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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BISHOP MACRAM MAX GASSIS, for himself and derivatively on behalf of BISHOP GASSIS SUDAN RELIEF FUND, INC., a Delaware charitable nonstock corporation,	:	No. 451, 2014
Plaintiffs below, Appellants,	:	Court Below: Court of Chancery
v.	:	C.A. 8868-VCG
NEIL CORKERY, ANN CORKERY, JOHN KLINK, FR. ROGER HUNTER-HALL, STEVEN WAGNER, KATHLEEN HUNT, DAVID COFFEY	:	
Defendants below, Appellees,	:	
and	:	
BISHOP GASSIS SUDAN RELIEF FUND, INC., a Delaware charitable nonstock corporation,	:	
Nominal Defendant below, Nominal Appellee.	:	

OPENING BRIEF OF APPELLANTS

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Dated: October 1, 2014

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NATURE OF THE PROCEEDINGS

Appellant Bishop Macram Max Gassis ("Bishop Gassis"), for himself and derivatively on behalf of the Bishop Gassis Sudan Relief Fund, Inc. (the "Fund") (collectively "Plaintiffs"), appeal from the July 21, 2014 Order ("Ex. A"), the July 21, 2014 Opinion granting Defendants' Motion to Dismiss on all Counts ("Ex. B"), and the May 28, 2014 Opinion on Plaintiff's claim under *8 Del. C* § 225 ("Ex. C"), entered by the Court of Chancery of the State of Delaware ("Trial Court") in Civil Action No. 8868-VCG.

On September 6, 2013, Plaintiff commenced this action in the Trial Court against Neil Corkery, Ann Corkery, John Klink, Father Roger Hunter-Hall, Steven Wagner, Kathleen Hunt, and David Coffey ("the Individual Defendants" or "director-Defendants") and the Fund as nominal Defendant (together with the Individual Defendants, "Defendants"). The action challenged both Plaintiff's removal as director and other Board elections under *8 Del. C.* § 225 ("§ 225"), and pursued claims for breach of fiduciary duty and for misappropriation of name and likeness, trademark infringement, and deceptive trade practices regarding Plaintiff's name and likeness (collectively the "Likeness Claims").

Plaintiff also moved for preliminary injunctive relief to prevent Defendants' unlicensed use of his name and likeness. The Court required Defendants to remove all references to Plaintiff from the Fund's website on October 4, 2013

(A341–360). On March 16, 2014, Defendants moved to dismiss the Complaint. On April 6, 2014, Plaintiff filed an Amended Complaint ("the Amended Complaint"). Defendants filed a Motion to Dismiss the Amended Complaint on April 21, 2014.

After discovery on the § 225 claims, an evidentiary hearing, and argument on the Motion to Dismiss, the Trial Court issued two opinions. First, on May 28, 2014, the Court denied all of Plaintiff's requested relief under § 225, finding Bishop Gassis was validly removed as a director of the Fund and, consequently he lacked to standing to challenge any other election to or removal from the board. (Ex. C, pp. 4, 46). Therefore, he did not rule on Plaintiff's remaining seven challenges to other Board actions. (Ex. C, pp. 29, 46). Second, on July 21, 2014, the Court granted Defendants' Motion to Dismiss on all counts, dismissing, *inter alia*, Plaintiff's claims alleging breach of fiduciary duties and the Likeness Claims. (Ex. B, p. 4–5, 7–19). On August 19, 2014, Plaintiff filed this appeal regarding both of these opinions. (A532–534). On August 20, 2014, defense counsel filed with the Trial Court a motion to withdraw as counsel pursuant to Ch.Ct.R. 5(aa) and Delaware Rule of Professional Conduct 1.16(a)(1). The Trial Court granted the motion on August 21, 2014 before Plaintiff had an opportunity to address the motion. The Trial Court then vacated its order as a nullity on September 11, 2014 pursuant to Plaintiff's Motion for Reargument.

SUMMARY OF THE ARGUMENT

1. The Trial Court wrongfully dismissed Plaintiff's Likeness Claims on the grounds that Plaintiff failed to name the Fund as a Defendant in those counts and failed to sufficiently allege infringing actions by the director-Defendants individually, even though: (i) the Trial Court admitted that Plaintiff sufficiently alleged Likeness Claims against the Fund in the substance of the Complaint, meaning that such claims would have survived but for the lack of the Fund's inclusion as a party in those counts' headers and (ii) Plaintiff properly pleaded actionable claims against the director-Defendants in alleging that they acted for personal, self-interested purposes. The Trial Court also misapplied Trial Court Rule 15(aaa) in denying Plaintiff the ability to amend the Complaint to correct the header, as Defendants were not prejudiced.

2. The Trial Court wrongfully held that Plaintiff was validly removed as a member and director of the Fund. Plaintiff's removal violated § 3.06 of the Fund's Bylaws, as he was an appointed rather than elected Board member. Plaintiff's removal was also voidable due to Defendants' breaches of fiduciary duties owed to him and to the Fund's beneficiaries. The Trial Court further erred in holding that Plaintiff was not owed fiduciary duties as a member of a non-stock corporation. Reversal on these grounds leads to reinstatement of all derivative claims and remand of the Action to the Trial Court for further proceedings.

STATEMENT OF THE RELEVANT FACTS

A. The Bishop Gassis Sudan Relief Fund and Its Beneficiaries

Bishop Macram Max Gassis was Bishop of the Catholic Church's El Obeid Diocese from 1988 until 2013. (Ex. C, p. 5). El Obeid is located in southern Sudan and is possibly the largest Diocese in the world. (A123). It includes the entire region of Darfur and borders other troubled areas including the Nuba Mountains and Twic County in the Diocese of Wau. (A123). Bishop Gassis, both through the church and through his efforts on behalf of the Bishop Gassis Sudan Relief Fund, has created a substantial and impressive infrastructure in El Obeid and Wau—including new schools and hospitals—despite the inhabitants' dangerous and violent existence in this war-torn region situated between northern Sudan and the new nation of South Sudan. (A124–125; A140–141). Bishop Gassis himself was exiled from much of his El Obeid diocese and his family, after speaking out against the Islamist regime centered in Khartoum and aiding the Nuba/Twic people. (A125; A140–141).

