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,	§	**INDEX NO. 451625/2020**
v.	§	Hon. Joel M. Cohen
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, ET AL.,	§	
Defendants.	§	

MEMORANDUM OF LAW IN PARTIAL OPPOSITION TO JOSHUA POWELL'S MOTION FOR SUMMARY JUDGMENT

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Defendant the National Rifle Association of America (the "**NRA**" or the "**Association**") respectfully submits this memorandum of law in partial opposition to the motion for summary judgment of Defendant Joshua Powell ("**Powell**" and such motion, the **"Motion**").

PRELIMINARY STATEMENT

Powell, a former officer of the NRA terminated for cause in January 2020,[1] contends that there are no triable issues regarding whether he breached relevant obligations—to the State of New York, or anyone else—and seeks "summary judgment on all but $14,144.25 of alleged expenses" he refused to repay.[2] Even if Powell prevails here on other grounds,[3] there can be no question that he breached fiduciary duties to the NRA. Powell charged improper expenses from the outset of his tenure, continued to charge them after presenting a "compliance refresher" seminar counseling staff otherwise, and knowingly failed to disclose multiple conflicts to the Audit Committee before September 2018. Whether such sums are recovered here by the NYAG, or in a separate action by the NRA, remains to be determined—but Powell's potential liability to the NRA vastly exceeds $14,144.25. To the extent that the Motion seeks a judgment otherwise, the NRA opposes it.

BACKGROUND

I. Powell Was A Fiduciary of the NRA, With Obligations Dictated by Virginia Law, New York Law, and NRA Policies and Procedures.

After previously serving on the Board of Directors of the NRA, Powell was hired as NRA Chief of Staff in June 2016,[4] entering into an Executive Employment Agreement (the "Employment

[1] *See* Second Amended Complaint ("**SAC**") ¶ 7; *See* NYSCEF 889 (NRA's Amended Answer of the National Rifle Association of America to the Second Amended Verified Complaint) ¶ 7; Employment Termination Letter (NYAG-00071587), Affidavit of John Frazer ("**Frazer Aff.**") Ex. J.
[2] Mot. at 2.
[3] For example, this Opposition does not address Powell's arguments regarding: EPTL § 8-1.4 (Mot. at 12), the timeliness of the NYAG's claims (Mot. at 15), or the sufficiency of the NRA's own review and ratification procedures for related-party transactions (Mot. at 16).
[4] *See* Mot. at 2.

Agreement") governed by Virginia law.[5] From the outset of his employment until his termination in January 2020, Powell was a fiduciary of the NRA under Virginia[6] and (to the extent the latter applied) New York law.[7] It is also undisputed that from January 2017 through December 2018, Powell was Executive Director of General Operations,[8] an officer position at the NRA that carried additional duties pursuant to the NRA Bylaws[9] and New York law.[10]

For the entire duration of Powell's employment, the Employment Agreement imposed clear "duties of loyalty"[11] on Powell and subjected him to the NRA's internal "policies and procedures," willful disregard of which supplied cause for termination.[12] The Employment Agreement explicitly limited Powell's actual authority, prohibiting him from entering into purported legal obligations or contracts on behalf of the NRA "other than as specifically directed in writing by Wayne LaPierre," to whom Powell directly reported.[13] It also limited business-expense reimbursements Powell could claim, requiring that such expenses be "reasonably incurred by [Powell] in furtherance of his duties"

