

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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA  
JAMES, ATTORNEY GENERAL OF THE STATE OF  
NEW YORK,

Plaintiff,

v.

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

Defendants.

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

Motion Seq. No.: \_\_\_\_\_

**DEFENDANT JOSHUA POWELL'S MEMORANDUM OF LAW  
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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Defendant Joshua Powell (“Powell”) respectfully submits this Memorandum of Law in support of his Motion for Summary Judgment.

### **PRELIMINARY STATEMENT**

Powell does not belong in this suit. Powell was at the NRA just four years—2016 to 2020. As discovery has shown, Powell simply was not responsible for the decisions ascribed to him in the complaint. He did not set his own salary, his vendor recommendations were vetted and approved by an independent committee, and he tried to reimburse the NRA for \$40,760.20 of the \$54,904.45 expenses that he allegedly mischarged. These undisputed facts entitle Powell to summary judgment for everything except \$14,144.25 of purportedly improper expenses.

The New York Attorney General’s Office (“NYAG”) sweeps Powell in with other defendants, but its specific allegations against Powell are scant. The NYAG alleges that Powell violated his fiduciary duty to the NRA and the public by (i) receiving an unduly generous compensation package and (ii) overcharging personal expenses, and engaging in improper related party transactions by (iii) causing the NRA to hire companies that employed his family members. None of these theories have merit.

The NYAG’s breach of fiduciary duty claims (its Fifth and its Ninth Causes of Action) fail because Powell did not set his own compensation package, and his expenses were reviewed by Lisa Supernaugh and Craig Spray. Moreover, there is nothing in the record to suggest that his salary was improper and Powell sent the NRA a check for all but \$14,144.25 of the allegedly improper expenses.

The NYAG’s related-party transaction claim (its Eleventh Cause of Action) fails for similar reasons. While it is true that Powell recommended engaging companies employing his wife and father, the relationships were fully disclosed, and the engagements were reviewed and approved

by an independent Audit Committee. In other words, Powell did nothing wrong with respect to these transactions. Accordingly, there are no triable questions of fact with respect to these claims, and Powell is entitled to summary judgment on all but \$14,144.25 of alleged expenses.

## FACTS

### I. Powell's Tenure At The NRA

Powell was employed by the NRA from June 2016 to January 2020. Chin Aff, Ex. 5. Powell held the title of Chief of Staff from June 2016 to January 2020; Executive Director of General Operations from January 2017 to December 2018; and Senior Strategist from December 2018 to January 2020. SAC ¶¶ 21, 141, 253; Chin Aff. Exs. 34-37 (Wayne LaPierre, Memo, Staff Announcements (Dec. 3, 2018) (NYAG-00288715); 2019 Form 990 (NRA-NYAGCOMMDIV-01531560); 2018 Form 990 (NRA-NYAGCOMMDIV-01483045); 2017 Form 990 (NRA-NYAGCOMMDIV-01473109)). Powell was put on administrative leave in October 2019 and was terminated in January 30, 2020. SAC ¶¶ 21, 553; Employment Termination Letter (NYAG-00071587), dated January 30, 2020 Chin Aff. Ex. 38.

Throughout his tenure at the NRA, Powell reported to Wayne LaPierre.

#### A. Powell's Compensation

Throughout his tenure at the NRA, Powell did not determine his own compensation. Instead, “[p]ursuant to the NRA bylaws, LaPierre was authorized to determine and approve Powell’s compensation”—a fact to which the NYAG dedicates an entire section in the Second Amended Complaint (“SAC”). See SAC III(C); *id.* at ¶ 256. On July 13, 2016, Wilson Phillips (then-NRA Treasurer and CFO) contacted Linda Crouch (Executive Director of Human Resources) to increase Powell’s base pay to \$500,000 from \$250,000 effective as of his start date. See Chin Aff. at ¶ 12, E-mail from Wilson Phillips to Linda Crouch (July 13, 2016). This was

authorized by Wayne LaPierre. *See id.*; Chin Aff. at ¶ 8 NRA Personnel Authorization Change Form, dated July 13, 2016.

In 2017, Powell took on an additional position—Executive Director of General Operations—and received salary adjustments. SAC ¶¶ 141, 258. The first salary adjustment in 2017 occurred on June 29, 2017, when Phillips contacted Crouch to increase Powell’s salary by \$150,000 from \$500,000 to \$650,000. *See* Chin Aff. at ¶ 13 [E-mail from Wilson Phillips to Linda Crouch, dated June 29, 2017]. This request was also authorized by Wayne LaPierre. *See id.*; Chin Aff. at ¶ 9 [NRA Personnel Authorization Change Form, dated June 29, 2017]. On November 8, 2017, Phillips contacted Crouch to adjust Powell’s compensation and provide a \$50,000 bonus. *See* Chin Aff. at ¶ 14 [E-mail from Wilson Phillips to Linda Crouch, dated Nov. 8, 2017]. This request was also authorized by Wayne LaPierre. *See id.*; Chin Aff. at ¶ 10 [NRA Personnel Authorization Change Form, dated Nov. 8, 2017].