William Saunders established the Fund in 1999 on behalf of Bishop Gassis to create a legal structure for the Bishop's charitable efforts. (Ex. C, p. 8 n. 20; A56; A88). Bishop Gassis focused the Fund's donations on projects benefiting the Nuba and Twic County peoples both as the Fund's Certificate of Incorporation noted, and through the Fund's historical practice. (A123–150; Ex. C, p. 5–10).

Board members had long agreed, until 2 to 3 years before this litigation, that the "aim [of the] board should be to seek to ensure both the immediate growth of the church in Nuba and Twic, and its long-term continuity as well." (A150). As of 2010, the Board comprised Defendants Ann Corkery, Wagner, Coffey, and Klink, along with non-parties David Forte and Nina Shea. Bishop Gassis served as the seventh director and, since 2002, the Fund's Chairman—as § 3.04 of the Bylaws specifically provided that he would be the Fund's chief public face and policymaker. (A105; A177–178).

B. Bishop Gassis's Centrality to the Fund

Bishop Gassis was no ordinary Board member. Since the Fund's beginning, its identity has been intertwined with Bishop Gassis's name and persona. Beyond entrusting the Fund with his name and likeness, Bishop Gassis was at the center of the Fund's fundraising efforts, (A257–272), and was the primary means of providing services to the Nuba and Twic beneficiaries. (A123–125; A140–143). Defendants used Bishop Gassis's name, reputation, and his personal vision for the Nuba and Twic peoples to raise donations through published books and short video campaigns. (A205–206; A241–252). In fact, the Board promoted Bishop Gassis's nomination for a Nobel Peace Prize in 2011–12. (A196; A241–252). Indeed, Bishop Gassis was "the face of the charity." The Fund was named after him, and its 2002 amendment to Bylaw § 3.04 made him the Fund's permanent Chairman,

public persona, and policy-maker. (Ex. C, p. 3; A105). Defendants admit that since its inception, the Fund's policy was to finance projects personally requested by Bishop Gassis. Historically, it gave over 90% of all funding to projects Bishop Gassis requested, and over 90% of all fundraising efforts were through Bishop Gassis personally. (A361; A367; A370).

C. The Fund's Governing Documents

The Fund's Certificate of Incorporation provides:

> The Corporation is organized exclusively for…(1) providing the people of Sudan's Nuba Mountain region with food, clothing, medical supplies, farming equipment, books, and other educational materials; (2) developing, establishing, and supporting educational facilities in the Nuba Mountains to teach residents husbandry techniques as well as basic reading, writing, and mathematics skills; and performing any other activities necessary or convenient to carry out such purposes, to the extent permitted by Section 501(c)(3) of the Internal Revenue Code of 1986…

Certificate of Incorporation, THIRD (A55).

The Fund's Bylaws, some of which were amended in 2002, contain the following provisions which control its governance:

> The members of the Corporation…shall be the members of the Board of Directors and each Member shall remain a Member so long as, and only so long as, such person continues to serve as a Director. A person shall cease to be a Member at such time as such person ceases to be a Director.

Section 2.01 (1999) (A86, A103).

> The Corporation shall be governed by a Board of Directors…[which] shall be self-perpetuating with elections to

be held at the Annual Meeting.

Section 3.03 (2002) (A105).

> The Chairman of the Board shall be His Excellency, Bishop Macram Max Gassis, Bishop of El Obeid Diocese, Sudan. He shall serve in this position until his retirement or resignation. The Chairman of the Board shall serve as the chief public representative of the organization, and shall determine policy in cooperation with the Board of Directors, its Officers, and Executive Director.

Section 3.04 (2002) (A105).

> Any Director elected to the Board of Directors may be removed at any time, with or without cause, by the affirmative vote of two-thirds (2/3) of the members of the Board of Directors then in office.

Section 3.06 (1999) (A89, A106).

> The Board shall elect its Officers, consisting of a President, a First Vice-President, a Second Vice-President, a Secretary and a Treasurer. All officers shall be members of the Board of Directors and elected by a majority of the Board.

Section 5.01 (2002) (A111–112).

D. The May 14, 2011 Election and Defendants' First Steps in their Conspiracy Against Bishop Gassis

After years of success supporting Bishop Gassis's projects for the Nuba and Twic peoples, Defendants Neil Corkery, Ann Corkery, Wagner, Klink, and Coffey began a conspiracy to wrest control of the Fund from the Bishop by making decisions about Fund governance without Bishop Gassis's knowledge or full Board consideration. Defendants claim that at a March 2010 Board meeting, Shea

remarked that when Bishop Gassis resigned as El Obeid's Bishop in September 2013, the Fund would dissolve and Bishop Gassis would receive its assets. (A362; A365–366). Responding to this single alleged comment, Defendants privately met without telling Bishop Gassis, Shea, or Forte, and hatched a legal theory and strategic course to remove the Bishop and supporters Shea and Forte to supposedly prevent this legally impossible outcome. (A363–364). Seeking corporate counsel's advice, Defendants interpreted Bylaw § 3.04 to mean that Bishop Gassis would have to leave the Fund entirely on his 75th birthday, September 21, 2013, the date when the Catholic Church would require him to step down as an active Bishop. (A363–364; A368–369). Incredibly, the director-Defendants never disclosed their meeting with counsel or this understanding to Bishop Gassis throughout three years of governance, decisions, board meetings, and transition planning. (A371–375; A525–528). Undoubtedly, Defendants concealed this from Bishop Gassis for three years so they could continue to use his name and likeness to raise money, ultimately raising $12 million over that time and holding $6.5 million in cash when they removed Plaintiff. (A339–340).

On advice of counsel, Neil Corkery scheduled an annual election of members of the Board for May 14, 2011, a practice required by the Bylaws but not recently followed. (A175–178). The Fund's attorneys designed the ballot to list each director's name next to two boxes—"Re-elect" and "Not re-elect" (A178–

184), but acknowledged that "per the by-laws Bishop Gassis is the permanent Chairman so does not need to be included." (A177; A363). At the meeting, Neil Corkery held the vote and announced that Shea was not reelected. (A187–188). This surprised Plaintiff; they had not substantively discussed candidate re-election, and Neil Corkery and the other director-Defendants refused to provide reasons why they voted not to re-elect Shea. (A187–188).

