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.	:	

MEMORANDUM OF LAW IN SUPPORT OF JOHN FRAZER'S MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

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Defendant John Frazer ("Frazer"), by and through his attorneys Gage Spencer & Fleming LLP, respectfully submits this memorandum of law in support of his motion to dismiss the Second Amended Complaint ("Complaint") (NYSCEF Doc. No. 646) filed by Plaintiff Attorney General of the State of New York ("Attorney General" or "NYAG") pursuant to CPLR 3211(a)(1) and (a)(7). For the reasons which follow, Plaintiff's Second Amended Complaint against Frazer should be dismissed.[1]

Preliminary Statement

In 2013, the New York Legislature passed the Not-For-Profit Revitalization Act. Expressing that a central purpose was "[t]o amend the Not-for-Profit Corporation Law (N-PCL), the Estates, Powers and Trusts Law (EPTL), and Article 7-A of the Executive Law[,]" the Legislature enacted its policy preferences into the three central statutes governing not-for-profits. *See* Affirmation of William B. Fleming dated June 6, 2022 ("Fleming Aff."), Ex. 1 (McKinney's 2013 Session Laws of New York, Vol. 2, 236th Session-2013, Memoranda Ch. 549 at 2097). To cement the interrelationship between the three statutes, the Legislature amended N-PCL § 520 "to add a reference to the Executive Law" and to make clear that the N-PCL also governed registration and reports required by the Executive Law and the EPTL. Fleming Aff., Ex. 1 at 2099; *see also* N-PCL § 520 ("All registration and reporting requirements pursuant to article seven-A of the executive law, and section 8-1.4 of the estates, powers and trusts law, or related successor provisions, are, without limitation on the foregoing, expressly included as reports required by the laws of this state to be filed within the meaning of this section").

[1] To the fullest extent relevant, Frazer incorporates by reference, and adopts, any and all arguments set forth in motions to dismiss the Complaint submitted by other defendants.

The Revitalization Act was the culmination of an effort to streamline the law governing nonprofits. Out of concern for maintaining the vitality of the nonprofit sector, which was "responsible for one in seven jobs" in New York State, promoters of the legislation recognized that "New York law and regulatory practices have placed unnecessary and costly burdens on the nonprofit sector." *See* "Revitalizing Nonprofits, Renewing New York," Leadership Committee for Nonprofit Revitalization, Report to Attorney General Eric T. Schneiderman, Feb. 16, 2012, at 1 (available at https://aclnys.org/wp-content/uploads/2014/02/Attorney-General-Non-Profit-Report.pdf).

Prior to the introduction of the Revitalization Act, the Judiciary established that the Legislature's scheme imposed limits on the enforcement reach of the Executive with respect to not-for-profits. In *People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64, 70 (2008), the New York Court of Appeals recognized that the Legislature had codified, and limited, the Attorney General's enforcement powers by crafting a "comprehensive enforcement scheme" pertaining to nonprofits. *See also People v. Grasso*, 42 A.D.3d 126, 137-38 (1st Dep't 2007) ("as is evident from both the text of the N-PCL and the three Explanatory Memoranda prepared by the Joint Legislative Committee to Study Revision of Corporation Laws which accompanied the N-PCL when it was enacted by chapter 1066 of the Laws of 1969, the N-PCL is a comprehensive enactment"), *aff'd*, 11 N.Y.3d 64 (2008). The Court reminded the Executive of the need to maintain "the integrity of calculated legislative policy judgments" which the Court warned the Attorney General would violate if it sought "to create a remedial device incompatible with the particular statute it enforces." *Grasso*, 11 N.Y.3d at 70-71.

The Revitalization Act passed by the Legislature notably did nothing to alter the holding in *Grasso* and refrained from furnishing the NYAG with enhanced remedial powers and

devices, save for a new power to unwind related party transactions. *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).

Against this background, the Attorney General has filed the instant Second Amended Complaint asserting causes of action against Frazer under each of the three interrelated statutes. *See* NYSCEF Doc. No. 646, ¶¶ 672-76, 689-92, 730-32 (asserting causes of action under each of N-PCL § 720, EPTL § 8-1.4, and Executive Law §§ 172-d, 175(2)(b) (contained in Article 7-A of the Executive Law)). Her causes of action, though, each exceed statutory limitations by seeking relief which the Legislature has not authorized.[2]

Asserted in a case involving a targeted political opponent against which there have been well-documented expressions of personal animus (*see* NYSCEF Doc. No. 99 at 6-8), and filed in the wake of the Court having already dismissed overreaching dissolution claims and an impermissible common law claim (NYSCEF Doc. No. 610), the Attorney General's transgressions of legislative and judicial policy, as in *Grasso*, implicate important notions of separation of powers. Respect for constitutional limits should restrain the Executive from trying to exercise authority the Legislature has not granted. Yet, the relief requested by the Attorney General here in the three causes of action asserted against Frazer is not authorized by the governing statutes, and each should be dismissed.