Powell’s final salary adjustment occurred on March 20, 2018, when Phillips contacted Crouch requesting that Powell’s annual pay be increased from \$650,000 to \$800,000, effective January 1, 2018. *See* Chin Aff. at ¶ 15 [E-mail from Wilson Phillips to Linda Crouch, dated Mar. 20, 2018]. This request was also authorized by Wayne LaPierre. *See id.*; Chin Aff. at ¶ 11 [NRA Personnel Authorization Change Form, dated Mar. 20, 2018].

The NRA never disciplined or sought reimbursement from Powell for his salary. *See* Deposition of Wayne LaPierre, June 28, 2022, pg. 470:7-19 Chin Aff. Ex. 21. In fact, the NRA hired an expert consulting firm to evaluate compensation, which found no evidence that Powell’s salary was not commensurate with his experience. *See* Expert Report of Michael Dennis Graham, Consultant Grahall, LLC, September 16, 2022, p. 43 Chin Aff. Ex. 14.

#### **B. Powell’s Expenses**



Throughout his time at the NRA, Powell's expenses were reviewed, including by the Chief Financial Officer ("CFO") and the Audit Committee. *See, e.g.*, SAC ¶¶ 302, 342, 390; Deposition of Lisa Supernaugh, May 5, 2022, pgs. 303:12-304:02 Chin Aff. Ex. 19.

Powell resided in Michigan when he began his employment with the NRA. SAC ¶ 21; Executive Employment Agreement at 2 Chin Aff. Ex. 5. Powell's employment agreement with the NRA included several benefits in addition to his salary, such as a housing allowance. SAC ¶ 257; Deposition of Lisa Supernaugh, May 5, 2022 pg. 413:01-413:06 Chin Aff. Ex. 19 (testifying that "housing, normal reimbursement such as mileage, that sort of thing, his cell phone, relocation expenses" were covered by the NRA). Powell's expenses were also internally reviewed and documented prior to reimbursement. *See* SAC ¶ 265; Deposition of John Frazer, *In Re Nat'l Rifle Ass'n of Am. and Sea Girt LLC* (Bankr. N.D. Tex. March 24, 2021), pgs. 61:20-62:02 Chin Aff. Ex. 16 (testifying that the NRA demanded information about Powell's cell phone charges and ultimately did not conclude that the charges were improper); Deposition of Michael Erstling, June 16, 2022, pg. 166:13-166:17 Chin Aff. Ex. 20 ("Josh Powell purchasing a computer on his credit card has been resolved.").

In October 2019, the Treasurer of the NRA conducted an independent investigation of Powell's expenses. SAC ¶ 263. During this time, the Brewer firm was also conducting an investigation into allegations of improper reimbursements, which included reviewing Powell's expenses. SAC ¶ 263. After the detailed investigation, Powell tendered a check to the NRA for \$40,760.20 to settle the disputed expenses. SAC ¶ 265; Deposition of John Frazer, July 12, 2022, pgs. 423:13424:5 Chin Aff. Ex. 23; Deposition of Wayne LaPierre, March 22, 2021, pgs. 130:23-131:5 Chin Aff. Ex. 15; Deposition of Craig Spray, January 14, 2022 pg. 195:1-195:22 Chin Aff.

Ex. 18. The NRA, however, rejected Powell's check and claimed that Powell owed \$54,904.45. SAC ¶¶ 265–66.

## II. **NRA's Engagement Of Companies That Employed Powell's Wife And Father**

Powell was not responsible for managing contracts with key NRA vendors or setting the terms of those contracts. SAC ¶¶ 320–21. The Audit Committee also conducted an independent review of the contracts and found that both were in the best interest of the NRA and its members. Deposition of John Frazer, July 12, 2022, pgs. 397:11–15, 408:11–409:1 Chin Aff. Ex. 23. Ex. 5, pgs. 247–49 (NYAG-00027017) Chin Aff. Ex. 24. Powell did not have oversight over the Audit Committee and he was never involved in the review and approval of the allegedly wrongful party transactions. SAC ¶¶ 279–80.

Powell's wife was employed as an independent contractor by an NRA vendor, McKenna & Associates. SAC ¶¶ 273–79. Powell's father was employed as a photographer for NRA events and contracted with NRA-vendor Ackerman McQueen. SAC ¶ 280. Both companies were engaged by the NRA pursuant to the above-described process.

