THE STATE OF NEW HAMPSHIRE

TRUST DOCKET, 6TH CIRCUIT – PROBATE DIVISION – CONCORD

TRUST U/W/O MARY BAKER EDDY – CLAUSE 6

TRUST U/W/O MARY BAKER EDDY – CLAUSE 8

CASE NO. 317-1910-TU-0001

MEMORANDUM CONCERNING STANDING OF THE SECOND CHURCH OF CHRIST, SCIENTIST, MELBOURNE (AUSTRALIA), IN RESPONSE TO ORDER OF NOVEMBER 6, 2017

Second Church of Christ, Scientist, Melbourne (Australia) ("Second Church"), by and through its undersigned attorneys, and in accordance with the Court's Order(s) of November 6, 2017, respectfully submits the following memorandum regarding its standing to participate in this matter.

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I. Introduction

This Court must decide whether Second Church, a branch church of the religion of Christian Science, has standing to seek the affirmative relief requested in the following pleadings:

1. Motion of Second Church for Appointment of Independent Trustee and Related Relief;[1]
2. Objections of Second Church to Assented to Motion of Trustees to Amend 1993 Order and Convert Clause 6 & 8 Trusts to Unitrusts; and
3. Objections of Second Church to Annual Accounting for Period Ending March 31, 2017.

[1] The relief sought in the Motion to Appoint Trustee has been alluded to in several previous filings of Second Church, including, *inter alia*, its pending Motion for Leave to File Brief *Amicus Curiae*, dated August 4, 2017, and Status Report and Request for Time for Discovery, dated September 12, 2017, and its prior filings that were dismissed without prejudice by this Court's Order of April 25, 2016. Pursuant to the Order of November 6, 2017, Second Church's request for appointment of an independent trustee is presented in a distinct pleading (the Motion to Appoint Trustee) asserting the standing of Second Church to be heard on same.

This brief speaks to the issue of Second Church's special interest standing to seek the relief sought in these pleadings on the basis of the special interest doctrine. Second Church has also asked to be heard on these same issues as an *amicus curiae* in the event the Court determines Second Church does not have standing to participate as a party in this proceeding.

All that has come before the Court in the last two years has been the result, in one way or another, of the special interests of Second Church. Second Church's interest is unique, actual, and necessary. The absence of such interests before the Court has allowed the Clause 8 Trust to be dominated by the singular, adverse interests of the Directors of the First Church of Christ, Scientist and to lapse into a decades long period of corrupt administration by that group, during which the priorities of the Trust were turned upside down and its assets used solely to support The Mother Church. The original purpose of promoting and extending the religion of Christian Science was lost as a result of the actions of the Directors of The Mother Church, without detection or opposition by the Director of Charitable Trusts ("DCT") and without notice to anyone else, until Second Church discovered the perversion of the Trust and insisted on its proper administration.

II. Relevant Background And Procedural History[2]

A. The Religion Of Christian Science And Mary Baker Eddy's Church

Mrs. Eddy founded both *a religion*—Christian Science; and *a church*—The First Church of Christ, Scientist, in Boston, Massachusetts, commonly referred to as "The Mother Church"

[2] Second Church incorporates the arguments and facts laid out in its August 28, 2017 Response to Objection by the Trustees of the Trusts Under the Will of Mary Baker Eddy, Clauses 6 and 8, to Second Church of Christ Scientist, Melbourne (Australia), Motion for Leave to File Brief *Amicus Curiae* and Brief *Amicus Curiae* of the Second Church of Christ, Scientist, Melbourne (Australia).

and, in official Church documents, as "Mary Baker Eddy's Church."[3] The distinction between the Christian Science religion and The Mother Church, and the distinct relationship of each to the Trusts administered under the jurisdiction of this Court, is important to the issues now presented, because the express purpose of the Clause 8 Trust is to promote and extend *the religion* of Christian Science as taught by Mrs. Eddy, not to fund The Mother Church. Mrs. Eddy provided separately, and generously, for the endowment and governance of her Church, The Mother Church through separate deeds of trust (collectively, the "Church Trust Deeds") executed between 1892 and 1906.[4] The Directors of The Mother Church were not designated as Trustees of the Clause 8 Trust.

To elaborate briefly, the *religion* of Christian Science was discovered by Mrs. Eddy first, and explained in her many writings—the most important being her book, *Science and Health with Key to the Scriptures* ("*Science & Health*"), the first published in 1875. In 1879, the "Church of Christ, Scientist" was formed. It was a congregational form of church, and Mrs. Eddy was elected its pastor. In 1982, she closed that church and reopened it under her jurisdiction as a deeds-based church called the First Church of Christ, Scientist. It was a voluntary association of individuals comprising a single congregation in Boston. Mrs. Eddy endowed The Mother Church with much property—including the real estate in Boston on which

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[3] Mrs. Eddy can be credited with the endowment of other Christian Science churches, including the First Church of Christ, Scientist, here in Concord, New Hampshire, but the special identification of The Mother Church in Boston as "her Church" is expressed, among other places, in the *Manual of the Mother Church* that she authored to govern that Church and its Directors (herein, the "*Church Manual*"). Article XXXXII of the *Church Manual*, for example, declares:

> All deeds of further purchases of land for The First Church of Christ, Scientist, in Boston, Mass., shall have named in them all the trusts mentioned in the deeds given by Albert Metcalf and E. Noyes Whitcomb in March, 1903.... Also there shall be incorporated in all such deeds the phrase, "Mary Baker Eddy's Church, The Mother Church or The First Church of Christ, Scientist, in Boston, Mass.

[4] The Church Trust Deeds and other documents governing The Mother Church and the Directors as its fiduciaries are discussed in more detail in the separate, Second Church Memorandum on Church Autonomy.

she directed (in her 1892 Church Trust Deed) that the Directors build and maintain the "church edifice" as a place of worship for the congregation. The Church Trust Deeds vested legal title to all or most of the property of *The Mother Church* in five trustees, known as the "Christian Science Board of Directors" (herein, the "Directors"). The Directors were formed as a body corporate under Mrs. Eddy's 1892 Church Trust Deed to manage The Mother Church congregation and its assets, and are subject to the bylaws and tenets of her *Church Manual.*

This background contrasts sharply with the description presented by the DCT in his Memorandum in Support of Trustees' Motion to Amend 1993 Order and to Convert Trusts to Unitrusts, dated August 11, 2017 ("DCT August 2017 Memo"), which conflates the religion of Christian Science with The Mother Church, describing it as part of a "hierarchical denomination" with central authority vested in the Board of Directors of [The Mother Church]. . . ."[5] The Mother Church is a *congregation*, not a denomination. There are over a thousand other Christian Science congregations—branch churches, like Second Church. They are connected to The Mother Church by shared membership and tenets,[6] but are explicitly independent in their governance.[7] The Directors, moreover, are a perpetual body corporate formed under the Church Trust Deeds to hold property, as trustees under the same, for use in the worship, teaching and preaching of the doctrines of Christian Science by the congregation of The Mother Church and to manage the business of that congregation and exercise other authority as set forth in, and subject

[5] See DCT August 2017 Memo at 1-2, in which the DCT cites *Weaver v. Wood*, 680 N.E. 2d 918, 920-21 (Mass. 1997) ("*Weaver*"). The cited section of *Weaver* speaks to the organizational structure of The Mother Church and not the *religion* of Christian Science. The words "hierarchical" and "denomination," moreover, are not found in the *Weaver* decision. The Director-Trustees in their November 2, 2017 Memorandum present the same erroneous picture of The Mother Church and their role as Directors as the central authority of an autonomous hierarchical denomination. *See* Memorandum of The Trustees In Support of Assented-To Motion To Amend 1993 Order, dated Nov. 2, 2017, at 7-9. Second Church disputes this characterization of The Mother Church and its Directors.

[6] *See, e.g.*, Church Manual, Art. XXIII.

[7] *See* Church Manual, Art. XXIII § 1.

to provisions of, the bylaws of the *Church Manual*. This role is separate and apart from the Directors' service as Trustees of the Clause 8 Trust, where they serve as individual trustees, by the discretionary appointment of this Court, subject to the terms of Clause 8 of Mrs. Eddy's Will and the laws of New Hampshire.

