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,	:	Index No. 451625/2020
	:	IAS Part Three
	:	Hon. Joel M. Cohen
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 WAYNE LAPIERRE'S MOTION TO DISMISS

P. Kent Correll
CORRELL LAW GROUP
250 Park Avenue, 7th Floor
New York, New York 10177
Tel: (212) 475-3070
Fax: (212) 409-8515

Attorney for Defendant
Wayne LaPierre

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Defendant Wayne LaPierre ("LaPierre") respectfully submits this memorandum of law in support of his motion to dismiss the causes of action asserted against him in the Amended and Supplemental Verified Complaint ("Amended Complaint"), pursuant to CPLR 3211(a)(2), (3) and (7) and *People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64 (2008) ("*Grasso*").

I.

PRELIMINARY STATEMENT

In flagrant disregard of a unanimous and controlling decision of the Court of Appeals and two clear statutory prerequisites to the maintenance of derivative claims, New York Attorney General Letitia James ("Attorney General"), without authority, in pursuit of a personal and political vendetta, asserts four causes of action against LaPierre, Executive Vice President and Chief Executive Officer of the NRA, challenging his compensation, charging that he has been "unjustly enriched" through the receipt of "unreasonable" compensation from the NRA. Fatally, she does this without alleging fault, *i.e.*, knowledge of unlawfulness or absence of good faith, without alleging that she represents at least five percent of the membership of the NRA, without alleging that she has made a demand on the NRA Board to take action, and without alleging with particularity that such a demand would be futile. Based on these defects, which cannot be cured, LaPierre respectfully requests dismissal of the causes of action asserted against him, without leave to replead, on grounds of lack of standing, failure to state a cause of action and lack of subject matter jurisdiction.

II.

QUESTION PRESENTED

The question presented on this motion is whether the Amended Complaint states a cause of action against LaPierre.

III.

STATEMENT OF FACTS

For his statement of facts, LaPierre respectfully directs the Court's attention to the accompanying Affirmation of P. Kent Correll, Esq., dated September 15, 2021, which summarizes the allegations of the Amended Complaint relevant to the Attorney General's "unreasonable compensation" claims, and attaches a copy of the complaint filed in *Grasso,* and other relevant documents. LaPierre respectfully submits that the claims challenging his compensation should be dismissed for the same reason the claims challenging Grasso's compensation were dismissed, and because the Attorney General fails to meet the threshold requirements of N-PCL § 623 for bringing a claim derivatively.

IV.

SUMMARY OF ARGUMENT

The Court should claims challenging LaPierre's compensation because: (1) 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 the Court of Appeals' controlling decision in *Grasso*; and (2) the Attorney General has failed to satisfy the 5% representation and demand/futility requirements of N-PCL § 623.

V.

ARGUMENT

A. Legal Standards

CPLR 3211 governs motions to dismiss.[1] CPLR 3211(a) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground

[1] N.Y. CPLR 3211.

that: (1) "the court has not jurisdiction of the subject matter of the cause of action";[2] (2) "the party asserting the cause of action has not legal capacity to sue;[3] or (3) "the pleading fails to state a cause of action".[4] On a motion to dismiss pursuant to CPLR 3211, the complaint is to be afforded a liberal construction.[5] The Court accepts the facts as alleged in the complaint as true, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory.[6] "Although on a motion addressed to the sufficiency of a complaint pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true and accorded every favorable inference, nevertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration."[7] Dismissal of the complaint is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable

[2] N.Y. CPLR 3211(a)(2).

[3] N.Y. CPLR 3211(a)(3).

[4] N.Y. CPLR 3211(a)(7).

[5] *See Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) (citing CPLR 3026); *Beattie v. Brown & Wood*, 243 A.D.2d 395 (1st Dep't 1997); *Kenney v. Immelt*, 41 Misc.3d. 1225(A), *2-3 (Sup.Ct. N.Y. County 2013) (Bransten, J.) ("On a motion to dismiss for failure to state a cause of action (CPLR 3211(a)(7)), the court must accept each and every allegation as true and liberally construe the allegations in the light most favorable to the pleading party. *** While factual allegations contained in a complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *** 'Pursuant to CPLR § 3211(a)(3) a cause of action may be dismissed where a party lacks legal capacity or standing to sue.' 'The critical issue in determining whether a party has standing to sue is whether the party has suffered an injury in fact, which is an actual legal stake in the matter being adjudicated and ensures that the party seeking review has some concrete interest in prosecuting the action.'") (citations omitted).

[6] *Leon v. Martinez*, 84 N.Y.2d at 88.

[7] *Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995); *Kenney v. Immelt*, 41 Misc.3d. 1225(A) (2013).

right of recovery."[8] Under CPLR 3211(a)(7) a claim fails to state a cause of action when the facts as alleged do not "fit within any cognizable legal theory."[9] A complaint alleging unreasonable compensation of a corporate officer or director "must—to survive a dismissal motion—allege compensation rates excessive on their face or other facts which call into question whether the compensation was fair to the corporation when approved, the good faith of the directors setting those rates, or that the decision to set the compensation could not have been a product of valid business judgment."[10] Finally, "one without the requisite grievance" "has no business suing, and a suit of that kind can be dismissed at the threshold for want of jurisdiction without reaching the merits."[11]

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[8] *Connaughton v. Chipotle Mexican Grill, Inc*., 29 N.Y.3d 137, 141 (2017) (citing John R. Higgitt, Practice Commentaries, McKinney's Cons. Laws of N.Y., CPLR C3211:22 ["(T)he (CPLR 3211[a] [7]) motion is useful in disposing of actions ... in which the plaintiff has identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action"]) (other citations omitted).

