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

THE FALLS CHURCH'S POST-TRIAL OPPOSITION BRIEF CONCERNING THE FALLS CHURCH ENDOWMENT FUND

Pursuant to the Court's direction at the October 20, 2008, Hearing, and in the Court's October 17, 2008 Letter Opinion, The Falls Church ("TFC"), by its counsel, hereby files this post-trial opposition brief concerning The Falls Church Endowment Fund.

I. TFC has presented sufficient evidence to support the finding that it had a non-vested property interest in its right to appoint the directors of the Endowment Fund at the time of the December 2006 vote.

As set forth in our Opening Post-Trial Brief, The Falls Church presented ample evidence at trial that demonstrates: (a) that the vestry of The Falls Church established The Falls Church Endowment Fund (the "Endowment Fund" or "Fund") to support the outreach ministries of TFC; (b) 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; (c) that, since the inception of the Fund, the TFC vestry has had the right to manage and control the Fund by electing all directors of the Fund; (d) that, since the inception of the Fund through the December 2006 vote, the TFC vestry, acting as a vestry and not individually, has consistently exercised this right to elect directors and thereby control the operations of the Fund; and (e) that, upon dissolution of the Fund, all assets of the Fund are to be distributed to "The Falls Church". TFC Opening Br. at 2-4. This evidence establishes, consistent with Virginia Code §13.1-884(B), that the TFC vestry's membership interests in, and right to elect the directors of, the Fund constitute (non-vested) personal property rights within the scope of Virginia Code §57-10.

ECUSA/Diocese do not directly address this evidence in their opening brief. Rather, they baldly assert that TFC "has offered no evidence" whatsoever in support of our position. *See* ECUSA/Diocese Opening Br. at 1. ECUSA/Diocese then repeat their summary judgment arguments that, as a matter of law, the right to elect directors of a nonprofit, nonstock corporation cannot be considered personal property and cannot come within the scope of §57-10 because it

cannot be held by trustees.[1] Br. at 1-2. For both legal and factual reasons, ECUSA/Diocese's arguments fail.

(a) ECUSA/Diocese first continue to contend that as a matter of law there cannot be *any* property right in a membership interest in a nonstock corporation. *See* ECUSA/Diocese Opening Br. at 3. But they again cite cases that instead address whether a property right in a nonstock corporation is a *vested* right, such that it cannot be changed by amendment of the applicable nonstock corporation laws or the governing documents of the corporation. *See* ECUSA/Diocese Opening Br. at 3. Contrary to ECUSA/Diocese's assertions, the holdings of these cases are not that the members do not have *any* property interest in their rights to elect directors, but rather that the members' rights to elect directors are not *vested* rights, and therefore may be changed by legislative amendment of the corporate laws and/or by amendment of the bylaws of the corporation (consistent with applicable laws and with the corporation's own governing documents. *See, e.g.*, *Bailey v. American SPCA*, 282 App. Div. 502, 505, 125 N.Y.S.2d 18, 21 (1953) (holding that amendment of bylaws of nonstock membership corporation that permitted board members to control the election of their successors did not infringe on property or other enforceable rights of members); *Westlake Hospital Ass'n v. Blix*, 13 Ill. 2d 183, 196, 148 N.E.2d 471, 479 (1958) (corporate charter is subject to state law and corporate bylaws may be amended as provided therein, such that the rights of members to vote are not constitutionally protected); 1 M. Phelan, *Nonprofit Enterprise: Corporations, Trusts, and Associations* §3.06 (2000) (right of a member of a nonprofit corporation to vote "is generally not a *vested* right...") (italics added).

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[1] ECUSA/Diocese's Opening Brief is styled as both a "renewed motion to strike" and a post-trial brief, but it presents the same set of arguments for both issues. Therefore, this TFC Opposition Brief will address these arguments together.

The primary case upon which ECUSA/Diocese rely, *In re: Mt. Sinai Hospital*, 250 N.Y. 103; 164 N.E. 871 (1928), is not to the contrary. There, the "only question [was] whether the act" of the legislature amending the public nonstock corporation's corporate charter to have directors elected by the board, rather than by the members of the corporation, "violates any of the [two appellant members'] constitutional rights...." The court found that, because 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, the right of two dissenting members "to participate in the control of the corporation by voting for trustees, must, under the reserved power, yield to the greater right of the State and the corporation to provide for the more efficient administration of the affairs of the corporation, as their judgment dictates." 250 N.Y. at 115. The court in *Mt. Sinai* acknowledged 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." 250 N.Y. at 113.

