Motion Seq. No. 029

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 IAS Part Three Hon. Joel M. Cohen ORAL ARGUMENT September 29, 2022

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

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Defendant Wayne LaPierre ("LaPierre") respectfully submits this reply memorandum of law in further support of his motion pursuant to CPLR 3211(a)(1), (2), (3), (7) and (10) for an order dismissing the Second Amended Verified Complaint ("Complaint") in its entirety or, in the alternative, as against him, on the ground that: (1) the Attorney General lacks the legal authority to seek judgment against him for relief other than the relief provided in section 720 of the Not-for-Profit Corporation Law ("N-PCL"); (2) the Attorney General is barred by the doctrine of law of the case from continuing to seek relief against him on the theory that he has been "unjustly enriched;" and (3) the National Rifle Association of America should be a party and the Court should not proceed in its absence.[1]

I.

PRELIMINARY STATEMENT

In his opening brief, LaPierre argues that the only relief the Attorney General is authorized to seek against him in this action is the relief provided in N-PCL § 720(a)(1), *i.e.*, a judgment to compel him to account for (i.e., explain) his official conduct in connection with his work as Executive Vice President of the National Rifle Association of America (the "Association"), that the Attorney General is barred by the doctrine of law of the case from continuing to seek relief against him on the theory that he has been "unjustly enriched," and that the Court should not proceed in the absence of the Association, a necessary party, which the Attorney General has failed to join.

In her opposing brief, the Attorney General cavalierly brushes aside the fact that this Court dismissed her unjust enrichment claim against LaPierre and that her amended complaint

[1] In accordance with the Court's Part Rules, to avoid duplication, LaPierre hereby adopts and incorporates by reference the arguments set forth in the papers presented by John Frazer and the National Rifle Association of America in support of their parallel motions, Motion Sequence Nos. 28 and 30, respectively.

contains exactly the same request for relief against LaPierre that she made on the basis of her dismissed unjust enrichment claim, casually dismissing LaPierre's argument that her new complaint should be dismissed because it continues to seek the same forbidden relief, stating: "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."[2] That is cold comfort for LaPierre, since, obviously, the jury will never see the footnote in the Attorney General's brief in which she disclaims any intention of asserting an unjust enrichment claim against him, and, unless the Court dismisses the Complaint, the improper demand for relief will remain live. To rectify the problem, the Court should dismiss the Complaint so that the Attorney General can correct the defect—properly.

In another sleight of hand, the Attorney General suggests in her brief that she amended her complaint only to add a cause of action for breach of EPTL § 8-1.4 "against the NRA," but neglects to mention that she also added a request for judgment against LaPierre for the same relief requested against the NRA based on that cause of action – relief that, if granted, would interfere with LaPierre's ability to do his job as Executive Vice President of the Association in accordance with its bylaws, the wishes of its members, and his good faith business judgment, and would infringe on his First Amendment rights and the First Amendment rights of the Association and its members.

The Attorney General goes on to argue that "[t]he Complaint states a claim against the NRA for failure to properly administer charitable assets pursuant to EPTL § 8-1.4," despite the fact that that statute creates no such cause of action, and despite the fact that the Attorney

[2] *See* NYSCEF Doc. No. 768 (The Attorney General's Memorandum of Law in Opposition to Defendants' Motions to Dismiss the Second Amended Verified Complaint), hereinafter cited as "Opp. Mem.", at 35, n. 19.

General's authority with respect to not-for-profit corporations and their directors and officers is comprehensively codified and expressly and meticulously circumscribed in the N-PCL, despite the fact that this Court does not have the power to amend, overrule or override that statute, and despite the fact that the relief sought against LaPierre, the Association and others based on her new cause of action, if granted, would infringe on their constitutional rights.

She then switches gears, attempting to dodge the serious issues raised by LaPierre on his motion by arguing that the individual defendants' motions to dismiss "are barred under the single motion rule since none of the allegations against them have changed," despite the fact that the allegations against them *have* changed—in that the Attorney General is now alleging that their conduct warrants appointment of a monitor and governance expert and implementation of governance reforms, an allegation never before levelled against them. Indeed, based on that allegation, the Attorney General has added a cause of action and a new request for judgment against *all* of the defendants, including LaPierre, for the extraordinary, unprecedented, unauthorized and unconstitutional relief she is now seeking in her new, completely-made-up First Cause of Action and "new and improved", and dangerously expanded, "Prayer for Relief".