Three days later, Neil Corkery pushed forward with the new director nominations of Hunt, Hunter-Hall, and Kevin Phillips, a Bishop Gassis nominee. (A190). He also added the creation of a 401K retirement plan for himself to the agenda. (A190). Ignoring Forte's objections regarding the improprieties in the May 14 voting and the lack of transparency in the salary and expenses given to Neil Corkery as Executive Director, (A192–193), Neil Corkery collected votes by email and then chose when to announce the results. The Board voted for Corkery friends Hunt and Hunter-Hall and rejected Phillips. (A189).

E. Defendants' Conspiracy Against Bishop Gassis Grows

The next year, in July 2012, Neil Corkery noticed the annual meeting and reelection of directors. (A210). However, once again, Neil Corkery collected informal email ballots over the following month to manipulate the voting process by holding the vote open until a majority could be secured to defeat Forte's re-election. (A221–234). Mr. Corkery warned Klink by private email that Forte "is a

dangerous ally of the bishop to have on the board," (A221), and that "we will be exposed having him on the board" as "he is a Gassis stooge." (A226–227). The Individual Defendants also secretly discussed alternative measures to gain control and squeeze Bishop Gassis out of the Fund. (A225; A232). The ballots received after the meeting did result, however, in Forte's removal. (A211–216). Again, the ballot listed Bishop Gassis as "Chairman" without an option to vote otherwise on his Board membership. (A211–216). Ann Corkery's later-completed meeting minutes incorrectly stated that the Board received ballots within two weeks of the meeting, as multiple votes came in a month later. (A218; A229; A235).

By late 2012, Neil Corkery moved forward to "begin phasing out the bishop." (A219). Defendants corresponded secretly regarding removing Bishop Gassis and changing the Fund's direction. (A220). They pursued a survey to test the effect on donations from the use of Bishop Gassis's name and likeness in the Fund's name and fundraising letters. (A253–257). That study's results, presented to Defendants but not Bishop Gassis in June 2013, showed that "[i]f you change the name of the organization or lose the ability to use mail signed by [Bishop Gassis] you can expect to see some drop-off in gross revenue raised." (A286).

F. Defendants' Covert Efforts to Divert Funds from the Beneficiaries

Meanwhile, Defendants communicated with members of the Vatican—efforts also kept secret from Bishop Gassis—regarding broadening the Fund's

deployment of donation to areas in East Africa outside of the Nuba Mountains and Twic County. (A207–209). In September 2012, Defendants wrote a letter to a high Vatican official—without informing Bishop Gassis—pledging money to a Diocese in the nation of South Sudan, to make clear to high-ranking members of the Catholic hierarchy that the Fund, and Defendants in particular, were committed "beyond the term of office of His Excellency Bishop Gassis, and beyond his person" and "beyond the geographical boundaries of the diocese of El Obeid to embrace all of South Sudan." (A238). The letter also alluded to problems the Board had with Bishop Gassis and requested a new point person to distribute donations, a role that Bishop Gassis had always filled. (A238–240). These efforts increased in 2013 when Klink traveled to Vatican City for meetings with high-level officials, including the Apostolic Nuncio to Sudan. (A282–285). Defendants pursued these actions to curry favor with high-ranking members of the Catholic Church and to expand the influence of the director-Defendants themselves. They visited dioceses in South Sudan, well away from the Nuba/Twic region, to solicit funding requests. (A273–281).

Also in 2012 and 2013, Mr. Corkery remained in close communication with Manuel Lazerov, head of the competing Southern Sudan Fund ("SSF"), regarding internal board politics and future plans. (A237). Forte had already raised concerns about Defendants' ties to SSF and the Fund's donations thereto, given conflicts of

interest—Klink and Mr. Corkery were former directors, (A201)—and the different beneficiaries in Sudan that it served. (A230–231; A415–416; A467; A481; A522). Removing Forte from the Fund eliminated scrutiny of the conflict.

G. Defendants Invalidly Remove Bishop Gassis--the August 24th Resolutions

By the summer of 2013, Defendants decided they could no longer wait to "inform" Bishop Gassis that he was required to step down on September 21 and acted to summarily remove him. This tactical change was spurred by Defendants' anger that Bishop Gassis insisted that an annual meeting be held that year, (A298; A309–310), and he made a books and records request. (A312–318). Defendants' conversations without Plaintiff initially concerned how to handle the meeting, (A288–295), but evolved into an active conspiracy to prevent a quorum and, thus, cancel the meeting. (A291; A297; A299–302; A307; A311). When Hunter-Hall believed that this step was too much, Ann Corkery considered freezing him out and calling for his resignation. (A305–307). Hunter-Hall ultimately concluded that "the board of directors and its members seem rather to be treated as bothersome appendages instead of the actual source of the corporation…except where there is some utility in invoking board members to achieve a desired end" and that "director independence does indeed seem to be a serious issue." (A320–321).

On August 16, 2014, Defendants noticed a meeting for August 24, 2014 to consider only "amendments to the Bylaws." (A326). Only two days prior to the

meeting, Defendants disclosed five resolutions to Bishop Gassis for the first time. (A327–334). Those resolutions (1) affirmed the Board's understanding that Bishop Gassis would cease to be a member of the Board at midnight on Sept. 20, 2013; (2) eliminated Bylaw § 3.04; (3) amended Bylaw § 5.01 regarding the officers of the Fund; (4) referred to alleged misconduct by Bishop Gassis; and (5) resolved to negotiate with Bishop Gassis the Fund's continuing use of his name and likeness. (A327–324). Ann Corkery commissioned a friendly study of Bishop Gassis's canonical status to support these resolutions, even though Defendants agreed that "canon law does not apply" to the Fund. (A319; A322–325). On August 24, each resolution passed over Bishop Gassis's objection. (A335–337).

H. Defendants ' Unlicensed Use of Bishop Gassis's Name and Likeness

The very day Defendants removed Bishop Gassis from the Fund, and thus eliminated the Fund's license to use his name, likeness, and reputation, Neil Corkery wrote that "I believe we will be able to keep the gassis [sic] name for some time." (A338). Bishop Gassis's removal, however, severed the license the Fund had to continue to use his name, and the Bishop refused to allow such use after his removal. (A473, ¶¶ 284–85). The Fund, however, continued to use Bishop Gassis's name and likeness in its fundraising letters and in promotional materials on its website, prompting the Trial Court to order Defendants to remove all references to Bishop Gassis from the Fund website. (A343).

