Mot. Seq. Nos. 16, 17, 18

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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Plaintiff, v. THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL, Defendants.	Index No. 451625/2020 Hon. Joel M. Cohen

THE ATTORNEY GENERAL'S OMNIBUS MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

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Plaintiff New York Attorney General Letitia James ("Attorney General") respectfully submits this omnibus memorandum in opposition to the second set of motions by Defendants the National Rifle Association of America, Inc. (the "NRA"), Wayne LaPierre, and John Frazer (collectively, the "Defendants")[1] to dismiss this action as set forth in motion sequence numbers 16, 17, and 18.

PRELIMINARY STATEMENT

The Court is already familiar with this state enforcement action having addressed motions to dismiss by the same three Defendants earlier this year. In those motions, Defendants unsuccessfully moved to dismiss, stay, or transfer this action under CPLR 3211, 511(b) and 2201. The Court denied the Defendants' motions in their entirety. Shortly before the dismissal of those motions, the NRA filed for Chapter 11 bankruptcy in a Texas federal court. The Attorney General moved to dismiss the NRA's bankruptcy petition on the basis that it was not filed in good faith and, alternatively, for appointment of a trustee. Following a 12-day trial, the bankruptcy court agreed with the Attorney General and dismissed the bankruptcy petition, finding "it was filed to gain an unfair litigation advantage and … to avoid a state regulatory scheme." NYSCEF 365 at 2. The Court also stated that "should the NRA file a new bankruptcy case, this Court would immediately take up some of its concerns about disclosure, transparency, secrecy, conflicts of interest of officers and litigation counsel, and the unusual involvement of litigation counsel in the affairs of the NRA, which could cause the appointment of a trustee out of a concern that the NRA could not fulfill the fiduciary duty required by the Bankruptcy Code for a debtor in possession." Id. at 37.

[1] For the purpose of this memorandum, the term "Defendants" does not include Defendants Wilson Phillips and Joshua Powell, who took no part in the motions opposed herein.

After the dismissal of the NRA's bankruptcy petition, the Attorney General supplemented her Complaint in this action with factual allegations of misconduct that have occurred since the filing of her original complaint—including the Defendants' lack of corrective action in response to the Attorney General's investigation and commencement of this action, and the NRA's improper attempt to evade this state enforcement action by filing for bankruptcy. There were no other amendments to the Complaint. No additional causes of action were asserted. No new parties were named. No new legal theories proffered.

Defendants now move (for a second time) to dismiss this action under CPLR 3211. The motions fail for three principal reasons.

First, Defendants' motions under CPLR 3211(a)(7) are barred by the one-motion rule. Under New York law, parties are limited to one motion under CPLR 3211(a). Defendants already availed themselves of that process with motions that raised numerous legal arguments under CPLR 3211(a) and involved "one of the larger records" the Court has "seen on motions to dismiss …." NYSCEF 220 at 66:25–67:9. The motions were denied in their entirety. Defendants now seek dismissal of the same causes of action with new legal arguments that they could have raised before but did not. Defendants' duplicative motions are thus barred under CPLR 3211(e).

Second, the Attorney General is not collaterally estopped under CPLR 3211(a)(5) from bringing the causes of action in her Complaint because the issues decided in the NRA's bankruptcy proceeding are not identical to those presented by the Attorney General's causes of action, nor are they dispositive of those claims.

And third, even if not barred by the one-motion rule, Defendants' motions under CPLR 3211(a)(7) still fail because the Attorney General's Complaint asserts viable causes of action with sufficient particularity against the Defendants. The Complaint amply alleges extensive statutory

violations by the NRA in the management and operation of the Association and self-dealing, waste, misuse of charitable assets and other failures by the individual defendants to discharge their duties in good faith as directors and officers of the NRA.

FACTUAL AND PROCEDURAL BACKGROUND[2]

The Attorney General's Complaint contains over 750 paragraphs of detailed allegations of pervasive and persistent illegal conduct by the NRA and Executive Vice President Wayne LaPierre, General Counsel John Frazer, former Treasurer and Chief Financial Officer Wilson Phillips and former senior executive Joshua Powell. *See generally* Am. & Suppl. Compl. ("FAC" or "Complaint"), NYSCEF 333. The alleged wrongdoing was not comprised of isolated bad acts, but rather systemic abuses that have corrupted the organization from within. The Complaint establishes that the NRA, its officers, and its Board permitted the diversion of millions of dollars away from the NRA's charitable mission, imposing substantial reductions on its expenditures for core program services. *Id.* ¶¶ 2–11. It alleges that the NRA ignored, and in some cases retaliated against, those who raised concerns about its operation and finances. *Id.* ¶¶ 444–475.

As a result of these persistent violations of law, the Attorney General's original and now supplemented Complaint asserts eighteen causes of action under New York's Not-for-Profit Corporation Law ("N-PCL") and Estates, Powers and Trusts Law ("EPTL"). The Attorney General requests multiple forms of relief, including an order directing an accounting; removing Defendants LaPierre and Frazer from office; mandating that the individual defendants pay restitution and penalties, and be enjoined from future leadership roles in any New York not-for-profit charitable organization; rescinding certain transactions; directing the NRA to account for its official conduct

[2] For a more complete recitation of the factual and procedural background of this action, the Attorney General respectfully refers the Court to its brief in opposition to the Defendants' original motions to dismiss, transfer, or stay this action. *See* NYSCEF 192.

with respect to management of the NRA's institutional funds; ordering repayment of illegal, unauthorized or *ultra vires* compensation, reimbursements, benefits or amounts unjustly paid; and seeking a finding that the NRA is liable to be dissolved under the N-PCL. *Id.* ¶¶ 560–666.

The Attorney General's original and now supplemented complaints are both highly detailed pleadings that assert identical causes of action against the Defendants—all of which were before the Court on the Defendants' prior motions to dismiss.

I. Defendants file a series of motions seeking to dismiss, transfer, or stay this action. The motions are denied.

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

In that first round of motions seeking dismissal under various legal theories, none of the Defendants challenged the sufficiency of the pleadings for failure to satisfy the elements of the very same claims that they now challenge.

[3] Motion Sequence Numbers 1, 3, and 4 (NYSCEF 70–99, 114–126, 129–130).

[4] Motion Sequence Numbers 5, 6, and 7 (NYSCEF 133–141, 156–171).

II. The NRA's attempt to use bankruptcy to evade this action is dismissed for lack of good faith.

On January 15, 2021, the NRA filed for bankruptcy in the United States Bankruptcy Court for the Northern District of Texas.[5] The Attorney General moved to dismiss the bankruptcy as a bad-faith filing, or alternatively, to appoint a trustee. Following a twelve-day trial, on May 11, the court granted the motions to dismiss, concluding "there is cause to dismiss this bankruptcy case as not having been filed in good faith both because it was filed to gain an unfair litigation advantage and because it was filed to avoid a state regulatory scheme." *Id.* at 2. The court found that "the primary purpose of the bankruptcy filing was to avoid potential dissolution" in this action, *id.* at 26, which gave the court "great concern … because [the NRA's] purpose is to avoid dissolution that is being sought as a remedy in a state regulatory action, … which is a distinct litigation advantage" and not a good faith basis for seeking bankruptcy protection. *Id.* at 27–29. The NRA did not appeal the court's order.

III. The Attorney General supplements her Complaint in this action with new allegations of wrongdoing committed by Defendants since commencement of this action.

