Motion Sequence No. 016

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.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF 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 reply memorandum of law in further 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 (the "Amended Complaint") should be dismissed.

Preliminary Statement

Chief Judge Kaye, writing for a unanimous Court of Appeals, stated that the N-PCL's purposeful inclusion of business judgment protections for officers and directors imposed critical limits on the Attorney General. *See People v. Grasso*, 11 N.Y.3d 64, 70 (2008). Citing to N-PCL § 717 and its expressed safe harbor for good faith conduct, the Court determined that, to be actionable, the N-PCL requires that offending conduct be done with knowledge of unlawfulness lest the statute "impose a type of strict liability." *Id*. at 71.

The NYAG's Amended Complaint violates this guardrail of the N-PCL. It does not accuse Frazer of financial misconduct or personal corruption. The NYAG instead claims Frazer's job performance was negligent, professionally incompetent, and purportedly marked by certain failures, and seeks disgorgement of compensation paid to him as excessive. *See, e.g.*, Amended Complaint, ¶¶ 296, 672-676, 731; NYAG Br. at 29.[1] Such assertions, however, do not establish the requisite bad faith, fault, or knowledge of unlawfulness which is the heart of the N-PCL's statutory scheme. *See Grasso*, 11 N.Y.3d at 71.

[1] References to "NYAG Br." refer to The Attorney General's Omnibus Memorandum of Law in Opposition to Defendants' Motion to Dismiss, NYSCEF Doc. No. 404. References to "Amended Complaint" refer to the NYAG's Amended and Supplemental Verified Complaint, NYSCEF Doc. No. 333.

To the contrary, the four corners of the Amended Complaint (and the U.S. Bankruptcy Court's post-trial findings incorporated by reference therein) acknowledge the NRA's compliance progress based on the good faith efforts of Frazer and his colleagues on behalf of the Association. For instance, the Amended Complaint concedes that the NRA adopted, at the conclusion of Frazer's first year as General Counsel, a Conflict of Interest and Related Party Transaction Policy which was "comprehensive," "hew[ed] closely to the requirements of N-PCL § 715" for related party transactions, and "define[d] conflicts of interest *more broadly* [than the N-PCL] . . . ." *See* Amended Complaint, ¶ 131-132 (emphasis added).[2] The Amended Complaint also acknowledges that Frazer assisted the NRA's Audit Committee to address current and legacy related-party transactions in 2018 (as it had in 2017), and that he did the work to review for error and approve the invoices from the Brewer law firm (excepting where it was appropriate to recuse himself). *See* NYSCEF Doc. No. 349 at 8-9, n.3, 4, 5; Amended Complaint, ¶¶ 475, 527-28, 534-535.

Further, the Amended Complaint cites to, quotes from, and incorporates by reference the Bankruptcy Court's post-trial opinion which determined that the NRA instituted remedial actions as part of its robust and positive response to whistleblowers' and board members' concerns with financial matters, and that each was addressed and resolved to the whistleblowers' satisfaction. *See* NYSCEF Doc. No. 352 at 3-6, 35; NYSCEF Doc. No. 349 at 10 (citing Amended Complaint, ¶¶ 164, 265, 319, 602). The Bankruptcy Judge approvingly referenced the NRA's compliance training program (which Frazer runs) and issued a finding that the NRA "now

[2] The Amended Complaint's charge that Frazer's failures dated "[f]rom 2014 to the present" is mistaken. Frazer did not begin his tenure as General Counsel until 2015, shortly after which he set about implementing changes to the Association to comply with New York's Not-for-Profit Revitalization Act of 2013 (the "Revitalization Act").

understands the importance of compliance." NYSCEF Doc. No. 352 at 35. These acknowledgments of Frazer's good faith efforts in the NYAG's pleading absolve him from liability under the N-PCL. As the *Grasso* Court held, the N-PCL dictates that those "who so perform their duties shall have no liability by reason of being or having been directors or officers of the corporation." *Grasso*, 11 N.Y.3d at 70 (citing N-PCL § 717(b)).

Argument

I. The Eighteenth Cause of Action For Unjust Enrichment Violates The Court of Appeals' Holding in *Grasso*

As in *Grasso*, the NYAG here has brought a common law unjust enrichment claim seeking disgorgement of Frazer's compensation, which it characterizes as "excessive" and "unreasonable." Frazer's moving brief sets forth how the claim lacks allegations of Frazer's bad faith or knowledge of unlawfulness and thus breaches the N-PCL's "comprehensive enforcement scheme." *Grasso*, 11 N.Y.3d at 70.

