EXHIBIT A

MOTION SEQ. NO. 18

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

PEOPLE OF THE STATE OFNEWYORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK	§	
Plaintiff,	§	**INDEX NO. 451625/2020**
v.	§	**ORAL ARGUMENT: DECEMBER 10, 2021**
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	
Defendants.	§	

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT THE NATIONAL RIFLE ASSOCIATION'S MOTION TO DISMISS AMENDED COMPLAINT (AMENDED 12.4.21)

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A. Aside from raising the inapplicable "one-motion" rule, the NYAG does not disagree with the NRA about the procedural legal standard applicable to the NRA's motion.

The NYAG does not dispute the legal standard for this motion. Among other things, the NYAG concedes that "allegations of misconduct against [allegedly] rogue directors [are not] sufficient to state a claim against the entity." She does not dispute that, "where liability of a corporation is . . . not for damages to a third party, misconduct by officers is not properly imputed to the corporation where the corporation is actually the victim of [the] scheme." Indeed, as the Office of the Attorney General made clear over 100 years ago, "[t]he penalty of corporate death will not be inflicted upon a corporation for the unauthorized and illegal acts of its agents."[1]

The NYAG argues that the Motion is barred by the "single motion rule."[2] This argument fails. CPLR 3211(e) provides that "[a] motion based upon … paragraph … ***seven*** … ***may be made at any subsequent time***."[3] The NRA has never moved to dismiss under CPLR 3211(a)(7), which can be invoked after answering.[4] This Motion, under CPLR 3211(a)(5) and (a)(7), is NRA's first motion to dismiss upon the merits.[5] The first motion to dismiss the NYAG's original complaint was limited to procedural grounds: (a) *forum non conveniens* (CPLR 327(a)); (b) a pending litigation between the parties (CPLR 3211(a)(4)); (c) improper venue (CPLR 3211(a)(1)); and (d)

[1] 1914 Op. Atty. Gen. 238, (1914) (Affirmation Exhibit E).

[2] NYSCEF No. 404 at ~~pages~~ 7-8.

[3] CPLR 3211(e) (emphasis added).

[4] *See* CPLR 3211(e); *Hendrickson*, 102 A.D.3d 251, 256 (2d Dep't 2012) ("CPLR 3211 motions may be made after service of the party's answer in three circumstances: when the motion is based upon ... (a)(7) failure to state a cause of action"); *Taylor,* 460 N.Y.S.2d 886, 890 (Sup. Ct. N.Y. Cnty. 1983) ("the single-motion rule of CPLR 3211(e) is not offended where, as here, the second motion raises the ground of CPLR 3211(a)(7), because a motion on this ground may be made at any time").

[5] NYSCEF No. 404 at ~~page~~ 4 ("In late 2020, Defendants filed six separate motions to dismiss, stay, or transfer this action under CPLR 327(a), 511(b), 2201, and 3211(a)(1) and (4).3 Those motions sought to (1) dismiss this action under CPLR 511(b) on forum-non-conveniens grounds; (2) dismiss or stay this action under CPLR 3211(a)(4) on the basis that a federal action was purportedly already pending between the parties when this action was commenced; and (3) dismiss or transfer this action to Albany County under CPLR 3211(a)(1) and CPLR 511(b) because that is where the NRA's registered agent is located.").

pending the resolution of related federal cases (CPLR 2201).[6]

Moreover, when it previously moved to dismiss, the NRA could not have moved on collateral estoppel grounds: Judge Hale made his findings *after* briefing on that motion had concluded.[7]

B. The NYAG's First, Second, Fourteenth, Fifteenth, and Sixteenth causes of action fail because the decisions of the NRA Board are protected by the business judgment rule.

The NRA moved to dismiss the NYAG's claims because the NYAG does not allege facts sufficient to overcome the protection of the business judgment rule. Instead, she vaguely accuses "the NRA" of conducting its business in a persistently fraudulent or illegal manner, without alleging that the NRA's Board or its members ever acted fraudulently, engaged in the purported illegalities, or lacked good faith.

NYAG concedes that "[t]he business judgment rule was incorporated into N-PCL 717 . . . as a good-faith defense" and that, in *Grasso*, the court held that "the Legislature has provided directors . . . [of a not-for-profit corporation] with the protections of the business judgment rule." Each of the NYAG's arguments is meritless.

First, NYAG's argument that the "common-law doctrine of the business judgment rule [allegedly] does not apply to the EPTL or N-PCL" is untrue. Likewise, NYAG's claims that NPCL's business judgment rule protections are narrower than the "common-law" rule, fail. Assuming *arguendo* that the business judgment is more limited than the common law doctrine, it still bars the NYAG's claims. NPCL 717 and 720 insulate officers and directors who act in good

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

[7] *See, e.g.*, *Rich v. Rich*, 426 N.Y.S.2d 936, 938 (Sup. Ct. N.Y. Cnty. 1980) ("To deem a waiver to take place based upon the failure to include a defense in an answer where the very facts upon which the defense is based did not arise until after service of the answer, would be more than an absurdity; it would raise serious questions of due process of law.").

faith, and the NYAG has not alleged that any Board member failed to discharge his or her duties in good faith, acted fraudulently, or illegally.

