

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

DISTRICT OF COLUMBIA,  
a municipal corporation,  
441 Fourth Street N.W.  
Washington, D.C. 20001,

Plaintiff,

v.

NRA FOUNDATION, INC.,  
a D.C. nonprofit corporation,  
11250 Waples Mill Road  
Fairfax, VA 22030, and

NATIONAL RIFLE ASSOCIATION OF  
AMERICA, INC.,  
a New York nonprofit corporation,  
11250 Waples Mill Road  
Fairfax, VA 22030

Defendants.

**Civil Action No.** 2020 CA 003454 B

**Judge:** Jose M. Lopez

**ORAL HEARING REQUESTED**

**Next Event:** Initial Scheduling Conference

**Date:** November 6, 2020

**DEFENDANT NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.'S  
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
ITS MOTION TO DISMISS**

Robert H. Cox  
(D.C. Bar No. 432945)  
**BRIGLIA HUNDLEY, P.C.**  
1921 Gallows Rd, Suite 750  
Tysons Corner, VA 22182  
Tel. 703.883.9105  
Fax: 708.883.0899  
[rcox@brigliahundley.com](mailto:rcox@brigliahundley.com)

**Attorneys for Defendant  
NATIONAL RIFLE ASSOCIATION OF  
AMERICA, INC.**

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Defendant the National Rifle Association of America (the “NRA”) respectfully submits this memorandum of points and authorities in support of its motion to dismiss Counts IV and IV of Plaintiff the District of Columbia (the “District”)’s complaint, dated August 6, 2020, against the NRA and the NRA Foundation, Inc. (the “Foundation”) (such complaint, the “Complaint”)<sup>1</sup> as follows.

## I.

### **PRELIMINARY STATEMENT**

The NRA is one of the oldest and most successful nonprofits in the United States. The Foundation, a 501(c)(3) charitable corporation, was founded in 1990, to pursue a variety of charitable purposes—including to support the charitable activities of the NRA itself. The NRA is currently the target of a partisan dissolution proceeding in New York so corrupt and improper that New York’s former Attorney General, Eric Schneiderman, expressed concerns about it before resigning,<sup>2</sup> and the American Civil Liberties Union has warned that New York’s hostilities against the NRA constitute unconstitutional government overreach.<sup>3</sup> This action by the District was commenced as a companion to the New York case and seeks, among other things, to impose a constructive trust over unspecified amounts of money which properly flowed from the Foundation to the NRA in support of the Foundation’s charitable mission, with the unqualified approval of the Foundation’s Board of Trustees (including its independent Trustees).

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<sup>1</sup> A copy of the District’s Complaint, dated August 6, 2020, is annexed to the instant motion as Exhibit A.

<sup>2</sup> See *National Rifle Association of America v. Letitia James*, 1:20-cv-00889-MAD-TWD (N.D.N.Y.), Doc. No. 1 “Complaint”, at pp. 2-3.

<sup>3</sup> David Cole, *The NRA Has a Right to Exist*, WALL ST. J. (Aug. 26, 2020 11:52 am ET), <https://www.wsj.com/articles/the-nra-has-a-right-to-exist-11598457143>.

Nothing in District of Columbia law countenances a cause of action to disrupt the finances of a political enemy, so the Complaint invents two: a purported statutory constructive trust claim which satisfies none of the elements of Section 29 of the District of Columbia Nonprofit Corporation Act of 2010 (the “NCA” or the “Act”)<sup>4</sup>; and, a common-law cause of action conjured from whole cloth. Thus, Counts IV and V of the Complaint, respectively, fail to state a claim upon which relief can be granted, for the following reasons.

**First**, Count V of the Complaint must be dismissed as a matter of law as this jurisdiction does not recognize an independent common law cause of action for a constructive trust.

**Second**, the statutory constructive trust sought by the District in Count IV of the Complaint is unavailable here as it is only applicable to compensation paid “to a corporation’s director, officer, or manager.” The District fails to plead any facts to support the conclusion that the NRA acted in any of these capacities. Even if the NRA acted as a “director, officer or manager” of the Foundation, a statutory constructive trust under the NCA is only available where the District establishes that the Foundation “exceeded or abused and is continuing to exceed or abuse the authority conferred upon it by law” or “continued to act contrary to its nonprofit purposes.”<sup>5</sup> There are no factual allegations in the Complaint to establish that the Foundation *ever* violated the law or acted in a manner contrary to its nonprofit purposes.

