaintiff's allegations of self-dealing by a minority of defendant corporation's board were insufficient to shift the burden of proof to the Triarc defendants to demonstrate "utmost good faith" under the entire fairness of the transaction rule … .").

[3] *See generally* Partida Affirmation ("Partida Aff.") Ex. 1 (Order Granting Motion to Dismiss, dated May 11, 2021) ("Bankr. Order"), issued in the Bankruptcy Action (Dkt. 740).

[4] *See People v. Oliver Schools*, 206 A.D.2d 143 (4th Dep't 1994) (quoting *People v. North River Sugar Refining Co*., 121 N.Y. 582, 608 (1890) (emphasis added).

[5] *Liebert v. Clapp*, 13 N.Y. 2d 313, 316 (1963).

and the compensation of 5 out of 76 Board members fail to state claims against the NRA, and fail to satisfy the NYAG's burden to rebut the protections of the business judgment rule.

Therefore, the NRA respectfully requests dismissal of the NYAG's First Cause of Action for dissolution under N-PCL §§112(a)(1), 112(a)(5), and 1101(a)(2);[6] the Second Cause of Action for dissolution under N-PCL §§112(a)(7), and 1102(a)(2)(D);[7] the Fourteenth Cause of Action which seeks to enjoin, void, or rescind wrongful related-party transactions under N-PCL §§112(a)(10), 715(f) and EPTL § 8-1.9(c)(4);[8] the Fifteenth Cause of Action for violation of whistleblower protections of N-PCL § 715-b and EPTL § 8-1.9;[9] the Sixteenth Cause of Action for Breach of the NYPMIFA, Article 5-A of the N-PCL;[10] and the Seventeenth Cause of Action for False Filings under Executive Law §§ 172-d(1) and 175(2)(d).[11] Each of foregoing claims fails to state a cause of action under CPLR 3211(a)(7) and/or is subject to dismissal on collateral estoppel grounds under CPLR 3211(a)(5).

STATEMENT OF FACTS

A. The NRA Board and Governance Policies

A 76-member board of directors governs the NRA with general oversight.[12] The NRA maintains formalized policies in an employee handbook and a policy manual, which include policies and procedures on employee selection, compensation, time off, work standards, insurance and pension benefits, a statement of corporate ethics, purchase policy, a contract review policy,

[6] Partida Aff. Ex. 2 ("Am. Compl.") ¶¶ 647-661.

[7] Am. Compl. ¶¶ 662-666.

[8] Am. Compl. ¶¶ 713-719.

[9] Am. Compl. ¶¶ 720-724.

[10] Am. Compl. ¶¶ 725-729.

[11] Am. Compl. ¶¶ 730-732.

[12] Am. Compl. ¶ 67.

travel and business expense reimbursement policy, an officer and board of directors policy on disclosure of conflicts of interest, and a conflict of interest and related-party transaction policy.[13]

B. The NYAG Fails to Allege Organizational Misconduct by the NRA's Board

The NYAG alleges 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; Joshua Powell, former Chief of Staff and the Executive Vice President of Operations; and John Frazer, General Counsel. Only for purposes of this motion, these allegations are to be taken as true.[14]

1. Allegations Against Defendant LaPierre

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 … ."[15] These expenses included:

- Private flights, which the NYAG alleges were never approved by the NRA's Board,[16] and were unknown to its Treasurer until recently;[17]
- Fees for a private travel consultant who booked flights, a process which the NYAG alleges was instituted under Phillips, who no longer works at the NRA;[18]
- Various personal expenses, which the NYAG alleges were processed for reimbursement by a lower-level employee but were not disclosed to the NRA's Board;[19]

[13] Am. Compl. ¶ 102 and Exs. 2 and 3.

[14] *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

[15] Am. Compl. ¶ 144.

[16] Am. Compl. ¶¶ 149, 160.

[17] Am. Compl. ¶¶ 158, 163.

[18] Am. Compl. ¶¶ 144, 161.

[19] Am. Compl. ¶ 209.

- Personal and home security costs, which the NYAG concedes were incurred at the direction of the NRA's Director of Security,[20] and the aborted purchase of a "safe house" during the aftermath of the Parkland tragedy (a transaction which the NYAG admits never happened;[21] and

- Alleged improper expenses by an assistant,[22] none of which are alleged to have been known to, approved by, or incurred at the behest of or for the benefit of the NRA's leadership or its Board.[23]

The NYAG also alleges that LaPierre caused the NRA to enter contracts for fundraising and advertising,[24] consulting services,[25] that failed to comply with internal NRA policies.[26] However, the NYAG fails to allege that the purported deviations from official NRA purchasing policy continue (they do not)[27] and cites contracts that were entered into years ago—before the recent leadership change in the NRA's Financial Services Division,[28] and before the NRA's leadership directed that a compliance "refresher" program be launched in Summer 2018.[29]

Finally, the NYAG alleges that LaPierre retaliated against "Dissident No. 1," a former NRA officer conceded to have had an improper contractual relationship with the NRA's former

[20] Am. Compl. ¶¶ 220 – 221.

[21] Am. Compl. ¶¶ 222 – 234.

[22] Am. Compl. ¶¶ 297 – 310.

[23] The NYAG does allege that two transactions by the targeted assistant were approved by the NRA's Audit Committee but fails to allege that approval was inappropriate—instead alleging in conclusory fashion that there is insufficient documentation of the Audit Committee's deliberations. *See* Am. Compl. ¶ 307.

[24] Am. Compl. ¶¶ 167 – 173; 296 – 306.

[25] Am. Compl. ¶¶ 210; 212 – 214.

[26] Am. Compl. ¶ 216.

[27] *See* Dkt. No. 325 ¶¶ 27-29, 37, 44, 47, 52-54.

[28] *See, e.g.*, Am. Compl. ¶¶ 168 (contract entered into in 2011, nine years before this lawsuit); 172 (business arrangement commenced in 1997); 335 (consulting contractors over the course of "the last 15 years"); 320 (contractual relationship with Ackerman McQueen existed "for two decades" before this lawsuit, and was most recently amended in May 2018, before the retirement of Defendant Phillips); 319 (NRA has terminated its relationship with Ackerman McQueen and sued to recover substantial funds).

[29] *See* Am. Compl. ¶ 279 (discussing compliance "refresher" presentation delivered in July 2018).

vendor and current litigation adversary, Ackerman McQueen, Inc. ("Ackerman").[30] But, the retaliation mechanisms are nebulous: for example, LaPierre allegedly "impeded [Dissident No. 1's] participation in the NRA's affairs"[31] and "influenc[ed]"[32] the decision of a Board committee to decline to re-nominate Dissident No. 1, although the allegations fail to explain how such influence was exerted and admits that Dissident No. 1 resigned ***before*** the Board ever took any action.[33] Importantly, there are no allegations that LaPierre, or anyone else at the NRA, was ***wrong*** to assert that Dissident No. 1's contract with Ackerman created a conflict of interest. Regardless, the NYAG fails to allege that any disagreement between LaPierre and Dissident No. 1 rendered the NRA a "fraudulent or illegal" organization.

2. Allegations Against Defendant Phillips

The NYAG alleges that Phillips "failed as Treasurer to adhere to internal financial controls and misused NRA assets to enrich himself and other NRA officers and directors."[34] For example, the Amended Complaint alleges that Phillips directed payments to be processed without adequate documentation,[35] had a "personal relationship" with an NRA vendor,[36] and elicited an improper post-employment consulting contract for himself.[37] Nor does the NYAG allege that the control failures which allegedly existed in the Financial Services Division during Phillips' tenure as Treasurer persisted after his exit. Indeed, the NYAG lauds his replacement multiple times for

[30] *See* Am. Compl. ¶¶ 462-69 (discussing Dissident No. 1's Ackerman contract).