The Attorney General next argues that "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," despite the fact that that statute authorizes the Attorney General to bring an action "for the relief provided in [that] section," implicitly limiting her to the causes of action and relief provided in that section, and tying each authorized form of relief to the specific authorized cause of action to which it is paired, thus barring her from bringing an action against any director or officer of a not-for-profit corporation based upon a cause of action not expressly created and codified in that statute, or for relief that is not expressly provided in

that statute and paired with the cause of action she is asserting, and barring her from mixing authorized causes of action and unauthorized relief, or unauthorized causes of action with authorized relief, thereby creating hybrid, non-statutory remedies, to reduce her burden of proof or expand the available relief, so she can seek prohibited relief such as restitution, damages, a lifetime ban on nonprofit service or any other relief she desires based solely on a cause of action under N-PCL § 720(a)(1), the least difficult cause of action to allege, with the most limited form of relief provided, which authorizes only relief in the form of "a judgment … to compel the defendant to account for [(i.e., explain)] his official conduct".

Next, in an effort to salvage her *ultra vires* claims against LaPierre through which she seeks to procure a judgment against him for appointment of a monitor and governance expert, implementation of governance reforms, and other relief that is not provided in section 720, she argues that the remedies created in N-PCL §§ 112(a)(10) and 715(f) and EPTL § 8-1.9 for actions based on "related party transactions" can somehow be magically transported into section 720, and sought against LaPierre, even though she has stated publically in her Charities Bureau Guidance that "[t]ransactions related to compensation of employees, officers or directors are not considered related party transactions," and even though documentary evidence establishes conclusively that the alleged "wrongful related-party transactions" on which she bases the cause of action she has asserted against LaPierre under N-PCL §§ 112(a)(10) and 715(f) and EPTL § 8-1.9 (the Tenth Cause of Action) are transactions related to the compensation of LaPierre as an employee and officer of the Association.

Then, in an effort to support the Sixth Cause of Action asserted against LaPierre, the Attorney General circles back to the meritless argument she made in support of her First Cause of Action, arguing that she has adequately alleged a claim that LaPierre breached an alleged duty

"to properly administer charitable assets entrusted to [his] care," an argument that fails for the same reasons the argument in support of her First Cause of Action fails, and for the further reason that the Sixth Cause of Action is redundant of both the First Cause of Action and the Second Cause of Action, and should be dismissed for that reason alone.

Next, she argues that the "Attorney General has stated claims for the removal and bar of the individual defendants under N-PCL §§ 706 and 714," ignoring that, in the new complaint, she has not alleged facts sufficient to support the conclusion that LaPierre is a "director" within the meaning of the N-PCL, *i.e.*, one of the Association's 76 "directors entitled to vote" with the "power and duty to govern and have general oversight of the affairs and property of the Association", and, therefore, has failed to allege facts sufficient to support the conclusion that he may be removed as a "director" of the Association or barred from "re-election" as a "director" of the Association (much less be barred from service as a director of *any* nonprofit organization and from service to *any* such organization in *any* capacity), and further ignoring the fact that her claim for removal of LaPierre as a "director" of the Association seeks relief that is not provided in section 720 and may not properly be sought in an action brought against LaPierre, and that her N-PCL § 706 claim is unnecessary and redundant because if she is successful on her claim under N-PCL § 714(c), and LaPierre is removed from his position as Executive Vice President of the Association, his status as an ex officio member, with voice but without vote, of the Board of Directors of the Association will automatically cease, rendering her 706 claim, and the issue of whether he is a "director" within the meaning of the N-PCL, moot. Moreover, the Attorney General's argument that she has stated a claim for removal and bar of LaPierre under N-PCL § 714 is without merit because it is a claim asserted against an officer of a not-for-profit corporation, an action against an officer of a not-for-profit corporation may be brought only

under N-PCL § 720(b) and only for the relief provided in section 720, and the relief provided in section 720 does not include removal as an officer or a bar on service as an officer. So, as with her section 706 claim, the Attorney General's assertion of a cause of action against LaPierre for removal as an officer of the Association under N-PCL § 714 is unauthorized, non-statutory and improper. Hence, contrary to the Attorney General's argument, she has not stated a claim for removal or bar of LaPierre under N-PCL § 706 or under N-PCL § 714, and those claims should be dismissed.

Lastly, the Attorney General completely ignores that branch of LaPierre's motion seeking an order dismissing the Complaint pursuant to CPLR 3211(a)(10) on the ground that the Association should be a party and the Court should not proceed in its absence, apparently hoping that an ostrich strategy will allow her to avoid that issue—and the inconvenient fact that the Association has not been properly named and joined as a defendant.

Circling back to the low-hanging fruit—the *ultra vires* unjust enrichment claim the Court dismissed, and its remnant—the Attorney General's purportedly "inadvertent" "reference to restitution for benefits that 'unjustly enriched' the Individual Defendants in Paragraph J of the Prayer for Relief"—the Court should reject the Attorney General's assertion that she is no longer asserting an unjust enrichment claim against LaPierre, recognize her *ultra vires* request for judgment against LaPierre for what it is—a stealth claim for unjust enrichment disguised as a "request for judgment" (without any corresponding cause of action to support it), recognize the obvious prejudice that allowing the Attorney General to continue to pursue this ghost claim and to continue to request judgment against LaPierre based on a theory of unjust enrichment would cause LaPierre, and, in in accordance with this Court's prior ruling dismissing the unjust enrichment claim, dismiss the Complaint on the ground that it seeks relief that is not available

under the N-PCL, is barred by *Grasso*, and is based on a claim that this Court dismissed.

