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

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

MEMORANDUM OF LAW IN SUPPORT OF THE NATIONAL RIFLE ASSOCIATION'S MOTION TO DISMISS THE FIRST CAUSE OF ACTION OF THE SECOND AMENDED VERIFIED COMPLAINT

William A. Brewer, III
Svetlana M. Eisenberg
Blaine E. Adams
BREWER, ATTORNEYS & COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

ATTORNEYS FOR THE NATIONAL RIFLE ASSOCIATION OF AMERICA

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I.
PRELIMINARY STATEMENT

After the Court dismissed, *inter alia*, the NYAG's two dissolution claims, the NYAG amended her complaint but added ***no*** new factual allegations. Rather, she asserts a new cause of action which seeks the intrusive, unnecessary, and unprecedented appointment of an "independent" compliance monitor to oversee the administration of the NRA, answerable to the NYAG's own office as well as the Court. She also asks the Court to appoint an independent governance expert to advise the Court on "reforms" that are "necessary" at the NRA.

The Court should dismiss the new claim. It is not based on a cognizable legal theory (the NYAG invented a claim out of a statute in which the legislature created none), has no precedent (has not been ordered by any court or even been sought by the NYAG), and disregards a carefully crafted and comprehensive legislative scheme. Further, the statute on which the NYAG relies does not permit her to exercise authority over all of the NRA's assets. Finally, the requested relief would burden the First Amendment rights of the NRA and its millions of members.

This Court has already determined that the NYAG's allegations, if proven, can be "addressed by the targeted, less intrusive relief" sought in the Complaint's surviving, non-dissolution claims.[1] There is no colorable practical need, and no legal basis, for the NYAG to contrive a *de facto* takeover of the NRA to replace her defunct dissolution claims. Rather, the parties should proceed with discovery and trial on the NYAG's previously existing claims, and the new one should be dismissed.

[1] Decision + Order on Motion, dated March 2, 2022, NYSCEF No. 611 at 2.

II.
PROCEDURAL POSTURE

On March 2, 2022, the Court dismissed two counts of the then-operative complaint which sought dissolution of the NRA.[2] On May 2, 2022, the NYAG amended her complaint to assert a new claim against the NRA. In the new First Cause of Action against the NRA, the NYAG seeks the appointment of an "independent" compliance monitor and an "independent" governance expert (both reporting to the NYAG as well as the Court), purportedly to secure proper administration of the NRA. Because the new cause of action fails to state a claim and fails in numerous other respects, it should be dismissed.

III.
ARGUMENT

A. Legal standard

On a motion to dismiss under CPLR 3211(a)(7), the court must accept "the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory."[3] While factual allegations are accorded a favorable inference, this does not follow for allegations that are "bare legal conclusions" or that are "inherently incredible or flatly contradicted by documentary evidence."[4] Such allegations are not sufficient to withstand a motion to dismiss.[5] Dismissal is warranted "if the plaintiff fails to assert facts in support of an element of the claim, or if the factual

[2] NYSCEF No. 611 at 2 (dismissing "the [NYAG's] Complaint's boldest claims[, which] target the NRA itself").

[3] *Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994); *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151-52 (2002).

[4] *Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995).

[5] *JFK Holding Co., LLC v. City of New York*, 68 A.D.3d 477, 477 (1st Dep't 2009).

allegations and inferences to be drawn from them do not allow for an enforceable right of recovery."[6] Under CPLR 3211(a)(7) a claim fails to state a cause of action when the alleged facts do not "fit within any cognizable legal theory."[7]

B. The Court should dismiss the NYAG's First Cause of Action.

There are four independent reasons to dismiss the NYAG's First Cause of Action.

1. <u>The NYAG's First Cause of Action fails to state a cognizable legal theory.</u>

a. <u>The NYAG does not allege that the NRA breached any obligations created by EPTL 8-1.4.</u>

The Court should dismiss the First Cause of Action because it is premised on the NRA's alleged breach of EPTL 8-1.4, but the NYAG does not allege that the NRA breached any of its obligations under EPTL 8-1.4.

The four subsections that create obligations are EPTL 8-1.4 (d), (e), (f), and (g). Subsection 8-1.4(d) requires a trustee (as that term is defined in EPTL 8-1.4(a)) to file with the NYAG the instrument providing for his title and duties after any property held by him is required to be applied to charitable purposes. Subsection 8-1.4(e) requires trustees to provide notice to the NYAG whenever, *inter alia*, they petition a court for instructions relating to the administration of property held for charitable purposes and whenever a testamentary instrument provides for a disposition for charitable purposes and is the subject of an application for denial of probate. Subsection 8-1.4(f) requires trustees to file with written annual financial reports stating among other things, "the nature of the assets held for charitable purposes and administration thereof by

[6] *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017).