[5] *See* Executive Employment Agreement, at ¶9.8 ("Governing Laws and Forum"), NYSCEF 1195 Ex. 5.
[6] *See, e.g.*, *Hilb, Rogal & Hamilton Co. of Richmond v. DePew*, 247 Va. 240, 246 (1994) ("[A]n employee's fiduciary duty to his employer prohibits the employee from acting in a manner adverse to his employer's interest[.]")
[7] Although recent authorities disfavor applying the internal affairs doctrine to labor and employment matters, courts sited in New York have occasionally done so. *See, e.g.*, Mohsen Manesh, *The Corporate Contract and the Internal Affairs Doctrine*, 71 AM. U. L. REV. 501, 556 (2021) ("[A] corporation's relationship with its employees is beyond the internal affairs doctrine"); *Focus Fin. Partners, LLC v. Holsopp*le, 241 A.3d 784, 811 (Del. Ch. 2020) ("the internal affairs doctrine does not extend to a Delaware entity's relationship with its employees")*; Rodrigue v. Lowe's Home Centers, LLC*, No. 22CV1127RPKPK, 2023 WL 2071298, at *3 (E.D.N.Y. Feb. 17, 2023) (applying New York choice-of-law rules and designating domicile law in wage dispute). To the extent that New York law governed Powell's duties to his employer before he assumed an officer role in 2018, Powell would have owed a fiduciary duty of "good faith and loyalty" by reason of his employment. *See, e.g.*, *30 FPS Prods., Inc. v. Livolsi*, 68 A.D.3d 1101, 1102 (2d Dept. 2009) (internal citations omitted); *see also CBS Corp. v. Dumsday*, 268 A.D.2d 350, 353 (1st Dept. 2000) ("[I]t is axiomatic that an employee is prohibited from acting in any manner inconsistent with his agency or trust and is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties[.]") (internal citations and quotation marks omitted).
[8] *See* Mot. at 2.
[9] *See* NRA Bylaws (NRA-NYAGCOMMDIV-01458215-8271 at NRA-NYAGCOMMDIV-01458237), Frazer Aff. Ex. E.
[10] *See, e.g.*, N.Y. Not-for-Profit Corp. Law § 717 (McKinney) ("Duty of directors, officers and key persons").
[11] Executive Employment Agreement, at ¶5.3, NYSCEF 1195 Ex. 5.
[12] *Id.*
[13] *Id.* at ¶ 1.

and "approved by the Executive Vice President" in compliance with "rules and policies" adopted by the NRA.[14]

Several of those rules and policies were laid out in the NRA Employee Handbook (the "**Employee Handbook**")—which Powell received, and acknowledged with his signature, on his first day of employment.[15] The Travel and Business Expense Reimbursement Policy contained in the Employee Handbook provided that expenses only qualified for reimbursement if they were "incurred for . . . activities[] which are necessary to meet organizational objectives" of the NRA,[16] and noted that the employee incurring the expenses (here, Powell) was responsible for making sure the expenses satisfied "NRA policy and ethical standards, sound business practices, [and] applicable laws" and were "clearly in the NRA's interest."[17] The Employee Handbook forbade charging first-class airfare absent an exception "explained and approved in writing."[18] It also forbade reimbursement of "personal" expenses, including travel costs for family members, unless the NRA requested (and an officer approved) a family member's attendance at an event.[19]

Moreover, Powell specifically acknowledged, signed, and agreed to be bound by the NRA Statement of Corporate Ethics set forth at Page No. A-1.03 of the NRA Employee Handbook (the "**Ethics Policy**").[20] Among other things, the Ethics Policy required that Powell:

- Not become involved in "conflict of interest situations," *i.e.*, any activity which might "give the appearance of influencing [his] objective business judgment when dealing with others;"[21]
- Maintain "complete and accurate" records in accordance with "controls established by

[14] *Id.* at ¶ 8.
[15] *See* Handbook – Signed Statement of Receipt (NRA-NYAG-00052613), Frazer Aff. Ex. A.
[16] *See* Employee Handbook (NRA-NYAGCOMMDIV-00896935-7159 at NRA-NYAGCOMMDIV-00897117), Frazer Aff. Ex. B.
[17] *Id.*
[18] *Id.* at NRA-NYAGCOMMDIV-00897120.
[19] *Id.* at NRA-NYAGCOMMDIV-00897123.
[20] *See* Powell Signed Ethics Policy (NRA-NYAGCOMMDIV-00009508-9512), Frazer Aff. Ex. D.
[21] *See id.* at 1.

the Association;"[22] in detail "sufficient to reflect accurately and fairly all financial transactions and dispositions of funds and assets;"[23]

- Forbear from using "information that he . . . acquired in the course of his . . . employment" for "personal gain;"[24] and
- Disclose any business with the Association in excess of $2,000 per year.[25]

