

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION**

DISTRICT OF COLUMBIA,

Plaintiff,

v.

NRA FOUNDATION INC, *et al.*,

Defendants.

Case No.: 2020 CA 003454 B

**Judge José M. López
Civil Calendar 14**

OMNIBUS ORDER

Before the Court is Defendant National Rifle Association of America, Inc.’s Motion to Dismiss (the “NRA Motion”), filed September 22, 2020. Also before this Court is Defendant NRA Foundation, Inc.’s Motion to Dismiss (the “Foundation Motion”), filed September 22, 2020. On October 20, 2020, Plaintiff District of Columbia filed its Opposition to the NRA Motion and its Opposition to the Foundation Motion. In response, both Defendants filed their replies on November 5, 2020. The Court has considered the pleadings, the relevant law, and the entire record. For the following reasons, the NRA Motion is granted in part and the Foundation Motion is denied.

BACKGROUND

Plaintiff District of Columbia (the “District”), through the Office of the Attorney General (“OAG”), brought this enforcement action against Defendants NRA Foundation, Inc. (the “Foundation”) and National Rifle Association of America, Inc. (“NRA”). The District alleges that the Foundation ignored its own charitable mission and ceded operational control to the

NRA. The District seeks a constructive trust on the Foundation's funds held by the NRA under the Nonprofit Corporations Act of 2010, D.C. Code §§ 29-401.01 to 29-414.04 (2012 Repl.) (the "NCA" or the "Act"). In the Complaint, the District brings the following allegations:

The Foundation is a nonprofit organization incorporated under the laws of the District of Columbia. As a charitable corporation it is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, and required to operate exclusively for one or more nonprofit purposes as defined in the NCA in D.C. Code § 29-401.02(3)-(4)(A). Compl. ¶ 4. Section 501(c)(3) nonprofit organizations (hereinafter "charitable corporations") are set up to benefit the public and must operate exclusively for public purposes. Compl. ¶ 9. A charitable corporation must adhere to the nonprofit purposes outlined in its bylaws and articles of incorporation under D.C. Code § 29-402.06(b). Compl. ¶ 11. The Foundation's nonprofit purposes include:

- a) To promote, advance and encourage firearms and hunting safety;
- b) To educate individuals, including the youth of the United States, with respect to firearms and firearms history and hunting safety and marksmanship, as well as with respect to other subjects that are of importance to the well-being of the general public;
- c) To conduct research in furtherance of improved firearms safety and marksmanship facilities and techniques;
- d) To support the activities of the [NRA], but only to the extent that such activities are in furtherance of charitable, educational and scientific purposes within the meaning of section 501(c)(3) of the Internal Revenue Code of 1986, as amended ("Code"), or any similar provision subsequently enacted; [and]
- e) . . .
- f) To engage in any other activity that is incidental to, connected with or in advancement of the foregoing purposes and that is within the definition of charitable, educational and scientific for the purposes of Section 501(c)(3) of the Code.

Compl. at 18; *see also* Foundation Mot., Ex. B (Articles of Incorporation of the Foundation).

The NRA is a nonprofit organization incorporated under the laws of the state of New York. It is also registered as a foreign nonprofit corporation in the District of Columbia.

Furthermore, the NRA is a social welfare organization federally exempt from taxation under Internal Revenue Code section 501(c)(4). Compl. ¶ 5. As such, the NRA is permitted to, and does engage in, political campaign activity and may engage in unlimited lobbying activity. Unlike the Foundation, donations to the NRA are not tax deductible as charitable contributions. Compl. ¶ 24.

The District claims that the NCA broadly empowers the Attorney General to police charitable corporations incorporated under District law. This includes the ability to secure broad injunctive and equitable relief whenever a District charitable corporation “has exceeded or abused and is continuing to exceed or abuse the authority conferred on it by law” or “has continued to act contrary to its nonprofit purposes.” Compl. ¶ 14 (citing D.C. Code § 29-412.20(a)(1)(B) and (C)).

The District alleges that the NRA is supported financially by the Foundation, which “raises tax-deductible contributions in support of a wide range of firearm-related public interest activities of the [NRA].” Compl. ¶ 26 (quoting <https://www.nrafoundation.org/about-us/>). The District’s case stems from its allegation that the Foundation has been operated as a wholly controlled subsidiary of the NRA, without independence or a separate identity from the NRA. The Foundation Board of Trustees, contrary to its fiduciary duties, repeatedly chose to serve the interests of the NRA above those of the charitable nonprofit purposes of the Foundation. Compl. ¶ 28. As a consequence of the NRA’s financial problems, the District alleges that the NRA has repeatedly turned to the Foundation’s funds to solve these problems. Specifically, the District points to loans and management fee payments from the Foundation to the NRA which the District alleges are contrary to the Foundation’s own best interests.