[7] *Richards v. Security Resources*, 187 A.D.3d 452, 452 (1st Dep't 2020).

the trustee." Subsection 8-1.4(f) also specifies the manner in which "[t]rustees required to report to the attorney general under article 7-A of the executive law" shall comply with their reporting obligations under this paragraph. Finally, EPTL 8-1.4(g) states that "[u]nless the filing of reports is suspended," the first report of any trustee "shall be filed no later than six months after the end of the fiscal year" during which he becomes subject to this section.

Other subsections of EPTL 8-1.4 do not create obligations; rather, they, among other things, define the universe of entities to whom the statute applies (Subsection (a)), create the NYAG's obligation to maintain a trustee registry (Subsection (c)) and to "make rules . . . for the administration of this section" (Subsection (h)), give her authority to conduct investigations (Subsections (i)-(k)) and "institute appropriate proceedings to secure compliance with this section and to secure the proper administration of any trust, corporation or other relationship to which this section applies" (Subsection (m)), and create reporting exemptions (Subsection (b)).

The NYAG, however, does not allege that the NRA violated the parts of EPTL 8-1.4 that create obligations. In fact, the Complaint does not mention Subsections (e) or (g) and refers to (d) and (f) only in passing.[8]

b. <u>The NYAG's reliance on EPTL 8-1.4(m) is misplaced.</u>

Instead of alleging a violation of any obligations that arise under EPTL 8-1.4, the NYAG asserts that the Subsection the NRA "breach[ed]" is Subsection 8-1.4(m). Specifically, in the Cause of Action, the NYAG states:

> Under section 8-1.4(m) of the EPTL, the Attorney General may commence a proceeding "to secure compliance with this section and to

[8] Second Amended Complaint, NYSCEF No. 646 at ¶ 46.

> secure the proper administration of any trust, corporation or other relationship to which this section applies."
>
> The NRA, acting through its fiduciaries, trustees, officers, directors, de facto directors and officers, employees, staff, or agents, including, but not limited to, the Individual Defendants, has failed to properly administer charitable assets for the reasons outlined herein.

But as its plain text indicates, EPTL 8-1.4(m) only authorizes the NYAG to secure compliance with the statute's other provisions—it does not lay out any substantive obligation which the NRA could have conceivably "breached." The NYAG's pleading alone makes that clear. She does not refer to EPTL 8-1.4(m) in her discussion of applicable law related to the corporation's legal obligations,[9] and refers to it only in in the discussion of the "Attorney General's statutory authority."[10]

As a matter of basic statutory construction, the NYAG is not given an unlimited field of potential remedies against any entity the NYAG chooses. Failure to properly administer property can take a variety of different forms, each of which is addressed individually and granularly elsewhere in the statute or in testamentary instruments. EPTL 8-1.4(m) thus does not enunciate a freestanding, capacious offense consisting of the "[im]proper" administration of funds or assets (with "property" defined however the NYAG or the Court chooses); it simply gives standing to the Attorney General to redress the forms of improper administration elsewhere. Importantly, the second, third, and fourth sentences of EPTL 8-1.4(m) (i) describe parts of the statute as providing for "[t]he powers and duties of the Attorney General," (ii) refer to "responsibilities of any . . .

[9] *See id.* at ¶¶ 33-45.

[10] *See id.* at ¶ 31.

corporation," which cannot be modified by the court without the Attorney General's involvement, and (iii) provide for a remedy for failure to perform certain acts "required by this section:"

> The attorney general may institute appropriate proceedings to secure compliance with this section and to secure the proper administration of any trust, corporation or other relationship to which this section applies. **The powers and duties of the attorney general provided in this section are in addition to all other powers and duties he or she may have**. No court shall modify or terminate the powers and **responsibilities of any trust, corporation or other trustee** unless the attorney general is a party to the proceeding, but nothing in this section shall otherwise impair or restrict the jurisdiction of any court with respect to the matters covered by it. **The failure of any trustee to register or to file reports as required by this section** may be ground for judicial removal of any person responsible for such failure.

By asserting that EPTL 8-1.4(m) creates a cause of action, the NYAG is asking the Court to create a cause of action that the legislature did not. Read in the context of 8-1.4(d), (e), (f), and (g) (e.g., "trustee shall file," "the filing shall be made," and "due notice shall be served")—and in light of the balance of EPTL 8-1.4(m), the first sentence of EPTL 8-1.4(m) cannot be construed to give rise to a separate obligation on the part of the NRA—rather only to a separate power for the NYAG.