At the same time, however, The Mother Church is part of the religion of Christian Science and plays a part, like branch churches, in the broader mission of promoting and extending that religion.[8] This role of The Mother Church in promoting and extending the religion of Christian Science—and not just the subordinate (and repeatedly disclaimed)[9] provision in Clause 8 for "keeping in repair the church building" and former residence of Mrs. Eddy in Boston—is what gives rise to the embedded conflict of the current Trustees of the Clause 8 Trust; because they also serve as fiduciaries (trustees and directors) of The Mother Church.

B. Formation Of The New Hampshire Trusts

The Clause 6 and Clause 8 Trusts are very different in every respect other than that they both are trusts created under Mrs. Eddy's Will. The Clause 6 Trust under Mrs. Eddy's Will (Will, Clause 6) bequeathed $100,000 to the Board of Directors, in trust, for the following purposes:

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[8] While one might assume Mrs. Eddy intended this role for her Church, it must be noted that the relevant documents suggest that this mission of "promoting and extending" was located by her primarily in two other entities: the Clause 8 Trust under her Will and the Christian Science Publishing Society. The Church Manual, itself, lacks any explicit mission of promoting and extending the religion through The Mother Church, but the provisions regarding the organization of branch churches (Art. XXIII §§ 6-8) clearly reinforce the primary role of branch churches, along with the Publishing Society, reading rooms and societies in the expansion of the religion.

[9] The provision in the Clause 8 Trust for the application of income to "as may be *necessary*...for the purpose of keeping in repair the church building..." and other designated properties of The Mother Church was, from the beginning, understood to be a "charge against the estate" and subordinate to the dominant purpose of "promoting and extending the religion of Christian Science..." *See, e.g.*, *Chase v. Dickey*, 212 Mass. 555, 565 (1912) (emphasis added). It is expressly conditioned on such charges being "necessary" (The Mother Church lacking sufficient funds to keep itself in repair) and its necessity was also disclaimed by the Directors, due to the generous provisions Mrs. Eddy had already made for The Mother Church. *See id.* at 566.

> [to] hold, invest, and reinvest the principal of said fund and conservatively manage the same, and shall use the income and such portion of the principal, from time to time, as they may deem best, for the purpose of providing free instruction for the indigent, well-educated, worthy Christian Scientists at the Massachusetts Metaphysical College and to aid them thereafter until they can maintain themselves in some department of Christian Science.

The Clause 6 Trust is an endowment, bequeathed to the Directors, in trust, with instruction to conservatively manage the principal of the trust.

The Clause 8 Trust (Will, Clause 8) bequeathed the residue of Mrs. Eddy's estate to The Mother Church, in trust, for the following principal purpose:

> the balance of said income, and such portion of the principal as may be deemed wise, shall be devoted and used by said residuary legatee for the purpose of more effectually promoting and extending the religion of Christian Science as taught by [Mrs. Eddy].

In contrast to the Clause 6 Trust, the Clause 8 Trust was a gift to the congregation, The Mother Church, in trust with no instruction of conservative investment with a clear purpose to distribute income and principal to "promote and extend" the religion.

While the Board of Directors are the stated Trustees of the Clause 6 Trust, they are not a named beneficiary, thus there is no embedded conflict of the sort present in their administration of the Clause 8 Trust. The Clause 8 Trust names no individual trustees and instead gives the money to The Mother Church, the congregation, in trust, for maintenance of certain buildings but principally to "more effectually promot[e] and extend[] the religion of Christian Science as taught by [Mrs. Eddy]." Though members of the Board of Directors have always served as trustees of the Clause 8 Trust, they have not always been the only trustees. Josiah Fernald, president of a Concord, New Hampshire bank and trustee of an *inter vivos* trust declared by Mrs.

Eddy in 1907,[10] was a trustee of the Clause 8 Trust until his death in 1949. Fernald was not replaced after his death by another independent trustee, leaving only the five Board of Director Trustees (the "Director-Trustees") in charge of the Trust assets. Notwithstanding the Directors' counsel's representations to the Court at the November 3rd hearing respecting what the Court knew or considered in directing that another independent trustee need not be appointed, there is simply no record of any motion or other proceeding before the Court at the time to support such representations. *See* Nov. 3, 2017 Hearing Tr. 13:9-11. During his life, Fernald acted as an independent trustee of the Clause 8 Trust, protecting it from the embedded conflicts of the other Director-Trustees. Second Church is not aware of any reason for the lack of an independent trustee since his death.

C. The Early Years Of The Trusts

The Clause 8 Trust was challenged early on. The heirs of Mrs. Eddy challenged the Trust under a number of theories, including that the gift violated New Hampshire and Massachusetts statutes prohibiting large gifts to churches. *See Glover v. Baker*, 76 N.H. 393 (1912); *Chase v. Dickey*, 212 Mass. 555 (1912). Both challenges failed on the reasoning that the establishment of trusts directed towards charitable purposes were not "gifts" under the applicable statutes. In

[10] This *inter vivos* trust (the "1907 *Inter Vivos* Trust") held the copyrights to Mrs. Eddy's writings and provided that these copyrights (along with other property she retained to her death) pour over into her probate estate and pass with the residue of her estate to the Clause 8 Trustees. The significance of her disposition of the copyrights cannot be understated. The content of Christian Science is so strongly identified with the content of Mrs. Eddy's writings that the writings become an essential medium for spreading the religion of Christian Science. The owner of the copyrights essentially owns and controls those writings. The copyrights, therefore, were worth more to Clause 8 Trust than the income they would produce or the price they would command on the market. They were not some fungible commodity like the stocks and bonds that were also left in Mrs. Eddy's estate the Clause 8 Trust, but unique and specific property of essential value to that object of the Clause 8 Trust "to promote and extend the religion of Christian Science as taught by [Mary Baker Eddy]." (Will, Clause 8) That Mrs. Eddy never gave these copyrights outright to The Mother Church or its Directors, but instead retained them in her 1907 *Inter Vivos* Trust to pass upon her death to the Clause 8 Trustees, evidences an intention on her part to separate the ownership and control these copyrights from the Directors for specific use in that mission of the Clause 8 Trust. As discussed below, among the acts of self-dealing that marked the history of the Directors' control of the Trust, and accomplished by them under the watch of DCT, was the sale of the copyrights, in 1972, by the Clause 8 Trust to the Directors, thus gutting the Clause 8 Trust of this essential property.

addition, in response to an action brought by the independent Trustee, Fernald, the New Hampshire Supreme Court held that the Clause 8 Trust is a testamentary trust and could not be turned over to The Mother Church or the directors, noting that Mrs. Eddy did not intend to give this property to the church to administer as a part of its corporate assets but to create a public trust to be administered by the church under the direct supervision of the Court. *See Fernald v. First Church of Christ, Scientist*, 77 N.H. 108, 109 (1913).

The promotion and extension of Christian Science as taught by Mrs. Eddy was the express primary purpose of the Clause 8 Trust. For the majority of its existence, the Trustees directed the large majority of distributions to promoting and extending Christian Science as taught by Mrs. Eddy. Indeed, at one point the Board of Directors assured the Massachusetts Supreme Judicial Court that *no* Clause 8 Trust assets or distributions were needed for repair and upkeep of The Mother Church edifice and the Clause 8 Trust would be used solely for promoting and extending Christian Science as taught by Mrs. Eddy. *See Chase*, 212 Mass. at 522.

As a result, branch churches, reading rooms, and other organizations have historically been the primary beneficiaries of the Clause 8 Trust. Branch churches, almost by definition, extend and promote Christian Science as taught by Mrs. Eddy. The Manual of the Mother Church specifies such a role for branch churches. *See, e.g.*, Church By-Laws Art. XXIII §§ 6, 8. Historical church documents support this claim – in July 1924 (a mere fourteen years after Mrs. Eddy's death) *The Christian Science Journal* reported that in the preceding ten year period $2,775,000 in Trust distributions had been made. Of that sum, $1,775,000 had been distributed to branch organizations and churches to assist in promoting the religion as well as branch church building. In the last issue before the death of Fernald, *The Christian Science Journal* reported:

> The Trustees under the Will of Mary Baker Eddy were appointed by the New Hampshire Court to carry out **Mrs. Eddy's intention**

> **that the major portion of her estate be devoted to the purpose of more effectually promoting and extending the religion of Christian Science as taught by her.** One of the means by which the Trustees endeavor to accomplish this mission is by way of their offer to assist in paying for church buildings. **They welcome the opportunity to award grants to branches** of The Mother Church, with a view to aiding in the cancellation of the last remaining indebtedness on church property.

