

IN THE COURT OF CHANCERY 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,)

Plaintiff,)

v.)

Civil Action No. 8868-VCG

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

Defendants,)

and)

BISHOP GASSIS SUDAN RELIEF)
FUND, INC., a Delaware charitable)
nonstock corporation,)

Nominal Defendant.)

MEMORANDUM OPINION

Date Submitted: May 9, 2014

Date Decided: May 28, 2014

David A. Dorey and Elizabeth A. Sloan, of Blank Rome LLP, Wilmington, Delaware, Attorneys for the Plaintiff.

Elena C. Norman, Timothy Jay Houseal, Kathaleen St. J. McCormick, Elisabeth S. Bradley, and Lakshmi A. Muthu, of Young Conaway Stargatt & Taylor LLP, Wilmington, Delaware; OF COUNSEL: Scott J. Ward and Stephen H. King, of Gammon & Grange, P.C., McLean, Virginia, Attorneys for the Defendants.

GLASSCOCK, Vice Chancellor

Sudan is a country shattered by sectarian civil war. Particularly harshly affected have been the regions in central Sudan, where the conflict between the Islamic government and its Christian citizens has been keen. The southern portion of Sudan has recently seceded and formed a new nation, South Sudan. Unfortunately, conflict persists, both there and in what was the central—now the southern—regions of Sudan itself.

This unfortunate litigation involves a struggle over a charitable corporation founded to help the oppressed people described above, particularly but not exclusively the people of the Nuba Mountain region of what is now the southern part of Sudan. The charity, now known as Sudan Relief Fund, Inc. (the “Fund”), consisted of two very different but indispensable elements: organizers and fundraisers in the United States, and those guiding the use of charitable funds on the ground in one of the more remote and dangerous areas of the world. Although the Fund is not officially associated with the Catholic Church, its board members are all congregants of that Church, and the Fund has distributed its charity through a Catholic group—the Comboni Missionary organization—and the Catholic Diocese of El Obeid, which encompasses the Nuba Mountain region. The Bishop of El Obeid, from the time of the Fund’s creation until recently, was Macram Max Gassis. Bishop Gassis was the face of the charity, which for many years bore the name Bishop Gassis Sudan Relief Fund. He directed the charitable works on the

ground in Sudan. Bishop Gassis was also the designated Chairman of the Board of the Fund. Both his status as board member and Chairman were largely honorific, however; he devoted little effort towards operating or overseeing the charity. His Fund-related time was spent on the ground in Sudan, doing the work for which the charity was organized.

On August 23, 2013, the Fund's board of directors voted to remove Bishop Gassis from the board. This litigation resulted, with the Plaintiff, Bishop Gassis, alleging that the board breached its fiduciary duties, misappropriated his name and likeness and committed other actionable wrongs. The Amended Complaint also seeks a determination that Bishop Gassis and two other board members were not validly removed from, and thus still serve on, the board. This Memorandum Opinion addresses that summary proceeding under Section 225 of the DGCL. I find that Bishop Gassis was validly removed by a two-thirds vote of directors, as provided in the Fund's Bylaws, effective September 21, 2013; that he ceased to be a member, officer, or director of the Fund at that time; and that he therefore lacks standing to challenge the current composition of the board. The other issues will be addressed by separate Opinion.

I. FACTS

1. Bishop Macram Max Gassis

In order to understand the issues before me, it is necessary to know something of the history of the remarkable individual who is the Plaintiff in this action, Bishop Gassis, and the diocese he administered for many years. Bishop Gassis is a former Catholic Bishop of the El Obeid Diocese. He was born in the city of Khartoum, located in northeastern Sudan. In 1957, Bishop Gassis joined the Comboni Missionary, and in 1964, after attending seminary in Italy, he was ordained.¹ Bishop Gassis was elected Apostolic Administrator of the El Obeid Diocese in October 1983 and, in 1988, he was nominated Bishop of that diocese.²

The El Obeid Diocese is one of two dioceses in Sudan; the other is the Archdiocese of Khartoum.³ The El Obeid Diocese, which covers a geographic area two-and-a-half times the size of Italy, is located predominately in western Sudan but also extends into portions of newly-independent South Sudan.⁴ The diocese includes the areas of “North and South Darfur, North and South Kordofan (the Nuba Mountains) and [the] Abyei region.”⁵

¹ P-165; P-169; DX 063.

² P-169; DX 063; Am. Compl. ¶ 19.

³ P-45 at BGF000579.

⁴ DX 63; DX 76; Am. Compl. ¶19.

⁵ Am. Compl. ¶ 19.

The Nuba Mountain region—“located between Arab Sudan and the Christian South Sudan”—is of particular interest to the Bishop.⁶ In fact, he contends that he was “exiled from much of his El Obeid diocese, and even from his family, after speaking out against the Islamist regime centered in Khartoum and aiding the suffering Nuba people [whom] the regime indiscriminately bombed, enslaved, and killed.”⁷ The Plaintiff’s Amended Complaint explains that, in this region:

Sudanese planes routinely drop bombs on schools and huts. Starvation is as rampant as medical care is sparse. Many victims flee the conflict and concentrate in the nearby Yida refugee camp in Unity State in South Sudan. In addition, refugees from Abyei in the Nuba mountain conflict area of the El Obeid Diocese have fled to Twic County in the Diocese of Wau in South Sudan.⁸

The Plaintiff also explains that “[t]here is a sharp divide between the violent Nuba Mountain region in [Christian] southern Sudan, where Bishop Gassis has always focused his humanitarian and awareness efforts, and the Arab-northern part of Sudan.”⁹ Notably, Bishop Gassis was the only Arabic-speaking member of the Sudan Catholic Bishops’ Conference.¹⁰

⁶ *Id.* at ¶ 32; *see also* DX 76 (noting that the Bishop has focused most of his efforts in the Nuba Mountain region, as well as the Dinka areas of South Sudan).

⁷ Pl.’s Br. in Supp. of § 225 Claim at 6; *see also* P-169 (“The Sudanese government brought a criminal indictment against Bishop Gassis when he testified before the U.S. Congress about the atrocities committed by that government against its own people.”).

⁸ Am. Compl. ¶ 32.

⁹ Pl.’s Br. in Supp. of § 225 Claim at 5.

¹⁰ Am. Compl. ¶ 22; *see also* P-169 (explaining that this language ability enabled the Bishop to “serve[] as the Liaison between the Sudanese government and the Bishops’ conference”).

According to the Amended Complaint, “[t]hrough his tireless and selfless work, Bishop Gassis has developed tremendous international recognition as a humanitarian, bringing the conflict and his people’s plight to the world’s consciousness.”¹¹ He has testified before the United States Congress, the State Department, and the United Nations Human Rights Commission, and met with members of the German Bundestag and of the European Parliament, as well as other world leaders.¹² Bishop Gassis has been recognized with various accolades, including the William Wilberforce Award, the A. Philip Randolph-Bayard Freedom Award, an Honorary Doctorate Degree in Human Letters from San Francisco University, and the Catholic University of America’s President’s Medal.¹³ In 2012, Bishop Gassis was nominated for a Nobel Peace Prize by Portuguese MP José Ribeiro e Castro,¹⁴

in recognition of his courage in the struggle against the discrimination of Christians in the Sudan. Mr[.] Castro said Bishop Gassis is a witness of the great dramas, the great sufferings of his Christian people and he himself experienced persecution. He added that the Sudanese bishop deserves the award due to his long stand of consistency, tenacity and courage during many years in favour of the persecuted Christians in the Sudan.¹⁵

¹¹ Am. Compl. ¶ 20.

¹² P-169; Am. Compl. ¶ 24.

¹³ Am. Compl. ¶ 21.

¹⁴ *Id.* at ¶ 21.

¹⁵ *Id.* at ¶ 30 (internal quotation marks omitted).

The Defendants also recognize that Bishop Gassis “has worked tirelessly for decades to give voice to the victims of the war-torn region of Sudan,” and that “[i]n doing so, [he] has encountered great hardship.”¹⁶

In accordance with canon law, Bishop Gassis submitted his resignation to Pope Francis on September 21, 2013, his seventy-fifth birthday.¹⁷ The Pope accepted the Bishop’s resignation on October 28, 2013.¹⁸ Following his resignation, Bishop Gassis “continues to work in Southern Kordofan and Twic County following requests from the respective [Bishops of those dioceses].”¹⁹

2. Bishop Gassis Sudan Relief Fund

In an effort to bring some relief to his diocese, Bishop Gassis became involved with the formation of Sudan Relief and Rescue, Inc., a Delaware non-profit, nonstock corporation, in 1999;²⁰ in 2001, the corporation’s Certificate of Incorporation was amended to change the corporation’s name to Bishop Gassis Sudan Relief Fund, Inc.²¹ The Plaintiff contends that the Fund’s charitable purpose

¹⁶ Defs.’ Answering Br. in Opp’n to Pl.’s § 225 Claim at 14.

