VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re: **Multi-Circuit Episcopal Church Litigation**	)	**Case Nos.:**	CL 2007-248724, 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

THE FALLS CHURCH'S
OPENING POST-TRIAL BRIEF CONCERNING THE 1746 PARCEL

Pursuant to the Court's direction at the October 20, 2008, Hearing, the Falls Church, by its counsel, hereby files this opening post trial brief concerning the 1746 parcel.

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INTRODUCTION AND SUMMARY OF ARGUMENT

As this Court recognized in its September 26, 2008, Order, "the only remaining issue[] to be adjudicated" in this matter is "whether certain property is subject to and covered by the [Falls Church's] § 57-9 petition[]"—*i.e.*, which disputed property is held in trust for the congregation of The Falls Church ("TFC"). Order at 2. For the most part, ECUSA and the Diocese concede that TFC's real property is subject to § 57-9. *See* TFC Exh. 5 at 2-4 (Stipulation). Indeed, they have stipulated that the real property to the West, East, and South of the disputed 1746 parcel (the "two-acre parcel")—including sections of the church building attached to the historic section—are subject to § 57-9. *Id.* They dispute, however, whether the TFC trustees have legal title to the original sanctuary and two-acre parcel. According to them, because an 1824 court decision characterized the vestry of Christ Church-Alexandria as the "successor" to the "vestry of Truro Parish"—the original grantee named in the 1746 deed that conveyed the two-acre parcel—legal title to that parcel must today reside in Christ Church-Alexandria. This argument lacks merit for at least five independent reasons.

First, the events on which ECUSA and the Diocese rely have been superseded by more than 150 years of court orders that were recorded in the land records and recognize that title to the property is held by TFC's trustees. Indeed, since 1842 this Court and the Circuit Court of Arlington County have entered at least ten Orders finding that the TFC trustees are the owners of the two-acre parcel. These Orders have variously permitted TFC to encumber the two-acre parcel, to convey easements rights therein, and to consolidate it with TFC's other real property, such that all of TFC's real property is treated as one unit for tax (and other governmental) purposes. At least some of these Orders have been entered with the Diocese's full knowledge. Yet the land records confirm that no one—including the Diocese, ECUSA, and Christ Church-Alexandria—has ever suggested that someone other than TFC's trustees own the property.

Second, ECUSA and the Diocese have previously admitted in this and other litigation that TFC's trustees are the owners of the two-acre parcel. Even after filing their declaratory judgment actions against TFC, the Diocese brought a separate lis pendens suit against TFC in Arlington County. That action identified the "Record Owner" of the two-acre parcel as the "Trustees of The Falls Church (Episcopal)." Similarly, ECUSA's answer to TFC's § 57-9 petition "admits and avers that trustees for the Falls Church hold legal title to the real property currently possessed by The Falls Church." Both parties' interrogatory responses say the same thing in various ways. Faced with this Court's rulings that their canons do not create enforceable rights in TFC's property, and that denominations could not hold property in pre-1867 Virginia, ECUSA and the Diocese have now changed their theory to argue that Christ Church-Alexandria owns the two-acre parcel. Their earlier admissions, however, are binding.

Third, post-1824 history confirms that TFC's vestry became the "successor" to the "vestry of Truro Parish" under the 1746 deed. As the Diocese's own expert acknowledged, "you could not have two vestries in the same parish." Thus, in 1836 TFC was admitted to the Diocese pursuant to a canon "For the Division of Parishes," and became "a distinct Parish." Thereafter, as Professor Bond admitted, the TFC vestry and the Christ Church-Alexandria vestry "operated independently," and TFC's vestry "[t]ook over the management of its own affairs." Indeed, much as the Truro Parish vestry initially bore responsibility for the routine operation, maintenance, and governance of The Falls Church and its property, it is undisputed that only the TFC vestry fulfills that role today.

ECUSA and the Diocese say that *Mason v. Muncaster*, 22 U.S. 445 (1824), compels a contrary conclusion. But the Court there addressed only the ownership of glebe lands in the District of Columbia, under D.C. law. Moreover, the circuit court decision—which the Supreme

Court affirmed—recognized that "the [Christ Church-Alexandria] vestry was not responsible" for "The Falls Church," which "was erected solely for those members of the church who lived in its vicinity." *Mason v. Muncaster*, 16 F. Cas. 1048, 1050 (C.C.D.C. 1821). Indeed, the court there rejected the notion that the Christ Church-Alexandria vestry governed TFC on the ground that this argument "would charge them with knowingly seizing upon, and converting to their own use, or the use of their constituents, *property to which they had no right*." *Id.* at 1052 (emphasis added). But even if *Mason* had addressed the ownership of TFC as of *1824*, any such ruling would have been superseded by later events—either in 1836, when TFC elected its own vestry and became the "successor" vestry under the 1746 deed, or in 1842, when the Virginia General Assembly confirmed that only congregational trustees could hold church property.

Fourth, the evidence supports an alternative finding that TFC acquired ownership by adverse possession. It is undisputed that the TFC congregation, governed by its vestry, has continuously and exclusively used the two-acre parcel since at least 1873. The TFC congregation has asserted its ownership not only by filing petitions with the courts seeking to encumber, transfer rights in, and consolidate the property, but also by maintaining it and constructing several additions. Furthermore, as TFC administrator William Deiss testified, no one—including Christ Church-Alexandria—has been allowed to enter the property without the TFC vestry's permission. Thus, this Court may alternatively find that TFC acquired title by adverse possession—actual, hostile, exclusive, visible, and continuous possession, under a claim of right, for more than 15 years.

Fifth, the doctrine of laches precludes ECUSA and the Diocese from denying that the TFC trustees are the record owners of the two-acre parcel. Laches is "'the neglect or failure to assert a known right or claim for an unexplained period of time under circumstances prejudicial

to the adverse party.'" *Stewart v. Lady*, 251 Va. 106, 114 (1996). It is hard to imagine a more appropriate case for applying laches. Assuming, *arguendo*, that *Mason* meant what ECUSA and the Diocese assert, the Christ Church-Alexandria vestry has known of its rights for 184 years. Yet it is undisputed that Christ Church-Alexandria has done nothing to assert any such rights. Indeed, Professor Bond admitted that its vestry disclaimed responsibility for TFC in *Mason*, and that it did nothing to maintain the property. Meanwhile, TFC has spent millions renovating the property, constructing additions, burying its dead, and holding itself out as owner to world, including Christ Church-Alexandria.

