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Admitted in: NH, NY

By Courier

December 11, 2017

Cheryll Andrews, Clerk
Attention: Trust Docket
7th Circuit- Probate Division- Dover
259 County Farm Road, Suite 203
Dover, NH 03820

Re: In re Trust under the Will of Mary Baker G. Eddy¹
Trust Docket Case No. 317-1910-TU-00001

Dear Ms. Andrews:

I have enclosed an original and two copies of the following for filing in the above matter:

1. The Response of the Second Church of Christ, Scientist, Melbourne (Australia) to the Director of Charitable Trusts' Reply to Second Church's Memorandum Concerning Its Standing; and a
2. Response of the Second Church of Christ, Scientist, Melbourne (Australia) to the Objection of the Trustees of the Trusts Under Will of Mary Baker Eddy, Clauses 6 and 8 to the Motion of Second Church for Appointment of Independent Trustee.

Thank you for your attention to this matter. Please contact me if you have any questions.

Very truly yours,



Michele E. Kenney

MEK/kmd
Enclosures

cc: James F. Raymond, Esquire
Michael P. Courtney, Esquire
Thomas J. Donovan, Esquire

¹ This matter was reassigned to the Trust Docket from the docket of the 6th Circuit — Probate Division — Concord, pursuant to Administrative Order 2016-0005-TD (Kelly, J.), dated February 23, 2016.

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

**THE RESPONSE OF THE SECOND CHURCH OF CHRIST, SCIENTIST,
MELBOURNE (AUSTRALIA), TO THE DIRECTOR OF CHARITABLE TRUSTS’
REPLY TO SECOND CHURCH’S MEMORANDUM CONCERNING ITS STANDING**

Second Church of Christ, Scientist, Melbourne (Australia) (“Second Church”), by and through its undersigned attorneys, respectfully submits this memorandum in response to the Director of Charitable Trusts’ Reply to Second Church’s Memorandum Concerning Its Standing (“DCT Reply”).¹

The DCT Reply ignores the clear record of misdeeds by the Director-Trustees and tries to excuse the Charitable Trusts Unit’s failure to properly monitor the Clause 6 and 8 Trusts as well as the actions of the Director-Trustees, whom the DCT admits suffer from an inherent conflict of interest. Further, the DCT offers no path forward to assure adherence to the interests of Mary Baker Eddy.

1. Second Church Bears A Well-Defined, Long And Special Relationship To Mary Baker Eddy And The Clause 8 Trust.

The DCT Reply begins with a mischaracterization of Second Church’s argument. The DCT argues that Second Church’s position “would make a potential litigant out of any disappointed applicant for a charity’s grant or services.” DCT Reply at 1. Second Church addressed this exact argument in its Memorandum Concerning Standing of the Second Church of

¹ Second Church has filed a pending, assented-to motion for leave to file this response. *See* Assented-To Motion of Second Church of Christ, Scientist, Melbourne (Australia), for Leave to File Replies to Objections to Its Motion for Appointment of Independent Trustee and Memorandum Concerning Standing, dated Dec. 5, 2017.

Christ, Scientist, Melbourne (Australia), In Response to Order of November 6, 2017 (“Memorandum Concerning Standing”), at page 34. For example, *Kania v. Chatham*, seemingly the DCT’s support for its argument, stands only for the uncontroversial proposition that an unsuccessful applicant for a scholarship, who bore no relationship to the subject trust other than not being selected to receive funds, did not have special interest standing. *See Kania*, 297 N.C. 290 (1979) (cited by the Director-Trustees in their November 1, 2017 memorandum opposing standing at 13). To adopt that same reasoning here would be to ignore the specific and special relationship between Second Church and Mary Baker Eddy’s Trusts. Second Church has explained in detail in numerous filings its relationship to the Trusts. *See generally* Memorandum Concerning Standing at 2-10. Second Church has made no application to the Trusts for grants or services, but simply seeks to vindicate the wishes of Mrs. Eddy by enforcing the proper administration of the Trusts under her will for the benefit of Christian Science. The DCT’s assertions to the contrary have no merit.

