

Motion Seq. No. 017

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

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

Plaintiff,

v.

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

Defendants.
 -----X

Index No. 451625/2020

IAS Part Three

Hon. Joel M. Cohen

REPLY AFFIRMATION OF
 P. KENT CORRELL, ESQ.

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

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

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

I.

INTRODUCTION

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

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

II.

FACTS

A. The Attorney General Files a Complaint Against the NRA, LaPierre, Frazer and Others, Asserting Eighteen Cause of Action, Including Four Against LaPierre--One “Derivatively”

5. On August 6, 2020, the Attorney General filed a complaint against the National Rifle Association of America (“NRA”), LaPierre, John Frazer (“Frazer”) and two other defendants, asserting eighteen causes of action, four against LaPierre, including one for “Unjust Enrichment”, which the Attorney General asserted “derivatively in favor of the NRA under N-PCL § 623 and common law.”¹ In the complaint, the Attorney General sought, *inter alia*, dissolution of the NRA, removal of LaPierre from his position as executive vice president, chief executive officer and a director of the NRA, removal of Frazer from his position as secretary, general counsel and a director of the NRA, and return of compensation.²

B. LaPierre Moves to Dismiss, Challenging Forum Selection, and the Court Denies the Motion without Reaching the Underlying Merits of the Case

6. On October 19, 2020, the NRA filed a motion to dismiss that focused on the first two causes of action in the complaint, *i.e.*, causes of action based on N-PCL § 1110 seeking dissolution of the NRA.³ The NRA’s motion was focused on the mandatory venue provision of N-PCL § 1110 governing actions seeking dissolution.⁴

7. On October 30, 2020, LaPierre moved to dismiss the original complaint,

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

² *Id.* Notably, although the Attorney General asserts a claim “derivatively” in the right of the NRA to enforce a right purportedly given under the N-PCL to members of the NRA to bring a members’ derivative action in the right of the NRA to procure a judgment in its favor, she does not name the NRA or any NRA member as a plaintiff.

³ NYSCEF Doc. No. 70 (NRA Notice of Motion).

⁴ *Id.*

challenging the Attorney General's forum selection.⁵ That same day, Frazer filed a parallel motion.⁶ The prior motions did not raise any issues specific to the causes of action against LaPierre.

8. On January 21, 2021, the Court held oral argument on the NRA's, LaPierre's and Frazer's pre-answer CPLR 3211(a) motions.⁷ In rendering its decision, the Court stated:

THE COURT: "Look, I appreciate everybody's hard work. Your briefs were exceptional. Your arguments were exceptional. I am ready to render a decision that I will describe for you now. After a careful review of one of the larger records I've seen on motions to dismiss, the defendants' various motions to dismiss, transfer or stay this action, which involve a number of interrelated issues, are denied. I will file a written order, but in the meantime will provide my reasons on the record. *At the outset, I note that these motions relate only to whether the Attorney General can maintain this action in this court or some other court. They have nothing to do with the underlying merits of this case, which are not before me today.*"⁸

C. LaPierre Answers, Raising Lack of Authority/Standing/Legal Capacity to Sue and Failure to State a Claim as Affirmative Defenses

9. On February 23, 2021, LaPierre answered the original complaint,⁹ raising affirmative defenses, including, among others, lack of authority, standing and/or legal capacity to sue,¹⁰ "failure to state a claim,"¹¹ good faith,¹² and protection of the business judgment rule.¹³

⁵ NYSCEF Doc. No. 114 (LaPierre Notice of Motion).

⁶ NYSCEF Doc. No. 129 (Frazer Notice of Motion).

⁷ See Exhibit 1 (Transcript of Oral Argument dated January 21, 2021).

⁸ *Id.* at 66:25-67:14 (emphasis added); and see NYSCEF Doc. Nos. 210-215 (short form decisions on motions).

⁹ NYSCEF Doc No. 226 (Verified Answer of Defendant Wayne LaPierre). A copy of LaPierre's Answer is attached hereto as Exhibit 2.

