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

PEOPLE OF THE STATE OF NEW YORK, BY LETITIA JAMES, ATTORNEY GENERAL OF THE STATE OF NEW YORK,	§	
Plaintiff,	§	**INDEX NO. 451625/2020**
v.	§	
THE NATIONAL RIFLE ASSOCIATION OF AMERICA, WAYNE LAPIERRE, WILSON PHILLIPS, JOHN FRAZER, and JOSHUA POWELL,	§	**Motion Sequence No. __**
Defendants.	§	

THE NRA'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

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The National Rifle Association of America ("NRA" or "Association") submits this brief in support of its Motion for Judgment Notwithstanding the Verdict.

I. LEGAL STANDARD

If a jury's verdict is in error as a matter of law, the trial court must correct that error and order judgment notwithstanding the verdict. *See* CPLR 4404(a). In answering this question, "the relevant inquiry [is] whether there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial." *Mirand v. City of New York*, 84 N.Y.2d 44, 48-49 (1994) (cleaned up); *see also Barrerra v. N.Y.C. Transit Auth.*, 61 A.D.3d 425, 426 (1st Dep't 2009) (affirming judgment notwithstanding the verdict where plaintiff failed to offer any evidence of an element required for prima facie case). "The criteria to be applied in making this assessment are essentially those required of a Trial Judge asked to direct a verdict." *Cohen v. Hallmark Cards*, 45 N.Y.2d 493, 499 (1978).

Alternatively, a party is entitled to a new trial where the verdict is "against the weight of the evidence" or where a new trial is "in the interest of justice." CPLR 4404(a).

II. ARGUMENT

A. The Trial Proof Does Not Rationally Sustain a Verdict That the NRA Violated EPTL § 8-1.4(m)

To establish "improper administration" under EPTL § 8-1.4(m), the NYAG was required to prove that the NRA itself—as distinct from rogue fiduciaries—persistently failed to protect the "charitable assets" of the Association. *See* NYSCEF 2682 at pp. 1-3, 5-15 (NRA Trial Brief).[1]

[1] The NRA incorporates by reference its previous briefing on EPTL § 8-1.4(m) and its objections to the jury instructions, and accordingly requests a new trial on the EPTL § 8-1.4(m)

Because the NYAG failed to present any proof on two elements of this claim, the Court should enter a verdict in the NRA's favor on it.

First, EPTL § 8-1.4(m) is limited to securing the "proper administration" of charitable assets. *See* Court Ex. XII, Jury Instructions, at p. 40 (transactions must "adversely affect the NRA's charitable assets" to constitute a violation of EPTL § 8-1.4(m)); NYSCEF 3032 (NRA Letter). No trial proof showed that the NRA's charitable assets, as opposed to its non-charitable assets, were improperly administered. *See* Tr. at 3834-37 (Erstling) (testifying, without contradiction, that the NRA's assets held for charitable purposes were carefully tracked and monitored).

Second, the NYAG needed to prove "a sustained or systematic failure of the board to exercise oversight" to hold the NRA liable for "improper administration." *See* NYSCEF 2711 (NRA Bench Brief) at pp. 4–7. The NYAG failed to do so. Instead, the evidence showed unequivocally that the NRA Board acted on the few "red flags" it received, and that misconduct by former officers and vendors was hidden from the NRA to avert controls that the Board installed and monitored. *See* NYSCEF 2922 at 2–7 (NRA's Motion for Directed Verdict), NYSCEF 3056 at 1–2 (NRA Letter in Support of Directed Verdict); Tr. at 2828–35 (Coy) (testifying that the Audit Committee acted in response to the 2003 Frenkel Report, including by requiring the NRA to adopt new policies and procedures).

In fact, Wilson Phillips and Wayne LaPierre, former officers, testified that they violated the Board's policies and rules and concealed their misconduct from the NRA Board. *See* Tr. 1023–24 (Phillips) (testifying that he failed to inform the Board that Ackerman McQueen invoices were

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claim. *See* App. A. In particular, over the NRA's objection, the Court reserved for itself the most crucial element of the claim—whether any of the alleged violations are continuing or is imminently likely to recur. *See* NYSCEF 2122. Further, EPTL § 8-1.4(m)'s "proper administration" standard is unconstitutionally vague. *See* NYSCEF 2564.

being paid with no business-purpose backup), 2203–09 (LaPierre) (testifying that he did not disclose or seek Board approval for his and Susan LaPierre's use of McKenzie's yacht), 2395–99 (LaPierre) (testifying that before 2018 he never informed the Board about his use of private planes or black cars for friends and family). And the NYAG introduced no evidence showing that these defendants or vendors undertook their concealed misconduct to benefit the NRA. In fact, the evidence before the jury was to the contrary. *See*, *e.g.*, Tr. at 2172-83, 2202-03 (LaPierre) (testifying that private flights for personal vacations and family members were billed to the NRA), 4350-55 (LaPierre) (testifying that several former vendors defrauded the NRA). Misconduct that targeted the NRA and was concealed from it cannot be imputed to it as a matter of law. *See Wight v. BankAmerica Corp.*, 219 F.3d 79, 87 (2d Cir. 2000).

Finally, the NYAG is estopped by its own judicial admissions from now contradicting that the misconduct of the individual defendants (and those acting in concert with them) was not known to the Board or undertaken for the benefit of the Association. *See* NYSCEF 611 at p. 2 (noting that the NYAG's Complaint "cast[s] the [NRA] as the *victim* of its executives' schemes."); NYSCEF 2700 (NRA Bench Brief).