2. **Mere Involvement By The DCT In The Probate Proceedings Does Not Preclude A Finding Of Standing.**

The DCT argues, without support, that the mere “*fact*” of his office’s involvement is sufficient to prevent a finding of standing to Second Church. *See* DCT Reply at 2 (emphasis in original). The DCT takes this position notwithstanding that his office is now cautious, at best, and refusing, at worst, to seek involvement in any matter the Director-Trustees assert involves their First Amendment rights, and will not even question the correctness of such an assertion. Aside from overstating the extent of the DCT’s involvement of late and being unwise from a policy perspective, this argument ignores the very *Blasko* factor cited by the DCT.² The

² The DCT cites The Restatement of Charitable Nonprofit Corporations as another source of the *Blasko* factors. The Restatement, unlike *Blasko* and the many cases it summarizes, requires all five factors to be present to find special (Continued)

effectiveness, not just the availability or participation, of the Attorney General must be considered. The DCT's appearance on the docket does not mean his involvement has been effective; indeed, the DCT stated at the hearing on November 3, 2017, that the Charitable Trusts Unit intends to be less involved going forward in any matter the Director-Trustees assert involves their First Amendment rights, including not to question the correctness of such an assertion. Second Church summarized on pages 26-32 of its Memorandum Concerning Standing the myriad ways in which the Charitable Trusts Unit has been involved and demonstrably ineffective. Particularly, where the Attorney General's involvement may have been "for better or worse,"³ DCT Reply at 2 (emphasis added), a grant of standing can only help further the goals of properly enforcing charitable trusts. *See Family Fed'n for World Peace & Unification Int'l v. Jyun Jin Moon*, 129 A.3d 234, 244-45 (D.C. Ct. App. 1015) ("[t]he exponential expansion of charitable institutions justifies a reasonable relaxation of any rule limiting enforcement to a busy Attorney General.").

In a vacuum, it may be that "the exercise of discretion is not the failure of oversight." DCT Reply at 3. But the DCT cannot rely on this assertion here given the harms suffered by the Trusts at the hands of the Director-Trustees while under the supervision of the Charitable Trusts Unit. The DCT in essence argues, for example, that the Charitable Trusts Unit's assent to the 1993 Order, which it now agrees perverted the wishes of Mrs. Eddy and which it now seeks to reverse, was a fair exercise of discretion, which even if true does not excuse the DCT's failure to

interest standing. The DCT has acknowledged that any *one* factor is sufficient to confer standing. *See* Director of Charitable Trusts' Memorandum Concerning Standing of Second Church of Christ, Scientist at 6. The Director-Trustees' argument in their Objection filed on December 1, 2017, that the Restatement controls, is undermined by the facts that (a) the DCT disagrees, (b) the Restatement is not binding law in New Hampshire, and (c) the Director-Trustees have cited no authority other than the Restatement to suggest that all five factors need be present.

³ The argument that the DCT's involvement "for worse" in enforcing the terms of Mrs. Eddy's trusts could somehow prevent a grant of standing fails at the outset. DCT Reply at 2.

correct the perversion immediately upon the repayment of the subject loan only 3 years later, without that and other matters being brought to the DCT's attention by Second Church. Moreover, even if such an act were properly characterized as an act of discretion and not a failure of oversight, such an act in 1993 is an example of an *abuse* of discretion. Whether the DCT's actions and inactions with respect to the Trusts are termed abuses of discretion or failures of oversight is an exercise in semantics. What is clear from the history of the Charitable Trusts Unit's involvement, as detailed in Second Church's papers, is that it has not properly or effectively fulfilled its role in protecting the wishes of Mrs. Eddy as testatrix.

In any event, it is curious that the DCT so strongly objects to Second Church's involvement. In theory, the DCT and Second Church should want the same thing – to see the Trust assets protected and the wishes of Mrs. Eddy as expressed in her will carried out. The Court should also consider the benefit of having an obviously knowledgeable party participate in the proceedings and provide its view to the Court. This is particularly so where, as here, the bad acts by the Director-Trustees do not necessarily appear as such on their face, and their actions should be viewed in the important context of the overall structure of checks and balances established by Mrs. Eddy.

3. Second Church Has Done More Than Plead Conclusory Allegations Of Bad Acts.

The DCT writes that, “[i]t is easy to allege extraordinary bad acts and bad faith.” DCT Reply at 1. While this may be true, Second Church has done far more than make mere conclusory allegations of bad faith with respect to the Director-Trustees. Second Church need not make any such allegations, however. Here, both the DCT and Director-Trustees admit to the Director-Trustees' wrongdoing. If these admissions alone are insufficient (they should be sufficient), then over fifteen pages of Second Church's submission are dedicated to explaining in detail the history of bad acts of the Director-Trustees — all, or at least most, of which are

supported by publically available documents of which the Court may take judicial notice. *See generally* Memorandum Concerning Standing at 10-16. While it is ultimately up to the Court to decide the exact nature of these acts, the DCT does not try to defend the propriety of the acts discussed or explain his failure to intervene. Second Church's presentation of the history of abuses by the Director-Trustees, and the DCT's failure to intervene, currently sits before the Court un rebutted by the DCT and the Director-Trustees.⁴

