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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.	:	

REPLY BRIEF OF APPELLANTS

BLANK ROME LLP
David A. Dorey (I.D. No. 5283)
Elizabeth Sloan (I.D. No. 5045)
1201 Market Street, Suite 800
Wilmington, DE 19801
dorey@blankrome.com
Counsel for Plaintiffs Below-Appellants BISHOP MACRAM MAX GASSIS, and derivatively on behalf of BISHOP GASSIS SUDAN RELIEF FUND, INC.

Dated: November 17, 2014

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PRELIMINARY STATEMENT

Appellant Bishop Macram Max Gassis ("Bishop Gassis" or "Plaintiff"), for himself and derivatively on behalf of the Bishop Gassis Sudan Relief Fund, Inc. (the "Fund") files this reply brief to correct the misstatements of law and fact contained in the answering briefs submitted by the current Director-Defendants Neil Corkery, Ann Corkery, David Coffey, and Kathleen Hunt (the "Corkery Defendants") and the now-former Director-Defendants John Klink, Father Rodger Hunter Hall, and Steven Wagner (the "FDDs") (all Defendants collectively "Defendants"). Supporting the Delaware Court of Chancery's (the "Trial Court") dismissal of Plaintiff's claims for misappropriation of name and likeness, trademark infringement, and deceptive trade practices (collectively the "Likeness Claims"), the Corkery Defendants elevate form over substance, placing dispositive weight on those counts' headings, even as they admit that Plaintiff substantively pleaded a viable claim against the Fund, and distort the events and arguments leading to dismissal in their attempt to deny amendment. On the Likeness Claims against the individuals, all Defendants ignore the proper standard on a motion to dismiss—whether there is any reasonably conceivable set of circumstances susceptible of proof.

The Corkery Defendants also fundamentally mischaracterize Plaintiff's core arguments as to why Bishop Gassis was invalidly removed as a director. Those

arguments are: 1) Bishop Gassis was a perpetual, *not* permanent, director; he was not subject to annual election and could only be removed for cause, and 2) Defendants owed Bishop Gassis fiduciary duties as a *member* with exceptional and proprietary interests in the operation of the Fund.

Finally, the FDDs center their brief on their own removal from the Board as Fund Directors *after* the Trial Court delivered its § 225 Opinion, a fact not disclosed until after appeal. They contend that they could not have breached their fiduciary duties to Bishop Gassis, or been involved in any Board conspiracy sufficient to call into question their allegedly disinterested business judgment in removing him, because they, too, were ultimately removed by the Corkery Defendants. The FDDs raise this previously undisclosed schism within the Fund directorship for the first time on appeal, casually discarding the well-worn arguments and evidence they presented below. These tactics not only violate this Court's rules and principles of appellate procedure, they wholly offend basic conceptions of fairness and justice. Besides, this argument has no logical force; Defendants' subsequent discord does not diminish their prior collaboration. Plaintiff respectfully asks that this Court apply the law and stop Defendants' disregard for it.

I. PLAINTIFF PROPERLY PLEADED LIKENESS CLAIMS AGAINST BOTH THE FUND AND THE INDIVIDUAL DEFENDANTS, WHILE ANY ALLEGED DEFICIENCY MAY BE CURED BY AMENDMENT

For three reasons, Defendants' Answering Briefs fail to counter Plaintiff's contention that the Likeness Claims must be reinstated. First, Defendants do not dispute that Plaintiff pleaded viable substantive allegations against the Fund, instead adopting the Trial Court's flawed reliance on mislabeled headers. Second, Defendants misstate the procedural posture leading to Plaintiff's alternative request to amend the Likeness Claims, and in so doing, they fail to adequately contest that Plaintiff has met the Rule 15(aaa) good cause/no prejudice standard. Third, neither brief disputes that Plaintiff has adequately pleaded Likeness Claims against Defendants individually; instead, they impermissibly conflate the standard on a motion to dismiss with that on review of the Trial Court's § 225 opinion.