B. The Trial Proof Does Not Rationally Sustain a Verdict Against the NRA Regarding the Remaining Alleged Related Party Transactions

The jury found only three of the alleged related party transactions lacked proper ratification by the NRA: (1) hair and makeup expenses for Susan LaPierre; (2) payments to NRA Board member David Keene for speaking engagements; and (3) Phillips's post-employment contract. *See* Court Ex. XI, Verdict Sheet, at pp. 11-13. But the trial evidence was not sufficient to prove liability as to these transactions either.

1. Susan LaPierre's Hair & Makeup Expenses Were "Ordinary Course" Transactions and De Minimis

N-PCL § 102(a)(24) excludes from the definition of a "related party transaction" any

transaction that is "de minimis" or "would not customarily be reviewed by the board or boards of similar organizations in the ordinary course of business and is available to others on the same or similar terms."

Ms. LaPierre's hair and makeup expenses clearly fit both of these exceptions. The expenses were associated with her unpaid participation as the Volunteer Chair for the NRA Women's Leadership Forum. As Mr. LaPierre testified of one such event, "It was filmed, and there was hair and makeup for not only for [Ms. LaPierre] but … other women … also, and then they did summits where they would invite the women donors at various times of the year. There was hair and makeup for that as well." Tr. at 4292:18–22 (LaPierre). Mr. LaPierre testified, without contradiction, that identical hair and makeup services were made available to all speakers at the relevant NRA events, and to male speakers in similar situations. Tr. at 4292–94 (LaPierre); *see also id.* at 2055:1–19 (Winkler); PX-3150 at p. 268 (invoice for five days of "Full day makeup" at the 2018 NRA Annual Meeting, with no indication that services were limited to Susan LaPierre). There was no contravening evidence from which the jury could infer that hair and makeup services were ***not*** made available to non-related parties on substantially similar terms. And there was no evidence in the record that hair and makeup for speakers at televised events constituted the type of expense customarily reviewed by non-profit boards.

Further, the expenses fit within the "de minimis" exception to the definition of a "related party transaction," as they constituted less than 0.007% of the NRA's revenues in 2017 and 2018. PX-3150; PX-3152; App. B at Fig. 1; N.Y. ATT'Y GEN, *Conflict of Interest Policies Under the Not-for-Profit Corporation Law*, 6 (Sept. 2018), https://ag.ny.gov/sites/default/files/regulatory-documents/Charities_Conflict_of_Interest.pdf ("What constitutes a 'de minimis' transaction will depend on the size of the corporation's budget

and assets and the size of the transaction."); *Ruggiero v. Molinari*, 112 A.D.2d 1071, 1072 (2d Dep't 1985) ("four one hundredths of one percent" or "12 one hundredths of one percent" overstatement of signatures was de minimis); *Staber v. Fidler*, 110 A.D.2d 38 (2d Dep't 1985) (candidates' overstatement of signatures by 0.0017% and 0.0021% was de minimis); *Druskin v. Answerthink, Inc.*, 299 F. Supp. 2d 1307, 1329 (S.D. Fla. 2004) (holding, in lawsuit alleging failure to disclosure related party transactions, that transaction that constituted 0.67% of company's $260,460,000 revenue was "de minimus when compared to the overall revenue" and, therefore, immaterial as a matter of law).

2. Keene's Speaking Engagements Were Properly Ratified and De Minimis

The NRA paid Keene $140,000 for speaking engagements from 2015 to 2020. *See* Tr. at 2239:10–20 (LaPierre); PX-5140, PX-1491. Those transactions were brought to and ratified by the Audit Committee in 2017, the same year the NRA's General Counsel, John Frazer, became aware of them. *See* JFX-66a at p. 2; *see also* Tr. at 4196:2–20 (Frazer). The Audit Committee ratified the $4,000-per-month arrangement with Keene after it found the arrangement to be fair, reasonable, and in the NRA's best interests. *Id.*; *see also* Tr. at 2639:16–2640:4 (Frazer) (the Audit Committee retroactively approved the payments to Keene in connection with his appearances at Friends of the NRA Dinners), 2640:1–23 (Frazer) (Keene's speeches at these dinners "advance[d] the NRA's mission"), 4196:2–4197:15 (Frazer) (before the December 7, 2017 Audit Committee meeting, Frazer gathered information and attended one of Keene's speeches, and the Audit Committee approved the transactions and their continuation). There was no evidence that the Audit Committee ratified Keene's speaking fees in bad faith. *See* PX-2374 at 63 (the NRA's 2020 CHAR500 disclosing Keene's compensation).

Further, Keene's payments, which ended in 2021, constituted less than 0.02% of the NRA's total revenues and less than 0.03% of the NRA's total assets and were thus de minimis. *See*

Druskin, 299 F. Supp. 2d at 1329; *see also* App. B at Fig. 3.

3. Phillips's Brief Post-Employment Contract, Which Was Found Not to Have Damaged the NRA, Was De Minimis

Phillips's post-employment contract was canceled after four months, and the payments under it constituted an insignificant amount of the NRA's total revenues—$167,500 or 0.0573% of the NRA's revenue for 2019. *See Druskin*, 299 F. Supp. 2d at 1329; App. B at Fig. 2; PX-5137 (Hines); PX-0159 at 50. Because the jury found that the NRA did not sustain any damages as a result of the contract (Court Ex. XI, Verdict Sheet, at pp. 8–9), and because a transaction "that is financially so minor that it is insignificant" cannot be a violation of N-PCL § 715, *see* NYSCEF 3049 at 46 (Jury Instructions), the only rational conclusion that the jury could have arrived at was that "the transaction . . . [was] de minimis" and thus not a violation of the law. *See* Court Ex. XI, Verdict Sheet, at p. 9.

