

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

Motion Sequence No. 46

Hon. Joel M. Cohen

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

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On behalf of the Plaintiff, the People of the State of New York (“Plaintiff”), the Office of Attorney General Letitia James (“OAG”) respectfully submits this memorandum of law in opposition to Defendant Joshua Powell’s (“Powell”) motion for summary judgment under New York Civil Practice Law and Rules (“CPLR”) 3212.

### PRELIMINARY STATEMENT

Defendant Powell was formerly the second in command within the National Rifle Association of America (“NRA”). Hired by and reporting directly to Wayne LaPierre, Powell rose quickly through the NRA ranks, becoming one of its highest-paid employees and in charge of its compliance efforts, despite his active participation in its culture of “greed, self-dealing, and lax financial oversight.” *People by James v. Nat’l Rifle Ass’n of Am., Inc.*, 74 Misc. 3d 998, 1003 (Sup. Ct. N.Y. Cnty. 2022). The record evidence establishes that Powell breached his fiduciary duties; had the NRA pay, directly and indirectly, for his personal expenses, luxury travel and meals; caused the NRA to enter into costly vendor arrangements in violation of NRA policies; and engaged the NRA in undisclosed and unapproved related party transactions to benefit his family.

Nevertheless, Powell moves for summary judgment, asking the Court to dismiss the claims against him for his breaches of fiduciary duty and unlawful related party transactions pursuant to the Not-For-Profit Corporation Law (“N-PCL”) and Estates, Powers and Trusts Law (“EPTL”). Powell’s motion focuses only on a narrow swath of the allegations against him, evinces a fundamental misapprehension of the claims against him, includes arguments already rejected by this Court, and ignores the existence of material issues of fact that preclude judgment in his favor. As set forth below, it is respectfully submitted that this Court must deny his motion in its entirety.

## STATEMENT OF FACTS

### I. POWELL'S EMPLOYMENT HISTORY WITH THE NRA

In June 2016, Executive Vice President Wayne LaPierre hired Powell to serve as the NRA's Chief of Staff. (NYSCEF 646 ("Second Amended Verified Complaint" or "SAC") ¶¶ 21, 141; Plaintiff's Counterstatement of Material Facts ("CSOMF") ¶ 50.) In that role, as a key employee of the NRA, [REDACTED]

[REDACTED] hiring and firing employees [REDACTED]. (CSOMF ¶¶ 50-55.) In January 2017, LaPierre appointed Powell to be the NRA's Executive Director of General Operations, a bylaws-established officer and *ex officio* director position, which he held in addition to his Chief of Staff position. (SAC ¶¶ 21, 141, 253; CSOMF ¶ 51.) In December 2018, LaPierre promoted Powell to be the NRA's Senior Strategist, where he remained a key employee and *de facto* officer, [REDACTED]. (SAC ¶¶ 21, 141, 253-54; CSOMF ¶ 52.) Powell remained Chief of Staff and Senior Strategist until he was placed on administrative leave in October 2019. (CSOMF ¶ 17.) He was ultimately fired on January 30, 2020, for, among other things, misappropriation of NRA funds and breaches of his duty of loyalty. (SAC ¶¶ 7, 21, 255, 264; NYSCEF 1233; CSOMF ¶¶ 18-19.)

Throughout his employment at the NRA, Powell's compensation was determined by LaPierre. (CSOMF ¶ 20.) In July 2016, one month after being hired, Powell's initial annual salary of \$250,000 was retroactively doubled by Phillips and LaPierre to \$500,000. (CSOMF ¶ 21.) In June 2017, Powell received a bonus of \$50,000 and another raise to \$650,000, and, in March 2018, received a third raise to \$800,000. (CSOMF ¶¶ 21-24.) In addition to his salary and bonus compensation, [REDACTED]



[REDACTED]

[REDACTED]. (CSOMF ¶ 10.)

**II. NRA POLICIES RELATING TO PROCUREMENT, CONFLICTS OF INTEREST, AND RELATED PARTY TRANSACTIONS**

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CSOMF ¶ 44 [REDACTED])

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.*) [REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(CSOMF ¶ 45.) [REDACTED]

[REDACTED]

[REDACTED] (*Id.*)

[REDACTED]

[REDACTED] (CSOMF ¶ 48.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Id.) [REDACTED]

[REDACTED]

[REDACTED] (Id.)