Finally, within days of his hiring, the NRA furnished and familiarized Powell with the NRA Conflict of Interest and Related Party Transaction Policy (the "**Conflicts Policy**"),[26] which required NRA directors, officers, and key employees to disclose [a]ll material facts related to" any potential transactions with family members or entities that employed them.[27] Disclosures were required to be made "in good faith and in writing to the NRA Audit Committee . . . ***in advance, before any action [wa]s taken***" to effect the potential conflict transaction.[28] In addition, the Conflicts Policy required each director, each officer, and each candidate for the Board of Directors to submit at least annually (and update as appropriate)[29] a Financial Disclosure Questionnaire (the "**Conflicts Questionnaire**") that inquired directly whether the NRA fiduciary, or any "relative" (including a spouse) had received or expected compensation from the NRA,[30] or been employed or received gifts from any entity doing or seeking business with the NRA.[31] For good measure, the Conflicts Questionnaire also inquired whether Powell was aware of any transaction, not captured by other specific line-items, "in which the NRA is a participant and in which you might have a conflict of interest."[32]

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[22] *Id*.
[23] *See id.* at 3.
[24] *Id.* at 2.
[25] *Id.* at 4.
[26] *See* Email from S. McCormick to J. Powell dated June 12, 2017 (NRA-NYAGCOMMDIV-01142266-2276), Affirmation of Sarah Rogers ("**Rogers Aff**.") Ex. 5.
[27] *See id.* at NRA-NYAGCOMMDIV-01142273.
[28] *Id.* (emphasis added).
[29] *See id*.
[30] *See* Powell October 2016 Financial Disclosure Questionnaire (NRA-NYAG-00025445-25452), Frazer Aff. Ex. F, Items No. 1-2.
[31] *Id.*, Items No. 3-4.
[32] *Id.*, Item No. 7.

Powell knew that the Conflicts Policy applied to him: he submitted his first Conflicts Questionnaire in February 2017 and, apart from his employment relationship, disclosed no conflicts.[33] Powell even helped Frazer deliver a seminar to upper management on July 26, 2018, titled "Compliance and Governance Refresher," that drove home the above-mentioned requirements and included remarks by Powell stressing the NRA's commitment to "gold standard" compliance.[34] That seminar, which Powell co-presented, identified specific statutes and policies that governed senior executives' expense-reimbursement and conflict obligations,[35] detailed disclosure requirements triggered by "familial relationships" with vendors and contractors,[36] and contained a dedicated slide highlighting the Conflicts Policy language which provided:

> [Y]ou are at all times expected to *err on the side of caution* and *disclose all* instances where a *conflict of interest* or the appearance of a conflict exists, even if you do not believe that there is an actual conflict.[37]

By the time Powell delivered the seminar, he knew of several conflicts and policy violations arising from his own conduct and family members' business affairs. He belatedly disclosed some of them a month later,[38] after outcry by whistleblowers to the Audit Committee.[39] The NRA would eventually discover that Powell's belated disclosure was also incomplete, omitting expense-policy violations that tainted Powell's entire tenure and continued until the NRA fired him.

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[33] *See id.*
[34] *See* Frazer Aff. ¶ 9; *see also* July 2018 Compliance Seminar Presentation, Slide 8 (NRA-NYAGCOMMDIV-00203706-3756 at NRA-NYAG-COMMDIV-00203751 ("THE GOLD STANDARD – JOSH")), Frazer Aff. Ex. G.
[35] *See* July 2018 Compliance Seminar Presentation, Slide 8 (NRA-NYAGCOMMDIV-00203706-3756), Frazer Aff. Ex. G.
[36] *See id*., Slide 14.
[37] *Id.*, Slide 16.
[38] *See* NRA Financial Disclosure Questionnaire of Joshua Powell, September 6, 2018 (NRA-NYAG-00022328), NYSCEF 1195 Ex. 32.
[39] *See* July 2018 Whistleblower "Top Concerns" List (NRA-NYAG-00021379-1380), Frazer Aff. Ex. H

II. Powell Incurred Improper Expenses and Otherwise Breached His Obligations.

A. Powell charged improper personal expenses from the outset of his tenure, and continued this misconduct even after leading a "compliance refresher" seminar as an NRA officer.

