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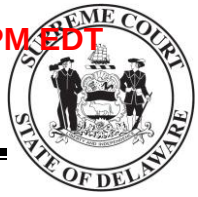

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BISHOP MACRAM MAX GASSIS, for himself and derivatively on behalf of BISHOP GASSIS SUDAN RELIEF FUND, INC.,

Plaintiffs below,
Appellants,

v.

NEIL CORKERY, ANN CORKERY, JOHN KLINK, FR. RODGER HUNTER-HALL, STEVEN WAGNER, KATHLEEN HUNT, and DAVID COFFEY,

Defendants below,
Appellees,

and

BISHOP GASSIS SUDAN RELIEF FUND, INC.,

Nominal Defendant below,
Nominal Appellee.

No. 451, 2014

CASES BELOW:

COURT OF CHANCERY OF THE STATE OF DELAWARE,
C.A. No. 8868-VCG

APPELLEES' ANSWERING BRIEF

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NATURE OF PROCEEDINGS

Plaintiff was the Bishop of the Catholic Diocese of El Obeid in Sudan. In 1999, he joined the board of directors (the "Board") of a Delaware nonprofit, nonstock corporation that provides assistance to Sudan, which was later renamed Bishop Gassis Sudan Relief Fund, Inc. (the "Fund"). Roughly fifteen years later, as Plaintiff approached mandatory retirement from his position as a Bishop, the Fund's Board prepared to transition smoothly its operations and fundraising. Toward that end, the Board passed a resolution removing him from his position as a director effective upon the date of his mandatory retirement.

Plaintiff sued the members of the Board, alleging breaches of fiduciary duty and misappropriation of his name and likeness, and seeking determinations under 8 *Del. C.* § 225 that he and two other former directors were not properly removed from the Board. Defendants moved to dismiss the action. The Court of Chancery held a trial related to Plaintiff's Section 225 claim, and received full briefing and argument on Defendants' motion to dismiss.

In its first opinion, the Court of Chancery found that Plaintiff "was validly removed from the Fund's [Board] effective" upon the date of his mandatory retirement. Appellant's Opening Brief ("Op. Br."), Ex. C at 46 ("*Gassis I*"). In its second opinion, the Court of Chancery granted Defendants' motion to dismiss the remaining misappropriation claims and granted Defendant's motion to dismiss with prejudice. Op. Br. Ex. B ("*Gassis II*"). Plaintiff then filed this appeal.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery properly dismissed Plaintiff's Likeness Claims because Plaintiff (i) failed to plead facts sufficient to state a claim against the defendants, *Gassis II* at 1-2, and (ii) asserted the Likeness Claims only "against the individual director Defendants," and not the Fund, *id.* at 7. Further, the Court of Chancery did not abuse its discretion in holding that Plaintiff failed to establish the good cause necessary under Court of Chancery Rule 15(aaa) for him to again amend his complaint to include the Fund *after* Defendants highlighted the defect in two motions to dismiss, and after the Court heard argument on the issue. *Gassis II* at 16-18.

2. Denied. The Court of Chancery correctly found that the Board properly removed Plaintiff pursuant to Section 3.06 of the Bylaws since Plaintiff was, in fact, a "Director elected to the Board." And even if Section 3.04 implicitly appointed Plaintiff to the Board, his removal was proper since (i) the Board validly repealed Section 3.04 as permitted by Section 7.08 and, in any event, (ii) the Board removed him as provided for in Section 3.04. Plaintiff was not, nor could he be, a permanent Chairman exempt from removal, as he claims. Moreover, Plaintiff's claim that Defendants breached their fiduciary duties by removing him fails because (i) the Board did not owe him any fiduciary duties, and (ii) Plaintiff's "removal was the product of a valid business decision, and did not pose a 'palpable threat' to the Fund's charitable purpose." *Gassis I* at 45.

STATEMENT OF FACTS[1]

A. The Fund

The Fund is a Delaware nonprofit, nonstock corporation founded in 1999 "to help the oppressed people" of Sudan, "particularly but not exclusively the people of the Nuba Mountain region of what is now the southern part of Sudan." *Gassis I* at 3, 8-9. The Fund's purpose "includ[es], but [is] not limited to," "providing the people of Sudan's Nuba Mountain region with food, clothing, medical supplies, farming equipment, books, and other educational materials," and "developing, establishing, and supporting educational facilities in the Nuba Mountains to teach residents husbandry techniques as well as basic reading, writing, and mathematics skills …." A55.[2]

Initially established as "Sudan Relief and Rescue, Inc.," the Fund was renamed "Bishop Gassis Sudan Relief Fund, Inc." at Plaintiff's request in 2001. *Gassis I* at 8; A396 ¶ 38; B328-329. The Fund is currently known as Sudan Relief Fund, Inc. The Board's seven directors include Executive Director Neil Corkery, who runs the Fund on a day-to-day basis. A384-85; *Gassis I* at 9; A112-113 § 5.05.

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[1] Plaintiff's Statement of Facts is fundamentally inconsistent with the Court of Chancery's findings of fact. In contrast, to the extent Defendants cite facts beyond those in the Court of Chancery's opinion, those facts are consistent with the Court's findings and, while not necessary for resolution of this appeal, are provided to afford a more complete background.

[2] As he did before the trial court, Plaintiff omits from the Fund's purpose clause the italicized language following "exclusively." *See* Op. Br. at 6. In full, that language states "The Corporation is organized exclusively *for charitable, scientific, and educational purposes within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986[] including, but not limited to, the following* …." A55 (emphasis added). Not only did Defendants note Plaintiff's omission below, *see* B384 (pre-trial brief at 8 n.7), but the Court of Chancery rejected Plaintiff's construction of the purpose clause, *Gassis I* at 42. Nevertheless, Plaintiff uses the same altered quote here, and misstates the purpose elsewhere in his brief. *See* Op. Br. at 34.

Although comprised mostly of lay Catholics, and not officially associated with the Catholic Church, the Fund worked with a Catholic missionary organization and the Catholic Diocese of El Obeid, which encompasses the Nuba Mountain region. *Gassis I* at 3. Despite its broad mission, Plaintiff viewed the Fund as "his own organization," B12, and "did not want any money to go to anyone else but him," B334.