For instance, the District alleges that in October 2017, the NRA requested a \$5 million loan from the Foundation’s Investment Committee (the “first loan”). Compl. ¶ 37. Woody Phillips, who was both the NRA and Foundation Treasurer at the time, worked on both sides of the transaction as lender and borrower. Phillips abstained from voting to approve the loan as an officer of the Foundation, but was involved in all other steps. Compl. ¶ 39. The District alleges that, even though the loan agreement specified that the loan could not be used for partisan political activities or to provide private benefit or inurement, the loan proceeds were intermingled with the NRA’s funds. Compl. ¶ 41.

When the loan came due in January 2018, the NRA requested a six-month extension. Compl. ¶ 42. In response, the Foundation’s Investment Committee allegedly asked the NRA to make a partial repayment on the principle. Mr. Phillips, who was still on the Foundations Investment Committee, rejected the request for partial repayment on behalf of the NRA. Nevertheless, the Foundation agreed to the extension.

Only three months after the NRA paid back the initial loan in March 2018, the NRA requested another \$5 million loan from the Foundation (the “second loan”). Compl. ¶ 45. The District alleges that as early as October 2018, it became clear to the Foundation that the NRA was in default of a separate loan it had with a large national bank. The District claims that the NRA demanded that the Foundation extend the maturity date of the second loan and that the Foundation subordinate its loan to the bank. Foundation President William “Bill” Satterfield allegedly told Susan Hayes, Chairman of the Foundation Investment Committee, that if she skipped the vote approving the loan alteration on the NRA’s requested terms, “it will enable both of us to avoid voting on a very bad deal for the Foundation.” Compl. ¶ 47. Despite this, the

Foundation approved both the loan subordination and the loan extension to October 2019. Compl. ¶ 48.

In October 2019, the maturity date on the second loan came and went, and the NRA did not pay off the loan. Compl. ¶ 49. In January 2020, the Foundation agreed to another extension through October 2020. As with all aspects of the second loan, the District claims that the Foundation did not obtain independent investment advice and did not perform any oversight to ensure the loan funds were being used for the stated purpose. Compl. ¶ 50. The District asserts that “[i]n approving the first and second loans, including all extensions, the Foundation’s Investment Committee improperly abdicated operational control to the NRA, ignored their independent fiduciary duties to the Foundation, and permitted the NRA to divert the Foundation’s charitable funds for noncharitable purposes with dubious assurances that the loan would be repaid.” Compl. ¶ 51.

In addition to the loans discussed above, the District also alleges that the Foundation agreed to management fee payments outside of the scope of its charitable mission. The District notes that the Foundation does not have its own employees or administrative staff. Instead, it relies on the NRA to provide those services for it in exchange for a management fee. The District alleges that in recent years, these management fees have been another way for the NRA to siphon Foundation funds to cover the NRA’s misspending. Compl. ¶ 52.

The District alleges that on September 17, 2018, at a Foundation Board of Trustees meeting, the current NRA Treasurer told the Foundation Board that the NRA had done a “study” and determined that there should be an increase in the management fees paid by the Foundation to the NRA. The increase totaled \$5,868,048 including a 2018 “catch-up fee” of nearly \$4 million to be paid immediately. Compl. ¶ 53. Despite not conducting any assessment of fair

market value of the management fee, obtaining an independent auditor, or receiving documentation to show that the increase was fair, or that the fees were used for proper purposes, the Foundation approved the increase to the 2018 management fee. Compl. ¶ 57.

Foundation board members were allegedly more cautious before approving the management fee increase for 2019. Board members began to ask for more information, including how the fees were determined. Compl. ¶ 61. The Foundation's Investment Committee also allegedly discussed engaging an outside firm to audit management fees. Compl. ¶ 62. On January 2, 2019, NRA Executive Vice President Wayne LaPierre personally attended a meeting of the Investment Committee, something the District claims was outside of his normal practice. At the meeting, LaPierre allegedly advised against hiring an outside auditor. Compl. ¶ 63. The Foundation then fully approved the 2019 management fee.

The District brings this action claiming that the Foundation's Trustees and Officers have a fiduciary duty to manage the activities and affairs of the Foundation in good faith and in a manner they reasonably believed to be in the best interest of the Foundation. Compl. ¶ 65. The Trustees and Officers owe a duty of loyalty to the Foundation. Compl. ¶ 66. Because of the control by the NRA over the Foundation and the governing overlap between the two organizations, the District claims that Foundation Board and Officers have conflicting loyalties. The District claims that loyalty to the NRA has taken precedence, thereby subverting the independence of the Foundation. Compl. ¶ 67.