[REDACTED]

[REDACTED]. (CSOMF ¶ 46.) It directs, in relevant part, that

NRA

employees shall not become involved in any activity which might influence, be reasonably expected to influence, or give the appearance of influencing their objective business judgment in dealing with others. Employees shall not become involved in conflict of interest situations.... Where a question arises whether a particular anticipated course of business conduct is ethical or legal, the individual contemplating the action or directed to perform the action shall seek advice from the Office of the General Counsel of the Association.

(Id.)

With respect to expenses, the NRA Employee Handbook limits relocation expenses to “transportation and out-of-pocket expenses for an interview, residence hunting, a temporary living allowance not to exceed 30 days, moving expenses not to exceed \$7,500, and other incidental expenses.” (CSOMF ¶ 49.) The Handbook also outlines the NRA’s “requirements for meal and travel expense reimbursement, including a requirement of a “properly completed, authorized expense report.” (Id.) The NRA’s “Travel and Business Expense Policy” further clarifies that employees “should incur the lowest practical and reasonable expense” and “have the duty to exercise care and avoid impropriety, or even the appearance of impropriety” in any travel expenses.

(*Id.*) “To qualify for reimbursement, an expense item must be incurred for NRA-related business,” which is “defined as those activities, which are necessary to meet organizational objectives.” (*Id.*) The policy further provides the requirements for travel authorization and approval, and for “lodging, meals, and entertainment expenses,” including requirements with respect to original receipts and warnings regarding non-reimbursable personal expenses. (*Id.*)

### III. ALLEGATIONS OF MISCONDUCT AGAINST POWELL

As alleged in the Complaint, Powell’s breaches of fiduciary duty in his relatively brief period of employment at the NRA were manifold. For example, Powell routinely violated the NRA’s expense reimbursement and travel expense policies, covered personal and inappropriate expenses using NRA funds without appropriate business purpose documentation, and took part in a “pass-through” arrangement to charge excessive personal expenses to vendors, which were in turn passed through to the NRA. (SAC ¶¶ 6, 231–232, 260–266, 325–341.) Powell was also regularly reimbursed thousands in housing and living expenses over a number of years, despite the fact that NRA’s relocation expense policy provided a maximum temporary living expense allowance of thirty days and a maximum of \$7,500 in relocation expense reimbursement. (CSOMF ¶ 10.)

Powell failed to comply with fundamental requirements of the NRA’s procurement policies by verbally approving contracts that committed the NRA to millions of dollars in payments to vendors without securing review and approval from the NRA’s legal or finance divisions. Powell also caused the NRA to engage in related party transactions, without complying with NRA policies or New York law regarding the same. *See, e.g.*, N-PCL § 715.

Powell now seeks partial summary judgment on a limited subset of Plaintiff’s allegations against him, related specifically to (1) his compensation, (2) improper expense reimbursements he

received from the NRA, and (3) related party transactions the NRA entered into with his wife and father.

**A. Powell's Improper Related Party Transaction with McKenna & Associates**

The NRA had, for some time prior to 2017, a relatively small fundraising agreement with consulting firm McKenna & Associates LLC ("McKenna"). (CSOMF ¶ 60.) [REDACTED]

[REDACTED]

[REDACTED] (*Id.*) [REDACTED]

[REDACTED]

[REDACTED] (CSOMF ¶ 62.) [REDACTED]

[REDACTED]

(*Id.*) Powell did not disclose the relationship to the Audit Committee, as required by the NRA's conflict of interest policies, until September 2018. (CSOMF ¶ 65.)

[REDACTED] (CSOMF ¶ 63.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*) Michael Erstling, an employee in the NRA's Financial Services Division and one of the whistleblowers who went to the Audit Committee in the summer of 2018 with concerns that included Powell's related party transactions, [REDACTED]

[REDACTED]

[REDACTED] (CSOMF ¶ 64.)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CSOMF ¶ 60.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CSOMF ¶ 63.) [REDACTED]

[REDACTED]

(*Id.*) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CSOMF ¶ 61.)

While Powell claims that he disclosed his wife's relationship with Powell to NRA leadership, issues of fact remain as to the extent to which Powell attempted to keep his wife's work secret. [REDACTED]

[REDACTED]

[REDACTED] (CSOMF ¶ 38.) It is uncontested that Powell did not disclose the same on the NRA's required annual Financial Disclosure Questionnaire until September 2018. (CSOMF ¶¶ 38, 65.)

