Motion Seq. No. 017

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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK, Plaintiff, v. THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL, Defendants.	Index No. 451625/2020 IAS Part Three Hon. Joel M. Cohen

REPLY 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

Attorney for Defendant
Wayne LaPierre

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Defendant Wayne LaPierre ("LaPierre") respectfully submits this reply memorandum of law in further support of his motion under CPLR 3211(a)(2), (3) and (7), to dismiss the causes of action asserted against him by Plaintiff People of the State of New York, by Letitia James, Attorney General of the State of New York (the "Attorney General") in the Amended and Supplemental Verified Complaint ("Amended Complaint").

I.

PRELIMINARY STATEMENT

LaPierre brings this post-answer motion to dismiss the four causes of action asserted against him in the Amended Complaint, which adds 25 pages and 87 paragraphs of new allegations "of wrongdoing committed by Defendants," directed mostly at him. The motion is based on CPLR 3211(a)(2), (3) and (7), and seeks dismissal of those claims on the grounds of lack of subject matter jurisdiction, lack of legal capacity/authority/standing to sue and failure of the new pleading to state a valid cause of action against him. The Attorney General's claims are devoid of any fault-based elements, 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 *People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64 (2008), and the Attorney General has failed to satisfy the five percent representation and demand/futility requirements of N-PCL § 623(a) and (c). LaPierre previously filed a motion to dismiss the original complaint challenging the Attorney General's forum selection, which was denied without the Court reaching the underlying merits of the case. LaPierre then filed an answer in which he raised defenses based upon grounds specified in paragraphs two, three and seven of sub-division (a) of CPLR 3211, the same grounds upon which he now bases his instant motion, presenting issues that this Court has not previously decided.

The Attorney General opposes the instant motion, arguing that it is "barred under the single motion rule" and that "the Amended Complaint states a derivative cause of action for unjust enrichment against LaPierre", but her argument is flawed in several respects.

First, the single motion rule does not apply here because the complaint has changed—the Attorney General has amended it to add 25 pages and 87 paragraphs of new allegations, which include claims not arising out of or relating to the conduct, occurrences or transactions contained in the original pleading—and because CPLR 3211(e) expressly permits a second motion to dismiss under CPLR 3211(a) if the motion is "based upon a ground specified in paragraph two [or] seven … of sub-division (a)" at any time subsequent to service of a responsive pleading.

Second, the law does not allow her to assert a claim for unjust enrichment against an officer or director of a nonprofit corporation, either directly, or indirectly as a derivative claim, and, furthermore, she has not satisfied critical threshold derivative standing requirements to which she would be subject, and which she would have to satisfy, even if it did. Her suggestion that the amendment of the Not-For-Profit Corporation Law ("N-PCL") by the Nonprofit Revitalization Act of 2013 ("N-PRA") somehow changed the fault-based scheme of the N-PCL to one that would impose a type of strict liability, or at least one that is not "purely fault-based," is not borne out by the text of the N-PCL, in which the relevant parts of the two core fault-based provisions on which the Court of Appeals focused its attention and based its holding in *Grasso* – sections 717 and 720 of the N-PCL – remain unchanged in all material respects.

Finally, her last-ditch argument that the Amended Complaint contains allegations sufficient to establish the necessary element of fault on the part of LaPierre is not borne out by the text of the Amended Complaint – nowhere in the complaint does the Attorney General allege facts sufficient to support a conclusion that LaPierre acted with "knowledge of unlawfulness" or

"bad faith," and the vague and conclusory allegations levelled at him fall far short of the high standard for imposing liability on nonprofit officers and directors codified in the N-PCL and recognized by the Court of Appeals in *Grasso*.

Accordingly, there is no merit to the Attorney General's argument that this motion is barred, that the 2013 changes to the N-PCL somehow changed the legal landscape in some material way and that, therefore, she can pursue this forbidden claim for unjust enrichment against LaPierre, even though she admits that she has not satisfied the first threshold standing requirement of N-PCL § 623, which governs members' derivative actions and sets clear bright-line statutory requirements for bringing derivative claims, which have not been met here, and that she can maintain statutory causes of action against LaPierre under the N-PCL without alleging fault on his part.