For all these reasons, the Court should find that the two-acre parcel is held in trust for TFC within the meaning of Va. Code § 57-9.

ARGUMENT

I. Title to the 1746 parcel is vested in trustees for The Falls Church.

As the Court is aware, in 1842 the Virginia General Assembly enacted a statute providing that churches could appoint trustees to hold property in trust "for the use and benefit of any religious congregation, . . . and not otherwise." 1842 Va. Acts ch. 102 ("1842 statute"). The 1842 statute further provided that upon the appointment of trustees, "the legal title shall thereupon become exclusively vested in the whole number of the then trustees and their successors." *Id.* A host of Orders from this Court and the Circuit Court of Arlington County confirm that trustees for The Falls Church hold the two-acre parcel under this statute.

A. Numerous orders of this Court and the Circuit Court of Arlington County confirm that legal title to the 1746 parcel is vested by law in trustees for The Falls Church.

The Virginia courts have issued at least ten Orders recognizing TFC's duly appointed trustees as the title holders to its property. As early as 1851, this Court entered an Order, stating: "Upon the application of the vestry of the Falls Church Episcopal Church, W.T. Dulaney, Arthur

Lee Brent, John G. Chichester, Fenton M. Fitzhugh and Levi Parker are appointed Trustees of the said church, the former trustees being all dead." TFC Exh. 62.[1] In 1877, after the Civil War, the TFC vestry adopted a resolution to apply to this Court for the appointment of certain individuals "as trustees to hold the real estate (church building, land) belonging to Falls Church, Fairfax Co., as provided by the statute." TFC Exh. 37; 10/15 Tr. 69:20-71:3 (Deiss). This Court subsequently entered an Order, stating: "On the motion of the proper authority, It is ordered that Cassius F. Lee, L. M. Blackford, and Silas D. Tripp, are appointed Trustees of Falls Church Fairfax County to hold the church buildings and land, with all the powers duties and responsibilities invested in them by law." TFC Exh. 38; 10/15 Tr. 97:14-98:22 (Schrantz). At the time, the only building owned by the congregation was the building finished in 1769—"[t]he historic section of the church"—which was (and is) located on the two-acre parcel. 10/15 Tr. 71:4-8, 51:14-17 (Deiss); TEC-DVA Exh. 78 at 87-90.[2]

These were just the first of numerous court Orders confirming that trustees of The Falls Church own the two-acre parcel. In April and May 1951, for example, the TFC trustees twice petitioned this Court to encumber the two-acre parcel (and several later-acquired parcels) with an $80,000 deed of trust for the purpose "of constructing a Parish Hall." TFC Exh. 39 at 1-2; *see also* TFC Exh. 41 at 1-2. That Parish Hall—the "'51" addition—was built on the two-acre parcel. 10/15 Tr. 56:3-18, 60:12-15 (Deiss). In support of these petitions, the trustees identified themselves as "the duly appointed trustees of the Falls Church, Falls Church, Virginia, and hold-

[1] Although we have been unable to locate any earlier orders, it is evident from this Order that The Falls Church had trustees even before 1851.

[2] *See also* TFC Exh. 5, Stipulation between The Falls Church and The Protestant Episcopal Church in the Diocese of Virginia and The Episcopal Church regarding Property Related to The Falls Church's Va. Code § 57-9 Petition, Exh. N (Title Review Table) (outlining the dates upon which the various TFC parcels were acquired by the church). Parcel 3 was given to The Falls Church in 1852, but no buildings have been erected on that parcel.

ers of legal title to that certain lot of land which was conveyed to the Vestry of Truro Parish by John Trammole by deed dated March 20, 1746, and of record in Liber B No. 1, page 249, of the land records of Fairfax County, containing two acres of land, more or less." TFC Exh. 39 at 1; TFC Exh. 41 at 1. The Court granted both petitions, referencing the two-acre parcel and authorizing the "Trustees of the Falls Church . . . to execute said deed of trust and note securing an amount not exceeding $80,000," "for the purpose of improving said land with a parish hall." TFC Exh. 40.[3]

Three years later, in 1954, the TFC trustees petitioned this Court for leave to "convey[] to the City of Falls Church an easement" over a part of "that certain lot of land . . . conveyed to the Vestry of Truro Parish by John Trammole by deed dated March 19, 1746, and of record in Liber B, No. 1, page 248, of the land records of Fairfax County, containing two acres of land, more or less." TFC Exh. 45 at 1. The TFC congregation and vestry had approved this conveyance, and the petition identified the TFC trustees as "holders of legal title to [the two-acre parcel]," among other property. *Id.* at 1, Exh. A. The Court granted the petition, describing part of the land conveyed by the easement as certain "land acquired by said Church by deeds recorded in Liber B, No. 1, page 248 [the location of the 1746 deeds] . . . of the land records of Fairfax County, Virginia." TFC Exh. 46 at 1; 10/15 Tr. 111:15-112:5 (Schrantz); 10/15 Tr. 153:22-155:12 (Blitz). The TFC trustees therefore conveyed the easement to the City of Falls Church (TFC Exh. 47), and the City of Falls Church became "another party of record who has accepted the trustees of The Falls Church as the owners of the property." 10/15 Tr. 114:3-7 (Schrantz).

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[3] *See also* TFC Exh. 42 at 1-2 (authorizing the trustees "to encumber the said real estate by executing a deed of trust" and stating that "[w]hen the said parish hall has been completed and the encumbrance authorized hereby has been satisfied and released, then the said Trustees of Falls Church may encumber the said real estate as authorized by the order entered herein on April 16, 1951"); TFC Exh. 43 (deed of trust); 10/15 Tr. 99:12-105 (Schrantz).