In fact, where the EPTL does create an obligation, it consistently speaks in terms of what someone may or may not (or shall or shall not) do. For example, EPTL 8-1.9(c)(1) states that "***no trust shall enter*** into any related party transaction unless" certain determination is reached. EPTL 8-1.9(c)(2) states that "the trustees . . . ***shall***," among other things, "***consider*** alternative transactions." EPTL 8-1.3 states that " [a]ny person desiring in his lifetime to promote the public welfare . . . may, by a disposition for such purpose, transfer property to a trustee" and "describe," among other things, "***[t]he powers and duties of the trustee***." EPTL 8-1.9(e) states that "***trustees*** of every trust [of certain size] ***shall adopt, and oversee*** the implementation of . . . a whistleblower

policy," that "[s]uch policy ***shall"*** protect against intimidation, and that "[t]he whistleblower ***policy shall include*** the [enumerated] provisions." EPTL 8-1.4(m) states that EPTL 8-1.4 "require[s]" trustees to register and file reports. *See also, e.g.*, EPTL 8-1.1(h) (notice of application "shall be given" to enumerated individuals); EPTL 8-1.8(a)(1) ("The trust ***shall distribute*** for each taxable year such amounts . . . in such manner as sufficient for such trust to avoid [certain] liability" and "***shall not***" "engage in [proscribed behavior]."

Against this backdrop, there is no basis to construe the first sentence of EPTL 8-1.4(m) as creating an additional obligation. Rather, as noted above, it should be construed as giving the Attorney General standing to pursue remedies for breaches of duties that exist otherwise.

Indeed, the Attorney General's ability to "secure proper administration of" charitable trusts or other dispositions for charitable purposes is the whole point of EPTL Article 8. The legislature determined that charitable trusts are not invalid simply because they do not identify specific beneficiaries. EPTL 8-1.1(a). Rather, the NYAG is empowered by the EPTL to oversee the administration of charitable trusts. EPTL 8-1.1(f).

Finally, even the details of the Cause of Action make clear that, in seeking relief for an alleged "breach" of EPTL 8-1.4(m), the NYAG relies solely on either (1) alleged violations of other statutes (items 2 through 4 below); or (2) alleged misconduct by the individual defendants, which, as the Court already noted, renders the NRA "the *victim* of its executives' schemes" (items

1 and 5 below).[11] Specifically, the NYAG claims that the NRA allegedly violated EPTL 8-1.4(m) because it:

1. "Failed to supervise or take appropriate disciplinary action against the Individual Defendants and others for the actions alleged herein, resulting in waste of the NRA's charitable assets, violation or evasion of the NRA's bylaws, policies, procedures and internal controls";

2. "Made material false statements in its filings with the Attorney General";

3. "Failed to comply with the applicable law governing conflicts of interest, related-party transactions and self-dealing";

4. "Failed to comply with the applicable law governing whistleblower protections"; and

5. "Permitted violations of the NRA's bylaws and internal policies and procedures."

The NYAG attempts to overcome this predicament by claiming that "[t]he NRA's conduct outlined herein has resulted in improper administration and diminution of property held for charitable purposes because, among other things, it [resulted in]" alleged "waste and diversion of charitable assets," "violations of the NRA's bylaws and internal policies and procedures," "retaliation against whistleblowers," and "harm to the public's and NRA members' faith in the proper administration of charitable assets."[12] For the reasons noted above, a construction of EPTL 8-1.4(m) to assert a separate claim against the NRA is too great of a stretch. As a result, the First Cause of Action should be dismissed. *See Connaughton v. Chipotle Mexican Grill, Inc.*,

[11] *See also* NYSCEF No. 611 at 25 ("[c]onflating the Individual Defendants with the NRA writ large for purposes of dissolution is inappropriate here . . . . It also ignores the allegations that the [alleged] wrongdoers in control of the NRA do not necessarily speak for other NRA members, some of whom have tried to instigate reform within the organization but have been met with resistance from entrenched leadership").

[12] Second Amended Complaint, NYSCEF No. 646, First Cause of Action.

29 N.Y.3d 137, 141 (2017) ("Dismissal is warranted 'if the plaintiff fails to assert . . . an enforceable right of recovery.'").

Stated differently, the First Cause of Action fails to state a cause of action because, while the alleged facts may fit within cognizable legal theories, those theories are articulated in other parts of the NYAG's complaint, not in the First Cause of Action.

2. The statute on which the NYAG relies does not authorize the appointment of a monitor or a governance expert.

A separate and independent reason for dismissing the NYAG's First Cause of Action is the relief it seeks. Specifically, EPTL 8-1.4(m) does not authorize the NYAG to seek the appointment of an independent compliance monitor or an independent governance expert. The statute merely states:

> The attorney general may institute appropriate proceedings to secure compliance with this section and to secure the proper administration of any trust, corporation or other relationship to which this section applies. The powers and duties of the attorney general provided in this section are in addition to all other powers and duties he or she may have. . . . .

The Attorney General apparently interprets the phrase "to secure the proper administration of any . . . corporation . . . to which this section applies" as encompassing broad varieties of "equitable relief,"[13] including the appointment of a compliance monitor and a governance expert (presumably at the NRA's expense).

[13] Second Amended Complaint, NYSCEF No. 646 at ¶ 14 ("As a result of these persistent violations of law by the Defendants, the Attorney General seeks a finding by this Court that the NRA has failed to properly administer charitable assets in violation of [EPTL] 8-1.4, and seeks equitable relief to ensure the proper administration of charitable assets going forward.").