In the end, the Attorney General fails to grapple in any meaningful way with the main issue raised on this motion, *i.e.*, the scope of her authority with respect to not-for-profit corporations in general and with respect to actions against directors and officers of not-for-profit corporations in particular—and, more specifically, her authority, *vel non*, to seek judgment against LaPierre for relief other than the relief provided in section 720 of the N-PCL—the specific, clear and detailed provision of that law that governs "actions against officers, directors and key persons" of not-for-profit corporations. Side-stepping this critical issue, she opposes LaPierre's motion principally on the ground that it is barred by the "single motion rule," even though she amended her prior pleading substantially by adding eight paragraphs of allegations and a new cause of action seeking sweeping new relief that raises serious constitutional and practical concerns that cannot be ignored, raising anew, and in a new context, the fundamental and critical issue of the scope of the Attorney General's authority with respect to not-for-profit corporations and the people who serve them, like LaPierre. Clearly, despite the Attorney General's exhortations, this Court may not exercise its inherent power to repeal, amend, overrule or override section 720 of the N-PCL by reading into it causes of action, remedies of provisions for relief that the Legislature chose to exclude, or by ignoring section 720 completely and reading into EPTL § 8-1.4 a cause of action and remedy the Legislature did not create in that statute either, disregarding the obvious inconsistency that that would create with N-PCL § 720 (and other provisions of the N-PCL), and the obvious conflict that would create with the Court of Appeals' decision in *Grasso*.

In the final analysis, the arguments the Attorney General advances in opposition to LaPierre's motion are hollow. The "single motion rule" does not bar LaPierre's motion to

dismiss because the Attorney General's complaint has changed—the Attorney General has added eight paragraphs of allegations, a new cause of action, and three new requests for relief, which, as noted above, raise serious constitutional and practical concerns and which, if granted, would almost certainly adversely affect LaPierre's ability to do his job as Executive Vice President of the Association efficiently, effectively, economically and appropriately, without undue government interference, in accordance with the bylaws of the Association and the wishes of its members, directors, donors and supporters. Also, contrary to the Attorney General's assertion, none of the statutes she cites—EPTL § 8-1.4, N-PCL § 720, N-PCL § 720(a)(1), N-PCL § 706(d), N-PCL § 714(c), N-PCL § 112(a)(10), N-PCL § 715(f) and EPTL § 8-1.9—gives her the authority to bring an action against LaPierre for relief that is not provided in N-PCL § 720, indeed, N-PCL § 720(b) precludes it. By expressly limiting the attorney general's authority with respect to actions against directors, officers and key persons of not-for-profit corporations in N-PCL § 720, and expressly limiting the relief the attorney general may seek in such actions, the Legislature has implicitly denied her the "broad," sweeping, and unlimited authority she claims to have been given in those statutes. Lastly, the Court may not simply disregard the Attorney General's *ultra vires* request for relief based on a theory of unjust enrichment. The Court ruled the unjust enrichment claim out of bounds, and it should enforce that ruling. In any case, the Attorney General's failure to address LaPierre's nonjoinder argument leaves that argument unrefuted and conceded, compelling dismissal of the Complaint in its entirety on the basis of nonjoinder alone.

Accordingly, the Court should grant LaPierre's motion and dismiss the Complaint in its entirety.[3]

[3] In the alternative, the Court should dismiss the Complaint as against LaPierre.

II.

ARGUMENT

A. LaPierre's Motion Is Proper Because the Complaint Has Changed.

The "single motion rule" does not apply where a pleading has been amended. *See Barbarito v. Zahavi,* 107 A.D.3d 416 (1st Dep't 2013) ("the 'single motion rule' (CPLR 3211(e)) does not bar [the defendants] from moving to dismiss the amended complaint, as the fraud cause of action in the amended complaint is not the same as the corresponding cause of action in the original complaint … Therefore, because [they] did not have the opportunity to address the merits of the original cause of action, the single motion rule does not apply."); *James v. National Rifle Association of America, Inc.,* 74 Misc.3d 998, 1015 n. 2 (Sup. Ct., N. Y. County) (Joel M. Cohen, J.) ("As a threshold matter, the 'single motion rule' does not bar the Defendants' motions to dismiss the Attorney General's amended pleading, which includes 'approximately 90 paragraphs of new factual allegations'"), citing CPLR 3211(e) and *Barbarito*; *Shelley v. Shelley,* 180 Misc.2d 275, 282 (Sup. Ct., Westchester County 1999) ("[I]t is clear that the single motion rule is no bar to a second dismissal motion where the complaint has been amended.").

