VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re:	)	**Case Nos.:** CL 2007-248724,
Multi-Circuit Episcopal Church Litigation	)	CL 2006-15792,
	)	CL 2006-15793,
	)	CL 2007-556,
	)	CL 2007-1235,
	)	CL 2007-1236,
	)	CL 2007-1237,
	)	CL 2007-1238,
	)	CL 2007-1625,
	)	CL 2007-5249,
	)	CL 2007-5250,
	)	CL 2007-5362,
	)	CL 2007-5363,
	)	CL 2007-5364,
	)	CL 2007-5682,
	)	CL 2007-5683,
	)	CL 2007-5684,
	)	CL 2007-5685,
	)	CL 2007-5686,
	)	CL 2007-5902,
	)	CL 2007-5903, and
	)	CL 2007-11514

POST-TRIAL REPLY BRIEF REGARDING THE FALLS CHURCH ENDOWMENT FUND, INC.

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1. TFC has presented no evidence that would support a finding that it had any property interest in the Endowment Fund at the time of the vote to disaffiliate.

We continue to maintain that "whether TFC – at the time of the vote to disaffiliate – had a personal property interest in the Endowment Fund by virtue of its vestry's power to appoint the Directors of the Fund," Letter Opinion (Oct. 17, 2008) at 4, is a purely legal issue and is governed by the corporate Articles and By-Laws of the Endowment Fund. That said, however, it must be recognized that TFC presents an entirely one-sided view of the evidence. It fails to note, for example, that there was "[n]ever" an occasion "when the vestry of the Falls Church told the Endowment Fund it needed to support a particular ministry"; that the vestry "[n]ever" provided any advice or input "with respect to any decisions regarding any grants from the Falls Church Endowment Fund"; and that "[i]t was explicitly not the purpose [of the Endowment Fund] to support the operation of the Falls Church. It's written from the very beginning, in the minutes and throughout, in document after document." Tr. (Oct. 20, 2008) at 195-96 (Fetsch). It fails also to note that there were "absolutely" no "joint accounts between the Falls Church and the Endowment Fund." *Id.* at 204. And it neglects to acknowledge that "[t]here was never any reporting" by the Endowment Fund Board of Directors to the vestry of the church.[1]

According to TFC, the holdings of the cases cited in our Opening Brief "are not that the members do not have *any* property interest in their rights to elect directors, but rather that the

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[1] TFC avers, inaccurately, that the evidence demonstrates "that the Fund was established with monies contributed to or by The Falls Church or contributions from TFC congregants directed by TFC to the Endowment Fund." TFC Opposition at 1. At other points in its Opposition it states the point even more boldly, and thus even more inaccurately, stating that "the TFC vestry" has "entrusted" "investments" to the Fund. TFC Opposition at 4. We answer those assertions *infra* at 3-4 & n. and at 6-8. Its assertion that "the TFC vestry has had the right to manage and control the Fund," TFC Opposition at 1, is answered in our Response at 7-8. Its contention that "the TFC vestry, acting as a vestry and not individually," has elected directors, TFC Opposition at 1, is answered *infra* at 9-10. The irrelevance of the dissolution provision (*see* TFC Opposition at 1) is discussed in our Response at 10-11.

members' rights to elect directors are not *vested* rights ...." TFC Opposition at 2. The only problem with that argument is that it is utterly unsupported by the cases. None of the cases cited in our Opening Brief even refers to vested rights, with the exception of the statement and the rhetorical question in *In the Matter of Mount Sinai Hospital*, 250 N.Y. 103, 113, 164 N.E. 871, 875 (1928), that "[a] member's right to a voice in the management of a corporation *may under conditions not presented here* be a vested interest entitled to protection under the Constitution," but "[w]hat vested interest does a mere voting member of a charitable corporation devoted in part, at least, to public uses, have to protect of which he is deprived when he is deprived of his right to vote?" (Emphasis added.) TFC attempts by indirection to avoid the analytical basis of the *Mount Sinai* decision, but it fails entirely to acknowledge, much less to confront, the court's explicit holding – that "*no one's property is taken*" by "a change in the method of electing trustees, once intrusted to the members, whereby the members are disfranchised and the board is made self perpetuating," 250 N.Y. at 114, 164 N.E. at 875 (emphasis added) – or its unambiguous distinction between "the stockholders of a business corporation," whose property interests are violated "when he is deprived of his right to vote," and "a mere voting member of a charitable corporation," who has no such interests, *id.* at 113, 164 N.E. at 875.[2]