Here, in contrast, it is undisputed that the Endowment Fund is a private religious and charitable corporation founded and initially funded by the TFC vestry, not by legislative charter, and devoted specifically to religious purposes – the support of the Christian Church and the outreach ministries of The Falls Church. Tr. 142:4-143:3 (Deiss); Tr. 184:14-185:2 (Fetsch); TFC Exh. 71 (2006 IRS Form 990 signed by Robin Fetsch and stating that the purpose of the Endowment Fund is to support the outreach ministry of The Falls Church). It is also undisputed that, upon dissolution all assets of the Fund are to be distributed "to The Falls Church." *See* Articles of Incorporation, Article Ninth, TFC Exh. 27. As 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*.

ECUSA/Diocese also continue to 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. Consequently, they again cite cases that all hold that the members of a nonstock corporation do not have a vested personal property interest in the *assets* of the corporation. *See, e.g.*, ECUSA/Diocese Opening Br. at 3-5, *citing Hanshaw v. Day*, 2020 Va. 818, 824, 120 S.E.2d 460, 464 (1961) (members acquire no property rights *in the assets of nonstock corporation*); *Commonwealth v. The JOCO Foundation*, 263 Va. 151, 163, 558 S.E.2d 280, 286 (2002) ("members of a charitable corporation have no personal property rights *in corporate assets*"); and 12A Fletcher §5687 at 680 (rev. 2001) ("a member of a nonprofit corporation does not acquire a *severable right* to any of *the property or funds of the corporation*") (italics added). They thus fail to come to grips with the fact that the TFC vestry has a valuable property interest in its right to appoint the directors of the Fund. This property right 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.

(b) As explained in our Opening Brief, the Virginia Nonstock Corporation Act provides that the right of a member of a nonstock corporation to control the management of the corporation is a contingent (non-vested) property right. *See* Virginia Code § 13.1-884(B) ("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.") (emphasis added.) ECUSA/Diocese's only response to this statutory language is to reiterate its claim that Code § 13.1-884(B) was included in the Virginia Nonstock Corporation Act merely to mirror the Stock Corporation Act and to make clear that the "vested rights" doctrine does not apply. For the reasons set forth in our Opening Brief,

however, ECUSA/Diocese's argument violates established principles of statutory construction and renders portions of the statute surplusage at best. *See* TFC Opening Br. at 5-6. Further, ECUSA/Diocese's interpretation of § 13.1-884(B) also contradicts its assertions that, as a matter of law, a membership interest in a nonstock corporation cannot constitute a personal property interest. *Cf.* ECUSA/Diocese Opening Br. at 1-2. If that were the case, there would have been no need for the General Assembly to include § 13.1-884(B) in the Nonstock Corporation Act, as there would have been no personal property right capable of vesting.

II. TFC has presented sufficient evidence to establish that its rights in the Endowment Fund are within the scope of Virginia Code §57-10 as interpreted by this Court's October 17, 2008 Letter Opinion.

In its October 17, 2008 Letter Opinion, this Court ruled that under Virginia Code §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...," and is subject to a 57-9(A) petition. *See* Ltr. Op. at 4. As explained in our opening brief, the evidence at trial demonstrates that TFC's rights in the Endowment Fund constitute personal property that comes within the scope of this provision. ECUSA/Diocese attempt to attack this showing in two closely related ways.

First, ECUSA/Diocese argue that TFC cannot have any property interest in the Fund, because the power to appoint the directors of the Fund was not held by TFC as an institution, nor even by the TFC vestry as a vestry, but rather by the individual members of the TFC vestry. See ECUSA/Diocese Opening Br. at 9 (Section 3). This hyper-formalistic argument appears to be a distinction without a difference. In any event, it is unpersuasive, for multiple reasons.

ECUSA/Diocese's argument ignores the plain language of the Fund's governing documents. Article I, Section 3 of the Fund's Bylaws provides that the directors "shall be elected by the vestry of The Falls Church, Episcopal Church, as set forth in the Articles of Incorporation...."

The Bylaws thus confirm that the election of the Fund's directors is carried out by the TFC vestry acting in its capacity as a vestry (*i.e.*, a legal governing board), and not by individual vestry members acting in their individual capacities.