Second, the NYAG's reliance on *Moore* is misplaced because, there, the Attorney General alleged that "the Individual Defendants have *failed to discharge their duties as directors of . . . in good faith*."[8]

Third, the NYAG's erroneously argues that the business judgment rule is not a defense to judicial dissolution.[9] She notes her dissolution claims are "governed by the statutory scheme . . . in Article 11 of the N-PCL," yet "[t]he NRA has cited no support for the proposition that it should be afforded the presumption of good faith afforded by the business judgment rule in addition to the protections found in article 11."[10] These arguments should be rejected outright. Each NPCL article giving rise to a dissolution cause of action the AG elected to pursue requires her to allege that the "NRA," not simply individuals associated with it, carried out its business in a persistently fraudulent or illegal manner *or* that board members in control of the NRA violated NPCL 1102(a)(2). The "NRA," of course, acts through its Board, and its Board's members' duties—as well as protections related to such duties—are governed by NPCL article 7's protections. The NYAG has cited no authority to compel the Court to disregard article 7 or to seek corporate dissolution.

Moreover, in seeking dissolution under NPCL 1101, the NYAG expressly relies on alleged article 7 and other NPCL violations, all of which are outside of article 11.[11] It would be illogical

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[8] *See also People v. Austin*, 2021 WL 325557, at *5-6 (N.Y. Sup. Ct. Jan. 29, 2021) (noting that the defendant "cannot use the business judgment rule to sidestep the allegations of bad faith described in the ~~compaint~~complaint [because] the complaint[, unlike here] states that Austin and others 'breached their duties of loyalty and good faith to the Cemetery'").

[9] ~~Cite opposition~~ Opposition at 15.

[10] ~~Cite opposition~~ Id.

[11] Amended Complaint First Cause of Action.

to protect a director from liability where a remedy against her is sought under Article 7, yet dissolve the corporation based on the same conduct even if the director did not fail to discharge her duties in good faith.

Cherokee, 112 S.W.3d 486 (Tenn. Ct. App. 2002), is inapposite. It is an opinion interpreting a statute of another state and has no binding force. Second, as the NYAG admits, the "Court . . . was considering whether a non-profit ***has abandoned any charitable purpose*** *and has pursued private, rather than public, interests*." Here, the NYAG's complaint does not and cannot allege that the NRA has abandoned any charitable purpose and pursued private, rather than public, interests.

Finally, the NYAG argues the "business judgment rule is not a sufficient basis for dismissal of pleadings at [this] stage" based on two inapposite cases. First, in *Higgins*, 10 Misc. 3d 257, 282 (Sup. Ct. N.Y. Cnty. 2005), the court stated that "[e]ven in the context of the business judgment rule, . . . the complaint will be sustained **if it contains allegations sufficient to demonstrate that directors did not act in good faith** or were otherwise interested, as 'pre-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate.'" Here, the Complaint does not allege that any director did not act in good faith and alleges no facts to support any such accusation. Second, in *Cohen*, 7 Misc. 3d 1015(A) (Sup. Ct. N.Y. Cnty. 2005), the court stated that "[i]n the pre-discovery stage of litigation, it is inappropriate to dismiss a claim by invoking the 'business judgment rule,' given that plaintiffs have set forth more than conclusory allegations concerning defendants' fiduciary duties." Here, in contrast, the NYAG is unable to point to any non-conclusory allegations concerning fiduciary duties.

The Court should dismiss all claims against the NRA on business judgment rule grounds.

C. <u>The NYAG's First and Second causes of action for dissolution fail because the remedy is unwarranted.</u>

The NYAG seeks to terminate the NRA's corporate existence under NPCL 1101(a)(2) on the grounds that "the NRA" has allegedly (i) exceeded the authority conferred upon it by law; and (ii) conducted "its business" in a persistently fraudulent or illegal manner or by the abuse of its powers contrary to public policy of the state.[12] The NYAG also seeks the same "draconian" remedy under NPCL 1102(a)(2), alleging "directors or members in control of the NRA have looted or wasted the corporate assets, have perpetuated the [NRA] solely for their personal benefit, or have otherwise acted in an illegal, oppressive or fraudulent manner."[13] The NRA moved to dismiss the NYAG's dissolution claims under CPLR 3211(a)(7) because, under well-settled law, to allege a claim for dissolution, the NYAG cannot simply repeat the statutory language in the Complaint; rather, the NYAG must allege facts that, if true, establish that the NRA (i) has committed "some sin against the law . . . which has produced . . . injury to the public," (ii) engaged in abuse that is (A) grave, (B) substantial, and (C) continuing and (D) involves a public—rather than—a private right, and (iii) engaged in a transgression that amount to "harm or menace [to] the public welfare."[14] Indeed, in *People v. Abbott Maint. Corp*., in affirming dismissal of AG's dissolution action, the court explained:

> There are levels of corporate misconduct, surely, which warrant [dissolution] [but] [t]he term 'violation of any provision' of law [(used in the dissolution statute)] **must be read more broadly than a mere violation of one or more of the list of the statutory provisions which govern corporate organization and function**.[15]

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[12] Opposition at 17 – 19.

[13] Id. at 17.

[14] Motion at 16, 25.

[15] 11 A.D.2d 136, 139 (1st Dep't 1960). Although the prong of the dissolution statute at issue in *Abbott* is not one on which the NYAG relies here, she does rely on other—similarly worded prongs that likewise "must be read more broadly than" to refer to any violation of the law.

"In the end, the question [was] whether [to] adjudge the corporate charter forfeited on suit of the People who gave the charter, will depend on the **magnitude and public importance** of the unlawful or improper practices complained of." Here, the NYAG fails to allege the requisite magnitude—and puts forward no allegations of the "public importance"—of the allegedly unlawful practices.[16]

Likewise, the Opposition does not distinguish the long line of cases the NRA cites. Instead, she claims that, under the NPCL, she is "entitled" to seek dissolution merely if "a charitable entity . . . has violated the law."[17] The Court should reject the AG's unsupported arguments and scrutinize her allegations against the more exacting standard uniformly required by binding authority.

Notably, in arguing that the NYAG does not have to allege that the defendant she seeks to dissolve is a sham corporation, she mischaracterizes the argument that the NRA made. The point is that dissolution is reserved for utterly extreme behavior, such as running a "sham" corporation, and the NYAG does not argue that the NRA is a sham and has not otherwise alleged such utterly extreme behavior as to warrant dissolution.

1. <u>The First and Second Causes of Action in the Amended Complaint fail to state a claim for dissolution under NPCL 1101 or 1102.</u>

a. <u>The NYAG does not allege such "grave, substantial and continuing abuse" as to warrant a remedy of dissolution.</u>

The Motion explained that, even affording the AG all reasonable inferences, her allegations against the NRA do not satisfy any of the applicable standards, let alone the heightened pleading standards.

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[16] *See also People by Abrams*, 206 A.D.2d 143, 145-46 (4th Dep't 1994) ("The remedy of dissolution has been described as a 'judgment . . . of corporate death,' . . . Its infliction must rest upon grave cause, and be warranted by material misconduct.").

[17] Opposition at 20.

The Opposition likewise does not dispute that the Amended Complaint contains no allegations that the NRA (i) has committed "some sin against the law . . . which has produced . . . injury to the public," (ii) engaged in abuse that involves a public right and that is grave, substantial, and continuing, or (iii) engaged in any transgressions that amounted to "harm or menace [to] the public welfare." The Amended Complaint contains no such allegations. The Court, therefore, has ample basis to dismiss the Dissolution claims.[18]

b. The NYAG fails to allege corporate wrongdoing.

The AG does not dispute that (i) misconduct by defendant cannot be imputed to another merely because ~~on~~of an existing relationship; and (ii) where liability sought is, as here, of a corporation to the state, misconduct by officers is not imputable to a corporation where the corporation is actually the victim. The NYAG, however, does not argue that the Amended Complaint alleges that the purported looting or waste furthered the "NRA's" business.

The NRA's business is defined in its Bylaws.[19] The NRA's "business" consists of the following:

1. To protect and defend the Constitution of the United States . . . ;
2. To promote public safety, law and order, and the national defense;
3. To train members of law enforcement agencies, . . . ;
4. To foster, promote and support the shooting sports, . . . ; [and]
5. To promote hunter safety . . . and wise use of our renewable wildlife resources.

The NYAG uses the words "its business" in her allegations, but those allegations have no connection to the NRA's business; rather the alleged improprieties (such as unauthorized expense

[18] Although the NYAG asserts in footnotes 15-17 that the paragraphs the footnotes list provide the particularized non-conclusory allegations, the majority of the allegations she cites are conclusory and should be disregarded by the Court. The balance are insufficient to assert a claim.

[19] Affirmation of David J. Partida in Support of Reply ("Reply Aff."), Exhibit F.

reimbursements) occurred in violation of the NRA's policies and at the expense of the NRA. In addition, the NYAG does not allege that the NRA pursued the above-listed business objectives in a persistently fraudulent or illegal way. In fact, other than acknowledging that NRA was formed in 1871 and has approximately 5 million members, the Amended Complaint contains no allegations about the NRA's operations, programs, activities or the NRA's other "business."