[9] *Hershco v. Gordon & Gordon*, 155 A.D.3d 1007, 1008 (2d Dep't 2017).

[10] *See Marx v Akers*, 88 N.Y.2d 189, 203-04 (1996) ("[A] complaint challenging the excessiveness of director compensation must—to survive a dismissal motion—allege compensation rates excessive on their face or other facts which call into question whether the compensation was fair to the corporation when approved, the good faith of the directors setting those rates, or that the decision to set the compensation could not have been a product of valid business judgment").

[11] Siegel, N.Y. Prac. § 136 (6th ed. 2018) ("It is the law's policy to allow only an aggrieved person to bring a lawsuit. One not affected by anything a would-be defendant has done or threatens to do ordinarily has no business suing, and a suit of that kind can be dismissed at the threshold for want of jurisdiction without reaching the merits. When one without the requisite grievance does bring suit, and it's dismissed, the plaintiff is described as lacking 'standing to sue' and the dismissal is one for lack of subject matter jurisdiction. A want of 'standing to sue, in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a 'jurisdictional' dismissal: (1) the courts have jurisdiction only over controversies; (2) a plaintiff found to lack 'standing' is not involved in a controversy; and (3) the courts therefore have no jurisdiction of the case when such a plaintiff purports to bring it.").

B. The Causes of Action Asserted Against LaPierre Should Be Dismissed Because 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 the Court of Appeals' Controlling Decision in *Grasso*.

Like the claims challenging the compensation of Richard Grasso in *People ex rel. Spitzer v. Grasso*,[12] the claims challenging the compensation of LaPierre here are based on a theory of unjust enrichment, premised on the reasonable compensation provisions of the N-PCL, §§ 202 and 515, and seek restitution. Like Grasso, LaPierre moves to dismiss the claims asserted against him on the ground that the Attorney General lacks authority to maintain them and has failed to state a cause of action against him because she has not alleged fault, which is required to sustain these claims. Like the claims against Grasso, the causes of action asserted against LaPierre "are devoid of any fault-based elements and, as such, are fundamentally inconsistent with the N-PCL." Indeed, the situation here is even worse than it was in *Grasso* because all of the causes of action asserted against LaPierre rely, explicitly or implicitly, on the reasonable compensation provisions of the N-PCL, and seek the same relief—restitution, removal of LaPierre as an officer of the NRA, and a lifetime ban on nonprofit service—yet, lack any element of knowledge or bad faith, and, like in *Grasso*, under these claims, the Attorney General need only prove that the compensation being challenged was unreasonable and, therefore, unlawful under the N-PCL and constituting an ultra vires act. Hence, in the words of Chief Judge Kaye, writing for a 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."[13] As the Court of Appeals held in *Grasso*, such causes of action may only be maintained in the absence of good faith, and, hence, require allegation and proof of a lack of

[12] 11 N.Y.3d 64 (2008).

[13] *Id.* at 71.

good faith. Thus, all of the Attorney General's claims against LaPierre fail for the same reason: the N-PCL requires the Attorney General to overcome a business judgment defense whereas the causes of action pleaded against LaPierre disregard the knowledge element that other unlawful transfers must allege. In other words, each of the challenged causes of action against LaPierre seeks to ascribe liability based on the size of his compensation package. As the Court of Appeals declared in *Grasso*: "The Legislature, however, enacted a statute requiring more. The Attorney General may not circumvent that scheme, however unreasonable that compensation may seem on its face. To do so would tread on the Legislature's policy-making authority."[14] Accordingly, for the same reasons the Court of Appeals gave for dismissing the claims challenging Grasso's compensation, this Court should dismiss the claims challenging LaPierre's compensation.[15]

In *Grasso*,[16] the New York Attorney General Eliot Spitzer sued Richard A. Grasso, the former Chairman and Chief Executive Officer of the New York Stock Exchange ("NYSE"), a New York not-for-profit corporation, challenging his compensation, bringing eight causes of action charging that the compensation paid to Grasso was excessive.[17] This Court, in the person of Charles E. Ramos, J., denied the Chairman's motion to dismiss the common law causes of action premised on the New York Not-for-Profit Corporation Law, and he appealed.[18] The Appellate Division reversed[19], and the Attorney General appealed.[20]

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[14] *Id.* at 72.

[15] Indeed, what General James is doing here is even worse than what General Spitzer did to Grasso in that Spitzer at least alleged the requisite fault, i.e., knowledge of unlawfulness and lack of good faith in some of the causes of action against Grasso. Here, General James has not alleged the requisite fault in any of the causes of action asserted against LaPierre.

[16] 11 N.Y.3d 64 (2008).

[17] *Id.*

[18] *Id.*

[19] *See People ex rel. Spitzer v. Grasso*, 42 A.D.32d 126, 139-140, n.9 (1st Dep't 2007), *aff"d* 11 N.Y.3d 64 (2008). In reversing this Court, the First Department explained: "What is of

