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I. INTRODUCTION

The word “episcopal” has long been generic for any religious organization governed by a bishop. Nevertheless, in this retaliatory lawsuit based on Plaintiffs’ desire to force Defendants back under Plaintiffs’ control, Plaintiffs assert they, and they alone, are entitled to the exclusive rights to that word. Such a claim flies in the face of well-established Circuit law precluding the use of trademark law to appropriate words the public domain, *see, e.g., Retail Servs., Inc. v. Freebies Publ’g*, 364 F.3d 535 (4th Cir. 2004) (affirming finding of genericness as a matter of law despite registration covering claimed mark), as well other opinions applying that principle in full force to similar overreaching claims by other churches. *See Universal Church, Inc. v. Universal Life Church*, No. 14 CIV. 5213 (NRB), 2017 WL 3669625 (S.D.N.Y. Aug. 8, 2017) (finding claimed “Universal Church” mark weak as a matter of law), *aff’d*, No. 17-2960-CV, 2018 WL 5783687 (2d Cir. Nov. 2, 2018); *Christian Sci. Bd. of Directors of First Church of Christ, Scientist v. Evans*, 520 A.2d 1347 (N.J. 1987) (finding claimed “christian science” or “church of christ, scientist” marks generic as a matter of law on appeal).

Here, the undisputed record evidence and testimony establish the generic use in the United States of “episcopal” by parties other than Plaintiffs as early as the 1600s, therefore rendering the name unprotectable ab initio by the time Plaintiffs asserted rights to it over a century later. *See Ale House Mgmt., Inc. v. Raleigh Ale House, Inc.*, 205 F.3d 137 (4th Cir. 2000) (affirming finding of genericness as a matter of law). Because the same evidence and testimony establish that the word is equally unprotectable in the present day under the factors identified by this Circuit as relevant to the genericness inquiry, *see Ale House Mgmt., Inc. v. Raleigh Ale House, Inc.*, 205 F.3d 137, 141 (4th Cir. 2000), summary judgment is warranted.

II. STATEMENT OF FACTS

A. Relevant Historical Facts

The histories of the Protestant Episcopal Church in the Diocese of South Carolina (“DSC”) and the Episcopal Church (“TEC”) are pertinent to certain facts concerning the use of the marks in this action. Many of these were findings of fact in the state court action, which involved claims that arose out of the same events as those in the present action.

B. State Court Findings

The DSC, TEC and The Episcopal Church in South Carolina (“TECSC”) as well as many of the Defendant parishes were all parties to the state lawsuit which joined the issues of the ownership of parish real and personal property and the DSC’s right to injunctive relief for the infringement of its marks. Also joined was TECSC’s defense that the DSC marks were invalid because they were derived from TEC’s marks. TEC’s two principal marks (“The Protestant Episcopal Church in the United States” and “The Episcopal Church”) were admitted and testimony was taken on that issue. *See generally*, Exhibit 1 - Final Order, *Protestant Episcopal Church in the Diocese of South Carolina, et al. v. The Episcopal Church, et. al.*, South Carolina Court of Common Pleas, First judicial Circuit Court, Case No. 2013-CP-18-00013 (Feb. 3, 2015). The state court made factual findings pertinent to the present dispute and the following were undisputed and unappealed in that proceeding.

The DSC was formed in May 1785 and has met annually more or less since then. *Id.* ¶1. TEC was formed in 1789 when the DSC and 6 other state associations of “Protestant Episcopal Churches” formed the association comprising TEC. *Id.* ¶ 69. Since the DSC’s formation, it has used the following names at various times in its history: “The Protestant Episcopal Church in the State of South Carolina”, “The Protestant Episcopal Church in South Carolina”, “the Protestant

Episcopal Church in the Diocese of South Carolina”, “The Protestant Episcopal Diocese of South Carolina”, “The Diocese of South Carolina” and “the Episcopal Diocese of South Carolina”. *Id.* ¶ 2.

In November 2010, the South Carolina Secretary of State registered the following service marks to the DSC as owner: “The Diocese of South Carolina”; “The Episcopal Diocese of South Carolina”; “The Protestant Episcopal Church in the Diocese of South Carolina” and the DSC seal in color and black and white. *Id.* ¶31. The DSC withdrew its association with TEC in October 2012. *Id.* ¶ 37. None of the Defendant Parishes have ever been members of TEC or TECSC. *Id.* ¶ 54. Thirteen of the Defendant parishes are legislatively chartered. *Id.* ¶ 60. Eight were legislatively chartered pursuant to Article 38 of the 1778 South Carolina Constitution. *Id.* ¶ 63. Ten Defendant parishes preexisted the formation of the DSC, TEC, TECSC and the United States. *Id.* ¶ 62. TECSC was first organized in January 26, 2013. *Id.* ¶82. Of particular relevance to this case, is the following finding of fact:

The Plaintiffs’ names and marks were not derived from TEC. The word “episcopal” is used in many other churches unrelated to TEC. Before TEC was created, “Episcopal” and “Episcopal Church” were part of some of the Plaintiffs corporate names and some were called “denominations” by the South Carolina legislature. Before TEC was created, the words “Protestant Episcopal Church” were used to describe the Moravian Church by the English Parliament in 1749 and were part of the names of pre-existing state church organizations who later formed the association comprising TEC.

Id. ¶ 81. Additionally, the record in this case, which by consent order adopts all discovery done in the state case except requests for admission (ECF 64), adds additional factual depth to this finding.

The DSC and the former Anglican parish churches that created it in May 1785 were referred to as “episcopal”, “episcopalian”, “episcopal churches”, and “Protestant Episcopal Churches” before TEC was organized in 1789. Thirteen “Protestant Episcopal Churches”

subscribed to the DSC's constitution on May 31, 1786. It states its subscribers are delegates of "our respective Protestant Episcopal Churches..." Declaration No. 1 of Andrew Platte in Support of Defendants Mot. for Summary Judgment, Exhibit 1 - DSC 56; *See also*, Frederick Dalcho, *An Historical Account of the Protestant Episcopal Church in South Carolina*, Charleston, SC: E. Thayer, 1820) at 473. Eight of the Defendant parishes were subscribers: St. Philips (Charleston), St. Michaels (Charleston), St. Helena (Beaufort), Old St. Andrew (Charleston), Trinity Edisto (Edisto Island), Prince George (Georgetown), St. John's (Johns Island), Christ Church (Mt. Pleasant). All eight were legislatively chartered, called themselves "episcopal" or "episcopalians" or members of an "Episcopal Church" in their petitions to the legislature. They were called "episcopal" in both the statutes incorporating them and in the names given them by the legislature. The legislature declared their names to be theirs "forever hereafter". Declaration No. 2 of Andrew Platte – Formation Documents of Defendant, Parishes, Exhibits 1, 2, 5, 7, 8, 9, 10, 13.

