

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

Plaintiff,

v.

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

Index No. 451625/2020

IAS Part Three

Hon. Joel M. Cohen

**MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT WAYNE LAPIERRE'S MOTION TO DISMISS
THE SECOND AMENDED VERIFIED COMPLAINT**

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TABLE OF CONTENTS

	<u>Page</u>
I. PRELIMINARY STATEMENT.....	1
II. QUESTIONS PRESENTED.....	1
III. STATEMENT OF FACTS	2
IV. LEGAL STANDARD.....	2
V. SUMMARY OF ARGUMENT	4
VI. ARGUMENT.....	4
A. The Attorney General Lacks Authority to Seek Judgment against LaPierre for Relief other than the Relief Provided in N-PCL § 720.....	4
B. The Attorney General Is Barred by the Doctrine of Law of the Case from Continuing to Seek Relief against LaPierre on the Theory that He Has Been “Unjustly Enriched”.....	16
C. The National Rifle Association of America Should Be a Party and the Court Should Not Proceed in Its Absence	16
VII. CONCLUSION.....	18

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Connaughton v. Chipotle Mexican Grill, Inc.</i> , 29 N.Y.3d 137 (2017).....	3, 9
<i>Mark G. v. Sabol</i> , 93 N.Y.2d 710 (1999).....	10
<i>Martin v. City of Cohoes</i> , 37 N.Y.2d 162, 165 (1975).....	16
<i>People v. Grasso</i> , 11 N.Y.3d 64 (2008) (Kaye, C.J.)	passim
<i>People v. Grasso</i> , 42 A.D.3d 126 (1 st Dep’t 2007), <i>aff’d</i> 11 N.Y.3d 64 (2008).....	passim
<i>People v. National Rifle Association of America, Inc.</i> , 74 Misc.3d 998 (Sup.Ct., N.Y. County 2022)	3
<i>Rector, Church Wardens & Vestrymen of St. Bartholomew’s Church, Inc.</i> , 84 A.D.2d 309 (1 st Dep’t 1982).....	8, 9
<i>Richards v. Security Resources</i> , 187 A.D.3d 452 (1 st Dep’t 2020)	3
 <u>Statutes and Rules</u>	
CPLR 1001.....	16
CPLR 3211	2, 3
CPLR 3211(a)	16
CPLR 3211(a)(1).....	2, 16
CPLR 3211(a)(2).....	2
CPLR 3211(a)(3).....	2
CPLR 3211(a)(7).....	2, 3
CPLR 3211(a)(10).....	2, 16
EPTL § 8-1.4.....	passim
EPTL § 8-1.9(c).....	6, 8
N-PCL § 112.....	8, 10

N-PCL § 706.....	passim
N-PCL § 706(d).....	7
N-PCL § 714.....	passim
N-PCL § 714(c).....	7
N-PCL § 715.....	passim
N-PCL § 715(f).....	6
N-PCL § 717.....	passim
N-PCL § 720.....	passim
N-PCL § 720(a).....	passim
N-PCL § 720(a)(1).....	passim
N-PCL § 720(b)	5, 15

Other

Black's Law Dictionary (9 th ed.).....	7
Dobbs, D.B., & Roberts, C. L. (n.d.). Dobbs and Roberts's Law of Remedies, Damages, Equity, Restitution, 3d (Hornbook Series).....	11
Siegel, N.Y. Prac. § 136 (6 th ed. 2018).....	3

Defendant Wayne LaPierre (“LaPierre”) respectfully submits this memorandum of law in support of his motion to dismiss the Second Amended Verified Complaint (“Complaint”) (NYSCEF Doc. No. 646) filed by Plaintiff People of the State of New York, by Letitia James, Attorney General of the State of New York (“Attorney General”).

I.

PRELIMINARY STATEMENT

In section 720 of the Not-for-Profit Corporation Law, the Legislature expressly authorized the Attorney General to bring actions against directors, officers and key persons of not-for-profit corporations for the relief provided in that section. In the Complaint, the Attorney General seeks relief that is not provided in that section. LaPierre respectfully submits that the Complaint should be dismissed to the extent it seeks relief against him that is not provided in that section. In addition, LaPierre seeks dismissal of the Complaint on the ground that it seeks relief against him on the theory that he has been “unjustly enriched,” despite this Court’s order dismissing the unjust enrichment claim asserted against him by the Attorney General in her prior pleading. Finally, LaPierre seeks dismissal of the Complaint on the ground that the Attorney General has failed to join the National Rifle Association of America, which should be a party.

II.

QUESTIONS PRESENTED

Does the Attorney General have the legal authority to seek judgment against LaPierre for relief other than the relief provided in section 720 of the Not-for-Profit Corporation Law?