C. <u>The Trial Proof Did Not Establish That the NRA Violated N-PCL § 715-b</u>

N-PCL § 715-b requires certain non-profits to "adopt, and oversee the implementation of, and compliance with, a whistleblower policy to protect from retaliation persons who report suspected improper conduct." *See* N-PCL § 715-b(a). To establish a violation of N-PCL § 715-b, the NYAG was required to prove that (1) a "director, officer, key person, employee or volunteer of a corporation," (2) "in good faith" (3) "report[ed] any action or suspected action taken by or within the NRA that was illegal, fraudulent, or in violation of any adopted policy," and (4) as a result, "suffer[ed] intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequence." *Id*.[2]

[2] The jury was charged, in addition, that it could find a N-PCL § 715-b violation if the NRA "fail[ed] to evaluate whistleblower complaints." NYSCEF 3212 (Court Ex. XI, Verdict Sheet, at p. 15). This requirement does not appear in the statute, and it was clear error to include it. *Compare* NYSCEF 3055 at pp. 11-17 (the NRA's proposed N-PCL § 715-b instructions). Even

Importantly, N-PCL § 715-b only protects individuals "who in good faith ***report*** any action or suspected action taken by or within the corporation that is illegal, fraudulent, or in violation of any adopted policy of the corporation from retaliation or adverse employment consequences." *Ferris v. Lustgarten Found*., 189 A.D.3d 1002, 1005 (1st Dep't 2020) (emphasis added). It does not protect those who simply "oppose" conduct they believe is improper. *Compare* Civil Rights Act of 1964, Tit. VII, 42 U.S.C § 2000e-3(a) (§ 704(a)).

1. Craig Spray

Spray testified that his employment was terminated after he (1) told other officers that he disagreed with the NRA's decision to seek reorganization in bankruptcy court and (2) did not sign the NRA's 2019 Form 990 after asking for more information about it. *See* Court Ex. 5 at 174:06–176:01, 207:04–208:04 (Spray). Spray never testified, however, that he made any whistleblower "report," that he was retaliated against, or that his "reports" were not investigated. *See generally* Court Exs. 5, 18 (Spray).

An employee does not make a "report" under N-PCL § 715-b if the purported "report" is made pursuant to the employee's job duties. *See, e.g.*, *Lawrence v. Int'l Bus. Mach. Corp.*, No. 12CV8433(DLC), 2017 WL 3278917, at *9 (S.D.N.Y. Aug. 1, 2017) (internal auditor's reporting of concerns about his employer's internal controls was not protected because the "identification of weaknesses in internal controls was part and parcel of his job responsibilities"); *State ex rel. Banerjee v. Moody's Corp.*, 54 Misc. 3d 1201(A), at *19 (Sup. Ct. N.Y. Cnty. 2016) (whistleblowing protections do not extend to "concerns . . . typically raised as part of [the employee's] job."), *aff'd sub nom. Anonymous v. Anonymous*, 165 A.D.3d 19 (1st Dep't 2018).

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if "evaluation" was a requirement, as explained *infra*, there is no evidence in the trial record that the NRA failed to evaluate any whistleblower complaint.

Thus, to prevail on a whistleblower claim, "a plaintiff needs to have done something more in order to make his or her internal complaints distinguishable from the reporting expected as part of his or her job." *Id.*

In this case, there was no evidence that Spray made any report of any kind alleging that the NRA's bankruptcy filing, its Form 990 filing, or any other NRA action was "illegal, fraudulent or in violation of any adopted policy." N-PCL § 715-b(a). Indeed, Spray denied that that the NRA's 990s were illegal, false or violated NRA policy. Court Ex. 5 at 173:10–15, 174:12–18, 175:24–176:1, 286:04–13 (Spray). And Spray never testified that he believed the NRA's bankruptcy filing was illegal, fraudulent or violated NRA policy. Thus, Spray's concerns about the NRA's bankruptcy filing or its Form 990 could not have amounted to a protected whistleblower report under N-PCL § 715-b. *See Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 952 (5th Cir. 1994) (no protected report where the employee "never characterized his concerns as involving illegal, unlawful, or false-claims investigations"); *Fraser v. Fiduciary Tr. Co. Int'l*, No. 04 Civ. 6958, 2009 WL 2601389, at *5 (S.D.N.Y. Aug. 25, 2009), *aff'd*, 396 F. App'x 734 (2d Cir. 2010) (comments seeking to ensure that the employer is "making the right decisions" are "a far cry from alerting an employer to a suspected fraud").

Further, it is undisputed that the NRA adopted a whistleblower policy that complied with N-PCL § 715-b by January 22, 2020—a year before Spray's termination. *See* NYSCEF 3049, 3078; PX-421 at 286. To ensure that the NRA had notice of and could appropriately investigate any whistleblower reports, the NRA's concededly valid whistleblower policy requires that all NRA employees and directors "report in good faith any concerns he or she may have regarding actual or suspected violations of [any] policies or controls" by making reports "in person, in writing, by telephone, or by email" to the Chairman of the Audit Committee, Secretary of the Audit

Committee, or Office of the General Counsel. PX-421 at 286. There was no evidence introduced that Spray presented any such reports to those officials, or otherwise made anything resembling a whistleblower report. Instead, the evidence established that any reporting Spray did was nothing more than "the reporting expected as part of his or her job." *Banerjee*, 54 Misc. 3d 1201(A), at *19; *see also Robertson*, 32 F.3d at 952 (no protected report where employee's actions "were in the normal course of his duties").

