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,	:	Index No. 451625/2020
Plaintiff,	:	
v.	:	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JOHN FRAZER'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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Defendant John Frazer ("Frazer"), by and through his attorneys Gage Spencer & Fleming LLP, respectfully submits this memorandum of law in support of his motion to dismiss the Amended Complaint filed by Plaintiff Attorney General of the State of New York ("NYAG") pursuant to CPLR 3211(a)(7). For the reasons which follow, Plaintiff's Amended Complaint against Frazer should be dismissed.

Preliminary Statement

On August 16, 2021, the NYAG filed an amended complaint (the "Amended Complaint"). The Amended Complaint reflects information gathered from its fifteen-month investigation, interviews with tens if not more than a hundred witnesses, reviews of voluminous documents, and even a twelve-day hearing addressing these very issues in the United States Bankruptcy Court. The Amended Complaint asserts four causes of action against Frazer, three purporting to allege violations of the New York State statutory law governing charities and their executives, and one alleging a violation of the common law.

The common law claim – the Eighteenth Cause of Action – is unavailable to the NYAG under New York law. *See People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64, 70 (2008). In *Grasso*, as here, the NYAG sought return of compensation as excessive and unreasonable under the common law, which did not require that the corporate officer act with fault through knowledge of the compensation's unlawfulness. Aware that its oversight authority over New York charities has been codified by the Legislature in the carefully constructed Not-For-Profit law – a statutory scheme which does not permit the NYAG to bring non-statutory claims lacking such built-in, fault-based protections – the NYAG here has styled the Eighteenth Cause of Action as a derivative claim pursuant to which it purports to proceed in the name of the NRA against Frazer. Thus, to circumvent restrictions placed on it by the Legislature, the NYAG adopts a procedural mechanism

to try to accomplish what it is prohibited from doing itself. *See Grasso*, 11 N.Y. 3d at 69 (NYAG is prohibited from bringing common law claims even under its parens patriae authority to act in the public interest).

In its zeal, the NYAG has also failed to adhere to the threshold requirements of the procedural mechanism it attempts to use. Governed by N-PCL § 623, purported derivative claims need to be brought on behalf of at least five percent of the NRA's members, a dispositive requirement which the NYAG makes no claim to have satisfied. *See* N-PCL § 623(a). Neither has the NYAG issued any demand to the NRA Board of Directors that the NRA bring this claim. Instead, it claims without evidence that such a demand is futile. This further failure violates N-PCL § 623(c) which requires that futility be established with particularity. Accordingly, the NYAG has failed to establish standing to assert the claim.

In short, the NYAG has disregarded the statutory prerequisites necessary to enable it to use the procedural mechanism of a derivative action, which it uses here as an end run around the Court of Appeals' unanimous determination that the prosecution of non-statutory claims violates the limits on its power imposed by the Legislature under New York's Not-For-Profit Law.

Additionally, the Seventeenth Cause of Action, alleging falsity in connection with the NRA's annual CHAR 500 filings fails to satisfy the heightened pleading standard of CPLR 3016(b) for such claims as the claim lacks the assertion of any fact establishing Frazer's knowledge or fault for such alleged falsities. The Fourth and Eighth Causes of Action, too, lack the requisite specificity and violate the rule of *Grasso*.

Plaintiff's Amended Complaint should be dismissed.

Argument

I. The Eighteenth Cause of Action Asserts a Common Law Claim Which Violates the Legislature's Limits on the NYAG's Regulatory Power

The plain language of the N-PCL "reveals a legislative policy decision to provide officers and directors of not-for-profit corporations with the 'business judgment' protections afforded their for-profit counterparts." *Grasso*, 11 N.Y.3d 64, 71 (2008); *see also* N-PCL § 717 (officers "shall have no liability" where they perform their duties in good faith and in reliance upon others whom they believe to be competent and to merit confidence). New York courts have repeatedly held that the actions and decisions of non-profit board members and officers are protected by the business judgment rule. *Consumers Union of U.S., Inc., v. State of New York*, 5 N.Y.3d 327, 360 (2005) (affirming dismissal of claim against not-for-profit board of directors for breach of fiduciary duty, holding that claims were barred by the business judgment rule); *People v. Lawrence*, 74 A.D.3d 1705, 1707 (4th Dept 2010) (officers of a not-for-profit corporation are protected by the business judgment rule under N-PCL § 717).