decisive importance is that the four nonstatutory causes of action are plainly inconsistent with core provisions of the legislative scheme governing the duties and liability of officers and directors. That inconsistency is most palpable with respect to the first and fourth causes of action. Both seek judgments requiring Grasso to repay allegedly unlawful compensation he received; each would require the Attorney General to prove only that the payments made to Grasso were neither compensation payments "in a reasonable amount" (as N-PCL 515 [b] requires) nor compensation payments "commensurate with services performed" (as N-PCL 202 [a] [12] requires). By contrast, in authorizing the Attorney General to bring the second cause of action under N-PCL 720 (a) (2) to "set aside an unlawful conveyance, assignment or transfer of corporate assets," the Legislature expressly required the Attorney General to prove more. That is, the Attorney General must prove that "the transferee knew of its unlawfulness" (N-PCL 720 [a] [2]). And in authorizing the Attorney General to bring the third cause of action under N-PCL 720 (a) (1) (A) and (B) for, as the Attorney General puts it, Grasso's alleged conduct in "influencing and accepting awards of excessive compensation," the Legislature expressly specified that a director "shall not be liable . . . if, in the circumstances, he discharged his duty to the corporation under section 717" (N-PCL 719 [e]). Nonetheless, the first and fourth causes of action would impose liability on Grasso without regard to either of these fault-based requirements of the legislative scheme. Under the Attorney General's view of his authority, he is free to avoid the burden of proving either requirement—each of which is likely to be the most difficult element to prove of the statutory causes of action—but nonetheless obtain the full relief he is authorized to obtain under the statutory causes of action. All he need do under his theory of his powers is simply elect to bring the first or fourth cause of action." *Grasso*, 42 A.D.32d at 139-140. In a footnote, the First Department explained further: "In this regard, the Attorney General's position calls to mind the venerable prohibition on public officials doing indirectly what they are forbidden from doing directly. In this case, however, the Attorney General's position is that he can avoid indirectly what he cannot avoid directly. In the context of an action brought by a private litigant, this Court recently rejected a similar attempt to create a hybrid (that is, both common-law and statutory) claim. In Han v Hertz Corp. (12 AD3d 195, 196 [2004]), the "plaintiff [did] not allege any actionable wrongs independent of the requirements" of a statute that did not permit a private right of action. As we held, "[s]ince no private right of action exists, the claims for money had and received and unjust enrichment were properly dismissed as an effort to circumvent the legislative preclusion of private lawsuits for violation of the statute" (id.)." (some citations omitted). *Grasso*, 42 A.D.32d at 140, n. 9. The First Department concluded: "In short, the N-PCL reflects an apparent conclusion by the Legislature about what sound public policy requires in any action brought against directors or officers under N-PCL 720 (a) (2), 720 (a) (1) (A) or 720 (a) (1) (B)—i.e., that such *a fault-based requirement should be essential to their liability.* Surely the nature and extent of the liability of directors and officers for, in particular, receiving excessive compensation and, more generally, for receiving a conveyance, assignment or transfer of corporate assets, are matters of considerable public importance. They certainly are factors of vital importance to any sensible person deciding whether to accept the responsibilities of being a director or officer. *In seeking to impose liability on Grasso without regard to either of the fault-based requirements of the legislative scheme, the complaint brings into sharp focus the fundamental problem with the Attorney General's position: its inconsistency with the principle of separation of powers.*"). *Grasso*, 42 A.D.32d at 140 (emphasis added).

On appeal, the Court of Appeals, Kaye, C.J., held that the Attorney General lacked authority to pursue nonstatutory common law causes of action, and affirmed, reasoning that the Attorney General lacked authority to pursue common law causes of action against Grasso for excessive compensation, as such causes of action would override the scheme of the New York Not-for-Profit Corporation Law ("N-PCL"), which was fault-based and provided directors and officers with protections of the business judgment rule.[21] The Court reasoned further that nonstatutory causes of action for constructive trust and payment had and received, based on a theory of unjust enrichment, required only proof that the Grasso's compensation was unreasonable, and lacked any element of knowledge or bad faith, and that a cause of action asserting that the Grasso's salary was not approved in accordance with the N-PCL would override the N-PCL requirement of showing absence of good faith.[22]

In *Grasso*, the challenge was to four of the eight causes of action brought by the Attorney General alleging that the compensation paid to Grasso was excessive.[23] The complaint alleged that "three agreements, executed in 1995, 1999 and 2003, governed Grasso's compensation by the NYSE,"[24] that, "[f]rom 1995 through 2002, his base salary was roughly $1.4 million, but his bonus awards escalated from $900,000 in 1995 to $10.6 million in 2002,"[25] and that "[t]he 2003 agreement provided Grasso with an immediate lump sum payment of $139.5 million and an additional $48 million payable over four years—compensating him for past and future work."[26]

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[20] *Grasso*, 11 N.Y.3d 64 (2008).

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.* at 66.

[25] *Id.*

[26] *Id. See* Correll Affm. Exhibit 5 (Complaint in *Grasso*).

The complaint further alleged that "the payments contemplated by the 2003 agreement were not reasonable or commensurate with the services performed by Grasso, and therefore violated N–PCL 202(a)(12) and 515(b)."[27] The complaint described the situation as "'a fundamental breakdown of corporate governance' predicated on numerous breaches of fiduciary duty, beginning with the composition of the Compensation Committee—its members hand-picked by Grasso—which ignored a benchmark system designed to calculate Grasso's compensation,"[28] and asserted that, "in 1999, 2000 and 2001, the Compensation Committee provided Grasso with awards exceeding the benchmark by 64%, 141% and 65%, respectively".[29] In addition, the complaint alleged "that information provided to Committee and Board members regarding the extent of Grasso's compensation under various benefit programs was inaccurate, incomplete and misleading."[30]

The complaint then shifted "to a description of the negotiation process for the 2003 agreement, beginning with Grasso's 2002 proposal."[31] The complaint alleged that, "[i]nstead of immediately approving the package, the Compensation Committee retained the law firm of Vedder Price to serve as independent consultant,"[32] that, "by August 2003 an agreement still had not been reached and several Board members expressed disapproval of the $139.5 million figure,"[33] and that, "in light of these concerns, … the proposal was not included on the agenda

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[27] *Id.* at 67. Here, significantly, the Amended Complaint does not allege that the payments received or contemplated by LaPierre were not commensurate with the services performed by LaPierre or to be performed by LaPierre.