**Fourth**, regardless of whether codified by statute or derived from common law, a constructive trust is an equitable remedy that can only be imposed on funds, or property, held by a person who has committed some wrongdoing. The Complaint does not, and cannot, allege equitable wrongs by the NRA sufficient to permit a constructive trust over its lawfully obtained assets.

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<sup>4</sup> D.C. Code § 29-401.01, *et seq.*

<sup>5</sup> D.C. Code § 29-412.20(a).

*Finally*, not only does the Complaint fail to plead any cognizable cause of action against the NRA—it demonstrates that the District cannot do so, even in an amended pleading. Accordingly, this Court should dismiss Counts IV and V with prejudice, without leave to replead.

## II.

### **FACTUAL BACKGROUND**

According to the District’s Complaint, in October 2017, the NRA requested a \$5 million loan from the Foundation’s Investment Committee.<sup>6</sup> After conferring with its investment consultant, the Foundation Board approved the \$5 million loan on November 2, 2017.<sup>7</sup> In January 2018, the NRA sought an extension of the loan’s maturity date until June 2018.<sup>8</sup> The Foundation Board agreed to the extension.<sup>9</sup> The NRA paid back the loan in full in March 2018, prior to the maturity date.<sup>10</sup>

The Complaint alleges that three months after repaying the loan, the NRA requested a second \$5 million loan from the Foundation.<sup>11</sup> The Foundation Board approved this request and issued the loan with a six-month maturity date.<sup>12</sup> After issuing the loan, the Foundation Board agreed to extend the maturity date twice; first until October 2019 and then until October 2020.<sup>13</sup> The Complaint alleges that the Foundation also agreed to subordinate its loan, so that the NRA

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<sup>6</sup> Complaint at ¶ 37.

<sup>7</sup> Complaint at ¶ 40.

<sup>8</sup> Complaint at ¶ 42.

<sup>9</sup> Complaint at ¶ 43.

<sup>10</sup> Complaint at ¶ 45.

<sup>11</sup> Complaint at ¶ 45.

<sup>12</sup> Complaint at ¶ 45.

<sup>13</sup> Complaint at ¶¶ 46 and 50.

could first repay a separate loan obligation owed to Wells Fargo.<sup>14</sup>

The Complaint further concerns the fact that the NRA provides the Foundation with services to conduct its day-to-day operations. According to the Complaint, the Foundation does not have its own employees or administrative support staff, so it relies on the NRA to provide those services.<sup>15</sup> In return, the Foundation pays the NRA a management fee each year to cover the costs of these services.<sup>16</sup>

The District contends that on September 17, 2018 the NRA advised the Foundation Board that it had conducted a study and determined that an increase in the NRA's management fees was warranted.<sup>17</sup> Per the Complaint, "[t]he increase totaled \$5,868,048, including a 2018 'catch-up fee' of nearly \$4 million to be paid immediately."<sup>18</sup> The Foundation Board ultimately approved the management fee increase.<sup>19</sup>

The District has commenced the instant action against both the Foundation and the NRA. The Complaint contains five counts and alleges that the Foundation has exceeded its authority under the NCA (Count I) and has acted contrary to its nonprofit purposes (Count II). The District alleges that the Foundation's actions are also violative of common law (Count III). Based on the Foundation's alleged violations of the NCA, the District seeks to impose a constructive trust over funds paid by the Foundation to the NRA. The District relies upon both the NCA (Count IV) and the common law (Count V) to support its request for a constructive trust over funds possessed by the NRA.

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<sup>14</sup> Complaint at ¶ 46.

<sup>15</sup> Complaint at ¶ 52.

<sup>16</sup> Complaint at ¶ 52.

<sup>17</sup> Complaint at ¶ 53.

<sup>18</sup> Complaint at ¶ 53.

<sup>19</sup> Complaint at ¶ 64.



The NRA now moves for dismissal of Counts IV and V in their entirety.