4. **Appointment Of An Independent Trustee of the Clause 8 Trust Cannot Lead To "Entanglement" In Religious Affairs.**

As a final argument, the DCT argues in conclusory fashion that appointment of an independent trustee would somehow involve "entanglement" of the court into the religious affairs of the church in violation of the First Amendment. DCT Reply at 3. Second Church addresses this argument more fully in its Response to the Trustees' Objection to its Motion for Appointment of Independent Trustee, filed on this day. While electing not to address its contention, the DCT fails to offer even a cursory explanation of how appointment of an independent trustee of the Clause 8 Trust — which since its creation has been administered under the supervision of this Court in New Hampshire and for the first 40 or so years was governed by at least one independent trustee — would involve an unconstitutional "entanglement." Notably, the DCT fails to address the history of this Court's involvement in the Clause 8 Trust, which has not given rise to any such "entanglement."

Conclusion

The DCT has failed to meaningfully address Second Church's arguments that it should be granted standing. For the reasons stated above, and those expressed in its Memorandum

⁴ Contrary to the DCT's suggestion, Second Church is not asking the Court to right all past wrongs occasioned on the Clause 8 Trust, but rather, identifies such actions or inactions as support for its special interest standing.

Concerning Standing, the Court should find Second Church has standing to participate in these proceedings.

Respectfully submitted,

SECOND CHURCH OF CHRIST,
SCIENTIST, MELBOURNE,

By its attorneys,

PIERCE ATWOOD LLP

Dated: December 11, 2017

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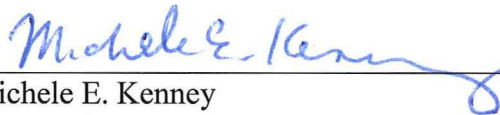
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CERTIFICATE OF SERVICE

I hereby certify that I have on this 11th day of December, 2017, forwarded a copy of the foregoing The Response of the Second Church of Christ, Scientist, Melbourne (Australia) to the Director of Charitable Trusts' Reply to Second Church's Memorandum Concerning Its Standing to the following counsel of record by electronic mail and first class mail:

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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

RESPONSE OF THE SECOND CHURCH OF CHRIST, SCIENTIST, MELBOURNE (AUSTRALIA), TO THE OBJECTION OF THE TRUSTEES OF THE TRUSTS UNDER WILL OF MARY BAKER EDDY, CLAUSES 6 AND 8, TO MOTION OF SECOND CHURCH FOR APPOINTMENT OF INDEPENDENT TRUSTEE

Second Church of Christ, Scientist, Melbourne (Australia) (“Second Church”), by and through its undersigned attorneys, submits this memorandum as its response to the Objection Of The Trustees Of The Trusts Under Will Of Mary Baker Eddy, Clauses 6 And 8, To Motion Of Second Church For Appointment Of Trustee (“Trustee Objection”) and accompanying Memorandum in support of same (“Trustee Memorandum”).¹

Second Church filed its Motion for Appointment of an Independent Trustee to address a fundamental defect in the administration of the Clause 8 Trust: the embedded conflict of the current Trustees of that Trust by virtue of their role as Directors of the First Church of Christ, Scientist, in Boston, known and referred to as The Mother Church. This is not a “potential conflict of interest” as suggested by the Trustees. *See* Trustee Memorandum at 1. It is an actual conflict of interest that arises because The Mother Church, to which the same Trustees serve as fiduciaries (or “Directors”), is one of larger classes of potential beneficiaries of the Clause 8 Trust. This places their existing fiduciary duty of loyalty as Directors to The Mother Church in

¹ Second Church has filed a pending, assented-to motion for leave to file this response. *See* Assented-To Motion of Second Church of Christ, Scientist, Melbourne (Australia), for Leave to File Replies to Objections to Its Motion for Appointment of Independent Trustee and Memorandum Concerning Standing, dated Dec. 5, 2017.

conflict with their fiduciary duty of loyalty and fairness as Trustees to the broader class of beneficiaries of the Clause 8 Trust.

