

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, WAYNE LAPIERRE, WILSON
PHILLIPS, JOHN FRAZER, and JOSHUA
POWELL,

Defendants.

Index No. 451625/2020
Hon. Joel M. Cohen

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT WILSON H. PHILLIPS'S
MOTION FOR SUMMARY JUDGMENT**

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Defendant Wilson H. Phillips (“Mr. Phillips”) respectfully submits this memorandum of law in support of his motion for partial summary judgment.

I. Preliminary Statement

The [Second Amended Verified Complaint](#) (“Complaint”) asserts three causes of action against Mr. Phillips. First, the Fourth Cause of Action alleges that Mr. Phillips breached his fiduciary duty to the National Rifle Association (“NRA”) under N-PCL §§ 717 and 720. Second, the Eighth Cause of Action alleges that Mr. Phillips failed to properly administer the charitable assets of the NRA under EPTL § 8-1.4. Third, the Twelfth Cause of Action alleges that Mr. Phillips engaged in a wrongful related-party transaction under N-PCL §§ 112(a)(10), 715(f), and EPTL § 8-1.9(c)(4).

The [Complaint](#) itself does not identify the specific conduct that forms the basis of the breach of fiduciary duty claim in the Fourth Cause of Action or the failure to administer claim in the Eighth Cause of Action. However, Plaintiff’s Responses and Objections to Phillips’s First Set of Interrogatories identify two specific transactions as among the bases for these claims: (i) an agreement that Mr. Phillips entered into with the NRA for providing post-retirement consulting services to the NRA (the “Consulting Agreement”) and (ii) a contract that the NRA entered into for software development with HomeTelos, L.P. (“HomeTelos”), an entity whose principal was a former girlfriend of Mr. Phillips (the “HomeTelos Contract”). (See Loegering Affirmation (“Loegering Aff.”) Ex. K, Plaintiff’s Responses and Objections to Defendant Phillips’s First Set of Interrogatories). The Twelfth Cause of Action for Wrongful Related-Party Transactions is expressly described in the [Complaint](#) as based on only the Consulting Agreement. In particular, Plaintiff claims the Consulting Agreement is a wrongful related-party transaction.

As explained below, neither the Consulting Agreement nor the HomeTelos Contract can

form the basis of a claim against Mr. Phillips. To begin with, the cause of action for a wrongful related-party transaction fails because the Consulting Agreement (which is the only transaction at issue on this claim) is not a “related-party transaction” as a matter of law. Rather, the Consulting Agreement is effectively a post-retirement employment agreement, and, as this Court has recognized, contracts between a not-for-profit and its officers or directors related to compensation for their services are not related-party transactions under the statute. Nor is there any basis for the claims that Mr. Phillips breached a fiduciary duty to the NRA or failed to properly administer its assets by entering into the Consulting Agreement or by executing the HomeTelos Contract. First, as to the Consulting Agreement, the undisputed evidence establishes that Mr. Phillips did not act on behalf of the NRA in entering into it. Rather, NRA President Pete Brownell executed the Consulting Agreement on the NRA’s behalf and, in this context, Mr. Phillips was an arm’s-length counterparty.

Second, as to the HomeTelos Contract, the undisputed evidence demonstrates that the NRA in fact needed, and benefited from, the software development services provided. Further, the mere fact that a principal of HomeTelos had a romantic relationship with Mr. Phillips years earlier does not render Mr. Phillips’s execution of the HomeTelos Contract improper. In that regard, the EPTL contains a comprehensive statutory scheme that defines related-party transactions, and transactions with former romantic partners are not included within it. (*See* EPTL §§ 8-1.9(a)(6); 8-1.9(a)(8)). Finally, although Mr. Phillips executed the HomeTelos Contract on behalf of the NRA, he did so only after the transaction was reviewed by the NRA’s Office of General Counsel and approved by each of NRA President James W. Porter, Executive Vice-President Wayne LaPierre, and First Vice President Allan D. Cors. (*See* Loegering Aff. Ex. F, Phillips Dep. Ex. 20).

Given these undisputed facts, there is no basis for a claim that Mr. Phillips breached a

fiduciary duty to the NRA or failed to properly administer the NRA's charitable assets based on his conduct with respect to either the Consulting Agreement or the HomeTelos Agreement. Accordingly, Mr. Phillips is entitled to partial summary judgment as to so much of the Fourth and Eighth Causes of Action as is based on that conduct. Similarly, Mr. Phillips is entitled to summary judgment on the Twelfth Cause of Action because the Consulting Agreement is not a related-party transaction as a matter of law.