In September 1958, as TFC continued to grow, its trustees again petitioned the court to encumber the 1746 parcel. *See* TFC Exh. 48. The petition requested approval of two deeds of trust, totaling more than $200,000 in debt, to "construct[] an educational addition to the present building and mak[e] improvements to the present main church building." *Id.* at 2. The petition again identified the "duly appointed trustees of the Falls Church" as the "holders of legal title" to several parcels, including: "PARCEL 1. containing 2 acres of land as described in deed dated March 19, 1746, and recorded in Liber B, No. 1, page 248, of the land records of Fairfax County, Virginia." TFC Exh. 48 at 1. This Court entered an Order granting the petition (TFC Exh. 49), and the congregation took on this additional debt (TFC Exh. 50, 51). As a result, the church "did an extensive remodeling in the historic section," and the "'59" addition was constructed, in part on the two-acre parcel. 10/15 Tr. 58:11, 59:4, 60:12-15 (Deiss).

The TFC congregation and vestry constructed another addition requiring an encumbrance of property, including portions of the 1746 parcel, in 1992. By then the City of Falls Church had been placed within Arlington County's jurisdiction (10/15 Tr. 87:1-8 (Schrantz)), so the TFC trustees petitioned for approval of this encumbrance in the circuit court for that county (TFC Exh. 55B at 1). The congregation wished to borrow $3,608,000, and the trustees' petition asked "the Court's leave to encumber the real property of the Church, namely, a portion of lot 14, and lots 15, 82[A], 84, 85, and 86, Historic Triangle, situated in the City of Falls Church, by the giving of a Deed of Trust thereon as security for construction and term loan financing for the construction of new facilities for the Church." TFC Exh. 55B at 1. Although the "old church building," the graveyard, and the sidewalk from the street to that building were not pledged as collateral, the balance of the 1746 parcel was so designated. TFC Exh. 55, 55A, exh. A-D. Moreover, the recitals in the "declaration of reciprocal easements" filed in the land records as part of

this transaction confirmed that the "trustees for the Declarant [the Falls Church], hold legal title to the property on which the Church is situated, which property includes a graveyard, parking areas, church buildings, administrative buildings, and other areas and is more particularly described in Exhibit A hereto (the '*Entire Site*')"—which Exhibit encompassed the entire two-acre parcel and more. TFC Exh. 55A at 1 & exh. A. The court granted the petition, thus permitting the trustees to encumber a significant portion of the two-acre parcel. TFC Exh. 55B at 1-2.

In 1996, the Arlington County Circuit Court granted the TFC trustees' petition "to exchange and encumber a part of the land to which they hold title." TFC Exh. 57. The purpose of this petition was three-fold—(1) to facilitate a "land swap" with a neighbor who "wanted to develop a townhouse project"; (2) to "consolidat[e] the land . . . so that the property obtained from the adjacent land owner, together with contiguous land now owned by the Trustees, may hereafter be known and referred to, for public record purposes, as a single lot"; and (3) "to complete a public street dedication . . . with respect to a portion of the land." 10/15 Tr. 61:20-62:10 (Deiss); TFC Exh. 57 at 2-3. The TFC trustees' petition represented that "[l]egal title to all real estate owned by the Church is vested in the Trustees by virtue of Section 57-8 of the Code of Virginia." TFC Exh. 57 at 1. The circuit court agreed, entering an Order granting all three requests in the petition. TFC Exh. 58 (Order); TFC Exh. 59 (Order as recorded in land records).

Thus, as the TFC vestry had directed (10/15 Tr. 73:3-74:19 (Deiss)), the TFC trustees effected "the consolidation of the property owned by the trustees of The Falls Church into one parcel." 10/15 Tr. 118:9-20 (Schrantz).[4] For tax purposes, therefore, "[t]he property is now as-

[4] *See also* 10/15 Tr. 118:21-119:4, 139:4-17 (Schrantz) (describing the "consolidation of the 1746 property into the other properties on the north side of East Fairfax Street," with the exception of the parcel marked 9 on Exhibit 8); TFC Exh. 20 (including plat showing surveyor's certificate, boundary line adjustment and consolidation of the properties); 10/15 Tr. 73:3-21 (Deiss)

sessed as one parcel under one map number." 10/15 Tr. 119:5-9 (Schrantz).[5] This treatment of the property is consistent with its actual use, as the TFC congregation uses the entire building as one integrated unit, with regular "meetings throughout all of the sections." 10/15 Tr. 72:17-18:2 (Deiss); *see also* 10/15 Tr. 63:3-65:22 (Deiss) (the electricity, water, and much of the heating and air conditioning is integrated throughout all sections of the building, including the historic section).[6]

Given the wealth of Orders discussed above, it is unsurprising that TFC expert Kenneth Schrantz would testify unequivocally that "the land records and related court records" indicate that "[t]he owners of those parcels [at issue] are the trustees of Falls Church." 10/15 Tr. 93:19-18. Mr. Schrantz searched for "any name that [he] could think of that may have any bearing on the property," including "all of the Virginia trustees' names that we were aware of, variations of the names of the church, any organizations that had the word 'Episcopal' in them," and for any reference to "Christ Church." 10/15 Tr. 95:1-10. He found "no evidence of any other claim in

("the parcels of land had been accumulated over a number of years, and when we did the land swap, one of the trustees suggested putting them all under one pile, and we did").

[5] The Diocese was aware of this consolidation and its chancellor, Russell Palmore, wrote to one of the TFC trustees to "confirm that under the Constitution and Canons of the Diocese of Virginia, the Falls Church does not need authorization from the Bishop, the Standing Committee or the Executive Board in connection with the proposed land exchange, the dedication of property to public street purposes, or the consolidation of lots." TFC Exh. 57, unmarked attachment.

[6] The Arlington County Circuit Court has issued other Orders confirming that the TFC trustees are the legal owners of all the congregation's real property. In July 1988, that court issued an Order affirming the appointment of an additional trustee and "reaffirm[ing] that the legal title to all real property of the Church be hereafter vested in Harrison D. Hutson, Lee M. Rhoads, and William W. Goodrich, Jr., Trustees, and that the Clerk of the Court is directed to record this Order or such other document as the Court may order in the Land Records." *See* TFC Exh. 53; *see also* TFC Exh. 54 (recording same Order at Book 2337, Page 0159 of the land records). Similarly, in November 1994, that court issued an Order appointing another trustee and ordering "that the legal title to all real property of the Church be, and it hereby is, vested in Harrison D. Hutson, William W. Goodrich, Jr. and Steven L. Skancke, Trustees, subject to all liens and encumbrances of record." TFC Exh. 56.

the records from 1746 to the present as to any other claim of title to the property," and he found "no documents in the land records relating to any other entities other than the trustees of The Falls Church relating to this property." 10/15 Tr. 94:16-18 , 95:11-16, 137:16-138:14.