However, the allegedly wrongful conduct on which the First Cause of Action is predicated factually is specifically addressed through targeted remedies in the N-PCL, other parts of the EPTL, and Article 7 of the Executive Law. In fact, the Second Amended Verified Complaint (the "Second Amended Complaint") acknowledges as much:

> The Attorney General's regulatory oversight of charitable nonprofit corporations . . . includes the authority to bring actions under Section 112 and Article 7 of the N-PCL, to dissolve a corporation, remove officers and directors, obtain relief as a result of prohibited related party transactions, ensure adequate protections for whistleblowers, to enforce any right given to members, . . . and, under Section 623(a) of the N-PCL, to bring a derivative action "in the right of a domestic or foreign corporation" to procure a judgment in favor of the corporation and against officers, directors, or third parties.

What is more, in the NYAG's other causes of action, she already seeks the remedies created by those distinct statutes. As a result, the enumerated statutory causes of action and remedies preclude the broad interpretation of Subsection (m).[14] For example, in her Thirteenth Cause of Action, the NYAG states that, as relief, the "Court should enjoin, void or rescind the unlawful related party transactions, and award damages and such other appropriate remedies, in law or equity to ensure compliance with the requirements of the law." It cites N-PCL § 112(a)(10) (Second Amended Complaint at Paragraph 583), under which the Attorney General "may maintain an action or a special proceeding . . . [t]o enjoin . . . any related party transaction, seek damages [etc.], in addition to any actions pursuant to section 715 (Related party transactions) of this chapter." Separately, in her Fourteenth cause of action, the NYAG seeks a judgment against

[14] *See* Dobbs, D. B., & Roberts, C. L. (n.d.). Dobbs and Roberts's Law of Remedies, Damages, Equity, Restitution, 3d (Hornbook Series) at page 186 ("[A] statutory cause of action may ***implicitly*** exclude other causes of action or preempt the field. In that case, no other cause of action can furnish a ground for a remedy. . . . a statutory authorization of one remedy may [also] ***implicitly*** exclude all others not named in the statute. This is the most likely to be a fair construction when the statutory remedies are [as here] extensively provided and qualified.").

the NRA ordering the "removal for cause of each officer, director, and trustee who violated the whistleblower policy required by N-PCL § 715-b and EPTL § 8-1.9." In her Fifteenth cause of action, the NYAG accuses the NRA of materially misleading statements in its regulatory filings in alleged violation of the Executive Law. The NYAG then seeks, pursuant to Section 175(2)(d) of the Executive Law, to "enjoin[the NRA] from soliciting . . . funds on behalf of any charitable organization operating in this State."

The N-PCL also provides for other remedies, such as the appointment of a "receiver of the property of a corporation" or the corporation's dissolution, which the NYAG does not seek or the Court dismissed.[15] In fact, the N-PCL devotes an entire article to receiverships (N-PCL Art. 12), which discusses in great specificity the six circumstances under which the court may appoint a receiver, the circumstances for his removal, his duties, the presumptive duration of his service, and several other details. N-PCL §§ 1211-1218. And other articles of the N-PCL contain additional references to receivers. E.g., N-PCL 112(b)(4), 517(b), 1008(a)(11), N PCL 1111, N-PCL 1114 (where "[a]n action . . . for the dissolution [is] discontinued," "the court shall . . . ***direct any receiver to redeliver to the corporation all its remaining property***"). In other words, where the legislature contemplated the appointment of a third party to manage some aspect of the corporation's affairs, it went to great lengths to specify rules to guide the courts.[16]

[15] NYSCEF No. 611 at 2 (dismissing two judicial dissolution and one NYPMIFA claims against the NRA and an unjust enrichment claim against co-defendants).

[16] The statutory canon *expression unius est exclusion alterius* means "expressing one item of an associated group or series excludes another left unmentioned." *N.L.R.B. v. SW Gen., Inc.* 137 S.Ct. 929, 940 (2017). Whatever is omitted is excluded. Thus, if a statute—as here—provides for a specific remedy (such as the appointment of a receiver in the N-PCL), other remedies are excluded, and the NYAG has no legal authority to seek them. *See also Rector, Church Wardens & Vestrymen of St. Bartholomew's Church, Inc.*, 84 A.D. 2d 309, 315-16 (1st Dep't 1982) ("When

In contrast, the appointment of a compliance monitor or a governance expert is not a remedy that the legislature mentioned or circumscribed, in EPTL 8-1.4 or anywhere else in the EPTL, the N-PCL, or the Executive Law.