¹⁷ *Id.*

¹⁸ DX 63; Defs.’ Answering Br. in Opp’n to Pl.’s § 225 Claim at 14.

¹⁹ P-169.

²⁰ The Defendants explain that William Saunders, and not Bishop Gassis, was the initial incorporator of Sudan Relief and Rescue, Inc; however, they agree that Bishop Gassis has been involved with the Fund since the beginning of the Fund’s history, and Bishop Gassis testified at deposition that Saunders incorporated the Fund at his direction. Bishop Gassis Dep. Vol. I 20:11-18.

²¹ In response to claims brought in this litigation arising out of the Fund’s non-permissive use of Bishop Gassis’s name and likeness in the operation of the Fund, the Fund notified the Court on October 1, 2013 that it has since changed its name to Sudan Relief Fund, Inc.

at its incorporation was limited to providing relief to the Nuba Mountain region of Sudan. Indeed, the Fund's Certificate of Incorporation states that 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," in addition to "developing, establishing, and supporting educational facilities in the Nuba Mountains to teach residents husbandry techniques as well as basic reading, writing, and mathematics skills" ²² The Fund has raised over \$25 million throughout its fifteen-year history. ²³ As of August 2013, the Fund maintained a cash balance of approximately \$6.4 million, funded by donors. ²⁴

3. The Directors' Relationships Break Down

In 2010, the Fund's seven-member board of directors consisted of Bishop Gassis, his supporters David Forte and Nina Shea, and Defendants Ann Corkery, John Klink, Steven Wagner, and David Coffey. At that time, Neil Corkery, Ann's husband, acted as the Fund's "Executive Director," a full-time management position. The Plaintiff contends that in 2010, Defendants Neil, Ann, ²⁵ Klink, Wagner, and Coffey hatched a plan to force the Bishop out of the Fund. The

²² Certificate of Incorporation § 3(1)-(2).

²³ Pl.'s Br. in Supp. of § 225 Claim at 1.

²⁴ Am. Compl. ¶ 50.

²⁵ I intend no disrespect by referring to the Corkerys by their first names, but do so for ease of reference.

Plaintiff suggests that the rift in the board was primarily caused by differing opinions among directors as to how donors' funds should be distributed among projects in and outside of the Nuba Mountain region. Throughout the Fund's history, the board had largely deferred to Bishop Gassis as to how donor funds would be spent. Beginning in 2010, however, the board began to fund projects not approved by the Bishop, in regions of Sudan Bishop Gassis contends did not comply with the Fund's charitable mission to bring relief to the people of the Nuba Mountains.²⁶ While Ann testified at trial that the Fund began to support projects outside the Nuba Mountain region only because that region did not have the infrastructure, and therefore the capacity, to accept all the capital the Fund was willing to donate²⁷—and although the Fund continued to spend ninety percent of its donations on projects chosen by Bishop Gassis²⁸—the Plaintiff contends that disagreements regarding how to allocate the Fund's donations caused the Defendants to conspire to remove him.

²⁶ See, e.g., P-32 at DEF001972 (email from Hunter-Hall) (“There is an expressed desire on the part of the members of the board to expand the foundation’s involvement beyond the territory of the diocese of El-Obeid in the future.”); P-39 at DEF001926 (email from Hunter-Hall) (“It is also our intention to extend our efforts to the particular churches which make up the Bishops’ conference of South Sudan and not just the diocese of El Obeid.”).

²⁷ See Trial Tr. 41:1-2 (“The diocese did not have the capacity or the bandwidth to receive this money.”); *id.* at 41:4-16 (“The diocese had one project manager so there were many churches and schools and wells and convents and hospitals we were working on. With one project manager. So work was slow. Number two, you had to bring in workers and you had to bring in cement, for instance, building materials from Kenya to this remote region, and that was really difficult, and it was not difficult—not only difficult because of getting planes, but it’s because of the situation in Sudan because it’s a war-torn region, just getting people in is hard.”).

²⁸ *Id.* at 27:19-23.

The Defendants, on the other hand, resist the Plaintiff's characterization that there existed an insidious plot to remove the Bishop, but contend that, motivated by their fiduciary duties to the Fund's beneficiaries, Ann, Klink, Wagner, and Coffey began to plan what they hoped would be a smooth transition when Bishop Gassis ultimately left the Fund, which they expected to happen at the time of his mandatory retirement as bishop on his seventy-fifth birthday. The Defendants point to four sources of conflict that led to their decision to phase out the Bishop's participation in the Fund. First, the Defendants suggest that personality conflicts made it difficult to work with Bishop Gassis, particularly in light of what they characterize as his aggressive communication style²⁹ and lack of interest in the Fund's management,³⁰ as well as their concern that he may not have treated the Fund's beneficiaries in the Sudan as gently as they would have preferred.³¹ Second, the Defendants explain that they were concerned by what they considered to be extravagant spending of donor funds by the Bishop throughout his travels.³² Third, the Defendants believed that certain projects the Fund supported at Bishop Gassis's request had been double-funded by other charities, raising questions of accounting for funds spent.³³

²⁹ *Id.* at 29:9-15.

³⁰ *Id.* at 28:1-7.

³¹ DX 5; Trial Tr. 36:19-37:1.

³² See P-45 at BGF000580 (report by Klink) (noting "exaggerated levels of spending that [the board] had seen on the part of Bishop Gassis").

³³ P-117 at DEF001364.

Finally, and perhaps most importantly, the Defendants contend that they were troubled by Bishop Gassis's attitude that the Fund was his personal property.³⁴ Significantly, the Defendants were alarmed by, and strongly disagreed with, former director Nina Shea's assertion at a 2010 board meeting that "when [Bishop Gassis] retired or became inactive, the Fund should 'sunset' and distribute its remaining assets" to the Bishop personally.³⁵ Because the Defendants believed that the Fund would continue even after Bishop Gassis's resignation³⁶—or removal, if necessary³⁷—they began to plan for that transition, which they hoped would occur without scandal, and consequently without a marked decrease in donations. Further, avoiding conflict appeared to the Defendants a distinct

³⁴ See Trial Tr. 29:5-8 ("It was only as the years went on that I realized he really believed that this was his organization, and that he wanted to control the organization, and he did not want to be transparent.").

³⁵ See Defs.' Answering Br. in Opp'n to Pl.'s § 225 Claim at 24; Trial Tr. 39:1-5 ("Nina Shea said when the Bishop retired or resigned that all the money would go to him. And John Klink said no, the money belongs to the people of God of Sudan. So there was a conflict of vision that was very clear at that moment in March of 2010."); *id.* at 39:8-16 ("Nina Shea and by extension the Bishop, because she always spoke with the Bishop, she was the only board member the Bishop spoke to, believed that the organization was basically an extension of the Bishop, and we believed, and I strongly believed that that was illegal and that it wasn't, didn't abide by the laws of the I.R.S., and that it was in conflict with what our beneficiaries understood about the organization.").

³⁶ P-31 at DEF001646 (email from Neil to Hunter-Hall) ("My perspective is that on or before September 21, 2013, the bishop will lose governance of the diocese; the foundation, in other words, will, all else being equal, outlast the bishop's term of office—and it will also outlive the bishop.").

³⁷ See, e.g., P-33 at DEF001633 (email from Hunter-Hall to Ann) ("I have had some time to reflect on things and to replay the conversations in my head. And I am very concerned about several scenarios. One came out in the heat of the moment in the exchange with you, which was critical from my perspective. It concerns this board member [Bishop Gassis] wants appointed. He said that he would propose him again and again and he will see him on the board. He did not say one more time . . . in other words, he does not expect to go away next year—or ever.").

possibility, as Ann, Wagner, Klink, and Coffey understood that, in accordance with applicable canon law, Bishop Gassis would be required to resign from his status as bishop with the Catholic Church on his seventy-fifth birthday, in September 2013,³⁸ and that, upon the Bishop's retirement with the Church, he would, in accordance with the Fund's Bylaws, also be required to retire from the Fund.

Because the Defendants believed the Fund would continue, rather than inure to the benefit of the Bishop personally, after Bishop Gassis retired, they began to evaluate what would become of donations after Bishop Gassis's exit. As part of that effort, Neil, Ann, Klink, Wagner, and Coffey, without Bishop Gassis's knowledge, "developed a survey in the fall of 2012 that was sent out to a sampling of donors to determine whether they would continue to give to the [Fund] if Bishop Gassis was not involved."³⁹ They also ran tests to determine whether letters sent to donors signed by Neil, or in the name of the "Sudan Relief Fund," received fewer responses than those signed by Bishop Gassis, in the name of "Bishop Gassis Sudan Relief Fund."⁴⁰ Ultimately, the Defendants determined to remove the

³⁸ P-32 at DEF001972 (email from Hunter-Hall) ("As you perhaps know, His Excellency Bishop Gassis will reach the mandatory retirement age in September 2013. The Holy See has already made provision for the succession through the appointment of a coadjutor, with whom we look forward to establishing relation in due course.").