The Christian Science Journal, July 1948 (emphasis added).

It is, therefore, quite clear from the Directors' own materials that the Clause 8 Trust's assets were intended to be used, and in fact for the majority of the Trust's history *were* used, primarily for extending and promoting Christian Science as taught by Mrs. Eddy through distributions to branch churches and other similar organizations. The Directors were infrequent recipients, if at all.

D. Modern Mismanagement Of Trust Assets By The Director-Trustees And Intervention By The Director Of Charitable Trusts

New Hampshire established its Charitable Trusts Unit, part of the Office of the Attorney General, in 1943. *See* RSA 7:19. The DCT is responsible for the supervision and enforcement of charitable trusts.[11] Being a necessary party to all judicial proceedings that affect the purposes of a charitable trust, the DCT has been involved with the proceedings around Mrs. Eddy's will for some time. The list of actions undertaken during the DCT's watch is a long one, discussed in more detail below, and includes what Second Church believes to be more than $26,000,000 in improper distributions, the lapsing of certain bonds and failure to report to this Court the status of the trustees' maintenance of certain bonds required by Mrs. Eddy and this Court and attempts to conceal the nature of financial statements. Given the repeated and brazen actions taken by the Director-Trustees both before and after the active involvement of the DCT, and the DCT's

[11] Charitable Trusts Unit, https://www.doj.nh.gov/charitable-trusts/index.htm (last accessed Oct. 10, 2017).

apparent ignorance of the consequences (or at best an inability to detect these bad acts) it is clear that the current enforcement scheme is ineffective. Second Church has demonstrated its interest, free from conflicts, in restoring the integrity of the Trusts by seeking no reward or distribution of funds from the Trusts and is ready, willing and uniquely capable of ensuring that Mrs. Eddy's wishes are followed and the Trusts are used for their designated purposes.

III. The Relief Sought By The Director-Trustees In Their Assented-To Motion Respecting the 1993 Order Constitutes Impermissible Changes To The Trusts

The Director-Trustees request, and the DCT assents to, the following actions:

> (1) the conversion of the Clause 6 and Clause 8 Trusts under the will of Mary Baker Eddy to unitrusts, pursuant to RSA 564-C:1-106(b). This provision of the New Hampshire statutes authorizes a trust, instead of distributing trust income as traditionally defined, to distribute between 3% and 5% of the value of the trust assets, whether from income or principal. RSA 564-C:1-106(e)(3);
>
> (2) adoption of the provisions of RSA 292-B, the Uniform Prudent Management of Institutional Funds Act ("UPMIFA") for the Clause 8 Trust;
>
> (3) elimination of The Mother Church, the congregation, as a permissible distribute even if to extend and promote the religion of Christian Science as taught by Mrs. Eddy; and
>
> (4) the Trustees' retention of the ability to make distributions from principal with respect to the Clause 6 Trust, but not with respect to the Clause 8 Trust.

Second Church regards the conversion of the Clause 8 Trust to a unitrust as offensive to Mrs. Eddy's intent, unnecessary and, with respect to the Clause 8 Trust, potentially deleterious to the welfare of the Trust and its beneficiaries. Clause 8 directs that the "income, and such portion of the principal as may be deemed wise, shall be devoted and used by said residuary legatee for the purpose of more effectually promoting and extending the religion of Christian Science as taught by [Mrs. Eddy]."

It is not clear what the status of the Trustees' discretion to make principal distributions from the Clause 8 Trust would be if the requested unitrust conversion were permitted. The Director-Trustees, as noted above, seek to reserve the right to make principal distributions from the Clause 6 Trust, but are silent with respect to the Clause 8 Trust, despite both Trusts in their granting clauses using similar language respecting distribution of principal. Second Church notes that RSA 564-C:1-106(h) provides that "a conversion to a unitrust does not affect a term of the trust directing or authorizing the trustee to distribute principal . . . ." If despite this the Director-Trustees are proposing to abandon the right to make principal distributions from the Clause 8 Trust, doing so would constitute an inexplicable and unwarranted diminishment of the direction to promote and extend Christian Science as taught by Mrs. Eddy through distributions from principal in excess of the applicable unitrust amount in furtherance of the purposes of the trust should circumstances arise that warrant it. Despite Second Church bringing forth this issue in its proposed Amicus Brief, neither the Director-Trustees nor DCT saw fit to respond for the benefit of the Court at the hearing. There is no basis in the Will or in the purpose of the Clause 8 Trust to warrant such a restriction.[12]

It also is not clear what purpose would be served by subjecting the Clause 8 trust to New Hampshire UPMIFA when in actuality the Clause 8 Trust investments are pooled in investment accounts with Director-related or The Mother Church-related investments in Massachusetts. Again, the DCT appears to ignore the consequences of the pooled assets and the impact on the relief requested in the Assented to Motion. Reference is made in the DCT August 2017 Memo to the fact that "modern portfolio theory recognizes that investing for total return between capital

[12] If permitted to introduce evidence, Second Church would show that since the trust eliminated branch churches, reading rooms and others from receipt of distributions and shifted all disbursements to the Directors the scope and breadth of Christian Science globally has retreated as a marked example of the failure to promote and extend the religion as taught by Mrs. Eddy.

appreciation and income will in the long run produce better results than a focus on investments that produce adequate current income, perhaps at the expense of long-term growth." DCT August 2017 Memo at 10. The UPMIFA certainly does require the expected total return from income and the appreciation of investments to be taken into account as a factor in investing funds subject to the Act, but the same is so for a trust converted to a unitrust. *See* RSA 564-C:1-106(d). Also, the New Hampshire Uniform Trust Code, already applicable to the Trusts, includes investment standards substantially identical to those of UPMIFA. *See* RSA 564-B:9-902.[13]

In the DCT August 2017 Memo, the DCT acknowledges that "since the trustees of the Clause 6 and 8 trusts are individuals, UPMIFA cannot apply to them." *Id.* at 10. The DCT states that by converting the trust to a unitrust, instead of applying the total return and distribution requirements of RSA 564-C:1-106(d), the trust may apply to the court for permission to use different distribution requirements pursuant to RSA 564-C:1-106(g), "such as the requirements of UPMIFA, and specifically RSA 292-B:3-7." The DCT's logic and reasoning is circular and faulty. There is no reason why the Clause 8 trust needs to comply with the requirements of UPMIFA. The Court got it right when it characterized the request as "shoehorning" these Trusts into New Hampshire UPMIFA. *See* Nov. 3, 2017 Hearing Tr. at 21:23. The request is worse than "shoehorning" – it is asking the Court to do something that is clearly beyond its power – it is plainly evident that UPMIFA *cannot* be applied to the trusts. The only provision of the cited

[13] Of interest to the Court, however, should be the extent to which New Hampshire UPMIFA, if adopted would be applicable to the Clause 8 Trust investments in any event in light of the fact that the assets of the trust are pooled with investments benefitting The Mother Church and managed in Massachusetts, and to what extent the DCT intends to exercise supervisory jurisdiction over the pooled investments in the future, or abandon the post altogether. The DCT sheds no light on this very complicated issue and should before the Court rules on the Assented to Motion. But again, only Second Church is raising these issues before the Court.

sections of UPMIFA that has anything to do specifically with the amount of distributions is RSA 292-B:4 VI,[14] providing as follows:

> The appropriation for expenditure in any year of any amount greater than 7 percent of the fair market value of an endowment fund, calculated on the basis of fair market value determined at least quarterly and averaged over a period of not less than 3 years immediately preceding the year in which the appropriation for expenditure was made, creates a rebuttable presumption of imprudence. For an endowment fund in existence for fewer than 3 years, the fair market value of the endowment fund shall be calculated for the period of time the endowment fund has been in existence.

Perhaps the answer here is that the Director-Trustees are seeking the authority to make annual distributions as little as 0%, but presumably not more than 7% of the value of the trust. Again, even with the heightened 7% limit, Second Church sees no justifiable reason why the trust should be restricted in this way, given the explicit provisions of Mrs. Eddy's will to the contrary. This request appears to be nothing more than a thinly veiled attempt to cloud the issues respecting the Director-Trustees' embedded conflict. The Director-Trustees admitted this directly on the record at the hearing on November 3, 2017. *See* Nov. 3, 2017 Hearing Tr. at 13:17-15:6.