In its response, the NYAG contends that the fault-based scheme noted in *Grasso* has been effectively overruled by the Legislature through changes made to the N-PCL in the Revitalization Act. It insists that Frazer's salary and other compensation, paid to him for performing his work, is a "related party transaction" which the NYAG has the power to "unwind and seek restitution" on the very strict liability basis anathematized in *Grasso*. *See* NYAG Br. at 31 ("[t]he changes created a strict liability scheme under which the Attorney General may bring an action to, among other things, unwind and seek restitution for related party transactions entered into in violation of the procedural requirements of N-PCL § 715"). As a consequence, the NYAG urges it is not required to plead fault-based conduct. *See* NYAG Br. at 30 (arguing "[n]or is the Attorney General required to allege fault to successfully assert this cause of action" for unjust enrichment).

The NYAG's argument is wrong for numerous reasons. First, the NYAG's office itself excepts compensation paid to an officer like Frazer from the definition of related-party transaction; second, the 2013 Revitalization Act did not overrule *Grasso*; third, the Court lacks subject matter jurisdiction to hear the Eighteenth Cause of Action's derivative claim because the NYAG has not satisfied the standing thresholds imposed by N-PCL § 623; fourth, the NYAG's unjust enrichment claim seeking disgorgement of Frazer's Board-approved compensation for work already performed offends strong public policy favoring settled contractual expectations; and fifth, under longstanding decisional precedent cloaking decisions of a corporate board with business judgment protections (*see, e.g., Grasso* and *Auerbach v. Bennett*, 47 N.Y.2d 619 (1979)), the NRA Board's authorization of compensation to Frazer was a protected business judgment on which Frazer justifiably relied to his detriment.

A. Payment of Frazer's Compensation Was Not a Related-Party Transaction

The NYAG first argues that Frazer's compensation was a related-party transaction which it is authorized to unwind under N-PCL § 715. Yet, the Eighteenth Cause of Action does not allege that Frazer's compensation is a related-party transaction. Rather, it is expressly based on N-PCL §§ 202, 515, and 720(a), not § 715. *See* Amended Complaint, ¶¶ 736, 752.

In any event, the NYAG *knows* that this position conflicts with her own office's published Guidance that compensation paid to an officer like Frazer is not a related party transaction. That Guidance, issued by the NYAG's Charities Bureau in 2018 concerning conflicts of interest policies under the N-PCL, advises that:

> *"[t]ransactions 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)."

See https://www.charitiesnys.com/pdfs/sympguidance.pdf (page 43 of 285).[3] Accordingly, the payment of Frazer's compensation is not a related party transaction, and should not be subject to unwinding under N-PCL § 715(f).

B. The New York Not-for-Profit Revitalization Act of 2013 Did Not Overrule *Grasso*

Nevertheless, the NYAG singles out the new related-party transactions provisions of N-PCL § 715 enacted by the Revitalization Act of 2013 and claims they permit it to recover Frazer's compensation on a strict liability basis. NYAG Br. at 31. The argument is erroneous. The 2013 changes do not introduce any language suggesting the Legislature intended to overwrite or replace its previously codified fault-based scheme with one not requiring fault. *See* 2013 N.Y. ALS 549, 2013 N.Y. LAWS 549, 2013 N.Y. A.N. 8072, 2013 N.Y. ALS 549, 2013 N.Y. LAWS 549, 2013 N.Y. A.N. 8072 (redlined version of the Revitalization Act). To be sure, the NYAG does not furnish any authority to the contrary. Even Section 715 itself does not include language exempting it from the scheme's fault requirement. *Cf.* N-PCL § 715(a) (confirming permissibility of related-party transactions where disclosures are made "in good faith to the board").

The best measure of the Legislature's intent is that the 2013 amendments did nothing to alter N-PCL § 717 or its business judgment protections which the *Grasso* court recognized as the source of the N-PCL's fault-based scheme. *See also People ex rel. Cuomo v.*

[3] The NYAG does not dispute that, unlike in *Grasso* where the compensation committee members were "hand-picked" by Mr. Grasso himself (*id*. at 67), Frazer was excluded from all participation in the Board's discussions or decisions about compensation.

Lawrence, 74 A.D.3d 1705, 1707 (4th Dept. 2010) ("[b]ecause officers of a not-for-profit corporation are protected by the business judgment rule (see N-PCL 717), liability pursuant to 720(a)(1) 'requires a showing that the officer or director lacked good faith in executing his [or her] duties") (quoting *Grasso*, 11 N.Y.3d at 71). In *Lawrence*, the Fourth Department reversed a denial of defendants' motion for summary judgment and determined that defendants warranted judgment in their favor on the ground that the Attorney General had failed to raise a triable issue of fact that defendants acted in bad faith. *Id*. Here, the NYAG acknowledges Frazer's good faith efforts *and* asserts a forbidden common law claim to impose strict liability. This is contrary to the expressed will of the Legislature and, accordingly, "reach[es] beyond the bounds of the Attorney General's authority." *Grasso*, 11 N.Y. 3d at 70.