Within weeks of signing and acknowledging the Employee Handbook and its travel-expense limitations, Powell began charging improper expenditures without disclosing or obtaining approval for them. Within months of beginning work at the NRA, Powell began abusing the NRA's American Express account, purchasing personal airfare for his wife in August 2016.[40] During September and November 2016, Powell incurred almost $4,390 in personal expenses, including airfare for his wife for three trips to the family home, six tickets for his wife to fly to various destinations in the U.S., two upgraded airfare tickets for himself, two upgraded airfare tickets for his wife, purchase of personal miles for himself from United Airlines, and personal cell phone charges.[41] This conduct continued, uninterrupted, over the course of 2017-2019, even after Powell ascended to a senior officer role and began instructing others on the compliance obligations he flouted. Indeed, each of Powell's pay increases and job-title changes—and notably, the Audit Committee's review and ratification of related-party transactions involving two of his family members—occurred against the backdrop of ongoing, undisclosed expense abuses. For example:

- By the time the NRA paid Powell a $50,000 bonus in November 2017,[42] Powell had already incurred $32,149 in improper expenses, including airfare for Powell and his wife to Palm Beach, Florida, and airfare for Powell's children.[43]
- By the time the NRA appointed Powell Executive Director of General Operations in January 2018, Powell had incurred $1,899 in additional improper expenses, including personal trips for his wife to the family home, airfare upgrades for himself, and personal cellphone charges weeks earlier. [44]
- When the Audit Committee reviewed related-party transactions involving Powell's

[40] *See* Affidavit of Sonya Rowling ("Rowling Aff.") ¶ 6.
[41] *See* Rowling Aff. ¶¶ 6-20; Rowling Aff. Exs. A, B, and C.
[42] *See* Mot. at 8.
[43] *See* Rowling Aff. ¶¶ 6-69.
[44] *See* Rowling Aff. ¶¶ 70-76.

relatives on September 6, 2018, Powell had by then incurred $44,979 in improper expenses, including private cars/limousines in connection with Powell's wife's trips to the family home.[45]

- When the NRA approved Powell's final salary adjustment on March 20, 2018,[46] he had run up $40,700 in improper expenses, including various personal limousine trips.[47]

None of these expenses were "approved by the Executive Vice President" as required under the Employment Agreement. [48] Nor would the NRA have approved Powell's salary adjustments,[49] or declined to discipline him in September 2018,[50] had it known of his breaches.

Insisting that Powell was nonetheless a faithful fiduciary, the Motion interposes a number of misstatements and distortions regarding his expense violations. *First*, the Motion presumes that the $54,904.45 in improper expenses itemized by the NRA in settlement negotiations, and disclosed by the NRA as excess benefits, reflected the sum of Powell's potential liability.[51] Even setting aside disgorgement and forfeiture,[52] this is untrue. Instead, at the time of Powell's termination, the NRA compiled a demand letter that only reflected expenses for which "the evidence was strong enough that the expenses were improper,"[53] notwithstanding the NRA's then-incomplete access to Ackerman McQueen's records;[54] and "left some things out where [they] were uncertain[.]"[55] In part for these reasons, settlement negotiations are inadmissible in New York to prove the amount of Powell's liability.[56]

[45] *See* Rowling Aff. ¶¶ 6-118.
[46] *See* Mot. at 8.
[47] Rowling Aff. ¶¶ 6-102.
[48] *See* Affidavit of Wayne LaPierre ("LaPierre Aff.") ¶¶ 4, 9.
[49] *See* LaPierre Aff. ¶¶ 10-11.
[50] *See* Affidavit of David Coy ("Coy Aff.") ¶¶ 8-10.
[51] *See, e.g.*, Mot. at 1.
[52] *See* discussion *infra* Section III.B.
[53] *See* Deposition of John Frazer, March 15, 2021, pgs. 61:19-62:15, NYSCEF 1195 Ex. 16.
[54] *Id.* at 60:05-11.
[55] *Id*. at 61:19-62:15.
[56] *See* C.P.L.R. § 4547.