As Mr. Schrantz explained, in his 38 years of experience as a title examiner, materials such as the foregoing petitions, deeds of trust, and easements provide convincing evidence that the trustees of The Falls Church are the owners of the two-acre parcel. Parties do not grant deeds of trust conveying property that they do not own (10/15 Tr. 102, 105:1-3), and TFC has executed multiple deeds of trust representing that it owned the two-acre parcel and conveying interests therein.[7] Moreover, "a lender, a sophisticated lender like a bank, would take steps to be certain that the security that they were using for making their loan was owned by the parties who were executing the deed of trust." 10/15 Tr. 110:14-20 (Schrantz). TFC has entered loan transactions involving the two-acre parcel with several lenders—First National Bank of Alexandria, Acacia Mutual Life Insurance Company, The Falls Church Bank, and First Virginia Bank. *See* TFC Exh. 43, 44, 50, 51, 55; 10/15 Tr. 111:8-14, 110:10-13, 113:11-12, 116:1-10 (Schrantz).

In summary, as Mr. Schrantz concluded, "[e]verything in the records indicates that the trustees of The Falls Church claim to be the owners and that claim has been consistently corroborated by orders of Court and by all of the dealings in the land records with other parties, including banks, [word] jurisdictions and other individual owners." 10/15 Tr. 121:22-122:6. Moreover, "[e]very indication would be that the trustees of The Falls Church as to this property are the successors to Truro, the Vestry of Truro Parish." *Id.* at 122:7-14 (Schrantz). Ms. Blitz reached

[7] *See* TFC Exhs. 43 (1951 deed of trust), 44 (1952 deed of trust), 50 (1959 deed of trust), 51 (1960 deed of trust), 55 (1991 deed of trust); *see also* Va. Code § 8.10-389(C) ("recitals of any fact in a deed or deed of trust of record conveying any interest in real property shall be prima facie evidence of that fact"); *Bond v. Crawford*, 193 Va. 437, 446-48 (1952) (a party may not execute a deed or deed of trust conveying an interest in land where the party had previously executed and recorded a contract to sell the land to others).

the same conclusion; her company would issue a policy insuring title on that basis despite the absence of a deed conveying the two-acre parcel to the TFC trustees. 10/15 Tr. 149:20-152:6.

B. The Diocese and ECUSA have admitted that the trustees of The Falls Church are the owners of the 1746 parcel.

In light of the many court Orders recognizing that trustees for The Falls Church own the two-acre parcel, it should come as little surprise that the Diocese and ECUSA previously admitted as much. For example, on February 5, 2007—after the Diocese and ECUSA filed their declaratory judgment actions against the CANA Congregations, but before those suits were transferred to Fairfax County—the Diocese brought a Lis Pendens action against TFC and its trustees in Arlington County Circuit Court. *See* TFC Exh. 61. That action sought "to establish and confirm title" in "the Bishop of the Diocese" to various parcels of property, including:

> Parcel 1
>
> That certain real property conveyed by Deed dated March 19, 1746 from John Trammole to the Vestry of Truro Parrish, recorded among the land records of Fairfax County, Virginia in Liber B, No. 1 at page 248.
>
> Parcel 2
>
> That certain real property conveyed by Deed dated March 20, 1746 from John Trammole to the Vestry of Truro Parrish, recorded among the land records of Fairfax County, Virginia in Liber B, No. 1 at page 249.

Id. at 1-2. As the Diocese's suit then recognized, the "Record Owner[s]" of these parcels (as well as TFC's other real property) are: "William W. Goodrich, Jr., Steven L. Skancke and Harrison D. Hutson, Trustees of The Falls Church (Episcopal)." TFC Exh. 61 at 2.

ECUSA has made similar admissions in this litigation. For example, its answer to paragraph 2 of The Falls Church's § 57-9 petition stated: "The Episcopal Church admits and avers that trustees for the Falls Church hold legal title to the real property currently possessed by The Falls Church for the congregation of The Falls Church, a parish or mission of the Episcopal

Church, subject to the Constitutions and Canons of the Episcopal Church and the Diocese of Virginia." *See* TFC Exh. 4, ¶ 2. And ECUSA's complaint states that "[the Trustees] are named as defendants in this action because, on information and belief, they continue to hold legal title to some of the real property at issue in this case, which was deeded over the years to the 'Vestry of Truro Parish,' 'Trustees of the Episcopal Church known and designated as the 'Falls Church' . . . ." ECUSA Compl. ¶ 23. The Diocese's complaint contains nearly identical language. *See* Diocese Compl. ¶ 5 ("The Trustee defendants are named as defendants because, on information and belief, they continue to hold legal title to the real property at issue in this case, which was deeded over the years to the 'Vestry of Truro Parrish' . . . .").

Similarly, in July 2007, The Falls Church served upon the Diocese and ECUSA a request for admission that stated: "Falls Church real property is currently titled in the names of Trustees for Falls Church." *See* Exh. 9 at 3.[8] In response, the Diocese stated in relevant part:

> *The deeds grant the subject property to trustees for the Falls Church*, a subordinate, constituent part of the Diocese and the Episcopal Church, for the benefit of the Episcopal Church, the Diocese, and loyal Episcopalians, pursuant to the Constitutions, Canons, long-standing customary law and traditions of the Episcopal Church and the Diocese, and the dealings and the relationship between the Falls Church and the Episcopal Church and the Diocese.

See TFC Exh. 10 at 5 (emphasis added); *id.* at 9 (admitting the same and that the Diocese has "never held [it]self out to third parties as the title owner of Falls Church real property"). In response to the same request, ECUSA "admit[ted] that Falls Church real property is titled in the

[8] As defined in The Falls Church's initial request for admissions, "the term 'Falls Church Real Property' refer[red] to the real property of The Falls Church which is referenced in paragraph 29 of the Diocese's Complaint in case No. CL 2007-5250 and in paragraph 13 [of] TEC's Complaint in Case No. CL-2007-1625." TFC Exh. 9 at 2. Both paragraphs refer broadly to "the real and personal property of The Falls Church"; and the response of ECUSA and the Diocese to the Motion Craving Oyer confirms that such property includes the 1746 parcel. *See* Exhibit 12 to Praecipe Indexing Documents Filed Pursuant to Order on Motion Craving Oyer (filed June 17, 2007).

name of Trustees for Falls Church Episcopal parish, a subordinate, constituent part of the Episcopal Church." *See* TFC Exh. 11 at 4.