[31] Am. Compl. ¶ 481.

[32] Am. Compl. ¶ 486.

[33] Am. Compl. ¶ 488.

[34] Am. Compl. ¶ 230.

[35] *See,* Am. Compl. ¶¶ 232-33.

[36] Am. Compl. ¶ 235.

[37] Am. Compl. ¶ 246.

taking corrective action.[38] Although it cites testimony from several NRA employee whistleblowers who raised concerns about Phillips' leadership,[39] the Amended Complaint makes only conclusory and speculative allegations regarding purported problems under the NRA's current leadership, including for example, speculative allegations why Mr. Spray left the NRA.[40] As the NYAG acknowledges, Phillips is no longer an employee of the NRA.[41]

3. Allegations Against Defendant Powell

At various times prior to January 2020, Powell served as Chief of Staff,[42] Executive Director of General Operations,[43] and Senior Strategist[44] at the NRA. The NYAG intimates that Powell's executive compensation was excessive, but identifies no procedural or rule violations which substantiate that speculation.[45] The NYAG also alleges "routine[]" violations of the NRA's expense-reimbursement policies by Powell,[46] but concedes that Powell was fired by the NRA for this exact reason.[47] The NYAG also acknowledges that the NRA proceeded against Powell to recover improper expenses.[48]

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[38] *See, e.g.*, Am. Compl. ¶ 161 (instituting a 50% reduction in unnecessary travel expenses about which the NYAG complains); ¶ 208 ("reengineer[ing] the process for reviewing LaPierre's expenses."); ¶¶ 239-241 (investigating and terminating a complained-of vendor contract with HomeTelos in the spring of 2018); ¶¶ 253-256 (examining Defendant Powell's improper expenses and engaging outside counsel to assist, and confronting Powell regarding conflicts of interest in mid-2018, resulting in Powell's removal and repayment of misappropriated monies to the NRA); ¶ 308 (examining the improper use of a corporate credit card by Defendant LaPierre's senior assistant).

[39] Am. Compl. ¶ 234.

[40] Am. Compl. ¶ 644.

[41] Am. Compl. ¶ 6.

[42] Am. Compl. ¶ 252.

[43] Am. Compl. ¶ 254.

[44] Am. Compl. ¶ 254.

[45] *See* Am. Compl. ¶¶ 257-60.

[46] Am. Compl. ¶ 261.

[47] Am. Compl. ¶ 7.

[48] Am. Compl. ¶ 265.

4. Allegations Against Defendant Frazer

The NYAG alleges that the NRA's General Counsel, John Frazer, failed to fully implement changes required by the New York Nonprofit Revitalization Act of 2013,[49] a sweeping statute that took effect in July 2014, shortly before Frazer's tenure as General Counsel began.[50] She also emphasizes Frazer's purported inexperience and allows that Frazer may have "negligently failed to learn"[51] of alleged inaccuracies in some of the NRA's numerous regulatory filings. Although the NRA disagrees with the NYAG's condescending and incomplete account of Frazer's qualifications and tenure, it recognizes these baseless allegations must be assumed true on a motion to dismiss. Notwithstanding, the NYAG's allegations against Frazer sound in negligence, not fraud.

5. Conclusory Allegations Against the NRA and Its Board of Directors

Although the NYAG vaguely accuses "the NRA" of actions that she elsewhere alleges were undertaken by individual defendants and actively concealed from oversight by others,[52] she makes ***no*** allegations of fraud or illegality by the NRA Board or any Committee of the Board, and does not allege any activity that is not protected under the business judgment rule. Instead, construed deferentially, the NYAG accuses the NRA and its Board of lax oversight, retroactive, but not wrongful, approval of executive compensation and the NRA's decision to file for bankruptcy, failing to maintain fulsome records, and/or making mistakes in its filings—***none*** of which are alleged to be intentional, and all of which are subject to business judgment rule protection.

[49] Am. Compl. ¶ 293-94.

[50] Am. Compl. ¶ 293.

[51] Am. Compl. ¶ 296.

[52] *See, e.g.*, Am. Compl. ¶¶ 144, 158, 197, 201-03, 205, 207, 227, 228, 233, 262, 266, 286, 293, 307, 309-24, 326, 335, and 337.

Specifically, the NYAG alleges that: (i) although the Board had a compensation committee[53] and hired compensation consultants,[54] it did not adequately benchmark peer compensation[55] or memorialize "evidence" of scrutiny given to executive performance;[56] (ii) forms filed with the IRS failed to properly account for expense reimbursements as compensation,[57] and failed to adopt the NYAG's view that the NRA's widely-disclosed executive salaries amounted to *per se* improper excess-benefit transactions;[58] (iii) the Audit Committee "failed to exercise proper duty of care" in approving related party transactions and conflicts of interest, [59] and failed to diligently supervise[60] or audit[61] the NRA's outside auditors; (iv) the Audit Committee made an *ultra vires* decision to indemnify a board member for legal fees in 2019, a decision that should have been left to the full Board[62]—although the NYAG fails to allege that the Board was unaware of, or did not duly ratify, the Audit Committee's indemnification resolution; (v) the Audit Committee failed to implement an effective compliance program,[63] although no specific inaccuracies or deficits in the NRA's current compliance training regime are identified and the federal bankruptcy court in Texas conclusively found otherwise after a twelve day trial; (vi) the Board subsequent to the filing, approved LaPierre's decision to have the NRA seek bankruptcy

[53] Am. Compl. ¶ 421.

[54] Am. Compl. ¶¶ 413 – 429.

[55] Am. Compl. ¶ 422.

[56] Am. Compl. ¶ 423.

[57] *See, e.g.*, Am. Compl. ¶ 432-34.

[58] Am. Compl ¶ 600-04.

[59] Am. Compl ¶ 517.

[60] Am. Compl. ¶¶ 537-552.

[61] Am. Compl. ¶¶ 537-552.

[62] Am. Compl. ¶¶ 553-554

[63] Am. Compl. ¶¶ 553-62.

protection;[64] and, (vii) unspecified "board members … ***may have*** used first class or business travel ***without authorization***."[65] (The NYAG takes issue with Defendant Powell's involvement in administering compliance training,[66] but concedes that Powell was fired by the NRA for the same issues raised in the Amended Complaint).[67]

ARGUMENT

C. Legal Standards

On a motion to dismiss pursuant to CPLR 3211, "the Court accepts the facts as alleged in the complaint as true, accords plaintiffs the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory."[68] Factual allegations are accorded a favorable inference, but bare legal conclusions and inherently incredible facts are not.[69] Dismissal is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery."[70]

Under CPLR 3211(a)(7) a claim fails to state a cause of action when the alleged facts do not "fit within any cognizable legal theory."[71] CPLR 3211(a)(5) bars a claim under the doctrine of

[64] Am. Compl. ¶ 616.

[65] Am. Compl. ¶ 602(vii).

[66] Am. Compl. ¶ 279.

[67] Am. Compl. ¶ 265.

[68] *Leon* 84 N.Y.2d at 87-88; *511 W. 232nd Owners Corp. v. Jennifer Realty Co*., 98 N.Y.2d 144, 151-52 (2002).

[69] *Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995).

[70] *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141 (2017).

