

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 REPLY 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 reply brief concerning The Falls Church Endowment Fund.

ARGUMENT

The issue framed by this Court's October 17 Letter Opinion is "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." Ltr. Op. at 4. As set forth in TFC's opening and opposition briefs, the limited legal authority that is directly relevant to this issue supports TFC's position that the TFC vestry's power to elect the Directors of The Fund under the Fund's Articles of Incorporation is an interest in personal property within the meaning of Virginia Code § 57-10, and therefore is subject to TFC's §57-9(A) petition.

Rather than directly address the issue stated by the Court, ECUSA/Diocese struggle to reframe and avoid it. Ignoring both the Court's Letter Opinion and the text of Virginia Code §57-10, they claim that the issue instead is whether the right to elect Directors of the Fund *is directly held by the trustees having the legal title to the land*—rather than *vested* in the trustees by operation of law under § 57-10. *See* Opp. Br. 1. Moreover, they continue to ignore the distinction in the Code and in the cases between a property right and a *vested* property right, thus citing cases holding that there is no *vested* or *constitutionally-protected* property right for the proposition that there is no property right *whatsoever*. Finally, a substantial portion of their argument is directed at attacking the Court's conclusion, in its Letter Opinion and in its evidentiary rulings at trial, that for purposes of § 57-9 and § 57-10 this issue must be determined "at the time of the vote to disaffiliate" and not thereafter. Opening Br. 9-11; Opp. Br. 9. *See also* Opp. Br. 10-11 (using Diocese's "effective immediately" arguments as the premise for attempting to distinguish the Fund's dissolution clause).

Ultimately, ECUSA/Diocese are trying to have it both ways. They argue that TFC does in fact have an interest in the Endowment Fund that is subject to ECUSA/Diocese's declaratory

judgment actions. *See* Op. Br. 1 (“TFC’s arguments are appropriate for the Diocese’s declaratory judgment action”); Tr. 146:11-20 (counsel for the Diocese states that Endowment Fund is encompassed within the same declaratory judgment actions that the Diocese and ECUSA originally filed against The Falls Church). But those declaratory judgment actions deal entirely with the ownership and use of *the real and personal property of The Falls Church*. *See* Diocese Complaint at p. 12 (prayer for relief); ECUSA Complaint at p. 19 (prayer for relief). Those actions were filed only against The Falls Church, its vestry, and its trustees, as such; the actions do not name the Fund, its Directors, nor its Class A or B members, as defendants. *Id.* So it is disingenuous at best for ECUSA/Diocese to contend that the Fund and its assets are personal property of The Falls Church subject to their declaratory judgment actions but that TFC vestry’s membership interest in and right to elect Directors of the Fund do not constitute personal property within the meaning of §57-10.

I. At the time of the December 2006 vote, The Falls Church had a property interest in its right to appoint the directors of the Endowment Fund.

At the time of the vote to disaffiliate, TFC had a personal property interest in the Endowment Fund by virtue of the TFC vestry’s power to appoint the Directors of the Fund. This property right is recognized by Code §13.1-884(B), but as a property right that is not vested. Because this property right is not vested, it can be altered by legislative action and/or by amendment of the Articles of Incorporation or Bylaws of the Fund, and such alterations would not violate a vested property right that is constitutionally protection. *See, e.g., Mt. Sinai*, 250 N.Y. at 113. But, at least as of the time of the vote to disaffiliate, no such alteration of the Funds’s governing documents had occurred, and this property right therefore continued to exist.

The evidence at trial established the factual basis underlying this property right. Among other things, the evidence demonstrates that the Fund was established by the TFC vestry; that the

property held by the Fund was contributed by TFC, its congregants, and (in a few instances) others specifically in order to support the outreach ministries of TFC;¹ that contributions were made in response to advertisements, announcements, and solicitations by TFC and the Fund indicating that donating to the Fund is one method to support the ministries of TFC; and that upon dissolution of the Fund all of its remaining assets must be distributed to The Falls Church.² See TFC Opening Br. 2-4. The evidence also demonstrates that the TFC vestry, acting as the vestry of TFC, at all relevant times elected the Directors of the Fund, exercising its rights under the Articles and Bylaws of the Fund. See TFC Opp. Br. 6. This evidence demonstrates that the TFC vestry's membership interest in and right to elect the directors of the Fund serve to protect the substantial assets that TFC and its congregants and other donors have entrusted to the Fund.

ECUSA/Diocese do not dispute that a membership interest in and the right to vote for the directors of a corporation constitute, at least in the context of a *for-profit* stock corporation, a

¹ In a few cases, contributions were made by non-congregants specifically intended to support ministries operated by The Falls Church, such as The Falls Church Fellows program. Tr. 158:19-159:21 (Deiss) (Kuhn family contribution to support TFC Fellows program).

² ECUSA/Diocese also miss the point as to the import of the dissolution clause in the Fund's Articles of Incorporation (or perhaps feign misunderstanding in an effort to again put forth their "continuing congregations" arguments). See Opp. Br. 10-11. The dissolution clause is one more factual indicator of the significant property interests of TFC in the Fund, rights that continue through the cessation of the Fund's existence, that the vestry's voting rights are intended to protect. See TFC Opening Br. 7-8.