B. Plaintiff Has Limited Involvement in the Fund.

Plaintiff was the Bishop of the Catholic Diocese of El Obeid from 1988 until September 21, 2013, when he retired upon turning seventy-five in accordance with Canon Law. *Gassis I* at 4-5, 8.

Although he was "the face of the" Fund through his charitable works on the ground in Sudan, *id*. at 3, Plaintiff's position with the Fund was "largely honorific," *id.* at 4. "Bishop Gassis was not a typical chairman." B324; *see also, e.g.*, B326-327. "[H]e devoted little effort towards operating or overseeing" the Fund, and had no "interest in the Fund's Management." *Gassis I* at 4, 11. Plaintiff attended only one meeting each year. B343; B351. All he did at that meeting, which he did not call or lead, was "talk [and] give a report." B337, B339, B341-342; B352. Outside of this one meeting, Plaintiff did not communicate with the Board. *See* B348-349; *see also* B310, B321 (testifying that he does not "have direct contact with the other members"). Plaintiff likewise had no interest in the Fund's financial statements and did not review them. B308; B350.

C. Plaintiff's Abrasive Personality Creates Conflict on the Board.

As a result of his work in war-torn Sudan, Plaintiff developed an "aggressive communication style," which created "personality conflicts." *Gassis I* at 11, *see also id.* at 38 (finding Board was motivated in part by "personality conflicts"); *id.* at 10 (describing conflicts). *See generally* B354-355 (former director, whom Plaintiff seeks to put onto the Board, described Plaintiff's style as a form of "tribal leadership," and testified that "the manner in which [Plaintiff] conducted himself [in Africa,] … would be objectionable in any other culture"); B317-B319, B322, (Plaintiff testifying that he "like[s] confrontation"; "When I speak, I say: I fired my bullets").

Plaintiff frequently exhibited this abrasive style in his dealings with the Board. At the 2012 annual meeting, Plaintiff "declared war" on the Board. B327, B335; B363-364, B368. As a result, Board members found it difficult to engage in productive conversations with Plaintiff because questions would result in "screaming." B327, B335; B363-364, B368; *see Gassis I* at 43.

D. Plaintiff's Conduct Causes the Resignation of Directors and Officers in 2002, After Which New Leadership Brings Increased Professionalism.

Tensions between Plaintiff and other members of the Board first erupted over a decade ago. In late 2002, six of the Fund's thirteen directors resigned, along with the Executive Director. B6-10. Among the reasons for the resignations were disagreements with Plaintiff about the proper role of the Board and concerns about the lack of transparency concerning Plaintiff's actions. B320; B355, B360; B3-5.

Shortly after the resignations, Neil Corkery was hired as Executive Director. Mr. Corkery immediately professionalized the Fund in areas such as fundraising, governance, and transparency. B337, B340. The Fund started a direct-mail fundraising campaign that increased annual revenues from roughly $450,000 to approximately $4-5 million. B299, B306; B345-346. The Fund also improved its governance practices. *See Gassis I* at 15 & n.46 (Ann Corkery describing "attempts at 'professionalizing' the Fund'"); *id.* at 41, 42 (finding testimony "credible"); *see generally* B50-54; A220; B337-338; B362. For example, the Fund began to hold more frequent Board meetings, report more frequently to the Board, conduct independent audits of its financial statements, and send representatives to review funded projects in Africa. *See* B302-303; B325-326; B358-359. The combined result of these efforts was the highest possible rating from independent evaluator Charity Navigator. *See* B1-2; B80-84.

E. Plaintiff Opposes the Fund's Long-Term Goals and Funding Priorities.

In 2010, the Board consisted of seven individuals: Plaintiff, his supporters David Forte and Nina Shea, and Defendants Ann Corkery, John Klink, Steven Wagner, and David Coffey. *Gassis I* at 9. Shea and Forte believed that the Fund existed to fulfill only Plaintiff's funding requests. *See, e.g.*, B292-293; B58-71; B140-143. In fact, Shea believed the Fund existed for Plaintiff's *personal* benefit, and that upon his retirement, its assets should be distributed to him. *Gassis I* at 12.

The other directors believed that the Fund was independent of Plaintiff and existed to serve a broader class of beneficiaries in Sudan than those identified by

Plaintiff. *See, e.g.*, B301; B331; B140-143. In accordance with Canon Law, Plaintiff was to retire as diocesan bishop on his seventy-fifth birthday—September 21, 2013. *Gassis I* at 11, 13; B300; B314-316. These directors understood that Plaintiff would resign from the Board upon his retirement as Bishop, after which the Fund would continue to serve the people of Sudan. *Gassis I* at 12-13.

"Because the Defendants believed that the Fund would continue even after Bishop Gassis's resignation," they "began to plan for that transition, which they hoped would occur without scandal." *Id.* at 12. They "began to evaluate what would become of donations after Bishop Gassis's exit" and "ran tests to determine whether letters sent to donors signed by Neil [Corkery], or in the name of the 'Sudan Relief Fund'" would be effective. *Id*. at 13.

F. Other Sources of Conflict and Concern Arise.

In addition to believing that the Fund was "his," Plaintiff believed "the Board is to approve what the beneficiaries say through my mouth," without question. B309; B351A ("[The] Board has every obligation to approve any project that came from the grassroots through the [B]ishop."). Despite their personal disagreements, the Board approved virtually all of Plaintiff's projections, which "received about 90 percent of all funding over the course of the organization." *Gassis I* at 40 & n.109 (citation omitted); *see also id.* at 10 (same).

Beginning in 2011, however, the Board began to approve other grants. This initially resulted, in part, from the Fund's phenomenal fundraising; it could not distribute the funds it raised as quickly as they came in. *Gassis I* at 10, 42 (Ann Corkery "credibl[y]" explained that the Fund expanded its reach "only because that

region did not have the infrastructure, and therefore the capacity to accept all of the capital the Fund was willing to donate."); B304-306; *see also* B80-84.