¹⁰ *Id.* at 91 (Fourth Affirmative Defense), 95 (Sixteenth and Seventeenth Affirmative Defenses), 97 (Twenty-Fourth Affirmative Defense), and 99 (Thirtieth Affirmative Defense: "Plaintiff lacks standing to sue Mr. LaPierre under N-PCL § 623"), (Thirty-First Affirmative Defense: "Plaintiff lacks capacity to sue Mr. LaPierre under common law."), and (Thirty-Second Affirmative Defense).

10. For example, in his Fourth Affirmative Defense, LaPierre alleged:

Plaintiff's attempt to bring a derivative action in behalf of the National Rifle Association of America and/or its members against Mr. LaPierre cannot be sustained due to its failure adequately to allege the futility of making a demand upon the National Rifle Association of America's Board of Directors. Further, the Attorney General has not only failed to allege with particularity, but cannot allege, that a majority of the Board is conflicted with self-interest, or is controlled by self-interested persons, concerning transactions at issue. Director nominations occur through a nominating committee – which gets candidates from innumerable sources including advertisements in NRA Magazine and in response to requests made to members for suggested directors – or by petition, or both, after which approximately one-half of the National Rifle Association of America's approximately five million members are eligible to vote for directors of their preference. The particular circumstances presented by these nomination and election protocols hopelessly defeat the Attorney General's necessary threshold allegations to establish demand futility.¹⁴

11. As another example, in his Sixteenth Affirmative Defense, LaPierre alleged:

The causes of action asserted against Mr. LaPierre in the Complaint purport to deprive him of his statutory business judgment rule defense and thus violate the fault-based scheme codified by the New York Legislature with respect to the regulation of not-for-profit corporations and officers, directors and other persons associated with such corporations. Plaintiff's claims exceed the bounds of the Attorney General's authority by asserting against Mr. LaPierre non-statutory claims which are devoid of any fault-based elements in a manner inconsistent with the N-PCL's statutory scheme. In this way, the Office of the Attorney General has arrogated to herself an inappropriate and unlawful lower burden of proof than that imposed on it by New York law.¹⁵

12. As a further example, in his Seventeenth Affirmative Defense, LaPierre alleged:

¹¹ *Id.* at 91 (First Affirmative Defense), 95 (Sixteenth and Seventeenth Affirmative Defenses), 97 (Twenty-Fourth Affirmative Defense) and 99 (Thirty-Second Affirmative Defense).

¹² *Id.* at 93 (Tenth Affirmative Defense), 94 (Thirteenth and Fourteenth Affirmative Defenses), 95 (Fifteenth and Seventeenth Affirmative Defenses), 96 (Twenty-First Affirmative Defense), 97 (Twenty-Second and Twenty-Fourth Affirmative Defense), 98 (Twenty-Fifth Affirmative Defense) and 99 (Thirty-Second Affirmative Defense).

¹³ *Id.* at 94 (Fourteenth Affirmative Defense) and 95 (Sixteenth and Seventeenth Affirmative Defenses).

¹⁴ *Id.* at 91.

¹⁵ *Id.* at 95.

The causes of action asserted against Mr. LaPierre in the Complaint for return of compensation paid to him violate the statutory authority granted to the Attorney General, which does not imbue her with the power to avoid contracts or transactions between a corporation and its officers or directors. In light of Mr. LaPierre's undisputed performance of the work assigned to him, he justifiably and reasonably relied upon a compensation expectation set by an affirmative vote of a majority of the National Rifle Association of America Board of Directors the subsequent payment of which, accordingly, was neither an unjust enrichment nor an excess benefit transaction as a matter of law.¹⁶

13. Also, in his Twenty-Fourth Affirmative Defense, LaPierre alleged: "The sanction of disgorgement is unwarranted because Mr. LaPierre did not knowingly or willfully violate any of the statutes, rules, or provisions specified in the Complaint."¹⁷