[71] *Richards v. Security Resources*, 187 A.D.3d 452 (1st Dep't 2020).

collateral estoppel when an issue has been decided against a party in a prior proceeding and when the party had a full and fair opportunity to litigate that point.[72]

When "a cause of action … is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence," CPLR 3016(b) requires that "the circumstances constituting the wrong shall be stated in detail."[73] The Court of Appeals has made clear that, as a result, New York litigants alleging fraud or comparable conduct ***must*** clear a hurdle substantially higher than mere notice pleading.[74] Thus, "conclusory" allegations that fail to detail the alleged wrongdoing with particularity must be dismissed.[75] Importantly, this means that the misconduct of one defendant cannot be imputed to another defendant merely because of an existing business relationship.[76] Nor are allegations of misconduct against rogue directors of an entity sufficient to state a claim against the entity itself.[77]

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[72] See, *e.g., Bauhouse Group I, Inc. v. Kalikow*, 190 A.D.3d 401 (1st Dep't 2021) (affirming motion to dismiss because the doctrine of collateral estoppel will "preclude[ ] a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same"); *Khan v. New York City Health and Hospitals Corp.*, 144 A.D.3d 600, 602 (1st Dep't 2016) (affirming motion to dismiss pursuant to CPLR 3211(a)(5) on grounds of collateral estoppel); *Browning Ave. Realty Corp. v. Rubin*, 207 A.D.2d 263 (1st Dep't 1994) (same).

[73] CPLR 3016(b).

[74] *See Pludeman v. Northern Leasing Systems, Inc*., 10 N.Y.3d 486, 492 n.3 (2008) ("We undoubtedly agree with the dissent's observation that section 3016(b) 'must require more than the 'notice pleading' applicable in other cases.").

[75] *See Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). "[B]undled, bare-boned and conclusory allegations" will not suffice. *See also MP Cool Invs. Ltd. v. Forkosh*, 142 A.D.3d 286, 291 (1st Dep't 2016), *leave denied* 28 N.Y.3d 911 (2016).

[76] *See M & T Bank Corp. v. Gemstone CDO VII, Ltd*., 23 Misc.3d 1105(A), 2009 WL 921381, at *6 (Sup. Ct. N.Y. Cnty. Apr. 7, 2009), aff'd 891 N.Y.S.2d 578 (4th Dep't 2009) (dismissing fraud allegations against an affiliate corporation based solely on a "close ongoing business relationship" with another defendant corporation).

[77] *See Alpert v. National Ass'n of Securities Dealers, LLC*, 7 Misc.3d 1010(A), *9, 801 N.Y.S.2d 229 (Sup. Ct. N.Y. Cnty. 2004.) (Director interest is ***not*** shown unless the "complaint alleges with particularity that a ***majority*** of the board of directors is interested in the challenged transaction.") (emphasis added) (quoting *Marx v. Akers*, 88 N.Y.2d 189, 200 (1996)); *Luong v. Ha The Luong*, 67 Misc.3d 1210(A), 26 N.Y.S.3d 850 (Sup Ct. New York County Apr. 28, 2020) (dismissing action where complaint "fail[ed] to disclose any fraudulent actions on the part of the Corporate Defendants" and did not "recount the Corporate Defendants' specific misconduct") (citing *Jonas v. Nat'l Life Ins.Co*., 147 A.D.3d 610, 612 (1st Dep't 2017) ("lumping together all defendants" on a fraud claim was impermissible.).

B. The NYAG's First, Second, Fourteenth, Fifteenth, and Sixteenth Causes of Action Fail Because the Decisions of the NRA Board are Protected by the Business Judgment Rule

Under the business judgement rule directors of a corporation are presumed to have acted properly, in the interest of the corporation and in good faith.[78] As a "general principle [] courts should strive to avoid interfering with the internal management of business corporations."[79] Indeed, absent "fraud or bad faith courts should respect those business determination," and "[c]onclusory allegations or bare legal assertions with no factual specificity are not sufficient, and will not survive a motion to dismiss."[80] "A charge of interest must be made with particularity. Simply naming board members as defendants with conclusory allegations of wrongdoing is insufficient."[81]

The NYAG's allegations which question the independence of the NRA's Board clearly fail to satisfy her burden to overcome the presumptions of the business judgment rule.[82] The NYAG's ***only*** allegations concerning the NRA Board's independence are the bald and conclusory claims that LaPierre "dominates and controls the NRA Board as a whole through his control of business,

[78] *See Consumers Union of U.S. v. State*, 5 N.Y.3d 327 (2005); *see also Sterling Industries v. Ball Bearing Pen Corporation*, 298 N.Y. 483 (1949) (best interest); *Macy v. Ladd*, 128 Misc. 732 (Sup. Ct. Westchester County 1926) (good faith).

[79] *See In re Kenneth Cole Productions, Inc.*, 27 N.Y.3d 268, 274 (2016).

[80] *Id*. at 274, 278.

[81] *Bansbach v. Zinn* 1 N.Y.3d 1, 11 (2003) (determining whether a board was interested and not independent such that a shareholder demand was futile); *see also Wandel ex rel. Bed Bath & Beyond, Inc. v. Eisenberg*, 60 A.D.3d 77, 80 (1st Dep't 2009) (affirming motion to dismiss claim alleging that board of directors knew of company's practice of backdating stock options where "the complaint fails to support the assertion that a majority of the directors should be treated as interested in the transaction"); *Batkin v. Softbank Holdings Inc.*, 270 A.D.2d 177, 177-78 (1st Dep't 2000) (affirming dismissal of derivative shareholder claim holding that "Plaintiffs have entirely failed to plead any particularized facts creating a reasonable doubt as to the disinterest or independence of the directors . . . the bare allegation that the purchaser appointed such directors to the board did not place their independence in doubt"); *Alpert 7* Misc.3d 1010(A) at *9.

[82] *See Pallot* 289 A.D.2d at 86 ("Plaintiff's allegations of self-dealing by a minority of defendant corporation's board were insufficient to shift the burden of proof to the Triarc defendants to demonstrate "utmost good faith" under the entire fairness of the transaction rule … .").

patronage and special payment opportunities for board members, and his public allegations to the NRA membership of a 'criminal conspiracy' against board members and officers who question his activities,"[83] that LaPierre "has consolidated his power and control over the NRA,"[84] that LaPierre "often hired and retained individuals in senior positions at the NRA, or as NRA contractors, whom he believed would aid and enable him to control the organization …,"[85] and allegations regarding the compensation of five unnamed board members.[86] The Amended Complaint fails to offer a single specific example in support of the foregoing allegations. New York courts regularly refuse to credit conclusory allegations to overcome the presumption of regularity accorded the actions of board members pursuant to this business judgment.[87]

All of the Board's decision-making and actions that are the subject of the NYAG's allegations are entitled to a presumption of regularity pursuant to the business judgment rule.[88] This is true even "if the results show that what they did was unwise or inexpedient."[89]

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[83] Am. Compl. ¶ 429.

[84] Am. Compl. ¶ 62.

[85] Am. Compl. ¶ 3.

[86] Am. Compl. ¶¶ 382-412.

[87] *See In re Kenneth Cole Productions, Inc*., 27 N.Y.3d at 278 (dismissing shareholder claims based only on allegations that Cole's "personally selected directors" had nominated individuals to the board and holding that "[f]riendships, traveling in the same circles, some financial ties, and past business relationships are not sufficient to rebut the presumption of independence," nor is "[s]peculation that the committee merely submitted to a [controlling party's] wishes") (internal citation omitted); *see also Hill v. Murphy*, 63 A.D.3d 680 (2d Dep't 2009) (finding insufficient "allegations that the defendants had allowed a nonparty Board member to dominate and control the Board."); *Cannings v. East Midtown Plaza Hous. Co*. 33 Misc.3d 1216(A), 941 N.Y.S.2d 536 (Sup.Ct. N.Y. Cnty. 2011), *aff'd* 104 AD3d 443 (1st Dep't 2013) ("[C]onclusory allegations of discrimination, self-dealing, fraud and bad faith are insufficient to overcome the presumption of regularity created by the business judgment rule.") *Arvonio v. Arvonio*, 31 Misc.2d 5, 6 (Sup. Ct. N.Y. Cnty. 1961) (dismissal appropriate where allegations implicating business judgment rule were "general in nature and wholly conclusory and insufficient.").

