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 RESPONSE BRIEF REGARDING THE FALLS CHURCH ENDOWMENT FUND, INC.

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TFC does its best to obscure the issue before the Court. It has conceded already – as of course it must – that its trustees did not and do not hold *either* the assets of The Falls Church Endowment Fund *or* the right to elect its directors in trust for its congregation. TFC's focus on the alleged value of the right of its vestry members to appoint directors only demonstrates that it is attempting to litigate, in the wrong proceeding, the issue of ownership of the sums on deposit in the Endowment Fund. TFC's arguments are appropriate for the Diocese's declaratory judgment action. The only issue for resolution by this Court, at this stage, is whether the right to elect directors of The Falls Church Endowment Fund is held in trust, for TFC's benefit and by "the trustees having the legal title to [its] land." It is not; therefore Va. Code § 57-10 does not and cannot apply.

TFC also studiously ignores a critical distinction on which it has relied, successfully, at earlier stages of this case – the distinction between holding property by a corporation (such as the Endowment Fund) and by trustees. *See* The CANA Congregations' Post-Decision Responsive Brief (filed May 9, 2008) at 4 ("churches may avoid the application of § 57-9 ... by directing that member congregations legally incorporate and transfer title to the incorporated entity"); *id.* at 7 ("title to the real property of Greek Orthodox and Foursquare churches, among others, is held by corporations. *Because none of this property is held by trustees, § 57-9 is not triggered*") (emphasis added). Having prevailed by arguing that distinction when the constitutionality of § 57-9 was at issue, TFC may not be heard to deny the significance of the same distinction now: "A party may not approbate and reprobate by taking successive positions in the course of litigation that are either inconsistent with each other or mutually contradictory." *Cangiano v. LSH Bldg. Co.*, 271 Va. 171, 181, 623 S.E.2d 889, 895 (2006).

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.

TFC provides an elaborate recitation of irrelevant evidence. *See* The Falls Church's Opening Post-Trial Brief Regarding The Falls Church Endowment Fund (TFC Brief) at 2-4. The issues presented by the motion to strike and the dispositive question as framed by the Court ("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) are purely legal issues. The only relevant facts are the contents of the corporate Articles and By-Laws of The Falls Church Endowment Fund, Inc., and those are stipulated.[1]

The centerpiece of TFC's case – its "[m]ost importan[t]" argument – is that the Virginia Nonstock Corporation Act, Va. Code § 13.1-884(B), "provides that '[a] member of the corporation' has a 'property right' in provisions of the non-stock corporation's articles of incorporation 'relating to management, control, capital structure, purpose, or duration of the corporation.'" TFC Brief at 1. Section 13.1-884(B) does not provide any such thing, of course;

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[1] Indeed, the *only* evidentiary matter that is even *mentioned* in TFC's Argument is that "prior to the conclusion of the 2006 vote, the vestry of The Falls Church actually appointed all directors of the Endowment Fund." TFC Brief at 5. That is a makeweight at best; it is undisputed that under the Articles of Incorporation, the Class A members of the Endowment Fund – "those individuals who are members of the vestry of The Falls Church, Episcopal Church" – "have the duty of electing Directors of the Corporation as the terms of the Directors expire." TFC Exhibit 27 at 2.

Probably the most egregious example of TFC's recitation – indeed, its exaggeration – of irrelevant evidence is its statement that the Endowment Fund's audited annual financial statements for recent years were consolidated with the its own financial statements and that the consolidated financial statements "treated the Fund as a subsidiary of TFC and treated the assets of the Fund as assets of the consolidated operation." TFC Brief at 4. As the Court ruled at the trial, TFC was allowed to present only Mr. Deiss's testimony that the financial statements were consolidated. Whether the Endowment Fund was "treated as a subsidiary and the purpose, ... even if I found it relevant," was an issue of accountants' opinion and required expert testimony,

(footnote continued)

but *if it did*, that "property right" would belong to the *members of the corporation* and *not* to *TFC*.