These were not the first projects funded outside the Nuba Mountain region—Plaintiff previously made two such requests, both of which the Board approved. *Gassis I* at 42; B45; B296. Plaintiff also requested funding of projects in the Twic County region outside of the El Obeid Diocese. *See* B51.

Like Plaintiff, the Board had identified worthy organizations not affiliated with Plaintiff. B116 at Schedule I; B249 at Part 4b. The Fund provided those organizations with grants for emergency supplies to a refugee camp, vocational, nurse and teacher training, and other projects that fell within its purposes as defined in its Charter. B86 at Parts 4b-c; B249 at Part 4b; B356-357 (conceding that all projects fell within the purposes set forth in the Charter). The funding for these projects was disclosed to Plaintiff, approved by the Board at proper meetings, and disclosed on the Fund's Form 990. *See* B85-122; B248-291.

When Plaintiff discovered that the Fund was supporting projects he had not requested, he "went ballistic." B333. He made it clear that he "did not want any money to go to anyone else but him." B334. For example, in an e-mail to the Board on March 8, 2012, Plaintiff argued that "[n]on Diocesan funds should be kept aside and given to unforeseen and urgent needs of the Bishop whenever he requests them …." B56. The Court of Chancery rejected Plaintiff's argument that this spending diverted resources away from the Fund's intended beneficiaries (*see* Op. Br. at 10-12) as having "little support." *Gassis I* at 42.

Other conflicts also developed. *Id.* at 11-12. Defendants were troubled by "their negative perceptions of [Plaintiff's] interactions with the Fund's beneficiaries," "concerns about the Bishop's extravagant spending," "their suspicion that the Bishop's projects had been double-funded," and Plaintiff's "belief that he had a personal ownership interest in the Fund and its assets." *Id.* at 43. The Court of Chancery found that these concerns ultimately led Defendants to conclude that it was "in the best interests of the beneficiaries of the Fund" to remove Plaintiff. *Id.*

G. Tensions Escalate as the Fund Begins Holding Annual Elections.

Although the Fund's Bylaws require directors to be elected annually, the Fund had not been holding such elections. *Gassis I* at 14. In May 2011, the Board held an election, at which the directors voted on whether each director, other than Plaintiff,[3] should be re-elected. *Id*. at 15, 16. All six directors were re-elected unanimously except Shea, who Ann Corkery, Klink, Wagner and Coffey voted against. *Id*.

The Board then sought a replacement for Shea. Over the objections of Plaintiff and Forte, the remaining directors elected Defendants Kathleen Hunt and Father Rodger Hunter-Hall. *Id*. at 17.

Thereafter, tensions continued to escalate. At the March 2012 annual meeting, Plaintiff was "out of control" and acting like "a bully." B73. He "spent over an hour criticizing various actions of the Board and the Executive Director,"

[3] The words "not applicable" appeared next to Plaintiff's name on both this ballot and the ballot used for the following year's election. *Gassis I* at 16 n.48.

id. at 20, and shouted to the Board members: "I declare war upon all of you." B364-365, B367. Plaintiff's own notes confirm that he also ominously warned his fellow Board members and the Executive Director that they "should care of the Bishops wrath." B69.

The Board members were stunned; Hunter-Hall had "never before" heard a bishop "declare war," and "nothing in 35 years" had prepared him for it. B366.

Four months later, the Board held an annual election and all of the directors were re-elected except Forte. *Gassis I* at 21.

H. The Board Removes Plaintiff as of the Date of His Retirement.

By mid-2013, with Plaintiff's seventy-fifth birthday approaching, transition planning was critical. *Gassis I* at 11. On August 16, Neil Corkery noticed a special Board meeting for August 24, 2013. *Id.* at 23. Although not required to do so, two days before the meeting Neil Corkery provided all Board members with the draft resolutions that would be considered. B128-139. Plaintiff and his counsel reviewed the resolutions before the meeting, and both attended and participated in the meeting without objection. B123-139.

Among other things, the draft resolutions:

- Removed Section 3.04 of the Fund's Bylaws, which designated Plaintiff as Chairman "until his resignation or retirement";
- Removed Plaintiff as Chairman, and declared his seat vacant, effective as of September 21, 2013—the day he was supposed to, and did, retire in accordance with Canon Law;
- Clarified the officer positions within the Fund;

- Set out allegations against Plaintiff concerning his "canonical status" and double-funding of certain projects; and,

- Made clear the Fund's willingness to work with Plaintiff and continue to use his name and likeness if the parties could reach an agreement.[4]

Gassis I at 23-25.

On August 24, 2013, the Board met and approved the resolutions.

As he did unsuccessfully in the Court of Chancery, Plaintiff argues repeatedly that these actions were part of a "conspiracy" to seize control from him, *see* Op. Br. at 7, 9, 10, 35, and that the directors were "motivated by enhancing their own control over the affairs of the Fund and in entrenching themselves on the Board." *Gassis I* at 41.

The Court of Chancery rejected these claims, finding "no … insidious motives" behind the removal. Instead, Defendants' actions were motivated by the approaching "mandatory retirement or removal of the Bishop," *id.* at 38, 41, and the desire for a "smooth" transition, *id.* at 11, 43. Plaintiff's theories had "no logical force" since, among other things, "Defendants at all times constituted a majority of the board." *Id.* at 41. Plaintiff lacked "any evidence sufficient to rebut the presumption that [his] removal was a product of the board's valid business judgment," *id.* at 40. Indeed, the Court found that Defendants removed Plaintiff because they "believed it was in the best interests of the beneficiaries of the Fund

[4] For reasons not explained in the record, Plaintiff already had been asked several times by the Holy See to resign, and had been stripped of his canonical authority—all unbeknownst to Defendants at the time. A303-304.

to do so," and "were motivated by [a] ... desire to protect the interests of the beneficiaries of the Fund in Sudan." *Id.* at 43, 44.[5]

The Court further found it "clear that all the Defendants have understood that their fiduciary duties run to the suffering people of Sudan," and that their decision to remove Bishop Gassis "did not pose a 'palpable threat' to the Fund's charitable purpose." *Id*. at 44, 45.