Following dismissal of the NRA's bankruptcy petition, both the NRA and Attorney General amended pleadings in this action. On July 20, 2021, the NRA amended its counterclaims to add supplementary allegations arising out of the bankruptcy action and decision. NYSCEF 325 at 145–149. On August 21, 2021, the Attorney General filed an Amended and Supplemental Verified Complaint in this action. *See* FAC. The Complaint contains approximately 90 paragraphs of new factual allegations detailing Defendants' wrongdoing in the twelve months after the commencement of this action, including their failure to adequately investigate the allegations in

[5] *In re National Rifle Association of America and Sea Girt LLC*, Jointly Administered, Case No. 21-30085-hdh11 (Bankr. S.D. Tex.); NYSCEF 365 (May 11, 2021 Order Granting Motions to Dismiss) at 8–9.

the Attorney General's original complaint; the NRA's disclosure in its 2019 Form 990 that numerous senior executives and board members, including LaPierre and Powell, diverted charitable assets over a period of several years from their intended purposes to enrich themselves; and the NRA's latest attempt to avoid accountability in this action by seeking Chapter 11 bankruptcy protection in a Texas federal court. The Complaint does not assert new causes of action or name additional parties.[6]

IV. Defendants file the instant motions under CPLR 3211.

Defendants now bring three motions to dismiss challenging several causes of action in the Complaint under CPLR 3211(a)(5) and (7).

Defendants argue that the Attorney General has failed to allege viable claims for the following causes of action under the heightened-pleading standard of CPLR 3016(b), the business judgment rule, and caselaw:

- First and Second Causes of Action ("Dissolution Claims") (Mot. Seq. No. 18)
- Fourth Cause of Action (Breach of Fiduciary Duty under N-PCL §§ 717 and 720 and Removal under N-PCL §§ 706(d) and 714(c)) (Mot. Seq. No. 16)
- Eighth Cause of Action (Breach of EPTL § 8-1.4) (Mot. Seq. No. 16)
- Fifteenth Cause of Action (Violation of Whistleblower Protections of N-PCL § 715-b and EPTL § 8-1.9) (Mot. Seq. No. 18)
- Sixteenth Cause of Action (Breach of the New York Prudent Management of Institutional Funds Act (NYPMIFA), N-PCL Art. 5-A) (Mot. Seq. No. 18)
- Seventeenth Causes of Action (False Filings under Executive Law §§ 172-d(1) and 175(2)(d)) (Mot. Seq. Nos. 16 and 18)
- The Eighteenth Cause of Action (Unjust Enrichment Derivatively in Favor of the NRA under N-PCL § 623 and Common Law) (Mot. Seq. Nos. 16 and 17)

[6] For the Court's convenience, a redline of the amendments to the original complaint is attached to the Affirmation of Jonathan D. Conley as Exhibit A. *See* NYSCEF 406.

The NRA also moves to dismiss the First, Second, Fifteenth, Sixteenth, and Seventeenth Causes of Action under CPLR 3211(a)(5) on the theory that the Attorney General is precluded from bringing those claims under the collateral-estoppel doctrine.[7]

For the reasons that follow, Defendants' motions should be denied with prejudice.

ARGUMENT

I. Defendants' motions are barred under the single-motion rule.

Defendants have already unsuccessfully moved to dismiss and are precluded from making arguments they could have previously raised.

Defendants' motions to dismiss under CPLR 3211(a)(7) violate the one-motion rule set forth in CPLR 3211(e). That rule provides that, "[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in [CPLR 3211(a)], and no more than one such motion shall be permitted." CPLR 3211(e).

Each of the Defendants has already moved under CPLR 3211(a) to dismiss this action. *See* NYSCEF 70, 114, 129. This Court denied each of the motions in their entirety. NYSCEF 210–212, 220. Where a court has ruled on the merits of a CPLR 3211(a) motion, parties are barred by CPLR 3211(e) from making a second motion that could have been raised in response to the original

[7] LaPierre also purports to challenge the sufficiency of the Third, Seventh, and Eleventh Causes of Action on the basis that the Attorney General has failed to allege fault-based elements for those claims under *People v. Grasso*, 11 N.Y. 3d 64 (2008). This is wrong. In *Grasso*, the Court held that the Attorney General is subject to the standards in the N-PCL when there is an applicable statute—which, in *Grasso*, meant meeting the fault-based standard found in the applicable N-PCL provision. *Grasso*, 11 N.Y. 3d at 71–72. *Grasso* does not stand for, and LaPierre has cited no other authority for, the proposition that the Attorney General must allege fault for any cause of action brought against individuals pursuant to any provision of the N-PCL. The Third, Seventh, and Eleventh Causes of Action are not barred by *Grasso*, and the Attorney General has met her pleading burden with respect to each of those claims.

pleading. *See* *Schwartzman v. Weintraub*, 56 A.D.2d 517, 517 (1st Dep't 1977) (holding that the one-motion rule barred party from moving to dismiss claim raised in most recent amended pleading that could have been, but was not, challenged in earlier pleading); *Bailey v. Peerstate Equity Fund, L.P.*, 126 A.D.3d 738, 738 (2d Dep't 2015) (permitting second CPLR 3211(a) motion only as to cause of action that was raised for the first time in the amended complaint); *B.S.L. One Owners Corp. v. Key Int'l Mfg., Inc.*, 225 A.D.2d 643, 643 (2d Dep't 1996) (holding that Supreme Court erred in permitting second motion to dismiss causes of action in the amended complaint that were already the subject of a previous motion to dismiss the original complaint).

It is only where a cause of action is asserted for the first time in an amended pleading that a second CPLR 3211(a) motion will be permitted. *See* *Barbarito v. Zahavi*, 107 A.D.3d 416, 420 (1st Dep't 2013) (allowing second CPLR 3211(a) motion where fraud cause of action was asserted against the defendant for the first time in an amended pleading). The causes of action asserted by the Attorney General in her Complaint are identical to the causes of action that were subject to the Moving Defendants' first motions to dismiss. *Compare* NYSCEF 11 ¶¶ 560–666 with FAC ¶¶ 647–753.

The Defendants had the opportunity, but elected not, to raise the arguments they now belatedly assert against the Complaint. Defendants' seriatim approach to motions directed against the pleadings violates CPLR 3211(e) and should be rejected. Defendants' first round of motions entailed three months of briefing six separate motions, which was immediately followed by the NRA's bankruptcy gambit, which resulted in another five months of briefing, expedited discovery, and a trial. Now Defendants move to dismiss causes of action on grounds that could have been raised in their first round of motions last year. The one-motion rule in CPLR 3211(e) is intended to prevent precisely this type of gamesmanship, inefficiency, and waste of judicial resources.

Defendants' duplicative motions to dismiss are barred by CPLR 3211(e) and must therefore be denied.

