Motion Sequence Nos. 28, 29 & 30

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

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

THE ATTORNEY GENERAL'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS THE SECOND AMENDED VERIFIED COMPLAINT

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On behalf of the Plaintiff, the People of the State of New York ("Plaintiff"), Attorney General Letitia James ("Attorney General") respectfully submits this omnibus memorandum in opposition to the third set of motions by Defendants the National Rifle Association of America, Inc. ("NRA"), Wayne LaPierre ("LaPierre"), and John Frazer ("Frazer"; the NRA, Frazer and LaPierre are referred to collectively as the "Defendants" and LaPierre and Frazer are referred to jointly as the "Individual Defendants")[1] to dismiss this action as set forth in motion sequence numbers 28, 29 and 30.

PRELIMINARY STATEMENT

As the Court is aware, Plaintiff commenced this action in August 2020 to hold the NRA and its current and former officers and directors accountable for their self-dealing, mismanagement and waste of charitable assets. Plaintiff has amended or supplemented the Complaint twice, once to incorporate allegations arising out of the bankruptcy proceeding the NRA commenced in an attempt to avoid this Court's jurisdiction, and again to add a cause of action against the NRA under Section 8-1.4 of the Estates, Powers and Trusts Law ("EPTL") based on its failure to properly administer the charitable assets entrusted to its care. Plaintiff made the second amendment after the Court's March 2022 decision upholding, for the second time, the Complaint's central allegations. Although the Complaint's claim for judicial dissolution of the NRA was dismissed, as the Court has recently pointed out, Plaintiff asserted "serious claims based on detailed allegations of wrongdoing at the highest levels of a *not-for-profit* organization as to which the Attorney General has legitimate oversight responsibility." (NYSCEF 706 at 2.)

[1] For the purpose of this memorandum, the terms "Defendants" and "Individual Defendants" do not include Defendants Wilson Phillips and Joshua Powell, who took no part in the motions opposed herein.

In light of the Court's decision dismissing the dissolution claim, particularly the Court's discretionary finding that such a claim was not sufficiently tailored and not in the interests of the organization and its members, (NYSCEF 609 at 26-27), Plaintiff amended the Complaint to add a claim under § 8-1.4, seeking injunctive relief, including, without limitation, the appointment of a compliance monitor and a governance expert. (NYSCEF 646.) The amended claim under § 8-1.4 for the appointment of a compliance monitor and governance expert is a narrowly tailored remedy that will ensure that the NRA's charitable assets are administered properly in furtherance of its charitable mission and for the benefit of its members. Moreover, the § 8-1.4 claim against the NRA is not based on any new factual allegations and, indeed, is based on the same legal theory as Plaintiff's claims under § 8-1.4 against Defendants LaPierre and Frazer that the Court has already determined stated a claim.

In response to the Second Amended Complaint (the "Complaint"), each of the Defendants filed a third motion to dismiss. None of the motions has any merit. The NRA's arguments that the § 8-1.4 claim should be dismissed for failure to state a claim are based on a complete misreading and mischaracterization of the plain language of EPTL § 8-1.4, its legislative history and applicable case law, including this Court's prior decision in this matter upholding claims under EPTL § 8-1.4 based on the alleged failure to properly administer charitable assets.

The Individual Defendants' arguments are barred by the single motion rule, which prohibits defendants from bringing serial motions to dismiss where, as here, the allegations against them remain unchanged. However, even if they are considered they should be rejected. Section 720 of the Not-For-Profit Corporation Law ("N-PCL") clearly empowers the Attorney General to seek restitution and injunctive relief from fiduciaries, such as Defendants LaPierre and Frazer, who

breach their duties to the not-for-profit organizations they are bound to serve and is not limited to merely requiring them to "explain" their wrongful conduct.

FACTUAL AND PROCEDURAL BACKGROUND

I. Defendants Unsuccessfully Moved to Dismiss, Transfer, or Stay This Action.

In August 2020, following an extensive investigation, the Attorney General commenced this action against the NRA and four of its current and former fiduciaries. The Attorney General's 163-page complaint alleged, *inter alia*, that the NRA, its officers, and its Board, through a pervasive culture of self-dealing, mismanagement, and negligent oversight, permitted the diversion of millions of dollars away from the NRA's charitable mission. (NYSCEF 1.) Later that year, Defendants filed six separate motions to dismiss, stay, or transfer the Attorney General's action. (*See* NYSCEF 70, 114, 129, 133 & 156.) In January 2021, the Court denied all of the motions in their entirety. (*See* NYSCEF 210-215, 220 at 67-81.)

II. The NRA Unsuccessfully Filed for Bankruptcy in an Effort to Evade this Action.

In January 2021, the NRA filed a Chapter 11 petition in the United States Bankruptcy Court for the Northern District of Texas.[2] The Attorney General moved to dismiss the bankruptcy petition in February 2021. Following a trial in April and May 2021, the court granted the Attorney General's motion to dismiss, finding that the NRA improperly commenced the bankruptcy "to gain an unfair litigation advantage and … to avoid a state regulatory scheme." (NYSCEF 365 at 2.)

[2] *In re National Rifle Association of America and Sea Girt LLC*, Jointly Administered, Case No. 21-30085-hdh11 (Bankr. S.D. Tex.).

III. The Attorney General Supplemented her Complaint and After Defendants Moved to Dismiss, the Court Upheld Fourteen of the Attorney General's Causes of Action.

After the court dismissed the NRA's bankruptcy petition, the Attorney General filed an Amended and Supplemental Verified Complaint (the "First Amended Complaint") in this action, in which she set forth detailed factual allegations of continued misconduct committed by the Defendants in the year since her original complaint was filed, including wrongdoing related to the Chapter 11 proceeding. (NYSCEF 333.) The First Amended Complaint alleged that, since this action was commenced, "[i]ntentional disregard for proper corporate governance, waste of charitable assets, concealment and false reporting of improper or unauthorized transactions, actions to advance personal interests to the determent of the NRA, and evasion of accountability have continued unabated." (*Id*. at ¶ 580.)

Defendants each moved to dismiss the First Amended Complaint. (*See* NYSCEF 348, 355 & 363.) On March 2, 2022, the Court granted the motions as to four of the eighteen causes of action, but sustained each of the Attorney General's remaining claims against the NRA and the Individual Defendants for violations of the N-PCL, the EPTL, and the Executive Law. (NYSCEF 609.) In doing so, the Court acknowledged that "[t]he Attorney General's allegations in this case, if proven, tell a grim story of greed, self-dealing, and lax financial oversight at the highest levels of the National Rifle Association." (*Id*. at 1.)

As to the causes of action for breach of fiduciary duty under N-PCL 717 and 720 and removal under N-PCL 706(d) and 714(c), the Court concluded that the Attorney General had adequately pled claims for breach of fiduciary duty against Defendants LaPierre and Frazer. With respect to Defendant LaPierre, the Court explained, "[i]n several hundred paragraphs of specific factual allegations, the Amended Complaint describes, in meticulous detail, LaPierre's exploitation of the NRA for his financial benefit, his abuse of power, and his general disregard for

corporate governance." (*Id*. at 28.) With respect to Defendant Frazer, the Court noted, "ten paragraphs of the Amended Complaint are spent describing his allegedly incompetent supervision of the NRA's compliance with New York law, and his failure to ensure the accuracy of the NRA's annual filings with the Attorney General. Frazer's alleged misconduct regarding supervision of the NRA's conflict-of-interest and related-party transaction policies, his failure to appropriately handle related party transactions, and his failure to follow proper procedures regarding procurement, are also detailed in the Complaint." (*Id*. at 28-29.) For the same reasons, the Court likewise upheld the Attorney General's claims under EPTL § 8-1.4 against the Individual Defendants, holding that the Attorney General's allegations were "sufficient to make out a claim that LaPierre and Frazer improperly administered the NRA's charitable assets." (*Id*. at 29.)

The Court also upheld the First Amended Complaint's claims for false filings under Executive Law §§ 172-3(1) and 175(2)(d), concluding that they stated a claim based on the allegations that the NRA, through its authorized agents, submitted materially false and misleading reports. (*Id*. at 35.) The Court also rejected both of Frazer's arguments for dismissal and found that "the detailed allegations in the complaint at least raise fact questions about whether Frazer was acting in good faith when he signed the reports." (*Id*. at 37.) The Court pointed to the fact that "[t]he complaint asserts, with numerous specific examples, that Frazer's knowledge about misconduct at the NRA vitiated any purported reliance on other NRA professionals." (*Id*.)

The Court also sustained the Attorney General's causes of action for violation of the whistleblower protections of N-PCL § 715-b and EPTL § 8-1.9 and wrongful related party transactions under N-PCL 112(a)(1), 715(f), and EPTL § 8-1.9(c)(4). (*Id*. at 30-31; 29-30.)

