

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

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

Plaintiff,

v.

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

Defendants.

Index No. 451625/2020

Hon. Joel M. Cohen

Motion Sequence No. 45

**REPLY BRIEF IN SUPPORT OF DEFENDANT WILSON H. PHILLIPS'S
MOTION FOR SUMMARY JUDGMENT**

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

I. Preliminary Statement

As set out in Mr. Phillips’s opening papers, Mr. Phillips is entitled to partial summary judgment on the Fourth, Eighth and Twelfth Causes of Action, as there was nothing wrongful about either his entering into an arms-length consulting contract with the National Rifle Association (“NRA”) to provide it with post-retirement consulting services (the “Consulting Agreement”) or his execution on behalf of the NRA of a software development contract with HomeTelos (the “HomeTelos Contract”).¹

In disputing whether Mr. Phillips is entitled to summary judgment with respect to his Consulting Agreement, the Attorney General incorrectly focuses on the terms of and performance under the agreement. But neither the content of Mr. Phillips’s Consulting Agreement nor his performance under it is relevant to whether Mr. Phillips engaged in a wrongful related party transaction under N-PCL § 715(f) and EPTL § 8-1.9(c) by entering into that agreement, which is all that is at issue in the Twelfth Cause of Action. As to that question, the Attorney General does not dispute that Mr. Phillips did not enter into the Consulting Agreement on behalf of the NRA but rather was merely a counterparty who executed the Agreement on his own behalf while NRA President Pete Brownell did so on behalf of the NRA.

Although the Attorney General attempts to distinguish her own published guidance indicating that, under those circumstances, such a contract for employment services is not a related

¹ The Fourth Cause of Action alleges that Mr. Phillips breached his fiduciary duty to the NRA under N-PCL §§ 717 and 720. The Eighth Cause of Action alleges that Mr. Phillips failed to properly administer the charitable assets of the NRA under EPTL § 8-1.4. The Twelfth Cause of Action alleges that Mr. Phillips engaged in a wrongful related party transaction under N-PCL §§ 112(a)(10), 715(f), and EPTL § 8-1.9(c)(4).

party transaction under the statute, the Attorney General offers no explanation for how or why such a contract for post-retirement services should be treated any differently under the statute.

For similar reasons, Mr. Phillips is entitled to partial summary judgment on so much of the Fourth and Eighth Causes of Action as are based on the Consulting Agreement. Here, too, the Attorney General's opposition glosses over the posture of the parties entering into the Consulting Agreement and ignores the uncontroverted facts that others from the NRA—not Mr. Phillips—executed and negotiated the consulting agreement on the NRA's behalf. Accordingly, none of the alleged shortcomings that the Attorney General cites in her Opposition as bases for sustaining this portion of her breach-of-fiduciary duty and failure-properly-to-administer-charitable-assets claims—not presenting the Agreement to the Audit Committee for advance approval (*see* Plaintiff's Memorandum of Law in Opposition to Defendant Wilson Phillips's Motion for Summary Judgment, Doc. No. 1317 at 15 ["Opp'n"]), not complying with the procedural requirements of the NRA's Financial Policies for large contracts (*id.*), and not "put[ting] the NRA's interests ahead of his own" in negotiating the contract (*id.* at 16)—can properly be laid at Mr. Phillips's doorstep.

Nor can the HomeTelos Contract serve as a basis for the Fourth or Eighth Causes of Action. First, the uncontroverted record evidence shows that the HomeTelos Contract was not a "related party" transaction, a conclusion that the Attorney General does not even dispute. Instead, the Attorney General argues that there is testimony in the record that Mr. Phillips had an ongoing romantic relationship with the "chairman and founder" of HomeTelos (Nancy Richards) and that Mr. Phillips had a duty to disclose this alleged ongoing romantic relationship to the NRA Audit Committee. (Opp'n at 17). But, in fact, there is no testimony that Ms. Richards and Mr. Phillips had an ongoing romantic relationship at the time the HomeTelos Contract was reviewed and

approved, leaving Mr. Phillips's testimony that their romantic relationship had ended years earlier as unrefuted. Moreover, even if Mr. Phillips's relationship with Ms. Richards had been ongoing, a mere failure to disclose that relationship to the Audit Committee in advance would be insufficient to support a breach-of-fiduciary duty or failure-to-administer-charitable-assets claim. In that regard, even if this alleged "failure to disclose" were wrongful, the Attorney General identifies no evidence in the record (and there is none) to support the assertion that this non-disclosure caused the NRA any harm. [REDACTED]

[REDACTED]

[REDACTED]. Finally, uncontroverted evidence also establishes that Mr. Phillips was properly authorized to execute the HomeTelos Contract. Accordingly, the evidence in the record cannot support a claim that Mr. Phillips breached a fiduciary duty to the NRA or failed to properly administer the NRA's charitable assets based on his conduct with respect to the HomeTelos Contract. Mr. Phillips is, therefore, entitled to partial summary judgment as to so much of the Fourth and Eighth Causes of Action as is based on that contract.