This fiduciary conflict and its origins have been described at length by Second Church in previous filings, including in Second Church’s “Second *Amicus* Brief.”² It is not just a personal conflict of the individuals who currently serve as “Director-Trustees.” It is endemic to the *institution* of the Board of Directors of the Mother Church and its relationship to the Clause 8 Trust. Any and all Directors of the Mother Church are necessarily conflicted as Trustees of the Clause 8 Trust. Not surprisingly, the conflict has manifested itself throughout the history of the Trust. It was so apparent during the probate of Mrs. Eddy’s Will that in a 1913 submission to this Court the New Hampshire Attorney General at the time, James P. Tuttle, concluded it “might be the duty of the Court...” to appoint other Trustees when the time came.³ This Court did so—appointing Josiah Fernald, a non-Director and non-Christian Scientist, as a sixth Trustee of the Clause 8 Trust. The Trust was well-administered until Mr. Fernald died, and was not replaced, after which the Trust was dramatically altered—shifting from the intended support of a broad class of beneficiaries that did not include The Mother Church, to supporting only The Mother Church. The effects of the remaining Director/Trustees’ conflict, unrestrained by the presence of an independent Trustee, were further manifest in the multiple improper acts of the Director/Trustees (viewed from the lens of the Clause 8 Trust) outlined in prior filings and summarized on pages 8-12 of the Motion for Appointment of a Trustee.

²“Second *Amicus* Brief” refers to Second Church’s second proposed Brief *Amicus Curiae* of The Second Church of Christ, Scientist, Melbourne (Australia) (herein, “Second *Amicus*”), Exhibit “A” to Motion for Leave to File Brief *Amicus Curiae*, dated August 4, 2017.

³ Brief for the State, *Josiah E. Fernald, Administrator of Mary Baker G. Eddy v. The First Church of Christ, Scientist, et al.*, Case No. 1122 (1913 Term), at 8, attached as Exhibit 1 to the Second *Amicus* Brief and quoted at more length at pages 8-9 of the Second *Amicus* Brief.

The problem of this embedded fiduciary conflict was acknowledged by the DCT, after being raised by Second Church, over a year and a half ago,⁴ and was never directly denied or disputed by the Director/Trustees in that time frame; but the DCT has continued to defer implementation of the obvious solution to the problem—the restoration of an independent Trustee—while assenting to various other relief sought by the Director-Trustees. The solution now proposed, in the most recent relief sought by the Director-Trustees and assented to by the DCT—the Assented-To Motion by the Trustees Under the Will of Mary Baker Eddy To Amend the 1993 Order, Convert Clause 6 And Clause 8 Trusts To Unitrusts, And Adopt For the Clause 8 Trust The Provisions of RSA 292-B, The Uniform Prudent Management Of Institutional Funds Act (the “Assented-To Motion to Amend”)—is to further alter the Trust by prohibiting the distribution of Clause 8 Trust funds to The Mother Church so that these otherwise conflicted Trustees could continue in exclusive control of the Trust. This, Second Church sought to argue in its Second *Amicus* Brief, turns the whole idea of a trust on its head—prioritizing the needs of the Director-Trustees over the needs of the Trust.

The solution to the conflict is to restore an independent Trustee, not impose unnecessary and unintended restrictions on the distribution of Trust funds. Now that the issue is joined, and Second Church has requested this relief in its own Motion to Amend, the Trustees object essentially on three grounds.

First, they argue that Second Church lacks standing to request this relief. (Trustee Objection at ¶¶ 1-6; Trustee Memorandum at 2-3). Second, they argue that the relief sought—the appointment of an independent Trustee—would interfere with the Director-Trustees’ free exercise of religion under the First Amendment to the United States Constitution and entangle this Court in the religion of Christian Science, violating the Establishment Clause of the First

⁴ See Director of Charitable Trusts’ Memorandum Concerning Standing, filed April 11, 2016, at 10-12.

Amendment. (Trustee Objection at ¶¶ 7-8; Trustee Memorandum at 5-6.) Third, they complain that the Second Church’s allegations of improper administration and misconduct by the Director-Trustees are not supported by the record of this Court. (Trustee Objection at ¶ 5; Trustee Memorandum at 6-8.) These objections are addressed in order, below.

A. This Court Should Exercise its Equitable Jurisdiction to Allow Second Church Special Interest Standing to Pursue the Motion for Appointment of a Trustee.

All three parties in this matter recognize the persuasive weight of the so-called “*Blasko* factors”—referring to the five factors commended in the law review article of Mary Grace Blasko, *Standing to Sue in the Charitable Sector*, 28 U.S.F.L. REV. 73 (Fall, 1993). *See, e.g.*, Trustees’ Memorandum at 2; DCT Reply to Second Church’s Memorandum Concerning Its Standing, filed December 1, 2017 (“DCT Reply on Standing”) at 1. Second Church briefed this Court separately on the application of these same factors, in its Memorandum Concerning Standing of Second Church, filed November 17, 2017 (“Second Church Standing Memorandum”), which, at pages 15 through 35, contains twenty pages of analysis and application of those factors to this case with extensive citations to relevant case law. *See also* Response of Second Church to DCT Reply to Second Church Memorandum Concerning Standing (“Second Church Response to DCT Reply”), filed contemporaneously herewith. Second Church hereby incorporates its arguments in these two previous filings by reference herein, and limits this response to two particular issues raised in the Trustees’ Objection and Memorandum.

