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February 10, 2024

VIA NYSCEF

Honorable Joel M. Cohen
Justice of the Supreme Court of the State of New York
Commercial Division, New York County
60 Centre Street
New York, NY 10007

Re: *People of the State of New York, by Letitia James, Attorney General of the State of New York v. The National Rifle Association of America et al*., Index No. 451625/2020

Dear Justice Cohen:

Pursuant to the Court's direction on February 5, 2024, the Plaintiff writes to provide further support for why Plaintiff's claims under the Estates, Powers and Trusts Law ("EPTL") against individual Defendants Wayne LaPierre, Wilson "Woody" Phillips, and John Frazer (collectively, the "Individual Defendants") should be submitted to the jury.

The motion for a directed verdict for the Individual Defendants on the claims against them pursuant to Section 8-1.4 of the EPTL should be denied because: (i) each of the Individual Defendants fits squarely within the definition of a trustee under the EPTL and the relevant case law; (ii) the claims under the EPTL and Not-for-Profit Corporation Law ("N-PCL") are not duplicative; (iii) permitting the jury to decide the claims will not cause any prejudice to the Individual Defendants, even assuming, *arguendo*, that their arguments in favor of a directed verdict have merit, which, as set forth below, they do not; and (iv) Plaintiff will be extremely prejudiced if the motion for a directed verdict is granted, and its claims are later sustained.

I. To Effectuate Its Purpose, EPTL 8-1.4 Defines the Trustees That It Applies to Broadly

EPTL § 8-1.4 gives the Attorney General a "wide range of supervisory powers over the trustees of property held for charitable purposes, including non-profit corporations . . . organized for charitable purposes under the laws of this state." *Lefkowitz v. Lebensfeld* , 68 A.D.2d 488, 497 (1st Dep't 1979) (so stating in a case denying standing to sue a for-profit organization on the

behalf of charitable beneficiaries who were gifted stock in the for-profit organization), *aff'd*, 51 N.Y.2d 442 (1980) (citing EPTL § 8-1.4). "These powers include the right to proceed against the directors or trustees of a charitable organization." *Id.* (citing EPTL § 8-1.4(m); N-PCL § 112(a)(7)). Under EPTL § 8-1.4, "trustees of charities are accountable . . . for the 'proper administration' of the assets entrusted to them." *Schneiderman ex rel. People v. Lower Esopus River Watch, Inc.*, 39 Misc. 3d 1241(A), 2013 WL 3014915, at *26 (Sup. Ct. Ulster Cnty. 2013) ("*LERW*") (quoting EPTL 8-1.4(m)). "**The EPTL defines a trustee broadly.**"[1] *Id.* at *27. As set forth in the statute, the term trustee includes "any **non-profit corporation organized under the laws of this state for charitable purposes**" and "any **individual . . . 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**." EPTL § 8-1.4(a)(1)-(2).[2]

Here, it is beyond reasonable dispute that the National Rifle Association ("NRA") is a charity under the laws of New York and **all** of its assets are considered to be charitable assets under EPTL § 8-1.4 because it is organized under the laws of this state as a charitable not-for-profit corporation. *See* EPTL § 8-1.4(a)(2); *see also* NYSCEF No. 2834 (explaining why the NRA is a charitable corporation for all purposes under New York law, citing N-PCL § 201(c) and other authorities).[3] In addition, each of the Individual Defendants is a trustee because they

[1] Unless otherwise indicated, all emphasis is added.

[2] The language "whether pursuant to any will, trust, other instrument or agreement, court appointment, or otherwise pursuant to law" in the definition does not affect the analysis. That broad language, which is inserted between two commas, is not, as a matter of grammar, essential to the sentence. The key phrase is "holding and administering property for charitable purposes . . . over which the attorney general has enforcement or supervisory powers."