IV. The Attorney General Amended Her Complaint to Add a Cause of Action for Breach of EPTL § 8.1.4 Against the NRA.

In May 2022, the Attorney General filed the Second Amended Complaint to add a cause of action against the NRA for failing to administer charitable assets properly in violation of EPTL § 8-1.4. (NYSCEF 646.) The Complaint does not add any new factual allegations in support of the § 8-1.4 claim, but rather, points to the following facts that had been alleged in the First Amended Complaint and which are set forth in detail throughout the Complaint: (1) the NRA meets the definition of trustee subject to suit under § 8-1.4 because it failed to supervise or take appropriate disciplinary action against the Individual Defendants and others for the actions alleged in the complaint; (2) the NRA made material false statements in its filings with the Attorney General; (3) the NRA failed to comply with the applicable law governing conflicts of interest, related-party transactions and self-dealing; (4) the NRA failed to comply with the applicable law governing whistleblower protections; and (5) the NRA permitted violations of its own bylaws and internal policies and procedures. (*Id*. ¶ 641.) The Complaint alleges that the NRA's conduct resulted in the waste of its charitable assets, violations of the NRA's by-laws, policies and procedures, harm to the public's and the NRA members' faith in the organization's ability to properly administer its charitable assets, as well as violations of the law relating to whistleblowers, and therefore seeks injunctive relief, including the appointment of an independent compliance monitor and the appointment of an independent governance expert. (*Id.* ¶¶ 642-43.) The appointment of a governance expert and compliance monitor would be narrowly tailored remedies to ensure that the NRA is administered properly and in accordance with applicable law, serving the interests of its members rather than lining the pockets of those running it.

The Complaint contains no new factual allegations against either LaPierre or Frazer, nor does it assert any new cause of action against them. Rather, the Complaint alleges the exact same

facts and seeks the exact same remedies as the prior complaints, each of which LaPierre and Frazer had the opportunity and sought, albeit unsuccessfully, to dismiss.

ARGUMENT

On a motion to dismiss, "the pleading is to be afforded a liberal construction," and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). The "motion must be denied" if the factual allegations contained within the four corners of the Complaint when considered together "manifest any cause of action cognizable at law." *511 West 232nd Owners Corp. v. Jennifer Realty Co*., 98 N.Y.2d 144, 151-52 (2002) (citation omitted). Defendants have failed to satisfy their high burden of showing that the causes of action they seek to dismiss fail to fit within any cognizable legal theory and, as a result, each of the motions to dismiss should be denied.

I. The Complaint States a Claim Against the NRA For Failure to Properly Administer Charitable Assets Pursuant to EPTL § 8-1.4.

EPTL § 8-1.4 "empowers the Attorney General to 'investigate transactions and relationships of trustees for the purpose of determining whether or not property held for charitable purposes has been and is being properly administered.'" *People by Underwood v. Trump*, 62 Misc.3d 500, 510-511 (Sup. Ct. N.Y. Cty. 2018) ("*Trump I*") (quoting § 8-1.4(i)). Section 8-1.4(m) gives broad powers to the Attorney General to supervise charities and expressly authorizes her to "***institute appropriate proceedings*** to secure compliance with this section and ***to secure the proper administration of any trust***, corporation or relationship to which this section applies."[3] EPTL § 8-1.4(m); *see, e.g., Trump I*, 62 Misc.3d at 510-13 (Attorney General stated

[3] Unless otherwise indicated, all emphasis is added.

claims under § 8-1.4 for the failure to administer charitable assets properly); *People ex rel. Schneiderman v. Lower Esopus River Watch, Inc.*, 2013 WL 3014915, *26-*27 (Sup. Ct. Ulster Cty. Apr. 8, 2013) ("*LERW"*) (in an action brought by the Attorney General pursuant to § 8-1.4, awarding restitution and injunctive relief for trustee's failure to administer charitable assets properly); *see generally* Margaret Valentine Turano, McKinney's EPTL Ch. 17-b, Art. 8, Refs. And Annos., Practice Commentaries ("EPTL 8-1.4 … gives the Attorney General broad powers over charities"); 18 N.Y. Jur.2d § Charities § 58 (Section 8-1.4 confers "upon the attorney general broad supervisory powers over trustees of charitable trusts"); Ch. 831, 1966, *Bill Jacket, Budget Report on Bills,* Connell Aff.[4] Ex. A at 127 ("*Budget Report*") (bill enacting 8-1.4 "grants thorough registration, supervisory and enforcement powers to the Attorney General"). In the First Cause of Action, the Complaint asserts a claim pursuant to EPTL § 8-1.4, alleging that the NRA failed to administer the charitable assets entrusted to its care properly and seeks injunctive relief, including without limitation the appointment of a monitor, to ensure that its charitable assets are administered properly in the future. The NRA's argument that this cause of action fails to state a claim mischaracterizes and misconstrues the text of the statute, its legislative history and the applicable case law. It should, for the reasons set forth below, be rejected.

A. Section 8-1.4 Was Enacted to Enhance the Attorney General's Enforcement Powers.

Both the text of § 8-1.4 and its legislative history make it clear that the section was enacted to expand the Attorney General's enforcement powers over charities and those that control them. Section 8-1.4(m) expressly provides that "[t]he powers and duties of the attorney general provided

[4] "Connell Aff." refers to the July 13, 2022 Affirmation of Monica Connell in Opposition to Defendants' Motions to Dismiss the Second Amended Verified Complaint, submitted herewith. Copies of legislative history materials that are not available on Westlaw are attached to the Connell Aff.

in this section are in addition to all other powers and duties he or she may have." Similarly, § 8-1.4's legislative history confirms that it was enacted to "increase the enforcement powers of the Attorney General" over charitable organizations in this State. *See, e.g.*, *Budget Report*, Connell Aff. Ex. A at 127. At the time § 8-1.4 was adopted in 1966, the Attorney General had enforcement power over charitable organizations and could bring actions for "a variety of remedies, including injunction, accounting, removal and surcharge," but its ability to effectively supervise charitable organizations was hampered by a lack of information. Ch. 831, 1966, *Bill Jacket, New York State Bar Association Legislative Report*, Connell Aff. Ex. A at 130; Julius Greenfield, McKinney's EPTL § 8-1.4, Practice Commentaries at 64, 66 (West 1968) ("*Greenfield Commentaries*"), Connell Aff. Ex. B at 5, 7. Thus, in his memorandum seeking adoption of what would become § 8-1.4, Attorney General Lefkowitz argued that the new statutory section, which was modeled on the Uniform Supervision of Trustees for Charitable Purposes Act, was "not only desirable but necessary" in order for the Attorney General's office to fulfill its enforcement functions with respect to charities. Memorandum of State Department of Law, McKinney's 1966 Session Laws of New York, vol. 2, at 2928, 2930 (189th Session – 1966), Connell Aff. Ex. C at 4. In addition, although § 8-1.4 is now incorporated into the EPTL, when it was originally adopted, it was a stand-alone provision that was separately added to both the Personal Property Law and the Real Property Law. *Greenfield Commentaries* at 63, Connell Aff. Ex. B at 4.

Section 8-1.4 remedied the deficiencies in existing law by requiring registration with, and reporting of financial information on an annual basis to, the Attorney General, *see* EPTL § 8-1.4(d)-(g), but it did not end there. Section 8-1.4 also gave the Attorney General "extensive investigating powers for the purpose of determining whether or not property held for charitable purposes has been and is being properly administered," EPTL § 8-1.4(i), and supplemented the

"Attorney General's existing powers and duties" with respect to enforcement. *Greenfield Commentaries* at 64, 66, Connell Aff. Ex. B at 5, 7. Section 8-1.4 also defined the term "trustee" broadly so as to extend the Attorney General's power to all persons and entities that administer charitable assets over which the Attorney General has "enforcement or supervisory powers," including "non-profit corporation[s] organized under the laws of this state for charitable purposes." EPTL § 8-1.4(a)(1)&(2); *see LERW*, 2013 WL 3014915 at *27.

B. The EPTL Requires Trustees to Administer Charitable Assets Properly and Authorizes the Attorney General to Institute Appropriate Proceedings Against Them if They Fail to Do So.