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

for the August 7, 2003 Compensation Committee meeting or Board meeting.[34] The complaint further alleged that, "during the August 7 Committee meeting, … the members present decided to approve the proposal and pass it on to the Board",[35] and that, "as a result of this last-minute change, neither independent counsel nor opponents of the compensation package were at the meeting, and Board members who did attend had no opportunity to review the details of the package in advance of the meeting."[36] Finally, the complaint alleged that "[t]he Board, nonetheless, approved the $187.5 million package."[37]

The complaint asserted "eight causes of action—six against Grasso, one against Kenneth Langone (Chairman of the Compensation Committee from 1999 through June 2003), and one for declaratory and injunctive relief against the NYSE."[38] The Court of Appeals found that the causes of action against Grasso could be separated into two categories—the statutory causes of action and the nonstatutory causes of action that were the subject of the appeal. The two statutory claims against Grasso—the second and third causes of action—were for unlawful transfer of corporate assets and breach of fiduciary duty, under N–PCL 720(a) and (b).[39] The Court of Appeals noted that section 720(b) expressly authorized the Attorney General to bring those two causes of action, and that that authority was uncontested in the appeal.[40]

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[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* Here, by contrast, LaPierre has not resigned and the NRA has not asked the Attorney General to pursue any matter on the NRA's behalf.

[38] *Id.*

[39] *Id.*

[40] *Id.*

The Court of Appeals found that the four nonstatutory claims against Grasso were "at bottom premised on provisions of the N–PCL, but clothed in the common law,"[41] noting that: (1) the "first and fourth causes of action for a constructive trust and payment had and received, based on a theory of unjust enrichment, were premised on the reasonable compensation provisions of the N–PCL (i.e., N–PCL 202(a)(12); 515(b));"[42] (2) the fifth cause of action sought restitution of certain benefit awards alleging that a majority of the Board had failed to approve them as required by N–PCL 715(f);[43] and (3) the sixth cause of action alleged that the NYSE's advance payments from a retirement plan violated the prohibition against loans to officers under N–PCL 716 and that the NYSE was entitled to reasonable interest thereon.[44]

Grasso moved "to dismiss the four nonstatutory claims on the ground that the Attorney General lacked authority to maintain them."[45] This Court, in the person of Justice Ramos, denied the motion to dismiss, holding that the attorney general had standing to sue under the parens patriae doctrine to vindicate the interests of the investing public.[46] A majority at the Appellate Division reversed and dismissed the four nonstatutory causes of action against Grasso, "viewing them as an attempt to circumvent the fault-based claims provided by the N–PCL."[47] The Court of Appeals affirmed the order of the Appellate Division unanimously in an opinion written by Chief Judge Kaye.[48]

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[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.* "The dissenting Justices would have permitted the claims to proceed based on the parens patriae doctrine." *Id.*

[48] *Id.*

In the opinion, the Court of Appeals noted that "[a]lthough several provisions of the N-PCL mirror those regulating for-profit entities under the Business Corporation Law, one unique characteristic is the legislative codification of the Attorney General's traditional role as an overseer of public corporations."[49] It further noted:

> At least 18 provisions of the statute detail the Attorney General's varied enforcement powers. These powers include the ability to provide structural relief with respect to the corporation and to bring actions against individual directors or officers. Section 112 expressly authorizes actions or special proceedings to annul or dissolve corporations that have acted beyond their authority or to restrain unauthorized activities (N-PCL 112 [a] [1]). In addition, the Attorney General may enforce any right given to members of Type B … corporations … (N-PCL 112 [a] [7], [9]). In addition, sections 719 and 720 permit the Attorney General to seek redress for injuries resulting from—to name only a few—unlawful distributions of corporate cash, property or assets (N-PCL 719 [a] [1], [4]), improper loans (N-PCL 719 [a] [5]), waste of corporate assets (N-PCL 720 [a] [1] [B]) and breach of fiduciary duties (N-PCL 720 [a] [1] [A]). The Attorney General's authority to maintain these actions is explicitly codified under N-PCL 720 (b).[50]

Importantly, the Court of Appeals went on to explain:

> *The Legislature's comprehensive enforcement scheme, however, is not without limitation*. First, any action or special proceeding brought by the Attorney General under the N-PCL "is triable by jury as a matter of right" (N-PCL 112 [b] [1]). Second, and *most relevant to the issue before us, the Legislature has provided directors and officers with the protections of the business judgment rule* (see N-PCL 717). The statute provides that officers and directors must discharge "the duties of their respective positions in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions" (N-PCL 717 [a]). Officers and directors are permitted to rely on information, opinions or reports of reasonable reliability so long as the officer or director acts in good faith (N-PCL 717 [b]). Moreover, *the statute dictates that persons "who so perform their duties shall have no liability by reason of being or having been directors or officers of the corporation*" (N-PCL 717 [b]).[51]

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[49] *Id.* at 69.

[50] *Id.*

[51] *Id*. at 70 (emphasis added).