Second, the Motion alleges that Powell's expenses "were reviewed, including by the Chief Financial Officer ("CFO") and the Audit Committee."[57] The Motion musters no admissible evidence for this proposition. Instead, it relies on: (i) plainly-inapposite paragraphs of the Second Amended Complaint[58] and (ii) testimony by Lisa Supernaugh, an administrative assistant, that she received and processed Powell's expense reimbursements.[59] But Supernaugh did not oversee Powell—she reported to him directly, had no ability to "judge[]" whether his expenses were "right or wrong," [60] and simply performed "the administrative work of " of compiling receipts:

> Q. Is it fair to say Mr. Powell was relying on you to review his expenses before passing them along?
>
> A. I would -- no. That is not fair to say. He was relying on me to do the administrative work of it to put it together. [61]

To the extent that Supernaugh did form a view about the propriety of Powell's expenses in the course of performing her administrative support role, the record suggests that she conveyed her concerns in the form of a "tip" to NRA CFO and Treasurer Craig Spray,[62] who began "digging into" Powell's expenses[63] with help from Sonya Rowling in late 2019.[64] This inquiry led to Powell's termination.[65]

B. Powell failed to duly disclose his wife's affiliation with McKenna.

Contrary to the Motion's insinuation (which is unsupported by the deposition testimony the Motion cites), Powell did not disclose his wife's potential contracting relationship with McKenna

[57] Mot. at 4.
[58] Specifically, the Motion cites SAC ¶¶ 302 (alleging incurrence of expenses by "LaPierre's Senior Assistant," who undisputedly was not Powell), 342 (alleging limited audits of Ackerman McQueen's expenses by Wilson Phillips), and 390 (alleging that the Audit Committee modified compensation paid to a Board member, not Powell, for fundraising activities). *See* Mot. at 4.
[59] *See* Mot. at 4, *citing* Deposition of Lisa Supernaugh, May 5, 2022, pgs. 303:12-304:02, NYSCEF 1195 Ex. 19.
[60] *See* Deposition of Lisa Supernaugh, May 5, 2022, pgs. 416:09-417:05, Rogers Aff. Ex. 6.
[61] *Id*. at 415:17-24.
[62] *See* Deposition of Craig Spray, January 14, 2022, pgs. 234:14-237:02, Rogers Aff. Ex. 7.
[63] *See id.*
[64] *See* Bankruptcy Trial Testimony of Sonya Rowling, April 8, 2021, pgs. 91:22-92:08, Rogers Aff. Ex. 8. (Rowling found improprieties dating back to 2016.)
[65] *See* Termination Letter (NYAG-00071587), Frazer Aff. Ex. J.

"prior to her starting the relationship with McKenna in December 2017."[66] Undisputedly, the relationship was not disclosed by Powell to the Audit Committee—as NRA policy required—until September 6, 2018.[67] During the preceding months, Craig Spray testified that Powell urged Spray to keep the relationship a secret.[68] Another email chain likewise creates, at minimum, a triable issue as to whether Powell intentionally concealed his wife's connection to McKenna from other fiduciaries who might detect the conflict—in this instance, John Frazer. [redacted][69]

Regardless, by the time Powell's September 2018 disclosure questionnaire was submitted, the secret was out: the NRA's ongoing compliance review had unearthed the relationship,[70] and accounting staff alerted the Audit Committee about it in July.[71] If the NRA had known that Powell (contrary to Powell's assurances)[72] concealed the relationship intentionally before reporting it on his September disclosure questionnaire, the NRA would have disciplined or removed him.[73]

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[66] The Motion asserts that Powell "disclosed ***his relationship with his wife*** to Phillips and LaPierre prior to her starting at McKenna." Mot. at 5 (emphasis added). But although each of Powell and Phillips testified that they learned Powell had a wife named Colleen, their testimony provides no support for the proposition that Powell disclosed his potential conflict of interest upfront. *See* Mot. at 5, *citing* Mot. Exs. 17 (testimony by Phillips that, as of 2021, he knew the name of Powell's wife) and 21 (testimony by LaPierre that he met Powell's wife "at some point," but cannot remember when).

