

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

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

Plaintiff,

v.

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

Defendants.

Index No. 451625/2020

Hon. Joel M. Cohen

PLAINTIFF'S PRE-TRIAL MEMORANDUM OF LAW

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Plaintiff, the People of the State of New York (“Plaintiff”), by the Office of Attorney General Letitia James (“OAG”), respectfully submits this pre-trial memorandum.

PRELIMINARY STATEMENT

For decades, Defendant the National Rifle Association of America (“NRA”) and the NRA’s senior leadership have flouted the laws applicable to charitable not-for-profit organizations. Wayne LaPierre (“LaPierre”), who has served as the NRA’s chief executive for approximately three decades, has exploited the organization for his financial benefit and the benefit of a close circle of NRA staff, board members, and vendors. LaPierre was enabled by NRA senior leadership and its board of directors, who have failed to exercise independent oversight and instead facilitated and endorsed LaPierre’s improper actions and breaches of fiduciary duty.

LaPierre handpicked senior executives who were loyal to him, including Defendants Wilson “Woody” Phillips (“Phillips”) and John Frazer (“Frazer”),¹ to facilitate his misuse of charitable assets. LaPierre hired and retained each of them despite their lack of skills or experience for their respective roles and responsibilities. He entrusted them with substantial authority for managing and administering the NRA and its charitable assets. Like LaPierre, each of them regularly ignored, overrode, or otherwise violated the bylaws and internal policies and procedures they were charged with enforcing. The effect of Defendants’ misconduct has been to divert millions of dollars away from the NRA’s charitable mission.

In 2020, Plaintiff commenced this action to hold the NRA, LaPierre, and the other Individual Defendants accountable for their self-dealing, mismanagement, and waste of charitable

¹ LaPierre, Frazer, and Phillips are referred to collectively as the “Individual Defendants”; the Individual Defendants, together with the NRA, are referred to collectively as the “Defendants.” Joshua Powell was named in the complaint as an individual defendant, but on January 5, 2024, Plaintiff entered into a Stipulation of Settlement with Mr. Powell, which is pending the Court’s so-order. *See* NYSCEF 2663.

assets. Since then, Defendants have tried desperately to avoid accountability. They have unsuccessfully sought to change the venue of the trial and have—despite repeated claims of sound finances—filed for Chapter 11 bankruptcy in Texas, a filing that was dismissed because it was brought to avoid this regulatory enforcement action. They have also unsuccessfully sought to dismiss the lawsuit multiple times. Each time, this Court has confirmed that the claims here are serious ones that Plaintiff has the power to bring.

In denying the various motions to dismiss the Court has confirmed, *inter alia*, that Plaintiff has authority to bring claims: (i) under the Estates, Powers and Trusts Law (“EPTL”) to ensure that charitable organizations and their assets are administered properly; (ii) under the Not-For-Profit Corporation Law (“N-PCL”) to hold the Individual Defendants liable for their breaches of fiduciary duty; (iii) to hold Defendants liable for impermissible related-party transactions and to require them to pay restitution for the losses they caused; (iv) under the N-PCL to hold the NRA accountable for its whistleblower violations; and (iv) under the Executive Law to hold the NRA and Frazer accountable for filing annual statements with OAG that contained material misstatements. The NRA has repeatedly appealed this Court’s decisions, but they have been repeatedly affirmed by the Appellate Division, First Department. *See, e.g., People v. Nat’l Rifle Ass’n of Am.*, 2023 WL 8939462 (1st Dep’t Dec. 28, 2023) (affirming dismissal of NRA’s counterclaims); *People v. Nat’l Rifle Ass’n of Am.* (“*NRA App.*”), 2023 WL 8632320 (1st Dep’t Dec. 14, 2023) (affirming denial of NRA’s motion to dismiss EPTL ¶ 8-1.4 claim).

As this Court has pointed out, the complaint here sets forth “serious claims based on detailed allegations of wrongdoing at the highest levels of a *not-for-profit* organization as to which the Attorney General has legitimate oversight responsibility.” NYSCEF 706 at 2. Plaintiff is now ready to substantiate the allegations to ensure that Defendants face the consequences of their illegal

conduct. The evidence will show that, *inter alia*, the Individual Defendants diverted or permitted the diversion of millions of dollars of charitable assets for their own personal use, as well as the use of favored insiders, family, and friends. The diversions and waste include monies spent for private air travel, limousine and black car service, and lavish meals and entertainment for LaPierre and other NRA insiders. The evidence will also show that the Individuals Defendants paid vendors in violation of NRA policies, despite clear conflicts of interest, and that these payments had the effect of enriching the Individual Defendants, their family members, and close associates. Further, the Individual Defendants awarded bogus “consulting” contracts to reward loyal insiders, or to buy former employees’ silence about the wrongdoing they had witnessed at the organization. Indeed, Plaintiff will prove that Defendants repeatedly and consistently administered the NRA in a manner that violated the law, wasted its charitable assets, and breached fiduciary duties. The parties are now proceeding to the liability phase of the trial, with a subsequent phase to take place before the Court, to address non-monetary remedies if liability is found.² NYSCEF 2341 at 2.