[3] The NRA, at trial, more than 4 years after the Office of the Attorney General's ("OAG") Charities Bureau began its regulatory investigation and enforcement action against the NRA, challenges for the first time its status as a charitable entity, or, alternatively, that only a portion of its assets are charitable assets. As the Court has observed during argument, federal tax law, upon which the NRA relies, is irrelevant. The NRA's belated argument is contrary to governing state law and fact. As set forth more fully in NYSCEF No. 2834, the NRA filed a certificate of type in 1973 declaring that it was a Type B corporation. At the time, N-PCL § 201 defined Type B corporations as follows: "Type B--A not-for-profit corporation of this type may be formed for any one or more of the following non-business purposes: charitable, educational, religious, scientific, literary, cultural or for the prevention of cruelty to children or animals." http://tinyurl.com/yp96aar8. If the NRA wanted to be considered a social organization, the NRA could have designated itself as a Type A corporation, which was defined to include "civic, patriotic, political, **social, fraternal**, athletic" and other types of organizations. *See id*. Not only did the NRA designate itself as a Type B corporation in 1973, the NRA reaffirmed that designation in filings with the Charities Bureau on multiple occasions. NYSCEF No. 121 at 3 (Selecting Type B in the certificate of type filing); NYSCEF No. 122 at 4 ¶ 4 (in 1977, declaring that the NRA "is a Type B corporation under section 201 of said Law; and it **shall hereafter continue to be such a Type B corporation**."); NYSCEF No. 123 at 3 ¶ 3 (stating same in a 1985 Certificate of Amendment). The NRA has also continuously, on an annual basis, filed with the OAG Charities Bureau as a "dual filer" under both the EPTL and the Executive Law.

played a substantial role in the administration of the NRA and were granted substantial authority over the administration and disbursement of its charitable assets.

The case law makes clear that officers and directors of a not-for-profit corporation who manage the organization and administer or control its finances are trustees within the meaning of EPTL § 8-1.4.[4] For example, in *LERW*, the court held that "a *de facto* officer" of a charitable not-for-profit corporation "was a 'trustee' within the meaning of EPTL § 8-1.4(a)" because of his exercise of control over the corporation's financial accounts. 2013 WL 3014915, at *27.[5] Similarly, in the Attorney General's special proceeding concerning the Trump Foundation, Justice Scarpulla found that the Foundation's directors not only "owed fiduciary duties to the Foundation under N-PCL § 717," but "were also trustees of charitable assets pursuant to EPTL § 8-1.4 and thus were responsible for the proper administration of charitable assets." *People by Underwood v. Trump*, 62 Misc. 3d 500, 511 (Sup. Ct. N.Y. Cnty. 2018) (*"Trump I")* (denying motion to dismiss Attorney General's claims against Donald Trump, the founder and president of the Trump Foundation, and his three oldest children, who were all directors); *accord People by James v. Trump*, 66 Misc. 3d 200, 204 (Sup. Ct. N.Y. Cnty. 2019) ("*Trump II"*; *Trump I* and *Trump II* are referred to collectively as *"Trump")* (granting judgment in a special proceeding in favor of the Attorney General against Donald Trump after claims against his children had been resolved by their agreement to the equitable relief—training in the duties of fiduciaries of not-for-profit organizations—sought against them).

Trump and *LERW* are directly on point here. In each case, as is true here, the entity at issue was a charitable not-for-profit corporation organized under the laws of this State. *See Trump*, 62 Misc.3d at 503; *LERW*, 2013 WL 3014915, at *2. In addition, as is the case here, the defendant in *LERW* and individual respondents in *Trump* were directors and officers of the relevant corporations, who had been delegated control in overseeing the charity and administering the charitable assets.[6] None of the individual directors or officers in *Trump* or

[4] The vast majority of regulatory investigations by the Charities Bureau where the OAG has found violations of charities laws resolve in settlements. As a result, there are only a limited number of decisions interpreting those laws, particularly in actions brought by the Attorney General. This is the case with respect to both regulatory actions under the EPTL *and* actions under the N-PCL. Indeed, as set forth in the text, most cases address the liability of fiduciaries of charitable organizations under both the N-PCL and EPTL, and the cases uniformly apply a broad definition of trustee under the EPTL to officers and directors who exercise the type of control over the organization that the Individual Defendants here do.

[5] In its recent decision upholding the Attorney General's claims against the NRA under EPTL § 8-1.4, the Appellate Division, First Department, relied on the Court's analysis of the EPTL in *LERW*. *People by James v. Nat'l Rifle Ass'n of Am.*, 222 A.D.3d 498, 498 (1st Dep't 2023).

[6] In *LERW*, the sole remaining defendant at the time of trial, Frederick Fritschler, had officially resigned as an officer of *LERW* in a failed attempt to hide a conflict of interest, but despite his resignation, he continued to exercise control over the organization and, as a result, was found to be a *de facto* officer of the corporation. *LERW*, 2013 WL 3014915, at *7-*9.