In the Complaint, the District brings five counts against the Defendants: Count I (Against Defendant Foundation for Exceeding or Abusing the Authority Conferred by Law in Violation of D.C. Code § 29-412.20(a)(1)(B)); Count II (Against Defendant Foundation for Continuing to Act Contrary to the Nonprofit Purposes in Violation of D.C. Code § 29-412.20(a)(1)(C)); Count III

(Against Defendant Foundation Pursuant to the Common Law); Count IV (Constructive Trust Pursuant to D.C. Code § 29.412.20 Over Foundation Funds Improperly Held by Defendant NRA); and Count V (Constructive Trust Pursuant to the Common Law Over Foundation Funds Improperly Held by Defendant NRA). The District asks this Court to 1) impose a constructive trust over Foundation funds improperly diverted to the NRA in violation of District law and the Foundation's nonprofit purpose; 2) modify Foundation governance policies to ensure proper independence from the NRA; 3) appoint an independent receiver; and 4) require all current Foundation Board of Trustees members and Officers to partake in charitable nonprofit corporate governance training. Compl. at 23.

STANDARD OF REVIEW

Dismissal of a complaint for failure to state a claim upon which relief can be granted should only be awarded if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *See, e.g.,* Super. Ct. Civ. R. 12(b)(6); *Fingerhut v. Children's Nat'l Med. Ctr.*, 738 A.2d 799, 803 (D.C. 1999). When considering a motion to dismiss a complaint for failure to state a claim, the Court must “construe the facts on the face of the complaint in the light most favorable to the non-moving party, and accept as true the allegations in the complaint.” *Fred Ezra Co. v. Pedas*, 682 A.2d 173, 174 (D.C. 1996). A court should not dismiss a complaint merely because it “doubts that a plaintiff will prevail on a claim.” *See Duncan v. Children's Nat'l Med. Ctr.*, 702 A.2d 207, 210 (D.C. 1997).

A pleading must contain a “short and plain statement of the claim showing that the pleading is entitled to relief.” *See, e.g.,* Super. Ct. Civ. R. 8(a); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). Plaintiffs who wish to survive a motion to dismiss under Super. Ct. Civ. R.

12(b)(6) must provide “enough facts to state a claim to relief that is plausible on its face.” *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (plaintiffs must “[nudge] their claims across the line from conceivable to plausible”); *Mazza v. Housecraft LLC*, 18 A.3d 786, 791 (D.C. 2011) (holding that “*Twombly* and *Iqbal* apply in our jurisdiction” because Super. Ct. Civ. R. 8(a) is identical to its federal counterpart). The “plausibility” pleading standard does not require “detailed factual allegations” at the initial litigation stage of filing the complaint, but “it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678. A claim is plausible on its face “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

ANALYSIS

Relevant to the analysis of both motions before the Court are the following statutory provisions found in Title 29 of the D.C. Code, the Business Organizations Code. Title 29 spans thirteen chapters and utilizes a “hub and spoke” structure. Provisions common to all businesses are found in Chapter 1, the “hub,” while the subsequent chapters are specific to a particular type of business, the “spokes.” Chapter 4, the NCA, regulates District nonprofit corporations. Section 20-412.20(a) of the NCA reads:

- (a) The Superior Court may dissolve a nonprofit corporation, place a corporation in receivership, impose a constructive trust on compensation paid to a corporation’s director, officer, or manager, or grant other injunctive or equitable relief with respect to a corporation:
 - (1) In a proceeding by the Attorney General for the District of Columbia if it is established that:

...

- (B) The corporation has exceeded or abused and is continuing to exceed or abuse the authority conferred upon it by law; or
- (C) The corporation has continued to act contrary to its nonprofit purposes[.]

D.C. Code § 20-412.20(a).

Additionally, D.C. Code § 29-105.1(c), found in Chapter 1 of the Business Organizations Code, prohibits a foreign nonprofit entity from “engag[ing] in any activity or exercise[ing] any power that a domestic entity of the same type may not engage in or exercise in the District.” D.C. Code § 29-105.01(c) (providing that “registration of a foreign entity to do business in the District shall not authorize it to engage in any activity or exercise any power that a domestic entity of the same type may not engage in or exercise in the District”). D.C. Code § 29-105.12 then gives the Attorney General the power to take action against any foreign corporations in violation of Title 29, providing that “the Attorney General for the District of Columbia may maintain an action to enjoin a foreign filing entity . . . from doing business in the District in violation of this title.” D.C. Code § 29-105.12.

