IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

The Right Reverend Charles G. vonRosenberg, individually and in his capacity as the former Provisional Bishop of The Episcopal Church in South Carolina and The Right Reverend Gladstone B. Adams, III, individually and in his capacity as the Provisional Bishop of The Episcopal Church in South Carolina,

Plaintiffs,

The Episcopal Church,

Plaintiff in Intervention,

The Episcopal Church in South Carolina,

Plaintiff in Intervention,

vs.

The Right Reverend Mark J. Lawrence, et al.

Defendants.

Case No. 2:13-cv-00587-RMG

DEFENDANTS' MOTION TO EXCLUDE TESTIMONY AND REPORTS OF MR. ROBERT KLEIN AND MEMORANDUM OF LAW IN SUPPORT

NOW COMES, Defendants, 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; 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; 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; Christ St. Paul's Episcopal Church; 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; Church Of The Redeemer; Holy Trinity Episcopal Church; The Church Of The Good Shepherd, Charleston, SC; St. Paul's Episcopal Church of Bennettsville, Inc.; St. James' Church, James Island, S.C.; The Church of St. Luke and St. Paul, Radcliffeboro; The Church Of The Resurrection, Surfside; The Protestant Episcopal Church, Of The Parish Of St. Philip, In Charleston, In The State of South Carolina; The Vestry and Wardens Of St. Paul's Church, Summerville; St. Timothy's, Cane Bay; Trinity Church of Myrtle Beach; Vestry and Church-Wardens Of The Episcopal Church Of The Parish Of Christ Church; St. Luke's Church; Grace Parish, North Myrtle Beach; Christ the King, Waccamaw; The Vestry and Church Wardens Of The Episcopal Church Of The Parish Of Prince George Winyah; St. John's Episcopal Church of Florence, S.C.; Church of the Advent, Marion; St. Paul's Episcopal Church of Conway;

The Well Ministries; Church of the Holy Cross, Sullivan's Island; and Berkeley County Strawberry Chapel, (collectively "The Defendants") by and through their undersigned attorneys, and pursuant to Federal Rules of Civil Procedure and Rules of Evidence move before this Honorable Court for an order precluding the Plaintiffs from presenting opinion testimony from Plaintiffs' purported expert, Mr. Robert L. Klein.

INTRODUCTION

In this trademark action, Plaintiffs have submitted the Expert Report and opinions of Mr. Klein on the issue of likelihood of confusion. To measure the likelihood of confusion between the Plaintiffs' and Defendants' marks, Mr. Klein conducted a survey. However, as detailed below, Mr. Klein's survey should be excluded as irrelevant and unreliable under Fed. R. Evid. 403 and 702 and the standards of Daubert and its progeny for the following reasons: (1) his survey did not test the Defendant Diocese's mark as it is used in the marketplace; (2) his survey lacked an appropriate control; (3) his survey utilized an improper leading question; and (4) Mr. Klein's improper coding resulted in inflated "confusion" rates.

LEGAL STANDARD

Federal Rule of Evidence 702 permits an expert to testify where the expert's "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue," so long as the expert's opinion is "based on sufficient facts or data," "is the product of reliable principles and methods," and the expert "has reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702.

In assessing the admissibility of expert testimony, a district court assumes a "gatekeeping role" under Federal Rule of Evidence 104 to ensure that the "testimony both rests on a reliable foundation and is relevant to the task at hand." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509

U.S. 579, 597 (1993).[1]

Daubert distinguished the scientific principles of validity and reliability; to be scientific, a theory need not be established as true, it must simply be reliable as evidence, i.e. trustworthy. Id. While, this could be determined in a number of ways, a trial court's inquiry must remain flexible to account for the subject matter, looking for "scientific validity—and thus the evidentiary relevance and reliability" focusing "solely on principles and methodology, not on the conclusions that they generate." Id. at 594-95. If the trial court determined that the testimony was reliable, it was then charged with the duty to determine if it would assist the trier of fact. That is, the testimony must be "helpful"; it must be relevant and fit the issues in dispute in the case.