The Trustees advocate to this Court convert the equitable, five-factor analysis embodied in the *Blasko* factors and case law, into a list of mandatory requirements on the basis of a recent, unadopted draft of a new section 6.05 of the *Restatement Of The Law: Charitable Nonprofit Organizations* (Tentative Draft 2, May 22, 2017) (“Restatement”). The cited draft states that:

A private party has a special interest for purposes of commencing a derivative suit on behalf of a charity (as provided by § 6.02), enforcing the purposes to which charitable assets are devoted or the administrative terms governing charitable assets (as provided by § 6.03), or commencing or intervening in a cy pres or deviation proceeding (as provided by § 6.04), *only upon demonstrating all of the following conditions....*

Restatement § 6.05 (emphasis added), followed by a list that generally reflects the five factors commended by Blasko. The emphasized language suggests an understanding that these “factors” are not mere factors but mandatory requirements that must be “demonstrated” before special interest standing is allowed. This language does not go so far as to say that the factors are rigid “requirements” to be “met.” Such an interpretation seems at odds with the equitable nature of the special interest doctrine and case law that reflects the application of “factors” to gauge the benefits and risks of special interest standing in any given case. The Comments to the *Restatement draft* themselves emphasize the “equitable” nature of the doctrine and suggest a more flexible “balancing” of the factors as opposed to a rigid application of a litmus test:

Nonetheless, on rare occasions, a court will use its equity power to grant standing to a private party who has what is known as a “special interest” to bring suit against or on behalf of a charity. Whether to grant special interest standing involves a balancing of costs and benefits of allowing a private party to be involved in what is typically a function of government oversight.

Restatement §6.05, Comment a. It is clear that certain factors – for example, the actual ability or effectiveness of the office of the attorney general in addressing the particular issues raised by the special interest party – are weightier than others:

The clearest situation in which a court will grant special interest standing to a private party is when the attorney general fails to maintain a charity oversight function in a particular state, either because of lack of statutory or other authority to do so or through systemic failure, such as inadequate funding or staffing. A court may also grant a private party special interest standing when the attorney general will not be exercising the office’s authority and

the attorney general either consents or does not object to the grant of standing. In addition, special interest standing often is appropriate to ensure adequate oversight of charitable assets if an attorney general is burdened by a conflict of interest. Such conflicts may arise for many reasons. Neither the fact that an attorney general approves of the complained-of behavior or transaction nor the fact that the office enters into a settlement with the charity is sufficient to demonstrate that the attorney general suffers a conflict of interest. Nonetheless, a settlement agreement is subject to court approval.

In extremely rare cases, the court may decide that, although the attorney general has acted, the protection of charitable assets and justice demand that a private party be granted special interest standing. For example, there may be cases in which the attorney general actively supports a charity's alleged breach of trust or a fiduciary's breach of duties.

Id.

Second Church submits that it has — as set forth in its prior Second Church Standing Memorandum at pp. 15-35 — demonstrated that each of these factors can be shown in this case to weigh in favor of special interest standing for Second Church. More importantly, however, Second Church submits that all the factors weigh heavily in favor of the exercise of this Court's equitable jurisdiction to allow such standing to Second Church.

This is particularly so with respect to the Motion to Appoint a Trustee, which addresses an issue of fundamental importance to the proper administration of these Trusts — the restoration of a modicum of non-conflicted independence on the Board of Trustees of the Clause 8 Trust. This, again, is a problem that the Charitable Trusts Unit has recognized and that the Director-Trustees do not themselves dispute or deny — and further that, as we have noted before, raises very serious questions why the Director-Trustees left their own conflict in this regard remain unaddressed for approximately 60 years. That itself is a serious breach of their duty of loyalty and good faith — which, unfortunately, may be expected from Trustees operating

under such a conflict of interest. Why the DCT has, however, chosen to look the other way instead of examining and addressing the deleterious effects of this long of unrestrained conflict on the Board of Trustees, and proposing a path forward, has been unclear until now. Now, the DCT states that taking the step of appointing an independent Trustee would somehow infringe upon the First Amendment rights of the Directors-Trustees or entangle his office in religious matters. For the reasons set forth in the next section, this concern is unfounded. But, in any event, the Attorney General of New Hampshire, represented here by the DCT, has deemed itself incapable of addressing this fundamental problem in the administration of the Clause 8 Trust because of these concerns about the application of the First Amendment. This situation is similar to those where an attorney general is burdened by a conflict of interest. *See, e.g., Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189, 195 (Me. 1978) (“*Fitzgerald*”);⁵ *cf.* Restatement § 6.05 cmt. a. In both cases — the existence of a conflict of interest burdening the attorney general or the attorney general’s adoption of a position that its intervention is inhibited by a constitutional limitation on his/her power — an important problem with the administration of the trust is not being addressed by the attorney general, for reasons unrelated to the merits of the issue.