The fact that Spray never made a report pursuant to the NRA's whistleblower policy is especially important, because Spray was required to raise financial issues internally as part of his job as NRA Treasurer and Chief Financial Officer. *See*, *e.g.*, Court Ex. 5 at 286:22–287:03 (Spray).[3] In cases involving officers with financial oversight duties, courts have been careful to ensure that whistleblowing protections do not extend to "concerns . . . typically raised as part of [the employee's] job." *Banerjee*, 54 Misc. 3d 1201(A), at *19. If Spray made protected whistleblower reports each time he spoke to other NRA officers about financial issues, that would mean any non-profit officer in a financial oversight position would automatically obtain constant whistleblower protection under N-PCL § 715-b. The courts have rejected this position. *See*, *e.g.*, *Ortiz v. Todres & Co.*, No. 15 Civ. 1506 (LGS), 2019 WL 1207856, at *5 (S.D.N.Y. Mar. 14, 2019) (auditor's objection to company's financial statements was not protected activity; "[o]therwise, the [False Claims Act] retaliation provision would confer virtual immunity on an auditor . . . from discipline or termination related to his work, because all his work would be

[3] For example, Spray's November 11, 2020 email stating "[t]here are no 'Wayne said' approvals [for authorization of expenses] at the NRA," Court Ex. 5 at 182:02–183:18 (Spray) (citing PX-570), cannot reasonably be construed as a whistleblower report. Rather, it was simply Spray doing his job, i.e., improving the NRA's accounting controls. *See, e.g.*, Tr. at 2388:10–17 (LaPierre) (testifying that he supported Spray's efforts to put a stop to verbal approvals); Court Ex. 5 at 183:11–17 (Spray); cf. *Lawrence*, 2017 WL 3278917, at *9.

'protected activity'").

Because Spray never made any "reports" in accordance with the NRA's policy, the NYAG never established that the NRA knew of any "reports" by Spray. "Without such knowledge, [a corporation] could not possess the retaliatory intent necessary to establish a [whistleblower] violation." *Banerjee*, 54 Misc. 3d 1201(A), at *21 (quoting *Robertson*, 32 F.3d at 952).

Finally, even if Spray's comments were protected whistleblower reports under the statute, Spray's testimony shows that the NRA "evaluated" all of them. *See* Court Ex. 5 at 183:11–17, 285:21–286:13 (Spray); Court Ex. 18 at 247:22–248:09, 251:01–13 (Spray).

2. Phillip Journey

Because Journey did not make any whistleblower report and was never retaliated against, the NYAG's N-PCL § 715-b claim as to him fails.

The NRA had a concededly valid whistleblower policy in place during Journey's service on the NRA Board from Summer 2020 until 2023. *See* NYSCEF 3049, 3078; PX-421 at 286. No evidence was introduced showing that Journey made any report to an appropriate custodian under the NRA's whistleblower policy. Thus, the jury could not have rationally found that Journey made a "report" pursuant to N-PCL § 715-b. *Johnson v. Univ. of Rochester Med. Ctr.*, 686 F. Supp. 2d 259, 269 (W.D.N.Y. 2010) (no claim for retaliatory discharge where "plaintiffs plead no facts which suggest that they complained to hospital administrators or high level personnel, or that the defendants . . . were otherwise aware that the plaintiffs were engaging in any protected activity whatsoever relating to Medicare/Medicaid fraud").

The only act by Journey that the NYAG apparently believes qualifies Journey as a whistleblower was his motion, filed in bankruptcy court, to appoint a bankruptcy examiner. *See* Tr. at 1491:18 (NYAG stating of Journey's bankruptcy court motion, "this is his blowing the whistle"). But that motion was not, as a matter of law, a whistleblower report under N-PCL §

715-b. Instead, as Journey admits, his motion was a public filing directed *against* the NRA in a public judicial proceeding—not an internal report directed *to* the NRA pursuant to its whistleblower policy. Tr. at 1491, 1523–25, 1531–33 (Journey) (testifying that he abstained from the Board's vote on the bankruptcy because of "the adverse relationship we had in the courtroom"), 1539–42, 1545 (Journey); N.Y. ATT'Y GEN., *Whistleblower Policies Under the Nonprofit Revitalization Act of 2013* (Apr. 13, 2015), https://ag.ny.gov/sites/default/files/regulatory-documents/Charities_Whistleblower_Guidance.pdf, at p. 1 (defining a whistleblower policy as "a procedure by which individuals may report suspected improper conduct ***within an organization*** without fear of retaliation or adverse employment consequences for doing so, and a procedure ***within the organization*** for collecting, recording, reporting, and addressing allegations of suspected improper conduct.") (emphasis added); *id*. at p. 2 ("A whistleblower policy … identifies those staff or board members or outside parties to whom such information can be reported.").