The Court of Appeals continued:

Despite the numerous causes of action explicitly made available to the Attorney General, the four nonstatutory claims that are the subject of this appeal rest on an assertion of parens patriae authority to vindicate the public's interest in an honest marketplace. Here, however, as *the dispositive defect stems from the inconsistency between the two sets of claims*, we need not and do not reach the scope of any such authority. Instead, *a side-by-side comparison of the challenged claims and the statutory claims reveals that the Attorney General has crafted four causes of action with a lower burden of proof than that specified by the statute, overriding the fault-based scheme codified by the Legislature and thus reaching beyond the bounds of the Attorney General's authority*.[52]

The Court of Appeals emphasized:

In an analogous context, we have consistently held that a private right of action may not be implied from a statute where it is "incompatible with the enforcement mechanism chosen by the Legislature". *That the plaintiff here is the Attorney General as opposed to a private party does not preclude the application of these decisions. Rather, in this context, the Attorney General's role as a member of the executive branch heightens our concerns. Although the Executive must have flexibility in enforcing statutes, it must do so while maintaining the integrity of calculated legislative policy judgments. That balance falters where, as here, the Executive seeks to create a remedial device incompatible with the particular statute it enforces.* The two statutory claims asserted against Grasso, in addition to those provided in N-PCL 719, rest on the fault-based provisions enacted by the Legislature to remedy not-for-profit corporate wrongdoing. The second cause of action for an unlawful transfer permits an action "[t]o set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee *knew of* its unlawfulness" (N-PCL 720 [a] [2] [emphasis added]). The third cause of action for breach of fiduciary duty permits an action for the "neglect of, or failure to perform . . . duties in the management and disposition of corporate assets" and for an officer's "acquisition . . . , loss or waste of corporate assets due to any neglect of, or failure to perform . . . duties" (N-PCL 720 [a] [1] [A], [B]). This claim requires a showing that the officer or director lacked good faith in executing his duties. The plain language of these provisions 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. The Legislature specifically provided for the Attorney General's role as an overseer of not-for-profit corporations, and requires that he prove an officer's fault to sustain these claims.[53]

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

[53] *Id.* at 70-71 (emphasis in original).

The Court of Appeals explained further:

By contrast, the four nonstatutory causes of action are devoid of any fault-based elements and, as such, are fundamentally inconsistent with the N-PCL. The first and fourth causes of action—for a constructive trust and payment had and received—rely on the reasonable compensation provisions of the N-PCL and seek the same relief as the statutory claims, yet they lack any element of knowledge or bad faith. Rather, under these claims the Attorney General need only prove that Grasso's compensation was unreasonable and, therefore, unlawful under the N-PCL and constituting an ultra vires act. Abandoning the knowledge requirement of N-PCL 720 (a) (2) and the business judgment rule, they would impose a type of strict liability.[54]

The Court of Appeals continued:

The fifth cause of action asserts that Grasso's salary was not approved in accordance with N-PCL 715 (f). Section 715 addresses circumstances relating to interested directors and officers. It provides, "[t]he fixing of salaries of officers . . . shall require the affirmative vote of a majority of the entire board" (N-PCL 715 [f]). It does not, however, grant the Attorney General the authority to maintain an action for the Board's failure to properly vote on a compensation package. In fact, N-PCL 715 (b) provides the corporation—not the Attorney General—with the power to avoid contracts or transactions between the corporation and its officers or directors and, *even then, such actions may only be maintained in the absence of good faith* (N-PCL 715 [b]).[55]

The Court of Appeals added:

Finally, the sixth cause of action alleges that certain advance payments from Grasso's supplemental retirement plan constituted an improper loan under N-PCL 716 and seeks interest on the loaned amounts. As distinct from the other three, the N-PCL expressly provides the Attorney General the authority to bring an action against directors who approve a loan in violation of N-PCL 716 (see N-PCL 719 [a] [5]; 720 [b]). *The Attorney General's present claim fails, however, for the same reason as the other three: the statutory claim would require the Attorney General to overcome a business judgment defense, whereas the action pleaded disregards the knowledge element that other unlawful transfers must allege* (see N-PCL 719 [e]; 720 [a] [2]).[56]

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[54] *Id.* at 71 (emphasis added).

[55] *Id.* at 71-72 (emphasis added).

[56] *Id.* at 72.

Importantly, the Court of Appeals concluded:

> *In summary, each of the challenged causes of action against Grasso seeks to ascribe liability based on the size of his compensation package. The Legislature, however, enacted a statute requiring more. The Attorney General may not circumvent that scheme, however unreasonable that compensation may seem on its face. To do so would tread on the Legislature's policy-making authority*.[57]

In other words, in *Grasso*, the Court of Appeals found that the Attorney General lacked authority to pursue claims for what essentially amounted to ultra vires acts that would impose a type of strict liability under the New York Not-For-Profit Corporation Law, because such claims were inconsistent with the statutory scheme, which is fault-based and provides directors and officers protection under the business judgment rule.[58] Accordingly, any claim under the New York Not-For-Profit Corporation Law must apply the business judgment rule, which, here, would require the Attorney General to plead and prove that LaPierre knowingly violated the Not-For-Profit Corporation Law in order to state a claim.[59] Stated another way, the N-PCL requires the Attorney General to plead a knowing violation of the law.[60]

This case is on all fours with Grasso. The eighteenth cause of action, "For Unjust Enrichment Derivatively in Favor of the NRA Under N-PCL § 623 and common law (Against LaPierre, Phillips, Frazer and Powell)", explicitly relies on the provisions of the N-PCL authorizing the payment of "reasonable" compensation (N-PCL §§ 202 and 515),[61] and the other

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

[58] *Id.* at 70-72.

[59] *Id. See 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 Dep't 2010) (officers of a not-for-profit corporation are protected by the business judgment rule under N-PCL § 717).

[60] *See Grasso*.