### III.

#### LEGAL STANDARD

The applicable legal standard for a motion to dismiss was well explained by the Court of Appeals in *Potomac Development Corp. v. District of Columbia* as follows:

“A complaint should be dismissed under Rule 12(b)(6) if it does not satisfy the pleading standard in Rule 8(a). Rule 8(a) requires a pleading to contain a ‘short and plain statement of the claim showing that the pleader is entitled to relief.’ In this respect, Rule 8(a) mirrors Rule 8(a) of the Federal Rules of Civil Procedure. ‘By statute, the Superior Court must ‘conduct its business according to the Federal Rules of Civil Procedure ... unless it prescribes or adopts rules which modify those Rules.’ The Superior Court has not prescribed or adopted any rule that modifies Federal Rule 8(a).”<sup>20</sup>

Thus, the District of Columbia follows the Supreme Court’s seminal decisions in *Iqbal*<sup>21</sup> and *Twombly*<sup>22</sup>. Under these rulings, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>23</sup> A complaint satisfies this pleading standard when its factual allegations “raise a right to relief above the speculative level.”<sup>24</sup> In determining whether a complaint states a plausible claim for relief, the reviewing court may draw on its judicial experience and common sense.<sup>25</sup>

For the purposes of the motion to dismiss, legal conclusions and conclusory allegations

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<sup>20</sup> *Potomac Development Corp. v. District of Columbia*, 28 A.3d 531 (2011) (internal citations and quotations omitted).

<sup>21</sup> *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

<sup>22</sup> *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

<sup>23</sup> *Iqbal*, 556 U.S. at 678 (quoting *v. Twombly*, 550 U.S. at 570).

<sup>24</sup> *Twombly*, 550 U.S. at 555-56.

<sup>25</sup> *Id.* at 556.

merely reciting the elements of a claim are not entitled to the presumption of truth.<sup>26</sup> “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.”<sup>27</sup> “[A] plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>28</sup>

#### IV.

#### ARGUMENT

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. A constructive trust is an equitable remedy, “used to force restitution in order to prevent unjust enrichment.”<sup>29</sup> It is based on the concept that “[w]hen property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee.”<sup>30</sup>

As pleaded, the Complaint lacks any factual allegations capable of supporting the District’s requested relief. Count V is subject to dismissal because, under the common law, there is no independent cause of action for a constructive trust. Even if the District were to interpose 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.

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.” The District has not adequately alleged that the NRA ever acted in any of these capacities.

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<sup>26</sup> *Iqbal*, 556 U.S. at 677-79.

<sup>27</sup> *Id.* at 678 (citing *Twombly*, 550 U.S. at 555).

<sup>28</sup> *Twombly*, 550 U.S. at 555.

<sup>29</sup> *Hertz v. Klavan*, 374 A.2d 871, 873 (D.C. 1977).

<sup>30</sup> *Id.*

Further, the District fails to allege that the Foundation has either exceeded its authority under the NCA or acted contrary to its nonprofit purposes. The NCA explicitly permits the Foundation to lend and invest its money. Likewise, the agreement to pay management fees to the NRA in exchange for day-to-day operational services is a valid exercise of the Foundation's right to conduct its mission. Nowhere within the Complaint has the District identified an instance where the Foundation has acted in a way inapposite to its stated nonprofit purposes.

Finally, both Counts IV and V should be dismissed on the basis that the District has not alleged that the NRA engaged in any wrongdoing, which is a prerequisite for the imposition of a constructive trust. In addition, the NRA has a legal entitlement to the management fees it has been paid.

**A. Count V Fails Because A Constructive Trust Is A Remedy, Not A Cause of Action, and the District Lacks Standing To Pursue It.**

Count V of the Complaint seeks the imposition of a constructive trust, pursuant to the common law, over the funds the NRA obtained “through its improper operational control over the Foundation.”<sup>31</sup> This Count must be dismissed as a matter of law since “a constructive trust is not an independent cause of action.”<sup>32</sup> Instead, “[a] constructive trust is a remedy that a court devises *after litigation* to redress the injustice that would otherwise occur when one person has fraudulently or wrongfully obtained the property of another.”<sup>33</sup>

Insofar as there is no legal basis for the District to pursue a constructive trust as an independent cause of action, this Court can make quick work in dismissing Count V of the

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<sup>31</sup> Complaint at ¶ 97.