As a result, the dissolution claims must be dismissed.

D. The NYAG's First and Second causes of action fail because the NRA bankruptcy trial's findings are binding and collaterally estop the NYAG from relitigating the same issues here.

The NRA moved to dismiss NYAG's two dissolution claims because (i) she is estopped from relitigating here factual issues that Judge Hale resolved against her in May 2021; and (ii) such findings are fatal to her dissolution claims.

Collateral estoppel bars the NYAG's dissolution claims because, in the bankruptcy proceeding before Judge Hale, the NYAG sought the dismissal of the chapter 11 petition or appointment of a trustee pursuant to 11 U.S.C. 1104(a)(2).[20] She argued that the appointment was warranted under Section 1104(a)(2) under a multi-factor test, including the debtor's trustworthiness; performance and the potential for reorganization; whether creditors have confidence in management; and the benefits of appointment balanced against its cost. Indeed, "[a]s with the analysis of cause under § 1104(a)(1), the debtor's ability to fulfill its duty of care to protect the assets, its duty of loyalty, and its duty of impartiality is at the base" of a § 1104(a)(2)

[20] NYSCEF No. 371, NRA Motion at Exhibit 3, NYAG Motion to Dismiss Bankruptcy Petition and for Appointment of Trustee at ¶¶ 39-89. Section 1104(a)(2) provides: "At any time after the commencement of the case but before confirmation of a plan … after notice and a hearing, the court shall order the appointment of a trustee— (2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor." The NYAG also moved for appointment of a trustee under 11 U.S.C. § 1104(a)(1), which requires appointment of a trustee "for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor." *Id*. at ¶¶ 44-83.

analysis.[21] In that setting, the AG urged Judge Hale to consider "the interests of creditors, . . . and other interests of the [chapter 11] estate" and "look to the practical realities and necessities inescapably involved in reconciling competing interests."[22] She argued that consideration of the applicable factors warranted the appointment of a chapter 11 trustee.[23]

In support of such relief, the AG offered evidence that she expressly claims supports the claims she asserted in this case. In fact, the NYAG expressly incorporated her complaint in the matter in her moving papers. Having made the tactical choice to do so—the NRA never moved to stay this case and expressly averred to the court that the automatic bankruptcy stay did not apply—the Attorney General actually litigated these issues and attempted to prove that "LaPierre and the management teams he has put into place [allegedly] have a long-standing history of failing in their fiduciary duties to the NRA and lacking honesty and care in their oversight of the NRA's charitable assets."[24] At trial, she also introduced evidence that she claims showed that there was an alleged "history of filing false and misleading regulatory filings," that the NRA's "current top management cannot be trusted," and that the NRA's management historically "abuse[d] . . . expense and reimbursement policies, disregard[~~Executive Director~~ed] . . . New York regulatory laws, and

[21] *Celeritas*, 446 B.R. 514, 520 (Bankr. D. Kan. 2011); *Golden Park*, 2015 WL 3643479, *6 (Bankr. N.D.Mex. 2015) ("'the debtor's ability to fulfill its duty of care to protect assets, its duty of loyalty, and its duty of impartiality' is at the core of an § 1104(a)(2) analysis.'"). Of course, the NYAG also sought the appointment under Section 1104(a)(1) (appointment for "cause"), which was intertwined with the NYAG's 1104(a)(2) argument and, in fact, depended on the same facts. See NYAG's chapter 11 motion to dismiss cross-referencing the factual arguments made in her 1104(a)(1) argument); *see also In re López–Muñoz*, 553 B.R. 179, 196 (BAP 1st Cir. 2016) ("[i]n many instances the bankruptcy court's considerations relating to cause under § 1104(a)(1) and the best interests of the creditors under § 1104(a)(2) are 'intertwined and dependent upon the same facts'"); *Vascular Access Centers*, 611 B.R. 742, 765 (Bankr. E.D. Pa. 2020) (same).

[22] ~~Id~~NYSCEF No. 371, NRA Motion at Exhibit 3 at ¶ 87.

[23] *Id*. at ¶¶ 88-89.