Grasso also continues to be recognized as good law. *See, e.g., Levy v. Young Adult Inst., Inc.,* No. 13-CV-02861 (JPO)(SN), 2015 U.S. Dist. LEXIS 145381, at *18 (S.D.N.Y. Oct. 9, 2015) (post-Revitalization Act case citing *Grasso* as support for the comment that "YAI has not alleged, *as it must*, that Levy "knew" that the transfer was unlawful . . . . In light of the evidence presented in this motion that the Board repeatedly approved Levy's compensation for decades – until it did not – YAI cannot establish Levy's undisputed knowledge of the transfer's unlawfulness") (emphasis added), *report and recommendation adopted*, No. 13-CV-2861 (JPO), 2015 U.S. Dist. LEXIS 161721 (S.D.N.Y. Dec. 2, 2015), *aff'd*, 744 F. App'x 12 (2d Cir. 2018). The NYAG's reliance on *People v. Trump*, 62 Misc. 3d 500, 517-18 (Sup. Ct. N.Y. Cnty. 2018) is not to the contrary. Evaluating a related-party transaction, the Court in *Trump* expressly found that the conduct was alleged to have been intentional and perpetrated with knowledge of its unlawfulness. *See Trump*, 62 Misc.3d at 518 ("[t]hese allegations sufficiently support a claim that

Mr. Trump *intentionally* used Foundation assets for his private interests *knowing* that it may not be in the Foundation's best interest") (emphasis added).[4]

The NYAG inappropriately attempts to avoid *Grasso*'s clear limitation on its authority to bring non-fault-based claims, and the Eighteenth Cause of Action should be dismissed accordingly.

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[4] The absence of any discussion of *Grasso* in the legislative history of the Revitalization Act is telling. Then Attorney General Schneiderman – *by his own account* – was the driving force behind that legislation. *See, e.g.*, Press Release, Office of the New York State Attorney General, *A.G. Schneiderman, Legislative Leaders And Advocates Celebrate Passage of Groundbreaking Reform To NY's Charities Laws*, at 2 (June 22, 2013) (available at https://ag.ny.gov/press-release/2013/ag-schneiderman-legislative-leaders-and-advocates-celebrate-passage) ("Attorney General Schneiderman's bill is the product of more than two years of work by the Attorney General's office" and referencing staff members who "led efforts on behalf of the Attorney General to draft and negotiate the bill" Thus, if the Attorney General believed *Grasso* clouded the parameters of his Office's policing powers over non-fault-based conduct, he certainly could have had it addressed. Instead, the case is not mentioned in the Act's legislative history. In cases we have identified where the state legislature has acted to address a judicial decision, the legislative history has been explicit. *See, e.g.*, *Matter of Diegelman v. Buffalo*, 28 N.Y.3d 231, 241 (2016) (Pigott, J., dissenting) ("Section 205-e of the General Municipal Law . . . was passed by the Legislature in 1989. That section was enacted, in large part, in response to this Court's decision in *Santangelo v. State* [], where we held that on-duty police officers were not entitled to recover for injuries sustained in the line of duty as a result of the negligence of third parties") (citations to legislative history omitted, emphasis in original); *Grumet v. Pataki*, 93 N.Y.2d 677, 695 (1999) ("The legislative history of chapter 390 [of the Education Law] reveals that it was enacted in direct response to *Kiryas Joel II*. . . . Indeed, the legislative debates reveal that the law was referred to as the 'Kiryas Joel School Bill,' and that chapter 390 was commonly referred to as 'Kiryas Joel No. 3'") (citation to legislative history omitted); *Cohen v. Borchard Affiliations*, 25 N.Y.2d 237, 245 (1969) ("Shortly after the *Sortino* case was decided, the Legislature amended the statute so as to lessen its impact"); *DeVita v. Metropolitan Distribs., Inc.*, 45 Misc. 2d 761, 762 (Sup. Ct., Nassau Co. 1965) ("The Legislature was alerted to this situation by the Bar following decision of *Sortino v. Fisher* and promptly amended C.P.L.R. 3216"); *Matter of Regina Metro. Co. v. NYS Div. of Housing & Community Renewal*, 35 N.Y.3d 332, 410 (Wilson J., dissenting) (noting that a section of the Housing Stability and Tenant Protection Act was enacted to resolve a split in the case law — "Before the majority here resolved the split, the legislature did . . . [s]etting out clear rules for the courts in determining damages after the understandable confusion following *Roberts*").

