



IN THE SUPREME COURT OF THE STATE OF DELAWARE

BISHOP MACRAM MAX GASSIS,
Plaintiff Below-Appellant,

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

APPEAL FROM THE COURT OF
CHANCERY OF THE STATE OF
DELAWARE,
C.A. NO. 8868-VCG

**ANSWERING BRIEF OF APPELLEES JOHN KLINK,
FATHER RODGER HUNTER HALL AND STEVEN WAGNER**

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Dated: October 31, 2014

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NATURE OF PROCEEDINGS

On September 6, 2013, plaintiff Bishop Macram Max Gassis (“Plaintiff” or “Bishop Gassis”) filed with the Court of Chancery a Verified Complaint against defendants Neil Corkery, Ann Corkery, John Klink, Father Rodger Hunter Hall, Steven Wagner, Kathleen Hunt and David Coffey (collectively, the “Individual Defendants”), as well as nominal defendant Bishop Gassis Sudan Relief Fund, Inc., a Delaware charitable non-stock corporation (the “Fund”). Among other things, Plaintiff’s complaint alleged claims against the Individual Defendants for breach of fiduciary duty, trademark infringement, unfair competition and violation of the Delaware Deceptive Trade Practices Act, 6 *Del. C.* § 2532. Plaintiff also alleged a claim under 8 *Del. C.* § 225 (“Section 225”) challenging certain actions taken by the Fund’s board of directors removing Plaintiff and two other individuals as directors.

On April 6, 2014, in response to the Individual Defendants’ motion to dismiss and pursuant to Court of Chancery Rule 15(aaa), Plaintiff filed a Verified First Amended Complaint (the “Amended Complaint”) alleging these claims, among others. The Individual Defendants moved to dismiss the Amended Complaint on April 21, 2014.

Following expedited discovery, the Court of Chancery held a one-day trial on Plaintiff’s Section 225 claim on May 7, 2014. The court also heard argument

on the Individual Defendants' motion to dismiss the Amended Complaint on that date.

On May 28, 2014, the Court of Chancery issued a Memorandum Opinion resolving Plaintiff's Section 225 claim. *See* Op. Br. Ex. C. In that opinion, the court held that Plaintiff was validly removed by the requisite vote of the Fund's board of directors as of September 21, 2013. Given the Court of Chancery's finding that Plaintiff ceased serving as a director, officer and member of the Fund as of that date, the court further held that Plaintiff lacked standing under Section 225 to challenge any other actions relating to the composition of the Fund's board.

On July 21, 2014, the Court of Chancery issued a Letter Opinion (Op. Br. Ex. B) and Order (Op. Br. Ex. A) granting the Individual Defendants' motion to dismiss Plaintiff's remaining non-Section 225 claims. In its opinion and Order, the court dismissed those claims with prejudice, including Plaintiff's claims that the Individual Defendants misappropriated Plaintiff's name and likeness, infringed Plaintiff's trademark and violated the Deceptive Trade Practices Act. Specifically as to these claims, the Court of Chancery found that the Amended Complaint failed to allege that the Individual Defendants, rather than the Fund, improperly used Plaintiff's name or likeness.

On August 19, 2014, Plaintiff filed a Notice of Appeal from the Court of Chancery's May 28, 2014 Memorandum Opinion and July 21, 2014 Letter Opinion

and Order. Prior to Plaintiff's appeal, on July 14, 2014, defendants John Klink, Father Rodger Hunter Hall and Steven Wagner (together, the "Former Director Defendants") were removed as directors and members of the Fund by vote of the Fund's board. To the extent possible, the Former Director Defendants will incorporate and rely upon the arguments advanced by the Fund and the other Individual Defendants to avoid duplication. The Former Director Defendants respectfully submit this Answering Brief to address those aspects of Plaintiff's appeal which relate specifically to them and implicate their interests.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery held correctly that the Amended Complaint failed to allege any facts suggesting that the Former Director Defendants, in their *individual* capacities, acted to misappropriate Plaintiff's name or likeness. The Former Director Defendants will not independently address Plaintiff's arguments relating to his failure to allege claims against the Fund or the Court of Chancery's application of Rule 15(aaa), but respectfully refer to and join in the Answering Brief filed by the Fund and the other Individual Defendants with respect to those issues.