[2] These include a new claim asserted against the NRA seeking the insertion of outsiders to monitor and direct its compliance and governance as part of a proposed Court oversight of the organization. Extrapolated from the Estates Powers and Trusts Law, the proposed appointments are not among the powers specifically granted to the Attorney General therein, unlike such powers as that to require registry of trustees, to require periodic reports and audited financial information, and to inquire and investigate.

Argument

On a motion to dismiss under CPLR 3211, the Court is subject to the well-established standard that requires it to accept all factual allegations as true, afford the pleadings a liberal construction, and accord plaintiff the benefit of every possible favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

I. The Attorney General Has Overreached By Requesting Relief Not Authorized by the Legislature

Fifteen years ago, in another politically charged case, the First Department instructed New York's Attorney General on the limits of his power. In that case, the New York Stock Exchange, also a not-for-profit, paid compensation totaling $139.5 million to its chief executive, and further promised to pay an additional $48 million in benefits, a total which was more than six times the NYSE's annual net income of $28 million. Furthermore, the recipient and beneficiary of those sums, Richard Grasso, was alleged to have manipulated the Board's compensation committee to award him that compensation. *See generally Grasso*, 42 A.D.3d at 145-46.

On these unseemly facts, the New York Attorney General sued Mr. Grasso asserting causes of action and remedies not authorized by the provisions of the N-PCL. *Grasso*, 42 A.D.3d at 140-41. The First Department dismissed offending claims as beyond the authority granted to the Attorney General, holding that "[w]here the Legislature has not been completely silent but has instead made express provision for civil remedy, albeit a narrower remedy than the plaintiff might wish, the courts should ordinarily not attempt to fashion a different remedy with broader coverage . . . ." *See Grasso*, 42 A.D.3d at 137 , *aff'd*, 11 N.Y.3d 64 (2008) (quoting *Sheehy v. Big Flats Community Day*, 73 N.Y.2d 629, 636 (1989)). Combing through the legislative history of the N-PCL, the First Department determined that the statute was "a comprehensive enactment"

and that the "Legislature specifically considered and expressly provided for enforcement mechanisms." *Id*. at 138. Invoking the "constitutional principle of separation of powers," the Court reasoned that, though the Executive Branch is "accorded great flexibility in determining the methods of enforcement" of legislation, it may not "go beyond stated legislative policy and prescribe a remedial device not embraced by the policy." *Id*. at 140-41 (quoting from and citing cases).

The Court's holding was entirely consistent with New York State's official policy on statutory interpretation. New York expressly endorses the "*expressio unius*" doctrine and has mandated that where "a law expressly describes a particular act, thing or person to which it shall apply, *an irrefutable inference must be drawn* that what is omitted or not included was intended to be omitted or excluded." *See* Fleming Aff., Ex. 2 (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240) (emphasis added); *compare Grasso*, 42 A.D.3d at 135-36 (expressing disagreement with the Attorney General's argument that the *expressio unius* rule of construction did not apply to statutes conferring powers on the Attorney General) (citing *People v. Kramer*, 33 Misc. 209, 213 (Ct. Gen. Sess. Of Peace, N.Y. Cnty 1900)). New York law also establishes that a court's "primary consideration" relating to the construction of statutes is "to ascertain and give effect to the intention of the Legislature." Fleming Aff., Ex. 2 (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 92).

Despite this authority, the New York Attorney General here nevertheless claims entitlement to relief beyond that authorized by the Legislature's "comprehensive enactment."[3]

[3] A request to adjudicate unauthorized remedies implicates the Court's subject matter jurisdiction. *Cf. Morales v. County of Nassau*, 94 N.Y.2d 218, 224 (1999) ("[w]here the Legislature has spoken, indicating its policy preferences, it is not for courts to superimpose their own"); *Steinberg v. Steinberg*, 46 A.D.2d 684, 684 (2d Dep't 1974) (in "an area comprehensively covered by the legislature, the courts may not fashion remedies not provided by statute"); *People*

a. N-PCL § 720 and Third Cause of Action

The requested relief in the Attorney General's Third Cause of Action exceeds the relief available to her as a matter of law.

