

Motion Sequence 017

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

IAS Part Three
Hon. Joel M. Cohen

**AFFIRMATION OF
P. KENT CORRELL, ESQ.**

I, P. KENT CORRELL, an attorney duly admitted to practice in the courts of the State of New York, hereby affirm the following under the penalty of perjury pursuant to CPLR 2106:

1. I am the attorney of record for Defendant Wayne LaPierre in this action, and am fully familiar with the facts and circumstances in this case.

2. I make this affirmation in support of Mr. LaPierre's Motion to Dismiss.

I.

INTRODUCTION

3. The Attorney General has sued LaPierre and others challenging their compensation, and asserting a cause of action for unjust enrichment derivatively in favor of the NRA under N-PCL § 623 and common law, premised on the reasonable compensation provisions of the N-PCL §§ 202 and 515.

4. LaPierre moves to dismiss the causes of action asserted against him for lack of standing, failure to state a claim, and lack of subject matter jurisdiction under CPLR 3211(a)(2), (3) and (7), in reliance of *People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64 (2008).

II.

ALLEGATIONS OF THE COMPLAINT

A. The New York Attorney General Sues the NRA, LaPierre and Others Challenging, Among Other Things, LaPierre's Compensation, and Seeking, Inter Alia, Return of Compensation Paid by the NRA to LaPierre and Rescission of a Contract Regarding Post-Employment Services

5. On August 6, 2020, the Attorney General of the State of New York, Letitia James, purportedly on behalf of the People of New York ("Plaintiff" or "Attorney General") filed a complaint against the National Rifle Association of America ("NRA"), LaPierre, and three other individual defendants (Wilson Phillips, John Frazer and Joshua Powell), challenging, among other things, LaPierre's compensation, and seeking, inter alia, return of compensation paid by the NRA to LaPierre and rescission of a contract regarding post-employment services, which the Attorney General calls the "LaPierre Post-Employment Contract".¹

B. The Attorney General Files an Amended and Supplemental Verified Complaint, Asserting Four Causes of Action Against LaPierre, Including One Predicated on the Old, Superseded "LaPierre Post-Employment Contract"

6. On August 16, 2021, the Attorney General filed an amended and supplemental verified complaint ("Amended Complaint") in which she asserted eighteen causes of action, three (the third, seventh and eleventh) against LaPierre and one (the eighteenth) against LaPierre and the other individual defendants collectively.² The eleventh cause of action was one for

¹ See NYSCEF Doc. 1 (original complaint dated August 6, 2020).

² See NYSCEF Doc. No. 333 (Amended and Supplemental Verified Complaint dated August 16, 2021) (hereinafter cited as "Am. Compl."), ¶¶ 667-671 ("**THIRD CAUSE OF ACTION For Breach of Fiduciary Duty Under N-PCL §§ 717 and 720 and Removal Under N-PCL §§ 706(d) and 714(c) (Against Defendant LaPierre)**"), ¶¶ 685-688 ("**SEVENTH CAUSE OF ACTION For Breach of EPTL § 8-1.4 (Against Defendant LaPierre)**"), ¶¶ 701-704 ("**ELEVENTH CAUSE OF ACTION Wrongful Related-Party Transactions – N-PCL §§ 112(a)(10), 715(f) and EPTL § 8-1.9(c)(4) (Against Defendant LaPierre)**"), and ¶¶ 733-753 ("**EIGHTEENTH CAUSE OF ACTION For Unjust Enrichment Derivatively in Favor**

“wrongful-party transactions” predicated on what she described as the “LaPierre Post-Employment Contract.”³ The eighteenth was one “for unjust enrichment derivatively in favor of the NRA under N-PCL § 623 and common law”.⁴

7. In the Amended Complaint, the Attorney General alleges that the NRA is a New York not-for-profit corporation regulated by the Not-for-Profit Corporation Law (“N-PCL”).⁵

8. The Attorney General further alleges that “[f]or nearly three decades, Wayne LaPierre has served as the chief executive officer of the NRA and has exploited the organization for his financial benefit, and the benefit of a close circle of NRA staff, board members, and vendors”.⁶

9. The Attorney General alleges further that “[c]ontrary to his statutory duties of care, loyalty and obedience to the mission of the charity, LaPierre has undertaken a series of actions to consolidate his position; to exploit that position for his personal benefit and that of his family; to continue, by use of a secret ‘poison pill contract’, his employment even after removal and ensuring NRA income for life; and to intimidate, punish, and expel anyone at a senior level who raised concerns about his conduct”.⁷

of the NRA Under N-PCL § 623 and common law (Against LaPierre, Phillips, Frazer and Powell)) (emphasis in original).