Moreover, neither these Defendant parishes nor the DSC were the first to use "Protestant Episcopal". There were other state organizations created by former anglican parishes who called themselves "Protestant Episcopal" as early as 1780. ECF 20-12 at 23 (Affidavit of Dr. Jeremy Bonner April 8, 2013). Even earlier, the English Parliament called the United Brethern Church (Moravian) an "ancient Protestant Episcopal Church" in a 1749 Act. Declaration No. 6 of Andrew Platte – Defendants' Expert Reports, Exhibit 7 - Expert Report of Dr. Jeremy Bonner at 3 (October 18, 2018). Still earlier, in 1688, the two principal protestant religious groups in Maryland were referred to as "Roman Catholic and the Protestant Episcopal". *Id.* at 3-4.

The words "episcopal", "Episcopal", and "Episcopalian" were commonly used in the 17th and 18th centuries to refer to worshiping communities and their clergy before TEC was organized. *Id.* at 4-12. The Church of England was viewed not only as an "episcopal church" whose members

were “Episcopalians of the Church of England”, *Combe v. Brazier*, 2 S.C. eq. 431, 443, 444 (1806) but also as a “Protestant Episcopal Church.” *Vestry of St. Luke’s Church v. Matthews*, 4 S.C. Eq. 578, 581, 585 (1815). (St. Luke’s was incorporated in 1788 as the “Protestant Episcopal Church of St. Luke’s” and before its incorporation was with the “Protestant Episcopal Church of England.”). There were similar uses by Defendant parishes in this action.

In addition to the legislative acts creating “episcopal” churches after petitions by “episcopalian” worshippers, there were also internal parish documents and public documents that used these terms. On July 7, 1784, St. Helena sought a “clergyman of the Episcopalian Church.” Exhibit 1 - Final Order at 44, n. 23; Declaration No. 6 of Andrew Platte – Defendants’ Expert Reports, Exhibit 7 at 15. Published in Charleston in 1787, the “South Carolina and Georgia Almanac, 1788” refers to the “Two Episcopal...Churches” in Charleston¹ and also to the “Society for the relief of the Widows and Orphans of the Clergy of the Protestant Episcopal Church, in the State of South Carolina, instituted 21st April 1762, incorporated 22nd March, 1786.” Declaration No. 1 of Andrew Platte in Support of Defendants Mot. for Summary Judgment, Exhibit 7 (DEF-120718-013-014).

As previous filings in this action make clear, the parties dispute the sequence of events between 1785 and 1789 concerning the formation of the Episcopal Church. *See* ECF 6-19 (Affidavit of Dr. Robert Mullin); 6-17 (Affidavit of Dr. Walter Edgar); 20-10 (Declaration of Dr. Colin John Podmore); 20-11 (Declaration of Dr. Gillis J. Harp); 20-12 (Affidavit of Dr. Jeremy Bonner). It is clear that nothing about that dispute affects the dates of first use of the word “episcopal”, “Episcopal”, “episcopalian”, “Episcopalian”, “Episcopal Church”, “Protestant

¹ The full quote follows: “There are twelve places of worship, viz. Two Episcopal and two Independent Congregational churches, one Baptist, one Scotch Presbyterian, one French Calvinist, one German Lutheran, and one Methodist church; a Roman Catholic chapel, and two Jewish synagogues.” Declaration No. 1 of Andrew Platte in Support of Defendants Mot. for Summary Judgment, Exhibit 7 (DEF-120718-013-014).

Episcopal” and “Protestant Episcopal Church”. These terms were all used before TEC used them not only by the DSC and some of those parishes that formed the DSC, but also by the legislature in its incorporation of parishes, the English Parliament, as well as other state associations of former anglican parishes.

In 2007, TEC received registrations from the USPTO for certain trademarks. The date of first use for “The Protestant Episcopal Church in the United States of America” was 1/1/1837. The date of first use for “The Episcopal Church” was 1/1/1967. Those dates of first use have never been amended even after renewal in 2017. Declaration No. 3 of Andrew Platte – Trademark Registrations Owned by The Episcopal Church, Exhibits A, B, D, G.

C. Third Party Use

Not only were the terms “episcopal” and “episcopal church” used by Defendant parishes who preexisted TEC’s formation, these terms have been, since at least 1784, used by many other denominations in the United States without any objection by TEC.

Eleven third party depositions were taken of religious denominations who use various combinations of the words “episcopal” and “episcopal church” in their names and in their operations. They have all used these terms in the furtherance of their religious services without objection by The Episcopal Church. A summary of these depositions is attached. Declaration No. 4 of Andrew Platte – Summary of Third Party Depositions, Exhibit A. The denominations and churches deposed include The Southern Episcopal Church of the United States, The African Methodist Episcopal Zion Church, The Charismatic Episcopal Church, The Episcopal Missionary Church and St. Luke’s Episcopal Church, The Communion of Evangelical Episcopal Church, the African Methodist Episcopal Church, The Christian Methodist Episcopal Church, The United Episcopal Church of North America, and the Christian Episcopal Church.

III. Argument

A. STANDARD OF REVIEW

(1) Rule 56 governing principles

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. *Harleysville Mut. Ins. Co. v. Packer*, 60 F.3d 1116, 1119 (4th Cir. 1995). Summary judgment exists to “isolate and dispose of factually unsupported claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Parties against whom summary judgment is sought cannot create a genuine issue of fact through mere speculation or the building of one inference upon another. *Harleysville Mut. Ins. Co.*, 60 F.3d at 1120. “[T]he existence of a mere scintilla of evidence in support of the [plaintiff’s] position is insufficient to withstand the summary judgment motion.” *Garcon v. Cruz*, No. 6:13-cv-2450-RMG, 2014 WL 5106893, at *2, *10 (D.S.C. Oct. 10, 2014) (Gergel, J.). A summary judgment motion requires a district court to look beyond the pleadings and inquire as to whether there is a genuine need for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The “party opposing summary judgment must produce evidence establishing every element on which it bears the burden of proof.” *Scheduled Airlines Traffic Offices, Inv. v. Objective, Inc.*, 180 F.3d 583, 593 (4th Cir. 1999) (citing *Celotex*, 477 U.S. at 323).

(2) No right to jury trial

In this case, resolution of Plaintiffs’ claims on summary judgment is particularly appropriate because Plaintiffs are only seeking injunctive and equitable relief. During discovery, Plaintiffs informed the Court they were not seeking damages. And in their last amended Complaints of record (*Third Amended Complaint* of the Plaintiff Bishops and TECSC (DE 146)

and *Second Amended Complaint* of TEC (DE 150), Plaintiffs do not seek damages; instead, the Plaintiffs only seek injunctive and equitable relief.

B. All of Plaintiffs’ claims related to the mark “The Episcopal Church” fail as a matter of law because the mark is generic and therefore invalid.

(1) The genericness doctrine

The Court of Appeals for the Fourth Circuit has ruled on a number of occasions – and on summary judgment – that generic marks are not protectable. *Retail Servs., Inc. v. Freebies Publ’g*, 364 F.3d 535 (4th Cir. 2004) (affirming finding of genericness as a matter of law for “Freebies” mark despite federal registration).² Indeed, even trademarks that are “incontestable” must be cancelled if they are generic:

[A] registration is subject to cancellation at anytime ‘if the registered mark becomes the generic name for the goods or services . . . for which it is registered.’ 15 U.S.C. § 1064(3). As we observed before, a generic word can never function as a trademark or receive a certificate of registration as one. Even an incontestable mark, therefore, comes within the reach of § 1064(3) and may be canceled if it becomes generic. *See Park ‘N Fly*, 469 U.S. at 195, 105 S. Ct. 658. *Retail Services*, 364 F.3d at 548.