II.

STATEMENT OF FACTS

For his statement of facts in reply to the Attorney General's opposition papers, LaPierre respectfully directs the Court's attention to the accompanying Affirmation of P. Kent Correll.

III.

ARGUMENT

A. LaPierre's Motion Is Proper Because the Complaint Has Changed and CPLR 3211(e) Expressly Permits a Motion to Dismiss Under CPLR 3211(a)(2) or (7) at Any Time

Contrary to the Attorney General's first red-herring argument, the single motion rule of CPLR 3211(e) has no application under the circumstances presented here because the Attorney General changed her complaint by adding 25 pages and 87 paragraphs of new allegations, including claims not arising out or relating to conduct, occurrences or transactions contained in

her original pleading.[1] The "single motion rule" does not apply where a pleading has been amended.[2] Her argument that her new pleading "does not assert new causes of action" is without merit because, by definition, "[a] claim not arising out of or relating to the conduct, occurrence or transaction contained in the original pleading" constitutes a "new cause of action".[3] Here, the new allegations in the Amended Complaint have been incorporated by reference into the parts of the Amended Complaint denominated as "Causes of Action",

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[1] In her opposing brief, the Attorney General admits: "The [Amended] Complaint 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 Texas federal court," thus adding a new temporal dimension and new substantive claims. *See* NYSCEF Doc. No. 404 (The Attorney General's Omnibus Memorandum of Law in Opposition to Defendants' Motions to Dismiss) (hereinafter cited as "Opp. Mem.") at 5-6.

[2] *Barbarito v. Zahavi*, 107 A.D.3d 416 (1st Dep't 2013) ("the 'single motion rule' (CPLR 3211(e)) does not bar Seelig and MSF from moving to dismiss the amended complaint, as the fraud cause of action in the amended complaint is not the same as the corresponding cause of action in the original complaint . . . . Therefore, because Seelig and MSF did not have the opportunity to address the merits of the original cause of action, the single motion rule does not apply."); *Shelley v. Shelley*, 180 Misc.2d 275, 282 (Sup. Ct., Westchester Cnty 1999) ("*[I]t is clear that the single motion rule is no bar to a second dismissal motion where the complaint has been amended*.") (italics added).

[3] *See* Black's Law Dictionary (9th ed. 2019) at 251 ("**cause of action.** (15c) 1. A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person; CLAIM (4) *** 2. A legal theory of a lawsuit <a malpractice cause of action>. CF. RIGHT OF ACTION. – Also termed (in senses 1 & 2) *ground of action.* ***new cause of action***. A claim not arising out of or relating to the conduct, occurrence, or transaction contained in the original pleading.") (italics and bolding in original); and 281-182 ("claim, n. (13c) 1. The aggregate of operative facts giving rise to a right enforceable by a court <the plaintiff's short, plain statement about the crash established the claim>. – Also termed *claim for relief* (1808). 2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional <the spouse's claim to half of the lottery winnings>. 3. A demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for.").

therefore, those "causes of action," are now different than they were in the original complaint, so under even the most narrow view of the meaning of the phrase "cause of action," the Attorney General's position is by definition wrong. In any event, CPLR 3211(e) expressly permits "a motion based upon a ground specified in paragraph two, seven or ten of subdivision (a)" at any time.[4]