In addition, the elimination of the Directors, and any programs administered by them under the guise of The Mother Church, as a potential beneficiary — potentially the most deleterious aspect of the Assented-To Motion — is a departure from the express wishes of Mrs. Eddy and a restriction not imposed by Clause 8. Funding directed to The Mother Church,

[14] The remaining provisions of RSA 292-B:3 through 7 cited by the DCT address administrative matters, rules of construction, the release of restrictions and the like. Surely the DCT and the Director-Trustees cannot be claiming that all of these UPMIFA provisions can be made applicable to the administration of the Trusts by virtue of the language of RSA 564-C:1-106(g) authorizing the trustees of a trust converted to a unitrust to apply to the court for permission to use different distribution requirements than the 3% to 5% payout mandated by the RSA 564-C:1-106(b). Note that RSA 292-B:2, V precludes the application of UPMIFA to the Trusts. But with the questions raised, it should not be for the Court or Second Church to guess about their intent; they should be forthcoming with candor to the tribunal.

including directly to any of its programs, especially in light of the fact that The Mother Church owns the copyrights, and the copyrights and Christian Science Publishing Society are the primary means to extend and promote the religion, may very well be necessary to extend and promote Christian Science as taught by Mrs. Eddy. Moreover, this "restriction" is again more self-dealing under the guise of benevolence. First, such a restriction is essentially unenforceable. "Administered" by The Mother Church is a vague standard that will be near impossible to enforce especially in light of the copyrights having been stripped away from the Clause 8 Trust. Second, this appears to be an act by the Directors to draw attention away from the millions of dollars in improper distributions which they have received from the Trust assets over the years and make no attempt to repay. Accordingly, the requested approval of conversion serves no justifiable purpose and is offensive to the express intentions of Mrs. Eddy.

IV. Second Church Has Special Interest Standing Under Each Of The *Blasko* Factors Cited By The DCT

As this Court has noted, there is little, if any, precedent in New Hampshire regarding the doctrine of special interest standing. *See* April 12, 2016 Hearing Tr. 16:8-16. However, special interest standing is widely granted by courts across the country and has support in numerous treatises. *See, e.g., Seal Cove Auto Museum v. Spinnaker Trust*, No. CV-2016-333, 2017 Me. Super. LEXIS 105 at *9-11 (May 3, 2017) (noting persons with a special interest may have standing to enforce a charitable trust); *Marks v. Southcoast Hosps. Group, Inc.*, Dkt. No. PLCV02-01284, 2011 Mass. Super LEXIS 325 at 39 (Dec. 30, 2011) (citing *Trustees of Dartmouth College v. Quincy*, 331 Mass. 219 (1954)); *Robert Schalkenbach Found. v. Lincoln Found., Inc.*, 208 Ariz. 176, 182 (2004) ("The 'special interest test' is the current, common-law view of standing to enforce charitable trusts....") (citation and quotation omitted); *Trustees of Dartmouth College v. Quincy*, 331 Mass. 219, 225 (1954); RESTATEMENT (SECOND) OF TRUSTS §

391 ("A suit can be maintained for the enforcement of a charitable trust by ... a person who has a special interest in the enforcement of the charitable trust..."); REST. (THIRD) OF TRUSTS § 94(2) (same); 5 A.W. SCOTT & W.F. FRATCHER, SCOTT & ASCHER ON TRUSTS § 37.3.10 (5th ed. 2006) (same); R. CHESTER ET AL., THE LAW OF TRUSTS AND TRUSTEES § 414 [Standing Granted to Specially Interested Beneficiaries] (3d ed. & Supp. June 2017) (same).

Mary Grace Blasko, in her leading article on standing to enforce charitable trusts, identified the following five factors typically relied on by courts in determining whether a party has standing to enforce a charitable trust (the "*Blasko* factors")[15]: (1) the extraordinary nature of the acts complained of and the remedies sought; (2) the presence of bad faith; (3) the attorney general's availability and effectiveness; (4) the nature of the benefitted class and its relationship to the charity; and (5) certain subjective factors and social desirability. The DCT relied on these same factors in his April 11, 2016 Memorandum Concerning Standing of Second Church of Christ, Scientist (the "DCT April 2016 Memo").

Notwithstanding the DCT's prior arguments to the contrary, the factual record and existing case law provide a clear basis for this Court to find that Second Church has special interest standing to enforce the trusts under all five of the *Blasko* factors. Though Second Church satisfies each of the five *Blasko* factors, the presence of any single factor can and should serve as an adequate basis for a finding of standing. *See Blasko*, *supra* n.15, at 47.

A. The Bad Acts Committed By The Director-Trustees Are Extraordinary And The Remedies Sought Support A Finding Of Standing

Where the acts complained of are extraordinary and the remedies sought are directed towards remedying these bad acts, courts have granted standing. *See, e.g., Stern v. Lucy Webb Hayes National Training School for Deaconesses and Missionaries*, 367 F. Supp. 536, 537

[15] Mary Grace Blasko, *et al.*, *Standing to Sue in the Charitable Sector*, 28 U.S.F. L. REV. 37 (1993).

(D.D.C. 1973) (holding plaintiffs had standing to maintain an action to enjoin trustees' self-dealing and organizational mismanagement). In addition, courts grant standing to parties wishing to challenge trustee action that would materially change the nature of the trust. *See, e.g., Alco Gravure v. Knapp Foundation*, 479 N.E.2d 752 (N.Y. 1985) (allowing challenge to amendment which enabled trustees to direct funds to other charitable organizations instead of the designated beneficiaries). Similarly, where a party has a "special interest" in and relationship to the trust and trustees have taken action that jeopardizes the existence and express charitable purpose of the trust, standing has been found. *See, e.g., Valley Forge Historical Society v. Washington Memorial Chapel*, 426 A.2d 1123 (Pa. 1981). Moreover, when a party seeks to address major issues concerning the charitable trust and not merely day-to-day issues, standing will be more readily granted. *See Hooker v. Edes Homes*, 579 A.2d 608, 614-16 (D.C. 1990).

Here, the historical facts and current allegations made against the Director-Trustees are exactly of the sort that supports a finding of standing. Second Church is not quibbling about day-to-day, small scale mismanagement of the trusts or minor differences in opinion of how trust assets should be distributed. Rather, the Director-Trustees quite obviously have taken actions that constitute flagrant self-dealing and threaten to pervert the very purposes for which the Trusts were established.[16]

The history of bad acts committed by the Director-Trustees, including acts taken which resulted in a material change in the purpose or nature of the trusts as set out by Mrs. Eddy, has been detailed at length before this Court in numerous other filings,[17] and include:

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16 "Extraordinary acts," as that term is used by *Blasko*, includes acts which pervert the express nature of the charitable trust. Blasko, *supra* n.15, at 48.

[17] *See generally* Brief *Amicus Curiae* of The Second Church of Christ, Scientist, Melbourne (Australia), Ex. A to Motion for Leave to File Brief *Amicus Curiae*, dated Feb. 15, 2017; Reply in Support of Motion to Vacate, or in the Alternative to Reconsider, Orders of November 2, 2015, dated Dec. 14, 2015.