A. Defendants Do Not Dispute that Plaintiff Substantively Alleges the Likeness Claims Against the Fund.

As Plaintiff emphasized in his Opening Brief, the Likeness Claims must be reinstated because the Trial Court admitted that he successfully pleaded viable claims against the Fund, but dismissed them anyway because the "Fund" was not named in the Likeness claims' headers. (Plaintiff's Opening Brief ("Op. Br."), p. 15; Ex. B, p. 10, 14). In their Answering Brief, the Corkery Defendants follow suit. They *agree* that Plaintiff, in substance, targeted the Likeness Claims against the Fund and pleaded them properly. (*See* Answering Brief of the Corkery

Defendants ("CD Ans. Br."), pp. 14–15). Since Delaware law requires pleadings to be construed in the interests of 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)), and given that Plaintiff, Defendants, and the Trial Court all agree that Plaintiff sufficiently pleaded substantive allegations supporting his Likeness Claims against the Fund which should survive for trial, this Court should reinstate them.

B. Plaintiff has met the Rule 15(aaa) Standard for Amendment

Even if the Court holds that a cause of action's headings are dispositive, or if the Plaintiff otherwise failed to identify the Fund as a direct Defendant, this case presents unimpeachable circumstances of "good cause" and lack of prejudice, thereby favoring amendment. To avoid this undeniable conclusion, the Corkery Defendants tell a patently untrue version of the Likeness Claims' procedural posture. They say the Court should not allow amendment because Plaintiff was "warned" twice of the technical error of not naming the Fund as a Defendant, and that "[i]n 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." (CD Ans. Br., p. 18).[1] This contention is emphatically incorrect.

[1] Even more misleading are the Corkery Defendants' assertions that Plaintiff "had many opportunities to rectify his omission," (CD Ans. Br. at 17) and "was given repeated notice of the deficiency of his complaint," (CD Ans. Br. at 18), despite identifying at most two such instances.

Defendants' *one* alleged "warning" was buried in a footnote in their initial Motion to Dismiss, and Plaintiff, through inadvertence at a minimum, did not add the Fund to the Likeness Claims in his First Amended Complaint. (Op. Br., p. 15, Ex. B, pp. 17–18; A497). When Defendants elevated the issue to its argument section in their renewed Motion to Dismiss, however, Plaintiff chose to file a responsive brief ***and*** raise the almost ministerial request for amendment under Ch. Ct. R. 15(aaa) at the same time. This procedure has been endorsed by the Chancery Court in *Tvi Corp. v. Gallagher*, 2013 Del. Ch. LEXIS 260, at *63–65 (Del. Ch. Oct. 28, 2013). As Plaintiff has said, he proceeded this way to foster litigation efficiency. Given the consolidation of the § 225 trial and motion to dismiss hearing, "[s]eeking leave to amend [a second time] instead of filing an answering brief would have…unduly taxed the Court's time and resources," (A509), and "complicat[ed] what was an expedited briefing schedule." (Op. Br., p. 18 n. 2). It was also done in an attempt to keep the Likeness Claims against the Fund within this litigation and prevent a separate suit to vindicate those rights. (See Op. Br., p. 19 n. 3).[2] Since Plaintiff sought only to add the Fund, against which the Trial Court admitted Plaintiff had made sufficient allegations, (Op. Br.,

[2] Defendants fail to contest Plaintiff's assertion, (Op. Br., p. 18 n. 3), that a separate case could be brought against the Fund even if the Court affirms the dismissal of the Likeness claims here. Thus, just as the *Tvi Corp.* court stated in allowing amendment under 15(aaa), "denying the Motion to Amend as to the new claim would not benefit Defendants substantially, because Plaintiffs likely could re-file the new…claim in a separate complaint, as a distinct cause of action..." *Tvi Corp.*, 2013 Del. Ch. LEXIS 260 at *70–71.

Ex. B, p. 14), no new claims or facts would have changed Defendants' motion to dismiss. Therefore, this Court need answer only one question regarding amendment if it believes excluding the Fund from the header outweighs the Amended Complaint's substantive allegations. Should Plaintiff be allowed to pursue claims that the Trial Court admitted would survive for trial if not for a single failure to amend the Likeness Claim headers, despite the good cause of increasing litigation efficiency and that minor amendment's lack of prejudice to Defendants? The Court should answer affirmatively and reverse the Trial Court.

