THE STATE OF NEW HAMPSHIRE

THE SUPREME COURT

IN RE TRUST OF MARY BAKER EDDY

CASE NO. 2018-0309

BRIEF OF APPELLANT SECOND CHURCH OF CHRIST, SCIENTIST, MELBOURNE, AUSTRALIA

ON APPEAL FROM DECISIONS OF THE CIRCUIT COURT, DOVER PROBATE DIVISION (COMPLEX TRUST DOCKET)

PIERCE ATWOOD LLP
Michele E. Kenney
N.H. Bar No. 19333
One New Hampshire Avenue, Suite 350
Portsmouth, NH 03801

DLA PIPER LLP (US)
Stuart Brown
Admitted *Pro Hac Vice*
1201 North Market Street, Suite 2100
Wilmington, Delaware 19801

FOEHL & EYRE, PC
Robert B. Eyre
Admitted *Pro Hac Vice*
432 North Easton Road
Glenside, PA 19038

To Be Argued By:
Stuart Brown or Robert B. Eyre

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QUESTIONS PRESENTED

1. Whether the Probate Court (King, J.) erred in holding that Second Church of Christ, Scientist, Melbourne, Australia ("Second Church") lacks special interest standing to request certain affirmative relief in proceedings concerning the Trusts created under Clause 6 and Clause 8 of the Will of Mary Baker Eddy. Appendix ("App.") 494-529, 566-70, 591-97, 605-12; Transcript of Hearing, Nov. 3, 2017 ("Tr."), 26-27, 40, 42-44.

2. Beyond its erroneous application of the special interest standing doctrine, whether the Probate Court (King, J.) erred in denying Second Church's motion for appointment of an independent trustee to the Clause 8 Trust, pursuant to RSA 564-B:7-704(e), in rulings that:

(a) acknowledge, but fail adequately to remedy, a conflict of interest plaguing the Trustees of the Clause 8 Trust, who serve in the conflicted dual role as Directors of The First Church of Christ, Scientist ("The Mother Church"), and have treated The Mother Church as the sole beneficiary of the Clause 8 Trust, contrary to the Clause 8 Trust's stated charitable purposes;

(b) conflict with this Court's decision in *Fernald v. First Church of Christ, Scientist,* 77 N.H. 108 (1913), that the Directors of The Mother Church were not to administer the Clause 8 Trust;

(c) overlook common law and statutory restrictions concerning conflicts of interest and pecuniary interest transactions under RSA 7:19-a, II [Regulation of Certain Transactions Involving

Directors, Officers, and Trustees of Charitable Trusts] and RSA 564-B:8-803 [Duties and Powers of Trustee]; and

(d) improperly treat as law of the case an un-docketed, apparently *sua sponte* 1949 letter from a judge of the Probate Court (Gordon, J.) that, contrary to *Fernald*, permitted the conflicted Directors to remain the only Trustees of the Clause 8 Trust, thereby incorrectly holding Second Church to a "good cause" standard in seeking the appointment of an independent trustee.

App. 440, 461-93, 572-86, 591-97; Tr. 34-35, 38-44.

RELEVANT STATUTES[1]

1. RSA 7:19-a [Regulation of Certain Transactions Involving Directors, Officers, and Trustees of Charitable Trusts].
2. RSA 564-B:4-405 [Charitable Purposes; Enforcement].
3. RSA 564-B:7-704 [Vacancy in Trusteeship; Appointment of Successor].
4. RSA 564-B:8-803 [Impartiality].

[1] Pursuant to Rule 16(3)(c), the full text of these statutes is included in the Appendix. *See* App. 5-8.

STATEMENT OF CASE

This is an appeal from decisions of the Probate Court (King, J.) denying Second Church standing, under the special interest standing doctrine, to seek to enforce certain charitable trusts established under Clause 6 and Clause 8 of the Will of Mary Baker Eddy ("Clause 6 Trust," "Clause 8 Trust," respectively, and, collectively, "Trusts"). After a non-evidentiary hearing and briefing, the Probate Court ruled in an Order, dated March 19, 2018 ("March 2018 Order"), that Second Church lacks standing to enforce the Trusts, but also denied Second Church discovery to support its showing of standing.

Further, the Probate Court denied Second Church's request for the appointment of an independent trustee to the Clause 8 Trust to abate the harm caused and prevent future harm by the acknowledged conflict of interest afflicting those Trustees. Second Church's motions for reconsideration and to supplement the record to furnish further evidence in support of its standing to seek the appointment of an independent trustee (App. 591-620) were denied by Orders, dated May 3, 2018 and May 14, 2018.

This timely appeal followed.

STATEMENT OF FACTS

This case concerns the administration of New Hampshire Trusts formed under the Will of Mary Baker Eddy ("Mrs. Eddy"), the founder of the religion of Christian Science. Mrs. Eddy died in 1910. The Clause 8 Trust has the declared purpose of "promoting and extending the religion of Christian Science as taught by me [Mary Baker Eddy]." March 2018 Order at 5.

The issues before this Court arise out of the undisputed fact that administration of the Clause 8 Trust has fallen into the hands of five trustees whose dual role as Directors of the First Church of Christ Scientist, in Boston, Massachusetts, also known and referred to as, "The Mother Church," leaves them hopelessly embedded in a conflict of interest. The facts relating to the conflict and its history and relationship to the issues on this appeal are set forth below, following this brief summary:

The conflict exists because The Mother Church—as one of many Christian Science churches—is a potential beneficiary of the Clause 8 Trust. The conflict of interest was recognized by the New Hampshire Attorney General and the Probate Court at the inception of the Trust in 1910, and addressed by the appointment of a sixth, independent trustee—a Concord, New Hampshire Banker named Josiah Fernald. Josiah Fernald was not replaced when he died in 1949, leaving the Clause 8 Trust in the exclusive control of the five, conflicted "Director-Trustees." This defect in the administration of the Trust went unnoticed until Second Church brought it to the attention of the Director of Charitable Trusts ("DCT") in 2015 and the DCT presented the issue to the Probate Court months later. App. 349.

Second Church has uncovered a trove of information concerning self-dealing and mismanagement that has plagued the Clause 8 Trust under the Director-Trustees' exclusive administration and presented this information to the DCT and alleged these circumstances in pleadings filed with the Probate Court on numerous occasions. Despite this, and repeated requests by Second Church, nothing was done to restore independence. Indeed, rather than address the need for an independent Trustee, the DCT accommodated the conflicted Trustees, assenting to relief requested by

them that, in some cases (and on the basis of information and arguments offered only by Second Church) was rejected by the Probate Court. The continued failure of the DCT to address the conflict, while continuing to assent to actions that only deepened the conflict—like their request to be excused from previously ordered annual audits—eventually led Second Church to seek standing to file its own motion to have an independent trustee appointed.

A. The Religion of Christian Science and Mrs. Eddy's Church

It is important to note at the outset that Mrs. Eddy founded both *a religion*—Christian Science; and *a church*—The First Church of Christ, Scientist, in Boston, Massachusetts. App. 497.

Briefly, the *religion* of Christian Science was discovered by Mrs. Eddy first, and explained in her many writings—the most important being her book, *Science and Health with Key to the Scriptures* ("*Science & Health*"). *Id.* In 1882, Mrs. Eddy created a deeds-based church called the First Church of Christ, Scientist—The Mother Church. *Id.*

The Mother Church is a voluntary association of individuals comprising a single congregation in Boston. Mrs. Eddy endowed The Mother Church with much property in her 1892 Church Trust Deed. App. 498. The Church Trust Deeds vested legal title to all or most of the property of *The Mother Church* in five trustees, known as the "Christian Science Board of Directors" (the "Directors"). The Directors were formed as a perpetual body corporate under Mrs. Eddy's 1892 Church Trust Deed to manage The Mother Church congregation and its assets, and are subject to the bylaws and tenets of her *Church Manual*. *Id.*

Branch churches, like Second Church, are connected to The Mother Church by shared membership and tenets, but are explicitly independent in their governance. App. 498. They have been an important vehicle for the promotion and extension of Christian Science supported by the Clause 8 Trust.

B. Formation and Early Years of The New Hampshire Trusts

Mrs. Eddy's Will provides for two Trusts. The Clause 6 Trust is an endowment, bequeathed to the Directors, in trust, with instruction to conservatively manage the principal of the Trust, "for the purpose of providing free instruction for indigent, well-educated, worthy Christian Scientists." March 2018 Order at 5. Clause 6 expressly provides that the Directors are to serve, as a body corporate, as the trustees of the Clause 6 Trust. The Directors who serve as Trustees of the Clause 6 do not have conflicting fiduciary duties because neither they nor The Mother Church are named beneficiaries.

By contrast, the Clause 8 Trust is expressed as a bequest, in trust, to The Mother Church congregation, with a clear purpose to distribute income and principal to "promote and extend" the religion of Christian Science as taught by Mrs. Eddy. The Clause 8 Trust named no individual trustees. These distinct characteristics of the Clause 8 Trust would have important implications for its administration, as indicated by a series of decisions in Massachusetts and New Hampshire at its inception.

The Directors have historically and consistently been hostile to the purpose and design of the Clause 8 Trust. In 1912, the Directors of The Mother Church brought suit, in Massachusetts, against the administrators of Mrs. Eddy's New Hampshire probate estate (including Josiah Fernald)

seeking to invalidate the Clause 8 Trust and have the assets distributed immediately to The Mother Church. *See Chase v. Dickey*, 212 Mass. 555, 99 N.E. 410 (1912). They were rebuffed in a decision that would not only affirm the validity of the Clause 8 Trust, but articulate certain fundamental precepts governing the nature, purpose, and administration of the Clause 8 Trust, including:

- That the Clause 8 Trust was *not a gift to The Mother Church*, but a gift to a charitable trust, to be administered by court-appointed trustees.[2]
- That the primary restriction and purpose of the Clause 8 Trust was "promoting and extending the religion of Christian Science" as taught by Mrs. Eddy (*see* Will, Clause 8);[3]
- That the other purpose of Clause 8— maintaining and repairing two Mother Church buildings in Massachusetts— was both distinct from and subordinate to the dominant purpose of "promoting and extending" the religion and did not benefit The Mother Church; but, rather, such restriction was construed as a charge on the Clause 8 Trust;[4]

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[2] *Chase*, 99 N.E. at 413-14.

[3] *Chase*, 99 N.E. at 415 ("The clause read as an entirety manifests a purpose to make this the dominating and real residuary purpose of the testatrix.").

[4] *Chase*, 99 N.E. at 415.

- And that this dominant purpose of "promoting and extending the religion of Christian Science as taught by [Mary Baker Eddy]" was not void for vagueness, but capable of interpretation and enforcement by a court.[5]

The Supreme Court of New Hampshire reached similar conclusions later that same year. *See Glover v. Baker*, 76 N.H. 393 (1912).

Not to be deterred, the Directors of the Mother Church pressed on with their quest to collapse the Clause 8 Trust corpus into The Mother Church in litigation before this Court asking, again, that the residuary of Mrs. Eddy's estate be distributed to The Mother Church. The New Hampshire Supreme Court responded (in *Fernald v. First Church of Christ, Scientist*, 77 N.H. 108, 88 A. 705 (1913)) by restating the fundamental precept of *Glover v. Baker*, that Clause 8 was a gift to a <u>*charitable trust*</u> and not to The Mother Church. *Fernald*¸ 77 N.H. at 109. The *Fernald* Court went further, however, and declared that the Clause 8 Trust would not be administered by the Directors in Massachusetts, but here, in New Hampshire,[6] by bonded trustees appointed by this Court.[7]

The Probate Court responded by appointing *six Trustees* in 1913: the five Directors of The Mother Church (*i.e.*, "Director-Trustees") and Josiah Fernald. Fernald was an independent, New Hampshire Trustee, who was

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[5] *Chase*, 99 N.E. at 416.

[6] *Fernald*, 77 N.H. at 110.

[7] *Id.*

neither a Director nor a Christian Scientist and an <u>*adverse*</u> party to the Directors in the *Chase v. Dickey* and *Fernald* litigation.

Fernald served as an independent Trustee of the Clause 8 Trust until his death in 1949, effectively protecting it from the embedded conflicts of the other Director-Trustees (App. 368.). After his death, for reasons unknown, Fernald was not replaced, leaving only the five, conflicted Director-Trustees in charge of the Clause 8 Trust since 1949.

Second Church has proffered undisputed evidence showing that during Fernald's tenure as Trustee and until approximately 1970, branch churches, reading rooms, and other Christian Science organizations (*excluding The Mother Church*) were the sole beneficiaries of the Clause 8 Trust.[8] App. 468-69, 488, 511, 521.