Section 13.1-884 gives a nonstock corporation the "[a]uthority to amend [its] articles of incorporation," as stated by its title. Subsection A provides that authority. It states, in full:

> A corporation may amend its articles of incorporation at any time to add or change a provision that is required or permitted in the articles or to delete a provision not required in the articles. Whether a provision is required or permitted in the articles of incorporation is determined as of the effective date of the amendment.

Subsection B, in turn, was enacted to preclude claims by members of nonstock corporations that their property rights were violated by amendments that are authorized by Subsection A. *See* Renewed Motion to Strike and Post-Trial Opening Brief Regarding The Falls Church Endowment Fund, Inc. (TEC-Diocese Brief) at 6 & n.2, citing Joint Bar Commentary to Va. Code § 13.1-705(B); *Goolsby on Virginia Corporations* § 11.1 (3d Ed. 2008); and *O'Brien v. Socony Mobil Oil*, 207 Va. 707, 152 S.E.2d 278, *cert. denied*, 389 U.S. 825 (1967)).[2] Section 13.1-884(B) provides this, and nothing more:

> A member of the corporation does not have a vested property right resulting from any provision in the articles of incorporation, including provisions relating to management, control, capital structure, purpose, or duration of the corporation.

That does not say that members *have <u>any</u>* interest, property or otherwise, "resulting from any provision in the articles of incorporation" or from any other source whatever. It says *only* that members do *not* have a vested property right resulting from such provisions, and it is simply silent on the question whether they have any other interest. Particularly in view of the clear (and undisputed) legislative purpose, to preclude interference with nonstock corporations' authority to

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which TFC did not present. Tr. (Oct. 20, 2008) at 166. *See id.* at 165-66. *See also id.* at 168-69 (excluding the financial statements from evidence).

[2] TFC does not dispute the legislative purpose. *See* TFC Brief at 5-6.

amend their articles of incorporation, it would require an exceedingly peculiar twist of logic to read that statute as *providing* that the members of such corporations *have* some unspecified *non*-vested property right. TFC's "[m]ost importan[t]" argument, in short, is a thin reed indeed.

TFC does not hesitate, however, to employ twisted logic. Thus it argues, for example, that the language of § 13.1-884(B), and nothing more, "*makes clear* that *this property right* is a *contingent* property right – a property right that can be altered by amending the articles of incorporation – but it is nonetheless a property right." TFC Brief at 5 (first two emphases added). That argument simply assumes the conclusion, that there *is* such a property right. Circular reasoning inevitably concludes where it began, but that does not validate the beginning.

TFC's argument depends on implication – indeed on a negative implication – from statutory silence on all matters other than vested property rights. That is an exceedingly weak argument. As discussed in the leading treatise on statutory construction:

> for a consequence to be implied from a statute there must be greater justification for its inclusion than a consistency or compatibility with the act from which it is implied. "A necessary implication within the meaning of the law is one that is so strong in its probability that the contrary thereof cannot reasonably be supposed."

2B N. Singer & J. Singer, *Statutes and Statutory Construction* (*Sutherland Statutory Construction*) § 55:3 at 452-53 (7th Ed. 2008) (citation omitted).

TFC also argues that if our argument were correct, § 13.1-884(B) would be mere surplusage, "as there is no need for a statute to state that property rights are not *vested* if those rights do not exist in the first place." TFC Brief at 6. That argument ignores the legislative purpose, which (as discussed above) was to prevent assertion of claims of right that would interfere with nonstock corporations' authority to amend their articles of incorporation, and more specifically to preclude application of a "vested rights" doctrine such as that asserted in the *Socony* case.

And contrary to TFC's argument, TEC and the Diocese do not agree "that the property rights of shareholders recognized in [Va. Code] § 13.1-705 exist," that § 13.1-705 "recognize[s]" the existence of any property rights of shareholders, "or that there was an existing property right at issue in the underlying *Socony Mobile* [*sic*] case," TFC Brief at 6.