Is the Attorney General barred by the doctrine of law of the case from continuing to seek relief against LaPierre on the theory that he has been “unjustly enriched”?

Should the Court proceed in the absence of the National Rifle Association of America?

III.

STATEMENT OF FACTS

The Attorney General sued “The National Rifle Association of America, Inc.”, LaPierre and others and the Court dismissed her dissolution, NYPMIFA and unjust enrichment claims.¹ The Attorney General amended her Complaint, but continues to seek restitution on the theory that Defendants were “unjustly enriched,” as well as other unauthorized relief, including appointment of a compliance monitor and governance expert, and governance reforms.² LaPierre moves to dismiss the Complaint on the ground that the Attorney General lacks the legal capacity to sue him for relief other than the relief provided in section 720 of the N-PCL, that the Attorney General is barred by the law of the case from continuing to seek relief on a theory of unjust enrichment and that the Court should not proceed in the absence of the National Rifle Association of America, who should be a party.³ For a full statement of the relevant facts, LaPierre respectfully directs the Court’s attention to the accompanying Affirmation of P. Kent Correll, Esq.

IV.

LEGAL STANDARD

CPLR 3211 (“Motion to Dismiss”) governs this motion. CPLR 3211(a) provides, in pertinent part:

A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or (2) the court has not jurisdiction of the subject matter of the cause of action; or (3) the party asserting the cause of action has not legal capacity to sue; or *** (7) the pleading fails to state a cause of action; or *** (10) the court should not proceed in the absence of a person who should be a party.

¹ See Affirmation of P. Kent Correll, Esq. dated June 6, 2022 (hereinafter cited as “Correll Affm.”) ¶¶ 4-9.

² Correll Affm. ¶¶ 10-20 and Exhs. 1-4.

³ Correll Affm. ¶ 21.

As this Court has previously stated:

On a motion to dismiss under CPLR 3211, the Court must accept all factual allegations as true, afford the pleadings a liberal construction, and accord plaintiff the benefit of every possible favorable inference. However, allegations that are “bare legal conclusions” or that are “inherently incredible or flatly contradicted by documentary evidence” are not sufficient to withstand a motion to dismiss. As is often stated, “the court must ‘determine only whether the facts as alleged fit within any cognizable legal theory.’”

People v. National Rifle Association of America, Inc., 74 Misc.3d 998, 1014-15 (Sup.Ct., N.Y. County 2022) (Joel M. Cohen, J.) (citations omitted). Dismissal is warranted “if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141 (2017). Under CPLR 3211(a)(7), a claim fails to state a cause of action when the alleged facts do not “fit within any cognizable legal theory.” *Richards v. Security Resources*, 187 A.D.3d 452 (1st Dep’t 2020).

Importantly, “one without the requisite grievance” “has no business suing, and a suit of that kind can be dismissed at the threshold for want of jurisdiction without reaching the merits.”⁴

⁴ Siegel, N.Y. Prac. § 136 (6th ed. 2018) (“It is the law’s policy to allow only an aggrieved person to bring a lawsuit. One not affected by anything a would-be defendant has done or threatens to do ordinarily has no business suing, and a suit of that kind can be dismissed at the threshold for want of jurisdiction without reaching the merits. When one without the requisite grievance does bring suit, and it’s dismissed, the plaintiff is described as lacking ‘standing to sue’ and the dismissal is one for lack of subject matter jurisdiction. A want of ‘standing to sue, in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a ‘jurisdictional’ dismissal: (1) the courts have jurisdiction only over controversies; (2) a plaintiff found to lack ‘standing’ is not involved in a controversy; and (3) the courts therefore have no jurisdiction of the case when such a plaintiff purports to bring it.”).

V.

SUMMARY OF ARGUMENT

The Court should dismiss the Complaint for three reasons. First, the Attorney General does not have the legal authority to bring an action against LaPierre to procure a judgment against him for relief other than the relief provided in section 720 of the Not-For-Profit Corporation Law, and the Complaint requests judgment against him for relief other than the relief listed in that section. Second, the Attorney General continues to seek judgment against LaPierre for relief based on the theory that he has been “unjustly enriched” despite this Court’s dismissal of her unjust enrichment claim, which violates the doctrine of law of the case. Third, the Court should not proceed in the absence of the National Rifle Association of America, which should be a party, and which the Attorney General has failed to join. (The Attorney General has sued “The National Rifle Association of America, Inc.”, which does not exist.)

VI.

ARGUMENT

A. The Attorney General Lacks Authority To Seek Judgment against LaPierre for Relief Other than the Relief Provided in N-PCL § 720.

Section 720 of the Not-for-Profit Corporation Law (N-PCL) governs “actions against officers, directors and key persons” of not-for-profit corporations.⁵ Section 720(a) provides that “[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:

⁵ See N.Y. N-PCL § 720 (“Actions against directors, officers and key persons”).