Notably, in seeking the judicial dissolution of the NRA in the First and Second Causes of Action of its prior Verified Complaint, the NYAG already attempted this approach without success. She attempted to state a claim for judicial dissolution not by alleging that the NRA conducted its business through persistently fraudulent or illegal means but, rather, that it allegedly violated laws on related party transactions, financial reporting, and whistleblower protections.[17] The Court dismissed the dissolution claims because, among other things, "[the NYAG's] allegations [in this action] . . . if proven can be addressed by the targeted, less intrusive relief [the NYAG] seeks through other claims."[18]

Likewise, here, while the NYAG alleges a "breach" of EPTL 8-1.4(m), the Court should refuse to interpret Subsection (m) to authorize the appointment of an independent compliance monitor or a governance expert merely because the statute permits the NYAG to "institute appropriate proceedings to secure proper administration of a . . . corporation . . . to which this section applies."[19] After all, the NYAG's allegations if proven "can be addressed by the targeted, less intrusive relief" she otherwise seeks.

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two statutes are *in pari materia* 'they must be read together and applied harmoniously and consistently.'").

[17] Second Amended Complaint, NYSCEF No. 646 at ¶ 642.

[18] NYSCEF No. 611 at 2.

[19] EPTL 8-1.4(m).

In fact, in *Spitzer v. Grasso*,[20] the Court of Appeals recognized that the N-PCL is a comprehensive statutory scheme for not-for-profit corporations organized under New York law and dismissed as inconsistent with that scheme a less demanding common law unjust enrichment claim. There, the Court stated:

> Despite the numerous causes of action explicitly made available to the Attorney General [in the N-PCL], the four nonstatutory claims that are the subject of this appeal rest on an assertion of parens patriae authority to vindicate the public's interest in an honest marketplace. Here, however, as the dispositive defect stems from the *inconsistency* between the two sets of claims, we need not and do not reach the scope of any such authority. Instead, a side-by-side comparison of the challenged claims and the statutory claims reveals that the Attorney General has crafted four causes of action with a lower burden of proof than that specified by the statute, overriding the fault-based scheme codified by the Legislature and thus reaching beyond the bounds of the Attorney General's authority.[21]

While *Grasso*, unlike here, involved a common law claim the NYAG asserted *in addition to* statutory claims, the separation of powers considerations apply with equal force. *See Grasso* at 70 ("Rather, in this context, the Attorney General's role as a member of the executive branch heightens our concerns. Although the Executive must have flexibility in enforcing statutes, it must do so while maintaining the *integrity of calculated legislative policy judgments*."). In the N-PCL and the EPTL, the legislature explicitly made available to the Attorney General numerous causes of actions and remedies, provided for the appointment of a receiver (N-PCL Art. 12), did not provide for the appointment of a compliance monitor or a governance expert, and, in EPTL 8-1.4(m), simply referred to "appropriate proceedings . . . to secure proper administration of a trust, corporation or other relationship." To construe EPTL 8-1.4(m) as the NYAG proposes would

[20] *People ex rel. Spitzer v. Grasso*, 11 N.Y.3d 64 (2008).

[21] *See id.* at 69 (also referring to the N-PCL as the "codification of the Attorney General's traditional role as an overseer of public corporations").

override, as in *Grasso*, the scheme codified by the legislature and thus reach beyond the bounds of the Attorney General's authority. *See Grasso* at 70-71; see also *Lefkowitz v. Parker*, 30 N.Y.2d 964, 965 (1972) (dismissing proceeding brought by the NYAG pursuant to a statute on the grounds that the statute did not confer standing on the NYAG); *Bank of Columbia v. Att'y Gen.*, 3 Wend. 588, 614 (N.Y. 1829) (the statute did not create the authority the NYAG sought to exercise; the NYAG and the court could not change the statutory scheme).

Indeed, the relief the First Cause of Action seeks is unprecedented. Typically, when the Attorney General seeks injunctive relief under EPTL 8-1.4(m), she seeks an injunction that is prohibitory, not—as here—mandatory. For example, in *Schneiderman v. James*, 971 N.Y.S.2d 73, *1 n.4 (Sup. Ct., New York County 2013), the Attorney General sought a permanent injunction to bar an officer of a not-for-profit organization from serving as an officer or director of any charitable entity organized under New York law.[22] Likewise, in *People v. Lower Esopus River Watch, Inc.*, 975 N.Y.S.2d 369 (Sup. Ct., Ulster County 2013), the NYAG sought an injunction to bar a board member from serving in any capacity for a charitable entity. *See also Koppell v. Long Island Soc. for Prevention of Cruelty to Child*, 621 N.Y.S.2d 762, 765 (Sup. Ct., New York County 1994) (seeking to enjoin a non-profit corporation from carrying on unauthorized activities); Complaint at ¶¶ 98-105, *James v. Goddard*, No. 001167/2022 (Sup. Ct., Onondaga County Feb. 18, 2022) (seeking a permanent injunction to bar an individual from serving as an officer or director).

[22] Whether the NYAG has authority to seek to bar an officer from serving for any organization organized under New York law is also questionable. *See, e.g.*, EPTL 8-1.4(m) (authorizing removal, not a bar).