Two weeks after his removal, Plaintiff filed suit. "The driving force" behind the decision to sue was "Bishop Gassis's belief that he is essential to the success of the Fund, so that it must be a breach of duty for the Board to remove him." *Id.* at 44.

[5] Plaintiff also claims that Defendants' supposed "tactical change was spurred by [their] anger that Bishop Gassis … made a books and records request." Op. Br. at 12. The Court of Chancery also rejected this argument as not only "unsupported by the record," but "counter to [Plaintiff's] own contention, substantiated by the evidence, that the Defendants had planned *since May 2011* for the mandatory retirement or removal of the Bishop." *Gassis I* at 38 (emphasis in original).

ARGUMENT

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

A. Question Presented

Did the Court of Chancery properly dismiss Plaintiff's Likeness Claims where Plaintiff failed to (i) plead facts sufficient to state a claim against Defendants or (ii) allege the Likeness Claims against the Fund, and lacked the "good cause" that must be "shown" under Court of Chancery Rule 15(aaa) to amend his complaint a second time after briefing and argument on Defendants' motion to dismiss? *See Gassis II* at 7-19.

B. Scope of Review

Dismissal under Rule 12(b)(6) is reviewed *de novo. Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009). The Court's finding that Plaintiff failed to show "good cause" is "entitled to deference as within the trial court's discretion," Op. Br. at 14 (citing *Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *34 (Del. Ch. May 21, 2008)), and should be reviewed for abuse of discretion.

C. Merits of Argument

1. The Court of Chancery correctly dismissed the Likeness Claims for failure to state a claim against the directors.[6]

Plaintiff's Likeness Claims are internally inconsistent. While Plaintiff purports to bring them against the "Director Defendants" only, the supporting

[6] The "Likeness Claims" are Counts V, VI and VII.

factual allegations focus on the actions of the Fund. For example, in Count V (a misappropriation of name and likeness claim brought "against the Director Defendants"), Plaintiff alleges that:

- "*The Bishop Gassis Fund's* use of Bishop Gassis's name, likeness, identity, service mark … have effectively been assets responsible for the Bishop Gassis Fund's successful fund-raising efforts." A471 ¶ 277 (emphasis added); and

- "*The Bishop Gassis Fund's* continued use of Bishop Gassis's name, likeness and service mark … constitutes infringement and misappropriation of such intellectual property." A473 ¶ 284 (emphasis added).

Similarly, in support of his common law trademark infringement claim "against the Director Defendants" (Count VI), Plaintiff alleges that:

- "*The Bishop Gassis Fund's* past continued unauthorized use … of his name, likeness and service mark by the Corporation is likely to cause confusion to the public …." A475 ¶ 291 (emphasis added);

- "His name, image, likeness, and service mark have been used extensively in advertising and fundraising *on behalf of the Bishop Gassis Fund* …." A476 ¶ 294 (emphasis added);

- "[T]here has already been actual confusion … based on Bishop Gassis's removal and *the Corporation's continued use* of his name, likeness, and service mark." *Id*. ¶ 296 (emphasis added); and

- "As a result of *Bishop Gassis Fund's conduct*, Bishop Gassis has suffered and continues to suffer irreparable damage." A477 ¶ 300 (emphasis added).

And in support of his Deceptive Trade Practices Act claim "against the Director Defendants" (Count VII), Plaintiff alleges that:

- The actions at issue "violate[] the Delaware Deceptive Trade Practices Act insofar *as the Corporation* continues to represent that its operations … have the express approval of Bishop Gassis." A478 ¶ 304 (emphasis added).

Consistent with these allegations, the Court of Chancery found "no allegations in the Amended Complaint which, if true, could sustain a claim that [Defendants] expropriated property of the Plaintiff for their own purposes, or that they took actions to cause the corporation to improperly exploit the Plaintiff's name and likeness." *Gassis II* at 2. "[T]he Plaintiff's allegations of misappropriation identify only actions of the *Corporation*, not of the individual Defendants." *Id.* at 10. Accordingly, the Court of Chancery 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*. Rather, the Amended Complaint alleges only that the *Fund* continued to use the Plaintiff's name for its own use in its fundraising efforts." *Id.* (emphases in original). *See also id.* at 18 (same).

Plaintiff admits that "allegations against [a corporation] do not, without more, implicate [a director] as an individual." Op. Br. at 20. He nevertheless contends that he sufficiently alleged that Defendants "use[d] [his] name and likeness to raise and divert Fund assets for their own purposes outside of their actions on behalf of the Fund." *Id.* at 20 (listing paragraphs).

Plaintiff is incorrect. *First*, most paragraphs he cites have nothing whatsoever to do with the use of his name or likeness; they concern the failed theory that Defendants removed Plaintiff because of personal animosity, *see*, *e.g.*,

Am. Compl. ¶¶ 186, 193, 199, 204, 210, 216, 221-25 (A446-A454; A456-459), and the "illogical" theory that Defendants removed Plaintiff to secure control they already enjoyed, *see, e.g.*, *id.* at ¶¶ 51, 167, 175, 186 (A401; A440-441; A443; A446-447). *See generally Gassis I* at 37-46. *Second*, Plaintiff does not identify any actions taken by Defendants for their own purported benefit during the brief period between the time when Plaintiff was removed from the Board (September 21, 2013) and the Fund ceased to use his likeness (early October 2013), instead citing allegations concerning spending in 2011. *See* Op. Br. at 20 (citing Am. Compl. ¶¶ 104-106 (A415-416)). *Third*, to the extent that the allegations concern money, Plaintiff alleges that the money was raised and distributed *by the Fund*. *See, e.g.*, Am. Compl. (A415-416; A423; A444-445). These allegations simply repackage the failed theory (flowing from Plaintiff's misconception about the Fund's purposes) that the funds were spent on projects beyond the authority of the Fund. *See* pp. 7-9, *supra*.[7]

2. The Court of Chancery properly found that Plaintiff did not assert the Likeness Claims against the Fund.

The Court of Chancery properly found that Plaintiff expressly asserted the Likeness Claims only "against the individual director Defendants," and not against the Fund. *Gassis II* at 7. Plaintiff identified the targets of the Likeness Claims in the relevant counts of his original complaint, B181-83, and again in the parentheticals beneath the bold headings to Counts V, VI, and VII of the Amended

[7] These claims also fail for reasons which the Court did not need to resolve, including the protection afforded by the federal Volunteer Protection Act (42 U.S.C. §§ 14501-14505) and Delaware's complementary statute, 10 *Del. C.* § 8133. *See Gassis II* at 14 n.33.