- (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.
- (2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness.
- (3) To enjoin a proposed unlawful conveyance, assignment or transfer of corporate assets, where there are reasonable grounds for belief that it will be made.”⁶

Section 720(b) provides that an action may be brought by the attorney general “*for the relief provided in this section.*”⁷

In the Complaint, the Attorney General asserts three causes of action against LaPierre—the second, sixth and tenth causes of action.⁸ In the second cause of action, the Attorney General alleges that:

LaPierre is liable under N-PCL § 720(a)(1) to **account** and pay restitution and/or damages, including returning the salary he received while breaching his fiduciary duties to the NRA, plus interest at the statutory rate of 9%, and rescission of any agreements providing for compensation following his employment as Executive Vice President of the NRA, for his conduct in the neglect and violation of his duties in the management and disposition of the NRA’s charitable assets and in causing loss and waste of those assets by this breaches of fiduciary duty.⁹

In addition, she alleges that “LaPierre should be removed for cause under N-PCL §§ 706 and 714 and be barred from re-election of [sic] reappointment as a director or officer of the NRA.”¹⁰

⁶ N.Y. N-PCL § 720(a) (emphasis added).

⁷ N.Y. N-PCL § 720(b) (“An action may be brought for the relief provided in this action ... by the attorney general”).

⁸ NYSCEF Doc. No. 646, at 162-63 (Second Cause of Action) ¶¶ 644-648; at 166 (Sixth Cause of Action) ¶¶ 662-665; and at 169 (Tenth Cause of Action) ¶¶ 678-681.

⁹ NYSCEF Doc. No. 646 ¶ 647 (emphasis added).

¹⁰ *Id.* at ¶ 10.

In the sixth cause of action, the Attorney General alleges that “LaPierre failed to administer the charitable assets of the NRA entrusted to his care properly and, as a result, should be ordered to *account for* his breaches and to make restitution and/or pay damages, plus interest at the statutory rate of 9%, to the NRA. In addition, LaPierre should be permanently barred 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.”¹¹

In the tenth cause of action, the Attorney General alleges:

LaPierre is liable under N-PCL § 715(f) and EPTL § 8-1.9(c), to *account for* profits from the LaPierre Post Employment Contract not already accounted for; to the extent not already paid, pay the NRA the value of charitable assets used in the LaPierre Post Employment Contract; return assets lost to the NRA as a result of the Post Employment Contract, to the extent not already returned; pay the NRA an amount up to double the value of the amount of each benefit improperly bestowed by the LaPierre Post Employment Contract; and should be enjoined from serving as an officer, director or trustee, or in any similar capacity, of any not-for-profit charitable organization incorporated or authorized to conduct business or solicit charitable donations in the State of New York.¹²

In her prayer for relief, the Attorney General requests judgment against the defendants “[d]irecting the Individual Defendants to *account for their conduct* in failing to perform their duties in managing the NRA’s charitable assets; to pay full restitution to the NRA for the waste and misuse of its charitable assets, including the return of salary received while breaching their fiduciary duties to the NRA, plus interest at the statutory rate; and to pay damages to the NRA arising from the breach of fiduciary duties pursuant to N-PCL §§ 720 and EPTL § 8-1.4.”¹³ In addition, she requests judgment against defendants “[r]emoving LaPierre for cause from his position as Executive Vice President of the NRA, and permanently barring his re-election or

¹¹ NYSCEF Doc. No. 646 ¶ 665 (emphasis added).

¹² NYSCEF Doc. No. 646 ¶ 681 (emphasis added).

¹³ NYSCEF Doc. No. 646, at 174-76 (Prayer for Relief) ¶ G (emphasis added).

appointment as an NRA officer or director pursuant to N-PCL §§ 706(d), 714(c), and 717 and EPTL § 8-1.4.,”¹⁴ and other relief that is not provided in section 720, including appointment of a compliance monitor and governance expert and implementation of governance reforms, restitution, forfeiture of salary, damages, double damages, interest, removal, a bar on re-election or appointment, and a lifetime ban on nonprofit service.¹⁵

As shown above, the second cause of action is premised specifically on N-PCL § 720(a)(1), which expressly authorizes the attorney general to bring an action to procure a judgment against an officer or director of a not-for-profit corporation “[t]o compel the defendant to *account for* his official conduct”¹⁶ The Attorney General has interpreted this language to authorize the sweeping relief she seeks against LaPierre, when the plain and natural meaning of the phrase “to account for” is simply “to explain”.¹⁷

¹⁴ NYSCEF Doc. No. 646, at 174-76 (Prayer for Relief) ¶ D.