Contrary to the Attorney General's argument, the single motion rule of CPLR 3211(e) has no application under the circumstances presented here because the Attorney General filed an amended pleading, which includes an additional cause of action that is not the same as any cause of action in the prior complaint.[4] Moreover, the amended pleading includes eight paragraphs of

[4] NYSCEF Doc. No. 646 (Second Amended Verified Complaint dated May 2, 2022) hereinafter cited as "Compl." ¶¶ 635-43 ("First Cause of Action for Breach of EPTL 8-1.4 (Against Defendant NRA)"). *Compare* NYSCEF Doc. No. 333 (Amended and Supplemental Verified Complaint dated August 16, 2021) (containing no cause of action for breach of EPTL 8-1.4 against defendant NRA and no request for appointment for monitor, governance expert or implementation of governance reforms) and NYSCEF Doc. No. 11 (Verified Complaint dated August 6, 2020) (same).

new allegations, including allegations concerning LaPierre, three new requests for relief, *i.e.*, appointment of a monitor, appointment of a governance expert and implementation of court-ordered "governance reforms",[5] and an amended prayer for relief that sets forth the three new requests for relief and includes a request for judgment against LaPierre for that relief,[6] which raises serious constitutional concerns and which, if granted, would impose significant costs on the Association and adversely affect LaPierre's ability to perform his duties as Executive Vice President of the Association in accordance with the wishes of its members and its Board of Directors and effectively carry out its mission, chill free speech and infringe on his right to freedom of association and freedom of expression.

Accordingly, contrary to the Attorney General's argument, LaPierre's motion is not barred under the single motion rule because the Complaint has changed, and the Attorney General is once again seeking non-statutory relief against LaPierre, *i.e.*, relief that is not provided in N-PCL § 720, thus attempting to amend the N-PCL to create new remedies, in defiance of the Court of Appeals' holding in *Grasso*.[7]

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[5] *See* NYSCEF Doc. No. 646 ¶¶ 635-643.

[6] *See* NYSCEF Doc. No. 646, Compl. at 174-76, ¶¶ A-C ("**PRAYER FOR RELIEF**[:] WHEREFORE, the Attorney General *requests judgment against the Defendants* for the following relief: A. Declaring that the NRA has failed to properly administer charitable assets, and appointing an independent compliance monitor with responsibility to report to the Attorney General and the Court to ensure the proper administration of the charitable assets pursuant to EPTL § 8-1.4; B. Appointing an independent governance expert to advise the Court on reforms necessary to the NRA's governance to ensure the proper administration of charitable assets pursuant to EPTL § 8-1.4; C. Directing the NRA to implement such governance reforms as the Court deems necessary to ensure the proper administration of charitable assets pursuant to EPTL § 8-1.4.") (italics added).

[7] The Attorney General's "law of the case" argument lacks merit because the issues of whether the Attorney General has authority to assert the First Cause of Action, whether the Attorney General has authority to seek a judgment against LaPierre for relief that is not provided in section 720 of the N-PCL, whether the new complaint states a cause of action on which a judgment may be procured against LaPierre, whether the Court has jurisdiction of the subject matter of the new complaint, and whether the new complaint should be dismissed for nonjoinder,

B. The Attorney General's Argument that She Has Authority to Sue LaPierre to Procure a Judgment against Him for Relief other than the Relief Expressly Provided in N-PCL § 720 Based on the EPTL, N-PCL §§ 112 and 715, or the Court's Inherent Powers, Lacks Merit.

1. The Attorney General's Argument regarding the First Cause of Action, "For Breach of EPTL [§] 8-1.4 (Against Defendant NRA)," Lacks Merit.

As shown above, in an attempt to circumvent N-PCL § 720 and *Grasso*, the Attorney General amended her complaint, adding a cause of action, styled as "FIRST CAUSE OF ACTION For Breach of EPTL 8-1.4 (Against Defendant NRA)," based on allegations of misconduct by LaPierre and others. *See* note 5 supra (Compl. ¶¶ 635-643). The Attorney General also amended her Prayer for Relief, adding "a request for judgment against Defendants [(including LaPierre)] for appointment of a monitor and a governance expert and implementation of governance reforms. None of this relief is provided in section 720 of the N-PCL.