II. Undisputed Facts

A. Mr. Phillips's Independent Consulting Agreement

Mr. Phillips served as the Treasurer and Chief Financial Officer of the NRA from 1993 to 2018. (*See* Loegering Aff. Ex. C, Phillips Dep. 18:8-11). Mr. Phillips retired from the NRA in the fall of 2018. (*Id.* at 18:12-21). Before his retirement, Mr. Phillips entered into the Consulting Agreement dated December 31, 2018 with the NRA. (*See* Loegering Aff. Ex. D, Phillips Dep. Ex. 3; *see also* Loegering Aff. Ex. C, Phillips Dep. 78:4-12 [testimony reflecting the agreement was entered into in May 2018 with an effective date in December 2018]). The Consulting Agreement required Mr. Phillips to perform post-retirement services for the NRA for a period of four years in exchange for a fee of \$30,000 per month and reimbursement of certain expenses related to those services. (*See* Loegering Aff. Ex. D, Phillips Dep. Ex. 3). The Consulting Agreement defined the post-employment services that Mr. Phillips was to provide as follows:

(i) Consultant shall provide advisory services and the benefit of his expertise in all appropriate areas including, but not limited to, areas related to his prior duties as CFO and Treasurer of the Organization; (ii) Consultant will coordinate activities with NRA's Executive Vice President, Treasurer and CFO and Executive Director, Office of Advancement to build and maintain relationships with major gifts donors, identify and cultivate relationships with fundraising partners and identify prospective high net worth individuals to solicit for major gifts. Consultant will communicate periodically with NRA employees, officers, board members and others as deemed necessary in the performance of stated services. (*See* Loegering Aff. Ex. D, Phillips Dep. Ex. 3 at 1).

Steven Hart, counsel to the NRA's Board of Directors, presented the Consulting Agreement to NRA President Pete Brownell for his signature. (*See* Loegering Aff. Ex. H, Brownell Dep. 200:17–201:17; 202:16-24). Both Mr. Brownell and NRA Vice-President Carolyn D. Meadows signed the Consulting Agreement on behalf of the NRA. (*See* Loegering Aff. Ex. D, Phillips Dep. Ex. 3; Loegering Aff. Ex. C, Phillips Dep. 77:8-25–78:1-3). Mr. Phillips's personal attorney, Mr. Dycio, negotiated the Consulting Agreement on behalf of Mr. Phillips (*See* Loegering Aff. Ex. C, Phillips Dep. 71:6-21; 81:21-24), and Mr. Phillips countersigned the Consulting Agreement on his own behalf. (*See* Loegering Aff. Ex. D, Phillips Dep. Ex. 3).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(*See* Loegering Aff. Ex. E, Phillips Dep. Ex. 5 at 3). Consistent with the terms of the Consulting Agreement, the NRA paid Mr. Phillips a monthly fee and reimbursement of office rental expenses for approximately 5 months before unilaterally ceasing to comply with its payment obligations. (*See* Loegering Aff. Ex. E, Phillips Dep. Ex. 5; *see also* Loegering Aff. Ex. C, Phillips Dep. 85:25–86:1-6; 87:20-25–88:1-13; 93:16-25–94:1-7). The uncontroverted evidence in the record indicates that Mr. Phillips performed services as requested by the NRA under the Consulting Agreement (*see* Loegering Aff. Ex. C, Phillips Dep. 83:4 –85:24), and there is no evidence that Mr. Phillips ever refused a request to perform services under the Consulting Agreement or otherwise breached it.

B. The HomeTelos Contract

In September 2014, the NRA contracted with HomeTelos for software development related to a website to support the NRA's Outdoors Outfitters programs. (*See* Loegering Aff. Ex. F, Phillips Dep. Ex. 20; *see also* Loegering Aff. Ex. G, Phillips Oct. Dep. 50:19-25– 52:17). Mr.

Phillips had many years earlier been in a romantic relationship with the principal of HomeTelos from approximately 2005 to 2010, and afterward maintained a friendship with her. (*See* Loegering Aff. Ex. C, Phillips Dep. 108:3-23).

Mr. Phillips introduced NRA staff members, including NRA Managing Director of Information Services Tony Hayes, to Home Telos. (*See* Loegering Aff. Ex. G, Phillips Oct. Dep.50:4-11). Mr. Phillips and Mr. Hayes then negotiated the terms of the HomeTelos Contract and prepared the Business Case Analysis that was submitted to and approved by multiple NRA executives and officers. (*See* Loegering Aff. Ex. F, Phillips Dep. Ex. 20; *see also* Loegering Aff. Ex. C, Phillips Dep. 230:2-6).

[REDACTED]

[REDACTED]

[REDACTED] (*See* Loegering Aff. Ex. J, Cotton Dep. Ex. 20 at 247; *see also* Loegering Aff. Ex. I, Cotton Dep. 362:17–364:3; 387:24–388:16). Michael Blaz from the NRA’s Office of General Counsel reviewed the Business Case Analysis and proposed contract, and the NRA’s Executive Vice President, President and First Vice President all approved the HomeTelos Contract, as well, before Mr. Phillips executed it on behalf of the NRA. (*See* Loegering Aff. Ex. F, Phillips Dep. Ex. 20; *see also* Loegering Aff. Ex. C, Phillips Dep. 231:5-16).