The NYAG's Eighteenth Cause of Action for unjust enrichment is outside of the statutory scheme which codifies the parameters of the NYAG's authority to oversee charitable organizations. Citing to N-PCL §§ 202 and 515, the Eighteenth Cause of Action asks the Court to require Frazer to repay compensation paid to him for his work because it was "unreasonable" and "excessive." *See* Amended Complaint, ¶¶ 749, 752-753 *see also* N-PCL § 202(12) (a corporation shall have power to elect or appoint officers and "fix their reasonable compensation"); § 515(b) ("[a] corporation may pay compensation in a reasonable amount to members, directors, or officers, for services rendered . . . .").[1] This claim is similar, if not identical, to the core issue in *Grasso*

[1] As asserted in the Amended Complaint, and as pertinent to Frazer on this motion, Frazer was elected by the Board of Directors to serve as Secretary of the NRA in 2015, after being

where the NYAG sought to undo compensation authorized and paid to the former Chairman of the New York Stock Exchange. There, the *Grasso* Court prohibited the claim on the ground that, as a non-statutory claim, it exceeded the confines of the governing statutory scheme. Here, not deterred by being so prohibited, the NYAG ignores the Legislature's clear intent by again challenging officer compensation, this time by seeking to proceed derivatively in the shoes of the corporation to assert a non-fault-based claim for unjust enrichment.

In *Grasso*, the Court of Appeals held that the NYAG exceeded its authority in asserting non-statutory causes of action for constructive trust and payment had and received based on the theory of unjust enrichment, which were sought alongside the statutory causes of action authorized under the N-PCL. It determined the Attorney General's non-statutory causes of action were "devoid of any fault-based elements and, as such, [were] fundamentally inconsistent with the N-PCL." Such claims "lack any element of knowledge or bad faith" and accordingly supersede the requirements of the N-PCL and the business judgment rule, imposing "a type of strict liability." *Grasso*, 11 N.Y.3d 64, 71 (2008). The Court noted that the N-PCL's plain language "reveals a legislative policy decision to provide officers and directors of not-for-profit corporations with the 'business judgment' protections afforded their for-profit counterparts." *Id*. In sum, the *Grasso* Court unanimously prohibited the Attorney General from asserting such non-statutory causes of action as an impermissible attempt to circumvent the fault-based scheme established by the Legislature in the N-PCL. *Id.* at 69.

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hired as its General Counsel that same year. Amended Complaint, ¶ 286. Under the NRA Bylaws, the NRA Board authorized Frazer's compensation annually. *Id.*, ¶ 416. During the years at issue in this action, Frazer was compensated as authorized in amounts set forth in the Amended Complaint, and also participated in retirement plans and nontaxable benefit programs available to all full-time NRA employees. *See id.*, ¶ 456.