LERW had registered separately with the Charities Bureau.[7] In each case, the court found that the directors and officers of the not-for-profit corporation were trustees under the EPTL because they had control over the organization and its financial accounts, particularly with respect to the distribution of its assets. Thus, in *LERW*, the court relied on fact-findings evidencing the officer's authority with respect to the corporation's assets**,** including that this individual had, for an extended period, "**control[led the organization's] finances, ma[d]e decisions for it, use[d] the [organization's] Credit Card, and sign[ed] its checks.**" *Id.* at *8. Given these responsibilities for administering the corporation and its assets, the court concluded that the individual was a trustee under the EPTL and was "responsible for [the organization's] failure to administer its charitable assets properly" and owed restitution accordingly. *Id.* at *27.

In *Trump*, the former president and his three oldest children were each found to be trustees because of the role they played as directors of the Trump Foundation, a not-for-profit corporation. Mr. Trump's children settled the claims against them by agreeing to equitable relief sought in the petition (taking training on their fiduciary duties in order to avoid a fiduciary bar). *Trump II*, 66 Misc.3d at 202. Mr. Trump also settled the claims for equitable relief against him, agreeing to a number of restrictions on his ability to serve as an officer or director of any charitable organization operating or soliciting donations in New York or to form a new charity in this state, but litigated his responsibility to pay restitution. *Id.* at 202-03. In ordering Mr. Trump to pay $2 million in restitution for breaching his fiduciary duties to the Foundation, the court found that as a director of the Foundation and the person responsible for organizing the fundraiser pursuant to which it received the donations that it misused as well as directing "the timing, amounts, and recipients" of the Foundation's grants, Mr. Trump violated his fiduciary duties under the EPTL (and the N-PCL). *Id.* at 204 & n.3.

Numerous other cases have similarly found that officers and directors of charitable organizations are trustees under the EPTL.[8] For example:

- In *People ex rel. Schneiderman v. James*, the court sustained claims under the EPTL against Aldon James, the President of the National Arts Club, based on allegations that James used the club's assets to pay for personal items, including meals and limousine services, and that he mismanaged one of the organization's projects, resulting in hundreds of thousands of dollars being misused for that project instead of the purpose for which it was intended. *People ex rel. Schneiderman v. James*, 2013 WL 1390877, at *1-*5 (Apr. 3. 2013) ("*James*").

[7] The Trump Foundation had registered with the Charities Bureau and filed annual reports regularly; on the other hand, the corporate entity in *LERW* had failed to register even though it was required to. *LERW*, 2013 WL 3014915, at *13.

[8] Other cases have involved individual officers and directors that were alleged to be trustees under the EPTL where the claims proceeded on the premise that the individuals had fiduciary duties under EPTL § 8-1.4. *See, e.g. Spitzer v. Schussel*, 7 Misc.3d 171, 172, 178 (Sup. Ct. N.Y. Cnty. 2005) (denying motion to dismiss, on statute of limitations grounds, claims for breach of fiduciary duty against the directors of a not-for-profit corporation, arising out of, among other things, one director's use of the organization's assets for his personal benefit and the other directors' failure to oversee him).

- In *Vacco v. Aramony*, Justice Crane granted summary judgment in favor of the Attorney General on an EPTL § 8-1.4 claim against the former president of the United Way Association, as well as the organization's former assistant treasurer and chief financial officer, based on their use of the corporation's funds for personal expenses, such as limousines for one of the defendants and his friends and family, airfare, retail goods, and hotel bills. *Vacco v. Aramony*, N.Y.L.J. Aug. 7, 1998 (Sup. Ct. N.Y. Cnty. 1998), a copy of which is annexed hereto as Exhibit A.

- In *Abrams v. Arcadipane*, the court denied a motion to dismiss an EPTL § 8-1.4 claim against a charitable foundation's director who had served at various points as its "secretary, treasurer and vice-president." *Abrams v. Arcadipane*, N.Y.L.J. August 25, 1994 (Sup. Ct. N.Y. Cnty. 1994) (a copy of this case is filed as NYSCEF No. 2915).

- In *People v. Moore*, the court denied a motion to dismiss an EPTL§ 8-1.4 claim against all of a charitable foundation's "current and former directors." *People v. Moore*, 2012 WL 10057358, at *1 (Sup. Ct. N.Y. Cnty. Sep. 17, 2012), *aff'd*, 103 A.D.3d 592 (1st Dep't 2013).