[REDACTED]

(*See* Loegering Aff. Ex. J, Cotton Dep. Ex. 20 at 247 [REDACTED])

[REDACTED]

III. Argument

A. Summary Judgment Standard

The Court should grant a motion for summary judgment under CPLR § 3212 when the

moving party, upon the papers and proof submitted, establishes a prima facie case, and the opposing party fails to set forth evidentiary facts to show that a triable issue of material fact exists. (*See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986) (citations omitted)).

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 [1985]) Once the moving party has established its entitlement to summary judgment, the opposing party must produce admissible evidence of a factual issue requiring a trial of the action. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]) “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to defeat summary judgment. (*Id.*).

“[A] defendant moving for summary judgment dismissing one of the plaintiff’s causes of action may generally sustain his or her prima facie burden ‘by negating a single essential element’ of that cause of action.” (*Poon v. Nisanov*, 162 AD3d 804, 806 [2d Dept. 2018]) (relying on *Nunez v. Chase Manhattan Bank*, 155 A.D.3d 641, 643 [2d Dept. 2017])).

B. Mr. Phillips Is Entitled to Summary Judgment on the Twelfth Cause of Action for Wrongful Related-Party Transactions.

Mr. Phillips’s Consulting Agreement cannot be the basis of a claim under N-PCL § 715(f) and EPTL § 8-1.9(c) because a contract that an officer enters into with a not-for-profit corporation for compensation for services is not a related-party transaction as a matter of law. As this Court has recognized, and as the Attorney General’s own published guidance reflects, transactions related to the compensation of an officer or director are not related-party transactions. (*See People v Nat’l Rifle Ass’n of Am., Inc.*, 74 Misc. 3d 998, 1035 [N.Y. Sup Ct. 2022]) (quoting Office of the New York State Attorney General Charities Bureau, Charities Symposium: Doing Well While Doing Good, Conflicts of Interest Policies under the Not-For-Profit Corporation Law at 7 [Sept.

2018] [“Transactions related to compensation of employees, officers or directors . . . are not considered related party transactions”]).¹

Indeed, a contrary statutory interpretation would be nonsensical, as it would render any employment agreement between a not-for-profit corporation and one of its officers presumptively unlawful. Here, Mr. Phillips did not enter into a contract with himself on behalf of the NRA. Rather, for purposes of the Consulting Agreement, Mr. Phillips was merely a counterparty to the NRA. Mr. Phillips executed the Consulting Agreement on his own behalf and NRA President Pete Brownell executed it on behalf of the NRA, after being presented with the Consulting Agreement by the Board’s attorney, Steven Hart. (*See* Loegering Aff. Ex. H, Brownell Dep. 200:17–208:9).

On these undisputed facts, the Consulting Agreement is not a related-party transaction as a matter of law, and Mr. Phillips is therefore entitled to summary judgment on Plaintiff’s Twelfth Cause of Action for Wrongful Related-Party Transactions under N-PCL § 112(a)(10), N-PCL § 715(f), and EPTL § 8-1.9(c)(4).

C. Mr. Phillips is Entitled to Partial Summary Judgment on the Fourth and Eighth Causes of Action.

1. The Consulting Agreement

As established above in Part III.B, the Consulting Agreement is not a related-party transaction and, thus, there was nothing inherently wrongful about Mr. Phillips’s entering into the Consulting Agreement while an officer of the NRA. Nor is there any other basis for a claim that Mr. Phillips either breached a fiduciary duty to the NRA or failed to administer the NRA’s

¹ Mr. Phillips recognizes that the Court sustained Plaintiff’s Cause of Action against Mr. LaPierre for unlawful related-party transactions, including Mr. LaPierre’s post-employment contract. *See People v Nat’l Rifle Ass’n of Am., Inc.*, 74 Misc 3d at 1027. However, in doing so, the Court addressed different arguments than Mr. Phillips is advancing here. In particular, the Court rejected Mr. LaPierre’s arguments that the transactions were protected by the business judgment rule and that the Court of Appeals’s decision in *People v. Grasso*, 11 N.Y3d 64 (2008), precluded the relief that Plaintiff was seeking. *Id.*

charitable assets properly by entering into that contract. That is so, first and foremost, because Mr. Phillips did not enter into the Consulting Agreement on behalf of the NRA; rather, it was NRA President Pete Brownell who acted on behalf of the NRA in entering into the Consulting Agreement. Mr. Phillips was the counterparty, acting only on his own behalf. Thus, Mr. Phillips neither owed any fiduciary duty to the NRA at all in connection with negotiating or entering into the Consulting Agreement, nor was he in any sense entrusted with the administration of the NRA's assets in connection with either the contractual negotiation or the execution of that agreement. Indeed, here, too, a contrary rule—one that would, for example, impose fiduciary duties to the employer on an employee in negotiating the employee's own compensation—would be nonsensical. *See (Sama v Mullaney (In re Wonderwork, Inc.), 611 BR 169, 202 [Bankr. S.D.N.Y. 2020])* [“An officer does not breach his fiduciary duty by asking for a raise or bonus. If that were the law, most if not all corporate officers would be in breach.”)].