II. The NRA's collateral-estoppel argument fails.

The NRA incorrectly argues that the Attorney General is collaterally estopped from asserting the Dissolution Claims because the bankruptcy court "made many significant factual findings and determinations that are dispositive here." NYSCEF 371 at 22. To invoke collateral estoppel, or issue preclusion, four conditions must be met: "'(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits.'" *Conason v. Megan Holding, LLC*, 25 N.Y.3d 1, 17 (2015) (quoting *Alamo v. McDaniel,* 44 A.D.3d 149, 153 (1st Dept. 2007). "Preclusive effect … will only be given where the particular issue was "actually litigated, squarely addressed and specifically decided." *Crystal Clear Dev., LLC v. Devon Architects of New York, P.C.*, 97 A.D.3d 716, 717–18 (2d Dep't 2012) (internal quotation marks and citation omitted).[8]

Here, the NRA's collateral-estoppel argument fails because the issues decided in the bankruptcy proceeding are not identical to those presented by the challenged causes of action, nor are they legally dispositive of those claims. *Kaufman v. Eli Lilly & Co.*, 65 N.Y.2d 449, 455 (1985) ("The identical issue necessarily must have been decided in the prior action and be decisive of the present action …"). The NRA's argument rests on a profound mischaracterization of the bankruptcy court's findings, which, taken as a whole, support the Attorney General's claims.

[8] *See also Alaimo v. McGeorge*, 69 A.D.3d 1032, 1034 (3d Dep't 2010) ("For collateral estoppel to apply, it is 'critical that the issues are identical.'" (quoting *People v. Roselle*, 84 N.Y.2d 350, 357 (1994)).

The NRA ignores that the bankruptcy court dismissed its bankruptcy filing *for lack of good faith* based on findings of improper conduct and motives. In its order of dismissal, the bankruptcy court found that "cringeworthy facts" had been presented during trial, noting that "[t]he movants have presented evidence of the NRA's past misconduct," and that "[s]ome facts regarding the NRA's past misconduct were not available to this Court because the NRA's former treasurer asserted his rights under the Fifth Amendment during large swaths of his deposition." NYSCEF 365 at 33. The court further found that "[s]ome of the conduct that gives the Court concern is still ongoing," noting evidence of recent violations of internal procedures, LaPierre's failure to make timely financial disclosures, and "lingering issues of secrecy and a lack of transparency." *Id.* at 34. The court also expressed serious concern about the NRA's governance under LaPierre, highlighting

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

Id. The court concluded its order with the observation that

> [t]here are several aspects of this case that still trouble the Court, including the manner and secrecy in which authority to file the case was obtained in the first place, the related lack of express disclosure of the intended Chapter 11 case to the board of directors and most of the elected officers, the ability of the debtor to pay its debts, and the primary legal problem of the debtor being a state regulatory action.

Id. at 37. It also warned that

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

Id.

The bankruptcy court's findings of fact and conclusions of law plainly do not address whether the standards for judicial dissolution under the N-PCL have been satisfied, nor do they undermine the Attorney General's claims in this action.[9] Indeed, the bankruptcy court expressly held that it was "not in any way saying it believes the NYAG can or cannot make the required showing to obtain dissolution of the NRA, but the Court is saying that the Bankruptcy Code does not provide sanctuary from this kind of a threat." NYSCEF 365 at 28.

The NRA's collateral-estoppel argument also fails because the Attorney General did not have a full and fair opportunity to litigate the issues in this state enforcement action in the narrow confines of the NRA's bankruptcy proceeding, which took place on an expedited basis with an accelerated schedule that allowed only truncated discovery. The Attorney General neither intended nor had the burden to prove the eighteen causes of action in this state enforcement action in the expedited hearing held on her motions in the NRA's bankruptcy proceeding. Moreover, it is well established that the collateral-estoppel doctrine does not apply against a party who could not have obtained appellate review of the earlier judgment.[10] In the NRA's bankruptcy proceeding, the court granted the Attorney General's motion to dismiss the NRA's bankruptcy petition for lack of good faith, so unlike the NRA—which could have appealed the ruling (but elected not to)—the Attorney General had no basis to appeal.

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[9] To the extent the NRA argues the Attorney General is collaterally estopped from asserting its Fourteenth, Fifteenth, Sixteenth, and Seventeenth Causes of Action against the NRA, those arguments fail for the same reasons. The NRA has failed to establish an identity of issues between the bankruptcy court's findings and the Attorney General's claims against the NRA for wrongful related-party transactions, violation of the whistleblower protections of N-PCL § 715(b) and EPTL § 8-1.9, and for breach of NYPMIFA.

[10] *See, e..g.,* *Augustine v. Sugrue*, 8 A.D.3d 517, 518 (2d Dep't 2004) (collateral estoppel not appropriate where party "did not have the opportunity to appeal the determination because he was not aggrieved by the court's order," and therefore lacked "a full and fair opportunity to litigate the issue …." (citing *People v. Sailor*, 65 N.Y.2d 224, 228 (1985)); *accord* Restatement (Second) of Judgments § 28(1); Siegel, N.Y. Prac. § 465 (6th ed.).

The policy considerations animating the collateral-estoppel doctrine further counsel against its application here. The doctrine is "intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it." *Juan C. v. Cortines*, 89 N.Y.2d 659, 667 (1997) (quoting *Kaufman*, 65 N.Y.2d at 455). It would be neither fair nor efficient to preclude the Attorney General's claims in this action. After all, the bankruptcy court dismissed the NRA's bankruptcy filing as an improper attempt to escape this action. To preclude the Attorney General from pursuing this state enforcement action because of judicial findings that expressly rejected the NRA's improper attempt to evade this case would not only be unjust, but would incentivize similar maneuvers by targets of state enforcement actions. This would hinder the Attorney General's ability to carry out her duties as New York's chief law-enforcement officer.[11]

III. The Attorney General's allegations amply support all of the causes of action in the Complaint.

Even if Defendants' motions under CPLR 3211(a)(7) were not barred by the one-motion rule, which they are, they would nevertheless fail because the allegations in the Complaint sufficiently support the Attorney General's eighteen causes of action.

On a motion to dismiss under CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994) (citations omitted). Defendants' attempt to seek refuge behind the business

[11] Tellingly, the NRA has not cited caselaw from any jurisdiction where a state attorney general was collaterally estopped from asserting claims in a state enforcement action because of issues decided in a prior proceeding initiated by the target entity.

judgment rule and heightened pleading standard of CPLR 3016(b) is unavailing. The business judgment rule does not apply to most of the Attorney General's causes of action, *see* Part III.A, and the invocation of the business judgment rule is not a sufficient basis for dismissal of pleadings at the motion-to-dismiss stage.[12] And to the extent the rule applies, the Complaint more than adequately alleges Defendants' failure individually and collectively—as a persistent dereliction of duty—to exercise good-faith business judgment. Defendants similarly overstate the implications of CPLR 3016(b). The "purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of." *GSCP VI EdgeMarc Holdings, L.L.C. v. ETC Northeast Pipeline, LLC* 192 A.D.3d 454, 456 (1st Dep't 2021) (quoting *Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 (2008)). It is well established that the requirement is satisfied where, as here, the facts alleged in the complaint "are sufficient to permit a reasonable inference of the alleged conduct." *Pludeman,* 10 N.Y.3d at 492.

Contrary to Defendants' claims, the allegations in the 189-page Complaint are neither "bare-boned" nor "conclusory." As set forth below, the Complaint is replete with detailed factual allegations that sufficiently support the Attorney General's eighteen causes of action. Defendants' motions to dismiss for failure to state a claim therefore fail and should be denied.