Their attempt to quibble with the contrast between the dissolution clause in the Fund's Articles and the ordinary dissolution clause used by many other § 501(c)(3) organizations, Opp. Br. 10, betrays yet again ECUSA/Diocese's unfamiliarity with the law of tax-exempt organizations. By specifically identifying The Falls Church as the recipient of all of the Fund's assets upon dissolution, the Fund's Articles go beyond what is required under §501(c)(3). The type of "ordinary dissolution clause" required for purposes of §501(c)(3) is set forth in a variety of judicially cognizable documents, such as Internal Revenue Service Publication 557, *Tax-Exempt Status for Your Organization* (June 2008), at p. 69 (Appendix: Sample Articles of Organization (Draft A)), 2008 WL 2376557.

personal property interest.³ ECUSA/Diocese also concede (or the authorities upon which they rely acknowledge) that the personal property interest in voting for directors is in large measure to enable the members of a corporation to protect their financial interests in the corporation.⁴ At bottom, ECUSA/Diocese's position thus rests upon their characterization of the distinction between the nature of membership and voting rights in stock and nonstock corporations and their assertions that membership and voting rights in a nonstock corporation can never constitute a property right (whether vested or unvested). But while ECUSA/Diocese do not mention it, the authorities upon which they rely go farther and acknowledge that "[m]embership in a nonprofit membership corporation may be property, in some respects at least." *See* 11 Fletcher §5096 at p. 74 (rev. 2003) (footnotes omitted), Exh. 2 to ECUSA/Diocese Opening Br.

To support their position, ECUSA/Diocese continue to ignore the distinction in the Code and in the cases between a property right and a *vested* property right. They thus cite cases finding that there is not a *vested* property right or a *constitutionally-protected* property right for the proposition that there is no property right whatsoever. *See, e.g.*, Opp. Br. 4 (discussing Va. Code §13.1-884), at 6-7 (discussing *Socony*), and at 8 (discussing *Mt. Sinai*); Opening Br. 3 (discussing *Westlake Hospital*). This blurring characterizes their analysis of the *Mt. Sinai* case. *Mt. Sinai* dealt with a nonstock corporation established by legislative charter. The court there "reached the conclusion that the right of a member of a charitable corporation to participate in the control

³ *See, e.g.*, ECUSA/Diocese MSJ Opening Br. 3 (citing *Willard v. Moneta Bldg. Supply, Inc.*, 262 Va. 473, 481, 551 S.E.2d 596, 600 (2001); *Carnegie Trust Co. v. Securty Life Ins. Co.*, 111 Va. 1, 27, 68 S.E.2d 412, 421 (1910)); ECUSA/Diocese Opening Post-Trial Br. 3; 1 Phelan Nonprofit Enterprises § 3:06, Exh. 1 to ECUSA/Diocese Opening Post-Trial Br. ("While the right to vote has been considered a property right for a shareholder of a business corporation, it is generally not a *vested* right for a member of a nonprofit corporation.") (emphasis added; footnotes omitted).

⁴ *See* ECUSA/Diocese Opening Post-Trial Br. 3. *See also Willard*, 551 S.E.2d at 600; *Fein v. Lanston Monotype Mach. Co.*, 196 Va. 763, 767, 85 S.E.2d 353, 361 (1955).

of the corporation by voting for trustees, must, under the reserved power [of the legislative charter], 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.” *See* 250 N.Y. at 115. The court thus determined that there was no *vested* interest entitled to protection under the Constitution that prevented the legislature from amending the corporation’s charter. *See* 250 N.Y. at 113. In contrast, the issue here is not whether the Articles or Bylaws could be amended to eliminate the TFC vestry’s right to elect the Directors of the Fund—it is undisputed that the Articles and Bylaws have never been amended—but rather whether that right constitutes an interest in property.

Similarly, the sections that ECUSA/Diocese quote from the *Socony* case are clear that those section are speaking to the existence of a right in the accumulated earnings and surplus of the corporation or to demand payment of cumulated undeclared dividends, in other words, as the *Socony* opinion expressly states, a “*vested* property right.” *See* 152 S.E.2d at 286. Indeed, the *Socony* court makes this clear at the end of its opinion in its discussion of “voting rights and rights to cumulated undeclared dividends, stating that “[n]either right is a *vested* property right, and each is subject to change by proper corporate action under existing corporate law.” *See* 152 S.E.2d at 287.

It is this distinction between vested and non-vested property rights that is reflected in Virginia Code § 13.1-884(B). If ECUSA/Diocese are correct in their reading of *Socony*, and their corresponding analysis of §13.1-884(B), that section would have been then unnecessary or, at most, would have provided that there is “no property right” whatsoever resulting from provisions relating to management, control, capital structure, purpose, or duration of the corporation. But that is not what § 13.1-884(B) states; rather, it provides that there is “no vested property

right.” And the fact remains that at the time of the vote to disaffiliate, TFC had a personal property interest – albeit a non-vested one -- in the Endowment Fund by virtue of its vestry’s power to appoint the Directors of the Fund.

