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,	:	Motion Seq. No. 028
	:	Index No. 451625/2020
Plaintiff,	:	
v.	:	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	:	
Defendants.	:	

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

GAGE SPENCER & FLEMING LLP
410 Park Avenue, Suite 810
New York, New York 10022
(212) 768-4900

Attorneys for Defendant John Frazer

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Defendant John Frazer ("Frazer"), by and through his attorneys Gage Spencer & Fleming LLP, respectfully submits this reply memorandum of law in further support of his motion to dismiss the Second Amended Verified Complaint ("Complaint") (NYSCEF Doc. No. 646) filed by Plaintiff Attorney General of the State of New York ("NYAG") pursuant to CPLR 3211(a)(2) and (a)(7). For the reasons which follow, Plaintiff's Second Amended Complaint against Frazer should be dismissed.[1]

Preliminary Statement

In opposition to Frazer's motion, the Attorney General touts her broad authority to regulate the conduct of the State's not-for-profit corporations. But the Court of Appeals has firmly established that her authority has limits. *People v. Grasso*, 11 N.Y.3d 64, 70 (2008) ("[t]he Legislature's comprehensive enforcement scheme, however, is not without limitation"). The Complaint violates these limits in several ways. First, its Third Cause of Action seeks repayments from Frazer of amounts the charged statute does not permit. Second, the Seventh Cause of Action bases its claim on a conclusory assertion of trusteeship which does not exist, and seeks remedies different from those authorized. Third, the Fifteenth Cause of Action seeks to enjoin what Frazer has never done. Because the Attorney General seeks relief which the Legislature has not authorized or her Complaint concedes she cannot establish, it should be dismissed.

Argument

I. The Third Cause of Action Seeks Relief Not Available Against Frazer

a. Repayment of "Losses" Is Not Available Under N-PCL § 720(a)(1)

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

The Third Cause of Action should be dismissed for two reasons. First, it fails to respect the Legislature's purposefully limited reach of N-PCL § 720(a)(1), and second, even if the section were given its most expansive reading, the Attorney General would only be entitled to disgorgement of Frazer's wrongful profits – of which her own Complaint acknowledges there were none.

The Attorney General argues that Frazer is a breaching fiduciary who is liable to "repay the losses sustained by the corporation due to his breach." NYSCEF Doc. No. 768 at 24 (quoting *People ex rel. Schneiderman v. Lower Esopus River Watch, Inc.*, 2013 WL 3014915 (Sup. Ct. Ulster Cty. Apr. 8, 2013) ("LERW")). However, N-PCL § 720(a)(1) and, indeed, § 720 as a whole, does not impose such broad liability. The Third Cause of Action against Frazer does not seek relief against him under N-PCL § 720(a)(2) or (a)(3), but is confined to subsection (a)(1). *See* NYSCEF Doc. No. 646, ¶ 653. The sole relief permitted by § 720(a)(1) is an equitable action (i.e., "to compel") against a corporate officer "to account for his official conduct . . . ." N-PCL § 720(a)(1).

The Attorney General's requested relief, however, seeks repayment by Frazer, not merely to compel him to account. N-PCL § 720(a)(2), which has not ever been charged here, is the only subsection in which the Legislature addressed repayment of any sort. Sandwiched between the remedies of compelling one to account (subsection (a)(1)) and enjoining future conveyances (subsection (a)(3)), only section 720(a)(2) permits the undoing of wrongful transfers. Conspicuously not alleged in any of the Attorney General's three complaints, subsection (a)(2)'s reach is limited to setting aside "an unlawful conveyance, assignment or transfer of corporate assets, *where the transferee had knowledge of the transfer's unlawfulness*." *See* N-PCL § 720(a)(2) (emphasis added). For precisely this reason, Plaintiff's citation to *People v. Grasso*, 54

A.D.3d 180, 190 & n.5 (1st Dep't 2008), is misplaced. The Attorney General there included a claim against Richard Grasso under N-PCL § 720(a)(2) and thus had the burden of proving Grasso's knowledge of the transfer's unlawfulness. *See Grasso*, 42 A.D.3d at 139. Here, the Attorney General seeks to jettison that burden.