As the Court of Appeals explained in *People v. Grasso*, 11 N.Y.3d 64 (2008), the N-PCL is "the legislative codification of the Attorney General's traditional role as an overseer of public corporations" and its provisions "detail the Attorney General's varied enforcement powers", which "include the ability to provide structural relief with respect to the corporation and to bring actions against individual directors or officers," and "permit the Attorney General to seek redress for injuries resulting from … unlawful distributions of corporate cash, property or assets (N-PCL 719 [a] [1], [4], … waste of corporate assets (N-PCL 720 [a] [1] [B]) and breach of fiduciary duties (N-PCL [a] [1] [A])". *Id.* at 69. As the Court of Appeals further explained: "The Attorney General's authority to maintain these actions is explicitly codified under N-PCL 720(b)." *Id*. N-PCL § 720(b) provides: "(b) An action may be brought *for the relief provided in*

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have not been litigated previously. *See People v. Grasso*, 54 A.D.3d 180, 210 (1st Dep't 2008) (citation omitted) ("An issue must be actually litigated for the law of the case doctrine or collateral estoppel to apply.").

this section and in paragraph (a) of section 719 (Liabilities of directors in certain cases) *by the attorney general*, …" (italics added).

N-PCL § 720, entitled "Actions against directors, officers and key persons," provides, in paragraph (a):

> An action may be brought against one or more directors, officers, or key persons of a corporation to procure a judgment for the following relief:
> (1) To compel the defendant to account for his official conduct in the following cases:
> (A) The neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge.
> (B) The acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties.
> (2) To set aside an unlawful conveyance, assignment or transfer of corporate assets, where the transferee knew of its unlawfulness.
> (3) To enjoin a proposed unlawful conveyance, assignment or transfer of corporate assets, where there are reasonable grounds for belief that it will be made.

In *Grasso*, the Court of Appeals found that the Attorney General had "crafted four causes of action with a lower burden of proof then that specified by the statute, overriding the fault-based scheme codified by the Legislature and thus reaching beyond the bounds of the Attorney General's authority." *People v. Grasso*, 11 N.Y.3d at 70. Here, likewise, the Attorney General has crafted a cause of action under the EPTL with a lower burden of proof than that specified in N-PCL §§ 717 and 720, and with relief much broader than that provided in N-PCL § 720, again overriding the fault-based scheme codified by the Legislature and the specific limitation on relief set forth in N-PCL § 720, and thus, again, reaching beyond the bounds of the Attorney General's authority.

The Not-for-Profit Corporation Law and the Estates Power and Trusts Law are *in pari materia*, and must be read together and harmonized. *See Rector, Church Wardens & Vestrymen*

of St. Bartholomew's Church, Inc., 84 A.D. 2d 309, 315-16 (1st Dep't 1982) ("When two statutes are *in pari materia* 'they must be read together and applied harmoniously and consistently.'"). Therefore, the EPTL must be read as being subject to the limits on the Attorney General's authority established by the N-PCL, including not only the limit on the causes of action the attorney general may assert against directors, officers and key persons of not-for-profit corporations, but also the limit on the relief the attorney general may seek based on any such cause of action, including the limit on relief established by N-PCL §§ 720(b) and 720(a)(1), which, together, limit the Attorney General, on her N-PCL § 720(a)(1) claim, to seeking a judgment against LaPierre to compel him to account for (i.e., explain) his official conduct, and bar the Attorney General from seeking any other relief against LaPierre, including, without limitation, a judgment for restitution, damages, a lifetime bar on nonprofit service to the Association or any other organization, and appointment of a monitor and government expert and implementation of governance reforms. Rather than reading the N-PCL and the EPTL properly, together, and harmonizing them, the Attorney General has chosen to ignore the N-PCL and read the EPTL, in isolation, as controlling, which runs afoul of *in pari materia* doctrine and the Court of Appeals' decision in Grasso recognizing that the N-PCL constitutes a comprehensive legislative codification of the Attorney General's traditional role as an overseer of public corporations and of the law governing not-for-profit corporations and directors and officers of such corporations.

As shown above, the Attorney General's supervisory and enforcement powers over not-for-profit corporation officers and directors have been legislatively codified and expressly limited in the N-PCL. In granting the Attorney General authority in EPTL § 8-1.4 to "institute appropriate proceedings" the Legislature did not intend to exempt the Attorney General from the

requirements and limitations of the N-PCL, and the Attorney General cannot escape the limitations of the N-PCL by invoking this Court's inherent power because that power cannot be used to amend a statute. In sum, neither the Attorney General nor the Court has the power to fashion remedies to address alleged misconduct governed by the N-PCL because the Legislature has already done that and the remedies created by the Legislature are exclusive, and have been held to be exclusive by the Court of Appeals in *Grasso*. Consequently, the Court may not supplement the Attorney General's power with its own power to help her get around the limitations on her power and authority imposed on her by the Legislature in the N-PCL (or the EPTL).