2. Denied. The Former Director Defendants respectfully refer to and join in the Fund's and the other Individual Defendants' Answering Brief with respect to Plaintiff's arguments that (i) his removal from the board violated the Fund's by-laws, and (ii) he was owed fiduciary duties as a member of a non-stock charitable corporation. To the extent Plaintiff contends that his removal as a director of the Fund should be voidable because the Former Director Defendants acted inequitably or breached fiduciary duties, his appeal has no merit. To the contrary, the fact record below demonstrates that the Former Director Directors acted at all times in the best interests of the Fund and its beneficiaries and, in some instances, openly disputed and disagreed with the actions of their fellow directors. These disagreements led certain Individual Defendants, around the time of the

board meeting at which Plaintiff was removed, to consider acting to remove the Former Director Defendants and ultimately did, in fact, result in the Former Director Defendants' removal from the board. These facts show that Plaintiff has no grounds on which to claim that the Former Director Defendants "conspired" with the other Individual Defendants to act unlawfully.

STATEMENT OF FACTS

In his Opening Brief, Plaintiff refers repeatedly to the Individual Defendants as a unified group and describes what he characterizes as a willful “conspiracy” among the Individual Defendants collectively “to wrest control of the Fund from the Bishop.” Op. Br. at 7. *See also, e.g., id.* at 8 (“Defendants ... hatched a legal theory and strategic course to remove the Bishop ...”); 9 (“Defendants’ Conspiracy Against Bishop Gassis Grows”); 10 (“Defendants’ Covert Efforts to Divert Funds from the Beneficiaries”); 12 (“Defendants’ conversations without Plaintiff ... evolved into an active conspiracy ...”). Plaintiff’s attempt to paint all the Individual Defendants with a broad brush, and thereby implicate them jointly in what he claims was a concerted, three-year effort to improperly oust him from the Fund, finds no support in – and, in fact, is contradicted by – the discovery record developed below. The following recitation of facts is intended to illustrate that the Former Director Defendants (who, notably, themselves were removed from the Fund’s board after Plaintiff) at no time participated in a conspiracy to oust Plaintiff from the Fund or otherwise favored their personal interests over those of the Fund’s beneficiaries.

Plaintiff contends that the first step in the Individual Defendants’ purported scheme was a May 14, 2011 board meeting at which Father Hunter Hall was elected as a director. *See* Op. Br. at 8-9. The record reflects, however, that Mr.

Klink and Mr. Wagner rightly were concerned that then-director Nina Shea believed that the Fund's assets would pass to Plaintiff upon his retirement at age 75, concerns which led them to vote against Ms. Shea's re-election to the board. *See* A362; C72.¹ Plaintiff does not allege, nor can he, that Father Hunter Hall participated in any conspiracy before he was even elected to the Fund's board.²

The next step in the alleged conspiracy was the removal of David Forte as a Fund director in August 2012. *See* Op. Br. at 9-10. Significantly, Plaintiff contends that Mr. Forte's removal was orchestrated by Neil and Ann Corkery, rather than by any of the Former Director Defendants. *See id.* The evidentiary record cited by Plaintiff himself further reflects that the Former Director Defendants were being lobbied by others to cast votes against Mr. Forte's re-election. For example, on August 16, 2012 Mr. Corkery solicited Mr. Klink's vote by e-mail, stating: "The only question is Forte. He has 2 votes for and 2 votes against him. You will be deciding." A221. It was in this context that Mr. Corkery attempted to sway Mr. Klink's deciding vote by expressing his beliefs that Mr. Forte "is a dangerous ally of [Bishop Gassis] to have on the board" (*id.*) and "is a

¹ Citations to pages with a "C" prefix refer to the Appendix to the Answering Brief of Appellees John Klink, Father Roger Hunter Hall and Steven Wagner filed herewith.