³⁹ Am. Compl. ¶ 116; *see also* P-34 at DEF000621 (email from Neil) ("We need to begin phasing out of the bishop—he will be retired and off board in a year and I don't want a campaign built around him—as we have with direct mail[.]"); P-71.

⁴⁰ Am. Compl. ¶ 119; P-40.

Bishop from the board, regardless of whether the Fund could continue to use his name going forward.

4. The Board Holds Annual Elections

Prior to May 2011, the Fund had not in recent years conducted a meeting to re-elect directors, despite requirements in the Fund's Bylaws that a director election be held annually.⁴¹ Specifically, the Bylaws provide that "[t]he [Fund's] Board shall be self-perpetuating with elections to be held at the Annual Meeting, and the Board members and Officers shall serve concurrently."⁴² The Bylaws also specify that "[t]he members of the Corporation . . . shall be the members of the Board of Directors and each Member shall remain a Member so long as, and only so long as, such person continues to be a Director. A person shall cease to be a Member at such time as such person ceases to be a Director."⁴³ In addition, "Members, in their capacity as Members, shall have no right to vote for the election of members of the Board of Directors or in connection with any other matter except as may be required by law."⁴⁴

⁴¹ Pl.'s Br. in Supp. of § 225 Claim at 10.

⁴² Bylaws § 3.03; *see also id.* at § 3.09 ("The annual meeting of the Board of Directors for the election of Directors and for the transaction of such other business as may properly come before the meeting shall be held each year at the time and place designated by the Executive Director of the Corporation."). The parties agree that these sections provide that directors are elected by the board.

⁴³ *Id.* at § 2.01.

⁴⁴ *Id.* at § 2.02.

The Plaintiff contends that in 2011, the board began to hold annual elections in an effort to replace Shea and Forte, who were aligned with Bishop Gassis, with directors who would support the Bishop's removal from the Fund. By contrast, Ann testified at trial that the decision to hold annual elections was a result of (1) conversations with legal counsel, who had explained that the Fund's Bylaws required annual elections;⁴⁵ (2) ongoing attempts at "professionalizing" the Fund;⁴⁶ and (3) concerns that arose when Shea expressed her belief that the Fund would "sunset" and assets would be distributed to Bishop Gassis personally when he eventually exited the Fund.

Elections held in 2011 and 2012, as well as a special board meeting held in 2013, form the basis of this Section 225 dispute, and are described below.

A. The Board Begins to Hold Director Elections

The Plaintiff points to several alleged procedural irregularities related to the board's decision to elect certain directors, as well as its failure to re-elect certain others, between 2011 and 2013. Specifically, the Plaintiff brings procedural challenges arising out of the board's failure to re-elect Nina Shea at a May 14,

⁴⁵ See P-30 at DEF000064 (May 14, 2011 Board Meeting Minutes) ("Neil Corkery told the board, before it voted on new board members, the organization's attorney advised him that the by-laws required an annual vote to re-elect the Board and he recommended this be done in writing since the election has not taken place in the past couple of years."); Trial Tr. 45:20-46:1.

⁴⁶ See Trial Tr. 34:19-35:1 ("We really wanted to get a high Charity Navigator rating. Charity Navigator is like a good housekeeping seal of approval for donors that you can give to us. So we started implementing all those best practices, including transparency and then including the—increasing board meetings. That's very important.").

2011 annual meeting; the board's June 2011 election of Kathleen Hunt and Rodger Hunter-Hall; the board's failure to re-elect David Forte at a July 28, 2012 annual meeting; and the board's decision to cancel a July 2013 meeting.

The Fund's board conducted its first re-election of directors in recent years at a May 14, 2011 annual board meeting. At that meeting, the board unanimously approved a motion to vote on the re-election of directors by written ballot.⁴⁷ No new candidates were proposed for election, but the directors were asked to vote on whether each current director, other than Bishop Gassis, should be re-elected.⁴⁸ Ballots, other than those from Wagner and Coffey, who attended the meeting telephonically, were completed and returned to Neil at the meeting.⁴⁹ Neil "explained to the board that based on the advice of counsel, the two members who were not physically present had faxed their ballots to the Club where the meeting was being held the night before and were delivered to [Neil] just prior to the meeting."⁵⁰ The completed ballots indicated that the board had unanimously voted to re-elect each director except Shea. Bishop Gassis, Forte, and Shea voted for Shea's re-election; Ann, Klink, Wagner, and Coffey did not. The Plaintiff challenges the effectiveness of Wagner and Coffey's votes, however, contending

⁴⁷ P-30 at DEF000064.

⁴⁸ With respect to each director other than Bishop Gassis, the ballot provided a box to mark "YES re-elect" or "NO Not re-elect." With respect to Bishop Gassis's re-election, the ballot indicated "not applicable." P-8 at DEF000298.

⁴⁹ P-29.

⁵⁰ P-30 at DEF000064.

that Wagner was dropped from his call before the board had an opportunity to vote, and was therefore unable to effectively ratify his pre-submitted ballot, and that Coffey's pre-submitted ballot was likewise never ratified.⁵¹ Despite the procedural objections noted by the Plaintiff, and instead accepting the pre-submitted ballots as effective, Neil announced that Shea had been effectively removed from the board by a vote of 4-3.

After Shea's removal, the board considered nominations for her replacement. At the May 14 board meeting, Ann identified two potential nominees: Kathleen Hunt and Father Rodger Hunter-Hall.⁵² In addition, Bishop Gassis recommended Kevin Phillips, who, according to the Plaintiff, held "Georgetown B.A., JD, and MBA degrees, was an investment banker and a [Fund] donor," and "had extensive experience with the operation of troubled companies, cost controls, public disclosures, and IRS filing requirements"⁵³ Although "[s]ome board members disagreed with [the Bishop's] assessment [of Phillips's qualifications]," Ann requested that Neil "research the internet to find a bio of Kevin Phillips [to] send the board so he could be considered with other nominees by e-mail."⁵⁴

⁵¹ Pl.'s Br. in Supp. of § 225 Claim at 11.

⁵² P-30 at DEF000065.

⁵³ Pl.'s Br. in Supp. of § 225 Claim at 12.

⁵⁴ P-30 at DEF000065.

The board did not vote on the nominees' election at the May 14 board meeting. Instead, Neil circulated resolutions for the election of Hunt, Hunter-Hall, and Phillips by email dated May 19, 2011. The directors then delivered their votes by email between May 14 and June 1.⁵⁵ Hunt and Hunter-Hall received votes from all directors but Forte and Bishop Gassis; Bishop Gassis and Forte objected to the vote, contending that Shea had not been validly removed. Forte criticized the board for moving through the nomination and voting processes too quickly and without enough board discussion.⁵⁶ In addition, Bishop Gassis sent the board a lengthy email, explaining that he felt he had been "confronted with whether [he] should 'Coram domino' accept nominations which were not discussed at the meeting;" expressing frustration that in previous years "persons chosen by [the Bishop for membership on the Fund's board] were rejected based on the decision

⁵⁵ See P-14 at DEF000142 (indicating Coffey's vote for Hunt and Hunter-Hall); P-19 at DEF000154 (indicating Wagner's vote for Hunt, Hunter-Hall, and Phillips).

⁵⁶ See, e.g., P-10 at DEF000139 (indicating, in an email from Forte to Neil, that "[r]ushing these motions now is not appropriate. Each needs discussion and further information. In addition, there are some procedural issues from last week's meeting that need to be resolved first."); P-12 (email from Forte to Neil) ("As I briefly stated in my earlier communication, the rush to vote on new board members and on compensation is inappropriate at this time. I presume elements of simply [sic] courtesy to a fellow board member as well as considerations of due process would allow for a reasonable time for deliberation, discussion and decision."); P-15 (email from Forte to Neil) ("Now do you see why discussion and information is the appropriate way we should proceed? The rush to judgment 'while we have the votes' should never be used or be perceived to be used in any board of directors, especially one that is supposedly based on Christian principles."); P-25 at DEF000158 (email from Forte to Neil) ("Certainly, common courtesy as well as the rules of good corporate governance would toll the period in which such a vote could be taken until the dispute regarding membership of the board is resolved. And only when such a dispute is resolved should further business regarding the board then be commenced—this time with sufficient notice to all, especially the Bishop, and with sufficient time for consultation and deliberation.").

of one member;” challenging notice and the procedures used to remove Shea; and “deem[ing] necessary there should be no vote on any new person which was not discussed at the meeting except Mr. Kevin [Phillips].”⁵⁷ Despite Bishop Gassis and Forte’s objections, based on email votes submitted on behalf of the other directors, Hunt and Hunter-Hall joined the Fund’s board, but Phillips did not. In response to Bishop Gassis and Forte’s procedural objections, Neil informed the board by email that, relying on an opinion from the Fund’s legal counsel, he had concluded that “all of the [procedural] issues raised by David Forte have no legal basis. The actions taken regarding re-election of directors were made in accordance with the by-laws and relevant statutes applicable to Delaware registered [501(c)(3)] non-profit entities.”⁵⁸ Despite the objections of Bishop Gassis and Forte, neither sought a judicial determination of the composition of the board before the next annual meeting.