Under the Lanham Act, trademarks identify and distinguish goods produced by one person “from those manufactured or sold by others and . . . indicate the source of the goods. *Id.* at 538 (quoting 15 U.S.C. § 1127). A trademark is supposed to signify to the public that the goods or services bearing the mark originate from the same source and “all goods bearing the trademark are of an equal level of quality.” *Id.*³ So a mark is not protectable as a trademark unless it is distinctive

² *See also Hunt Masters Inc. v. Landry’s Seafood Rest. Inc.*, 240 F.3d 251 (4th Cir. 2001) (affirming D.S.C. finding of genericness for “Crab House” on preliminary injunction motion despite plaintiff’s proffered survey evidence of distinctiveness); *Ale House Mgmt., Inc. v. Raleigh Ale House, Inc.*, 205 F.3d 137 (4th Cir. 2000) (affirming finding of genericness for “Ale House” as a matter of law); *Convenient Food Mart, Inc. v. 6-Twelve Convenient Mart, Inc.*, 870 F.2d 654 (4th Cir. 1989) (Table) (unpublished) (affirming finding of genericness as a matter of law despite incontestable registration); *Evans v. Paramount Pictures Corp.*, 7 F. App’x 270, 271 (4th Cir. 2001) (unpublished) affirming finding of genericness as a matter of law despite registrations owned by plaintiff).

³ Quoting 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 3.2 (4th ed. 2003).

by “distinguishing the applicant’s goods from those of others” and identifying the source of those goods. *Id.*⁴ Indeed, a generic mark is the “antithesis” of a distinctive mark because “a ‘generic’ mark [] merely employs ‘the common name of a product or service’⁵ or “refers to the genus of which the particular product is a species.” *Id.*⁶ Thus, “by definition,” a generic mark neither indicates the source of the goods nor distinguishes the specific product from other products in the marketplace. *Id.*

For these reasons, the Fourth Circuit has made clear that “a generic mark *cannot* be protected as trademark nor registered as one.” *Id.* (emphasis[added]).⁷ The Fourth Circuit explained that “[t]he concepts of ‘generic name’ and ‘trademark’ are mutually exclusive” because a generic name ‘can never function as a mark to identify and distinguish the products of only one seller.’” *Id.*⁸

The Court of Appeals for the Fourth Circuit has also articulated the public policy interest undergirding the rule that businesses cannot monopolize generic marks to prevent others, including competitors, to market their own brands:

From a policy standpoint, of course, if a business were permitted to appropriate a generic word as its trademark, it would be “difficult for competitors to market their own brands of the same product. Imagine being forbidden to describe a Chevrolet as a ‘car’ or an ‘automobile’ because Ford or Chrysler or Volvo had trademarked these generic words.”

*Id.*⁹

In a case strikingly similar to our case and in a very recent opinion, the Court of Appeals for the Second Circuit affirmed a finding that the mark “Universal Church” for religious services

⁴ Quoting *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 112 S. Ct. 2753 (1992).

⁵ *Id.* (quoting *Sara Lee Corp. v. Kayser-Roth Corp.*, 81 F.3d 455, 464 (4th Cir. 1996)

⁶ Quoting *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 105 S. Ct. 658 (1985).

⁷ Citing *Two Pesos*, 505 U.S. at 768, 112 S. Ct. 2753; *Sara Lee*, 81 F.3d at 464; *Larsen v. Terk Techs. Corp.*, 151 F.3d 140, 148 (4th Cir. 1998).

⁸ Quoting McCarthy at § 12:1.

⁹ Quoting *Blau Plumbing, Inc. v. S.O.S. Fix-It*, 781 F.2d 604, 609 7th Cir. 1986).

was generic. *Universal Church v. Toellner*, 2018 WL 5783687 (2d Cir. Nov. 2, 2018) (summary order). In finding “Universal Church” generic, in a thoughtful opinion the District Court for the Southern District of New York explained that trademark law is not intended to “create a monopoly” over terms “necessary to describe a product [or service] characteristic.” *Universal Church v. Universal Life Church*, 2017 WL 3669625, *10 (S.D.N.Y. Aug. 8, 2017).¹⁰ The District Court further explained that trademark law could not grant a monopoly over that mark for church names and religious services because the “law is not intended to allow the mark to be weaponized by plaintiff in that way.” *Id.* The District Court ruled that “Universal Church” is generic because its primary significance is a “type” of church rather than indicating particularly only the plaintiff:

[W]e hold that the primary significance of “universal church” to the relevant public is a type of church rather than plaintiff, namely one that considers itself to be universal in the sense of representing the entire Christian church.

Id. at *9.¹¹

Similarly, this Court ruled as a matter of law that the mark “crab house” was generic and denied the request for a preliminary injunction to the owner of the “Charleston Crab House” restaurant.

¹⁰ Citing and quoting *Genesee Brewing Co.*, 124 F.3d at 144 (quoting *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 305 (3d Cir. 1986)); see also *CES Pub. Corp. v. St. Regis Publ'ns, Inc.*, 531 F.2d 11, 13 (2d Cir. 1975) (“To allow trademark protection for generic terms, i.e., names which describe the genus of goods being sold, even when these have become identified with a first user, would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are.”); cf. *Miller Brewing Co.*, 561 F.2d at 80-81 (“Other brewers whose beers have qualities that make them ‘light’ as that word has commonly been used remain free to call their beer ‘light.’ Otherwise a manufacturer could remove a common descriptive word from the public domain by investing his goods with an additional quality, thus gaining the exclusive right to call his wine ‘rosé,’ his whiskey ‘blended,’ or his bread ‘white.’”).

¹¹ Citing and quoting *Self-Realization Fellowship Church*, 59 F.3d at 909-10 (finding that “Self-Realization Fellowship Church” was generic because the “evidence suggests that a ‘Self-realization’ organization is a class of organization dedicated to spiritual attainment in the manner taught by Yoga, not an organization that is part of [plaintiff’s] chain of churches”); *Rudolph Int’l, Inc. v. Realys, Inc.*, 482 F.3d 1195, 1198 (9th Cir. 2007) (“Our review of the record amply supports the district court’s conclusions [that ‘disinfectable’ as applied to nail files is generic]. The district court correctly found that the term ‘disinfectable’ has a history of established use as a generic adjective within the nail care industry as well as in other fields such as medicine and dentistry. For example, the district court noted that ‘disinfectable’ is included in at least 25 patents issued since 2001.”); *Miller Brewing Co. v. G. Heileman Brewing Co.*, 561 F.2d 75, 80-81 (7th Cir. 1977) (finding that “light” had “been widely used in the beer industry for many years” to describe certain beer characteristics, that such use “long antedated” plaintiff’s, and concluding that “even if Miller had given its light beer a characteristic not found in other light beers, it could not acquire the exclusive right to use the common descriptive word ‘light’ as a trademark for that beer”).