It is also undisputed that the Audit Committee did not review and approve the related party transaction involving McKenna in advance, as required. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(CSOMF ¶ 39.)

Indeed, longtime Audit Committee member and current Second Vice President of the NRA Charles Cotton [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*)

**B. Powell's Improper Related Party Transaction with Jim Powell Photography**

In 2017 and 2018, Powell's father received approximately \$100,000 in payments from NRA vendor Ackerman McQueen (that were passed through to the NRA) and from the NRA directly for photography services. (NYSCEF 1219 at NYAG-00027018.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CSOMF ¶ 40.)

This transaction was purportedly ratified by the Audit Committee, which again failed to satisfy NRA's legal and policy requirements. The Audit Committee [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*; NYSCEF 1219 at NYAG-00027018 NYAG-00027019.) And, contrary to the Audit Committee's purported finding that Powell's father's services were reasonably priced,

NRA whistleblowers reported to the Audit Committee that there had been a quote for less expensive photography services from another vendor. (CSOMF ¶ 42.)

## ARGUMENT

### I. LEGAL STANDARD

“On a motion for summary judgment, the moving party must ‘make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.’ *Trustees of Columbia University in City of New York v. D’Agostino Supermarkets, Inc.*, 36 N.Y.3d 69, 73-74 (2020) (internal citations omitted). “Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *People ex rel. Spitzer v. Grasso*, 50 A.D.3d 535, 545 (1st Dep’t 2008).

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.” *D’Agostino Supermarkets*, 36 N.Y.3d at 74 (citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 (2012).) In deciding a motion for summary judgment, the “facts must be viewed ‘in the light most favorable to the non-moving party.’” *Vega*, 18 N.Y.3d at 503 (quoting *Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339 (2011)).

### II. MATERIAL ISSUES OF FACT PRECLUDE SUMMARY JUDGMENT AS TO PLAINTIFF’S FIFTH AND NINTH CAUSES OF ACTION

Powell seeks summary judgment on Plaintiff’s Fifth and Ninth Causes of Action, which assert that Powell breached his fiduciary to the NRA under the N-PCL and EPTL. (SAC ¶¶ 658–661, 674-677.)

“The fiduciary duties of care, loyalty and obedience are the legal standards that govern the conduct of not-for-profit boards and individual directors in their day-to-day relationship to the organizations they serve.” *Consumers Union of U.S., Inc. v. State*, 5 N.Y.3d 327, 370 (2005). To

comply with their fiduciary duty of care under N-PCL § 717(a), not-for-profit directors, officers, and key persons, like Powell,<sup>1</sup> must “discharge the duties of their respective positions in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.” N-PCL § 717(a); *see also Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemp. Dance, Inc.*, 224 F. Supp. 2d 567, 608 (S.D.N.Y. 2002) (citations omitted) (“It is firmly established that the directors of a corporation have the fiduciary obligation to act on behalf of the corporation in good faith and with reasonable care so as to protect and advance its interests.”), *aff’d in part, vacated in part*, 380 F.3d 624 (2d Cir. 2004).

Directors, officers, and key persons also “owe the corporation their undivided and unqualified loyalty,” and accordingly “should not be permitted to ‘profit personally at the expense of the corporation, nor must they allow their private interests to conflict with corporate interests.’” *Higgins v. New York Stock Exchange, Inc.*, 10 Misc. 3d 257, 278 (Sup. Ct. N.Y. Cty. 2005) (quoting *Foley v. D’Agostino*, 21 A.D.2d 60, 66–67 (1st Dept. 1964); *see also S.H. & Helen R. Scheuer Family Foundation, Inc., By & Through Scheuer v. 61 Assocs.*, 582 N.Y.S.2d 662, 665 (1st Dep’t 1992).