ARGUMENT

I. THE TRIAL COURT WRONGFULLY DISMISSED PLAINTIFF'S NAME AND LIKENESS CLAIMS

A. Question Presented

Whether the Trial Court erred in holding that Plaintiff had not validly pleaded the Likeness Claims against the Fund itself and against the director-Defendants in their individual capacities, (A509–510), and if not, whether the Trial Court wrongfully denied Plaintiff's request to Amend the Complaint under Ct. Ch. R. 15(aaa). (A508–510).

B. Scope of Review

This Court's review of questions of law is *de novo* and requires no deference to the Trial Court's findings. *Fiduciary Trust Co. of N.Y. v. Fiduciary Trust Co. of N.Y.*, 445 A.2d 927, 930–31 (Del. 1982). Specifically, review of a lower court's dismissal of a Complaint is *de novo*. *Price v. E. I. DuPont De Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011). Courts have not articulated the standard of review for denials of motions under Rule 15(aaa) but have stated that the decision is entitled to deference as within the trial court's discretion. *Certain Underwriters at Lloyd's v. Nat'l Installment Ins. Servs., Inc.*, 2008 Del. Ch. LEXIS 57, at *34 (Del. Ch. May 21, 2008).

C. Merits of the Argument

1. The Trial Court erred in holding that Plaintiff did not allege name and likeness claims against the Fund.

In dismissing Plaintiff's Likeness Claims, the Trial Court erred by elevating form over substance. Although admitting that "Plaintiff's allegations of misappropriation identify…actions of the *Corporation*," (Ex. B, p. 10) (emphasis in original), the Trial Court analyzed the allegations of the Complaint only as applied to the director-Defendants in their individual capacities because the "Amended Complaint purports to bring each of these claims against the individual director Defendants, but not against the Fund itself." (Ex. B, p. 7). The Trial Court's holding effectively penalizes Plaintiff for simply failing to identify the Fund underneath each of the Amended Complaint's Likeness Claim headings in writing "(against the Director Defendants)," (A412, ¶ 96; A414 ¶ 100; A415, ¶ 103), in response to Defendants oblique reference to the issue in a footnote in their original Motion to Dismiss. (Ex. B, pp. 17–18; A497).

Delaware law does not endorse the Trial Court's cramped reading of the target of Plaintiff's Likeness Claims, and this Court should not foreclose their consideration based on a formal header rather than the unequivocal substance of the claims. The Trial Court did not cite authority holding that a header takes precedence over the actual substance of a cause of action in determining against whom the count is properly pleaded, and the circumstances here make clear that its

reasoning does not construe Plaintiff's pleadings so as to do "substantial justice." Ct. Ch. R. 8(f); *see also Rose v. 3M Co.*, 2012 Del. Super. LEXIS 338, at *5 (Del. Super. Ct. July 19, 2012); *Garcia v. Signetics Corp.*, 2010 Del. Super. LEXIS 333, at *2 (Del. Super. Ct. Aug. 5, 2010). This is particularly so here where the Trial Court admitted that ***"[h]ad the Plaintiff chosen to sue the Fund, such an allegation presumably would survive for trial[.]"*** (MTD Op. 14) (emphasis added). Indeed, the Amended Complaint named all Defendants, including the Fund, as legitimate Defendants, and the Amended Complaint's detailed allegations establish that Plaintiff sufficiently pleaded each element of the three Likeness Claims. (A376–477, ¶¶ 23, 25–26, 29–31, 134–35, 43, 55, 113–114, 116–121, 149(v), 150, 163–165, 224, 278–284, 286, 289–291, 295–296, 298).[1]

The ruling's injustice is more acute when compared to this Court's treatment of amendments in the far more extreme circumstance where a plaintiff names the wrong party in his Complaint and fails to correct the error prior to the expiration of the statute of limitations. Delaware courts permit amendment to include the correct party as if sued within the limitations period where three elements are met:

> (1) that the claim must arise out of the same conduct, transaction, or occurrence; (2) that the party to be added must

[1] Even Defendants themselves argued in their initial Motion to Dismiss that Plaintiff's pleading inconsistency should be dealt with by construing the Complaint in a manner they saw as consistent with the substantive allegations—i.e. as brought against the Fund and not the Individual Defendants. (*See* Def. Or. MTD Op. Br. 13 n. 2).

> have received notice of the institution of the action, so that the party will not be prejudiced; and, (3) that within the time provided by the rules, the party to be added must have known or should have known that, but for the mistake concerning the identity of proper party, the action would have been brought against the party to be added.

Flowers v. WITCO Chems. Corp., 765 A.2d 951 (Del. 2000); *see also Lovett v. Pietlock*, 32 A.3d 988 (Del. 2011). Here, each of those requirements is met, without the attendant procedural fairness concerns. It would be highly incongruous to allow the addition of an entirely new party to some other action where the limitations period had already run, but not construe Plaintiff's claims here as made against a party already before the court. Substantial justice means finding that a mislabeled header does nothing to affect the clear import of the allegations in Plaintiff's Likeness Claims—that the Fund engaged in unlawful and unlicensed use of Bishop Gassis's name and likeness.

2. The Trial Court wrongfully denied Plaintiff's request to Amend the Complaint under Ch. Ct. R. 15(aaa).

To the extent that the failure to explicitly name the Fund as a Defendant in the Likeness Claims' parenthetical header was a proper ground for dismissal, the Trial Court erred in denying Plaintiff's request to amend the Complaint pursuant to Trial Court Rule 15(aaa). Rule 15(aaa)'s standard for granting a motion to amend after a plaintiff answers a motion to dismiss, *Tvi Corp. v. Gallagher*, 2013 Del. Ch. LEXIS 260, at *62 (Del. Ch. Oct. 28, 2013), provides that a court should grant the

motion to amend where the plaintiff can show "good cause [why] dismissal with prejudice would not be just under all the circumstances." Ct. Ch. R. 15(aaa).[2] The rule's purpose "is to curtail the number of times that the Court of Trial [will be] required to adjudicate multiple motions to dismiss the same action," *Tvi Corp.*, 2013 Del. Ch. LEXIS 260 at *62, and to prevent a party from informally amending his factual allegations through the answering brief. *MCG Capital Corp. v. Maginn*, 2010 Del. Ch. LEXIS 87, at *15 (Del. Ch. May 5, 2010); *see also Stern v. LF Capital Partners*, 820 A.2d 1143, 1144 (Del. Ch. 2003) (rejecting amendment under Rule 15(aaa) because the "proposed amendment [was] for the purpose of making more detailed allegations of fact"). Indeed, "[p]rejudice to the nonmoving party is the touchstone for the denial of an amendment." *Certain Underwriters at Lloyd's*, 2008 Del. Ch. LEXIS 57 at *41.