- The Directors' attempt to have the assets of the Clause 8 Trust distributed to The Mother Church in *Chase v. Dickey*;

- The stark change in beneficiaries of Trust distributions after the death of Josiah Fernald, the last independent trustee – where the early years of the trust saw distributions to branch churches and other entities in furtherance of Mrs. Eddy's wishes with no distributions to The Mother Church, the last thirty years has seen The Mother Church become nearly the sole beneficiary of Trust distributions (for example the 2016 accounts show that all distributions that year went to The Mother Church);

- An improper loan of $5,000,000 of principal from the Clause 8 Trust to The Mother Church in 1992 (a loan which, at the time, represented 63% of Trust assets), that was only discovered through an independent audit. The 1993 Order that required The Mother Church to repay the loan is the same order that "switched" the priority of distributions of the Clause 8 Trust to favor The Mother Church. The loan, in other words, was essentially repaid using trust distributions, at least in part;

- The continued distribution of income to the Director-Trustees under the 1993 Order, and failure to restore the restrictions for and principal purposes of distributions under the Will;

- The Director-Trustees' 2001 motion to pool Clause 8 Trust assets with those of The Mother Church and allow joint administration without adequate accounting or auditing of those assets. The funds were pooled in 2002. There has never been an audited accounting of the Trust's initial allocable share of the investment vehicle, and there has never been an audit of any changes from year to year based on expenditures and gifts out and into the pooled fund vehicles. Accordingly, no auditor could audit the 2017 report without knowledge of the starting point and the changes along the way;

- A reprioritization of Clause 8 Trust objectives, which the DCT now asserts was improper and which, through the Assented-to Motion, the Directors-Trustees now admit;

- A breach by the Director-Trustees of their obligation under the Court's August 23, 2001 order to "continue to have independent audits of each trust performed" and file those audits. Rather, the Director-Trustees filed accounts "audited" by their in-house, and therefore not independent, accounting manager. For example, the March 31, 2015 statements contain the disclaimer by the preparer: "I am *not independent* with respect to The Mother Church or the Trusts, and I am precluded from expressing an opinion or giving any assurance as to the fairness of the financial statements' presentation of the Trusts' financial position as of March 31,

2015, or the results of its activities or their cash flows for the fiscal year then ended." (emphasis added);

- The Director-Trustees' attempt, assented-to by the DCT, to eliminate the obligation to audit the accounts for the Trusts, which this Court refused to approve;

- The sale, by the Directors, of the copyrights of many of Mrs. Eddy's works — central and vitally important to the promotion of her religion — to The Mother Church. This was in direct perversion of Mrs. Eddy's wishes and the purposes of the Trusts established by her will. The act not only harmed the ability of the trusts to further Christian Science, but also robbed the Trusts of the proceeds generated by the copyrights (estimated by Second Church to be at least $10,000,000; and

- The Director-Trustees' attempt to be excused from curing their failure to provide historical forensic audits for the last approximately 15 years and to permit The Mother Church investment committee to remain in place over the Trusts' assets and investments, despite that The Mother Church and the Trusts should not necessarily have the same investment objectives.

The above are just a selection of the numerous and extraordinary actions the Director-Trustees have taken or attempted to take, each of which has been characterized by self-dealing, gross mismanagement of Trust assets or both. The Director-Trustees have repeatedly taken actions to distort, if not destroy, the achievement by the Trusts of the aims set out by Mrs. Eddy. As discussed by the courts in *Stern* and *Alco Gravure*, these are exactly the sorts of harms and misbehaviors that merit a finding of standing where a party is seeking to enforce a charitable trust.[18]

For example, Second Church is aware of various financial difficulties experienced by the Directors and, not surprisingly, during each period of illiquidity of The Mother Church, the Directors turned to the Trust for relief. The Director-Trustees unabashedly admitted as much on the record at the November 3rd hearing, specifically that the Directors raided the Trust to assist

[18] Second Church recognizes that some acts have been taken with Court approval. Second Church respectfully submits that, had the Court been apprised of all information relevant to its decision, it would have reached a different conclusion. The 1993 Order is one example.

The Mother Church with its finances following the failed cable television experiment. *See* Nov. 3, 2017 Hearing Tr. at 10:7-11. But more to the point, neither the DCT nor this Court was made aware, by the Director-Trustees, of the circumstances of the so-called loan by the Trust to the Mother Church, or The Mother Church's financial situation at the time when asked to approve a stipulation that perverted the purposes of the Trust.

While the DCT may again try to minimize these actions as merely "divided loyalty" (*see* DCT April 2016 Memo at 8), they are not – indeed, the record of misconduct by the Director-Trustees shows acts that are more egregious than the bad acts numerous courts have found sufficient to confer standing. *See, e.g., Jones v. Grant*, 344 So.2d 1210, 1211-12 (Ala. 1977) (finding members of a charitable institution had standing to challenge misuse of funds) (superseded by state statute); *Family Fed'n for World Peace & Unification Int'l v. Hyun Jin Moon*, 129 A.3d 234, 244-45 (D.C. Ct. App. 2015) (finding plaintiffs had standing to challenge misuse of trust funds, noting "[t]he exponential expansion of charitable institutions justifies a reasonable relaxation of any rule limiting enforcement to a busy Attorney General.").[19]

Now, the Director-Trustees are before the court, along with the DCT, with an assented-to motion which purports to seek three principal forms of relief: (1) to restore the primary purpose of the Clause 8 trust – the promotion and extension of Christian Science as taught by Mrs. Eddy – and add a condition to the trust that funds may not be directly distributed to The Mother Church, (2) the conversion of the Clause 6 and Clause 8 trusts to unitrusts under RSA 564-C:1-106(b), and (3) adoption of RSA 292-B, the UPMIFA for the Clause 8 trust. Second Church does

[19] Indeed, and contrary to the DCT's characterization of the problem as one of mere "divided loyalty," one has to look very hard for any action taken by these Director-Trustees that shows anything but undivided loyalty to themselves and The Mother Church and corresponding adversity and disloyalty to the interests of any other beneficiaries, like branch churches, which in the beginning and for some 70 years were understood to be the primary, if not sole, beneficiaries of the purpose to "promote and extend the religion of Christian Science as taught by [Mary Baker Eddy]." Will, Clause 8.

not object to the first objective – the primary aim of the Clause 8 trust is, and always has been, the promotion of Christian Science as taught by Mrs. Eddy. However, Second Church does object to the elimination of The Mother Church as a potential beneficiary if such a distribution in the trustees' discretion is prudent to fulfill the direction to extend and promote Christian Science as taught by Mrs. Eddy. As detailed above, the conversion to unitrusts and application of UPMIFA are unnecessary changes to the administration of the trusts that threaten to unduly restrict the trustees against the wishes of Mrs. Eddy. At best they are an unnecessary complication.

The remedies sought by Second Church are carefully tailored to remedy these types of injustices and ensure the trusts are managed properly and in line with Mrs. Eddy's clear intent. As discussed, Second Church seeks principally to have the Court (1) appoint an independent trustee, [20] (2) require independently audited financial statements and accounts of the trusts, (3) prevent conversion of the Clause 6 and Clause 8 Trusts to unitrusts, (4) and prevent the application of UPMIFA.[21] Each of these remedies is for the benefit and protection of the Trusts.

B. The Director-Trustees Have Acted In Bad Faith

Blasko explains that while fraud or bad faith is not an explicit factor discussed by courts when analyzing special interest standing, its presence is nevertheless strongly positively associated with conferral of standing. That is, while courts may not expressly reference the presence of fraud or bad faith as a justification for finding standing, courts are much more likely to find standing where fraud or bad faith acts are present. *See Blasko*, *supra* n.15, at 50-51.

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[20] *See* Motion for Appointment of Independent Trustee, dated Nov. 17, 2017.

[21] Notably, the Second Church is not seeking any monetary recovery. *See, e.g., Stern*, 367 F.Supp. at 537 (denying standing to sue for treble damages but *granting* standing to enjoin self-dealing and mismanagement). While Second Church is not seeking a monetary recovery, that does not mean there cannot be a monetary recovery or claim against the trustees' bonds on behalf of the Trusts if the Court finds certain distributions were improper as a result of reopening the trust accounts.

The DCT cites *Weaver v. Wood*, 425 Mass. 270 (1997), in arguing that Second Church does not have standing. *Weaver* concerned claims by members of The Mother Church congregation that the Directors had breached their fiduciary duties as Directors of The Mother Church and Trustees of The Christian Science Publishing Society by making imprudent investments in television ventures in the late 1980's and early 1990's. *Id.* at 271. The plaintiffs asserted that their membership in The Mother Church was sufficient to make them beneficiaries of the 1892 Church Deed Trust and 1898 Publishing Society Trust. *See id.* The *Weaver* Court concluded that their membership in The Mother Church did not make them beneficiaries of the public charitable trusts at issue or constitute a sufficient private interest to give them standing to bring claims "that a charitable organization has been mismanaged or that its officials have acted ultra vires...." *Id.* at 276-77.