Branch churches extend and promote Christian Science as taught by Mrs. Eddy. The *Church Manual* specifies such a role for branch churches. Historical church documents also support this claim: In July 1924 (a mere fourteen years after Mrs. Eddy's death), *The Christian Science Journal* reported that in the preceding ten year period $2,775,000 in Trust distributions had been made. Of that sum, $1,775,000 had been distributed to branch organizations and churches to assist in promoting the religion. App. 26, 502. In the last issue before the Fernald's death, *The Christian Science Journal* reported:

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[8] Second Church's Brief *Amicus Curiae* shows that this pattern dramatically reversed thereafter to the point where, by the mid-1980s The Mother Church was the exclusive beneficiary of the Trust. App. 400, 417-18.

> The Trustees under the Will of Mary Baker Eddy were appointed by the New Hampshire Court to carry out Mrs. Eddy's intention that the major portion of her estate be devoted to the purpose of more effectually promoting and extending the religion of Christian Science as taught by her. One of the means by which the Trustees endeavor to accomplish this mission is by way of their offer to assist in paying for church buildings. They welcome the opportunity to award grants to branches of The Mother Church, with a view to aiding in the cancellation of the last remaining indebtedness on church property.

App. 26-27, 502-03 (quoting *The Christian Science Journal,* July 1948 (emphasis added)).

C. Modern Mismanagement of Trust Assets By The Director-Trustees and Intervention By The Director of Charitable Trusts

Upon Fernald's death in 1949, Judge Gordon S. Lord of the Probate Court, apparently *sua sponte*, sent a letter to the Trustees stating that it was "not necessary to fill the vacancy" and that the "five members of the Christian Science Board of Directors who are the surviving trustees" shall remain the "sole trustees" of the Clause 8 Trust. App. 436. That direction was startling for numerous reasons, the least of which is that it left the remaining trustees of the Clause 8 Trust embedded in a conflict. They were Directors of the Mother Church, but at the same time trustees for the Clause 8 Trust that held funds for the benefit of churches and other organizations beyond The Mother Church. Every distribution to be made from the Clause 8 Trust presents a conflict between the Director-Trustees' allegiance to The Mother Church and their duty of loyalty to the larger class of beneficiaries of the Clause 8 Trust with its distinctly broader purpose of promoting an extending the religion of Christian Science.

There is no watchdog to prevent self-dealing by the Director-Trustees, except for the Director of Charitable Trusts ("DCT"), who supervises and enforces New Hampshire charitable trusts. *See* RSA 7:20 [Director of Charitable Trusts]. But since the DCT's supervision over the Clause 8 Trust, the Director-Trustees' self-dealing has perpetuated. The list of improper actions undertaken under the DCT's watch is a long one. It includes the complete reversal of the intended preference of branch churches and other organizations besides The Mother Church as beneficiaries, the more than $26,000,000 in improper distributions to The Mother Church, the inadequacy of certain bonds and attempts to conceal the nature of financial statements. App. 399-403, 417-18, 467-71, 488-89; Tr. 43.

Of particular importance here is a 1993 Probate Court Order (Cushing, J.) (the "1993 Order"), approving a stipulation between then-DCT and the then Director-Trustees. App. 351-54. That stipulation arose after the DCT investigated a $5 million loan the Director-Trustees approved from the Clause 8 Trust to The Mother Church for a failed television venture.

As noted above, the prior judicial interpretation of the Clause 8 Trust was that Mrs. Eddy intended promoting and extending the religion to be the dominant purpose of the Trust, and repairs of the Mother Church a subordinate charge against the fund, *Chase*, 99 N.E. at 415; the Director-Trustees had at the same time stipulated they did not need Clause 8 Trust funds to repair the Church, *id.* at 416; and the consistent practice of the Trustees for 57 years was consistent with these declared intentions. App. 468, 488. Not only did the 1993 Order reverse the declared priorities of the Clause 8 Trust but in doing so, effectively allowed the Director-Trustees to use Trust assets—otherwise beyond

their reach—to repay the improper loan they took for The Mother Church. In other words, the 1993 Order, entered to remedy the Director-Trustees' self-dealing, ended up perpetuating it. Nothing in the 1993 Order or the scant record relating to it suggests the DCT or the Court appreciated that they were allowing such changes in and abuse of the Clause 8 Trust.

D. Second Church Becomes Aware of the Trusts' Mismanagement, Brings Action

The Director-Trustees continued for some 25 years to reap the benefits of the 1993 Order. It was only after Second Church brought these issues to the attention of the DCT and the Court in 2015 that the Director-Trustees moved to "correct" this abuse. App. 422-32. Before that, in October of 2015, the Director-Trustees filed their annual accounting (the "2015 Accounting"), containing what Second Church believed to be numerous, serious deficiencies. The DCT did not object, so Second Church sought to present objections including that (1) the 2015 Accounting was unaudited and insufficient in light of the conflicted dual role of the Director-Trustees; and (2) that the Director-Trustees' "pooling" of the assets of the Clause 8 Trust with the assets of The Mother Church was improper. App. 9-338. The DCT joined the Director-Trustees in opposing Second Church's standing to object to accountings. Second Church responded, in part, by arguing it should be granted standing under the "special interest" doctrine. App. 29-30. This dispute was rendered moot at a hearing on April 12, 2016, before Judge King, at which the DCT acknowledged, among other things, that the Director-Trustees "have embedded conflicting fiduciary obligations." App. 349. The DCT also agreed to conduct "a review" directed at the Director-Trustees' "embedded conflicting fiduciary obligations." *Id.*

Nothing had been done to address the embedded conflict of the Director-Trustees a year later when they filed their 2016 annual accounting (the "2016 Accounting"). The DCT filed Objections to the 2016 Accounting—believed to be the first objections ever filed to accountings on the Trusts. The DCT's Objections cited, among other things, the Trustees unilateral transfer of assets in 2009 to the "TMC Investment Pool"—an investment entity of The Mother Church—and the failure of the Director-Trustees to provide annual audits, asserting that both of these actions violated a prior, August 23, 2001 Order of the Probate Court. App. 377-78. At a December 9, 2017 hearing the Court "deferred" consideration of these Objections to provide the DCT and Director-Trustees an opportunity to resolve them.

A proposed resolution emerged approximately two months later when the Director-Trustees filed an *Assented-To Motion By The Trustees Under The Will Of Mary Baker Eddy, Clauses VI And VIII To Approve Amended Account And Amend 2001 Order*. App. 376. Among other things, the Director-Trustees proposed excusing themselves from the requirement of filing annual audits with their accountings, while continuing to do nothing to address their embedded conflict. The DCT assented to this Motion without any notice to or consultation with Second Church. This prompted Second Church to seek leave to file its first *amicus curiae* brief (App. 360-75) recommending that "the Motion be taken under advisement until resolution of [the] threshold issue of the embedded conflict that taints as presumptively invalid everything the Director-Trustees have done and will do." App. 363 (citations omitted). While the Probate Court denied Second Church's Motion for leave to file its first *Amicus* Brief, it granted important relief suggested by Second Church,

against the assent of the DCT, when it ordered the Director-Trustees to continue to submit independent audits with its annual accounts, adding:

> Whether that requirement remains in place for all accounts moving forward will depend, in part, *on whether a solution is found to the present conflict between the duties of the Trustees and their co-existing roles as directors of the Mother Church.*

App. 383 (Order of April 4, 2017, p.8) (emphasis added).

The question of Second Church's standing to enforce the Trusts came to a head after the Director-Trustees filed, with the assent of the DCT, an *Assented-to Motion to Amend the 1993 Order, Convert Clause 6 & 8 to Unitrusts and Adopt RSA 292-A Uniform Prudent Management of Institutional Funds Act* (the "1993 Motion"). Second Church again raised concerns via an *amicus* filing and sought time for discovery. App. 387-421, 437-49. Moreover, Second Church sought affirmative relief including appointment an independent trustee and independently audited financial statements and accounts of the trusts. App. 461-93.

In support of its requests for relief, at the direction of the Probate Court, Second Church submitted a memorandum concerning its standing to seek such relief, in which it laid before the Probate Court, without the benefit of discovery, numerous acts of self-dealing and mismanagement by the Director-Trustees, carried out, in some instances, with the approval of the DCT. App. 494-529. Specifically, for just a few examples, the Director-Trustees:

- impermissibly loaned The Mother Church $5,000,000 of principal from the Clause 8 Trust, which, at the time, represented 63% of the Trust's assets;

- sought and received permission of the Probate Court to pool Clause 8 Trust assets with those of The Mother Church;
- breached their obligation, under an August 23, 2001 Order of the Probate Court (Hampe, J.) to "continue to have independent audits of each trust performed" and file those audits; and
- sold the copyrights of many of Mrs. Eddy's works—central and vitally important to the promotion of her religion —to The Mother Church, in direct perversion of Mrs. Eddy's wishes and the purposes of the Trusts established by her Will. This act robbed the Trusts of the proceeds generated by the copyrights (estimated by Second Church to be at least $10,000,000) and, as important, removed control of the copyrights from Mrs. Eddy's writings—so important to the promotion and extension of her religion—from the Trust.

App. 511-12.

E. The Probate Court Denied Second Church Standing

In reaching its determination on Second Church's standing, the Probate Court recognized the doctrine of special interest standing, and applying the so-called "*Blasko* test,"[9] evaluated the following factors: (1) the extraordinary nature of the actions complained of and remedies sought; (2) the presence of bad faith; (3) the attorney general's availability and effectiveness; (4) the nature of the benefitted class and its relationship to

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

the charity; and (5) social desirability. March 2018 Order at 17. In applying these factors, the Probate Court observed that the present "DCT has been an active participant, . . . suggesting ways to mitigate the effect of that embedded conflict on the interests of potential distributees" of the Clause 8 Trust. *Id.* at 21. And although the Probate Court acknowledged the Director-Trustees' conflict of interest and their "sometimes sloppy management" of the Trusts, *id.* at 19, 21, it concluded that Second Church had failed to provide "sufficient evidence of outright fraud or bad faith." *Id.* at 19. Yet, the Probate Court had also denied Second Church's requested opportunity for discovery concerning the Director-Trustees' embedded conflict of interest administration of the Trusts as "moot." *Id.* at 19, 43. The Probate Court also denied, without prejudice, Second Church's motion to have an independent trustee appointed, on the ground that it lacks standing and, further, has not presented "good cause" to vacate what the Probate Court deemed to be a ruling set forth in a 1949 letter of Judge Lord (the "1949 Letter," App. 436), which declared that the vacancy created by Fernald's death need not be filled. *Id.* at 4, 34.[10]

Second Church thereafter moved for partial reconsideration with respect to the Probate Court's denial of its standing to seek the appointment of an independent trustee. App. 591-604. Second Church also requested leave to supplement the record with additional facts it had uncovered about the Director-Trustees' malfeasances. App. 605-20. Both motions were

[10] The Probate Court also ruled that the Trusts would be converted to unitrusts, but denied the assented-to relief of adopting UPMIFA provisions.

denied. Order (King, J.), dated May 3, 2018, at 6-9; Order (King, J.), dated May 14, 2018.

This timely appeal followed.

SUMMARY OF ARGUMENT

The Probate Court correctly recognized the doctrine of "special interest standing," but misapplied it, erroneously denying Second Church standing to seek the limited relief of having an independent trustee appointed to the Clause 8 Trust. Second Church, as one of a limited number of potential beneficiaries under the Trusts, has a "special interest" in the Clause 8 Trust sufficient for standing. The Probate Court improperly reached a decision without development of a factual record, and, in a circular fashion, faulted Second Church for not having developed sufficient facts to demonstrate standing, while having denied its request for discovery based on a lack of standing.

Beyond its misapplication of the special interest standing doctrine, the Probate Court erred in denying Second Church's motion for the appointment of an independent trustee to the Clause 8 Trust. Overlooking common law and statutory restrictions concerning conflicts of interest and pecuniary interest transactions, and this Court's instruction in *Fernald*, 77 N.H. 108, that the Clause 8 Trust assets were not to be given to the Directors of The Mother Church, the Probate Court improperly elevated the 1949 Letter of Judge Lord to the status of a decree, thereby requiring Second Church to show "good cause" (again, without discovery) to vacate Judge Lord's letter. The 1949 Letter should not hold the weight of an Order, but, even so, Second Church presented ample cause for it to be set aside, and for the

Probate Court to appoint an independent trustee to the Clause 8 Trust to address the acknowledged on-going conflict.

ARGUMENT

I. THE STANDARD OF REVIEW

Whether the Probate Court properly applied the factors of special interest standing presents questions of law that are to be reviewed *de novo*. *See Hopwood v. Pickett*, 145 N.H. 207, 208 (2000). If the Probate Court's rulings are plainly erroneous, they will be vacated. *See, e.g.*, *In re Estate of Lock*e, 148 N.H. 754, 755 (2002) (citation omitted).