³ Am. Compl. ¶¶ 702-704.

⁴ Am. Compl. ¶¶ 734-753.

⁵ *Id.* ¶ 17. The NRA is currently classified as a type B not-for-profit corporation, which, pursuant to N-PCL § 201(c), is deemed a “charitable corporation”. A copy of the NRA’s Certificate of Incorporation is attached hereto as Exhibit 1. N-PCL § 201 (c) provides: “A type B ... not-for-profit corporation formed prior to [July 1, 2014] shall be deemed a charitable corporation for all purposes under this chapter.”

⁶ Am. Compl. ¶ 2.

⁷ *Id.*

10. The Attorney General goes on to allege that “[t]he effect has been to divert millions of dollars away from the NRA’s charitable mission, imposing substantial reduction in its expenditures for core program services, including gun safety, education, training, member services and public affairs,”⁸ and that “[w]ith the assistance of Phillips, Powell and Frazer, 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, which includes in-kind benefits and reimbursements from the NRA and vendors.”⁹

11. Based on these allegations, the Attorney General seeks, *inter alia*, an order pursuant to the N-PCL, Estates Powers & Trusts Law (“EPTL”), and Executive Law: (1) “directing the Individual Defendants to account, make restitution and pay all penalties resulting from the breach of fiduciary duties and their misuse of charitable assets for their own benefit and interests”; (2) “removing LaPierre for cause as a director and as Executive Vice President of the NRA”; (3) “enjoining the Individuals from future service as an officer, director or trustee, or in any other capacity as a fiduciary of any not-for-profit or charitable organization incorporated or authorized to conduct business in the State of New York, or which solicits charitable donations in the State of New York or which holds charitable assets in New York”; (4) “rescinding related party transactions by the Defendants and directing the Individual Defendants to account for their profits and to pay the NRA up to double the value of each benefit improperly bestowed by such transaction”; and (5) “ordering restitution for the Individual Defendant [sic] to recover illegal,

⁸ *Id.*

⁹ *Id.* ¶ 9.

unauthorized or *ultra vires* compensation, reimbursements, benefits or amounts unjustly paid to the Individual Defendants.”¹⁰

12. With regard to LaPierre’s compensation, the Attorney General alleges: “Upon information and belief, ... the NRA Board set the compensation for LaPierre . . . during the period 2015 to 2019, without relying upon or properly consulting a compensation consultant, considering reliable compensation surveys or obtaining appropriate comparability data” and that “[t]he Board also did not maintain adequate documentation of the process of determining officer compensation.”¹¹ As an “example”, the Attorney General alleges that, “in or about late August 2017, the OCC [(Officer Compensation Committee)] hired an executive compensation consultant to prepare a report which would, among other things, compile competitive market compensation levels for NRA executives based on comparable positions in comparable organizations”, and that “[t]he report was to be completed for consideration by the OCC at its September 7, 2017 meeting in preparation for making 2018 officer compensation recommendations to the Board as provided in the NRA bylaws”, and that “[t]he OCC, however, made a recommendation on salary and bonus awards for LaPierre, Phillips and Frazer without awaiting a report or even comparability data from the consultant prior to making a recommendation.”¹² The Attorney General goes on to aver that “[t]he OCC also did not consider payments or expense reimbursements to or on behalf

¹⁰ *Id.* ¶ 15 (italics in original). Under the NRA bylaws, the NRA Board authorizes LaPierre’s compensation annually. *See* Bylaws, Article 5, Section 5(c) (“At the fall meeting of the Directors, the Officers Compensation Committee shall recommend to the Board, and the Board shall, at the same meeting, establish by resolution the authorized compensation for the next budget year for all elected salaried officers, who shall be the Executive Vice President, the Secretary, and the Treasurer.”). For convenience of reference, a copy of the Bylaws is attached hereto as Exhibit 2.