[12] *See, e.g.*, *Higgins v. New York Stock Exch., Inc.*, 10 Misc. 3d 257, 282 (Sup. Ct. N.Y. Cnty. 2005) ("Even in the context of the business judgment rule, … the complaint will be sustained if it contains allegations sufficient to demonstrate that directors did not act in good faith or were otherwise interested, as 'pre-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate.'" (citing *Ackerman v. 305 E. 40th Owners Corp.*, 189 A.D.2d 665, 667 (1st Dept. 1993)); *Cohen v. Seward Park Hous. Corp.*, 7 Misc. 3d 1015(A) (Sup. Ct. N.Y. Cnty. 2005) ("In the pre-discovery stage of litigation, it is inappropriate to dismiss a claim by invoking the 'business judgment rule,' given that plaintiffs have set forth more than conclusory allegations concerning defendants' fiduciary duties.")).

A. The business judgment rule does not apply to the Attorney General's causes of action against the NRA.

The NRA argues that the common-law business judgment rule applicable to for-profit entities applies to, and bars, the Attorney General's First (dissolution under N-PCL § 1101), Second (dissolution under N-PCL § 1102), Fourteenth (wrongful related party transactions under N-PCL §§ 112(a)(10) and 715(f), and EPTL § 8-1.9(c)(4)), Fifteenth (violation of whistleblower protections under N-PCL § 715-b and EPTL § 8-1.9), and Sixteenth (breach of NYPMIFA under Article 5-A of the N-PCL) causes of action. NYSCEF 371 at 12–15. The NRA is mistaken.

The business judgment rule was incorporated into N-PCL § 717 by the Legislature as a good-faith defense afforded to individual officers and directors for claims related to the good faith, prudent exercise of business judgment. *See People v. Grasso*, 11 N.Y.3d 64, 70 (2008) (citing N-PCL § 717 and holding that "the Legislature has provided directors and officers with the protections of the business judgment rule"). Outside of this, however, the common-law doctrine of the business judgment rule does not apply to the EPTL or N-PCL. *See People v. Moore*, No. 401004/12, 2012 WL 10057358, at *3 (Sup. Ct. N.Y. Cnty. Sep. 17, 2012) (holding that business judgment rule does not protect conduct except as provided for in N-PCL §§ 717 and 720), *aff'd* 103 A.D.3d 592 (1st Dep't 2013).

Consumers Union of U.S. v. State, 5 N.Y.3d 327 (2005), cited by the NRA in support of its claim that the business judgment rule applies to *all* actions taken by its board, NYSCEF 371 at 13 n.88, is not to the contrary. In *Consumers Union*, the Court noted in *dicta* that, even if the applicable statutory scheme under the Insurance Law had not superseded all other statutory and common law duties, the business judgment rule would apply to the plaintiffs' breach-of-fiduciary-duty claims against the defendant's board of directors. 5 N.Y.3d at 360.

The Legislature did not see fit to extend the business judgment rule to charitable organizations for violations of statutory requirements outside of situations where the directors, officers, and key persons discharge the duties of their position "in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." N-PCL § 717(a).

In fact, as *Grasso* recognized, "[a]lthough several provisions of the N-PCL mirror those regulating for-profit entities under the Business Corporation Law, one unique characteristic is the legislative codification of the Attorney General's traditional role as an overseer of public corporations." *Grasso*, 11 N.Y.3d at 69; *see*, *e.g.*, *People v. Lowe*, 117 N.Y. 175 (1889). As a New York not-for-profit corporation, the NRA must comply with numerous statutory duties, and the Attorney General is given specific statutory tools to assure that compliance. Applying the business judgment rule to those duties, and to the Attorney General's tools to enforce that compliance, would defeat the plain language of the statutes.

With respect to the First and Second Causes of Action, dissolution of charities is governed by the statutory scheme set forth in Article 11 of the N-PCL. The Attorney General's burden is specifically set for in N-PCL §§ 1101 and 1102. The NRA has cited no support for the proposition that it should be afforded the presumption of good faith afforded by the business judgment rule in addition to the protections found in Article 11. *Summers v. Cherokee Child. & Fam. Servs., Inc.* is instructive on this point. 112 S.W.3d 486 (Tenn. Ct. App. 2002). In *Summers*, the Tennessee Attorney General sought the dissolution of the defendant not-for-profit, and the defendant argued that the Attorney General must, but could not, overcome the business judgment rule in seeking dissolution. *Id.* at 527–30. The Tennessee Court of Appeals held that the business judgment rule

> has no application to allegations that a public benefit corporation has abandoned any charitable purpose and has pursued private, rather

> than public, interests. Similarly, while Tennessee courts have adopted a non-interventionist policy with regard to internal corporate matters, that policy is inapplicable here because the legislature has specifically given the Attorney General and the courts authority and responsibility to ensure that nonprofit public benefit corporations operate in the public interest and not for private gain. The public policy of this state, as expressed by the legislature, is that the Attorney General and the courts intervene in such situations because the public interest is involved and the activities involved are not merely 'internal corporate matters.'

Id. at 529–30 (citations omitted). The Tennessee Court of Appeals' reasoning, and the public policy considerations in play, apply with equal force here. The New York Legislature has not made the business judgment rule a defense to judicial dissolution sought by the Attorney General under the authority granted her by the N-PCL. To create such a defense would frustrate the Legislature's intent that the Attorney General and the Court supervise charitable not-for-profits like the NRA.

With respect to the Fourteenth, Fifteenth, and Sixteenth Causes of Action, the NRA is required to meet certain standards set forth in the N-PCL and EPTL. For example, the NRA must have a whistleblower policy that meets the requirements of N-PCL § 715-b and EPTL § 8-1.9. Similarly, the NRA is required to meet statutory requirements for related party transactions[13] and NYPMIFA.[14] These statutes define strict requirements that do not call for an exercise of business judgment and are not entitled to the presumption of legality provided by that doctrine. *See In re Musicland Holding Corp.*, 398 B.R. 761, 785 (Bankr. S.D.N.Y. 2008) (holding, under Delaware law, that business judgment rule does not apply to statutory violations with strict liability).

[13] *See* N-PCL §§ 112(a)(10), 715(f); EPTL § 8-1.9(c)(4).

[14] N-PCL Article 5-A.

For these reasons, the business judgment rule does not shield the NRA from the violations alleged in the First, Second, Fourteenth, Fifteenth, and Sixteenth Causes of Action or entitle it to dismissal of those claims.

B. The Complaint states causes of action for judicial dissolution against the NRA.

The NRA moves to dismiss the Dissolution Claims for failure to state a cause of action. The NRA's motion is devoid of merit and should be denied.

1. The Dissolution Claims are adequately plead.

The Complaint clearly sets forth facts supporting her First and Second Causes of Action for dissolution under N-PCL § 1101(a)(2) and N-PCL § 1102(a)(2). These allegations are sufficiently plead, even if evaluated—as the NRA requests—against the heightened pleading standard in CPLR 3016(b). Accordingly, the NRA's motion to dismiss those causes of action for failure to state a claim must be denied.

N-PCL § 1101(a)(2) authorizes the Attorney General to bring an action seeking dissolution when "the corporation has exceeded the authority conferred upon it by law, or has … carried on, conducted or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to public policy of the state has become liable to be dissolved." N-PCL § 1101(a)(2). Additionally, N-PCL § 1102(a)(2) authorizes the Attorney General, assuming the rights of members, to bring a claim for dissolution in cases where the "directors or members in control of the corporation have looted or wasted the corporate assets, have perpetuated the corporation solely for their personal benefit, or have otherwise acted in an illegal, oppressive or fraudulent manner." N-PCL § 1102(a)(2)(D).