¹⁵ NYSCEF Doc. No. 646, at 174-76 (Prayer for Relief) ¶¶ A-J.

¹⁶ See N.Y. N-PCL § 720(a)(1).

¹⁷ See Black’s Law Dictionary (9th ed.) at 22 (“**account for.** **1.** To furnish a good reason or convincing explanation for; to explain the cause of. **2.** Render a reckoning of (funds held, esp. in trust). **3.** To answer for (conduct).” (Bolding in original.) The phrase “account for” is not to be confused or conflated with the term “accounting”, or the term “accounting for profits”, particularly when the phrase “account for” is used with respect to “conduct”, as it is here. See Black’s Law Dictionary (9th ed.) at 22 (“**accounting.** **1.** The act or a system of establishing or settling financial accounts; esp., the process of recording transactions in the financial records of a business and periodically extracting, sorting, and summarizing the recorded transactions to produce a set of financial records. – Also termed *financial accounting*. Cf. BOOKKEEPING. **2.** A rendition of an account, either voluntarily or by court order. The term frequently refers to the report of all items of property, income, and expenses prepared by a personal representative, trustee, or guardian and given to heirs, beneficiaries, or the probate court. See ACCOUNT (4). **3.** A legal action to compel a defendant to account for and pay over money owed to the plaintiff but held by the defendant (often the plaintiff’s agent); ACCOUNTING FOR PROFITS. – Also termed *account render*; *account*; *action of account*. **4.** More broadly, an action for the recovery of money for services performed, property sold and delivered, money loaned, or damages for the nonperformance of simple contracts. Such an action is available when the rights of parties will be adequately protected by the payment of money. – Also termed *action on account*; *account*; *action of book debt*. **5.**

In an attempt to circumvent the limit on her authority established by the Legislature in section 720 of the N-PCL, the Attorney General refers to sections 112, 706, 714, 715 and 717 of the N-PCL, and sections 8-1.4 and 8-1.9 of the Estates Powers and Trusts Law (EPTL), but the this legal sleight-of-hand is unavailing because section 720 is the only section of the N-PCL that authorizes the attorney general to bring actions against directors, officers and key persons of not-for-profit corporations, and because the N-PCL and the EPTL must be read together and harmonized, which means that the limit on the attorney general's authority established by the Legislature in section 720 of the N-PCL must be deemed to apply in any action against a director, officer or key person of a not-for-profit corporation regardless of whether, in bringing the action, the attorney general refers to and relies on other provisions of the N-PCL or on provisions of the EPTL. *Cf. Rector, Church Wardens & Vestrymen of St. Bartholomew's Church, Inc.*, 84 A.D.2d 309, 315-16 (1st Dep't 1982) ("When two statutes are *in pari materia* 'they must be read together and applied harmoniously and consistently.' If by fair construction, two statutes can be given operation, implied repeal of one by the enactment of the other will not be declared.") (citations omitted). In other words, the only way to harmonize the N-PCL and the EPTL with respect to the subject of actions against directors, officers and key persons of not-for-profit corporations is to conclude that section 720 of the N-PCL controls in all actions against such persons, and that the limitations on the attorney general's authority set forth in that section, and the limitations on relief obtainable by the attorney general in such an action, apply regardless of whether an action is brought against an officer, director or key person of a not-for-profit corporation under the N-PCL, the EPTL, or both.

Commercial law. An equitable proceeding for a complete settlement of all partnership affairs, usu. In connection with partner misconduct or with a winding up. ***").

Thus, the Attorney General may not circumvent the limits imposed by the N-PCL by citing the EPTL because the EPTL does not eliminate the limit placed on the Attorney General's authority in section 720 of the N-PCL. Hence, in an action against an officer or director of a not-for-profit corporation, claims based on the EPTL are unauthorized and redundant and should be dismissed as *ultra vires*, duplicative, unnecessary and superfluous. Accordingly, the Attorney General's reliance on the EPTL in its sixth cause of action is misplaced, and the sixth cause of action should be dismissed as *ultra vires*, duplicative, unnecessary and superfluous.¹⁸

The Attorney General's reference to other provisions of the N-PCL do not allow her to escape the limitations of section 720 of the N-PCL either, because the provisions of the N-PCL must be read as a whole and harmonized, too. Section 112 of the N-PCL, cited by the Attorney General in support of her tenth cause of action, addresses, generally, "actions or special proceedings by [the] attorney-general", granting the attorney general authority to maintain certain listed actions and special proceedings and specifying the relief the attorney general may seek in each of those actions or proceedings; however, importantly, it does not give the attorney general authority to bring "actions against officers, directors or key persons".¹⁹ The authority to bring "actions against directors, officers and key persons" is set forth specifically in section 720 of the