The board held its next annual meeting to re-elect directors on July 28, 2012.

Bishop Gassis began that meeting with the following ominous Psalm:

My soul rests in God alone, from whom comes my salvation.

⁵⁷ P-16 at BISHOP0309-0310 (typeface altered from original); *see also* P-17 at DEF000150 (expressing Forte’s view that “I do not think it is a valid action of the board because the board does not include Nina Shea, who was illegally removed from the board at the last annual board meeting. At that time, there was insufficient notice given in the agenda that there would be an election of the board members, the vote was held after two members had absented themselves from the meeting, votes had already been submitted ahead of time. The action was clearly pre-planned and the import kept from certain members of the board so that the planned removal could be effectuated without discussion, notice, or appropriate consideration.”).

⁵⁸ P-24 at BISHOP0336.

God alone is my rock and my salvation, my secure height; I shall never fall.

How long will you set upon people, all of you beating them down, as though they were a sagging fence or battered wall?

Even from my place on high they plot to dislodge me.

They delight in lies;

They bless with their mouths, but inwardly they curse.⁵⁹

According to the board meeting minutes, as part of his remarks, the Bishop “spent over an hour criticizing various actions of the Board and the Executive Director [Neil],” followed by a presentation of expenses to be reimbursed.⁶⁰ Ann testified at trial that she believed Bishop Gassis’s address to the board demonstrated how the animosity that had finally surfaced between the Fund’s directors would prevent any meaningful conversation among directors going forward.⁶¹

After the Bishop’s presentation, Neil passed out ballots for the re-election of directors. Ann, Hunter-Hall, Coffey, and Bishop Gassis submitted ballots by hand, while Forte, Wagner, and Hunt submitted votes by email. Over the weeks following the July 28 meeting, Klink held the sole undecided—but not decisive—vote. The Plaintiff points to several email communications between Klink and Neil, who at that time vigorously—and, according to the Plaintiff, improperly—

⁵⁹ P-50 at BISHOP01110; 62 Psalm 2:50.

⁶⁰ P-58 at DEF000007.

⁶¹ See Trial Tr. 58:22-59:4 (“The last board meeting I had with him he screamed and yelled and anyone there can tell you that he spent most of the time screaming at me. So for me to have a meaningful conversation with the Bishop was—I mean, I think it’s impossible. I have never been treated like I have been by the Bishop—I mean screaming.”).

encouraged Klink to vote against Forte’s re-election,⁶² emphasizing that “[Forte] is a dangerous ally of the bishop to have on the board,”⁶³ and that “we will be exposed having him on the board”⁶⁴ However, despite pressure from Neil to vote against Forte’s re-election, and although Klink agreed that Forte should be removed, he declined to so vote because he wished to support only a unanimous board decision. Ultimately, the meeting minutes indicated that votes “showed all directors except David Forte re-elected,”⁶⁵ based on a vote of 5-3, with only Bishop Gassis, Forte, and Klink dissenting.

Finally, in June 2013, Neil provided notice to the board that Bishop Gassis wished to schedule a board meeting for mid-July.⁶⁶ Several directors—but fewer than would prevent a quorum—indicated that they were unavailable to attend the meeting, and debated whether it would be preferable to cancel the meeting, or to permit the meeting to go forward, enabling “[t]he Bishop [to] yell and scream”⁶⁷ Neil expressed his desire for the meeting to go forward without a quorum so that Bishop Gassis could vent his frustrations with the board but no board action could be taken. However, despite Neil’s request that Hunter-Hall intentionally avoid the meeting in order to prevent a quorum, Hunter-Hall insisted

⁶² Pl.’s Br. in Supp. of § 225 Claim at 18-19.

⁶³ P-53 at DEF000616.

⁶⁴ P-60 at DEF000607.

⁶⁵ P-58 at DEF000008.

⁶⁶ P-75 at DEF000559.

⁶⁷ P-75.

on attending any scheduled board meeting, believing it would be immoral and a breach of his fiduciary duties to do otherwise.⁶⁸ The Plaintiff suggests that, without Hunter-Hall's cooperation, Neil decided to cancel the July meeting. However, Ann testified at trial that, in addition to its inconvenient timing, the meeting was cancelled because some directors felt Hunter-Hall had a separate agenda in speaking to Bishop Gassis concerning Hunter-Hall's interest not as a board member but as a father of the Church,⁶⁹ regarding the Bishop's service as a bishop, rather than a director. Those directors believed Hunter-Hall had an interest in "poking" Bishop Gassis "in the eye," despite the other directors' continued hope for a quiet transition after the Bishop's seventy-fifth birthday in September.⁷⁰

⁶⁸ See P-83 (email from Hunter-Hall to Wagner) ("Apparently, there is a thought that there may not be a quorum for the meeting next Saturday. I am rather troubled by this approach as I think it is even more harmful at this point. . . . I am very concerned about the prospect of willfully absenting myself from the board meeting."); P-84 (email from Neil to Klink) ("Let me know if you can change Fr. Rodgers [sic] mind—Ann agrees with you particularly in light of the e mail just received from Gassis that the best course of action is no meeting at all.").

⁶⁹ See P-92 at DEF001085 (email from Neil to Ann) ("It was Fr. Rodger who initiated the communication with [the Apostolic Nuncio to Sudan]. And [J]ohn tells me that Fr. has been given a list of questions from [the Nuncio] that he wants him to ask [G]assis at the meeting. It 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.").

⁷⁰ See *id.* ("The game plan as I saw this board meeting was to get through without [G]assis going nuclear. We need him to keep functioning in the way he has until it is clear who will replace him, who will the south sudan nuncio be, who will employ and direct all the logistical folks in [N]airobi etc etc. If [G]assis takes his marbles and goes away we won't get hurt, the people on the ground in Gidel will."); Trial Tr. 61:3-14 ("Father Rodger Hunter-Hall had come across information that greatly disturbed him about the Bishop. And he decided he was going to confront the Bishop. . . . That's what we understood. So we believed, the majority of the board believed, that it would be beyond counter-productive to poke the Bishop in the eye. Just a few months before he would be leaving, anyway. So we thought it was better to not attend. So there was no quorum and the meeting was canceled.").

B. The Board Removes Bishop Gassis

On August 16, 2013, the Fund’s directors received a “Notice of Special Meeting,” indicating that a special meeting was scheduled for August 24, 2013. While the Notice stated that “Proposed Amendments to the bylaws will be considered by the Board of Directors . . . ,”⁷¹ the Plaintiff contends that, prior to that meeting, “[t]he Board provided Bishop Gassis with no meaningful information on the meeting’s purpose until they served Bishop Gassis with five proposed resolutions 36 hours before the August 24, 2013 meeting.”⁷² On August 24, 2013, the board began the special meeting by voting to elect Neil to the Fund’s board and to serve as President of the Fund; Klink, Wagner, Coffey, Hunt, and Ann voted in favor of his election, while Bishop Gassis and Hunter-Hall did not.⁷³

⁷¹ DX 58 at BISHOP0451.

⁷² Am. Compl. at 7. Despite that contention, the Plaintiff does not argue that the Bishop’s removal should be invalidated on the basis that he did not receive adequate notice as required by the Fund’s Bylaws. Pl.’s Br. in Supp. of § 225 Claim at 49-57. All directors received notice of the meeting on August 16, 2013, seven days prior to the meeting, as required by the Bylaws. *See* Bylaws § 3.12 (“Special meetings of the Board of Directors or any committee thereof may be called by the Executive Director on notice to each Director . . . either personally, or by telephone, telegram, facsimile, or other means of wire communication, at least one (1) day prior to such meeting or by mail at least seven (7) days prior to such meeting.”). Further, despite a section in the Bylaws providing that “[n]either the business to be transacted at, nor the purpose of, any regular or special meeting of the Directors . . . need be specified in any written of notice [sic] unless so required by the Certificate of Incorporation or these bylaws,” Bylaws § 4.02, the Plaintiff acknowledges that Bishop Gassis received copies of the resolutions more than twenty-four hours prior to the special meeting, on August 22, 2013. Pl.’s Br. in Supp. of § 225 Claim at 24.