14. As a final example, in his Thirty-Second Affirmative Defense, LaPierre alleged:

Plaintiff lacks capacity to sue Mr. LaPierre because he has substantially complied with all applicable statutes and has taken voluntary steps to ensure complete compliance and avoid any compliance issues, including *voluntary rescission of the post-employment contract complained of by Plaintiff, thereby rendering the causes of action against him based, in whole or in part, on that contract moot.*¹⁸

D. The Attorney General Amends the Complaint, Adding 25 Pages and 87 Paragraphs of New Allegations, Containing Claims Not Arising Out of or Relating to the Conduct, Occurrences or Transactions Contained in the Original Pleading

15. On August 16, 2021, the Attorney General amended her original complaint, adding 25 pages and 87 paragraphs of new allegations, including claims not arising out of or relating to the conduct, occurrences or transactions contained in the original pleading most aimed at LaPierre.¹⁹ In doing so, she changed it substantially and expanded the causes of action asserted against LaPierre dramatically by incorporating the new allegations.²⁰

¹⁶ *Id.* at 95.

¹⁷ *Id.* at 97.

¹⁸ *Id.* at 99 (emphasis added).

¹⁹ NYSCEF Doc. No. 333 (Amended and Supplemental Verified Complaint).

²⁰ See Exhibit 3 (Redlined Comparison of Original Complaint (NYSCEF Doc. No. 11) and Amended and Supplemental Verified Complaint (NYSCEF Doc. No. 333)).

16. For example, the Attorney General added a new section entitled: “LaPierre’s Security Costs”.²¹

17. Moreover, the Attorney General added a new section entitled: “LaPierre’s Improper Use of NRA Funds to Influence Board Elections”.²²

18. Furthermore, the Attorney General added new allegations concerning LaPierre’s compensation for 2019, putting an additional \$1,884,709 in issue.²³

19. In addition, the Attorney General added: “LaPierre signed the NRA’s CHAR500 for 2019. Upon information and belief, LaPierre knew that that CHAR500, and its attachments, included materially misleading information and falsely attested to the accuracy of the information provided, under penalty of perjury.”²⁴

20. Finally, the Attorney General added a sweeping new section entitled: “The Defendants’ Continued Breaches Since the Attorney General’s Complaint.”²⁵ This section runs for 17 pages and 66 paragraphs, setting forth many new allegations aimed at LaPierre, culminating in this new allegation:

Despite a conflict of interest and his lack of authority to do so, LaPierre unilaterally determined to place the NRA into bankruptcy to evade a regulatory action in which he was named as a defendant. That bankruptcy, which was dismissed for lack of good faith, cost the NRA tens of millions of dollars in attorneys’ fees, payments to proposed restructuring officers, costs relating to special board meetings necessitated by the filing, and other expenses. LaPierre continues in his leadership position.²⁶

²¹ *Id.* ¶¶ 217-219.

²² *Id.* ¶¶ 311-312.

²³ *Id.* ¶ 451.

²⁴ *Id.* ¶ 566

²⁵ *Id.* ¶¶ 580-646.

²⁶ *Id.* ¶ 646.

21. In short, the complaint has changed.²⁷

E. LaPierre Brings a Post-Answer Motion Under CPLR 3211(a)(2), (3) and (7) Seeking Dismissal of the Amended Complaint for Lack of Subject Matter Jurisdiction, Lack of Legal Capacity to Sue, and Failure to State a Cause of Action

22. On September 15, 2021, LaPierre brought a post-answer motion under CPLR 3211(a)(2), (3) and (7) seeking dismissal of the claims asserted against him in the Amended Complaint for lack of subject matter jurisdiction, lack of authority/standing/capacity to sue, and failure to state a claim based on the holding of the Court of Appeals in *Grasso*—that the Attorney General does not have authority to assert nonstatutory causes of action against officers or directors of not-for-profit corporations, such as claims based on a theory of unjust enrichment, and that in order to sustain a statutory claim under the New York Not-For-Profit Corporation Law, the Attorney General must allege and prove the necessary element of fault—i.e., “knowledge of unlawfulness” or “bad faith.”²⁸