[88] *See 40 W. 67th St. v. Pullman*, 100 N.Y.2d 147, 153 (2003); *Consumers Union*, 5 N.Y.3d at 360 (business judgment rule applies to nonprofit corporations). *Cannings* 33 Misc.3d 1216(a). The rule is "grounded in the prudent recognition that courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments." *Auerbach v. Bennett*, 47 N.Y.2d 619, 630 (1979); *see also In re Bear Stearns Litig.*, 23 Misc. 3d 447, 474 (Sup. Ct. N.Y. Cnty. 2008).

[89] *See Matter of Levandusky v. One Fifth Avenue Apt. Corp.*, 75 N.Y.2d 530, 538 (1990).

The NYAG alleges that four officers of the NRA acted entirely for their own purposes which were mostly hidden from the Board, and makes allegations regarding Board compensation, including with respect to five unnamed Board members, without alleging that compensation was wrongful or that a majority of the Board was conflicted.[90] As the Court of Appeals has held, however, "a complaint challenging the excessiveness of director compensation must—to survive a dismissal motion—allege compensation rates excessive on their face or other facts which call into question whether the compensation was fair to the corporation when approved, the good faith of the directors setting those rates, or that the decision to set the compensation could not have been a product of valid business judgment."[91] The Amended Complaint makes ***no*** such specific allegations.

Moreover, none of the NYAG's allegations against any individual executive or rogue Board member (or group of Board members) can be imputed to the NRA as an entity unless specific allegations demonstrate that a ***majority*** of the Board was conflicted.[92] For example, in *Alpert v. National Ass'n of Securities Dealers, LLC*, the court considered allegations against a non-profit corporation, almost identical to the allegations presented here, alleging fraud and self-dealing in connection with a challenged business transaction.[93] In *Alpert*, plaintiffs alleged the non-profit's board was conflicted, because one of four directors, stood to receive a bonus payment as a result of the challenged transaction and further alleged that two additional board members

[90] Am. Compl. ¶¶ 382-412.

[91] *Marx*, 88 N.Y.2d 189, 203–04 (1996).

[92] *See Alpert* 7 Misc.3d 1010(A) at *9; *Eisenberg*, 60 A.D.3d at 80.

[93] See *id*. 7 Misc.3d *9-10.

were appointed by him and served "at his whim" on the board of the non-profit.[94] In granting defendants' motion to dismiss, the court held that plaintiffs' allegations:

> [F]ail to explain with particularity how Koondel and Hyde, by virtue of their positions as alleged hold-over directors or appointees of Boglioli, were dominated by Boglioli or NASD. Nor have plaintiffs shown that Boglioli or NASD controls the AMC Directors. Thus, even if Hyde and Koondel were appointed as hold-over directors by Boglioli, plaintiffs fail to show that Hyde and Koondel were beholden to NASD, or controlled by Boglioli.[95]

The court further held that "the receipt of directors fees is not sufficient to show self-interest by a board member, and plaintiffs fail to allege that payments to Koondel and Hyde were substantially in excess of normal directors, fees."[96] Therefore, the court concluded, "allegations regarding Hyde and Koondel's receipt of significant economic benefits, vis-à-vis compensation as AMC directors, are insufficient to demonstrate a conflict of interest."[97]

Similarly here, the Amended Complaint fails to allege anything beyond conclusory facts that a majority—not even any specific number—of the NRA's Board is (or was) dominated by LaPierre or anyone else. Further, the NYAG fails to allege that, even if payments were made to a handful of unnamed Board members, that such payments were excessive, and even if made, that such payments create self-interest by those unnamed board members.

C. The NYAG's First and Second Causes of Action For Dissolution Fail Because The Remedy is Unwarranted

The remedy of dissolution has been described as a judgment of "corporate death," which "represent[s] the extreme rigor of the law."[98] "Its infliction must rest upon grave cause, and be

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[94] *See id.* at *9.

[95] *Id*.

[96] *Id*. at *10 (internal citations and quotations omitted).

[97] *Id*.

[98] *Oliver Schools, Inc.*, 206 A.D.2d at 146 (dissolution under N-PCL § 1101(a)(2) sister statute, Business Corporation Law § 1101(a)(2).

warranted by material misconduct," and the State "must show on the part of the corporation accused some sin against the law … which has produced … 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."[99]

Thus, dissolution is available only in cases of "egregious" conduct, which "go far beyond charges of waste, misappropriation and illegal accumulations of surplus, which might be cured by a derivative action for injunctive relief and an accounting."[100] As such, this extreme remedy is reserved for non-profit organizations that themselves are deemed to be a "sham"[101] or otherwise engaged in utterly extreme behavior far beyond anything alleged in this Action.[102]

The NYAG does not allege that the NRA fails to conduct activities consistent with its corporate purposes, nor that it fails to honor requests by donors regarding the specific application of their gifts. The Amended Complaint is silent concerning the NRA's finances and whether any alleged looting or waste by the individual defendants rendered the NRA insolvent or incapable of continuing to carry out its stated purpose.

The dissolution claims have rightfully drawn widespread condemnation as an abuse of power and a threat to democratic principles from both sides of the political divide, including from the American Civil Liberties Union, and other voices not traditionally aligned with the NRA.[103] Indeed, in this case, even if the disputed allegations against the individual defendants were true,

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[99] *Id*.

[100] *Liebert*, 13 N.Y.2d at 316.

[101] *See State v. Coalition Against Breast Cancer, Inc.* 975 N.Y.S.2d 712 at *1 (Sup Ct. Suffolk Cnty. 2013) (action by the NYAG for dissolution and other relief against a "sham charity").

[102] *See People v. Zymurgy, Inc., et al.,* 233 A.D.2d 178, 179 (1st Dep't 1996) (reversing supreme court dismissal of dissolution action because allegations involved a non-profit acting as a front for a pedophilia organization without not-for-profit status, where respondents ***admitted*** there were never any board meetings and potential child sex crimes were implicated.)

[103] *See supra* Note 1.

the NRA itself, its Board, and its members were the ***victims*** of the wrongdoing, not the perpetrators. It would be a fundamental miscarriage of justice—and contrary to New York law—to punish the NRA's 5 million members by dissolving the NRA.

1. The First and Second Causes of Action in the Amended Complaint Fails to State Claims for Dissolution Under N-PCL § 1101 or 1102

Pursuant to N-CPL §1101 the Attorney General may commence a dissolution proceeding against a corporation if the Attorney General demonstrates that the corporation "has exceeded the authority conferred upon it by law . . . or 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."[104] Pursuant to N-PCL § 1102(a)(2)(D), a director is permitted to bring a dissolution action where "[t]he 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." On their face and affording every reasonable inference favorable to the Attorney General as required on a motion to dismiss, the allegations against the NRA do not satisfy any of these standards, let alone the heightened pleading standards required under CPLR § 3016(b).