I. THE NRA MOTION

Defendant NRA moves to dismiss Count IV, which seeks a constructive trust pursuant to D.C. Code § 29.412.20 over Foundation funds held by the NRA, and Count V, which seeks a constructive trust over the same pursuant to the common law. The NRA asserts that: A) Counts IV and V fail because a constructive trust is not a cause of action and the District lacks standing; B) Count IV fails because the District does not plead facts establishing a basis for a constructive trust under D.C. Code § 29-412.20; and C) both Counts IV and V fail because the District has not pled wrongdoing by the NRA.

A. Count V Fails Because a Constructive Trust is Not an Independent Cause of Action.

The NRA first asserts that Count V is subject to dismissal because, under the common law, there is no independent cause of action for a constructive trust. Instead, the NRA argues that a constructive trust is a remedy that a court devises after litigation. Mot. at 7 (citing *Macharia v. United States*, 238 F. Supp. 2d 13, 31 (D.D.C. 2002)). Furthermore, the NRA claims that even if the District were able to assert a separate common law claim against the NRA, a constructive trust would be unavailable as a remedy as the District lacks standing under the law. NRA Mot. at 6.

The District, disputing the NRA's first argument, asserts that the D.C. Court of Appeals has recognized a cause of action for a constructive trust. Opp'n at 6 (citing *Heck v. Adamson*, 941 A.2d 1028, 1031 (D.C. 2008) (referring to the plaintiff's claim as "a claim for entitlement to a constructive trust"). The District also claims that this Court rejected the NRA's argument that a constructive trust cannot be a cause of action in its ruling on a motion to dismiss in *District of Columbia v. 58th Presidential Inaugural Committee*. Opp'n NRA at 6 (citing *District of Columbia v. 58th Presidential Inaugural Committee*, Case No. 2020 CA 000488 B (D.C. Super.), Omnibus Order at 20 (Sept. 9, 2020) [hereinafter "PIC Order"]).

The Court is convinced that a constructive trust is not an independent cause of action. In *District of Columbia v. 58th Presidential Inaugural Committee*, this Court held that the District "may seek a constructive trust, among other forms of equitable relief, against Defendant Trump Hotel." PIC Order at 20. However, in that case, the District did not bring a claim for just a constructive trust; rather, the District stated that the Complaint alleged a single count for equitable relief, which included a constructive trust among other relief. PIC Order at 20. Here, the District provides *Heck v. Adamson* as an example of the Court of Appeals recognizing the

claim. 941 A.2d at 1031 (stating that defendant “has not shown that [plaintiff] failed to state a claim concerning either tort alleged (or breach of contract) or for entitlement to a constructive trust”). However, in *Heck*, the plaintiff sought a constructive trust as a remedy to his claims for conversion, fraud, and breach of contract. 941 A.2d at 1029. The plaintiff did not bring an independent cause of action for a constructive trust. As the District notes in its Complaint, “a constructive trust is a flexible equitable remedy that can be applied in a broad range of circumstances.” Compl. ¶ 96. As such, the Court finds that the District may seek a constructive trust as a remedy, but not assert it as an independent cause of action. As a result of this finding, the Court need not address the NRA’s standing argument.

B. Count IV Fails Because a Constructive Trust is Not an Independent Cause of Action; However, the District Has Pled Facts Establishing a Basis for a Constructive Trust Under D.C. Code § 29-412.20.

“Counts IV and V of the District’s Complaint seek the imposition of a constructive trust over funds paid by the Foundation to the NRA.” As discussed above, “[a] constructive trust is an equitable remedy[.]” NRA Mot. at 6. The NCA does not specifically create a cause of action for a constructive trust, and to derogate the common law, it must do so. Accordingly, Count IV is dismissed. Defendant NRA also argues that Count IV fails because the District does not plead facts establishing a basis for a constructive trust under D.C. Code § 29-412.20. While the Court has dismissed Count IV, this argument is relevant to the analysis of Counts I and II below.

The NRA argues that Count IV is subject to dismissal on the basis that the NCA only authorizes the imposition of a constructive trust over compensation paid “to a corporation’s director, officer, or manager” and when the “corporation has exceeded or abused and is continuing to exceed or abuse the authority conferred upon it by law.” D.C. Code §20-412.20(a).

The NRA therefore claims that the District has not adequately alleged that it ever acted in any of these capacities. NRA Mot. at 6. Specifically, the NRA argues that: 1) the District does not allege that the NRA ever acted as a “director, officer, or manager” of the Foundation; 2) the District has failed to allege the Foundation exceeded or abused the authority conferred upon it by law; and 3) the allegations in the Complaint do not support the conclusion that the Foundation acted contrary to its nonprofit purposes. Mot. at 9. Furthermore, the NRA argues that the NCA only authorizes the Court to grant relief with respect to the *individual corporation* that engaged in the conduct described in D.C. Code § 29-412.20(a)(1)(A)-(C). Essentially, the NRA claims that the District has failed to establish any of the elements laid out in §20-412.20.