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[4] *See* CPLR 3211(e); *Olsen v. Stellar West 110 LLC*, 2012 WL 337781, *2-3, N.Y. Slip. Op. 30178, Jan. 25, 2012 (Sup. Ct. N.Y. County 2012), *aff'd* 96 A.D.3d 440 (1st Dep't 2012), lv to app dismissed, 20 N.Y.3d 1000 (2013) (granting defendant's motion to dismiss plaintiffs' amended complaint for lack of jurisdiction after having previously denied defendant's pre-answer motion to dismiss plaintiffs' original complaint, where plaintiffs served an amended complaint and defendant moved to dismiss the amended pleading based on lack of jurisdiction, stating: "[A]n exception to CPLR 3211 (e) applies here because the defendant is asserting that this court lacks subject matter jurisdiction to hear plaintiffs' claims …. *On the prior motion to dismiss the parties did not raise the issue of subject matter jurisdiction but instead brought before the court the issue of forum selection. *** However, now the defendant raises the issue of subject matter jurisdiction and there is no prejudice to plaintiffs in the court's consideration of defendant's application because subject matter jurisdiction is a threshold limitation on the court's power to grant relief.*") (emphasis added); *see also Rivera v. Board of Educ. of the City of N.Y.*, 82 A.D.3d 614, 614 (1st Dep't 2011) (unanimously reversing order denying motion to dismiss complaint for failure to state cause of action, granting motion, and directing clerk to enter judgment dismissing complaint, holding that second motion did not violate single motion rule "since the prior motion was not decided on the merits"); *767 Third Ave. LLC v. Greble & Finger, LLP*, 8 A.D.3d 75, 75 (1st Dep't 2004) (unanimously affirming order granting motion to dismiss complaint, stating: "The single motion rule … has no application where … [t]here was no prejudice to plaintiff, and the matter was ripe for disposition. Neither the letter nor the spirit of the single motion rule was violated."); *Lemberg v. John Blair Communications, Inc.*, 258 A.D.2d 291, 292 (1st Dep't 1999) (reversing order denying motion to dismiss cause of action in second amended complaint, where legal sufficiency of cause of action was never challenged on prior motion, concluding that latest motion to dismiss did not contravene single motion rule of CPLR 3211(e)); *Wallert v. Ballance*, 2012 N.Y. Slip. Op. 33290 (Sup. Ct., N.Y. Cnty 2012) (Kornreich, J.) (motions made under CPLR 3211(a)(7) for failure to state a cause of action constitute an exception to the single motion rule); *Wallert v. Ballance*, 2011 N.Y. Slip. Op. 34002 (Sup. Ct., N.Y. Cnty 2011) (Kornreich, J.) ("CPLR 3211(e) permits a single motion to dismiss on the grounds set forth in subdivision (a), except for motions made pursuant to subdivisions (a) (2), (7) or (10). Here, Ballance made two motions: to dismiss for lack of personal jurisdiction, subdivision (a)(8), and a second motion to dismiss both for failure to state a claim and based upon documentary evidence, respectively subdivisions (a)(7) and (a)(1). His second motion also addressed the statute of frauds (a)(5). Hence, his second motion violates the single motion rule, except insofar as it is based upon failure to state a cause of action") (emphasis added).

Moreover, even if the complaint had not changed, LaPierre would have been entitled to bring a second motion upon a ground specified in paragraph two or seven of CPLR 3211(a) at any time.[5] CPLR 3211(e) provides:

> *At any time before service of the responsive pleading is required*, *a party may move on one or more of the grounds set forth in subdivision (a) and no more than one such motion shall be permitted.* Any objection or defense based upon a ground set forth in paragraphs one, three, four, five and six of subdivision (a) is waived unless raised either by such motion or in the responsive pleading. *A motion based upon a ground specified in paragraph two, seven or ten of subdivision (a) may be made at any subsequent time ….*[6]

Thus, CPLR 3211(e) is no bar to a second dismissal motion based on a court's lack of subject matter jurisdiction or insufficiency of the complaint under CPLR 3211(a)(2) and (a)(7).[7] Based upon those very provisions, LaPierre's motion is expressly permitted by CPLR 3211(e).[8]

Finally, this Court has not previously ruled on the issues raised on LaPierre's motion.[9] As this Court stated in describing its decision on the prior motions to dismiss: "At the outset, I

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[5] CPLR 3211(e).

[6] CPLR 3211(e) (italics added). Clearly, the phrase "one such motion" in the first sentence of CPLR 3211(e) refers to a motion made "before service of the responsive pleading is required" (*i.e.*, a *pre-answer* motion), not to a motion based upon a ground set forth in paragraph two or seven of CPLR 3211(a) made after service of the responsive pleading is required (*i.e.*, a *post-answer* motion), which is governed by the third sentence of CPLR 3211(e) and "may be made at any subsequent time".

[7] *See* note 4, *supra*. *See also Financial Industry Regulatory Authority, Inc. [FINRA] v. Fiero*, 10 N.Y.3d 12, 17 (2008) (subject matter jurisdiction is not waivable); *Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 718 (1997) ("A court's lack of subject matter jurisdiction is not waivable, but may be raised at any stage of the action, and the court may, *ex mero motu* [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action") (emphasis in original).