Fiduciaries of not-for-profits also have a duty to follow all laws binding the organization, and to abide by the policies and procedures of the organization. *People v. National Rifle Association of America, Inc.*, 165 N.Y.S.3d 234, 253–54 (Sup. Ct. N.Y. Cty. 2022) (denying motions to dismiss breach of fiduciary duty claims premised on failure to follow and supervise

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<sup>1</sup> Pursuant to the N-PCL, Powell was an officer and *de facto* officer or “key person” within the meaning of N-PCL § 102(a)(25) (SAC ¶¶ 21, 26, 30, 33, 36–38, 44), a contention that Powell has not contested in his motion.



implementation of the NRA's policies and procedures); 1 New York Nonprofit Law and Practice § 6.04[2], available at <https://plus.lexis.com/api/permalink/59e3b55c-77d0-4826-b34e-c794b9a5a5bb/?context=1530671>. Not-for-profit fiduciaries are subject to the same fiduciary duties under the EPTL. *See People by Underwood v. Trump*, 88 N.Y.S.3d 830, 839 (Sup. Ct. N.Y. Cty. 2018) ("As directors of the Foundation, the Individual Respondents were also trustees of charitable assets pursuant to EPTL § 8-1.4 and thus were responsible for the proper administration of charitable assets.").

As set forth below, Powell fails to establish that he is entitled to judgment on Plaintiff's Fifth and Ninth Causes of Action because he misapprehends Plaintiff's claims against him, disregards evidence regarding his breaches of fiduciary duty, and, contrary to his argument, he is a trustee, and, therefore a fiduciary, under the EPTL as a matter of law.

**A. Questions of Fact Regarding Powell's Compensation Preclude Summary Judgment of Plaintiff's Fifth Cause of Action**

Powell argues that he did not breach his fiduciary duty by receiving an unduly generous compensation package. (NYSCEF 1235 (Powell Mem. at 7).) He argues that he has a fiduciary duty only as to those matters within his purview and setting his own compensation was not within his purview. He further argues that the salary was "commensurate with his experience and the services he provided to the NRA." (*Id.* at 9.)

However, Plaintiff's compensation-based claims for breach of fiduciary duty against Powell are not based upon his acceptance of the salary and bonus set by LaPierre, or that such

salary and bonuses would be unreasonable when subject to an executive compensation analysis.<sup>2</sup> Rather, as outlined in the SAC, Powell participated in the self-dealing, mismanagement and evasion of financial controls within the NRA. This environment allowed insiders, including Powell and members of his family, to benefit through, *inter alia*, improper payment of or reimbursement for personal expenses and waste of charitable assets without regard to the NRA's best interests. (SAC ¶ 142.)

Material issues of fact regarding monies and private benefits Powell received from the NRA preclude summary judgment in his favor. There are disputed issues of fact regarding monies Powell received from the NRA in breach of his fiduciary duties. Powell benefitted from his own and the other Defendants' evasion and override of internal controls. For example, Powell himself routinely violated the NRA's expense reimbursement requirements and policies concerning travel expenses, both on his NRA-issued credit card and by passing his expenses through NRA vendors:

[REDACTED]

[REDACTED]

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<sup>2</sup> We note, however, that an equitable remedy which may be imposed by this Court is disgorgement or restitution in the amount of compensation Powell received. Should the jury and this Court find that Powell breached his fiduciary duty, particularly his duty of loyalty, his compensation may be disgorged or subject to repayment. Under the faithless servant doctrine, 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. Not only must the employee or agent account to his principal for secret profits, but he also forfeits his right to compensation for services rendered by him if he proves disloyal." *Lamdin v. Broadway Surface Advert. Corp.*, 272 N.Y. 133, 138, (1936); *Bon Temps Agency Ltd. v. Greenfield*, 184 A.D.2d 280, 281 (1<sup>st</sup> Dep't 1992); *Visual Arts Foundation, Inc. v. Egnasko*, 91 A.D.3d 578, 579 (1<sup>st</sup> Dep't 2012); see also *Murray v. Beard*, 102 N.Y. 505, 508 (1886); *Maritime Fish Products, Inc. v. World-Wide Fish Products, Inc.*, 100 A.D.2d 81, 89 (1<sup>st</sup> Dep't 1984).

[REDACTED]

[REDACTED] (CSOMF ¶¶ 57-58.)

[REDACTED]

[REDACTED]. (CSOMF ¶ 58.) [REDACTED]

[REDACTED] (CSOMF ¶ 58.) [REDACTED]

[REDACTED] (*Id.*) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*)

In addition to [REDACTED], Powell, like others within the NRA, was charging luxury hotels and other expenses on his corporate credit card without providing evidence of a business purpose and without complying with the NRA's then-applicable travel policies. (CSOMF ¶ 59.)