In short, the NYAG's inclusion of the Eighteenth Cause of Action exceeds the limits imposed on it by the Legislature's statutory scheme. Not only does the NYAG ground its common law claim on what it asserts were erroneous decisions by the Board of Directors and its authorized committees – decisions which lie at the heart of the business judgment rule central to the N-PCL – but the claim contains no assertion, as it must, that Frazer received the allegedly "excessive" and "unreasonable" compensation with knowledge that it was unlawful. *See People v. Grasso,* 42 A.D.3d 126, 128 (1st Dept 2007) (to prevail on a claim to set aside compensation payments, "the Attorney General is required to prove that the payments were 'unlawful' (i.e., not 'reasonable' compensation 'commensurate with services performed') and that [defendant] 'knew of [their] unlawfulness'"), *aff'd*, 11 N.Y.3d 64 (2008); Amended Complaint, ¶¶ 413-429 (lacking any assertion that, or explanation why, the compensation was unreasonable, and similarly bereft of even a single allegation that Frazer knew it). Indeed, that Frazer had cause justifiably to rely on the reasonableness of his compensation in performing his work is accentuated by the fact that Frazer was, by requirement of the bylaws, specifically excluded from compensation decisions made by the Board and its authorized committee. *See* Affirmation of William B. Fleming dated September 15, 2021 ("Fleming Aff."), Ex. 1 Art. V, Section 5(c) at 22-23 ('[a]ll deliberations by the Board of Directors concerning such [officer] compensation shall be held in an executive session, at which none of the officers whose compensation is to be or is being established may attend . . . .").[2] Nothing in the NYAG's Amended Complaint establishes otherwise.

[2] The exhibits used on this motion are documents Plaintiff has incorporated by its reference to them in the Amended Complaint or to which the Court can take judicial notice. On a motion to dismiss pursuant to CPLR 3211(a)(7), "it is undisputed that the Court . . . may consider documents referred to in a Complaint" (*Deer Consumer Prods., Inc. v. Little,* 32 Misc. 3d 1243(A), 938 N.Y.S.2d 226, 226 (Sup. Ct. 2011) as well as "those facts alleged in the complaint, documents attached as an exhibit therefor or incorporated by reference and documents that are integral to the plaintiff's claims, even if not explicitly incorporated by reference." *Lore v. N.Y. Racing Ass'n Inc.,*

II. The NYAG's Assertion of the Eighteenth Cause of Action As An Attempted Derivative Claim Fails The Requirements of N-PCL § 623

In the face of *Grasso's* clear prohibition, the NYAG has elected to try an end run by asserting the Eighteenth Cause of Action as a derivative claim and proceeding in the shoes of the NRA itself. This effort, too, must fail, as the NYAG has not met the standing requirements to proceed derivatively.

A. The NYAG Makes No Allegation That It Is Acting On Behalf of Five Percent or More of Any Class of NRA Members

N-PCL § 623(a) provides, in relevant part, that with respect to a not-for-profit corporation, "[a]n 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." *See* N-PCL § 623(a). Thus, as recently addressed with respect to the attempt by would-be intervenors, a litigant "lack[s] standing to prosecute [a] claim" when he does "not represent 5% or more of any class of members of [the corporation]." *Bernbach v. Bonnie Briar Country Club*, 144 A.D.2d 610, 610 (2d Dept 1988); *see also Schaefer v. Chautauqua Escapes Association, Inc.*, 158 A.D.3d 1186, 1187 (4th Dept 2018); *Pall v. McKenzie Homeowners' Ass'n, Inc.*, 121 A.D.3d 1446, 1447 (3d Dept 2014); *Tae Hwa Yoon v. New York Hahn Wolee Church, Inc.*, 56 A.D.3d 752, 755 (2d Dept 2008); *Segal v. Powers*, 687 N.Y.S.2d 589, 180 Misc.2d 57, 59-60 (Sup. Ct. N.Y. Cnty. 1999) (plaintiff's "failure to name in his pleading the persons who he asserts constitute 5% of the members of the Club warrants dismissal of the action since [plaintiff] has failed to adequately allege that he represents a sufficient number of members" to give him standing); *Romain v. Seabrook*, 2017 U.S.

12 Misc. 3d 1159(A), 819 N.Y.S.2d 210, 210 (Sup. Ct. 2006) (internal quotation omitted); 6A CARMODY-WAIT 2D, CYCLOPEDIA OF NEW YORK PRACTICE WITH FORMS, § 38:161 (2011) ("on a motion to dismiss the complaint for failure to state a cause of action, the court is not limited to a consideration of the pleading itself, but may consider extrinsic matters submitted by the parties in disposing of the motion").