[8] *Id.*

[9] LaPierre's motion was focused on forum selection issues; it did not raise issues directed to the merits such as: (i) whether the Attorney General has authority to assert nonstatutory causes of action against officers and directors of nonprofits, (ii) whether the Attorney General has standing to maintain a derivative action without the participation of at least five percent of a nonprofit's members as plaintiffs, (iii) whether the original complaint failed to state a cause of action against LaPierre because of a failure to allege the necessary element of fault, or (iv)

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*."[10]

In sum, LaPierre's motion is not barred under the single motion rule because it is a non-duplicative, post-answer motion based upon CPLR 3211(a)(2), (3) and (7), challenging subject matter jurisdiction, the Attorney General's authority, standing and legal capacity to sue, and the sufficiency of the Amended Complaint—a motion which LaPierre could file at any time.[11]

Hence, LaPierre's motion is permitted under CPLR 3211(e).[12]

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whether the court lacked jurisdiction of the subject matter of the causes of action asserted against LaPierre because the Attorney General lacks authority/standing/legal capacity to maintain the nonstatutory, non-fault-based causes of action. In short, LaPierre's prior motion was directed to a different pleading and did not seek dismissal of any cause of action asserted against him, *i.e.*, the Third, Seventh, Eleventh or Eighteenth Cause of Action—based on any of the arguments presented on his instant motion.

[10] *See* Correll Reply Affm. ¶ 8 and Exhibit 1 (Transcript of oral argument on prior motions to dismiss).

[11] *See supra* notes 4 and 7 and accompanying text.

[12] *See* Siegel, N.Y. Prac. § 273 (6th ed.) ("Omitting the insufficiency objection from an initial CPLR 3211 motion will not waive it …. *** Certainly a second motion would have to be entertained on the paragraph 2 ground of subject matter jurisdiction—whatever the motion that asserts it may be called—and with paragraphs 2, 7, and 10 treated as a package by CPLR 3211(e) it would be awkward to reach any other conclusion for the other objections.") (footnotes omitted); *Higby Enterprises, Inc. v. City of Utica*, 54 Misc.2d 405, 405-406 (Sup. Ct., Oneida Cnty 1967) (Cardamone, J.), *aff'd*, 30 A.D.2d 1052 (4th Dep't 1968) ("CPLR 3211(e) provides that 'any objection or defense *** based upon a ground specified in paragraphs *** 7 *** of subdivision (a) may be made by motion at any subsequent time or in a later pleading ***'. Accordingly, the defendant city may have set forth this defense in its answer or may, at its own option, make a motion under CPLR 3211 at any time. *Motions under subdivision (a)7 are not limited*.") (emphasis added). The cases relied upon by the Attorney General are distinguishable on the ground that they involved amended complaints that were "the same" or "essentially the same" as the earlier pleadings and/or did not involve challenges to subject matter jurisdiction and sufficiency of the complaint under CPLR 3211(a)(2) and (a)(7), which is not the case here. This case involves a non-duplicative, post-answer motion based upon grounds specified in CPLR 3211(a) and (7) to dismiss a complaint that has been amended and supplemented so extensively, substantially and fundamentally as to constitute a different pleading, with greatly expanded causes of action, which LaPierre had no prior opportunity to move to dismiss. And given that the

B. The Nonprofit Revitalization Act of 2013 Did Not Change the Fault-Based Scheme Codified by the Legislature in the Not-For-Profit Corporation Law, Which Still Requires the Attorney General to Allege Fault and Bars Unjust Enrichment Claims, and the Attorney General Has Not Adequately Alleged Fault on the Part of LaPierre—*i.e.*, "Knowledge of Unlawfulness" or "Bad Faith"