Nowhere does the NYAG allege that the Board, the Audit Committee, or the NRA as a whole acted fraudulently, nor that the NRA acted illegally and contrary to its stated purpose. Taken in the worst possible light, the procedural, documentation, oversight and filing deficiencies alleged against the NRA constitute at most, negligence. They do not depict an organization acting beyond its powers, exceeding its legal authority, or conducting or transacting its business in a persistently fraudulent or illegal manner or otherwise abusing its power contrary to public policy. Indeed,

[104] NPCL § 1101(a)(2) (emphasis added).

nowhere does the NYAG allege that the NRA fails to engage in, or to devote a significant amount of its resources to its stated not-for-profit mission. In fact, the federal bankruptcy court in Texas found that the NRA does precisely that and declared that it should continue doing so outside of bankruptcy.[105]

a. The NYAG Does Not Allege Such "Grave, Substantial and Continuing Abuse" As to Warrant a Remedy of Dissolution

The court in *Oliver Schools* held that "[i]n the final analysis, the standard set forth in the *North River* 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."[106]

The NYAG's allegations do not come close to meeting this standard. The Amended Complaint fails to allege that the NRA does not operate pursuant to its charter to advocate for Second Amendment rights, nor does it allege—because it cannot—that any alleged misspending is impeding the NRA's ability to perform that function. In addition, the NYAG nowhere explains how the actions of two officers who are no longer with the NRA constitute a "substantial and continuing abuse." Indeed, the Amended Complaint is replete with admissions that the NRA Board implemented stricter policies in recent years and that Phillips' replacement has engaged in significant measures to insure compliance with the demands of good governance.[107] Moreover, dissolving the NRA is patently not in the interest of its members, who will then be left without their chosen voice to advocate for them. Rather, dissolution would solely be in the interest of the NYAG and her stated political aims.

[105] Bankr. Order at p. 35.

[106] *Oliver Schools, Inc.* 206 A.D.2d at 147. (internal citation omitted) (emphasis added).

[107] *See, e.g.,* Am. Compl. ¶¶ 592-596,

b. The NYAG Fails to Allege Corporate Wrongdoing

CPLR 3016(b) requires that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." The Court of Appeals has made clear that this imposes a higher pleading standard than mere notice pleading.[108] This requires particularized allegations with respect to each defendant.[109] "[B]undled, bare-boned and conclusory allegations" will not suffice.[110]

And, where liability of a corporation is to the State and not for damages to a third party, misconduct by officers is not properly imputed to a corporation "where the corporation is actually the victim of a scheme undertaken by the agent to benefit himself or a third party personally, which is therefore entirely opposed (*i.e.*, 'adverse') to the corporation's own interests."[111] Nowhere does the Amended Complaint allege that the purported looting and self-dealing allegedly engaged in by the individual defendants furthered the NRA's business. Nowhere does the NYAG explain how the alleged false financial filings, which were not alleged to have been reviewed or approved by the Board, advanced the NRA's business by omitting portions of director income.

Moreover, the misconduct of one defendant cannot be imputed to another defendant merely because of an existing business relationship.[112] Nor are allegations of misconduct against a

[108] See *Pludeman*, 10 N.Y.3d at 492 n.3 ("We undoubtedly agree with the dissent's observation that section 3016(b) 'must require more than the 'notice pleading' applicable in other cases.").

[109] *See, e.g., Eurycleia Partners*, 12 N.Y.3d at 559.

[110] *See MP Cool Invs. Ltd.*, 142 A.D.3d at 291.

[111] *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 467 (2010).

[112] *See M & T Bank Corp.* 2009 WL 921381, at *6.

member of an entity sufficient to state a claim against that entity.[113] Nor can the NYAG get around this hurdle with vague, unsubstantiated allegations of "control" of the Board by defendant LaPierre. Indeed, these allegations are contradicted by repeated statements in the Amended Complaint that the individual defendants took steps to conceal their misconduct from the Board and Audit Committee;[114] testimony from Audit Committee officials that clearly underscores the repeated actions taken to remedy Phillips' time as treasurer.[115] They are also belied by the many steps taken by the NRA to investigate potentially fraudulent conduct, including retaining an outside law firm and commencing legal action against a vendor that refused to provide substantiation for years of charges.[116]

D. The NYAG's First and Second Causes of Action Fail Because the NRA Bankruptcy Trial's Findings are Binding and Collaterally Estop the NYAG from Relitigating the Same Issues Here

The doctrine of collateral estoppel precludes a party from relitigating an issue decided against her in a prior proceeding when she had a full and fair opportunity to litigate that point.[117] For a motion to dismiss on the grounds of collateral estoppel, the issues must have been decided in a prior action and decisive of the present action.[118] Under the doctrine of collateral estoppel, "[f]irst, the identical issue necessarily must have been decided in the prior action and be litigated

[113] *See Luong*, 67 Misc.3d 1210(A) (dismissing action where complaint "fail[ed] to disclose any fraudulent actions on the part of the Corporate Defendants" and did not "recount the Corporate Defendants' specific misconduct") (citing *Jonas v. Nat'l Life Ins.Co*., 147 A.D.3d 610, 612 (1st Dep't 2017).

[114] *See, e.g.*, Am. Compl. ¶¶ 160, 178-179, 186, 188-190, 235, 238, 242, 277, 278, 281, 313.

[115] *See, e.g.*, Am. Compl. ¶¶ 178, 241, 247, 498-500.

[116] *See, e.g., id*. (noting individual defendants "overrode" and "concealed" their misconduct); *see also Eurycleia Partners*, 12 N.Y.3d at 559-60 (plaintiff must provide sufficient facts to support a "reasonable inference" that allegations of fraud are true; "[c]onclusory allegations will not suffice."); *see also Facebook, Inc. v. DLA Piper LLP (US)*, 134 A.D.3d 610, 615 (1st Dep't 2015) ("Statements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud.").

[117] *See Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455-456 (1985).

[118] *See Id*.

in the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination."[119] Outcomes entitled to the benefits of collateral estoppel include determinations by a federal bankruptcy court.[120]

On January 15, 2021, the NRA and its affiliate, Sea Girt, LLC, filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Northern District of Texas, styled as *In re National Rifle Association of America and Sea Girt LLC*, Case No. 21-30085 (Bankr. N.D. Tex.) (the "Bankruptcy Action"). The NYAG, among others, moved to dismiss the Chapter 11 case or, in the alternative, for the appointment of a Chapter 11 trustee.[121]

In support of its motion to appoint a Chapter 11 Trustee, the NYAG relied upon the "allegations of pervasive and persistent violations of New York laws governing charitable not-for-profit entities" asserted by the NYAG in this Action.[122] The NYAG argued that the then-Complaint in this Action was "replete with examples of LaPierre's and his lieutenants' siphoning off tens of millions of dollars out of the NRA to use for their own purposes while failing to disclose such payments on regulatory filings and blatantly violating the NRA's reimbursement, procurement, and expense policies."[123] The NYAG further asserted, precisely as she has in this Action, that "NRA personnel failed to take appropriate steps to protect the whistleblowers and took affirmative steps to conceal the nature and scope of the NRA whistleblower' concerns from

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[119] *See, Id*.

[120] *See Lue v. Finkelstein & Partners, LLP*, 67 A.D.3d 1187, 1188 (3d Dep't 2009) (claim was dismissed "on the grounds of collateral estoppel and res judicata as a result of the failure to preserve the claim in the bankruptcy proceeding."); *see also Lowe v. Feiring*, 205 A.D.2d. 505 (2d Dep't 1994) (barring claims under doctrine of collateral estoppel because "[i]t is clear that the invalidity of the confession of judgment was necessarily decided in the bankruptcy proceeding and is decisive in this declaratory judgment action.").