The Court of Appeals for the Fourth Circuit affirmed the ruling that “crab house” was a generic term and was not protectable as a trademark or service mark. *Hunt Masters, Inc. v. Landry’s Seafood Restaurant, Inc.*, 240 F.3d 251 (4th Cir. 2001). The Fourth Circuit has also ruled as a matter of law that the mark “Ale House” is generic “just as similar terms such as ‘bar,’ ‘lounge,’ ‘pub,’ ‘saloon,’ or ‘tavern.’” *Ale House Mgmt, Inc. v. Raleigh Ale House*, 205 F.3d 137, 141 (4th Cir. 2000).

If “the term at issue was regularly used [generically] before the plaintiff sought trademark protection,” then the term was generic at inception—or ab initio—and cannot achieve trademark protection. *Schwan’s IP, LLC v. Kraft Pizza Co.*, 460 F.3d 971, 975-76 (8th Cir. 2006) (“brick oven” for pizza).¹² This is true even if the plaintiff was the first to assert rights in the generic word.¹³ It is also true even if a plaintiff is able to show that some consumers have come to associate the generic term with a single source (i.e., de facto secondary meaning). *Schwan’s*, 460 F.3d at 974. “[T]he repeated use of ordinary words functioning within the heartland of their ordinary meaning, and not distinctively, cannot give [a plaintiff] a proprietary right over those words, even if an association develops between the words and [the plaintiff].” *Boston Duck Tours, LP v. Super Duck Tours, LLC*, 531 F.3d 1, 21 (1st Cir. 2008) (internal quotation omitted).

Even if not generic at the time of their adoption, marks may become generic through “genericide,” which occurs when “the generic meaning becomes the primary or principal significance of the designation to prospective purchasers.”¹⁴ Though these marks may have started

¹² See also *Harley-Davidson, Inc. v. Grottanelli*, 164 F.3d 806, 810 (2^d Cir. 1999) (acronym “HOG” generic for motorcycle); *Miller Brewing Co. v. G. Heileman Brewing Co.*, 561 F.2d 75, 77 (7th Cir. 1977) (“light” or “lite” for beer); 2 McCarthy § 12:11.

¹³ “The Court will withhold trademark protection for generic terms to avoid the creation of a monopoly in favor of the first provider of goods or services.” *Nassau*, 59 F. Supp. 2d at 1237; see also *Kellogg v. Nat’l Biscuit*, 305 U.S. 111, 116 (1938) (“shredded wheat”).

¹⁴ Restatement (Third) of Unfair Competition (“Restatement”) § 15 cmt. c (1995); *Schwan’s*, 460 F.3d at 974; see also 15 U.S.C. § 1064(3) (providing for cancellation of registrations for marks that become generic).

as protectable, they become generic through common generic use.¹⁵ Notable examples include *Bayer Co. v. United Drug Co.*, 272 F. 505, 511 (S.D.N.Y. 1921) (“aspirin”) and *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 321 F.2d 577, 579-81 (2d Cir. 1963) (“thermos”). Once a mark has become generic, it enters the public domain and cannot be claimed exclusively by any single user. *Nassau*, 59 F. Supp. 2d at 1238-39.

C. The terms “episcopal” and “The Episcopal Church” were generic *ab initio*

In addition to the Statement of Facts section above, Defendants’ religious historian, Dr. Grant Wacker of the Duke University Divinity School, provides a concise summary of his opinion of the generic use of “episcopal” and “Episcopal Church” in the United States and that dates back to First Century.

The word “episcopal” derives from the Greek word *episkopos*, meaning overseer, and the Latin word *episcopus*, meaning bishop. In English, in reference to American denominations, the adjective *episcopal* has for hundreds of years come to refer to the means of organizing and exercising spiritual governance; almost always by bishops. The noun *episcopacy* has come to refer to a council of overseers or council bishops that govern spiritually the group.

The notion of episcopacy usually entails the principle of apostolic succession. This means that there has been a continuous line of blessing or authorization stretching from the Jesus to the apostles to the early church “Fathers” to the popes to the bishops of the Church of England to the bishops of various Episcopal and Protestant Episcopal Churches in the United States. This includes hundreds of non-PECUS bishops in numerous episcopal churches and religious organizations in the US and in the worldwide Anglican communion (including Africa).

In sum, spiritual governance by a bishop of other clergy, perpetuated through the spiritual authority of apostolic succession, is the core of episcopacy. The term episcopal is thus a generic reference to a particular form of organization and spiritual authority running from the 1st century to the present, including when used in a church name. In the United States, use of episcopal, including in church names, is not defined by a single religious entity.

...

¹⁵ *Nassau*, 59 F. Supp. 2d at 1238; see also *Murphy Door Bed Co. v. Interior Sleep Sys., Inc.*, 874 F.2d 95, 101 (2d Cir. 1989).

To see how widely used, and thus generic, the term and concept of episcopacy has been in the history of Christianity in general, and in American Christianity in particular, it is useful to look back and look around. Until the Protestant Reformation of the 16th century, the vast majority of Christians—which is to say Catholics—explicitly acknowledged governance by an episcopacy consisting of bishops and council of bishops, with the pope at the top. Today the term is still commonly used among Catholic theologians to refer to their higher leaders of bishops and councils of bishops, the episcopacy.

Turning to Protestants, since the 16th and especially since the 18th centuries many groups have acknowledged spiritual governance by an episcopacy consisting of bishops or overseers or elders. Hence the frequency of the word episcopal in their public titles.

Declaration No. 6 of Andrew Platte Defendants’ Expert Reports, Exhibit 8 - Dr. Wacker Expert Report, pp. 1-2

As Dr. Wacker explained, since the 16th century and especially since the 18th century, the use of the word “episcopal” with religious organizations in the United States, including in the name of Episcopal Churches, was generic.¹⁶

D. Even if not generic ab initio, the terms “episcopal” and “The Episcopal Church” have become generic since their adoption by Plaintiffs.

As Defendants point out in their other *Motion for Summary Judgment regarding the Trademark-Related Claims*, TEC has admitted that it did not begin using the mark “The Episcopal Church” until 1967. Even if not generic ab initio, the terms “episcopal” and “The Episcopal Church” have become generic since before and after adoption by Plaintiffs.

(1) Dictionaries show that “episcopal” and “Episcopal Church” are generic terms and not trademarks.

Courts may consider the meaning of individual words in determining the meaning of the entire mark. *Hunt Masters, Inc. v. Landry's Seafood Restaurant, Inc.*, 240 F.3d 251, 254 (2001)

¹⁶ Dr. Wacker’s opinion concerning the generic use of episcopal and Episcopal Church is consistent with the expert reports of Dr. Bonner and Dr. Fairfield. See Declaration No. 6 of Andrew Platte Defendants’ Expert Reports, Exhibit 7, 6.