⁷³ P-118 at DEF000130.

The purpose of the special meeting was to permit the board to vote on five resolutions purporting to remove Bishop Gassis as a director of the Fund.

Resolution 1 read, in part:

Whereas, on September 21, 2013, His Excellency Bishop Macram Max Gassis will reach the age of 75, which is the mandatory retirement age for Bishops of the Catholic Church, and . . .

Whereas, from and after September 21, 2013, Bishop Gassis will no longer be the Bishop of El Obeid Dioceses; and . . .

Whereas, it is important to the Corporation to ensure the smooth and proper transition of the Corporation and its charitable mission from and after Bishop Gassis's departure from his position as Bishop of El Obeid Dioceses, and

Whereas, it is not in the best interests of Bishop Gassis, the Corporation, or the beneficiaries of the work of the Corporation for there to be a public dispute of any kind between the Corporation and the Bishop,

The Board of Directors of the Corporation hereby resolves as follows:

RESOLVED, that the term of office of Bishop Gassis as Chairman of the Corporation shall expire at midnight on September 20, 2013, unless terminated earlier as described by resolution adopted by the Board of Directors at the special meeting on August 24, 2013.

FURTHER RESOLVED, Bishop Gassis shall cease to be a director of the Corporation effective at midnight on September 20, 2013 and a vacancy in that board position is declared to exist as of that date.⁷⁴

Resolution 2 purported to strike Section 3.04 of the Fund's Bylaws, which provided that "[t]he Chairman of the Board shall be His Excellency, Bishop Macram Max Gassis, Bishop of El Obeid Diocese, Sudan. He shall serve in this position until his retirement or resignation."⁷⁵ Resolution 3 clarified the officer

⁷⁴ P-117 at DEF001361.

⁷⁵ Bylaws § 3.04.

positions that existed within the Fund. Resolution 4 set out allegations against the Bishop regarding his “canonical status . . . in relation to his appointment as Bishop of the El Obeid,” as well as suspicions that with respect to projects requested by Bishop Gassis, “funding may have been separately and previously funded by other sources”⁷⁶ Resolution 5 resolved to “advise counsel to Bishop Gassis of the Board’s willingness to enter into an agreement whereby the Bishop, his name, likeness and goodwill are allowed to play a continuing role with and for the Corporation,” but also that “a role for Bishop Gassis on behalf of the Corporation shall not include any authority to direct funds of the Corporation unless otherwise specifically directed or approved by the Board.”⁷⁷

Klink, Wagner, Coffey, Hunt, Ann, and Neil voted in favor of each resolution, and Bishop Gassis voted against each resolution. Hunter-Hall abstained from voting on Resolutions 1, 2, and 3, but voted in favor of Resolutions 4 and 5.⁷⁸

5. The Bylaws

Three Bylaw provisions bear on the board’s authority to execute the actions purportedly undertaken at the August 24, 2013 board meeting. First, Section 3.06 states that “[a]ny Director elected to the Board of Directors may be removed at any

⁷⁶ P-117 at DEF001364. Ann Corkery testified that this resolution was included as a way to provide Bishop Gassis notice of allegations against him, if he wished to respond and continue to have a relationship with the Fund after his removal.

⁷⁷ P-117 at DEF001367.

⁷⁸ P-118 at DEF000131.

time, with or without cause, by the affirmative vote of two-thirds (2/3) of the members of the Board of Directors then in office.”⁷⁹ The parties dispute whether that provision is applicable to Bishop Gassis.

Second, as noted above, Section 3.04 provides that “[t]he Chairman of the Board shall be His Excellency, Bishop Macram Max Gassis, Bishop of El Obeid Diocese, Sudan. He shall serve in this position until his retirement or resignation.”⁸⁰ That Section was enacted as part of a 2002 amendment to the Fund’s Bylaws. The parties dispute what is meant by reference to Bishop Gassis’s “retirement” in Section 3.04 of the Bylaws; the Plaintiff contends that “retirement” refers to Bishop Gassis’s voluntary retirement from the Fund, while the Defendants contend that “retirement” refers to his required retirement, in accordance with applicable canon law, as a bishop of the Catholic Church. Although in August 2013 the Defendants commissioned a report from an expert on canon law, opining that Bishop Gassis would be required to retire from his position as bishop on his seventy-fifth birthday,⁸¹ Bishop Gassis was unaware of that report or the Defendants’ interpretation of Section 3.04 until shortly before August 24, 2013, the date on which he was removed from the Fund’s board.⁸² However, setting aside

⁷⁹ Bylaws § 3.06.

⁸⁰ *Id.* at § 3.04.

⁸¹ Am. Compl. ¶ 144; P-31 at DEF001646 (email from Neil to Hunter-Hall) (“[W]ould love to get together before the meet tonight to discuss the [G]assis memo.”).

⁸² Pl.’s Br. in Supp. of § 225 Claim at 10.

the appropriate interpretation of Section 3.04, the Defendants contend that the board effectively repealed that Section at the August 24 board meeting. Thus, the third Bylaw provision at issue in this litigation is Section 7.08, which states that “[t]he Certificate of Incorporation and the Bylaws may be altered, amended, or repealed and new Bylaws may be adopted by the affirmative vote of a majority of the members of the Board of Directors then in office, providing that prior notice has been given to all members of the Board of Directors in accordance with the notice provisions set out in Article IV herein.”⁸³

II. PROCEDURAL HISTORY

The Plaintiff filed his Verified Complaint in this action on September 6, 2013, seeking relief on fifteen counts. On September 13, 2013, I granted the Plaintiff’s Motion to Expedite on two categories of those counts: counts brought pursuant to 8 *Del. C.* § 225, and counts alleging the Fund’s improper use of Bishop Gassis’s name and likeness. On October 1, 2013, the Defendants notified the Court that the Fund had ceased to use Bishop Gassis’s name, mooting the need to expedite those claims. Then, in December 2013, briefing was stayed while the parties participated in mediation. The parties informed the Court in February 2014 that mediation had been unsuccessful, and on February 26, 2014, I informed the parties that they should prepare the Plaintiff’s 225 counts for trial.

⁸³ Bylaws § 7.08.

On April 6, 2014, the Plaintiff filed his Verified First Amended Complaint, asserting fourteen counts against the Defendants. Those counts⁸⁴ include: (I) a count for breach of fiduciary duty; (II) a count pursuant to 8 *Del. C.* § 220 for books and records; (III) a count pursuant to 8 *Del. C.* § 225 to reinstate Bishop Gassis, Nina Shea, and David Forte as directors on the Fund's board; (IV) a count for misappropriation of Bishop Gassis's name and likeness; (V) a count for common law trademark infringement; (VI) a count brought pursuant to 6 *Del. C.* § 2532, the Delaware Deceptive Trade Practices Act; (VII) a count for waste of corporate assets; (VIII) a count for civil conspiracy; (IX) a count for a declaratory judgment that Bishop Gassis remains on the Fund's board; (X) a count for the appointment of a receiver or custodian; (XI) a count for a constructive trust; (XII) a count for the appointment of a master to oversee an annual election of directors; (XIII) a count for injunctive relief preventing the Fund's board from taking any action inconsistent with recognizing Bishop Gassis's status as Chairman of the Board and a director of the Fund; and (XIV) a count for injunctive relief preventing the Fund from using Bishop Gassis's name and likeness.

On April 21, 2014, the Defendants filed a Motion to Dismiss all counts of the Verified First Amended Complaint. On May 7, 2014, I held a one-day trial on the counts related to the Plaintiff's Section 225 claim, and heard oral argument on

⁸⁴ The numbered counts in the Verified First Amended Complaint begin at "II;" I present those counts here in the order they are listed in the Verified First Amended Complaint.

the Defendant's Motion to Dismiss. In the interest of providing the parties a quick resolution of the Section 225 claim, I address only those counts in this Memorandum Opinion.

III. ANALYSIS

The Plaintiff seeks relief under 8 *Del. C.* § 225, which provides that “[u]pon application of any stockholder or director, or any officer whose title to office is contested, the Court of Chancery may hear and determine the validity of any election, appointment, removal or resignation of any director or officer of any corporation”⁸⁵ The Plaintiff seeks to invalidate:

(a) the removal of Nina Shea in May 2011 based on an invalid vote; (b) the improper election of Defendants Father Hunter-Hall and Kathleen Hunt in June 2011; (c) the failure to properly consider and follow appropriate procedures for holding an election on Kevin Phillips as a nominee, particularly in 2011 and 2012; (d) the invalid election that resulted in David Forte's removal from the Board in July and August 2012; (e) the failure to hold an annual election in July 20, 2013 after the meeting was scheduled for such purpose and a quorum secured (which was later intentionally undermined); (f) the removal of Bishop Gassis with the August 24, 2013 Resolutions; (g) the election of Neil Corkery to the Board on August 24, 2013; and (h) the election of Neil Corkery as President of the Corporation on August 24, 2013.⁸⁶

⁸⁵ 8 *Del. C.* § 225(a).