This is critical here, because the Attorney General does not allege that Frazer is a transferee except for the receipt of his board-authorized compensation. Thus, her theory is that section 720(a)(1) permits repayment of "losses" without having to prove (or even allege) the transferee's knowledge of a transfer's unlawfulness. But such a theory renders section 720(a)(2) superfluous and erases the line separating it from section 720(a)(1). Relying on *LERW* – a case where, incidentally, the defendant knew of the unlawfulness of transfers to himself (*see infra* at 12-13 and n.7) – the Attorney General argues that proof of a mere breach of duty entitles her to recovery for all losses incurred. This is not the law, and her theory seeks a judicial amendment which would be "incompatible" with the Legislature's "comprehensive enforcement scheme." *Grasso*, 11 N.Y.3d at 70-71; *see also Grasso*, 42 A.D.3d at 137-38. As noted by those Courts, the Attorney General's power "is not without limitation," and those limits include requiring her to respect the Legislature's carefully-constructed scheme and to prove "fault" before liability can be assessed against individuals in not-for-profit corporations.

b. Restitution Is Not Warranted Under The Pleaded Facts Of The Complaint

Even granting section 720(a)(1) its most expansive interpretation, and even importing common law concepts and permitting them to color a very particular and purposefully crafted statute, the Attorney General has no claim against Frazer. Frazer's moving brief demonstrated that the ancient remedy of account does not include damages but merely disgorgement. *See* NYSCEF Doc. No. 690 at 8-9 (citing cases holding that an accounting holds a

defendant liable for his profits, not for damages). Citing to the Court of Appeals, the Attorney General concedes this. NYSCEF Doc. No. 768 at 25-26 ("the remedy of accounting is restitutionary by definition") (citing *Ederer v. Gursky*, 9 N.Y.3d 514, 516 (2007)).

Here, there is nothing for Frazer to disgorge. The Complaint does not assert that he received anything from the NRA other than his Board-approved compensation. *See* NYSCEF Doc. No. 646, ¶ 417. That compensation does not merit disgorgement as a matter of law. Approved by the Board, it is the fruit of a protected business judgment which a court is prohibited, without more, from scrutinizing. *See Auerbach v. Bennett*, 47 N.Y.2d 619, 630 (1979); *accord Consumers Union of U.S., Inc. v. The State of New York, Empire HealthChoice, Inc.,* 5 N.Y.3d 327, 360 (2005). In *Auerbach*, the Court of Appeals maintained that "responsibility for business judgments must rest with the corporate directors; their individual capabilities and experience peculiarly qualify them for the discharge of that responsibility. Thus, absent evidence of bad faith or fraud (of which there is none here) the courts must and properly should respect their determinations." *Auerbach*, 47 N.Y.2d 619, 630-31; *Consumers Union*, 5 N.Y. 3d 327, 360 (same applicable to not-for-profit corporation).[2]

The Attorney General's case support warrants no different result. *Ault v. Soutter*, 204 A.D.2d 131 (1994), (a case brought under and decided according to Delaware law, not BCL § 720 as proffered by the NYAG, and thus inapposite (*see Ault v. Soutter*, 167 A.D.2d 38 (1991))),

[2] Frazer respectfully submits the facts alleged in the Complaint do not fall outside the business judgment rule as a matter of law because they do not allege the NRA Board acted with bad faith or fraud in setting Frazer's compensation. *Auerbach,* 47 N.Y.2d at 631 (absent evidence of bad faith or fraud, as here, "[t]he courts must and properly should respect" a board's decisions); *see also DeRaffele v. 210-220-230 Owners Corp.*, 33 A.D.3d 752, 752-53 (2d Dep't 2006) (dismissing breach of fiduciary duty claim because plaintiff failed to allege bad faith actions by the board); *Simpson v. Berkley Owner's Corp.*, 213 A.D.2d 207, 207 (1st Dep't 1995) (the business judgment rule "permits judicial inquiry into claims of fraud or self-dealing by board members but only where such claims have a basis") (internal citations omitted).

sought to compel defendants to account for profits and benefit they personally realized as a consequence of "extensive self dealing." Likewise, in *People v. James*, 971 N.Y.S.2d 73, 73 (Sup. Ct. N.Y. Cty. 2013), the court sustained claims against individuals charged with using corporate funds to acquire personal items. Lastly, the *Trump* decisions concerned use of charitable donations for self-enrichment, i.e., to promote candidate Trump's properties, to purchase personal items, to advance his presidential election campaign, and to settle personal legal obligations. *People v. Trump*, 62 Misc. 3d 500, 504 (Sup. Ct. N.Y. Cty. 2018); *Matter of People v. Trump*, 66 Misc. 3d 200, 204 (Sup. Ct. N.Y. Cty. 2019). None of these cases refutes the longstanding and ancient rule that a claim to account requires, at most, disgorgement of unlawful profits.[3]