The other cases cited in our Opening Brief are less explicit in their analyses, but they are directly to the same effect. *Bailey v. American Society for Prevention of Cruelty to Animals*, 282 App. Div. 502, 505, 125 N.Y.S.2d 18, 21 (1953), *aff'd mem.*, 307 N.Y. 679, 120 N.E.2d 853 (1954), states unequivocally "that in the case of a membership corporation organized for charitable or nonprofit purposes such provisions in corporate by-laws" – changes which take the

[2] That distinction is articulated forcefully in the TEC-Diocese Opening Brief at 3-6, responding to TFC's argument at the trial that the Court "might analogize this to if The Falls Church held stock in a corporation." TFC apparently has no response.

power to elect directors from the members and give it to a "self-perpetuating" board – "do not infringe on *any property or other enforcible right* of ordinary members and are not illegal." (Emphasis added.) *Bailey* also squarely rebuts TFC's primary argument for ignoring *Mount Sinai*, which is that the decision in that case turned on the fact that "the right of the members to elect directors had been conferred by the original legislative grant of a corporate charter, and thus was subject to the legislature's reserved power of amendment over the charter." TFC Opposition at 3. As stated in our Opening Brief at 3, *Bailey* applied the *Mount Sinai* analysis to a change in voting rights by amendments to corporate by-laws. Neither a legislative grant nor the legislature's reserved power of amendment was a factor in that decision.

Westlake Hospital Association. v. Blix, 13 Ill. 2d 183, 196, 148 N.E.2d 471, 479 (1958), like *Bailey*, involved a change in the by-laws of a non-profit corporation and not an exercise of a reserved legislative power to amend; and also like *Bailey*, there is not one word in that decision about vested rights. The *Westlake* holding is as stated in our Opening Brief: "the right of members of a not-for-profit corporation to vote is not constitutionally protected."

TFC makes one more half-hearted attempt to avoid *Mount Sinai*, arguing that "[a]s a founder of and contributor to the Fund, and as the ultimate charitable recipient of the Fund's assets upon dissolution, the TFC vestry thus stands in a very different position from the members of the nonstock corporation present in *Mt. Sinai*." TFC Opposition at 3. TFC neglects to explain the significance of the purported distinction, which in all events is not as clear as it contends. The plaintiffs in *Mount Sinai* were not mere hangers-on but were "members of the society, paying annual dues, one as a $10 member and the other as a donor or $25 member." 250 N.Y. at 109, 164 N.E. at 873. (And obviously the value of a $10 or $25 contribution was substantially greater in the 1920's than it is today.) The TFC vestry, on the other hand, was not shown by any evidence at the trial to be a "contributor to the Fund," TFC Opposition at 3. *See* Tr. (Oct. 20,

2008) at 158-59 (Deiss): "Most of them [contributions to the Endowment Fund] come from people that are members of the Falls Church. Some donors are associated with the Falls Church but may not be members."[3] And as noted above, the irrelevance of the dissolution provision is discussed in our Response at 10-11.

TFC's arguments based on Va. Code § 13.1-884(B) (TFC Opposition at 4-5) are mere reiterations of arguments made in its Opening Brief and require no further response.