N-PCL § 720(a) specifically identifies the relief available to the Attorney General. *See* N-PCL § 720(a) ("[a]n action may be brought against" an officer of a corporation "for the following relief"). The specific relief permitted is threefold:

(1) to compel a defendant "to account for his official conduct" in connection with the violation of his duties in the "management and disposition" of corporate assets committed to his charge, including any acquisition by himself, transfer to others, loss or waste of corporate assets;

(2) to set aside an unlawful transfer "where the transferee knew of its unlawfulness;"

(3) to enjoin a proposed unlawful transfer.

As to Frazer, the Complaint alleges only that he received his authorized compensation. There are no other transfers alleged – lawful or unlawful, past or future – to set aside or enjoin. Put another way, the only corporate asset which the Attorney General has alleged was received by Frazer was his employment compensation. Yet, as the NYAG has acknowledged, Frazer's compensation was authorized and approved by the Board of Directors upon the recommendation of its duly authorized Officers Compensation Committee. *See* NYSCEF Doc. No. 646, ¶ 417. On the strength of that

v. Varuzzi, 179 Misc.2d 716, 719 (Sup. Ct. Qns. Cnty. 1999) ("in construing statutory language, courts must take statutes as they find them and may not extend their operation beyond the bounds of legislative intent"); *see also Meghrig v. KFC W., Inc.*, 516 U.S. 479, 488 (1996) ("it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it"); *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) (invoking *expressio unius* canon to conclude that "when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies"); Siegel, N.Y. Prac. § 136 (6th ed. 2018) (courts have jurisdiction only over controversies, and a dismissal for a lack of subject matter jurisdiction results from a lack of standing where a plaintiff's claim does not present a genuine controversy).

undisputed fact, there is no basis on which to allege that that transfer was unlawful. *A fortiori*, it cannot be said that Frazer, as the transferee, knew of its unlawfulness. *See* N-PCL § 720(a)(2).

Accordingly, the only claim available against Frazer is under subsection (a)(1). Section 720(a)(1) permits an action against a corporate officer "to procure a judgment *for the following relief*: (1) [t]o compel the defendant to account for his official conduct . . . ." N-PCL § 720(a)(1) (emphasis added).[4] The Legislature's permitted relief is exclusive. Yet, the Attorney General's Third Cause of Action asserts Frazer's liability (i) to account *and pay restitution and/or damages*, (ii) to return the salary he received, (iii) to pay interest, and (iv) to be removed from office. *See* NYSCEF Doc. No. 646, ¶ 653. This seeks what the statute and the law does not permit.

As an initial matter, the plain meaning of the permitted remedy of compelling Frazer "to account" is to require him to explain his official conduct. The Attorney General previously failed to secure this. During her 16-month investigation of this case, the Attorney General had a full and unfettered opportunity to have Frazer discuss, explain, and "account" for his official conduct but declined to do so. Rather, the Attorney General elected to name him as a defendant without ever having asked to speak with him during her investigation. Where, as here, the Attorney General has demonstrated her lack of interest in an explanation of Frazer's official conduct, the broad and unauthorized relief she has demanded is particularly inappropriate.

Further, to the extent the statute's express remedy of compelling Frazer "to account" could be interpreted as one for an accounting (*see, e.g., People v. James*, 39 Misc. 3d

[4] N-PCL § 720 specifically provides: "[a]n action may be brought against one or more directors, officers, or key persons of a corporation to procure a judgment for the following relief: (1) To compel the defendant to account for his official conduct in the following cases: (A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge. (B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties."

1206(A), 2013 N.Y. Slip Op 50508[U] (Sup. Ct., N.Y. Cnty. 2013) (treating as an action for an "accounting" a claim that a defendant "account" for his conduct under N-PCL 720(a)), the Attorney General's failure is relevant. *Cf. McMahan & Co. v. Bass*, 250 A.D.2d 460, 463 (1st Dep't 1998) (denial of an accounting where request for information not first made); *Conroy v. Cadillac Fairview Shopping Ctr. Properties, Inc*., 143 A.D.2d 726, 726–27 (2d Dep't 1988) (noting need to show first a demand and then a refusal or failure to provide complete information in response) (cited with approval by *Non–Linear Trading Co., Inc. v. Braddis Assocs*., 243 A.D.2d 107, 119 (1st Dep't 1998)).