Further, the NRA responded at length to Journey's motion, showing beyond doubt that it "evaluated" it. DX-1083. And the Bankruptcy Court found that Journey's motion to appoint an examiner was not in the NRA's best interest. *See* PX-2281 at 34–36. A director who files a judicial motion contrary to the non-profit's best interests does not thereby obtain whistleblower protection. *See Davidson v. James*, 172 A.D.2d 323, 324 (1st Dep't 1991); *Grace v. Grace Inst.*, 19 N.Y.2d 307, 314 (1967). Were it otherwise, N-PCL § 715-b would not incentivize good-faith reports of wrongdoing, but cycles of follow-on litigation anytime a non-profit defended itself against a disgruntled director in court. That is not the law. *Sherman v. Fivesky, LLC*, No. 19-CV-8015 (LJL), 2020 WL 5105164, at *6 (S.D.N.Y. Aug. 31, 2020) ("a vigorous defense" to an employee's litigation is not actionable retaliation).

Just as there was no whistleblowing, there was no retaliation. The only "adverse action" Journey complained of is verbal chastisement. Tr. at 1497:19–24 (Journey).[4] Journey testified that the NRA's bankruptcy attorney characterized him as the NRA's "greatest enemy" during Executive Session at a Board meeting wherein that attorney was addressing the bankruptcy proceeding. Tr. at 1497:19–24 (Journey). Journey admitted that he was ruled out of order during a later part of that same Board meeting for discussing outside of Executive Session legal matters that had been discussed in Executive Session. *Id*. at 1498:3-17, 1535-1539 (Journey). And Journey complains that the NRA's President subsequently wrote a memo to the Board describing his bankruptcy motion as containing "outright untruths." *Id*. at 1502-03 (Journey).

But Journey's fellow Board members—who were not Journey's superiors, but his equals—had every right to speak out against him. The NYAG cannot use N-PCL § 715-b to police debates between elected Board members accountable to the NRA's millions of members via elections. *See Hous. Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 479 (2022) (Board resolution censuring Board member could not qualify "as a materially adverse action as a matter of law" for purposes of retaliation claim, as "[e]veryone involved was an equal member of the same deliberative body").

To the extent Journey's retaliation claim is based on comments made by the NRA's bankruptcy attorney during Executive Session, it also fails, because that attorney had no

[4] In August 2022, outside of the relevant period charged to the jury (which ended May 2, 2022), Journey was not chosen for the Board of Directors ballot by the Nominating Committee. Even if that action had occurred within the relevant time period, it would not constitute retaliation. *See Oller v. Roussel*, 690 F. App'x 770, 772 (5th Cir. 2015) (per curiam) (failure to renominate individual for a discretionary, merit-based award was not an "adverse employment action" for purposes of First Amendment retaliation claims). Further, "[t]here are two paths to be nominated to be on the ballot, by petition of the members and by the Nominating Committee." Tr. at 1479:7–13 (Journey). But Journey did not seek to obtain a place on the ballot via petition. Journey's actions thus amounted to a voluntary resignation. *See* Tr. at 1479:15–19 (Journey) (testifying that he is now seeking election to the Board by petition).

supervisory authority over Journey or any other Board member, and instead was there to consult with the Board in an attorney-client capacity. *See Kim v. Lee*, 576 F. Supp. 3d 14, 26–27 (S.D.N.Y. 2021), *aff'd*, No. 22-61, 2023 WL 2317248 (2d Cir. Mar. 2, 2023) (employer's outside counsel cannot be held liable for retaliation under the Fair Labor Standards Act and other employment laws); Tr. at 1496-97 (Journey) (the Board meeting was for the bankruptcy attorneys to explain "the strategy and the reasoning" behind the filing prior to the Board's vote on ratifying it).

Moreover, even if Journey was ruled out of order at the March 2021 meeting, *see* Tr. at 1500:24 (Journey), that amounts to nothing more than "a mere inconvenience" insufficient to constitute retaliation under N-PCL § 715-b. *See Burlington N. & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 68 (2006) ("petty slights, minor annoyances, and a simple lack of good manners" are insufficient to demonstrate retaliation). Further, the NYAG failed to challenge the reason Journey was ruled out of order—he sought to discuss the bankruptcy filing outside of Executive Session, after its lawyers had left. *See* Tr. at 1535-1539 (Journey); PX-379 at pp. 23, 25-26.

3. Rocky Marshall

Marshall's whistleblower allegations revolve around his supposed denial of access to the NRA's directors and officers ("D&O") insurance policy. *See* Tr. at 237:7–12 (Marshall). Marshall's request for the D&O policy stemmed from Frazer's August 9, 2021 announcement notifying the Board of updated D&O coverage. PX-3569 at 2-4; *see also* Tr. at 205:2–208:22 (Marshall). Within four days of Marshall's request, Frazer informed Marshall that the D&O forms had not yet been issued by the underwriters, assured Marshall that the policy would be available for review at NRA headquarters when completed, and offered to bring a copy to show Marshall at the next Board meeting. PX-3569 at 1–2.

Nonetheless, Marshall filed an "ethics complaint" against Frazer with the Board's Ethics Committee on September 22, 2021 falsely claiming that Frazer had not allowed him to inspect the

D&O policy. PX-2156. Following Marshall's complaint, Frazer sought to accommodate Marshall by bringing the D&O policy to the October 2021 NRA Board meeting. Tr. at 2719:17–2721:5 (Frazer). Tellingly, Marshall never asked for a copy of the policy at the meeting. Tr. at 227:9–17, 239:2–12 (Marshall). Thus, Marshall's meritless "ethics complaint" was not made in "good faith" under N-PCL § 715-b(a). *Ochs v. Washington Heights Fed. Sav. & Loan Ass'n,* 17 N.Y.2d 82, 88 (1966) (request to inspect corporate records undertaken "for the sole purpose of harassment" is not made in good-faith); *Tate v. Sonotone Corp*., 272 A.D. 103, 105 (1st Dep't 1947) (inspection request motivated by "disinterested malevolence against the individuals in charge of the corporation" not undertaken in good-faith) (cleaned up).