The issue in *Socony* was whether an amendment to the articles of a for-profit corporation, which converted all outstanding shares of the company's "Dividend Participating Preferred Stock" into newly authorized shares of stock and canceled all arrearages of accrued but undeclared dividends on the old preferred stock, violated a preferred shareholder's rights. The Supreme Court of Virginia acknowledged that the shareholder, Miss O'Brien, had "rights and privileges spelled out in [the company's] certificate of incorporation," which "were subject to change, however, by the requisite vote of her fellow stockholders as prescribed by the Virginia corporation laws in effect when she acquired the stock *or* in effect at any time thereafter." 207 Va. at 715, 152 S.E.2d at 284 (cited in TFC Brief at 6).[3] The Court was careful, however, *not* to characterize those "rights and privileges" as "property," consistent with its previous pronouncement that the plaintiff in that case was "denied no constitutional right." *Id.* at 715, 152 S.E.2d at 284. The corporation, seeking a decision on the merits,[4] argued that the Court could

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[3] Those "rights and privileges [also] were subject to change pursuant to the provisions of the Virginia Stock Corporation Act because of the power reserved by the State under § 158 of the Constitution of Virginia to alter or amend a corporate charter by the enactment of new corporation laws." 207 Va. at 716, 152 S.E.2d at 285, citing *French v. Cumberland Bank and Trust Co.*, 194 Va. 475, 74 S.E.2d 265 (1953).

[4] The Supreme Court of New Jersey had previously reversed a judgment in the preferred shareholder's favor, subject to the conditions that the corporation "waive any time limitation on the institution of proceedings in Virginia to review the State Corporation Commission's action in approving the amendment to [its] certificate of incorporation or to question the validity of the recapitalization plan, and that the appropriate Virginia court accept jurisdiction and render a decision on the merits." 207 Va. at 713, 152 S.E.2d at 282.

"waive the time limitations for appeal in this case, as we did in three habeas corpus cases: *Cabaniss v. Cunningham*, 206 Va. 330, 143 S.E.2d 911 (1965); *Thacker v. Peyton*, 206 Va. 771, 146 S.E.2d 176 (1966); and *Stokes v. Peyton*, 207 Va. 1, 147 S.E.2d 773 (1966)." *Socony*, 207 Va. at 715, 152 S.E.2d at 284. The Court rejected that argument, for the following reasons:

> We permitted late appeals in the *Cabaniss*, *Thacker* and *Stokes* cases because of overriding constitutional requirements that operated to suspend the time requirements for appeal to this Court. This permission was based upon our holdings that Cabaniss, Thacker and Stokes had been denied their constitutional rights. For reasons to be set forth, *we hold that Miss O'Brien has been denied* ***no*** *constitutional right.* The question whether the precedent of the *Cabaniss*, *Thacker* and *Stokes* cases should be followed *in cases involving denial of constitutional property rights* can therefore be deferred, and should be deferred, for decision when that issue is presented.

Id., 152 S.E.2d at 284 (emphases added). *See also id.* at 717, 152 S.E.2d at 286:

> Miss O'Brien had ***no*** *property right* in the accumulated earnings and surplus of the corporation. They never represented a fund dedicated for payment of undeclared dividends. *Because* Miss O'Brien had *no* right to demand payment of cumulated undeclared dividends and no claim to the funds out of which they might be paid, she *necessarily* had no *vested* property right in undeclared dividends that accrued before January 1, 1957. [Emphases added.[5]]

In short, *nothing* in *Socony* supports TFC's suggestion "that there was an existing property right at issue" in that case, and every indication is to the contrary. And if a preferred shareholder has "*no* property right" in the accumulated earnings and surplus of a for-profit, stock corporation, notwithstanding an express statement of entitlement to receive dividends out of the surplus or net earnings of the corporation as declared by the board of directors of the

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[5] The Court also disagreed with the New Jersey trial court's decision (*see* n.4, *supra*) "that Miss O'Brien's right to 'unpaid, cumulative dividends ... on her shares of 6% Preferred Stock [the Old Preferred] ... [continues] to constitute a valid and subsisting property right owned by her and protected against confiscation or diminution by ... [the corporation] until paid to her according to law ....'" 207 Va. at 712-13, 152 S.E.2d at 282, quoting the New Jersey trial court decision. *See id.* at 715, 152 S.E.2d at 284 ("Nor do we agree with the Superior Court's conclusion that our interpretation renders [Va. Code] § [13.1-]55(k) unconstitutional").