Dist. LEXIS 207056, at *17 (S.D.N.Y 2017) (Plaintiff members of labor union "lack standing to sue derivatively . . . [because] they have failed to adequately plead that they represent 'five percent or more' of [the union's] membership, as required by [N-PCL] Section 623(a)"). This threshold is required no matter the size of the membership of the nonprofit organization. *See Romain*, 2017 LEXIS 207056 at *21. The failure to satisfy this standing requirement is "dispositive," as the NYAG recently conceded. *See* Fleming Aff., Ex. 2 at 30 ("[f]or all of the reasons that [the NRA] 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").

Here, the NYAG does not even allege that it meets the five percent threshold under N-PCL § 623(a). This warrants dismissing the NYAG's derivative claim. *See, e.g., Segal,* 180 Misc.2d at 59-60 (dismissal on standing grounds); *Melucci v. Sackman,* 37 Misc. 3d 1212(A), 2012 NY Slip Op 52002(U), *12 (Sup. Ct., Kings Cnty. 2012) (dismissing derivative claim for lack of standing – and denying leave to replead – where the complaint, *inter alia*, failed to plead support of five percent of the membership). In sum, the NYAG has failed to establish its standing to bring this derivative claim.

B. The NYAG's Claims of Futility Are Not Supported

Additionally, the NYAG has made no demand on the NRA Board of Directors. Rather, the NYAG has invoked futility. It asserts 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" because the Board and its authorized committees "did not fully inform themselves" about certain transactions, and because it "passively rubberstamped the decisions of the officer-defendants." Amended

Complaint, ¶ 750(a), (b). A claim of futility, however, requires particularization. *See* N-PCL § 623(c) (requiring that a complaint "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").

In its attempt to support its futility assertion, the Eighteenth Cause of Action cites not to facts but rather to the NYAG's own allegations in the Amended Complaint as the reason the Board cannot be expected to initiate an action for the benefit of the Association. Amended Complaint, ¶ 750(a), (b). For example, the NYAG contends the Board would not consider a demand in good faith because it granted "excessive" and "unreasonable" compensation to Frazer which should be disgorged by him, the very charge of the Eighteenth Cause of Action. The NYAG sees this futility in the Board's purported failures (i) to address items of concern raised by whistleblowers (notwithstanding sworn testimony from one of the whistleblowers – who has since been elevated to the NRA's Treasurer and CFO – that each of the items of concern was addressed and resolved to her full satisfaction),[3] (ii) to evaluate related party transactions brought to its

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[3] In July 2018, the Board's Audit Committee (and Frazer) were provided by internal NRA whistleblowers with an oral presentation and written list of their top concerns, principally relating to the Association's adherence to financial internal controls. *Id*., ¶¶ 505-506. Following that presentation, with Frazer's assistance, the NRA addressed and resolved each concern, as confirmed by one of the whistleblowers, Sonya Rowling who was elevated to and now serves as the NRA's Treasurer and Chief Financial Officer, in her recent testimony in the bankruptcy process. Crediting this testimony, as well as the testimony of another whistleblower Michael Erstling, the United States Bankruptcy Court found that:

> [b]oth 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. [Former NRA CFO] 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

attention by Frazer,[4] and (iii) to require an audit or outside review of the Brewer law firm's invoices for legal work conducted on behalf of the NRA which, as the Amended Complaint acknowledges, until the filing of the instant action, were being reviewed and approved by Frazer and the General Counsel's office.[5] *See* Amended Complaint, ¶¶ 733-753 (Eighteenth Cause of Action). This *ipse dixit* reasoning is insufficient. Permitting the NYAG's own allegations to serve as a basis to establish futility fails the particularity requirement of N-PCL § 623(c); even more dangerously, though, it would open wide the doors to the NYAG to proceed derivatively in the future without meaningful compliance with the statutory thresholds.

> 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.

See Fleming Aff., Ex. 3 (Order Granting Motions to Dismiss in *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.) at 35); *see also id.*, Ex. 3 at 4-6 (addressing remedial actions taken by NRA in response to the whistleblowers).