⁸⁶ Am. Compl. ¶ 252.

The Plaintiff bears the burden to demonstrate that the director removals he challenges should be invalidated.⁸⁷

In the following analysis, I first consider the Plaintiff's contention that (1) Bishop Gassis's removal from the Fund in 2013 should be invalidated on the basis that his removal failed to comply with the Fund's Bylaws and (2) his removal should be invalidated in equity because the removal constituted a breach of fiduciary duty. I then separately consider whether to invalidate the Fund's 2011 and 2012 elections.

1. Removal of Bishop Gassis

In challenging the board's August 2013 decision to remove Bishop Gassis as a director of the Fund, the Plaintiff draws a distinction between void and voidable corporate actions, suggesting that actions of a board of directors taken in violation of a corporation's governing documents are void, and therefore not subject to equitable defenses, while board actions arising out of inequitable conduct are voidable, even if "legally possible."⁸⁸ The Plaintiff accordingly contends that Bishop Gassis's removal was both void, as violative of the Fund's Bylaws,⁸⁹ and

⁸⁷ See *In re IAC/InterActive Corp.*, 948 A.2d 471, 493 (Del. Ch. 2008) ("Liberty, as the plaintiff in the 225 Action, bears the burden of proving by a preponderance of the evidence that it is entitled to relief.").

⁸⁸ See Pl.'s Br. in Supp. of § 225 Claim at 30-31 (quoting *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971)).

⁸⁹ The Plaintiff does not challenge the Bylaw provision by which directors remove directors. Notably, when translated for application to nonstock corporations, 8 *Del. C.* § 141(k) provides that "[a]ny member of the governing body of the corporation or the entire governing body of the

voidable, as a result of the Defendants' inequitable conduct. I address those arguments in turn, below.

A. The Fund's Bylaws Permitted Bishop Gassis's Removal

The Plaintiff contends that the Court must invalidate the board's action removing Bishop Gassis as a director of the Fund because (1) Resolution 1, though it interpreted Bylaw Section 3.04, did not purport to remove Bishop Gassis, and (2) even if Resolution 1 did purport to remove him, that removal violated several provisions of the Fund's Bylaws.⁹⁰

As an initial matter, the Plaintiff's contention that the August 24 resolutions did not by their express language purport to remove Bishop Gassis from the Fund's board must fail. Although Resolution 1 referred to "the mandatory retirement age for Bishops of the Catholic Church" and Bishop Gassis's approaching seventy-fifth birthday, it also unambiguously stated:

corporation may be removed, with or without cause, by the holders of a majority of the memberships then entitled to vote at an election of the members of the governing body of the corporation" That provision vests the power to remove directors in a nonstock corporation's members, not its directors. *See Nevins v. Bryan*, 885 A.2d 233, 251-52 (Del. Ch. 2005) (citing *Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at *11 n.30 (Del. Ch. July 21, 2000)) ("[B]y negative implication intended by the draftsmen, directors do not have the authority to remove other directors."). However, Section 141(j) provides, in part, that "[t]he certificate of incorporation of any nonstock corporation may . . . provide that the business and affairs of the corporation shall be managed in a manner different from that provided in this section." Accordingly, the Fund's Certificate of Incorporation states that "Section 141(f) and Section 141(k) of the Delaware General Corporation Law shall not apply to or govern the Corporation." Certificate of Incorporation § 7.

⁹⁰ Pl.'s Br. in Supp. of § 225 Claim at 49-52.

RESOLVED, that the term of office of Bishop Gassis as Chairman of the Corporation shall expire at midnight on September 20, 2013, unless terminated earlier as described by resolution adopted by the Board of Directors at the special meeting on August 24, 2013.

FURTHER RESOLVED, Bishop Gassis shall cease to be a director of the Corporation effective at midnight on September 20, 2013 and a vacancy in that board position is declared to exist as of that date.⁹¹

The Defendants interpret Section 3.04 as mandating that Bishop Gassis remain Chairman only until his retirement as bishop, rather than from the board of directors. That understanding, summarized in the recitals to Resolution 1, is informed by the board's reading of Section 3.04, which states that Bishop Gassis "shall serve in this position until his retirement or resignation." Without deciding whether the Defendants' interpretation of Section 3.04 is correct as a matter of contract law,⁹² I find that the Resolution's language clearly undertakes to remove Bishop Gassis from the Fund's board effective September 20. In other words, although the board acknowledged in Resolution 1 that its interpretation of Section 3.04 informed its decision to remove Bishop Gassis, the Resolution by its plain

⁹¹ P-117 at DEF001361.

⁹² I note, however, that the Defendants have presented a compelling explanation for interpreting Section 3.04 as requiring Bishop Gassis's exit from the Fund upon his retirement as a bishop from the Catholic Church. Importantly, the Fund distributes donations through religious channels, and in order for the Fund to distribute donations to beneficiaries, those donations must be accepted and put to use by individuals on the ground in Sudan—namely, the bishop of whichever diocese a project is located. I find it 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.

language does not make his removal contingent on the correctness of that interpretation.

The Plaintiff also argues that Bishop Gassis's removal violated Bylaw Sections 3.06 and 3.04. Section 3.06 states that "[a]ny Director elected to the Board of Directors may be removed at any time, with or without cause, by the affirmative vote of two-thirds (2/3) of the members of the Board of Directors then in office."⁹³ While the Defendants contend that Bishop Gassis was effectively removed by six of eight directors in accordance with Section 3.06, the Plaintiff disagrees, suggesting that, according to Section 3.06, "only directors *elected* to the Board may be removed without cause," and that "Bishop Gassis, of course, was not elected to the Board."⁹⁴ Instead, the Plaintiff contends that Bishop Gassis was *appointed* as a director by Section 3.04, which states: "[t]he Chairman of the Board shall be His Excellency, Bishop Macram Max Gassis, Bishop of El Obeid Diocese, Sudan. He shall serve in this position until his retirement or resignation."⁹⁵

Although the Plaintiff's interpretation of Sections 3.04 and 3.06—that, because Section 3.04 states that the Chairman "shall be" Bishop Gassis, he was *appointed*, rather than *elected*, to the Fund's board—is perhaps plausible, that reading is not the only reasonable interpretation of those sections. In any event,

⁹³ Bylaws § 3.06.

⁹⁴ Pl.'s Br. in Supp. of § 225 Claim at 50.

⁹⁵ Bylaws § 3.04.

my analysis must be informed by the crucial fact that Bishop Gassis was a director of the Fund before Section 3.04 was added to the Fund's Bylaws in 2002.⁹⁶ Of course, that Section did not appoint the Bishop to a director seat he already held. Further, Bishop Gassis was not designated a director in the Fund's initial incorporation documents, and accordingly, he must have been elected at some time between the Fund's incorporation and the enactment of the 2002 Bylaw amendments, notwithstanding the Fund's poor record-keeping in that regard. As a result, although the Fund's records do not indicate when Bishop Gassis was elected to the Fund's board, the only reasonable inference that may be drawn from the record before me is that Bishop Gassis was in fact elected as a director at some point between the Fund's incorporation and the adoption of Section 3.04.⁹⁷ As an elected director, Section 3.06 permits Bishop Gassis's removal with or without cause.

The Plaintiff additionally suggests that because Section 3.04 was adopted after Section 3.06, it was intended to modify its application. He therefore argues:

Now, since § 3.04, making Bishop Gassis the “permanent chairman” was passed with § 3.06 in existence, and passed at the same time as § 3.03 calling annual elections for the full non-classified Board, then that meant the Board wrote those provisions with § 3.06 in mind, and intended Bishop Gassis to be immune: (1) from annual election of the non-classified Board under § 3.03, and (b) from removal without

⁹⁶ Trial Tr. 246:4-6.

⁹⁷ I so find notwithstanding the board's failure to vote on the Bishop's re-election in 2011 and 2012.

cause under § 3.06 which applied only to directors elected annually under § 3.03.⁹⁸

I find that argument unpersuasive. As the Defendants correctly point out, Section 3.04 by its plain terms in no way constrains the Bishop's removal as a *director*, but states only that he "shall be" the Chairman of the Board—an officer, not a director. Moreover, Section 3.04 itself is subject to Section 7.08, which authorizes a majority of directors to alter, amend, or repeal the Bylaws. Section 3.04 contains no language providing its own immunity from repeal under Section 7.08. The board always had the ability, by majority vote, to repeal Section 3.04 and remove the Bishop from his position as Chairman.