Weaver, in addition to being a Massachusetts opinion not binding on this Court, is distinguishable from this case on numerous levels. The plaintiffs in *Weaver* sought standing as *actual beneficiaries* of the public charitable trusts at issue there, *based on their membership in The Mother Church.* Second Church does not assert standing as a member of a public charity or as an actual beneficiary of the Clause 8 Trust, but seeks special interest standing based on the "*Blasko* factors" and other special circumstances cited by courts applying the special interest doctrine. These special circumstances include Second Church's special interest as a member of a class — branch churches — that were both intended and historical recipients of the benefits of the Clause 8 Trust. This factor, alone, is dramatically distinct from the interest of the church members in *Weaver,* who were found to have no basis to claim to be beneficiaries of either

Trusts at issue there.[22] As discussed throughout this memorandum, the special interest doctrine looks to other special factors not alleged at all in the *Weaver* case, such as the nature and gravity of the claims and issues which special interest standing sought and the effectiveness of the public official — in *Weaver* the Massachusetts Attorney General and here the DCT — in addressing such issues. None of these sorts of circumstances — none of the *Blasko* factors — are discussed in *Weaver*, because *Weaver* did not address a claim of special interest standing. The case is inapposite.

Related to this distinction between the standing principles addressed in *Weaver* and those to be addressed under the special interest doctrine, the claims in *Weaver* essentially alleged that the Directors had mismanaged the assets of The Mother Church and The Publishing Society. There was no claim, as there is here, of an organic flaw in the composition of the fiduciaries overseeing those assets — that is, no embedded conflict of interest — nor was there any assertion of a pattern of self-dealing and perversion of the core purposes of the trust under their charge resulting from such an organic defect and administration. Part of what is special about the circumstances that support special interest standing here is that the composition of the Trustees of the Clause 8 Trust suffers from an organic defect — lacking any independence and being wholly conflicted. That is an extraordinary problem that impugns everything these Director-Trustees do, and it has resulted in repeated and persistent violations of the purposes of

[22] It appears, however, that the *Weaver* court looked only at the first, 1892 Church Trust Deed and the separate 1898 Publishing Society Deed -- finding no evidence in either of these that supported a claim by members of The Mother Church to any legal or beneficial interest in those trusts. No reference is made to the later, 1903 and 1904 Church Trust Deeds. As discussed in the Second Church's Memorandum on church autonomy, filed herewith, these later Church Trust Deeds incorporated the permanent bylaws of the *Church Manual* of The Mother Church as additional terms of trust; and that among other provisions suggesting beneficial rights of members, Article XXIV § 2 of the *Church Manual* expresses the intention that the property conveyed to the Trust was considered owned "legally" by the Christian Science Board of Directors, but owned "beneficially" by the members of The Mother Church.

the Trust and the intentions of its settlor, Mary Baker Eddy. None of this was presented in *Weaver*.

Here, the evidence[23] that the Director-Trustees have acted in bad faith is substantial. For example, and without limitation, the Director-Trustees' taking of a loan representing 63% of the corpus of the Trust assets. Following the improper $5,000,000 loan, the stipulated agreement to repay the improper loan was accompanied by a reversal of the priorities of the Clause 8 Trust, which the Director-Trustees and DCT *both only now*, and only through Second Church's efforts, agree was against the express purpose of the Clause 8 Trust. These acts and omissions are compounded by the failure to call on the Trustees' bond to restore the Clause 8 Trust, because, as it must, such an action would have resulted in the bonding company requiring the removal of the defaulting Trustees. Additionally, it is undisputed that though the stated purpose of the Clause 8 Trust was to promote and *extend* Christian Science as taught by Mrs. Eddy, the Director-Trustees distributed Clause 8 Trust funds solely to The Mother Church.[24] A branch church or similar organization, largely the sole beneficiaries of the Trust initially, did not receive a single distribution for nearly thirty years.

Moreover, though the Director-Trustees represented that they would, and this Court ordered the Director-Trustees to, continue to have independent audits performed on the accounts, the Director-Trustees instead submitted non-independently prepared unaudited financial statements. Such actions would represent mismanagement and misadministration of Trust assets

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[23] Limited to what has been disclosed, but without independent proper audits and without discovery, who knows what additional evidence may be discovered and brought to the Court's attention? The limited documents obtained by Second Church from DCT through its requests under RSA 91-A reveal that much, if not all, that Second Church has been arguing and bringing to DCT's and this Court's attention is admitted to by the Director-Trustees.

[24] While the Directors, in such capacity, have pronounced that they alone may interpret the Manual, the governance document controlling the congregation and management of The Mother Church, the same is not and cannot be true of Mrs. Eddy's Will, including Clause 8 of the Will; only this Court has the power to interpret the Will.[25] Here, the Upton firm is counsel for the directors, counsel for the trustees, counsel for the trusts, and the New Hampshire agent for the trusts, as all trustees are non-New Hampshire residents.

if they had been taken by a disinterested trustee. When, as here, such actions were taken by Director-Trustees with "embedded conflicting fiduciary obligations," they represent clear examples of bad faith conduct. Each action was made to the detriment of both the Clause 8 Trust and the wishes of Mrs. Eddy and for the benefit of The Mother Church.

It also bears repeating that since 1949, when Josiah Fernald died, there has not been an independent trustee. Instead, for nearly 70 years, each Trustee has been a Director of The Mother Church with corresponding conflicting duties. The DCT has correctly recognized the conflicting duties of the Director-Trustees as "embedded conflicting fiduciary obligations." DCT April 2016 Memo at 11.

In re Green Charitable Trust, 431 N.W.2d 492 (Mich. Ct. App. 1988), is instructive. In *In re Green*, the court noted the "case concern[ed] the objections by the charitable trust beneficiaries" to an attorney's role as trustee, legal representative of the trust and legal representative of the trust property. *Id.* at 495. The court allowed the beneficiaries to maintain an action to remove the attorney as trustee, and ultimately removed the attorney as trustee. [25] This was despite the general Michigan rule that "the Attorney General has exclusive authority to enforce a charitable trust." *Olesky v. Sisters of Mercy*, 253 N.W.2d 772, 774 (Mich. Ct. App. 1977). Similarly, in *Jones*, beneficiaries including students and staff were found to have standing to bring an action for misuse of funds where that misuse was steeped in the misconduct of the directors of the charitable institution. *See Jones*, 344 So.2d at 1211-12.

Furthermore, the Director-Trustees have a long history of removing questioning voices by removing The Mother Church members for the roles of The Mother Church,

[25] Here, the Upton firm is counsel for the directors, counsel for the trustees, counsel for the trusts, and the New Hampshire agent for the trusts, as all trustees are non-New Hampshire residents.

"excommunicating" members, and shutting down branch churches, including attempts to wipe Second Church off the face of the earth.

Given all of the above circumstances, Second Church certainly has a special interest in the administration of the Clause 8 Trust.

C. The Attorney General, Through The Director Of Charitable Trusts, Has Not Been Effective In Policing The Director-Trustees' Misconduct

As an initial matter, the DCT has expressed hesitation to question decisions made by the Directors. At the most recent (November 3, 2017) hearing concerning these matters, it became apparent that concerns about the application of the First Amendment to the United States Constitution, and the so-called "church autonomy" doctrine, loomed large in the DCT's inclination towards a "hands-off" policy toward the administration of these Trusts. The DCT had hinted at this in his DCT August 2017 Memo at 1-2, but emphasized this at the November 3 hearing as the primary reason for not restoring an independent Trustee for the Clause 8 Trust. *See* Nov. 3, 2017 Hearing Tr. at 20:7-14. The Director-Trustees have been more forceful in asserting the First Amendment as a shield to their accountability to this Court, suggesting in their recent Memorandum of the Trustees Under the Will of Mary Baker Eddy, Clauses 6 and 8, in Support of Assented-to Motion, dated November 2, 2017 ("Trustees' November 2, 2017 Memo") that the First Amendment church autonomy doctrine precluded this Court from appointing an independent Trustee. *See* Trustees November 2, 2017 Memo. at 7-9. Second Church addresses the flaws in the DCT's position more fully in its Memorandum on Church Autonomy, filed simultaneously herewith.

The Office of the Attorney General has played a role in attempting to enforce the trusts for some time. *See, e.g.,* DCT April 2016 Memo at 8, Exs. 1, 2. Second Church's desire to be allowed to move independently to protect and enforce the Clause 6 and Clause 8 Trusts is not

born out of complete inaction by the DCT, but rather by the objective fact that the DCT on many occasions has been spurred into action by Second Church and the DCT has not done enough and has failed to enforce its own agreements. The DCT promised to take certain actions – detailed at the end of DCT April 2016 Memo – that served as the basis for Second Church withdrawing its earlier motions and objections without prejudice. *See* April 12, 2016 Hearing Tr. 19:11-16. To the best of Second Church's knowledge, however, the DCT has not sufficiently pursued its investigation. The DCT has filed no report with this Court explaining his review or the conclusions his office reached as a result of the DCT's review.