TFC tries to hide its argument on yet another central point (*see* TEC-Diocese Opening Brief at 7) at the end of its argument on a separate issue, contending that even though the right to elect the directors of the Endowment Fund – the "personal property" right on which TFC rests its entire claim – is *not* held by the trustees who hold the legal title to the land, "under §57-10, if personal property is 'given or acquired for the benefit' of a church, it thereby stands 'vested in the trustees having the legal title to the land ....'" TFC Opposition at 6-7. That assumes *two* conclusions, that the right to elect the directors is "personal property" *and* that it was "'given or acquired for the benefit' of a church."[4]

TFC does not stop there, however, but pursues the rabbit even further: "this is no different from other personal property that may be held by the vestry, clergy, or staff of a church,

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[3] TFC states that the Endowment Fund was "initially funded by the TFC vestry." TFC Opposition at 4, citing "Tr. 142:4-143:3 (Deiss); Tr. 184:14-185:2 (Fetsch)." That is misleading at best. Actually, Mr. Deiss carefully *avoided* testifying that the vestry provided any funding to the Endowment Fund. He testified only that it was "[t]he vestry of the Falls Church" that "*established* the Endowment Fund" and that "the vestry thought it was important to establish a separate corporation Endowment Fund *to attract funds* to support missions and outreach programs of the Falls Church." Tr. (Oct. 20, 2008) at 142. *See also id.* at 143-44 (describing how "potential contributors learn[ed] that there was an Endowment Fund that they could contribute to"); *id.* at 157-58 (explaining how "contributions to the Endowment Fund [were] received at the Falls Church"). Mrs. Fetsch testified similarly, that the Endowment Fund "was established principally with the idea of *receiving gifts separate from the Falls Church Episcopal* ...." *Id.* at 184. (All emphases added.)

[4] As discussed *infra* at 6, and elsewhere, TFC repeatedly assumes the conclusion that it has "property interests in electing the directors of the Endowment Fund."

that the trustees may never actually physically possess or control, such as books, furniture, sacramental materials, vestments, etc... Under §57-10, such property is nevertheless 'vested in the trustees having the legal title to the land ....'" TFC Opposition at 7. That argument depends on the unstated and erroneous notion that "held" and "possessed" are synonymous. Of course they are not. The vestry, clergy, or staff of a church may "physically possess or control" books, furniture, sacramental materials, vestments and the like; but they do not *hold the title* to such property (at least to the extent that it is the property of the church and therefore vested in the trustees having the legal title to the land, as opposed to individual property of the members of the vestry, clergy, or staff).

What TFC inadvertently demonstrates yet further by its argument, however, is that the right at issue here, the right to elect directors of a non-profit, nonstock corporation, just does not have the sort of substance required to constitute "property." Books, furniture, sacramental materials, vestments and the like are tangible and capable of physical possession and control. No one would deny that they are "property." Intangible interests such as certificates of deposit or ownership of stock in a corporation likewise have tangible representation and, more importantly, actual value, and they too are property. Taking the analysis a step further, the right to elect directors of a for-profit, business corporation is considered property *because* it is "a right to protect property from loss, and to make its possession beneficial.'" *Willard v. Moneta Bldg. Supply, Inc.*, 262 Va. 473, 481, 551 S.E.2d 596, 600 (2001) (citation omitted), quoted (and explained further) in TEC-Diocese Opening Brief at 4. But that reasoning just does not apply to voting rights in a non-profit, nonstock corporation, as we have discussed in previous filings.

Seeking to avoid or obscure the analysis compelled by case law, TFC argues that the Episcopal Church and the Diocese "conflate TFC's property interests in electing the directors of the Endowment Fund with having a direct property interest in the assets of the Fund." TFC

Opposition at 4. That argument overlooks the fact that the sole analytical basis on which courts have held that the shareholders of a *business* corporation have property interests in electing corporate directors is, as just stated, that "the right to vote for directors is a right to protect property from loss, and to make its possession beneficial." *Willard*, 262 Va. at 481, 551 S.E.2d at 600. The fact that the members of a nonstock corporation have no property interests in the corporate assets thus directly supports the conclusion that their right to vote for directors is not "property." And of course TFC is not even a member of the Endowment Fund. It is at least one step yet further removed and thus in even a poorer position than a member to claim that it has a property interest in the members' voting rights.

