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| STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
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| COUNTY OF DORCHESTER | ) | FOR THE FIRST JUDICIAL CIRCUIT |
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| The Protestant Episcopal Church In The Diocese Of South Carolina, *et al.* | ) | Case No. 2013-CP-1800013<br>Case No. 2017-CP-18-1909 |
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| | ) | **DEFENDANTS' OMNIBUS REPLY BRIEF TO PLAINTIFFS' OPPOSITION BRIEFS TO DEFENDANTS' PETITION FOR ENFORCEMENT, PETITION FOR AN ACCOUNTING, AND MOTION TO DISMISS BETTERMENT ACTION** |
| v. | ) | |
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| The Episcopal Church, *et al.* | ) | |
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Defendants The Episcopal Church (the "Church") and its diocese The Episcopal Church in South Carolina ("TECSC" or "Associated Diocese") hereby submit this Omnibus Reply Brief to Plaintiffs' Opposition Briefs to Defendants' Petition for Enforcement, Petition for an Accounting, and Motion to Dismiss the Betterment Action.

Plaintiffs' Opposition Briefs rely on common and overlapping themes and arguments, many of which have already been addressed in Defendants' previous briefs, and some of which are new. As opposed to replying to each of Plaintiffs' Opposition Briefs independently, we believe it is most efficient and helpful to the Court to submit this Omnibus Reply, addressing only the issues that we believe warrant further response beyond what we have already provided to the Court in our previous briefs, and addressing such issues collectively, succinctly, and without repetition, as follows:

**1. <u>Plaintiffs have repudiated their roles as trustees.</u>**

First and foremost, due attention should be given to what Plaintiffs say in their Opposition Brief to Defendants' Motion to Dismiss the Betterment Action: "Assuming, arguendo, that the trusts continued to exist, Plaintiffs have standing to bring this action ***because***

***they have repudiated their roles as trustees*.**" (Plaintiffs' Opposition to Motion to Dismiss Betterment Action, p. 21) (emphasis added). This statement of repudiation is an admission that Plaintiffs are using trust property for their own disparate purposes and are therefore breaching their fiduciary duties to hold the property in trust for Defendants. This is why Defendants have asked this Court to transfer possession and control of the trust property and to order an accounting.

It is remarkable, moreover, that Plaintiffs suggest that repudiating their roles as trustees somehow supports their claims under the Betterment Act. *First*, the relief they seek under the Betterment Act is the monetary value of the very same property they are supposed to be holding in trust. *Second*, Plaintiffs' notion that they terminated the trusts by repudiating their roles as trustees would only make sense if Plaintiffs had also relinquished possession and control of the trust property. They have not done so, despite TEC and TECSC's demands and the Supreme Court's mandate in this case. *Third*, even if, *arguendo*, Plaintiffs' repudiation of their roles as trustees terminated the trusts, it does not change the fact that the Betterment Act is a misfit. Upon termination of a trust, the Trust Code statutorily requires the trustee to distribute the trust property to the beneficiary. S.C. Code Ann. §62-7-18 ("Distribution upon termination"). This distribution of trust property does not equate to the specific prerequisite for a claim under the Betterment Act, which is a "final judgment in favor of the plaintiff in an action to recover lands and tenements." S.C. Code Ann. §27-27-10; *see Citizens & S. Nat. Bank, Atlanta, Ga. v. Homes Constr. Co.*, 248 S.C. 130, 134, 149 S.E.2d 326, 328 (1966) ("[T]he betterment statute affords no remedy" in a case where no "action for possession of the land has been brought by the owner.").

**2. <u>The Supreme Court's decision is dispositive of this property dispute.</u>**

Plaintiffs repeatedly rehash their argument from their Motion for Clarification that the South Carolina Supreme Court did not make a dispositive decision against them in this property dispute, and that if it did, that decision is too flawed to be enforced. Defendants already addressed this argument in their Opposition to Plaintiffs' Motion for Clarification. Briefly summarized here, the Supreme Court considered this property dispute for two years, understating of course that it was an important case involving a large amount of diocesan and parish property. It issued a final decision by a 3-2 majority composed of Justices Pleicones, Hearn, and Beatty. It denied Plaintiffs' petition for rehearing, which specifically requested a remand and raised all of the same legal and factual issues Plaintiffs complain of now. This Court has jurisdiction upon remittitur to enforce the mandate of the South Carolina Supreme Court, not to unravel it.

**3. <u>Defendants do not propose inconsistent interpretations of the Supreme Court decision; they propose alternatives as to how this Court can enforce it.</u>**

Plaintiffs accuse Defendants of proposing inconsistent interpretations of the Supreme Court's decision. (*See e.g.*, Plaintiffs' Opposition to Petition for Enforcement, p.4). This is not a fair accusation. The Supreme Court recognized Defendants' trust interests and, consequentially, their entitlement to the trust property. Plaintiffs, as they say in their own words, "***have repudiated their roles as trustees***" (Plaintiffs' Opposition to Motion to Dismiss Betterment Action, p. 21), yet they continue to possess and control the trust property, disregarding the mandate of the Supreme Court. Defendants have accordingly asked this Court to enforce their trust interests and their entitlement to the trust property by proposing two alternatives: (1) removing and replacing the individuals acting in the capacity of trustees, or (2) transferring legal title to the trust property to Defendants. These alternatives are not inconsistent. Either alternative would give Defendants possession and control of the trust property to which they are entitled by mandate of the Supreme Court.