¹¹ *Id.* ¶ 418.

¹² *Id.* ¶ 419.

of LaPierre that were passed-through [certain vendors]”¹³, and that, “[i]n addition, the OCC did not consider or disclose the value of a post-employment contract that the NRA gave defendant LaPierre, which provides for payments in excess of \$1 million per year after LaPierre’s tenure as EVP ends due to retirement or losing a re-election bid.”¹⁴

13. The Attorney General goes on to allege that “[t]his post-employment contract was signed in 2013 by the then-NRA President, Phillips, and LaPierre (hereinafter, together with any subsequent amendments or reiterations, the “LaPierre Post-Employment Contract”)), that “[n]either the First nor Second Vice President signed the contract as required by NRA policy governing procurement’, that “[t]here is no evidence that the NRA Board or a designated committee reviewed or approved the LaPierre Post-Employment Contract”, and that “LaPierre testified that he did not know whether his post-employment contract was approved by the OCC, or whether it was disclosed to NRA membership or the NRA Board”.¹⁵

14. She further alleges that “[u]nder the terms of the LaPierre Post-Employment Contract, if LaPierre retired or lost reelection in 2014, his annual compensation from the NRA would increase”, that “[i]n each amendment to LaPierre’s Post-Employment Contract, which extended the terms and the amount of compensation, the NRA was obligated to continue to pay LaPierre for years after he lost re-election or retired and at a higher rate than his compensation as Executive Vice President”, and that “LaPierre testified that he was aware of this feature of the contract: ‘I noticed that and kind of shook my head at it when I saw it,’ LaPierre recalled, ‘I

¹³ *Id.* ¶ 434.

¹⁴ *Id.* ¶ 435. Notably, while the Attorney General, at this point in her complaint, alleges that the contract “provides” for such payments (thereby implying that the contract is still live), later in the Complaint, she alleges that the contract remained in place only until January 7, 2021, “when the Board approved a new employment agreement for LaPierre that purportedly superseded his prior agreements.” *Id.* ¶ 442.

¹⁵ *Id.* ¶ 436.

didn't ask for this contract. It's what was presented to me and I signed it and it never went into effect because I stayed on as EVP.'"¹⁶

15. The Attorney General further alleges that, "[b]y letter agreement dated March 16, 2015, the then-NRA President extended the term of the LaPierre Post-Employment Contract by two years, to 2020, with annual compensation in 2019 of \$1,150,000, and in 2020 of \$1,200,000", that "[t]he letter was signed by the then-NRA President and Phillips", and that "[t]here is no evidence that any other NRA officer, the NRA Board, the OCC, the Audit Committee or any other Board committee reviewed or approved this letter agreement."¹⁷

16. She continues: "By memorandum dated April 30, 2018, the then-NRA President advised LaPierre that the NRA 'would like to extend and modify' the LaPierre Post-Employment Contract due to, among other things, 'security concerns.' The memorandum proposes a 7-year compensation schedule paying \$1,300,000 in 2019, and \$1,500,000 for the next 6 years (2020-2025)."¹⁸

17. She goes on to allege:

The memorandum further provides that 'we continue to believe it is in the best interest of the NRA that we maintain control over your name and likeness. For that reason we seek to contract with you for an additional five years (2026-2030) as a consultant. During this five year period, the NRA will have use of your name and likeness as mutually agreed upon. You agree to make personal appearances that are reasonable in terms of advance notice and convenience of the location.' The annual compensation for these consulting services is \$1,500,000 per year for three years (2026-2028), followed by \$1,300,000 per year for two years (2029-2030). The memorandum agreement is signed by LaPierre, Phillips, the then-NRA President, and then-NRA Second Vice President. There is no evidence that any other NRA officer, the NRA Board, the OCC, the Audit Committee or any

¹⁶ *Id.* ¶ 437.

¹⁷ *Id.* ¶ 438.