² After one of the directors raised questions about the procedures followed at the May 14, 2011 board meeting, Neil Corkery sought legal advice from the Fund's counsel, who responded directly to Mr. Corkery rather than to the Former Director Defendants or any other board member. *See* C1-C3.

Gassis stooge” (A227). Over the subsequent days, Mr. and Ms. Corkery e-mailed between themselves to tally prospective votes, emphasizing the importance of securing Mr. Klink’s and Mr. Wagner’s votes against Mr. Forte. *See* A222 (on August 18, 2012, noting “we have 3 against and 4 for forte (assuming klink and wagner vote for)” and “it needs john [Klink] to vote against”); A225 (on August 19, 2012, suggesting that “[i]f we can’t turn John [Klink] I think we need to move on and have a board meet [*sic*] in October and propose election of Exec Committee (excluding forte)”); A229 (on August 20, 2012, reporting that “Steve [Wagner] will vote against forte. We still need john klink”). When Mr. Corkery later corresponded with the Fund’s counsel, expressing the “need to ensure this decision to vote Forte off is valid and prepare whatever defenses are appropriate to address a potential lawsuit” (C5), he shared his e-mails only with Ms. Corkery and not with any of the Former Director Defendants. *See* C4-C6.³

Plaintiff’s claim that “Defendants” contacted officials within the Catholic Church “to curry favor ... and to expand the influence of the director-Defendants themselves” (Op. Br. at 11) is particularly misplaced and finds no support in the

³ Similarly, while Plaintiff claims that the “Individual Defendants” collectively “discussed alternative measures to gain control and squeeze Bishop Gassis out of the fund” (Op. Br. at 10), the only communications he cites to support this statement are e-mails authored by Mr. Corkery. *See* A225; A232. The “secret” correspondence Plaintiff attributes to the “Defendants” as a group (*see* Op. Br. at 10) likewise was between Mr. and Ms. Corkery only. *See* A220. Finally, the marketing tests analyzing the effect of Plaintiff’s name on fundraising (*see* A286-A287) were furnished to Mr. Corkery, not to “Defendants” as Plaintiff claims (*see* Op. Br. at 10).

record. In support of this allegation, Plaintiff cites two e-mails authored by Father Hunter Hall – a Catholic priest and educator with extensive knowledge of canon law and experience as secretary to a member of the Vatican’s diplomatic corps (*see* C75) – in May and September 2012 (*see* A207-A209; A238-A240). Even a cursory review of these e-mails shows that they are far from an effort by Father Hunter Hall “to curry favor,” but rather his attempt as a cleric to strengthen the Fund’s relationship with the Church and open lines of communication that might promote greater efficiency and transparency in the Fund’s pursuit of its mission. As Father Hunter Hall testified at his deposition, “the overall thrust of [his actions] ... was towards a greater accountability, a greater strictness, a greater systemization of what the [Fund] was doing.” C76.

Moreover, neither e-mail reflects an improper intent to expand the Fund’s geographic reach. In particular, Father Hunter Hall’s September 2012 e-mail sent to the Pontifical Council of Cor Unum (the Vatican agency that oversees all charitable initiatives, *see* C78) related to a \$35,000 donation authorized by Pope Benedict XVI for the express purpose of aiding displaced persons located in the Diocese of Torit in South Sudan. *See* A238; C78-C79.⁴ To the extent Father

⁴ Subsequent correspondence shows that Father Hunter Hall strove at all times to ensure that, if the Fund was supporting projects outside the Diocese of El Obeid (*i.e.*, in the Nuba Mountains or Twic County), it properly followed Vatican policy and protocol by communicating directly with the Bishop of Wau, in whose diocese the projects were located. *See* C7; C10.