[121] *See* Partida Aff. Ex. 3 (The State of New York's Memorandum of Law and Brief in Support of Motion to Dismiss, or, in the Alternative, Appoint Chapter 11 Trustee, dated February 12, 2021, filed in the Bankruptcy Action (Dkt. 156) ("NYAG Bankr. Motion").).

[122] *Id*.

[123] NYAG Bankr. Motion at ¶ 47 (citing to NYAG Complaint at pp. 39-76).

its external auditors."[124]

Trial commenced in the Bankruptcy Action on April 5, 2021 and continued over twelve days with twenty-three witnesses testifying concerning the allegations asserted by the NYAG and other parties.[125] Although the court ultimately dismissed the bankruptcy petitions, it considered the motions to appoint a bankruptcy trustee. In that regard, the court made many significant factual findings and determinations that are dispositive here.[126]

Significantly, and dispositive here, the federal bankruptcy court found that the NRA had undertaken a "course correction" since 2018, with greater disclosure and self-reporting.[127] The court referred to the "Whistleblower Memo," known in the NYAG's Amended Complaint as the "Top Concerns Memo,"[128] prepared in July 2018, which "enumerated the NRA Whistleblowers' concerns related to financial conflicts of interest, senior management override of internal controls, and vague and deceptive billing practices."[129] The court found that the NRA's current CFO, Sonya Rowling, and Michael Erstling, the NRA's Director of Budget and Financial Analysis, testified that the concerns they expressed in the Top Concerns Memo[130] "are no longer concerns."[131]

Thus, the bankruptcy court declared that it is "an encouraging fact that Ms. Rowling [who

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[124] *Id*. at ¶ 85 (citing NYAG Complaint at pp. 121-124).

[125] *See* Bankr. Order, at p. 11.

[126] *See generally,* Bankr. Order.

[127] *Id*. at p. 35.

[128] Am. Complaint at ¶¶ 507, 510, 513, 541, 562, 750.

[129] Am. Complaint ¶ 507.

[130] The Whistleblower Memo included "concerns related to (1) financial conflicts of interest of senior management and board members, (2) senior management override of internal controls relating to, among other things, accounts payable procedures, travel and expense reporting, and procurement/contracts policy, (3) management making decisions in the best interests of vendors instead of the NRA, (4) vague and deceptive billing practices of vendors, (5) improper reimbursement for apartments and living expenses of certain employees, and (6) lack of control over vehicle leases obtained by senior management." Bankr. Order at pp. 4-5.

[131] Bankr. Order at p. 35.

is now the CFO of the NRA] has risen in the ranks of the NRA to become the acting chief financial officer, both because of her former status as a whistleblower and because of the Court's impression of her from her testimony as a champion of compliance."[132] The court also credited testimony from Mr. Frazer regarding "the compliance training program that the NRA now has for employees."[133] Further, the court found that the NRA's former CFO, Craig Spray, "testified credibly that the change that has occurred within the NRA over the past few years could not have occurred without the active support of Mr. LaPierre."[134]

Indeed, with regard to the whistleblowers, the bankruptcy court specifically found that:

> Following the presentation of the Whistleblower Memo to the Audit Committee, the NRA took several actions, including examining related party transactions and reviewing vendor contracts. As a result of this review process, the NRA required the inclusion of specific metrics in all contracts and improved documentation and recordkeeping. One of the more significant actions taken in response to the Whistleblower Memo was to send letters to the NRA's vendors notifying them of the rules regarding proper invoicing. While most vendors complied with these new measures, some did not. As a result, some contracts with vendors were re-negotiated, and some were terminated.[135]

The court concluded that appointment of a trustee or an examiner would not be in the best interests of the bankruptcy estate:

> In short, the testimony of Ms. Rowling and several others suggests that ***the NRA now understands the importance of compliance***. Outside of bankruptcy, the NRA can pay its creditors, ***continue to fulfill its mission, continue to improve its governance and internal controls***, contest dissolution in the NYAG Enforcement Action, and pursue the legal steps necessary to leave New York.[136]

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[132] *Id*.

[133] *Id*.

[134] *Id*.

[135] *Id*. at p. 5.

[136] *Id*. (emphasis added).

The Texas federal court expressly concluded that the NRA is well-placed to ***continue*** improving governance and internal controls and to fulfill its mission, as it has since its whistleblowers came forward. These findings comprehensively undermine the NYAG's contrived narrative of an organization rife with corruption that is unable to reform itself and that must, therefore, be dissolved.

Pursuant to N-CPL §1101 the NYAG must demonstrate that the corporation "has exceeded the authority conferred upon it by law . . . or 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."[137] Pursuant to N-PCL § 1102(a)(2)(D), dissolution is provided for where "[t]he 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."

The bankruptcy court's factual findings, which followed a full and comprehensive trial that involved the same parties, issues and witnesses relevant here, are binding in this Action.[138] These findings conclusively determine issues central to the NYAG's First and Second Causes Action for dissolution. Thus, given the foregoing findings of the Texas federal court, there can be no plausible determination that the NRA has "transacted its business in a *persistently* fraudulent or illegal manner" as the NYAG is required to establish under N-CPL §1101. As the court found, when confronted with the concerns of the whistleblowers in 2018, the NRA took steps to correct course, clarity, and instill disciplines regarding the importance of compliance with its Board- adopted policies and controls. Moreover, the court found that the NRA should *continue* performing its

[137] NPCL § 1101(a)(2) (emphasis added).

[138] *See, e.g.*, *Khan*, 144 A.D.3d at 602; *Bauhouse Group I, Inc. v. Kalikow*, 190 A.D.3d at 401.

mission, as it has throughout this process.[139] Similarly, even assuming the allegations against the individual defendants are true, the NYAG cannot establish that those officers "perpetuated the corporation *solely* for their personal benefit" as is required by N-PCL § 1102(a)(2)(D). To the contrary, the Texas federal court found that the NRA is financially healthy and has the ability to continue its charitable mission.

For example, in support of its First Cause of Action for Dissolution, the NYAG relies on an allegation that the NRA "violated N-PCL § 715-b and EPTL § 8-1.9(e)" because it failed to adopt and enforce a whistleblower policy to protect people who report improper conduct from retaliation.[140] But the bankruptcy court specifically found that when the whistleblowers came forward with the Top Concerns Memo to the NRA's Audit Committee, the NRA took action to address the issues raised by them.[141] That is precisely the opposite of what the NYAG alleges in support of dissolution, and the issue of the NRA's alleged "retaliation" cannot be relitigated.

Finally, given the Texas court's findings, the NYAG cannot establish that there is a "substantial and *continuing* abuse" involving a public right by the NRA,[142] that the NRA presents a "harm or to menace the public welfare,"[143] that the NRA's actions have gone "far beyond charges of waste, misappropriation and illegal accumulations of surplus,"[144] or that it conducts its not-for-profit activities as a "sham."[145] Dissolution of the NRA in light of the findings discussed above would be contrary to New York law.

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[139] Bankr. Order at p. 35.

[140] Am. Complaint ¶ 654.

[141] Bankr. Order at p. 5.

[142] *Oliver Schools*, 206 A.D.2d at 147-48.

[143] *Id.* at 146.

[144] *Liebert*, 13 N.Y.2d at 316.

[145] *Coalition Against Breast Cancer, Inc.* 90 N.Y.S.2d at *1.