C. The NYAG Lacks Standing to Maintain a Derivative Claim, And The Court Lacks Subject Matter Jurisdiction To Hear the Eighteenth Cause of Action

The NYAG has failed to satisfy the procedural requirements demanded of members to bring a derivative action. As established in our moving brief, a litigant lacks standing to prosecute a derivative claim when he does not represent five percent or more of any class of members of the corporation.[5] In response, the NYAG makes the peremptory claim that it is "not subject to the five percent threshold requirement in N-PCL § 623(a) when bringing a claim on behalf of a corporation's members" and need not even allege it. NYAG Br. at 32. The NYAG tries to exempt herself from N-PCL § 623's threshold pleading requirement on the ground that, she argues, N-PCL § 112(a)(7) grants her authority to enforce "any right" of "members." *See id.*

The NYAG's reasoning is wrong. N-PCL §112(a)(7), under which the NYAG expressly proceeds with this claim, grants the Attorney General authority "[t]o enforce any right given under this chapter to members . . . ." Pursuant to N-PCL § 101, "chapter" is defined as the N-PCL. Here, the one and only right granted to members "under this chapter" to bring an action against Frazer is found in N-PCL § 720(b)(3), which gives members the right to proceed against officers "in the right of the corporation" exclusively under N-PCL § 623.[6] Accordingly, as Section 623 represents the only right a member has under the Legislature's framework, the NYAG's bald contention that its statutory requirements do not apply to her is entirely meritless.

[5] Section 623 commands a member to show that he or she represents a minimum of five percent of members, and to state with particularity his or her effort to make a demand on the board of directors or why such an effort would have been futile. *See* N-PCL § 623(a), (c). The NYAG has not done either.

[6] Members also have rights to vote to petition for judicial dissolution under N-PCL § 1102, and to vote to remove an officer under N-PCL § 714, the latter of which is restricted to officers who are elected by members, not, as here, where Frazer was elected by the Board. *See* N-PCL § 714(a).

The NYAG argues that this Court's earlier ruling on members' motion to intervene in the case justifies her failure to make the required showings. NYAG Br. at 33. Respectfully, in that ruling, the Court only observed the fact that certain provisions of the N-PCL, like Section 112(a)(7) granting the Attorney General authority to enforce rights belonging to members, serve to add to, not limit, the rights "granted expressly to the Attorney General in the statute . . . ." *See* NYSCEF 395 at 49:19-21. The Court did not state, nor could it, that the Attorney General need not comply with specific requirements of the statute, and the NYAG cites to no authority granting the Attorney General the power to ignore statutory requirements. To the contrary, the NYAG previously stated in open court that a failure to make those showings is "dispositive." *See* NYSCEF Doc. No. 395 at 30:5.

In any event, the NYAG's flawed attempt to proceed under Section 623 also seeks an improper purpose, i.e., to end-run *Grasso* to assert a non-fault-based common law claim not otherwise available to her. The NYAG's reasoning is that the *Grasso* Court did not tell her she couldn't. NYAG Br. at 30 ("the [C]ourt did not, however, address . . . the Attorney General's authority to assert [common law] claims in a derivative capacity on behalf of the corporation"). But, the Court in *Grasso* plainly expressed that the NYAG, even more than a private litigant, cannot bring an action which is "incompatible with the enforcement mechanism chosen by the Legislature." *Grasso*, 11 N.Y.3d at 70 ("the Attorney General's role as a member of the executive branch heightens our concerns"). Seemingly wary of a governmental instinct to reach for greater power – which is an especially relevant concern here, where the Attorney General has issued repeated public expressions of her animus against the NRA, including equating it to a terrorist organization – the Court emphasized the Executive branch's need to "maintain[] the integrity of calculated legislative policy judgments" and warned that attempts, as here, to "create a remedial

device incompatible with the particular statute it enforces" corrosively tips needed "balance." *Id.* at 70-71. The NYAG's use of a common law claim to avoid the N-PCL's fault requirements in this case pays no heed to the Court's warning about Executive overreach. *Id.*; *see also People v. Litto*, 8 N.Y.3d 692, 705 (2007) (an action "should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature . . .") (citation omitted).

For these further reasons, the Eighteenth Cause of Action should be dismissed as the NYAG lacks standing to bring it, and the Court lacks the subject matter jurisdiction to hear it. *See* CPLR 3211(a)(2).

D. The NYAG's Demand for Disgorgement of Agreed-to Compensation Would Violate Important Policies Protecting Justified Contractual Expectations

Courts have recognized that corporations have flexibility to determine what is reasonable compensation. *Levy*, U.S. Dist. LEXIS 145381 at *27. Here, the Amended Complaint concedes that the NRA's Board of Directors set Frazer's compensation. *See* Amended Complaint, ¶ 418. There is no dispute that Frazer performed the work for the compensation he was promised, and that he was paid no more than that. The NYAG is not, and should not be, permitted to nullify a completed contractual arrangement, nor to upset satisfied expectations, without a plausible allegation of wrongdoing. *Levy*, U.S. Dist. LEXIS 145381 at *28.