Complaint, which state claims "against the Director Defendants." Am. Compl. at 96, 100, 103 (A470-471; A474-475; A477-478).[8] Plaintiff faults the Court of Chancery for relying upon his own pleadings and seeks to save his Likeness Claims by arguing that he "simply fail[ed] to identify the Fund underneath each of the Amended Complaint's Likeness Claim headings in writing." Op. Br. at 15. Plaintiff's *post hoc* justification fails.

Plaintiff did not simply fail to identify the Fund as a defendant in the hearings. Plaintiff never sued the Fund in either of his complaints. Plaintiff only named the Fund as a nominal defendant (as required for his derivative claims). The failure to name the Fund as a direct defendant not only forecloses any claim that this was an inadvertent oversight, but it prevented the Court from construing the claim as being asserted against the Fund.

But even if Plaintiff's failure to sue the Fund and include it in the Likeness Claims had been a mere oversight, he had many opportunities to rectify his omission. Defendants alerted Plaintiff to the deficiency of the Likeness Claims in their brief in support of their motion to dismiss Plaintiff's *initial* complaint, *see* A497, and again in their brief in support of their motion to dismiss the Amended Complaint, *see* B506.

In response to the first warning, Plaintiff amended *other* aspects of his complaint pursuant to Court of Chancery Rule 15(aaa), but again chose not to assert the Likeness Claims against the Fund. Am. Compl. at 96, 100, 103 (A470-

[8] Notably, Plaintiff did not specifically identify the targets of other claims in the Amended Complaint. *See, e.g., id.* at 88, 90, 107, 109, 111-12, 114-15 (A463; A465; A482; A484; A486-487; A489-490).

471; A474-475; A477-478). In response to the second warning, Plaintiff chose not to amend his complaint at all, and instead chose to stand on the allegations and claims in his Amended Complaint.

Under these circumstances, the Court of Chancery did not "elevat[e] form over substance." Op. Br. at 15. The Court held Plaintiff to the consequences of his tactical decisions. And while he may now regret his choice, the Court's decision to hold Plaintiff to his choices is not error, much less reversible error.

3. The Court of Chancery properly rejected Plaintiff's untimely attempt to amend his Complaint.

Plaintiff does not dispute that Rule 15(aaa) governs. Instead, he claims that the Court abused its discretion by rejecting Plaintiff's argument that "dismissal with prejudice would not be just under all the circumstances." Op. Br. at 18. Yet Plaintiff lacks a single case in which a plaintiff (a) was given repeated notice of the deficiency of his complaint, (b) repeatedly elected pursue deficient claims despite those warnings, (c) briefed and argued a motion to dismiss, (d) participated in a trial on the merits of some claims, (e) received two adverse opinions, and (f) was then permitted to amend his complaint to bring the same failed claims against an entity not previously named as a defendant.

Plaintiff claims dismissal with prejudice was unjust and "highly incongruous" because (he asserts) that under Rule 15(c), his amendments would relate back under the statute of limitations. *See* Op. Br. at 17. But even assuming his interpretation of Rule 15(c) is correct, Rule 15(c) applies a different standard in a different context, and reflects a different policy judgment. Whether amendment

is permitted under a different rule has no bearing upon whether amendment is permissible under Rule 15(aaa). Indeed, if amendment under Rule 15(aaa) was required whenever it was permitted under Rule 15(c), Rule 15(aaa) would be meaningless.

Nowhere in his brief does Plaintiff identify "good cause," which he admits is required here. Indeed, Plaintiff only refers to "good cause" once, when quoting the rule. Op. Br. at 18. Instead, Plaintiff merely asserts that amendment should be permitted because it would not undermine Rule 15(aaa)—which is insufficient. *See* Op. Br. at 18-19.

It is therefore not surprising that the few Rule 15(aaa) cases Plaintiff cites do not support his position. In *TVI Corp. v. Gallagher*, 2013 WL 5809271 (Del. Ch. Oct. 28, 2013), the Court found good cause when counsel intended all along to file the claims it sought to add through amendment, mistakenly filed "an incorrect version of the First Amended Complaint," found the error shortly before argument, and promptly notified the court. *Id*. at *22.

In contrast, Plaintiff was put on notice at least twice that his claims were deficient, but made a tactical decision not to name the Fund either as a Defendant or a target of the Likeness Claims. As the Court of Chancery found: "nothing prevented the Plaintiff from filing a timely second amended complaint in response to the Motion to Dismiss, pursuant to Rule 15(aaa), if he felt it appropriate to do so." *Gassis II* at 17.

More analogous is another case cited by Plaintiff—*MGC Capital Corp. v. Maginn*, 2010 WL 1782271 (Del. Ch. May 5, 2010), in which the court rejected the

plaintiff's attempt to introduce new allegations through its opposition to a motion to dismiss. *Id*. at *5. When faced with a motion to dismiss, the plaintiff "had a choice to make …. [i]t could either seek leave to amend its complaint or stand on its complaint and answer the motion to dismiss." *Id*. The court rejected the plaintiff's attempt to have it both ways.

Plaintiff acknowledges that the attempt in *MGC Capital* was contrary to Rule 15(aaa), but then advocates for the very result rejected in that decision. Op. Br. at 18-19. But the same policy consideration applies here; Plaintiff made his election, and now must live with the consequences.[9]

[9] Neither of the other cases Plaintiff cites supports his argument. In *Stern v. LF Capital Partners, LLC*, 820 A.2d 1143 (Del. Ch. 2003), the Court of Chancery *rejected* an attempt to amend a complaint after briefing but before oral argument. In *National Installment Insurance Services*, 2008 WL 2133417, at *7-8, the Court of Chancery rejected an attempt to amend a complaint after a post-trial opinion. And while that case was governed by Rule 15(a), not Rule 15(aaa), the result should be the same here.