The Trial Court abused its discretion because granting the proposed amendment posed no threat to the undesirable practices that 15(aaa) sought to

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[2] Plaintiff argued in his Answering Brief that he should be allowed to amend his Complaint under Rule 15(aaa) in the event the court found the technical deficiency of failing to explicitly name the Fund as a Defendant in the Likeness Claims proved fatal to those allegations. (A508–510). Although a motion to amend under Rule 15(aaa) typically must be made either before a party has filed an answering brief or after the court has granted the motion to dismiss, trial courts have considered and ruled on the merits of the issue in their motion to dismiss opinions. *Tvi Corp. v. Gallagher*, 2013 Del. Ch. LEXIS 260 at *63–65. As plaintiff explained below, he raised the issue in his answering brief to avoid complicating what was an expedited briefing schedule to present both the summary § 225 claim and the motion to dismiss at one hearing before the Trial Court. The Trial Court considered but rejected this issue on the merits. (Ex. B, pp. 15–17). Thus, the issue is preserved.

eliminate. Further, simply adding the words "and Fund" as a party to the Likeness counts causes Defendants no prejudice, as Plaintiff is not seeking to add a new party to the case or alter a single factual allegation in the Complaint. The Trial Court's sole basis for dismissing the Likeness Claims—the inconsistency between the allegations in the Complaint and the header, (Ex. B, pp. 17–18)—thus prejudices only Plaintiff, as the Trial Court admitted that "[h]ad the Plaintiff chosen to sue the Fund, such an allegation presumably would survive for trial[.]" (Ex. B, p. 14). Simply put, amendment here to correct the name in a voluntary header would be the least offensive situation where Rule 15(aaa) would be applicable. *MCG Capital Corp.*, 2010 Del. Ch. LEXIS 87 at *57–58 (allowing amendment under Rule 15(aaa) to add an entirely new claim for relief). Thus, the Trial Court abused its discretion; denying amendment in these circumstances serves neither the interests of justice nor Ch. Ct. R. 15(aaa)'s purposes.[3]

3. The Trial Court erred in holding that Plaintiff had not adequately pleaded its claim against the director-Defendants in their individual capacities.

Regardless of whether Plaintiff properly stated the Likeness Claims against the Fund, the Trial Court erred in finding that Plaintiff did not sufficiently plead

[3]Regardless of whether Plaintiff appealed this ruling, Plaintiff could pursue his Likeness Claims against the Fund in Superior Court or federal court; the Trial Court did not adjudicate the merits. However, he pursues this appeal based on the Trial Court's ruling to ensure maximum protection and preservation of his rights.

those claims against the individual director-Defendants. The Trial Court found that the "Amended Complaint is devoid…of allegations indicating that the individual director Defendants personally misappropriated the Plaintiff's name *to their own use*." (Ex. B, p. 10). While it is true that "allegations against [a corporation] do not, without more, implicate [a director-Defendant] as an individual[,]" *Howell v. Persans*, 2012 Del. Super. LEXIS 64, at *7 (Del. Super. Ct. Feb. 8, 2012), the Trial Court's Opinion ignores the significant additional allegations in the Amended Complaint giving rise to individual liability.

The Amended Complaint details the director-Defendants' use of Bishop Gassis's name and likeness to raise and divert Fund assets for their own purposes outside of their actions on behalf of the Fund. (A401–459, ¶¶ 51, 104–106, 122, 167, 175, 179–180, 186, 193, 199, 204, 210, 216, 221–225). For instance, the Amended Complaint details the covert motive of the Individual Defendants to use Bishop Gassis's name and likeness to benefit a competing organization known as the Southern Sudan Fund. (A415–416, ¶¶ 104–106; A237). The Complaint also alleges that Ann and Neil Corkery undertook these actions to support Neil Corkery's considerable salary and benefits. (A444–445, ¶ 180). The Amended Complaint raises the reasonable inference that Ann Corkery and Neil Corkery concealed from Bishop Gassis their belief that he would be required to step down from the Fund in order to exploit the use of his name and likeness to raise $12

million between 2011 and 2013, and secure and preserve Neil Corkery's appreciable salary and retirement benefits.

The Amended Complaint also alleges that Neil Corkery, Wagner, and Coffey visited dioceses outside of the Nuba and Twic regions, offered funds to peoples not among the beneficiaries, and inexplicably but intentionally concealed those actions from Bishop Gassis. (A423, ¶ 122). Contrary to the Trial Court's assertion that "reputational interests" are insufficient to infer that the Defendants misappropriated the Plaintiff's name and likeness on their own behalf, (Ex. B, pp. 10–11 n. 21), the Complaint sufficiently, and indeed plausibly, alleges that Defendants' actions were undertaken to raise their *individual* standing within Washington, DC social and charitable circles and religious and social circles in the Vatican. (A376–495, ¶¶ 51, 180, 187, 200, 205, 211, 238, and Introduction).

Together, these allegations amount to a "reasonably conceivable set of circumstances" establishing liability against the director-Defendants in their individual capacities. *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011). Thus, the allegations in the Complaint sufficiently plead Likeness Claims against the Individual Defendants.

II. THE TRIAL COURT WRONGLY HELD THAT BISHOP GASSIS WAS VALIDLY REMOVED

A. Question Presented

Whether the Trial Court erred in holding that Defendants validly removed Bishop Gassis pursuant to the Bylaws and without breaching any fiduciary duty owed to Bishop Gassis or the Fund's beneficiaries. (A500–503; 505–507; A512–522).

B. Scope of Review

The scope of review is *de novo* for the issues of law of whether Bishop Gassis was owed fiduciary duties and whether he was validly removed pursuant to the Fund's Bylaws. *Fiduciary Trust Co. of N.Y. v. Fiduciary Trust Co. of N.Y.*, 445 A.2d 927, 930–31 (Del. 1982). The scope of review is also *de novo* as to whether Defendants' breached their fiduciary duties to the beneficiaries in removing Bishop Gassis as a mixed question of law and fact. *Miller v. Pennymac Corp.*, 77 A.3d 272 (Del. 2013). The Trial Court's "factual conclusions supporting [its] legal findings" that Defendants did not breach their fiduciary duties to the beneficiaries may be reversed where "clearly erroneous." *SIGA Techs., Inc. v. Pharmathene, Inc.*, 67 A.3d 330, 341 (Del. 2013).