¹⁸ *Id.* ¶ 439.

other Board committee reviewed or approved this 2018 extension of the memorandum agreement.¹⁹

18. The Attorney General further avers:

LaPierre testified that this contract extension and modification was [sic] prompted by a desire to retain rights over his name and likeness. ‘They wanted to tie my likeness, my name, my brand, my signature up for years given the fact that the signature raises so much money in terms of the identify with sportsmen and Second Amendment enthusiasts and all that.’ LaPierre testified that he did not have any plans to use his likeness for any other purpose after his departure from the NRA.²⁰

19. The Attorney General then contends that “[t]he unapproved contracts, and their promise of post-employment payments, violated New York law and the NRA’s bylaws and policies.”²¹

20. Importantly, admitting that the “LaPierre Post-Employment Contract” no longer remains in place, the Attorney General alleges:

*This employment agreement remained in place until January 7, 2021, when the Board approved a new employment agreement for LaPierre that purportedly superseded his prior agreements. This 2021 employment agreement marked the first time the terms of LaPierre’s employment were approved by the full Board.*²²

21. The Attorney General then offers the legal conclusion that: “Because of the failure of the OCC and the NRA Board to consider the value of all of the components of LaPierre’s and Phillips’s compensation packages, the Board’s approval of their compensation is not entitled to a presumption of reasonableness.”²³

¹⁹ *Id.* ¶ 440.

²⁰ *Id.* ¶ 441.

²¹ *Id.* ¶ 442.

²² *Id.* ¶¶ 440-442 (emphasis added).

²³ *Id.* ¶ 445.

22. Finally, the Attorney General alleges that “[f]rom 2015 to 2019, the NRA reported paying LaPierre \$12,076,437 in total compensation, an average of \$2,415,287 a year,”²⁴ and that, in its annual IRS Form 990 filings, the NRA reported base compensation of \$1,090,515 and bonus and incentive compensation of \$150,000 for 2015, base compensation of \$1,165,062 and bonus and incentive compensation of \$150,000 for 2016, base compensation of \$1,172,166 and bonus and incentive compensation of \$150,000 for 2017, base compensation of \$1,267,878 and bonus and incentive compensation of \$455,000 for 2018, and base compensation of \$1,268,790 and bonus and incentive compensation of \$455,000 for 2019.²⁵

23. The Attorney General then asserts four causes of action against LaPierre (the third, seventh, eleventh and eighteenth).

24. In the third cause of action, “For Breach of Fiduciary Duty Under N-PCL §§ 717 and 720 and Removal Under N-PCL §§ 706(d) and 714(c) (Against Defendant LaPierre),”²⁶ the Attorney General alleges: “LaPierre breached his fiduciary duties of loyalty, care and obedience to the NRA by using his powers as an officer and ex officio director of the NRA to obtain illegal compensation and benefits, to convert NRA funds for his own benefit, and to dominate, control, and direct the NRA to obtain private benefit for himself, his family members and for certain other insiders, including Defendants Phillips and Powell in contravention of NRA bylaws, policies and procedures, and applicable laws” (¶ 668); that “LaPierre’s breaches of fiduciary duty have damaged the NRA by, among other things, causing its assets to be diverted for non-NRA purposes and be wasted and by exposing the NRA to liability for failure to report taxable

²⁴ *Id.* ¶ 451.

²⁵ *Id.* ¶ 451. According to the Complaint, the balance of the “total compensation” consists of “other reportable compensation”, “retirement & other deferred compensation” and “nontaxable benefits”. *Id.*

²⁶ Am. Compl. ¶¶ 667-671.

income, failure to withhold payroll taxes, failure to report and pay excise taxes due pursuant to Section 4958 of the Internal Revenue Code, and jeopardizing the NRA's tax exempt status and authority to conduct business for failure to comply with regulatory reporting obligations (§ 669); that: "[a]ccordingly, LaPierre is liable under N-PCL § 720(a)(1) to account and pay restitution and/or damages, including returning the salary he received while breaching his fiduciary duties to the NRA, plus interest at the statutory rate of 9%, and rescission of any agreements providing for compensation following his employment as Executive Vice President of the NRA, for his conduct in the neglect and violation of his duties in the management and disposition of the NRA's charitable assets and in causing loss and waste of those assets by his breaches of fiduciary duty" (§ 670); and that "LaPierre should be removed for cause under N-PCL §§ 706 and 714 and be barred from re-election or reappointment as a director or officer of the NRA" (§ 671).²⁷