[67] *See* Mot. at 6, *citing* NRA Financial Disclosure Questionnaire of Joshua Powell dated September 6, 2018, NYSCEF 1195 Ex. 32.

[68] *See* Deposition of Craig Spray, Jan. 14, 2022, pgs. 155:24-156:05, Rogers Aff. Ex. 8.

[69] [redacted]

[70] *See* Coy Aff. ¶ 5.

[71] *Id.* ¶ 3.

[72] *See* LaPierre Aff. ¶ 13 (recounting verbal representations by Powell that the failure to disclose his wife's work with McKenna was inadvertent).

[73] Coy Aff. ¶¶ 10-11; *see also* LaPierre Aff. ¶ 17.

C. Powell failed to duly disclose his father's engagement by Ackerman McQueen.

Powell assured the Audit Committee,[74] and testified under oath in this case,[75] that he was unaware his father had been engaged to perform photography services for the NRA until the NRA's lawyers alerted him to the relationship in 2018.[76] Both LaPierre[77] and the Audit Committee[78] took Powell at his word. Email correspondence unearthed later suggests Powell was not truthful: During 2017, at which time Powell held a senior officer position and Powell's father was retained by Ackerman McQueen, Powell's father sent an invoice for his services directly to the NRA's Director of Competitive Shooting, commenting: "Josh told me to send this to you."[79] At a minimum, this correspondence creates a triable issue as to whether Powell willfully breached his fiduciary duty by directing his father to invoice the NRA for services while concealing the relationship from the Audit Committee. If LaPierre[80] or the Audit Committee[81] had known that Powell concealed a related-party transaction with his father, Powell would have been "fired [] on the spot."[82]

LEGAL STANDARD

Summary judgment is a drastic remedy, to be granted sparingly and only where no material issue of fact is demonstrated in papers related to the motion.[83] To obtain summary judgment, it is necessary that the movant establish his cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment" in his favor;[84] moreover, he must do so by tender of

[74] Coy Aff. ¶ 5;
[75] Deposition of Joshua Powell, June 9, 2022, pgs. 287:15-22. Rogers Aff. Ex. 10.
[76] *Id*. at 287:15-289:20.
[77] LaPierre Aff. ¶ 13.
[78] Coy Aff. ¶ 5.
[79] *See* Email chain re: Invoice for photo shoot at the Carry Guard Convention (NRA-NYAG-00012605), Rogers Aff. Ex. 11.
[80] LaPierre Aff. ¶ 17.
[81] Coy Aff. ¶ 12.
[82] LaPierre Aff. ¶ 17.
[83] *See Crowley's Milk Co. v. Klein*, 24 A.D.2d 920; (3d Dep't 1965); *Wenger v.* Zeh, 45 Misc.2d 93(N.Y Sup. Ct. 1965) *aff'd* 26 A.D.2d 729.
[84] CPLR 3212, subd. (b).

evidentiary proof in admissible form.[85] Failure by the movant to make the requisite showing based on admissible evidence "requires denial of the motion, regardless of the sufficiency of the opposing papers."[86] Unlike the movant, the party opposing summary judgment may be excused from the requirement of tendering strictly-admissible evidence.[87]

Even where the movant proffers sufficient evidence to make such a showing, the nonmoving party may defeat summary judgment by establishing "the existence of material issues of fact which require a trial of the action."[88] A court deciding a motion for summary judgment must construe disputed facts "in the light most favorable to the non-moving party;"[89] therefore, where there are conflicting affidavits, "the testimony of the nonmoving party must be accepted as true."[90]

ARGUMENT

I. Powell Breached His Fiduciary Duties to the NRA.

It is well-settled that a fiduciary owes his principal "a duty of undivided and undiluted loyalty," which subjects him to a "sensitive and 'inflexible' rule of fidelity[] [that] bar[s] not only blatant self-dealing, but also require[es] avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty."[91] A corporate fiduciary