II. THE PROBATE COURT CORRECTLY ADOPTED THE *BLASKO* TEST FOR SPECIAL INTEREST STANDING BUT MISAPPLIED IT

A. The Court Should Adopt the Special Interest Standing Doctrine

This Court should recognize the standing of certain persons or entities that have a "special interest" in a particular charitable trust, to enforce that trust.

Similar to the "case or controversy" requirement of Article III of the U.S. Constitution, the New Hampshire Constitution circumscribes New Hampshire courts' jurisdiction to "parties to have personal legal or equitable rights that are adverse to one another with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." *Duncan v. State*, 166 N.H. 630, 642 (2014). By statute, "[t]he settlor of a charitable trust or the director of charitable trusts, *among others*, may maintain a proceeding to enforce the trust. In any such proceeding where the director of charitable trusts is not a party, the director of charitable trusts shall be joined as a necessary party." RSA 564-B:4-405(c) (emphasis added). This

case concerns who the "others" may be. In this regard, numerous courts have recognized that in certain circumstances parties that demonstrate a "special interest" have standing to enforce a charitable trust. *See, e.g.*, *Seal Cove Auto Museum v. Spinnaker Trust,* No. CV-2016-333, 2017 WL 2672538, at *3-4 (Me. Super. Ct. May 3, 2017) (noting persons with a special interest may have standing to enforce a charitable trust); *Marks v. Southcoast Hosps. Group, Inc.,* Dkt. No. PLCV02-01284, 2011 WL 36398868, at *10 (Mass. Super. Ct. Dec. 30, 2011) (citing *Trustees of Dartmouth College v. Quincy,* 331 Mass. 219 (1954)); *Robert Schalkenbach Found. v. Lincoln Found., Inc.,* 208 Ariz. 176, 182 (2004) ("The 'special interest test' is the current, common-law view of standing. . . .") (citation and quotation omitted); *Trustees of Dartmouth College v. Quincy,* 331 Mass. 219, 225 (1954); Restatement (Second) of Trusts § 391 ("A suit can be maintained for the enforcement of a charitable trust by . . . a person who has a special interest. . . ."); Restatement (Third) of Trusts § 94(2) (same); 5 A.W. Scott & W.F. Fratcher, *Scott & Ascher On Trusts* § 37.3.10 (5th ed. 2006) (same); R. Chester et al., *The Law Of Trusts And Trustees* § 414 [Standing Granted to Specially Interested Beneficiaries] (3d ed. & Supp. June 2017) (same).

Blasko, *supra*, 28 U.S.F. L. REV. 37, identified five factors typically relied on by courts in determining whether a party has standing to enforce a charitable trust (the "*Blasko* factors"): (1) the extraordinary nature of the acts complained of and the remedies sought; (2) the presence of bad faith; (3) the attorney general's availability and effectiveness; (4) the nature of the benefitted class and its relationship to the charity; and (5) certain subjective factors and social desirability.

New Hampshire should follow numerous other states and hold that persons that have a "special interest" in a charitable trust have standing to enforce the terms of that trust. And the Court should adopt the flexible *Blasko* factors to determine when a person has such an interest.

B. Second Church Has A Special Interest in the Clause 8 Trust

The limited factual record demonstrates that Second Church has special interest standing to enforce the Clause 8 Trust under all five of the *Blasko* factors, but the presence of any single factor can serve as an adequate basis for a finding of standing. *See Blasko*, *supra*, at 47. The Probate Court's ruling to the contrary on each factor is wrong as a matter of law.

1. The Bad Acts Committed By The Director-Trustees Are Extraordinary

Under the first *Blasko* factor, courts consider the extraordinary nature of the acts complained of and the remedies sought. Here, without the benefit of any discovery, Second Church identified numerous bad acts committed by the Director-Trustees, many of which were been blessed by the DCT. As explained above, the Director-Trustees have taken actions that constitute flagrant self-dealing and perverted the purposes Clause 8 Trust. They caused The Mother Church to become the sole beneficiary of the Clause 8 Trust. They willfully violated court orders intended to ensure there are annual independent audits. All of this, moreover, has occurred in the context of their embedded conflict—a situation that would ordinarily disqualify them and render everything they do presumptively void. In the face of admitted and obvious self-dealing, and the extraordinary context of

the Trustee-Directors' embedded conflict, Second Church seeks the limited relief of restoring an independent Trustee to provide urgently needed independence and ensure that such malfeasance no longer occurs; it did not seek to replace all of the Trustees.

Numerous courts have granted standing in similar circumstances—where the acts complained of are extraordinary and the remedies sought are directed towards remedying these bad acts, courts have granted standing. *See, e.g., Stern v. Lucy Webb Hayes Nat'l Training Sch. for Deaconesses and Missionaries,* 367 F. Supp. 536, 537 (D.D.C. 1973) (holding plaintiffs had standing to maintain an action to enjoin trustees' self-dealing and organizational mismanagement). In addition, courts grant standing to parties wishing to challenge trustee action that would materially change the nature of the trust. *See, e.g., Alco Gravure v. Knapp Foundation,* 479 N.E.2d 752 (N.Y. 1985) (allowing challenge to amendment which enabled trustees to direct funds to other charitable organizations instead of the designated beneficiaries). Similarly, where a party has a "special interest" in and relationship to the trust and trustees have taken action that jeopardizes the express charitable purpose of the trust, standing has been found. *See, e.g., Valley Forge Hist. Soc'y v. Washington Mem. Chapel,* 426 A.2d 1123 (Pa. 1981). Moreover, when a party seeks to address major issues concerning the charitable trust and not merely day-to-day issues, standing will be more readily granted. *See Hooker v. Edes Homes,* 579 A.2d 608, 614-16 (D.C. 1990).

Courts have thus resoundingly held that in circumstances such as this, where there is evidence of self-dealing and bad acts on the part of the

trustees, the first *Blasko* factor weighs in favor of granting Second Church standing.

The Probate Court erred as a matter of law by focusing not on the extraordinary acts complained of by Second Church, but on what it considered to be the *extraordinary* relief it requested (*e.g.*, restoring the independent trustee). The Probate Court should have focused on the extraordinary nature of the bad acts complained—that the Director-Trustees have had, for some fifty years, an inherent conflict of interest as trustees and also as directors. That conflict of interest has lead to outright fraud and pillaging of the Clause 8 Trust for the sole benefit of the Mother Church. The Probate Court does not even acknowledge that critical fact in its analysis. Moreover, questioning the accountings and restoring an independent trustee can hardly be seen as "extraordinary" remedies in light of the rule of the case. *See Fernald,* 77 N.H. 108.

The first *Blasko* factor thus favors standing for the Second Church.

2. The Director-Trustees Have Acted In Bad Faith

As to the second factor, *Blasko* explains that while fraud or bad faith is not an explicit factor discussed by courts when analyzing special interest standing, its presence is nevertheless strongly positively associated with conferral of standing. *See Blasko*, 28 U.S.F. L. REV. at 50-51.

Here, upon the limited record, and without the benefit of discovery, the evidence that the Director-Trustees have acted in bad faith is substantial. For example, and without limitation, the Director-Trustees' taking of a loan representing 63% of the corpus of the Clause 8 Trust assets. Following the improper $5,000,000 loan, the stipulated agreement to

repay the improper loan was accompanied by a reversal of the priorities of the Clause 8 Trust, which the Director-Trustees and DCT both *only now,* and only through Second Church's efforts, agree was against the express purpose of the Clause 8 Trust. App. 469. Additionally, it is undisputed that though the express purpose of the Clause 8 Trust is to promote and *extend* Christian Science as taught by Mrs. Eddy, the Director-Trustees distributed Clause 8 Trust funds solely to The Mother Church. A branch church or similar organization did not receive a single distribution for nearly thirty years.

Moreover, though the Director-Trustees represented that they would, and the Probate Court ordered them to continue to have independent audits performed on the accounts, the Director-Trustees instead submitted non-independently prepared unaudited financial statements. March 2018 Order at 10 n.5. Such actions would represent mismanagement and misadministration of Trust assets if they had been taken by a disinterested trustee. When, as here, such actions were taken by Director-Trustees with "embedded conflicting fiduciary obligations," *id.* at 9, they represent clear examples of bad faith conduct. Each action was made to the detriment of both the Clause 8 Trust and the wishes of Mrs. Eddy and for the benefit of The Mother Church.

Courts in other jurisdictions have found special interest standing in the face of similar mismanagement. *See In re Green Charitable Trust,* 431 N.W.2d 492 (Mich. Ct. App. 1988). In *In re Green,* the court noted the "case concern[ed] the objections by the charitable trust beneficiaries" to an attorney's role as trustee, legal representative of the trust and legal representative of the trust property. *Id.* at 495. The court allowed the

beneficiaries to maintain an action to remove the attorney as trustee, and ultimately removed the attorney as trustee. This was despite the general Michigan rule that "the Attorney General has exclusive authority to enforce a charitable trust." *Olesky v. Sisters of Mercy,* 253 N.W.2d 772, 774 (Mich. Ct. App. 1977).

The Probate Court's ruling that Second Church failed to present "sufficient evidence of outright fraud or bad faith" is plainly erroneous based on the record Second Church has presented (without the benefit of discovery). March 2018 Order at 19. There can be no reasonable debate that the Director-Trustees have for decades administered the Clause 8 Trust in breach of their fiduciary duties, engaged in self-dealing, and ignored court orders, all the while the DCT was supposed to be ensuring that the Trust was being faithfully administered. Given all of the above circumstances, the second *Blasko* factor weighs in favor of granting Second Church standing, or, in the very least, granting it an opportunity to take discovery in support of this factor.

3. The DCT Has Not Been Effective In Policing The Director-Trustees' Misconduct

Under the third *Blasko* factor, courts assess whether the attorney general has availability to monitor a charitable trust and how effective the attorney general is in ensuring that the trust is operated faithfully. Here, the DCT allowed these Trust to fall into the exclusive control of the conflicted Director-Trustees; participated in the Director-Trustees' crafting of the 1993 Stipulated Order that turned the Trust priorities upside down for their benefit; and sat idly by as they diverted (based on Second Church's analysis, App.399-400, 468-69)) some $26 million in funds to their

preferred Mother Church. Only because of Second Church's indepdendent investigation and intervention has any of this come to light.

Yet even now, over two years after having acknowledged the embedded conflict under which these Director-Trustees serve, the DCT will not address this untenable defect in the administration of the Clause 8 Trust. Instead, the DCT has worked with the Director-Trustees, accommodating them in ways that only deepened the conflict and made monitoring its effects more difficult. For example, the DCT (as noted above) supported the Director-Trustees' Assented-To Motion to be excused from annual audits—relief that was rejected by the Probate Court after Second Church objected (App. 380-82, 427); and the DCT has allowed the pooling of the Clause 8 Trust assets with The Mother Church assets. App. 380, 476.[11]

Given the number of questionable acts taken by the Director-Trustees, it may be that there are simply too many aspects of the administration of the Clause 8 Trust for the DCT to effectively police and that the harms flowing from the Director-Trustees' embedded conflicting fiduciary obligations are too numerous for the DCT to effectively monitor with his own resources. This is precisely the problem with relying solely on attorney general enforcement, as recognized by the court in *Family Fed'n for World Peace & Unification Int'l,* 129 A.3d 234, 244 (D.C. 2015)

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[11] The pooling of the assets creates its own conflict as the investment strategy and objectives of these two distinct trust funds are now unitized, depriving the Clause 8 Trust of the ability to pursue its own, independent investment strategy and objectives.

(noting "[t]he exponential expansion of charitable institutions justifies a reasonable relaxation of any rule limiting enforcement to a busy Attorney General") and *Blasko*, *supra*, 28 U.S.F. L. REV. at 70 ("[i]f a court determines, that the attorney general is substantially ineffective, the probability increases that a private party will be allowed to represent, in litigation, the public's beneficial interest in a charity."); *see also Holt v. College of Osteopathic Physicians & Surgeons,* 394 P.2d 932, 935 (Cal. 1964) (recognizing that "[t]he Attorney General may not be in a position to become aware of wrongful conduct or to be sufficiently familiar with the situation to appreciate its impact, and the various responsibilities of his office may also tend to make it burdensome for him to institute legal actions except in situations of serious public detriment.").

The Probate Court ignored this reality in concluding that the DCT's status as an active participant demonstrates the DCT's vigilance in the matter. March 2018 Order at 21. As noted above, Second Church has been responsible for bringing potential misuse of Trust assets to the attention of DCT. For example, Second Church alerted DCT by letter dated January 5, 2017, of potential mismanagement of trust assets and of the dangers of comingling trust and The Mother Church assets. App. 490-92. To the best of Second Church's knowledge, the DCT has not acted on the information contained in this letter.