C. Defendants Ignore the Motion to Dismiss Standard that a Reasonably Conceivable set of Circumstances is all Plaintiff Need Show to Support Individual Liability for the Likeness Claims

Finally, neither answering brief adequately addresses the only question relevant to whether Plaintiff properly pleaded Defendants' individual liability under the Likeness claims—whether Plaintiff pleaded a reasonably conceivable set of circumstances sufficient to defeat a motion to dismiss. Review of the Plaintiff's claims' dismissal involves *de novo* application of the same standard the Trial Court applied. *Price v. E. I. DuPont De Nemours & Co.*, 26 A.3d 162, 166 (Del. 2011). And that standard requires the court to "accept all well-pleaded factual allegations in the Complaint as true, accept even vague allegations in the Complaint as 'wellpleaded' if they provide the defendant notice of the claim, draw all reasonable inferences in favor of the plaintiff, and deny the motion unless the plaintiff could

not recover under any reasonably conceivable set of circumstances susceptible of proof." *Cent. Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011).

Given this standard, the Court should reject all Defendants' arguments that Plaintiff's Likeness Claims relate to "failed" and "illogical" theories based on Defendants' conception of the proof in the case, (CD Ans. Br., pp. 15–16), or that specific allegations establishing the potential of proving the Likeness Claims should be discarded because conclusive proof has not already been proffered. (FDD Ans. Br., pp. 16–18). As Plaintiff argued below, the Trial Court's §225 factual findings do not affect consideration of the Motion to Dismiss because those factual findings are outside the pleadings, are subject to a different standard, and, unlike the Likeness Claims, have had the benefit of discovery. (AR117–119).

Applying the correct standard, the First Amended Complaint easily pleads a reasonably conceivable set of circumstances establishing individual liability of *each* Defendant by identifying unlawful actions, individual motives for those actions, and personal benefits inuring to them individually. (Op. Br., pp. 20–21).[3] Plaintiff has made especially strong claims of individual benefit against Ann

[3] For ease of reference, the paragraphs establishing liability for each Defendant are: Ann Corkery (A401, ¶ 51; A456–458, ¶¶ 221–225); Neil Corkery (A401, ¶ 51; A423, ¶ 122; A444, ¶ 179; A456–458, ¶¶ 221–225); Kathleen Hunt (A452, ¶ 210; A456–458, ¶¶ 221–225); David Coffey (A401, ¶ 51; A423, ¶ 122; A451, ¶ 204; A456–458, ¶¶ 221–225); John Klink (A401, ¶ 51; A448–449, ¶ 193; A456–458, ¶¶ 221–225); Rodger Hunter-Hall (A454, ¶ 216; A456–458, ¶¶ 221–225); and Steven Wagner (A401, ¶ 51; A423, ¶ 122; A450, ¶ 199; A456–458, ¶¶ 221–225).

Corkery, Neil Corkery, and John Klink for their improper relationship with the competing Southern Sudan Fund (A415–416, ¶¶ 104–106), against Ann and Neil Corkery for their financial interests in maintaining Mr. Corkery's considerable salary and benefits from the Fund. (A444–445, ¶ 180; A446–447, ¶ 186). Defendants conceded as much below, stating that Neil and Ann Corkery "arguably" had an improper motive given their financial interests. (B443). Moreover, these interests are directly tied to Defendants' fraudulent advancement of Bishop Gassis's name, likeness, and reputation on behalf of the Fund. Executive Director Neil Corkery, with Ann Corkery's active support, needed to sell Bishop Gassis's name and likeness to donors and beneficiaries (and Bishop Gassis's promised involvement with those causes and projects) to raise $12 million during the three years they knew they intended to remove him (holding $6.5 million when they did so). (A339–340). This would in turn justify enhanced salary and benefits for Mr. Corkery due to the Fund's success, and elevate all Defendants' status and reputation. Thus, they concealed from Bishop Gassis their intention to remove him so they could continue to use his name and likeness on fraudulent pretenses.

For each of these reasons, Plaintiff has cleared the pleading hurdle of Del. Ch. Ct. R. 12(b)(6) and sufficiently made out the Likeness Claims against all the individual Defendants.

II. BISHOP GASSIS WAS INVALIDLY REMOVED FROM THE FUND

A. The Bylaws and their History Establish that **Plaintiff was a Perpetual, not Permanent, Director**

Defendants base their opposition to Plaintiff's contention that his removal violated the Fund's bylaws on a fundamental misstatement of that claim. They wrongly summarize Plaintiff's position as that "the effect of the Bylaws, when read together, was to crown him a permanent director and Chairman until he decides to retire or resign." (CD Ans. Br., p. 22). Plaintiff claims nothing of the sort. Instead, Plaintiff's position is that Bylaw § 3.04 appointed him as a perpetual director and Chairman, not subject to annual election, which was to continue until he either retired as Chairman, resigned from the Board, ***or*** was removed ***for cause***.