¹⁸ *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141 (2017) ("Dismissal is warranted 'if the plaintiff fails to assert . . . an enforceable right of recovery.'"); *People v. Grasso*, 11 N.Y.3d 64 (2008); *People v. Grasso*, 42 A.D.3d 126 (1st Dep't 2007), *aff'd* 11 N.Y.3d 64 (2008); *Rector, Church Wardens & Vestrymen of St. Bartholomew's Church, Inc.*, 84 A.D.2d 309 (1st Dep't 1982). There is no cognizable cause of action for "breach of the EPTL § 8-1.4." All that statute does is authorize the attorney general "to institute appropriate proceedings to secure the proper administration of any not-for-profit corporation organized under the laws of this State for charitable purposes." "The National Rifle Association of America, Inc." is not a not-for-profit corporation organized under the laws of this State for charitable purposes, and, even if it were, the only proceeding the Attorney General would be authorized to institute against LaPierre is under section 720 of the N-PCL for the relief provided in that section.

¹⁹ N.Y. N-PCL § 112.

N-PCL, which expressly grants the attorney general authority to bring such actions, but also expressly and precisely limits the relief the attorney general may seek in such actions.²⁰ While section 112, entitled “Actions or special proceedings by attorney-general,” authorizes the attorney general to maintain an action “[t]o enjoin, void or rescind any related party transaction, seek damages and other appropriate remedies, in law or equity, in addition to any actions pursuant to section 715 (Related party transactions) ...,”²¹ neither section 112 nor section 715 gives the attorney-general authority to bring an action against an officer or director for the relief provided in those sections, and section 720 does not give the attorney general authority to bring an action against a director or officer for the relief provided in those sections either. Indeed, the absence from sections 112, 715 and 720 of an express grant of authority to the attorney general to bring an action for the relief provided in sections 112 and 715 must be viewed as excluding that authority “by reasonable intendment”, under the maxim *expressio unius est exclusio alterius*.²²

²⁰ N.Y. N-PCL § 720.

²¹ N.Y. N-PCL § 112. While the Attorney General asserts a cause of action against LaPierre for “Wrongful Related-Party Transactions” (the tenth cause of action), as a matter of law, the transactions the Attorney General complains of do not constitute related-party transactions because they relate to compensation of an officer, and, by the Attorney General’s own admission, transactions related to compensation of officers are not considered “related party transactions”. See Office of the New York State Attorney General Charities Bureau, Charities Symposium: Doing Well While Doing Good, Conflicts of Interest Policies under the Not-For-Profit Corporation Law at 7 (Sept. 2018) available at (<https://www.charitiesnys.com/pdfs/sympguidance.pdf>) (“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, ...”) (page 43 of 285) (emphasis added) and see Correll Affm. ¶ 20 and Exh. 4. The Attorney General has not alleged that LaPierre engaged in any “related party transactions” other than those alleged in the tenth cause of action. Therefore, even if the Attorney General had authority to bring an action against LaPierre under sections 112 and 715, which she does not, the relief provided in those sections would not be available against LaPierre.

²² See *Mark G. v. Sabol*, 93 N.Y.2d 710, 720-21 (1999) (“The Legislature specifically considered and expressly provided for enforcement mechanisms. *** Given this background, it would be inappropriate for us to find another enforcement mechanism beyond the statute’s already ‘comprehensive’ scheme Considering that the statute gives no hint of any private enforcement remedy for money damages, we will not impute one to the lawmakers.”); *People v. Grasso*, 42

Tellingly, in section 715(f) of the N-PCL, in specifying the relief the attorney general is authorized to seek in an action against “a person or entity” with respect to a “related-party transaction”, the Legislature used the phrase “to ... account for any profits,” rather than “to account for his official conduct,” thus showing that the Legislature is well aware of, and fully appreciates, the difference between the two expressions and does not intend for them to be viewed as synonymous, and that where it wants to grant the attorney general the authority to seek relief in the form of a judgment requiring a person or entity “to account for any profits,” it knows exactly how to do that.²³ Thus, the text of the Not-for-Profit Corporation Law, read as a whole, shows that the Legislature is well aware of the difference between “account for his official conduct” and