**4. Defendants have not raised a "new" claim regarding the names and marks of the diocese and the twenty-nine parishes; they simply ask this Court to enforce the terms of their trust interests; TEC and TECSC are separately pursuing their trademark infringement claims and related Lanham Act claims in federal court.**

Plaintiffs assert that Defendants have raised a "new" claim regarding the names and marks of the diocese and the twenty-nine parishes. (*See e.g.*, Plaintiffs' Opposition to Petition for Enforcement, p.6). This is not true. Defendants merely ask this Court to enforce the terms of Defendants' trust interests, which include *all* property, both real and personal, of the diocese (under the 1880 and 1902 Acts) and the twenty-nine parishes (under the Dennis Canon).

Intellectual property, which includes a corporation's names and marks, is a form of personal property. *See In re CC & Co., Inc.*, 86 BR 485, 486 (Bankr. E.D. Va. 1988) ("[B]y definition, a 'trademark' includes a trade name used by a merchant to identify goods sold, and by implication a trade name is a general intangible and, thus, personal property . . . Therefore, it is the decision of this Court that the collateral term 'personal property' includes the trade name 'Pete Smith's Surf Shop' and the good will inherent in it. This Court also holds that Pete Smith's Surf Shop, Inc., had a perfected security interest in the trade name and goodwill and that it acquired all rights in the same when it purchased them at public auction. This Court, therefore, orders the Trustee to execute all documents necessary to complete the transfer as required by 15 U.S.C. § 1060 (1982)."); *Little Tavern Shops v. Davis*, 116 F.2d 903, 905 (4th Cir. 1941) ("The courts recognize a right of property in a trade name which has been adopted by a person to denominate his business, and has been so used by him in association therewith as to acquire a special significance as the name thereof."); *see also Skycam, LLC v. Bennett*, 62 F.Supp.3d 1261, 1266 (N.D. Okla. 2014) ("…all personal property, including intellectual property, is subject to execution...") (collecting cases).

Plaintiffs pled that the names and marks they have used throughout their respective histories are their protectable intellectual property and they sought to enforce such intellectual property rights against Defendants in this action. To illustrate, Plaintiffs' pleading begins with the following introduction, which precedes nearly 100 pages of detailed allegations pertaining to the property of each of the Plaintiffs, including their names and marks:

> Plaintiffs, through their respective undersigned counsel, bring this action against Defendant seeking a declaratory judgment pursuant to §§15-53-10 *et. seq.* of the South Carolina Code of Laws (1976) that they are the sole owners of their respective real and personal property in which the Defendant, The Episcopal Church ('TEC') has no legal, beneficial, or equitable interest. The Plaintiffs (except for St. Andrew's Church, Mount Pleasant) also seek a declaratory judgment that the Defendants and those under their control have improperly used and may not continue to use any of the names, styles, seals and emblems of any of the Plaintiffs or any imitations or substantially similar names, styles, seals and emblems and that the Court enter injunctions prohibiting the Defendants and those under their control from such uses pursuant to §§39-15-1105 and §§16-17-310 and 320 of the South Carolina Code of Laws (1976). In support of these claims, Plaintiffs allege as follows: . . .

(Plaintiffs' Second Amended Complaint, p. 2).

Plaintiffs cannot now take the position, as they try to do, that their names and marks are their "identities" and constitute something other than intellectual property – which, unlike the rest of their property, should be excluded from Defendants' trust interests, and should remain with Plaintiffs (because, as Plaintiffs say, they followed corporate formalities in voting to disassociate from the Church). (*See e.g.*, Plaintiffs' Opposition to Petition for Enforcement, p.7). This argument is nonsensical, wholly contrary to law, and estopped based on Plaintiffs' pleading in this action.

Furthermore, it does not matter whether or which of the names and marks used by Plaintiffs were registered as trademarks. *Flying Pigs, LLC v. RRAJ Franchising, LLC*, 757 F.3d

177, 182 (4th Cir. 2014) ("[I]t is a settled proposition that '[t]rademark ownership is not acquired by federal or state registration."). All of the names and marks, registered or unregistered, constitute intellectual property, which is personal property subject to Defendants' trust interests.

The enforcement of Defendants' trust interests therefore requires the transfer of all intellectual property, which includes names and marks of the diocese and the twenty-nine parishes, whether registered or unregistered, together with the transfer of all of the other trust property, which includes land and buildings, bank accounts, historic records, books, antiques, etc.