In its motion to dismiss, the NRA incorrectly contends that the Complaint "does not allege that [it] breached any of its obligations under EPTL 8-1.4." (NYSCEF 705 at 3.) The NRA's argument is premised on a fundamental mischaracterization of § 8-1.4 as only creating a limited number of obligations, all relating to reporting, that the Attorney General can bring proceedings to enforce. (*Id.* at 3-4.) Under the NRA's strained reading of the statute, the Attorney General would not be permitted, pursuant to EPTL § 8-1.4(m), to pursue claims against those that fail to administer charitable assets properly. However, the NRA does not, because it cannot, cite a single case or other authority in support of such reading. (*See id* at 3-9.) Contrary to the NRA's unsupported argument, it is well established that EPTL § 8-1.4 imposes a duty on trustees to administer charitable assets properly, which the Attorney General can enforce. *See, e.g.*, *Trump I*, 62 Misc.3d at 511 (sustaining Attorney General's claims pursuant to § 8-1.4 against founder and president of foundation, as well as other board members, for failing to fulfill their responsibility to administer charitable assets properly); *LERW*, 2013 WL 3014915, *27, *29 (individual running organization was a trustee and liable, in an action brought by the Attorney General pursuant to

§ 8-1.4 for the waste resulting from organization's "failure to administer charitable assets properly").

As an initial matter, the plain language of the statute makes it clear that the Attorney General's enforcement powers under EPTL § 8-1.4 are broad. Section 8-1.4(m) gives the Attorney General authority to "***institute appropriate proceedings*** to secure compliance with this section ***and to secure the proper administration of any trust, corporation*** or other relationship to which this section applies." EPTL § 8-1.4(n) provides that Section 8-1.4 "shall be ***liberally construed*** so as to effectuate its general purpose of protecting the public interest in charitable uses, purposes and dispositions."

Courts applying § 8-1.4 have uniformly held that it imposes a responsibility on trustees to administer charitable assets properly. For example, in analyzing the Attorney General's claims against former President Trump and his children for their failure to run his foundation properly, Justice Scarpulla held that they were "***trustees*** of charitable assets ***pursuant to EPTL § 8-1.4 and thus were responsible for the proper administration of charitable assets.***" *Trump I*, 62 Misc.3d at 511; *People by James v. Trump*, 66 Misc.3d 200, 204 (Sup. Ct. N.Y. Cty. 2019) (same) ("*Trump II*"); *see, e.g.*, *LERW*, 2013 WL 3014915, *26-*27 ("[i]n addition to the obligations imposed by the N-PCL, ***trustees*** … ***are accountable under the EPTL for the 'proper administration' of the assets*** entrusted to them"). Thus, numerous courts, including this one, have held that the Attorney General may bring claims for equitable relief against trustees who fail to administer charitable assets properly. *See, e.g.*, NYSCEF 609 at 29 (allegations in seventh and eighth causes of action brought pursuant to EPTL § 8-1.4 seeking an accounting, restitution and injunctive relief, which "largely overlap" with allegations of breach of fiduciary duty under the N-PCL, state a claim); *LERW*, 2013 WL 3014915, *27, *29 (issuing injunction and ordering payment of restitution under

EPTL § 8-1.4); *see generally Abrams v. New York Found. For the Homeless*, 190 A.D.2d 578, 578 (1st Dep't 1993) (Attorney General is "clearly empowered" by EPTL § 8-1.4 "to supervise charitable corporations … and to enjoin them from soliciting funds improperly").

The Complaint alleges numerous ways in which the NRA failed to administer charitable assets properly, setting forth its: (i) failure to take action against individuals who wasted its assets and violated its policies; (ii) making false statement in filings with the Attorney General; (iii) failure to comply with the N-PCL's and EPTL's requirements with respect to conflicts of interest, self-dealing and related party transactions; (iv) failure to comply with the N-PCL's and EPTL's provisions concerning whistleblowers; and (v) permitting violations of its bylaws and policies. (NYSCEF 646 at ¶ 641; *see* NYSCEF 705 at 7-8.) These allegations are clearly sufficient to state a claim under EPTL § 8-1.4(m). *See, e.g.*, *Trump I*, 62 Misc.3d at 509-13 (sustaining claims under EPTL where trustees allegedly (i) failed to (a) hold board meetings, (b) oversee organization, or (c) supervise staff and (ii) permitted the waste of charitable assets thorough self-dealing transactions); *LERW*, 2013 WL3014915, *27 (trustee violated fiduciary duties under the EPTL and was liable under Section 8-14(m) for engaging in self-dealing transactions).[5]

The NRA acknowledges that EPTL § 8-1.4(m) "should be construed as giving the Attorney General standing to pursue remedies for breaches of duties that exist otherwise." (NYSCEF 705 at 7.) Although this interpretation is still too narrow because, as set forth above, Section 8-1.4 was

[5] The NRA's attempt to avoid liability for these failures by pointing to the Court's determination that the dissolution claim could not proceed because the NRA was "the victim of its executive's schemes" is misplaced. (NYSCEF 705 at 7-8.) As an initial matter, the failures identified in paragraphs 641-42 of the Complaint are breaches by the NRA itself, not just the Individual Defendants. In addition, the concerns involved with dissolving an organization when its leaders victimize it are not present where, as is the case with respect to the First Cause of Action, the relief sought is injunctive relief to ensure that the organization can comply with the law going forward and cannot be victimized in the same way again. (*See* NYSCEF 646 ¶ 643.)

enacted to enhance the Attorney General's enforcement powers, not merely restate them, it is fatal to the NRA's argument because, as the NRA acknowledges, (*see id.* at 7-8), the Second Amended Complaint cites to the NRA's failure to comply with numerous obligations imposed by the EPTL, N-PCL and Executive Law in support of the claim that it failed to administer charitable assets properly. (NYSCEF 646 ¶¶ 641-42.)

C. This Court Has the Power to Appoint a Monitor and Expert to Ensure That the NRA Is Administered Properly.

The NRA argues that the First Cause of Action should be dismissed for the "separate and independent reason" that "EPTL 8-1.4(m) does not authorize the NYAG to seek the appointment of an independent compliance monitor or an independent governance expert." (NYSCEF 705 at 9.) This argument fails for several reasons. First, this Court is empowered by the EPTL, the State Constitution and the Judiciary Law to issue appropriate injunctive relief, including the appointment of an independent monitor, to ensure the proper administration of charitable organizations such as the NRA. Second, appointing an independent monitor to ensure that the NRA is administered properly is consistent with § 8-1.4's broad grant of supervisory powers to the Attorney General, as well as other statutes, including the N-PCL and Executive Law, that give her authority to supervise charitable organizations. For these, and other reasons set forth below, the appointment of a monitor will not run afoul of the Court of Appeals' holding in *Spitzer v. Grasso*, 11 N.Y.3d 64 (2008). Finally, even *assuming arguendo* that a monitor could not be appointed, that result would not warrant dismissal of the First Cause of Action, since the Court may impose other relief tailored to the proof at trial.

As an initial matter, the Complaint's request for injunctive relief, including the appointment of an independent monitor and governance expert, is proper under the EPTL and well within this Court's power to grant. As detailed above, the EPTL was enacted to expand the

Attorney General's supervisory and enforcement powers over charities, which, even before its enactment, permitted the Attorney General to bring actions for equitable relief to ensure that charities were administered properly. (*See* pp. 8-10*, supra.)* The statute's language reflects this broad grant of power in several sections. In § 8-1.4(m), the EPTL gives the Attorney General broad authority to "***institute appropriate proceedings*** … ***to secure the proper administration of any trust, corporation or other relationship to which this section applies.***" That section also notes that the powers it grants to the Attorney General are "in addition to all other powers and duties he or she may have." (*Id.*) Section 8-1.4(n) further explains that the Section "***shall be liberally construed so as to effectuate its general purpose of protecting the public interest in charitable uses, purposes and dispositions***." Similarly, § 8-1.4(i) gives the Attorney General broad powers to "investigate transactions and relationships of trustees" in order to determine if charitable assets are "being properly administered." By granting the Attorney General broad and enhanced powers to bring "appropriate proceedings" to secure the proper administration of charitable assets, the EPTL undoubtedly permits her to seek a monitor to help ensure that charitable organizations subject to its oversight are administered properly. *Cf. People v. Greenberg*, 27 N.Y.3d 490, 497-98 (2016) (broad remedial language in statute authorized Attorney General to seek relief not specifically enumerated in the statute).