By contrast, Second Church is extensively familiar with the Trusts (and related deeds and other) instruments, and the (largely clandestine) workings of The Mother Church and relationships between and among The Mother Church, the Christian Science Publishing Society and the Clause 8 Trust, and is better able to evaluate the impact of actions taken by the

Director-Trustees than the DCT. The Probate Court should have applied the *Holt* court reasoning that, "[t]he administration of charitable trusts stands only to benefit if in addition to the Attorney General other suitable means of enforcement are available." *Holt*, 394 P.2d at 935. Allowing Second Church to intervene in this proceeding is the best, and perhaps only, way to protect the Trust assets, but more importantly, ensure the intentions of Mrs. Eddy and the public's interest in sound administration of her Trust are protected.

Indeed, at the November 13, 2017 hearing on Second Church's request for standing and appointment of an independent trustee, the DCT admitted it was "reluctant" to seek the appointment of an independent Trustee because of purported First Amendment concerns. Tr. 20:7, 20-21. These concerns were addressed by Second Church's Memorandum Concerning first amendment Concerns (App. 530-65) and properly dismissed by the Probate Court(March 2018 Order at 3 n.2); but the reluctance of the DCT to act is clear and militates strongly in favor of allowing Second Church standing.

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

The fourth *Blasko* factor analyzes the size and nature of the benefited class. For standing, the special interest in the charitable trust cannot be one shared by the public at large. *Y.M.C.A. of the City of Washington v. Covington,* 484 A.2d 589, 592 (D.C. 1984). Instead, courts find special interest standing where the class of entities is "sharply defined and its members are limited in number." *Hooker,* 579 A.2d at 614.

Second Church fits that definition of "special interest." Second Church is a branch church, one of a select group of approximately 1,400 Christian Science churches which (as noted previously) defined by their unique connection to The Mother Church, but also independently governed and historically important vehicles for the promotion and extension of the religion beyond the walls of The Mother Church. The Probate Court determined that this *fourth* factor weighed against Second Church because 1,400 branch churches "is not small by any measure, and as such, the potential for vexations litigation is heighted . . . ." March 2018 Order at 21. The record contains no evidence, however, of potentially vexatious litigation, as Second Church is *the only* branch church of that has sought relief in the Probate Court with respect to the Trusts.

Other courts have granted special interest standing to more attenuated persons. For example, in *Y.M.C.A. of the City of Washington,* 484 A.2d at 592, the court permitted all of the members of a branch of the YMCA in Washington, D.C. special interest standing to challenge the YMCA's decision to sell its building, which had fallen into disrepair. The plaintiffs, residents in the neighborhood of where the building was located and members of the YMCA, sued YMCA for breach of trust provisions requiring that the building be kept up. Similarly, in *Alco Gravure*, 479 N.E.2d at 755, the court permitted the employees of corporations in which defendant was involved and the employees of successors to such corporations standing to challenge the dissolution of the corporation. And in *Family Fed'n,* 129 A.3d at 240, in a suit regarding a church's "series of coordinated and calculated illegal actions to usurp [a nonprofit corporation church] and its corporate assets and wrest control of [the church]" from

another entity, the court found the following plaintiffs had standing: the entity that directed the church's activities worldwide, the church's primary donor, a "long-time major recipient of funding" from the church, and two ousted directors.

Here, Second Church is a member of a limited, defined class of entities that bears an unquestionable, long-standing relationship and devotion to the religion of Christian Science and, correspondingly, to the Trusts set up by Mrs. Eddy to promote and extend that religion.

The Probate Court's error on the fourth *Blasko* factor is readily apparent. This factor recognizes that a charitable trust is for the benefit of the public, and to permit such members to enforce the trust could result in the opening of litigation flood gates. Thus, special interest standing should only be granted to a limited and defined set of persons. But that is precisely the situation here. The Probate Court agreed that the potential beneficiaries of the Trust, like Second Church, were a defined set of persons. But it viewed the 1,400 potential litigant's as "not small." But there is no magic number. The purpose of this factor is to ensure that the trust is not inundated with litigation. There is no basis to assume that granting Second Church standing in this matter will open any floodgate of litigation. In the over 100 years of litigation relating to the Trusts, Second Church is the only one to act and its need to act relates directly to the problem of the embedded conflict and lack of independent administration of the Trust. In other words, the appointment of a bona fide independent trustee will likely eliminate the need for the special interest standing it seeks.

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

The final *Blasko* factor focuses on whether it is socially desirable for special interest standing to be granted. The Probate Court determined that the "social desirability of special interest standing is diminished" here because the DCT has "acted on" information furnished by Second Church to DCT. March 2018 Order at 22. As discussed above, however, the the record shows, to the contrary, that the DCT has acted primarily (and wrongly) to accommodate the conflicted Director-Trustees. Most importantly, the DCT has failed altogether to address the core problem for which Second Church seeks standing—the lack of an independent Trustee. Indeed, as discussed above, the DCT has only declared its "reluctance" to do so.

It is socially desirable that Second Church be granted standing for this very reason: it is the only party that has the capacity and will to do so.

Thus, contrary to the Probate Court's ruling, this final *Blasko* factor also weighs in favor of standing.

C. The Probate Court Procedurally Erred in Denying Second Church Standing on a Limited Record

Compounding the Probate Court's errors on the merits of Second Church's standing under *Blasko*, the Probate Court failed to recognize the burden on Second Church at this stage of the case—effectively the complaint stage without discovery—is relatively light. The Probate Court effectively required Second Church, without the benefit of any discovery, to prove each *Blasko* factor by a preponderance of the evidence. Such a burden, at this stage of the case, is contrary to law. As the U.S. Supreme

Court explained in its seminal standing case, *Lujan v. Defenders of Wildlife*, 504 U.S 555 (1992), although the party asserting a claim had the burden to demonstrate standing, the "manner and degree of evidence" required follows the "stage of litigation." *Id.* at 561. At the pleading stage, without discovery, "general factual allegations" may suffice. *Id.*

Here, without any discovery, and only using the public record and intrinsic knowledge, Second Church has without question, demonstrated sufficient facts for *prima facie* standing under *Blasko*. By deciding those facts without permitting Second Church discovery or an evidentiary hearing, the probate court incorrectly augmented Second Church's burden of proof at this stage of the case. Worse still, when Second Church sought discovery to support its allegations for standing, the probate court circularly denied that request as "moot" because Second Church had no standing for such a request.

Second Church has proffered ample evidence to demonstrate standing to pursue its challenges to the Director-Trustees' conflicted actions. At a minimum, there were sufficient facts to permit discovery. The Probate Court's decision to the contrary should not stand.

III. THE PROBATE COURT ERRED AS A MATTER OF LAW IN DENYING SECOND CHURCH'S REQUEST FOR APPOINTMENT OF AN INDEPENDENT TRUSTEE, EFFECTIVELY OVERRULING THIS COURT'S PRIOR DECISION IN THIS CASE

The probate court erred in denying Second Church's motion to appoint an independent trustee to oversee the Trusts. The New Hampshire Attorney General, almost a hundred years ago, explained that there must be a suitable independent New Hampshire trustee who "either profess[es], or

is not hostile to, the belief Mrs. Eddy desired to promote, [should be appointed] to act in conjunction with [the Directors] and their successors under such bonds to the Probate Court as may be determined to be reasonable." The Probate Court originally heeded this instruction in 1913, when it appointed a suitable, independent New Hampshire trustee, Josiah E. Fernald, to the Clause 8 Trust, bearing in mind the admonition of Attorney General Tuttle, in his brief filed in the *Fernald* case, that an independent trustee would be necessary to the protection of the public's interests therein. *See* App. 367-68. Mr. Fernald served as an independent trustee of the Clause 8 Trust until his death in 1949. But since that time, the Director-Trustees have controlled, without the requirement of an independent trustee, as this Court plainly required. The failure to follow this Court's rule of law has been to the detriment of the Trusts.

Second Church has demonstrated that, since beginning in or about 1971, if not before, the conflicted Directors-Trustees began systematically to strip the economic and intrinsic value of the Clause 8 Trust, left unchecked by an independent New Hampshire trustee and ineffectively supervised by the New Hampshire Attorney General's Office. *See, e.g.,* App.362-75, 390-421, 437-49, 454-93. Second Church has shown the wisdom of Attorney General Tuttle's admonition and this Court's direction in *Fernald,* and the harm that followed after the loss of the Clause 8 Trust's independent New Hampshire trustee.

Despite *Fernald* never being overruled by this Court and being the law of the case, the Probate Court denied Second Church's request for the appointment of an independent trustee. The Probate Court erred in requiring Second Church to satisfy the "good cause" standard to relief from

a court order, erroneously characterizing the 1949 undocketed letter from Judge Lord (App. 436) that the trustee vacancy left by the death of Mr. Fernald need not be filled as an "order" of the Probate Court.

The Probate Court's decision was in error for several reasons. First, the 1949 letter was not docketed and is not an order of the Probate Court. It does not appear on any public dockets, and appears to have been a *sua sponte* letter from the court. Second, even if the 1949 letter could be considered an order, it would directly conflict with this Court's binding precedent in *Fernald* that the Probate Court appoint (independent) New Hampshire trustees to the Clause 8 Trust. Third, in any event, Second Church presented "good cause" for departing from it now, after decades of flagrant self-dealing by the conflicted Directors/Trustees and perversion of the Clause 8 Trust's charitable purposes.

Compounding the Probate Court's error, it erred in failing to exercise its statutory discretion to appoint an independent trustee to the Clause 8 Trust under RSA 564-B:7-704(e), which provides that: "Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust." In view of the Director-Trustees' embedded conflict and ample record of their self-dealing, the probate court's failure to exercise its statutory discretion to appoint an independent trustee to the Clause 8 Trust constitutes an unsustainable exercise of its discretion. *See, e.g., DeButts v. LaRoche,* 142 N.H. 845, 847 (1998) ("Failure to exercise discretion constitutes an abuse of discretion.").

Moreover, the Probate Court's decisions cannot be squared with common law and statutory prohibitions against the Director-Trustees' impermissible enduring conflicts and pecuniary interest transactions. *See, e.g.,* RSA 7:19-a [Regulation of Certain Transactions Involving Directors, Officers, and Trustees]; RSA 564-B:8-803 [Impartiality]; *cf. Sparhawk v. Allen,* 21 N.H. 9 (1850) ("If the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases it will lend its assistance to fraud.") (citations and quotation marks omitted); *Shelton v. Tamposi,* 164 N.H. 490, 505 (2013) (upholding removal of trustee "who failed to satisfy her statutory duties of loyalty, impartiality and reasonable care of the trust property").

Accordingly, this Court should reverse the decisions of the probate court and remand the matter to the probate court to appoint a suitable independent New Hampshire trustee who "either profess[es], or is not hostile to, the belief Mrs. Eddy desired to promote, to act in conjunction with [the Directors] and their successors under such bonds to the probate court as may be determined to be reasonable."

CONCLUSION

For the reasons stated above, the Court should vacate the March 2018 Order with respect to the Probate Court's denial of Second Church's (a) motion for standing to seek the appointment of an independent trustee to the Clause 8 Trust and (b) motion for the appointment of an independent trustee to the Clause 8 Trust.

REQUEST FOR ORAL ARGUMENT

Second Church requests 15 minutes for oral argument, to be presented by Robert B. Eyre or Stuart Brown.

SUPREME COURT RULE 16(3)(i) CERTIFICATION

The undersigned counsel certify that a copy of the decisions that are being appealed are included with and appended to this Brief.

CERTIFICATION OF SERVICE

The undersigned counsel certify that a copy of this Brief and the Appendix are being filed on this date through the Supreme Court's electronic filing service, which "satisfies the requirement in Supreme Court Rule 26(2) that a filer provide to all other parties a copy at or before the time of filing." Sup. Ct. 2018 Supp. R. 18(a). Counsel of record for the Trustees of the Clause 6 and Clause 8 Trust under the Will of Mary Baker Eddy are receiving a copy of this filing through the Court's electronic filing system on this date.