Regardless of all this, the Third Cause of Action does not permit the expansive relief sought here. The statute does not identify any relief beyond compelling one "to account," and even if deemed an action for an accounting, the only relief available would be disgorgement. *SEC v. Cavanagh*, 445 F.3d 105, 119 (2d Cir. 2006) ("the ancient remedies of accounting, constructive trust, and restitution have compelled wrongdoers to 'disgorge' – *i.e.*, account for and surrender – their ill-gotten gains for centuries") (citing Joseph Story, Commentaries on Equity Jurisprudence as Administered in England and America 423-504 (1835) (describing the "remedy of 'account,' by which chancery ordered an accounting of assets so that wrongly gained profits might be recovered"); *accord Gucci Am. v. Bank of China*, 768 F.3d 122, 131-32 (2d Cir. 2014) (same).[5] An accounting holds the defendant liable for his profits, not for damages. *SCA Hygiene*

[5] For 800 years, the concept of "account" has traditionally been associated with ideas of disgorgement of accounted-for money or property. It traces back to the duty recognized at common law and equity requiring anyone who deals with money or property belonging to another to keep and deal with it according to the conditional nature of any entitlement. *See* Fleming Aff., Ex. 3 (JA WATSON, THE DUTY TO ACCOUNT: DEVELOPMENT AND PRINCIPLES (2016), at 160). The writ of account at common law involved two distinct judicial stages: first by a judgment *to* account (called *quod computet*) and second by a judgment that one recover *on* the account (called *quod recuperet*). *Id*. at 62; *see also Malone v. Sts. Peter & Paul's Church*, 172 N.Y. 269, 277-278 (1902) (noting the existence of two "judgments" to the writ of account: "the first is that the defendant do

Prods. Aktiebolag v. First Quality Baby Prods., LLC, 137 S. Ct. 954, 964 (2017) ("[a]ccounting holds the defendant liable for his profits, not for damages") (quoting 1 Dobbs §4.3(5), at 611); *see also Roslyn Union Free Sch. Dist. v. Barkan*, 16 N.Y.3d 643, 645 (2011) (the remedy of an accounting requires one to "demonstrate how money was expended and return pilfered funds *in his or her possession*") (emphasis added) (citing *Ederer v. Gursky*, 9 N.Y.3d 514, 525 (2007); *see also Matter of Grgurev v. Licul*, 203 A.D.3d 624, 625 (1st Dep't 2022); *Hall v. Louis*, 184 A.D.3d 437, 438 (1st Dep't 2020) (same). On this history, the Attorney General's request for damages is unavailing and would exceed the limits of what is obtainable on a remedy to account.

Disgorgement, though, is also not appropriate on the particular facts of this case. As discussed above, the Complaint does not assert that Frazer is in receipt of any other property of the organization other than his employment compensation. That compensation, furthermore, was approved by the NRA's Board of Directors. *See* NYSCEF Doc. No. 646, ¶ 417. As a consequence, the decision to pay that compensation to Frazer is a protected business judgment (a) which a court is not authorized, without more, from scrutinizing (*see Auerbach v. Bennett*, 47 N.Y.2d 619 (1979); *accord Consumers Union of U.S., Inc. v. The State of New York, Empire HealthChoice, Inc.,* 5 N.Y.3d 327, 360 (2005)), and (b) on which Frazer was entitled to rely in deciding to proceed with his employment. Thus, even to the extent his compensation could be

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account *quod computet* before auditors appointed by the court; and when such account is finished then the second judgment is that the defendant pay the plaintiff so much as he is found in arrear"); *Appleby v. Brown, 23 How. Pr*. 207, 210, 1862 N.Y. Misc. LEXIS 265 at *6 (same). The first stage required a determination of whether the defendant was, in fact and at law accountable, and required a defendant to *explain* dealings with the property that was the subject of the account. Fleming Aff., Ex. 3 at 62, 70. The second stage gave effect to the account in the form of a judgment for the return of the capital and any profits from its use, or payment of the sum found due, with costs and damages. *Id.,* Ex. 3 at 62, 63. In this context, "damages" refers to interest, not compensation. *Id*. at 63 n. 5. The damages sought by the Attorney General here are not available. *Id*. at 74 n. 62.

characterized as "profits" to him, they were not "ill-gotten" or "unlawful." They simply are not subject to disgorgement.

Lastly, the Third Cause of Action improperly seeks Frazer's removal from office for cause and to bar him from re-election. But N-PCL § 720 does not authorize these remedies. And, while permitted by N-PCL § 714 – which is lumped into the Third Cause of Action – the power to remove extends only to Frazer's position as an officer (as Secretary, but not General Counsel which is not an officer position). Nevertheless, the Attorney General improperly demands that Frazer be removed from both. *See* NYSCEF Doc. No. 646, Prayer for Relief, ¶ E. Section 714 – which is reserved to a corporation's Board of Directors, individual directors, a bloc of ten percent of its members, holders of ten percent of a corporation's capital certificates, and the Attorney General – does not authorize this. *See* N-PCL § 714. It bears emphasis, moreover, that none of those other authorized plaintiffs has sought Frazer's removal as Secretary. To the contrary, the Board (itself elected by the members) has re-elected Frazer by acclamation twice since the instant allegations were made public. To that important extent, any order to remove Frazer from that office would contravene the clearly measured, and twice expressed, business judgment of the NRA's Board. *See Consumers Union of U.S., Inc. v. The State of New York, Empire HealthChoice, Inc.,* 5 N.Y.3d 327, 360 (2005).