<sup>32</sup> *Macharia v. United States*, 238 F. Supp. 2d 13, 31 (D.D.C. 2002), *aff'd*, 334 F.3d 61 (D.C. Cir. 2003); *see also Alemayehu v. Abere*, 199 F. Supp. 3d 74, 87 (D.D.C. 2016) (“Because a constructive trust is not an independent cause of action, the Court will dismiss Count IV.”); *Chin-Teh Hsu v. New Mighty U.S. Tr.*, No. CV 10-1743 (JEB), 2020 WL 588322, at \*11 (D.D.C. Feb. 6, 2020) (dismissing a “freestanding count[]” for a constructive trust); *Hedgeye Risk Mgmt., LLC v. Heldman*, 271 F. Supp. 3d 181, 191 (D.D.C. 2017) (dismissing a constructive trust count and “treat[ing] the request for a constructive trust as part of . . . request for relief.”).

<sup>33</sup> *Alemayehu*, 199 F. Supp. 3d at 87 (emphasis added) (quoting *Macharia*, 238 F. Supp. 2d at 31).

Complaint.

This Court should note that even if the District were to assert a common law cause of action against the NRA, the District would be unable to obtain a constructive trust in this matter. In seeking a constructive trust under the common law, the District is, in effect, attempting to redress an injury purportedly suffered by the Foundation. The District lacks standing to do so. In order to establish standing in the District of Columbia, “[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”<sup>34</sup> Based on this traditional standing analysis, the District lacks standing to pursue remedies for injuries allegedly suffered by the Foundation.

Courts in the District of Columbia have not ruled, specifically, on how a party can establish standing so as to be entitled to a constructive trust. In this instance, the Court should look to Maryland common law, which is “the source of the District's common law and an especially persuasive authority when the District's common law is silent[.]”<sup>35</sup> Under Maryland common law, *a litigant does not have standing to pursue a constructive trust on behalf of a third party.*<sup>36</sup>

As such, this Court should dismiss Count V of the Complaint and rule that even in any subsequent attempts to plead, the District cannot, as a matter of law, assert a common law constructive trust on behalf of the Foundation against the NRA.

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<sup>34</sup> *Vining v. Exec. Bd. of D.C. Health Benefit Exch. Auth.*, 174 A.3d 272, 278 (D.C. 2017) (quoting *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016)).

<sup>35</sup> *Napoleon v. Heard*, 455 A.2d 901, 903 (D.C. 1983).

<sup>36</sup> See *Powers v. Am. Exp. Fin. Advisors, Inc.*, 82 F. Supp. 2d 448, 453 (D. Md. 2000), *aff'd sub nom. Powers v. Am. Express Fin. Advisors, Inc.*, 238 F.3d 414 (4th Cir. 2000) (Citing *Aliano, Aliano & Aliano v. Aliano*, 251 A.D.2d 436, 674 N.Y.S.2d 404 (N.Y. App. Div. 2d Dep't 1998) for the proposition that a “constructive trust plaintiff must have standing as the one defrauded”).

**B. Count IV Fails Because the District Does Not, And Cannot, Plead Facts Establishing A Basis For A Constructive Trust Under D.C. Code § 29-412.20.**

The NCA authorizes the Superior Court to impose a constructive trust “on compensation paid to a corporation’s director, officer or manager . . .”.<sup>37</sup> In order to obtain a constructive trust, the Attorney General for the District must establish that either (a) “[t]he corporation has exceeded or abused and is continuing to exceed or abuse the authority conferred upon it by law;”<sup>38</sup> or (b) “[t]he corporation has continued to act contrary to its nonprofit purposes.”<sup>39</sup>

In Count IV of its Complaint, the District seeks relief under the NCA and asks this Court to impose a constructive trust over funds allegedly “diverted” from the Foundation by the NRA.<sup>40</sup> Count IV must be dismissed because, even if taken as true, the District’s allegations are insufficient to warrant the imposition of a constructive trust, as a matter of law. Specifically, the District does not allege facts tending to show that the NRA ever acted as a “director, officer, or manager” of the Foundation. The District has, likewise, failed to allege the Foundation exceeded or abused the authority conferred upon it by law. In addition, the allegations in the Complaint do not plausibly support the conclusion that the Foundation has acted contrary to its nonprofit purposes.