C. Merits of the Argument

In holding that Bishop Gassis was validly removed as a member and director of the Fund, the Trial Court made two incorrect legal determinations. First, the

Court held that Bishop Gassis's removal at the August 24, 2013 meeting was done in accordance with the Fund's Bylaws and the Delaware General Corporate Law ("DGCL"). (Ex. C, pp. 30–37). Second, the Trial Court rejected the contention that "the Bishop's removal constituted a breach of the board's fiduciary duties" to Bishop Gassis as a member of the Fund and to the beneficiaries of the Fund. (Ex. C, pp. 38–39). Specifically on the second point, the Trial Court held (1) Bishop Gassis was not owed fiduciary duties as a member of the Fund and (2) that the evidence was insufficient to show that Bishop Gassis's removal was not a valid business judgment of the Defendants as directors. (Ex. C, pp. 37–45). As a result of these determinations, the Trial Court found that Bishop Gassis did not have standing to pursue his other claims. (Ex. C, pp. 4, 46). In fact, the Trial Court cited eight challenges (a–h). (Ex. C, p. 29). The Court decided only (f), deciding to forego the others. (Ex. C, p. 46). On remand this issue should be revisited.

1. The Trial Court erred in holding that Bishop Gassis's removal was permissible under Bylaws 3.04 and 3.06

The Trial Court incorrectly held that Bishop Gassis's August 24, 2014 removal from Board complied with the Fund's bylaws, namely § 3.04 read with § 3.06. Delaware law holds that a "bylaw provision that conflicts with the DGCL is void[,]" *Crown Emak Partners, LLC v. Kurtz*, 992 A.2d 377, 398 (Del. 2010), and "[a]ction taken at a board meeting that was not called in compliance with the bylaws may be deemed void." *Hockessin Cmty Ctr., Inc. v. Swift*, 59 A.3d 437,

461 (Del. Ch. 2012). In deciding whether board action is bylaw-compliant, the Court applies ordinary rules of contract interpretation. *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010). Thus, the Court should construe an unambiguous bylaw consistent with its plain meaning, *Gentile v. Singlepoint Fin., Inc.*, 788 A.2d 111, 113 (Del. 2001), and an ambiguous bylaw in accordance with the drafters' intent at the adoption of the provision at issue, using extrinsic evidence if necessary. *Airgas*, 8 A.3d at 1188; *Zimmerman v. Crothall*, 62 A.3d 676, 693 n. 101 (Del. Ch. 2013). In "upholding the intentions of the parties, a court must construe the agreement as a whole, giving effect to all provisions therein." *E. I. Du Pont de Nemours & Co. v. Shell Oil Co.*, 498 A.2d 1108, 1113 (Del. 1985).

Here, Bishop Gassis's removal directly violated the clear and unambiguous meaning of Fund Bylaws §§ 3.04 and 3.06 as read together. Bylaw § 3.06, governing removal of directors, states that "[a]ny director ***elected*** to the Board of Directors may be removed at any time, with or without cause, by the affirmative vote of two-thirds (2/3) of the members of the Board of Directors then in office." (A106, § 3.06) (emphasis added). Therefore, only directors elected to the Board, as opposed to those appointed, may be removed without cause. Section 3.06 must be read this way so as to give effect and meaning to all words in the Bylaws and not render any as mere surplusage. *Donohue v. Corning*, 949 A.2d 574, 579–80

(Del. Ch. 2008); *NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007). In addition, § 3.04 provides that Bishop Gassis "shall" be Chairman of the Board "until his retirement or resignation." (A105, § 3.04). Especially considered against the annual election § 3.03, Bishop Gassis was an annually non-elected, appointed Board member by the plain terms of the Bylaws, and his removal without cause violated the Bylaws.

Moreover, the intent of the parties at the time of drafting and the subsequent conduct of the board confirms this interpretation. Neil Corkery acknowledged that Bishop Gassis was an unelected member of the Board, (A363), and the Fund's own legal counsel advised the Corkerys in administering the 2011 annual election that "per the by-laws Bishop Gassis is the permanent Chairman so does not need to be included" in the vote for election. (A177). For that reason, next to Bishop Gassis's name on the 2011 and 2012 ballots were written "Not applicable" and "Chairman" respectively. (A178–184; A211–216).

Further, this interpretation of the Bylaws is consistent with the Fund's history and operation. As the Trial Court observed, although William Saunders was the initial incorporator of the Fund, "Bishop Gassis has been involved with the Fund since the beginning of the Fund's history" in 1999, and "Saunders incorporated the Fund at his direction." (Ex. C, p. 8 n. 20). Thus, with the corporate formalities and structure established, the Fund operated with Bishop

Gassis as the face of the charity and the person responsible for directing funds to the Nuba/Twic beneficiaries in Sudan. (Ex. C, pp. 3–4). In 2001, the Fund's name was changed in the Certificate of Incorporation to the Bishop Gassis Sudan Relief Fund, Inc. (Ex. C., p. 8). And in 2002, only three years into the Fund's current fifteen year existence, the Fund amended its Bylaws to appoint the Bishop as Chairman. Therefore, the available extrinsic evidence bearing on the intent of the drafters shows that Bishop Gassis could not be removed without cause until his retirement or resignation from the Fund.

The Trial Court's analysis rejecting these arguments was legally flawed. First, the Trial Court incorrectly interpreted § 3.04 to prevent the Bishop's removal only as "Chairman of the Board—an officer, not a director." (Ex. C, p. 35). Yet, the Bylaws plainly provide that the Chairman of the Board is a director and not merely an officer. Section 5.01 of the Bylaws provides an exclusive list of officer positions in the Fund as "consisting of a President, a First Vice-President, a Second Vice-President, a Secretary and a Treasurer." (A111–112, § 5.01). Nowhere is the Chairman listed as an officer, and therefore, *he must be an appointed director instead*. Moreover, even if the Chairman were an officer, the very next sentence of § 5.01 states that "[a]ll officers shall be members of the Board of Directors." (A111–112, § 5.01). Thus, the Trial Court erroneously interpreted § 3.04 to apply to Bishop Gassis as an officer, and not as a director and member of the Fund.