The Attorney General's argument regarding the First Cause of Action lacks merit for other reasons as well. First, the Attorney General does not adequately allege that LaPierre is a trustee within the meaning of EPTL § 8-1.4(m), *i.e.*, "an individual … holding and administering property for charitable purposes."[8] Second, the Attorney General does not allege that any of the

[8] *See* EPTL § 8-1.4 ("Supervision of trustees for charitable purposes") ("(a) For the purposes of this section, "trustee" means (1) any *individual … holding and administering property for charitable purposes … over which the attorney general has enforcement or supervisory powers* ….") (italics added). The Association's bylaws show conclusively that LaPierre is not one of the Association's 76 "directors entitled to vote" within the meaning of the N-PCL, is not a member of its "entire board" within the meaning of the N-PCL, and does not have the power or duty to hold to "formulate the policies or govern and have general oversight of the affairs and property of the Association, in accordance with applicable law and these Bylaws" and therefore does not have the power or duty to hold or administer property of the Association "for charitable purposes," and, hence, does not qualify as a "individual … holding and administering property for charitable purposes … over which the attorney general has enforcement or supervisory powers" and therefore does not qualify as a trustee under EPTL § 8-1.4. *See* Reply Affirmation of P. Kent Correll, Esq. (hereinafter cited as "Correll Reply Affm.") at ¶¶ 3-4 and Exh. 1 (Bylaws of the National Rifle Association of America). N-PCL § 102 ("Definitions") ("As used in this chapter, unless the context otherwise requires, the term: *** (6) 'Director' means any member of the *governing* board of a corporation, whether designated as director, trustee, manager, governor, or by any other title. The term 'board' means 'board of directors' or any other body constituting a '*governing* board' as defined in this section. (6-a) 'Entire board' means the total number of *directors entitled to vote* which the corporation would

Association's assets are in New York and fails to show that EPTL 8-1.4(m) was expressly intended to have any extra-territorial reach. Third, the extraordinary, unprecedented and unauthorized relief sought by the Attorney General in the First Cause of Action would likely infringe on LaPierre's constitutional rights and limit his ability to do his job properly in accordance with the bylaws of the Association, the wishes of its members, directors, donors and supporters, and his business judgment. Finally, assertion of an unauthorized and invalid cause of action seeking unauthorized and inappropriate relief is particularly inappropriate where it is clear that there are less intrusive means to ensure the proper administration of charitable assets than appointing a monitor and ordering changes in a constitutionally protected advocacy organization's internal governance.

Hence, the Attorney General's argument regarding the First Cause of Action lacks merit and that cause of action should be dismissed.

2. The Attorney General's Argument regarding the Second Cause of Action, "For Breach of Fiduciary Duty Under N-PCL §§ 717 and 720 and Removal Under N-PCL §§ 706(d) and 714(c) (Against Defendant LaPierre)," Lacks Merit.

The Attorney General's argument regarding the "Second Cause of Action: For Breach of Fiduciary Duty under N-PCL §§ 717 and 720 and Removal under N-PCL §§ 706(d) and 714(c)" lacks merit because an action against an officer of a not-for-profit corporation for breach of his statutory duty as an officer of the corporation may be brought only based on a cause of action provided in section 720 and only for the relief provided in section 720,[9] and, in the Second Cause of Action, she seeks unauthorized non-statutory relief—i.e., relief that is not expressly provided

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have if there were no vacancies. *If the by-laws of the corporation provide that the board shall consist of a fixed number of directors, then the 'entire board' shall consist of that number of directors*. [(The Association's bylaws so provide.)]*** (15) '*Governing* board' means the body responsible for the management of a corporation or of an institutional fund.") (italics added).

[9] *See* N-PCL §§ 717 and 720.

in N-PCL § 720, including removal of LaPierre as a "director" under N-PCL § 706(d) and removal of LaPierre as an "officer" under N-PCL § 714(c).

As shown above, section 720(a)(1) of the N-PCL creates a cause of action against "one or more directors, officers or key persons" of a not-for-profit corporation "to procure a judgment … to compel the defendant to account for (i.e., explain) his official conduct in the following cases: "(A) [t]he neglect of, or failure to perform, or other violation of his duties in the management and disposition of corporate assets committed to his charge"; and "(B) [t]he acquisition by himself, transfer to others, loss or waste of corporate assets due to any neglect of, or failure to perform, or other violation of his duties."[10] N-PCL § 720(b) provides, in relevant part, that "an action may be brought for the relief provided in this section … by the attorney general". Clearly, N-PCL § 720 does not provide relief in the form of removal of a director or officer, since the word "removal" appears nowhere in that section.