The district court's inquiry is a "flexible one," whose focus "must be solely on principles and methodology, not on the conclusions that they generate." Id. at 594–95. Daubert's design is to "make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). A district court may consider a wide variety of factors to evaluate the reliability of expert testimony, including "testing, peer review, error rates, and 'acceptability' in the relevant scientific community." Id. at 141, 119 S.Ct. 1167; In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig., 892 F.3d 624, 631 (4th Cir. 2018).

In Kumho, the Court found that Daubert's principles applied to all expert matters, holding that Rule 702 "establishes a standard of evidentiary reliability" and "requires a valid . . . connection to the pertinent inquiry." In any expert testimony, the trial judge must simply determine whether

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[1] Rule 104(a) states "[p]reliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court." Fed. R. Evid. 104.

the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." Id. at 152 (citations omitted). The question is only "whether [a] particular expert [has] sufficient, specialized knowledge to assist the jurors "in deciding the particular issues in the case." Id. at 156.

Therefore, the court must engage in a three part inquiry to determine the admissibility of expert testimony under Fed. R. Evid. 702. Specifically, whether (1) [T]he expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. See Paoli R.R. Yard PCB Litig., 35 at 741 (3d Cir. 1994) (Courts must focus "on the trilogy of restrictions on expert testimony: qualification, reliability and fit.").

Although there is some overlap among the inquiries into an expert's qualifications, the reliability of his proffered opinion and the helpfulness of that opinion, these are distinct. Therefore, an expert's overwhelming qualifications are by no means a guarantor of reliability. By the same token, a reliable opinion expressed by a genuinely qualified expert may not help the jury if it does not pertain to a fact at issue in the case.

Under Rule 104(a) and 702, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993). To be reliable, the proponent of the testimony must establish that (1) "the testimony is the product of reliable principles and methods," that (2) "the expert has reliably applied the principles and methods to the facts of the case," and (3) that the "testimony is based on sufficient facts or data." Fed.R.Evid. 702(b), (c), (d). "This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically

valid," Daubert, 509 U.S. at 592–93, 113 S.Ct. 2786, and whether the expert has "faithfully appl[ied] the methodology to facts." In re Lipitor (Atorvastatin Calcium) Mktg., Sales Practices & Prod. Liab. Litig., 174 F. Supp. 3d 911, 920 (D.S.C. 2016), Aff'd 892 F.3d 624 (4th Cir 2018) (citing Roche v. Lincoln Prop. Co., 175 Fed.Appx. 597, 602 (4th Cir.2006). "The proponent of the [expert] testimony must establish its admissibility by a preponderance of proof." Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199 (4th Cir.2001).

Factors to be considered include "whether a theory or technique ... can be (and has been) tested," "whether the theory or technique has been subjected to peer review and publication," the "known or potential rate of error," the "existence and maintenance of standards controlling the technique's operation," and whether the theory or technique has garnered "general acceptance." Id. These factors are neither definitive nor exhaustive, and "merely illustrate[ ] the types of factors that will bear on the inquiry." Id. Courts have also considered whether the "expert developed his opinions expressly for the purposes of testifying," or through "research they have conducted independent of the litigation" and whether experts have "failed to meaningfully account for ... literature at odds with their testimony." Id. (citing Wehling v. Sandoz Pharm. Corp., 162 F.3d 1158 (4th Cir.1998), Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1317 (9th Cir.1995) (on remand), McEwen v. Baltimore Washington Med. Ctr. Inc., 404 Fed.Appx. 789, 791–92 (4th Cir.2010).

Rule 702 also requires courts "to verify that expert testimony is 'based on sufficient facts or data . . . to determine if that data provides adequate support to mark the expert's testimony as reliable." E.E.O.C. v. Freeman, 778 F.3d 463, 472 (4th Cir.2015) (quoting Fed. R. Evid. 702(b)). The court may exclude an opinion if "there is simply too great an analytical gap between the data and the opinion offered." Id.