At the conclusion of the liability trial, Plaintiff will seek a finding that the NRA: (i) violated EPTL § 8-1.4 by failing to properly administer the NRA and its charitable assets; (ii) violated N-PCL § 715-b by failing to adopt a sufficient whistleblower policy in a timely manner and retaliating against whistleblowers; and (iii) violated Article 7 of the Executive Law by filing materially false annual statements with OAG’s Charities Bureau (“Charities Bureau”).

Plaintiff will seek a verdict against the Individual Defendants: (i) pursuant to EPTL § 8-1.4 and N-PCL §§ 715, 717, and 720, directing them to account, make restitution for, and pay all penalties resulting from their engagement in related-party transactions, breaches of fiduciary duties

² Because a determination on Plaintiff’s requested non-monetary remedies will be addressed in the bench phase of this trial, Plaintiff focuses in this pre-trial memorandum exclusively on the matters to be addressed during the liability phase.

to the NRA, and failure to administer the NRA and its charitable assets properly; (ii) finding that there is cause to remove LaPierre as an NRA director and to bar his re-appointment or re-election to any officer or director role in the NRA; (iii) finding that there is cause to remove Frazer as an NRA director and as Secretary and to bar his re-appointment or re-election to any officer or director role in the NRA; and (iv) holding that the related-party transactions that the Individual Defendants benefitted from be rescinded, and that the Individual Defendants be directed to account for their profits and pay a penalty of up to double the value of each benefit improperly bestowed by such transactions.

FACTUAL BACKGROUND

1. The NRA

The NRA is a charitable not-for-profit corporation. NYSCEF 646 (“Compl.”) ¶ 17.³ It was chartered in 1871 and, throughout its entire history, has been domiciled in New York. *Id.* Its stated mission is, among other things, “[t]o protect and defend the Constitution of the United States, especially with reference to the ... right to use, keep and bear arms,” “[t]o promote public safety,” to provide training “in marksmanship and in the safe handling and efficient use of small arms,” and “[t]o promote hunter safety” and “defend hunting.” *Id.* ¶ 19. Since its founding, the NRA has grown to become one of the largest social-welfare charitable organizations in the country. *Id.* ¶ 59. The NRA is subject to New York law, including in the governance of its

³ When the N-PCL was amended in 2014, it expressly provided that then-classified Type B New York not-for-profit corporations, such as the NRA (NYSCEF 121 at 3; NYSCEF 123 at 3 ¶ 3), would be deemed to be charitable for all purposes under the N-PCL. N-PCL § 201(c); 13 N.Y.C.R.R. § 90.2. The NRA is a dual filer, and registers both pursuant to the EPTL as a charitable organization “incorporated, ... formed or [that] otherwise conduct[s] activity in New York,” and pursuant to Executive Law Article 7-A as a charitable organization that “solicit[s] contributions from New York.” 13 N.Y.C.R.R. § 91.2.

internal affairs, and is registered with the Charities Bureau to conduct business and solicit donations in New York. *Id.* ¶ 17.

The NRA has tax-exempt status pursuant to Section 501(c)(4) of the Internal Revenue Code (“IRC”). *Id.* ¶¶ 18, 59. This tax-exempt status, however, is conditioned on the organization’s compliance with various statutory requirements, including that it cannot permit its income to inure to the benefit of any private individual. *Id.* ¶ 59.

The NRA has a 76-member Board of Directors (“Board”); a leadership structure of eight officers; and dozens of standing and special committees, including an Executive Committee that generally exercises all the powers of the organization’s full Board. *Id.* ¶¶ 66, 68, 85, 87. The NRA is governed by its bylaws and numerous internal policies and procedures. *Id.* ¶ 64, 101. Most of the internal policies and procedures are set forth in two documents. The first document—the NRA Employee Handbook—sets out the NRA’s policies and procedures concerning employee hiring, compensation, time off, work environment standards, travel policies, and insurance and pension benefits. *Id.* ¶ 101. The second document—the NRA Policy Manual—is a compendium of resolutions that the Board has passed over the last few decades, annexed to which are various Board-ratified policies including the Audit Committee Charter, Statement of Corporate Ethics, NRA Purchase Policy, and Officer and Board of Directors Policy on Disclosure of Financial Interests. *Id.*

Plaintiff will prove that the NRA: (i) failed to comply with the applicable law and NRA policies governing conflicts of interest, related-party transactions, procurement, and self-dealing; (ii) failed to enact sufficient internal policies and procedures, and permitted violations of its own bylaws and the internal policies and procedures it did enact; (iii) failed to enact a legally-compliant whistleblower policy for years and permitted retaliation against whistleblowers; and

(iv) made material false statements in its filings with the Attorney General. *Id.* ¶ 641. The evidence will show that the NRA's conduct resulted in the waste of its charitable assets as well as harm to public interests and the faith of NRA members in the organization's ability to properly administer its charitable assets. *Id.* ¶¶ 642-43.