II. THE BOARD PROPERLY REMOVED PLAINTIFF

A. Question Presented

Did the Court of Chancery err in finding that Defendants validly removed Plaintiff pursuant to the Bylaws without breaching their fiduciary duties to the Fund or its beneficiaries? *See Gassis I* at 30-45.

B. Scope of Review

The Court of Chancery's legal determinations are reviewed *de novo*, *Klaassen v. Allegro Dev. Corp.*, --- A.3d ---, 2014 WL 996375, at *6 (Del. Mar. 14, 2014), while post-trial factual findings must be affirmed unless they were "clearly erroneous." *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 217 (Del. 2005). "When the factual findings are based on determinations regarding the credibility of witnesses, the deference already required by the clearly erroneous standard of appellate review is enhanced." *Olson v. Halvorsen*, 986 A.2d 1150, 1157 (Del. 2009).

C. Merits of Argument

1. The Board Properly Removed Plaintiff Pursuant to Section 3.06 of the Bylaws.

Under Section 3.06 of the Bylaws, "*[a]ny* Director elected to the Board of Directors may be removed at any time … by the affirmative vote of two-thirds (2/3) of the members of the Board of Directors then in office." A106 (emphasis added). At the August 24 Board meeting, six of eight directors (*i.e.*, more than two-thirds) voted to remove Plaintiff as of September 21, 2013, when Defendants expected that Plaintiff would—and in fact did—retire as bishop on his seventy-

fifth birthday in accordance with Canon Law. *Gassis I* at 4-5, 8. Plaintiff's removal therefore was proper if he was a "Director elected to the Board of Directors."

The Court of Chancery found just that. Indeed, it found that "the only reasonable inference … is that Bishop Gassis was in fact elected as a director at some point between the Fund's incorporation and the adoption of Section 3.04." *Id.* at 34. The Court of Chancery's analysis was "informed by the crucial fact that Bishop Gassis was a director of the Fund before" the adoption of Section 3.04, which says nothing about appointing Plaintiff to the Board. *Id*. at 34.[10]

Plaintiff does not challenge the Court of Chancery's factual finding. Instead he argues that, "[r]egardless of whether he was initially elected," the effect of the Bylaws, when read together, was to crown him a permanent director and Chairman until he decides to retire or resign. Op. Br. at 27.

Plaintiff argues that Section 3.04 implicitly made him an "appointed Board member" indefinitely, "until he chose to retire or resign from the Board. Op. Br. at 25. Plaintiff claims that Section 3.06 of the Bylaws reflects a considered judgment to distinguish between appointed and elected directors, and only elected directors can be removed under Section 3.06. Op. Br. at 24. Because Plaintiff claims to be an appointed director, he asserts that he is entitled to remain on the board and serve as Chairman as long as he wished, and the Board cannot remove him. *Id*. at 26; B312-313 (claiming that Section 3.04 gave him the unqualified right to be director

[10] Plaintiff nevertheless claims that "the intent of the parties at the time of drafting" supports his interpretation. Op. Br. at 25. But none of the evidence he cites concerns that intent.

and Chairman as long as he wants). Plaintiff's arguments fail for the reasons set forth below.

a. Section 3.04 did not make Plaintiff permanent Director and Chairman.

Plaintiff misreads Section 3.04. Section 3.04 did not create a director seat or appoint Plaintiff to the Board. Rather, it simply made an existing director the "Chairman" until he retired as Bishop or resigned from the Board.

Nor was there reason for Section 3.04 to appoint Plaintiff to the Board. As the Court found, Plaintiff was already an elected director. *Gassis I* at 33-34. Not only is this consistent with Delaware law, it comports with Article SIXTH of the Fund's Certificate of Incorporation (the "Charter"). *See* 8 *Del. C.* § 107 (stating that incorporator may "perfect the organization of the corporation" by, among other things, "election of directors"); A56 (stating incorporator "is to serve as Director until the first annual meeting of the Corporation's Board of Directors or until his successor(s) is (are) elected"). That Section 3.04 designated Plaintiff as Chairman while he served as a director does not change this result.

Additionally, Section 3.04 limited the length of Plaintiff's Chairmanship. Section 3.04 states that "His Excellency, Bishop Macram Max Gassis, Bishop of El Obeid Diocese, Sudan" would serve as Chairman until his "retirement or resignation." The use of Plaintiff's title within the church in Section 3.04 demonstrates an intention to refer to his mandatory retirement from the Catholic Church. *Gassis I* at 32 n.92. Moreover, the words "resignation" and "retired" are both found in the provisions of the Code of Canon Law that address a bishop's

"responsibility … to lay his burden down." James A. Coriden, *An Introduction to Canon Law* 84 (rev. ed. 2004) (attached as Exhibit A hereto). Specifically, Canon 401 § 1 provides, "A diocesan bishop who has completed the seventy-fifth year of age is requested to present his *resignation* from office to the Supreme Pontiff, who will make provision after he has examined all the circumstances." (Emphasis added) (attached as Exhibit B hereto). And Canon 402 § 2 provides, "[t]he conference of bishops must take care that suitable and decent support is provided for a *retired* bishop, with attention given to the primary obligation which binds the diocese he has served." (Emphasis added) (*see* Exhibit B hereto). Defendants' reading therefore gives natural meanings to all of the words used in Section 3.04.

Accordingly, the Court found that "the board's intent in adopting Section 3.04 was to include Bishop Gassis as Chairman only so long as he was implementing donations on behalf of the Fund in his position as Bishop of the El Obeid Diocese." *Id.* And it further found "compelling" the interpretation that Section 3.04 "requir[ed] Bishop Gassis's exit from the Fund upon his retirement as a bishop from the Catholic Church." *Id.*

By contrast, Plaintiff's interpretation of Section 3.04 would render the words "retirement or" meaningless. Individuals "resign" from corporate office. *See, e.g.*, 8 *Del. C.* § 142(b) ("Any officer may resign at any time…."). But the DGCL only uses "retire" or "retirement" in connection with retirement plans and stock retirement. *See, e.g.*, 8 *Del. C.* §§ 122(15), 160(a)(1).

b. Plaintiff's interpretation contravenes the Bylaws, Charter, and Delaware General Corporation Law.