**1. The District has not alleged that the NRA acted as a director, officer or manager of the Foundation.**

Per the text of the NCA, the Superior Court may “impose a constructive trust on compensation paid to a corporation’s director, officer or manager.”<sup>41</sup> The District has wholly failed to allege that the NRA acted in any of these capacities. The District contends that the

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<sup>37</sup> D.C. Code § 29-412.20(a).

<sup>38</sup> D.C. Code § 29-412.20(a)(1)(B).

<sup>39</sup> D.C. Code § 29-412.20(a)(1)(C).

<sup>40</sup> See Complaint at ¶¶ 86-91 and at “Prayer for Relief.”

<sup>41</sup> D.C. Code § 29-412.20(a).

“Foundation’s Board is controlled by the NRA.”<sup>42</sup> The District bases this conclusion on the supposed fact that “[m]embership on the Foundation’s Board substantially overlaps with membership on the NRA’s Board.” Taking this allegation as true, that would mean that certain *individuals* might serve on both the NRA Board and the Foundation Board. However, the District seeks a constructive trust over funds *held by the NRA, not any individual*. There is no allegation in the Complaint that the NRA, itself, serves as a director of the Foundation Board.

The District alleges that “[t]he Treasurer for the NRA and for the Foundation are the same person.”<sup>43</sup> But, once again, that individual is not the defendant in this action – *the NRA is*. Even if a certain individual served as a treasurer or any other officer for both the NRA and the Foundation simultaneously, there is no allegation or support for the notion that the NRA, itself, served as an officer of the Foundation.

To the extent the District claims that the NRA served as a “manager” of the Foundation, that is similarly without factual support. Nowhere within the Complaint does the District overtly allege that the NRA served as a Foundation manager. Though the District claims that the Foundation pays the NRA a “management fee” that fee was allegedly meant to assist the Foundation since it does not have its own “employees” or “support staff.”<sup>44</sup> Any reasonable definition of the word “manager” does not include generic “employees” or “support staff.”<sup>45</sup>

Based on the foregoing, there are no allegations in the Complaint which, if proven true, would enable this Court to impose a constructive trust, pursuant to the NCA, over funds held by the NRA. As such, Count IV of the Complaint must be dismissed as a matter of law.

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<sup>42</sup> Complaint at ¶ 29.

<sup>43</sup> Complaint at ¶ 34.

<sup>44</sup> Complaint at ¶ 52.

<sup>45</sup> “Manager” is defined by Black’s Law Dictionary as meaning “Someone who administers or supervises the affairs of a business, office, or other organization.” *See* MANAGER, Black’s Law Dictionary (11th ed. 2019).

2. **There are no allegations in the Complaint to support the notion that the Foundation has “exceeded or abused and is continuing to exceed or abuse the authority conferred upon it by law.”**

The District claims, in entirely conclusive fashion, that the Foundation has “exceeded or abused, and continues to exceed or abuse, the authority conferred on it by law, in violation of the District’s NCA.”<sup>46</sup> However, the Complaint is devoid of any detail as to the section of the NCA (or any other law) of which the Foundation has allegedly run afoul. This is insufficient even under lax, notice pleading standards.

The conduct upon which the District bases this action is divided into two main categories: (1) loans provided to the NRA,<sup>47</sup> and (2) management fees paid to the NRA.<sup>48</sup> Neither lending money or paying management fees to the NRA is, by itself, indicative of any violation of the NCA. Under the NCA a nonprofit corporation is *explicitly permitted* to “[l]end money, invest and reinvest its funds.”<sup>49</sup> As for the management fees paid to the NRA, as the District concedes, the Foundation “does not have its own employees or administrative support staff to run day to day operations. It relies on the NRA to provide those services.”<sup>50</sup> Paying the NRA to run its day-to-day operations cannot conceivably be a violation of the NCA, as the NCA provides the Foundation with the power to “do all things necessary or convenient to carry out its affairs.”<sup>51</sup>

To the extent the District disagrees with the terms upon which the Foundation agreed to lend money to the NRA or the amounts the Foundation agreed to pay the NRA for management fees, those disagreements do not form the basis of a valid claim against the Foundation. As the

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<sup>46</sup> Complaint at ¶ 73.