[4] To the contrary, Frazer assisted the NRA Board's Audit Committee to evaluate related party transactions by issuing and collecting financial disclosure questionnaires from officers, directors, and key employees in compliance with the requirements of N-PCL 715. *See, e.g.*, Amended Complaint, ¶ 527. During the years in question, the Audit Committee strengthened the processes for addressing related party transactions, and voted to approve, reject, or ratify current or legacy related party transactions (i.e., those pre-dating Frazer's hiring) based on a host of considerations including whether the activities were of the type paradigmatically associated with the NRA's core mission. *See, e.g., id.*, ¶ 535.

[5] Frazer and the General Counsel's office reviewed and approved legal invoices submitted by the Brewer firm, with the sole exception of those invoices related to the instant NYAG action and substantially related matters in other venues, as to which Frazer, as a party to this case, deemed it appropriate to recuse himself as the invoices would describe privileged activities undertaken in defense of the NRA. Amended Complaint, ¶ 475.

In any event, as the extensive record indicates and the NYAG's amended pleading quietly acknowledges, the facts establish little basis to conclude a demand would have been futile. To the contrary, the NRA Board of Directors has authorized a "course correction" since 2018, well prior to the filing of the Amended Complaint. *See* Fleming Aff., Ex. 3 at 3-6, 35. Since that time, the Board of Directors has authorized investigations, the results of which have notably resulted in, among other things, the examination of related party transactions and vendor contracts (*id*., Ex. 3 at 5), the authorization of litigation against a vendor with which the NRA had had a long-standing relationship to recover sums inappropriately charged to the NRA (*id*., Ex. 3 at 5-6; Amended Complaint, ¶ 319), terminations of personnel and compensation arrangements where deemed to have transgressed internal policies (*see, e.g.*, Amended Complaint, ¶ 265), and recovery of expenses where investigation concluded the purpose to be not sufficiently corporate (*see* Complaint, ¶¶ 164, 602 (referencing an alleged excess benefit of $299,778.78 to Mr. LaPierre which, according to Schedule L of the NRA's 2019 Form 990, Mr. Lapierre repaid to the NRA in its entirety).

In addition, the Attorney General cannot establish that a majority of the Board is conflicted with self-interest, or is controlled by self-interested persons, concerning the transactions at issue. Among the extant protections, director nominations occur through a nominating committee – which receives suggestions for candidates from innumerable sources including articles in NRA magazines calling for members to submit names for the committee's consideration – or by petition, or both, after which approximately one-half of the NRA's five million members are eligible to vote for directors of their preference. *See* NYSCEF Doc. No. 229 (Verified Answer of Defendant John Frazer) at 94-95 (Ninth Affirmative Defense). As addressed in the recent motion to intervene before the Court, a claim of futility is undercut by the facts present here,

namely (i) that the NRA's Board consists of 76 members, (ii) no member of the Board is a defendant in this Action, (iii) the NYAG does not identify any Board member who was allegedly "complicit" in any alleged wrongdoing, and (iv) cannot name 39 such members to constitute a majority of the Board. The NYAG's allegations that the Board is hopelessly corrupted or unreliable to address a demand in good faith are conclusory and, therefore, insufficient to establish futility. *See, e.g.,* NYSCEF Doc. No. 340 (citing to September 9, 2021 Transcript annexed to Fleming Aff., Ex. 2 at 52, 55); *Segal*, 180 Misc.2d at 60. In these circumstances, the NYAG's assertion that a demand on the NRA Board of Directors would have been futile lacks substance and particulars, and is not well founded. *See Tomczak v. Trepel*, 283 A.D.2d 229, 229-30 (1st Dept 2001); *Gemmel v. Immelt*, 2019 N.Y. Slip Op. 32005(U), *8 (Sup. Ct., N.Y. County 2019) (Masley, J.)(due to the existence of "independent, outside directors elected by GE's shareholders to their positions, plaintiffs could not have reasonably concluded that the Board would have rejected a pre-litigation demand"); *Segal*, 180 Misc.2d at 60; *BPS Lot 3, LLC v. Nw. Bay Partners, Ltd*., 2018 N.Y. Slip Op. 51575(U), * 4, 61 Misc. 3d 1219(A), (Sup. Ct., Warren Cnty.) (an assertion of futility must allege that "the directors are incapable of making an impartial decision as to whether to bring suit"); *Melucci*, 37 Misc.3d 1212(A), at *10 (dismissing derivative claim for lack of standing – and denying leave to replead – where the Amended Complaint failed to plead (i) support of five percent of the membership, (ii) demand or futility of demand, (iii) acts of individual defendants, or (iv) specific facts, relying instead on speculative assertions).