Second Church is not so inhibited and, for the reasons already set forth in its November 17, 2017 Memorandum of Second Church Concerning Application of First Amendment (“First Amendment Memorandum”), and supplemented briefly below, is confident that this Court can grant the relief sought in its Motion to Appoint a Trustee without running afoul of the First Amendment to the United States Constitution.

⁵ The decision of the Maine Supreme Court in *Fitzgerald* is notable for its emphasis of the “disability” of the Attorney General in that case due to a conflict of interest and the concomitant necessity that someone else be given standing. *See Fitzgerald*, 385 A.2d at 195. The one case cited by the Trustees, *Seal Cove Auto Museum v. Spinnaker Trust*, 2017 Me. Super. LEXIS 105 (Superior Court of Maine, Cumberland County, 2017) (Trustee Memorandum at 2) distinguished *Fitzgerald* largely because this factor of the Attorney General’s disability was not present.

B. The Motion to Appoint a Trustee Does Not Require Adjudication of any Religious Questions or Otherwise Present any First Amendment Concerns.

Second Church's previously filed First Amendment Memorandum addressed at length why the DCT and Trustee/Directors are wrong in their assertion that the First Amendment precludes the relief sought here. To summarize:⁶ The Clause 8 Trust is not an autonomous "church" of the sort protected by the autonomy principles that have come to be applied to such voluntary religious associations; and the Director-Trustees are not before this Court in a capacity as Directors of The Mother Church or to exercise any office of a church or denomination. The Clause 8 Trust is, rather, a testamentary trust with a religious purpose — a legal form that was recognized in the seminal case of *Watson v. Jones*, 80 U.S. 679 (1871), to be excluded from the application of such autonomy principles — and the Director-Trustees are before this Court as individuals appointed to serve as Trustees under and subject to the terms and conditions of Clause 8 of Mary Baker Eddy's Will.

The distinction between such "deeds-based" and "trust-based" religious organizations is so clear in the Supreme Court's reasoning in *Watson* that it warrants quoting the relevant portion of the opinion at length here:

The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, may, so far as we have been able to examine them, be profitably classified under three general heads, which of course do not include cases governed by considerations applicable to a church established and supported by law as the religion of the state.

1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching support, or spread of some specific form of religious doctrine or belief.

⁶ See Second Church First Amendment Memorandum at page 5-13 for an extended discussion of what follows here.

2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.

3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.

In regard to the first of these classes it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting, and propagating definite religious doctrines or principles, provided that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced, the formalities which the laws require. And it would seem also to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use. So long as there are persons qualified within the meaning of the original dedication, and who are also willing to teach the doctrines or principles prescribed in the act of dedication, and so long as there is any one so interested in the execution of the trust as to have a standing in court, it must be that they can prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters.

80 U.S. at 722-23 (emphasis added). **The Clause 8 Trust clearly falls within the “first of these classes” of religious organizations** that are distinguished from the other two “autonomous” classes of religious organizations that *Watson* and its progeny have given broader protection by the First Amendment. The exception of such “deeds-based” and “trust-based” organizations survived the later evolution of First Amendment church autonomy principles following *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94, 116

(1952) ("*Kedroff*"), and *United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) ("*Blue Hull*").⁷

The continuing exception of such "deeds-based" and "trust-based" restrictions is clear from the Supreme Court's decision in *Md. & Va. Eldership of Churches of God v. Church of God, Inc.*, 396 U.S. 367 (1970) ("*Md. & Va. Eldership*"). In that case, the Supreme Court let stand a Maryland Court of Appeals decision that relied upon, *inter alia*, the terms and conditions of deeds to allow local congregations to secede from their association with the Eldership, and take with them property previously committed to that association. In concurring in the Court's per curiam opinion, Justice Brennan (joined by Justices Marshall and Douglas) opined that the autonomy principles of *Watson* and its progeny, under which states "may" and force the decisions reached in accordance with the internal rules of governance of an autonomous congregation or hierarchical denomination,

unless "express terms" in the "instrument by which the property is held" condition the property's use or control in a specified manner...