Respectfully submitted,

SECOND CHURCH OF
CHRIST, SCIENTIST,
MELBOURNE (AUSTRALIA),

By its Attorneys,

PIERCE ATWOOD LLP

Dated: November 6, 2018

By: /s/ Michele E. Kenney

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

DLA PIPER LLP (US)

Dated: November 6, 2018

By: /s/ Stuart Brown, signed by Michele E. Kenney with permission of Stuart Brown

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

FOEHL & EYRE, PC

Dated: November 6, 2018

By: /s/ Robert B. Eyre, signed by Michele E. Kenney with permission of Robert B. Eyre

Robert B. Eyre

Admitted *Pro Hac Vice*
432 North Easton Road
Glenside, PA 19038
(610) 566-5926
rob@foehlaw.com

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

7th Circuit - Probate Division - Dover
259 County Farm Road, Suite 203
Dover NH 03820

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

MICHELE E. KENNEY, ESQ
PIERCE ATWOOD LLP
1 NEW HAMPSHIRE AVENUE SUITE 350
PORTSMOUTH NH 03801

Case Name: **Trust of Mary Baker Eddy (Clause VI & VIII)**
Case Number: **317-1910-TU-00001**

On March 19, 2018, Judge David D. King issued orders relative to:

Order(s) on Motions; Order Issued. (See enclosed Order)

Any Motion for Reconsideration must be filed with this court by March 29, 2018. Any appeals to the Supreme Court must be filed by April 18, 2018.

March 19, 2018

Cheryll-Ann Andrews
Clerk of Court

C: James F. Raymond, ESQ; Thomas J. Donovan, ESQ; Stuart Brown,, ESQ; Robert B. Eyre, ESQ; Richard D. Judkins, ESQ; Theodore E. Dinsmoor, ESQ; Russell F. Hilliard, ESQ; Patrick O'Brien Collins, ESQ; Michael P. Courtney, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET
6TH CIRCUIT COURT
PROBATE DIVISION

TRUST OF MARY BAKER EDDY (CLAUSE VI & VIII)

317-1910-TU-00001

ORDER(S) ON MOTIONS

Presently before the Court are a series of approximately twenty-eight (28) pleadings filed over many months by the parties in this matter concerning: (1) an *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*, see Index #281 (the "*Assented-to Motion*"), submitted by the Trustees of the Trust of Mary Baker Eddy (Clause VI Trust), and the Trustees of the Trust of Mary Baker Eddy (Clause VIII Trust)(collectively the "Trusts" and "Trustees") and objections and responses thereto submitted by the Second Church of Christ, Scientist, Melbourne (Australia) (the "Second Church"), the Director of Charitable Trusts, Thomas J. Donovan (the "DCT"), and the Trustees, see Index ##282, 284-287, 298, 299; (2) the annual accountings for the Clause VI and Clause VIII Trusts for the period ending March 31, 2017, see Index ## 292-295, and objections and responses thereto, see Index ##300, 302; (3) recently filed[1] motions concerning the standing of the Second Church to object to accountings

[1] As set forth in its Scheduling Order dated September 21, 2017, see Index #289, the standing issue was first addressed nearly two years ago by the Court and briefed by the parties. See Index ##233-39,245, 252. Consideration of standing was deferred, however, after certain pleadings were withdrawn by the Second Church. See generally Order on Assented-To Motion for Continuance of Hearing at 2-3 (March

and other motions concerning the Clause VI and Clause VII Trusts, and to file briefs as *Amicus Curiae*, see generally, Scheduling Order dated September 21, 2017 (Index #289), see also Index ##297, 304, 310, 312; (4) a *Motion for Leave to File Amicus Curiae with Brief*, see Index #282, and *Motion to Appoint an Independent Trustee*, see Index #303, filed by the Second Church in which it seeks, inter alia, appointment of an independent trustee, and objections thereto filed by the Trustees and the DCT, see Index ##307-09, and a *Response*, submitted by the Second Church, see Index #313; and finally, (5) the related issue concerning the authority of the DCT (and by extension, this Court) to address a recognized "embedded conflict" in the administration of the Clause VIII Trust given that the five trustees of that trust are also Directors of the Mother Church. See *DCT Memorandum Concerning Standing of Second Church* at 11 (Index #252); *Memorandum of the Second Church Concerning Application of the First Amendment Church Autonomy Doctrine to the Trustees of the Clause 8 Trust Under the Will of Mary Baker G. Eddy* (Index #305); *Trustees' Objection(s) to Appointment of an Independent Trustee* (Index ##307-08); *DCT Objection to Appointment of an Independent Trustee* (Index #309).

After thorough consideration of all the pleadings, applicable case law, and the extensive history in this 108-year-old matter, the Court, as more fully set forth infra, **ENTERS** the following **ORDERS**:

24, 2016)(Index #245)(discussing standing); Order on Hearing Held April 12, 2016 (dated April 25, 2016)(Index #253). In September 2017, the Court determined, sua sponte, that in light of affirmative relief requested by the Second Church, it was necessary to address standing and ordered briefing for its consideration. See Scheduling Order dated September 21, 2017 (Index #289). A hearing on the issue, and others pending, was held on November 3, 2017. See Order dated November 6, 2017 (Index #301). Additional briefing was allowed, see id. at 3, and the issue was submitted after the Second Church filed its final pleadings on December 11, 2017. See Index #304, 310, 312. The Court observes that although consideration of standing was effectively deferred in April 2016, see Index #253, standing was mentioned or discussed in an additional seven pleadings filed between April 2016 and September 2017 before the Court ordered formal address of the issue. See Index ##268, 270, 271, 273, 276, 284-85.

- As a preliminary matter, the Court concludes that at present, and importantly in light of the renewed and diligent participation by, and/or oversight of, the DCT, the Second Church lacks standing to object to: the accountings, see Index ##292-95; the *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*, see Index #281; petition for appointment of an independent trustee, see *Motion to Appoint an Independent Trustee* (Index #303); or seek to reopen accountings previously allowed by the Probate Division. See *Motion to File a Brief Amicus Curiae* at 9-18 (Index #282). That said, as this Court noted in its Order dated May 4, 2017 (Index #274), the Second Church may continue, as appropriate, to: (1) submit briefs as *amicus curiae*,[2] and cooperate with the "DCT, who, by statute, represents their interests in the matter." Id. at 10.

- The Trustees' *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act* ("*Assented-To Motion*"), see Index #281, is **GRANTED IN PART AND DENIED IN PART**. The Court: (1) **GRANTS Prayer A**, and, subject to further conditions, **AMENDS** a prior court order from 1993 to comply with the terms of the Trusts; (2) it **GRANTS Prayer B** requesting conversion of both Trusts to unitrusts, see RSA 564-C:1-106(b); and (3) **DENIES Prayer C** requesting adoption of certain provisions of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA") with respect to the Clause VIII Trust. See RSA chapter 292-A.

- The Court **GRANTS** the *Motion to File Brief Amicus Curiae* filed in response by the Second Church. See Index #282. It considered the *Brief Amicus Curiae* in rendering its decision on the *Assented-To Motion*.

- The Court **DENIES WITHOUT PREJUDICE** the *Motion to Appoint an Independent Trustee*. See Index ##303, 307, 309, 313. As noted supra, the Second Church lacks standing to petition for appointment of a trustee. Assuming without deciding, however, that the DCT's reluctance, on First Amendment grounds,[3] to actively seek appointment of an independent trustee opens the door

[2] The Court reminds the parties, however, that should amicus curiae briefing be submitted, the Court is under no obligation to enter a ruling allowing submission, and even if a submission is allowed, rule on issues raised therein. See Order Dated May 4, 2017 (Index #274); cf. Order dated September 21, 2017, n. 1 (Index #289)(noting that the Court need not rule on issues raised in an unsolicited "Status Report," see Index #288, filed by the Second Church, and objections thereto. See Index ##290-91.

[3] The Court appreciates the extensive argument submitted by all parties, see Index ##305, 307-309, concerning whether the DCT, and by extension this Court, may properly oversee appointment of trustees without violating the "Church Autonomy Doctrine" of the First Amendment to the United States Constitution. See generally, Jones v. Wolf, 443 U.S. 595, 602, 604-605 (1979)(allowing for adoption of, inter alia, a "neutral principles test" to settle church property disputes "so long as it involves no consideration of doctrinal matters" and declining to adopt "a rule of compulsory deference to religious

to the Second Church to assert standing to petition for appointment of an independent trustee, see generally, Robert Schalkenbach Foundation v. Lincoln Foundation, Inc., 91 P.3d 1019, 1025-28 (Ariz. Ct. App. 2004), the Court, at the present time, will not overturn the 1949 ruling of Judge Lord holding that "it is not necessary to fill the vacancy" created by the death of the last independent trustee. See DCT Memorandum in Support of Trustee's Motion to Amend 1993 Order and to Convert Trusts to Unitrusts, Exh. 2 (Index #284); see generally, Indian Head Nat. Bank v. Theriault, 96 N.H. 23, 27 (1949)(reopening prior orders for good cause); cf. Ford v. New Hampshire Dep't of Transp., 163 N.H. 284, 290 (2012)("When asked to reconsider a holding, the question is not whether we would decide the issue differently de novo, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed" (quotations and brackets omitted)). It notes, however, that Judge Lord did not affirmatively require that the trustees be board members of the Mother Church, and as such, the Court will take into consideration the lack of an independent trustee when reviewing candidates the next time there is a trustee vacancy. See generally, Fernald v. First Church of Christ, Scientist, in Boston, 77 N.H. 108, 109 (1912)(confirming role of court to supervise the Trusts).

- The Court **ALLOWS** the annual accounts for the Clause VI and Clause VIII Trusts for the period ending March 31, 2017, see Index ##292-295, noting that although the Second Church has objected, the DCT, aware of those objections, has reviewed them and has not objected. In addition, the Court reminds the Trustees that all future accounts are to continue to be audited by an independent auditor at least until such time as there is no longer an embedded conflict between the Trustees of the Trust(s) and the Directors of the Mother Church.

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authority" in resolving church property disputes); Berthiaume v. McCormack, 153 N.H. 239, 248-49 (2006)(recognizing adoption of the "neutral principles test" and directing courts to first consider "secular documents such as trusts" in order to "avoid any perception of entanglement"); cf. Glover v. Baker, 76 N.H. 393 (1912)(gift was not to church, but made in trust and so long as bequests comply with terms of trust, there is no breach). Although it need not decide the issue at present, and declines to do so in order to avoid rendering an advisory opinion, see, e.g., Duncan v. State, 166 N.H. 630, 640 (2014)(courts not authorized "to render advisory opinions to private individuals"); Piper v. Town of Meredith, 109 N.H. 328, 330 (1969); N.H. CONST. Part II, art. 74, after an extensive review of case law, the Court strongly deduces that pursuant to the terms of the Clause VIII trust, see Berthiaume, 153 N.H. at 248, the DCT and Court may appropriately continue to oversee appointment of trustees, as it has since 1910, without becoming unduly entangled in church doctrinal controversies. Cf. Family Federation for World Peace v. Hyun Jin Moon, 129 A.3d 234, 246 (D.C. Ct. App. 2015)(record did not suggest that claim would make court "entangle itself in church doctrine" and that to conclude otherwise "would approach granting immunity to every non-profit corporation with a religious purpose from breach of fiduciary suits and present any scrutiny of questionable transactions."(quotations and ellipses omitted)). Certainly, the Court will entertain argument on this issue at such time as there is a vacancy in the trustees of the Trusts and the issue is properly before it.

A. Brief Background

The Court recites the following facts for background purposes only and incorporates by reference all prior orders issued by it. See, e.g., Index ##245, 253, 274, 289. This matter involves two testamentary trusts, the Clause VI Trust and Clause VIII Trust, established in the Will of Mary Baker Eddy, founder of the Christian Scientists, upon her death in May 1910. The Clause VI Trust bequeathed to the "Christian Science Board of Directors of the Mother Church" $100,000 in trust "for the purpose of providing free instruction for indigent, well-educated, worthy Christian Scientists." Clause VIII of Ms. Baker Eddy's Will devised "all the rest, residue and remainder of my estate . . . to the Mother Church – The First Church of Christ, Scientist, in Boston Massachusetts, in trust," for certain "general purposes." She directed, inter alia, that: "I desire that such portion of the income of my residuary estate *as may be necessary* shall be used for the purpose of keeping in repair the church building" (emphasis added) and her former home in Boston (or other buildings "substituted therefore"), and that:

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

Notably, a 1912 Massachusetts Supreme Judicial Court case observed that this latter purpose:

> is not a gift to the particular ecclesiastical organization for its special needs. It manifests a broader design, and authorizes the use of the gift for spreading the tenets of faith taught by the testatrix over an area more extensive than could possibly be gathered in one congregation. It includes the most catholic missionary effort, both as to territory, peoples and times. It is the founding of a trust of comprehensive scope

> for the upbuilding of the sect which the testatrix made the object of her bounty. While in a general sense it may be said that every church is devoted to 'promoting and extending the religion' of the denomination to which it belongs, a gift to the particular use described in this will is not a gift to the church to do with as it chooses. The testamentary statement of the purpose of the gift when coupled with its magnitude and express fiduciary words manifests an intent that it shall be devoted as a trust fund to the specified ends.

Chase v. Dickey, 99 N.E. 410, 413-14 (Mass. 1912); see Glover v. Baker, 76 N.H. 393, 401 (1912) (finding that "[t]he testatrix gave the bulk of her property in trust to be devoted and used for the purpose of promoting and extending the religion of Christian Science as taught by her.")