Hunter Hall referred to “certain regrettable irregularities ... originating with the particular church of El Obeid relative to funds we have provided” (A238), it was to ensure that the same irregularities did not affect utilization of Vatican funds in another diocese. *See* A239. By the time Mr. Klink met with Archbishop Leo Boccardi (the Apostolic Nuncio⁵ to Sudan) at the Vatican in June 2013, it had become clear to the Former Director Defendants that Plaintiff had pursued “exaggerated levels of spending” with Fund assets, “enjoy[ed] no support from official church structures, including at any level in the Holy See” and, therefore, that it was imperative that the Fund establish a relationship with Bishop Didi, who the Vatican recognized as Apostolic Administrator of El Obeid and the successor to Plaintiff upon his mandatory retirement. *See* A283-A284; C14-C18; C21.⁶

Not all members of the Fund’s board, however, shared this view. For example, Mr. Corkery questioned the need to open dialogue with Bishop Didi, believing a prospective meeting with him offered “low value ... that does not justify the expense of flying everyone to Rome.” C19. *See also* C23. On June 28, 2013, when Father Hunter Hall questioned a \$146,981 expenditure for a hospital

⁵ A Nuncio “is the ambassador of the Holy See as a sovereign state to another nation” and “functions as the personal envoy of the Holy Father in his capacity as sovereign of the Vatican City state.” C75.

⁶ Of course, nowhere in his Opening Brief does Plaintiff challenge or even address any of these serious issues, choosing instead to rely solely on his suspicion that the Fund’s board was motivated by its desire to expel him and misappropriate his name and likeness.

project, asking “[s]hould we not engage the new Bishop [Didi] in a dialogue before spending money on projects that he is telling the Holy Father’s ambassador that he wishes to rid himself of?” (C25),⁷ fellow director Kathleen Hunt wrote that she approved the expense based on “a desire to keep our support in place while issues related to the bishops (Gassis and Didi) are addressed.” *Id.* Ms. Corkery then e-mailed Ms. Hunt privately to express her thanks and support for Ms. Hunt’s position. *See id.* After Mr. Wagner expressed his agreement with Father Hunter Hall’s concerns and analysis, Mr. Corkery questioned Mr. Wagner’s views in a private e-mail with director David Coffey. *See* C28. When Mr. Klink then proposed that he meet with Bishop Didi during a July 2013 trip to Rome, Ms. Corkery wrote to Mr. Corkery that she “would much prefer” that Mr. Corkery attend the meeting rather than Mr. Klink. C30.

In short, the Fund directors’ opinions were far from unanimous in the weeks leading to the August 24, 2014 board meeting which Plaintiff alleges was the culmination of the concerted effort to remove him. This is reflected in the correspondence preceding that meeting, which Plaintiff characterizes as “an active conspiracy to prevent a quorum” (Op. Br. at 12) but consists mostly of e-mails between Mr. and Ms. Corkery. *See* A295; A297-A298. As Plaintiff concedes (*see*

⁷ *See also* C77 (expressing Father Hunter Hall’s “concern about the prudence of long-term capital expenditures when we ... have no contact with the coadjutor of the diocese”).

Op. Br. at 12), Father Hunter Hall openly objected to “the prospect of willfully absenting [himself] from the board meeting” (A299), and Mr. Wagner likewise believed that attempting to avoid a quorum was “a weak response on [the board’s] part.” *Id.* When Father Hunter Hall voiced his objection (*see* A301), Mr. Corkery asked Mr. Klink to “change [his] mind.” A300.

On or about July 16, 2013, Mr. and Ms. Corkery learned that Father Hunter Hall had communicated with Archbishop Boccardi in advance of the anticipated board meeting and was “given a list of questions” to pose to Plaintiff at that meeting. A307. Ms. Corkery took particular offense to this, writing to Mr. Klink that “I am very disappointed and surprised by Father’s behavior. I had thought better of him and his judgment.” A303. Ms. Corkery further stated to Mr. Klink her belief that “Father should resign. He has crossed the line and clearly has some conflict.” A305. In a separate draft e-mail he shared with Ms. Corkery, Mr. Corkery wrote: “I have not talked to Father but it is obvious he has an agenda different from others since we think the Fund is not a church institution.” A307. After he was notified that the board meeting had been canceled, Father Hunter Hall expressed to Mr. and Ms. Corkery his view that it was “a terrible mistake . . . , above all in these circumstances.” C32.