- Finally, and most recently, in *People v. Austin*, Justice Sherwood denied a motion to dismiss EPTL § 8-1.4 claims against an individual director of a charitable not-for-profit corporation for failing to administer charitable assets properly, where the director, *inter alia*, permitted the corporation's assets to be disbursed improperly for the benefit of an insider. 2021 WL 305767, at *3-*5(Sup. Ct. N.Y. Cnty. Jan. 29, 2021).

In short, the case law amply demonstrates that an individual director or officer of a not-for-profit corporation who exercises control over the organization and the distribution of its assets is considered to be a trustee with responsibility for properly administrating those assets under the EPTL.[9] Indeed, Plaintiff has found no authority to the contrary.

[9] The text of the EPTL § 8-1.4 reflects the Legislature's intent to include officers and directors as trustees. EPTL 8-1.4(b) addresses the OAG registration requirements for trustees, which but for a statutory exemption apply to directors and officers of charitable corporations. The statutory exemption provides that the registration and reporting requirement does not apply to "any person who, in his or her capacity as an ***officer, director*** or trustee of any corporation or organization mentioned in this paragraph, holds property for the religious, educational or charitable purposes of such corporation or organization so long as such corporation or organization is registered with the attorney general pursuant to [EPTL 8-1.4]." EPTL 8-1.4(b)(9). EPTL 8-1.4(b) further states that the exemption "shall apply only to the registration and reporting requirements of this section and shall not limit, impair, change or alter any other provision of this article, the not-for-profit corporation law or any other provision of law." EPTL 8-1.4(b).

II. Based on the Trial Record to Date, a Reasonable Fact Finder Could Determine That the Individual Defendants Were Trustees Within the Meaning of the EPTL

Here, as NRA employees and officers, acting under the authority of the NRA's charter and New York law governing not-for-profit corporations, each Individual Defendant had authority to and in fact made decisions concerning the NRA's operations and the use of its charitable assets.[10] In particular, the Individual Defendants exercised control over the NRA's assets and the administration of its affairs, such as by signing contracts with third parties that permitted millions of dollars of the NRA's charitable assets to be disbursed, as well as supervising the performance of the parties with whom the NRA worked pursuant to those contracts. In fact, in denying the motion to dismiss the First Amended Complaint in this action, this Court found that these allegations were sufficient to state a claim that LaPierre and Frazer were trustees under the EPTL. *See* 74 Misc.3d 998, 1025-26 (Sup. Ct. N.Y. Cnty. 2022); NYSCEF No. 333 ¶¶ 685-92. Plaintiff has introduced substantial evidence during trial to support these allegations, as well as to support its allegations that Phillips was a trustee. Below we highlight just some, but certainly not all of that evidence:

With Respect to LaPierre

- Mr. LaPierre was the Executive Vice President of the NRA for more than 30 years.
- LaPierre exercised control of the entirety of the NRA's operations and assets by unilaterally authorizing the NRA to file for bankruptcy. (Tr. at 2251:8-2257:18; 1698:20-1699:7.)
- LaPierre unilaterally used the NRA's assets for his personal benefit by, among other things, taking charter flights and charging those flights to the NRA (*see e.g.*, Tr. at 2172:2-20), using NRA assets to buy personal gifts for friends (*see, e.g.*, Tr. at 2227:25-2229:2), and using NRA assets to pay for mosquito treatments at his home (*see, e.g.*, Tr. at 2232:1-15).
- LaPierre unilaterally authorized millions of dollars in expenditures for private charter flights for himself, his family, and others without Board approval (Tr. at 2397:16-2398:17; PX-5116; PX-5117; PX-5118; PX-5119).
- LaPierre has "significant authority and discretion in contracting with vendors." (Tr. at 2161:6-8.)
- LaPierre signed several of the contracts and amendments with the MMP Entities, which were paid approximately $135 million between 2012 and 2021. (Tr. at 2185:23-2186:3; PX-5122.)
- LaPierre signed an extension with MMP with the intent to continue the NRA-MMP relationship even after his retirement. (Tr. at 2191:9-7.)
- LaPierre approved increases in the scope of work performed by the MMP Entities, with corresponding fee increases. (Tr. at 2192:24-2193:7.)