Under these circumstances, Mr. Phillips's conduct with respect to the Consulting Agreement cannot serve as a basis for Plaintiff's breach of fiduciary duty claim or its claim for violation of EPTL § 8-1.4. Accordingly, Mr. Phillips is entitled to partial summary judgment on so much of the Fourth and Eighth Causes of Action as is based on the Consulting Agreement.

2. The HomeTelos Contract

The HomeTelos Contract does not constitute a “related-party” transaction because the principal of HomeTelos was not a related-party to Mr. Phillips under the applicable statutory definition. In that regard, Section 8-1.9(a)(6) of the Estates, Powers and Trusts Law defines a “related party” as “(i) any trustee or key person of the trust or any affiliate of the trust; (ii) any relative of any individual described in clause (i) of this subparagraph. . . .” (EPTL § 8-1.9(a)(6)). Section 8-1.9(a)(5) then defines “Relative” of an individual as “(i) his or her spouse or domestic partner as defined in section twenty-nine hundred ninety-four-a of the public health law; (ii) his or

her ancestors, brothers and sisters (whether whole or half blood), children (whether natural or adopted), grandchildren, great-grandchildren; or (iii) the spouse or domestic partner of his or her brothers, sisters, children, grandchildren, and great-grandchildren.” (EPTL § 8-1.9(a)(5)).

Mr. Phillips’s uncontroverted testimony establishes that his romantic relationship with the HomeTelos principal ended approximately four years before the HomeTelos Contract was executed and, at the time of the transaction, that relationship was merely a friendship. (*See* Loegering Aff. Ex. C, Phillips Dep. 108:3-23). Because the statutory definition of “relative” does not include either current platonic friends or former romantic ones, the HomeTelos Contract cannot be actionable as a wrongful related-party transaction.

Nor is there any other basis for a claim that Mr. Phillips breached a fiduciary duty to the NRA or failed to properly administer its charitable assets by executing the HomeTelos Contract.

To the contrary, the uncontroverted evidence in the record establishes both that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*See* Loegering Aff. Ex. J, Cotton Dep. Ex. 20 at 247). Finally, there can be no dispute that Mr. Phillips was appropriately authorized when he executed the HomeTelos Contract, as it was first reviewed by the NRA’s Office of General Counsel, supported by a Business Case Analysis, and approved by each of the NRA’s Executive Vice-President, President and First Vice President. (*See* Loegering Aff. Ex. F, Phillips Dep. Ex. 20).

Based on these undisputed facts, Mr. Phillips’s conduct with respect to the HomeTelos Contract cannot serve as a basis for Plaintiff’s breach of fiduciary duty claim or its claim for violation of EPTL § 8-1.4. Accordingly, Mr. Phillips is entitled to partial summary judgment on

so much of the Fourth and Eighth Causes of Action as is based on that contract, as well.

IV. Conclusion

For all the foregoing reasons, Mr. Phillips is entitled to summary judgment on Plaintiff's Twelfth Cause of Action for Wrongful Related-Party Transactions and to partial summary judgment on Plaintiff's Fourth Cause of Action for Breach of Fiduciary Duty to the NRA and Eighth Cause of Action for Breach of EPTL § 8-1.4 to the extent that those Causes of Action are based on Mr. Phillips's conduct with respect to the Consulting Agreement and the HomeTelos Contract.

Dated: February 10, 2023
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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. I am an attorney at the law firm of Winston & Strawn LLP, I am admitted to practice in the State of Texas and am admitted *pro hac vice* in this action and have appeared on behalf of Defendant Wilson Phillips in this action.

2. This Memorandum of Law in Support of Defendant Wilson H. Phillips Motion for Partial Summary Judgment was prepared in the processing system Microsoft Word, with Times New Roman typeface, 12-point font.

3. Pursuant to the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70(g)), I certify that this memorandum of law complies with the word count limit set out in Rule 17, as it contains 3,134 (excluding the parts of the brief exempted by Rule 17).

Dated: February 10, 2023
Dallas, Texas

By: /s/ Rebecca Loegering
Rebecca Loegering