TFC argues, again, that "the TFC vestry has a valuable property interest in its right to appoint the directors of the Fund [which] enables the vestry to exercise control over the ultimate disposition of the investments that it has entrusted to the Fund and even over the ultimate dissolution of the Fund and return of the Fund assets to The Falls Church." TFC Opposition at 4. As it has done in previous briefs, TFC thus continues to assume the conclusion, that there *is* such a property right. (*See* TEC-Diocese Response at 4.) Even aside from that point, TFC's argument also assumes several matters which are contrary to the evidence: (1) While the various contributors to the Endowment Fund have indeed entrusted their contributions – but *not* their "investments," as discussed just below – to the management of the directors of the Fund, there is no evidence that the vestry has done so, as discussed above. (2) The directors of the Endowment Fund, and *not* the vestry of The Falls Church, are "in charge of its affairs" and have absolute discretion to "accept, expend, transfer or otherwise manage or dispose of any funds or other property of the Corporation." Endowment Fund Articles of Incorporation, TFC Exhibit 27 at 2, Article SIXTH (quoted in TEC-Diocese Response at 7). And (3) TFC is claiming the right to the "return" of funds that were contributed by various of its members and friends but *not* by the

church.

TFC's reference to "investments that [the vestry] has entrusted to the Fund" is not only contrary to the evidence, as discussed above, it also confuses investments with contributions. Contributions are given for a charitable purpose. Funds given to the Endowment Fund are contributed. They are not "invested." The universal understanding of the word "invest" is "to commit (money) in order *to obtain a financial return.*" Merriam-Webster's Collegiate Dict. 616 (10th ed. 1995) (emphasis added). Volumes of federal and state case law confirm that definition as a legal matter. "The word 'investment' ... ordinarily signifies the use of money to purchase property, personal or real, for any purpose from which *income or profit is expected*, presently or in the future, speculatively or permanently." *Pennsylvania R. Co. v. Interstate Commerce Com.*, 66 F.2d 37, 39 (3d Cir. 1933) (emphasis added), *aff'd* (by an equally divided Court), 291 U.S. 651 (1934). *Accord, e.g., Sapp v. Sapp*, 33 Del. Ch. 524, 96 A.2d 741, 746 (1953); *State v. Gertsch*, 137 Idaho 387, 49 P.3d 392, 397 (2002); *In re National City Bank of New York*, 285 N.Y. 475, 35 N.E.2d 177, 179 (1941) (quoting 33 C. J. 808); *In re Bowen*, 141 Ohio St. 602, 49 N.E.2d 753, 755 (1943); *Brownie Oil Co. v. Railroad Com. of Wisconsin*, 207 Wis. 88, 240 N.W. 827, 829 (1932). *See also, e.g., SEC v. W. J. Howey Co.*, 328 U.S. 293, 298 (1946), holding that the statutory term "investment contract" is universally understood as meaning

> a contract or scheme for "the placing of capital or laying out of money in a way intended to secure income or profit from its employment." *State v. Gopher Tire & Rubber Co.*, 146 Minn. 52, 56, 177 N. W. 937, 938 [(1920)]. This definition was uniformly applied by state courts to a variety of situations where individuals were led to invest money in a common enterprise with the expectation that they would earn a profit solely through the efforts of the promoter or of some one other than themselves. [Footnote omitted.]

Accord, e.g., People v. Hoover, 165 P.3d 784, 794 (Colo. App. 2006); *State v. Ameen*, 27 Kan. App. 2d 181, 1 P.3d 330, 332, *review denied*, 269 Kan. 934 (2000); *State v. LaCount*, 750 N.W.2d 780, 789-90 (Wis. 2008) (applying the "far broader" definition of investment contract in

Wisconsin securities law, *i.e.*, "[a]ny investment in a common enterprise with the expectation of profit to be derived through the essential managerial efforts of someone other than the investor" (quoting Wis. Admin. Code)). *See also SEC v. Edwards*, 540 U.S. 389, 394 (2004), explaining that the *Howey* Court used the term "'profits' in the sense of income or return, to include, for example, dividends, other periodic payments, or the increased value of the investment." *Cf. SEC v. Energy Group of America, Inc.*, 459 F. Supp. 1234, 1239 (S.D.N.Y. 1978) (no "investment" in a Bureau of Land Management lottery, where "[t]here is no distribution of profits or earnings, only a windfall if a lease is won.... It is an inducement to participate in a lottery, a game of chance, not to invest capital in order to realize a return over time").