Second, the Trial Court was wrong to rely on its assumption that because "Bishop Gassis was a director of the Fund before Section 3.04 was added to the Fund's Bylaws in 2002…he must have been elected at some time between the Fund's incorporation and the enactment of the 2002 Bylaw amendments notwithstanding the Fund's poor record-keeping in that regard." (Ex. C, p. 34). Regardless of whether he was initially elected, any director's authority to continue on the Board required annual re-election under § 3.03. (A88–89; A105, § 3.03). Thus, after §§ 3.04 and 3.03 were amended in 2002—providing for the appointment of Bishop Gassis as chairman and eliminating a classified board while requiring annual re-election of all directors respectively— Bishop Gassis required annual re-election to sit as a director, unless, of course, he was appointed. Thus, the 2002 amendments rendered moot any previous method of Bishop Gassis's original Board membership; whether or not he was initially elected had no relevance to the legality of his Board position from 2002 forward. Since it is undisputed that the Fund did not reelect him during that period because election on his status as director was "not applicable," (A178), Bishop Gassis was an appointed director after the amendment of § 3.04 of the Bylaws.

Finally, the Trial Court found that the Bishop's removal was valid because the Board always had the ability to repeal § 3.04 by a majority vote. (Ex. C, p. 35). Yet, the Board's elimination of § 3.04 in Resolution 2 on August 24, 2013 does not

affect the invalidity of his removal. Plaintiff remained an unelected, appointed director outside the scope of § 3.06, a Bylaw provision left intact by the August 24 Resolutions. In other words, § 3.04's *prior* existence, regardless of its subsequent elimination, established Plaintiff as an unelected director, until at least the next annual election. Thus, Plaintiff's removal violated § 3.06, given his appointed status under § 3.04.

2. The Trial Court erred in holding that fiduciary duties are never owed to a Member of a non-profit corporation.

Even if Defendants' removal of Bishop Gassis complied with the Bylaws, Defendants' unconscionable and inequitable three-year campaign of concealment and misconduct leading up to his removal was unlawful. As this Court has long held, inequitable conduct "may not be permitted to stand[,]" regardless of whether the inequitable action is "legally possible." *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971); *see also Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 67 (Del. Ch. 2008). Indeed, regardless of whether it complies with a corporation's bylaws, "actions may be voidable if improperly motivated." *Adlerstein v. Wertheimer*, 2002 Del. Ch. LEXIS 13, at *29 n. 28 (Del. Ch. Jan. 25, 2002). Thus, Defendants' elimination of Bylaw § 3.04, to the extent that serves as the legal basis for Bishop Gassis's removal, should also be set aside: "[l]egally permissible bylaws adopted for an improper purpose are unenforceable in equity." *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 560 (Del. 2014).

The Trial Court declined to invalidate Defendants' actions here—in the face of years of bad-faith conduct—because it held that members of non-stock corporations, such as Bishop Gassis, are not owed fiduciary duties by members of the corporation's board of directors. The Trial Court based this holding on this Court's pronouncement in *Oberly v. Kirby*, 592 A.2d 445 (Del. 1991). (Ex. A, 38–40). In *Oberly*, the Court considered whether the actions of the then sole-member of a non-stock, charitable corporation— electing his wife and children as members of the corporation and removing his siblings as directors—violated his fiduciary duties. The Court held that the member's "status as the surviving member created a fiduciary responsibility comparable to that owed by a controlling shareholder to the corporation, and to other shareholders, to act with fairness and loyalty, devoid of considerations of self-interest." *Oberly* at 462. This Court then went to on to say, however, that the plaintiffs were not shareholders "and have no legitimate expectation of financial benefit from the operation of the Foundation." *Id*. Indeed, the plaintiffs were merely ousted directors; they had no legitimate property or financial interest in the corporation and had not been members of the corporation at any time. *Id*. at 461. For that reason, they themselves were owed no fiduciary duties and could only seek to assert breaches of the fiduciary duties the defendants owed to the corporation itself and to its beneficiaries. *Id*. at 462. Critically, the *Oberly* Court *did not* hold that members of non-stock corporations could not be

owed fiduciary duties; it simply made clear that fiduciary duties run only to persons in positions analogous to shareholders in a stock-holding corporation. *Id*. at 462. The plaintiffs in that case were not analogous to shareholders because they were not members and had no financial or property stake in the corporation. *Id*.

Oberly, therefore, has limited application to the wildly different facts presented here. Here, in contrast, Bishop Gassis was a member of the Fund and no ordinary member at that. The Fund's identity was intertwined with his. He directed the Fund's creation and entrusted his name and likeness to it. Indeed, the Fund spent 90% of its revenues on projects he requested, supervised, and implemented, and relied almost exclusively on his name, likeness, reputation, and person to fundraise and to support the Fund's charitable mission. The Trial Court simply misread *Oberly* to extend to circumstances such as these. *See Scattered Corp. v. Chicago Stock Exch.*, 671 A.2d 874, 879 (Del. Ch. 1994) ("*Oberly* stands for the principle that the conduct of directors of nonstock corporations should be evaluated under corporate law fiduciary standards" even though the DGCL does not "apply across the board to nonstock corporations").

Delaware law supports the view that nonstock corporation members, or at least those with individual interests in its operation, are owed fiduciary duties. 8 *Del. C.* § 114(a)(1) (stating that "[a]ll references to stockholders of the corporation in the DGCL shall be deemed to refer to members of the corporation" for non-

stock corporations); 8 *Del. C.* § 141(j) (applying the same translator principle to the legality of board action); *Oberly*, 592 A.2d at 459 n. 8 ("The parallel between stockholders and members is clearly contemplated in relevant statutory law"). Delaware courts have held that "directors of a non-profit membership corporation have a duty to act in the best interests of the corporation's members, and must set aside their parochial interests." *Baring v. Watergate East, Inc.*, 2004 Del. Ch. Lexis 17, at *6 (Del. Ch. Feb. 25, 2004); *see also Baring v. Condrell*, 2004 Del. Ch. Lexis 148, at *21 (Del. Ch. Oct. 18, 2004) (confirming prior order in § 225 action).