Contrary to the Attorney General's second red-herring argument, the Nonprofit Revitalization Act of 2013 did not change the fault-based scheme codified by the Legislature in the Not-For-Profit Corporation Law into a strict liability scheme and did not overrule or in any undermine the core holding of *Grasso*—that the Attorney General does not have authority to assert nonstatutory causes of action against nonprofit officers and directors, and that in asserting statutory claims against nonprofit officers and directors the Attorney General must allege and prove fault, *i.e.*, knowledge of unlawfulness or bad faith—because the 2013 amendment of the N-PCL did not materially change the fault-based provisions relevant to *Grasso*, i.e., sections 717 and 720 of the N-PCL. Nor did they change the key N-PCL provisions governing transactions related to compensation on which the attorney general relied in *Grasso*, sections 202(a)(12) and 515 of the N-PCL, in any material way. [13]

Attorney General amended her original pleading to assert claims "not arising out of or relating to the conduct, occurrences and transactions contained in the original pleading," by definition, asserting new "causes of action," her new pleading cannot be considered "the same" or "essentially the same" as her original pleading.

[13] The amendment of N-PCL § 715 in 2013 is not relevant here because the transactions on which the eleventh cause of action are premised are not "related party transactions" and, even if they were, they have already been rescinded. *See* Correll Reply Affm. ¶ 14 and Exhibit 2 (LaPierre Answer, Affirmative Defense (rescinded and moot)). So, with regard to the causes of action asserted against LaPierre, section 715 is inapposite. Moreover, since transactions related to compensation are not considered related party transactions, the 2013 amendment of N-PCL § 715, which deals with "related party transactions", has no bearing on the core holdings in *Grasso* concerning causes of action challenging nonprofit officer or director compensation, or on the causes of action asserted by the Attorney General here against LaPierre challenging his compensation (although the eleventh cause of action asserted against LaPierre is characterized as one for "wrongful related party transactions", it is premised solely on transactions related to compensation which are not considered "related party transactions"; therefore, it is unaffected by the 2013 amendment of N-PCL § 715). *See* Correll Reply Affm. ¶ 28 and Exhibit 5 (Guidance

Sections 717 and 720 of the N-PCL, on which *Grasso's* fault-based standard was based,[14] were not amended in any material way in 2013.[15] Section 717 was not amended at all.[16] And

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issued by the OAG's Charities Bureau in September 2018) ("*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).") (page 43 of 285) (emphasis added).

[14] *In People ex rel. Spitzer v Grasso*, 42 A.D.3d 126, 139-140 (1st Dep't 2007), *aff'd*, 11 N.Y.3d 64 (2008), the Supreme Court, Appellate Division, First Department held that the attorney general did not have authority to assert nonstatutory excessive compensation causes of action against a former officer and director of a not-for-profit corporation in circumvention of substantive standards codified in the comprehensive legislative scheme that had been established to govern duties and liability of officers and directors of not-for-profit organizations, focusing on sections 717 and 720 of the N-PCL, stating: "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. *** 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). *** 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." On appeal, the Court of Appeals did the same, again focusing on sections 717 and 720 of the N-PCL, stating: "[M]ost 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]). *** 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)

section 720 was only slightly amended (to include "key employees" within its scope).[17] Moreover, Section 202(a)(12) of the N-PCL, on which Attorney General Spitzer based his complaint in *Grasso*, was not amended at all in 2013, and section 515, on which Attorney General Spitzer further based his complaint, was amended only to add language which is not relevant here.[18]

Accordingly, there is no textual basis for the Attorney General's argument that the 2013 amendment of the N-PCL changed the fault-based scheme that was before the courts in *Grasso* into a scheme that would impose a type of strict liability on officers and directors of not-for-profit corporations.[19] In short, the fault-based scheme codified by the Legislature in the N-PCL was left untouched.

Thus, the Legislature did not jettison the business judgment rule in 2013 and open the door to common law claims against officers and directors of nonprofit corporations; rather, it kept the protections of the business judgment rule in place, and the high standard for imposing liability on officers and directors of nonprofit corporations intact.

The Attorney General's novel theory that the N-PRA amended the N-PCL to change the substantive standard of liability for nonprofit officers and directors from a fault-based one to a

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and the business judgment rule, they would impose a type of strict liability." *See People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64, 70-71 (2008).

[15] *See* Correll Reply Affm. ¶ 26 and Exhibit 4 (2013 Sess. Law News of N.Y. Ch. 549 (A.8072)).