Courts in this State are "vested with inherent plenary power (N.Y. Const. art. VI, § 7) to fashion any remedy necessary for the proper administration of justice." *64 B Venture v. American Realty Co*., 194 A.D.2d 504, 504 (1st Dep't 1993) (affirming lower court's exercise of its equitable powers to appoint a receiver to run a nursing home); *accord Osman v. Sternberg*, 181 A.D.2d 868, 868-69 (2d Dep't 1992) (citations omitted) (because "Supreme Court 'is vested with inherent plenary power with original jurisdiction in law and equity [and] … is authorized to render such

relief as may be necessary to protect the rights of any party [before it]" it could direct the receiver to withhold the payment of salaries"); *Matter of Schwartzreich*, 136 A.D.2d 642, 643 (2d Dep't 1988) (citing N.Y. Const. art. VI, § 7 and Judiciary Law § 140-b); *see generally* CPLR § 3017(a) ("court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just"). The court's inherent equitable powers enable it to appoint receivers, accountants and other experts to ensure that justice is served. *See, e.g.*, *Copeland v. Salomon*, 56 N.Y.2d 222, 227-28 (1982) (power to appoint a receiver flows from court's inherent powers, not only statute); *64 B Venture*, 194 A.D.2d at 504; *In re Carter*, 2017 WL 5075786, *6 (Sup. Ct. Bx. Cty. Nov. 2, 2017) (even though the remedy is not authorized by the Business Corporation Law, court would appoint an accountant of the court's choosing to conduct a comprehensive accounting because the remedy was necessary for the administration of justice); *Arkin Kaplan Rice LLP v. Kaplan*, 2013 WL 3970718 (Sup. Ct. N.Y. Cty. Aug. 1, 2013) (court had "inherent power to appoint accountant or other appropriate expert where complex financial data must be analyzed to resolve the litigation"); *see generally U.S. v. Apple Inc.*, 992 F.Supp.2d 263 (S.D.N.Y. 2014) (federal court had inherent equitable power to appoint a monitor to ensure compliance with its orders), *aff'd*, 787 F.3d 131 (2d Cir. 2015). Here, given the Court's inherent equitable powers and the broad mandate of EPTL § 8-1.4, the appointment of a monitor and a court appointed expert on governance are well within the remedies that the Court may consider.

Grasso has no application here since the First Cause of Action is a ***statutory*** claim brought pursuant to EPTL § 8-1.4 and, in fact, is based on a showing of fault – i.e., a failure to administer charitable assets properly. (NYSCEF 609 at 28 (recognizing that *Grasso* only stands for the proposition that the Attorney General may not assert certain ***non-statutory*** claims that impose a

lower burden of proof than the N-PCL's statutory claims).) Indeed, the legislature's express purpose in adopting § 8-1.4 was to enhance the Attorney General's existing enforcement powers not limit or restate them.[6] (*See* pp. 8-10, *supra.*) And, as set forth above, the court has inherent power, by virtue of the State Constitution, among other things, to fashion appropriate remedies to achieve justice. Further, even *assuming arguendo* that *Grasso* precluded the appointment of a monitor or expert, that would not necessitate dismissal of the EPTL § 8-1.4 claim since the Court can fashion an alternate remedy. *See, e.g., Ansonia Assocs. v. Ansonia Residents' Ass'n*, 78 A.D.2d 211, 215-16 (1st Dep't 1980) (court should grant appropriate relief even if relief sought is not available) (*citing Kaminsky v. Kahn*, 23 A.D.231, 236 (1st Dep't 1965)); CPLR § 3017(a).

Appointment of a monitor is consistent with the statute's broad language, its legislative history and the case law interpreting it. "The state legislature has given the Attorney General broad supervisory and oversight responsibilities over charitable assets and their fiduciaries, as enumerated in the [N-PCL], the EPTL and the Executive Law." *In re McDonnell*, 195 Misc.2d 277, 278-79 (Sup. Ct. N.Y. Cty. 2002). The purpose of the monitor sought here is to ensure that the NRA administers its charitable assets in accordance with these laws. Even setting aside the broad equitable powers of this Court to fashion an appropriate remedy under § 8-1.4, *see, e.g., 64 B Venture*, 194 A.D.2d at 504 (the appointment of a "receiver is a matter confined to the 'sound discretion of the court'… and the court 'is vested with inherent plenary power … to fashion any remedy necessary for the proper administration of justice'") (internal citations and quotations omitted), the statutory scheme here supports such a request. Indeed, both the Executive Law and

[6] At the time of Section 8-1.4's adoption, many of the powers that the Attorney General now exercises through the N-PCL were codified in the General Corporation Law and the Membership Corporation Law. *See, e.g.*, *McKinney's Consolidated Laws of New York Annotated,* Legislative Studies and Reports, Comments to N-PCL §§ 103, 112, 702, 1101, 1102.

N-PCL contain provisions that demonstrate that seeking the appointment of a monitor is consistent with the broad authority granted to the Attorney General to seek appropriate remedies in law or equity when those laws are violated. For example, Executive Law § 175(2), which prohibits making false statements in filings with the Attorney General expressly provides that the Attorney General can seek injunctive relief as well as "***other relief which the court may deem proper***." *See Greenberg*, 27 N.Y.3d at 497-98 (such language indicates an intent to permit additional remedies). Here, the § 8-1.4 claims are based, in part, on the NRA's violations of this section of the Executive Law. (NYSCEF 646 ¶ 641.) Similarly, N-PCL § 112(a)(10) provides that the Attorney General may "seek damages and ***other appropriate remedies, in law or equity***," in actions to address related party transactions. Here, the Complaint alleges that the NRA's violation of the related party transactions rules constitutes a failure to administer its charitable assets properly that subjects it to liability under EPTL § 8-1.4. (*Id.* ¶¶ 641, 642.) In addition, contrary to the NRA's assertion, (NYSCEF 705 at 13), the fact that the N-PCL permits the appointment of receivers to oversee charitable assets supports, rather than undercuts, the request for a monitor here. A receiver is a more intrusive remedy than a monitor, yet can be appointed by the Court in any action brought by the Attorney General pursuant to N-PCL § 112. N-PCL § 1202; *see Lawsky v. Condor Capital Corp.*, 2014 WL 2109923, **14* (S.D.N.Y. May 13, 2014) (rejecting Defendants' request that a monitor rather than a receiver be appointed so that Defendants could remain in control of the company because the problems were too extensive to permit the less invasive remedy of a monitor).

The NRA's assertion that the request for a monitor "is unprecedented," (NYSCEF 705 at 14), is also inconsistent with the case law and regulatory enforcement matters. As the NRA concedes, the Attorney General often seeks injunctive relief when it brings actions against trustees

under the EPTL. (*See id.*) The nature of the injunctive relief the Attorney General seeks, and obtains, varies based on the facts alleged. The Attorney General has obtained injunctions barring fiduciaries who cannot be trusted to administer charitable assets properly from serving charities as fiduciaries in the future. *See, e.g.*, *LERW*, 2013 WL 3014915, *27, *29. In other enforcement actions, the Attorney General has obtained injunctive relief barring charities that have misled the public from making misrepresentations to the public or soliciting funds improperly. *See, e.g.*, *New York Found. For Homeless*, 190 A.D.2d at 578; *Koppell v. Long Island Soc. For Prevention of Cruelty to Children*, 163 Misc.2d 654, 657-59 (Sup. Ct. N.Y. Cty. 1994). The Attorney General has also sought the appointment of independent monitors or auditors on numerous occasions, primarily in investigations that were resolved through settlement, but also, in complaints. For example, the Attorney General sought an independent compliance auditor in an action it commenced against the Diocese of Buffalo, after its leadership failed for years to fulfill their fiduciary duties to ensure that the Diocese responded to allegations of sexual abuse adequately. (Connell Aff. ¶ 6 & Ex. D.) The Charities Bureau has also obtained an independent monitor in a so-ordered consent decree with Cooper Union, as well as in settlements resolving its investigations of organizations such as the Metropolitan Council on Jewish Poverty. (*Id.* ¶¶ 7-8 & Exs. E-F.)[7] Contrary to the NRA's assertion, the relief obtained in settlements is not irrelevant. Rather, it demonstrates both that the relief is not unprecedented and that such monitors are a proper mechanism for ensuring that a troubled charity complies with its legal obligations.

[7] In other matters, the Charities Bureau has resolved investigations by requiring direct oversight of the organization to ensure compliance with the resolution. For example, the Charities Bureau has required, among other things, monitoring by the Attorney General, the making of annual reports concerning compliance with settlements and ensuring that new trustees meet the approval of the OAG. (Connell Aff. ¶¶ 9-11, Exs. G-I.)

D. The Attorney General Has Supervisory and Enforcement Powers Over the NRA, Which Is a Trustee Under EPTL § 8-1.4.

The NRA's contention that the Complaint purportedly fails to adequately allege that the organization "held and administered" assets "within the meaning of EPTL 8-1.4(a)(1)" does not comport with the statute and is unsupported by any other authority. (NYSCEF 705 at 16-21.)