Accordingly, the NYAG has failed to meet the threshold requirement of N-PCL § 623, and lacks standing to prosecute a derivative claim on behalf of the NRA. Lacking standing, the Eighteenth Cause of Action must be dismissed.

III. The Amended Complaint's Seventeenth Cause of Action Fails the Heightened Pleading Standards of CPLR 3016(b)

The Seventeenth Cause of Action addresses Frazer's purportedly "negligent" certification of the NRA's annual CHAR 500 filings as true, correct, and complete to the best of the signer's knowledge and belief. Amended Complaint, ¶¶ 295-96. New York State requires that charities file a public report called a CHAR 500, which is a NYS Annual Filing for Charitable Organizations. Id., ¶¶ 295, 563; Fleming Aff., Ex. 4. CHAR 500 reports require two signatures: from the President or Authorized Officer, and from the Chief Financial Officer or Treasurer. *See id.*, ¶ 564. The signatures certify under penalties of perjury that the signatories have "reviewed this report, including all attachments, and to the best of [their] knowledge and belief, they are true, correct and complete in accordance with the laws of the State of New York applicable to this report." *Id.*, ¶ 295; Fleming Aff., Ex. 4 at 1. As pertains to Frazer, the NYAG asserts that the CHAR 500 filings he signed contained materially false and misleading statements and omissions as to which it has only been able to allege he "either knew or negligently failed to learn" were not true, correct, and complete. Amended Complaint, ¶ 296.

Despite sounding in negligence, the NYAG's alleges falsity in connection with the CHAR 500 filings which subjects the Seventeenth Cause of Action addressing these allegations to the CPLR's heightened pleading standard. *See* CPLR 3016(b). Entitled "Particularity in specific actions," CPLR 3016(b) elevates above mere notice the standards for pleading claims based on allegations of fraud, misrepresentation, or breach of trust, requiring pleadings of such claims to contain detail as to the "circumstances constituting the wrong." *Id.* The provision requiring detailed particularity in the pleading uses the mandatory "shall" and applies to claims of falsity, as here. *See Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 492 n.3 (2008) ("[w]e undoubtedly

agree with the dissent's observation that section 3016(b) 'must require more than the 'notice pleading' applicable in other cases" (quoting *id*. at 494 (Smith, J., dissenting)). The Amended Complaint fails to identify or plead particular facts showing either that Frazer had knowledge of any purported falsity, or that he did not have good reason to believe they were true, correct, and complete.

Not only does the Amended Complaint lack the requisite particularity, the Seventeenth Cause of Action disregards Frazer's statutorily protected right to rely on professionals and/or other competent individuals. *See, e.g.*, N-PCL § 717(b) (officers may rely, in discharging their duties, on other "officers or employees" believed to be reliable and competent, "counsel, public accountants" or other professionals or experts, or "a committee of the board upon which they do not serve" believed to merit confidence). Here, the NYAG describes that each and every alleged misstatement or omission it attributes to the CHAR 500 filings is found in either the NRA's IRS Form 990 or its audited financial statements. *See* Amended Complaint, ¶ 568 (identifying the source of the alleged false statements or omissions). Both documents are required by New York State to be annexed as exhibits to the CHAR 500 reports *(see id.*, ¶ 295; Fleming Aff., Ex. 5, at 2 (Checklist of Schedules and Attachments)), the Form 990s and financial statements were principally created by the NRA Treasurer's Office with the assistance of outside tax accountants, tax lawyers, or audited by independent third-party auditors. The 990s for the years in question were also signed by the NRA's CFO and Treasurer – Mr. Wilson Phillips for 2015 and 2016, and Mr. Craig Spray for 2017 and 2018. Amended Complaint, ¶¶ 564-65. Mr. Frazer never signed or certified a Form 990.