MR. KLEIN'S SURVEY AND OPINIONS

At Plaintiffs' request, Mr. Klein attempted to perform an internet survey to measure "the degree to which relevant individuals would be confused by the South Carolina Registrations, 'The Protestant Episcopal Church in the Diocese of South Carolina' and 'The Episcopal Diocese of South Carolina', and believe that churches with these names are affiliated with The Episcopal Church." (Klein Rpt., p. 5, attached hereto as "**Exhibit A**").

Relevant to this discussion, Mr. Klein's survey showed respondents one of the following terms: **THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA** and **THE EPISCOPAL DIOCESE OF SOUTH CAROLINA**. (Ex. A, p. 10). The survey also tested the following control: **THE PROTESTANT CHURCH IN THE DISTRICT OF SOUTH CAROLINA**. The survey then asked respondents to answer "yes" or "no" to the following question: "Do you or do you not believe that this group of churches is affiliated with a national or international organization?" Id. If the answer was "yes", the survey then asked the respondents to identify the name of the organization. Mr. Klein and his assistants then coded the responses as indicating a perceived affiliation (or lack thereof) with TEC.

ARGUMENT

I. Mr. Klein's opinions should be excluded because his survey did not test the Defendant Diocese's mark as it is used in the marketplace.

In order to be relevant and, thus, admissible, a trademark survey must "replicate market conditions" including how the marks appear to the public. Valador, Inc. v. HTC Corp., 242 F. Supp. 3d 448, 462 (E.D. Va.), aff'd, 707 F. App'x 138 (4th Cir. 2017); See also Water Pik, Inc. v. Med–Sys., Inc., 726 F.3d 1136 (10th Cir. 2013) (upholding exclusion of a likelihood of trademark confusion survey that did not show the parties' marks as they actually appeared on packaging in

the marketplace); Malletier v. Dooney & Bourke, Inc., 525 F.Supp.2d 558 (S.D.N.Y. 2007) ("A survey that uses a stimulus that makes no attempt to replicate how the marks are viewed by consumers in real life may be excluded on that ground alone." (citing Am. Footwear Corp. v. Gen. Footwear Co., 609 F.2d 655 n.4 (2d Cir. 1979) (observing that the district court properly rejected a survey that failed to replicate "actual market conditions"))).

Here, Mr. Klein's survey wholly failed to replicate market conditions because Mr. Klein failed to test the mark actually used by the Defendant Diocese. The Defendant Diocese currently uses the mark "Diocese of South Carolina" when it publicly refers to itself. [Exhibit C - Deposition of Jim Lewis at 26]. However, Mr. Klein's survey did not test that mark. Instead, Mr. Klein used tested two marks owned by the Defendant Diocese but seldom used in public, namely: "THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF SOUTH CAROLINA" and "THE EPISCOPAL DIOCESE OF SOUTH CAROLINA". Both of the tested marks contain the word "episcopal" while the mark publicly used by the Defendant Diocese—"Diocese of South Carolina"—does not. Consequently, Mr. Klein's survey provides no assessment of the likelihood of confusion from the use of the non-"episcopal" mark "Diocese of South Carolina".

Furthermore, respondents to Mr. Klein's survey saw the Defendant Diocese's nonpublic marks in a complete vacuum and without context. This is especially important in light of the undisputed practice of both the Defendant Diocese's and the Plaintiffs to advise current and potential parishioners of the ongoing dispute and multiple lawsuits between the parties. This additional "market" information would be critical in a parishioner's sophisticated and complex decision in choosing a church to attend. Without it, Mr. Klein's survey is useless. Thus, the failure to test the publicly used mark of the Defendant Diocese or construct the survey to mimic actual market conditions renders Mr. Klein's survey results both unreliable under Fed. R. Evid. 702 and

irrelevant under Fed. R. Evid. 402 because it did not even test the mark used by Defendant Diocese in the "marketplace."