[10] As officers of the NRA, LaPierre, Phillips and Frazer each were exercising control over the NRA's assets pursuant to N-PCL § 713 as well as the powers delegated to them under the NRA's bylaws and their elected and appointed positions.

- LaPierre was the sole individual at the NRA requesting services from Associated Television. (Tr. at 2194:5-13.) The NRA has paid Associated Television more than $30 million since 2008. (PX-00821.).
- LaPierre had control over his EVP budget, through which he authorized payments over a period of several years to several NRA board members and other persons—including Marion Hammer, Sandra Froman, David Keene, Kayne Robinson, Mercedes Schlapp, and Mary Mallus. (Tr. at 2233:2-24, 2238:20-2240:21.)
- LaPierre solely authorized and executed contracts with Marion Hammer in 2017 and 2018. (Tr. at 2235:22-2238:19.)
- LaPierre directed the NRA to enter into a severance agreement with Kyle Weaver valued at $1.83 million. (Tr. at 2241:10-2243:20; PX-595.)
- LaPierre executed the NRA's 1999 contract with Ackerman McQueen, which was in effect until 2017. (Tr. at 2260:18-24; PX-506; PX-3145.)
- Under the NRA's agreements with Ackerman McQueen, only LaPierre or his designee had authority to cause Ackerman McQueen to take action. (Tr. at 2261:6-2262:16.) Ackerman McQueen was the NRA's largest vendor from 1992 to 2018 (Tr. At 2259:24-2260:4.)
- LaPierre executed the NRA's contracts with Under Wild Skies. (Tr. at 2276:8-2282:9.) From 2015 to 2019, the NRA paid Under Wild Skies more than $12 million. (PX-5124.)
- LaPierre authorized millions of dollars in payments for Youth for Tomorrow events. (Tr. at 2360:24-2364:11.)
- LaPierre authorized Paul Payne, an organizer from California to be paid out of the EVP budget, to provide electioneering services. (Tr. at 2383:16-2384:12.)u

With respect to Phillips

- Phillips was the Chief Financial Officer and Treasurer of the NRA for 25 years.
- Phillips, as NRA Treasurer and CFO, had "oversight over financial matters involving the whole NRA." (Tr.at 708:14-16.)
- Phillips approved payments of out-of-pocket expense invoices. (Tr. at 776:23-25.)
- Phillips had "charge of the NRA's books of account and financial operations." (Tr. at 806:3-8.)
- Phillips negotiated and executed some MMP agreements along with LaPierre (Tr. at 828:18-23.)
- Phillips paid MMP invoices. (Tr. at 830:25-831:12.)
- Phillips authorized Ms. Stanford to bill the NRA through three different payment arrangements (through NRA, NRA-ILA, and Ackerman McQueen) using different company names and with no written contract, which amounted to more than $17 million in expenditures between 2012 and 2019. (Tr. at 873:9-876:24; Court Ex. 7 at 51:21-52:02, 66:11-17; PX-5119.)
- Phillips approved payments to Froman. (Tr. at 852:7-8.)
- Phillips signed the WBB operating agreement on behalf of the NRA and wrote a related $70,000 check on behalf of the NRA. (Tr. at 879:8-884:6).

With respect to Frazer

- Frazer is the Secretary and General Counsel of the NRA.
- Frazer is responsible for administration of NRA corporate financial transactions from a legal perspective, including the review and authorization of contracts in excess of $100,000. (Tr. at 2514:4-2515:15.)
- Frazer personally approved invoices and contracts that violated NRA policy and New York law. For example, Frazer approved invoices for unspecified "out of pocket" expenses incurred by Ackerman McQueen and passed through to the NRA. (Tr. at 618:20-22; PX-5099 at 2.) Frazer also approved the renegotiated contract with Allegiance Creative Group that designated LaPierre as the "Responsible Officer" for the contract in spite of LaPierre's conflict of interest. (PX-2426 at 1.)
- Frazer is responsible for the NRA's spending with respect to corporate legal matters and has to manage a budget for the Office of General Counsel, including oversight of expenditures of outside counsel. (Tr. at 2537:24-2538:3.) Between 2018 and 2022, Frazer directly oversaw approximately $156.4 million dollars in spending by the NRA. (*See* Statement of Functional Expenses in PX-2512; PX-597; PX-2347; PX-225; and PX-226.)
- Frazer has oversight over financial transactions between the NRA and related parties to ensure that, among other things, the transactions are for fair value, reasonable and in the best interests of the NRA. (Tr. at 2551:12-17.)
- Frazer failed to intervene or exercise reasonable care when he watched as the Audit Committee ratified a contract between Ackerman McQueen and Lt. Col. Oliver North worth millions of dollars, where the Audit Committee had not even set eyes on the contract. (Tr. at 2575:3- 2576:10.)