[24] *Id*. at ¶ 88.

fail[ed] to establish any meaningful oversight."[25]

Despite all these arguments and her extensive attempts to prove them up, after this trial—a trial with testimony from 23 witnesses and received in evidence more than 300 exhibits[26]—Judge Hale disagreed with the AG.[27] Instead, he found—in deciding to dismiss the case under 11 U.S.C. 1112(b)[28]—that, "appointment of a trustee . . . would not be in the best interests of creditors and the estate" within the meaning of 11 U.S.C. 1104 because the "NRA can . . . continue to fulfill its mission," "can . . . continue to improve its governance," and "can . . . continue to improve its . . . internal controls." In addition, he expressly made other factual findings, which—like those quoted in the previous sentence—he said, "weigh[ed] against keeping this case in bankruptcy with the appointment of a trustee."[29] They include:

(i) "the NRA has made progress since 2017 with its course correction";[30]

(ii) "there has been more disclosure and self-reporting [at the NRA] since 2017";[31]

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[25] *Id*. ("LaPierre and the management teams he has put into place have a long-standing history of failing in their fiduciary duties to the NRA and lacking honesty and care in their oversight of the NRA's charitable assets. These facts, including a history of filing false and misleading regulatory filings, leads to the conclusion that the NRA's current top management cannot be trusted. Similarly, the NRA's past performance—management's abuse of expense and reimbursement policies, disregard of New York regulatory laws, and failure to establish any meaningful oversight—should be considered and weighed in determining the equity of appointing a chapter 11 trustee.").

[27] Reply Aff. at ¶ 10; Bankr. Order, issued in the Bankruptcy Action (Dkt. 740).

[28] The standard for appointing a trustee under 11 U.S. Code § 1104, which is the issue the NYAG litigated, is substantially the same as the determination a court must make before dismissing a Chapter 11 proceeding under 11 U.S.C. § 1112(b), which is what Judge Hale did. *See, In re Corona Care Convalescent Corp.*, 527 B.R. 379, 384 (Bankr. C.D. Cal. 2015) (noting that while "there is a slight difference in the statutory language between 11 U.S.C. § 1112(b) and § 1104(a) …, the factors are much the same between these statutes" (citing 7 Resnick and Sommer, *Collier on Bankruptcy*, ¶ 1112.05(1) at 1112–4)). Indeed, in *Corona Care*, the court stated that "[b]ecause the court [already determined that it should] . . . appoint a trustee under § 1112(b), it need not rule upon the . . . Motion seeking the same relief of trustee appointment under § 1104(a)." *Id*. 527 B.R. at 384; *see also id.* n.4 (noting that "[a]ssuming arguendo that the court would rule on the . . . Motion [for a trustee], the court would likely determine that the factors to appoint a trustee would be much the same under § 1104(a)" as they are under § 1112(b)).

[29] Bankr. Order at ~~page~~ 5.

[30] *Id*. at ~~page~~ 35.

[31] *Id*.

(iii) "[b]oth Ms. Rowling [the NRA's Treasurer and CFO (acting CFO at the time of the trial)] and . . . the NRA's Director of Budget and Financial Analysis, testified that the concerns they expressed in the 2017 Whistleblower Memo are no longer concerns";

(iv) "Mr. Frazer testified regarding the compliance training program that the NRA now has for employees";

(v) "Mr. Spray [who the court commented all agreed is a professional of great talent and integrity] testified credibly that the change that has occurred within the NRA over the past few years could not have occurred without the active support of Mr. LaPierre";

(vi) "[i]t [was] also an encouraging fact that Ms. Rowling ha[d] risen in the ranks of the NRA to become the acting chief financial officer, both because of her former status as a whistleblower and because of the Court's impression of her from her testimony as a champion of compliance"; and

(vii) "the testimony of Ms. Rowling and several others suggest[ed] that the NRA now understands the importance of compliance."

Here, the NYAG does not contest that, contrary to her ~~contestations~~contentions, Judge Hale made the factual findings quoted above. In addition, she concedes that in order to obtain the dissolution relief she seeks here, she must demonstrate that either (i) the NRA "has exceeded the authority conferred upon it by law . . . or carried on, conducted or transacted its business in a persistently fraudulent or illegal manner, or by the abuse of its powers contrary to public policy of the state"; or (ii) "[t]he directors . . . in control of the [NRA] have looted or wasted the corporate assets, have perpetuated the corporation solely for their personal benefit, or have otherwise acted in an illegal, oppressive, or fraudulent manner."[32]

She argues, however, that even though Judge Hale made the factual findings and even though the bar for dissolution here is quite high, she should not be collaterally estopped for five reasons. Each, however, as explained below, lacks merit.

[32] Opposition at 17-18.