Here, even if the Board's compensation decisions were derelict, Frazer was entitled to rely on their legitimacy given the absence of any allegation that he knew such decisions were derelict in any way. The Legislature explicitly left decisions regarding nonprofit executive compensation to the governing boards of such organizations. *See* N-PCL §§ 202(12), 515; *see also* N-PCL § 719 (expressing the Legislature's choice, under its statutory scheme, that directors have responsibility for such decisions and that recourse be to them). Accordingly, they are decisions on which Frazer was clearly able to justifiably and reasonably rely – as shown by his continued services to the NRA. *See, e.g., Bratone v. Conforti-Brown*, 150 A.D. 3d 1068, 1072 (2d Dep't 2017) (citing *Aronoff v. Albanese*, 85 A.D.2d 3, 5 (2d Dep't 1982) (even in the absence of a business judgment rule presumption, expended funds cannot be characterized as a waste of corporate assets where consideration and benefit was returned to the corporation in the form of

[3] Thus, to the extent that disgorgement and restitution are distinct remedies – with the former concerned with gain to the wrongdoer and the latter concerned with loss to the victim – they are not distinct remedies in this case where Frazer is not alleged to be in receipt of ill-gotten gains and the NRA is not a victim, but rather is conceded to have authorized his compensation. *See, e.g., People v. Ernst & Young LLP*, 114 A.D.3d 569, 569 (1st Dep't 2014).

services rendered); *People v. Lawrence,* 74 A.D.3d 1705, 1707 (4th Dep't 2010) (business judgment rule applied where there was no triable issue of fact that officers' payments were either authorized by the corporations by-law or made in good faith); *Blake v. Blake*, 225 A.D.2d 337, 337 (1st Dep't 1996) (where board of directors ratified compensation payments, the business judgment rule applies and plaintiff would need to demonstrate that no person of sound business judgment would conclude the corporation received fair benefit). In these circumstances, there is no fair basis on which to order Frazer to disgorge that pre-approved compensation.

c. The Faithless Servant Doctrine Is Inapplicable To The Complaint's Particular Allegations Against Frazer

Hemmed in by the reality that Frazer justifiably relied on protected business judgments of the Board of Directors, and having alleged no claim under N-PCL § 719 against the Board for those annual compensation decisions, the Attorney General now claims that Frazer is a faithless servant.

This contention, too, is misplaced. Under New York law, an employee only becomes a faithless servant when there is "substantial" disloyalty to his employer. *See Phansalkar v. Andersen Weinroth & Co., L.P.*, 344 F.3d 184, 200, 201-02 (2d Cir. 2003) (citing *Turner v. Konwenhoven*, 100 N.Y. 115, 120 (1885)); compare *Murray v. Beard*, 102 N.Y. 505, 508 (1886).[4] Furthermore, the New York Court of Appeals, in *Turner*, explained that "substantial" disloyalty did not include situations where an employee merely "knew of and tolerated the

[4] New York has long adhered to a policy against forfeiture of earned wages. *See Post v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 48 N.Y.2d 84, 86 (1979) ("[P]owerful considerations of public policy militate against sanctioning the loss of a man's livelihood") (quoting *Purchasing Assocs., Inc. v. Weitz*, 13 N.Y.2d 267, 271 (1963) (internal quotations omitted); *Weiner v. Diebold Grp., Inc.*, 173 A.D.2d 166, 167 (1st Dep't 1991) (recognizing the long standing policy against the forfeiture of earned wages); *Mirchel v. RMJ Sec. Corp.*, 205 A.D.2d 388, 389 (1st Dep't 1994) (same).

behavior." *Phansalkar*, 344 F.3d at 201-02. Here, the allegations against Frazer are nearly precisely that. *See* NYSCEF Doc. No. 768 at 31 (alleging that Frazer "failed to ensure" and "permitted") (citing NYSCEF Doc. No. 646 Paras. 8, 10).

The Attorney General further bases her request for forfeiture of Frazer's salary on the alleged ground that he breached a duty of loyalty by failing to perform with a requisite degree of care, skill, prudence, and diligence. NYSCEF Doc. No. 768 at 28. The *Turner* standard, though, holds such forfeitures to be inappropriate absent substantial, material breaches of loyalty, often over a significant period of time. *See Hamlet at Willow Creek Dev. Co., LLC v. Ne. Land Dev. Corp*., 907 N.Y.S.2d 437, 437 (Sup. Ct. 2010) ("[a] common thread running through each of the foregoing cases is systematic and repeated misconduct over a substantial period of time which exhibits fundamental immorality evincing a high degree of disloyalty") (collecting cases). By contrast, the Attorney General's allegations against Frazer are plainly based in negligence, do not come close to the *Turner* standard of "substantial" disloyalty, and tacitly acknowledge that Frazer never acted to benefit himself. That Frazer's employer twice re-elected him and authorized compensation after the public release of the NYAG's allegations further negates the Attorney General's claims of Frazer's faithlessness to the NRA.