(affirming District of South Carolina (Charleston Division) ruling that mark “crab house” is generic).¹⁷ As in the *Landry’s Seafood Restaurant* case, “here, the meaning of the individual words is fairly clear.” The Oxford Dictionary defines “church” as a building used for public Christian worship and a sub definition of that as “a particular Christian organization with its own clergy, buildings, and distinctive doctrine,” “the hierarchy of clergy within a particular Christian Church” or “institutionalized religion as a political or social force.” Declaration No. 1 of Andrew Platte in Support of Defendants Mot. for Summary Judgment, Exhibit Ex. 3 DEF-120718-001-003.

Moreover, the dictionary definitions for episcopal and the meaning of an Episcopal Church are consistent with Dr. Wacker’s expert report and opinion that episcopal means of bishops, and an episcopal organization or Episcopal Church is a church with bishops. For example, in Plaintiff TEC’s own submission to Patent and Trademark Office in Response to an Office action, TEC attached pages from the “Answers.com” website concerning the definitions of these terms. TEC’s submission defined episcopal: “The word episcopal is derived from the Greek episkopos, which literally means “overseer”; the word, however, is used in religious contexts to refer to a bishop.” Declaration No. 3 of Andrew Platte – Trademark Registrations Owned By The Episcopal Church, Exhibit H (DEF-112618-115) (TEC Response to Office Action, dated Jan. 30, 2006). TEC also defined Episcopal Churches: “Episcopal churches are the churches with bishops, those with episcopalian church governance, but generally those whose bishops are in Apostolic Succession.” *Id.* These definitions in TEC’s submissions to the Trademark Office clearly describe “episcopal” as a generic term for bishops, and “Episcopal Church” as a generic term for churches or religious organizations with bishops.

¹⁷ *Liquid Controls Corp. v. Liquid Control Corp.*, 802 F.2d 934, 938 (7th Cir.1986).

Also, the Oxford Dictionary defines “episcopal” as “of a bishop or bishops” and “(of a Church) governed by or having bishops.” Declaration No. 1 of Andrew Platte in Support of Defendants Mot. for Summary Judgment, Exhibit Ex. 4 DEF-120718-004-006. “Episcopacy” is defined as “Government of a Church by bishops” and a sub definition of that as “the bishops of a region or church collectively” or “the office of a bishop.” *Id.* at Ex. 5 DEF-120718-007-009. Finally, it defines “Episcopalian” as an adjective that means “of or advocating government of a Church by bishops” and a sub definition of that as “of belonging to an episcopal Church” or a noun meaning “a person who advocates government of a Church by bishops” and a sub definition of that as “a member of the Episcopal Church.” *Id.* at Ex. 6 DEF-120718-10-12.

(2) Plaintiff’s own generic use of “episcopal” and “Episcopal Church” demonstrates the terms are generic.

“Evidence of the owner’s generic use, in particular, ‘is strong evidence of genericness,’” *Retail Services, Inc. v. Freebies Publishing*, 364 F.3d 535, 545 (4th Cir. 2004) (affirming summary judgment of genericness for “Freebies” mark and finding probative mark owner’s generic use of the mark) (quoting 2 McCarthy at § 12.13). In this case, TEC uses the generic term “episcopal,” “Episcopal Church,” and other derivations of the word “episcopal” on its website. For example, under TEC’s list of “Episcopal Seminaries” the text describes these institutions as “Episcopal” seminary, and “Episcopal center of learning.” Declaration No. 1 of Andrew Platte in Support of Defendants Mot. for Summary Judgment, Exhibit Ex. 2 (DEF-110718-160-161). The listed institutions are recognized for many different denominations other than TEC and including the Episcopal Missionary Church, the North American Lutheran Church, the Anglican Church in North America along with different streams of orthodox Anglicanism – evangelical, charismatic, and Anglo-Catholic. *Id.*

Further, under a page of “Brief Dictionary of Terms” that a bishop’s function is to consecrate to the “episcopate” and a Diocese was “the territorial limits of jurisdiction of a diocesan bishop.” DEF-110718-162. The “History of the American Church” describe clergy seeking “episcopal consecration” and that once a bishop was consecrated he could return to the United States and the “episcopate” could declare their independence from Great Britain. Declaration No. 1 of Andrew Platte in Support of Defendants Mot. for Summary Judgment, Exhibit 2 (DEF-110718-1173). Under the American Church Polity section on the same webpage, it describes the central governance of TEC as “episcopally dominated,” referring to the bishops within the church. DEF-110718-174.

(3) Competitor and third party use – totaling tens of millions of active church members in the United States and dwarfing Plaintiffs church membership – demonstrates that “episcopal and “Episcopal Church” are generic.

The Fourth Circuit, and other federal courts, have made clear that third-party generic use of the alleged mark is highly probative to show that a mark is generic. “Other common sources [of evidence relevant to genericness] include evidence of generic use by competitors, generic use of the term by the mark's owners, and use of the term by third parties in trademark registrations.” *Retail Servs., Inc. v. Freebies Publ’g*, 364 F.3d 535, 544-45 (4th Cir. 2004) (affirming finding of genericness and noting the term in issue was used on “scores of other websites on the internet”); (citation omitted); *see also Colt Def., LLC v. Bushmaster Firearms, Inc.*, 486 F.3d 701, 706 (1st Cir. 2007) (use by “several” competitors probative of genericness).

(a) Many significant religious church organizations in the United States – some with millions of active church members and use dating back to as early as 1784 – use “Episcopal Church” in their church name because they have an episcopal organization with bishops.

As Plaintiff TEC admitted to the United States Patent and Trademark Office in its Response to Office Action dated January 30, 2006, literally there are dozens of religious church organizations that use “Episcopal Church” (or “Episcopal” and “Church” in their name). In its Response, TEC admitted the use of Episcopal Church by eight other churches: Reformed Episcopal Church; African Methodist Episcopal Church (www.amecnet.org); Christian Methodist Episcopal Church (www.c-m-e.org); Calvary Episcopal Church (www.calvarypgh.om); Pohick Episcopal Church (www.pohjck.org); All Saints Episcopal Church (www.allsaints.org); St. Andrews Episcopal Church (www.standrewsaa.org); and Grace Episcopal Church (www.gracechurchamherst.org). *See* Declaration No. 3 of Andrew Platte – Trademark Registrations Owned by The Episcopal Church ¶ 10 & Ex. H at DEF-112618-069.

Further Dr. Wacker, Defendants’ Expert on Religious History, listed fourteen separate religious organizations currently using “Episcopal Church” or “Episcopal” and “Church” in their names and who are not affiliated with any of the Plaintiffs. Dr. Wacker Expert Report, Section Two, at pp. 4 to 11 (listing fourteen Episcopal Churches in the U.S. and detailed information regarding each Episcopal Church). And Dr. Wacker reports there are far more than the fourteen listed, and these churches have millions of members, with the total number far exceeding the church members of Plaintiffs. Moreover, each of the church organizations have bishops, which is why the churches have “Episcopal Church” in their church name.

And some of these religious organizations have been using “Episcopal Church” in their names for more than 200 years, and most of them for at least the past 30 to 50 years.