2. Wayne LaPierre

LaPierre is the NRA's EVP, a position he has held since the early 1990s. *Id.* ¶ 136. In this role, which is functionally equivalent to a chief executive, he is responsible for overseeing the NRA's eleven divisions, as well as its day-to-day affairs. *Id.* ¶¶ 62, 71, 136. He also has access to the budget allocated to the Office of the EVP, including its consulting budget. *Id.* ¶¶ 145, 209. On January 5, 2024, one business day before trial, LaPierre publicly announced his resignation as NRA EVP effective January 31, 2024.

As the evidence will show, during his tenure as EVP, LaPierre has consolidated his power and control over the NRA. *Id.* ¶ 61. The evidence will also show that LaPierre routinely abused his authority to cause the NRA to improperly, and in violation of the NRA's own policies and the law of this State, incur and reimburse LaPierre for expenses that were entirely for his personal benefit or the personal benefit of his family, friends, and loyal insiders. *Id.* ¶ 143.

These expenses include:

- Use of private jet travel, including multiple chartered flights for LaPierre's wife and extended family where LaPierre was not even a passenger. *Id.* ¶¶ 143, 146, 148.
- Acceptance of valuable and undisclosed gifts, including from top NRA vendors and their principals such as David and Laura McKenzie, owners of Associated Television International and Membership Marketing Partners ("MMP"), entities to whom the NRA

has paid hundreds of millions of dollars, including tens of millions in violation of NRA policies. *Id.* ¶¶ 143, 166, 168, 175.

- Use of LaPierre’s personal travel consultant, Gayle Stanford, to arrange private air travel and other accommodations, such as limousine services, through an unnecessarily complex transaction structure designed to hide the amounts of money spent. *Id.* ¶¶ 143, 181, 183.
- Reimbursements to LaPierre for personal expenses, including gifts to friends and favored employees. *Id.* ¶¶ 143, 198.
- No-show or low-show “consulting” or “speaking” contracts for, among other persons, former NRA presidents and Board members who were loyal to LaPierre and helped him consolidate control. *Id.* ¶¶ 143, 215.

Plaintiff will also prove that LaPierre ignored NRA policies and permitted its assets to be diverted to NRA vendors who (i) provided him with financial benefits, including free use of a luxury yacht in the Bahamas, and (ii) paid for his and other NRA insiders’ travel and expense disbursements, concealing that those disbursements were for private benefit and avoiding the application of the NRA’s expense reimbursement process. *Id.* ¶¶ 146, 178. LaPierre also retaliated against NRA employees, officers, and directors who raised concerns about the organization’s misuse of charitable assets. *Id.* ¶ 700. For example, when Board officers Lt. Col. Oliver North and Richard Childress raised concerns about NRA spending and violations of NRA internal controls, and particularly about the \$2 million per month the NRA was paying in improperly-authorized fees to its outside counsel Brewer, Attorneys & Counselors (“Brewer firm”), LaPierre, with the assistance of Frazer, retaliated against them. *Id.* ¶¶ 469, 471, 480.

3. John Frazer

Frazer is the NRA's General Counsel and Secretary. *Id.* ¶ 285. He was hired by LaPierre in 2015 for the former role and appointed by the Board of the Directors that same year for the latter. *Id.* As General Counsel, Frazer reports directly to LaPierre. *Id.* As Secretary, Frazer is elected by and serves as an *ex officio* member of the Board. He also serves under EVP LaPierre in this role. *Id.* ¶ 81.

At the time of his appointments, Frazer had less than two years of legal experience actively representing clients—and no experience at all with the legal issues one would deal with as the top lawyer of a non-profit the size of the NRA, including corporate governance, corporate compliance, tax-exempt organization requirements, not-for-profit organization requirements, New York law, and the law governing boards and board procedure. *Id.* ¶ 289. In fact, the evidence will show that LaPierre hired Frazer as General Counsel without regard for his lack of qualifications or sufficient legal expertise and experience for the role. *Id.* ¶ 290.