Throughout her Complaint, which contains over 750 paragraphs of detailed allegations, the Attorney General has repeatedly alleged that each of these standards for dissolution has been met.

The Complaint comprehensively lays out the Attorney General's factual findings of pervasive and persistent illegality on the part of the NRA and egregious waste of charitable assets on the part of its entrenched leadership.[15] Among other allegations, the Complaint sets forth, in meticulous detail, facts establishing that the NRA and its Board permitted the diversion of tens of millions of dollars away from the NRA's charitable mission, imposing substantial reductions in its expenditures for core program services. The Complaint contains numerous allegations demonstrating the NRA's systemic misconduct, illegality, mismanagement of charitable assets, and abuse of its charitable status.[16]

[15] *See*, *e.g.*, FAC ¶¶ 12 (alleging the NRA, at the direction of Individual Defendants and with a series of failures of required oversight by its Board, persistently engaged in illegal and unauthorized activities in the conduct and transaction of its business); 382 (alleging the NRA routinely entered into related party transactions with board members); 426 (alleging the Board did not carry out its duties under NRA bylaws, New York or federal law in regard to ensuring only reasonable compensation is paid, and exposed the NRA to liability for federal excise tax); 505 (alleging that the Audit Committee failed to respond adequately to whistleblowers, in violation of its obligations under New York law and NRA policy); 550 (alleging the NRA Board displayed a sustained and systemic failure to exercise their oversight function and stood by as various laws were violated by the NRA).

[16] *See*, *e.g.*, FAC ¶¶ 143 (alleging LaPierre instituted a culture of self-dealing, mismanagement, and negligent oversight at the NRA that allowed for, among other things, waste of charitable assets without regard to the NRA's best interests); 248 (alleging the NRA entered into a no-show consulting contract with Phillips and that payments made pursuant to this contract constituted a waste of charitable assets; 495 (alleging the NRA Audit Committee failed to fulfill its obligations to oversee internal controls, resulting in waste and loss of charitable assets); 567–568 (alleging the NRA made materially false and misleading statements and omissions on its annual filings for multiple years, including false statements about diversion of corporate assets, compensation and benefits to officers and directors, and related party transactions); 578 (alleging the NRA failed to manage its institutional funds in accordance with New York law, including by failing to assure that its institutional funds were not subject to waste or misappropriation); 600 (alleging the NRA paid excess benefits to numerous NRA executives and board members); 646 (alleging LaPierre's unilateral decision to file for bankruptcy cost the NRA tens of millions of dollars in attorneys' fees, payments to proposed restructuring officers, costs relating to special board meetings necessitated by the filing, and other expenses).

The Attorney General's request for dissolution is not, as the NRA suggests, "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." NYSCEF 371 at 1 (emphasis in original omitted). Rather, it is based on specific factual allegations of egregious corporate wrongdoing that has permeated deep into the organization and remains ongoing.[17] The need for dissolution is all the more heightened given: (1) LaPierre, one of the chief wrongdoers implicated in the Complaint, remains at the helm of the NRA; and (2) in the period since this action was initiated, "the NRA, LaPierre, and Frazer have continued the same course of misconduct in violation of New York law, IRS requirements for exempt organizations, NRA bylaws, and internal policies and procedures without objection from the NRA." FAC ¶¶ 580–646.

The NRA cites *People v. Oliver Schools*, 206 A.D.2d 143 (4th Dep't 1994) in support its claim that the Attorney General has failed to allege sufficiently serious harm to warrant a remedy of dissolution. NYSCEF 371 at 2 n.4. But *Oliver Schools* explicitly recognized that "New York case law indicates that the Attorney-General, and the courts, have a considerable amount of discretion in determining whether dissolution is warranted," 206 A.D. 3d at 147–48, and made clear that dissolution serves as a "procedural remedy to the State for the abuse of power entrusted to its 'creature,' a corporate body." *Id*. at 145–46. Moreover, the court in *Oliver Schools*—which was deciding an appeal from an order that granted the Attorney General's summary judgment motion and not ruling on a motion to dismiss as is the case here—ultimately determined that dissolution was, in fact, warranted. *Id.*

[17] *See, e.g.*, FAC ¶¶ 9, 11–12, 143–144, 199, 316, 428, 429, 461, 495, 506, 550, 568, 578, 580, 586, 604, 605, 616, and 637.

2. Dissolution is an appropriate remedy.

Under New York law, the Attorney General has an obligation to ensure that not-for-profit charitable corporations and their assets are not abused or misused, and to protect "the public interest in charitable property." *Schneiderman v. Tierney*, 2015 WL 2378983, at *3 (Sup. Ct. N.Y. Cnty. May 18, 2015). By statute, the Attorney General is entitled to seek judicial dissolution of a charitable entity that has violated the law. N-PCL §§ 1101, 1102(a)(2)(D).

The NRA's claim that the remedy of dissolution "is reserved for non-profit organizations that themselves are deemed to be a sham," NYSCEF 371 at 16, finds no support in New York law. Neither N-PCL § 1101(a)(2) nor N-PCL § 1102(a)(2)(D) contain a requirement that the Attorney General prove that an entity is a sham to seek dissolution. The fact that a charity is completely fraudulent—or a "sham"—is a sufficient, but not a necessary, condition for dissolution under the N-PCL. The term "sham"—or its equivalent—does not appear in these statutes and is not the relevant legal standard against which the Attorney General's causes of action should be evaluated. Moreover, the law does not require allegations of insolvency or a complete inability to conduct mission-advancing activities to state a claim for judicial dissolution. *See e.g.*, *Leibert v. Clapp*, 13 N.Y.2d 313, 316 (1963) (explaining "it is certainly no bar to the grant of such relief that the corporation may be operating profitably); *People v. N. Leasing Sys. Inc.*, 70 Misc.3d 256 at *278–80 (Sup. Ct. N.Y. Cnty. 2020) (dissolution held appropriate where entity engaged in persistently fraudulent conduct, even where the majority of its business was legitimate).

The NRA's suggestion that dissolution is not an appropriate form of relief because the Attorney General has failed "to meet its burden to plead specific, non-conclusory allegations implicating a majority of the Board," NYSCEF 371 at 2 (emphasis in original omitted), is also without support. The applicable N-PCL provisions require no such showing to assert a viable cause of action for dissolution. As explained in Part III.B.1, the Attorney General has met her burden by

adequately pleading causes of action under N-PCL §§ 1101(a)(2) and 1102(a)(2)(D). This court should not evaluate—let alone dismiss—these causes of action based on requirements invented by the NRA.

C. The Complaint states a cause of action for breach of NYPMIFA against the NRA.

1. NYPMIFA applies to the NRA.

In relation to the Attorney General's Sixteenth Cause of Action against the NRA for breach of NYPMIFA, the NRA is incorrect that dismissal is warranted because "none of the allegations in the Amended Complaint has anything to do with an institutional fund." NYSCEF 371 at 29. This argument misconstrues the meaning of "institutional fund" and should therefore be rejected.