### A. **McKenna & Associates**

On December 15, 2017, Powell's wife was hired as an independent contractor by McKenna. SAC ¶ 274. McKenna's relationship with the NRA predates Powell's employment, dating back to 2012. SAC ¶ 269. Powell disclosed his relationship with his wife to Phillips and LaPierre prior to her starting with McKenna in December 2017. *See* Deposition of Joshua Powell, June 9, 2022, pgs. 227–28; Deposition of Wilson Phillips, August 11, 2021, pg. 298:10-13 Chin Aff. Ex. 17; Deposition of Wayne LaPierre, June 28, 2022, pgs. 557:13–558:21 Chin Aff. Ex. 21; Deposition of Susan LaPierre, July 21, 2022, pgs. 264:23–265:25 Chin Aff. Ex. 22; Deposition of Sonya Rowling, July 14, 2022, pg. 411:5-18 Chin Aff. Ex. 25; Deposition of Lisa Supernaugh,

May 5, 2022, pg. 377:9-24 Chin Aff. Ex. 19. Powell also disclosed this relationship in his Financial Disclosure Questionnaire for the years 2017 and 2018. SAC ¶¶ 279–80; Chin Aff. Ex. 32 NRA Financial Disclosure Questionnaire of Joshua Powell, September 6, 2018 (NRA-NYAG-00022328). Powell’s Financial Disclosure Questionnaire for 2017 was made on September 6, 2018. *Id.* This disclosure was made a few months after his wife’s employment at McKenna began because Powell was unaware of the requirement to make a written disclosure. Deposition of Joshua Powell, June 9, 2022, pgs. 227–28. Once he learned about this requirement, he remedied this oversight. Deposition of Joshua Powell, June 9, 2022, pgs. 227–28; NRA Policy Manual, March 11, 2020, Officer and Board of Directors Disclosure of Financial Interest, January 1, 2007, pgs. 297-299 (NRA-NYAGCOMMDIV-00008897) Chin Aff. Ex. 27; Hines Report ¶ 469–70.

On or around September 8–9, 2018, the Audit Committee reviewed and ratified the NRA’s contract with McKenna, finding that it was fair, reasonable, and in the best interest of the NRA. Deposition of John Frazer, July 12, 2022, pgs. 397:11–15, 408:11–409:1 Chin Aff. Ex. 23. Ex. 5, pgs. 247–49 (NYAG-00027017) Chin Aff. Ex. 24.

### **B. Ackerman McQueen**

In 2017 and 2018, NRA-vendor Ackerman McQueen engaged Powell’s father, a professional photographer. SAC ¶ 280. Powell did not have oversight over Ackman McQueen’s budget. As alleged by the NYAG, LaPierre “was directly involved in managing the scope and the cost of Ackerman’s services,” and LaPierre, Phillips, and Ackerman’s co-founder Angus McQueen negotiated the budget. SAC ¶ 321. Independent Audit Committee personnel compared the prices and photographs of Powell’s father with that of similar event photography services and determined that the engagement with Powell’s father was “fair, reasonable, and in the best interest of the NRA.” Deposition of John Frazer, July 12, 2022, pgs. 409:21-410:12 Chin Aff. Ex. 23, Ex. 5, pgs.

248–49 (NYAG-00027017) Chin Aff. Ex. 24; Deposition of John Frazer, July 12, 2022, pg. 411:16–24 Chin Aff. Ex. 23 (testifying that he believed the Audit Committee conducted an adequate investigation in order to make the resolution); SAC ¶ 280.

### ARGUMENT

This Court should grant Powell summary judgment because the NYAG cannot show “the existence of a bona fide issue raised by evidentiary facts.” *Black v. Loomis*, 236 A.D.2d 338, 338 (1st Dept. 1997); *see also* CPLR 3212. The proponent of a summary judgment motion “need not specifically disprove every remotely possible state of facts on which [Plaintiff] might win the case.” *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 320 (2009). Rather, summary judgment merely requires the movant make an evidentiary showing “adequate to shift the burden to [Plaintiff] to produce evidentiary proof sufficient to establish the existence of material issues of fact.” *Id.* (citation and internal quotation marks omitted). “Mere conclusions, expressions of hope or unsubstantiated allegations or assertions” are not sufficient to satisfy Plaintiff’s burden. *Gilbert Frank Corp. v. Fed. Ins. Co.*, 70 N.Y.2d 966, 967 (1988).

#### I. POWELL DID NOT BREACH HIS FIDUCIARY DUTIES TO THE NRA OR THE PUBLIC

The NYAG asserts two claims against Powell for alleged breaches of his fiduciary duty to the NRA and the public. The Fifth Cause of Action, asserted pursuant §§ 717 and 720 of New York’s Not-For-Profit Corporation Law (“N-PCL”) and the Ninth Cause of Action, asserted pursuant to EPTL § 8-1.4(m). Both claims fail for a number of legal and factual reasons.