Under Plaintiff's interpretation, Sections 3.04 and 3.06 vested him with a permanent board position and immunity from removal, even if he committed gross misconduct.[11] But "Delaware law considers the right to remove directors to be a fundamental element of stockholder authority." *Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *11 (Del. Ch. July 21, 2000). This is true "regardless of whether [the Corporation's] Certificate of Incorporation was originally intended to provide a permanent tenure for" certain directors. *Id*.

The same should be true here. While directors in this context are not accountable to stockholders, the right to elect, and therefore remove them belongs to the Board. A contrary rule would immunize a director from removal for incompetence (despite good intentions), and even intentional misconduct. The Court should not permit such an absurd result. *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1161 (Del. 2010) ("We cannot countenance such an absurd interpretation of the contract."); *Veloric v. J.G. Wentworth, Inc.*, 2014 WL 4639217, at *9 (Del. Ch. Sept. 18, 2014) (courts "should avoid interpreting a term in an unreasonable way that would yield an absurd result").

Plaintiff's interpretation also contradicts 8 *Del. C.* § 109 and Article NINTH of the Charter. Under Section 109(a), "any corporation may in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon … its governing body." The Fund did just that; Article NINTH of the Charter states:

[11] Recognizing the untenability of his position, Plaintiff implies that he could be removed for cause, but does not explain where such a limitation is found in the Bylaws. *See* Op. Br. at 26.

"[T]he Board of Directors shall have the power to make, alter, amend, add to, or repeal this Certificate of Incorporation and the Bylaws … and all rights and powers conferred herein on Directors or members are subject to this reserved power." A60. Section 109(b) of the DGCL prohibits any bylaw provision "inconsistent with Delaware law or with the certificate of incorporation." Thus, a Bylaw that creates an indefinite position that cannot be repealed contravenes both Delaware law and the Charter.

Additionally, Plaintiff's interpretation is inconsistent with—and, indeed, belied by—Section 7.08, which permits the Bylaws to "be altered, amended, or repealed" by majority vote of the directors. A118 § 7.08. It makes little sense to read Section 3.04 as granting Plaintiff a permanent Board seat given that those same Bylaws permit a majority of the Board to repeal the provision at any time, simply by amending them. *See Gassis I* at 34-35.

Plaintiff also argues that the Board's failure to re-elect him at annual meetings evidences his right to a permanent position.[12] Of course, such external evidence can only be considered if the Court finds the provisions ambiguous. *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013). And to the extent the Bylaws are—as the Court of Chancery found—ambiguous, *Gassis I* at 33 (finding Plaintiff's interpretation "perhaps plausible," but "not the only

[12] That Plaintiff was not later re-elected is irrelevant to whether he obtained his directorship by election. The Court of Chancery made this exact point, finding that Plaintiff was an elected director "notwithstanding the board's failure to vote on the Bishop's re-election in 2011 and 2012." *Gassis I* at 34 n.97. The Board's failure to re-elect Plaintiff did not make him an appointed director, it made him a holdover director—validly occupying his seat until subsequent election or removal. *Id*. at 34.

reasonable interpretation"), the Court of Chancery found this extraneous evidence unpersuasive, *see id.* at 34 & n.97. Instead, the Court found that it was "likely that the board's intent in adopting Section 3.04 was to include Bishop Gassis as Chairman only so long as he was implementing donations on behalf of the Fund in his position as Bishop of the El Obeid Diocese." *Id*. at 32 n.92.

c. Even if Plaintiff was an appointed director, the Board properly removed him.

Even if Plaintiff is correct—that his authority as a director derived not from election pursuant to Section 3.03, but rather from appointment under Section 3.04—then that authority evaporated when the Board repealed Section 3.04, as it was entitled to do pursuant to Section 7.08, and created a vacancy. Section 3.05 of the Bylaws allows that vacancy to be filled by the vote of a majority of the Board at any meeting at which quorum is present. A106. The Board did exactly that. The Board declared a vacancy as of the date of his mandatory retirement, and that vacancy was filled by Mr. Corkery. *Id*. at *9. Even under Plaintiff's argument, if his authority as a director was given him by the Board, the Board had the power to remove that authority.

Moreover, even under Section 3.04, Plaintiff only served "until his retirement or resignation." For the reasons discussed above, *supra* 23-24, which the Court of Chancery found "compelling," "retirement" refers to his retirement as a Bishop. *Gassis I* at 32 n.92. Because Plaintiff retired as Bishop as of September

21, 2013, B522, his authority under Section 3.04 terminated and Defendants properly removed him.[13]

2. The Court of Chancery correctly held that the Board's decision to remove Plaintiff was "a valid business decision" and not a breach of its fiduciary duties.

a. The Board did not owe Plaintiff fiduciary duties.

Directors of a Delaware nonstock charitable corporation owe fiduciary duties to the corporation and its beneficiaries. *Oberly v. Kirby*, 592 A.2d 445, 462 (Del. 1991). The corporation's members and any fellow directors, on the other hand, are not the object of special duties on the directors' part. *Id.* In *Oberly*, this Court explained these principles in its review of the Court of Chancery's dismissal of a suit involving, *inter alia*, claims under Section 225 of the DGCL. *Id.* at 451. Like here, the removed directors of a nonstock charitable corporation sought to invalidate their removal on the basis of procedural deficiencies and purported breaches of fiduciary duty. *Id*. This Court ruled that the "controlling" director in that case "owed no fiduciary duties to other directors, only to the [charitable] Foundation."[14] *Id*. at 463. Thus, where a corporation is "created for a limited charitable purpose rather than a generalized business purpose, those who control it

[13] Plaintiff argues that even though he was an appointed director pursuant to Section 3.04, and not an elected director pursuant to Section 3.03, Op. Br. at 3, once his authority under Section 3.04 disappeared, he was entitled to serve "until at least the next annual election," Op. Br. at 28, citing Section 3.03. If Plaintiff's authority existed independent of Section 3.03, then that Section can offer him no refuge.