In summary, both the Diocese and ECUSA have repeatedly admitted that the two-acre parcel is held by TFC's trustees—a fact they now seek to disprove by citing historical events that have long since been superseded. It was only after this Court rejected their argument that their canons trumped § 57-9 that ECUSA and the Diocese changed their views concerning who owned the two-acre parcel. This Court should hold them to their earlier admissions. *See West v. Anderson*, 186 Va. 554, 564 (1947) ("The admission of a party during the course of a judicial proceeding, relevant to an issue, is of the highest evidential value.")

C. In 1836, the vestry of The Falls Church became the successor to the vestry of Truro Parish for purposes of the property conveyed by the 1746 parcel.

Quite apart from the long line of Orders of this Court (and of Arlington County) and the admissions of ECUSA and the Diocese—both of which recognize the TFC trustees as the record owners of the two-acre parcel—the TFC vestry that appointed those trustees is the "successor" to the Vestry of Truro Parish for purposes of the property conveyed by the 1746 deed. As Professor Bond testified, in 1765 the Truro Parish vestry was succeeded by the Fairfax Parish vestry, which in the early 1800s ceased to have an existence distinct from that of the vestry of Christ Church-Alexandria. 10/20 Tr. 78:8-16, 79:11-12. It is undisputed, however, that after TFC was admitted to the Diocese in 1836, the vestry of TFC and the vestry of Christ Church-Alexandria "operated independently." 10/20 Tr. 107:15-108:3 (Bond). As Professor Bond explained, "you could not have two vestries in the same parish." 10/20 Tr. 107:3-4. Not surprisingly, then, TFC was admitted to the Diocese pursuant to Canon 12—the canon "For the Division of Parishes"—and became "a distinct Parish." Exh.116 (1836/1837 canons). Canon 12 provided:

> Whereas from the great extent of many of the Parishes in the Diocess, and from various other causes, it may be for the interest of the Church, and for the

> convenience and quiet of the people, to permit *the division of some of the Parishes*:
>
> *Be it therefore enacted*, That whenever it shall be made appear [*sic*] to the satisfaction of the Convention, that such division is expedient, or when the desire of the people of the Parish for such division shall be manifested, by repairing the old churches, or building new ones, electing a vestry, conformably to the regulations of the church, and shall produce to the Convention the original subscriptions of the vestry of the church, from which the application *for a division of a parish* is made, according to the test required by the 10th canon; and, also, produce a register of the names of those who wish *for a division of the Parish*; on application to this Convention, such petitioners may be received *as a distinct Parish*.

TEC-DVA Exh. 116 at 12-13 (second emphasis in original, other emphases added).

In other words, much as Fairfax Parish became independent of Truro Parish (albeit by Act of the General Assembly), and much as St. Paul's Church in Alexandria became independent of Christ Church-Alexandria (by act of the Diocese's Annual Convention), so too did The Falls Church become independent of Fairfax Parish (by act of the Diocese's Annual Convention). *See* 10/20 Tr. 102:17-103:9 (Bond) (acknowledging that "once St. Paul elected its own vestry, it was fully independent of Christ Church" and "had full control and ownership of its property"). It is undisputed that, from 1836 forward, TFC was a "distinct parish" that "elected its own vestry" and "[t]ook over the management of its own affairs." 10/20 Tr. 106:7-15 (Bond). And as Professor Bond testified, when a new parish was created, "[i]f the property [land and church buildings] was in the new parish, it stayed with the new parish." 10/20 Tr. 54:4-9.

The TFC vestry is also the "successor" to the vestry of Truro Parish under the 1746 deed in that the TFC vestry's function most closely parallels that of the Truro Parish vestry in colonial times. To be sure, neither the vestry of Christ Church-Alexandria nor that of The Falls Church ever held governmental powers; after disestablishment, vestries' powers were solely ecclesiastical. 10/20 Tr. 57:16-18 (Bond) (after the Revolution, vestries lost the ability to tax). But the Truro Parish vestry was the entity that made routine decisions concerning the operation, mainten-

ance, and governance of the church and its buildings. *See generally* TEC-DVA Exh. 78 (Minutes of the Vestry of Truro Parish, 1732-1785). And as Professor Bond explained, in colonial times the parish would have been the governing entity at "the closest level to the people." 10/20 Tr. 45:13-14 (Oct. 20, 2008); *id.* at 45:21-22 ("the parish is the level really closest to the people"). It is undisputed that the governing body "closest to the people" who worship at The Falls Church is the vestry of The Falls Church. Indeed, the TFC vestry is the *only* vestry that governs the TFC congregation and its property today.

The 1746 deed grants property to the vestry that governed the "two acres Situate . . . where the upper church now is" (TFC Exh. 12; TEC-DVA Exh. 64 (transcription)), and there can be no question that the current TFC vestry is the entity whose powers over that parcel most closely parallel those of the Truro Parish vestry.[9] As Mr. Deiss testified, for example, the TFC vestry conducted "fundraising events to get that building up in a usable condition" (10/15 Tr. 54:11-13), repaired the chimney and put tiles on the roof (*id.* at 54:15-19), and authorized and oversaw construction and financing of additions to the church in 1951, 1958, and 1992 (*id.* at 56:3-11, 58:11-59:10)—much as the Vestry of Truro Parish earlier raised money for the church and made decisions about whether and how to improve it (TEC-DVA Exh. 78 at 9, 46, 48-50, 52, 75, 78, 82, 86-94 (Minutes of Vestry of Truro Parish)). And, of course, it is the TFC vestry that for at least 135 years has governed matters such as how the property is used; whether and how to maintain, repair, and improve it; the schedule of services; and access to the property. 10/15 Tr. 57:9-12, 57:12-20, 66:18-68-3, 69:14-19, 77:8-79:12 (Deiss).