The Attorney General has enforcement and supervisory powers over the NRA because it is a charitable not-for-profit corporation organized under the laws of this State, holding charitable assets. (NYSCEF 646 ¶¶ 1, 17, 29, 31.) Section 8-1.4 authorizes the Attorney General to supervise trustees and, Section 8-1.4(a) defines a "trustee" in three ways, two of which apply to the NRA. Section 8-1.4(a)(1) defines trustees to include "any … corporation ... holding and administering charitable purposes … over which the attorney general has enforcement or supervisory powers." Section 8-1.4(a)(2) defines a trustee as "any non-profit corporation organized under the laws of this state for charitable purposes." As a charitable corporation formed under the laws of this State and domiciled here, and, as a result, subject to the enforcement powers of the Attorney General, the NRA fits squarely within both definitions.[8]

Although the Complaint clearly alleges that the NRA is a trustee under the EPTL under both these definitions, (NYSCEF 646 ¶¶ 29, 31, 636-38), the NRA nevertheless argues that the Complaint is deficient because the Attorney General does not allege "that the NRA holds or administers property for charitable purposes ***in New York***—or that the NYAG otherwise has

[8] Unlike the NRA, which fits within the definition of a trustee by virtue of being a corporation organized under the laws of this State and domiciled here, (NYSCEF 646. ¶¶ 17, 29, 31, 636-38), the Individual Defendants fit within the definition of a trustee because of their administration of charitable assets. As a result, the NRA's argument that the Complaint's allegations against the Individual Defendants demonstrate that its allegations against the NRA are somehow deficient, (NYSCEF 705 at 18), completely misses the mark.

enforcement powers as to—all, most, or any of the property at issue in the First Cause of Action."[9] (NYSCEF 705 at 18.)

The EPTL gives the Attorney General power over all trustees that fit within its definition of that term, as the NRA clearly does, and the NRA does not cite any authority whatsoever in support of its argument that the Attorney General must allege that the NRA's assets are physically in New York in order for it to be subject to EPTL § 8-1.4.[10]

E. The Injunctive Relief Sought Will Not Infringe on the NRA's and Its Members' Constitutional Rights.

The NRA's conclusory assertion that appointing a monitor will interfere with its First Amendment rights does not affect the analysis here. *See New York Found. For Homeless*, 190 A.D.2d at 578 ("mere utterance of First Amendment privileges … cannot shield defendants from the scrutiny of the Attorney General"). Indeed, the NRA makes no effort to explain how a monitor

[9] The only reference in the definition of a trustee to property being held in this State is in § 8-1.4(a)(3), which is the provision covering foreign corporations. The NRA is a domestic corporation and the Complaint does not rely on § 8-1.4(a)(3) to allege that it is a trustee.

[10] The NRA also points to several places in the Complaint where the Attorney General alleged that "certain not-for-profit organizations, including the NRA, holding charitable assets and operating in New York" as purported evidence that the Attorney General understood that it needs to plead that the NRA held charitable assets in New York, even though the Complaint purportedly fails to make the predicate allegation. (*See* NYSCEF 705 at 18-19.) This argument is non-sensical. An allegation that the NRA is (i) holding charitable assets and (ii) operating in New York is not the same as alleging that the NRA is ***holding charitable assets in New York***. Moreover, there is no requirement in EPTL § 8-1.4 that the assets held by New York corporations be held in New York in order for the Attorney General to supervise those corporations. *See* EPTL § 8-1.4(a)(1), (2) & (m). Under the NRA's argument, a regulated entity could completely elude responsibility for failing to properly administer charitable assets by registering in one state but keeping its assets in other states. This is neither logical nor the law.

Similarly meritless is the NRA's argument that the title of a bill to amend the EPTL that merely refers to assets being held in New York supports its assertion that assets must be held and administered in New York for the Attorney General to have authority over them, (NYSCEF 705 at 20), particularly where that bill did not change the relevant language in the statute. It is also worth noting that, by its own terms, the name of the bill only refers to what is being amended; it does not purport to change the scope of the Attorney General's powers under § 8-1.4. (*See id.*)

to ensure compliance with applicable laws by, for example, ensuring that it files accurate reports and satisfies statutory requirements for related party transactions, addressing conflicts of interests and responding to whistleblowers, could somehow interfere with its First Amendment rights. And, of course, the Court can tailor the scope of any monitorship to ensure that it does not do so.

II. The Individual Defendants' Third Set of Motions to Dismiss Are Barred Under the Single-Motion Rule Since None of the Allegations Against Them Have Changed.

It is well-established that parties are not permitted to make an argument in a motion to dismiss that they could have raised previously. Here, each of the Individual Defendants has already moved under CPLR 3211(a) to dismiss this action on two prior occasions. *(See* NYSCEF 114, 129, 348 & 355.) They are therefore precluded from raising arguments that they had the opportunity to but elected not to assert against the Complaint in prior motions to dismiss.

CPLR 3211(e) provides that, "[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in [CPLR 3211(a)] and ***no more than one such motion shall be*** permitted." CPLR 3211(e). *See also Miller v. Schreyer*, 257 A.D. 2d 358, 361 (1st Dep't 1999) ("CPLR 3211(e) permits only one motion to dismiss on the basis of CPLR 3211(a)(7) for failure to state a cause of action"). Where the defendant had the full opportunity to raise their argument in response to an earlier pleading, the single motion rule acts as a bar to the defendant bringing such argument in a subsequent motion. *See Landes v. Provident Realty Partners II, L.P.*, 137 A.D.3d 694 (1st Dep't 2016) (trial court correctly denied defendants' motion for violating the single motion rule where "defendants had the full opportunity to raise their current CPLR 3211(a) arguments" on their original motion to dismiss). The single motion rule is designed to prevent "repetitive motions to dismiss a pleading pursuant to CPLR 3211(a), as

well as subsequent motions to dismiss that pleading pursuant to CPLR 3211(a) that are based on alternative grounds." *Bailey v. Peerstate Equity Fund, L.P.*, 126 A.D.3d 738, 739 (2d Dep't 2015).

Under New York law, a second CPLR 3211(a) motion is permitted only where a cause of action is asserted for the first time in an amended pleading. *See Barbarito v. Zahavi*, 107 A.D.3d 416, 420 (1st Dep't 2013). In the present case, the Complaint's factual allegations and legal claims against Defendants LaPierre and Frazer are identical to those that were asserted—and subject to unsuccessful motions to dismiss—in both the original complaint and the First Amended Complaint. For that reason, the grounds for dismissal raised by the Defendants in their third round of dismissal motions could have been raised in their earlier motions. As such, the Individual Defendants' latest CPLR 3211(a) motions are not permissible under the single motion rule. *See, e.g., Inter Connection Elec., Inc. v. Helix Partners LLC*, 2014 WL 2990387, at *2 (Sup. Ct. June 14, 2014) (finding that the amended complaint "afford[ed] defendants no basis for circumventing the single motion rule" where it included no new claims); *cf.* NYSCEF 609 at 16, n.2 (finding that the single motion rule did not bar Defendants' motions to dismiss where the Attorney General's amended pleading included new factual allegations).

Frazer's argument that his motion falls within an exception to the single motion rule is unavailing. Frazer erroneously relies on CPLR 3211(e), which provides 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 one is permitted." (NYSCEF 690 at 17-18.) However, Frazer's interpretation of this provision was rejected by the Court of Appeals in *McLearn v. Cowen & Co.*, 60 N.Y. 2d 686, 689 (1983), in which it held 3211(e) to mean that a motion for failure to state a cause of action may be made subsequently in another form (*e.g.*, a summary judgment motion)*, not* in another motion under 3211. Additionally, Frazer's reliance on *Newton v. Town of*

Middletown, 31 A.D.3d 1004 (3d Dep't 2006), is misplaced. *Newton* found that there was an exception to the single motion rule for challenges to subject matter jurisdiction. *Id.* at 1005-06. But, Frazer does not have a viable argument that there is no subject matter jurisdiction. Although he refers to a lack of subject matter jurisdiction as the basis for the exception on pages 17 and 18 of his brief, he does not explain why the Court has no jurisdiction.[11]

Finally, the purpose of the single motion rule is not solely to "prevent the delay that ensues from postponing an answer and the ensuing discovery process" as Frazer suggests.[12] (NYSCEF 690 at 18.) The rule is also intended "to protect the pleader from being harassed by repeated CPLR 3211(a) motions and to conserve judicial resources." *Oakley v. County of Nassau*, 127 A.D.3d 946, 947 (2d Dep't 2015) (internal citations omitted). In the instant case, the Court has thoroughly addressed, on the merits, multiple rounds of separate motions to dismiss by the Defendants for the better part of two years. It is squarely within the purpose of the single motion rule for the Court to reject the Individual Defendants' attempt to move, yet again, to dismiss causes of action on grounds that could have been raised in their earlier rounds of motions. As a result, the Individual Defendants' motions to dismiss should be denied in their entirety.