Contributions to the Endowment Fund were given for purely charitable purposes, with no expectation and no possibility of income or profit to the contributor. To refer to such contributions as "investments," as TFC has done repeatedly during this phase of this litigation, is either to misunderstand the concept or to attempt to mislead. To understand the concept, on the other hand, is to demonstrate further that the vestry of TFC – and TFC itself – have no property interest of any kind in the Endowment Fund, including in the right to elect its directors.

2. TFC has presented no evidence that would support a finding that the power to appoint the Directors of the Fund was "given or acquired for the benefit" of a church, as required by Va. Code § 57-10.

TFC continues to ignore and avoid this argument. Its only reference to the issue assumes the conclusion, that the right to elect the directors *was* "'given or acquired for the benefit' of a church." TFC Opposition at 6-7. *See also* page 4, *supra*.

3. Under the Articles of Incorporation, the power to appoint directors of the Endowment Fund is not held by the vestry but by "those *individuals* who are members of the vestry of The Falls Church, Episcopal Church."

TFC avers that the directors were actually elected by the vestry and "not by individual

vestry members acting in their individual capacities." TFC Opposition at 6.[5] The dichotomy is false; the issue is not whether individual vestry members acted as a vestry or in their individual capacities. As a matter of law, they acted in their capacity as Class A members of the Corporation, and therefore owing fiduciary duties to the Endowment Fund Corporation. That is the *only* capacity in which they lawfully could act, under the Articles of Incorporation. As stated in argument at the trial, "They are not acting as vestry when they do so. They may do so in the same room at the same time," but that is simply irrelevant; "when they act to elect directors, they are acting as Class A members of the corporation, which is a separate institution." Tr. (Oct. 20, 2008) at 151.

TFC also ignores the unambiguous provision of the Articles of Incorporation that the Class A members of the Endowment Fund – defined as "those *individuals who are members* of the vestry of The Falls Church, Episcopal Church" – are responsible for electing directors of the Endowment Fund Corporation as the terms of the Directors expire. TFC Exhibit 27, page 2, quoted in, *e.g.*, TEC-Diocese Opening Brief at 7, 9 (emphasis added). It relies instead on the corporate By-Laws, which state that the directors "shall be elected by the vestry of The Falls Church, Episcopal Church ...." TFC Opposition at 5-6. But the bylaws of a nonstock corporation are invalid to the extent that they contradict its articles of incorporation. *See* Va. Code § 13.1-823(B) ("The bylaws of a [nonstock] corporation may contain any provision for managing the business and regulating the affairs of the corporation that is not inconsistent with law or the articles of incorporation"); Va. Code § 13.1-826(A)(10) (unless its articles of

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[5] *See also* TFC Opposition at 6: "An individual vestry member, acting alone, could not elect any director of the Fund, let alone all five directors." That is just silliness. There is no suggestion that "[a]n individual vestry member, acting alone," could take any relevant action – except, perhaps, in some purely hypothetical circumstances in which an individual vestry member was the only Class A member of the Corporation who was acting or capable of acting.

incorporation provide otherwise, every nonstock corporation has the power "[t]o make and amend bylaws, not inconsistent with its articles of incorporation or with the laws of the Commonwealth, for managing the business and regulating the affairs of the corporation").

4. At the moment TFC voted to leave the Episcopal Church, the members of its vestry were no longer members of the vestry of The Falls Church, Episcopal Church.

TFC professes to find our argument "incomprehensible." TFC Opposition at 7. We respectfully disagree. As stated in our Opening Brief, the Class A members of the Endowment Fund Corporation (the TFC vestry) lost the right to elect the corporate directors at the moment of disaffiliation; and that loss was "effective immediately," as stated by the Congregational Ballot. It therefore occurred "at the time of the vote, not subsequent to the vote" – in precisely the same manner as the congregational "determin[ation] to which branch of the church or society such congregation shall thereafter belong," Va. Code § 57-9(A), was "effective immediately," "at the time of the vote, not subsequent to the vote."

Respectfully submitted,

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