As Secretary and General Counsel, Frazer had a duty to be aware of—and ensure compliance with—the governance requirements of the New York Nonprofit Revitalization Act of 2013, including requirements related to: (i) audit oversight by a committee of independent directors; (ii) the substance and procedures for addressing related-party transactions; and (iii) conflict of interest and whistleblower policies. *Id.* ¶ 292. But, as Plaintiff will prove, Frazer failed to make the necessary changes to board governance procedures or even to advise officers and directors of those necessary changes. *Id.* ¶ 293. For example, Frazer repeatedly failed to ensure that the NRA's related-party transactions with NRA insiders were being reviewed in accordance with New York law by NRA officers and directors. *Id.* ¶ 8. Similarly, Frazer failed to enforce satisfactory conflict-of-interest and whistleblower policies. *Id.*

In his capacity as Secretary, Frazer was also responsible for executing and certifying the NRA's annual CHAR500 report—a report to the Charities Bureau that includes the organization's IRS Form 990 and audited financial statement. *Id.* ¶ 294. The evidence will show that the NRA made, and Frazer certified, materially false and misleading statements and omissions in those filings. *Id.* ¶¶ 294-95. Plaintiff will prove that Frazer either knew, or negligently failed to learn, that the NRA's filings with the Charities Bureau were not in fact “true, correct, and complete in accordance with laws of State of New York applicable to this report,” as he certified. *Id.* ¶ 295.

4. Wilson “Woody” Phillips

Phillips is the NRA's former Treasurer and Chief Financial Officer. *Id.* ¶ 229. He served in both roles from 1992 to 2018, when he retired. *Id.* ¶¶ 6, 229. During that time, he was responsible for overseeing the NRA's financial affairs, including divisions such as Purchasing, Financial Services, and Information Services. *Id.* ¶ 229. Like Frazer, Phillips was hired by and reported directly to LaPierre. *Id.*

Plaintiff will prove that, as Treasurer, Phillips failed to adhere to and deliberately evaded the NRA's internal controls. *Id.* ¶¶ 6, 229. Phillips also misused NRA assets to enrich himself and other NRA officers and directors. *Id.* ¶ 229. For example, at LaPierre's direction, Phillips implemented a practice under which millions of dollars in entertainment and travel expenses incurred by NRA executives were billed to the NRA as disbursements by the NRA's largest vendor. *Id.* ¶ 6. This practice evaded the NRA's own internal and Board-established expense reimbursement process, as well as the IRS's requirements governing proper expense reimbursement. *Id.* Phillips and others regularly used this pass-through arrangement to conceal NRA payments for expenses that were largely personal in nature—a practice that wasted

substantial charitable resources in addition to exposing the NRA to millions of dollars of potential liability for violating IRS reporting requirements. *Id.*

Moreover, while still CFO and Treasurer of the NRA, Phillips entered into an independent “consulting” agreement with the NRA in violation of NRA policies under which the NRA promised that, following Phillips’s retirement, it would pay him \$30,000 per month for a period of five years. *Id.* ¶ 245. The evidence will show that Phillips provided no consulting services to the NRA under this agreement. *Id.* ¶ 247.

Once Phillips’s replacement, Craig Spray, was hired by the NRA, and while he was transitioning into his new roles, several members of Phillips’s staff finally came forward as NRA whistleblowers. *Id.* ¶¶ 233, 238. The evidence will show that they disclosed to the NRA Audit Committee longstanding failures by Phillips and others to comply with NRA financial policies and procedures as well as ensure adequate internal controls. *Id.* After Spray began to implement systemic changes within the NRA, he was summarily terminated by LaPierre. *Id.* ¶ 586.

ARGUMENT

I. The NRA Failed to Properly Administer Charitable Assets in Violation of EPTL § 8-1.4

Plaintiff will establish that the NRA failed to administer itself and the charitable assets entrusted to its care properly, in violation of EPTL § 8-1.4.

As a charitable not-for-profit corporation organized under the laws of this State (*see supra* 4 n.3), the NRA fits squarely within the definition of a trustee under EPTL § 8-1.4. EPTL § 8-1.4(a)(1)-(2). The NRA has argued that EPTL § 8-1.4 only applies to its administration of certain of its assets because its tax exemption is under IRC § 501(c)(4), rather than IRC § 501(c)(3). *See* NYSCEF 2561 at 2-3. This meritless argument is refuted by the plain language of the governing New York statutes. The federal tax code classification is irrelevant.

All organizations, such as the NRA, that were organized as Type B not-for-profit organizations, are deemed to be charitable under the N-PCL. N-PCL § 201(c); 13 N.Y.C.R.R. § 90.2. EPTL § 8-1.4, in turn, expressly defines the trustees to which it applies as including “any ... corporation ... holding and administering property for charitable purposes ... over which the attorney general has enforcement or supervisory powers,” and also as “any non-profit corporation organized under the laws of this state for charitable purposes.” EPTL § 8-1.4(a)(1)-(2). Since the NRA was incorporated for charitable purposes under the N-PCL, and is subject to the Attorney General’s enforcement and supervision under both the N-PCL and EPTL, the NRA clearly qualifies as a charity under the laws of this State.⁴ The NRA has acknowledged the same for years on its annual regulatory filings. It has both represented and complied with the requirements applicable to “dual filers” as a charitable non-profit under both the EPTL and Article 7-A of the Executive Law.