Although the NYAG claims that Marshall suffered "retaliation" based on verbal and written pushback from other NRA personnel, Tr. at 195:2–21 (Marshall), the evidence does not support a claim of retaliation. In fact, this type of free and open debate is characteristic of a large corporate board and not "adverse action" as a matter of law. *See Hous. Cmty. Coll. Sys.*, 595 U.S. at 478-79; cf. *Nichols v. Mem'l Sloan-Kettering Cancer Ctr*., 36 A.D.3d 426, 427 (1st Dep't 2007) ("memorandum criticizing plaintiff's job performance . . . was not an employer action sufficiently adverse to support a retaliation claim").

Thereafter, the NYAG offered Marshall's testimony that he was not subsequently placed on the Board of Directors ballot by the Nominating Committee as evidence of retaliation. Tr. at 215:3–216:11 (Marshall). But the Nominating Committee's discretionary choices as to which candidates it places on the ballot do not amount to retaliation. *See Oller*, 690 F. App'x at 772. There is no evidence that in exercising its broad discretion under the NRA's Bylaws to select what it considers to be "suitable nominees," the Nominating Committee was acting inappropriately. *See* PX-606 at p. 32 (Art. VIII, Sec. 2 of the NRA Bylaws). Further, Marshall's failure to seek re-

nomination to the Board via petition was akin to a voluntary resignation. *See* Tr. at 215:05–16 (Marshall) (testifying that he has now obtained placement on the NRA Board of Directors ballot pursuant to the same petition process he earlier failed to pursue); *see Cadet v. Deutsche Bank Sec. Inc.*, No. 11 CIV. 7964 CM, 2013 WL 3090690, at *11 (S.D.N.Y. June 18, 2013) (holding that a voluntary resignation is not an adverse employment action). Further, the NYAG never argued or presented evidence that Marshall was constructively discharged, and thus the jury's verdict could not rationally have been based on such a finding. *See, e.g.*, *Baker v. Dorfman*, No. 97 CIV. 7512 (DLC), 1999 WL 191531, at *3 (S.D.N.Y. Apr. 6, 1999), *aff'd*, 239 F.3d 415 (2d Cir. 2000).

Finally, the NYAG introduced no evidence that the NRA failed to investigate the "ethics complaint" against Frazer, the NRA's bankruptcy filing, or any other matter raised by Marshall during his Board service.

4. Oliver North

North never made a good faith report of illegal or improper conduct. North's supposed whistleblowing was his alleged concerns about the Brewer Firm's legal bills. Tr. at pp. 1766- 1780. But when asked, North was unable to identify any specific issues with the invoices—much less allege that they were somehow illegal, fraudulent, or violative of an NRA policy. *Id.* at 3921–22 (Froman). Indeed, North did not accept the multiple opportunities he was given to review the Brewer Firm's bills. *Id.* at 1838–47 (North) (testifying that he never reviewed the legal invoices he purported to "report," despite receiving an email from Frazer stating that he could review all of them "except the three where you have a conflict").

Further, North's testimony shows that he did not raise his concerns in good faith. Instead, North pressed for information related to the Brewer Firm's fees only after the NRA (represented by the Brewer Firm) filed suit against North's employer, Ackerman McQueen, and the NRA Audit Committee sought to review North's Ackerman contract. *See id.* at 1827:07–1833:11, 1834:21–

1836:03 (North); Court Ex. 19 at 375–76 (Meadows); PX-1685; *see Middleton v. Metro. College*, 545 F. Supp. 2d 369, 374 (S.D.N.Y.2008) (rejecting retaliation claim where plaintiff only asserted sexual harassment allegation after she learned that the Human Resources director was investigating her behavior); *Spadola v. N.Y.C. Transit Auth.*, 242 F. Supp. 2d 284, 292 (S.D.N.Y.2003) (rejecting retaliation claim as not brought in good faith where plaintiff sought to use sexual harassment allegation "to advance [his] own retaliatory motives and strategies" and avoid disciplinary charges).

There is no dispute that North had a conflict of interest as a highly-paid employee of Ackerman, the former NRA vendor that had victimized the NRA with fraudulent billing practices, and whom the NRA was then suing. *See* Tr. at 1797:2–14 (North). Given North's clear conflict of interest, the NRA Audit Committee asked North to step down from Ackerman, but he refused. *See id.* at 1848:3–13 (North). And North failed to perform under his contract with Ackerman, producing three episodes of the "American Heroes" TV show for NRATV when his contract had promised twelve, thus rendering his Ackerman compensation (which was ultimately paid by the NRA) an unearned benefit that defrauded the Association. *Id.* at 1797, 1811–12 (North) (acknowledging he failed to perform his contractual obligations); PX-597 at 87 (the NRA's 2019 990 disclosing that North's Ackerman contract may have constituted an excess benefit because North failed to perform under it).