23. In his opening brief in support of his motion to dismiss, LaPierre argues that the Attorney General lacks standing to sue him for unjust enrichment or to maintain statutory claims against him without alleging the necessary element of fault and that the claims asserted against him should be “dismissed at the threshold for want of jurisdiction” without reaching the merits.²⁹

24. On the same day, the NRA and Frazer filed parallel motions to dismiss.³⁰

F. The Attorney General Opposes LaPierre’s Motion

25. On October 15, 2021, the Attorney General filed an omnibus brief in opposition to the NRA’s, LaPierre’s and Frazer’s motions to dismiss, arguing that their motions are barred

²⁷ See Exhibit 3.

²⁸ NYSCEF Doc. No. 355.

²⁹ See, e.g., NYSCEF Doc. No. 356 (Opening Brief) at 4, fn. 11 and accompanying text.

³⁰ See NYSCEF Doc. Nos. 363 and 348, respectively.

under CPLR 3211(e)'s so-called "single motion rule", that the Nonprofit Revitalization Act of 2013 amended the Not-For-Profit Corporation Law and the changes "created a strict liability scheme", that, in any case, the Amended Complaint adequately alleges fault, and that the Amended Complaint states a derivative cause of action for unjust enrichment against LaPierre and Frazer.³¹

F. The Nonprofit Revitalization Act of 2013

26. Attached hereto as Exhibit 4 is a true and correct copy of the Nonprofit Revitalization Act of 2013, showing the amendments to the Not-For-Profit Corporation Law.

27. In her brief in opposition to the instant motions to dismiss, the Attorney General admits that she supplemented her original pleading with "new allegations of wrongdoing committed by Defendants since commencement of this action" and that her new, amended pleading "contains approximately 90 paragraphs of new factual allegations detailing Defendants' wrongdoing in the twelve months after the commencement of this action, including their failure to adequately investigate the allegations in the Attorney General's original complaint; the NRA's disclosure in its 2019 Form 990 that numerous senior executives and board members, including LaPierre and Powell, diverted charitable assets over a period of several years from their intended purposes to enrich themselves; and the NRA's latest attempt to avoid accountability in this action by seeking Chapter 11 bankruptcy protection in a Texas federal court."³²

G. The Attorney General's Guidance on "Related Party Transactions"

28. Attached hereto as Exhibit 5 is a true and correct copy of the Office of the New York State Attorney General, Charities Bureau Guidance, including the following guidance

³¹ NYSCEF Doc. No. 404.

³² NYSCEF Doc. No. 404 (The Attorney General's Omnibus Memorandum of Law in Opposition to Defendants' Motions to Dismiss) at 5-6.

issued in September 2018, stating:

*Transactions related to compensation of employees, officers or directors or reimbursement of reasonable expenses incurred by a related party on behalf of the corporation are not considered related party transactions, unless that individual is otherwise a related party based on some other status, such as being a relative of another related party. However, such transactions must be reasonable and commensurate with services performed, and the person who may benefit may not participate in any board or committee deliberation or vote concerning the compensation (although he or she may be present before deliberations at the request of the board in order to provide information).*³³

III.

CONCLUSION

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

Executed this 12th day of November 2021 in New York, New York.

/s/ P. Kent Correll

P. Kent Correll

³³ See Exhibit 5 (Relevant portions of Office of the New York State Attorney General, Charities Bureau, Conflicts of Interest Policies Under the Not-for-Profit Corporation Law, Guidance Document, Issue date: September 2018) (<https://www.charitiesnys.com/pdfs/sympguidance.pdf>) at 43 (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 Reply Affirmation of P. Kent Correll, Esq. complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)) because the Affirmation contains 2,584 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this affirmation.

Dated: November 12, 2021
New York, New York

/s/ P. Kent Correll

P. Kent Correll