This follows inexorably from construing the bylaws "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). Section 3.04 unambiguously provides for Bishop Gassis's perpetual appointment as Chairman of the Board he "***shall*** be" in such a position and "***shall*** serve in this position until his retirement or resignation." (A105, § 3.04) (emphasis added).

The plain meaning of "Chairman of the Board" is that such a person is a director, and not an officer as the Trial Court held. Regardless, other Bylaws confirm this understanding. Section 5.01 provides that the "Board shall elect its Officers, consisting of a President, a First Vice-President, a Second Vice-President,

a Secretary, and a Treasurer." (A111, § 5.01). "Chairman" is not included in the exclusive list of officer positions, and thus cannot be an officer. Moreover, § 5.01 requires officers to be elected, which is incompatible with the Chairman's appointment under § 3.04. Thus, Bishop Gassis was an appointed director, and Bylaw § 3.06 allows director removal without cause only for "[a]ny Director elected" (A106, § 3.06).

The Trial Court's finding that §3.04 could not have "appointed [Plaintiff] to a director seat he already held," (Op. Br., Ex. C, p. 34), confuses the issue. The Bylaws limited director terms, requiring reelection. (*See* A88, A90, A105–107, §§ 3.03, 3.09). Thus, an individual's status as director is valid only as of the latest election. Thus, in 2002 Bishop Gassis's elected status ended, and only § 3.04's presence in the Bylaws, not any prior election, allowed him to serve as director.

Moreover, this reading does not contradict Delaware law and public policy; it does not prevent a for-cause removal. As the Corkery Defendants acknowledge in their answering brief, there is an inherent right to vote to remove a director for cause under fundamental principles of corporate law. *Rohe v. Reliance Training Network, Inc.*, C.A. No. 17992, 2000 Del. Ch. LEXIS 108, at *59 n. 50 (Del. July 21, 2000). Thus, the Corkery Defendants' contention that a "contrary rule would immunize a director from removal for…even intentional misconduct" is incorrect, as Bishop Gassis was subject to removal for cause. (CD Ans. Br., p. 25).

In addition to their distorted characterization of Plaintiff's position, the Corkery Defendants' other bylaw-related arguments fail. First, their attempt to read § 3.04 in harmony with canon law should be rejected.[4] The Bylaws neither mention nor incorporate by reference canon law, and Delaware law should not be read to incorporate religious law as a matter of public policy. Ann Corkery admitted that canon law does not apply to the Fund. (AR180, AC Tr., 72:4-74:12). Moreover, in the context of contractual interpretation, "[t]o incorporate one document into another, an explicit manifestation of intent is required." *Wolfson v. Supermarkets General Holdings Corp.*, 2001 Del. Ch. LEXIS 6, *16 (Del. Ch. Jan 23, 2001). Finally, the unambiguous words "retirement or resignation" must be given their plain meaning within the full context of the Bylaws and in the context of the corporate structure. Bylaws § 3.07 discusses "resignation" from the Board, while "retirement" in § 3.04 refers to the Chairman position. This reading is plainly apparent without resort to canon law.[5]

Second, the Corkery Defendants' wrongly rely on their repeal of § 3.04 of the Bylaws to thwart Plaintiff's argument. Repeal of § 3.04, if appropriate,[6]

[4] Even so, the Code of Canon Law they provide cites "resignation" from office after turning 75 years old and for a number of other reasons. (CD Ans. Br., Ex. B, 4.01, §§1–2, 402 §1).
[5] Regardless of whether the Trial Court found Defendants' contrary position "compelling" or not, this is a legal interpretation of the Bylaws that this Court must resolve *de novo*.
[6] The Court below also disregarded (Op. Br. Ex. C at 38) Plaintiff's arguments that the Fund's historical operation pursuant to §3.04 (Plaintiff as chief public representative and policy-maker) created fiduciary duties to beneficiaries that were breached with §3.04's repeal. (AR30–35).

merely eliminated Bishop Gassis's status as a perpetually appointed director, subjecting him to annual election at the next properly held meeting. Nevertheless, he remained appointed until that time.