EPTL § 8-1.4 imposes a duty on trustees to administer charitable organizations and charitable assets properly, and gives the Attorney General power to institute appropriate proceedings to secure the proper administration of charitable assets and the corporations that hold them. EPTL § 8-1.4(m); *see, e.g., People by Underwood v. Trump*, 62 Misc. 3d 500, 511 (Sup. Ct. N.Y. Cnty. 2018); *People ex rel. Schneiderman v. Lower Esopus River Watch, Inc.* (“LERW”), 2013 WL 3014915, at *27, *29 (Sup. Ct. Ulster Cnty. Apr. 8, 2013). Indeed, as the Appellate Division held in its recent decision denying the NRA’s challenge to this Court’s ruling that Plaintiff may seek equitable relief against trustees that violate Section 8-1.4:

⁴ Moreover, the NRA’s reliance on EPTL § 8-1.4(b)(6) is misplaced because, *inter alia*, by its express terms, EPTL § 8-1.4(b) does not provide an exemption from any provision of Section 8-1.4 other than the registration and reporting requirements, and the NRA has never asserted an exemption based on that section.

Plaintiff alleged in detail that the NRA failed to properly administer charitable assets, resulting in improper administration and diminution of property held for charitable purposes; engaged in waste and diversion of charitable assets; and retaliated against whistleblowers. These allegations are sufficient to state a claim under EPTL 8-1.4, which enhances New York Attorney General's enforcement powers and authorizes it to institute proceedings against trustees who fail to properly administer charitable assets.

NRA App., 2023 WL 8632320, at *1; *see also* NYSCEF 845 (denying NRA's motion to dismiss EPTL § 8-1.4 claims seeking appointment of a monitor and other equitable relief); *LERW*, 2013 WL 3014915, at *27, *29 (issuing injunction and ordering restitution under EPTL § 8-1.4); *Abrams v. New York Found. for the Homeless*, 190 A.D.2d 578, 578 (1st Dep't 1993) (Attorney General is "clearly empowered" by EPTL § 8-1.4 "to supervise charitable corporations ... and to enjoin them from soliciting funds improperly").

In contrast to the N-PCL, which applies to all not-for-profit corporations, both charitable and noncharitable, the EPTL is focused on protecting the public's interest in safeguarding charitable assets. *See generally* EPTL § 8-1.4(n) (Section 8-1.4 should be liberally construed to ensure charitable assets are protected). The relief that Plaintiff seeks against the NRA under EPTL § 8-1.4 reflects this focus and is not punitive; rather, it is to ensure that the NRA is administered properly going forward. For this reason, and because the remedies under the EPTL can be narrowly tailored if the violations were caused innocently and more broadly if they were not, there is no scienter requirement under the EPTL, and the business judgment rule has no application.

II. The NRA Violated N-PCL § 715

Plaintiff will establish that, in violation of N-PCL § 715, the NRA entered into numerous related-party transactions in which NRA insiders had a substantial financial interest, including, without limitation, Defendants LaPierre and Phillips, as well as numerous Board members and

key persons within the NRA. Such related-party transactions were not properly reviewed and approved in advance, as required. *See* N-PCL § 715(b). Moreover, the NRA's attempts to retroactively ratify related-party transactions pursuant to N-PCL § 715(j) failed to comply with the strict requirements of that "safe harbor" provision in that it failed: (i) to properly evaluate whether, at the time they were entered into, (a) the transactions were fair, reasonable, and in the NRA's best interest, and (b) to consider alternative transactions; (ii) to document the nature of the violation and the basis for the ratification; and (iii) to put into place procedures that would ensure that the rules will be followed in the future.

III. The NRA Violated the Whistleblower Protections of N-PCL § 715-b

Plaintiff will demonstrate that the NRA violated N-PCL § 715-b, as well as its own policies, by failing to implement a legally-compliant whistleblower policy for years and by permitting retaliation against whistleblowers. The NRA also failed to supervise Frazer's incompetent performance of his responsibilities in carrying out the NRA's whistleblower policy. The evidence will show, for example, that the NRA, through Board members, officers, and employees, including LaPierre and Frazer, failed to investigate whistleblower complaints and engaged in and permitted whistleblower retaliation by freezing whistleblowers out of leadership positions, denying them committee assignments, subjecting them to disparate treatment, and failing to investigate harassment allegations raised by whistleblowers. *See People by James v. Nat'l Rifle Ass'n of Am., Inc.* ("NRA"), 74 Misc. 3d 998, 1027-28 (Sup. Ct. N.Y. Cnty. 2022); *Ferris v. Lustgarten Found.*, 189 A.D.3d 1002, 1003-04 (2d Dep't 2020).