Most of these religious organizations with “Episcopal Church” in their names have bishops, many also have dioceses, and many also have a presence in the Southeastern United States, including in South Carolina and in the Low Country of South Carolina. These organizations collectively have millions of members that dwarf the membership of Plaintiff the national Episcopal Church. The list below is not exhaustive as there are a number of additional religious organizations in the

United States of varying sizes that currently have “Episcopal” and “Church” in their names.

Declaration No. 6 of Andrew Platte Defendants’ Expert Reports, Exhibit 8 - Dr. Wacker Expert Report, Section Two, at p. 4.

And many of these third parties have millions of active church members in the United States and some have been using “Episcopal Church” in their names for hundreds of years. And several of them have filed federal registrations for trademarks but they disclaimed the mark “Episcopal Church.” In the United States, it is estimated that TEC currently has approximately 1.6 million church members. On the other hand, when one adds up each of the other episcopal churches that currently have Episcopal Church in their name, the number reaches approximately 2.875 million to 3.2 million, which approximately twice as many as TEC’s membership. *See* Declaration No. 5 of Andrew Platte Membership Numbers in the United States, Exhibit 1, 2. In addition, if one adds to those churches the members of churches that are episcopal (with bishops) like the former Methodist Episcopal Church (now United Methodist Church), which remains an episcopal organization with bishops,¹⁸ that membership rises to more than 11 million church members in the United States, which is almost seven times as many church members as those currently in TEC.

Defendants deposed eleven third party religious denominations who use various combinations of the words “episcopal church” and “episcopal” in their names and in their operations. Each of these religious organizations testified that have all used these terms in the furtherance of their religious services because they have bishops in governance of their organizations. A summary of these depositions is attached as Declaration No. 4 of Andrew Platte – Summary of Third Party Depositions, Exhibit A. Almost all of them claim Apostolic succession

¹⁸ Dr. Wacker Expert Report at pp. 2-3.

to the very beginning of the Christian Church in the First Century. Many of them claim use for more than 100 years and some for more than two centuries. All of their use of “episcopal” and “episcopal church” has been without objection by TEC or the Plaintiffs.

The denominations and churches deposed include The Reformed Episcopal Church, The Southern Episcopal Church of the United States, The African Methodist Episcopal Zion Church, The Charismatic Episcopal Church, The Episcopal Missionary Church and St. Luke’s Episcopal Church, The Communion of Evangelical Episcopal Church, the African Methodist Episcopal Church, The Christian Methodist Episcopal Church, The United Episcopal Church of North America, and the Christian Episcopal Church. Individually and combined, the testimony of the bishops from these third-party religious churches and organizations shows conclusively the widespread and generic use of “Episcopal Church” in church names, particularly in the United States.

(b) Third parties have used “Episcopal Church” in their trademark registrations.

In addition to the religious organizations discussed above with tens of millions of church members and using “Episcopal Church” in their church names, religious organizations not related to the Plaintiffs have filed at least twelve separate federal registrations in the U.S. Patent and Trademark Office for trademarks with “Episcopal Church” in the name including:

- Reformed *Episcopal Church*
- Traditional Reformed *Episcopal Church*
- Charismatic *Episcopal Church*
- Charismatic *Episcopal Church* of North America
- Communion of Evangelical *Episcopal Churches*
- Emmanuel *Episcopal Church*
- Mother Emanuel AME Church
- The African Methodist *Episcopal Zion Church*
- Women In Ministry in the African Methodist *Episcopal Church*

See Exhibit 2 (listing the 28 federal trademark registrations and the individual pages for registrations by third parties).

(c) Plaintiffs have failed to police use by third parties of the term “Episcopal Church,” which strongly supports finding “The Episcopal Church” mark is generic.

A trademark owner’s failure to police its marks (i.e., taking steps to prevent others from infringing the marks) results in the mark becoming generic by the widespread third-party use. See 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 17:8 (5th ed.) (“Sometimes a mark becomes abandoned to generic usage as a result of the trademark owner’s failure to police the mark, so that widespread usage by competitors leads to a generic usage among the relevant public, who see many sellers using the same word or designation.”); *BellSouth Corp. v. White Directory Publishers, Inc.*, 42 F. Supp. 2d 598, 607–08 (M.D.N.C. 1999).¹⁹

In this case, TEC and plaintiffs have not presented any evidence that they have taken any steps to police the use of the Episcopal Church marks. As noted above, there is no evidence that Plaintiffs have taken any steps against the fourteen churches Dr. Wacker listed that are using “Episcopal Church” in their church name, and some of them for over 200 years. Dr. Wacker Report their name listed in Dr. Wacker’s report at pp. 4 to 11 (Declaration of Andrew Platte No. 6 - Exhibit 8). Moreover, regarding the eleven third-party churches Defendants deposed and listed above, each of them testified without qualification that neither TEC nor any entity has sued them or otherwise demanded that they stop using “Episcopal Church” in their respective church names. See Declaration No. 4 of Andrew Platte Summary of Third Party Depositions, Exhibit A.

¹⁹ *BellSouth Corp. v. DataNational Corp.*, 60 F.3d 1565, 1570 (Fed. Cir. 1995) (“While the ‘Walking Fingers’ logo may once have been a strong candidate for trademark protection, through common usage by virtually all classified directory publishers it can no longer be understood to represent a source of the directories.”); 3 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 17:17 (5th ed.) (“Without question, distinctiveness can be lost by failing to take action against infringers. If there are numerous products in the marketplace bearing the alleged mark, purchasers may learn to ignore the ‘mark’ as a source identification. When that occurs, the conduct of the former owner, by failing to police its mark, can be said to have caused the mark to lose its significance as a mark.”).

4. Defendants’ Survey evidence proves consumer understanding that “Episcopal Church” is a generic term and not protectable as a trademark.

(a) Mr. Poret’s Survey on Genericness of TEC’s “The Episcopal Church” mark

Defendants presented the expert report and survey on genericness of Mr. Hal Poret. Mr. Poret’s performed the well-accepted Teflon survey to test for the genericness of the mark “The Episcopal Church.” See Declaration No. 6 of Andrew Platte Defendants’ Expert Reports, Exhibit

1 - Poret Expert Report and Survey. A summary of Mr. Poret’s survey results follow:

- 55.3% of respondents (166 of 300) identified “The Episcopal Church” to be a category of various organizations. Only 43% of the respondents found the mark to be related to a specific organization.
- 61.0% of respondents (122 of 200) identified “Episcopal Church” to be a category of various organizations. Only 38.5% of respondents (77 of 200) identified “Episcopal Church” to be a trademark name of one specific organization.

Poret Report at 17 (Declaration of Andrew Platte No. 6, Exhibit 1).