[85] *Id.*
[86] *People ex rel. Spitzer v. Grasso*, 50 A.D.3d 535, 545 (1st Dep't 2008).
[87] *See, e.g.*, *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980); *see also McKenney by McKenney v. Orzechowski*, 208 A.D.2d 1149, 1149 (3d Dep't 1994) ("A defendant seeking summary judgment has the initial burden of coming forward with admissible evidence showing that the cause of action has no merit"); *Pringle by Cheek v. New York City Hous. Auth.*, 260 A.D.2d 623, 623(2d Dep't 1999) ("The defendant's motion for summary judgment was properly denied as it failed to present admissible evidence showing that the plaintiffs' action has no merit"); *Rugova v. Davis*, 112 A.D.3d 404, 404 (1st Dep't 2013) ("hearsay may be used to defeat summary judgment as long as it is not the only evidence submitted in opposition"); *Gier v. CGF Health Sys., Inc.*, 307 A.D.2d 729, 7293 (4th Dep't 2003) ("although Cudmore's memorandum is inadmissible hearsay and thus by itself is insufficient to defeat a motion for summary judgment, the memorandum may be considered together with the admissible evidence submitted in opposition to the motion").
[88] *Trustees of Columbia Univ. in City of New York v. D'Agostino Supermarkets, Inc.*, 36 N.Y.3d 69, 74 (2020), *citing Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012).
[89] *Vega*, 18 N.Y.3d at 503 (*quoting Ortiz v. Varsity Holdings*, LLC, 18 N.Y.3d 335, 339 (2011)).
[90] *Bershaw v. Altman*, 100 A.D.2d 642, 643 (3d Dep't 1984) (internal citations and quotation marks omitted).
[91] *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989), *quoting Matter of Ryan*, 291 N.Y. 376, 407, 52 N.E.2d 909(1943); *see also Williams v. Dominion Tech. Partners, L.L.C.*, 265 Va. 280, 289 (2003).

acts disloyally if he causes his company to violate the law.[92] Similarly, Powell owed the NRA "an obligation of utmost candor" which "strictly obligat[ed] [him] . . . to make full disclosure of any and all material facts within his [] knowledge" relating to his relationship and dealings with the NRA.[93] The record is replete with evidence that Powell breached the duties of loyalty, candor, and good faith which he owed the NRA.

A. Powell breached his fiduciary duties by charging improper expenses.

A loyal fiduciary "may not profit improperly at the expense of their corporation."[94] Therefore, "an officer breaches his or her fiduciary duty of loyalty when he knowingly causes the corporation to pay personal expenses in violation of law and corporate policy."[95] Powell's expense abuses also violated his duties of candor and good faith, since he failed to report these lapses—and continued to commit similar ones—after co-presenting a compliance training that instructed other NRA employees on proper expense practices.[96] There can be no question that from the moment Powell charged his first improper expense in August 2016[97] until the moment he was terminated, Powell's expense-policy violations, and his failure to disclose the same, placed him in breach of fiduciary duties arising under his Virginia Employment Agreement.[98] Moreover, during his time as an NRA officer, Powell owed—and breached—fiduciary duties under New York law.[99]

[92] *See, e.g.*, *Guttman v. Huang*, 823 A.2d 492, 506 (Del. Ch. 2003) (discussing implicit duty of "legal fidelity" contained within the duty of loyalty). Delaware law provides "persuasive authority" in cases involving errant corporate fiduciaries, even where New York law controls. *See, e.g.*, *State v. McLeod*, 12 Misc.3d 1157(A), 819 N.Y.S.2d 213 (Sup. Ct. 2006).
[93] *Ajettix Inc. v. Raub*, 804 N.Y.S.2d 580, 588 (Sup. Ct. 2005) (internal citations and quotation marks omitted). The same duties of candor and good faith bound Powell under Virginia law. *See, e.g.*, *Horne v. Holley*, 167 Va. 234, 239 (1936) (fiduciary required to show "utmost good faith [and] . . . most scrupulous honesty" toward his principal and make "frank and full disclosure of all material facts").
[94] *S.H. & Helen R. Scheuer Family Foundation, Inc., By & Through Scheuer v. 61 Associates*, 582 N.Y.S.2d 662, 665 (1st Dep't 1992) (citations omitted).
[95] *In re Wonderwork, Inc.,* 611 B.R. 169 (Bankr. S.D.N.Y. 2020).
[96] *See* Frazer Aff. ¶ 9.
[97] *See* Rowling Aff. ¶ 6.
[98] *See* discussion *supra* at 3.
[99] *See* N.Y. Not-for-Profit Corp. Law § 717.