NYPMIFA establishes the standard of conduct applicable to all New York not-for-profit corporations. Enacted in 2010, NYPMIFA is based on the Uniform Prudent Management of Institutional Funds Act, which was designed to "provide[] guidance and authority to charitable organizations concerning the management and investment of funds held by those organizations, and [to] impose[] additional duties on those who manage and invest charitable funds."[18] NYPMIFA defines "institutional funds" broadly to include "a fund held by an institution," excluding "program-related assets."[19] N-PCL §§ 551(d)-(e).The definition is not limited, as the NRA suggests, only to "donor restricted endowment funds." NYSCEF 371 at 28–29. As a New

[18] Prefatory Note, Uniform Prudent Management of Institutional Funds Act (UPMIFA).

[19] "Program-related assets" are a narrow category of assets generally limited to a charity's headquarters or similar real property. As the Uniform Law Commission explained in an article on the meaning of "program-related assets" in UPMIFA, "[n]early all funds held by a charity are governed by UPMIFA … The exclusion for program-related assets applies to tangible or real assets held by a charity for direct use in its charitable activities," such as "laboratory equipment owned by a university, the house owned by a homeless shelter, and the food storage building and food preparation equipment owned by a soup kitchen …." *Program-Related Assets under UPMIFA*, Uniform Law Commission.

York not-for-profit corporation, the NRA qualifies as an "institution" under NYPMIFA. N-PCL §§ 102(5), 551(d). The NRA also, as alleged in the Complaint, manages "institutional funds" of the nature contemplated by NYPMIFA, including investments, cash balances, funds derived from pledging NRA assets or credit, income derived from rents to third parties, and funds held or paid out to vendors. FAC ¶¶ 569–579, 725–729. Accordingly, NYPMIFA applies to the NRA and the NRA must act in accordance with the standards set forth therein.

2. The Complaint adequately alleges mismanagement of institutional funds.

Under NYPMIFA, the NRA, through its directors and officers, must manage its institutional funds "in good faith and with care an ordinarily prudent person in a like position would exercise under similar circumstances." N-PCL § 552(b). NYPMIFA articulates basic requirements for meeting this standard of care, which include requiring that the institution "incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution, and the skills available at the institution" and "make a reasonable effort to verify facts relevant to the management and investment of the fund." *Id.* § 552(c).

In her Complaint, the Attorney General has easily met the CPLR's pleading requirements by setting forth facts sufficient to allege that the NRA did not meet these standards. The Complaint first articulates each of the relevant standards set forth in section 552 of NYPMIFA ("Standard of Conduct in Managing and Investing an Institutional Fund") and then lays out sixteen specific ways in which the NRA failed to manage its institutional funds in accordance with those standards. FAC ¶ 578. Additionally, the Complaint contains factual allegations throughout that establish how the NRA permitted the diversion of tens of millions of dollars away from its charitable mission, and, in so doing, failed to assure that its institutional funds were not subject to waste or misappropriation, in violation of NYPMIFA.

The Complaint alleges, for example, that the NRA Board's negligent oversight of management created conditions whereby the individual directors "routinely circumvented internal controls" and "condoned or partook in expenditures that were an appropriate and wasteful use of charitable assets." FAC ¶ 12. The Complaint further alleges that the NRA's Audit Committee, a key oversight mechanism of the NRA Board, failed to fulfill its obligation to oversee internal controls, resulting in "waste and loss of the NRA's charitable assets" and contributing directly "to the NRA reaching its currently deteriorated financial state." *Id.* ¶ 495. With respect to the Board as a whole, the Complaint alleges that the NRA Board "displayed a sustained and systematic failure to exercise their oversight function and stood by as various laws were violated by the NRA," including waste of NRA assets. *Id.* ¶ 550. Each of these allegations supports the Attorney General's claim that the NRA, under the leadership of its Board of Directors, failed to manage its institutional funds in accordance with the standards set forth in NYPMIFA.

D. The Complaint states a cause of action against the NRA for violations of statutory whistleblower protections.

In her Fifteenth Cause of Action, the Attorney General alleges that the NRA violated the N-PCL, the EPTL, and its own policies by permitting Powell and LaPierre to retaliate against whistleblowers, and for failing to supervise Frazer's incompetent performance of his responsibilities in carrying out the NRA's whistleblower policy. FAC ¶¶ 720–724. The NRA's argument that the Fifteenth Cause of Action fails to state a claim based on the preclusive effect of the bankruptcy court's findings of fact is meritless. NYSCEF 371 at 26–28.

The NRA argues that the Attorney General's allegations concerning retaliation against former board member and officer Dissident No. 1 are negated by its elevation of Ms. Rowling to Treasurer and CFO—which occurred after the former Treasurer and CFO Craig Spray was

abruptly fired by LaPierre without explanation[20]—and the bankruptcy court's general statements about the NRA's incomplete[21] efforts to come into legal compliance. NYSCEF 371 at 34. They are not. Far from being "conclusory," the Complaint contains 27 paragraphs detailing the ways in which LaPierre, with assistance from other NRA employees and board members, froze Dissident No. 1 out of his leadership position after Dissident No. 1 questioned and sought to investigate the Brewer Firm's expenses. FAC ¶¶ 462–489. Indeed, as alleged in the Complaint, the NRA's retaliation has included seeking to revoke Dissident No. 1's membership status and instigating a lawsuit towards that end. *Id.* ¶ 489.

The NRA also ignores the numerous other allegations of retaliation in violation of New York law, which are asserted in the Complaint. For example, the NRA ignores the allegations that it refused to assign four board members to any committees of the board after they requested an investigation into issues that included allegations raised in the Complaint. *Id.* ¶¶ 490–494. And how the NRA refused to undertake an investigation into allegations of harassment, including by the Brewer firm, raised by one of the NRA Whistleblowers. *Id.* ¶ 516. And how the NRA's Audit Committee, the board committee with primary supervisory authority over the NRA's whistleblower policy, failed to adequately document what steps, if any, it took in response to

[20] *See* NYSCEF 365 at 34 (noting that "it is still very unclear why Mr. Spray, an officer everyone seemed to hold in high regard for his talent and integrity, parted ways with the NRA two weeks into this bankruptcy case. What is clear is that Mr. Spray's departure was precipitated by a call from Mr. LaPierre without involvement of the board of directors."); FAC ¶¶ 597–599 (alleging that Mr. Spray was fired for the concerns he raised about the NRA's 2019 Form 990).

[21] Specifically, the bankruptcy court noted that "[w]hether [the NRA's course correction] is complete or not, there has been more disclosure and self-reporting since 2017…. There are several aspects of this case that still trouble the Court, including the manner and secrecy in which authority to file the case was obtained in the first place, the related lack of express disclosure of the intended Chapter 11 case to the board of directors and most of the elected officers, the ability of the debtor to pay its debts, and the primary legal problem of the debtor being a state regulatory action." NYSCEF 365 at 35-37.

whistleblower complaints, and failed to provide information about the whistleblowers to its independent auditor. *Id.* ¶¶ 511–513, 541.

The Attorney General's Fifteenth Cause of Action states a claim against the NRA for failing to implement a whistleblower policy as required by New York law.

E. The Complaint states a false-filing cause of action against the NRA and Frazer.

In her Seventeenth Cause of Action, the Attorney General alleges that the NRA and Frazer violated the Executive Law by making materially false and misleading statements and omissions in the NRA's annual reports filed with the Attorney General. FAC ¶¶ 730–732. The NRA and Frazer challenge this claim based on erroneous standards. The NRA incorrectly argues that the Attorney General must allege that the NRA board was aware of the falsity of the filings. NYSCEF 371 at 32–33. Frazer incorrectly contends that (1) the claim is subject to but fails to meet the requirements of the heightened pleading standard in CPLR 3016(b), and (2) he was entitled to rely on other professionals and experts when signing the NRA's filings under N-PCL § 717(b). NYSCEF 349 at 12–15.