Based on these results, Mr. Poret concluded that the survey shows that both “The Episcopal Church” and “Episcopal Church” are more frequently perceived to be generic terms than trademarks. *Id.*²⁰

In trademark law and genericness surveys, if the survey finds that the majority of the respondents perceive the mark to be generic than identifying a trademark or particular source, then the mark is generic. 2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 12:6 (5th ed.) (“The result of the primary significance rule [codified in 15 U.S.C. § 1064(3)] is that

²⁰ As discussed in the Detailed Findings section of Mr. Poret’s report, these conclusions apply both to the subgroup of Episcopalians and the subgroup from other denominations. Mr. Poret’s survey was comprised of two separate Groups: One Group of 300 respondents were shown and questioned about the term “The Episcopal Church.” A second Group of a separate 200 respondents were shown and questioned concerning the term “Episcopal Church.” The Teflon format assessed whether a term is generic. Following the Teflon format, respondents in the survey were shown a series of terms (including one of the two terms at issue) one at a time and for each term, respondents were asked if they believe the term is a trademark of one specific organization (i.e. a trademark) or a category of various organizations (i.e. generic), if they know.

majority usage controls.”); *Big Island Candies, Inc. v. Cookie Corner*, 269 F. Supp. 2d 1236, 1251 (D. Haw. 2003) (“[F]or a genericness survey, majority usage controls.”). Thus, Mr. Poret’s genericness survey and expert opinion strongly supports a finding that “The Episcopal Church” and “Episcopal Church” are generic.

(b) The Court should exclude or give no weight to the Keegan Report if proffered by Plaintiffs.

For all of the reasons discussed in *Defendants’ Motion to Exclude the Expert Report of Mr. Keegan* (ECF 598) (filed on December 7, 2018), under Fed. R. Evid. 403 and 702 and the standards of *Daubert* and the Court’s gatekeeping role, the Court should either exclude or give no weight to Mr. Keegan’s Report concerning genericness. As explained in the *Motion to Exclude*, Mr. Poret’s Supplemental Expert Report and Genericness Survey proves that Mr. Keegan’s survey and methodology are completely unreliable and irrelevant.

The exclusion of, or giving no weight to, Mr. Keegan’s proffered report gives Mr. Poret’s conclusions and survey even more weight given they are un rebutted by any credible expert survey on genericness by Plaintiffs. Also, a plaintiff’s failure to present a credible genericness survey showing recognition of its term as a trademark, weighs in favor of a finding the term is generic. *U.S. Search, LLC v. U.S. Search.com, Inc.*, 300 F.3d, 526 (4th Cir. 2002).

E. The policies underlying trademark law strongly support finding that “episcopal” and “Episcopal Church” are generic to prevent Plaintiffs from weaponizing the generic terms against other churches.

As noted above, the Fourth Circuit has ruled that the public policy interest demands that generic marks cannot receive trademark or service mark protection. *Retail Servs., Inc. v. Freebies Publ’g*, 364 F.3d 535, 538 (4th Cir. 2004); *Universal Church v. Universal Life Church*, 2017 WL 3669625, *10 (S.D.N.Y. Aug. 8, 2017). In this case, the public policy interest is even stronger

given the retaliatory nature of the lawsuit Plaintiffs filed in this case over marks Defendants have been using in some instances for 240 years or more.

F. Because Plaintiff TEC’s “Episcopal Church” mark is generic, its federal registration should be cancelled.

If a mark that has been registered is generic, may be canceled if it becomes or is found to be generic. *Retail Servs., Inc. v. Freebies Publ’g*, 364 F.3d 535 (4th Cir. 2004) (affirming finding of genericness as a matter of law for “Freebies” mark despite federal registration); *Universal Church v. Universal Life Church*, 2017 WL 3669625, *10 (S.D.N.Y. Aug. 8, 2017), *aff’d*, *Universal Church v. Toellner*, 2018 WL 5783687 (2d Cir. Nov. 2, 2018) (affirming finding on summary judgment that term “Universal Church” is generic) (summary order). Because the marks “The Episcopal Church” and “Episcopal Church” are generic, the Court should order that the federal registrations for those marks should be cancelled. Also, to the extent that TEC has not disclaimed “Episcopal Church” from its Asserted Marks, those marks also should be cancelled.

IV. CONCLUSION

For all of the reasons explained above, the Court should grant Defendants motion for summary judgment and rule that TEC’s mark “The Episcopal Church” is generic and it should be cancelled from the federal register. In addition, any of TEC’s Assert Marks that include “Episcopal Church” should also be cancelled to the extent TEC does not disclaim any right to “Episcopal Church.” Additionally, because this is an exceptional case in which, among other things, Plaintiffs are attempting to assert against Defendants a clearly generic term and filed the lawsuit in retaliation for the Defendants disassociating from TEC, Defendants request that they be awarded its costs and attorneys’ fees under 17 U.S.C. § 117(a)(3).

Respectfully submitted,

/s/Andrew S. Platte

C. Alan Runyan, Esq.
Andrew S. Platte, Esq.
RUNYAN & PLATTE, LLC
2015 Boundary Street, Suite 239
Beaufort, SC 2902
(843)-473-6800

/s/ Lance A. Lawson

Lance A. Lawson
McNAIR LAW FIRM
Bank of American Plaza
101 South Tryon Street, Suite 2610
Charlotte, NC 28280

Henrietta U. Golding, Esq.
McNAIR LAW FIRM
P.O. Box 336
Myrtle Beach, SC 29578
(843) 444-1107

C. Mitchell Brown, Esq.
NELSON, MULLINS, RILEY & SCARBOROUGH, LLP
1320 Main Street, 17th Floor
Columbia, SC 29201
(803) 255-9595

Charles H. Williams, Esq.
WILLIAMS & WILLIAMS
P.O. Box 1084
Orangeburg, SC 29116-1084
(803) 534-5218

David Cox, Esq.
BARNWELL WHALEY PATTERSON & HELMS, LLC
288 Meeting Street, Suite 200
Charleston, SC 29401
(843) 577-7700

*The Rt. Rev. Mark J. Lawrence, The Protestant Episcopal
Church In The Diocese of South Carolina; and The*

Trustees of the Protestant Episcopal Church of South Carolina,

/s/ C. Alan Runyan

C. Alan Runyan, Esq.
Andrew S. Platte, Esq.
RUNYAN & PLATTE, LLC
2015 Boundary Street, Suite 239
Beaufort, SC 2902
(843)-473-6800

Church of The Cross, Inc. and Church of the Cross Declaration of Trust, The Church of Our Saviour, of the Diocese of South Carolina, The Protestant Episcopal Church, of the Parish of Saint Philip, in Charleston South Carolina, The Protestant Episcopal Church, The Parish of Saint Michael in Charleston, in the State of South Carolina and St. Michael's Church Declaration of Trust, The Vestry and Church Wardens of the Episcopal Church of the Parish of St. Helena and the Parish Church of St. Helena Trust, Trinity Episcopal Church, Edisto Island, St. David's Church, Vestry and Church Wardens of the Episcopal Church of the Parish of St. John's Charleston County, Vestry and Church Wardens of St. Jude's Church of Walterboro, The Vestries and Churchwardens of the Parish of St. Andrew, Old Saint Andrews Parish Church; Holy Trinity, Grahamville; St. Alban's Chapel, The Citadel; St. John's Episcopal, Charleston; St. Andrew's Mission

/s/ C. Pierce Campbell

C. Pierce Campbell, Esq.
TURNER, PADGET, GRAHAM & LANEY
319 South Irby Street, P.O. Box 5478
Florence, SC 29501
(843) 662-9008