Starting with § 20-412.20(a), the NRA argues that the District does not allege facts tending to show that the NRA ever acted as a “director, officer, or manager” of the Foundation. The NRA claims that, taking the District’s allegations as true, certain individuals might have served on both the NRA Board and the Foundation Board, but the District is seeking a constructive trust over funds held by the NRA, not any individual. Mot. at 10.

The District rebuts the NRA’s argument that D.C. Code § 20-412.20(a) limits the District to seeking a constructive trust over compensation paid to a director, officer, or manager. Opp’n at 3. In doing so, the District again references this Court’s recent ruling in *District of Columbia v. 58th Presidential Inaugural Committee*. In that case, this Court rejected defendant 58th Presidential Inaugural Committee’s argument that the NCA does not apply to it, or its co-defendants Trump Organization and Trump Hotel, because they are all “foreign” corporations. PIC Order at 14. This Court noted that D.C. Code § 29-105.12 gives the Attorney General the power to maintain an action to enjoin any foreign corporations in violation of the NCA. At the same time, D.C. Code § 29-105.01(c) prohibits foreign entities from engaging in any activity that

a domestic entity of the same type may not engage in. Therefore, reading these two provisions together, this Court held that the Attorney General for the District of Columbia may bring an action to enjoin a foreign nonprofit corporation for violations of § 20-412.20(a) of the NCA. *Id.*

The District further notes that the Court came to the same conclusion in another nonprofit enforcement case, *District of Columbia v. Options Public Charter School*, Case No. 2013 CA 006644 B (D.C. Super.). There, Judge Craig Iscoe held that the authority to “grant other equitable relief” under § 20-412.20(a) “may include imposition of a constructive trust on other funds at issue and not solely compensation paid to a corporation’s management.” Case No. 2013 CA 006644 B (D.C. Super.), Order at 10 (Jan. 15, 2014).

The Court agrees with the District. The authority to “grant other equitable relief” under § 20-412.20(a) may include a constructive trust over funds paid not to a corporation’s director, officer, or manager. Moreover, the Court finds that the allegations of the NRA’s “dominance” over the Foundation, such that the independence of the Foundation has been subverted, is analogous to the role of a manager, director, or officer. *See* Compl. ¶ 67. This dominance is a result of “the control by the NRA over the Foundation and the governing overlap between the NRA and the Foundation” and is also illustrated by Mr. LaPierre’s attendance at the Foundation Investment Committee meeting after which the Foundation Board took no action to investigate the management fees. Compl. ¶¶ 63, 67.

Turning to § 20-412.20(a)(1)(B), the NRA asserts that there are no allegations in the Complaint to support the notion that the Foundation “exceeded or abused and is continuing to exceed or abuse the authority conferred upon it by law.” Mot. at 11. The NRA argues that neither lending money nor paying management fees to the NRA is, by itself, indicative of any violation of the NCA. As for the terms of the loans, Defendants note that they were all validly approved by

the Foundation Board. Mot. at 12. The same is true for the decision to accept the NRA's proposed increase to its management fee. All of this, the NRA argues, is presumed to have been made on an informed, good faith basis, under the business judgment rule. Mot. at 12 (citing *Behradrezaee v. Dashtara*, 910 A.2d 349, 361 (D.C. 2006)).

The District argues that the NRA has oversimplified the District's allegations; and this Court agrees. The District has alleged facts tending to show that the Foundation exceeded or abused its authority. The District does not allege merely that the Foundation made two loans to the NRA and paid it a management fee. The Complaint asserts that the Foundation extended each loan multiple times, even under unfavorable circumstances. Compl. ¶¶ 37, 42-45, 49-50. The Complaint also claims that the Foundation agreed to subordinate the second loan to the NRA's bank loan, even though the President of the Foundation's board told the chair of its Investment Committee that this was "a bad deal for the Foundation." Compl. ¶¶ 46-48. Importantly, the District also alleges that Mr. Phillips worked on both sides of the loan transactions and that Foundation's Trustees and Officers failed to abide by their obligations to act in the best interest of the Foundation and its charitable purposes. Compl. ¶¶ 42, 44, 68.

As for the management fee, the District alleges that the NRA conducted a "sham" study, whereby it justified nearly doubling the Foundation's annual management fee and charging a \$4 million "catch-up fee." Compl. ¶ 53. The Foundation allegedly approved the increased fee without any investigation or negotiation. Compl. ¶ 56. Furthermore, the District alleges that the Foundation abandoned discussions of obtaining an outside audit of the management fee after NRA Executive Vice President Wayne LaPierre made an appearance at a Foundation Investment Committee meeting and suggested doing so. Compl. ¶¶ 63-64.