A.D.3d 126, 135 (1st Dep’t 2007), *aff’d* 11 N.Y.3d 64 (2008) (“Under ‘the standard canon of construction of expression *unius est exclusion alterius*, we can infer that the expression of [authority to bring specific causes of action] indicates an exclusion of others’ [applying ‘the legal maxim, *Expressio unius est exclusio alterius*, or, as it is otherwise worded, *expressum facit cessare tacitum*. That is, the express mention of one thing implies the exclusion of another’]”) (citations omitted). *See also* Dobbs, D.B., & Roberts, C.L. (n.d.). Dobbs and Roberts’s Law of Remedies, Damages, Equity, Restitution, 3d (Hornbook Series) at page 186 (“a statutory cause of action may *implicitly* exclude other causes of action or preempt the field. In that case, no other cause of action can furnish a ground for a remedy a statutory authorization of one remedy may [also] *implicitly* exclude all others not named in the statute. This is the most likely to be a fair construction when the statutory remedies are [as here] extensively provided and qualified.”). Here, in section 720(b), in conferring authority on the attorney-general to bring an action for the relief provided for in section 720, the Legislature expressly gave the attorney-general authority to bring an action for relief provided in section 720 and “in paragraph (a) of section 719 (Liabilities of directors in certain cases)”, showing that when the Legislature wants to give the attorney general authority to bring an action for relief provided in a particular section of the N-PCL, the Legislature knows exactly how to do it.

²³ *See* N-PCL § 715(f) (“The attorney general may bring an action to enjoin, void or rescind any related party transaction or proposed related party transaction that violates any provision of this chapter ... or to seek restitution, and the removal of directors or officers, or seek to require any person or entity to: (1) *Account for any profits* made from such transaction, and pay them to the corporation; (2) Pay the corporation the value of the use of any of its property or other assets used in such transaction; (3) Return or replace any property or other assets lost to the corporation as a result of such transaction, together with any income or appreciation lost to the corporation by reason of such transaction, or *account for any proceeds* of sale of such property, and pay the proceeds to the corporation together with interest at the legal rate; and (4) Pay, in the case of willful and intentional conduct, an amount up to double the amount of any benefit improperly obtained.”).

“account for any profits.” Accordingly, the Attorney General should not be allowed to import the language of section 715(f) into 720(a)(1) and thereby expand the relief provided in section 720(a)(1).

Similarly, while sections 706 and 714 grant the attorney general authority to bring an action for removal of a director or officer, those sections do not grant the attorney general authority to bring such an action against a director or officer, indicating an intent on the part of the Legislature that actions seeking removal be brought not against directors and officers, but against the corporations they serve.²⁴ And that makes perfect sense, because the natural defendant in an action for removal of a director or officer of a corporation is the corporation itself, since it is the corporation that has the power to elect or remove directors and officers.²⁵ Accordingly, LaPierre respectfully submits that the Attorney General’s claim for removal should be expurgated from the second cause of action.

Sections 717, 719 and 720 of the N-PCL are the core provisions of the comprehensive legislative scheme governing the duties and liability of officers and directors of not-for-profit corporations and there is no reason for this Court to find that an action against a director or officer

²⁴ See N-PCL § 706 (“Removal of directors”) (“(a) [A]ny or all of the directors may be removed for cause by vote of the members, or by vote of the directors *** (b) An action to procure a judgment removing a director for cause may be brought by the attorney-general The court may bar from re-election any director so removed for a period fixed by the court.”); N-PCL § 714 (“Removal of officers”) (“(a) Any officer elected or appointed by the board may be removed by the board with or without cause. *** (c) An action to procure a judgment removing an officer for cause may be brought by the attorney-general The court may bar from re-election or reappointment any officer so removed for a period fixed by the court.”). Compare N-PCL § 720 (“Actions against directors, officers and key persons”) (“(a) An 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: *** (b) An action may be brought for the relief provided in this section ... by the attorney general”).

²⁵ *Id.*

of a not-for-profit corporation, brought by the attorney general, in which the attorney general refers to and relies on the EPTL is exempt from the limitations imposed by the Legislature on actions against directors, officers and key persons of not-for-profit corporations in sections 717 and 720.²⁶

Section 720(b) expressly authorizes the attorney general to bring an action against a director, officer or key person of a not-for-profit corporation for the relief provided in section 720, thus implicitly limiting the authority of the attorney general to bring an action against a director,