For the reasons given, the Attorney General has no basis under her Third Cause of Action, as a matter of law, to obtain disgorgement of funds here, which were received lawfully by Frazer, or an award of damages, regardless of whether there were any failures of conduct by him. Additionally, the statutory scheme does not permit Attorney General to remove Frazer as General Counsel, and her effort to procure Frazer's removal as Secretary would require the Court to overrule the considered business judgment of the NRA Board.

b. EPTL § 8-1.4 and the Seventh Cause of Action

The Attorney General's Seventh Cause of Action asserts a breach of the Estates, Powers & Trusts law, and similarly overreaches by requesting relief the statute does not permit. The Attorney General's available remedies under EPTL § 8-1.4 are (i) to secure compliance with Section 8-1.4, and (ii) to secure the proper administration of any trust, corporation or other relationship to which Section 8-1.4 applies. *See* EPTL § 8-1.4(m). Yet, the Attorney General asks Frazer "to account," asks for restitution and damages, plus interest, and asks for a permanent bar from serving as an officer, director, or trustee "of any not-for-profit or charitable organization incorporated or authorized to conduct business in the State of New York." NYSCEF Doc. No. 646, ¶ 669. These remedies are not available under Section 8-1.4. The statute makes no provision for Frazer "to account," nor for restitution, damages, interest, or a bar.[6]

In any event, the Attorney General cannot create remedies not authorized by a statute. *See, e.g., Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979) (rejecting claim for damages or other monetary relief under the Investment Advisors Act because the statute did not provide for such remedies, and instructing that "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it . . . [because w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode"); *Thoreson v. Penthouse Int'l*, 80 N.Y.2d 490, 496-97 (1992) (vacating punitive damages award because the statute at

[6] The Attorney General overreaches when she seeks a permanent bar to Frazer's purported service as a trustee, officer, or director, not just for the NRA, but any out-of-state domestic or international organizations authorized to conduct business in New York. As New York is indisputably a hub for charitable giving, the Attorney General's requested relief amounts to an effective banishment of Frazer from the not-for-profit sector. Not only does the statute not authorize it, but where, as here, the Attorney General has a documented animus towards the NRA, the request is punitive and inappropriate.

issue did not authorize such relief); *People v. Direct Revenue, LLC*, 19 Misc. 3d 1124[A], 1124A, 2008 NY Slip Op 50845[U], *8 (Sup. Ct., N.Y. Cnty. 2008) (rejecting NYAG's claim for "disgorgement" under the Executive Law); *State v. Solil Mgmt. Corp*., 491 N.Y.S.2d 243, 249 (Sup. Ct., N.Y. Cnty. 1985) (rejecting NYAG's claim for punitive or treble damages where Executive Law § 63(12) remedies were "limited to obtaining restitution or compensatory damages on behalf" of injured parties).

In addition to demanding unauthorized remedies, the Seventh Cause of Action further fails in that it wrongly assumes Frazer is a trustee of the NRA. EPTL § 8-1.4 sets forth the powers of the Attorney General to supervise trustees for charitable purposes, and the Attorney General claims "authority over any 'trustee' of any not-for-profit corporation organized under the laws of New York for charitable purposes." NYSCEF Doc. No. 646, ¶ 31. Section 8-1.4(m) grants the Attorney General the power to "institute appropriate proceedings to secure . . . the proper administration of any trust" which include the power to "modify or terminate the powers and responsibilities of any . . . trustee." Thus, both the Attorney General's own view of its authority and the language of the statute require that Frazer be a trustee of the NRA. If he is not a trustee, there is nothing for the Court to "modify or terminate."