In 2020, after suspending him, the NRA terminated Powell for improper travel-related and other expenses. The NRA indicated in its 2019 IRS Form 990 filing that Powell owed \$54,904.45 as excess benefits made up of "personal expenses from 2016 through 2019 that were not intended by the NRA to be part of Mr. Powell's compensation and constitute automatic excess benefits" under federal regulations. (CSOMF ¶ 25.) Powell admits that he "tendered a check to the NRA for \$40,760.20 to settle the disputed expenses." (CSOMF ¶ 31.) However, as set forth above, there is significant evidence that Powell's receipt of excess benefits was much larger than either the amount identified by the NRA or admitted by Powell.

That Powell attempted to pay back some portion of his excess benefits does not absolve his failure to act in good faith and to properly administer the NRA's assets. In fact, Powell has not pointed to any evidence that the amounts the NRA seeks to recover are, in fact, all of the outstanding personal expenses paid for by the NRA, directly or indirectly. Accordingly, Powell cannot establish an entitlement to summary judgment on Plaintiff's Fifth Cause of Action even if the Court only looks at compensation he received from the NRA.

**B. Questions of Fact Regarding Powell's Status as a Trustee Under EPTL § 8-1.4 Preclude Summary Judgment on Plaintiff's Ninth Cause of Action**

Powell's role within the NRA disproves his disclaimers of responsibility for administering the organization's assets, and bring Powell squarely into the EPTL's statutory definition of a "trustee" under the Attorney General's enforcement and supervisory authority.

First, the statute does not require that Plaintiff identify a trust instrument that confirms Powell's status as a trustee; rather, EPTL § 8-1.4 extends to "individual[s] ... holding and administering property for charitable purposes, whether pursuant to any will, trust, other instrument or agreement, court appointment, *or otherwise pursuant to law, over which the attorney general has enforcement or supervisory powers.*" EPTL § 8-1.4(a)(1) (emphasis added); *see also Schneiderman ex rel. People v. Lower Esopus River Watch, Inc.*, 39 Misc. 3d 1241(A) at \*27 (Sup. Ct. Ulster Cty. 2013) (noting that "[t]he EPTL defines a trustee broadly" and finding a "*de facto* officer of ... a not-for-profit corporation organized for charitable purposes" to be a trustee within the meaning of the statute); *Trump*, 88 N.Y.S.3d at 839 ("As directors of the Foundation, the Individual Respondents were also trustees of charitable assets pursuant to EPTL § 8-1.4 and thus were responsible for the proper administration of charitable assets."). This Court has rejected similar arguments before, asserted by a different Defendant in an earlier motion to dismiss. *See* NYSCEF 438 at 19 (arguing Defendant Frazer is not a statutory trustee); *National Rifle*

*Association of America, Inc.*, 74 Misc. 3d at 1026 (sustaining breach of EPTL § 8-1.4 claims against Frazer).

Throughout his tenure at the NRA, Powell was both a bylaws-established officer and a *de facto* officer, and played a key role in managing the organization’s affairs and administering its assets.<sup>3</sup> [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (CSOMF ¶ 50.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*) From January 2017 to December 2018, Powell was the NRA’s Executive Director of General Operations, a bylaws-established officer and *ex officio* director of the NRA with “such powers and duties as delegated to him from time to time by the Executive Vice President.” (CSOMF ¶ 51.) LaPierre promoted Powell to a “Senior Strategist” position in December 2018, [REDACTED]

[REDACTED] (CSOMF ¶ 52.) For a brief period of time, [REDACTED]

[REDACTED] (*Id.*)

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<sup>3</sup> Powell ascribes meaning to slight variations in the language of the Complaint, which states that Powell “was responsible” for holding and administering property for charitable purposes, while his co-defendants “held and administered” such property. (Powell Mem. at 13.) Powell raises a distinction without a difference—the Complaint alleges and the record demonstrates, or at least raises questions of fact, that Powell held and administered NRA property for charitable purposes pursuant to EPTL § 8-1.4.

Powell admitted that he was involved in [REDACTED]

[REDACTED]

[REDACTED]

(CSOMF ¶ 41.) Indeed, Powell testified [REDACTED]

[REDACTED]

[REDACTED] (*Id.*)

Accordingly, questions of fact regarding Powell's responsibility for holding and administering the NRA's property for charitable purposes preclude summary judgment.