The Attorney General's cited authorities lend her no support. Those cases involved an individual who pleaded guilty to criminal larceny for stealing cash from his employer (*see City of Binghamton v. Whalen*, 141 A.D.3d 145 (3d Dep't 2016)), and an employee who stole money from his employer in eight separate schemes including one where, as a duly authorized trustee, he stole money from a trust to invest it in his own name. *See Yukos Capital S.A.R.L. v. Feldman*, 977 F.3d 216, 223-24 (2d Cir. 2020) (where, despite findings of theft and self-serving schemes, a jury declined to award disgorgement of compensation). The allegations against Frazer do not assert

any turpitude, much less the level of turpitude involved in those cases; since all NRA funds ever received by Frazer were authorized by the NRA Board, no self-serving conduct has been, or can be, alleged. The faithless servant doctrine is inapt to the circumstances presented here. *Cf. Abramson v. Dry Goods Refolding Co*., 166 N.Y.S. 771, 773 (1st Dep't 1917) (an employer seeking to recover an employee's compensation under the faithless servant doctrine must prove "facts sufficient to show dishonesty and disloyalty on the part of his employe[e] which permeates the employe[e]'s service in its most material and substantial part").

d. The Attorney General Lacks Authority Under the N-PCL To Remove Frazer From His Employment As General Counsel

As discussed below in Section III, the Attorney General seeks Frazer's removal. N-PCL § 714, however, is specifically limited to "officers." While she has authority to seek his removal from his officer position of Secretary, she is not authorized to cause his removal as General Counsel, which he is merely employed, not elected, to perform.

e. The Law of the Case Doctrine Is No Basis On Which To Deny Frazer's Motion

Lastly, the Attorney General argues that the law of the case doctrine bars Frazer's motion to dismiss the Third Cause of Action. But, the law of the case doctrine is a discretionary power belonging to courts, and Frazer's motion does not seek to re-litigate issues previously decided. *See People v. Evans*, 94 N.Y.2d 499, 502-03 (2000) (law of the case is a non-statutory concept which in no way restricts a court's authority); *see generally Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (in the absence of a statute, law of the case "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power"). The Attorney General's claim under N-PCL § 720(a)(1) seeks remedies not permitted by the Legislature's scheme, which is an overcharging the Court has clear authority to address. *See Grasso*, 42 A.D.3d at 137-41, *aff'd*, 11 N.Y.3d 64 (2008) (declaring the N-PCL to be "a

comprehensive enactment" of the Legislature under which the Attorney General may not assert "a remedial device not embraced by the [Legislature's] policy." The Attorney General's request that the Court exercise its discretion to permit that overreach should be rejected.[5]

II. The Attorney General's Pleading Fails to Establish a Cause of Action for Breach of EPTL 8-1.4

The Attorney General predicates her Seventh Cause of Action on a solitary and conclusory assertion: "[t]he Individual Defendants are statutory trustees under New York law." NYSCEF Doc. No. 646, ¶ 31. That assertion defies legal requirements and lacks substantiating fact. On top of that threshold deficiency, the cause of action based thereon seeks relief not permitted by the statute.

a. Frazer Is Not A Trustee As Defined By The Statute

As we earlier established, Frazer never took steps to register as a trustee of the NRA, or pay trustee fees, because he was not one. *See* EPTL § 8-1.4(c) (registration), (p) (payment); Fleming Aff., Ex. 4 (results of search for "Frazer" on Office of the Attorney General's Search Charities Database, available at

[5] The law of the case doctrine is particularly inappropriate where complaints have been amended. *Peters v. Peters*, 118 A.D.3d 593, 594 (1st Dep't 2014) (allegations of an earlier complaint are rendered academic by an amended complaint) (citing *Thompson v. Cooper*, 24 A.D.3d 203, 205 (1st Dep't 2005)); *Cobalt Partners, L.P. v. GSC Capital Corp*., 2012 97 A.D.3d 35, 39 (1st Dep't 2012). In *Cobalt Partners*, the First Department held "[l]aw of the case did not require the court to deny the motion to dismiss the second amended complaint, even though it had previously denied the motion to dismiss the amended complaint" where, as here, the second amended complaint differed from the amended complaint. *Cobalt*, 97 A.D. 3d 35 at 39; *see also Gay v. Farella*, 5 A.D.3d 540, 541 (2nd Dep't 2004) ("[s]ince the original complaint was superseded by the amended complaint, rendering the sufficiency of the allegations in the original complaint academic, the Law of the Case doctrine did not bar the Supreme Court from entertaining the defendants' motion to dismiss the amended complaint"); *Kaplan v. K. Ginsburg, Inc*., 178 N.Y.S.2d 25, 27 (Sup. Ct. 1958) (denial of motion to dismiss second amended complaint was not law of the case where third amended complaint was filed, even though third amended complaint was a near replica of second amendment).

https://www.charitiesnys.com/RegistrySearch/search_charities.jsp). Demanded of "each trustee," the Attorney General's failure ever to compel compliance makes clear that Frazer has never been considered a trustee.