On July 19, 2013, Father Hunter Hall sent a lengthy e-mail to the other Individual Defendants in which he disclosed his prior communications with

Archbishop Boccardi and Bishop Didi and explained the purpose for his actions – to foster dialogue between the Fund and the Catholic Church officials with oversight over Plaintiff and his ecclesiastical activities. *See* C34-C54. Through his communications with the Vatican, Father Hunter Hall learned that Plaintiff, since as early as 1995, had no administrative authority over the Diocese of El Obeid. *See* C47. Father Hunter Hall further disclosed that the Vatican had, in fact, instructed him to make certain inquiries of Plaintiff since Plaintiff himself had declined direct communication with the Church (*see* C43) but later opted not to proceed with that course of action (*see* C44). The next day, Ms. Corkery shared with Mr. Corkery and Ms. Hunt a draft response to Father Hunter Hall that was highly critical of him and his communications with the Vatican. *See* C34. However, Mr. Corkery convinced his wife not to send the e-mail to Father Hunter Hall, stating “I don’t think we want to slap him down this hard right now.” *Id.*

On August 2, 2013 – prior to the board meeting at which Plaintiff was removed as a Fund director – Mr. Corkery attempted to reconcile with Father Hunter Hall, describing the July 19 e-mail as a “masterpiece” and writing that he “was wrong ... when I stated there was no benefit in talking to Bishop Didi or [Archbishop] Bocard [sic].” A321. In response, Father Hunter Hall wrote to Mr. and Ms. Corkery in part:

My conclusion from these past weeks is that [the Fund] has very serious problems at many levels – which do not

relate merely to the chairman of the board and his innumerable issues. These are now made clearer thanks only to the Holy See, the involvement of which elicited such a volatile reaction from you both. ... I have concluded, from the actions of these past weeks, that at this moment I have no confidence in this organization and, clearly, the support I have given it heretofore was a great mistake. I find it is not deserving of my support. It is evidently not what I had thought it to be. I have also misjudged the motivations of some associated with it, as has become evident to me.

A321. Ms. Corkery then responded to Father Hunter Hall by writing that Mr. Corkery “would like your help now. He has been working towards this moment for several years.” A320. In the same e-mail, Ms. Corkery also referred to “differences” between Mr. Klink and her. *Id.*

In the days prior to the August 24, 2013 board meeting, Mr. Corkery, Ms. Corkery, Ms. Hunt and the Fund’s counsel exchanged several e-mails planning for the meeting, none of which included any of the Former Director Defendants. *See* C55-C58; C62-C65. Significantly, these e-mails included strategic discussions about taking action potentially to remove all of the Former Director Defendants from the board in addition to Plaintiff. *See* C62-C65. At the same time, just a few days before the board meeting, Father Hunter Hall confided to Archbishop Boccardi in an e-mail his belief that “I may not be on the [Fund’s] board for much longer. There is now a move to try to vote me off the board, as the laity have become thoroughly hostile.” C60.

Following the August 24, 2013 board meeting – at which Father Hunter Hall abstained from the vote to remove Plaintiff as a director (*see* A336) – Father Hunter Hall expressed by e-mail his view that “[t]he board of directors has failed ... to comply with the comity of the Church I have found the method of proceeding ... inappropriate and outside the bounds of the Church’s norms and practices.” C69. While Mr. Wagner thanked Father Hunter Hall for his “important reflections,” Ms. Hunt and Mr. Corkery privately exchanged with Ms. Corkery e-mails that were critical of both Former Director Defendants and suggested that Father Hunter Hall should resign from the Board. *See* C66; C68.