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[11] In footnote 3 on page 5 of Frazer's memorandum of law in support of his motion to dismiss the Complaint, he asserts that a request for purportedly unauthorized remedies implicates subject matter jurisdiction, but none of the cases that he cites address subject matter jurisdiction. (NYSCEF 690 at 5 n.3.) Further, as noted above, this Court has broad equitable jurisdiction. (*See* pp. 7-17, *supra.*)

[12] The ruling in *Held v. Kaufman*, 91 N.Y.2d 425, 430 (1998), on which Frazer relies, is not as broad as he asserts. The court in *Held* was addressing an argument raised on a reply in response to a new argument raised by the plaintiff, a scenario that has no relevance here, and the court did not hold that the single motion rule had no applicability after an answer, as Frazer would like. *See id.* Indeed, such reliance on *Held* has been rejected by other courts. *See, e.g., Riordan v. Garces*, 2021 WL 851919, *3 (Sup. Ct. N.Y. Cty. Mar. 5, 2021).

III. N-PCL § 720 Expressly Authorizes the Attorney General to Hold the Individual Defendants Liable for Their Breaches of Fiduciary Duty and to Pay Restitution for the Losses They Caused.

Defendants LaPierre and Frazer both argue that the Attorney General lacks the authority to seek the relief she is requesting under N-PCL § 720. This argument is barred by the law of the case doctrine (as well as the single-motion rule) because this Court has already held that the allegations in the First Amended Complaint for breach of fiduciary duty pursuant to N-PCL §§ 717 and 720 – which are identical to the allegations in the current Complaint – stated claims against LaPierre and Frazer. *See, e.g., Briggs v. Chapman*, 53 A.D.3d 900, 901 (3d Dep't 2008) (law of the case doctrine precludes party from "relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue") (citation omitted); *see also Lee v. Chun Ka* Luk, 127 A.D.3d 612, 613 (1st Dep't 2015) (law of the case precluded amendment of pleading to re-assert statute of limitations defense where court, on prior motion to dismiss, held that the cause of actions were timely).

Even if the Court considers the argument, it should be rejected. Section 720 of the N-PCL expressly authorizes the Attorney General to bring actions against officers, directors and key persons of not-for-profit organizations, such as LaPierre and Frazer, to account for their conduct with respect to the management of charitable assets committed to their care. *See* N-PCL § 720(a) & (b). Included within the actions that the Attorney General may bring under § 720 are actions to require a fiduciary that breaches his duties to "repay the losses sustained by the corporation due to his breach." *LERW*, 2013 WL 3014915, *25*; see also People v. Grasso*, 54 A.D.3d 180, 190 & n.5 (1st Dep't 2008) (noting that "[u]nquestionably, the Attorney General was authorized by N-PCL 720 to bring" causes of action seeking to "recover very substantial sums of money" for alleged breaches of fiduciary duty, but dismissing the claims because the New York Stock Exchange was no longer a not-for-profit organization).

Despite the clear statutory language and case law applying it, LaPierre and Frazer argue that § 720 only authorizes an action to "account," which they interpret as merely requiring them to explain their conduct, not to reimburse the NRA for the losses it suffered as a result of their breaches or, as Frazer argues in the alternative, only for disgorgement, not to recover for waste. Their argument is meritless and is not supported by any of the authorities they cite. Moreover, if accepted, their argument would eviscerate the statutory scheme pursuant to which the Attorney General has power to hold those entrusted with the care of charitable assets liable when they abuse that trust.

The term "to account" in N-PCL § 720 does not simply mean "to explain," (NYSCEF 690 at 7; NYSCEF 697 at 7),[13] but rather refers to an action for an accounting. *See, e.g., People by Attorney General of State v. Lutheran Care Network, Inc.*, 167 A.D.3d 1281, 1285-86 (3rd Dep't 2018) ("Attorney General may ***compel an accounting***" pursuant to N-PCL § 720(a) & (b)); *In re Martin Found., Inc.*, 73 Misc.2d 985, 989 (Sup. Ct. N.Y. Cty. 1972) ("N-PCL § 720 authorizes the Attorney General to bring an action against directors or officers of a not-for-profit corporation ***for an accounting*** where there has been a violation of their duties …."), *aff'd,* 41 A.D.2d 905 (1st Dep't 1973); Victoria B. Bjorklund, et al., *New York Nonprofit Law and Practice*, § 6.05[3][c][i] at 6-77 (3rd Ed.) (relief under N-PCL § 720 includes an "accounting, rescission … and injunction"). Moreover, as the Court of Appeals has explained, "the remedy of accounting is

[13] LaPierre's citation to Black's Law dictionary's definition does not support his argument. (NYSCEF 697 at 7 & n.17.) Indeed, the definition of "accounting" that he quotes makes it clear that it includes "[a] legal action to ***compel*** a defendant to ***account for*** and ***pay over*** money owed" and that it is also referred to as an "action of account" or simply "account." (*See id.*) Moreover, Courts routinely use the terms interchangeably. *See, e.g.*, *Gabbay v. Gabbay*, 260 A.D.2d 345, 346 (2d Dep't 1999) (remitting matter for "a hearing requiring the respondent ***to account*** for the money obtained during her receivership, that is ***an accounting***"); *Columbia Fed. Sav. Bank v. Poulikidis*, 203 A.D.2d 165, 166 (1st Dep't 1994) (affirming order granting motion for an "***accounting***" that required mortgagee "***to account***" for rents collected).

restitutionary by definition" and not only requires that the defendant account for their conduct, but also that an order be issued "directing payment of the sum of money found due." *Ederer v. Gursky*, 9 N.Y.3d 514, 525 (2007) (citations omitted); *see First Equity Realty v. The Harmony Group, II*, 2022 WL 624601, *11 (Sup. Ct. N.Y. Cty. Mar. 3, 2022) (Cohen, J.) (same).

Frazer argues, in the alternative, that even if an action brought pursuant to N-PCL § 720 authorizes the Attorney General to do more than compel a fiduciary to explain his conduct, it is limited to actions for disgorgement of ill-gotten gains. (NYSCEF 690 at 8-9.) There is, however, nothing in the statute or in the case law applying it that limits an action for an accounting under N-PCL § 720 in this manner.[14] Indeed, the express language of the statute permits the Attorney General to bring actions to hold fiduciaries accountable for "***loss or waste*** of corporate assets due to any ***neglect of, or failure to perform***, or other violation of his duties." N-PCL § 720(a)(1)(B). Such language makes it clear that actions to account under the N-PCL are not simply for disgorgement, but also may be brought when a fiduciary's negligence results in waste or other loss to the charity. *See, e.g., Trump II*, 66 Misc.3d at 204 (requiring defendant to pay $2 million for wasting charitable assets); *Trump I*, 62 Misc.3d at 509-13 (Attorney General stated cause of action for waste under N-PCL § 720 where corporate assets were used for improper purposes but went to

[14] Similarly absent from N-PCL § 720 is any requirement that the Attorney General first make a demand for an accounting before bringing an action under the statute. *See id.* The cases that Frazer cites requiring a demand before an action for an accounting could be pursued, (NYSCEF 690 at 7-8), all involved partnerships or limited partnerships and, as a result, have no relevance here. Unlike N-PCL § 720, which expressly gives the Attorney General the right to bring an action for, among other things, an accounting, the Partnership Law merely gives partners and limited partners the right to obtain an accounting from each other, but does not expressly provide for a proceeding to obtain it. *See* Partnership Law §§ 44, 99. Thus, with a partnership, it is the refusal to comply with the law requiring partners to account that triggers the right to enlist a court's assistance, *see Non-Linear Trading Co. v. Braddis Assoc.*, 243 A.D.2d 107, 119 (1st Dep't 1998), whereas under the N-PCL the statute itself provides that the action can be brought without any mention of a requirement for a demand. *See* N-PCL § 720(a) & (b).

other charities); *People ex rel. Schneiderman v. James*, 2013 WL 1390877, *4-*5 (Sup. Ct. N.Y. Cty. Apr. 3, 2013) (sustaining claims for waste that, *inter alia*, arose out of the mismanagement of a project, but that did not benefit the defendant); *see also Ault v. Soutter*, 204 A.D.2d 131, 131 (1st Dep't 1994) (in a case under BCL § 720, which largely mirrors N-PCL § 720, affirming decision holding defendant "accountable for waste of corporate assets notwithstanding the absence of proof that he benefitted personally" and finding that "he is liable for all damages flowing from his breach of duty as director") (citing *Rapoport v. Schneider*, 29 N.Y.2d 396, 403 (1972)).