E. The NYAG's Fifteenth Cause of Action Fails to Allege Violation of Whistleblower Protections of N-PCL § 715-b and EPTL § 8-1.9

Pursuant to N-PCL § 715-b, not-for-profits with five or more employees and revenue in the prior fiscal year in excess of $1 million must adopt a whistleblower policy to protect whistleblowers from "intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequence."[146] The policy must also contain procedures for reporting violations, handling investigations, and preserving documents for six years and must designate a compliance administrator, and the policy must be distributed to all employees.[147]

Here, the NYAG alleges in conclusory fashion that individual Defendants Powell and LaPierre "harassed and retaliated against" unnamed whistleblowers and Board members "who raised issues covered by the policy [and] suffered intimidation, harassment, discrimination, or other retaliation, including attempted revocation of NRA membership."[148] The NYAG further alleges that the "Audit Committee failed to make any record or take any action responding to whistleblower concerns."[149] The NYAG seeks removal of "each officer, director, and trustee who violated the whistleblower policy."[150]

The NYAG asserted this claim in its Amended Complaint despite the clear and dispositive findings of the Texas federal bankruptcy court. Specifically, as set forth *supra* at pp. 22-25, the federal court referenced the "Whistleblower Memo," known in the NYAG's Amended Complaint as the "Top Concerns Memo,"[151] was prepared in July 2018 and "enumerated the NRA

[146] N-PCL § 715-b.

[147] *Id*.

[148] Am. Compl. ¶ 723.

[149] Am. Compl. ¶ 723.

[150] Am. Compl. ¶ 724.

[151] Am. Complaint at ¶¶ 507, 510, 513, 541, 562, 750.

Whistleblowers' concerns related to financial conflicts of interest, senior management override of internal controls, and vague and deceptive billing practices."[152] The bankruptcy court found that the whistleblowers, Sonya Rowling and Michael Erstling—both still employed by the NRA—testified that the concerns they expressed in the Top Concerns Memo[153] "are no longer concerns."[154] In fact, as set forth above pp. 23-24, the bankruptcy court found, following disclosure of the Top Concerns Memo to the NRA's Audit Committee, the NRA took concrete measures to insure compliance with its control processes and procedures.[155]

Dispositive of the question whether the NRA "retaliated" against its whistleblowers, the court declared that it is "an encouraging fact that Ms. Rowling has risen in the ranks of the NRA to become the acting chief financial officer, both because of her former status as a whistleblower and because of the Court's impression of her from her testimony as a champion of compliance."[156] The court further specifically found that the NRA's former CFO "testified credibly that the change that has occurred within the NRA over the past few years could not have occurred without the active support of Mr. LaPierre."[157]

After a twelve day trial, featuring 23 witnesses, and given the federal court's foregoing unambiguous findings, it is simply not possible for the NYAG to maintain a claim against the NRA

[152] Am. Complaint ¶ 507.

[153] The Whistleblower Memo included "concerns related to (1) financial conflicts of interest of senior management and board members, (2) senior management override of internal controls relating to, among other things, accounts payable procedures, travel and expense reporting, and procurement/contracts policy, (3) management making decisions in the best interests of vendors instead of the NRA, (4) vague and deceptive billing practices of vendors, (5) improper reimbursement for apartments and living expenses of certain employees, and (6) lack of control over vehicle leases obtained by senior management." Bankr. Order at pp. 4-5.

[154] Bankr. Order at p. 35.

[155] Partida Aff., Ex. 1, Bankr. Order at p. 5.

[156] *Id*. at p. 35.

[157] *Id*.

for retaliation against whistleblowers.[158] To the extent the NYAG relies upon conclusory allegations that the NRA somehow retaliated against "Dissident No. 1" as identified in the Amended Complaint, such allegations are, again, irreconcilable with the federal court's findings of the NRA's treatment of the actual whistleblowers in this case, Ms. Rowling and Mr. Erstling, as well as the actions taken by the NRA following submission of their Top Concerns Memo. The binding and preclusive findings of the Texas federal court establish precisely the opposite—the NRA undertook a comprehensive course correction as a result of the whistleblowers' actions, and it valued and promoted the whistleblowers to the highest executive levels of the Association, rather than retaliated against them.

The NYAG's Fifteenth Cause of Action fails to state a cause of action and must be dismissed.

F. The NYAG's Sixteenth Cause of Action Fails to State a Cause of Action Against the NRA for Breach of the NYPMIFA

The New York Prudent Management of Institutional Funds Act ("NYPMIFA") governs the management and investment of funds held by not-for-profit corporations and other institutions.[159] The statutory language and the NYAG's published guidance dictates that the NYPMIFA governs the managing and investing of "***an institutional fund***"[160] *i.e.*, "endowment funds—funds that are not wholly expendable on a current basis due to donor-imposed restrictions

[158] *See, e.g., Kalyanaram v. New York Institute of Technology*, 549 Fed.Appx. 11, 13-14 (2d Cir. 2013) (holding that plaintiff's claim of whistleblower retaliation was barred by doctrine of collateral estoppel following findings of arbitration panel and confirmation by New York State courts)

[159] *See* N-PCL §§ 550-558; *see also* Partida Aff., Ex. 4 (Office of the New York State Attorney General, Charities Bureau, *A Practical Guide to The New York Prudent Management of Institutional Funds Act* ("NYAG NYPMIFA Guidance") at p. 2.

[160] *See* N-PCL § 552.

on spending."[161] None of the allegations in the Amended Complaint has anything to do with an institutional fund or endowment.[162] Indeed, nowhere has the NYAG alleged that a relevant investment fund or endowment was mismanaged by the NRA to support the NYAG's Sixteenth Cause of Action against the NRA for breach of the NYPMIFA.

Nevertheless, even if the NYPMIFA were to apply more broadly to any funds controlled by a not-for-profit corporation (e.g., operational funds), under the NYPMIFA, the institution's Board must authorize any action that the NYPMIFA requires to be taken.[163] The NYAG has not alleged, other than in a speculative and conclusory fashion, that the NRA's Board approved the acts by individual executives alleged to have violated the NYPMIFA. The only thing the NYAG has alleged in that regard is that four executives and unidentified board members overspent or engaged in misconduct—none of which is alleged to have been approved by the NRA's Board. These speculative and conclusory allegations fail to state a claim against the NRA for breach of the NYPMIFA.

Indeed, as set forth by the NYAG in its own published guidance regarding the NYPIMFA, the standard for a Board's decisions is "that each person responsible for managing and investing an institutional fund 'shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.'"[164] This is almost identical to the business judgment rule protection under New York law.[165]

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[161] NYAG NYPMIFA Guidance at p. 2; *see also In re Dicocese of Buffalo, N.Y.*, 621 B.R. 91, 93 (2020) (describing the purpose of the NYPMIFA as establishing the "standards of conduct for managing and investing" an "institutional fund.").

[162] *Id*.

[163] *See* N-PCL § 551(d); *see also* NYAG NYPMIFA Guidance at p.3.

[164] NYAG NYPIMFA Guidance at pp. 2 (quoting N-PCL § 552(b)).

[165] *See Pullman,* 100 N.Y.2d at 153 (collecting cases) ("The business judgment rule is a common-law doctrine by which courts exercise restraint and defer to good faith decisions made by boards of directors in business settings.").