In *Levy*, a not-for-profit corporation sought to withhold contractual payments to an executive in the amount of $10.4 million as excessive under the N-PCL. The executive had allegedly committed wrongdoing identified in a *qui tam* action brought by the federal and state governments resulting in an $18 million settlement.[7] Acknowledging the N-PCL's underlying

[7] Incidentally, the corporation in *Levy* requested that the NYAG Charities Bureau support its position on the excessiveness of the compensation, but the NYAG declined. While unrevealed reasons may have influenced the NYAG's decision not to pursue the case, the $10.4 million amount of the compensation in question in *Levy* which the NYAG declined to say was

public policy limiting a non-profit's executive compensation to "a reasonable amount . . . for services rendered," the *Levy* court determined that the public policy favoring enforcement of contracts outweighed it. *See Levy*, U.S. Dist. LEXIS 145381 at *15 ("the public policy in favor of protecting a non-profit corporation's resources by limiting its executive pay is outweighed in this instance by the public policy in favor of enforcing negotiated contracts between sophisticated parties"). This analysis applies to the NYAG, especially since the NYAG here seeks to do so in the shoes of a private party enforcing the right of an NRA member. *See Grasso*, 11 N.Y.3d at 70 ("[t]hat the plaintiff here is the Attorney General as opposed to a private party does not preclude the application of these decisions . . .").

E. The NRA Board's Compensation Decision Was a Protected Business Judgment On Which Frazer Justifiably Relied To His Detriment

Lastly, the NRA's compensation decisions, recommended by the OCC and approved by its full Board, were business judgments presumed to be valid and protected from judicial scrutiny in the absence of bad faith or an overriding conflict of interest, none of which are alleged here. Further, Frazer was entitled to rely on those compensation decisions.

As the Court of Appeals has emphasized, courts are "ill equipped and infrequently called on to evaluate what are and must be essentially business judgments" of corporate directors. *See Auerbach*, 47 N.Y.2d at 630. The business judgment rule is a rebuttable presumption that protects directors from liability for actions taken in good faith. *See Grasso*, 11 N.Y.3d at 70 (2008); *Higgins v. NYSE, Inc.*, 10 Misc. 3d 257, 282 (Sup. Ct. N.Y. Co. 2005); N-PCL § 717(b).

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excessive dwarfs the sums at issue here where Frazer was compensated, depending on the year, between approximately $272,000 and $414,000 per annum (*see* Amended Complaint, ¶ 456), not including payments made pursuant to employee benefit plans which are not reachable through state law causes of action which ERISA explicitly preempts. *See* 29 U.S.C. § 1144(a); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987).

The absence of good faith may be demonstrated by alleging "wantonly negligent, even reckless conduct." *Giblin v. Murphy*, 73 N.Y.2d 769, 771-72 (l988) (citations omitted). Here, the Amended Complaint simply alleges, without description of how or why, that Frazer's compensation was "unreasonable" and "excessive" (*see* Amended Complaint, ¶¶ 749, 752-753), and lacks any particular assertion to establish wanton negligence or recklessness by the Board.

The Amended Complaint does not allege that the Board's compensation decisions pertaining to Frazer were tainted by conflict, or that the Board lacked independence or disinterestedness. *See, e.g., Auerbach* 47 N.Y.2d at 632 (the business judgment rule will shut down judicial interference with corporate decisions when directors making those decisions are "disinterested and independent") (citations omitted).[8] Nor, critically, does the Amended Complaint contain any allegations that Frazer believed his compensation was excessive or unreasonable, or that he influenced the compensation decision. *See Sama v. Mullaney (In re Wonderwork, Inc.)*, 611 B.R. 169, 202 (Bankr. S.D.N.Y. 2020) ("a Court will not ordinarily scrutinize an officer's acceptance of compensation determined by an independent board or a committee" unless the officer has breached his fiduciary duty by "accepting compensation that is clearly improper or by wrongfully influencing a compensation decision") (citing *Friedman v. Dolan*, C.A. No. 9425-VCN, 2015 WL 4040806, at *9 (Del. Ch. June 15, 2015)).

Frazer was entitled to rely on the Board's compensation decisions. The NYAG does not dispute that Frazer performed the work. In these circumstances, it would be against public

[8] In conclusory fashion, the NYAG only claims that the 76-member, all volunteer Board was a rubber stamp, dominated and controlled by Mr. LaPierre through his "control of business, patronage and special payment opportunities for board members." NYAG Br. at 32. The NYAG, though, does not identify which, if any, Board members are so dominated, does not allege they constitute a majority bloc, or offer any other such details needed to challenge the Board's business judgment on compensation.

policy, contract law, and *Grasso* now to require disgorgement of that consideration. *Levy*, U.S. Dist. LEXIS 145381 at *28 (deeming it "unjust to the executives of New York's not-for-profit corporations to allow their contracts to be undone" after performance is completed "[w]ithout a finding of wrongdoing") (citing *Vought v. E. Bldg. & Loan Ass'n*, 172 N.Y. 508, 517-18 (1902) (noting that it "is now well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the benefit of the performance and of the contract")).