Frazer is not a trustee of the NRA, and the Complaint does not adequately assert to the contrary. The Complaint baldly alleges "[t]he Individual Defendants are statutory trustees under New York law." NYSCEF Doc. No. 646, ¶ 31. But, EPTL § 8-1.4(a) defines "trustee," in relevant part, as an "individual . . . holding and administering property for charitable purposes . . . pursuant to any will, trust, other instrument or agreement, court appointment, or otherwise pursuant to law . . . ." The Attorney General does not identify any such instrument or any of the other qualifying items as establishing Frazer's status as a trustee. Nor does the Complaint identify any

New York law establishing Frazer as a trustee. Further, the Attorney General does not charge Frazer with "holding and administering property for charitable purposes" as required by the statute. Instead, the Complaint only approximates that requirement, stating only that he "was responsible" for holding and administering property for charitable purposes. *See* NYSCEF Doc. No. 646, ¶ 668. This is to be notably compared with other individual defendants charged under the EPTL who the Attorney General alleged "held and administered" such property. *Cf*. NYSCEF Doc. No. 646, ¶¶ 664, 672. The Complaint simply lacks the necessary allegations to establish that Frazer was a trustee under EPTL § 8-1.4(a).

The EPTL further charges the Attorney General with establishing and maintaining "a register of all trustees." *See* EPTL § 8-1.4(c). As the Attorney General knows, Frazer is not registered as a trustee on its registry. *See* Fleming Aff., Ex. 4 (results of search for "Frazer" on Office of the Attorney General's Search Charities Database, available at https://www.charitiesnys.com/RegistrySearch/search_charities.jsp). Each year, moreover, the Attorney General is required "to collect from each trustee" a filing fee at the time of the required filing of annual reports. *See* EPTL § 8-1.4(p). The Attorney General is further authorized to serve Frazer with notice of dereliction for any failure to pay that fee. *See* EPTL § 8-1.4(r). Thus, had Frazer been a trustee, each year, the Attorney General would have gotten confirmation of that fact. Tellingly, the Attorney General makes no allegation that Frazer has violated that statutory requirement mandated of "each trustee."

Additionally the NRA's federal Form 990 tax filing invariably denoted that Frazer was not a trustee of the NRA. *See* Annual Filings for National Rifle Association of America, available at https://www.charitiesnys.com/RegistrySearch/show_details.jsp?id={04D804B6-96D1-48BA-B865-97FA91510118}, Form 990 Return of Organization Exempt From Income Tax

at Part VII, Section A.[7] Those annual filings also, each year, affirmatively checked a box describing Frazer (and the other individual defendants) as merely an "officer," and did not check the available box that would describe him (or them) also as a trustee. *Id*. In view of these contrary facts, known to the Attorney General for years, the naked allegation that "[t]he Individual Defendants are statutory trustees under New York law" is not sufficient. *See* CPLR 3016(b) (applicable to breaches of trust).

The Attorney General's pleading does not satisfy threshold standards for alleging that Frazer is a requisite trustee to be governed by EPTL § 8-1.4 and, in any event, further seeks relief nowhere authorized in the statute. The Seventh Cause of Action should be dismissed.

c. Executive Law and Fifteenth Cause of Action

The Attorney General's Fifteenth Cause of Action likewise seeks overbroad relief in connection with its alleged violations of New York's Executive Law Article 7-A. The Complaint alleges a violation of Section 175(2)(d) arising out of purported material false statements in the required CHAR500 filings. It seeks two remedies: (1) to enjoin Frazer "from soliciting or collecting funds on behalf of any charitable organization operating in" New York State, and (2) to enjoin Frazer from serving as an officer, director or trustee of any not-for-profit or charitable organization incorporated or authorized to conduct business" in New York State. *See* NYSCEF Doc. No. 646, ¶¶ 731-32.

[7] The NRA's publicly filed Form 990s are referenced throughout the Attorney General's Complaint. Accordingly, they are documents which a Court may consider on a motion to dismiss. *Deer Consumer Prods., Inc. v. Little,* 32 Misc. 3d 1243(A), 938 N.Y.S.2d 226, 226 (Sup. Ct. 2011); *Lore v. N.Y. Racing Ass'n Inc.,* 12 Misc. 3d 1159(A), 819 N.Y.S.2d 210, 210 (Sup. Ct. 2006) (a court may consider documents integral to a plaintiff's claims); 6A CARMODY-WAIT 2D, CYCLOPEDIA OF NEW YORK PRACTICE WITH FORMS, § 38:161 (2011) ("on a motion to dismiss the complaint for failure to state a cause of action, the court is not limited to a consideration of the pleading itself, but may consider extrinsic matters submitted by the parties in disposing of the motion").

The Attorney General's request for an injunction enjoining Frazer from soliciting or collecting funds is plainly inappropriate. Frazer does not solicit funds for the NRA, and the Complaint does not allege otherwise. Under the statute, the Attorney General is empowered to seek to enjoin "persons acting for [a charitable organization] or on its behalf . . . from *continuing* the solicitation or collection of funds or property or engaging therein or doing any acts in furtherance thereof . . . ." *See* Executive Law § 175(2) (emphasis added). Because he does not solicit funds, any equitable relief to enjoin Frazer from "continuing" the solicitation or collection of funds is neither applicable nor suitable.