²⁶ See *People v. Grasso*, 11 N.Y.3d 64, 69 (2008) (Kaye, C. J.) (“Although several provisions of the N-PCL mirror those regulating for-profit entities under the Business Corporation Law, one unique characteristic is the legislative codification of the Attorney General’s traditional role as an overseer of public corporations (see e.g. *People v. Lowe*, 117 N.Y. 175 [1889]). At least 18 provisions of the statute detail the Attorney General’s varied enforcement powers. These powers include the ability to provide structural relief with respect to the corporation and to bring actions against individual directors or officers. Section 112 expressly authorizes actions or special proceedings to annul or dissolve corporations that have acted beyond their authority or to restrain unauthorized activities (N-PCL 112 [a] [1]). In addition, the Attorney General may enforce any right given to members of Type B or Type C corporations and, upon an order from Supreme Court, may do the same for Type A corporations (N-PCL 112 [a] [7], [9]). In addition, sections 719 and 720 permit the Attorney General to seek redress for injuries resulting from—to name only a few—unlawful distributions of corporate cash, property or assets (N-PCL 719 [a] [1], [4]), improper loans (N-PCL 719 [a] [5]), waste of corporate assets (N-PCL 720 [a] [1] [B]) and *breach of fiduciary duties* (N-PCL 720 [a] [1] [A]). *The Attorney General’s authority to maintain these actions is explicitly codified under N-PCL 720 (b).*”); *People v. Grasso*, 42 A.D.3d 126, 127-28 (1st Dep’t 2007), *aff’d* 11 N.Y.3d 64 (2008) (“The central issue on this appeal is whether the Attorney General has the legal authority to assert against defendant Richard A. Grasso four of the six causes of action that the Attorney General asserts against him in his complaint. Although these four causes of action, the first, fourth, fifth and sixth causes of action, refer to and rely on various provisions of the Not-For-Profit Corporation Law (N-PCL), neither the N-PCL nor any other statute purports to confer authority upon the Attorney General to assert any of them. Indeed, none of them are mentioned in, let alone defined by, the N-PCL or any other statute, and Grasso’s position at bottom is that none of them are valid causes of action. *** We conclude that the Attorney General does not have the authority to assert the first, fourth, fifth and sixth causes of action. Regardless of whether the Attorney General’s authority to bring causes of action against directors and officers of not-for-profit corporations relating to the affairs of the corporations is limited to the causes of action the Legislature expressly has authorized the Attorney General to bring, these four causes of action are not within the scope of the Attorney General’s authority. As discussed below, *the assertion of these causes of action is inconsistent with the policy judgments made by the Legislature in enacting the N-PCL and, specifically, both with core provisions of the N-PCL relating to the duties and liability of officers and directors and with the enforcement scheme of the N-PCL.*”) (Emphasis added).

officer and key person of not-for-profit corporations for relief that is not provided in section 720.²⁷

Accordingly, the Attorney General lacks authority to seek relief against LaPierre other than the relief provided in section 720.²⁸

Thus, while the Attorney General has the authority to bring an action against the National Rifle Association of America seeking removal of LaPierre as an officer and director of that corporation, and to seek a court order barring his re-election or reappointment for a period fixed by the Court, she does not have the authority to bring an action against LaPierre for a permanent injunction barring him from nonprofit service for life, or for any relief other than a judgment “to compel him to account for his official conduct” because that is the only relief provided under N-PCL § 720(a)(1), the specific provision of the N-PCL on which the Attorney General has based her second cause of action.²⁹

In short, section 720 sets out an exclusive list of relief the Attorney General is authorized to seek against a director, officer or key person of a not-for-profit corporation, yet the Attorney General has filed an amended complaint in which she seeks loads of relief against LaPierre that is not on the list, and tries to stretch the phrase “to account for his official conduct”, into a list of relief ten items long. The Court should read and apply the N-PCL as it was intended to be read and applied, and dismiss the Complaint with leave to re-plead to give the Attorney General an opportunity to tailor her complaint to comply with the limitations on causes of action and relief imposed by the Legislature in section 720.³⁰

²⁷ See N.Y. N-PCL § 720; and note 22, *supra*.

²⁸ *Id.*

²⁹ See N-PCL § 720.

³⁰ *People v. Grasso*, 11 N.Y.3d 64, 69 (2008) (Kaye, C. J.)

Hence, the Attorney General may not bring an action against LaPierre for relief that is not provided in section 720 of the Not-for-Profit Corporation Law, thereby circumventing the limit on her authority codified in that statute.³¹ Accordingly, as against LaPierre, the Attorney General is limited as a matter of law to seeking the relief provided in N-PCL § 720, which does not include a monitor, governance expert, governance reforms, restitution, forfeiture of salary and damages for breach of fiduciary duty, double damages, interest, removal, a bar on re-election or reappointment, and a lifetime ban on nonprofit service.³²

In summary, although the three causes of action asserted against LaPierre in the Complaint refer to and rely on various provisions of the N-PCL and the EPTL, neither statute, nor any other statute, purports to confer authority upon the Attorney General to bring an action against LaPierre for the relief she is seeking, except to procure a judgment to compel him “to account for his official conduct.” While N-PCL §§ 706 and 714 authorize the Attorney General to seek his removal as Executive Vice President of the National Rifle Association of America, in order to seek that relief, she must bring an action against the National Rifle Association of America, not LaPierre (and not “The National Rifle Association of America, Inc.”). Indeed, apart from a judgment against him to compel him to account for his official conduct and a judgment against his employer for removal, none of the relief she is seeking is authorized by the N-PCL, the EPTL or any other statute, and none of it is procurable through an action brought against LaPierre. In other words, the only judgment the Attorney General is authorized to seek against LaPierre based on the facts alleged in the Complaint is a judgment to compel him “to account for his official conduct”.³³

³¹ See N.Y. N-PCL § 720(a) and (b); *People v. Grasso*, 11 N.Y.3d 64 (2008).