##### A. Powell Did Not Determine His Own Compensation

The NYAG asserts that Powell breached his fiduciary duty by receiving an unduly general compensation package. But it is well-established that an officer’s fiduciary duty extends only to “matters within [his] purview.” *In re Ampal-Am. Israel Corp.*, No. 12-13689 (SMB), 2020 WL

5075992, at \*6 (Bankr. S.D.N.Y. Aug. 25, 2020). The record is clear that Powell had no authority to determine his own salary, nor did he have any role in approving any of his salary adjustments or expenses. Moreover, his salary was commensurate with his experience and the services he provided to the NRA.

### 1. Powell Did Not Set His Own Salary

As alleged in the SAC, LaPierre and Phillips determined Powell's compensation. *See* SAC ¶ 256 ("Powell's salary was set at the discretion of LaPierre."), ¶ 256 (alleging that Phillips and LaPierre increased Powell's salary in 2016), ¶ 257 (alleging that Phillips approved payments for Powell's rent, which was covered under his employment contract), ¶¶ 258–59 (alleging that Phillips and LaPierre increased Powell's salary in both 2017 and 2018).

The SAC does not allege that Powell played any role, proper or improper, in determining his salary while employed at the NRA. *See* SAC ¶ 256 (alleging that Powell signed his employment contract, but not that he played a role in setting the contract's terms). LaPierre and Phillip's control over Powell's salary was confirmed during discovery. *See* Deposition of Wayne LaPierre, June 28, 2022, pgs. 464:16–468:7, 555:17–22 Chin Aff. Ex. 21 (LaPierre stating that he and Phillips authorized Powell's salary and each salary increase).

This is dispositive. An officer's fiduciary duty extends only to matters an official has "discretionary authority over[] and the power to prevent." *In re Ampal-Am. Israel Corp.*, No. 12-13689 (SMB), 2020 WL 5075992, at \*6–7. Therefore, "[a] director who plays no role in the process of deciding whether to approve a challenged transaction cannot be held liable on a claim that the board's decision to approve that transaction was wrongful." *KDW Restructuring & Liquidation Serv's LLC v. Greenfield*, 874 F. Supp. 2d 213, 221 (S.D.N.Y. 2012) (quoting *In re Bridgeport Holdings, Inc.*, 388 B.R. 548, 566 (Bankr. D. Del. 2008))

Here, similarly, Powell simply cannot be held responsible for something he did not do. LaPierre and Phillips had the authority to and determined Powell's compensation. Powell had no role in that decision and cannot be held liable for it.

**2. Powell's Salary Was Commensurate with His Experience and the Services He Provided to the NRA**

Not only did Powell have no role in setting his salary—making it outside the scope of his fiduciary duties—the factual record also demonstrates that Powell's compensation was at all times commensurate with his experience and role at the NRA.

Allegations in the SAC and the evidentiary record clearly indicate that Powell's compensation and salary increases were commensurate with his experience and contributions to the NRA. Peter Brownell recommended Powell, an experienced businessman, to Wayne LaPierre, who believed Powell to be a "good addition" to the NRA. *Lippman v. Shaffer*, 15 Misc. 3d 705, 711 (Sup. Ct. 2006) (barring judicial inquiry into directors' actions "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes") (citation omitted); Deposition of Wayne LaPierre, June 28, 2022, pgs. 533:13–534:10 Chin Aff. Ex. 21 (stating that Powell "had some very good ideas"). When he started working at the NRA in 2016, Powell's salary was \$250,000—\$100,000 less than that of his predecessor. SAC ¶ 256. As Powell's responsibilities and position at the NRA increased over time, so did his salary. Powell's salary was first increased in 2016 to reflect LaPierre's expanded vision of his role. *See Marx v. Akers*, 88 N.Y.2d 189, 204 (1996) ("[B]are allegations that the compensation set lacked a relationship to duties performed or to the cost of living are insufficient as a matter of law to state a cause of action."); *Walsh v. Wwebnet, Inc.*, 116 A.D.3d 845, 847 (2014); *Lippman*, 15 Misc. 3d at 718 (precluding challenge to compensation in the absence of bad faith, which requires more than "a mere difference of opinion as to whether an officer's salary is unnecessarily high");

Deposition of Wayne LaPierre, June 28, 2022, pg. 535:23–24 (“I wanted a fresh look at the business operations of the NRA.”). In particular, Powell developed the idea for the “Carry Guard Program,” which would facilitate training and insurance coverage for NRA members, and was projected to be highly profitable for the NRA. *Id.* at 535:24–536:3; *see also id.* at 545:16–546:7 (stating that Powell received his first raise in 2016 “in relation to the [] work he was doing with the Carry Guard Program,” which “was mainly Josh’s idea . . . and . . . from a business standpoint, it was a tremendous upside”).