[61] See Am. Compl. (Eighteenth Cause of Action), ¶ 752. N-PCL § 202 provides, in pertinent part, "Each corporation, subject to any limitations provided in this chapter or any other

three causes of action asserted against LaPierre challenging his compensation rely on the "reasonable compensation" provisions of the N-PCL implicitly.[62] The eighteenth cause of action alleges 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"[63], 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"[64], and 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)".[65] It further alleges that 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,"[66] that LaPierre "received payments in excess of reasonable compensation from the

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statute of this state or its certificate of incorporation, shall have power in furtherance of its corporate purposes: *** (12) To elect or appoint officers, employees and other agents of the corporation, define their duties, fix their reasonable compensation and the reasonable compensation of directors, and to indemnify corporate personnel. Such compensation shall be commensurate with services performed." N-PCL § 515 ("Dividends prohibited; certain distributions of cash or property authorized") provides, in pertinent part: "(a) A corporation shall not pay dividends or distribute any part of its income or profit to its members, directors, or officers. (b) A corporation may pay compensation in a reasonable amount to members, directors, or officers, for services rendered ….").

[62] *See* Am. Compl. (Third, Seventh and Eleventh Causes of Action), ¶¶ 667-671, ¶¶ 685-688 and ¶¶ 701-704, respectively. These causes of action are remarkably similar to those asserted against Grasso. *See* Correll Affm. Exhibit 5 (Grasso Complaint), ¶¶ 164-205.

[63] *See* Am. Compl. ¶ 734.

[64] *Id.* ¶ 735.

[65] *Id.* ¶ 736.

[66] *Id.* ¶ 737.

NRA,"[67] 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.[68] It then alleges that LaPierre "obtained a benefit that in equity and good conscience should be paid to the NRA"[69] 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.[70] In addition, it alleges that the "Attorney General brings this derivative action on behalf of the NRA" against LaPierre "to recover excessive, unreasonable compensation and excess benefits."[71] Finally, it alleges that "[t]he allegations of this complaint involve wrongdoing of substantial magnitude and duration", that "[t]he 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,"[72] and that:

> 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.[73]

Notably, the cause of action does not allege that LaPierre knew of the unlawfulness of the payments. Thus, the Attorney General necessarily contends that in bringing these causes of action she can sue LaPierre and obtain a judgment requiring him to repay the amount of any

[67] *Id.* ¶ 738.

[68] *Id.* ¶ 746.

[69] *Id.* ¶ 747.

[70] *Id.* ¶ 748.

[71] *Id.* ¶ 749.

[72] *Id.* ¶ 752.

[73] *Id.* ¶ 753.

excess compensation solely on the basis of a showing that the compensation is unreasonable. Neither knowledge of the unlawfulness of the payments nor any state of mind, fault-based or otherwise, on the part of an officer or director is required under the Attorney General's view of her authority.

Here, as in *Grasso*, the Attorney General is challenging the compensation of a Chief Executive Officer of a New York not-for-profit corporation, asserting multiple causes of action charging that the compensation paid to the executive was excessive. The causes of action asserted against LaPierre are essentially identical to those asserted against Grasso, except that the amount of the compensation being challenged is much lower in this case. And, here, the Attorney General has, again, crafted causes of action with a lower burden of proof than that specified by the statute, again overriding the fault-based scheme codified by the Legislature and thus reaching beyond the bounds of her authority.

Critically, the Attorney General fails to allege, as she must, that LaPierre received the allegedly unreasonable and excessive compensation that she complains of with knowledge that it was unlawful.[74] The Attorney General has not plausibly alleged that LaPierre knowingly violated the N-PCL, or any other law for that matter. Instead, here, as in *Grasso*, each of the challenged causes of action seeks to ascribe liability based on the size of the compensation package. Hence,

[74] *See People v. Grasso*, 42 A.D.3d 126, 128 (1st Dep't 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); Am. Compl. ¶¶ 413-429 (lacking any assertion that, or explanation why, the compensation was unreasonable, and similarly bereft of even a single allegation that LaPierre knew it).

under the reasoning of *Grasso*, all of the causes of action asserted against LaPierre should be dismissed on the ground that the Attorney General lacks authority to maintain them.[75]

C. To the Extent that the Causes of Action against LaPierre Are Asserted Derivatively, They Fail to Satisfy the Clear Statutory Prerequisites of N-PCL § 623, *i.e.*, 5% Representation and Demand/Futility

Section 623 of the Not-For-Profit Corporation Law governs a "[m]embers' derivative action brought in the right of the corporation to procure a judgment in its favor."[76] Section 623(a) provides that "[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 …."[77] Section 623(c) of the N-PCL provides: "In any such 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 of the reason for not making such effort."[78]

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[75] *See Grasso.* In the alternative, they should be dismissed for failure to state a claim against LaPierre on the ground that they fail to allege knowledge of unlawfulness or absence of good faith on LaPierre's part.

[76] N.Y. N-PCL § 623.

[77] N-PCL § 623(a). *Bernbach v. Bonnie Briar Country Club*, 144 A.D.2d 610 (2d Dep't 1988); *see also Schaefer v. Chautauqua Escapes Association, Inc.*, 158 A.D.3d 1186 (4th Dep't 2018); *Pall v. McKenzie Homeowners' Ass'n, Inc.,* 121 A.D.3d 1446, 1447 (3d Dep't 2014); *Tae Hwa Yoon v. New York Hahn Wolee Church, Inc.*, 56 A.D.3d 752, 755 (2d Dep't 2008); *Segal v. Powers*, 180 Misc.2d 57, 59 (Sup. Ct. N.Y. County 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 WL 6453326, *6 (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 WL 6453326 at *8.