Following Plaintiff’s removal, the differences of opinion between the Former Director Defendants and the other board members ultimately led to Mr. Klink, Mr. Wagner and Father Hunter Hall themselves being voted off the Fund’s board on July 14, 2014. *See* C84. The other Individual Defendants, along with new board members they elected, continue to serve as directors of the Fund. *See id.*

ARGUMENT

I. THE COURT OF CHANCERY PROPERLY DISMISSED PLAINTIFF'S CLAIMS THAT THE FORMER DIRECTOR DEFENDANTS MISAPPROPRIATED HIS NAME AND LIKENESS.

A. Question Presented.

Did the Court of Chancery hold correctly that the Amended Complaint failed to state claims for relief against the Former Director Defendants for misappropriation of Plaintiff's name and likeness, trademark infringement and violation of the Deceptive Trade Practices Act? *See* Op. Br. Ex. B at 7-15.⁸

B. Scope of Review.

"A motion to dismiss a complaint presents the trial court with a question of law and is subject to *de novo* review by this Court on appeal." *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998).

C. Merits of Argument.

The Court of Chancery found correctly that the Amended Complaint did not allege that any Former Director Defendant took any "affirmative acts of misappropriation" of Plaintiff's name and likeness. Op. Br. Ex. B at 13. Since Plaintiff cannot identify any actions undertaken by the Former Director Defendants in which they *personally* misappropriated his name and likeness, he relies instead

⁸ As noted above, the Former Director Defendants rely upon and incorporate herein by reference the other appellees' arguments concerning the Court of Chancery's holdings that Plaintiff failed to allege claims against the Fund and was not entitled to further amend his complaint under Rule 15(aaa).

on his allegations that the Former Director Defendants had *personal incentives* to cause the Fund to act unlawfully. *See* Op. Br. at 20-21.

For example, Plaintiff argues that the Individual Defendants collectively used his name and likeness “to benefit a competing organization known as the Southern Sudan Fund.” *Id.* at 20. Since Plaintiff alleges only that Mr. Klink serves as a director of the Southern Sudan Fund (A415, Am. Compl. ¶ 104), he offers no basis from which one can infer that either Mr. Wagner or Father Hunter Hall has any personal interest in that organization. Moreover, notwithstanding Mr. Klink’s connection with the Southern Sudan Fund, the Amended Complaint alleges at most that he (identified not individually, but impliedly as a member of the board) caused *the Fund* to direct payments to the Southern Sudan Fund. *See* A416, Am. Compl. ¶ 106. Plaintiff relies similarly upon a single allegation that Mr. Wagner “visited numerous parishes in Southern Sudan outside of the Nuba/Twic targeted beneficiary region” and “offer[ed] funds raised through Bishop Gassis for the targeted beneficiaries to others.” A423, Am. Compl. ¶ 122. Of course, Plaintiff does not and cannot allege that Mr. Wagner visited these parishes for his own personal benefit, since the Amended Complaint itself concedes that he traveled to Southern Sudan in June 2013 for Fund business. *See id.* As the Court of Chancery noted correctly, Plaintiff fails to recognize the distinction between

imposing liability upon an organization and imposing personal liability on the individuals through which that organization necessarily must act.

Unable to cite any conduct through which the Former Director Defendants personally misappropriated his name and likeness, Plaintiff falls back on his general allegations that “Defendants’ actions were undertaken to raise their *individual* standing within Washington, D.C. social and charitable circles and religious and social circles in the Vatican.” Op. Br. at 21. Even assuming *arguendo* that this conclusory allegation is remotely plausible,⁹ Plaintiff fails to note that these supposed reputational benefits arise solely from the Former Director Defendants’ affiliation with *the Fund*, and therefore can result only if *the Fund* succeeds through the actions of its agents. Consistent with established Delaware law (*see* Op. Br. Ex. B at 10-12), this alleged incentive is wholly insufficient to hold any Former Director Defendant liable for allegedly unlawful acts undertaken for the Fund’s benefit. Instead, a plaintiff must specifically identify affirmative, tortious actions taken by an individual agent rather than merely actions taken by or on behalf of the corporate entity. *See St. James Recreation, LLC v. Rieger*