III. The EPTL and N-PCL Are Complimentary —Not Duplicative—Enforcement Tools

The EPTL and N-PCL are complimentary but nonetheless distinct statutes. The N-PCL is based, in large part, on the Business Corporation Law, which applies to for-profit organizations. The N-PCL is focused on the operation of **the corporation itself** and covers both charitable and non-charitable not-for-profit organizations.[11] The EPTL functions differently. Unlike the N-PCL,

[11] Under both the EPTL and the N-PCL, this Court is "vested with inherent plenary power (N.Y. Const. art. VI, § 7) to fashion any remedy necessary for the proper administration of justice." *64 B Venture v. American Realty Co*., 194 A.D.2d 504, 504 (1st Dep't 1993) (affirming lower court's exercise of its equitable powers to appoint a receiver to run a nursing home); *Copeland v. Salomon*, 56 N.Y.2d 222, 227-28 (1982) (power to appoint a receiver flows from court's inherent powers, not only statute); *cf. In re Carter*, 2017 WL 5075786, *6 (Sup. Ct. Bx. Cnty. Nov. 2, 2017) (even though the remedy is not authorized by the Business Corporation Law, court would appoint an accountant of the court's choosing to conduct a comprehensive accounting because the remedy was necessary for the administration of justice); *see also* NYSCEF No. 768 at 20-21 (pgs. 14-15 of the memorandum).

the EPTL's focus is not the corporation itself; it is on **the ultimate charitable beneficiaries** and the **public's interest in ensuring that charitable assets are properly administered**. *See* EPTL § 8-1.4(n) (Section 8-1.4 "shall be liberally construed so as to effectuate its general purpose of protecting the public interest in charitable uses, purposes and dispositions").[12] Critically, because the EPTL is concerned with the **public interest** in the proper administration of charitable assets, it provides a cause of action exclusively to the representative of that interest: the Attorney General. *See* EPTL § 8-1.4; *see also People by James v. Nat'l Rifle Ass'n of Am.*, 222 A.D.3d 498, 498 (1st Dep't 2023) ("EPTL 8-1.4 . . . enhances [the] New York Attorney General's enforcement powers and authorizes it to institute proceedings against trustees who fail to properly administer charitable assets."); *James*, 2013 WL 1390877, at *5 (EPTL grants the "Attorney General exclusive rights thereunder").

Although the EPTL § 8-14 claims against the Individual Defendants have significant overlap with the breach of fiduciary duty claims under the N-PCL, because the purpose of the EPTL is to protect the public's interest in safeguarding charitable assets, these claims do not have a scienter requirement and are not subject to the business judgment rule or a good faith reliance defense. *See* NYSCEF No. 2655 at 20-22, 26; *compare, e.g.*, N-PCL § 717(b) (permitting a good faith reliance defense) *with* EPTL § 8-1.4(m) (permitting the Attorney General to bring appropriate proceedings to ensure the proper administration of charitable organizations and their assets). This is because the EPTL is not punitive; its purpose is to protect charitable assets. Thus, for example, if a well-intentioned trustee is permitting the misuse of charitable assets because they are not capable of protecting them, the EPTL empowers the Court to take steps to ensure that the assets are protected, such as by removing the trustee or appointing a monitor to oversee that trustee's administration of charitable assets. *See generally LERW*, 2013 WL 3014915, at *27 (injunctive relief is appropriate where defendant "demonstrated that **he does not understand**, and is likely not to follow, the obligations required of a director or officer of a not-for-profit corporation, **and cannot be trusted** with those obligations in any future role"). The Court will have the power to consider any good faith in determining the equitable remedy it crafts under the EPTL as part of the remedial phase of this action.

Moreover, not all the Individual Defendants have agreed that the relief available under the N-PCL is the same as the relief available under the EPTL (*compare* NYSCEF No. 2925 at 3-4 *with* NYSCEF No. 2928 at 2-3 and NYSCEF No. 3020 at 1-2) and, for that additional reason, the Court should not dismiss the EPTL claims at this juncture.