The alleged facts as presented by the District allow this Court to draw the reasonable inference that the Foundation’s officers failed to discharge their decision-making authority in a manner they “reasonably believed to be in the best interests of the corporation.” *See* D.C. Code § 29-406.42(a)(3) (stating that an “officer with discretionary authority shall discharge his or her duties under that authority . . . [i]n a manner the officer reasonably believes to be in the best interest of the corporation”). Additionally, the District has alleged facts that show the Foundation’s directors relied on a study approving the management fee increase despite having “had knowledge that [made] reliance unwarranted.” *See* D.C. Code § 29-406.30(e) (stating that a director “who does not have knowledge that makes reliance unwarranted” may rely on information prepared by certain individuals). Finally, the District alleges facts that tend to show violations of D.C. Code 29-404.41(a), which only permits payment of “reasonable compensation.”

As to the NRA’s business judgment rule argument, the District claims that: 1) the business judgment rule is inapplicable to alleged breaches of the directors’ fiduciary duty of loyalty, as alleged here; 2) the business judgment rule is not a defense against allegations that a nonprofit corporation has “abandoned its charitable purposes;” 3) the business judgment rule applies only when individual officers or directors face personal liability; 4) allegations that the director’s decision was tainted by self-interest can overcome the business judgment rule. *Opp’n* at 4-5. Citing *Summers v. Cherokee Children & Family Services, Inc*, the District notes that a director’s duty of loyalty is the duty to faithfully pursue the corporation’s purposes and interests, rather than their own interests, or the interests of another person or organization. 112 S.W. 3d 486, 528 (Tenn. Ct. App. 2002).

The Court finds that the business judgment rule does not apply to this case. The District has brought allegations that a nonprofit corporation has “abandoned its charitable purposes.” As stated in *Summers*, public policy, “as expressed by the legislature, is that the Attorney General and the courts intervene in such situations because the public interest is involved and the activities are not merely ‘internal corporate matters.’” 112 S.W. 3d 486 at 530.

Finally, the NRA argues that there are no allegations in the Complaint to establish that the Foundation “has continued to act contrary to its nonprofit purposes.” Mot. at 12; *see* § 20-412.20(a)(1)(C). The NRA argues that the District has failed to identify a single act taken by the Foundation that can be considered “contrary” to its nonprofit purposes, let alone a series of acts. Mot. at 14.

Viewing the allegation in the Complaint a light most favorable to the nonmoving party, the Court finds that District has alleged facts showing that the Foundation has acted “contrary” to its nonprofit purposes, and continues to do so. The Foundation’s articles allow it to “support the activities of the [NRA], *but only to the extent that such activities are in furtherance of charitable, educational and scientific purposes within the meaning of section 501(c)(3) of the Internal Revenue Code.*” Opp’n NRA at 10 (emphasis in original) (quoting Foundation Mot., Ex. B at 1). In short, the Complaint alleges that the Foundation’s officers failed to carry out their decision-making authority in a manner they “reasonably believed to be in the best interests of the corporation” and these failures continue. Opp’n Foundation at 9 (citing D.C. Code § 29-406.42(a)(3)). The Complaint alleges that the Foundation’s directors relied, and continue to rely, on the NRA’s “study” and its reassurances in approving the drastic increase in the management fee even though they “had knowledge that [made] reliance unwarranted.” Opp’n Foundation at 9

(citing D.C. Code § 29-406.30(e)). The Court finds these allegations sufficient to survive the motion to dismiss.

C. The District Does Not Need to Plead Wrongdoing to Support a Claim for a Constructive Trust.

Defendant NRA moves to dismiss Counts IV and V of the Complaint arguing that a constructive trust is only warranted where the party holding the funds or property has engaged in wrongdoing, which has not been alleged here, and is not warranted where the party who holds the funds has a legal entitlement to do so. Mot. at 15-16.

The District argues that it does not need to allege a wrongful act to support a claim for a constructive trust. Regardless, the District claims that it has alleged that NRA officials had “direct involvement in exploiting the Foundation’s funds for the NRA’s own purposes and in encouraging and assisting the Foundation board in subordinating its public purposes to the NRA’s concerns about its lack of financial health.” Compl. ¶ 63.

The District does not need to allege a wrongful act to support a claim for a constructive trust. “A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if permitted to retain it.” *Heck v. Adamson*, 941 A.2d 1028, 1029 (D.C. 2008). Furthermore, “[a]ny transaction may be the basis for creating a constructive trust where for any reason the defendant holds funds which in equity, and good conscience should be possessed by the plaintiff.” *Woodruff v. Coleman*, 98 A.2d 22, 24 (D.C. 1953). Accordingly, the District has alleged facts to entitle it to a constructive trust.