By way of example, the DCT planned to review "the trustees' resolution of their conflicting fiduciary obligations" yet there is no evidence that the DCT has done so, and meanwhile the Director-Trustees are still plagued by these conflicting obligations. In fact, the DCT states in his August 11, 2017 Memorandum, that the granting of the pending motion "should address the concerns raised." DCT August 2017 Memo at 11. As explained in herein, granting the Assented-To Motion does not solve any of the current issues relating to the Director-Trustees and in fact would only serve as a new source of harms to the Trusts' purposes. As a second example, the DCT has ignored the failure of the Director-Trustees to have the Trusts independently audited in accordance with a 2001 representation by the Director-Trustees and Court order that allowed the pooling of Trust assets with those of The Mother Church. Indeed, the DCT has assented to the elimination of any audit requirement. Respectfully, that makes little sense, particularly given the history of self-dealing by, and the embedded conflicts of interests on the part of, the Director-Trustees. Moreover, the DCT did not seek to intervene when he learned of the Director-Trustees' desire to strip the assets of the Clause 8 Trust and pool them with investments managed by the Directors, including with the funds of the Clause 6 Trust that are

subject to a different, stricter investment direction than the Clause 8 Trust assets. It is not clear how funds with markedly different investment restrictions could be pooled and managed together. Nevertheless, with the lack of any objection by the DCT, the Court approved the motion to pool investments in 2001.

As noted above, Second Church has been responsible for bringing potential misuse of Trust assets to the attention of DCT. For example, Second Church alerted DCT by letter dated January 5, 2017, of potential mismanagement of trust assets and of the dangers of comingling trust and The Mother Church assets.[26] To the best of Second Church's knowledge, the DCT has not acted on the information contained in this letter. Second Church also provided the DCT with information concerning the marked change in distributions during in the 1980s, after which The Mother Church became the sole beneficiary.[27] The DCT, relying on Second Church's information and noting the "embedded conflicting fiduciary obligations" of the Director-Trustees, opened an investigation.

Given the number of questionable acts taken by the Director-Trustees, it may be that there are simply too many aspects of the administration of the Clause 8 Trust for the DCT to effectively police and that the harms flowing from the Director-Trustees' embedded conflicting fiduciary obligations are too numerous for the DCT to effectively monitor with his own resources. This is precisely the problem with relying solely on attorney general enforcement, as recognized by the court in *Family Fed'n for World Peace & Unification Int'l*, 129 A.3d at 244 (noting "[t]he exponential expansion of charitable institutions justifies a reasonable relaxation of

[26] A true copy of the January 5, 2017 letter is attached to the Motion to Appoint Independent Trustee, filed separately by Second Church on this day, as Exhibit 2.

[27] Second Church engaged a Certified Public Accountant and Certified Fraud Examiner, Steven Witten, to examine the Trusts' Accounts. Results of Mr. Witten's examination, furnished to the DCT, are summarized in charts attached to the Motion to Appoint Independent Trustee, filed on this day, as Exhibit 1.

any rule limiting enforcement to a busy Attorney General") and *Blasko*, *supra* n.15, at 70 ("[i]f a court determines that the attorney general is substantially ineffective, the probability increases that a private party will be allowed to represent, in litigation, the public's beneficial interest in a charity."). Plainly put, viewing DCT's involvement in the greater context of the litany of abuses committed by the Director-Trustees favors a finding of standing, or sufficient support for the appointment of an independent trustee /administrator to review the issues raised and report back to the DCT or this Court as appropriate. The DCT has not, and apparently cannot, effectively police the continuing string of self-dealing and misuse of Trust assets.

Indeed, the very issue of the 1993 Order of this Court, which the DCT now seeks to amend, is illustrative of the problem with sole reliance on the DCT for policing the Trusts. That Order, the current DCT now notes, "approved a change in the priority of distributions from the Clause VIII Trust" and DCT asserts there is nothing in the record to indicate why the parties (*including* the DCT) agreed to the change. The current DCT now asks this Court to modify the 1993 Order to "restore" the original purpose of the Trusts, but only in the context of the impermissible conversion and application of UPMIFA. The DCT notes "[t]he post-1987 distributions, reinforced by the 1993 order, illustrate the conflict in having the same persons serve as Directors of the Mother Church and as Trustees of the Clause VIII Trust." DCT April 2016 Memo at 8. However, this further demonstrates the problem with having the Charitable Trusts Unit be the sole entity capable of objecting to the probate proceedings. The DCT himself recognizes that Charitable Trusts Unit has not consistently appropriately guarded the Trusts. The DCT was as responsible as the Director-Trustees each and every year since 1996 — the last 20 years — after the loan was repaid for not seeking to restore the original purpose of the Trusts following the full repayment of the loan.

The decision in *Holt v. College of Osteopathic Physicians & Surgeons*, 394 P.2d 932 (Cal. 1964), is instructive. In *Holt*, certain plaintiff trustees sued to enjoin actions from being taken with respect to certain funds held in trust for the purpose of furthering the practice of osteopathic medicine. Certain defendant trustees desired to take actions that would, at least in part, move the College of Osteopathic Physicians & Surgeons away from osteopathy and towards allopathy (the type of medicine taught at "typical" medical schools which grant students an M.D.). Defendant trustees moved to dismiss on the grounds that only the attorney general could bring suit to enforce the trust. The court rejected that argument, finding strong public policy reasons to give other parties standing to enforce the terms of the trust. Notably that court specifically rejected the argument that the actions complained of were not significant enough to support standing. *See id.* at 939. The court adopted the "prevailing view [that] the Attorney General does not have exclusive power to enforce a charitable trust and that ... other person[s] having a sufficient special interest may also bring an action for this purpose." *Id.* at 934 (and collecting cases). The court reasoned that statutes authorizing enforcement by the attorney general are an assurance of a minimum level of oversight, typically enacted "in recognition of the problem of providing adequate supervision and enforcement of charitable trusts." *Id.* at 935. The court recognized, however, the limitations of supervision solely by the attorney general: "[t]he Attorney General may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact, and the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions except in situations of serious public detriment." *Id.*

There are strong legal and policy reasons to allow Second Church standing to intervene in this proceeding to enforce the terms of the Clause 6 and Clause 8 Trusts. Second Church is

extensively familiar with the Trusts (and related deeds and other) instruments, and the (largely clandestine) workings of The Mother Church and relationships between and among The Mother Church, the Christian Science Publishing Society and the Clause 8 Trust, and is better able to evaluate the impact of actions taken by the Director-Trustees. By way of example, in or about 1971 the Director-Trustees filed a motion with the Court seeking to sell the copyrights over Mrs. Eddy's works owned by the Clause 8 Trust to The Mother Church. They supported the motion with an appraisal. The Court required that the Director-Trustees provide notice of the motion to beneficiaries and the only parties on whom notice was served were the Director-Trustees — they served themselves — and the DCT and no one else. Of course, there was no objection and the Court approved the sale. The point here is not whether the sale was for fair value, but that the DCT did not then and does not now appreciate that the materials subject to the copyrights are central to the religion of Christian Science as taught by Mary Baker Eddy, not to mention the financial damage the trust suffered from the divestiture. It was not Mrs. Eddy's intent to convey the copyrights to the Director-Trustees or to The Mother Church. Rather, reserving for the Clause 8 residual Trust the copyrights and the rights reserved by the Pastor Emeritus under the Manual created a check and balance over the directors and permits the Trust the use of the copyrights in furtherance of the primary purpose of the Trust — to promote and extend the religion of Christian Science as taught by Mrs. Eddy. By selling the copyrights, arguably, the Trust lost the ability effectively to promote and extend the religion as taught by Mrs. Eddy and The Mother Church then arguably became the exclusive entity through which the religion may be promoted and extended. In the context of the current assented-to motion and the proposal to eliminate The Mother Church as a distributee, the Director-Trustees may be intending to transmogrify the religion into a creature of their own making instead of maintaining its teachings

as those of Ms. Eddy. This is further evidence of the Directors' prior governance constitutional pronouncements that they interpret the Manual as they see fit from time to time, whether or not consistent with the directions intended by Mrs. Eddy and prior interpretations. It is clear that the DCT does not have the resources to oversee and appreciate the consequences of the actions taken by the Director-Trustees.