And third, the Corkery Defendants' strange argument that the August 24th resolutions created a vacancy on the Board does not change the analysis. Resolution 1 was not an annual vote against Bishop Gassis's reelection, it was a removal, and thus needed to comply with the Bylaws' restrictions on removal.

Thus, Plaintiff was a perpetual director, entitled to serve until he retired as Chairman, resigned from the Board, or was removed for cause. As none of those events occurred, he should remain on the Board.[7] And if removal was improper, then this Court must also reverse the Trial Court's finding that he has no standing to pursue his derivative claims and ultimately requires remand and reconsideration of the Motion to Dismiss it its entirety. (Op. Br., Ex. B, pp. 5–6; AR122–125).

B. Defendants Owed Bishop Gassis Fiduciary Duties as an Exceptional Member of the Fund

Next, the Corkery Defendants engage in a flawed analysis of *Oberly*, reflecting another misunderstanding of Plaintiff's position. They wrongly contend

[7] Defendants clearly did not remove Bishop Gassis for cause. As argued below, a "director can only be removed for cause after notice of the charges and an opportunity to be heard," *Hockessin Cmty. Ctr., Inc. v. Swift*, 59 A.3d 437, 464 (Del. Ch. 2012), and Bishop Gassis was not formerly charged with any violations or afforded those procedures. (A501). Moreover, Defendants clearly argued below that "Plaintiff Was Not Removed 'for Cause'." (B437).

that *Oberly*'s holding that directors owe no fiduciary duties to other directors dictates the outcome here. (CD Ans. Br., p. 28 (citing *Oberly v. Kirby*, 592 A.2d 445, 463 (Del. 1991))). Plaintiff's position is that Defendants owed fiduciary duties to Bishop Gassis as a ***member***—indeed as a member with an exceptional personal and proprietary interest in the Fund, and it is that recognized legal principle that Plaintiff seeks to apply here.

Starting with first principles, Delaware corporate law provides that members of a non-stock corporation are equivalent to for-profit corporation stockholders. 8 *Del. C.* § 114(a)(1); 8 *Del. C.* § 141(j). *Oberly* is consistent with this principle in its limited holding that directors do not owe fiduciary duties to other *directors* of a non-stock corporation. This is clearly so as the plaintiffs in *Oberly* were directors, but not members of the charity at issue. 592 A.2d at 461. *Oberly* does, however, add the proviso that fiduciary duties in a non-stock corporation must flow only to those in positions truly analogous to stockholders. *Id*. at 461–62.

These principles were then distilled in *In re Nymex S'holder Litig.* into the law that applies here. 2009 Del. Ch. LEXIS 176 (Del. Ch. Sept. 30, 2009). *Nymex* held that whether fiduciary duties run to members does not depend on the corporation's status as a stock-holding or non-stock entity. Id. at *54. Instead, the critical question is whether there is a special or exceptional relationship between the member and the corporation such that the member has "a property or other

equitable interest" and has ceded "legal control" over such interest. *Id*. at *55. Bishop Gassis perfectly meets this standard. The Fund deeply intertwined its existence with Bishop Gassis's name, likeness, reputation, and life's work. (Op. Br. pp. 32–33). This is an ideal case with highly unique, if not unprecedented facts (Plaintiff's identity tied to corporate identity), for that principle's application.

C. The FDDs Base their Fiduciary Duty Arguments on New, Inadmissible, and Illogical Arguments not Raised Below

The FDDs take issue with what they call "Plaintiff's attempt to paint all the Individual Defendants with a broad brush…" (Answering Brief of Former Director Defendants ("FDD Ans. Br.") at 6), in arguing for the first time in this litigation that the individual defendants were not united in their decisions to limit and then remove Bishop Gassis from the Fund. Yet, Plaintiff merely paints Defendants with the same brush that they themselves used at every step of this litigation. The FDDs cannot now, on appeal and after Plaintiff has filed his opening brief, change their entire theory of the case and cite to evidence not in the record below. In addition, the FDDs do not explain—as they cannot—how Defendants' internal disagreements and removal of three of their number from the Board logically affects Plaintiff's theory and the undisputed documented evidence that they conspired to remove Bishop Gassis unlawfully. The Court must disregard the FDDs' brief on this point in its entirety.