396 U.S. at 369 (citing *Watson*). Justice Brennan's concurring opinion in *Md. & Va. Eldership* suggested that enforcing such provisions may be limited where it would require a court to consider "doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith." *Id.* That opinion was expressed by only Justice Brennan and two others and was, therefore, not the opinion expressed by the majority of the Court, and Second Church is aware of no other decisions ruling definitively on that issue of the extent to which a Court could enforce purely religious language governing a trust.

In other words, if an issue were to come before this Court that required the interpretation of some religious or theological concept that was not sufficiently clear from the language of the

⁷ See discussion in Second Church First Amendment Memorandum at pages 7-9.

Trust, the Court might be confronted with a more profound and complicated question of whether and *to what extent* *Watson's* exception of trust provisions from the application of First Amendment autonomy principles survived the evolution of those principles after the 1950s.⁸ But there can be no doubt that as long as the dispute does not require this Court to discern or interpret some undeclared religious tenet or doctrine, or intrude upon the ecclesiastical authority of the Director-Trustees as Directors of The Mother Church, this Court can and must enforce the terms of the Trust and is not required to relinquish its established authority over the Clause 8 Trust to the Directors of The Mother Church. Indeed, to do so would violate the fundamental intention of Mrs. Eddy, as declared by the courts of New Hampshire and Massachusetts over a century ago, that these assets be held in a Trust to be administered in New Hampshire by Trustees appointed by and accountable to this Court — not given to the Directors or The Mother Church. *See Fernald v. First Church of Christ, Scientist*, 77 N.H. 108 (1913); *Glover v. Baker*, 76 N.H. 393 (1912).

The Director-Trustees are correct that *Watson* “concerned rights to property, not church governance and religious interpretation....” (Trustee Memorandum at 4.) This case, likewise, concerns property rights: is the property of the Clause 8 Trust property of that Trust or property of The Directors of The Mother Church. Clearly, it is property of the Trust and not The Mother Church. And this case does not involve “religious interpretation”; it involves how the Board of Trustees of a charitable trust should be composed and whether established neutral principles of law concerning conflicts of interest and pecuniary interest transactions should apply to the

⁸ The 1952 decision of the Supreme Court in *Kedroff* is often cited as the beginning of the application of *Watson's* autonomy principles as a constitutional restraint on the states. This, as has been noted previously, was decades after Mary Baker Eddy had declared her Trusts and Will, and her passing in 1912, and the legal context in her time did not hesitate to enforce even religious language in trusts and will. *See* Second Church First Amendment Memorandum at 9-10.

Trustees. *See, e.g.*, RSA 7:19-a; RSA 564-B:8-803; *Shelton v. Tamposi*, 164 N.H. 490, 505 (2013).

Second Church stands by its contention that the Directors are not the autonomous ecclesiastical overseers of a denomination called Christian Science. *See* First Amendment Memorandum at 4-6. In response, the Director-Trustees can cite only the conclusory and ambiguous conclusions of a 1955 decision of a United States District Court in Ohio for the proposition that the *Directors* are “the highest governing body of the Christian Science Church. Trustees’ Objection at ¶ 7 (citing *Jandron v. Zuendel*, 139 F. Supp. 887, 888 (N.D. Ohio 1955) (“*Jandron*”). The *Jandron* case states the conclusion somewhat differently:

Upon careful consideration of the material submitted and the arguments in regard to this phase of the matter, it is my conclusion that *despite obvious inconsistencies in the “Church Manual” in regard to the inter-relationship of The Mother Church and her branch churches*, the plaintiffs, as the highest authority of The Mother Church, are in fact the highest authority and judicatory of the Christian Science denomination. To conclude otherwise would be to ignore the significance of the term “Mother Church” and the connotation attached to that term throughout the “Church Manual.”

Jandron, 139 F. Supp. at 888 (emphasis added). The emphasis is added, in part, to note the lack of clarity of the record on the issue of the “interrelationship of The Mother Church and her branch churches...” but more importantly to stress that what the church was analyzing was just that: the interrelationship between “The Mother Church and her branch churches.” Whether that relationship was properly called a denomination is not relevant. That label arose solely of an analysis of the relationship of The Mother Church to her branch churches. That relationship is not the one at issue here. What is at issue here is the relationship of the Directors, *as Trustees of a New Hampshire Trust to that Trust and this Court*. There is nothing in the Clause 8 Trust or the cases interpreting Mrs. Eddy’s Will to suggest that the Clause 8 Trust is part of a

denomination or otherwise under the ecclesiastical authority of The Mother Church or its Directors. *Glover, Fernald, and Chase v. Dickey* say precisely the opposite: the Clause 8 Trust is not the same as, or even a gift to, The Mother Church. The *Jandron* case has no application here.