The Attorney General implicitly concedes this, but now contends that the EPTL does not require individual officers or directors of a registered corporation to register. She cites to an exemption under EPTL § 8-1.4(b)(9) in support. NYSCEF Doc. No. 768 at 32. Section 8-1.4(b)(9), though, only exempts an officer or director who "holds property" for charitable purposes. *See* EPTL § 8-1.4(b)(9) ("[t]he registration and reporting provisions of this section do not apply to . . . (9) any person who, in his or her capacity as an officer, director or trustee of any corporation or organization mentioned in this paragraph, *holds property* for the religious, educational or charitable purposes of such corporation or organization so long as such corporation or organization is registered with the attorney general pursuant to this section") (emphasis added).

The necessity that an officer hold property is wholly consistent with the EPTL § 8-1.4's requirement that individuals hold and administer property in order to be liable thereunder. *See* EPTL § 8-1.4(a)(1); *People by Abrams v. Westchester Cty. S.P.C.C.*, 198 A.D.2d 484, 485 (2nd Dep't 1993) (EPTL § 8-1.4(a)(1) requires any "trustee" to register with and report to the Attorney-General. The definition of a trustee includes "any non-profit corporation organized under the laws of this state for charitable purposes", and "*any individual* [or] corporation *holding and administering property* for charitable purposes") (emphasis added). As noted in Frazer's moving brief, while the Attorney General has specifically pleaded – on three separate occasions now – that certain individuals "held and administered property for charitable purposes," Frazer is not one of them. Rather, the Complaint charges merely that he is "*responsible for* holding and administering property for charitable purposes." Compare NYSCEF Doc No. 646,

¶ 672 with *id*., ¶ 668 (emphasis added). The difference in pleading is clearly purposeful and, as pleaded, it does not satisfy the Section 8-1.4(b)(9) exemption the Attorney General urges. The NYAG's pleading fails to allege, much less establish, that Frazer "holds and administers" property for charitable purposes.

Additionally, the NYAG misstates that statutory language when describing the purported test for qualifying as a trustee. EPTL § 8-1.4(a) defines "trustee," in relevant part, as an "individual . . . holding and administering property for charitable purposes . . . *pursuant to any will, trust, other instrument or agreement, court appointment, or otherwise pursuant to law* . . . ." EPTL § 8-1.4(a) (emphasis added). The NYAG omits that critical italicized language or ignores this requirement altogether in several places in its memorandum. *See* NYSCEF Doc No. 768 at 10 ("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 . . ."), 19, n.8 ("the Individual Defendants fit within the definition of a trustee because of their administration of charitable assets"), 32 ("trustees include, *inter alia*, any person or entity that holds and administers property for charitable purposes").[6]

As an individual, the statute requires that, to qualify as a trustee, Frazer both (i) hold and administer property for charitable purposes, and (ii) do so pursuant to a will, trust, instrument, agreement, court appointment, or otherwise pursuant to law. Now more than two years into the case, the Attorney General has never alleged that Frazer held and administered property for such purposes. Further, even were the Court to read the Complaint as colorably asserting that

[6] Notably, the statutory phrase "holding and administering" is written in the conjunctive, not the disjunctive; it is not either/or, but both. Accordingly, the Attorney General's apparent attempts to suggest that the Individual Defendants could be liable for merely administering charitable assets falls short of what would be needed to sustain her claim.

Frazer in fact held and administered property for charitable purposes (notwithstanding the Attorney General's obvious reluctance to make such an allegation), there is no allegation or evidence that he did so pursuant to a will, trust, instrument, agreement, or court appointment. The claim fails the explicit requirement of the statute's own language.

Ultimately, the NYAG's assertion that Frazer is a trustee also conflicts with pleaded evidence (and law) to the contrary. As discussed in our moving brief, the NRA's Form 990s, incorporated by reference by the Attorney General in her Complaint, classify only its directors as trustees, not its officers. *See* Annual Filings for National Rifle Association of America, available at https://www.charitiesnys.com/RegistrySearch/show_details.jsp?id={04D804B6-96D1-48BA-B865-97FA91510118}, Form 990 Return of Organization Exempt From Income Tax at Part VII, Section A (describing, by box check, Frazer and the other individual defendants as officers, not trustees). This same classification is also drawn (and emphasized) by the NYAG in its opposition. *See* NYSCEF Doc. No. 768 at 30 ("Trump was a trustee under Section 8-1.4 *because* he was a director") (emphasis added) (citing *People v. Trump*, 66 Misc.3d 200, 204 (Sup. Ct. N.Y. Cty. 2019)); *see also People v. Trump*, 62 Misc.3d 500, 511 (Sup. Ct. N.Y. Cty. 2018) ("[a]s directors of the Foundation, the individual respondents were also trustees of charitable assets pursuant to EPTL 8-1.4 . . . .").