Even more shockingly, North admitted that he relayed a threat from Ackerman to LaPierre, which sought to extort LaPierre's resignation. Tr. at 1849 (North); Court Ex. 19 at 43:07–45:24 (Meadows) (testifying that North "stated that the time was short and that if Wayne LaPierre didn't resign as the EVP, that the window would close quickly, and that Ackerman McQueen, who was our largest vendor and Colonel North's employer, that they would release damaging information

concerning Wayne LaPierre"). A Board member cannot brazenly attempt to coerce a non-profit officer into resigning, and then claim protection as a whistleblower. *See e.g., Tang v. Glocap Search LLC,* No. 14-CV-1108 JMF, 2015 WL 5472929, at *2 (S.D.N.Y. Sept. 16, 2015) ("[I]f a plaintiff complained, not in good faith, but rather to protect her job or extort money from her employer, the activity is not protected under the statute.")

The NYAG contends that North suffered adverse action when he was not chosen by the Nominating Committee for another term as NRA President. However, the evidence is clear that North "did not actually stand for reelection as President of the NRA in 2019." Court Ex. 4 at 266:22-267:2 (Meadows). North left the NRA's 2019 Annual Meeting before the Nominating Committee met to choose the NRA President and had Childress read a letter into the record stating, "It has been a great honor serving as your President this past year . . . . Should you ever need me in the future, just call." Tr. at 1790:4-9, 1793:3-15 (North); PX-1313A at p. 1.[5] Thus, the evidence established that North chose voluntarily not to seek another term as NRA President.

Even if North had not stepped aside, his admitted misconduct amply justified any decision by the Nominating Committee not to select him for another term as NRA's President or recommend him for future Board service, and no reasonable jury could find otherwise. *See Clark v. Morelli Ratner PC,* 73 A.D.3d 591, 591 (1st Dep't 2010) (discrimination and retaliation claims failed where "defendants' evidence regarding plaintiff's insubordination and unprofessional conduct was sufficient to establish a legitimate, nondiscriminatory explanation for her termination"); *Koester v.*

[5] Attached to North's letter announcing his departure as President was a memorandum to the Board announcing that he had formed a "Crisis Management Committee" that would, *inter alia*, investigate the Brewer Firm's bills and the filing of the Ackerman lawsuit and "determine whether there is a basis to resolve whatever differences exist between NRA and Ackerman McQueen in an arbitration or other forum." PX-1313A at p. 6. North testified this memo was his "last act going out the door" because by the time he wrote it, he "knew [he] was finished." Tr. at 1784:21-22, 1781:8-9.

New York Blood Ctr., 55 A.D.3d 447, 449 (1st Dep't 2008) (disciplinary record including "poor performance, breach of company policies, and unprofessional behavior" defeated retaliation claim).

To the extent that the NYAG argues that the NRA's filing a lawsuit against North violated N-PCL § 715-b, that claim fails because the NRA had a First Amendment right to initiate non-frivolous litigation against North pursuant to the *Noerr-Pennington* doctrine. *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000). The NYAG presented no evidence that the NRA's suit against North was "objectively baseless," *see id*., nor could it—indeed, the NYAG did not even move the NRA's complaint against North into evidence.

Finally, the undisputed evidence showed that North's reports were evaluated. *See, e.g.*, Tr. at 1686–92 (Cotton) (testifying that the NRA's Audit Committee investigated North and Childress's letter); *id*. at 2143 (Cotton) (the Special Litigation Committee, Frazer, Spray, and an outside insurance company all reviewed the Brewer Firm's legal bills, and none found them unreasonable), 2604–06 (Frazer) (testifying that he investigated Childress's and North's complaints). Frazer also acted on North's purported concerns by offering to provide North copies of the Brewer Firm's bills—except for bills that concerned North. Tr. at 2706 (Frazer).

5. Richard Childress

Childress's alleged protected activity was co-signing, with North, a letter raising concerns about the Brewer Firm's bills. *See* PX-1685. Subsequently, Childress resigned from the Board. *See* Court Ex. 4 at 277:14-17 (Meadows).

"A voluntary resignation does not constitute an adverse employment action unless the plaintiff was constructively discharged—i.e., the resignation was in fact *involuntary* as a result of coercion or duress." *Cadet*, 2013 WL 3090690, at *11. Here, there was no evidence from which a jury could have rationally concluded that Childress faced "working conditions so intolerable,

difficult or unpleasant that a reasonable person would have felt compelled to resign." *Crookendale v. N.Y.C. Health & Hosps. Corp.*, 175 A.D.3d 1132, 1132 (1st Dep't 2019) (quotation omitted). Further, there was no evidence presented at trial as to whether Childress even sought another term as Vice President, or voluntarily stepped aside.

Finally, the undisputed evidence established that Childress's "report" was evaluated. *See* Tr. at 1686:7–1692:2 (Cotton) (Childress's letter was "investigated"), 2658–60 (Frazer) (Childress' accusations were reviewed by Frazer, others in the General Counsel's office, and an independent law firm).

6. Esther Schneider, Timothy Knight and Sean Maloney

Article IV, Section 2 of the NRA's Bylaws requires the NRA's directors to "govern and have general oversight of the affairs and property of the Association, *in accordance with applicable law and these Bylaws*." PX-606 at 17 (emphasis added). A violation of Article IV, Section 2 provides "good cause" for a director's discipline, suspension, or expulsion from the Association. *See* PX-606 (Article III, Section 11(b) of the Bylaws). Thus, the NRA Bylaws constitute a binding contract governing the service of NRA Board members. *See* PX-606 at 17; *Saba Cap. Cef Opportunities 1, Ltd. v. Nuveen Floating Rate Income Fund*, 88 F.4th 103, 115 n.10 (2d Cir. 2023) ("The corporate by-laws constitute a contract between the corporation's owners—the shareholders—and its managers, the [b]oard.")); *Berich v. Ithaca Police Benev. Ass'n, Inc.*, 23 A.D.3d 904, 905 (3d Dep't 2005).