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

1. The Complaint states a cause of action for false filings against the NRA.

The NRA does not cite any authority in support of its argument that the Attorney General should have alleged that the NRA Board "knew of, approved, or participated in any alleged 'false statements' in the NRA's filings with the NYAG." NYSCEF 371 at 32. Instead, the NRA cites to a single authority for the alleged proposition that the Attorney General must show how the charity is not a "victim" of the false statements, and that the remedy of banning charitable solicitation requires a showing that the charity is a "sham." *Id.* at 33 (citing *Schneiderman ex rel. People v. Lower Esopus River Watch, Inc.*, 39 Misc. 3d 1241(A) (Sup. Ct. Ulster Cnty. 2013)). Neither proposition is accurate.

Lower Esopus is inapposite: there, the Attorney General settled with the defendant charity and made no finding that the entity was not engaged in bona fide charitable activities. 39 Misc. 3d at *1. Executive Law § 175(2)(d) clearly provides that the Attorney General may enjoin both the charity and individuals acting on its behalf from soliciting charitable donations in New York for, among other things, making a "material false statement in an application, registration or statement required to be filed pursuant to" Article 7-A of the Executive Law.

The NRA does not refute that Frazer or any other NRA employee was not acting as an authorized agent of the NRA when they signed materially false filings submitted to the Attorney General. "[S]ince corporations, which are legal fictions, can operate only through their designated agents and employees, the acts of the latter are, in a sense, the acts of the corporation as well." *People v. Byrne*, 77 N.Y.2d 460, 465 (1991) (citation omitted). The NRA can and should be held responsible for the acts of its agents like Frazer.

Furthermore, the NRA has not identified any authority for its assertion that "the remedy of banning future solicitation by an organization is implemented only when such organization is exposed as a 'sham charity,'" and the Attorney General is aware of none. NYSCEF 371 at 33.

2. The Complaint states a cause of action for false filings against Frazer.

Frazer argues that, under N-PCL § 717(b), the Attorney General must allege that he acted with scienter to state a claim under Executive Law §§ 172-d and 175. NYSCEF 349 at 13–14.[22] That is incorrect. N-PCL § 717(b) applies to the fiduciary duties applicable to officers and directors. It has no bearing on the registration and reporting requirements that Frazer and the NRA have with the Attorney General in her regulatory capacity, as codified in Article 7-A of the Executive Law. And as is made clear by the plain language of the statute, the Attorney General is not required to allege scienter to state a claim under Executive Law §§ 172-d and 175. *See* N-PCL § 172-d(2) ("To establish fraud neither intent to defraud nor injury need to be shown.").

But even if N-PCL § 717(b) were applicable here, it allows officers to rely in good faith on certain professionals unless "they have knowledge concerning the matter in question that would cause such reliance to be unwarranted." The Complaint is replete with examples of Frazer's knowledge of his and others' misconduct at the NRA. For example:

- Frazer was aware of the NRA Whistleblower's and board members' concerns about financial mismanagement at the NRA (FAC ¶¶ 490, 505);

[22] Frazer also argues that, because a violation of Executive Law § 172-d(1) requires a showing of material falsity, the Attorney General is required to meet the heightened pleading standard found in CPLR 3016(b). NYSCEF 349 at 12–15. This argument wrongly presumes that material falsity is synonymous with fraud, which is not true. Frazer has not identified any authority holding that CPLR 3016(b)'s heightened pleading standard applies where a showing of material falsity only is required, and the Attorney General is aware of none. But regardless of whether CPLR 3016(b) applies, the allegations in the Complaint easily support the Seventeenth Cause of Action against Frazer.

- Frazer was aware, as the officer primarily charged with overseeing the NRA's whistleblower policy, that the policy was not being adequately enforced due in part to his own failures (FAC ¶¶ 559, 567); and

- Frazer failed in his responsibility of presenting the NRA's Audit Committee with the information necessary for it to consider conflicts of interest and related party transactions (FAC at ¶¶ 517–536).

All of the above resulted in material false statements in the NRA's regulatory filings, including the failure to disclose related party transactions; failure to disclose payments to vendors; and failure to accurately answer questions about the NRA's governance and policies. FAC ¶ 568. Frazer has not acted in good faith, and thus is not entitled to rely on N-PCL § 717 even if it were applicable to the Seventeenth Cause of Action.

For these reasons, the Seventeenth Cause of Action states a claim for false regulatory filings against the NRA and Frazer.

F. The Complaint states causes of action against Frazer for breaches of fiduciary duty and for improper administration of charitable assets.

In her Fourth Cause of Action, the Attorney General alleges that Frazer violated the fiduciary duties he owed to the NRA under N-PCL §§ 717 and 720 by "failing to provide competent representation, in that he failed to act with reasonable diligence in representing the NRA and to use the thoroughness and preparation reasonably necessary for the representation of the NRA throughout his tenure, including by failing to make sufficient inquiry into and analysis of the factual and legal problems under his responsibility, and by failing to use methods and procedures meeting the standards of competent practitioners." FAC ¶¶ 672–676. In her Eighth Cause of Action, the Attorney General alleges that Frazer, as a trustee of charitable assets, failed to properly administer those assets in accordance with EPTL § 8-1.4. *Id.* ¶¶ 689–692.

Frazer argues that (1) the heightened pleading standard in CPLR 3016(b) applies to both causes of action; (2) that *Grasso* applies to, and bars, the Fourth Cause of Action; and (3) that both causes of action fail to state a claim. All three arguments fail.

First, while the Attorney General agrees that CPLR 3016(b) applies to the Fourth Cause of Action as a breach-of-fiduciary-duty claim, the Eighth Cause of Action is a claim based on the improper administration of charitable assets. EPTL § 8-1.4. Frazer has not cited to any authority applying the heightened pleading standard of CPLR 3016(b) to this statutory claim, and the Attorney General is aware of none. But even if CPLR 3016(b) does apply, for the reasons given below, the Attorney General has met her pleading burden.

Second, the Attorney General's Fourth Cause of Action is premised on Frazer's violation of his fiduciary duties as codified in N-PCL § 717. *Grasso*, which involved nonstatutory claims brought by the Attorney General, 11 N.Y.3d at 71–72, does not support dismissal in this case because the Complaint easily meets the statutory pleading standard.

Finally, the Attorney General has sufficiently plead that Frazer violated both his fiduciary duties and his obligation to properly administer charitable assets, and that he is not entitled to rely on a defense of good faith. Ten paragraphs of the Complaint are devoted just to Frazer's incompetent supervision of the NRA's compliance with New York law, and his failure to ensure the accuracy of the NRA's annual filings with the Attorney General. FAC ¶¶ 286–296. Frazer's misconduct regarding supervision of the NRA's conflict-of-interest and related-party-transaction policies, his failure to appropriately handle related party transactions, and his failure to follow proper procedures regarding procurement, are also detailed in the Complaint. *Id.* at ¶¶ 402, 405, 476, 478–479, 490–494, 503–536, 553–562.

Individually and collectively, these allegations of misconduct establish a violation of Frazer's fiduciary duties and an improper administration of the NRA's charitable assets. The Attorney General has sufficiently plead the Fourth and Eighth Causes of Action against Frazer.