Additionally, the Attorney General overreaches when she requests that Frazer be enjoined (i) from soliciting or collecting funds on behalf of any charitable organization operating in New York, and (ii) from serving as an officer, director, or trustee of any not-for-profit or charitable organization incorporated or authorized to conduct business in New York. These requests exceed the reach of the statute. While Executive Law § 175(2) addresses removal, it nowhere permits the relief of an injunction barring an individual from serving other organizations.

Even to be removed, however, Frazer must have been "responsible for the violation." *See* Executive Law § 175(2). The Complaint identifies the "violation" as the purportedly false statements in the NRA's audited financial statements and Form 990 tax filings which were attached to the CHAR500 filings. *See* NYSCEF Doc. No. 646, ¶ 567.[8] The Complaint

[8] Though the Complaint references the NRA's Form 990 as a source for the purportedly false statements, we note that the Legislature has never required the submission of Form 990s. Rather, that requirement is only imposed by the Executive through the Attorney General. *See* N.Y. Comp. Codes R. & Regs. Tit. 13 § 91.5 (adding the requirement that organizations include their federal Form 990 tax filing). The statute enabling that regulation, however, specifically and exclusively requires only that the CHAR500 report contain the organization's annual financial statements along with an independent certified public accountant's audit opinion that the financial statements are fairly presented. *See* Executive Law § 172-b(1) ("[t]he annual financial report shall be accompanied by an annual financial statement which

attributes to Frazer sole responsibility for the purported false statements on the basis of his statutorily required execution of the CHAR500 report attaching them.[9] *See* NYSCEF Doc. No. 646, ¶¶ 702-04. Though the Treasurer's office staff, working together with outside auditors and tax professionals, prepared the attached audited financial statements and tax filings, the Complaint makes no such claim against those who were Frazer's co-signatories each year – including fellow defendant and former Treasurer Wilson Phillips – nor against anyone else involved in preparing the attachments.

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includes an independent certified public accountant's audit report containing an opinion that the financial statements are presented fairly in all material respects and in conformity with generally accepted accounting principles, including compliance with all pronouncements of the financial accounting standards board and the American Institute of Certified Public Accountants that establish accounting principles relevant to not-for-profit organizations"). In fact, in the Revitalization Act, as part of its effort to lower burdens on non-profits, the Legislature opted to *reduce* the number of organizations subject to the audit requirement by raising their revenues threshold. *See* Fleming Aff., Ex. 1 at 2097 (referencing the Legislature's amendment to Executive Law § 172-b restricting the Attorney General's authority to request that nonprofits with gross revenue of $250,000 and under obtain an audit from an independent CPA). The regulation thus conflicts with the statute's express language and purposes. *Cf. AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999) (vacating agency's regulation where it exceeded a statute's expressed limits). Thus, even if the Executive's requirement that nonprofits *submit* Form 990s is deemed permissible, the Legislature has nowhere authorized *liability* arising out of that submission where the statute only expresses a requirement to submit an independent auditor's opinion. The Legislature's omission of a requirement that organizations furnish their federal Form 990s was, and need be found, considered and purposeful. *See* Fleming Ex. 2 (McKinney's Cons. Laws of N.Y., Book 1, Statutes § 240 (establishing the "*expressio unius*" doctrine)). Where, as here, 17 of the 18 purportedly false statements identified by the Attorney General in her Complaint are sourced to the Forms 990, these questions take on a heightened significance. *See* Complaint, ¶ 567 (listing only one alleged false statement (of 17 total) from the NRA's audited financial statements).

[9] The Executive Law requires that an organization's CHAR500 reports include the signatures of both the organization's Chief Financial Officer, and its "president or other authorized officer." *See* Executive Law § 172-b(1) ("[t]he financial report shall be signed by the president or other authorized officer and the chief fiscal officer of the organization who shall certify under penalties for perjury that the statements therein are true and correct to the best of their knowledge, and shall be accompanied by an opinion signed by an independent public accountant that the financial statement and balance sheet therein present fairly the financial operations and position of the organization").