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] *Id*.

strict liability one finds no support in the text of the N-PRA,[20] no support in the commentary concerning the N-PRA,[21] and no support in the case law decided after *Grasso*.[22]

The leading treatise on New York Nonprofit Law and Practice contains no mention of the fault-based scheme codified by the Legislature in the N-PCL having been changed in 2013 to one that would impose strict liability, and no mention of *Grasso* having been overruled, limited or even questioned (despite over a dozen references to *Grasso*).[23] If the fault-based scheme of N-PCL has been changed to a strict liability scheme and *Grasso* has been overruled, it is a very well-kept secret.

In short, the enactment of the N-PRA in 2013 did not change sections 717 or 720 of the N-PCL in any way material to the claims asserted by the Attorney General against LaPierre in this action and did not affect the viability of *Grasso* or its applicability to the compensation-related claims asserted against LaPierre in the Amended Complaint, and the changes to section

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[20] *Id.*

[21] *See*, *e.g.*, Victoria B. Bjorklund, *et al.*, New York Nonprofit Law and Practice § 6.03[2][a] at 6-34 (Matthew Bender, 3rd ed.) (cited hereinafter as "Bjorklund"). In discussing *Grasso*, the treatise states: "The Court concluded that the Attorney General, through these causes of action, was not attempting to enforce the law but to amend it. The Court noted that "as 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 … [t]he Attorney General cannot go beyond stated legislative policy and prescribe a remedial device not embraced by the policy.' Only the Legislature can eliminate the fault-based requirement of the N-PCL. With respect to the fifth and sixth causes of action, the Court found that those causes of action "also circumvent *the substantive standards for the liability of directors and officers established by the Legislature in N-PCL 717, 719(e) and 720(a)(2)*." (Emphasis added.) Tellingly, in the discussion of *Grasso*, there is no mention of the case being overruled by statute or in any way limited or undermined by enactment of the N-PRA (or by any other amendment), or of the opinion being questioned or criticized by any court.

[22] *Trump*, cited by the Attorney General, is not to the contrary because it involved related party transactions and allegations by the Attorney General, which the court found sufficient to meet the fault-based standard of the N-PCL.

[23] *See generally* Bjorklund.

715 of the N-PCL are irrelevant to the claims asserted by the Attorney General against LaPierre challenging his compensation, given that section 715 addresses "related party transactions" and transactions relating to compensation are not considered "related party transactions."[24]

Nowhere in the Amended Complaint does the Attorney General allege that LaPierre acted with "knowledge of unlawfulness" or "bad faith."[25]

C. The Bar on Unjust Enrichment Claims Cannot Be Avoided by Labelling Claims "Derivative", and, in Any Case, the Attorney General Is Subject to N-PCL § 623(a) and Has Not Met that Clear, Critical, Mandatory, Threshold Standing Requirement

Contrary to the Attorney General's last red-herring argument, the special standing requirements applicable to derivative claims apply fully to the Attorney General. Her authority under N-PCL § 112(a)(7) to enforce a right "given under [the N-PCL] to members" in section 623 to bring a members' derivative action in the right of a corporation to procure a judgment in its favor is limited, since the statute, by its terms, requires that the action be "brought" "by five percent or more of any class of members … of such corporation," and, thus the right to bring such an action is given under the N-PCL only to "five percent or more of any class of members."[26] The right belongs to members, and not to the attorney general directly, and that

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[24] *See supra* note 13 and accompanying text.

[25] The Attorney General fails to allege fault adequately in support of any of the causes of action asserted against LaPierre, but the failure is particularly glaring in her seventh, eleventh and eighteenth causes of action, where her theory of recovery against LaPierre seems to be that he has been "unjustly enriched." But an allegation of unjust enrichment cannot support a claim against an officer or director of a nonprofit corporation and that is true regardless of whether the claim is asserted directly or derivatively because it is the lack of the necessary element of fault that bars the claim, not the identity, status, authority, standing or legal capacity to sue of the person asserting it. *See People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64 (2008) (applying N-PCL); *People ex rel. Spitzer v. Grasso*, 42 A.D.3d 126 (1st Dep't 2007) (applying N-PCL), *aff'd* 11 N.Y.3d 64 (2008). *See also Lefkowitz v. Lebensfeld*, 51 N.Y.2d 442 (1980) (applying EPTL); *People ex rel. Cuomo v. Lawrence*, 74 A.D.3d 1705, 1707 (4th Dep't 2010) ("liability pursuant to section 720(a)(1) requires a showing that the officer … lacked good faith in executing his [or her] duties") (citing *Grasso*).