II. Mr. Klein's opinions should be excluded because his survey lacked an appropriate control.

"As courts routinely hold, a survey's lack of a control group or control questions constitutes yet another ground for granting a Rule 702 motion to exclude." Valador, Inc. v. HTC Corp., 242 F. Supp. 3d 448, 463 (E.D. Va.), aff'd, 707 F. App'x 138 (4th Cir. 2017). As the Tenth Circuit has recognized, where, as here, a survey reflects "raw figures" and the "raw confusion rate" among respondents, those figures "are usually unhelpful ... in predicting likelihood of confusion, because [these figures] can be inflated by background noise, or false positives arising from something other than the particular confusion that is alleged and that the survey aims to capture." Water Pik, Inc. v. Med-Sys, Inc., 726 F.3d 1136, 1148 (10th Cir. 2013) (upholding the district court's conclusion that a survey was "devoid of any probative value and therefore irrelevant ... because [of] several serious methodological flaws in the survey" (citation omitted)). Indeed, the McCarthy treatise echoes this principle, noting,

> [A] properly constructed survey has at least two groups of respondents: one group (the "test cell") is shown the allegedly infringing mark; the second group (the "control cell") is shown a mark similar in appearance to the test cell, except for the designation whose influence is being tested.

6 McCarthy on Trademarks § 32:187. In other words, a properly constructed likelihood of trademark confusion survey will "isolate confusion arising specifically from the contested mark [by] substitut[ing] for the contested mark a control mark that shares as many characteristics with the contested mark as possible, with the key exception of the characteristic whose influence is being assessed." Water Pik, Inc., 726 F.3d at 1148. Accordingly, "[b]y discounting for confusion arising from the control, the survey can measure net confusion, or 'the difference between the raw

confusion percent and the control confusion percent.' " *Id.* at 1148–49 (quoting 6 McCarthy on Trademarks § 32:187). Put succinctly: a control helps ensure reliable results. Valador, Inc., 242 F. Supp. 3d at 463–64.

Here, Mr. Klein's survey lacked an appropriate control. Mr. Klein's opinion relies on the coding as "confused" a variety of survey responses that include the term "episcopal". In order to scientifically determine the actual rate of confusion, an appropriate control is needed to screen the "background noise" created by the words used in the survey itself. In other words, an allegedly non-infringing control term which included the word "episcopal" should have been used to determine the rate at which respondents simply reiterated a word found in the survey stimulus in their response. The failure to include such a control means that the "background noise" created by the presence of the word "episcopal" was not measured and, thus, not subtracted from the "raw confusion" rate. Thus, Mr. Klein failed to utilize any supposedly non-infringing mark to discount any raw confusion from the allegedly infringing marks he did test.

As observed by Defendant's expert, Hal Poret, the importance of such a control is made apparent because "virtually no one answered that [the control mark] is affiliated with a national 'episcopal' organization when it does not contain the generic term "episcopal." (Expert Rpt. Of Hal Poret, p. 18, excerpts attached hereto as "**Exhibit B**"). Thus, respondents shown one of the test cells may have simply reiterated "episcopal" in their answer because it was present in the stimulus. This is precisely the "background noise" that requires appropriate controls to filter out to ensure reliable survey results. Mr. Klein's failure to test a non-infringing control mark with the term "episcopal" leads to survey results that are "inflated by background noise, or false positives" and, thus, unreliable. Water Pik, Inc., 726 F.3d at 1148. As a result, his survey results are unreliable and should be excluded under Rule 702.