II. THE FOUNDATION MOTION

The Foundation moves to dismiss all counts of the District's Complaint. The Foundation first argues that Counts I and II should be dismissed for failure to plead a violation of the NCA. The Foundation next claims that Count III should be dismissed because the District's common law authority has been preempted by the NCA. Finally, the Foundation moves to dismiss Count IV for lack of an underlying statutory violation, and Count V because the District's common law claim cannot be squared with the NCA and the Complaint does not allege a claim for unjust enrichment that can support the remedy of a constructive trust.

A. The District Has Sufficiently Pled a Violation of the NCA to Support Counts I and II.

Defendant Foundation moves to dismiss Count I and II of the Complaint for failure to state a claim. The Foundation presents many of the same arguments as the NRA: namely that the loans and management fees paid to the NRA were within the Foundation's legal authority and conformed with its nonprofit purposes. It also argues that the Complaint fails to allege ongoing wrongful conduct. As discussed above, viewing the facts in the Complaint in a light most favorable to the District, the Court disagrees.

However, the Foundation brings several arguments not discussed above. First, the Foundation claims that it had no duty to audit or otherwise monitor the NRA's use of the loan proceeds or its compliance with the limitations in the loan agreements. Second, the Foundation argues that the alleged decline to Foundation funds due to the loans and management fees caused

only de minimus harm to the Foundation’s charitable purpose. Third, according to the Foundation, the District’s request for appointment of a receiver is unjustified because there is no underlying claim for waste or mismanagement. Foundation Mot. at 12, 14, 17.

The Foundation argues that nothing in the Act, IRS rules, or the case law supports the allegation that the Foundation had a duty to audit or otherwise monitor the NRA’s use of the loan proceeds or its compliance with the limitations in the loan agreements. Foundation Mot. at 12. The District notes that a District nonprofit corporation, such as the Foundation, must be formed for a “lawful nonprofit purpose” and its legal authority is limited to advancing that nonprofit purpose. D.C. Code §§ 29-403.01(a), 29-403.02(17). The District has alleged, as discussed above, that the Foundation has violated the NCA by not acting in a manner that it reasonably believes to be in the best interest of the corporation and its directors unwarrantedly relied on a study approving the management fee increase, which led to unreasonable compensation. These alleged activities are not in furtherance of charitable, educational, and scientific purposes and the Court finds these allegations sufficient to support Counts I and II.

Next, the Foundation addresses the District’s allegation that the loans and increased management fees to the NRA caused “a decline in the Foundation funds available to issue . . . national grants between 2017 and 2019.” Compl. ¶ 70. The Foundation argues that having an unspecified smaller amount of grant funds to distribute for three years does not undermine the Foundation’s charitable purposes or exceed the Foundation’s legal authority. Foundation Mot. at 14. The Foundation argues that immaterial or de minimus harm fails to state a claim for injunctive relief. Foundation Mot. at 14. The District, on the other hand, states that there is no threshold of injury required to allege that a nonprofit corporation is acting contrary to its

nonprofit purposes. Opp'n at 10. The Court agrees, seeing no element of materiality under D.C. Code § 29-412.20.

Finally, the Foundation argues that the District's request for appointment of a receiver is unjustified because there is no claim for waste or mismanagement. Foundation Mot. at 16-17. The Foundation claims that, under D.C. Code § 29-412.20, the Court may only appoint a receiver if a nonprofit's members or directors brought an action against the nonprofit alleging that corporate assets were wasted. Foundation Mot. at 17. D.C. Code § 29-412.20(a)(1) of the NCA provides that "the Superior court may . . . place a corporation in receivership . . . in a proceeding by the Attorney General." Under § 29-412.20, the Court finds no requirement that there be a claim for waste or mismanagement in order to appoint a receiver. Accordingly, the Foundation Motion is denied as to Counts I and II.

B. The District Has Authority to Bring its Common Law Claim Against the Foundation (Count III).

The Foundation moves to dismiss Count III, the District's common law claim against the Foundation, arguing that the District cannot circumvent the legislature's statutory scheme defining the Attorney General's enforcement authority. Foundation Mot. at 18. The Foundation does not dispute that the Attorney General can enforce the public interest to ensure that charitable funds are used for a proper purpose. Foundation Reply at 10. Rather, the Foundation argues that the D.C. legislature chose to cover this ground through a different liability scheme, the NCA. Citing *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633 (D.C. 2005) and *People v. Grasso*, 11 N.Y.3d 64 (2008), the Foundation claims that even if the Attorney General retains some common law authority after the passage of the NCA, this power cannot be used to

create common law liability based on standards that deviate from the NCA's scheme expressly covering the same subject. Foundation Mot. at 20. The District's common law claim is inconsistent with the NCA, the Foundation asserts, because the NCA requires the Attorney General to establish continuing violations whereas the District's common law claim eliminates this requirement. Foundation Mot. at 18.