### **III. QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT WITH RESPECT TO PLAINTIFF'S RELATED PARTY TRANSACTION CLAIMS**

Plaintiff's Eleventh Cause of Action asserts that Powell engaged in wrongful related party transactions under N-PCL § 715 and EPTL § 8-1.9(c). (SAC ¶¶ 682–685.) Specifically, Plaintiff alleges that Powell caused the NRA to enter into unlawful related party transactions with entities related to his wife, Colleen Gallagher, and his father, Jim Powell. A "related party transaction" is defined in the N-PCL as "any transaction, agreement or any other arrangement in which a related party [which includes officers] has a financial interest and in which the corporation or any affiliate of the corporation is a participant," with certain exceptions not relevant here. N-PCL § 102(a)(23) and (24). The N-PCL prohibits an organization from entering into a related party transaction

unless the transaction is determined by the board, or an authorized committee thereof, to be fair, reasonable and in the corporation's best interest at the time of such determination. Any director, officer, or key person who has an interest in a related party transaction shall disclose in good faith to the board, or an authorized committee thereof, the material facts concerning such interest.

N-PCL § 715(a). The EPTL similarly forbids related party transactions absent appropriate approval and obligates the conflicted party to disclose their conflict to the appropriate trustees. EPTL § 8-1.9(a)(6), (a)(8), and (c)(1).

Where an organization identifies a related party transaction that should have been approved in advance but was not, the statutory violation can be cured by the organization if:

prior to receipt of any request for information by the attorney general regarding the transaction, the board has: (A) ratified the transaction by finding in good faith that it was fair, reasonable and in the corporation's best interest at the time the corporation approved the transaction; and, with respect to any related party transaction involving a charitable corporation and in which a related party has a substantial financial interest, considered alternative transactions to the extent available, approving the transaction by not less than a majority vote of the directors or committee members present at the meeting; (B) documented in writing the nature of the violation and the basis for the board's or committee's ratification of the transaction; and (C) put into place procedures to ensure that the corporation complies with paragraphs (a) and (b) of this section as to related party transactions in the future.

N-PCL § 715(j); *see also* EPTL § 8-1.9(c)(8). For the reasons stated below, there are material issues of fact concerning Powell's related party transactions and the insufficiency of the NRA Audit Committee's purported ratification of those transactions.

**A. Powell's Wife's Work for NRA Vendor McKenna**

Contrary to Powell's contention that he appropriately disclosed his wife's relationship to an NRA vendor—and his own hands-off approach to managing that vendor relationship—the evidence shows that Powell: [REDACTED]

[REDACTED]

[REDACTED] (CSOMF ¶¶ 60-63); [REDACTED]

[REDACTED] (CSOMF ¶ 35); and [REDACTED]

[REDACTED]

[REDACTED] (CSOMF ¶¶ 35, 65.)

The only evidence Powell offers in support of his motion are self-serving minutes from the Audit Committee that fail to meet the requirements for a post-hoc ratification defense in N-PCL § 715(j) and EPTL § 8-1.9(c)(8). For example [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (NYSCEF 1219.) Powell cannot hide behind this deficient ratification to protect his own liability.

Powell miscites *Freer v. Mayer*, 223 A.D.2d 667 (2d Dep’t 1996) for the alleged proposition that the party disclosing a conflict has no responsibility for the quality of the board’s review of a transaction. That case, however, stands for no such proposition. The *Freer* court found that the interested person had properly disclosed the agreement to the board, which had “made a complete inquiry into whether the corporation should enter into the retirement agreement.” *Id.* at 668. Here, Powell indisputably failed to timely disclose the transaction and material issues of fact relating to the Audit Committee’s retroactive review preclude judgment in his favor.

#### **B. Powell’s Father’s Work for the NRA**

Powell’s arguments related to his father’s photography services fail for similar reasons.

[REDACTED]

[REDACTED]. (CSOMF ¶ 40.) [REDACTED]

[REDACTED]

[REDACTED] (*Id.*) He has also failed to meet the requirements of N-PCL § 715(j) or EPTL § 8-1.9(c), [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (*Id.*)



Further, the record belies Powell's improbable arguments that he was not aware of his father's work on behalf of the NRA. (*Id.*)

For these reasons, material issues of fact remain as to Powell's liability for improper related party transactions.

#### **IV. POWELL'S STATUTE OF LIMITATIONS DEFENSE FAILS AS A MATTER OF FACT AND LAW**

Powell cannot take refuge in his argument that all of Plaintiff's "claims are mostly time-barred anyway." (NYSCEF 1235 at 15, 17–18.) Powell has waived his statute of limitations defense, incorrectly interprets the applicable law, and is mistaken on the relevant facts.