[14] The Court ruled that the defendant acted to entrench his control over the Fund, but that such entrenchment was insufficient to establish a breach of fiduciary duty. *Id*. at 463.

have a special duty to *advance its charitable goals* and protect its assets." *Id*. at 462 (emphasis added).

Here, the Court of Chancery found that Defendants did just that. Rejecting claims that certain Defendants acted for their own self-interests, the Court found that Defendants were "motivated by the[ir] desire to protect the interests of the beneficiaries of the Fund in Sudan" and took steps they believed were in the best interest of the beneficiaries. *Gassis I* at 44.

Plaintiff seeks to distinguish *Oberly* by arguing that he has a "*protectable property interest in his personal name and image which he entrusted to the Board of Directors of the Fund*." Op. Br. at 33 (emphasis in original). Plaintiff cites *In re NYMEX Shareholder Litigation*, 2009 WL 3206051 (Del. Ch. Sept. 30, 2009), for the proposition that a fiduciary duty exists where one cedes legal control over a property interest "such that the owner reposes special trust in and reliance on the judgment of those in control." Op. Br. at 32. In *NYMEX*, however, the stockholders at issue were not owed fiduciary duties because they, not the corporation, retained ownership of the "vested property interest" at issue. *In re NYMEX*, 2009 WL 3206051, at *14. The interest in that case, seats on a stock exchange, were owned by the Members and leased to others. *Id*. Because the Members retained rights and the ability to negotiate certain structural changes to the agreements, they did not give up control over their seats "sufficient to establish a distinct fiduciary duty." *Id*. at *15. So too here.

Even assuming *arguendo*, as the Court of Chancery did below, *Gassis II* at 10, that Bishop Gassis licensed his name and likeness to the Fund, he did not cede

legal control over his legal or property interest in either. *See Gassis I* at 40 n.111 ("[W]hile the Plaintiff suggests he has a property interest in the Fund, he in fact had only a property interest in the use of his name and likeness, an interest he is vigorously seeking to vindicate independent of his fiduciary duty claims.") Indeed, Plaintiff purports to have terminated any license of his likeness, Op. Br. at 13, which indicates that he believed he—and not the Fund—maintained legal control over his name and likeness. Under *NYMEX*, any right granted by Plaintiff to the Fund does not arise to "control over the [interest] sufficient to establish a distinct fiduciary duty." And Plaintiff's remedy for any harm resulting from a misappropriation of the type he complains of would have been found in the law of contracts, not fiduciary duties.

Plaintiff also cites *Baring v. Condrell*, 2004 WL 5389666 (Del. Ch. Oct. 18, 2004) for the proposition that directors of a nonstock corporation owe fiduciary duties to the members of that corporation. There, the members in question owned a housing cooperative and were found to "have a relatively large economic stake (*i.e.*, their homes) in the enterprise." *Id*. at *5.

Plaintiff has no such economic stake in the Fund. The Court of Chancery identified this flaw in Plaintiff's argument, stating that "members of a charitable nonstock corporation do not as members have an economic interest in the corporation; rather, it is the beneficiaries who have an economic interest, and accordingly, it is the beneficiaries to whom fiduciary duties are owed." *Gassis I* at 39-40 n.108.

Indeed, Plaintiff's argument exposes the fundamental flaw in his view of the purpose of the Fund. Plaintiff sees the fund as an entity created on his behalf and for his personal benefit. *Id.* at 12; B329-330. But the Fund was not created to benefit Plaintiff; the Fund was created, and Plaintiff's involvement was intended, to benefit the Fund's beneficiaries—the people suffering in war-torn Sudan. Thus, even the use of Plaintiff's image and likeness was intended not for his own personal gain, but for the benefit of others.

b. The Board was properly motivated in making its decision.

Most of Plaintiff's Opening Brief argues that Defendants engaged in a lengthy scheme to entrench themselves, free the Fund from Plaintiff's "control," and ultimately to bask in the power of distributing the Fund's resources in a manner of which Plaintiff does not approve. *See supra* p.11. Plaintiff fails to articulate how he "controlled" the Fund as a single director who admittedly was required to bring his funding requests to the full Board for approval. Further, the Court of Chancery found that this theory had "no logical force" and "that no such insidious motives existed." *Gassis I* at 41.

Plaintiff takes issue with this factual finding, arguing that the Defendants took "appallingly conspiratorial conduct," and "used their growing control over the Fund to divert money" away from certain geographic regions and certain beneficiaries. Op. Br. at 34-35. Plaintiff concludes that even if Defendants did not breach a duty to him, "they breached their express fiduciary duties to the Fund and its beneficiaries." *Id.* at 35. This is just a recasting of Plaintiff's unsuccessful

challenge to the Board's decisions about where to spend money (based upon his misreading of the Fund's purpose). *See* pp. 7-9, *supra*.

Plaintiff also has not shown that his removal caused financial harm to the Fund's beneficiaries, much less that Defendants believed that it would.[15] Plaintiff does not and cannot argue that the people of the Nuba Mountain region of Sudan have not benefitted. Nor can Plaintiff argue that the Fund has not been used to benefit the specific people he has identified in his proposed projects. B336, B344 ("[F]rom the beginning of the organization until the time the Bishop left, over 90 percent of all money went to his projects."). Instead, Plaintiff's complaint is that the Fund *also* has been used to benefit people suffering in Sudan *in addition to those he specifically wanted to help*. Op. Br. at 35.

Decisions of that nature are left to the sound judgment of the Board. "A court cannot second-guess the wisdom of facially valid decisions made by charitable fiduciaries, any more than it can question the business judgment of the directors of a for-profit corporation." *Oberly*, 592 A.2d at 462. And on that point, the Court of Chancery found "that Bishop Gassis's removal was the product of a valid business decision, and did not pose a 'palpable threat' to the Fund's charitable purpose." *Gassis I* at 45.

[15] Indeed, the Court of Chancery found that Defendants "acted to remove Bishop Gassis . . . because the[y] believed it was in the best interests of the beneficiaries of the Fund to do so." *Gassis I* at 43.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

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