25. In the Seventh Cause of Action, "For Breach of EPTL § 8-1.4 (Against Defendant LaPierre)"²⁸, the Attorney General alleges that "Section 8-1.4(m) of the EPTL authorizes the Attorney General to institute appropriate proceedings to secure the proper administration of any not-for-profit corporation organized under the laws of this State for charitable purposes" (§ 686); that "LaPierre, in his capacity as the Executive Vice President of the NRA was a trustee pursuant to EPTL § 8-1.4 because he held and administered property for charitable purposes in the State of New York" (§ 687); and that "LaPierre failed to administer the charitable assets of the NRA entrusted to his care properly and, as a result, should be ordered to account for his breaches and to make restitution and/or pay damages, plus interest at the statutory rate of 9%, to the NRA," and, in addition, that "LaPierre should be permanently barred from serving as an officer, director

²⁷ *Id.*

²⁸ Am. Compl. ¶¶ 685-688.

or trustee of any not-for-profit or charitable organization incorporated or authorized to conduct business in the State of New York” (§ 688).²⁹

26. In the eleventh cause of action, for “Wrongful Related-Party Transactions – N-PCL §§ 112(a)(10), 715(f) and EPTL § 8-1.9(c)(4)”³⁰, the Attorney General alleges that LaPierre is liable to account for profits from the LaPierre Post Employment Contract, to pay the NRA the value of charitable assets used in the contract, to return assets lost to the NRA as a result of the contract, and to pay the NRA an amount up to double the value of the amount of each benefit improperly bestowed by the contract, and contends that LaPierre should be enjoined from serving as an officer, director or trustee, or in any similar capacity, of any not-for-profit charitable organization incorporated or authorized to conduct business or solicit charitable donations in the State of New York.³¹

27. In the eighteenth cause of action, “For Unjust Enrichment Derivatively in Favor of the NRA Under N-PCL § 623 and common law,”³² the Attorney General starts by alleging several legal conclusions: that “[u]nder N-PCL § 112(a)(7), the Attorney General may bring an action to enforce any right given under the N-PCL to members of the Corporation,”³³ that “[u]nder N-PCL § 623, the Attorney General may bring an action to enforce rights given to members of the corporation to procure a judgment in favor of the Corporation,”³⁴ and that the

²⁹ *Id.*

³⁰ *Id.* §§ 701-704.

³¹ *Id.*

³² *Id.* §§ 733-753.

³³ *Id.* § 734.

³⁴ *Id.* § 735.

Attorney General, “acting as a member pursuant to N-PCL § 623, may call upon the Board to secure the initiation of an action by the Board of the corporation on behalf of the corporation.”³⁵

28. The Attorney General goes on to allege that “[a]cting pursuant to her authority under N-PCL § 623, the Attorney General initiates this action pursuant to N-PCL § 515, on behalf of the NRA and against Defendants LaPierre, Phillips, Frazer, and Powell for the illegal conduct set forth in this Complaint, including conduct set forth in N-PCL § 720(a).”³⁶ She further alleges that “[t]his unjust enrichment claim seeks to recover excessive, unreasonable, and/or unauthorized compensation to Defendants LaPierre, Phillips, Frazer, and Powell, as well as payments or reimbursements to them made in violation of IRS requirements and NRA bylaws and policy,”³⁷ that LaPierre “received payments in excess of reasonable compensation from the NRA,”³⁸ and that LaPierre received illegal compensation by causing the NRA to pay, or permitting himself to receive, compensation or reimbursement in excess of amounts permitted by law or by the bylaws and policies of the NRA.³⁹

29. She further alleges that LaPierre “obtained a benefit that in equity and good conscience should be paid to the NRA”⁴⁰ and that, as the result of compensation, including salary, bonuses, expense payments, reimbursements and other benefits, which were paid in violation of law and NRA bylaws and policies, LaPierre was *unjustly enriched*.⁴¹

³⁵ *Id.* ¶¶ 733-753 (“Unjust Enrichment Derivatively in Favor of the NRA Under N-PCL § 623 and common law”).