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[10] *See* N-PCL § 720(a)(1)(A) and (B); *Aramony v. United Way of Am.*, 969 F. Supp. 226, 234 (S.D.N.Y. 1997) (finding that the only sustainable relief under N-PCL § 720 was to compel officer to account for his actions); *Ali Baba Creations, Inc. v. Congress Textile Printers, Inc.*, 41 A.D.2d (1st Dep't 1973) (unanimously reversing order of this Court denying defendants' motion to dismiss the complaint, on the law, granting motion, and dismissing complaint with leave to make an application to the trial court for leave to serve an amended complaint, stating: "The complaint alleges that … the individual defendants, officers and directors of both defendant corporations, transferred all the assets of defendant Maet Swimwear, Ltd., to defendant Congress Textile Printers, Inc., without consideration, in order to prevent Maet's creditors from satisfying their claims. *** Plaintiffs rely on section 720 of the Business Corporation Law to sustain their complaint which seeks money damages. However, 720 permits an action against a director or officer to: (1) compel the defendant to account for his official conduct; (2) set aside an unlawful conveyance of corporate assets; or (3) enjoin a proposed unlawful conveyance of corporate assets. None of these remedies is sought herein. *The section may not be utilized to obtain a money judgment in an action at law*.") (italics added); *NYKCool A.B. v. Pac. Intern Services, Inc.*, 2013 WL 1274561, at *15 (S.D.N.Y. Mar. 29, 2013), subsequently aff'd sub nom. *NYKCool A.B. v. Ecuadorian Line, Inc.*, 562 Fed. Appx 45 (2d Cir. 2014) (denying plaintiff's motion for summary judgment as to individual defendants, stating: "NYKCool argues that Aguirre and Hickey should be personally liable 'for disposing of corporate assets' as 'individual officers of foreign corporations doing business in New York' pursuant to § 720 of New York's Business Corporation Law. *Section 720*, however, *only provides for equitable relief* ***") (italics added).

The Attorney General's argument also lacks merit because she is asserting a cause of action for removal against an individual who is not alleged to be among the Association's "directors entitled to vote", or a member of the Association's "entire board", or to have the power or duty to "govern" the Association or vote on board matters, or the right to attend executive sessions of the Board or committee meetings, and therefore does not qualify as a "director" for purposes of N-PCL§ 706. In any event, the claim should be dismissed as redundant because the Attorney General alleges that LaPierre is an officer of the Association, which LaPierre admits, and the Attorney General is seeking removal of LaPierre as the Association's Executive Vice President under N-PCL § 714(c), which, if the Attorney General is successful, would automatically result in his removal as an ex officio member, with voice but without vote, of the Association's Board of Directors, rendering the issue of whether he is a "director" within the meaning of the N-PCL moot.

In *Grasso*, the Court of Appeals held that the Attorney General is limited to the remedies set forth in section 720 and may not fashion new remedies or enforcement mechanisms because to do so would be treading on the policy making of the Legislature.[11]

3. The Attorney General's Argument regarding the Sixth Cause of Action, "For Breach of EPTL § 8-1.4 (Against Defendant LaPierre)," Lacks Merit.

Contrary to the Attorney General's argument, the Attorney General has not adequately alleged a claim that LaPierre is a "trustee" within the meaning of EPTL § 8-1.4, that he has any

[11] *See People ex rel. Spitzer v.* Grasso, 11 N.Y.3d 64, 70, 72 (2008); *People ex rel. Spitzer v. Grasso*, 42 A.D.3d 126, 136-137 (1st Dep't 2007), *aff'd* 11 N.Y.3d 64 (2008) ("We held in Grasso II that authority to sue not expressly vested in the Attorney General by statute may not be granted by judicial fiat: "Because of the Legislature's plenary authority over its choice of goals and the methods to effectuate them, a private right of action should not be judicially sanctioned if it is incompatible with the enforcement mechanism chosen by the Legislature or with some other aspect of the over-all statutory scheme … '[w]here the Legislature has not been completely silent but has instead made express provision for civil remedy … the courts should ordinarily not attempt to fashion a different remedy'").

"duty" under EPTL § 8-1.4 "to properly administer any charitable assets entrusted to his care," or that, if he has such a duty, he has breached that duty, because she has not alleged facts sufficient to support the legal conclusion that he is a "trustee" within the meaning of the EPTL. In any event, even assuming arguendo, but not conceding, that he may be considered a "trustee", she lacks authority to assert a claim against him for relief other than the relief provided in N-PCL § 720. As a result, the Sixth Cause of Action is duplicative of both the First Cause of Action and the Second Cause of Action, and should be dismissed as doubly redundant.

4. The Attorney General's Argument regarding the Tenth Cause of Action, "Wrongful Related-Party Transactions – N-PCL §§ 112(a)(10), 715(f) and EPTL § 8-1.9(c)(4) (Against Defendant LaPierre)," Lacks Merit.