1. The FDDs' arguments were not raised at trial and may not be considered on appeal.

A fundamental principle of appellate authority is that arguments not fairly presented in the trial court may not be raised for the first time on appeal. *Russell v. State*, 5 A.3d 622, 627 (Del. 2010); *see also Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (applying principle to evidentiary arguments). This principle is codified in this Court's rules, which state: "Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented." Del. Supr. Ct. R. 8 (2014). Thus, any claim not raised below is deemed waived in the absence of plain error. *Martin v. Nat'l Gen. Assurance Co.*, 2014 Del. LEXIS 310, at *7 (Del. July 9, 2014). Moreover, "arguments on appeal by…new counsel (retained post-trial) that directly contradict[] the arguments made earlier by…trial counsel" may not be considered. *TR Investors, LLC v. Genger*, 2013 Del. Ch. LEXIS 48, at *58–60 (Del. Ch. Feb. 18, 2013).

In their § 225 brief below, Defendants submitted one, unified brief that did not discuss or raise the argument that no conspiracy could exist because the Defendant-Directors had split into different factions. (B370–455). Indeed, many of the averments made below directly contradict the story the FDDs now tell here. Defendants, including the FDDs, argued before the Trial Court *inter alia* that they "began to engage in succession planning," (B381), voted against Nina Shea's

reelection because "they shared a concern regarding Shea's belief[s]" (B408), and "acted throughout on a well-informed basis, disinterestedly" and "kept the best interests of the Fund and its beneficiaries in the forefront of their decision making." (B439–440, B443). Indeed, they portrayed themselves as a harmonized and accomplished group working together and praised the actions and qualifications of all Defendants, including the Corkery Defendants. (*See* B387–389, B395–396). These arguments are plainly inconsistent with the FDDs new efforts to pin the removal of David Forte solely on the Corkerys, (FDD Ans. Br., p. 8), or to suggest that the Corkery Defendants and the Former Director Defendants were wholly at odds over reaching out to the Vatican. (FDD Ans. Br., pp. 9–14).

Moreover, these new arguments would not correct plain error of the Trial Court, but would instead inject a new defense theory into this case well after the time that Plaintiff could meaningfully respond. Thus, the FDDs' brief rests primarily on arguments waived and presented here in violation of Del. Supr. Ct. R. 8, and the interests of justice do not require their consideration.

2. The FDDs' arguments and appendix are based on evidence outside the trial record.

The FDDs argue for the first time on appeal that a schism between them and the Corkery Defendants existing before Plaintiff's 2013 removal prevents them from being part of any "conspiracy to oust Plaintiff" or means they did not favor their personal interests over the Fund's beneficiaries. (FDD Ans. Br., pp. 6–15).

Shockingly, no one disclosed this schism to Plaintiff when he could have explored it as part of discovery on the §225 proceeding. In addition, the substance of the FDDs' appendix violates this Court's rules.

"An appeal shall be heard on the original papers and exhibits which shall constitute the record on appeal." Del. Supr. Ct. R. 9. Rule 9 "implicitly imposes a limitation upon the record on appeal by requiring that such record shall consist of 'the original papers or exhibits.' 'Original papers' are documents filed with and presented to the trial court. This classification does not include documents prepared solely for introduction into evidence." *Delaware Elec. Coop. v. Duphily*, 703 A.2d 1202, 1206 (Del. 1997). The FDDs utterly ignored this rule when they cited internal, self-serving emails *not part of the trial record* to support their position. Of the twenty exhibits in their appendix, only three were in the record below without objection, and two others are improperly in this record on appeal. [8] None of the other 15 documents the FDDs cite were on the trial exhibit list below.

All Defendants, in their respective appendices and briefs, rely upon each other's deposition testimony. They attempted the same below in their §225

[8] Only the FDDs' appendix exhibits C1, C55, and C59 were on the trial exhibit list (*see* AR91, Ex. P-22; AR96, Ex. P-109; and AR99, Ex. P-161). Also, the FDD appendix exhibit beginning at C28 was trial exhibit DX057 that Plaintiff objected to (AR105), and it should therefore not be in this record. Finally, of the 22 pages the FDDs included beginning at C34 in their appendix, only the first two pages (C34 and 35) were in the trial record below, and the FDDs' own trial counsel objected to those pages going into evidence. (AR99, Ex. P-158).