First, the NYAG accuses the NRA of "profound[ly] mischaracteriz[ing]" Judge Hale's findings and claims—falsely—that Judge Hale "dismissed [the NRA's chapter 11] filing . . . based on findings of improper conduct."[33] On pages 12 through 36 of his opinion, Judge Hale made clear that the dismissal inquiry turned on:

> (i) the purpose for which the NRA sought chapter 11 relief and, consequently, whether there was "cause" for dismissal under 11 U.S.C. 1112(b), and
>
> (ii) whether, under 11 U.S.C. 1104, the appointment of a chapter 11 trustee—as opposed to a dismissal of the chapter 11 case—was nonetheless in the best interests of the NRA's creditors or its estate.[34]

In analyzing the first issue, he found that the purpose of the chapter 11 filing was to obtain a litigation advantage in this action and held that such a purpose was not among those intended or sanctioned by the Bankruptcy Code.[35] This—he held—amounted to "lack of good faith," that is, "cause" for dismissal.[36] Significantly, Judge Hale did not find that the NRA acted in "bad faith" or, as the NYAG claims falsely, acted improperly. In fact, he made a special effort to emphasize this at a hearing he called days after he issued his opinion. He said:

> . . . the words 'bad faith' were used this morning [by counsel for another movant] in our discussions. … I don't think that term ["bad faith"] actually appears in the opinion. **It certainly is not the reason that the case was dismissed.** The case was dismissed for lack of a bankruptcy purpose and lack of good faith. And I want everybody to know we spent a substantial amount of time on distinguishing reasons for dismissing the bankruptcy case. The reasons for dismissal of this case were painstakingly made. We spent a lot of time trying to get it right.[37]

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[33] Opposition at 9-10.

[34] Bankr. Order at 12-13 ("If a court finds cause for dismissal, it must dismiss the case unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate.").

[35] *Id*. at ~~page~~ 29.

[36] *Id*. at ~~pages~~ 29-30.

[37] ~~Affirmation of David J. Partida in Support of Reply ("Partida~~ Reply Aff.~~").~~, Exhibit D (Transcript of ~~Status~~Bankruptcy Action Conference ~~Dated,~~ May 14, 2021~~) issued in the Bankruptcy Action ,~~ at ~~25~~24:16 – 25:1~~.~~).

In the Opinion, Judge Hale analyzed whether the appointment of a chapter 11 trustee was in the best interests of the NRA's creditors or its estate.[38] As noted above, this prong of the analysis was required because, under 11 U.S.C. 1112(b), courts should not dismiss chapter 11 cases ***even if*** "cause" for dismissal exists, ***if*** appointment of a trustee is in best interests of the debtor's creditors or its estate.[39] In conducting the "best interests" analysis, Judge Hale specifically acknowledged that the NYAG and others presented evidence of past misconduct but, nevertheless based on the findings of fact quoted above—which are not disputed by the NYAG here—concluded that the NRA "has made progress since 2017 with its course correction," and can . . . continue to fulfill its mission," "can . . . continue to improve its governance," and "can . . . continue to improve its . . . internal controls."[40] Therefore, contrary to the arguments the NYAG urged and spent months litigating, Judge Hale held that "appointment of a trustee . . . would not be in the best interests of creditors and the estate."[41]

In short, contrary to the NYAG's contention,[42] in dismissing the NRA's chapter 11 petition, Judge Hale made ***no*** findings of "improper conduct" and, indeed, the NYAG cites none. What the NYAG cites are Judge Hale's comments on the evidence he otherwise received at trial, but none of those comments were dispositive to his rulings that the appointment of a trustee was not in the best interests of the NRA's creditors or its estate. Rather, what he wrote was that he found that the NRA "can . . . continue to fulfill its mission," "can . . . continue to improve its governance," and "can . . . continue to improve its . . . internal controls."[43]

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[38] Bankr. Order at ~~pages~~ 33 – 36.

[39] *Id*. at ~~page~~ 33.

[40] *Id*. at ~~page~~ 35.

[41] *Id*. at ~~page~~ 36.

[42] Opposition at ~~page~~ 10.

[43] Bankr. Order at ~~page~~ 35.

Second, the NYAG argues that she did not have a full and fair opportunity to litigate the issues before Judge Hale because (i) the "confines" of the "bankruptcy proceeding" were "narrow," and the proceeding took place on an "expedited" basis allowing only for "truncated" discovery[44]; and (ii) because the chapter 11 proceeding was dismissed, she was not able to appeal any of the findings that now collaterally estop her.[45] This first argument is factually inaccurate, and the second argument is legally wrong.

The trial lasted 12 days. The court heard testimony of 23 witnesses and received in evidence over 300 exhibits.[46] The AG does not—and cannot—point to any aspect of the 12-day trial or the pretrial schedule that impeded her ability to disprove that the "NRA [under its current management] can . . . continue to fulfill its mission [and] continue to improve its governance and internal controls" or to disprove any of the other factual findings quoted above.[47] Her allegation that discovery was "truncated" is also untrue. Not only was the discovery phase of the chapter 11 proceeding fulsome (it involved 16 depositions and a production to the NYAG of over 24,000 documents by the NRA alone[48]), but it also, as Judge Hale noted, came on the heels of the NYAG's ***16-month investigation*** of the NRA, during which she, among other things, received testimony of at least ~~16~~13 witnesses~~;~~ and, on information and belief, interviewed others; and subpoenaed more than 100,000 documents from the NRA and third parties ~~over 18,000 records~~.[49]

[44] Opposition at ~~page~~ 11.