The District argues that its common law authority to police nonprofits has not been preempted by the NCA. Opp'n Foundation at 14. Instead, it asserts that the public has an interest in ensuring that charitable funds are used for proper purposes and the Attorney General can sue to enforce this public interest. Opp'n Foundation at 14 (citing *Hooker v. Edes Home*, 579 A.2d 608, 612 (D.C. 1990)). The District further notes that “[w]here property is given to a charitable corporation without restrictions as to the disposition of the property, the corporation is under a duty, enforceable at the suit of the Attorney General, not to divert the property to other purposes but to apply it to one or more of the charitable purposes for which it is organized.” Opp'n Foundation at 14 (quoting *Board of Directors, Washington City Orphan Asylum v. Board of Trustees, Washington City Orphan Asylum*, 798 A.2d 1068, 1075 n.6 (D.C. 2002) (quoting Restate (Second) of Trusts ¶ 348 cmt. f)). The District claims it is exercising its common law enforcement authority to ensure that a nonprofit corporation does not divert “property to other purposes but [instead] appl[ies] it to one or more of the charitable purposes for which it is organized.” Opp'n Foundation at 15 (quoting *Orphan Asylum*, 798 A.2d at 1075 n.6). Moreover, the District argues that neither *Beretta* or *Grasso* support the Foundation's preemption argument. Opp'n Foundation at 17.

In *District of Columbia v. Beretta*, the District and nine individuals harmed or killed by persons unlawfully using firearms brought suit against various manufacturers, importers, and

distributors of firearms. Underlying all three counts of the complaint are allegations that, despite the District's stringent gun control laws, the defendants' action or inaction contributed to the illegal flow of firearms into the District of Columbia. 872 A.2d at 638. Count I of the complaint alleged that defendants were strictly liable to the District under D.C. Code § 7-2551.02. Count II, for negligent distribution, alleged that defendants breached a duty to the District and its residents by creating an unreasonable risk of foreseeable harm. Finally, under count III, the District alleged that the defendants created an ongoing public nuisance of readily available guns. *Id.* At 639. The Court of Appeals dismissed the District's "claim for common-law negligence in the distribution of firearms." *Id.* at 645. In reaching this decision, the court noted that the Council for the District of Columbia had "intervened precisely in this area by enacting a strict liability statute governing the manufacture and sale of a subclass of firearms (assault weapons)[.]" *Id.* The court noted that, in similar circumstances, it has refused to expand the boundaries of a common-law cause of action.

The court dismissed the common law cause of action brought in *Beretta*, negligent distribution of firearms, because the District had failed to allege facts establishing the existence of a duty, a key element of common law negligence claim. The court was cautious to extend liability to defendants for their failure to control the conduct of others, and ultimately found there was no special relationship between the defendants and plaintiffs as to give rise to duty of care. *Id.* In part because of the existence of a statute expressly addressing the matter, the court declined to relax the requirements of an established common law cause of action, negligence. *Id.*

The Court finds that this action is within the Attorney General's common law enforcement authority. Here, unlike in *Berretta*, the District is not seeking to create a new common law cause of action. Instead, the District brings this action to enforce the public interest

to ensure that charitable funds are used for a proper purpose, an authority that the Foundation does not dispute. *See Reply* at 10. Accordingly, the Foundation Motion is denied as to Count III. Furthermore, as Counts IV and V have been dismissed above, the Court need not address the Foundation's arguments as to those two counts.

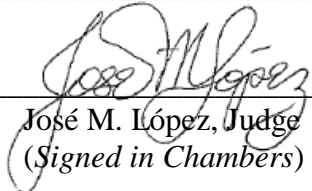
CONCLUSION

The Court has found that the District has pled facts establishing a basis for a constructive trust under D.C. Code § 29-412.20 and that the District has authority to bring its common law claim against the Foundation. Additionally, the Court has found that Counts IV and V fail because a constructive trust is not an independent cause of action. Accordingly, it is this 21st day of December, 2020, hereby

ORDERED that the NRA Motion is **GRANTED IN PART**; and it is further

ORDERED that Counts IV and V are **DISMISSED**; and it is further

ORDERED that the Foundation Motion is **DENIED**.



José M. López, Judge
(Signed in Chambers)

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