II. Argument

A. **Because Mr. Phillips's Consulting Agreement is not a Related Party Transaction, the Court Should Grant Summary Judgment on the Twelfth Cause of Action.**

As Mr. Phillips explained in his opening brief, the Attorney General's own published guidance expressly states that transactions related to the compensation of employees, officers or directors are not related party transactions. (*See People v. Nat'l Rifle Ass'n of Am., Inc.*, 74 Misc. 3d 998, 1035 [Sup. Ct., NY Cnty. 2022]) (quoting Office of the New York State Attorney General Charities Bureau, Charities Symposium: Doing Well While Doing Good, Conflicts of Interest Policies under the Not-For-Profit Corporation Law at 7 [Sept. 2018] ["Transactions related to compensation of employees, officers or directors . . . are not considered related party

transactions”)). The Attorney General attempts to distinguish this guidance by asserting that the guidance “has no application here and does not address contracts, like the one at issue: a post-employment, self-renewing consulting contract commencing after Phillips’s retirement[.]” (Opp’n at 2). But that is a distinction without a difference, and the Attorney General cites to no authority to support the legal distinction that she attempts to draw.² Instead, the Attorney General simply asserts the “guidance is intended to avoid turning employee or officer compensation into a prohibited related party transaction” and then pronounces that the Consulting Contract should be treated differently because it “is not related to Phillips’s compensation *as an employee or officer of the NRA*—instead, the agreement by its very terms compensated Phillips as an *independent contractor* of the NRA after his retirement.” (*Id.* at 11 [emphasis in original]).

However, the logic behind not treating employee, officer or director compensation as a related party transaction applies equally to a contract with an employee that provides compensation for post-employment services. In each case, the employee is acting at arms-length from the not-for-profit (as it is undisputed that Mr. Phillips did here) and negotiating with it as a counterparty. Moreover, there is nothing about the nature of Mr. Phillips’s technical status (contractor vs. employee) at the time that the services will be performed that would justify treating the negotiation of a contract for such services any differently.

As a fallback argument, the Attorney General contends that “[e]ven if the Consulting Agreement were not a related party transaction . . . it would still violate N-PCL § 715, because

² The Attorney General does cite this Court’s prior denial of Mr. LaPierre’s motion to dismiss her cause of action against Mr. LaPierre for allegedly unlawful related-party transactions, including his own post-employment contract. Opp’n at 12 (citing *People v. Nat’l Rifle Ass’n of Am., Inc.*, 74 Misc. 3d 998, 1027 (Sup. Ct. N.Y. Cnty. 2022)). However, as Mr. Phillips explained in his opening brief, Mr. LaPierre did not raise, and the Court did not address, the arguments that Mr. Phillips advances here. (See Memorandum in Support of Defendant Wilson Phillips’s Motion for Summary Judgment, Doc No. 1193 at 7, n.1 [“Phillips’s Br.”]).

officer compensation agreements must be approved in accordance with the NRA's bylaws, which the Consulting Agreement was not.” (Opp’n at 12 [citing N-PCL § 715(e)]). However, there are two separate problems with this argument. First, the Twelfth Cause of Action expressly alleges a violation of N-PCL § 715(f)—not N-PCL § 715(e)—and the Attorney General cannot now, in her opposition to summary judgment, amend her claim. Second, the Consulting Agreement is plainly not “officer compensation” because it does not compensate Mr. Phillips for services to be provided to the NRA while an officer of the organization. Rather, as the Attorney General herself points out, the Consulting Agreement provides compensation for services to be provided to the NRA after Mr. Phillips was no longer its Treasurer. (Opp’n at 12 [“the Consulting Agreement is not related to Phillips’s compensation as an employee or officer of the NRA.”]) Accordingly, there is no basis for her argument that the Agreement is covered by Section 715(e)’s requirements “for the fixing of compensation of officers.”