ECUSA/Diocese also ignore the undisputed evidence at trial – including their own exhibits – demonstrating that at all relevant times, the directors of the Fund in fact were elected by "the vestry of The Falls Church", not by individual vestry members acting in their individual capacities. The minutes of the Endowment Fund over the years repeatedly note that the directors were elected by formal action of the vestry of The Falls Church at regular vestry meetings, and that the directors of the Fund (including Mrs. Fetsch) expected nothing else. *See, e.g.*, TEC-DVA Exh. 91 (Nov. 1, 2006 Minutes) ("The Vestry will be notified and requested that they re-appoint [Steve Skancke and Dan Henneberg] for another five-year term"); TEC-DVA Exh. 92 (Oct. 17, 1995 Minutes) ("These elections were made by the vestry at its September 18, 1995 meeting.").

Legally and logically, the power to elect directors by its nature must be held and exercised by the vestry acting as a governing body, not by individuals. An individual vestry member, acting alone, could not elect any director of the Fund, let alone all five directors. Only by acting as a vestry – just as the vestry normally does and just as the TFC vestry intended when it established the Fund – can the members of the TFC vestry effectively appoint directors of the Fund.

Second, in Section 1(c) of their Opening Brief, ECUSA/Diocese contend that, because the TFC *vestry* possesses the right to elect the directors of the Fund, it is impossible for that right to "stand vested in the trustees having legal title to the land" for purposes of §57-10. ECUSA/Diocese Opening Br. at 7-8. Their argument, however, ignores the Court's ruling that 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...," and would therefore be subject to a 57-9(A) petition. *See* Ltr. Op. at 4. Indeed, this is no different from other personal property that may be held by the vestry, clergy, or staff of a church, 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...," just as the General Assembly intended.

III. At all times relevant to the approval of TFC's §57-9 Petition, the right to appoint directors of the Endowment Fund has been the property of The Falls Church within the meaning of Virginia Code §57-9 and §57-10.

In section 4 of their brief, ECUSA/Diocese make a novel and somewhat incomprehensible last argument. They appear to argue that the TFC vestry lost its right to elect the directors of the Endowment Fund immediately upon final confirmation of the December 2006 congregational vote results. *See* ECUSA/Diocese Opening Br. at 10. They may also be contending that TFC's property interest in appointing the directors of the Fund terminated at that same time and therefore cannot be encompassed within TFC's §57-9 Petition, but that is not clearly stated in their brief. They may be attempting as well to have the Court reconsider its rulings on TFC's motion in limine and TFC's objections at trial, but, if so, they have failed to satisfy the procedural requirements for seeking such reconsideration.

To the extent that their argument is comprehensible, it rests upon misreadings of the Fund's Articles of Incorporation, upon factual mischaracterizations of the TFC Congregational Ballot, and upon misunderstandings of the laws of Virginia. More significantly, it largely fails to address the Court's October 17, 2008 Letter Opinion (framing the issue as "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") and the Court's rulings and instructions at the October 20 trial. For all of these reasons, the Court should reject this argument.

ECUSA/Diocese's argument simply misses the point of the Court's October 17 and October 20 rulings. Those rulings reflect the Court's recognition that §57-9 anticipates that there will be competing claims to congregational property after a congregational vote, and therefore looks to the status of congregational property prior to the emergence of the competing claims.

An essential but unsupported premise of their argument is the assumption that the Class A members of the Endowment Fund must at all times be members of some congregation that it is affiliated with ECUSA, rather than members of The Falls Church. This assertion rests entirely upon ECUSA/Diocese's spin on the language of Article Fifth, Section B of the Articles of Incorporation, which states that "Class A members shall be those individuals who are members of the vestry of The Falls Church, Episcopal Church." ECUSA/Diocese presume, without offering proof or even argument, that this language operates restrictively, rather than descriptively. Viewed in context, though, the language is clearly descriptive, referring to the same congregation that established the Fund and that is identified in Article Ninth simply as "The Falls Church."[2] ECUSA/Diocese also presume that any purported restrictive effect of these two words would operate in an instantaneous self-executing manner to immediately disqualify all Class A members.

ECUSA/Diocese rely on this tenuous assertion to set up a third flawed premise, that because the vote to disaffiliate was purportedly self-executing, it not only allegedly terminated any future power of the TFC vestry to continue to elect the directors of the Fund, but in some unexplained way also immediately retroactively divested the vestry of any *pre-vote* property interest

[2] The fact that the legal name of the Fund is "The Falls Church Endowment Fund, Inc." and not "The Falls Church, Episcopal Church, Endowment Fund, Inc." or even "The Falls Church Episcopal Endowment Fund, Inc." reinforces this conclusion.

it had in the right to elect directors of the Endowment Fund. This circular logic ignores the fact, as demonstrated by the text of §57-9, by the 1867 petitions filed under §57-9, and by this Court's earlier rulings, that §57-9 envisions that there will be two (or more) congregations following a §57-9 vote asserting competing claims to congregational property.