In fact, although EPTL 8-1.4(m) went into effect in 1967,[23] the OAG apparently sought the appointment of an independent compliance monitor under EPTL 8-1.4(m) in only one other case.[24] It involved sexual abuse of children and a diocesan corporation's alleged failure to monitor priests accused of such sexual abuse.[25] The NYAG sought the appointment of an "independent compliance auditor" "to monitor and audit the . . . Corporation's compliance with the . . . procedures" in "standards established by the U.S. Conference of Catholic Bishops . . . to . . . prevent the sexual abuse of minors by U.S. clergy."[26] Shortly after being filed, the case was stayed.[27]

Nor is there a single case of which the NRA is aware in which a New York court granted pursuant to EPTL 8-1.4(m)—or any law—the appointment of a compliance monitor or a governance expert against the corporation's will.[28]

A search for cases in which the NYAG sought the appointment of an independent compliance monitor in a pleading—regardless of the legal basis for the request—reveals only two

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[23] *See generally*, Turano, Practice Commentary, N.Y. Est. Powers & Trusts Law § 8-1.4 (McKinney).

[24] **Exhibit 1**, Complaint, *The People of the State of New York by Letitia James v. Diocese of Buffalo et al.*, No. 452354/2020 (N.Y. Sup. Ct.) (filed on Dec. 2, 2020). References to exhibits are to documents appended to the Affirmation of Svetlana Eisenberg dated June 6, 2022.

[25] *Compare with* NYSCEF No. 611 (noting there is a lack of public interest at stake).

[26] **Exhibit 1** at pages 214-15, ¶ 1.

[27] *See* No. 12-00189 (RA) (S.D.N.Y.) (Sept. 20, 2021) [ECF No. 32] (Order staying the case pursuant to Title 11 of the United States Code).

[28] Cases where the target of investigation ***agreed*** to the appointment of a compliance monitor in a settlement are for that reason inapposite. *E.g.*, **Exhibit 2**, *Verified Cross-Petition of Intervenor Attorney General of The State of New York, The Comm. To Save Cooper Union, Inc. v. Bd. of Trustees of the Cooper Union for the Advancement of Science and Art*, No. 155185/2014, NYSCEF No. 139 (N.Y Sup. Ct.) (filed on Sept. 2, 2015) (attaching a consent decree, No. 155185/2014 NYSCEF No. 140, evidencing that the corporation agreed to the appointment of a "financial compliance monitor").

other cases. First, in *The City of New York and the People of New York v. FedEx Ground Package Sys., Inc.*, No. 14-8985 (S.D.N.Y.) (filed on May 8, 2015), the NYAG sought to appoint a "Special Master to assure [defendant's] compliance" with specific New York statutes and any injunctive relief ordered by the court after noting—unlike here—that the NYAG had "no adequate remedy at law" in part because the defendant had previously entered into an Assurance of Compliance with the NYAG but later allegedly "show[ed] itself unable or unwilling to comply [with the assurance] voluntarily."[29] That case involved the society's interest in preventing injury from smoking to "the health and safety of a considerable number of persons."[30] In *Schneiderman v. Armor Correctional Health Services*, the Attorney General filed an action against a jail health services company for egregious underperformance of its contractual duties, which included failure to provide "appropriate medical care in provided jails.[31]

3. <u>The statute on which the NYAG relies does not permit exercise of her authority over all of the NRA's assets.</u>

Moreover, the cause of action should be dismissed on the grounds that the NYAG seeks to participate in "administration of [the NRA's] assets" that have not been alleged to be (i) held or

[29] **Exhibit 3**, Amended Complaint at 31, 33, ¶¶ 137-38, *The City of New York and the People of New York v. FedEx Ground Package Sys., Inc.*, No. 14-cv-8985 (S.D.N.Y.) (filed on May 8, 2015).

[30] *Id.*

[31] **Exhibit 4**, The NYAG's press release accompanying the *Armor Correctional Health* petition stated that "[o]f 12 inmates who have died since Armor was contracted by county, five were found to have received inadequate medical care" and described the defendant's violation of its contractual duties as including "not timely responding to inmates' request for medical assistance, and at times failing to respond entirely" and "failing to provide timely and continuous access to prescription medications." Press Release, A.G. Schneiderman Sues Nassau County Prison Health Service Provider, Armor Health, Alleging Inadequate Care Of Inmates (July 12, 2016). https://ag.ny.gov/press-release/2016/ag-schneiderman-sues-nassau-county-prison-health-service-provider-armor-health (last accessed June 6, 2022).

administered for charitable purposes in New York; or (ii) within the "Attorney General['s] enforcement supervisory powers." It is the NYAG's burden to allege a legally cognizable claim. She does not allege, as she must, that any specific asset—let alone one that is "held and administered" within the meaning of EPTL 8-1.4(a)(1) is "held and administered" for "charitable purposes," or that it is "held and administered" in New York. Because she utterly failed to allege this critical element of the First Cause of Action, that cause of action can be dismissed on this basis alone.

In seeking the appointment of a compliance monitor and a governance expert, the NYAG relies on EPTL 8-1.4(m). The provisions of that subsection, according to the NYAG, apply to the NRA because it is a "statutory trustee" within the meaning of EPTL 8-1.1(a)(1) and (a)(2).