In sum, the NYAG's Eighteenth Cause of Action, asserting a common law claim of unjust enrichment, improperly grasps for a lower burden of proof than the one to which they are subjected under the N-PCL. Not only would an unjust enrichment claim eliminate any need to prove that Frazer had knowledge of unlawfulness (i.e., that he knew his compensation was excessive and unreasonable), but it would also nullify Frazer's manifestly reasonable reliance on the Board's decisions.[9] Per the Court of Appeals' decision in *Grasso*, which rejected the Attorney General's prior attempt to do so and remains the applicable law, this is impermissible and in derogation of the Legislature's intent. The Eighteenth Cause of Action should be dismissed.

[9] Under the New York law of unjust enrichment, Frazer's knowledge of unlawfulness and his justified reliance on the Board's decisions would not be germane. The NYAG would merely have to establish that Frazer was enriched at the NRA's expense in a way that it would be against equity and good conscience to permit Frazer to retain that benefit. *See Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). Of course, to enforce a member's right to proceed "in the right" of the corporation under N-PCL § 623(a), as the NYAG seeks to do, the NYAG would have to establish the absence of a contractual relationship between the NRA and Frazer in order to pursue the quasi-contract claim of unjust enrichment. *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009) (citing *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.,* 70 N.Y.2d 382, 388 (1987) (unjust enrichment claims ordinarily precluded where the subject matter is governed by an express contract).

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

The NYAG's Seventeenth Cause of Action charges Frazer with a violation of Executive Law § 172-d(1). Section 172-d(1) requires that one "make" a material statement which is untrue. *See* Exec. Law § 172-d(1).

CPLR 3016(b) dictates that "circumstances constituting the wrong shall be stated in detail" when a cause of action "is based upon misrepresentation, fraud, mistake, wilful default, breach of trust or undue influence." CPLR 3016(b). The NYAG argues that CPLR 3016(b) does not apply the Seventeenth Cause of Action. First, it contends that the claim under the Executive Law is not a cause of action for fraud. See NYAG Br. at 27, n.22. By its plain language, though, the application of the rule is not limited to fraud claims, and the NYAG provides no support for its contention to the contrary. Second, the NYAG argues that it need not show "intent to defraud." *See* NYAG Br. at 27. Yet, the NYAG has brought its claim under § 172-d(1), to which that dispensation does not apply. It is instead specific to Exec. Law § 172-d(2), a violation of which has not been alleged. Unlike Section 172-d(2), there is nothing in Section 172-d(1) which dispenses with the need to show intent to defraud or any other mental state. Compare Exec. Law § 172-d(1) (regarding making of material statement which is untrue) with § 172-d(2) (regarding engaging in "fraud" or "fraudulent" acts for which no intent to defraud need be shown).

Further, the Amended Complaint here does not allege that Frazer made any false statement. Rather, it only charges *the NRA* with making such statements. *See* Amended Complaint, ¶¶ 296 ("the filings of the NRA with the New York Charities Bureau were not 'true, correct, and complete in accordance with the laws of State of New York applicable to this report'"), 731 ("[t]he NRA made materially false and misleading statements and omissions in the annual reports the organization filed with the Attorney General"). Indeed, the Amended Complaint lists

each purportedly false and misleading statement, and sources them exclusively to the NRA's Form 990 tax filings or its audited financial statements. *See* Amended Complaint, ¶ 568. The NYAG does not dispute that Frazer neither created nor signed any of those documents.

The only statement attributed to Frazer is his joint certification with the NRA's Treasurer that the NRA's CHAR 500 filings were true and correct "to the best of our knowledge and belief."[10] The Amended Complaint's assertions do not impugn the truth of the statement; to the contrary, as discussed above, the pleading's references confirm Frazer's good faith efforts at compliance. *Cf. In re Diebold Nixdorf, Inc. Sec. Litig.*, No. 19-CV-6180 (LAP), 2021 U.S. Dist. LEXIS 62449 at *31, 34 (S.D.N.Y. Mar. 30, 2021) (in Sarbanes-Oxley context, a certification is a "statement of opinion" based on an officer's knowledge "at the time" it was made); *Das v. Rio Tinto PLC,* 332 F. Supp.3d 786, 816 (S.D.N.Y. 2018) (in Sarbanes-Oxley context, the certification by a corporate officer serves merely as a basis to infer scienter, and a plaintiff "cannot raise an inference of fraudulent intent based on the signing of a certification without alleging any facts to show a concomitant awareness of or recklessness to the materially misleading nature of the statements"); *In re Lululemon Sec. Litig.*, 14 F. Supp.3d 553, 571 (S.D.N.Y. 2014) (actionable false statements must be *contemporaneously* false: "[a] statement believed to be true when made, but later shown to be false, is insufficient").