By contrast, once the Christ Church-Alexandria and TFC vestries began "operat[ing] independently" (10/20 Tr. 107-08 (Bond), the Christ Church-Alexandria vestry no longer exercised

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[9] As Professor Bond acknowledged, the phrase "upper church" was a reference to The Falls Church. Tr. 49:8-12.

any control over TFC (if it ever did). Indeed, Professor Bond admitted that, even before the division of the parish and establishment of the TFC vestry, the vestry of Christ Church-Alexandria "den[ied] being responsible for the upkeep" of The Falls Church. 10/20 Tr. 99:18-100:4 (Bond). Similarly, Mr. Schrantz found no evidence of any petitions or Orders requesting or "approving the trustees for Christ Church to do anything with this property." 10/15 Tr. 137:20-138:14. For this reason as well, the Christ Church-Alexandria vestry has no legitimate claim to be the "successor" to the "vestry of Truro Parish" under the 1746 deed.

Mason v. Muncaster, 22 U.S. 445 (1824), is not to the contrary. That case resolved a dispute over title to glebe lands in Alexandria, which was then in the District of Columbia. The Court was applying "Local Law" (*id.* at 445) in its capacity as the highest appellate court with jurisdiction over D.C.—a role fulfilled today by the D.C. Court of Appeals. Thus, even if the Court had held that Christ Church-Alexandria's vestry was the successor to the entity named in the 1746 deeds, its ruling would not have had effect in Virginia (which may explain why no Virginia court has cited it).

But the Court did not so hold. To the contrary, the Christ Church-Alexandria wardens who were defendants in *Mason* denied responsibility for The Falls Church. 10/20 Tr. 98:18-100:4 (Bond). Moreover, the circuit court there recognized that, even if the Christ Church-Alexandria vestry was the successor to the Fairfax Parish vestry for purposes of the glebe lands, there was no basis to Mason's argument that the Christ Church-Alexandria vestry was "guilty of sacrilege in suffering the building commonly called the Falls Church to go to ruin." 16 F. Cas. 1048, 1051 (C.C.D.C. 1821). As the court explained:

> *The Falls Church was erected solely for those members of the church who lived in its vicinity. It was for them to keep it in repair; and if they did not, the vestry was not responsible.* But the hypothesis of the complainant's counsel would charge the vestry with a much heavier sin than that of repairing a useless church. *It*

> *would charge them with knowingly seizing upon, and converting to their own use, or the use of their constituents, property to which they had no right.* The weight of this argument, therefore, turns against the complainant.

Id. at 1051-52 (emphasis added). The circuit court thus held that TFC, which then consisted of only the two-acre parcel, was "property to which [the Christ Church-Alexandria vestry] had no right," and for which "the vestry was not responsible." *Id.* The Supreme Court affirmed that decision. 22 U.S. at 469. This alone disposes of the argument that *Mason*'s holding governs the ownership of the two-acre parcel at issue here.

In addition, the principal reasoning of the *Mason* opinions supports the conclusion that the *TFC* vestry is the successor to the Fairfax Parish vestry for purposes of the two-acre parcel. In determining that the Christ Church-Alexandria vestry succeeded the Fairfax Parish vestry as owner of the glebes, both courts in *Mason* relied heavily on the existence of only one vestry for "the whole parish," elected by all parishioners, and responsible for "management of all the temporalities of the parish within the scope of their authority." 22 U.S. at 456; *accord* 16 F. Cas. at 1050. Both courts emphasized and that the Christ Church-Alexandria vestry *had* to be the Fairfax Parish vestry because Christ Church-Alexandria had not "formed a distinct Episcopal Church" or "a distinct society" with its own vestry. 22 U.S. at 458, 462; *accord* 16 F. Cas. at 1052 ("the Alexandria congregation did not separate themselves from the parish of Fairfax, and establish a distinct separate religious society, because they could not do so consistently with the canons of the church then in force").[10] But as we have explained, TFC was later admitted to the

[10] *See also id.* at 456-57 ("Not the least trace can be found of any other Vestry until the year 1819, when a Vestry was chosen *de facto*, by persons purporting to belong to the Falls Church, and that portion of the parish of Fairfax which is not included within the District of Columbia. Up to the year 1796, it is not disputed that a Vestry was regularly chosen for the whole parish"); 16 F. Cas. at 1050 ("when the congregation at the Falls Church ceased to exist, the Alexandria congregation became the only Protestant Episcopal congregation in the parish, and constituted the whole Protestant Episcopal Church in the parish. All the Protestant Episcopal inhabitants in

Diocese as "a distinct Parish" under Canon 12, which was adopted in 1823, after the record in *Mason* closed. TEC-DVA Exh. 116; TEC-DVA Exh. 75 at 13. TFC then became a "separate and distinct church" from Christ Church-Alexandria. 10/20 Tr. 89 (Bond) As Professor Bond admitted, from 1836 forward TFC was a "distinct parish" that "elected its own vestry" and "[t]ook over the management of its own affairs." 10/20 Tr. 106:7-15. Thus, under the reasoning of *Mason* itself, the vestry of Fairfax Parish had a different successor for purposes of the glebe lands there (the Christ Church-Alexandria vestry) than it had for purposes of the two-acre parcel here (the TFC vestry).[11] Accordingly, the TFC vestry is the successor to the vestry of Truro Parish under the 1746 deed.

II. Alternatively, the doctrines of adverse possession and laches establish that the property at issue is held in trust for The Falls Church.

A. At a minimum, The Falls Church obtained title to the two-acre parcel by adverse possession.

Even assuming, *arguendo*, that TFC did not hold good title to the two-acre parcel based on the Orders discussed above and the 1746 deeds, there could be no dispute that during the past 135-150 years it has obtained ownership by adverse possession. "To establish title to real property by adverse possession, a claimant must prove actual, hostile, exclusive, visible, and continuous possession, under a claim of right, for the statutory period of 15 years." *Grappo v. Blanks*, 241 Va. 58, 61-62 (1991); *see* Va. Code § 8.01-236. TFC meets all of these requirements nine or ten times over.

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the parish, who had a right to vote at all for a vestry, had a right to attend the election held in April, 1810, and to vote for vestrymen; and if they did not, it was their own fault").