Article V, Section 2(a)(3) of the Bylaws states that "the President shall appoint all standing and special committees of the Association," and Article XI, Section 3 provides that "members of the Board of Directors . . . in good standing may be appointed by the President to membership on such standing and special committees of the Association as may be established, *and shall serve at the pleasure of the President* …." PX-606 at 17, 46 (emphasis added).

Here Schneider, Knight and Maloney claim that they were retaliated against when they were not appointed to Board committees. But under the NRA Bylaws—which form a contract binding the NRA's Board members—committee assignments are the prerogative of the NRA President, who has discretion to choose those Board members she believes will be best suited for each committee. Tr. at 3389 (King); Court Ex. 4 at 177–78, 181–82 (Meadows); PX-606 at 8, 17.

Further, Schneider, Maloney and Knight resigned from their Board positions voluntarily. *See* Court Ex. 4 at 277:18–25 (Meadows); PX-590. A voluntary resignation is not an "adverse employment action." *Cadet*, 2013 WL 3090690, at *11. And the NYAG did not argue at trial that Schneider, Maloney and Knight were constructively discharged, thus waiving the argument. *Baker*, 1999 WL 191531, at *3.

Moreover, Schneider admitted that she used expletives in a heated April 24, 2019 conversation with Meadows that was witnessed by donors and other directors. Tr. at 316:7–15 (Schneider). Meadows described this conversation as a verbal attack that undermined her faith in Schneider's ability to faithfully discharge her duties to the NRA. Court Ex. 4 at 169:13-171:04, 205:07-207:09 (Meadows). Schneider's expletive-laden verbal tirade at Meadows provides an "obvious alternative explanation" for Meadows's decision not to appoint her to committees that the NYAG entirely failed to rebut, thus defeating any whistleblower claim. *See, e.g.*, *Nance v. Clerk of Cir. Ct. for Baltimore City*, No. 1:23-CV-01869-JMC, 2023 WL 8650346, at *7 (D. Md. Dec. 14, 2023) (retaliation claim failed because plaintiff's admitted use of profanity in a work setting constituted an "obvious alternative explanation" for his termination); *Middleton*, 545 F. Supp. 2d at 376–77 (employee's use of profanities and vulgar insults in argument with co-worker constituted a "legitimate, non-retaliatory reason for her termination").

Finally, the undisputed evidence showed that the NRA evaluated Schneider, Knight and

Maloney's reports. *See, e.g.*, Tr. at 255:1–23, 344:13–345:9 (Schneider) (admitting that Frazer investigated the issues raised in her report, which were substantially similar to the issues identified in the joint letter sent by Knight, Maloney, and Schneider); *see also* PX-2087; Tr. at 2592:25–2593:9, 2599:9–2600:17, 2600 (Frazer) ("[T]hese were all issues that were ongoing, that were already under investigation by the time they raised them."). Frazer spoke with Schneider at length, responded to her questions, and investigated the matters reported by Schneider, Maloney, and Knight. *See* Tr. at 345:10–346:2, 347:8–20 (Schneider), 2717:4–2718:5 (Frazer).

D. The NYAG's "False Filings" Claim Fails as a Matter of Law

The NYAG failed to present evidence showing how the alleged statements or omissions in the NRA's Form 990 filings affected donor behavior or the public's perception, thereby failing to meet the "materiality" threshold. *See* App. C. A statement or omission in a corporation's financial statement is material only if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed . . . as having significantly altered the 'total mix' of information made available." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (emphasis added) (interpreting Exec. Law § 63(12)); *see also State v. Rachmani Corp.*, 71 N.Y.2d 718, 727 (1988) (adopting this standard of materiality). Since nonprofits do not have shareholders, "materiality" in this context requires a showing "that in all probability the omitted or misrepresented facts would . . . have assumed ***actual significance*** in the deliberations of" the general public or the NRA's donors. *People v. Essner*, 124 Misc. 2d 830, 835 (Sup. Ct. N.Y. Cnty. 1984) (emphasis added) (citation omitted). The NYAG presented no such evidence.

Even if the NYAG met its burden in proving that the alleged statements were both material and false, the NYAG failed to prove that Frazer or the NRA Board knew that, at the time the relevant reports were filed, they were incomplete, false, or misleading, let alone in a material sense. *See* App. C; *see also* Exec. Law § 172-b(1) (requiring signers to certify "the statements therein are

true and correct to the best of their knowledge").

III.
CONCLUSION

For the reasons set forth *supra*, the Court should enter judgment for the NRA on all the remaining claims against it, or else order a new trial as to those claims.

Dated: April 5, 2024

New York, New York

Respectfully submitted,

By: */s/ Noah Peters*

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CERTIFICATION OF COMPLIANCE WITH WORD COUNT REQUIREMENT

I certify that the foregoing memorandum of law filed on behalf of the National Rifle Association of America complies with the applicable word count limit. Specifically, the memorandum of law contains fewer than 7,000 words.

In preparing this certification, I relied on the word count function of the word-processing system used to prepare this memorandum of law.

/s/ Noah Peters
Noah Peters

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing motion and related documents was electronically served via the Court's electronic case filing system upon all counsel of record on April 5, 2024.

/s/ Noah Peters
Noah Peters