These cases incorporate the well-settled reality that a statute requiring a certification cannot "require an impossibility." *See Powell v. Shepard Niles Crane & Hoist Corp.*, 25 Misc. 2d 485, 487 (Sup. Ct. Broome Cty. 1960) (finding a statutory requirement to certify

[10] The New York State CHAR 500 forms for charitable organizations at issue contain a joint certification attesting "[w]e certify under penalties of perjury . . . to the best of our knowledge and belief, they are true, correct and complete . . ."). *See, e.g.*, NYSCEF Doc. No. 353 at 1.

statements as "true" to be satisfied by a qualified certification that something is true "to the best of my knowledge and belief," because "it would be impossible for the treasurer of this corporation who could not have participated in and witnessed every transaction, to make an unqualified verification . . ."). The relevant question, then, is what an individual defendant knew or believed at the time of the certification. CPLR 3016(b) recognizes this by requiring assertions of fraudulent conduct to include sufficient detail "to permit a jury to 'infer (defendant's) knowledge of or participation in the fraudulent scheme." *See, e.g., Pludeman v. Northern Leasing Systems, Inc.*, 10 N.Y.3d 486, 492 (2008) (quoting *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 55 (2001)). Here, there is no particular allegation (nor basis to conclude) that Frazer knew or believed the statements in the NRA's tax return and audited financial statement to be untrue. The NYAG has not disputed that, each year, the NRA's Form 990 tax filings and audited financial statements were completed by the NRA's Treasurer and his staff, working with independent tax accountants, lawyers, and auditors. The CHAR 500 reports attached these previously completed and published documents. Amended Complaint, ¶¶ 46, 563.

Unable to show knowledge, the NYAG charges Frazer for having failed to learn about purportedly material false statements made by others. *See* Amended Complaint, ¶¶ 296 ("Frazer either knew or negligently failed to learn that the filings of the NRA" were not true), 731 (Frazer "was or should have been aware"). But, allegations that an individual "knew or should have known" generally fail the specificity required by CPLR 3016(b). *See, e.g., National Westminster Bank USA v. Weksel*, 124 A.D.2d 144, 148-149 (1st Dept. 1987). Further, the NYAG's theory that Frazer, as a lawyer, should have known about purported errors in work conducted by other professionals is misplaced. *See In re Diebold Nixdorf, Inc. Sec. Litig.*, 2021 U.S. Dist. LEXIS 62449, at *37 ("Plaintiff must do more than allege that the Individual Defendants

had or should have had knowledge of certain facts contrary to their public statements simply by virtue of their high-level positions") (quoting *Lipow v. Net1 UEPS Techs., Inc.*, 131 F. Supp. 3d 144, 163 (S.D.N.Y. 2015)); *cf. Abrahami v. UPC Constr. Co.*, 224 A.D.2d 231, 233-234 (1st Dept. 1996) (for a fraud claim, corporate officers' "mere negligent failure to acquire knowledge of the falsehood is not sufficient to demonstrate intent . . .") (citing *Marine Midland Bank v. Russo Produce Co.*, 50 N.Y.2d 31, 44 (1980)).

Thus, the Seventeenth Cause of Action asserts strict liability because Frazer signed the CHAR 500 reports with the Treasurer. After having spearheaded the process for completing and signing the Form 990 with his staff and tax professionals, and having overseen the Treasurer's Office's compilation of the financial statements and completion of the independent third-party audit, the Treasurer signed the CHAR 500 attesting, with Frazer, that these attachments were true and correct "to the best of our knowledge and belief." NYSCEF Doc. No. 353 at 1 (joint certification). For the 2017 and 2018, the signing Treasurer was Craig Spray, the man who had championed the whistleblowers (who were members of his staff in the Treasurer's Office) and, the NYAG acknowledges, enjoyed a reputation for "talent and integrity." *See* NYSCEF Doc. No. 352 at 34 (noting Spray's reputation for "talent and integrity"); *accord* Amended Complaint, ¶ 6er'44 (NYAG's acknowledgement of same); NYAG Br. at 24, n.20 (same).