³⁶ *Id.* ¶ 736.

³⁷ *Id.* ¶ 737.

³⁸ *Id.* ¶ 738.

³⁹ *Id.* ¶ 746.

⁴⁰ *Id.* ¶ 747.

⁴¹ *Id.* ¶ 748 (italics added).

30. The Attorney General then alleges that she “brings this derivative action on behalf of the NRA” against LaPierre “to recover excessive, unreasonable compensation and excess benefits.”⁴²

31. Significantly, however, she does not allege that she represents five percent of any class or member of the NRA, and does not set forth with particularity the efforts she has made, or any member of the NRA has made, to secure the initiation of such action by the Board, or the reason for not making such effort.⁴³

32. Instead, she alleges:

The Attorney General represents and avers that making demand upon the NRA Board for the initiation of an action by the Board for the benefit of the NRA would be futile, as that term is used in Section 623 of the N-PCL[,] based upon the following facts:

- a. The Board of Directors and its committees did not fully inform themselves about the challenged transactions to the extent reasonably appropriate under the circumstances. These failures to obtain information about the transactions included:
 - i. The failure to inquire into excessive and inappropriate payments to or on behalf of [LaPierre], even after notice of allegations of such payments in media reports, complaints from some NRA board members, and complaints from NRA employees;
 - ii. The failure of the Audit Committee ... to conduct or assure any system of internal controls at the NRA, and the failure of the Board to assure that a system was in place and was being reasonably complied with, including internal controls over payments and expenditures for LaPierre...; ***
 - iv. The failure of the OCC to conduct compensation reviews and determinations in the manner described in the NRA’s IRS Form 990 reports ... the failure of the Board to confirm and document that such reviews and determinations were appropriately conducted and the failure of the Board to set reasonable compensation.
- b. The Board of Directors, including allegedly ‘independent directors’ and the relevant committees of the Board, passively rubberstamped the decisions of the officer-defendants, to the detriment of the NRA. For example:

⁴² *Id.* ¶ 749.

⁴³ *See* Am. Compl., generally.

- i. Defendant LaPierre effectively dominates and controls the Board of Directors 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[;]
- ii. [T]he board members and the members of the OCC did nothing to evaluate the full extent of the compensation paid to or on behalf of [LaPierre];
- iii. The failure to conduct reviews of related party transactions specifically required by the N-PCL until September 2018, followed by an Audit Committee ‘review’ and approval of all related party transactions before them, with minimal inquiry or detail;***⁴⁴

33. Based on the foregoing, the Attorney General contends: “The NRA exceeded the scope of its authority pursuant to N-PCL § 202, and violated N-PCL § 515, by paying compensation to officers LaPierre, Phillips, Frazer and Powell, in excess of a reasonable amount.”⁴⁵

34. The Attorney General concludes:

Accordingly, this Court should require Defendants LaPierre, Phillips, Frazer and Powell to repay to the NRA all excessive, unreasonable, and/or unauthorized compensation paid to them, as well as payments or reimbursements to them made in violation of IRS requirements and the NRA’s bylaws, policy and procedures, and/or without the authorizations required by the NRA’s bylaws, policy, and procedures.⁴⁶

35. Lastly, in her “Prayer for Relief”, the Attorney General requests, among other things, judgment “[r]emoving LaPierre for cause from his position as Executive Vice President of the NRA, and permanently barring his re-election or appointment as an NRA officer or director pursuant to N-PCL §§ 706(d), 714(c), and 717 and EPTL § 8-1.4,” “[p]ermanently barring the Individual Defendants from serving as officers, directors or trustees of any not-for-

⁴⁴ *Id.* ¶ 750.

⁴⁵ *Id.* ¶ 752.