This is not the first time there has been litigation concerning the Eddy Trusts, as there are two reported New Hampshire decisions, Glover v. Baker, 76 N.H. 393 (1912) and Fernald v. First Church of Christ, Scientist, in Boston, 77 N.H. 108 (1912) discussing the Will, Trusts, and key provisions at issue in this case and denying both Mrs. Baker Eddy's family's challenge(s) to the will and trusts and the Mother Church's request that funds be distributed directly to it. Notably for our purposes today, the Glover case, upheld the validity of the Eddy Trusts, 76 N.H. at 425, and established that the residuary bequest in Clause VIII was not a gift to the church, but to be held in trust for two purposes, church building repair and "promoting and extending the religion of Christian Science as taught by me." Id. at 400.[4] In the Fernald case, 77 N.H. at 109, the Mother Church sought direct payment of the residuary to them as administration of the estate was concluded. The Supreme Court reaffirmed that Ms. Baker Eddy intended "to create a public trust for promoting and extending Christian Science as

[4] In the Chase matter, 99 N.E. 410, the trustees of the Clause VIII Trust agreed to use all distributions from it for "promoting and extending religion." Id. at 416.

taught by her to all parts of the world," and that her gift was "to a charity" administered "under the direct supervision of the court." Id. The New Hampshire Supreme Court directed the administrator, Josiah E. Fernald, to "hold the property in his hands on the settlement of the final account until a trustee or trustees are appointed by the probate court." Id. at 110. As such, unchallenged court oversight of the trusts commenced, and annual accounts for both trusts, and requests for appointments of trustees, have been filed in the Concord Probate Court for over one hundred years.

It is agreed by the parties that initially the trustees of the Clause VIII Trust were comprised of the Board of Directors of the Mother Church and Josiah Fernald, the administrator of Ms. Baker Eddy's estate. Upon Mr. Fernald's death in 1949, Judge Lord ruled that it was "not necessary to fill the vacancy" and that the "five members of the Christian Science Board of Directors who are the surviving trustees" shall remain the "sole trustees" of the Clause VIII Trust. See *DCT Memorandum in Support of Trustee's Motion to Amend 1993 Order and to Convert Trusts to Unitrusts*, Exh. 2 (Index #284). Since that time, the trustees have all been Mother Church Board of Directors members, and the probate courts have reviewed and approved appointment of successor trustees. See, e.g., Index ##32, 41 (example, in 1998-99, of a petition to replace a trustee and appointment of successor trustee).

Of note for the Court's purposes today, is a 1993 Order by Judge Cushing approving a *Stipulation* between then-DCT William B. Cullimore and the trustees of the Clause VIII Trust in their dual capacities as trustees and directors of the Mother Church. See *DCT Memorandum Concerning Standing of Second Church of Christ, Scientist*, Exh. 2 (Index #252). That *Stipulation* arose after DCT Cullimore investigated a five

million dollar loan from the Clause VIII Trust to the Mother Church to be used to fund a failed television venture. See generally, Weaver v. Wood, 680 N.E.2d 918, 921 (Mass. 1997)(describing the venture). In the *Stipulation*: (1) the Mother Church agreed to repay the loan; (2) it was decreed that Clause VIII Trust income was to be used to repair the church; (3) further loans were prohibited; and (4) the principle of the Clause VIII Trust could only be invaded with court approval. See *DCT Memorandum Concerning Standing of Second Church of Christ, Scientist*, Exh. 2 (Index #252).

The current litigation began when the Second Church sought to review and potentially object to, the annual accounting filed by the Trustees on September 30, 2015. See Index ##234, 237. That accounting was approved by the Concord Probate Division on November 2, 2015. See Index ##229-230. The DCT assented to the Second Church's motion, however, the Trustees objected on the basis that the Second Church, as a "branch church," lacked standing to sue. Although the Court scheduled a hearing to address standing, see Order dated March 24, 2016, the parties agreed at the hearing that the Second Church would withdraw its motions and the DCT, Second Church, and Trustees would cooperate to resolve concerns raised by the Second Church and DCT. See Order dated April 25, 2016.

Notably, prior to the Court's initial scheduling order, the DCT had not weighed in on the concerns voiced by the Second Church. See Order dated February 24, 2016 (Index #241). In response to the Court's request that the DCT or an attorney from his office attend the hearing, the DCT filed a *Memorandum Concerning Standing of Second Church of Christ Scientist* with detailed briefing on the matter. See Index #252. As this Court has observed, the DCT noted prior litigation arising from "tensions" between the

two beneficial purposes of the Clause VIII Trust, namely: (1) repair of Mother Church building(s); and (2) "promoting and extending the religion of Christian Science." He stated that there were potential procedural infirmities in the 1993 *Stipulation* approved by the Probate Court allowing for distributions from the Clause VIII Trust for repairs only, because it was approved in the absence of a decree of cy pres or deviation. See generally RSA 547:3-c (deviation statute); 547:3-d (cy pres statute); *Memorandum Concerning Standing of Second Church of Christ Scientist* at 11 (Index #252). Importantly, the DCT also indicated his belief that "[b]ecause the trustees of the Clause VIII Trust are also the Board of Directors of the Mother Church, they have *embedded conflicting fiduciary obligations*." Id. (emphasis added). The DCT then outlined the "Charitable Trusts Unit's Planned Review," setting a planned assessment he intended to undertake with the Trustees/Mother Church, id., and concluding that he "plans to review the distributions made from the Clause VIII [Trust] either in context of this docket or separately as part of the Charitable Trust Unit's oversight responsibilities." Id. at 12. On the standing issue, he observed that because his office had, and continued to take, an active role in monitoring the Clause VIII Trust, "special interest standing is not warranted." Id. at 9. He observed, however, that where an "attorney general adopts a neutral position on pending litigation brought by a charity, . . . standing may be appropriate." Id.

The DCT thereafter became actively involved in the matter, filing objections to accounts filed in September 2016, see Index #259, and working directly with the Trustees/Mother Church to voice his concerns. See Order dated May 4, 2017 (Index #274). The Trustees/Mother Church and DCT reached an agreement and the Trustees

filed a *Motion to Approve Amended Account and Amend 2001 Order*, assented-to by the DCT. See Index #274. The Second Church filed motions to file briefs as *Amicus Curiae*, see Index #269, continuing to raise concerns. After a hearing, the Court denied in part and granted in part the *Motion to Amend the 2001 Order*, see Order dated May 4, 2017 (Index #274), and required the Trustees to file accounts audited by an independent auditor.[5] The Court denied the Second Church's motion file an *amicus* brief, concluding that although thorough, it was not necessary to assist the Court with making a decision on the *Motion to Amend*. Id. at 9. It, however, indicated to the Second Church that it would "not be adverse to accept future *amicus curiae* submissions should it decide that in light of the questions before it," if the additional submissions would be helpful to the Court. Id. at 10 citing 4 AM. JUR. 2D *AMICUS CURIAE* §1 (Supp. 2017). It also encouraged the Second Church "to share their information with the DCT who, by statute, represents their interests in this matter." Id.; see generally, RSA 7:19-7:32; cf. Concord Nat. Bank v. Town of Haverhill, 101 N.H. 416, 419 (1958)("While the Attorney General . . . represents the public in the enforcement and supervision of charitable trusts, this does not preclude other interested parties from presenting their views particularly where they are acting for the benefit of the charitable trust as a whole").

This Order addresses disputes that arose after the Trustees submitted an *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*, see Index #281 (the "*Assented-to Motion*"), to which the DCT filed a *Memorandum in Support*, see

[5] The Court observes that despite a court-order, the Trustees had failed to file audited accounts for thirteen years, however, the DCT had not entered any objections, nor had the court enforced its own order requiring audited accounts. See id. at 5.

Index #284, seeking amendment of a 1993 Probate Court Order, conversion of the Clause VI and Clause VIII Trusts to unitrusts, see RSA 564-C:1-106, and approval of the application of certain provisions of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), see RSA chapter 292-A, to the Clause VIII Trust, as it is proposed to be amended. The Second Church, also sought to submit a brief as *amicus curiae*, see Index #282, to which the Trustees have objected, see Index #285, and the Second Church filed a responsive pleading. See Index #286-287. The Second Church additionally filed a *Status Report and Request for Time for Discovery*, see Index #288, seeking affirmative relief, despite the fact that its standing to participate as a party in this matter has not yet been determined. See Order on Hearing Held April 12, 2016 (dated April 25, 2016)(Index #253)(noting that the Court "made no orders concerning the standing of the Second Church to challenge the trust accountings in this matter, [so that] withdrawal of pleadings by the Second Church has no preclusive effect whatsoever on determination of the standing issue."); see generally Order on Assented-To Motion for Continuance of Hearing at 2-3 (March 24, 2016)(Index #245)(discussing standing). The DCT and Trustees objected. See Index ##290-91.

The Trustees also filed *Accountings* for the year-ending March 31, 2017 for both the Clause VI and Clause VIII Trust(s), see Index ##292-295, to which the Second Church objected and the Trustees filed a responsive pleading. See Index ##300, 302.

The Court scheduled a hearing for November 3, 2017, see Index #289, and shortly before it, the Trustees submitted a *Memorandum Concerning the Issue of Standing*, see Index #297, and a *Memorandum In Support of the Assented-To Motion to Amend*. See Index #299. The DCT filed a *Supplemental Memorandum Concerning*

Proposed Conversion of Clause VIII Trust to Unitrust and Use of UPMIFA. See Index #298. The Second Church also filed a *Motion to Appoint an Independent Trustee*, see Index #303, a *Memorandum on Standing*, see Index #304, and a *Memorandum Concerning Application of the First Amendment Church Autonomy Doctrine to the Clause VIII Trust.* See Index #305. Objections and replies were submitted by the Trustees, see Index ##307-311, as were follow-up responses by the Second Church. See Index ##312-313.

Having reviewed the avalanche of pleadings ripe for decision,[6] the Court now proceeds to evaluate and rule on them.

B. Standing

As a preliminary matter, the Court will address the standing of the Second Church, under the "special interest doctrine" to: (1) object to accountings; (2) petition for appointment of an independent trustee; and (3) otherwise seek affirmative relief.[7]

Generally, "[i]n evaluating whether a party has standing to sue, [courts] focus on whether the party suffered a legal injury against which the law was designed to protect." Petition of Lath, 169 N.H. 616, 620 (2017). New Hampshire common law concerning the ability of a possible beneficiary of a trust to have standing is unclear. The New Hampshire Supreme Court in In re Burnham, 74 N.H. 492, 494 (1908), stated the

[6] The Court observes that the first relevant pleading, the Trustee's *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*, see Index #281, was filed on July 26, 2017, with the final volley in this protracted battle submitted nearly six months later on December 11th. See Index #313. It apologizes for the delay in issuing this order, however, it aspired to a thorough review of the matters before issuing a comprehensive order.

[7] As discussed supra, the standing issue had been raised previously and a ruling on it was deferred by agreement. See Order Dated April 25, 2016 (Index #253). The Court later concluded in its Order Dated September 21, 2017, that it had become necessary to decide the standing issue as the Second Church's pleadings were seeking affirmative relief. Id. at 3 (Index #289). By the Court's informal count, at least twenty-seven pleadings have been filed since November 2015 raising or actively addressing this issue.

general rule that once "it was determined that the trust was charitable it became the duty of the Attorney General to see that the rights of the public in the trust were protected and that it was properly executed. The heirs had no interest in the question apart from the general public, whose rights were represented by the Attorney General." Id. Fifty years later, however, the Supreme Court, called the DCT an "indispensable party," but, awarded attorney's fees to counsel for potential beneficiaries, noting: "[w]hile the Attorney General or his representative represents the public in the enforcement and supervision of charitable trusts, this does not preclude other interested parties from presenting their views particularly where they are acting for the benefit of the charitable trust as a whole." Concord Nat. Bank v. Town of Haverhill, 101 N.H. 416, 419 (1958). The Supreme Court recognized that the respondent towns in that case "were not direct beneficiaries of the charitable trust," but that their "participation in the litigation can be considered a service to the trust and aid to the Court," justifying the award of fees. Id. at 418-19.

Notwithstanding the lack of clarity under New Hampshire common law, it is nearly uniformly recognized[8] that in the case of charitable trusts, "[t]he general rule is that one who is merely a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust," and instead, that power is given to the state attorney general who is tasked with representing the public's interest in enforcement of a charitable trust. Alco Gravure, Inc.