[26] *See* N-PCL § 623.

pre-condition must be satisfied in order for the Attorney General to "maintain" an action to enforce that right.[27] Therefore, without satisfaction of that condition, there is no "right given under the N-PCL" to members for the Attorney General to enforce and the Attorney General's authority to maintain such an action fails.[28] Further, despite ample opportunity to come forward to support the Attorney General's claims against LaPierre in the year since her complaint was filed making her allegations, it is notable that five percent or more of the NRA's members have not done so.

The Court of Appeals' decision in *Lefkowitz v. Lebensfeld* is instructive on this point.[29] In *Lefkowitz*, on facts similar to those presented here, the Court of Appeals affirmed dismissal of an entire action brought by the attorney general under the EPTL on the ground of lack of standing, stating:

> In effect, the Attorney-General is stepping into the shoes of the charity without first making a demand upon the corporation *or satisfying the other procedures normally associated with a derivative action.* He is endeavoring, not to enforce a gift or a trust, but to enforce rights that arise from the ownership of charitable property originally received as a gift. No authority has been furnished to this court that would sanction such an expansive reading of EPTL 8-1.1 (subd. (f)). That provision was enacted in response to a particular problem and, although now broader than at its inception, *it does not authorize a large scale incursion into the everyday affairs of charitable corporations. Indeed, in these circumstances, to confer standing upon the Attorney-General under EPTL 8-1.1 (subd. (f)) would be to grant all but unlimited and uncontrolled power to act as the alter ego of the charitable organization*. Since most charitable holdings probably originated as gifts, as did the shares involved here, virtually all obligations owed a charity would be independently enforceable by the Attorney-General. Such a result would require a strained interpretation of EPTL 8-1.1 (subd. (f)), a statute designed primarily to ensure that there is a party available to enforce charitable trusts on behalf of the ultimate beneficiaries. *Nor does EPTL 8-1.4 (subd. (m)) authorize the Attorney-General to maintain this action. It is true that 8-1.4 grants*

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[27] *See* N-PCL §§ 112(a)(7) and 623(a).

[28] *Lefkowitz v. Lebensfeld*, 51 N.Y.2d 442 (1980) (affirming dismissal of entire action brought by Attorney General under EPTL on ground of lack of standing).

[29] *Id*.

> *supervisory power over charities and other entities and allows the Attorney-General to institute proceedings to secure proper administration of such entities. Quite simply, however, the section does not provide for an action for unjust enrichment or restitution against an officer or director of a not-for-profit corporation who allegedly is liable to the charitable organization.*[30]

Here, similarly, Attorney General James is stepping into the shoes of the NRA without first making a demand on the NRA or satisfying other procedures normally associated with a derivative action, including the five percent representation requirement of N-PCL § 623(a).[31] She is endeavoring, not to enforce a right given under the N-PCL to members of a charitable corporation, but, rather, a right expressly, specifically and deliberately denied members—*i.e.*, the right to bring a derivative action without at least five percent of the corporation's members supporting the action and appearing as plaintiffs. No authority has been furnished to this Court that would sanction such an expansive reading of N-PCL § 112(a)(7) (nor such a cavalier, dismissive and disrespectful reading of N-PCL §§ 623, 717 and 720, or such contempt and disregard for the Appellate Division's and Court of Appeals' decisions in *Grasso*). The N-PCL simply does not authorize "a large scale incursion" by the Attorney General "into the everyday affairs of charitable corporations."

The Attorney General's attempt to invoke sections 112(a)(7) and 623 of the N-PCL to

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[30] *Id.* at 447.