The Amended Complaint's pleaded facts are too general to give rise to a fair inference of Frazer's knowledge or fraudulent intent about the purportedly false Form 990s. *See,*

e.g., National Westminster Bank USA v. Weksel, 124 A.D.2d 144, 148-149, 511 N.Y.S.2d 626, 629-630 (1st Dept 1987) (conclusory allegations that a defendant "knew or should have known" about alleged fraudulent conduct fails under CPLR 3016(b)); *Raytheon Co. v. Foster Wheeler Energy Corp*., 2004 N.Y. Slip Op. 30216(U), *13-15 (Sup Ct, N.Y. County 2004) (same, citing cases). Accordingly, the Seventeenth Cause of Action depends on Frazer having signed the CHAR 500 filings to which the 990s and audited financial statements were attached. Yet, many of these forms or their attachments were also signed by Mr. Spray, the NRA's Treasurer and Chief Financial Officer. *See* Amended Complaint, ¶ 568. Mr. Spray, who the Bankruptcy Court found was "an officer everyone seemed to hold in high regard for his talent and integrity" (Fleming Aff., Ex. 3 at 34; *see also* Amended Complaint, ¶ 644), was precisely the sort of reliable and competent officer contemplated by N-PCL § 717(b) in whom Frazer would be justified in placing his confidence and reliance with respect to tax and financial statement documents. With Frazer entitled to rely on Mr. Spray and his similarly reliable and competent staff, it is incumbent at a minimum for the NYAG to plead facts sufficient to support a conclusion that Mr. Frazer had such knowledge of alleged falsities or inaccuracies.

The First Department recognizes CPLR 3016(b)'s heightened pleading requirement, and applies it to the NYAG including where claims were based, as here, on Executive Law § 63(12). *See, e.g., People v. Katz*, 84 A.D.2d 381, 384-85, 446 N.Y.S.2d 307, 310 (1st Dept 1982) ("Since many of the eighteen causes [including claims under Section 353 of the General Business Law and Executive Law 63(12)] are framed in fraud or sound in fraud, the circumstances constituting the wrong should have been stated in detail (CPLR [section] 3016(b))."); *Apfelberg v. E. 56th Plaza, Inc.*, 78 A.D.2d 606, 607, 432 N.Y.S.2d 176, 178 (1st Dept. 1980) (stating that the Martin Act claims at issue were deficient because they failed to set forth the detail required by

CPLR 3016(b)); *People v. H&R Block, Inc.*, 2007 N.Y. Slip Op. 51562(U), ¶ 5, 16 Misc. 3d 1124(A), 1124A, 847 N.Y.S.2d 903, 903 (Sup. Ct.)(holding that a complaint alleging violations of EL section 63(12) was subject to the pleading requirements of CPLR 3016(b) "[b]ecause the underlying facts of the complaint here are based on fraud").

The NYAG's Amended Complaint, and the Seventeenth Cause of Action specifically, lacks the required particularity. The minimum required fairness is that law enforcement agencies like the NYAG be put to its burden of ensuring its pleading is grounded in specific facts that a defendant has acted with the requisite fraudulent intent and knowledge.