The Attorney General's other case citation, *LERW*, is unavailing on both the facts and the law. The Attorney General seeks to use LERW to establish that a "*de facto* officer" of a not-for profit corporation is a trustee under the EPTL. See NYSCEF Doc. No. 768 at 30. In fact, as the Court in *LERW* noted, the defendant had simultaneously served as head for both counterparties to contracts – as the Executive Director of the Board of LERW, and as the Chairman of the Ulster County Environmental Management Council which had given LERW contracts. It

was only after an outside auditor noticed that conflict that the defendant was told he could not serve in both positions, after which he "resigned" from LERW. *LERW*, 2013 WL 3014915 at *10-11. Yet, as the Court in *LERW* observed, he "never surrendered his effective control over LERW" but rather continued in an untitled role to have "complete control" over the corporation. *Id*. at *11, 29. Thus, though characterized as a "*de facto* officer," in reality the defendant in *LERW* remained the *de facto* Executive Director running the Board.[7]

Additionally, as the Attorney General does here, the Court in *LERW* misstated the EPTL's governing language. Writing that "[t]he EPTL defines a trustee broadly; it is defined as 'any individual . . . holding and administering property for charitable purposes," (*LERW*, 2013 WL 3014915 at *31 (quoting EPTL § 8-1.4(a))), the *LERW* court likewise omitted the statute's words "pursuant to any will, trust, other instrument or agreement, court appointment, or otherwise pursuant to law . . . ." *See* EPTL § 8-1.4(a).

There is no evidence or allegation that Frazer is a trustee pursuant to the statutory definition. The Attorney General's Seventh Cause of Action should be dismissed because it does not establish the necessary prerequisite that Frazer was a trustee of the NRA.

[7] The particular facts of *LERW* make the case even more inappropriate as a basis to stretch the law to impose trusteeship on officers. Among other facts found in the Court's lengthy opinion, the defendant in that case (i) had been convicted of felony armed robbery, (ii) misappropriated taxpayer funds, (iii) lied to the Court in sworn statements, (iv) had been given what was, in effect, a warning to resign with which he appeared to comply but deceitfully circumvented, (v) forged signatures to hide his subsequent involvement, (vi) secretly caused LERW checks to be made payable to his own business, and (vii) breached fiduciary duties he owed to Ulster County as well as to LERW. Further, he notably failed to cause or oversee LERW to file any Form 990s or any required annual financial reports with the Attorney General's Office.

b. The Attorney General Seeks Remedies Not Authorized By The Statute

The Attorney General also seeks specific remedies not available to her under the EPTL's express statutory authorization. As set forth in our moving brief, she has no power to create remedies not authorized by a statute. *See, e.g.*, NYSCEF Doc. No. 690 at 11-12 (citing cases). Her claim demands that Frazer be made "to account," pay restitution and damages, pay interest, and 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." NYSCEF Doc. No. 646, ¶ 669. The statute, though, does not provide for the remedies of "account," restitution, damages, interest, or a bar from nonprofit service.[8] Rather, EPTL § 8-1.4 governs *supervision* of trustees, and grants the Attorney General power (i) to secure compliance with the registration, payment, filing, and other requirements of Section 8-1.4, and (ii) to secure the proper administration of any trust, corporation or other relationship to which Section 8-1.4 applies which expressly includes removal of any person responsible for a "failure of any trustee to register or file reports." *See* EPTL § 8-1.4(m). No such failure is alleged in the Complaint, and imposing liability against or punishing Frazer as an individual non-trustee is not authorized. The Seventh Cause of Action should be dismissed with prejudice.

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

III. The Attorney General's Fifteenth Cause of Action Under The Executive Law Seeks To Enjoin Frazer From Acts He Has Never Performed

Lastly, in addressing Frazer's arguments concerning the relief requested in the Fifteenth Cause of Action under Executive Law § 175(2)(d) for false statements in the NRA's CHAR500 filings, the Attorney General cites no case authority except *LERW* which, for the reasons previously discussed, is inapposite to Frazer. As relevant here, Executive Law § 175(2) authorizes injunctive relief exclusively to enjoin Frazer from "continuing" the solicitation or collection of funds or property. *See* Exec. Law § 175(2) ("the attorney general may bring an action . . . against a charitable organization and any other persons acting for it or in its behalf to enjoin such . . . persons from continuing the solicitations or collection of funds or property or engaging therein or doing any acts in furtherance thereof . . . ."). This remedy is plainly inapplicable to Frazer because he has never solicited or collected funds for the NRA. The Attorney General implicitly acknowledges this truth; it supplies no evidence, allegation, or even argument to the contrary. Instead, she argues that the statute permits both an injunction against "doing any acts in furtherance" of soliciting funds – specifying Frazer's supplying the legally-required certifications on the CHAR500 reports – and relief which the court may deem proper. NYSCEF Doc. No. 768 at 33.