<sup>47</sup> See Complaint at ¶¶ 37-51.

<sup>48</sup> See Complaint at ¶¶ 52-64.

<sup>49</sup> D.C. Code § 29-403.02(8).

<sup>50</sup> Complaint at ¶ 52.

<sup>51</sup> D.C. Code § 29-403.02.

District admits, the loans to the NRA, the extensions related thereto, and the agreement to subordinate the loan were all validly approved by the Foundation Board.<sup>52</sup> The same is true for the decision to accept the NRA's proposed increase to its management fee.<sup>53</sup> These decisions are protected from arbitrary, hindsight criticism (i.e. the District's Complaint) by the business judgment rule.<sup>54</sup> Under the business judgment rule, the actions of the Foundation are presumed to have been made on an informed, good faith basis. "The burden is on the party challenging the decision to establish facts rebutting the presumption."<sup>55</sup>

There are no factual allegations in the Complaint capable of rebutting the presumption of propriety embodied by the business judgment rule. Instead, the District relies solely on baseless conjecture and innuendo which are insufficient as a matter of law. As such, the Complaint does not adequately plead that the Foundation "exceeded or abused, and continues to exceed or abuse, the authority conferred on it by law, in violation of the District's NCA."

**3. There are no allegations in the Complaint to establish that the Foundation has "has continued to act contrary to its nonprofit purposes."**

Pursuant to the NCA, the District can also establish entitlement to a constructive trust if it can show that the Foundation "has continued to act contrary to its nonprofit purposes."<sup>56</sup> Nothing in the Complaint can plausibly support such a conclusion.

According to the District, the Foundation's nonprofit purposes are:

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<sup>52</sup> Complaint at ¶¶ 40, 42, 43, 45, 50 and 51.

<sup>53</sup> Complaint at ¶ 64.

<sup>54</sup> See *Behradrezaee v. Dashtara*, 910 A.2d 349, 361 (D.C. 2006) (adopting the business judgment rule and defining it as "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company ... [citations omitted.] Absent an abuse of discretion, that judgment will be respected by the courts.") (quoting *Willens v. 2720 Wisconsin Ave. Co-op. Assn., Inc.*, 844 A.2d 1126, 1137 (D.C. 2004)); see also *Armenian Assembly of Am., Inc. v. Cafesjian*, 772 F. Supp. 2d 20, 104 (D.D.C. 2011), *aff'd*, 758 F.3d 265 (D.C. Cir. 2014) (applying the business judgment rule to a nonprofit corporation).

<sup>55</sup> *Behradrezaee*, 910 A.2d at 361 (quoting *Willens*, 844 A.2d at 1137).

<sup>56</sup> D.C. Code § 29-412.20(a)(1)(C).



- (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 National Rifle Association of America (“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]  
...
- (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 purposes of Section 501(c)(3) of the Code.<sup>57</sup>

The District claims that, “[b]y failing to render proper oversight and ceding operational control to the NRA, the Foundation allowed its funds to be utilized by the NRA in a manner that is contrary to the Foundation’s charitable purposes.”<sup>58</sup> The District further contends that an “improper allocation of funds” occurred when the Foundation was assigned 75% responsibility to pay the salary of the Foundation’s former Executive Director, pursuant to a consulting agreement.<sup>59</sup> This was supposedly “improper” because the Executive Director did not perform services for the Foundation under this agreement and “did not perform any of the typical tasks that would be expected of an Executive Director.”<sup>60</sup> However, the District does not even attempt

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<sup>57</sup> Complaint at ¶ 18.

<sup>58</sup> Complaint at ¶ 79.

<sup>59</sup> Complaint at ¶ 60.

<sup>60</sup> *Id.*

to connect-the-dots to explain how this allocation was “contrary”<sup>61</sup> to any of the Foundation’s stated purposes.

The District further alleges that the Foundation “subverted its own charitable nonprofit purposes” “through loans and management fee agreements.”<sup>62</sup> As detailed above, there is nothing inherently improper about the loans provided to the NRA or the management fees. These decisions were approved by the Board and are protected by the business judgment rule.<sup>63</sup> The Foundation does not have employees of its own, so it is certainly in furtherance of its charitable nonprofit purposes for the Foundation to pay a management fee to enable its day-to-day operations to be performed. In addition, the NCA explicitly permits the Foundation to loan money, and it defies logic to conclude that doing so can be considered a subversion of the Foundations purposes.