[11] The Diocese makes much of the fact that no deed expressly conveys the two-acre parcel from the vestry of Truro Parish to "the trustees of The Falls Church." But as TFC expert Barbara Blitz testified, that is not unusual. Tr. 150:18-152:10. Moreover, there is no "deed showing title passing from Truro parish to Fairfax Parish," let alone to the vestry of Christ Church. Tr. 93:17-94:10 (Bond). Nor was there any such deed in *Mason*, but that did not deter the Court from determining who the successor entity was "for all the purposes of the original bill." 22 U.S. at 456.

Actual. "[T]he usual kind of actual possession" is "occupancy, use, or residence upon the premises for the statutory period of time, evidenced by cultivation, enclosure, or erection of improvements." *LaDue v. Currell*, 201 Va. 200, 207 (1959). TFC's use plainly meets this standard. It is undisputed that, at the direction of TFC's vestry, "improvements started . . . right after the Civil War," including tiling the roof and repairing the chimney; further, TFC constructed major additions on the two-acre parcel in 1951 and 1959, and in 1959 "did an extensive remodeling in the historic section"—with "new pews," "balconies," "walls," "bricks," "gutters," and "heating and air-conditioning systems." 10/15 Tr. 46:8-10, 49:4-22, 50:1-13, 51:9-22, 58:16-59:4 (Deiss). Such actions obviously amount to use of the land, evidenced by enclosure and improvements.

Hostile. It is black letter law that construction of buildings and other structures "are acts that are clearly open, notorious, and hostile," *Quatannens v. Tyrrell*, 268 Va. 360, 374 (2004); hence, TFC's construction of additions on the two-acre parcel in the 1950s establishes its hostile possession. Moreover, "actual, exclusive, and visible possession without permission necessarily meant that the claimant's interest was hostile to that of the legal titleholder." *Id.* at 371 (citing *Taylor v. Burnsides*, 42 Va. 165, 190 (1844)). We have already established that Falls Church's possession was actual. Accordingly, its possession was also hostile if it was also exclusive, visible, and without permission. It was all of these.

Exclusive. "One's possession is exclusive when it is not in common with others" *Grappo*, 241 Va. at 61-62. Such possession can be established by showing, among other things, "occupation, use, and improvement." *Quatannens*, 268 Va. at 371-72, 375. Here again, TFC occupied, used, and improved the two-acre parcel dating back to "right after the Civil War"—thus establishing exclusivity. Further, according to Mr. William Deiss, who testified as to the historic

use of the property based on vestry minutes and building records dating to 1873, Christ Church-Alexandria could not have used the property without TFC's permission and never did use it:

> Q: In terms of Christ Church, could Christ Church have had the right to use this property without approval of the Vestry?
>
> A: Not without approval of the Vestry.
>
> Q: Has it ever used this property?
>
> A: Not to my knowledge.

10/15 Tr. 48:15-49:16; 84:14-19. Thus, TFC occupied, used, and improved the property; and its possession was not in common with others. It was therefore "exclusive."

Visible. "Possession is visible when it is so obvious that the true owner may be presumed to know about it." *Grappo*, 241 Va. at 61-62. "[O]ccupation, use, and improvement," moreover, "may be used to establish exclusivity and visibility." *Quatannens*, 268 Va. at 371-72. As noted above, TFC has established "occupation, use, and improvement," including major building projects in the 1950s and 1990s and improvements dating to "right after the Civil War." Moreover, Mr. Deiss testified that "it was obvious to me on reviewing the minutes of the previous Vestries that [TFC's use of the graveyard on the Property] has been going on . . . [c]ertainly back to 1874." 10/15 Tr. 67:3-6. The public may be presumed to know about use of a graveyard, where burials routinely occur after public announcements in newspapers. TFC has proven visibility.

Without permission. Far from Christ Church-Alexandria or the Diocese granting TFC permission to use the property, the evidence shows that TFC would have had to grant *them* permission for its use. It is undisputed that Christ Church-Alexandria could not use the property "without approval of the [TFC] vestry," and that officials of the Diocese likewise "couldn't come unless the Vestry approved it." *See* 10/15 Tr. 83:6-84:14-19 (Deiss); *id.* at 84:5-10 (noting "a time when the Bishop wasn't invited to come"). Thus, this is not "simply a case of unchallenged occupancy," which itself would establish adverse possession, *Mary Moody Northern, Inc. v. Bai-*

ley, 244 Va. 118, 122 (1992); it is the *a fortiori* case where the *occupant* grants the supposed *owner* permission.

Continuous. "Possession is continuous only if it exists without interruption for the statutory period." *Grappo*, 241 Va. at 61-62. Here, Mr. Deiss testified that the TFC has "a continuous set of vestry minutes" dating back to 1873. 10/15 Tr. 49:13-16, 67:22-68:3. As noted above, he also testified that TFC made improvements to the two-acre parcel right after the Civil War and major additions to the original sanctuary in the 1950s. With the vestry meeting on a "continuous" basis and periodically ordering major improvements to the property over the span of a century, it is not surprising that TFC's possession was uninterrupted for more than 15 years:

> Q. Now, let me ask you, how long has The Falls Church been using this historic center?
>
> A. Since the beginning of time. Certainly before my time.
>
> Q. Do you have records going back to 1873?
>
> A. Yes.
>
> Q. Do they indicate use of this building?
>
> A. Yes.

10/15 Tr. 57:21-58:10 (Deiss). Moreover, Mr. Deiss testified that there is no sign that Christ Church-Alexandria has "ever used this property" (10/15 Tr. 84:14-19), and Professor Bond acknowledged that, after 1800, the Christ Church-Alexandria vestry did nothing to "keep[] up the property at the Falls" (10/20 Tr. 98:18-99:1).

In sum, even if *Mason* had established Christ Church-Alexandria's right to the Property in 1824 (and it did not), TFC would have obtained title to the property long ago by adverse possession. This is the plain lesson of *Marion Investment Company v. Virginia Lincoln Furniture Corp.*, 171 Va. 170 (1938), among other cases. There, a company purchased land at a foreclosure sale, but the land continued to be held by another company under an already-existing oral

agreement purporting to convey title. The Virginia Supreme Court held that "since the [foreclosure sale] purchasers were in a position, upon confirmation of the sale, to protect their title . . . the statute of limitation commenced to run against them at that time." *Id.* at 181. It was "immaterial," the court explained, "whether an adversary possession under a claim of title be under a good or a bad, a legal or an equitable title," or be "based on a writing," because "for nearly thirty years, in plain and under close view of those who held legal title," the defendant's predecessor had "erected valuable improvements." *Id.* at 183. Here, for more than 135 years, TFC itself has, "in plain and under close view of those who [allegedly] held legal title," "erected valuable improvements" on the two-acre parcel. *Id.* The statutory clock has long since run on Christ Church-Alexandria.