The Complaint, however, does not seek to enjoin Frazer from "doing any acts in furtherance" of soliciting funds. Rather, it expressly, and solely, states that Frazer "should be enjoined from soliciting or collecting funds on behalf of any charitable organization operating in this State . . . ." *See* NYSCEF Doc. No. 646, ¶ 704. Then, in her Prayer for Relief, the Attorney General doubles down by requesting a Judgment for the following relief: "Enjoining the NRA and Frazer from *soliciting or collecting funds* on behalf of any charitable organization operating in this State pursuant to Executive Law § 175(2)(d)." *See* Prayer for Relief, ¶ I (italics added, underlining

in original). That her Prayer for Relief couples the NRA with Frazer further means that, were the Court to accept the Attorney General's argument, the NRA would likewise be enjoined from filing legally-required CHAR500 reports. But the Court need not consider such a *reductio ad absurdum* because the Complaint does not seek to enjoin Frazer (or the NRA) from "acts in furtherance" of solicitation such as supplying the legally-required CHAR500 reports.

Finally, the Attorney General overreaches when she requests Frazer be enjoined from any possible future service as an officer, director, or trustee of any not-for-profit or charitable organization incorporated or authorized to conduct business in New York. These requests exceed the reach of the statute. As stated above, the statute permits an injunction to prevent a *continuation* of soliciting or collecting funds, which necessarily implies persisting in such conduct *for the organization at issue*. *See* Executive Law § 175(2) (permitting an injunction "against a charitable organization and any other persons acting *for it or in its behalf* . . . from continuing the solicitation or collection of funds or property . . . .") (emphasis added). In light of that delimiting reference to the charitable organization on whose behalf the solicitor was acting, the statute cannot fairly be read to extend to all future employment of this sort in the absence of more specific statutory language. The Executive Law also speaks only to "removing" a director or "other person responsible for the violation of this article;" it does not authorize a bar from service to other organizations. Indeed, the definition of the word "remove" is "to move from a position occupied." Webster's II New Riverside University Dictionary (Berkley ed. 1984). Its plain meaning does not contemplate the more expansive future bar sought by the Attorney General as a remedy.

The Attorney General further incorrectly states that Executive Law § 175(2) permits the removal of Frazer as General Counsel, a non-officer position. Section 175(2) permits removal of the "person responsible for the violation of this article . . . ." Here, the allegation

against Frazer relates to his certification of the CHAR500s which he did, as required by law, in his officer position as Secretary of the NRA. *See* Executive Law § 172-b(1) ("[t]he financial report shall be signed by the president *or other authorized officer* and the chief fiscal officer of the organization who shall certify under penalties for perjury that the statements therein are true and correct to the best of their knowledge, and shall be accompanied by an opinion signed by an independent public accountant that the financial statement and balance sheet therein present fairly the financial operations and position of the organization") (emphasis added). The Attorney General's own allegations undergirding the Fifteenth Cause of Action yield no basis to remove Frazer from his non-officer position of General Counsel under the Executive Law.[9]

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[9] The Attorney General has chosen not to address the argument, made in Frazer's moving brief, that the New York Legislature has never required the submission of Form 990s which are the source for 16 of the 17 purportedly false statements at issue in the NRA's CHAR500 filings. The Attorney General has chosen not to address this argument. NYSCEF Doc. No. 690 at 15, n.8. Only imposed by regulatory fiat of the Executive through the Attorney General, the insistence that corporations attach their federal tax form exceeds the requirements of the governing statute. Compare N.Y. Comp. Codes R. & Regs. Tit. 13 § 91.5 (adding the requirement that organizations include their federal Form 990 tax filing) with Executive Law § 172-b(1) (requiring only an annual financial statement which includes an appropriate audit report from an independent certified public accountant). The statute neither requires the attachment of federal tax forms nor, *a fortiori*, authorizes liability based on purported false statements in federal tax forms. As established in our moving brief, and left unaddressed by the Attorney General, the regulation thus inappropriately expands the statute's reach and purposes. As addressed in Frazer's moving brief, the New York Not-for-Profit Revitalization Act – which encompassed this relevant portion of the Executive Law pursuant to N-PCL § 520 – was enacted following the expressed concerns of promoters that "New York law and regulatory practices have placed unnecessary and costly burdens on the nonprofit sector." *See* NYSCEF Doc. No. 690 at 1-2 (citing "Revitalizing Nonprofits, Renewing New York," Leadership Committee for Nonprofit Revitalization, Report to Attorney General Eric T. Schneiderman, Feb. 16, 2012, at 1 (available at https://aclnys.org/wp-content/uploads/2014/02/Attorney-General-Non-Profit-Report.pdf)). The Attorney General's regulation, which adds burdens to not-for-profit corporations, thus subverts and is inconsistent with the underlying purposes of the Legislature's enactment. *See, e.g., Gen. Elec. Cap. Corp. v. New York State Div. of Tax Appeals*, 2 N.Y.3d 249, 254 (2004).