[78] N-PCL 623(c). *See Marx v Akers*, 88 N.Y.2d 189, 194 (1996) ("[t]he purposes of the demand requirement are to (1) relieve courts from deciding matters of internal corporate governance by providing corporate directors with opportunities to correct alleged abuses, (2) provide corporate boards with reasonable protection from harassment by litigation on matters clearly within the discretion of directors, and (3) discourage strike suits' commenced by

Here, the Attorney General purports to bring the eighteenth cause of action to enforce rights given to members of the NRA to procure a judgment in favor of the NRA, but fails to allege that she meets the requirements of sections 623(a) and 623(c) of the Not-for-Profit Corporation Law.[79] The Attorney General alleges that demand would have been futile because the Board of Directors and its committees did not fully inform themselves about the challenged transactions to the extent reasonably appropriate under the circumstances, and because the Board, 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.[80]

The issue of derivative standing has been addressed previously by this Court in this case. As the Court may recall, the issue was before it just last week on an intervention motion filed by two NRA members.[81] Significantly, then, rightly, the Attorney General agreed with the NRA as to the applicability and preclusive effect of the five percent membership requirement, stating:

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shareholders for personal gain rather than for the benefit of the corporation." "[T]he demand is generally designed to weed out unnecessary or illegitimate shareholder derivative suits.").

[79] Mr. LaPierre respectfully submits that, regardless of how they are labeled or characterized, all of the causes of action asserted against him should be viewed, and treated, as derivative to the extent that they seek judgment in favor of the NRA requiring him to return to the NRA any portion of the compensation he received from the NRA, since such claims are inherently derivative, since claims for the return of compensation to a corporation belong to the corporation, not to any member, and certainly not to the Attorney General, and that, consequently, the Attorney General, should she decide to pursue those claims, should be required to plead and prove, at the threshold, that she meets the clear, statutory threshold standing requirements of N-PCL 623(a) and (c), because courts should look to the substance of claims rather than their characterization in deciding whether a plaintiff has standing to assert them and whether a claim has been stated.

[80] Am. Compl. ¶ 750(a), (b).

[81] *See People ex rel. James v. NRA*, Index No. 451625/2020 (Sup.Ct. N.Y. County) (Cohen, J.) (denying motion for intervention, finding that requirement of N-PCL § 623(a) was "clearly not met by the Proposed Intervenors."); NYSCEF Doc. No. 340 (Decision and Order on Motion) (citing to Transcript, a copy of which is attached to Correll Affm. as Exhibit 4).

"For all of the reasons that Mr. Geisler 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."[82] Moreover, on that motion, the proposed intervenors argued that the NRA has a "rubber-stamp board" and that, therefore, any effort to secure the initiation of action by the Board would be futile, and the Court rightly rejected that allegation as conclusory and insufficient to establish futility and thereby excuse the proposed intervenors' failure to make any effort to secure the initiation of any action by the Board.[83] As the Court may recall further, in denying the motion for lack of standing, it analyzed the issue as follows:

> 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 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 Intervenors 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.

[82] Correll Affm. Exhibit 4 (Transcript) at 30:2-8.

[83] *Id.* at 10:17, 36:12, and 36:15.

> In addition, as also discussed in the argument, the Intervenors 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 Intervenors 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 Intervenors 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.[84]

The Court was exactly right then, and it should apply the same analysis and reach the same conclusion now, since, in bringing an action to enforce rights given to members of the corporation to procure a judgment in favor of the corporation, the Attorney General stands in the shoes of members and is, therefore, legally, and logically, subject to the same threshold standing requirements as members. In other words, the rights given to members under N-PCL § 623 are subject to clear statutory prerequisites and standing to sue to enforce those rights is expressly conditioned on satisfaction of those prerequisites. Thus, when asserting derivative claims under N-PCL § 623 to enforce "rights given to members of the corporation to procure a judgment in favor of the corporation", the Attorney General is subject to the same standing requirements that would apply to members if they were attempting to assert and enforce those rights themselves. To conclude otherwise would be fundamentally inconsistent with the N-PCL and the clear statutory prerequisites for assertion of a claim derivatively.

Here, like the proposed intervenors, the Attorney General has made no demand on the NRA Board of Directors whatsoever and has failed to sufficiently allege why demand would

[84] *Id.* at 50:14-52:9.

have been futile regarding compensation paid to LaPierre.[85] Instead, the Attorney General has simply asserted 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 "to the extent reasonably appropriate" and because it "passively rubberstamped the decisions of the officer-defendants."[86] These conclusory allegations do not "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" as required by N-PCL § 623(c) and do not support the conclusion that demand would have been futile; indeed, as the Attorney General well knows, the public record

[85] *See Marx v Akers*, 88 N.Y.2d 189, 194 (1996) (affirming dismissal of shareholder derivative action alleging breach of fiduciary duty and corporate waste by board of directors for failure to make demand upon board of directors, holding that plaintiff failed to sufficiently state why demand would have been futile regarding compensation paid to executive officers, stating: "Defendants' motion to dismiss for failure to make a demand as to the allegations concerning the compensation paid to IBM's executive officers was properly granted. A board is not interested 'in voting compensation for one of its members as an executive or in some other nondirectorial capacity, such as a consultant to the corporation,' although 'so-called "back-scratching" arrangements, pursuant to which all directors vote to approve each other's compensation as officers or employees, do not constitute disinterested directors' action'). Since only three directors are alleged to have received the benefit of the executive compensation scheme, plaintiff has failed to allege that a majority of the board was interested in setting executive compensation. Nor do the allegations that the board used faulty accounting procedures to calculate executive compensation levels move beyond 'conclusory allegations of wrongdoing', which are insufficient to excuse demand. The complaint does not allege particular facts in contending that the board failed to deliberate or exercise its business judgment in setting those levels. Consequently, the failure to make a demand regarding the fixing of executive compensation was fatal to that portion of the complaint challenging that transaction.") (citations omitted); *see also Tomczak v. Trepel*, 283 A.D.2d 229, 229-30 (1st Dep't 2001) (applying N-PCL § 623(c), holding that derivative action was properly dismissed since allegations in plaintiffs' amended verified complaint failed to set forth with particularity the efforts of plaintiffs to secure the initiation of such action by the board or the reason for not making such effort, explaining that "[w]hile plaintiffs allege that unsuccessful demands were made on the [board] ... to initiate legal action, the complaint provides no indication as to who made the demands, when they were made, which Board members they were made to, the content of the demands or *why the Board refused to take action*.") (emphasis added).