Fourth, this argument rests upon additional misunderstandings of Virginia law. It presumes that disqualification and disenfranchisement of the legal members of a nonstock corporation can occur without any affirmative action by the members themselves, by the corporation's board, or by the courts. But neither the Articles nor Bylaws, nor the Virginia Nonstock Corporation Act, provides for the sort of self-executing disenfranchisement of all members of a nonstock corporation that ECUSA/Diocese advocate here. As evidence of their misunderstanding of the operation of Virginia law, ECUSA/Diocese misread the plain language of Resolution 1 of the Congregational Ballot which clearly contemplates the necessity of further actions by the TFC vestry and trustees in order to effectuate the vote results. When read in context, the Ballot Resolution seeks to vest the vestry and trustees with the necessary authority to take such actions rather than attempt to linguistically short-circuit the appropriate legal process, as ECUSA/Diocese alleges. *See* Congregational Ballot (Exhibit 3 to TFC's §57-9 Petition), Resolution 1.

CONCLUSION

From the inception of the Fund, the vestry of The Falls Church, as "Class A" members of the Fund, had the right to control the appointment and removal of the directors of the Fund. This right to control the management of the Fund and its assets is a valuable (non-vested) property interest, as that term is used in the Virginia Non-Stock Corporation Act and relevant case law. As such, it is personal property within the meaning of Va. Code § 57-10, and, under the Court's Letter Opinion, is within the purview of The Falls Church's § 57-9(A) petition.

Dated: November 6, 2008

Respectfully submitted,

WINSTON & STRAWN

By: _____

Gordon A. Coffee (VSB #25808)
Gene C. Schaerr
Steffen N. Johnson
Andrew C. Nichols (VSB #66679)
1700 K Street, N.W.
Washington, DC 20006-3817
(202) 282-5000 (telephone)
(202) 282-5100 (facsimile)
Counsel for The Falls Church

SEMMES, BOWEN & SEMMES, P.C.

By: _____

James A. Johnson
Paul N. Farquharson
Scott H. Phillips
25 South Charles Street
Suite 1400
Baltimore, Maryland 21201
(410) 539-5040 (telephone)
(410) 539-5223 (facsimile
Counsel for The Falls Church

GAMMON & GRANGE, P.C.

By: _____

Scott J. Ward (VSB #37758)
Timothy R. Obitts (VSB #42370)
Dawn W. Sikorski (VSB ##77315)
8280 Greensboro Drive, Seventh Floor
McLean, VA 22102
703-761-5000 (telephone)
703-761-5023 (facsimile)
Counsel for The Falls Church

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of November, 2008, a copy of the foregoing *The Falls Church's Post-Trial Opposition Brief Concerning The Falls Church Endowment Fund* was delivered by first class mail and by electronic mail, to:

Bradfute W. Davenport, Jr., Esquire
George A. Somerville, Esquire
Joshua D. Heslinga, Esquire
TROUTMAN SANDERS, LLP
P.O. Box 1122
Richmond, VA 23218

Heather H. Anderson, Esquire
Adam M. Chud, Esquire
Soyong Cho, Esquire
GOODWIN PROCTER, LLP
901 New York Ave., N.W.
Washington, D.C. 20001

Mary C. Zinsner, Esquire
TROUTMAN SANDERS, LLP
1660 International Drive, Suite 600
McLean, VA 22102

Robert C. Dunn, Esquire
Law Office of Robert C. Dunn
P.O. Box 117
Alexandria, VA 22313-0117

Edward H. Grove, III, Esquire
BRAULT PALMER GROVE
WHITE & STEINHILBER, LLP
3554 Chain Bridge Road, Suite 400
Fairfax, VA 22030

William E. Thro, Esquire
Stephen R. McCullough, Esquire
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

With a courtesy copy by electronic mail and hand-delivered to:

Sara G. Silverman
Law Clerk to the Honorable Randy I. Bellows
4110 Chain Bridge Road
Fifth Floor Judges' Chambers
Fairfax, VA 22030

Courtesy copy to CANA Congregations counsel by electronic mail.

Scott J. Ward