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.

ECUSA/Diocese continue to contend that TFC has not presented any evidence that its vestry’s power to appoint the Directors of the Fund was “given or acquired for the benefit of a church,” and thus that § 57-10 cannot apply here. This is more an assertion than an argument, as ECUSA/Diocese have never set forth any reasoning in support of this claim. *See* Tr. 176 (argument by counsel for Diocese); ECUSA/Diocese Opening Br. 8; ECUSA/Diocese Opp. Br. 8. This argument appears to rely entirely upon ECUSA/Diocese’s unsupported assumptions that, although the Articles of Incorporation and Bylaws of the Fund grant membership interests and voting rights given to the TFC vestry, such rights have not been “given or acquired” for The Falls Church or do not “benefit” The Falls Church.

Of course, the evidence at trial directly refutes such assumptions. It showed that the Fund was established by the TFC vestry specifically to support the outreach ministries of TFC, such as The Falls Church Fellows program. The TFC vestry established the Fund in such a way that the vestry would retain control over the management of the Fund. The Articles and Bylaws of the Fund give the TFC vestry the right to elect the Fund’s Directors. This right to elect the Directors clearly benefits The Falls Church by, among other things, ensuring that the substantial assets entrusted to the Fund are managed and controlled by persons whom the TFC vestry has selected.

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.

ECUSA/Diocese again argue that the right to appoint the Directors of the Fund belongs only to the individual members of the TFC vestry in their individual capacities, and not to the TFC vestry or TFC, and therefore cannot be personal property covered by Code § 57-10. Opp. Br. 9. This argument makes no more sense now than it did when counsel for the Diocese first presented it at trial. Tr. 149:22-152:9. As the Court observed at that time, there is no practical difference between the two characterizations—in both cases, the same persons are voting, on the basis of their status as members of the TFC vestry, to elect Directors of the Fund. *Id.* In any event, the evidence at trial, including the Diocese's own exhibits, expressly contradicts the argument by counsel for the Diocese's contention that the TFC vestry members "are not sitting as a vestry" (Tr. 151) when they elect the Directors of the Fund. *See generally* TFC Opp. Br. 5-7.⁵

ECUSA/Diocese also assert once more that the vestry of The Falls Church ceased to be vestry of "The Falls Church, Episcopal Church" and thus ceased to be "Class A members" of the Fund effective immediately upon the vote to disaffiliate. *See* Opp. Br. 9. This appears to be largely a back-door effort to informally obtain reconsideration of the Court's October 17 Letter Opinion and the Court's evidentiary rulings at trial regarding the relevant time frame for pur-

⁵ The fact that the Articles of Incorporation make the members of the TFC vestry Class A members of the Fund as the mechanism for implementing their right to elect the Directors of the Fund actually reinforces TFC's argument that this is a valuable property right that helps protect the contributions that TFC and its supporters have entrusted to the Fund. By implementing the election rights in the form of vestry membership interests, the Articles and Bylaws provide additional legal protections against the removal of those voting rights. For example, the Virginia Nonstock Corporation Act gives certain statutory rights and protections to the members of a nonstock corporation, such as the right to inspect the corporation's business records, *see* Virginia Code §13.1-933, and the right to bring a legal action in Virginia Circuit Court to obtain judicial review of an election of directors, *see* Virginia Code §13.1-861, to enjoin corporate action on the grounds that such action is "ultra vires," and to seek dissolution of the corporation as permitted in Virginia Code §13.1-909.

poses of § 57-9 and § 57-10 and to again attempt to present their “continuing congregation” evidence. It should be rejected for the same reasons that the Court has already articulated and as discussed further in TFC’s Opposition Brief at pages 7-9.

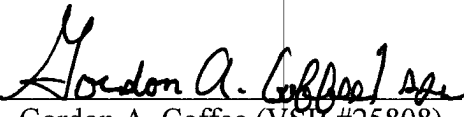
CONCLUSION

ECUSA/Diocese cannot have it both ways. If The Falls Church has an interest in the Endowment Fund that is subject to their declaratory judgment actions—actions that address ownership of the real and personal property of The Falls Church—then The Falls Church has a property interest in the Endowment Fund that is subject to Virginia Code § 57-9 and § 57-10.

Dated: November 10, 2008

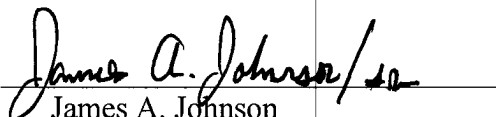
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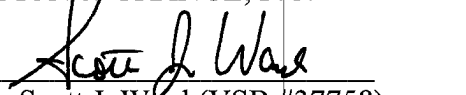
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of November, 2008, a copy of the foregoing *The Falls Church's Post-Trial Reply Brief Concerning The Falls Church Endowment Fund* was delivered by first class mail and by electronic mail, to:

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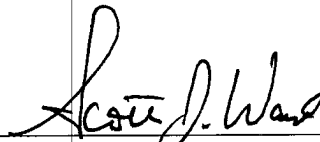
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