[12] The OAG has long held this view, putting registered charitable organizations and their fiduciaries on notice. Reflecting both the statutory language of the EPTL and the case law interpreting it, OAG Guidance has described the application of EPTL § 8-1.4 as follows: "Thus, the Attorney General can initiate court action seeking the removal of trustees, broadly defined, who authorize, or acquiesce in, inappropriate payments or other benefits to fellow trustees." New York State Office of the Attorney General, *The Regulatory Role of the Attorney General's Charities Bureau* at 3 (citing EPTL § 8-1.4(m), (n)), available at https://www.nycourts.gov/reporter/webdocs/role.pdf.

IV. This Court Should Allow the Jury to Render a Verdict on Whether the Individual Defendants Are "Trustees" Within the Meaning of EPTL § 8-1.4

Under the directed verdict statute, "[a]ny party may move for judgment with respect to a cause of action or issue upon the ground that the moving party is entitled to judgment as a matter of law, after the close of the evidence presented by an opposing party with respect to such cause of action or issue, or at any time on the basis of admissions." CPLR 4401. "A trial court's grant of a CPLR 4401 motion for judgment as a matter of law is appropriate where the trial court finds that, upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party." *Szczerbiak v. Pilat*, 90 N.Y.2d 553, 556 (1997). "In considering the motion for judgment as a matter of law, the trial court must afford the party opposing the motion every inference which may properly be drawn from the facts presented, and the facts must be considered in a light most favorable to the nonmovant." *Id.*

Appellate courts have strongly cautioned against granting directed verdicts under CPLR 4401 in favor of a defendant. As the First Department has observed, "if the jury is prevented from passing on the issues, an appellate court that disagrees with a verdict directed by the Trial Justice has no jury verdict to reinstate, wasting the time spent on trial." *Austin v. Consilvio*, 295 A.D.2d 244, 246 (1st Dep't 2002). For that reason, "the better practice is to submit the case to the jury which, in some instances, may obviate defendant's CPLR 4401 motion by returning a defendant's verdict.'" *Id.* (quoting *Rosario by Vasquez v. City of New York*, 157 A.D.2d 467 (1st Dep't 1990)); *accord Vera v. Knolls Ambulance Serv. Inc.*, 160 A.D.2d 494, 496 (1st Dep't 1990) ("[W]here . . . judgment is improvidently granted at the close of plaintiff's case, there is no jury verdict which may be reinstated by the appellate court, leaving no alternative but to order a new trial which, . . . will largely duplicate the prior proceeding. . . . [I]t is far better practice to withhold any ruling on an application to dismiss until after the jury has returned a verdict.").

This deference to jury decision making is particularly appropriate here. The EPTL and its predecessor statutes (the Personal Property Law and the Real Property Law) predate the N-PCL, and are based upon case law, the experience of other jurisdictions, and the analysis and recommendations of bar groups and uniform law commissions. If determining the scope and limits of the term "trustee" is a legal question, it is an important question deserving more thorough briefing, argument, and analysis than brief letters from the parties submitted over a few days in the heat of trial. This is particularly true given the thoughtful decisions from other Supreme Court justices, cited above, upholding the broad remedial interpretation of "trustee."

A decision by directed verdict would be particularly counterproductive in the last days of this six-week trial. Not only should a reasonable fact-finder be able to determine that LaPierre, Frazer, and Phillips are all trustees within the meaning of EPTL § 8-1.4, but (1) the last few days of trial would proceed in virtually the same manner regardless of whether the EPTL claims against the Individual Defendants were dismissed; and (2) a directed verdict that was subsequently overturned on appeal would have the practical effect of forcing the Court and the parties to replicate substantial portions of this six-week trial, repeating the hard work of picking a jury and putting on evidence. Not only would such an outcome extremely prejudice Plaintiff, but it would also burden the court system, and, if the matter was retried before a jury, the general

public. In contrast, if the matter is submitted to the jury and the Individual Defendants are found to be trustees who violated their duties under Section 8-1.4, but that verdict is later overturned, no new trial will be necessary.

* * *

As a result of the foregoing, Plaintiff respectfully submits that this Court should allow the jury to render a verdict on whether the Individual Defendants are "trustees" within the meaning of EPTL § 8-1.4.

We thank the Court for its attention to this matter.

Respectfully submitted,

/s ***Steven Shiffman***

Assistant Attorney General

cc: All Counsel of Record