G. The Complaint states a derivative cause of action for unjust enrichment against Frazer and LaPierre.

In her Eighteenth cause of action, the Attorney General properly brings a claim for unjust enrichment on behalf of the NRA, using her authority under N-PCL § 112(a)(7) to bring claims on behalf of members, directors, and officers. Specifically, she brings the claim derivatively on behalf of members pursuant to N-PCL § 623. *See* FAC ¶¶ 734–736.

The Attorney General has pled sufficient facts to overcome Frazer's and LaPierre's motions to dismiss her claim against them for unjust enrichment.

To start, the Attorney General is not barred by the Court of Appeals' decision in *Grasso* from asserting this cause of action. *Grasso* held that the Attorney General does not have *parens patriae* authority to bring common law claims for unjust enrichment on her own behalf because the Legislature specifically provided a means by which the Attorney General can pursue such claims in the N-PCL. 11 N.Y.3d at 70–72. The court did not, however, address the corporation's authority to bring such common law claims or the Attorney General's authority to assert those claims in a derivative capacity on behalf of the corporation.[23]

Nor is the Attorney General required to allege fault to successfully assert this cause of action. The Attorney General brings her claim for unjust enrichment under N-PCL § 515, which

[23] There is no tension between the Court's holding in *Grasso* and the Attorney General's decision to bring a derivative claim for unjust enrichment in this action. Nowhere does *Grasso* prohibit the Attorney General from asserting common law claims on behalf of the members of the corporation where demand on the board would be futile.

permits charitable corporation to pay only reasonable compensation to its directors and officers. While Defendants characterize the N-PCL's statutory scheme as fault-based, the 2013 amendments to the N-PCL demonstrate that the Legislature did not intend to impose a purely fault-based scheme. For example, a key piece of the Not-for-Profit Revitalization Act was the amendment of N-PCL § 715 to codify the practices required in a board's consideration of related party transactions. *See* 2013 Sess. Law News of N.Y. Ch. 549 (A. 8072); *see also People v. Trump*, 62 Misc. 3d 500, 517–18 (Sup. Ct. N.Y. Cnty. 2018) (finding that the Attorney General adequately alleged an improper related party transaction under N-PCL § 715 without imposing a requirement of bad faith). The changes created a strict liability scheme under which the Attorney General may bring an action to, among other things, unwind and seek restitution for related party transactions entered into in violation of the procedural requirements of N-PCL § 715. N-PCL § 715(f).

Even if the Attorney General were required to plead lack of good faith, she has met that standard in the Complaint. "[T]he presumptive applicability of the business judgment rule is rebutted … by a showing that a breach of fiduciary duty occurred, which includes evidence of bad faith, self-dealing, or by decisions made by directors" demonstrably affected by inherent conflicts of interest." *Higgins,* 10 Misc. 3d at 278*Higgins*, 10 Misc. 3d at 278 (citations omitted). The Complaint plainly contains allegations sufficient to rebut this presumption by demonstrating "that directors did not act in good faith or were otherwise interested." *Id.* at 282.

It is well accepted that "the business judgment rule does not protect corporate officials who engage in fraud, self-dealing or make decisions affected by conflict of interest." *Wolf v. Rand*, 258 A.D.2d 401, 404 (1st Dept 1999). The Complaint alleges that LaPierre, together with his direct reports, including Frazer, overrode and evaded internal controls to allow themselves and others to benefit through reimbursed expenses, related party transactions, excess compensation, side deals,

and waste of charitable assets without regard to the NRA's best interests. *See, e.g.*, FAC ¶ ¶ 143, *et seq*. The Complaint further alleges that LaPierre abused his position as a fiduciary to the NRA to obtain millions of dollars in personal benefits in the form of undisclosed excessive compensation. FAC ¶ 9. With respect to the Board more broadly, the Complaint alleges that the majority of the NRA Board members disregarded their responsibilities under the bylaws and governing law concerning oversight or compensation of corporate officers for the purpose of accommodating LaPierre and his senior officers. *Id.* ¶ 428. *Id.* ¶ 428

The Complaint also alleges that LaPierre effectively dominates and controls the NRA Board as a whole through his control of business, 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. *Id.* ¶ 429. These allegations, among others, undoubtedly satisfy any obligation the Attorney General might have to plead lack of good faith and overcome any presumed protection afforded by the business judgment rule.

The Attorney General is also not subject to the five percent threshold requirement in N-PCL § 623(a) when bringing a claim on behalf of a corporation's members. As such, her failure to allege that she represents at least five percent of the membership of the NRA is without consequence. The N-PCL clearly authorizes the Attorney General to bring an action to enforce "any right" of "members" of the Corporation. N-PCL § 112(a)(7). In seeking to vindicate the rights of members, the Attorney General is not subject to those procedural limitations intended to prevent frivolous or burdensome lawsuits by small groups of members.

This is consistent with this Court's ruling on the intervention motion decided on September 9, 2021. In ruling that the proposed intervenors were subject to the five-percent threshold requirement of N-PCL § 623, the Court also held that certain procedural requirements applicable

in private disputes do not apply to the Attorney General. The Court noted that when the N-PCL gives the Attorney General the same status as members, directors, or officers:

> [the applicable sections] work[] to add to the AG's rights under the law, not to limit the rights granted expressly to the Attorney General in the statute. … Put another way, even if the Attorney General has the same status as a member, director or officer for some purposes, it exercises those rights differently and in her unique role as a law enforcement officer and with supervisory authority over nonprofit entities. That distinction between an ordinary private lawsuit and an action brought by the Attorney General is etched into the Not-For-Profit Corporation Law.

NYSCEF 395 at 49:19-50:7 (Sept. 9, 2021).

Finally, to the extent the Attorney General is subject to the demand-futility requirements in N-PCL § 623 when bringing an action on behalf of a corporation's members, she has clearly met those requirements here. Under New York law, "[d]emand is futile, and excused, when the directors are incapable of making an impartial decision was to whether to bring suit." *Bansbach v. Zinn*, 1 N.Y.3d 1, 9 (2003) (agreeing that demand was futile where the plaintiff alleged that "the board was dominated and controlled by [the defendant], who by reason of his position and associations with defendants caused them to place his interests above those of the corporation."). Among other circumstances, a demand is excused when "a complaint alleges with particularity that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances" including where directors "fail[ed] to do more than passively rubber-stamp the decisions of the active managers." *Id.* at 9 (internal quotation marks and citation omitted). The Attorney General has satisfied her burden under N-PCL § 623 by properly alleging with particularity that a demand by the members of the NRA to assert a claim for unjust enrichment against the Individual Defendants would be futile because the NRA Board of Directors and its committees failed to fully inform themselves about the challenged transactions. FAC ¶ 750.

CONCLUSION

For the foregoing reasons, Defendants' motions in Motion Sequence Numbers 16, 17, and 18 should be dismissed with prejudice.

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New York, New York

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Of Counsel

Attorney Certification Pursuant to Commercial Division Rule 17

I, Jonathan Conley, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Omnibus Memorandum of Law in Opposition to Defendants' Motions to Dismiss this Action in Mot. Seq. Nos. 16, 17, and 18 complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the memorandum of law contains 10,988 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 and affirmation.

Dated: October 15, 2021
New York, New York

/s/ Jonathan Conley
Jonathan Conley