The NYAG's allegations against the NRA's Board with respect to purported mismanagement of institutional funds are nothing more than conclusory assertions that, in hindsight, the NRA made poor financial decisions. The NYAG asserts in summarily statements that: (i) the Board allowed its ***unrestricted*** assets to decline by 77 million over four years;[166] (ii) that the NRA authorized payments to its legal counsel under N-PCL 552(e)(1)—which on their face have nothing to do with retaining counsel;[167] (iii) that the NRA used its funds and assets to obtain loans;[168] (iv) and, that the NRA made poor spending decisions under lax oversight.[169]

None of these allegations come close to stating an NYPIMFA claim against the NRA. First, the NYAG does not allege other than in a completely speculative and conclusory way that the Board's decisions were not made in good faith or were unreasonable.[170] Second, the NYAG's allegation that the Board allowed the NRA's ***unrestricted*** assets to decline is contrary and irrelevant to this purported cause of action given that the NYPMIFA applies only to "***donor-restricted*** endowment funds."[171]

Third, the NYAG's allegations regarding payments made by the NRA to its counsel, Brewer, Attorneys & Counselors ("BAC")—which payments are not alleged to have been inappropriate—are contrary to New York law. In fact, the NRA is entitled to rely on the independent judgment of its special litigation committee in this Action. The Special litigation Committee ("SLC") of the NRA Board of Directors was constituted in August 2020 after the

[166] Am. Compl. ¶ 578(a).

[167] Am. Compl. ¶ 578(f).

[168] Am. Compl. ¶ 578(g)-(i), (k).

[169] Am. Compl. ¶ 578(c)-(e), (j), (l)-(p).

[170] Am. Compl. ¶ 578(b).

[171] NYAG NYPIMFA Guidance at p. 2 (emphasis added).

NYAG commenced this Action.[172] The SLC consists of President of the NRA, Ms. Carolyn Meadows, who acts as Chair, NRA First Vice President Charles Cotton, and NRA Second Vice President Willes Lee.[173] The members of the SLC are independent and disinterested, and the NRA defers oversight of this litigation to the Committee.[174] Furthermore, the SLC is advised by attorney William Davis, who was retained as independent counsel to the Board of Directors.[175] The SLC "firmly and unanimously" recommended that BAC continue to represent the NRA in this Action, more than two years after BAC was specifically retained by the Association to handle this potential lawsuit.[176] Moreover, on March 28, 2021, the NRA Board of Directors ratified BAC's continued representation of the Association as counsel in various litigation matters, including this Action.[177] As the Court of Appeals has held, inquiry into the legitimate decisions of a special litigation committee, including selection of counsel, "would be to emasculate the business judgment doctrine as applied to the actions and determinations of the special litigation committee."[178]

Finally, the NYAG has not alleged any specific facts supporting its conclusory allegations that the NRA's purported improper use of its funds and assets to obtain loans or spending decisions

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[172] *See* (the "Meadows Aff.") at ¶ 5, filed in this Action (at Dkt. 178). A true copy of the Meadows Aff. is annexed to the Partida Aff. at Exhibit 5.

[173] Meadows Aff. at ¶ 5.

[174] *Id*. at ¶¶ 5-6.

[175] *Id*. at ¶ 6.

[176] *Id*. at ¶¶ 4, 7.

[177] *See* Minutes of the Meeting of the Board of Directors of the NRA, dated March 28, 2021, at p. 3, a true copy of which is annexed to the Partida Aff. at Exhibit 6. There was only one dissenting vote.

[178] *Auerbach* 47 N.Y.2d at 633-634 ("the business judgment rule applies where some directors are charged with wrongdoing, so long as the remaining directors making the decision are disinterested and independent" and "the determination of the special litigation committee forecloses further judicial inquiry" into the committee's decision that it would "not be in the best interests of the corporation to press claims against defendants"); *Pillartz v. Weissman,* Index No. 654401/2019, 2021 WL 2592672, *2 (Sup. Ct. N.Y. Cnty. June 24, 2021) (relying on Auerbach, holding that a special litigation committee "is entitled to deference," and "[d]eclining to pursue plaintiff's derivative claims, which belong to the company, is a valid exercise of business judgment") (citing *Matter of Comverse Tech., Inc. Derivative Litig*., 56 AD3d 49, 53 (1st Dep't 2008)).

were made in bad faith as required to state a claim for violation of the NYPIMFA.

G. The NYAG's Seventeenth Cause of Action Fails to Allege False Filings under Executive Law §§ 172-d(1) and 175(2)(d)

The NYAG alleges that the "NRA made materially false and misleading statements and omissions in the annual reports filed with the Attorney General," which were signed by defendant Frazer in violation of Section 172-d(1) of the Executive Law and, pursuant to Section 175(2)(d) of the Executive Law, the Association should, therefore, be enjoined from soliciting or collecting funds on behalf of any charitable organization operating in this State.[179]

The NYAG alleges that the NRA failed to include required information and made "false statements" in its IRS Forms 990 variously in 2014 through 2019, that were reported to the NYAG in the NRA's CHAR500 reports, concerning: (a) transactions with interested persons, (b) compensation and to Officers and Directors, (c) payments to vendors, (d) governance, management and disclosure, and (e) fundraising expenses, fundraisers and amounts paid thereto.[180] The NRA's CHAR500 annual reports were signed by defendant Phillips in 2015 and 2016, by defendant Frazer in 2015 through 2018, and by defendant LaPierre in 2019.[181]

The NYAG fails to allege that the NRA's Board knew of, approved, or participated in any alleged "false statements" in the NRA's filings with the NYAG. Instead, it alleges that the individual defendants signed such filings and that "Frazer signed and certified such reports notwithstanding the number of falsehoods therein, of which he was or should have been aware."[182] These allegations, even when given full credit, do not support the claim asserted by the NYAG. In cases with facts that appear even more egregious than those alleged herein, where a charity subject

[179] Am. Compl. ¶¶ 731-732.

[180] Am. Compl. ¶¶ 567-568.

[181] Am. Compl. ¶¶ 565-566.

[182] Am. Compl. ¶ 731.

to the registration and reporting requirements of Article 7–A of the Executive Law "never registered or filed annual reports" with the NYAG, it is the not-for-profit organization that the "victim" and the individual responsible for such filings is assessed a ban on future charitable solicitation.[183] Indeed, the remedy of banning future solicitation by an organization is implemented only when such organization is exposed as a "sham charity." Even assuming all of the allegations in the Amended Complaint are true for purposes of this motion, the NYAG fails to allege ***any*** facts remotely supporting a finding that the NRA's operations are a sham or that it has failed to allocate its funds towards its mission. Indeed, the Texas federal bankruptcy court determined that issue and is binding in this Action— that the NRA is financially healthy and is in position to *continue* fulfilling its mission, as it has throughout this entire investigation and subsequent Action. Accordingly, the NYAG's Seventeenth Cause of Action should be dismissed.

CONCLUSION

For the foregoing reasons, the First, Second, Fourteenth, Fifteenth, Sixteenth, and Seventeenth Causes of Action against the NRA set forth in the Amended Complaint should be dismissed with prejudice pursuant to CPLR 3211(a)(5) and 3211(a)(7).

[183] *See, e.g., Schneiderman ex rel. People v. Lower Esopus River Watch, Inc.*, 39 Misc.3d 1241(A), *27, 975 N.Y.S.2d 369 (Sup Ct. Ulster Cnty. 2013).

Dated: September 15, 2021

Respectfully submitted,

By: /s/ *William A. Brewer III*

William A. Brewer III
wab@brewerattorneys.com
Sarah B. Rogers
sbr@brewerattorneys.com
Mordecai Geisler
mxg@brewerattorneys.com
David J. Partida
djp@brewerattorneys.com

BREWER, ATTORNEYS & COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

ATTORNEYS FOR DEFENDANT THE NATIONAL RIFLE ASSOCIATION OF AMERICA

Certification of Compliance with Word Count

I, William A. Brewer, III, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)), as increased to 11,000 words pursuant to the Court's Order dated September 15, 2021 (NYSCEF No. 342) because the memorandum of law contains 10,609 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

By: /s/ *William A. Brewer III*
William A. Brewer III
Attorney for Defendant
National Rifle Association of America