To be clear, Defendants do not ask this Court to entertain any trademark infringement or related Lanham Act claims. The Supreme Court deferred to the United States District Court of South Carolina to resolve such claims. The resolution of such claims involves additional factual and legal issues beyond the transfer of the trust property to Defendants – the cornerstone of which is whether Plaintiffs' conduct of using the same or similar names and marks, without modification, creates a "likelihood of confusion." *See Resorts of Pinehurst, Inc. v. Pinehurst Nat. Corp.*, 148 F.3d 417, 422 (4th Cir. 1998) ("'Likelihood of confusion' is the basic test of both common-law trademark infringement and federal statutory trademark infringement.") (citing 3 McCarthy § 23:1; 15 U.S.C. § 1125(a) (common-law mark) and 15 U.S.C. § 1114(1) (registered mark)). The fundamental relief available under the Lanham Act for such claims is an injunction against Plaintiffs' prospective use of the names, and confusingly similar names. 15 U.S.C. § 1116. Such trademark infringement and related Lanham Act claims, involving such factual and legal issues, together with such a request for injunctive relief, are pending before the

United States District Court of South Carolina,[1] not before this Court, and they are not within this Court's jurisdiction upon remittitur.

**5. <u>The trial court's injunction was reversed</u>**

Plaintiffs contend that the injunction issued by the trial court is still in place. (Plaintiffs' Opposition to Petition for Enforcement, p. 7). It is not. The Supreme Court reversed the trial court's decision (and its underlying findings and conclusions that Defendants have no interest in the property at issue) as to the diocese and twenty-nine parishes, including its injunction, and deferred the trademark infringement claims and related Lanham Act claims between the parties to the United States District Court of South Carolina.

Judge Gergel recently rejected this exact same argument that the injunction issued by the trial court is still in place. *VonRosenberg v. Lawrence*, 2:13-587-RMG (Order dated August 23, 2018 at 7-8) ("Moving Defendants [two parishes] argue that this Court is precluded from hearing Plaintiffs' state trademark claims. The Moving Defendants focus on the fact that 'there [was] no majority of three concurring opinions on the South Carolina Supreme Court reversing the trial court's state trademark registration decision, and therefore the trial court's ruling regarding the state trademarks allegedly controls. Moving Defendants are incorrect.").[2]

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[1] Following the South Carolina Supreme Court's decision, TEC and TECSC intervened in the related federal action and filed trademark claims and related Lanham Act claims against the corporation currently using the names of the diocese and the twenty-nine parish corporations currently using the names of the parishes. TEC and TECSC can ask the federal court to enjoin the twenty-nine parish corporations, for the purpose of preventing of confusion, from using the same parish names, or confusingly similar parish names, to operate and provide religious services to the public in different buildings in the same communities as part of a diocese of the Anglican Church in North America ("ACNA").

[2] *VonRosenberg v. Lawrence*, 2:13-587-RMG (Order dated August 23, 2018 at 7-8) ("Justice Pleicones and Justice Hearn explicitly ruled to reverse the trial court regarding the state registered trademarks. *Protestant Episcopal Church*, 421 S.C. 211 at 216, 248. Chief Justice Beatty, in the controlling opinion, ruled that he would 'reverse in part' the trial court's decision.

### 6. The trial court's decision does not bar this Court from ordering an accounting

Plaintiffs likewise argue that this Court should not order an accounting because the trial court denied Defendants' counterclaims, which included a cause of action for an accounting. Again, the Supreme Court reversed the trial court's decision (and its underlying findings and conclusions that Defendants have no interest in the property at issue) as to the diocese and twenty-nine parishes. The trial court's decision, therefore, is not the law of the case. Furthermore, an accounting is an equitable remedy, not a cause of action (irrespective of how it was pled in Defendants' counterclaims). Rogers v. Salisbury Brick Corp., 299 S.C. 141, 145, 382 S.E.2d 915, 917 (1988) ("An accounting is essentially an equitable remedy."). This Court has jurisdiction in enforcing the mandate of the Supreme Court to order an accounting of Plaintiffs' use of the trust property. Indeed, given that Plaintiffs now admit that ***"they have repudiated their roles as trustees,"*** (Plaintiffs' Opposition to Motion to Dismiss Betterment Action, p. 21), an accounting of the trust property is a particularly necessary and appropriate remedy under the Trust Code. S.C. Code Ann. §62-7-1001(b) ("To remedy a breach of trust that has occurred or may occur, the court may: . . . (4) order a trustee to account.").

WHEREFORE, for the foregoing reasons, Defendants respectfully ask this Court to grant their Petition for Enforcement, Petition for an Accounting, and Motion to Dismiss the Betterment Action.

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(*Id*. at 251.) Importantly, Chief Justice Beatty explained that his decision 'express[ed] no opinion concerning the rights to the service marks,' and instead left the decision to this Court. *Id*. at 251 n. 28 ('[T]his determination should remain with the federal court.'). Chief Justice Beatty drew no distinction between the state and federal trademark claims, and instead explicitly deferred all questions regarding the rights to the service marks to this Court, reversing the trial court's attempt to rule on those issues. This Court is therefore not precluded from hearing these issues.").

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Respectfully submitted

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