⁹ For example, Plaintiff posits the boilerplate allegation that each of the Former Director Defendants “sought to alienate, isolate, and ultimately remove Bishop Gassis ... in order to enhance his own power, to keep himself entrenched on the Corporation’s board, and in order to satisfy the wishes of his longstanding friends Ann and Neil Corkery.” A448, A450, A454 (Am. Compl. ¶¶ 193, 199, 216). Certainly, given that the Former Director Defendants themselves were later removed as directors of the Fund, Plaintiff’s allegations that they acted to preserve their “power” over the Fund and to entrench themselves on the board are entitled to absolutely no credence.

Opportunity Partners, LLC, 2003 WL 22659875, at *8 n.40 (Del. Ch. Nov. 5, 2003) (noting that “actual participation in wrongful acts is [a] ‘crucial predicate’ to imposition of individual liability”) (citing *Donsco, Inc. v. Casper Corp.*, 587 F.2d 602 (3d Cir. 1978)); *Ayers v. Quillen*, 2004 WL 1965866, at *3 (Del. Super. June 30, 2004) (“[C]onsidering the purpose of limited liability, a principle central to corporate law, an injured party must prove the officer, director or agent participated in the tort.”). Since the Amended Complaint did not and cannot allege that the Former Director Defendants took any actions to misappropriate Plaintiff’s name or likeness for their personal, individual benefit, the Court of Chancery correctly dismissed all claims relating to that alleged misappropriation.

II. THE COURT OF CHANCERY HELD CORRECTLY THAT THE FORMER DIRECTOR DEFENDANTS DID NOT BREACH FIDUCIARY DUTIES IN CONNECTION WITH PLAINTIFF'S VALID REMOVAL FROM THE FUND'S BOARD.

A. Question Presented.

Did the Court of Chancery hold correctly that the removal of Plaintiff as a director and member of the Fund, which otherwise complied with the Fund's by-laws, was not voidable due to the Former Director Defendants' allegedly inequitable conduct and purported breaches of fiduciary duty? *See Op. Br. Ex. C at 37-45.*¹⁰

B. Scope of Review.

Appellate review of the Court of Chancery's findings of fact after trial "is limited to a search for substantial evidence supporting them." *Bartley v. Davis*, 519 A.2d 662, 664 (Del. 1986) (citing *Levitt v. Bouvier*, 287 A.2d 671 (Del. 1972)). The trial court's fact findings are accepted if they "are the product of an orderly and logical deductive process" and will be overturned only "when ... clearly wrong and the doing of justice requires." *Levitt*, 287 A.2d at 673. To the extent the Court of Chancery's post-trial ruling implicates issues of law, this Court reviews it *de novo*. *Bartley*, 519 A.2d at 664.

¹⁰ The Former Director Defendants rely upon and incorporate herein by reference the other appellees' arguments concerning the Court of Chancery's holdings that Plaintiff was validly removed under the Fund's by-laws and was not owed fiduciary duties as a member of a non-stock charitable corporation.

C. Merits of Argument.

In confirming Plaintiff's removal as a director and member of the Fund, the Court of Chancery rejected Plaintiff's claims that the removal was inequitable and/or constituted a breach of the Individual Defendants' fiduciary duties. *See* Op. Br. Ex. C at 37-44. In particular, the trial court held that the Individual Defendants properly removed Plaintiff due to "policy and personality conflicts" and dismissed Plaintiff's suggestion that the stated reasons for his removal were pretextual. *Id.* at 38. Moreover, the Court of Chancery found that Plaintiff did not "put forward any evidence sufficient to rebut the presumption that the Bishop's removal was a product of the board's valid business judgment." *Id.* at 40.

By challenging this holding as "clear error," Plaintiff relies upon his mantra that the Individual Defendants engaged collectively in an unlawful conspiracy – what Plaintiff characterizes as "breathhtakingly deceptive, secretive, and inequitable actions." Op. Br. at 33. *See also id.* at 34 (describing "Defendants'" conduct as "appallingly conspiratorial"). As the fact record demonstrates, however, any contention that the Former Director Defendants participated in a conspiracy to expel Plaintiff from the Fund is entirely misplaced.