For all these reasons, the Attorney General has again overreached with her requested relief. Because the Complaint does not assert that Frazer solicits or collects funds for the NRA (he doesn't), there is no basis for an injunction preventing him from "continuing" to do so. Also, the Attorney General's request that the Court enjoin Frazer from serving any charitable organization approved to conduct business in New York is impermissible as the statute does not authorize such relief. Lastly, though not requested in the Fifteenth Cause of Action (*see* NYSCEF Doc. No. 646, ¶¶ 731-32), the Attorney General's prayer for relief seeks Frazer's removal as General Counsel for cause under Executive Law § 175(2)(d). *See* NYSCEF Doc. No. 646, Prayer for Relief, ¶ E. Predicated on Frazer's having "signed and certified" the CHAR500 filings – which must be done by an "authorized officer" – Frazer's removal from his non-officer employee position of General Counsel would be inappropriate as the General Counsel could not have signed the filing.[10] *See* Executive Law § 172-b(1) (requiring signature by the "president or other authorized *officer*") (emphasis added).

II. The Instant Motion to Dismiss Is Permitted By CPLR 3211(e) Because The Complaint Fails to State a Claim and Seeks Unauthorized Relief Over Which The Court Lacks Subject Matter Jurisdiction

CPLR 3211(e) states that "a motion based upon a ground specified in paragraphs two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if

[10] Frazer was hired as an NRA employee to be its General Counsel in January 2015 by the NRA's Executive Vice President, Wayne LaPierre ("LaPierre"). NYSCEF Doc. No. 646, ¶¶ 140, 285. It was not until April 2015 that the NRA's Board of Directors elected Frazer to serve as the Association's Secretary. *Id*. The Secretary is one of three salaried, Board-elected officer positions established by the NRA's Bylaws. *See* NYSCEF Doc. No. 350 at 18 (The National Rifle Association of America, Bylaws, as amended October 24, 2020), Article V, Section 2(d). The Secretary's position has "charge of the [NRA's] archives," attends "to the proper publication of official notices and reports," and serves as secretary to the NRA Board's Executive Committee, Nominating Committee, and Committee on Elections. Complaint, ¶ 81.

one is permitted." *See* CPLR 3211(e). Qualifying for the permitted exception to the so-called "single motion rule," the instant motion is made under CPLR 3211(a)(2) and (7). *See Matter of Newton v. Town of Middletown*, 31 A.D.3d 1004 (3d Dep't 2006) (permitting a second motion to dismiss both on subject matter jurisdiction grounds and for failure to state a cause of action, and stating "[u]nless a cause of action is expressly provided for by the statute pleaded, no cause of action can exist unless it could be fairly implied from the statute or its legislative history" and "[w]e find no basis to support the conclusion that the [allegation] is actionable by petitioners") (citing *Uhr v. East Greenbush Cent. School Dist.*, 94 N.Y.2d 32, 38 (1999); *McDonald v. Cook*, 252 A.D.2d 302, 304 (3d Dep't 1998), *leave denied*, 93 N.Y.2d 812 (1999)); *see also Olsen v. Stellar West 110 LLC*, 2012 N.Y. Slip Op. 30178 (Sup. Ct. N.Y. Cnty. Jan. 25, 2012) (permitting second motion to dismiss an amended complaint on ground that "an exception to CPLR 3211(e) applies here because the defendant is asserting that this court lacks subject matter jurisdiction to hear plaintiffs' claims . . . ."), *aff'd*, 96 A.D.3d 440 (1st Dep't 2012); *Wallert v. Ballance*, 2011 N.Y. Slip. Op. 34002 (Sup. Ct. N.Y. Cnty. 2011) (Kornreich, J.) (permitting second motion under CPLR 3211(a)(7)).

Furthermore, the Court of Appeals has clarified that the purpose of the single motion rule is to prevent the delay that ensues from postponing an answer and the ensuing discovery process. *See Held v. Kaufman*, 91 N.Y.2d 425, 430 (1998) ("[t]he purpose of CPLR 3211(e) is to prevent the delay before answer that could result from a series of motions") (citations and internal quotation marks omitted)). Here, that purpose is satisfied and there is no danger of delay. Frazer has furnished the Attorney General with an Answer already, and the parties are currently proceeding with fulsome discovery according to deadlines established by the Court. Frazer makes no argument or request that the instant motion should cause the current schedule to

be changed. Whether resulting in dismissal or not, consideration of these issues of law now will promote judicial efficiency by clarifying the bounds of discovery and helping distill the number of issues germane to a subsequent summary judgment motion and/or trial.

Conclusion

For the reasons stated, Frazer's motion to dismiss Plaintiff's Second Amended Complaint should be granted, with prejudice.

Dated: New York, New York
June 6, 2022

GAGE SPENCER & FLEMING LLP

By: */s/ William B. Fleming*

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2022, a true and correct copy of the foregoing Memorandum of Law in Support of John Frazer's Motion to Dismiss Plaintiff's Second Amended Complaint was served on all counsel of record by NYSCEF.

By: */s/ William B. Fleming*

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 Second Amended Complaint 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 6,453 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
June 6, 2022

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