[86] Am. Compl. ¶ 750(a), (b).

supports exactly the opposite conclusion. The Attorney General admits in the Amended Complaint that the NRA Board has authorized litigation against a vendor with which the NRA had had a long-standing relationship to recover sums inappropriately charged to the NRA (Am. Compl. ¶ 319), terminations of personnel and compensation arrangements where they were deemed to have transgressed internal policies (*see, e.g.,* Am. Compl. ¶ 265), and recovery of expenses where investigation concluded the purpose to be not sufficiently corporate. Hence, the Attorney General's assertion that demand on the NRA Board would have been futile lacks substance and is not well founded.[87]

Moreover, a federal court, after a 12-day trial found that the NRA has made progress since 2017 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

[87] *See, e.g., Gammel v. Immelt*, No. 650780/2018, 2019 N.Y. Slip Op. 32005(U), *8 (Sup. Ct. N.Y. County, June 28, 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 v. Powers*, 180 Misc.2d 57, 59 (Sup. Ct. N.Y. County 1999); *BPS Lot 3, LLC v. Northwest Bay Partners, Ltd.*, 61 Misc.3d 1219(A), *5 (Sup. Ct. Warren County 2018) (an assertion of futility must allege that "the directors are incapable of making an impartial decision as to whether to bring suit"). As recently addressed by the NRA in opposition to a motion to intervene, 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 Attorney General 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. Movants' conclusory allegations are, therefore, insufficient to show that making a demand upon the Association's Board would have been futile. *See Tomczak v. Trepel,* 283 A.D.2d 229, 229 (1st Dep't 2001); *Segal,* 180 Misc.2d at 60.

> 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"[88]

Accordingly, the NYAG has failed to meet the threshold requirements of N-PCL § 623, and lacks standing to prosecute any derivative claim on behalf of the NRA, and the eighteenth cause of action should be dismissed on this additional, separate and independent ground.[89]

V.

CONCLUSION

For the foregoing reasons, the Third, Seventh, and Eleventh Causes of Action set forth in the Amended Complaint should be dismissed pursuant to CPLR 3211(a)(2), (3) and (7) in their entirety and the Eighteenth Cause of Action set forth in the Amended Complaint should be dismissed pursuant to CPLR 3211(a)(2), (3) and (7) insofar as it is asserted against LaPierre, with prejudice.[90]

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[88] *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). For convenience of reference, a true and correct copy of Judge Hale's Order is attached to the Correll Affm. as Exhibit 3.

[89] To avoid duplication in accordance with the Court's Part Rules, LaPierre hereby adopts and incorporates by reference the arguments made by the NRA in support of its motion to dismiss and made by John Frazer in support of his motion to dismiss, and, in particular, the arguments made by Frazer with respect to the Attorney General's lack of authority to assert nonstatutory or common law causes of action and lack of standing to maintain a member's derivative action. Also, to the extent that the third, seventh or eleventh causes of action may fairly be viewed as derivative, since they appear to seek return to the NRA of compensation paid to LaPierre, they should be dismissed for lack of derivative standing, too, for the same reasons.

[90] The causes of action asserted against LaPierre should be dismissed with prejudice because the defects in the Attorney General's pleading cannot be cured. *See Melucci v. Sackman*, 37 Misc.3d 1212(A), *10 (Sup. Ct., Kings County 2012) (granting motion to dismiss pursuant to CPLR 3211(a)(1), (3), and (7), and 3016(b), based on asserted grounds of documentary evidence, lack of standing, failure to state a cause of action, qualified immunity, and failure to plead with requisite specificity, and denying plaintiff's request for leave to amend complaint, stating: "The complaint is deficient in several respects (the failure to join and plead support of five percent of

Dated: New York, New York
September 15, 2021

Respectfully submitted,

/s/ P. Kent Correll

P. Kent Correll
CORRELL LAW GROUP
250 Park Avenue, 7th Floor
New York, New York 10177
Tel: (212) 475-3070
Fax: (212) 409-8515
E-mail: kent@correlllawgroup.com

Attorney for Defendant Wayne LaPierre

the membership, the failure to plead demand or futility of demand, the failure to allege acts of individual defendants or to provide the specific facts, other than speculation, upon which the derivative claims are based), however, *amendment of the complaint could not cure the basic defect that plaintiff lacks standing to bring this derivative action. …. The request for leave to amend the complaint is therefore denied*.") (Emphasis added).

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 Memorandum of Law in Support of Defendant Wayne LaPierre's Motion to Dismiss (Mot. Seq. 016) complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)), as modified by Court Order dated September 15, 2021, enlarging the word limit to 11,000, because the memorandum of law contains 9,354 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law and affirmation.

Dated: September 15, 2021
New York, New York

/s/ P. Kent Correll
P. Kent Correll, Esq.