All Saints Protestant Episcopal Church, Inc.; St. Bartholomews Episcopal Church; The Church of the Holy Cross; The Vestry and Church Wardens of The Parish of St. Matthew Holy Apostles, Barnwell; St. James Anglican, Blackville; St. Barnabas, Dillon; Ascension, Hagood; St. Paul's Orangeburg; Historic Church of the Epiphany, St. Johns, Berkeley

/s/ I. Keith McCarty

I. Keith McCarty, Esq.

McCARTY LAW FIRM, LLC
P.O. Box 30055
Charleston, SC 29417
(843) 793-1272
Christ St. Paul's Episcopal Church

/s/ John E. Cuttino
John E. Cuttino, Esq.
GALLIVAN, WHITE & BOYD, P.A.
1201 Main Street, Suite 1200
Post Office Box 7368 (29202)
Columbia, South Carolina 29201
(803) 724-1714
Church Of The Holy Comforter; St. Matthias Episcopal Church, Inc.; St. Matthews Church; Christ Episcopal Church, Mars Bluff Community, Florence County, South Carolina; Trinity Episcopal Church, Pinopolis

/s/ C. Pierce Campbell
C. Pierce Campbell, Esq.
TURNER, PADGET, GRAHAM & LANEY
319 South Irby Street, P.O. Box 5478
Florence, SC 29501
(843) 662-9008

Robert R. Horger, Esq.
HORGER, BARNWELL & REID, LLP
P.O. Drawer 329
1459 Amelia Street
Orangeburg, SC 29115
(803) 531-3000
Church Of The Redeemer

/s/ William A. Scott
William A. Scott, Esq.
PEDERSEN & SCOTT, PC
775 St. Andrews Blvd.
Charleston, SC 29407
(843) 556-5656
Holy Trinity Episcopal Church

/s/ John Furman Wall
John Furman Wall, Esq.
140 Wando Reach Court
Mt. Pleasant, SC 29464
(843) 408-3433

and

Henry P. Wall, Esq.
151 Meeting Street / Sixth Floor
Post Office Box 6110
Columbia, SC 29260
(803) 252-7693

The Church Of The Good Shepherd, Charleston, SC

/s/ Harry R. Easterling, Jr.

Harry R. Easterling, Jr., Esq.
EASTERLING LAW FIRM, PC
120 North Liberty Street
Post Office Box 611
Bennettsville, South Carolina 29512
843-454-1711

*St. David's Church; St. Paul's Episcopal Church of
Bennettsville, Inc.*

/s/ Mark V. Evans

Mark V. Evans, Esq.
147 Wappoo Creek Drive., Ste. 202
Charleston, SC 29412
(843) 762-6640
St. James' Church, James Island, S.C.

/s/ David B. Marvel

David B. Marvel, Esq.
DAVID B. MARVEL, LLC
P.O. Box 22734
Charleston, SC 29413
(843) 853-4877

and

David L. DeVane, Esq.
110 N. Main Street
Summerville, SC 29483
(843) 285-7100

The Church of St. Luke and St. Paul, Radcliffeboro

/s/ William A. Bryan

William A. Bryan, Esq.
BRYAN & HAAR
P.O. Box 14860

Surfside Beach, SC 29587
(843) 238-3461
The Church Of The Resurrection, Surfside

/s/ P. Brandt Shelbourne
P. Brandt Shelbourne, Esq.
SHELBOURNE LAW FIRM
131 E. Richardson Avenue
Summerville, SC 29483
(843) 871-2210
*The Vestry and Wardens Of St. Paul's Church,
Summerville;
St. Timothy's, Cane Bay*

/s/ Susan MacDonald
Susan MacDonald, Esq.
Jim Lehman, Esq.
NELSON, MULLINS, RILEY & SCARBOROUGH, LLP
BNC Bank Corporate Center, Suite 300
3751 Robert M. Grissom Parkway
Myrtle Beach, SC 29577
(843) 448-3500

And

/s/ Andrew M. Connor
Andrew M. Connor, Esq.
NELSON, MULLINS, RILEY & SCARBOROUGH, LLP
Liberty Center, Suite 600
151 Meeting Street
Charleston, SC 29401-2239
(843) 853-5200

/s/ J. Andrew Yoho
Paul E. Sperry
J. Andrew Yoho
CARLOCK, COPELAND & STAIR, LLP
40 Calhoun Street, Suite 400
Charleston, SC 29401
(843)727-0307
Trinity Church of Myrtle Beach

/s/ Allan P. Sloan, III
Allan P. Sloan, III, Esq.
Joseph C. Wilson IV, Esq.
PIERCE, SLOAN, WILSON, KENNEDY & EARLY,
LLC

321 East Bay Street; P.O. Box 22437
Charleston, SC 29413
(843) 722-7733
*Vestry and Church-Wardens Of The Episcopal Church Of
The Parish Of Christ Church*

/s/ Henrietta U. Golding
Henrietta U. Golding, Esq.
McNAIR LAW FIRM
P.O. Box 336
Myrtle Beach, SC 29578
(843) 444-1107
St. Luke's Church; Grace Parish, North Myrtle Beach

/s/ Harry A. Oxner
Harry A. Oxner, Esq.
OXNER & STACY
235 Church Street
Georgetown, SC 29440
(843) 527-8020
*Christ the King, Waccamaw; The Vestry and Church
Wardens Of The Episcopal Church Of The Parish Of Prince
George Winyah*

/s/ Lawrence B. Orr
Lawrence B. Orr, Esq.
ORR, ELMORE & ERVIN
504 South Coit Street, P.O. Box 2527
Florence, SC 29503-2527
(843) 667-6613

and

Saunders M. Bridges, Jr., Esq.
AIKEN BRIDGES ELLIOTT TYLER & SALEEBY, PA
181 E. Evans Street, Suite 409
Post Office Drawer 1931
Florence, SC 29503
(843) 669-8787
St. John's Episcopal Church of Florence, S.C.

/s/ Lawrence B. Orr
Lawrence B. Orr, Esq.
ORR, ELMORE & ERVIN
504 South Coit Street, P.O. Box 2527
Florence, SC 29503-2527

(843) 667-6613
Church of the Advent, Marion

/s/ Robert S. Shelton
Robert S. Shelton, Esq.
THE BELLAMY LAW FIRM
1000 29th Avenue
Myrtle Beach, SC 29577
(843) 448-2400
St. Paul's Episcopal Church of Conway

/s/ Karolan Ohanesian
Karolan Ohanesian, Esq.
OHANESIAN & OHANESIAN
Post Office Box 2433
Myrtle Beach, SC 29578
(843) 626-7193
The Well Ministries

/s/ Ryan A. Earhart
Ryan A. Earhart, Esq.
EARHART OVERSTREET LLC
P.O. Box 22528
Charleston, SC 29413
(843)-972-9400

And

Robert A. Kerr, Esq.
MOORE & VAN ALLEN
78 Wentworth Street
Charleston, SC 29401
Church of the Holy Cross, Sullivan's Island