The District has not identified any act ever taken by the Foundation that can plausibly be considered “contrary” to its nonprofit purposes. Even if a single such act was identified, the text of the NCA requires the District to show that the Foundation has “continued to act” in a way that contravenes its purpose. The allegations in the Complaint are woefully short of this standard.

**C. The District Fails to Plead Wrongdoing By The NRA—Which Independently Warrants Dismissal of Counts IV and V.**

In addition to the arguments set forth in sections A and B, *above*, Counts IV and V of the Complaint must be dismissed since a constructive trust is only available where the entity possessing the funds or property has engaged in wrongdoing, which is not alleged here. In addition, a constructive trust is inappropriate as the allegations in the Complaint establish that the

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<sup>61</sup> “Contrary” is defined by Black’s Law Dictionary as meaning “conflicting with.” *See* CONTRARY TO LAW, Black’s Law Dictionary (11th ed. 2019).

<sup>62</sup> Complaint at ¶ 80.

<sup>63</sup> *Behradrezaee*, 910 A.2d at 361.

NRA has a legal entitlement to retain the funds paid to it.

1. **A constructive trust is only warranted where the party holding the funds or property has engaged in wrongdoing – which has not been alleged here.**

“The imposition of a constructive trust requires proof of three elements. First, there must be a wrongful act. Second, specific property acquired by the wrongdoer must be traceable to the wrongful behavior. Finally, there must be a reason why the party holding the property should not be allowed in good conscience to keep it.”<sup>64</sup> Though wrongdoing need not rise to the level of fraud to justify a constructive trust, a constructive trust may be warranted “for example, where the transfer of property was induced by a mistake of fact, for embezzlement, conversion of goods, fraud, duress, undue influence, and breach of a fiduciary duty.”<sup>65</sup>

The District has not identified any such wrongdoing by the NRA. If the District intends to argue that the NRA exerted undue influence over the Foundation, such an accusation is unsupported by any factual allegations in the Complaint. “Undue influence is influence gained by improper means.”<sup>66</sup> There is no allegation in the Complaint that the influence the NRA holds was obtained improperly or unscrupulously. As the District concedes, the Foundation’s trustees are elected by the NRA Board of Directors.<sup>67</sup> It is disingenuous for the District to feign as though they have uncovered or exposed some secret scheme by the NRA to control the Foundation. The ties between the NRA and the Foundation are completely legitimate and well-known. In the absence of any fact-based allegation of wrongdoing by the NRA, a common law constructive trust is not appropriate.

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<sup>64</sup> *Alsco-Harvard Fraud Litig.*, 523 F. Supp. 790, 806–07 (D.D.C. 1981) (internal citations removed).

<sup>65</sup> *Hertz*, 374 A.2d at 873. (“Inequitable conduct short of fraud will cause equity to employ this remedy.”).

<sup>66</sup> *Roberts-Douglas v. Meares*, 624 A.2d 405, 418 (D.C. 1992), opinion modified on reh'g, 624 A.2d 431 (D.C. 1993) (quoting *In re Weir's Estate*, 475 F.2d 988, 992 (D.C. Cir. 1973)).

<sup>67</sup> Complaint at ¶ 29.

**2. A constructive trust is not appropriate where, as here, the party who holds the funds has a legal entitlement to do so.**

Finally, a constructive trust is wholly unwarranted where, as here, the funds in question were obtained in a legitimate and legal manner. “A constructive trust is fundamentally a remedy to prevent unjust enrichment.”<sup>68</sup> “When someone is lawfully entitled to possession of certain property, there is no reason to impose a constructive trust on that property for the benefit of someone else.”<sup>69</sup>