Answering Brief, to which Plaintiff emphatically objected. (AR11, fn. 3; AR77-81; AR90–109). The Trial Court reserved decision on that issue at the May 7 hearing, noting that "[t]he defendants can proceed at their own risk if they want to rely on the depositions, and I will make a decision at the end of the action what [sic] I need to rely on and whether it's appropriate." (AR112). In the end, the Trial Court never ruled, but it primarily relied on Ann Corkery's in-court testimony while appearing to disregard Defendants' depositions. (*See* Op. Br., Ex. A, at Ex. C). This Court, too, should ignore those references. *See* Del. R. Evid. 801(c), 802.

3. The FDDs' arguments are based on an alleged conflict they never disclosed to Plaintiff or the Court until this appeal, raising questions about the integrity of the record below.

On August 20, 2014, one day after Plaintiff filed his notice of appeal, Defendants' counsel inexplicably moved to withdraw from representing any Defendant, citing Delaware Lawyers' Rule of Professional Conduct Rule 1.16(a)(1) (withdrawal if "representation will result in the violation of the rules of professional conduct or other law." (AR139). The Trial Court granted the motion before Plaintiff could respond (AR138). Plaintiff filed a Motion for Reconsideration, identifying concern that the non-stated reasons for withdrawal could have impacted discovery and the trial record. (AR 145–153). The Trial Court nullified its Order for lack of jurisdiction. (AR175–176, 22:15 to 23:14).

The FDDs new argument on appeal that there was Board conflict when Plaintiff was removed and that they, too, were almost removed casts further doubt on the Trial Court record and discovery. This just-disclosed information renders highly suspect the FDDs' argument below that Plaintiff had a "groundless suspicion that 'the reasons requiring withdrawal impacted the proceedings before this Court in this matter.'" (C81). It is now quite clear that the FDDs' new appellate arguments were knowingly concealed, or at least undisclosed throughout the §225 discovery and trial proceedings. (C80–85). This adversely affected Plaintiff's right to explore them, and to obtain documents from and depose Klink and Wagner.[9] Now that the FDDs made this an issue in their brief, the Court should remand the matter for full consideration of why withdrawal occurred, when the reasons arose, and whether they impacted discovery or the Trial record below.

4. The FDDs' arguments do not diminish Plaintiff's claim that they breached their fiduciary duties.

Even setting aside these fatal procedural flaws, the FDDs' contention that "the fact that the Former Director Defendants themselves subsequently were removed as Fund directors demonstrates that they did not act (and could not have

[9] As the §225 Action was a summary proceeding, full discovery was not taken from Klink, Wagner, or Coffey (no depositions or documents), and Hunt (no deposition). (*See* AR119-122, arguing why the § 225 conclusions should not affect other claims at the pleading stage). Had this conflict been disclosed to Plaintiff (in contrast to the joint representation advanced below), Plaintiff would have deposed Klink, Wagner, and perhaps Hunt, and would have continued other lines of questioning with the Corkerys and Hunter-Hall.

acted) for purposes of their own entrenchment or control" is astonishing. (FDD Ans. Br., p. 23). That the FDDs were later removed from the Board does not affect their prior conspiratorial conduct. To the contrary, simple logic dictates that after-the-fact disharmony cannot change prior agreement toward unlawful action. In addition, there is no record detailing the reasons for the FDDs' conflict with the remaining Board members, or why they were removed. Without discovery there is no way for the Court to evaluate the effect of the FDDs' removal. Finally, the FDDs' contention is belied by the clear, documented evidence contained in the record negating any valid business judgment. (A201; A211–216; A288–294; A362–363; A529–530 (showing self-interested and secretive conduct of the FDDs inconsistent with above-board and legitimate transition planning)). The Trial Court termed these facts to be "less-than-transparent." Op. Br., Ex. C at 43. This Court should hold them unlawful.

BLANK ROME LLP

/s/ David A. Dorey
David A. Dorey (DE Bar # 5283)
Elizabeth Sloan (DE Bar # 5045)
1201 Market Street, Suite 800
Wilmington, DE 19801

Attorneys for Bishop Macram Max Gassis, individually, and derivatively on behalf of the Bishop Gassis Sudan Relief Fund, Inc. Plaintiffs Below, Appellants

Dated: November 17, 2014