[45] Opposition at ~~page~~ 11.

[46] ~~Partida~~ Reply Aff~~.~~., ¶ 10.

[47] Bankr. Order at ~~page~~ 5.

[48] ~~Affirmation~~Reply Aff., ¶ 10 (based on review of ~~the records, transcripts of deps, exhibit lists,~~record and docket ~~on which the court posted all admitted exhibits~~).

[49] ~~Partida~~ Reply Aff~~.~~., Exhibit H; Reply Aff., ¶ 20, Exhibit I at ¶¶ ~~__~~1-2.

The NYAG's argument regarding a lack of an opportunity to appeal is wrong as a matter of law. To the contrary, it is well settled that even where a party obtains the relief she seeks but the court in granting it makes factual findings adverse to the party and such findings can estop her future arguments in other proceedings, she can—and should—appeal and seek the reformation of the trial court's adverse findings.[50] In short,[51] the AG made the choice not to appeal any aspect of Judge Hale's opinion.[52]

Finally, the authorities the NYAG cites regarding her purported inability to appeal Judge Hale's findings are completely inapposite. For example, in *Augustine*,[53] unlike here, the party against whom collateral estoppel was invoked was not a party in the prior proceeding and was not alleged to have been in privity with the aggrieved party. Therefore, the party against whom collateral estoppel was invoked, unlike here, had no opportunity to litigate the issue at all.[54]

Third, the NYAG alleges that the issues before Judge Hale and here are not "identical" such that collateral estoppel should not apply.[55] However, does not explain the basis for this assertion. If what she means is that, here, the Court is not being asked to appoint a chapter 11 trustee or determine whether such an appointment is in the best interests of the NRA's creditors or

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[50] *Electrical Fittings Corporation v. Thomas & Betts Co*., 307 U.S. 241, 242 (1939); *see also*, *Lincoln v. Austic*, 60 A.D.2d 487, 490 (3rd Dep't 1978) (holding a prevailing party could appeal a judgment "[w]hen, for example, a specific finding at trial might prejudice a party in a future proceeding by way of collateral estoppel [citation], it seems clear that a substantial and important right of said party has been adversely affected and that the interests of justice require that said party be permitted to appeal the adverse finding [citations]") (internal citations omitted); *Hercules Inc. v. AIU, Ins. Co.*, 783 A.2d 1275, 1278 (Del. 2000) (party which received final judgment in its favor was "aggrieved" such that it could appeal the final judgment to eliminate erroneous factual rulings or findings in order reform the court's decree).

[51] *In re López–Muñoz*, 553 B.R. at 188.

[52] *See Pinkney v. Keane*, 920 F.2d 1090 (2d Cir. 1990) ("failure to appeal an adverse judgment negates the preclusive effect of that judgment only when review was unobtainable 'as a matter of law' [otherwise], estoppel applies").

[53] Opposition at ~~page~~ 12 (citing *Augustine v. Sugrue*, 8 A.D.3d 517 (2d Dep't 2004)).

[54] *Sailor* and other sources cited by the NYAG are also inapposite.

[55] Opposition at ~~pages~~ 2, 9.

its estate, that distinction is of no moment. The doctrine of collateral estoppel is an equitable doctrine and will "preclude[ ] a party from relitigating in a subsequent action . . . an issue clearly raised in a prior action . . . and decided against that party . . . , ***whether or not*** the tribunals or ***causes of action are the same***."[56] Indeed, by definition, collateral estoppel applies to issues of fact decided on different claims, for were it otherwise, the doctrine of res judicata would apply instead.[57]

Furthermore, it is well settled that the doctrine of collateral estoppel is "flexible" and does not operate under "rigid rules."[58] Rather, it is "'grounded in the facts and realities of a particular litigation"[59] such that "the enumeration of [its] elements" "is intended merely as a framework, not a substitute, for case-by-case analysis of the facts and realities."[60] Indeed, "[i]t is . . . well-settled . . . that a fact, once decided in an earlier suit, is conclusively established between the parties . . . in any later suit, provided it was [as before Judge Hale] necessary to the result in the first suit."[61] As a result, any differences in the legal issues sub judice are immaterial.

Fourth and finally, the NYAG complains that collaterally estopping her from pursuing dissolution claims against the NRA is "unjust."[62] She concedes that the doctrine of collateral estoppel exists to reduce litigation, conserve resources, avoid inconsistent judgments on issues the parties had an opportunity to litigate, and avoid permitting a party to relitigate an issue it already

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[56] *Bauhouse Group I, Inc. v. Kalikow*, 190 A.D.3d 401, 401 (1st Dep't 2021).