IV. LaPierre and Phillips Each Violated N-PCL § 715 by Benefitting from Wrongful Related-Party Transactions

All the Individual Defendants breached their fiduciary duties by enabling, assisting, and/or permitting illegal related-party transactions within the NRA. Compl. ¶¶ 644-45, 649-50,

654-55, 658-59. The evidence will further show that LaPierre and Phillips each individually engaged in, or benefited from, unlawful related-party transactions with the NRA. These transactions include LaPierre's and Phillips's post-employment contracts, and LaPierre's financial interests in contracts with vendors who bestowed gifts and things of value on him and his family members. Plaintiff will demonstrate that these transactions were entered into without advance Board review and approval, as required by N-PCL § 715. As a result, the Individual Defendants should be required to account for the benefits they received from the wrongful related-party transactions and reimburse the NRA for the benefits they received and the assets the NRA lost in connection with those transactions.

The evidence will also show that the violations of N-PCL § 715 were willful and thus an amount up to double the value of the benefit received should be paid as a penalty. N-PCL § 715(f)(4).

The evidence will further show that LaPierre's violation of this section provides grounds for him to be removed as an officer and *ex officio* director of the NRA.

V. The Individual Defendants Breached Their Fiduciary Duty to the NRA in Violation of N-PCL §§ 717 and 720

Plaintiff will establish that each of the Individual Defendants violated their fiduciary duties to the NRA under N-PCL §§ 717 and 720. Under N-PCL § 720, the Attorney General may bring an action to require an officer, director, or key person to account for his or her "neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge" or for "[t]he acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties." The fiduciary duties that officers, directors, and key persons of not-for-profit corporations, such as the Individual Defendants here, must adhere to include the

duties of care, loyalty, and obedience. *LERW*, 2013 WL 3014915, at *24; Bjorklund, et al., *New York Nonprofit Law and Practice: With Tax Analysis* (“Bjorklund”) § 6.01 (2023).

To satisfy the duty of care, an officer or director must discharge his “duties in good faith and with the care than an ‘ordinarily prudent person in a like position’ would exercise ‘under similar circumstances.’” Bjorklund § 6.02[2][a] (quoting Business Corp. L. § 717(a); N-PCL § 717(a)). Ordinary prudence does not require any special skills, but does require a fiduciary to act with common sense, informed judgment, and reasonable diligence. *Id.* § 6.02[2][b].

Ordinary prudence also requires that a fiduciary exercise due diligence and inform himself of necessary facts, read information that is important to the organization, and take action to protect the organization’s interests. *Id.*

A fiduciary who knows that other fiduciaries are committing breaches of trust and not only fails to exert efforts directed towards prevention but accedes to them is legally accountable. *Matter of Rothko’s Est.*, 43 N.Y.2d 305, 320 (1977). This is true even where he claims that he was acting on the advice of counsel. *Id.*

While fiduciaries may rely on others when discharging their duty of care, they must do so “prudently, diligently, and in good faith.” Bjorklund § 6.02[5]; N-PCL § 717(b). To do so, the officer must not merely accept the conclusions of the person relied upon, but must gather relevant information, read any reports those they relied upon create, and ask questions to ensure that the reliance is reasonable. Bjorklund § 6.02[5]; *see, e.g., Hanson Trust PLC v. ML SCM Acquisition, Inc.*, 781 F.2d 264, 274-75 (2d Cir. 1986) (applying New York law and finding that allegations that did not rise to the level of gross negligence could support a claim for breach of the duty of care where directors relied on conclusory opinions and failed to ask relevant

questions). Reliance on an expert or on the advice of counsel will not excuse a fiduciary's lack of diligence. 27 Carmody-Wait 2d § 157:185.

While Defendants may assert that the business judgment rule shields them from liability for breaching their duties of care, that rule has no application where, as here, Defendants:

(i) engaged in self-dealing and other breaches of the duty of loyalty; and/or (ii) failed to “gather[] and consider[] material information” to inform themselves about the matters at issue in a real, and not pro forma or halfhearted, manner. *Hanson*, 781 F.2d at 274-75; *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 634-35 (1979). In addition, the business judgment rule has no application to the failure to act or to decisions that are made without adequate deliberation. *Hanson*, 781 F.2d at 274-75; *Bacharach v. Board of Mgrs. of Brooks-Van Horn Condominium*, 2002 WL 9688751, at *5 (Sup. Ct. N.Y. Cnty. Oct. 14, 2022); *Higgins v. New York Stock Exchange*, 10 Misc.3d 257, 283 (Sup. Ct. N.Y. Cnty. 2005); *RSL Comms. PLC v. Bildirici*, 649 F. Supp. 2d 184, 199 (S.D.N.Y. 2009), *aff'd*, 412 F. App'x 337 (2d Cir. 2011); Bjorklund § 6.02[3][a] (rule does not protect the abdication of responsibilities).