It is axiomatic under Delaware law that a director's fiduciary duty of loyalty prohibits him from "deriv[ing] any personal benefit through self-dealing." *Anadarko Petroleum Corp. v. Panhandle E. Corp.*, 545 A.2d 1171, 1174 (Del.

1988). “Classic examples of director self-interest” include “a director receiving a personal benefit ... not received by the shareholders generally.” *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 362 (Del. 1993). With respect to a non-stock charitable corporation such as the Fund, the duty of loyalty runs to the entity’s beneficiaries, rather than its members. *See Oberly v. Kirby*, 592 A.2d 445, 462-63 (Del. 1991).

Plaintiff can identify no personal benefit to any Former Director Defendant, citing only his naked allegation that *all* Individual Defendants “engaged in a three-year long plot to removed qualified directors for purposes of their own entrenchment and control and not for the beneficiaries’ benefit.” Op. Br. at 35. As detailed above, however, the Former Director Defendants’ actions were not motivated by entrenchment or control – nor could they be, since at all times they comprised only three members of the board who, like Plaintiff, could be removed with or without cause by their fellow directors. *See* Op. Br. Ex. C at 41.

Moreover, the evidentiary record makes clear that the Fund’s board was not a unified body which spoke with one voice. The Former Director Defendants certainly did not agree with their director colleagues on all issues, and in particular the board members disagreed strongly as to how to best address Plaintiff’s impending retirement in 2013 and whether and to what extent to communicate with the Vatican concerning Bishop Gassis and the Fund’s activities. These

disagreements even led certain Individual Defendants to contemplate removing the Former Director Defendants from the board, in addition to Plaintiff, in August 2013. In short, the evidence below disproves any suggestion that the Individual Defendants collectively engaged in a conspiracy to remove Plaintiff or that any Former Director Defendant had a personal incentive to participate in such a conspiracy. To the contrary, the fact that the Former Director Defendants themselves subsequently were removed as Fund directors demonstrates that they did not act (and could not have acted) “for purposes of their own entrenchment or control.” Op. Br. at 35.

Plaintiff’s argument that the Former Director Defendants violated the intent of the Fund’s charitable purpose by “divert[ing] money destined for the true Nuba and Twic beneficiaries to the SSF and to geographic regions far greater than the Fund’s targeted beneficiaries” (*id.*) – even if correct as to the scope of the Fund’s activities¹¹ – likewise fails to prove any breach of the duty of loyalty. Once again, Plaintiff conflates the Former Director Defendants’ *personal* interests with the interests of other constituencies in Sudan. The record before the Court of Chancery contains no evidence suggesting that any Former Director Defendant had a personal incentive to allegedly divert Fund resources to displaced persons located

¹¹ As discussed by the other appellees in their Opening Brief, Plaintiff’s view of the Fund’s purpose contradicts the plain terms of the Fund’s governing documents.

in geographic regions beyond the El Obeid Diocese. Rather, even assuming *arguendo* that Fund resources were used to assist needy recipients in areas of Sudan outside the Fund's intended geographic area, Plaintiff cannot argue credibly that the Former Director Defendants could have realized any direct, personal benefits from these charitable acts that were not shared with the Fund's beneficiaries. Based on the fact record before it, the Court of Chancery found correctly that the Individual Defendants "acted to remove Bishop Gassis not out of self-interest, but because [they] believed it was in the best interests of the beneficiaries of the Fund to do so." Op. Br. Ex. C at 43.

CONCLUSION

For the reasons stated herein, Defendants Below-Appellees John Klink, Father Rodger Hunter Hall and Steven Wagner respectfully request that the Court affirm the Court of Chancery's May 28, 2014 Memorandum Opinion and its July 21, 2014 Letter Opinion and Order.

/s/ Thad J. Bracegirdle

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