As the *Holt* court reasoned, "[t]he administration of charitable trusts stands only to benefit if in addition to the Attorney General other suitable means of enforcement are available." Allowing Second Church to intervene in this proceeding is the best, and perhaps only, way to protect the trust assets, but more importantly, ensure the wishes of Mrs. Eddy are protected.

D. Second Church Is Part Of A Defined Class Of Entities That Bears A Special Relationship With The Trusts

Courts are more likely to find special interest standing where the class of entities is "sharply defined and its members are limited in number." *Hooker*, 579 A.2d at 614. "Sharply defined" and "limited in number" are not restrictive tests. Similarly, the special interest in the charitable trust cannot be one shared by the public at large. *Y.M.C.A. of the City of Washington v. Covington*, 484 A.2d 589, 592 (D.C. 1984). Courts have found that the following groups satisfy those requirements:

- Members of a particular YMCA branch. *Y.M.C.A. of the City of Washington*, 484 A.2d at 592;
- "Elderly indigent [Georgetown] widows." *Hooker*, 579 A.2d at 614;
- The employees of corporations in which defendant was involved and the employees of successors to such corporations. *Alco Gravure*, 479 N.E.2d at 755;
- In a suit regarding a church's "series of coordinated and calculated illegal actions to usurp [a nonprofit corporation church] and its corporate assets and wrest control of [the church]" from another entity, the court found the following plaintiffs had standing: the entity that directed the church's activities worldwide, the church's primary donor, a "long-time major

> recipient of funding" from the church, and two ousted directors. *Family Fed'n*, 129 A.3d at 240.

Second Church fits a definition of "special interest" at least as constrained as in the above four cases. Second Church is a branch church, of which there are approximately 1,400 worldwide and the number is shrinking. That is a defined, set number of organizations that can only change with the blessing of The Mother Church. Any "parade of horribles" to which the Director-Trustees or DCT may allude (which appears to be limited to an unfounded fear that a multitude of parties would seek to intervene in the proceeding) is diminished significantly (if not outweighed) where, as here, the proceeding has been ongoing for over two years and Second Church is the only entity seeking to intervene, and, by virtue of its extensive knowledge of the Trusts and its consistent efforts to protect both the Trusts and Mary Baker Eddy's intentions when she established them, Second Church is well-suited to and has demonstrated the resources to do so.

In addition, Second Church receives a benefit that the general public does not — seeing its religion flourish and the church's beliefs expand according to the wishes of Mrs. Eddy. There are no general public benefits readily identifiable from the Trust, and as such Second Church, and other branch churches, is unique from the general public.

The Director-Trustees argue that Second Church's status as a potential beneficiary does not confer standing. *See* Memorandum of the Trustees of the Trusts Under the Will of Mary Baker Eddy, Clauses 6 and 8 Concerning the Issue of Standing of the Second Church of Christ, Scientists, Melbourne (Australia), dated Nov. 1, 2017, at 11-15 (citing, *inter alia*, *St. John's-St. Luke Evangelical Church v. Nat'l Bank of Detroit*, 283 N.W.2d 852 (1979); *In re Jewish Secondary School Movement*, 174 N.Y.S.2d 560 (1958)). But Second Church is not relying on its mere status as a potential beneficiary. Many of the cases cited rely on exactly this proposition

to deny special interest standing. But Second Church has a very different relationship to Christian Science, and the Trusts set up by Mrs. Eddy to further her teachings than, for example, a church that could potentially benefit from a charitable trust bearing no direct relation to that church. *Rhone v. Adams*, 986 So. 2d 374 (Ala. 2007). Similarly, *Kania v. Chatham* involved an unsuccessful applicant for a Morehead Scholarship suing the trust supporting that scholarship. 297 N.C. 290 (1979). The court, unsurprisingly, said that an *unsuccessful* scholarship applicant, who bore no relationship to the trust at all other than being not selected to receive the scholarship, could not maintain a suit.

Simply put, the fact that Second Church is a potential beneficiary of the Trusts is not the sole reason, or even the primary reason, Second Church has standing. Second Church is a member of a limited, defined class of entities that bears an unquestionable, long-standing relationship and devotion to the religion of Christian Science and, correspondingly, to the Trusts set up by Mrs. Eddy to promote and extend that religion.

E. It Is Socially Desirable To Hold That Second Church Has Standing

The Court may consider factors other than the above four in its standing analysis, including the socially desirable outcome. While *Blasko* found that courts typically favor the first four factors, social desirability, too, weighs in favor of a finding of standing of Second Church. The Clause 6 and Clause 8 trusts have a worldwide impact – branch churches, reading rooms and other potential beneficiaries are located throughout the world. As described earlier, it is not possible or desirable for the DCT to police all instances of Director-Trustee misconduct. Branch churches, however, and in particular Second Church, are well positioned to monitor and enforce the terms of the Trusts due to their special relationship with The Mother Church and their detailed knowledge of the church, its organization and its history. It is certainly socially desirable to enforce the wishes of a testator, and allowing Second Church to do so here would further that

goal. More importantly, there is certainly no socially undesirable outcome that would result by finding Second Church has standing.

V. In Any Event, This Court Should Allow Second Church To File An *Amicus Curae* Brief

While the Rules of the Circuit Court of the State of New Hampshire – Probate Division do not address standards for the filing of an *amicus curiae* brief, the Rules of the Supreme Court of the State of New Hampshire provide some guidance. Under Rule 30, where consent to the filing is denied by a party, a third-party wishing to file as *amicus curiae* must state (1) the nature of their interest, (2) the facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and (3) their relevancy to the case. As to the first of these factors, Second Church's interest, as explained above and in previous filings, is clear: as a branch church it has a special interest in seeing the wishes of Mrs. Eddy carried out and that the Clause 6 and Clause 8 Trust assets are used only for their specified purpose. The second factor, too, is clearly met: the only parties to this proceeding are the Director-Trustees and the DCT. As described in this memorandum and other filings, the Director-Trustees are not only plagued by conflicting fiduciary obligations but have engaged in self-dealing and other misuse of trust assets. The Director-Trustees, therefore, cannot be relied upon to give a complete and accurate recitation of their actions and the context surrounding them.[28] For its part, the DCT does not have the same familiarity with the religion taught by Mary Baker Eddy, the Manual, the structure of The Mother Church as a congregation with no church hierarchy, or the Trusts, as Second Church has shown it possesses. Nor does the DCT have the time or resources to gain that familiarity. Second Church should be allowed to file as *amicus curiae,* because its knowledge

[28] And in pleadings filed with the Court the Director-Trustees have denied that to which they admit in documents obtained by Second Church from the DCT through open records requests.

and perspective on the operation of the Church and the management of the Trust assets are not currently before the Court through either the Director-Trustees or the DCT.

Finally, and obviously, the matters, points and authorities addressed by the *amicus* brief proffered by Second Church are indisputably relevant to the protection and proper enforcement of the Trusts.

Respectfully submitted,

SECOND CHURCH OF CHRIST, SCIENTIST, MELBOURNE,

By its attorneys,

PIERCE ATWOOD LLP

Dated: November 17, 2017

By: Michele E. Kenney

Michele E. Kenney
N.H. Bar No. 19333
One New Hampshire Avenue, Suite 350
Portsmouth, NH 03801
(603) 433-6300
mkenney@pierceatwood.com

DLA PIPER LLP (US)

Dated: November 17, 2017

By: Stuart Brown /MEK

Stuart Brown
Admitted *Pro Hac Vice*
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5640
Stuart.brown@dlapiper.com

FOEHL & EYRE, PC

Dated: November 17, 2017

By: Robert B. Eyre /MEK

Robert B. Eyre
Admitted *Pro Hac Vice*
27 East Front Street
Media, PA 19063-0941
(610) 566-5926
rob@foellaw.com

CERTIFICATE OF SERVICE

I hereby certify that I have on this 17th day of November, 2017, forwarded a copy of the foregoing Memorandum Concerning Standing to the following counsel of record by electronic mail and first class mail:

James F. Raymond, Esquire
Michael P. Courtney, Esquire
Upton & Hatfield LLP
10 Centre Street
PO Box 1090
Concord, NH 03302-1090

Thomas J. Donovan, Esquire
Director of Charitable Trusts
Office of the Attorney General
33 Capitol Street
Concord, NH 03301-6397

Michele E. Kenney
NH Bar #19333