[8] The DCT, in his pleadings, see *DCT Reply to Second Church's Memorandum on Standing* at 2, observes that the Probate Division, in In re: Nashua Center for the Arts, No. 316-2017-EQ-00191 (August 30, 2017) recently held that because the DCT represented the rights of the public in a charitable trust, the petitioners only had standing if they could demonstrate a direct and distinct interest in the matter. Id. at 4. That case is not relevant to our inquiry here, however, because, on its face, it did not involve application of the special interest doctrine, and relies on a case concerning the standing of a DCT, and not the application of the "among others" language in RSA 564-B:4-405(c) as it pertains to the special interest doctrine. See infra.

v. Knapp Found., 479 N.E.2d 752, 755 (1985); see, e.g., State ex rel. Nixon v. Hutcherson, 96 S.W.3d 81, 83-84 (Mo. 2003). The purpose for this restriction is that:

> The persons affected by such trusts are usually some or all of the members of a large and shifting class of the public. If any member of this class who deemed himself qualified might begin suit, the trustee would frequently be subjected to unreasonable and vexatious litigation. Often no individual can prove that he will necessarily benefit from the charity. All may be prospective or possible beneficiaries, but no one can be said to be a certain recipient of aid. In ultimate analysis it is the public at large which benefits, and not merely the individuals directly assisted. Obviously, there is good reason for vesting in a single authority the discretion and power incident to the enforcement of such trusts, rather than in leaving the matter to the numerous, changing, and uncertain members of the group directly to be aided.

State ex rel. Nixon, 96 S.W.3d at 84, quoting George Gleason Bogert & George Taylor Bogert, The Law of Trusts and Trustees § 411, at 8 (Rev. 2d ed. 1991).

However, an exception to the general rule has been recognized "where an individual seeking enforcement of the trust has a 'special interest' in continued performance of the trust distinguishable from that of the public at large." Hooker v. Edes Home, 579 A.2d 608, 612 (D.C. 1990); see RESTATEMENT (THIRD) OF TRUSTS §94 comments g-g(1) Standing to Enforce a Trust (2012). This exception arises from both: (1) a recognition that where there is an identifiable litigant with a special interest, the concern that there may be unduly vexatious litigation is lessened, see Robert Schalkenbach Found., 91 P.3d at 1025-26; and (2) that given the realities of budgetary constraints on a state's attorney general, he or she may be unwilling or unable to properly represent the public good. See City of Paterson v. Paterson Gen. Hosp., 235 A.2d 487, 494-95 (N.J. Ch. Div. 1967).

The UTC provides that "[t]he settlor of a charitable trust or the director of charitable trusts, *among others*, may maintain a proceeding to enforce the trust." RSA 564-B:4-405(c)(emphasis added). The Second Church contends that this provision gives it standing to sue to enforce the trust as a person with a "special interest" in the Eddy Trusts. See Milton v. Milligan, No. 4:12CV384-RH/CAS, 2013 WL 828607, at *4 (N.D. Fla. Mar. 5, 2013)(finding that person with a "special interest" falls under the "among others" clause of the UTC); cf. Family Federation for World Peace v. Hyun Jin Moon, 129 A.3d 234, 244 n. 16 (D.C. Ct. App. 2015)(ousted directors are "among others"); In re United Effort Plan Trust, 296 P.3d 742, 750 (Utah 2013)(assuming without deciding that "among others" includes those with a special interest).

Although the "special interest" doctrine is broadly recognized, see generally, Mary Grace Blasko, Curt S. Crossley, David Lloyd, Standing to Sue in the Charitable Sector, 28 U.S.F.L.Rev. 37 (Fall 1993)(hereinafter "Blasko on Standing"); RESTATEMENT (THIRD) OF TRUSTS §94 Standing to Enforce a Trust comments g-g(1) (2012), it has been rightly observed that "'special interest' is a term of uncertain scope." Hooker, 579 A.2d at 612. State courts addressing the issue have applied the doctrine with little uniformity and New Hampshire case law has not addressed it. However, the reported cases have generally been divided into three categories, see RESTATEMENT (THIRD) OF TRUSTS §94 Standing to Enforce a Trust comment g(1) (2012), namely those that: (1) narrowly apply the doctrine; (2) use a balancing test; and (3) broadly allow for standing.

Cases narrowly applying the doctrine require that the interest be presently and clearly identified. See State ex rel. Nixon, 93 S.W. 3d at 85 (requiring a "clear, identifiable, and present claim to any benefits"); Hardman v. Feinstein, 195 Cal. App. 3d

157, 161-62 (Cal. Ct. App. 1987)(requiring a "special and definite interest"); Weaver v. Wood, 680 N.E.2d 918, 923 (Mass. 1997)(in a matter involving the Mother Church, requiring a "personal right that directly affects the individual member").

Some courts balance specific factors to determine whether there is a special interest. A number of courts employ a two-part test, namely: (1) whether the person is one of a sharply defined and limited in number class of potential beneficiaries; and (2) whether the challenged act is "fundamental" in nature (meaning related to the core purpose of the charitable trust), rather than a challenge to the trustee's normal exercise of discretion. See Hooker, 579 A.2d at 614; Alco Gravure, Inc., 479 N.E.2d at 465-66; see also Family Federation for World Peace, 129 A.3d at 244 (noting that key consideration in Hooker is "is whether finding a justiciable interest in a given plaintiff would contravene the considerations underlying the traditional rule"); cf. In re United Effort Plan Trust, 296 P.3d at 750 (noting and applying, but not adopting, the two-part test).

Some courts adopt an even more comprehensive five-part test that was developed in Blasko on Standing. Id. at 61-75 (the "Blasko Test"). That test was developed from the various cases deciding the issue, and directs courts to evaluate: "(1) the nature of the benefitted class and its relationship to the charity; (2) the extraordinary nature of the acts complained of and the remedy sought; (3) the state attorney general's availability or effectiveness to enforce the trust; (4) the presence of fraud or misconduct on the part of the defendants; and (5) subjective and case-specific circumstances." Robert Schalkenbach Found., 91 P.3d at 1026. The Blasko Test developed these factors based upon a comprehensive survey of case law, Blasko on

Standing, supra at 61-75, and discussed how to weigh each one relative to the others. Id. at 75-79; see Robert Schalkenbach Found., 91 P.3d at 1026 (court gave "special emphasis to several of those factors—the nature of the benefitted class and its relationship to the trust, the nature of the remedy requested, and the effectiveness of attorney general enforcement of the trust").

Finally, some jurisdictions jettison most of the considerations discussed supra and allow private individuals, and often broad swaths of people, to sue for enforcement of a charitable trust where it is found that the Attorney General did not, or cannot, properly supervise the trustees. See Kapiolani Park Pres. Soc. v. City & Cty. of Honolulu, 751 P.2d 1022 (Haw. 1988); Fitzgerald v. Baxter State Park Auth., 385 A.2d 189 (Me. 1979); State of Del. ex rel. Gebelein v. Florida First Nat. Bank of Jacksonville, 381 So. 2d 1075 (Fla. Dist. Ct. App. 1979); City of Paterson v. Paterson Gen. Hosp., 235 A.2d 487 (N.J. Ch. Div. 1967).

In this matter, the Court will use the "Blasko Test" to evaluate whether the Second Church has standing under the special interest doctrine. The "Blasko Test" is premised on a comprehensive review of the law and comports with the principles developed and expanded upon by our sister courts. Cf. Robert Schalkenbach Foundation, 91 P.3d at 1026. By balancing a number of factors, it allows courts flexibility of application[9] to address the myriad of factual situations that may present

[9] The Trustees suggest adoption of Section 6.05 the Tentative Draft American Law Institute's Restatement of the Law Charitable Nonprofit Institutions defining a "Private Party with a Special Interest for the Purposes of Standing (Approved May 22, 2017)." See *Trustees' Memorandum Concerning the Issue of Standing* at 9 (Index #197). Section 6.05 sets forth a five-part test and requires that all conditions be met. Id. The Court will not adopt that test in this case as it discerns that the flexibility of the Blasko Test better suits the pursuit of a just outcome. That said, even if the Court used Section 6.05 for evaluative purposes, the outcome would be the same.

themselves in the realm of charitable trusts.[10] Importantly, the Court's application of this test allows it to properly focus on the "key consideration" of whether the plaintiff has a "justiciable interest" distinct from the public at large that justifies application of the special interest exception. Cf. Federation for World Peace, 129 A.3d at 244. As such, it comports with New Hampshire common law directing that a "mere general interest" is insufficient to confer standing. Petition of Lath, 169 N.H. at 621; cf. Clipper Affiliates v. Checovich, 138 N.H. 271, 277 (1994). Consequently, the Court proceeds to determine whether the Second Church has standing under the Blasko Test. See Blasko on Standing at 61-76.

(1) Extraordinary Nature of Acts/Remedy

In this matter, the Second Church seeks a number of fairly extraordinary remedies. They seek to object to currently pending accountings and re-open over twenty-years of accountings allowed by the Probate Division without meaningful objection by the DCT and no prior contemporaneous attempt to object on the part of the Second Church or any other potential beneficiary. It also seeks appointment of an independent trustee, and in so-doing, implicit reconsideration of a 1949 Order of the Probate Court. Finally, they seek to object to the *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act* which was submitted by the Trustees after consultation with the DCT.

In each of its requests, the Second Church seeks to undo prior court orders and suggests remedies that the DCT has not chosen to adopt despite the Second Church's

[10] It is this lack of flexibility that convinces the Court that it is unwise to narrowly apply the special interest doctrine, and as such, it rejects the approach used in Weaver, 680 N.E.2d at 923.

informative and thorough *amicus* submissions that the Court assumes the DCT has reviewed. As such, it appears to the Court that the Second Church seeks standing as it disagrees with the judgment of the DCT, who is granted authority to represent their interests. See generally, RSA 7:19-20; Attorney General by Anderson v. Rochester Trust Co., 115 N.H. 74, 76 (1975); Petition of Burnham, 74 N.H. at 494; but cf. Concord Nat. Bank v. Town of Haverhill, 101 N.H. at 419. Simply because a potential charitable beneficiary disagrees with the judgment of the DCT is not sufficient to justify standing. Cf. Kapiolani State Park Pre'n Soc, 751 P.2d at 1025 (HI 1988)(standing conferred when Attorney General does not take action). Consequently, this factor weighs against a finding of special interest standing.

(2) Bad Faith, Fraud or Misconduct

While the Second Church has provided a thorough history of sometimes sloppy management by the trustees, in most cases, the complained-of accountings have been allowed by the Court without objection by the DCT. It is true that the Trustees did not, for many years, comply with Judge Hampe's 2001 Order requiring independent audits, however, that fact was known and was not objected to by the DCT and implicitly approved by the courts. Certainly, ignoring the 2001 Court Order amounts to misconduct on the Trustees' part.

The Court does not find, however, sufficient evidence of outright fraud or bad faith. The Second Church offers conclusory examples of bad faith on the part of the Directors-Trustees, including "shutting down branch churches" and going so far as to suggest that they have attempted "to wipe [the] Second Church off the face of the earth." See *Memorandum Concerning Standing of the Second Church In Response to*

Order of November 6, 2017 at 26 (Index #304). These assertions, however, lack sufficient factual underpinnings on which to support a finding of fraud or bad faith. Cf. generally, Lamprey v. Britton Const., Inc., 163 N.H. 252, 262-263 (2012); Brzica v. Trustees of Dartmouth College, 147 N.H. 443, 449 (2002)(insufficient to allege fraud in general terms). As such, the Court finds this factor is neutral in its analysis of standing.

(3) Attorney General Participation/Effectiveness

As noted supra, our statutes and common law empower the DCT to represent the public and potential beneficiaries of New Hampshire Charitable Trusts. See generally, RSA 7:19-20; Attorney General by Anderson, 115 N.H. at 76; Petition of Burnham, 74 N.H. at 494; but cf. Concord Nat. Bank, 101 N.H. at 419. As the authors of Blasko on Standing recognized, "[a] court's evaluation of the availability and effectiveness of the attorney general . . . will weigh heavily in its decision to grant or deny standing to a private party." Id. at 70. As the DCT himself recognized, when "an attorney general adopts a neutral position on pending litigation brought by a charity . . . unnamed beneficiary standing may be appropriate." *DCT's Memorandum Concerning Standing of Second Church of Christ, Scientist* at 9, citing Coffee v. William Marsh Rice Univ., 403 S.W.2d 340, 341-342 (Tex. 1996); see, e.g., Robert Schalkenbach Foundation, 91 P.3d at 1028 (standing may be appropriate where "lack of enforcement by the Attorney General is due to a conflict of interest, ineffectiveness, or lack of resources").