EPTL 8-1.1(a)(1), however, states that it applies to the NRA only to the extent that there is property that is held and administered by the NRA for charitable purposes and over which the "NYAG has enforcement or supervisory powers":

> (a) For the purposes of this section, "trustee" means (1) any individual, group of individuals, executor, trustee, corporation or other legal entity ***holding and administering property for charitable purposes***, whether pursuant to any will, trust, other instrument or agreement, court appointment, or otherwise pursuant to law, ***over which the attorney general has enforcement or supervisory powers***, ...

See also Second Amended Complaint Paragraph 636 (apparently conceding that trustee status under EPTL 8-1.1(a)(1) hinges on property being held and administered by the corporation and

also on the NYAG having "enforcement . . . powers" or "supervisory powers" over the property thus held).[32]

Yet, nowhere does the NYAG allege that the NRA holds or administers property for charitable purposes in New York—or that the NYAG otherwise has enforcement or supervisory powers as to—all, most, or any of the property at issue in the First Cause of Action. Conversely, the NYAG's First Cause of Action is not in any way limited and applies broadly to the "NRA" and its "charitable assets" as a whole.[33]

The NYAG apparently understood that to invoke EPTL 8-1.4(m) against the NRA, she must allege that property is held and administered by the NRA for charitable purposes and is within the "NYAG['s] enforcement or supervisory powers." *See* EPTL 8-1.4(a)(1). Thus, she alleged—albeit in conclusory terms—that each individual defendant "held and administered property for ***charitable purposes in the State of New York***" or was responsible for doing so. Second Amended Complaint Paragraphs 664, 668, 672, and 676. Yet, the NYAG does ***not*** allege that the NRA held or administered property for charitable purposes in the State of New York, even though certain of her allegations appear to assume that that allegation is pleaded elsewhere, even though it is not. *See, e.g.*, Second Amended Complaint Paragraphs 46 (alleging that, "[u]nder New York law, certain not-for-profit organizations, including the NRA, ***holding charitable assets and operating***

[32] Although the definition of trustee in EPTL 8-1.4(a)***(2)*** requires only that the corporation be organized under the laws of New York, the NYAG does not claim that EPTL 8-1.4(m)'s "proper administration" prong applies to all of the NRA's assets on that basis.

[33] Notably, the use of the term "charitable assets" in the Second Amended Complaint (it is used over twenty times) appears to be misguided in that neither the N-PCL nor the EPTL nor, with an irrelevant exception, the NYAG's own rules and regulations uses that term. N.Y. Comp. Codes R. & Regs. Tit. 13, Chapter V. Rather, the focus is on the uses and purposes of the assets. Id.

in New York must register and file accurate and complete reports with the Attorney General"); 562 (alleging that "[a]s a New York not-for-profit corporation ***holding charitable assets and operating in New York***, the NRA must register and file accurate and complete annual reports with the Charities Bureau").

Notably, the NYAG does allege that the NRA is "chartered," "registered," "domiciled," has "members," and "engages in fundraising" in New York. Second Amended Complaint Paragraphs 17, 25. The allegation that the NRA held and administered property for charitable purposes in the State of New York, however, is conspicuously missing.

Nor does the NYAG allege that she has authority to seek injunctive relief under EPTL 8-1.4(m) as to any property held and administered by the NRA, wherever such property is thus held or administered or regardless of whether the NRA holds and administers the property for charitable or other purposes. Compare with Second Amended Complaint Paragraph 17 (alleging that the NRA "is subject to New York law in the ***governance of its internal affairs***" (emphasis added)). Nor does the NYAG allege that the applicability of "New York law in the governance of [the NRA's] internal affairs" renders the EPTL applicable to all property held and administered by the NRA, regardless of it location or the purpose of administration.

Indeed, the legislative history of the EPTL, the NYAG's own pleading, and the NYAG's regulatory guidance, demonstrate that the applicability of the "proper administration" prong in EPTL 8-1.4(m) hinges on property being held and administered both for charitable purposes and in New York. For example, when EPTL 8-1.4(a) was amended in 2002, the title of the bill that effected the amendment specifically referred to the "holding and administering of charitable assets in the state of New York":

> TITLE OF BILL: An act to amend the executive law and the estates, powers and trusts law, [1] in relation to solicitation and collection of charitable contributions and the ***holding and administering of charitable assets in the state of New York*** and [2] in relation to disclosure and reports by charitable organizations.[34]