[57] *Mutual Fire, Marine & Inland Ins. Co. v. Fred S. James & Co. of N.Y.*, 92 A.D.2d 203, 207 (1st Dep't 1983) ("Collateral estoppel is a corollary to the doctrine of *res judicata;* it permits . . . the determination of an issue of fact or law raised in a subsequent action by reference to a previous judgment ***on a different cause of action*** in which the same issue was necessarily raised and decided.").

[58] *Suter v. Ross*, 179 A.D.3d 1127, 1129 (2d Dep't 2020) (quoting *Buechel v. Bain,* 97 N.Y.2d 295, 303 (2001)).

[59] *Id*.

[60] *Id*. at 304 (emphasis added).

[61] *Oldham*, 237 N.Y.S.2d at 293-294.

[62] Opposition at ~~page~~ 12.

lost. Even as she implicitly concedes that the dismissal of her dissolution claims here will serve all these goals, she complains that such an outcome would be "unjust" to her and that the Court, therefore, should refuse to apply the doctrine of collateral estoppel against her. Of course, there is nothing unjust about holding the NYAG responsible for the consequences of her choice to prove the same claims in a different forum after she voluntarily chose to intervene and litigate and lost. In addition, apparently disappointed by Judge Hale's findings, she ~~shoes~~chose not to appeal. Notably, when the NRA filed for chapter 11 protection, it did not seek to stay this action and instead continued to litigate it against the NYAG.[63] Any irony from the collateral estoppel here is the product of the AG's own tactical decisions, not alleged "maneuver[ing]" by the NRA.[64]

E. The NYAG's Fifteenth Cause of Action fails to state a cause of action for violation of whistleblower protections of N-PCL § 715-b and EPTL § 8-1.9.

Regarding the Fifteenth Cause of Action, the NRA explained that the NYAG fails to state a cause of action because the allegations are insufficient and the NYAG is precluded from relitigating given Judge Hale's findings. In response, the NYAG does nothing more than to urge a tortured reading of his opinion and to identify allegations that relate to issues that she is precluded from relitigating. She mischaracterizes Judge Hale's comment about the NRA's ongoing efforts to come into compliance, as a comment that such efforts by the NRA are "incomplete." The Fifteenth Cause of Action must be dismissed.

[63] NYSCEF No. 205, January 20, 2021 Letter from NRA (referring to "its agreement to proceed with pending motion practice" while "reserve[ing] its rights with regard to an application to a stay; "the NRA does not intend to make any imminent application that would interfere with the oral argument scheduled for January 21, 2021").

[64] The Court should disregard the NYAG's reliance on the Judge Hale's statement that he "not in any way saying [he] believes the NYAG can or cannot make the required showing to obtain dissolution of the NRA." Whether there is a basis for dissolution of the NRA under New York law was not before Judge Hale and, clearly, he simply stated expressly what was otherwise obvious.

F. The NYAG's Sixteenth Cause of Action fails to state a cause of action against the NRA for breach of the NYPMIFA.

Regarding her NYPMIFA claim, the NYAG fails to address the NRA's point that the complaint alleges that the Board allowed its ***unrestricted*** assets to decline by 77 million over four years, but that the NYPMIFA applies only to "donor ***restricted***" endowment funds.[65] Nor does the AG address the NRA's argument that she has failed to allege that the Board's decisions were not made in good faith. Under 551(d), the Board is authorized and obligated to take actions under the NYPMIFA, but the AG has made no specific allegations that the Board approved any misconduct by four executives or a handful of unidentified board members.[66] Finally, the AG fails to challenge the NRA's argument that it is entitled to rely on its Special Litigation Committee in making payments to the NRA's counsel of choice, or that such payments are even in breach of the NYPMIFA. The AG's Sixteenth Cause of Action should be dismissed.

G. The NYAG's Seventeenth Cause of Action fails to allege false filings under Executive Law §§ 172-d(1) and 175(2)(d).

Regarding her Seventeenth cause of action, the NYAG's argument is that *Lower Esopus River Watch* is inapposite.[67] This argument entirely misses the point. The AG concedes that she does not allege that the NRA is not engaged in bona fide charitable activities. Further, she does not allege that the Board approved or participated in any alleged "false statements." Instead, she repeats her allegation that individual defendants signed filings and that "Frazer signed and certified such reports notwithstanding . . . falsehoods . . . of which he was or should have been aware."[68] The Seventeenth Cause of Action should be dismissed.

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[65] See NRA Motion at 30.

[66] Id. at 29.

[67] Opposition at ~~page~~ 26.

[68] Am. Compl. ¶ 731 (emphasis added).

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Respectfully submitted,

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Certification of Compliance with Word Count

I, Svetlana M. Eisenberg, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Reply Memorandum of Law 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 increased to 6,600 words pursuant to the Court's Order dated September 15, 2021 (NYSCEF No. 342), because the reply memorandum of law contains 6,~~598~~590 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.

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