IV. CPLR 3211(e) Expressly Permits The Instant Motion Because The Complaint Fails to State a Claim and Seeks Unauthorized Relief Over Which The Court Lacks Subject Matter Jurisdiction

The Attorney General overstates the reach of the "single-motion rule" in contending that Frazer's motion is barred under CPLR 3211(e). As a general matter, an amendment of a complaint eliminates such a bar. *See Shelley v. Shelley*, 688 N.Y.S.2d 439, 444 (N.Y. Sup. Ct., Westchester Cty. 1999) ("[t]he single motion rule is no bar to a second dismissal motion where the complaint has been amended"); *Kaplan*, 178 N.Y.S.2d at 27 (denial of motion to dismiss second amended complaint was not law of the case where third amended complaint was filed, even though third amended complaint was a near replica of second amendment).

Nevertheless, citing to cases which adjudicated subsequently-brought motions to dismiss grounded on CPLR 3211(a)(1) or (a)(5) (*see* NYSCEF 768 at 21-22 (citing to the *Miller*, *Bailey*, *Inter Connection*, and *McLearn* cases)), she argues that parties "are not permitted to make an argument in a motion to dismiss that they could have raised previously." But, CPLR 3211(e) does not say that. To the contrary, it precludes motions made under 3211(a)(1) and (a)(5) as waived unless raised in an initial motion to dismiss, but permits motions made, as here, under 3211(a)(2) and (a)(7). Compare CPLR 3211(e) (an objection or defense based on CPLR 3211(a)(1), (3), (4), (5), and (6) "is waived unless raised either by such motion or in the responsive pleading") with *id*. ("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"); *see also Matter of Newton v. Town of Middletown*, 31 A.D.3d 1004 (3d Dep't 2006) (permitting a second motion, which challenged whether a statutory source existed to ground a claim and whether the claim was consistent with the legislature's scheme, as raising questions of justiciability and subject matter jurisdiction); Siegel, N.Y. Prac. § 136 (6th ed. 2018) (courts have jurisdiction only

over controversies, and a dismissal for a lack of subject matter jurisdiction results from a lack of standing where a plaintiff's claim does not present a genuine controversy); *Wallert v. Ballance*, 2011 N.Y. Slip. Op. 34002 (Sup. Ct. N.Y. Cty. 2011) (Kornreich, J.) (permitting second motion under CPLR 3211(a)(7)).

In any event, the Attorney General can make no argument that the instant motion has had any effect whatsoever on the completion of discovery or the Court's schedule. To the contrary, consideration of these issues of law now may have the salutary effect of eliminating or, if not eliminated, clarifying case issues and further narrowing any subsequent summary judgment motion and/or trial. *Cf. Held v. Kaufman*, 91 N.Y.2d 425, 430 (1998) ("[t]he purpose of CPLR 3211(e) is to prevent the delay before answer that could result from a series of motions") (citations and internal quotation marks omitted)).

Conclusion

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

Dated: New York, New York
August 15, 2022

GAGE SPENCER & FLEMING LLP

By: */s/ William B. Fleming*

William B. Fleming
Ellen V. Johnson
410 Park Avenue, Suite 810
New York, New York 10022
Tel. (212) 768-4900
Email: wfleming@gagespencer.com
ejohnson@gagespencer.com
Counsel for Defendant John Frazer

To: PEOPLE OF THE STATE OF
NEW YORK, by LETITIA JAMES,
Attorney General of the State of New York (via NYSCEF)

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2022, a true and correct copy of the foregoing Memorandum of Law in Support of John Frazer's Motion to Dismiss Plaintiff's Second Amended Complaint was served on all counsel of record by NYSCEF.

By: */s/ William B. Fleming*

ATTORNEY CERTIFICATION PURSUANT TO COMMERCIAL DIVISION RULE 17

I, William B. Fleming, an attorney duly admitted to practice law before the courts of the State of New York, hereby certify that the Reply Memorandum of Law in further support of Defendant John Frazer's Motion to Dismiss Plaintiff's Second Amended Verified Complaint complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court because the memorandum of law contains 6516 words, excluding parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word processing system used to prepare this memorandum of law.

Dated: New York, New York
August 15, 2022

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