Powell received his second raise in 2017 when he took on additional responsibilities as the Executive Director of General Operations. SAC ¶ 141; *see also* Deposition of Wayne LaPierre, June 28, 2022, pgs. 550:22–551:7 Chin Aff. Ex. 21 (stating that Powell’s second raise was also tied to Powell’s development of the Carry Guard Program and that “Josh was doing a very good job with the business projects that he was working on”). In 2018, Powell received another raise and, later that year, transitioned to the role of “Senior Strategist”—while maintaining his Chief of Staff position. SAC ¶¶ 253, 259. Each of these raises was authorized by other NRA executives, namely Wayne LaPierre and Wilson Phillips, and submitted to the NRA’s Human Resources department in the proper course. *See* Deposition of Wayne LaPierre, June 28, 2022, pgs. 464:16–468:7, 468:16–470:18, 545:16–546:7, 550:22–551:7, 555:17–22 (LaPierre discussing the authorization of Powell’s pay raises), 543:20–554:12 (LaPierre confirming that each pay raise was reported to Linda Crouch, NRA Director of Human Resources); *see also* SAC ¶¶ 256–59 (alleging that LaPierre and Phillips authorized Powell’s salary and each pay increase). Further, the NRA hired an expert consulting firm that evaluated executive compensation within the organization and he did not find that Powell’s salary was excessive or out-of-step with his experience. Expert Report of Michael Dennis Graham, Consultant Grahall, LLC, at 43 (Sept. 16, 2022) Chin Aff. Ex. 14. Not

only was Powell's compensation commensurate with the services he provided to the NRA, there is no evidence in the record that Powell engaged in bad faith or self-dealing with respect to his salary.

**B. Powell Tried to Repay the NRA for any Personal Expenses**

The NYAG claims that Powell improperly charged \$54,904.45 in expenses. Even if that is true, the factual record demonstrates that Powell repaid—or attempted to repay—the NRA for any personal expenses that were not provided for in his employment agreement or related to NRA business.

As a threshold matter, the record shows that Powell's expenses were closely reviewed by Lisa Supernaugh and Craig Spray—who were responsible for ensuring that his expenses had a proper business purpose. *See* Deposition of Lisa Supernaugh, May 5, 2022, pgs. 303:12-304:02 Chin Aff. Ex. 19 (stating that she would review and compile documentation for Powell's expenses and, if there were any questions regarding any expense, Craig Spray would review and sign off prior to reimbursement). Moreover, Powell made a good faith effort to repay the NRA for any non-compliant expenses. Because Powell was in no way involved in the preparation of the Forms 990, he cannot be liable for any alleged reporting errors. *See Rut v. Young Adult Institute*, 74 A.D.3d 776, 777 (2d Dept. 2010) (“The plaintiff did not allege any misconduct by the defendants that caused her to sustain damages. Therefore, she did not state a cause of action sounding in breach of fiduciary duty.”); *In re Ampal-Am. Israel Corp.*, No. 12-13689 (SMB), 2020 WL 5075992, at \*6–7.

Further, while employed by the NRA, it was Powell's practice to write a check to the NRA to account for any personal expenses that were accidentally paid for using his NRA credit card. Deposition of Lisa Supernaugh, May 5, 2022, pgs. 306:5–307:15, 401:24-402:4, 418:22–419:11 Chin Aff. Ex. 19 (stating that Powell would reimburse the NRA when he inadvertently charged



personal expenses to his NRA credit card). In the same spirit, Powell tendered a \$40,760.20 check to the NRA on July 9, 2020 to account for disputed expenses that came to his attention after the NRA and Brewer law firm each independently reviewed his expenses. SAC ¶ 265; Deposition of John Frazer, July 12, 2022, pgs. 423:13–424:5 Chin Aff. Ex. 23; Deposition of Wayne LaPierre, March 22, 2021, pgs. 130:23–131:5 Chin Aff. Ex. 15; Deposition of Craig Spray, January 14, 2022, pg. 195:1–195:22 Chin Aff. Ex. 18. Thus, in accordance with his duties under N-PCL § 717, Powell has demonstrated a good faith effort correct any personal expenses inadvertently paid for by the NRA both during and after his employment with the organization.

Accordingly, the NYAG cannot show that Powell breached his fiduciary duties to the NRA with respect to a penny more than \$14,144.25 of purportedly improper expenses.