[31] N-PCL § 623(a) is a codification of the common law rule that plaintiffs in derivative actions must demonstrate that they will fairly and adequately represent the interests of the shareholders or members of the corporation in whose right they claim to be suing. *See Pokoik v. Norsel Realties*, 55 Misc.3d 1208(A), *6 (Sup. Ct., N.Y. Cnty 2017) ("New York courts have held that because derivative actions bind absent interest holders they take on 'the attributes of a class action' and a 'plaintiff must therefore demonstrate that [he] will fairly and adequately represent the interests of the shareholders and the corporation, and that [he] is free of adverse personal interest or *animus*. If a plaintiff cannot demonstrate such representation, the derivative causes of action will be dismissed.") (emphasis in original), *aff'd as modified*, 164 A.D.3d 1124 (1st Dep't 2018). Thus, here, in addition to ignoring the 5% representation requirement of N-PCL § 623(a), the Attorney General fails to satisfy another procedural requirement normally associated with a derivative action.

circumvent the fault-based provisions of that statute and defeat the fault-based enforcement scheme codified by the Legislature in the statute must be rejected as a sham. There is no authority for the proposition that the Attorney General may evade the strictures of the fault-based provisions (principally section 717 and 720) by asserting a claim under section 623, purportedly on behalf of members of a charitable corporation, where five percent or more of the members are not plaintiffs, and, in fact, no member is a plaintiff--not a single one. Accordingly, the Attorney General's argument that she is not subject to the stricture of N-PCL § 623(a) should be rejected and the eighteenth cause of action in the Amended Complaint should be dismissed as against LaPierre on the separate and independent ground that she lacks authority to maintain the claims because they have not been asserted by five percent or more of any class of NRA members and do not have the support of at least five percent of any class of NRA members.[32] Put simply, there is no support in the N-PCL or case law for the proposition that the five percent representation requirement of N-PCL § 623(a) does not apply in an action brought by an attorney general under N-PCL § 112(a)(7) ostensible to enforce a member's purported right. The authority given to the Attorney General in N-PCL § 112(a)(7) is expressly limited to "maintain[ing]" an action "to enforce any right *given under this chapter* to members," and, clearly, the N-PCL does not give members the right to bring a derivative action without satisfying the five percent representation requirement of N-PCL § 623(a).[33]

In *Grasso*, the Court of Appeals held that the attorney general does not have authority to bring nonstatutory claims based on a theory of unjust enrichment against an officer of a nonprofit

[32] *See Lefkowitz*.

[33] In arguing that "[t]he N-PCL clearly authorizes the Attorney General to bring an action to enforce 'any right' of 'members' of the Corporation," citing N-PCL 112(a)(7), the Attorney General neglects to mention the critical language "given under this chapter," which qualifies the phrase "any right." *See* Opp. Mem. at 32. As shown above, the N-PCL does not give members any right to bring an unjust enrichment claim against an officer or director.

because such claims are inconsistent with the fault-based scheme codified by the Legislature in the N-PCL. Contrary to the Attorney General's assertion, the N-PCL has not been changed in any way that is material to the holding in *Grasso*, *Grasso* is still good law, and it is controlling here, and it doesn't matter that, here, the Attorney General has asserted a claim for unjust enrichment derivatively. In any case, the Attorney General does not have standing to maintain an action to enforce a right *not* given under the N-PCL to members—*i.e.*, a right to bring a derivative action for unjust enrichment without the action being brought by a class of five percent or more of members, or, for that matter, to assert any cause of action against LaPierre, directly or derivatively, for unjust enrichment or otherwise.

V.

CONCLUSION

For the reasons stated herein and in our opening brief, as well as in the memoranda and other supporting materials submitted by the NRA and Frazer, which LaPierre incorporates by reference and adopts here, LaPierre's motion to dismiss the causes of action asserted against him in the Third, Seventh, Eleventh and Eighteenth Causes of Action of the Amended Complaint should be dismissed with prejudice pursuant to CPLR 3211(a)(2), (3) and (7), in accordance with the Court of Appeals' unanimous and controlling decision in *Grasso.*

Dated: New York, New York
November 12, 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

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 Memorandum of Law in Support of Defendant Wayne LaPierre's Motion to Dismiss (Motion Seq. No. 017) 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 6,600, because the memorandum of law contains 6,537 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 reply memorandum of law.

Dated: New York, New York
November 12, 2021

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