In sum, the Consulting Agreement is not a related party transaction, and Mr. Phillips is, therefore, entitled to summary judgment on Plaintiff’s Twelfth Cause of Action.

B. Mr. Phillips Is Entitled to Partial Summary Judgment on the Fourth and Eighth Causes of Action to the Extent that They Are Based Upon the Consulting Agreement and the HomeTelos Contract.

1. The Consulting Agreement

The Attorney General offers three arguments to support its position that, by entering into the Consulting Agreement, Mr. Phillips breached his fiduciary duties to the NRA and failed adequately to administer its assets. As explained below, each of these arguments fails for the same reason: Mr. Phillips was properly, openly and necessarily acting on his own behalf (and not as a fiduciary of the NRA) in negotiating this arms-length agreement with it.

First, the Attorney General argues that “the Consulting Agreement should have been, but was not, presented to the full Audit Committee for its review and approval in advance.” (Opp’n

at 15). However, the Attorney General does not explain why it would have been Mr. Phillips's obligation to do so on behalf of the NRA in an instance where he was a counterparty to it.³ In fact, others at the NRA—including NRA President Pete Brownell and NRA counsel Steven Hart—were responsible for the NRA's negotiation and execution of the agreement. (*See* Phillips's Br. at 3-4, 7-8). Therefore, if any NRA executives would have had such a duty, it would have been Mr. Brownell and Mr. Hart, not Mr. Phillips.

Second, the Attorney General contends that "Phillips did not ensure that the Consulting Agreement met all of the requirements for large contracts set forth in the Financial Policies." (Opp'n at 15). Here, too, it was not Mr. Phillips's role to do so, as he was not acting on behalf of the NRA in negotiating or executing an agreement for his own services.

Third, and perhaps most surprisingly of all, the Attorney General argues that "Phillips failed to put the interests of the NRA ahead of his own" when he negotiated and entered into a contract with it. (*Id.* at 16). However, the suggestion that Mr. Phillips, as a counterparty negotiating with the NRA at arms-length, should have put the NRA's interests above his own in those negotiations makes no sense. Indeed, the Attorney General's position is contrary to the very concept of arms-length negotiations (where each party looks after its own best interests) and utterly unworkable. Unsurprisingly, the Attorney General cites no authority to support this argument, and this Court should reject it.⁴

³ Indeed, elsewhere in her Complaint, the Attorney General takes a contrary position and criticizes Mr. Phillips for presenting his own compensation to a board committee for approval. (*See* Second Amended Verified Complaint, Doc No. 646, ¶ 419)

⁴ At various points, the Attorney General highlights the substantive terms of the Consulting Agreement, which she twice refers to as "lucrative." Opp'n at 2, 16. She also cites various witnesses who testified to a lack of recollection of Mr. Phillips performing services under the Consulting Agreement. *Id.* at 16. Once again, though, Mr. Phillips was not acting as a fiduciary to the NRA in negotiating his own contract with it and, accordingly, the terms of that contract cannot serve as the basis for a breach-of-fiduciary-duty claim against him. Moreover, whether Mr. Phillips subsequently performed services as contractually required by the Consulting Agreement

2. The HomeTelos Contract

The Attorney General does not dispute that the HomeTelos Contract is not a related party transaction. Instead, she grounds her argument that Mr. Phillips breached his fiduciary duty to the NRA and failed to properly administer its charitable assets in his alleged failure to disclose his relationship with Ms. Richards to the NRA Audit Committee and to obtain that Committee's approval before executing that contract on the NRA's behalf.

To begin with, the Attorney General mischaracterizes the deposition testimony regarding Mr. Phillips's relationship with Ms. Richards. Specifically, the Attorney General asserts, "numerous witnesses have testified that Phillips's personal relationship with Ms. Richards carried on into at least 2018, contradicting Phillips's testimony that his romantic relationship with Mr. Richards ended in 2010." (Opp'n at 17). However, Mr. Phillips never denied that his personal friendship with Ms. Richards continued after their romantic relationship ended. (*See, e.g.*, Loegering Affidavit in support of Phillips's Motion for Summary Judgment ("Loegering Aff."), Ex. C at 108:3-23 [confirming Ms. Richards was an individual with whom he had a romantic relationship "at one time" "over 10 years ago" and that "[i]t became just friendly and we're good friends"]]). There is, therefore, nothing contradictory between his testimony and any testimony that their relationship as personal friends continued into 2018.⁵

is a separate issue from whether he breached a fiduciary duty or failed properly to administer NRA assets by entering into that agreement. Such alleged non-performance would have to be the subject of a breach-of-contract claim, which the Attorney General has not brought and which is not the subject of the claims at issue in this motion.