**C. Powell Did Not Have Oversight Over the NRA’s Form 990**

The NYAG asserts that “the NRA made misleading representations” in its Form 990. *See, e.g.*, SAC ¶¶ 458, 567. Powell was not responsible for preparing the NRA’s annual Forms 990 nor the NRA’s failure to properly report his income to the NYAG. The SAC alleges that Powell was responsible for the NRA’s alleged failure to accurately report his income in its annual Forms 990, SAC ¶ 453; however, it does not allege that Powell had any involvement in the NRA’s preparation of Forms 990. This is also dispositive. *See In re Ampal-Am. Israel Corp.*, No. 12-13689 (SMB), 2020 WL 5075992, at \*6–7; *KDW Restructuring & Liquidation Serv’s LLC*, 874 F. Supp. 2d at 221.

**D. The Claims Are Also Legally Deficient**

**1. Plaintiff’s Breach of EPTL § 8-1.4 is Barred Because Plaintiff Fails to Allege that Powell was a Trustee**

NYAG’s Ninth Cause of Action also fails because it wrongly deems Powell a “trustee” under EPTL § 8.14. He is not. EPTL § 8-1.4 empowers the NYAG to supervise trustees for

charitable purposes. Section 8-1.4(a) defines “trustee” 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 . . . .”

The NYAG asserts that Powell “in his capacity as an officer and a de facto officer, was a trustee . . . because he was responsible for holding and administering property for charitable purposes.” SAC § 676. But the NYAG fails to identify any instrument confirming Powell’s status as a trustee. *See In re Fischer*, 308 B.R. 631, 649 (Bankr. E.D.N.Y. Apr. 7, 2004) (“Directors of a corporation, despite their fiduciary duties as ‘guardians of the corporation,’ are not trustees.”) (citation omitted). Nor does the NYAG charge Powell with “holding and administering property for charitable purposes” as required by the statute. *Compare* SAC ¶ 676 (alleging in a conclusory fashion that Powell “was responsible” for holding and administering property for charitable purposes) *with* SAC ¶ 665 (alleging LaPierre “held and administered” property) and SAC ¶ 672 (alleging Philips “held and administered” property). As explained in Sections I(A)–(C), Powell did not have or exercise the authority over the NRA that the NYAG ascribes to him throughout its complaint.

To be sure, Powell was a subordinate to LaPierre, Frazer, and Phillips; he did not wield the same influence. This distinguishes Powell from these defendants for purposes of EPTL § 8-1.4. *See People by James v. Nat’l Rifle Ass’n of Am., Inc.*, 74 Misc. 3d 998, 1025–26 (N.Y. Sup. Ct. 2022) (citing Frazer’s “incompetent supervision of the NRA’s compliance with New York law, . . . failure to ensure the accuracy of the NRA’s annual filings” and “misconduct regarding supervision” in its denial of Frazer’s motion to dismiss). Unlike LaPierre, Frazer, and Phillips, Powell was not responsible for controlling or determining the NRA’s capital expenditures, budget, or complying with federal reporting requirements. *Id.*

Indeed, the SAC's scant allegations concerning Powell are a stark contrast to the "several hundred paragraphs of specific factual allegations . . . describ[ing] in meticulous detail, LaPierre's exploitation of the NRA for his financial benefit, his abuse of power, and his general disregard for corporate governance." *People by James*, 74 Misc. 3d at 1025–26 (citing ¶¶ 137–229, 311–41). Powell was not directing LaPierre's activities, he did not have oversight or responsibility for LaPierre's consulting budget, and he did not play a significant role in the day-to-day misconduct perpetuated by LaPierre. Rather, Powell was merely a subordinate who did not have oversight over or responsibility for the key areas of concern raised in the Amended Complaint.

For these reasons, holding that Powell is a "statutory trustee[]" under New York law" is insufficient. *See* CPLR § 3016(b). The NYAG does not allege that Powell was responsible the NRA's annual filings. Powell was not responsible for nor played any role in the preparation of the Annual Form 990. SAC ¶¶ 286–96 (alleging that Frazer was responsible for the NRA's compliance with New York law and the NRA's annual filings with the Attorney General). Nor was Powell responsible for managing contract with key NRA vendors or setting the terms of those contracts, including with Ackerman McQueen. *See People by James*, 74 Misc. 3d at 1025–26 (noting the SAC's allegations regarding Frazer's "alleged misconduct regarding *supervision* of the NRA's conflict-of-interest and related-party-transaction policies, his failure to appropriately handle related party transactions, and his failure to follow proper procedures regarding procurement . . ."). Powell also lacked authority and oversight with respect to LaPierre's expenses and consulting budget, known as the "EVP Consulting Budget." He did not monitor, review, or approve of expenses that LaPierre passed through NRA vendors and therefore is not liable for any breach of fiduciary duties with respect to that conduct. As such, there is no legal basis to hold Powell responsible under EPTL § 8-1.4 in any event.