The Plaintiff alternatively argues that "the majority that favored the bylaw amendment [removing Section 3.04] comprised directors who had not been validly seated on the Board," and that the amendment should therefore be invalidated. That argument must be rejected, however, because even if I were to find that Hunt, Hunter-Hall, and Neil ultimately had no valid claim to their director seats, that finding would not invalidate prior actions of the board. In *Hockessin Community Center, Inc. v. Swift*,⁹⁹ this Court addressed a challenge to certain individuals' statuses as directors based on procedural deficiencies in their election. The Court explained that "[t]he failure of the [corporation] to follow corporate formalities

⁹⁸ Pl.'s Reply Br. at 15-16 (emphasis removed).

⁹⁹ 59 A.3d 437 (Del. Ch. 2012).

when adding directors does not cause those individuals' status as directors to evaporate. It rather confers on them the status of *de facto* directors.”¹⁰⁰

Summarizing the relevant case law, the Court explained:

A [*d*]e *facto* director is one who is in possession of and exercising the powers of that office under claim and color of an election, although he is not a director [*d*]e *jure* and may be removed by proper proceedings. Where a director assumes office pursuant to an irregular election in violation of the provisions of the corporate charter, he achieves only [*d*]e *facto* status which may be successfully attacked by the stockholders.¹⁰¹

Furthermore, although the defendants' *de facto* director status subjected them to removal at a future annual election, the Court upheld prior, otherwise-valid actions taken by the board.¹⁰² Indeed, it would be troubling to accept an alternative rule that required the Court to call into question all actions taken by a corporation's board of directors from the occurrence of any procedural irregularity to the time of challenge, which may span the course of several years; here, all board actions taken over the past three years, since May 2011, would be subject to challenge. I therefore find that, even if Hunt, Hunter-Hall, and Neil were merely *de facto* rather than *de jure* directors, Bishop Gassis's removal could not be invalidated on that

¹⁰⁰ *Id.* at 459.

¹⁰¹ *Id.* (citing *Prickett v. Am. Steel & Pump Corp.*, 253 A.2d 86, 88 (Del. Ch. 1969)).

¹⁰² *See id.* at 462-63 (finding that a board meeting called by a *de facto* director had been validly called, convened, and conducted, and that an action filling four board vacancies taken by a quorum of five directors, four of whom were *de facto* directors, was a valid action of the board); *id.* at 463 (finding that a board action removing the company's president was taken by a quorum of seven directors, three of whom were *de facto* directors and four of whom had been validly appointed by *de facto* directors, was a valid action of the board).

basis. As a result, to the extent Section 3.04 placed any limit on the board's ability to remove Bishop Gassis, that Section was effectively removed by an affirmative vote of a majority of at least *de facto* directors, pursuant to Section 7.08 of the Fund's Bylaws. Further, even if I were to set aside the votes cast by Hunt, Hunter-Hall, and Neil, Bishop Gassis would have been validly removed by the affirmative vote of a super-majority of the remaining directors—Ann, Coffey, and Wagner—who would in that case constitute three-quarters of the entire board.

B. The Board's Alleged Inequitable Conduct

The Plaintiff additionally argues that, even if his removal was not void, Bishop Gassis's removal was voidable. Accordingly, the Plaintiff requests the Court, under *Schnell*,¹⁰³ to return the Bishop to his seat on the board due to the Defendants' inequitable conduct in connection with his removal. The Plaintiff identifies two bases on which the Court should invalidate the Bishop's removal.

First, the Plaintiff suggests that the Court should invalidate the Bishop's removal because he was removed in retaliation for exercising his rights under 8 *Del. C.* § 220. Shortly before the July 20, 2013 scheduled meeting, Bishop Gassis submitted a Section 220 request for books and records. The Plaintiff accordingly contends that the "Defendants' retaliation against Bishop Gassis for exercising his legitimate rights as a director was a breach of fiduciary duty and rendered his

¹⁰³ *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971).

removal invalid.”¹⁰⁴ That argument, however, is unsupported by the record, and runs counter to the 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. Additionally, the Plaintiff’s argument that the reasons stated in the August 2013 resolutions were mere “pretexts” for removing the Bishop is equally unpersuasive; as I have explained above, his removal was permissible with or without cause, pursuant to Section 3.06. In any event, I find from the record that the board was motivated by the policy and personality conflicts described above, and that “retaliation” for exercise of his rights under Section 220 was not its motive for removing Bishop Gassis.

Second, the Plaintiff contends that the Court should invalidate Bishop Gassis’s removal as it constituted a breach of the board’s fiduciary duties. To whom the board of directors of a non-profit, nonstock corporation owes a fiduciary duty is an issue explored by our Supreme Court’s decision in *Oberly v. Kirby*.¹⁰⁵ In that case, the Supreme Court addressed claims brought by removed directors of a nonstock charitable corporation, who sought to invalidate their removal on the basis of procedural deficiencies and purported breach of fiduciary duty. With respect to the latter issue, the Supreme Court explained that:

¹⁰⁴ Pl.’s Br. in Supp. of § 225 Claim at 53-54.

¹⁰⁵ *Oberly v. Kirby*, 592 A.2d 445 (Del. 1991).

[The] [p]laintiffs are not shareholders . . . and have no legitimate expectation of financial benefit from the operation of the [charitable corporation]. While they have the right as ousted directors, to seek judicial review of [the defendant director's] actions as a fiduciary, the focus of that scrutiny is limited to (a) any financial harm or jeopardy to the [charitable corporation] itself and its beneficiaries and (b) any personal benefit to [the defendant director] or his family, notwithstanding the absence of harm to the [charitable corporation].¹⁰⁶

The Court stated in summary that where a corporation is “created for a limited charitable purpose rather than a generalized business purpose, those who control it have a special duty to *advance its charitable goals* and protect its assets.”¹⁰⁷

The Plaintiff here contends that the Bishop's removal constituted a breach of the board's fiduciary duties. It is unclear, however, whether the Plaintiff means to suggest that the removal constituted a breach of duty owed to Bishop Gassis personally as a member of the Fund, or owed to the Fund's beneficiaries. To the extent the Plaintiff believes the board owed a fiduciary duty to Bishop Gassis as a member, that suggestion is contrary to the Supreme Court's holding in *Kirby*. As noted above, that decision made clear that a nonprofit charitable corporation's board owes fiduciary duties to its *beneficiaries*, not to its members *qua* members or directors *qua* directors.¹⁰⁸ Further, while Ann's testimony at trial imprecisely

¹⁰⁶ *Id.* at 462.

¹⁰⁷ *Id.* (emphasis added).

¹⁰⁸ *See id.* at 463 (“[The director defendant's] actions may well be viewed as exhibiting ‘a lack of brotherly regard’ but in his capacity as member and director of the [charitable corporation], [the director defendant] owed no fiduciary duties to other directors, only to the [corporation].”). The Plaintiff disagrees with this interpretation of *Kirby*, explaining that in that case the plaintiffs were directors but not members of the corporation. What he fails to acknowledge, however, is that

referred to Bishop Gassis as a “beneficiary” of the Fund,¹⁰⁹ the Bishop’s own testimony at deposition made clear that in fact he is *not* a beneficiary, but a “voice” of and conduit to the Fund’s beneficiaries¹¹⁰—the Sudanese people for whom the Fund was established.¹¹¹

In addition, to the extent the Plaintiff argues the Bishop’s removal constituted a breach of the board’s fiduciary duties to its beneficiaries in Sudan, the Plaintiff has 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. The *Kirby* Court provides the standard by which I must examine the actions 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. However, because the Foundation was created for a limited charitable purpose rather than a generalized business purpose, those who control

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.

¹⁰⁹ See Trial Tr. 27:19-28:1 (“You know, on the board, it was really clear there was two roles of the Bishop. He was primarily the beneficiary of the organization so he received about 90 percent of all funding over the course of the organization to his diocese. So he was a beneficiary and he was also a board member and as a board member, he did not excel.”).

¹¹⁰ See Bishop Gassis Dep. Vol. II 24:10-16 (“I am not the beneficiary. Let me put it clearly. I am the voice of the beneficiaries. . . . I hope this is clear. I am the voice of the [voiceless]. This Board was actually created for the beneficiaries, not for me.”).