IV. Plaintiff's Fourth and Eighth Causes of Action Against Frazer Are Insufficiently Pleaded and Should Be Dismissed

CPLR 3016(b) also applies to alleged breaches of trust, and similarly requires that "the circumstances constituting the wrong shall be stated in detail. The NYAG's Fourth and Eighth Causes of Action, for breach of fiduciary duty and breach of trust respectively, are required to be pleaded with particularity with "the circumstances constituting the wrong" stated with the requisite detail. *See* CPLR 3016(b) (expressly applying to causes of action based upon breaches of trust); *Benjamin v. Yeroushalmi*, 178 A.D.3d 650, 653 (2d Dept 2019) ("a cause of action to recover damages for breach of fiduciary duty must be pleaded with the particularity required under CPLR 3016(b)). Both causes of action are insufficiently specific.

The Fourth Cause of Action asserts a non-statutory claim, i.e., that Frazer breached his common law fiduciary duty owed to the NRA by having not provided it competent legal representation in some unspecified way or ways. Amended Complaint, ¶¶ 672-676. Alleging that he caused NRA assets to be wasted, exposed the NRA to enhanced tax liability, jeopardized the NRA's tax-exempt status, and failed to comply with regulatory reporting obligations, the Amended Complaint provides no guidance as to what particular conduct caused these things. With the

relevant infractions unspecified, indeed unidentified, the Amended Complaint also does not furnish a basis supporting an inference that Frazer had the requisite knowledge of unlawfulness. This deficit violates the fault-based scheme of the N-PCL, which is fatal for a non-statutory claim. *See Grasso*, 11 N.Y. 3d 64 (2008).[6]

The Eighth Cause of Action asserts that Frazer was a trustee pursuant to EPTL § 8-1.4 responsible for "holding and administering" property for charitable purposes. Amended Complaint, ¶¶ 689-692. The NYAG charges that Frazer "failed to administer the charitable assets of the NRA entrusted to his care properly." *Id*. This is the entirety of the assertion. Arguably failing even notice pleading, the Eighth Cause of Action certainly fails to state "the circumstances constituting the wrong" with the requisite detail. As an alleged breach of trust, this is required. *See* CPLR 3016(b).

In the end, the heart of the claims against Frazer seek disgorgement of his compensation. The Fourth and Eighth Causes of Action insist, as does the Eighteenth, that Frazer "make restitution," a demand which implies return of something received. In Frazer's case, the Amended Complaint only alleges that he received compensation authorized by the Board of Directors in return for his service as Secretary and General Counsel. It does not allege that he or any friend or family member received any other benefit. Accordingly, these causes of action echo

[6] While the Fourth Cause of Action references N-PCL § 720(a)(1), which compels an accounting relating to a disposition of corporate assets, it does not require knowledge of unlawfulness. That is required only when trying to set aside an unlawful transfer. *See* N-PCL § 720(a)(2). But, the NYAG is not seeking to set aside an unlawful transfer, nor is it just seeking an accounting; it seeks restitution and damages. This is indicative of the error in the NYAG's approach to this case. As stated by the unanimous Court of Appeals in *Grasso*, "[a]bandoning the knowledge requirement of N-PCL 720(a)(2) and the business judgment rule, they would impose a type of strict liability." *Grasso*, 11 N.Y.3d at 71.

Grasso which sought recapture of employment compensation from an officer of a charity. Having alleged nothing approaching fault – i.e., knowledge that the alleged conduct was unlawful – these claims should be dismissed as attempts by the NYAG to exceed the limits of its authority imposed by the N-PCL's fault-based statutory scheme installed by the New York Legislature.

Conclusion

For the reasons stated, Frazer's motion to dismiss Plaintiff's Amended Complaint should be granted, with prejudice.

Dated: New York, New York
September 15, 2021

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By: */s/ William B. Fleming*

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Attorney General of the State of New York (via NYSCEF)

ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, William B. Fleming, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that the Memorandum of Law in support of Defendant John Frazer's Motion to Dismiss Plaintiff's Eighteenth Cause of Action complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court because the memorandum of law contains 5,546 words, excluding 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.

Dated: New York, New York
September 15, 2021

By: */s/ William B. Fleming*
William B. Fleming