## 2. The NYAG's Claims Are Time-Barred

Lastly, the NYAG's claims are mostly time-barred anyway. Under New York law, there is a three-year statute of limitations "to recover upon a liability, penalty or forfeiture created or imposed by statute". CPLR 214(2); *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 (2009) (applying three-year limitations period where plaintiff sought significant monetary damages and equitable relief was incidental) (citing CPLR § 214(4)).

The NYAG's breach of fiduciary duty claims under Article 7 of the N-PCL and of the EPTL (section II below) are subject to a three-year statute of limitations. *See Grika v. McGraw*, 55 Misc. 3d 1207(A), 2016 N.Y. Slip Op. 51878(U) (Sup. Ct. N.Y. County 2016), *aff'd sub nom. L.A. Grika on behalf of McGraw*, 161 A.D.3d 450 (2018) (breach of fiduciary duty and unjust enrichment claims seeking to claw back compensation to unfaithful employees held subject to three-year statute of limitations). On the breach of fiduciary duty claim, the NYAG seeks "restitution and/or damages, including the return of the salary he received while breaching his fiduciary duties . . . plus interest at the statutory rate of 9% . . . ." SAC ¶ 661. The three-year statute of limitations period is applicable to this request for relief. *See IDT Corp.*, 12 N.Y.3d at 139.

Powell's salary was set when he first joined the NRA in June 2016. SAC ¶ 256. Beginning in August 2016, as part of his employment agreement with the NRA, Powell was reimbursed for his housing expenses in Virginia. SAC ¶ 257. During his tenure, the NRA raised Powell's salary, with the final adjustment occurring in March 2018. SAC ¶¶ 256–59. Any claim the NYAG might have had would have accrued on those dates and is therefore time-barred. *See Spitzer v. Schussel*, 7 Misc. 3d 171, 176 (Sup. Ct. N.Y. County. 2005) ("A cause of action accrues 'when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court.'") (quoting *Aetna Life & Casualty Co. v. Nelson*, 67 N.Y.2d 169, 175 (1986)).

### III. POWELL'S "RELATED-PARTY TRANSACTIONS" WERE INDEPENDENTLY VETTED AND APPROVED

The NYAG's Eleventh Cause of Action asserts that Powell engaged in wrongful related-party transactions under N-PCL §§ 112(a)(1), 715(f) and EPTL § 8-1.9(c)(4). SAC ¶¶ 682–85. Section 715 requires that boards be informed of, and approve, "related party transactions." The NYAG seeks equitable and monetary damages "up to double the value of the amount" under N-PCL § 714(f) and EPTL § 8-1.9(c). Double damages are permitted under N-PCL § 715(f)(4) only where there is "willful and intentional conduct." None of this is the case here.

Here, Powell's engagement recommendations were vetted and approved by an independent Audit Committee—there were no violations Powell's part, let alone willful ones. This also requires summary judgment in Powell's favor.

#### A. The NRA's Contracts with Companies Employing Powell's Family Members Were Vetted And Disclosed

Under the N-PCL, a contract may be voided if a director's "interest in [the] contract" is not disclosed to the board, unless the contract is deemed substantively fair. N-PCL § 715(a)(1). The N-PCL requires disclosure, but does not make the director liable for the quality of board review. *See Freer v. Mayer*, 223 A.D.2d 667, 668 (2d Dept. 1996). However, when "good faith disclosure of the material facts as to the director's or officer's interest in the contract or transaction . . . is made to the directors . . . or known to the board or committee . . . authorizing such contract or transaction," the contract or transaction may not be avoided under section 715 (N-PCL 715[b])." *People ex rel. Spitzer v. Grasso*, 42 A.D.3d 126, 131–32 (2007), *aff'd*, 11 N.Y.3d 64 (2008).

Here, it is undisputed that Powell's relationships with his wife, Colleen Gallagher, and with his father, Jim Powell, were disclosed to the Audit Committee and Board. The NYAG cannot provide any credible evidence of any wrongdoing associated with the negotiation and execution

of the NRA's contracts with Jim Powell and Colleen Gallagher. The NYAG alleges that Powell "took affirmative steps to hide" his wife's employment such as instructing his wife not to attend meeting where Frazer would be in attendance. SAC ¶ 276. The record directly contradicts this and demonstrates that as early as January 25, 2018, Frazer was included on calls and e-mails with Powell and his wife. See calendar Invite for January 2018 Call (NYAG-00300402) Chin Aff. Ex. 28. Even Frazer admits that he attended a meeting at McKenna's offices regarding NRA business where she was present. Deposition of John Frazer, July 12, 2022, pg. 387:8–387:10 Chin Aff. Ex. 23.