III. Mr. Klein's opinions should be excluded because his survey utilized an improper leading question.

The survey is also unreliable because the questions were improperly suggestive. Suggestive questions render a survey unreliable by creating "demand effects" or "cues" from which a respondent can "infer the purpose of the survey and identify the 'correct' answers." Valador, Inc. v. HTC Corp., 242 F. Supp. 3d 448, 465 (E.D. Va.), aff'd, 707 F. App'x 138 (4th Cir. 2017) (quoting 6 McCarthy on Trademarks § 32:172). In other words, leading questions "bias the survey by suggesting to respondents, at least implicitly, that they should believe there is at least some sort of relationship between the different items when the possibility might not even have occurred to the vast majority of consumers who see the items." *Simon Prop. Grp. L.P. v. mySimon, Inc.*, 104 F.Supp.2d 1033, 1048 (S.D. Ind. 2000). Thus, "[a] survey question that begs its answer by suggesting a link between plaintiff and defendant cannot be a true indicator of consumer confusion." *Scott Fetzer Co. v. House of Vacuums Inc.*, 381 F.3d 477, 488 (5th Cir. 2004) (rejecting a survey that asked, "Looking at this ad, would you say that this company is in any way affiliated with, connected with, sponsored by, associated with or authorized by the Kirby Company?").

Here, Mr. Klein's survey does precisely what it should not: It improperly suggested a link between the tested marks and a "national or international organization." Mr. Klein's survey presented the following question:

> Q1. Do you or do you not believe that this group of churches is affiliated with a national or international organization?

[Klein Report, p. 10 of Exhibit A]. Thus, the questions creates a "demand effect" or "cue" which improperly leads the respondent to assume that there is such an association with a national organization and answer in accordance with that survey-generated assumption. This is fundamentally different from a typical confusion questions which might ask whether or not the

tested marks were affiliated with *any other organization*. In such a hypothetical example, the improper cues are missing and the respondent is not led to assume any affiliation exists or what type of organization such an affiliation would be with. By contrast, Mr. Klein's survey does the opposite: It implicitly suggests an affiliation with a national organization. Because of the presence of "episcopal" in both of the tested marks, Mr. Klein's suggestive question improperly and invariably leads respondents to assume and answer, when prompted, that the tested marks are affiliated with a "national or international" "episcopal" church—precisely the response favored by Plaintiffs. "Thus, because the survey is improperly suggestive, it must be excluded as unreliable." Valador, 242 F. Supp. 3d at 466.

IV. Mr. Klein's improper coding resulted in inflated "confusion" rates.

Courts have excluded survey results based on improper coding which inflates the reported "confusion" rates of the respondents. See THOIP v. Walt Disney Co., 788 F. Supp. 2d 168, 183 (S.D.N.Y. 2011) (excluding survey that "improperly counted certain responses as indicating confusion"); see also Bd. of Regents, Univ. of Tex. Sys. ex rel. Univ. of Tex. at Austin v. KST Elec., Ltd., 550 F. Supp. 2d 657, 676 (W.D. Tex. 2008) (rejecting results from Klein survey because of similarly improper and biased coding).

Here, as set out in detail in the Expert Report of Hal Poret (attached hereto as "**Exhibit B**"), a large majority of the answers Mr. Klein coded as "confused" do not even mention TEC or its marks. For instance, numerous respondents—counted as "confused" by Mr. Klein—simply typed the word "episcopal" or some variation thereof without any mention of TEC or its marks. These respondents likely focused on the term "episcopal" presented in both the test and control cells and reiterated it as the assumed response. Similarly, a large number of respondents provided the answer "episcopal church" and were counted as "confused." Notably, this is not TEC's mark.

But, furthermore, for the more than two-thirds of respondents who identified as either "Episcopalian" or "Christian", such a response connecting the presented term "episcopal" with "church" needs no great leap of logic such to constitute "confusion". Moreover, many of the survey answers indicate that respondents—improperly influenced by a suggestive question (see above)—merely tacked on a geographic descriptor of national or international designation to the word "episcopal" and Mr. Klein included those responses as "confused." All of these coding examples resulted in coding of responses as "confused" which, in fact, such responses were inconclusive at best. Thus, Mr. Klein's coding of such a broad range of responses as "confused" improperly inflated the survey "results" and renders any testimony or evidence concerning the survey unreliable and inadmissible under Rule 702.

CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court exclude the testimony and opinions of Mr. Robert Klein and the results of his survey from consideration at the trial of this case.

December 7, 2018 Respectfully submitted,

/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

/s/ Henrietta U. Golding
Henrietta U. Golding, Esq.

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

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

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