LaPierre and Frazer also argue that the Attorney General is not entitled to seek the forfeiture of back salary under N-PCL § 720.[15] (NYSCEF 690 at 9; NYSCEF 697 at 15). LaPierre argues that the relief permitted under that section is limited to having him explain what he did wrong (NYSCEF 697 at 7, 15), while Frazer argues that his salary was authorized by the Board and, thus, protected by the business judgment rule. (NYSCEF 690 at 9). Both arguments are without merit. Section 720 gives the Attorney General authority to hold directors, officers and key persons that breach their fiduciary duties to not-for-profit organizations accountable. *See Trump I*, 62 Misc.3d at 509-513 (sustaining claims under N-PCL § 720 and EPTL § 8-1.4 for damages resulting from "breach of fiduciary duty/failure to properly administer Foundation assets"); *LERW,* 2013 WL 3014915, *25-*27 (finding defendant breached his fiduciary duties under N-PCL § 720 and EPTL § 8-1.4 and must pay restitution for the waste his breaches caused). A fiduciary that breaches his duty of loyalty forfeits his right to compensation during the time that he breaches that duty. *See, e.g.*, *City of Binghamton v. Whalen*, 141 A.D.3d 145,

[15] Although LaPierre and Frazer only address the claim for back salary under N-PCL § 720, as the text makes clear, their liability for the return of back salary is also appropriate as part of the remedy under the EPTL because the § 8-1.4 claims are based on a breach of fiduciary duty theory.

146-49 (3d Dep't 2016) (forfeiture of compensation under faithless servant doctrine is appropriate remedy for cause of action sounding in breach of fiduciary duty even if fiduciary's performance otherwise benefitted principal); *see also Yukos Capital S.A.R.L. v. Feldman*, 977 F.3d 216, 242 (2d Cir. 2020) (although federal and state cases in New York do not always analyze the issue clearly, finding that "[o]ur review of the caselaw suggests that, when the New York Court of Appeals [clarifies the issue] …, it will hold that compensation under the faithless servant doctrine can satisfy the 'damage' element of a breach of fiduciary duty claim").

Here, the Complaint alleges breaches of the duty of loyalty by LaPierre and Frazer. As to LaPierre, the Complaint alleges that he breached his duty of loyalty to the NRA by using his powers as an officer and ex officio director of the organization to obtain illegal compensation and benefits, to convert NRA funds for his own benefit, and to dominate, control, and direct the NRA to obtain private benefit for himself, his family members and certain other insiders. (NYSCEF 646 at ¶ 645). As to Frazer, the Complaint alleges that he failed to discharge his duty as an officer of the NRA, both as General Counsel and as Secretary, with the degree of care, skill, prudence, diligence and ***undivided loyalty*** required. (*Id*. at ¶ 650.) Accordingly, the Complaint clearly states a claim for return of salary under the faithless servant doctrine during the time of their breaches.

IV. The Attorney General May Bring Claims Pursuant to N-PCL §§ 112, 715 and EPTL § 8-1.9 to Hold LaPierre Liable for Causing the NRA to Enter Into Wrongful Related Party Transactions With Him.

The plain language of the N-PCL and EPTL expressly authorize the Attorney General to ***"bring an action*** to enjoin, void or rescind any related party transaction … that violates any provision of this chapter or was otherwise not reasonable … or to seek restitution, and the removal of directors or officers, or seek to ***require any person*** … to: (1) Account for any profits made from

such transaction, and pay them to the corporation…."[16] N-PCL § 715(f); *see* EPTL § 8-1.9(c)(4) (using the same language with the exception of using the term "trustees" instead of "directors" and trust instead of "corporation"); *see Trump I*, 62 Misc.3d at 515-18 (sustaining claims under N-PCL § 715 and EPTL § 8-1.9 against Mr. Trump, as a director and officer of the Trump Foundation, and pointing out that the recent amendments to the statute was intended to strengthen New York law relating to related party transactions). The relevant sections of the N-PCL and EPTL also provide that the powers given to the Attorney General "are in addition to all other powers the attorney general may have under this chapter or any other law." N-PCL § 715(g); EPTL § 8-1.9(c)(5). In addition, N-PCL § 112 provides that "[t]he ***attorney general may maintain an action*** or special proceeding: … (10) To 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) of this chapter." Here, as the court has already found, the Complaint adequately alleges that LaPierre and the NRA entered into an unlawful related party transaction.[17] (NYSCEF 609 at 29-30; *see also* NYSCEF 646 ¶ 679 (alleging LaPierre caused the

[16] LaPierre interprets N-PCL § 720 as limiting ***all*** claims the Attorney General may bring to the claims set forth in that section. (**NYSCEF at 7-9**.) LaPierre's argument is frivolous. He cites to various authorities on statutory construction, but ignores the plain language of the statutes at issue and misinterprets the Appellate Division's reasoning in *People v. Grasso*, 52 A.D.3d 126, 135 (1st Dep't 2007). Thus, he argues that the expression of authority for ***one*** thing (*expression unius*) – here, for claims by the Attorney General in N-PCL § 720 – indicates the exclusion of others – claims by the Attorney General under other sections. (**NYSCEF at 7-9**.) He misses a crucial distinction between that rule of construction relied upon in *Grasso* and the current case. In *Grasso*, the claims that were invalidated were ***not authorized by any statutory section***, particularly N-PCL § 720, and thus the fact that they were not listed in that section was telling. 52 A.D.3d at 134-35. In contrast, here, the claims the Attorney General is asserting, including the claims in the Tenth Cause of Action, are brought pursuant to express statutory grants of authority and the rule of statutory construction LaPierre cites is irrelevant. *See* N-PCL §§ 112, 706, 714 & 715; EPTL §§ 8-1.4 & 8-1.9.

[17] LaPierre also asserts that his post-employment contracts are not subject to the rules governing related-party transactions because it relates to his compensation. (NYSCEF 697 at 10 n.21.) Even if the Court were to consider this argument now despite the single motion rule, it should

NRA to enter into a post-employment contract in which he had a financial interest without obtaining authorization from the Board or a determination by the Board that the transaction was fair, reasonable and in the NRA's best interest at the time of the transactions).) LaPierre has not come forward with any basis for why the Court's decision sustaining the Attorney General's claim against him for wrongful related party transactions, (NYSCEF 609 at 29-30), which is law of the case, should be disturbed. *See, e.g., Briggs*, 53 A.D.3d at 901.

V. The Attorney General Has Adequately Alleged Claims that LaPierre and Frazer Breached Their Duty to Properly Administer Charitable Assets Entrusted to Their Care

As set forth in detail above, EPTL § 8-1.4 was enacted to enhance the Attorney General's enforcement power over organizations administering charitable assets and gives her broad power to ensure charitable assets are used appropriately. Section 8-1.4 defines trustees broadly to include any "individual" that holds or administers charitable assets either through an agreement or "otherwise pursuant to law, over which the attorney general has enforcement or supervisory powers." EPTL § 8-1.4(a). Directors and officers of corporations organized under the laws of New York, such as the NRA, are trustees under EPTL § 8-1.4. *See Trump II*, 66 Misc.3d at 204 (Trump was a trustee under Section 8-1.4 because he was a director); *LERW,* 2013 WL 3014915, *27 (*de facto* officer of not-for-profit corporation was a trustee under EPTL). It is well established that pursuant to Section 8-1.4(m) the Attorney General may bring claims: (i) to hold trustees accountable for breaching their fiduciary duty to administer charitable assets, requiring them to

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reject it. LaPierre's post-employment contracts, which, among other things, are for consulting services and covers the use of his name and likeness after his retirement (NYSCEF 646 ¶¶ 439-40), does not fall within the routine compensation transactions that are addressed by the guidance he cites, which is intended to capture ordinary course of business salary decisions that are, by their terms, "reasonable and commensurate with services performed," where "the person who may benefit may not participate in any board or committee deliberation." (*See* https://www.charitiesnys.com/pdfs/sympguidance.pdf, at p. 43 of 289.)

pay restitution for the losses caused by their breaches and (ii) to remove and ban from future service trustees who have demonstrated that they cannot be trusted to administer charitable assets. *See, e.g.*, *LERW,* 2013 WL 3014915, *27, *29 (trustee ordered to pay restitution for assets that were wasted and banned permanently from future service because he is not likely to follow "the obligations required of a director or officer of a not-for-profit corporation, and cannot be trusted with those obligations in any future role"); *Trump I*, 62 Misc.3d at 512-13 (sustaining claims for waste and a fiduciary bar under Section 8-1.4); *James*, 2013 WL 1390877, *1, *5 (sustaining claims under Section 8-1.4 for waste and bar on future service as a fiduciary).