After Powell's disclosure of his family members' employment, the Audit Committee reviewed these contracts and subsequently approved the transactions as "fair and reasonable," and "in the best interest of the NRA." Deposition of John Frazer, July 12, 2022, pgs. 397:11–15, 408:11–409:1 Chin Aff. Ex. 23. Ex. 5, pgs. 247-48 (NYAG-00027017) Chin Aff. Ex. 24; Deposition of John Frazer, July 12, 2022, pgs. 409:21-410:12 Chin Aff. Ex. 23 Ex. 5, pgs. 248-49 (NYAG-00027017) Chin Aff. Ex. 24; see also SAC ¶¶ 279–80; see also *Owen v. Hamilton*, 44 A.D.3d 452, 456–57 (1st Dept. 2007) (granting summary judgment for corporate board under business judgment rule, where board approved two directors' purchase of related business). Absent any allegation of discrimination, self-dealing or misconduct, disinterested members of the Audit Committee are presumed to have acted in good faith and in the exercise of honest judgment in the legitimate furtherance of corporate purposes. *Jones v. Surrey Cooperative Apartments, Inc.*, 263 A.D.2d 33 (1999).

**B. This Claim Is Also Untimely**

Furthermore, the NYAG's claims relating to Powell's wife and father are also untimely and should be dismissed. The NYAG seeks money damages on their claims for "wrongful related-party transactions" so the three-year statute of limitations period applies. On the Eleventh Cause

of Action, the NYAG seeks “an amount up to double the value of the amount of each benefit improperly owed by a transaction occurring after July 1, 2014 . . . .” SAC ¶ 685. The NYAG initiated the action on August 16, 2021, which is more than seven years after July 1, 2014. Furthermore, Powell’s wife was hired by McKenna on December 15, 2017. Thus, the action commenced in August 2021 is untimely as the alleged wrongful act occurred almost four years prior to the initiation of this lawsuit. *See Ingrami v. Rovner*, 45 A.D.3d 806, 808 (2007) (holding statute of limitations “begins to run upon the occurrence of the wrongful act giving rise to the duty of restitution”).

Similarly, Ackerman McQueen engaged Powell’s father for his photography services in January 2017, which was four years and seven months prior to the NYAG’s lawsuit. *See* NRA Financial Disclosure Questionnaire of Joshua Powell, September 6, 2018 (NRA-NYAG-00022328) Chin Aff. Ex. 32.

Therefore, any alleged wrongful party transaction is barred by New York’s three-year statute of limitations and should be dismissed.

**C. Double Damages Are Unavailable as There Was No Willful or Intentional Conduct**

The double damages sought by the NYAG are only available in the event of “willful and intentional conduct.” N-PCL § 715(f)(4). There are no facts to support this assertion with respect to Powell.

A “willful” act requires “voluntary intent to violate a known legal duty.” *United States v. Kupfer*, 792 F.3d 1226, 1228 (10th Cir. 2015); *see also Cheek v. United States*, 498 U.S. 192, 201 (1991); *People by Vacco v. Alamo Rent A Car. Inc.*, 174 Misc.2d 501, 504-06 n.2 ( Sup. Ct. N.Y. County 1997); *Mueller v. Elderwood Health Care at Oakwood*, 31 Misc.3d 1210(A), 2011 N.Y. Slip Op. 50555(U), \*16 (Sup. Ct. Erie County 2011) (“An act or omission is willfully done if done

voluntarily and intentionally and with the specific intent to do something the law forbids or with a specific intent to fail to do something the law requires to be done”).

Therefore, to hold Powell liable for double damages, the NYAG must demonstrate that Powell’s wife was engaged as a consultant and his father as a photographer despite Powell’s knowledge that it would violate the law. The NYAG does not meet its burden. Since Powell disclosed these relationships and had them vetted by the Audit Committee, double damages are unwarranted. *See* N-PCL § 715(f)(4); EPTL§ 8-1.9(c)(4)(D).

### CONCLUSION

For the reasons stated above, the Court should grant Powell’s motion for summary judgment.

Dated: Friday, February 10, 2023

By: /s/ Kristen W. Chin

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**CERTIFICATE PURSUANT TO RULE 17 OF THE COMMERCIAL DIVISION RULES**

This memorandum of law in support of motion for summary judgment complies with the type-volume limitation of Rule 17 of the Commercial Division Rules (“Rule 17”) because it contains 6669 words (using the “word count” function of Microsoft Word), excluding the parts of the affirmation exempted by Rule 17.

Dated: February 10, 2023

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