##### **A. Powell's Statute of Limitations Defense Is Waived**

A defendant waives his statute of limitations defense by failing to raise it in his answer or in a pre-answer motion to dismiss. CPLR 3211(a)(5), (e); *see also Matter of Augenblick*, 66 N.Y.2d 775, 777 (1985) (citing CPLR 7804(f); 3211(a)); *Robinson v. Canniff*, 22 A.D.3d 219, 220, 801 N.Y.S.2d 597 (1st Dep't 2005). Here, Powell failed to raise the affirmative defense in any of his three responsive pleadings served over the course of three years since this action has been pending (*see* NYSCEF 200, 346, 681), and failed to raise the defense in a pre-answer motion to dismiss. Accordingly, his statute of limitations defense is waived.

##### **B. Powell Improperly Applies a Three-Year Statute of Limitations**

Even if Powell's statute of limitations defense were not waived, it fails as a matter of law. To remedy Powell's breaches of fiduciary duty and related party transactions, Plaintiff seeks equitable relief; namely, an accounting, restitution, disgorgement, and an injunction against Powell's future fiduciary service. (SAC ¶¶ 661, 677, 685.) Accordingly, Plaintiff's claims are governed by the six-year statute of limitations period of CPLR 213(1). *Loengard v. Santa Fe Indus.*, 70 N.Y.2d 262, 267 (1987). This is so even where, as here, some monetary relief is sought.

*See Spitzer v. Schussel*, 7 Misc.3d 171, 174–75 (Sup. Ct. N.Y. Cty. 2005) (holding that recovery of “improperly handled” funds is akin to an equitable remedy and applying a six year statute of limitations); *accord Trump*, 62 Misc. 3d 500, 507. Alternatively, claims brought by the Attorney General under the N-PCL on behalf of a corporation “to recover damages for waste or for an injury to property” from corporate directors and officers “fall[] within the ambit of C.P.L.R. § 213(7)” and also have a six-year statute of limitations. *Schussel*, 7 Misc.3d 171, at 174–75.<sup>4</sup>

Further, the statute of limitations on a breach of fiduciary duty claim does not begin to run until the fiduciary has openly repudiated the fiduciary relationship or it has been otherwise terminated. *In re Barabash’s Estate*, 31 N.Y.2d 76, 80 (1972); *see also Trump*, 88 N.Y.S.3d at 837. This toll also applies even when a mix of equitable relief and monetary damages are sought. *Trump*, 88 N.Y.S.3d at 837; *People of the State of New York v. Austin*, No. 451533/2019, 2021 WL 325557, at \*4 (Sup. Ct. N.Y. Cty., Jan. 29, 2021) (Sherwood, J.); *Lemle v. Lemle*, No. 601281/2007, 2017 WL 1407712, at \*7 (Sup. Ct. N.Y. Cty. Apr. 20, 2017). And it also applies to actions by the Attorney General acting on behalf of charitable beneficiaries against fiduciaries of not-for-profit corporations. *People ex. rel. Spitzer ex. rel. Ultimate Charitable Beneficiaries v. Ben*, 55 A.D.3d 1306, 1308 (4th Dep’t 2008). Moreover, where a party’s wrongful conduct is continuous, equitable relief is not barred because more than six years have elapsed from the first

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<sup>4</sup> Powell’s reliance on *Grika v. McGraw*, 55 Misc. 3d 1207(a) (Sup. Ct. N.Y. Cty. 2016), *aff’d sub nom., L.A. Grika on behalf of McGraw*, 161 A.D.3d 450 (1st Dep’t 2018) is misplaced. *Grika* held that a three year statute of limitations applies to claims seeking “only monetary damages” against “mere[] employees” rather than directors or officers. Moreover, the case confirmed that the six year limitations period applies to claims seeking equitable relief against directors, officers, or shareholders. *Id.* at \*12. Here, the six-year limitations period applies, as Plaintiff seeks equitable relief, including restitution, against Powell, who was unquestionably an officer under the NRA’s bylaws. (CSOMF ¶ 43.)

instance of wrongdoing. *Butler v. Gibbons*, 173 A.D.2d 352, 353 (1st Dep’t 1991); *Trump*, 88 N.Y.S.3d at 837.