⁴⁶ *Id.* ¶ 753.

profit or charitable organization incorporated or authorized to conduct business or solicit charitable donations in the State of New York pursuant to EPTL § 8-1.4,” and “directing the Individual Defendants to account for their conduct in failing to perform their duties in managing the NRA’s charitable assets, including the return of salary received while breaching their fiduciary duties to the NRA, plus interest at the statutory rate; and to pay damages to the NRA arising from the breach of fiduciary duties pursuant to N-PCL §§ 720 and EPTL § 8-1.4.”⁴⁷

36. Finally, she requests judgment:

Enjoining, voiding or rescinding the related party transactions entered into or proposed by Defendants; directing the Individual Defendants to account for profits made from and the value of charitable assets used in those transactions, to the extent not already paid; and due to their willful and intentional conduct as alleged, directing the Individual Defendants to pay the NRA an amount up to double the value of each benefit improperly bestowed by such transactions occurring after July 1, 2014 pursuant to N-PCL §§ 112(a)(10), 715(f) and EPTL § 8-1.9(c)(4).⁴⁸

37. In the end, the 188-page Amended Complaint is remarkable for what it does not do: (a) it does not allege explicit authority under N-PCL § 515 to bring a cause of action to enforce the reasonable compensation provisions of the N-PCL; (b) it does not allege any element of knowledge of unlawfulness, or of lack of good faith, on LaPierre’s part; (c) it does not allege occurrence of the condition precedent to performance of the LaPierre Post-Employment Contract i.e., termination of LaPierre’s employment with the NRA; (d) it does not allege that LaPierre ever received any payment under the LaPierre Post-Employment Contract; (e) it does not allege that the Attorney General represents five percent or more of any class of members of the NRA; (f) it does not set forth with particularity the efforts of the Attorney General to secure the initiation of action by the Board or the reason for not making such effort; and (g) it does not allege that LaPierre’s compensation was not commensurate with services performed (which N-

⁴⁷ *Id.*, Prayer for Relief ¶¶ D, F, G.

⁴⁸ *Id.* ¶ H.

PCL § 202(a)(12) says is the standard for fixing the reasonable compensation of officers, employees and other agents of a New York not-for-profit corporation).

III.

A FEDERAL JUDGE FINDS THAT THE NRA HAS MADE PROGRESS IN ITS COURSE CORRECTION

38. After a 12-day trial held in the matter of *In re: National Rifle Association of America and Sea Girt LLC*, Case No. 21-30085 (HDH) (U.S. Bankruptcy Court, N.D. Tex. May 11, 2021), Judge Harlan DeWayne Hale, of the United States Bankruptcy Court for the Northern District of Texas, Dallas Division, found that the NRA has made progress with its course correction, stating:

Both Ms. Rowling and Mr. Erstling, the NRA's Director of Budget and Financial Analysis, testified that the concerns they expressed in the 2017 Whistleblower Memo are no longer concerns. Mr. Frazer testified regarding the compliance training program that the NRA now has for employees. Mr. Spray testified credibly that the change that has occurred within the NRA over the past few years could not have occurred without the active support of Mr. LaPierre. It is also an encouraging fact that Ms. Rowling has risen in the ranks of the NRA to become the acting chief financial officer, both because of her former status as a whistleblower and because of the Court's impression of her from her testimony as a champion of compliance. In short, the testimony of Ms. Rowling and several others suggests that the NRA now understands the importance of compliance. Outside of bankruptcy, the NRA can pay its creditors, continue to fulfill its mission, continue to improve its governance and internal controls, contest dissolution in the NYAG Enforcement Action, and pursue the legal steps necessary to leave New York"⁴⁹

⁴⁹ See *In re: National Rifle Association of America and Sea Girt LLC*, Case No. 21-30085 (HDH) (U.S. Bankruptcy Court, N.D. Tex. May 11, 2021) (Hale, C.J.) (Order Granting Motions to Dismiss at 35) (emphasis added). A copy of the Order is attached hereto as Exhibit 3.

IV.

THIS COURT RULES THAT TWO NRA MEMBERS LACK STANDING TO SUE

39. On June 17, 2021, two members of the NRA filed a motion to intervene in this action (NYSCEF Doc. No. 243).

40. On July 9, 2021, the NRA filed opposition, in which LaPierre and Frazer joined, arguing that the proposed intervenors lacked standing to assert claims against LaPierre, Frazer and other individuals derivatively under N-PCL § 623 (NYSCEF Doc. No. 300).