B. The doctrine of laches bars ECUSA and the Diocese from asserting that Christ Church-Alexandria has any rights in the two-acre parcel.

The equitable clock too has run on any claim that Christ Church-Alexandria has an ownership interest in the two-acre parcel. At the outset, "[n]o principle is better established . . . than that, in respect to the Statute of Limitations—equity follows the law—that is to say, if legal demand be asserted in equity, which is barred by statute, it is equally barred in a court of equity." *Camp Manufacturing Co. v. Green*, 129 Va. 360, 367 (1921). Thus, if the Diocese and ECUSA are barred by the statute of limitations from asserting that Christ Church-Alexandria has a claim to the two-acre parcel, they are also barred from asserting such a claim by principles of equity. That is what it means to say that "equity follows the law." *Id.*

But even if the doctrine of adverse possession did not apply here, the doctrine of laches would foreclose the claim that Christ Church-Alexandria is the owner of the two-acre parcel.[12]

[12] If Christ Church is barred by laches, so are the Diocese and ECUSA. *See National Mutual Building & Loan Ass'n v. Blair*, 98 Va. 490, 515 (1900) ("The [assignee] can occupy no better position than her assignor. Inasmuch, therefore, as [the assignor] is estopped by reason of his

Laches is "'the neglect or failure to assert a known right or claim for an unexplained period of time under circumstances prejudicial to the adverse party." *Stewart v. Lady*, 251 Va. 106, 114 (1996). Under the theory of ECUSA and the Diocese, Christ Church-Alexandria has known of its rights since its vestry and wardens were parties in *Mason*—for 184 years. Yet Christ Church-Alexandria has done nothing to assert any such rights: its vestry disclaimed responsibility for TFC in *Mason*; the court there held that "The Falls Church was . . . property to which [the vestry of Christ Church-Alexandria] had no right," 16 F. Cas. at 1051-52; and Professor Bond admitted that Christ Church-Alexandria did nothing to maintain the property after 1800. 10/20 Tr. 98:18-100:4. Meantime, the TFC vestry and congregation were:

- conducting "fundraising events to get th[e] building up in a usable condition";
- "put[ting] the lights back in and put[ting] the pews back in";
- repairing the chimney and putting tiles on the roof;
- carrying out "an extensive remodeling in the historic section";
- overseeing the construction and financing of the '51, '58, and '92 additions to the church at a cost of several million dollars plus interest;
- paying off that debt;
- burying its dead in the graveyard; and
- holding itself out as owner of the historic two-acre parcel to the world at large—including Christ Church, the Diocese, ECUSA, the Arlington County Circuit Court, and this Court.

E.g., 10/15 Tr. 54:1-13; 54:15-19, 56:3-11, 58:11-59:10, 59:4, 60:9-15 (Deiss).

Assuming, *arguendo*, that Christ Church-Alexandria once had a valid claim to the two-acre parcel, it is an understatement to say that allowing the Diocese and ECUSA to assert such a claim today would cause TFC extraordinary prejudice. Indeed, this is an even stronger case for the application of laches than *Puckett v. Jessee*, 195 Va. 919 (1954), where the Court held that a

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laches and acquiescence," "his assignee is also denied the right to call th[e] transaction in question").

13-year delay barred a church from recovering its property from another church. There, the first church purported to transfer title to its land to a second church, which in turn paid off the debt on the land and invested thousands of dollars completing the building. *Id.* at 921-22. Thirteen years later, the first church sued to get the property back, alleging that it had lacked the capacity to convey valid title. *Id.* But the Supreme Court said "no," declaring that "[t]he rights of the parties depend, not on the technicalities of title, but on the application of basic principles of equity." *Id.* at 929.

"Equitable principles should be applied in controversies between two unincorporated religious societies," the court explained. *Id.* at 931. And "equity aids only the vigilant"; "[i]t has always refused to give its aid to stale demands where the party has slept upon its rights and acquiesced in adverse use thereof to the prejudice of another for a great length of time." *Id.* (citation omitted). The Court then pointed to another case where a church sued to recover property "after the debts had been paid and valuable improvements" made, claiming it was entitled to do so because the conveying deed was "void." *Id.* (citation omitted). "We can see no equity in returning to the plaintiff the property with additions made and debts removed," the court had said, "which would not have been made or removed if the plaintiff's action had been prompt." *Id.*; *see also Camp Manufacturing Co.*, 129 Va. at 367 (holding that laches precluded a party from recovering title where the party had delayed bringing suit for 52 years, and explaining that "the underlying reason for the doctrine of laches is that because of the lapse of time, and the death of parties, it is impossible to ascertain all the facts, and therefore it is just to leave the parties in the possession in which they have placed themselves").

So too here. Even if *Mason* means what ECUSA and the Diocese assert, that decision came down in 1824. Christ Church-Alexandria has thus waited 171 years *longer* to take action

than did the plaintiffs in *Puckett*, who waited "only" 13 years. If "stale demands," "slept upon its rights," and "acquiesced" have ever described a situation, this is it. *Id.* TFC has invested its resources in the property at issue since at least 1873, and probably far longer. Thus, even if TFC's title were "absolutely void" (*id.*), there would be "no equity in returning to [Christ Church-Alexandria] the property with additions made . . . which would not have been made . . . if [Christ Church-Alexandria's] action had been prompt." *Id.* The contrary claims of ECUSA and the Diocese are frivolous.

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Respectfully submitted,

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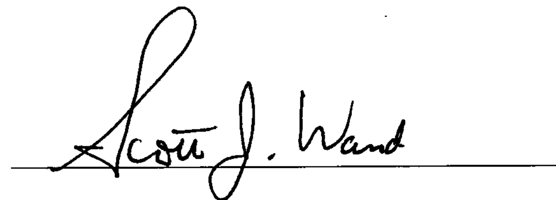

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