corporation,[6] then it would take an enormous stretch to hold that a member of a non-profit, nonstock corporation – who likewise, and *a fortiori*, has no interest whatever in its assets – has some sort of a property right by virtue of his power to vote for directors. And obviously it would take an even greater stretch to hold that an *institution* whose governing body's individual members (the members of the vestry) have the power to elect the directors of such a corporation, but which is *not itself a member* of the corporation, has such a property right. TFC is just trying to slice its bologna too thin.

One of the lesser premises of TFC's argument is that it is "undisputed" that "the Articles of Incorporation of the Endowment Fund gave the vestry members of The Falls Church the right to manage and control the Endowment Fund" at all times prior to conclusion of the 2006 vote. TFC Brief at 4. We have no idea how TFC came to that conclusion, but it is completely wrong. Management of the Endowment Fund is committed to its Board of Directors, not to the vestry of TFC. *See* Endowment Fund Articles of Incorporation, TFC Exhibit 27 at 2, Article SIXTH: "The Board of Directors of this Corporation shall be in charge of its affairs, and in carrying out the purposes of the Corporation shall, in its absolute descretion [*sic*], accept, expend, transfer or otherwise manage or dispose of any funds or other property of the Corporation." *At most*, the *members* of the vestry can try to influence the management and control of the Endowment Fund by electing directors who are expected to act as their puppets (*see* TFC Brief at 5); but directors, once they are elected and take office, have fiduciary duties – duties that are owed to the

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[6] Under the corporate articles before the amendment at issue, holders of the preferred stock were "entitled ... to receive, out of the surplus of the corporation ... or out of the net earnings of the corporation, when and as declared by the board of directors of the corporation, dividends at the rate of ... 6% per annum," and no dividend could be paid or set apart for payment on its common stock "unless and until all such accumulated dividends on the ... [Old Preferred] for all previous fiscal years ... [and the current fiscal year] shall have been paid or set apart for payment in full." 207 Va. at 710 n.3, 717, 152 S.E.2d at 280 n.3, 285-86.

Endowment Fund Corporation and *not* to the vestry of TFC.

With several weeks available to research and refine its arguments, TFC has managed to identify only *one decision* which, TFC contends, supports its argument that the "'right to control property by selecting those who shall manage it'" is "'a valuable property right in contemplation of law.'" TFC Brief at 7, quoting the trial court's opinion in *In re Mt. Sinai Hospital*, 219 N.Y.S. 505, 519 (1926), *aff'd mem.*, 223 App.Div. 836, 228 N.Y.S. 855, *aff'd*, *In the Matter of Mount Sinai Hospital*, 250 N.Y. 103, 164 N.E. 871 (1928) (discussed in TEC-Diocese Brief at 2-3, 4). TFC failed to inform the Court that the trial court decision that it cites was affirmed by two appellate courts; but more importantly, TFC failed to inform the Court that the state's highest court, the New York Court of Appeals, affirmed the judgment but explicitly *rejected* the analytical premise of the trial court decision on which TFC relies. *See* TEC-Diocese Brief at 2, quoting *Mount Sinai*, 250 N.Y. at 113, 164 N.E. at 875 ("a mere voting member of a charitable corporation devoted in part, at least, to public uses" loses no vested interest *and no "property interests of his own*" when he is deprived of his right to vote for corporate directors (or "trustees")). *See also* TEC-Diocese Brief at 2-3, quoting *Mount Sinai*, 250 N.Y. at 114, 164 N.E. at 875 ("no one's property is taken" when the members are disfranchised and the board is made self perpetuating).

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.

This point is addressed in the TEC-Diocese Brief at 8-9. It is not addressed in the TFC Brief, although TFC was well aware of the issue because it was addressed orally, at the trial, in the Diocese's argument in support of its motion to strike. *See* Tr. (Oct. 20, 2008) at 176. If TFC deems it appropriate to respond to this point in its Response, we will address it again in Reply.