The Attorney General's argument regarding the Tenth Cause of Action[12] lacks merit because: (1) the first element of a cause of action under N-PCL § 112 (a)(10), N-PCL § 715(f) or EPTL § 8-1.9(c)(4) is a "related party transaction";[13] (2) the Complaint alleges, and documentary evidence conclusively establishes, that the transactions on which the Attorney General bases the Tenth Cause of Action were transactions related to compensation of LaPierre;[14] (3) the Complaint alleges that, at the time of each transaction, LaPierre was an officer and employee of the Association;[15] and (4) as stated in the Attorney General's Charities Bureau Guidance: "Transactions related to compensation of employees, officers or directors are not considered related party transactions." *See* NYAG Charities Bureau Guidance at 43 ("Transactions related to compensation of employees, officers or directors are not considered

[12] *See* Opp. Mem. at 28-30 (Section IV).

[13] *See* N-PCL § 112 (a)(10); N-PCL § 715(f); and EPTL § 8-1.9(c)(4).

[14] See Compl. ¶¶ 435-441 and Correll Reply Affirm. ¶¶ 5-10 and Exh. 2 (2013 agreement, 2015 contract extension and 2018 contract extension).

[15] *See* Compl. ¶¶ 2 and 680.

related party transactions.").[16] Therefore, as a matter of law, the alleged transactions may not be considered related party transactions and the Complaint fails to state a cause of action for "wrongful related party transactions" under N-PCL § 112(a)(10), N-PCL § 715(f) or EPTL § 8-1.9.[17]

C. The Attorney General's Failure to Rebut LaPierre's Argument regarding Her Request for Relief Based on a Theory of Unjust Enrichment Requires Dismissal of the Complaint.

The Attorney General's failure to make any meaningful argument in opposition to LaPierre's motion to dismiss the Complaint on the ground that it seeks relief against LaPierre based on a theory of unjust enrichment, which is non-statutory relief, mandates dismissal of the Complaint on that ground so that prejudice to LaPierre can be avoided. The Attorney General's "inadvertent" request for relief based on a theory of unjust enrichment is tantamount to continuing assertion of an unjust enrichment claim, and equally prejudicial, and the Court should dismiss this vestigial claim, or strike it, to prevent prejudice to LaPierre.

D. The Attorney General's Failure to Address LaPierre's Argument that the Court Should Dismiss the Complaint Pursuant to CPLR 3211(a)(10) Mandates Dismissal of the Complaint for Nonjoinder.

LaPierre contends that this case must be dismissed under CPLR 3211(a)(10) based on the Attorney General's failure to join the Association as a necessary party. Under CPLR 1001(a), an individual or entity is a necessary party to litigation "if complete relief is to be accorded to the persons who are parties to the action" or if the entity "might be inequitably affected by a

[16] *See* NYSCEF Doc. No. 692 (Affirmation of P. Kent Correll, Esq.) at ¶20 and NYSCEF Doc. No. 696 (Exh. 4) (excerpt from Office of the New York State Attorney General Charities Bureau, Charities Symposium: Doing Well While Doing Good, Conflicts of Interest Policies Under the Not-for-Profit Corporation Law, Guidance Document, Issue date: September 2018) at 43.).

[17] In her brief, the Attorney General argues that her guidance applies only to compensation that is "reasonable" thus attempting to rewrite her guidance for purposes of this case. The Guidance speaks for itself and the Court should ignore the self-serving gloss.

judgment in the action." *See Frymer v. Bell*, 99 A.D.2d 91, 95 (1st Dep't 1984) ("In an action for rescission, all parties to the agreement must be brought before the court."); *The Residential Bd. Of Managers of Walker Tower Condo. V. Gotham Tower LLC,* 2022 N.Y. Slip Op. 31918 (Sup. Ct. N.Y. County, June 17, 2022) (granting defendants' motions to dismiss under CPLR 3211(a)(1) based on plaintiff's failure to join a necessary party).

In this action, the Attorney General seeks rescission of agreements entered into by LaPierre and the Association. The Attorney General failed to address this argument; therefore this point should be deemed conceded and LaPierre's motion to dismiss should be granted under CPLR 3211(a)(10) and the case dismissed against LaPierre.

V.

CONCLUSION

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

Dated: New York, New York
August 15, 2022

Respectfully submitted,

/s/ P. Kent Correll

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was electronically served via the Court's electronic case filing system upon all counsel of record on this 15th day of August 2022.

By: */s/ P. Kent Correll*

CERTIFICATE OF COMPLIANCE

I, P. Kent Correll, an attorney duly admitted to practice law before the courts of the State of New York, certify that the Reply Memorandum of Law in Support of Defendant Wayne LaPierre's Motion to Dismiss (Motion Seq. No. 029) complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)), as modified by Court Order dated August 11, 2022, enlarging the word limit to 7,000, because the memorandum of law contains 6,933 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this reply memorandum of law.

Dated: New York, New York
August 15, 2022

/s/ P. Kent Correll
P. Kent Correll, Esq.