Here, Plaintiff’s claims for equitable and monetary relief against Powell for his continuing violations of his fiduciary duties are subject a six-year statute of limitations, which did not begin to run until Powell’s status as a fiduciary was terminated along with his employment on January 30, 2020. (CSOMF ¶ 18.) Plaintiff’s claims under N-PCL § 715 and EPTL § 8-1.9(c) for wrongful related party transactions that occurred in 2017 and 2018 are likewise subject to a six-year statute of limitations. As Plaintiff commenced this action on August 6, 2020 (NYSCEF 1), each of the claims against Powell is timely.<sup>5</sup>

#### **V. QUESTIONS OF FACT PRECLUDE SUMMARY JUDGMENT WITH RESPECT TO DOUBLE DAMAGES**

Powell argues that Plaintiff has not satisfied its burden to prove willful or intentional conduct sufficient to recover double damages, because it has not demonstrated that Powell knew he violated the law. (Powell Mem. at 18–19). However, such a showing is not required under the statutes at issue here.

Under the N-PCL and EPTL, the Attorney General may “seek to require any person or entity to: ... [p]ay, in the case of willful and intentional conduct, an amount up to double the amount of any benefit improperly obtained.” N-PCL § 715(f)(4); EPTL § 8-1.9(c)(4)(D). Read plainly, these statutes impose a penalty for willful and intentional *conduct*, not for a willful and

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<sup>5</sup> In arguing that Plaintiff’s claims are time-barred by a three-year statute of limitations. Powell erroneously asserts that Plaintiff “initiated the action on August 16, 2021.” (Powell Mem. at 17–18), more than a year after the action was actually commenced. As noted above, Plaintiff commenced this action on August 6, 2020 (NYSCEF 1), and accordingly these claims would be timely even if a three-year statute of limitations applied.

intentional violation of the statute. *See Trump*, 62 Misc. 3d at 518 (sustaining double damages claim where plaintiff alleged that defendant directed that foundation checks be drawn up, signed and intentionally presented at campaign rallies, and where defendant “intentionally used charitable assets to advance his private interests knowing that it may not be in the Foundation’s best interest”); *People v. Alamo Rent a Car*, 174 Misc.2d 501, 503–05 (Sup. Ct. N.Y. Cty. 1997) (interpreting “knowing violation” of General Business Law § 391-g(2)).<sup>6</sup> This interpretation is consistent with the text of the statute and its purpose to protect charitable beneficiaries from those who impermissibly benefit from related party transactions.

As explained above, through his willful and intentional conduct, including signing the contract with McKenna and, by his own admission, recommending vendors that employed his father and wife to the NRA, Powell caused the NRA to enter into transactions with related parties which he knew would benefit his family members and, by extension, himself. (*See* CSOMF ¶¶ 37–41.) Powell argues that he “disclosed these relationships” and “had them vetted by the Audit Committee,” (Powell Mem. at 19), but fails to mention that the relationships were disclosed *after* the transactions had already occurred, in violation of the NRA’s Conflicts of Interest Policy. (*See* (NYSCEF 1227 at NYAG-00041309; CSOMF ¶ 38.) At a minimum, questions of fact preclude summary judgment with respect to the issue of double damages.

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<sup>6</sup> In addition to the *Alamo* case, Powell cites to other inapposite federal cases interpreting “willfulness” for the purposes of criminal tax liability, *see United States v. Kupfer*, 792 F.3d 1226, 1228 (10th Cir. 2015); *Cheek v. United States*, 498 U.S. 192, 201 (1991), and an Erie County case involving a claim for punitive damages for “willful or reckless disregard of the [plaintiff’s] lawful rights,” where the parties stipulated to the definition of the term “willful” and where that definition was not challenged. *Mueller v. Elderwood Health Care at Oakwood*, 31 Misc.3d 1210(A), \*15–\*18 (Sup. Ct. Erie Cty. 2011).

### CONCLUSION

For the reasons set forth above, Plaintiff respectfully requests that the Court issue an order denying Powell's motion for summary judgment in its entirety and granting such other and further relief as the Court deems just and appropriate.

Dated: March 20, 2023  
New York, New York

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**Attorney Certification Pursuant to Commercial Division Rule 17**

I, Alexander Mendelson, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law contains 6,994 words, excluding the parts exempted by Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)). In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

Dated: March 20, 2023  
New York, New York

/s/Alexander Mendelson  
Alexander Mendelson