The duty of loyalty requires that a fiduciary act with undivided and unqualified loyalty towards the corporation they are a fiduciary of (whether as an officer, director, or employee) and prohibits them from acting in any manner contrary to the corporation's interests. Bjorklund § 6.03. In addition, the duty of loyalty requires a fiduciary to exert best efforts on behalf of the organization and not compete with it or profit at its expense, or place private interests in conflict with its interests. *See, e.g., LERW*, 2013 WL 3014915, at *24; *Trump*, 62 Misc. 3d at 510 (not-for-profit officers must “act with undivided loyalty toward the corporation”). In particular, this requires a person acting in a fiduciary capacity to make truthful and complete disclosures to those to whom a fiduciary duty is owed, and forbids a fiduciary from obtaining an improper

advantage at the other's expense. *See* Bjorklund §§ 6.03[d], [h][ii]. An employee may not, for example, charge expenses to his employer which were incurred for his own benefit, and may not actively divert the employer's business for his own personal benefit or the benefit of others. *See LERW*, 2013 WL 3014915, at *25 (the "use of a charity's assets by a director or officer ... for his or her personal benefit constitutes a violation of his fiduciary duties," requiring them to repay the corporation for the losses it sustained).

The duty of obedience requires a fiduciary to ensure that the mission of the organization they serve is carried out and that the organization acts in compliance with the law and with its own charter, bylaws, and other applicable rules, including its own policies and procedures. *See* Bjorklund § 6.04[2].

Plaintiff will demonstrate that the Individual Defendants did not exercise due care and did not act in good faith or in the best interests of the NRA in several respects. In particular, Plaintiff will show that Defendants LaPierre and Phillips each breached their duties of loyalty, care, and obedience to the NRA by using their powers as an officer, *ex officio* director, or key person of the NRA to obtain unauthorized compensation and benefits, to convert NRA funds for his own benefit, and to dominate, control, and direct the NRA to obtain private benefit for themselves, their family members and for other NRA insiders. The evidence will show that Frazer breached his fiduciary duties of loyalty, care, and obedience to the NRA by: (i) acceding to and assisting in such violations; (ii) putting the interests of those to whom he was indebted to for a job and compensation exceeding his qualifications, in particular LaPierre and Board members, above his duty to the NRA; and (iii) failing to act with reasonable diligence as a fiduciary.

Plaintiff will demonstrate that the Individual Defendants violated NRA bylaws, policies, and procedures and the laws of this State, and that their breaches have damaged the NRA by, among other things, causing its assets to be diverted for non-NRA purposes and be wasted, and jeopardizing the NRA's tax-exempt status and authority to conduct business.

Finally, Plaintiff will demonstrate that Frazer's and LaPierre's breaches of fiduciary duty provide cause for them to be removed, and/or barred from re-appointment or re-election, as officers and directors of the NRA.⁵ N-PCL §§ 706, 714; *NRA*, 74 Misc. 3d at 1025 (Plaintiff stated claim for removal based upon allegations of breach of fiduciary duty).

VI. The Individual Defendants Failed to Properly Administer Charitable Assets in Violation of EPTL 8-1.4

Plaintiff will prove that each of the Individual Defendants failed to administer charitable assets properly as required by EPTL § 8-1.4. *See supra* pp. 10-12. Each of the Individual Defendants is a trustee under EPTL § 8-1.4 because they held and administered "property for charitable purposes, whether pursuant to any will, trust, other instrument or agreement ... or otherwise pursuant to law." EPTL § 8-1.4(a). As NRA employees and officers, acting under the authority of the NRA's charter and New York law governing not-for-profit corporations, each Individual Defendant had authority to and made decisions concerning the NRA's operations and the use of its charitable assets. Accordingly, each of the Individual Defendants fit squarely under EPTL § 8-1.4(a)'s definition of trustee. *See* EPTL § 8-1.4(a); *see, e.g., LERW*, 2013 WL 3014915, *27 (person who managed not-for-profit corporation's affairs and administered its accounts was trustee under EPTL § 8-1.4(a), which defines the term trustee broadly); *Trump*, 62

⁵ That they were re-elected as officers or directors following allegations of such misconduct does not preclude or protect them from removal. *People v. Lyon*, 119 A.D. 361, 363 (1st Dep't 1907), *aff'd*, 189 N.Y. 544 (1907).

Misc.3d at 511 (as foundation directors, individuals were trustees under EPTL § 8-1.4); *see also* EPTL §§ 8-1.4(b) & (b)(9) (excluding officers and directors of charitable corporations from the *registration and reporting* requirements of Section 8-1.4 if the corporation they serve is registered, and expressly noting that the exclusion applies only to the registration and reporting requirements, not to any other Section 8-1.4 provision).