41. On September 9, 2021, this Court heard oral argument on the motion.⁵⁰

42. During the argument, counsel for the Attorney General, referring to counsel for the NRA stated: “For all of the reasons that Mr. Geisler [(i.e., NRA counsel)] has stated regarding the five-percent membership requirement for derivative standing under N-PCL 623, we believe that that is dispositive of whether or not the Intervenors here can represent the NRA derivatively with respect to any counterclaims that they propose to bring against the Attorney General.”⁵¹

43. At the conclusion of the argument, the Court denied the motion, stating:

Moving to the claims against the individuals, which are derivative claims. As a threshold matter – and this is going to cut across many different fronts here – these Proposed Intervenors lack standing.

Section 623(a) of the Not-For-Profit Corporation Law provides that ‘an action may be brought in the right of a domestic or foreign corporation to procure a judgment in its favor by five percent or more of any class of members,’ a requirement clearly not met by the two Proposed Intervenors here.

[T]he point of these provisions is to ensure that the entity is not forced to engage in litigation and including the management and distraction and expense at the

⁵⁰ See NYSCEF Doc. No. 340 (Decision and Order on Motion) (citing Transcript of Oral Argument on Motion Seq. No. 011). A copy of the Order and a copy of the Transcript are attached hereto as Exhibit 4.

⁵¹ Exhibit 4 (Transcript) at 30:2-8.

instance of [a] small number of members, however well[-]intentioned they may be and who may or may not reflect the views of other members.

*** I'm being asked to enforce a clear statutory prerequisite to bringing those claims. And there is, obviously, no fact dispute as to whether these Intervenor constitute five percent of the NRA's membership. It would be inefficient, to say the least, to permit intervention only to immediately dismiss the claims on a motion to dismiss. Nor is there any cited authority even allowing the Court to grant intervention when there is plainly no standing to bring the underlying claims.

In addition, as also discussed in the argument, the Intervenor haven't complied with the demand requirement under the Not-For-Profit Corporation Law[,] which states that in a derivative action, 'the complaint shall set forth with particularity the efforts of the plaintiff or plaintiffs to secure the initiation of such action by the Board or the reason for not making such effort.'

The Intervenor argue that the demand would have been futile because it would require the Board to scrutinize their own misconduct. But as the NRA points out, the Board consists of 76 members. There's a Special Litigation Committee, and the Proposed Intervenor have not alleged specific facts with particularity showing that a majority of the Board is complicit in any alleged wrongdoing. Because the claim of demand futility lacks specificity, they have failed to satisfy the requirements of Section 623 and, therefore, lack standing to bring derivative claims.⁵²

V.

THE INSTANT MOTION

44. LaPierre seeks an order and judgment pursuant to CPLR 3211(a) (2), (3) and (7) dismissing the causes of action asserted against him in the Amended and Supplemental Verified Complaint dated August 16, 2021, on the ground that the Attorney General lacks legal capacity, standing or authority to maintain the causes of action, the causes of action fail to state a claim and the Court lacks jurisdiction of the subject matter of the causes of action, because:

(a) they are devoid of any fault-based elements and, as such, are fundamentally inconsistent with the N-PCL, and "would impose a type of strict liability," in contravention of

⁵² *Id.* at 36:12 and 36:15.

the Court of Appeals' controlling decision in *People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64 (2008)⁵³; and

(b) to the extent that they are asserted derivatively, they fail to satisfy the clear statutory prerequisites of N-PCL § 623, *i.e.*, 5% representation and demand/futility.

VI.

CONCLUSION

45. LaPierre respectfully submits that his motion to dismiss should be granted.

Executed this 15th day of September 2021 in New York, New York.

/s/ P. Kent Correll

P. Kent Correll

⁵³ For convenience of reference, a copy of the complaint in *Grasso* is attached hereto as Exhibit 5.

CERTIFICATE OF COMPLIANCE

I, P. Kent Correll, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Affirmation of P. Kent Correll, Esq. 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 Affirmation contains 5,653 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 affirmation.

Dated: September 15, 2021
New York, New York

/s/ P. Kent Correll

P. Kent Correll