

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re:)
Multi-Circuit Episcopal Church) **Civil Case Numbers:**
Litigation) CL 2007-248724,
) CL 2007-1625, and
) CL 2007-5250,

**THE FALLS CHURCH'S POST-TRIAL REPLY BRIEF
REGARDING THE FALLS CHURCH ENDOWMENT FUND**

The Falls Church (“The Falls Church” or “TFC”), by counsel, hereby files its post-trial reply brief regarding The Falls Church Endowment Fund (the “Endowment Fund” or “Fund”).

I. The Vestry of The Falls Church continues to be the rightful electors of the Board of Directors of The Falls Church Endowment Fund.

All of plaintiffs’ arguments about The Falls Church Endowment Fund depend entirely upon a single factual premise – their assertion that the so-called “continuing congregation” created by the Diocese in 2007 and now calling itself “Falls Church (Episcopal)” is the same legal entity identified in the Fund’s Articles and Bylaws adopted in 1976. But the unrefuted record evidence is that this “continuing congregation” did not exist until at least a month after TFC’s congregational vote, first meeting in mid or late January 2007. Tr. 1468:14-1469:17 (W. Fetsch). And although plaintiffs claim that this “continuing congregation” *is* “The Falls Church” and “The Falls Church (Episcopal)” for purposes of asserting an interest in TFC’s property and TFC’s control over the Fund, the undisputed evidence is that this “continuing congregation” has never undertaken any of the pre-existing obligations or burdens of The Falls Church from prior to the 2006 vote.¹ *See* TFC’s Opening Post-Trial Brief Regarding The Falls Church Endowment Fund (“Fund Br.”) at 9 & n.9.

¹ After the vote and disaffiliation, it was the defendant TFC that continued to carry on the activities of and to fulfill the obligations of The Falls Church. TFC continued in the corporate

Plaintiffs never directly address this record evidence that the “continuing congregation” did not exist until 2007 and therefore could not be the legal entity identified in the Fund’s 1976 Articles and Bylaws. Rather, they attempt to attack it collaterally in two ways. First, they baldly assert, without citation, explanation, or even argument, that it “simply is not true” that the “continuing congregation” did not exist until 2007. DVA/TEC Br. at 96. Obviously, such “wishing does not make it so,” and the record evidence remains unrefuted. Second, they argue that the determination, for purposes of interpreting the corporate governing documents of a Virginia nonstock corporation, whether “The Falls Church” is the same entity that appointed the Fund’s directors for thirty years or is the plaintiffs’ new “continuing congregation,” is an entirely ecclesiastical decision that this Court must defer to and enforce without question or analysis. DVA/TEC Br. at 96-97.

Plaintiffs’ arguments regarding The Falls Church Endowment Fund thus ultimately rely upon the same legal premise as their deed arguments – a disguised “deference to hierarchy” analysis that contends that this Court must defer to and enforce the plaintiffs’ views as to the “identity” of The Falls Church, no matter what. *See* DVA/TEC Br. at 96-97. Plaintiffs take this position even though the Endowment Fund is a separate legal entity established as a Virginia non-stock corporation and even though the Articles of Incorporation and Bylaws of the Fund are secular legal documents of precisely the sort that courts routinely interpret and apply.

For the reasons discussed in Sections I.B and III.B of the CANA Congregations’ Post-Trial Reply Brief filed herewith, plaintiffs’ “identity” approach must be rejected. The Falls

form and paid employees and vendors for pre-vote services and goods. TFC continued to use its pre-vote tax ID and submitted year-end W-2’s and statements of contribution for the entire year. Tr. 2464-2468 (“Deiss”). The “continuing congregation” is not incorporated and did none of these things. Indeed, the “continuing congregation” did not even think about any of these obligations as its responsibility. Tr. 1472-1475 (W. Fetsch).

Church's identity is determined not by deferring to plaintiffs' asserted hierarchy, but by generally applicable Virginia corporation law and by consideration of the specific facts in evidence here.

The plaintiffs' "identity" arguments here rest upon the same slender reed as do their deed arguments, specifically, on the inclusion of the words "Episcopal" and "Episcopal Church" in several of the places where the name of The Falls Church appears in the Fund's Articles and Bylaws. Plaintiffs selectively quote from those documents to support their contention that only the vestry of an "Episcopal" church can appoint the members of the Fund's Board. But Plaintiffs fail to address the Fund's Articles and Bylaws *in toto* and, in particular, *all* of the various references to The Falls Church in those documents.

As we have previously explained, the varying references to The Falls Church, both with and without "Episcopal" modifiers, are merely a description identifying the entity that in 1976 incorporated the Fund. *See* Fund Br. at 5-6. This is evident, for example, from the fact that the "Episcopal" reference in Article 1, Section 2 of the Bylaws is immediately followed by the remainder of what is clearly a descriptive phrase: "Falls Church, Virginia". *See* DX-FALLS-368-001. Further, if the use of those terms had been designed to operate as a restriction requiring that the directors of the Fund must always be appointed by an "Episcopal" church, that could have been done unambiguously.² Most notably, the term would have been used in Article Ninth of the Articles, the provision required by IRS regulations that provides for distribution of the

² The only testimony that plaintiffs point to on this issue is Mr. Hutson's single word response to Diocesan counsel's leading question indicating that, at the time he helped set up the Fund, it never occurred to him that the directors of the Fund would be appointed by non Episcopalians. DVA/TEC Br. at 97, *quoting* Tr. 4253-54. The indication that such a possibility never occurred to Mr. Hutson actually further reinforces the conclusion discussed above that the "Episcopal" references in the Articles and Bylaws were not designed to distinguish between potential future competing claims of different congregations but rather were simple descriptive terms.

corporation's assets on dissolution of the corporation, a fact the plaintiffs never address. *See* Fund Br. at 6.

Finally, it remains undisputed that the local congregation established the Endowment Fund and that the Diocese and TEC were not involved in its creation. It is undisputed that the contributions to the Fund came from The Falls Church and its congregants, and not from the Diocese or TEC. *See* Fund Br. at 1-3. It is also undisputed that The Falls Church incorporated in June 2006, six months prior to the congregational vote to disaffiliate, and that the vestry of The Falls Church and all the directors of the Fund (including Mrs. Robin Fetsch) recognized that the vestry of the incorporated church continued to hold the power to appoint the Fund's directors. *See* Fund Br. at 7-9 & n.8. In fact, the directors of the Fund (including Mrs. Fetsch) voted unanimously in November 2006, after incorporation and with full awareness of the impending congregational vote on disaffiliation, to recommend that the vestry of now-incorporated The Falls Church re-appoint Mr. Skancke and Mr. Henneberg to continue their service as Directors, and communicated this recommendation to TFC Wardens Tom Wilson and Carol Jackson. DX-FALLS-0373; DX-FALLS-0374; Tr. 2876:6-2877:7 (Henneberg). And it remains undisputed that it was only in December 2007, a year later, that the Diocese and Mrs. Fetsch attempted to bring the Fund under the control of the "continuing congregation." *See* Fund Br. at 3-4, 7-8. In light of all of these undisputed facts, it is simply not possible to conclude that the "continuing congregation" is the church that established the Fund and that is identified in the Fund's Articles and Bylaws as having the power to appoint directors.


TFC therefore respectfully requests that this Court rule in TFC's favor regarding the appointment of directors of The Falls Church Endowment Fund.


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Respectfully submitted,

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CERTIFICATE OF SERVICE

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