All of the cases cited by the Trustees and the DCT for the notion that this Court cannot entertain the issues presented by the Motion to Appoint Trustee are doubly inapposite: (i) they address the First Amendment rights of autonomous churches and their officers, not the enforcement of trust-based or deeds-based restrictions and (ii) they concern the internal governance, discipline or interpretation of church doctrine, and not neutral principles of law concerning the composition of a Board of Trustees and the application of the law regarding conflicts of interests and pecuniary interest transactions to such trustees.

The Director-Trustees attempt to place this case in the latter category by suggesting that Motion to Appoint Independent Trustee requires this Court to interpret the meaning of the principle purpose of the Clause 8 Trust, “to promote and extend the religion of Christian Science as taught by Mary Baker Eddy.” This is a red herring. There is no actual dispute over the meaning of this clause. Nowhere do the Trustees identify an interpretation that clause by Second Church that they disagree with, let alone how that purported disagreement would require this Court to engage in a theological or religious exercise of interpretation.

The gravamen of the dispute is whether this Court has the authority to appoint an independent Trustee. Second Church thinks it is all too clear that not only does it have the authority, but such authority was exercise at the very beginning of this Trust and may in fact be necessary to eliminate the fundamental problem of the conflicting interests of the entire sitting Board of Trustees. There is no religion in that. It is all neutral principles of law.

Likewise, the request of Second Church that the Independent Trustee be authorized to inquire into the historical record of the Director-Trustees, does not on its face require this Court to engage in any religious or theological exercise. To the contrary, Second Church has asked the Court to provide an independent Trustee with the same privilege granted any fiduciary — to examine and understand whether his or her co-fiduciaries have acted properly in accordance with their fiduciary obligations and fully and accurately accounted for such actions. If, after such examination by the independent Trustee, he or she comes back to this Court and requests some relief that the actually presents some question that requires interpretation of religious doctrine, then that more complicated and profound question left open by Justice Brennan's concurring opinion in *Md. & Va. Eldership, supra*, would be presented to this Court. That is, however, entirely speculative this point.

C. The Director-Trustees Should Be Required to Respond to the Allegations of Improprieties in the Administration of the Trust.

Second Church has set forth extensive facts to support its allegations of the Director-Trustees' improprieties, based on all the information available to it — including extensive documentation and analysis of a forensic accountant. The Director-Trustees, in the meantime, have responded with conclusory denials that are corroborated by no relevant documents or verified or attested to by any actual Trustee. The seriousness of these allegations deserves more attention. Second Church submits that the appropriate path is to allow Second Church an opportunity to actually present the evidence after reasonable discovery, and if (as Second Church believes will be the case) a *prima facie* case can be made in support of Second Church's allegations, the Director-Trustees should be required to respond with actual evidence as opposed to the conclusory denials and representations of counsel.

Apart from all that, however, it is believed that the need for the appointment of an independent Trustee is clear from the undisputed fact that all the present Trustees are embedded in a fiduciary conflict because of their dual agency as Directors of The Mother Church.

WHEREFORE, Second Church of Christ Scientist, Melbourne (Australia), respectfully prays that this Honorable Court enter an Order:

- A. Finding that Second Church has standing to request the appointment of an Independent Trustee to the Clause 8 Trust;
- B. Appointing an Independent Trustee permanently to the Clause 8 Trust;
- C. Directing the Independent Trustee to investigate Clause 8 Trust distributions to The Mother Church by way of a forensic audit, at the expense of The Mother Church, of the accounts from 1972 through 2016;
- D. Directing the Independent Trustee to investigate the breadth of property rights and interests of the Clause 8 Trust and bring to the Court's attention the need to restore any such property rights and interests to the Clause 8 Trust;
- E. Requiring all annual accounts to detail distributions and be supported by an independent audit of the books and records of the Clause 8 Trust conducted by outside independent auditors; and
- F. Granting such other and further relief as justice may require.

Respectfully submitted,

SECOND CHURCH OF CHRIST,
SCIENTIST, MELBOURNE,

By its attorneys,

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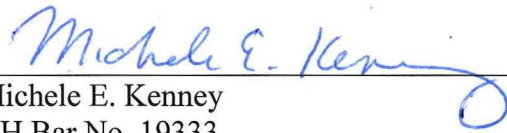
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CERTIFICATE OF SERVICE

I hereby certify that I have on this 11th day of December, 2017, send a copy of the foregoing Response to the following by electronic mail and first class mail:

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