Although this Court has already ruled that the First Amended Complaint adequately alleged a "claim that LaPierre and Frazer improperly administered the NRA's charitable assets" under EPTL § 8-1.4, (NYSCEF 609 at 29), and that ruling is binding as the law of the case, they each impermissibly attempt to reopen the Court's decision even though the Complaint's allegations against them have not changed. (NYSCEF 690 at 12-14; NYSCEF 697 at 9); s*ee, e.g., Briggs*, 53 A.D.3d at 901. For example, Frazer argues that he is not a trustee because the Complaint only alleges that he was "responsible for" holding and administering property for charitable purposes, not that he actually did so. (NYSCEF 690 at 13). But, the Complaint's allegations are not so limited; rather, it sets forth numerous examples of the role Frazer, who served as an officer of the NRA, played in administering the NRA's assets. (*See, e.g.*, NYSCEF 646 ¶ 8 ("Frazer repeatedly failed to ensure that the NRA's many related party transactions with NRA insiders were being reviewed or properly considered by NRA officers and directors in accordance with New York law."), ¶ 10 ("Frazer permitted the NRA to secretly pay millions of dollars to several board members through consulting arrangements that were neither disclosed to, nor approved by the

NRA Board"); ¶¶ 473-75 (describing Frazer's role in executing the contract with the Brewer firm and in paying its invoices).)

Finally, Frazer's argument that his failure to register with the Office of the Attorney General ("OAG") pursuant to EPTL § 8-14(c) shows he is not a trustee is meritless. Section 8-1.4(b)(9) specifically exempts individuals that are trustees by virtue of serving as an officer or director of a charitable corporation from registering as long as the corporation itself is registered. Thus, the fact that he did not register with the OAG is irrelevant. Similarly unavailing is Frazer's reliance on the fact that the NRA's Form 990 does not list him as a trustee is irrelevant since the definition of a trustee under Section 8-1.4 is different – and much broader – than the definition used in the Form 990. *Compare, e.g.,* 2018 Instructions for Form 990, Part VII(A) at 27 ("A 'director or trustee' is a member of the organization's **governing body**, but only if the member has voting rights") (emphasis in original) *with* EPTL § 8-1.4(a) (trustees include, *inter alia,* any person or entity that holds and administers property for charitable purposes).

VI. The Relief the Attorney General Seeks Under Executive Law § 175(2) Is Clearly Authorized.

Frazer does not dispute that the Complaint's Fifteenth Cause of Action, which asserts claims against him for false filings, adequately states a claim under Article 7-A of the Executive Law, but argues that the request for injunctive relief is overbroad. (NYSCEF 690 at 14-17.) His argument, which ignores the well-pled allegations in the Complaint, mischaracterizes the role he played at the NRA and misconstrues the scope of Article 7-A, should be rejected. Executive Law § 175(2) gives the Attorney General statutory authority to bring actions for injunctive relief against those who make material false statements in filings with the Attorney General. That section provides, in pertinent part:

> In addition to any other action or proceeding authorized by law …, the attorney general may bring an action or special proceeding in the supreme court … against

> a charitable organization and any other persons acting for it or in its behalf ***to enjoin*** such organization and/or persons from continuing the solicitation or collection of funds or property or engaging therein ***or doing any acts in furtherance thereof***, … and ***removing any director or other person responsible for the violation of this article***; dissolving a corporation ***and other relief which the court may deem proper***, whenever the attorney general shall have reason to believe that the charitable organization or other person:
>
> (a) is violating or has violated any of the provisions of this article;
>
> * * *
>
> (d) has ***made a material false*** statement in an application, registration or ***statement required to be filed pursuant to this article***;

Contrary to Frazer's assertion, (NYSCEF 690 at 15), Section 175(2) not only gives the Attorney General authority to bring actions seeking to enjoin those that violate the statute, such as Frazer, "from continuing the solicitation … of funds," but it also expressly authorizes injunctions that prohibit the subject from "doing any acts in furtherance" of the solicitation of funds, as well as to obtain such "other relief which the court may deem proper." The injunctive relief the Attorney General seeks is not only consistent with this express grant of authority, but is also within the Court's power inherent powers. (*See* pp. 14-15, *supra*.) Moreover, although Frazer asserts that he plays no role in the NRA's fundraising, that assertion ignores the fact that he certifies the NRA's annual filings with the OAG, which it is required to file in order to engage in fundraising. His certifications are thus acts in furtherance of the solicitation of funds. In addition, Frazer's assertion that he is not responsible for the violation because others also may have been involved, (NYSCEF 690 at 15-16), is frivolous. The violation at issue is the making of a material false statement in an annual filing. Exec. Law §§ 172-d(1) & 175(2). The Complaint alleges that Frazer falsely certified, under penalty of perjury, that information in the annual filings was true even though those filings contained material misstatements of fact. (NYSCEF 646 ¶ 295.) As someone whose false statements form the basis for the violation of the Executive Law, Frazer is indeed responsible

for the violation. As a result, a bar of the type that the Attorney General seeks here is appropriate. *See, e.g.*, *LERW*, 2013 WL 3014915, *27, *29 (imposing permanent injunction under Section 175(2), as well as under EPTL, barring defendant "from serving in any capacity for a charitable entity and from soliciting directly or indirectly for any charitable contributions").

VII. The Attorney General Has Stated Claims for the Removal and Bar of the Individual Defendants Under N-PCL §§ 706 & 714.

N-PCL § 706 authorizes the Attorney General to bring an action to procure a judgment removing a director for cause and barring them from re-election. Likewise, N-PCL § 714 authorizes the Attorney General to bring an action to procure a judgment removing an officer for cause and barring them from re-election.[18] In the instant case, the Attorney General exercised her statutory authority under these provisions to seek the removal of Defendants LaPierre and Frazer based on their alleged breaches of fiduciary duty and the Court denied Defendants' prior motions to dismiss the Attorney General's causes of action under N-PCL §§ 706(d) and 714(c). (NYSCEF 609 at 29.) That decision is law of the case and the Individual Defendants are barred from challenging it. *See, e.g., Briggs*, 53 A.D.3d at 901.

LaPierre now argues that, while N-PCL §§ 706 and 714 authorize the Attorney General to seek his removal as Executive Vice President of NRA, in order to seek that relief, she must bring an action against the NRA, not against LaPierre himself. (NYSCEF 697 at 12, 15.) This argument is wholly without merit. LaPierre cites to no legal authority, other than the language of the N-PCL

[18] The Complaint seeks to remove Frazer from his position as General Counsel pursuant to the N-PCL, EPTL and Executive Law. However, because N-PCL § 714 only expressly refers to officers, and the NRA refers to the General Counsel position as a non-officer position, Frazer argues that N-PCL § 714 cannot be used to remove him from that role. Even if Frazer were correct, it would not affect the Court's ability to remove him from that role because the Complaint also seeks removal of Frazer as General Counsel (as well as Secretary) pursuant to EPTL § 8-1.4 and Executive Law § 175(2), neither of which is limited to officers.

itself, in support of his contention that N-PCL §§ 706 and 714 only grant the Attorney General authority to bring an action for removal of a director or officer against the corporations they serve. *Id*. at 12. And the statutory language does not, as LaPierre suggests, preclude the Attorney General from bringing an action for removal against an individual defendant. N-PCL §§ 706 and 714 each provide, "[a]n action to procure a judgment removing a [director or officer] for cause may be brought by the attorney-general." As is apparent from the plain language of the statutes, neither states that the Attorney General is limited to bringing such an action against an organization, as opposed to a director or officer in his or her individual capacity. Indeed, since the individual whose removal and bar is sought is directly affected by such an action, the claim is one that is properly asserted against them. *See, e.g., People v. Moore*, 2012 WL 10057358, *1-*2, *5 (Sup. Ct. N.Y. Cty. Sept. 17, 2012) (sustaining claims for removal asserted against individual directors pursuant to N-PCL § 706); *Id.* Complaint, Connell Aff. Ex. J, at ¶¶ 81-83. Accordingly, LaPierre's motion to dismiss on this basis should be denied.[19]

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss in Motion Sequence Numbers 28, 29 and 30 are wholly lacking in merit and should be denied with prejudice.

[19] The reference to restitution for benefits that "unjustly enriched" the Individual Defendants in Paragraph J of the Prayer for Relief was inadvertent; Plaintiff is no longer asserting an unjust enrichment claim in the Complaint.

Dated: July 13, 2022
New York, New York

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Attorney General
of the State of New York

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Of Counsel

Attorney Certification Pursuant to Commercial Division Rule 17

I, Monica Connell, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Second Amended Verified Complaint ("Memorandum") in Mot. Seq. No. 28, 29, and 30 contains 12,246 words, excluding the parts exempted by Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)). A request for enlargement of the word count limitations set forth in Rule 17 has been made (and is currently pending before the Court) because this Memorandum is a unified brief responding to three separate motions to dismiss which were supported by three separate memoranda of law. The request for an enlargement of the word count limitations has been consented to by the moving parties. 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: July 13, 2022
New York, New York

/s Monica Connell

Monica Connell