Indeed, a corporation's status as a stock-holding or non-stock entity is not the critical question in divining whether fiduciary duties run to members. *In re Nymex S'holder Litig.*, 2009 Del. Ch. LEXIS 176, at *54 (Del. Ch. Sept. 30, 2009).[4] In *Nymex*, the court considered breach of fiduciary duty claims by Class A members of a subsidiary membership company of a for-profit stock holding corporation that was formed after the demutualization of the original non-profit membership organization. *Id*. at *4–5. In rejecting the breach of fiduciary duty claims, the court emphasized that the demutualization severed the members' equity

[4] Other jurisdictions have also recognized the need for fiduciary duties to run between members of a non-profit corporation. *See, e.g., Kademian v. Marger*, 2012 Ohio App. LEXIS 845, at *39–40 (Ohio Ct. App. Mar. 9, 2012) (quoting *DiPasquale v. Costas*, 926 N.E.2d 682 (Ohio Ct. App. 2010)); *Hatch v. Emery*, 400 P.2d 349, 353 (Ariz. Ct. App. 1965); *Best Western Int'l, Inc. v. Furber*, 2008 U.S. Dist. LEXIS 100141, at *5 (D. Ariz. Dec. 2, 2008).

stake in the subsidiary company, stating that "[w]ith that transfer, those fiduciary duties owed Members *qua* members were terminated." *Id*. at *52–53.

The analysis did not depend, however, on whether the corporation was a stock or non-stock company, as the *Nymex* plaintiff's contention that "members in a non-stock corporation are owed the same fiduciary duties by the corporation's governing body as a shareholder in a stock corporation is owed by the corporation's board of directors, while overbroad is not unfounded." *Id*. at *54. The *Nymex* court stated instead that the critical question was whether there was "a separation of legal control from beneficial ownership with respect to a valid property interest necessary for the imposition of a trust relationship with concomitant fiduciary duties." *Id*. (internal quotations omitted). Specifically:

> For a fiduciary duty to be created, there must be both (1) a property or other equitable interest; and (2) the ceding of legal control over the property interest, such that the owner reposes special trust in and reliance on the judgment of those in control.

Id. at *55 (internal quotation omitted).

Each requirement is met here. The Fund was incorporated on Bishop Gassis's behalf to help the Nuba and Twic peoples. Bishop Gassis licensed his name, likeness, and reputation to the Fund for use in all aspects of the operation, and those properties were used as the near exclusive means of carrying out the Fund's charitable mission. Bylaw §3.04 solidified Bishop Gassis's centrality to the organization, and the need for his perpetual involvement as director and Chairman

and as the Fund's "chief public representative" and policymaker. (A105, § 3.04). Simply put, Bishop Gassis was never the typical non-profit volunteer who sits on Delaware charitable corporate boards, as he had a *protectable property interest in his personal name and image which he entrusted to the Board of Directors of the Fund along with his vision and life's work.* His personal and symbiotic connection to the Fund, its mission, its beneficiaries, and its donors was greater and more personal than any connection of the director-Defendants. It is precisely under these types of circumstances that fiduciary duties should run to a non-stock corporate member. Thus, this Court should find that Defendants owed fiduciary duties to Bishop Gassis personally and should remand Plaintiff's § 225 claims to determine whether Defendants' inequitable conduct, concealed from Bishop Gassis, breached those duties.

3. The Trial Court erred in holding that Defendants' actions did not breach the fiduciary duties they owed to the Fund's beneficiaries.

Finally, the Trial Court's holding that Defendants' actions were consistent with their fiduciary obligations to the Fund's beneficiaries was clear error. The Trial Court's analysis of the record sweeps Defendants' breathtakingly deceptive, secretive, and inequitable actions under the rug in crediting the implausible justifications for their actions they proffered in the face of overwhelming evidence to the contrary. The Trial Court must be reversed because the evidence clearly

shows that Defendants removed Bishop Gassis without concern for, and to the detriment of, the Fund's targeted beneficiaries and thus their actions are not entitled to deference under the business judgment rule.

The Trial Court erred in finding that "the record supports the Defendants' contention that they acted to remove Bishop Gassis not out of self-interest, but because the directors believed it was in the best interests of the beneficiaries of the Fund to do so[,]" (Ex. C, p. 43) by characterizing their appallingly conspiratorial conduct as merely "less-than-transparent," (Ex. C, p. 43), and "far from transparent," (Ex. C, p. 45), and thus effectively ignoring it. Although "the wisdom of facially valid decisions made by charitable fiduciaries" cannot be questioned, a charitable board's actions may be challenged without deference where it violates its "special duty to advance its charitable goals and protect its assets" by creating "financial harm or jeopardy to the Foundation itself and its beneficiaries." *Oberly*, 592 A.2d at 462. The "extent and measure" of the Fund's charitable purpose must be determined by looking to the Certificate of Incorporation and Bylaws. *Id*. at 461–62.

Here, the Certificate of Incorporation and the Fund's practices make clear that the Fund was to be run virtually exclusively for "the people of Sudan's Nuba Mountain region" and allowing only "any other activities necessary or convenient to carry out such purposes." (A55). The record, however, demonstrates that

Defendants engaged in a three-year long plot to remove qualified directors for purposes of their own entrenchment and control and not for the beneficiaries' benefit. Meanwhile, they used their growing control over the Fund to divert money destined for the true Nuba and Twic beneficiaries to the SSF and to geographic regions far greater than the Fund's targeted beneficiaries. (A273–281). At the same time, Defendants acted without regard for the beneficiaries in concealing their intention to remove Bishop Gassis—the direct connection to the beneficiaries, while still touting *his* Nuba projects and needs through 2013. (A257–272). The Trial Court found that it was "clear that the use of the Bishop's name and likeness as an asset that had value to the Fund for many years." (Ex. C, p. 44). Defendants themselves notified the donating public that Bishop Gassis was their core identity by prominently advertising him in their letter and on their website, touting his Nobel Prize nomination, and using his name in their marketing efforts. (A241–252). Their clandestine plans, carried out for the three years they continued to speak to and solicit donors through Bishop Gassis served to divert money from the donors' intended targets, the explicit beneficiaries of the Fund.

Thus, even if Defendants breached no duty to Plaintiff himself, they breached their express fiduciary duties to the Fund and its beneficiaries. Therefore this Court should reverse the Trial Court's incorrect holding that Defendants' actions were entitled to deference as a valid business judgment.

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