¹¹¹ The Plaintiff suggests that the board owed Bishop Gassis a fiduciary duty “as a member with valid property and equitable interests in the Fund.” Pl.’s Reply Br. at 19. The Plaintiff can cite no basis for that contention, however. Rather, if anything, the Bylaws may have created some contractual rights for the Plaintiff. And while 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.

it have a special duty to advance its charitable goals and protect its assets. Any action that poses a palpable and identifiable threat to those goals, or that jeopardizes its assets would be contrary to the Certificate and hence *ultra vires*.¹¹²

While the Plaintiff suggests that the Corkerys were “motivated by enhancing their own control over the affairs of the Fund and in entrenching themselves on the Board,”¹¹³ weighing the record evidence and credibility of Ann’s testimony at trial, I find that no such insidious motives existed. Importantly, the Defendants at all times constituted a majority of directors on the board—who, under the Fund’s Bylaws, had exclusive control over director elections—and so the suggestion that the Corkerys acted to remove the Bishop in an effort to entrench themselves has no logical force. The Plaintiff suggests that “[t]he Board’s active conspiracy to prevent a quorum at the July 2013 annual meeting constituted a shocking breach of fiduciary duty to the Corporation and to its beneficiaries,” but has not demonstrated how that is so.¹¹⁴ There is no indication in the record that, had the July meeting gone forward with a quorum, the board would have taken any action that would—or even could—have impeded a majority of the board’s ability to remove the Bishop at the August 2013 meeting. Similarly, the Plaintiff’s contention that the Defendants acted “to enhance their own reputations and stature”

¹¹² *Oberly*, 592 A.2d at 462 (citations omitted).

¹¹³ Pl.’s Answering Br. in Opp’n to Defs.’ Mot. to Dismiss at 25.

¹¹⁴ Pl.’s Br. in Supp. of § 225 Claim at 47.

is simply insufficient to demonstrate an invalidating interest in the Bishop's removal.¹¹⁵

Further, to the extent the Plaintiff suggests that the Defendants sought to remove Bishop Gassis in an effort to deviate from the Fund's charitable purpose of providing relief to Sudanese people in the Nuba Mountain region, that argument finds little support in the record. The Fund's Certificate of Incorporation expressly provides that the Fund's charitable purpose is "not limited to" providing relief in the Nuba Mountains;¹¹⁶ Bishop Gassis himself has supported projects in Sudan outside of the Nuba Mountains in the past;¹¹⁷ Ann credibly testified at trial that the Fund began to support projects outside of the Nuba Mountains in 2010 because that region did not have the capacity to accept all the funding the Fund was able to provide;¹¹⁸ and the record indicates that the board was primarily motivated by factors other than disagreements regarding what projects to support when the board determined it was in the best interests of the beneficiaries of the Fund to remove Bishop Gassis. In any event, nothing in the record indicates that the charitable interests of the Defendants are incompatible with the aims of the Fund as stated in its Certificate of Incorporation.

¹¹⁵ The Plaintiff also contends that Hunter-Hall acted out of a "well-documented personal dislike of Bishop Gassis." *Id.* at 40. Hunter-Hall did not vote in favor of Bishop Gassis's removal, however.

¹¹⁶ Certificate of Incorporation § 3(1)-(2).

¹¹⁷ *See, e.g.*, Trial Tr. 42:4-43:9.

¹¹⁸ *Id.*

In fact, the record supports the Defendants’ contention that they acted to remove Bishop Gassis not out of self-interest, but because the directors believed it was in the best interests of the beneficiaries of the Fund to do so. The Defendants have identified some of their reasons for removing Bishop Gassis, including (1) personality conflicts that made him a difficult director with whom to work; (2) their negative perception of his interactions with the Fund’s beneficiaries in Sudan; (3) concerns about the Bishop’s extravagant spending throughout his travels, as well as other disagreements about his lifestyle that might reflect negatively on the Fund;¹¹⁹ (4) their suspicion that the Bishop’s projects had been double-funded; and (5) what the board perceived as Bishop Gassis’s belief that he had a personal ownership interest in the Fund and its assets. Further, the directors had business reasons for strategically timing his removal: Ann credibly testified at trial that the board’s less-than-transparent plan to remove the Bishop on his seventy-fifth birthday was motivated by an interest in smoothly transitioning Bishop Gassis out of the Fund in an effort not to disrupt the flow of donations from donors.¹²⁰ Those

¹¹⁹ *Id.* at 52:13-17.

¹²⁰ *Id.* at 30:20-31:7 (“The reason why I tolerated it is—first of all, I was a very strong board member, and I absolutely was always respectful to him but I always spoke the truth. In that board meeting, I knew that the Bishop would be resigning in September of 2013, and then according to our bylaws when he resigned as the Bishop of El Obeid diocese he would no longer be the chair of our organization. So I believed it was in the best interests of our beneficiaries, and I actually believed it was in the best interests of the Bishop, to keep my head down and to get through one more year because he would be leaving.”); *id.* at 40:4-8 (“So what I hoped and what I wanted was there to be a peaceful transition when he resigned. But the Fund would go on. I mean as you can see now there’s more needs now than ever in Sudan. I mean just reading

acts, based on the record evidence, were motivated by the Defendants' desire to protect the interests of the beneficiaries of the Fund in Sudan, the only people who would be harmed if donations ceased due to a scandal. Notably, except with respect to the Corkerys (and the Bishop himself), there is no allegation of self-interest; all other directors were independent and disinterested. The record is clear that all the Defendants have understood that their fiduciary duties run to the suffering people of Sudan, despite the parties' disagreement as to how best to satisfy those duties.

The driving force of this litigation is 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. Specifically, the Bishop contends that, despite any shortcomings he may have had as a board member, or would have as an ex-bishop attempting to oversee projects in Sudan, his name and likeness were an asset essential to the Fund, so that any action that risked loss of that asset necessarily constituted a breach of fiduciary duty. It is clear that the use of the Bishop's name and likeness was an asset that had value to the Fund for many years. I note, however, that discharging Bishop Gassis from the board did not necessarily mean loss of that asset. Setting that aside, weighing loss of the name and likeness

the newspapers you can see that."); *id.* at 54:14-19 ("So we really believed that he wouldn't be around long. So we thought that it was in the best interests of the beneficiaries if we let him go away quietly and we kept our head down. We thought that was the best, but we did know we had the power. We just wanted to do this amicably.").

against the detriment of retaining Bishop Gassis as a board member and Chairman is precisely the type of business decision the board is charged with making. In any event, the record does not support the contention that, in discharging Bishop Gassis and risking loss of his name and likeness, the board acted adversely to the interests of the beneficiaries of the Fund in Sudan.

Ultimately, while the Defendants' conduct throughout 2011, 2012, and 2013 was far from transparent, the record supports a finding 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. I therefore decline to invalidate his removal on the basis that the Defendants breached their fiduciary duties either to the Bishop personally or to the Fund's beneficiaries.

2. The 2011 and 2012 Elections

In addition to challenging the Defendants' decision to remove Bishop Gassis from the Fund's board in 2013, the Plaintiff seeks to invalidate Shea's May 2011 removal, Forte's August 2012 removal, Hunt and Hunter-Hall's June 2011 election, and Neil's August 2013 election. Section 225 confers on this Court jurisdiction to "hear and determine the validity of any election, appointment, removal or resignation of any director or officer of any corporation, and the right of any person to hold or continue to hold such office," "[u]pon application of any

stockholder or director, or any officer whose title to office is contested”¹²¹ I have already determined that Bishop Gassis no longer holds a director seat on the Fund’s board of directors, as he was validly removed by a two-thirds vote of directors either *de jure* or *de facto*, and that he ceased to be an officer as a result of that same board vote. As a result, pursuant to Section 2.01 of the Fund’s Bylaws,¹²² he ceased to be a member of the corporation on September 21, 2013. Because the Plaintiff is no longer a director, officer, or member of the Fund, he has no standing under Section 225 to contest the validity of Shea and Forte’s removal, or Hunt, Hunter-Hall, and Neil’s election. Perhaps as important, neither Shea nor Forte are parties to this action, and it is far from clear that, several years after their respective removals, either would be interested in returning to the Fund’s board of directors. I therefore decline to consider the validity of their removals, on the basis that Bishop Gassis lacks standing to challenge them. In light of my findings here, I need not address the Plaintiff’s affirmative defenses.

IV. CONCLUSION

For the reasons stated above, I find that Bishop Gassis was validly removed from the Fund’s board of directors effective September 21, 2013, and that he lacks standing to challenge the prior removals of Nina Shea and David Forte or the

¹²¹ 8 *Del. C.* § 225(a) (emphasis added).

¹²² See Bylaws § 2.01 (defining the Members of the Fund as “the members of the Board of Directors,” and providing that “each Member shall remain a Member so long as, and only so long as, such person continues to serve as a Director”).

elections of Kathleen Hunt, Father Rodger Hunter-Hall, and Neil Corkery. The parties should submit an appropriate Order, and inform the Court what issues, in light of this Memorandum Opinion, remain to be addressed.