B. Powell breached his fiduciary duties by concealing conflict-of-interest transactions from the NRA.

Similarly, during 2017 and 2018, while an officer of the NRA, Powell failed to disclose conflicts of interest involving both his wife and his father. There are even triable issues regarding whether he concealed these transactions deliberately. "Where an agent has a conflict of interest with his principal, and fails to disclose the conflict, the agent is liable for a breach of fiduciary duty."[100] Powell insists that both failures were unintentional, but cites no authority that would thereby absolve him of liability for breach of fiduciary duty. What is worse, Powell's testimony is controverted by documents suggesting that Powell knew of both relationships and took steps to conceal at least one of them. Thus, the record precludes summary judgment on breach of fiduciary duty.

II. Powell's liability to the NRA is not limited by his offer of partial reimbursement.

Powell cites no authority, and the NRA is aware of no authority, for the proposition that Powell's rejected settlement offer of partial reimbursement for challenged expenses negates, or limits, his liability under New York or Virginia law. Powell was paid W-2 compensation totaling $2,758,869[101] during his time at the NRA, and the vast majority of this income accrued after Powell began incurring improper expenses in August 2016—for which he would have been "fired [] on the spot," had LaPierre known.[102] Moreover, the remedy for breach of fiduciary duty under N-PCL § 720 contains no safe harbor for officers who attempt to tender partial payment as part of a failed accord-and-satisfaction in the context of settlement negotiations.[103] Finally, Powell is not entitled to any judgment foreclosing common law remedies, including equitable ones, available to

[100] *Aon Risk Servs. v. Cusack*, 946 N.Y.S.2d 65 (Sup. Ct. 2011).
[101] Frazer Aff. ¶ 15, Exs. L, M, N, O, and P.
[102] CITE LaPierre Aff. ¶ 17.
[103] *See* N-PCL § 720(b)(2) (providing that any unlawful conveyance, assignment, or transfer of assets may be "set aside").

the NRA under Virginia[104] or New York law.[105]

CONCLUSION

For the reasons stated above, to the extent that the Motion seeks a judgment that Powell breached no fiduciary duty to the NRA, or that his liability to the NRA is limited to $14,144.25, the Motion should be denied.

Dated: March 13, 2023
New York, New York

By: s/ *Sarah B. Rogers*

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[104] *See, e.g*, *Makel v. Tredegar Tr. Co*., 69 Va. Cir. 204 (2005) ("[E]quity treats as done what ought to be done," and courts of equity may utilize flexible remedies to achieve just results.If disbursements are made improperly (i.e., in breach of a fiduciary obligation), then the Court may impose a constructive trust, requiring the transferee to disgorge the payments.") (internal citations omitted).

[105] For example, New York courts may order disgorgement of compensation by faithless agents if the aggrieved principal elects to pursue the same. *See, e.g.*, *Webb v. Robert Lewis Rosen Assocs., Ltd*., No. 03 CIV. 4275 (HB), 2003 WL 23018792, at *6 (S.D.N.Y. Dec. 23, 2003), *aff'd*, 128 F. App'x 793 (2d Cir. 2005) (applying New York law), *citing* RESTATEMENT (SECOND) OF AGENCY § 469 (1958).

Certification of Compliance

I, Sarah B. Rogers, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law in Partial Opposition to Joshua Powell's Motion for Summary Judgment filed on behalf of the NRA, complies with the word count limit set in 22 CRR-NY 202.8b (a)(1). The memorandum of law contains fewer than 7,000 words. In executing this certification, I relied on the word count function of MS Word.

Dated: March 20, 2023
New York, New York

By: s/ *Sarah B. Rogers*
Sarah B. Rogers