⁵ In contesting Mr. Phillips's assertion that his romantic relationship with Ms. Richards ended in approximately 2010, the Attorney General cites the deposition testimony of various NRA employees and NRA Audit Committee Chair Charles Cotton who, according to the Attorney General, testified that Ms. Richards "was known among NRA employees as Phillips's 'girlfriend' or 'significant other' in years following 2010." (Plaintiff's Counterstatement of Material Facts, Doc No. 1318 at 15). However, although all those witnesses testified that [REDACTED]

[REDACTED] See Affirmation of Alexander Mendelson in support of Plaintiff's

In any event, regardless of the precise nature of Mr. Phillips's relationship with Ms. Richards, his alleged failure to disclose that relationship to the Audit Committee and obtain its approval in advance cannot support either a breach-of-fiduciary-duty or failure-properly-to-administer-assets claim against him because there is no evidence in the record that this purported failure caused the NRA any harm. In that regard, it is undisputed [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]:

[REDACTED]

[REDACTED]

[REDACTED]

Opposition to Defendant Wilson Phillips's Motion for Summary Judgment ("Mendelson Aff."), Ex. R at 373:8-12, 373:25-374:16 (Supernaugh Dep. Tr.) [REDACTED]

[REDACTED]; Mendelson Aff., Ex. Y at 277:23-278:3 (Cotton Dep. Tr.) [REDACTED]

[REDACTED]; Mendelson Aff., Ex. S at 335:5-22 (Rowling Examination Tr.) [testifying she "found out in early '18" that HomeTelos was owned by Mr. Phillips's "significant other" but offering no testimony regarding the timing of their romantic relationship]; Mendelson Aff., Ex. T at 386:3-13 (7/14/22 Rowling Dep. Tr.) [REDACTED]

[REDACTED]; Mendelson Aff. Ex. U at 379:9-12, 408:11-20 (Spray Examination Tr.) [testifying as to when he became aware of payments to Mr. Phillips's "significant other" but offering no testimony regarding the timing of their romantic relationship]; Mendelson Aff., Ex. N at 133:4-12 (Grable Dep. Tr.) [REDACTED]

[REDACTED].

As a result, any purported failure by Mr. Phillips to have disclosed his relationship with Ms. Richards to the Audit Committee in advance could not have harmed the NRA, [REDACTED]

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[REDACTED].

In her opposition, the Attorney General cites no contrary evidence but instead argues that “the Audit Committee’s consideration was lacking” because, according to the Attorney General, “there is no evidence in the report that the Audit Committee even reviewed the contract at issue[,] [n]or does it appear to have considered alternative transactions.” (Opp’n at 18). However, whether the Audit Committee acted diligently or not in approving the HomeTelos Contract, it is undisputed that [REDACTED]

[REDACTED]. That is all that matters for these purposes, as the relevant issue is not whether the Audit Committee complied with its internal procedures but whether Mr. Phillips’s alleged failure to disclose the relationship caused the NRA to enter into an agreement that it otherwise would not have. Because [REDACTED]

[REDACTED] Mr. Phillips’s conduct with respect to the HomeTelos Contract cannot support a breach-of-fiduciary-duty or failure-properly-to-administer-assets claim against him.

Accordingly, Mr. Phillips is entitled to partial summary judgment on those portions of the Fourth and Eighth Causes of Action as are based on those grounds.

III. Conclusion

For these reasons, and all those set forth in Mr. Phillips’s summary judgment papers, the Court should grant summary judgment to Mr. Phillips on the Twelfth Cause of Action for Wrongful Related Party Transactions and partial summary judgment on the Fourth Cause of Action for Breach of Fiduciary Duty to the NRA and Eighth Cause of Action for Breach of EPTL § 8-1.4 to the extent that those Causes of Action are based on Mr. Phillips’s conduct related to the Consulting Agreement and the HomeTelos Contract.

Dated: March 27, 2023
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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

3. Pursuant to the Rules of the Commercial Division of the Supreme Court (22 NYCRR § 202.70(g)), I certify that this memorandum of law complies with the word count limit set out in Rule 17, as it contains 3,613 words (excluding the parts of the brief exempted by Rule 17).

Dated: March 27, 2023
Dallas, Texas

By: /s/ Rebecca Loegering
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