The only funds mentioned in the Complaint which have been paid to the NRA are the management fees for assisting the Foundation on a day-to-day basis.<sup>70</sup> This is necessary since the Foundation “does not have its own employees or administrative support staff to run day to day operations. It relies on the NRA to provide those services.”<sup>71</sup> The District concedes that payment of these funds was authorized by the Foundation Board.<sup>72</sup> Thus, there is no allegation that the NRA has procured funds from the Foundation through improper means. Instead, the Complaint establishes that the NRA has a legal entitlement to retain these funds as the benefit of its bargain with the Foundation. Accepting the facts in the Complaint as true, the District’s demand for a constructive trust, which comprises Counts IV and V of its Complaint, must be dismissed.<sup>73</sup>

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<sup>68</sup> *Duggan v. Keto*, 554 A.2d 1126, 1134 (D.C. 1989)

<sup>69</sup> *Id.*

<sup>70</sup> See Complaint at ¶¶ 52-64.

<sup>71</sup> Complaint at ¶ 52.

<sup>72</sup> Complaint at ¶ 64.

<sup>73</sup> See *Bolle v. Hume*, 619 A.2d 1192, 1197 n. 1 (D.C. 1993) (refusing to impose a constructive trust where “there is no evidence that [the defendant] acquired her right to the [property at issue] by guile, deceit or subterfuge.”).

**D. This Court should dismiss Counts IV and V of the District’s Complaint with prejudice, without leave to replead.**

Dismissal pursuant to Rule 12(b)(6) is warranted based upon the arguments set forth above. In this jurisdiction, by default, a dismissal pursuant to Rule 12(b)(6) is deemed to be “with prejudice.”<sup>74</sup> “A dismissal with prejudice is a final judgment that slams the door shut on the possibility of future amendments to the complaint[.]”<sup>75</sup> A dismissal with prejudice is appropriate where, as here, “there is no set of facts by which [the District] could establish, even by amendment, a claim”<sup>76</sup> for a constructive trust.

As detailed above, there is no independent common law cause of action for a constructive trust. This means that Count V of the Complaint was wholly baseless and there is nothing the District can allege to change that. As for the District’s statutory constructive trust claim (Count IV), it is clear from the text of the NCA that the NRA was not a proper defendant since that section of the NCA only applies to compensation paid “to a corporation’s director, officer or manager.” In this instance, there is no possibility that the District can cure its pleading deficiencies by way of an amended complaint. As such, dismissal of Counts IV and V with prejudice, without leave to replead, is appropriate in this matter.<sup>77</sup>

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<sup>74</sup> See *In re Estate of Curseen*, 890 A.2d 191, 192 (D.C. 2006) (where the “court did not indicate otherwise, the dismissal is deemed to be with prejudice.”); see also *Okusami v. Psychiatric Inst. of Washington, Inc.*, 959 F.2d 1062, 1066 (D.C. Cir. 1992) (“A dismissal on that ground, pursuant to Rule 12(b)(6), is a resolution on the merits and is ordinarily prejudicial.”).

<sup>75</sup> *Miller-McGee v. Washington Hosp. Ctr.*, 920 A.2d 430, 438 n. 12 (D.C. 2007) (quoting *U.S. ex rel. Karvelas v. Melrose–Wakefield Hosp.*, 360 F.3d 220, 242 n. 30 (1st Cir.2004)).

<sup>76</sup> *Hunt v. Maryland-Nat’l Capital Park & Planning Comm’n*, 16 F.3d 410 n. 2 (4th Cir. 1994).

<sup>77</sup> *Manago v. D.C.*, 934 A.2d 925, 926 (D.C. 2007) (affirming a dismissal “with prejudice” where the defendant was “not a proper defendant to these claims” based on the relevant statute).

V.

**CONCLUSION**

For the foregoing reasons, Defendant NRA respectfully requests that this Court dismiss Count IV and V in the District's Complaint; award the NRA its costs pursuant to Rule 54 and grant all other relief this Court deems just and proper.

Dated: September 22, 2020

/s/ Robert H. Cox

Robert H. Cox

(D.C. Bar No. 432945)

**BRIGLIA HUNDLEY, P.C.**

1921 Gallows Rd, Suite 750

Tysons Corner, VA 22182

Tel. 703.883.9105

Fax: 703.883.0899

[rcox@brigliahundley.com](mailto:rcox@brigliahundley.com)

**Attorneys for Defendant**

**NATIONAL RIFLE ASSOCIATION OF  
AMERICA, INC.**