³² *Id.*

³³ *People v. Grasso*, 11 N.Y.3d 64 (2008).

B. The Attorney General Is Barred by the Doctrine of Law of the Case from Continuing to Seek Relief against LaPierre on the Theory that He Has Been “Unjustly Enriched”.

“The doctrine of the ‘law of the case’ is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned.”³⁴ Here, in a prior complaint, the Attorney General asserted a claim against LaPierre for “unjust enrichment” and requested judgment against him directing him to pay “The National Rifle Association of America, Inc.” restitution for all excessive, unreasonable, and excess benefits that were paid to and “unjustly enriched” him.³⁵ LaPierre moved to dismiss the claim and the Court granted his motion.³⁶ Nevertheless, in her amended Complaint, the Attorney General continues to seek exactly the same relief against LaPierre.³⁷ Given the Court’s prior order dismissing the unjust enrichment claim, which the Attorney General did not appeal, the Attorney General is barred by the doctrine of “law of the case” from continuing to seek relief against LaPierre on the theory that he has been “unjustly enriched”.

C. The National Rifle Association of America Should Be a Party and the Court Should Not Proceed In Its Absence.

CPLR 3211(a) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or *** (10) the court should not proceed in the absence of a person who should be a party.” CPLR 1001 (“Necessary Joinder of Parties”) states, in pertinent part: “(a)

³⁴ *Martin v. City of Cohoes*, 37 N.Y.2d 162, 165 (1975).

³⁵ See NYSCEF Doc No. 333, at 185-86 (Prayer for Relief) ¶ J.

³⁶ NYSCEF Doc Nos. 355-362, 392, 439-445 (LaPierre Motion to Dismiss) and NYSCEF Doc. No. 609 (Decision + Order on Motion).

³⁷ See NYSCEF Doc No. 646, at 174-76 (Prayer for Relief) ¶ J.

Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. *** (b) *** When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. *** ”

Here, a defense is founded on documentary evidence showing that the Secretary of State of the State of New York has no record of any entity with the name “The National Rifle Association of America, Inc.”, and that the name of the entity of which LaPierre is an officer is “National Rifle Association of America”.³⁸ Nevertheless, the Complaint names “The National Rifle Association of America, Inc.” as a defendant, and fails to join “National Rifle Association of America.”³⁹ LaPierre notified the Attorney General of this defect, but the Attorney General has inexplicably failed to cure the defect.⁴⁰ Accordingly, LaPierre respectfully requests that the Court dismiss the Complaint without prejudice to give the Attorney General a further opportunity to cure the defect.

³⁸ See Correll Affm. ¶¶ 16-19 and Exhs. 1, 2 and 3.

³⁹ NYSCEF Doc No. 646.

⁴⁰ See Correll Affm. ¶¶ 5 and 9. Requiring the Attorney General to correctly identify the National Rifle Association of America and properly join it as a party defendant would promote clarity and certainty and facilitate the preparation of answers. No one should have to answer a 179-page complaint that fails to correctly identify and join a necessary and indispensable party.

VII.

CONCLUSION

For the reasons stated above, the Court should grant LaPierre's motion to dismiss.⁴¹

Dated: New York, New York
June 6, 2022

Respectfully submitted,

/s/ P. Kent Correll

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⁴¹ To avoid duplication in accordance with the Court's Part Rules, LaPierre hereby adopts and incorporates by reference the arguments made by the National Rifle Association of America in support of its motion to dismiss, and, in particular, the arguments it makes supporting dismissal of the first cause of action on the ground that it is premised on the Association's alleged breach of EPTL 8-1.4, but the Attorney General does not allege it breached any of its obligations under EPTL 8-1.4 since the same is true vis-à-vis LaPierre. LaPierre also adopts and incorporates by reference the arguments made by John Frazer in support of his motion to dismiss, and, in particular, the arguments made by Frazer with respect to the Attorney General's lack of authority to assert unauthorized remedies not provided in the governing statutes in an action against an officer or director of a not-for-profit corporation.

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 Memorandum of Law in Support of Defendant Wayne LaPierre's Motion to Dismiss the Second Amended Verified Complaint complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)), because the memorandum of law contains 6,574 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 memorandum of law and affirmation.

Dated: New York, New York
June 6, 2022

/s/ P. Kent Correll

P. Kent Correll, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record on this 6th day of June 2022.

/s/ P. Kent Correll
P. Kent Correll