Plaintiff will show that each of the Individual Defendants violated EPTL § 8-1.4 by failing to follow the laws applicable to them as trustees of a New York charitable not-for-profit corporation, such as the laws concerning related-party transactions, conflicts of interest, and reporting, as well as failing to follow the NRA's own policies and procedures concerning the management of its charitable assets. *See, e.g., LERW*, 2013 WL 3014915, *27 (trustee violated EPTL by engaging in self-dealing transactions and using charitable assets for his own unreported personal benefit, as well as by failing to ensure charity complied with registration and reporting requirements). In addition, the evidence will show that the Individual Defendants violated EPTL § 8-1.4 by permitting and engaging in evasion or overrides of the NRA's internal controls and allowing the NRA's assets to be used for improper purposes, including the personal benefit of NRA insiders. *Id.*; *People by James v. Trump*, 66 Misc. 3d 200, 204 (Sup. Ct. N.Y. Cnty. 2019) (trustee breached fiduciary duty in violation of EPTL when he used charitable assets for improper purposes).

Although the EPTL § 8-14 claims against the Individual Defendants have significant overlap with the breach of fiduciary duty claims under the N-PCL, because the purpose of the EPTL is to protect the public's interest in safeguarding charitable assets, these claims are not subject to the business judgment rule or a good faith reliance defense. *See supra* p. 16; *compare, e.g.,* N-PCL § 717(b) (permitting a good faith reliance defense) *with* EPTL § 8-1.4(m)

(permitting the Attorney General to bring appropriate proceedings to ensure the proper administration of charitable organizations and their assets). The Court will have the power to consider good faith in determining the equitable remedy it crafts under the EPTL as part of the remedial phase of this action.

VII. The NRA and Frazer Made False Filings in Violation of Executive Law §§ 172-d(1) and 175(2)(d)

Plaintiff will prove that the NRA made materially false and misleading statements and omissions in the annual reports the organization filed with the Attorney General, and that Frazer, as Secretary, signed and certified such reports notwithstanding the number of falsehoods therein, of which he was or should have been aware. The annual CHAR500 reports are required to be filed with OAG's Charities Bureau under the EPTL and Article 7-A of the Executive Law, and must include copies of the organization's annual IRS Form 990 and, for organizations such as the NRA, copies of the organization's audited financial statements. The reports are used by the Charities Bureau, as well as the public, to review the activities of charities and ensure their proper administration. *See* Exec. Law §§ 172 & 175; N-PCL § 520; EPTL §§ 8-1.4(c), (f), (h) & (l); Bjorklund § 11.02[4][a] (“The purpose of such reports is to make available to the state and the public, on an ongoing basis, information about the organization's financial status, especially the relationship among charitable activities conducted, contributions, and expenses.”).

A statement in a regulatory filing is materially false if knowledge of the true statement would cause the intended recipient, here, OAG or the public donating to charities, to act differently than they would have acted if they knew the true information. Thus, information that if accurately reported would cause OAG to investigate or take other enforcement action is material, as is information that would be relevant to a person deciding whether or not to donate. *See, e.g., U.S. v. Shellef*, 732 F. Supp.2d 42, 62-63 (E.D.N.Y. 2010) (“In general, a false

statement is material if it has ‘a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.’” (quoting *Neder v. United States*, 527 U.S. 1, 16 (1999))). What is key to materiality in this situation is the effect on the recipient of the information and its actions, not the amount of money involved. *Id.* (fact that additional tax that could result was relatively minor did not affect materiality analysis).

Here, the evidence will show that the misstatements in the NRA’s annual filings were materially misleading because they contained false statements relating to the violations of law summarized above. In particular, the NRA’s annual filings contained materially misleading statements concerning, among other things, related-party transactions, undisclosed compensation and benefits received by officers and directors, diversions of charitable assets, and lack of compliance with the NRA’s conflict of interest, whistleblower, and travel and entertainment policies. The misstatements concealed violations of law that the Attorney General has the power to investigate and prosecute as well as information that the public and NRA members might consider in determining whether to trust the NRA with their membership dues and donations.

Frazer signed and certified these reports beginning in 2015 and for each year through the filings for the year 2021 on behalf of the NRA and attested to their accuracy under penalties of perjury. Frazer and the NRA are liable under Executive Law §§ 172-d(1) & 175(2)(d) for filing material false statements with the Attorney General and, as a result, should be enjoined from “soliciting or collecting funds on behalf of any charitable organization operating in this State.” Compl. ¶ 704.

CONCLUSION

For the foregoing reasons, the jury should find that Defendants are liable for the violations of the N-PCL, EPTL, and the Executive Law alleged in Plaintiff’s Second Amended Complaint and assess damages against the Individual Defendants. The Court should thereafter

address the non-monetary remedies that are just and appropriate to address Defendants’ wrongdoing.

Dated: January 6, 2024
New York, New York

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Attorney Certification Pursuant to Commercial Division Rule 17

I, Daniel Sugarman, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing reply memorandum of law contains 6,659 words, excluding the parts exempted by Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)).

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

Dated: January 6, 2024
New York, New York

/s/ Daniel Sugarman
Daniel Sugarman