Similarly, in various parts of the Second Amended Complaint, as noted above, the NYAG variously references the State of New York. Second Amended Complaint Paragraph 46 (stating that "[u]nder New York law, certain not-for-profit organizations, including the NRA, ***holding charitable assets and operating in New York*** must register and file accurate and complete reports with the Attorney General (citing EPTL 8-1.4(d) and (f)); id. (also stating that charitable organizations ***soliciting contributions in New York*** must also register and file accurate and complete annual reports"); Second Amended Complaint Paragraph 49 (alleging that "[r]egistration with the Charities Bureau enables the Attorney General to exercise her statutory oversight of not-for-profit entities that . . . ***hold charitable assets*** . . . ***in New York***"); Second Amended Complaint Paragraph 15 (NYAG seeks an injunction against the Individual Defendants for future service as an officer for "***any not-for-profit or charitable organization . . . which . . . holds charitable assets in New York***"); *see also* "The Regulatory Role of the Attorney General's Charities Bureau," https://www.nycourts.gov/reporter/webdocs/role.pdf (last visited June 6, 2022) (stating that the "Attorney General supervises organizations . . . that ***administer*** . . . ***charitable funds . . . in New York State***" and "is responsible for overseeing the administration of ***charitable assets in the State of New York***").

[34] *See also*, **Exhibit 5**, New York State Assembly, Memorandum In Support Of Legislation, Sec 1(E), Bill Number: A871f, New York Bill Jacket, 2002 Assembly Bill 871, 2002, Governor of New York, 225th Legislature, 2002 Regular Session (likewise referring to "***the holding and administering of charitable assets in the state of New York*** and in relation to disclosure and reports by charitable organizations").

To be sure, numerous members and donors of the NRA are in New York, and the NRA's activities benefit various additional residents of New York. Nonetheless, the majority of the NRA's operations are located in the Commonwealth of Virginia, in Washington D.C., and are otherwise spread all over the United States. In addition, the majority of the NRA's members and donors are located outside of New York.

Because the NYAG neglected to plead a key element of the First Cause of Action, the cause of action should be dismissed.

4. The Court should dismiss the First Cause of Action because the injunctive relief it seeks risks infringing on the NRA's and its members' constitutional rights to free speech.

In considering requests for equitable relief, courts can and should consider its effect on First Amendment rights. Dobbs, D. B., & Roberts, C. L. (n.d.). Dobbs and Roberts's Law of Remedies, Damages, Equity, Restitution, 3d (Hornbook Series) at page 101 (injunctions bearing on the "right to speak" are "more intrusive," "more serious in their limitations," and "usually even more circumscribed" than damages for some kind of speech like libel; in fact, "[t]radition has it that libel is not enjoined").[35]

In fact, that is precisely what this Court did in connection with its dismissal of the NYAG's dissolution claims.[36] The Court noted that while First Amendment cases it cited "are distinguishable [because] there is no regulation of speech at issue [in the NYAG's action against

[35] *See Kane v. Walsh*, 295 N.Y. 198, 205 (1946) (exercising discretion to deny equitable relief); *Kleist v. Stern*, 187 A.D.3d 1666, 1668 (4th Dep't 2020) (same); *Mazzochetti v. Cassarino*, 370 N.Y.S.2d 765, 765 (4th Dep't 1975) (same); *Thaw v. Thaw*, 389 N.Y.S.2d 753, 756 (N.Y. Sup. Ct. 1976) (same).

[36] NYSCEF No. 611 at 2.

the NRA," the "overarching principles [set forth in those cases] are nevertheless informative to the exercise of discretion [with regard to the dissolution claims]."[37] Given the NYAG's request that the independent compliance monitor report not just to one but to two governmental entities—the Court and the Attorney General—"particularly careful scrutiny"[38] is required.

IV.
CONCLUSION

For the foregoing reasons, the NRA respectfully requests that the Court dismiss the NYAG's First Cause of Action with prejudice.

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Respectfully submitted,

By: /s/ Svetlana M. Eisenberg

William A. Brewer III
wab@brewerattorneys.com
Svetlana M. Eisenberg
sme@brewerattoneys.com
Blaine E. Adams
bea@brewerattorneys.com

BREWER, ATTORNEYS & COUNSELORS
750 Lexington Avenue, 14th Floor
New York, New York 10022
Telephone: (212) 489-1400
Facsimile: (212) 751-2849

ATTORNEYS FOR DEFENDANT THE NATIONAL RIFLE ASSOCIATION OF AMERICA

[37] NYSCEF No. 611 at 26.

[38] NYSCEF No. 611 at 26 ("[t]he NRA is a prominent advocacy organization that represents the interests of millions of members who have stuck with it despite the well-publicized allegations in this and other cases"; "[t]he State-sponsored dissolution of such an entity is not something to be taken lightly or without a compelling need").

Certification of Compliance with Word Count

I, Svetlana M. Eisenberg, an attorney duly admitted to practice law before the courts of the State of New York, certify that the foregoing Memorandum of Law complies with the word count limit set forth in Rule 17 of the Commercial Division of the Supreme Court (22 NYCRR 202.70(g)), because the memorandum of law contains fewer than 7,000 words, excluding the parts exempted by Rule 17. In preparing this certification, I have relied on the word count of the word-processing system used to prepare this memorandum of law.

By: /s/ Svetlana M. Eisenberg
Svetlana M. Eisenberg
Attorney for Defendant The National Rifle Association of America