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 effectively concedes this point. We assume that it did not intend to do so, as it otherwise ignores the issue – which likewise was argued at the trial. *See* Tr. (Oct. 20, 2008) at 177. The point nevertheless is inescapable, as shown by TFC's own description of the interests at issue. *See* TFC Brief at 1, referring to "the membership interests of *the TFC vestry members*, and the corresponding right of *the TFC vestry members* to appoint the directors of the Fund." (Emphases added.) As discussed in the TEC-Diocese Brief at 9, those "membership interests ... and the corresponding right ... to appoint the directors of the Fund" are held individually, by the TFC vestry members (in their capacity as Class A members of the Endowment Fund Corporation), and not by TFC as an institution. *If* TFC is right when it says that those "membership interests ... and the corresponding right ... to appoint the directors of the Fund, constitute a property interest within the meaning of § 57-10," TFC Brief at 1, that is a property right that belongs to the members of the Corporation (in their capacity as Class A members of the Corporation, and therefore owing fiduciary duties to the Endowment Fund Corporation) and *not* to TFC.

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.**

Again, TFC has elected not to discuss this point, which is addressed in the TEC-Diocese Brief at 9-12 and in the Diocese's argument in support of its motion to strike at the trial (*see* Tr. (Oct. 20, 2008) at 177-78). If TFC addresses the point in its Response, then we will respond in Reply.

5. The dissolution clause of the Endowment Fund's Articles of Incorporation is irrelevant and proves nothing.

Finally, TFC relies on Article NINTH of the Endowment Fund's Articles of Incorporation, TFC Exhibit 27 at 3, which provides for disposition of the assets of the Endowment Fund "to The Falls Church" – or, "if The Falls Church is no longer in existence," to some other organization or organizations organized and operated for charitable, educational, religious or scientific purposes, as the Endowment Fund Board of Directors shall determine – upon the dissolution of the Corporation. TFC Brief at 7-8. According to TFC, that clause "stands in marked contrast to the ordinary dissolution clause used by many § 501(c)(3) organizations, which requires only that upon dissolution the assets of the nonprofit be distributed to another qualified §501(c)(3) organization." *Id.* That argument fails for several reasons.

First, it is entirely hypothetical. The Endowment Fund has not dissolved and there is no evidence that its dissolution is imminent or even proposed. Dissolution of the Endowment Fund is an entirely speculative event – as is the assumption that "The Falls Church" will be in existence if and when the Endowment Fund is dissolved. Such hypothetical, speculative and conjectural possibilities are not the stuff that property is made of.

Second, it relies on matters of fact that are neither in evidence nor capable of judicial notice. TFC's description of "the ordinary dissolution clause used by many § 501(c)(3) organizations" is simply and purely *ipse dixit*.

Third, it simply assumes, with neither argument nor citation of authority to support it, that upon dissolution of the Endowment Fund its assets would belong to The Falls Church *CANA*. The assumption is wrong. The first time "The Falls Church" is mentioned in the Articles of Incorporation, it is specified as "The Falls Church, Episcopal Church." Each subsequent reference in the Articles to "The Falls Church" obviously and necessarily refers to the *same*

church; and The Falls Church CANA deliberately and consciously chose *not* to remain The Falls Church, *Episcopal* Church, "effective immediately." *See* TEC-Diocese Brief at 9-12, quoting Congregational Ballot (Exhibit 3 to TFC's 57-9 Petition), Resolution 1. That issue, however, may be presented in the declaratory judgment actions or in other proceedings, when and if the Endowment Fund dissolves. It is not presented for decision at this time, or in this case, and it should be addressed only to the extent necessary to resolve the issue that is presented now, *i.e.*, "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 (emphasis added).

Respectfully submitted,

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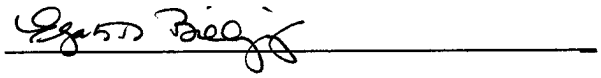

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