In these circumstances, the NYAG's contention that the Seventeenth Cause of Action's Executive Law claim is not governed by N-PCL § 717(b) – which expressly authorizes officers like Frazer to rely on reliable and competent officers and outside professionals in discharging his duties like executing the CHAR 500 reports – misses larger points. The first is the Court of Appeals' clear declaration that the N-PCL is a "comprehensive enforcement scheme." *Grasso*, 11 N.Y.3d at 70. The second and more important point is that Mr. Spray's acknowledged

good faith efforts justifiably warranted his exclusion from claims against him despite alleged false statements made in the report's attachments he supervised or signed. Amended Complaint, ¶¶ 591, 596. Because Frazer lacks that nexus to the alleged false statements, the basis for a claim against him is indiscernible, and the Amended Complaint, whether subjected to the pleading standard required by CPLR 3016(b) or even just to a notice pleading standard, fails to inform because it does not say.

III. The NYAG's Fourth and Eighth Causes of Action Fail to State The Circumstances of Any Actionable Wrong Allegedly Committed by Frazer

The Fourth Cause of Action brought under N-PCL § 720(a)(1) should be dismissed. First, as discussed above with respect to *Grasso* and the Eighteenth Cause of Action, a claim under Section 720(a)(1) requires allegations Frazer lacked good faith. *See Lawrence*, 74 A.D.3d at 1707 (officer deemed not liable on motion for summary judgment because "liability pursuant to section 720(a)(1) '*requires a showing* that the officer . . . lacked good faith in executing his [or her] duties'") (emphasis added) (citing *Grasso*, 11 N.Y.3d at 71). Here, the NYAG predicates its claim for liability on Frazer's purported negligence and failings, with no allegation he lacked good faith.

Second, though the NYAG concedes that CPLR 3016(b) applies to the claim, her imprecise and conclusory charges do not specify what Frazer is alleged to have done. The Amended Complaint states only that Frazer "violated his professional responsibility to his client," "fail[ed] to provide competent representation," "failed to act with reasonable diligence in representing the NRA," failed to "use the thoroughness and preparation reasonably necessary for the representation of the NRA throughout his tenure," "fail[ed] to make sufficient inquiry into and analysis of the factual and legal problems under his responsibility," and "fail[ed] to use methods and procedures meeting the standards of competent practitioners." *See* Amended Complaint, ¶¶ 672-676. Nor do the allegations establish any causal link between the alleged legal incompetence

and the wasted assets, enhanced tax liability, danger to the Association's tax-exempt status, and failures to comply with regulatory reporting requirements the NYAG claims to have occurred.

The NYAG's Eighth Cause of Action is even less specific. It claims that Frazer is a "trustee" who should be required to account for his "breaches" in failing to administer "properly" charitable assets "entrusted" to his care. *See id.*, ¶¶ 691-692. The plain language of CPLR 3016(b) states that the circumstances of the wrong shall be stated in detail where a cause of action is based upon such a "breach of trust." Though it references "preceding paragraphs," the Amended Complaint does not identify what assets Frazer is alleged to have failed to "administer," what was improper about his conduct, or even on what authority he is characterized as a trustee. *See* Amended Complaint, ¶¶ 691-692. The EPTL defines "trustee" as a non-profit corporation organized for charitable purposes or, if an individual, then one who holds and administers property pursuant to a written instrument or law. EPTL § 8-1.4(a)(1), (2). While the EPTL requires that trustees be registered with the State of New York and mandates that the Attorney General maintain a register of those trustees (*see* EPTL § 8-1.4(c), (d)), the NYAG has not cited to that registration to ground its characterization of Frazer as a trustee. Perhaps this is telling, as Frazer, as an officer, differs from each of the NRA's 76 voting directors who serve as the NRA's trustees.

In sum, the Fourth and Eighth Causes of Action fail to state the circumstances of respective wrongs charged with the requisite minimum detail and should be dismissed.

IV. Frazer's Motion to Dismiss Pursuant to CPLR 3211(a)(7) Does Not Violate Any Single Motion Rule

The NYAG contends that Frazer's motion violates the "single motion rule" of CPLR 3211. Pursuant to the Court's Part Rules, Section V(D) requiring similarly situated parties to avoid duplication of arguments where possible, Frazer incorporates by reference and adopts the arguments on this issue submitted by the NRA and Mr. LaPierre including that motions under

CPLR 3211(a)(7) are express exceptions to CPLR 3211(e), especially where, as here, the pleading has been substantially changed.

Conclusion

For the reasons stated herein and in our moving brief, as well as in the memoranda and other supporting materials submitted by Defendants The National Rifle Association of America, Inc. and Wayne LaPierre, which Frazer incorporates by reference and adopts here, Frazer's motion to dismiss Plaintiff's Amended Complaint should be granted, with prejudice.

Dated: New York, New York
November 12, 2021

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To: PEOPLE OF THE STATE OF
NEW YORK, by LETITIA JAMES,
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 6,566 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
November 12, 2021

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