Certainly, during the long history of these trusts, the quality and thoroughness of the DCT's performance of his oversight duties has been mixed, and at times, arguably deficient. However, during the pendency of the present dispute, the DCT has been an

active participant, importantly identifying the "embedded conflict" due to the dual role of the Trustees as Directors of the Mother Church and Trustees, and suggesting ways to mitigate the effect of that embedded conflict on the interests of potential distributees. As such, this important factor does not support standing on the part of the Second Church. Certainly, the Court continues to encourage it to share information with the DCT, and, should the present diligence diminish to the detriment of the Trusts, the Court could revisit the standing issue.

(4) Nature of Benefitted Class

As noted supra, one purpose of tasking the DCT with the authority to represent the interests of the public and potential charitable distributees is that the class of persons with an interest may be "large and shifting" and thus a charity may need protection from costly and "vexatious litigation that would result from recognition of a cause of action by any and all of a large number of individuals who might benefit incidentally from the trust." Hooker, 579 A.2d at 612. Consequently, as Blasko on Standing observes, special interest standing is appropriately granted to a litigant that is "a member of a small identifiable class that the charity is designed to benefit." Here, income from the Clause VIII Trust is to be utilized for the purpose of "effectually promoting and extending the religion of Christian Science as taught by me." It is undisputed that the Second Church is one of over 1,400 worldwide branch churches that although "identifiable," is not small by any measure, and as such, the potential for vexatious litigation is heightened, and this factor weighs against standing.

(5) Other Case Specific Considerations

This factor looks at the "social desirability" of allowing special interest standing. Blasko on Standing describes it as instances "the general policy concern that charities not be harassed by suits brought by a near infinite number of potential beneficiaries . . . gives way to a court's concern that an improper action will not be challenged." Although in this matter the Court remains concerned about the embedded conflict, it does not conclude that the claim that Second Church is "well positioned to monitor and enforce the terms of the Trusts" due to its status as a branch church and knowledge of the religion, *Memorandum Concerning Standing of the Second Church of Christ, Scientist of Melbourne (Australia), in Response to Order of November 6, 2017* at 34 (Index #304), weighs heavily in its determination of standing. As noted supra, the Second Church is encouraged, and in fact has acted, to share its perspective with the DCT, and, where appropriate, as an *amicus curiae* in this Court. The DCT has acted on that information, and as such, the social desirability of special interest standing is diminished.[11]

Consequently, the Court finds that the Second Church has not satisfied its burden to demonstrate that it qualifies under the special interest exception to justify standing in this matter, at this time, to: object to the accountings, see Index ##292-95; object to the *Assented-to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*, see Index #281; petition for appointment of an independent trustee, see *Motion to Appoint an Independent Trustee* (Index #303); or seek to reopen accountings previously

[11] The Court observes, however, that should the DCT be unable or unwilling to monitor the management of the Trust(s), it will entertain re-evaluation of the standing issue. See e.g. Robert Schalkenbach Foundation, 91 P.3d at 1028. Indeed, as noted supra, the DCT has advised that the Second Church may have standing should he take a neutral stand on controversies between potential beneficiaries and the Mother Church/Trustees. See *DCT's Memorandum Concerning Standing Of Second Church of Christ, Scientist* at 9 (Index #252)(where "an attorney general adopts a neutral position on pending litigation brought by a charity[,] . . unnamed beneficiary standing may be appropriate.")(citing Coffee v. William Marsh Rice Univ., 403 S.W.2d 340, 341-42 (Tex. 1966).

allowed by the Probate Division. See *Motion to File a Brief Amicus Curiae* at 9-18 (Index #282).[12]

C. *Assented-to Motion to Amend 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*

The Court now considers the Trustees' *Assented to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act.* See Index #281. The Trustees reached an agreement with the DCT to "amend" Judge Cushing's 1993 Order approving a *Stipulation* between then-DCT William B. Cullimore and the trustees of the Clause VIII Trust directing that income from that trust be used first for repairs on the Mother Church and then to support of church doctrine. In the *Assented-To Motion*, the Trustees state that the primary purpose of the Clause VIII Trust is to "more effectively promot[e] and extend[] the religion of Christian Science as taught by me." Id. at 2-5. They seek an order that the Court "restore the original intent" of the Clause VIII Trust directing them to distribute trust income to "third party recipients" chosen by the Trustees, but not as part of programs offered by the Mother Church. Id. at 6. Distributions may be used for church repairs, but only after approval by the DCT. Finally, the Mother Church will no longer be a permissible beneficiary of the Trust. Id.

The Trustees also seek an order directing conversion of both Trusts to unitrusts under the Uniform Principle and Income Act ("UPIA"), see RSA 564-C:1-106(b), id. at 6-

[12] The Court notes that even if the Second Church had standing to seek re-opening of many years of prior accountings, it would not be inclined to grant that relief. Although the Second Church has alleged mismanagement of the Trusts, it has not, heretofore, objected to the accounts filed. Prior courts have reviewed the accounts, as presumably had the DCT, and as such it is not inclined to reopen them. Going forward, the accounts will be audited, and, if the DCT is unable or unwilling to undertake a proper review, the Second Church may have standing to intervene and object.

7, reserving powers to distribute principal from the Clause VI Trust "as they may deem best," and finally, adoption of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), see RSA chapter 292-A, for the larger of the two trusts, the Clause VIII Trust. Id.

The Second Church filed a *Motion to File a Brief Amicus Curiae* with the *Amicus* brief attached, see Index #282, seeking submission of the amicus brief in which it addresses the relief sought in the *Assented-To Motion* and additionally sets forth alleged misdeeds/self-dealing by the Trustees/Directors of the Mother Church. Id. As a preliminary matter, the Court must determine whether it will consider the Second Church's *Amicus* brief. As set forth in prior orders, see Order dated May 4, 2017 (Index #274), the rules of the Circuit Court-Probate Division do not address submission of *amicus curiae* briefs. However, even if the Probate Division rules are silent, it has been recognized that "[p]ermission to appear as amici curiae . . . rests in the sound discretion of the trial court." Witty v. Planning & Zoning Comm'n of Town of Hartland, 784 A.2d 1011, 1018 (2001)(Conn. Ct. Ap. 2001); see, e.g., Parsons v. State, Dep't of Soc. & Health Servs., 118 P.3d 930, 934 (2005)(Wash. Ct. App., Div. 1, 2005); State ex rel. Com'r of Transp. v. Med. Bird Black Bear White Eagle, 63 S.W.3d 734, 758 (Tenn. Ct. App. 2001)("courts have inherent authority to appoint an amicus even in the absence of a rule or statute")(collecting cases). New Hampshire courts recognize the useful role *amici* can play in assisting courts to reach the proper result. See e.g. In re Peterson's Estate, 104 N.H. 508, 510 (1963)(courts are "not averse to wisdom in any form, from any source" (quotations omitted)). Parties seeking to submit *amicus curiae* briefs, however, "bear the burden of demonstrating that they specifically could contribute

expertise and arguments not presented by the parties." 4 AM. JUR. 2D *Amicus Curiae* §3 (Supp. 2017).

Although the Court previously declined to consider the Second Church's *amicus* submissions as it was able to make its determination without assistance from the Second Church, see Order dated May 4, 2017 (Index #274), given the issues presented by the *Assented-To Motion*, it deems it prudent to accept and consider the *amicus* submission of the Second Church. Although it agrees with the Trustees that it is likely that the Second Church has provided information to the DCT, see Trustees' *Objection to Motion for Leave to File Brief Amicus Curiae* at 2 (Index #285), it does not agree that no further expertise is needed to assist the Court with understanding and ruling on the *Assented-To Motion.* The DCT's submission, while demonstrating an understanding of the Trusts and New Hampshire laws governing investment of institutional/endowment funds, is not as comprehensive as that of the Second Church, and as such the Court finds review of the *Brief Amicus Curiae* assistive. As such, the Court **GRANTS** the *Motion to File Brief Amicus Curiae* filed in response by the Second Church. See Index #282.

In its submissions, the Second Church suggests that the 1993 Order be vacated as it argues that the *Motion to Amend* is an admission that the trustees "have failed to safeguard the Clause VIII Trust for more than two decades." *Brief Amicus Curiae* at 14. They also assert that the proposed restrictions do not safeguard the trust and are insufficient to deal with the embedded conflicts. Id. at 14-16. They seek appointment of an independent trustee and investigation into prior accountings submitted to the Court. Id. at 17-18.

The DCT subsequently filed a *Memo in Support of Trustee's Motion*, see Index #284, in which he argues that the agreement he reached with the Trustees restores the original intent of the donative provisions of the Mary Baker Eddy testamentary trusts, namely, to support worldwide dissemination of church doctrine. Id. at 8. As to an independent trustee, he states that the Trustees alleged that forcing them to appoint an independent trustee would violate their prerogative to control distributions of a religious nature, and that he "does not wish to test the limits of the application of the Free Exercise Clause of the First Amendment to the qualifications of Trustees for a religiously oriented Trust." Id.

The DCT also explains the reasons for seeking conversion of both trusts to unitrusts under the UPIA and to make the Clause VIII Trust subject to the UPMIFA. Id. at 9-11. Essentially, the DCT opines that the asset management provisions of UPIA and the UPMIFA, see RSA chapter 292-A, are more applicable to the long term needs of the Trusts, as both the UPIA and UPMIFA would allow the Trustees to choose investments vehicles that balance the twin goals of capital appreciation and income production, rather than "a focus on investments that produce adequate current income." See *Memo in Support of Trustee's Motion* at 10 (Index #283). In order for UPMIFA and the UPIA to apply, however, the DCT contends that both Trusts must be converted to unitrusts, id., see RSA 564-C:1-106(b), to allow for application of the "total return and distribution" requirements of RSA 564-C:1-106(d) that usually target long-term growth strategies. Id. He recommends subsequent application of UPMIFA to the Clause VIII Trust so that the trustees "may apply to the court for permission to use" different distribution requirements of UPMIFA set forth in RSA 292-B:3-:7. Id.; compare RSA

564-C:1-106(d)(3)(establishing a "payout provision" between 3%-5%) with RSA 292-B:3-:7 (allowing for flexible asset accumulation/distribution with a 7% appropriation for expenditure deemed presumptively imprudent). Notably, the DCT does not recommend application of the UPMIFA to the smaller trust, asserting that it "could result in additional accounting requirements" and that the Trustees wish to retain the right to distribute principal of the Clause VI Trust as they see fit. See id. at 11.

In response, the Second Church filed a *Motion for Leave to Reply*, and a *Response to the Objection*. See Index ##286-287. The Second Church alleges that the DCT "has overlooked and misinterpreted" certain aspects of church history and thus has improperly sanctioned conversion of the Clause VIII Trust to a unitrust and sought application of certain provisions of UPMIFA. It also argues that the proposed resolution is "fundamentally flawed" because it does not cure the "embedded conflict;" ignores the intent of the trust(s); and does not account for, and allow recovery of losses from, prior alleged financial transgressions of the trustees. Finally, it argues that unitrusts cannot be governed by the UPMIFA as it is not an "endowment fund" subject to that chapter.

The Court **GRANTS Prayer A of** the *Assented-To Motion*, subject to certain conditions set forth infra. It agrees with the Trustees and the DCT that under the 1993 Order, one of the primary purposes of the Clause VIII Trust, namely, to "more effectively promot[e] and extend[] the religion of Christian Science as taught by me," is not fully realized. It is well-settled that the intent of the testator/settlor is the veritable North Star guiding a court when it is interpreting a will and testamentary trusts. King v. Onthank, 152 N.H. 16, 18 (2005)(intent of testator is the "sovereign guide"); see, e.g., Shelton v. Tamposi, 164 N.H. 490, 495 (2013)(intent of settlor is "paramount"). "Similarly, it is the

[testator's/] settlor's intent, as ascertained from the language of the entire instrument, which governs the distribution of assets under a [testamentary] trust." King, 152 N.H. at 18. Courts "determine that intent, whenever possible, from the express terms of the [instrument] itself." Shelton, 164 N.H. at 495. "[I]f no contrary intent appears in the will, the words within the will are to be given their common meaning . . . clauses in a will are not read in isolation; rather, their meaning is determined from the language of the will as a whole." In re Clayton J. Richardson Trust, 138 N.H. 1, 3 (1993). Finally, testators/settlors are presumed to understand the import of the words *used* in the instrument, see, e.g., Blue Ridge Bank & Trust, Co. v. McFall, 207 S.W.3d 149, 157 (Mo. App. W.D. 2006); and similarly, testators/settlors have been found to understand how to include limiting language in a will. See Cowan v. Cowan, 90 N.H. 198, 201 (1939). Here, the simple terms of the Clause VIII testamentary provisions provide for two categories of distributions: church repair and "promoting and extending the religion of Christian Science as taught by me." As noted supra, the Glover v. Baker, 76 N.H. 393 (1912), Fernald v. First Church of Christ, Scientist, in Boston, 77 N.H. 108 (1912), and Chase v. Dickey, 99 N.E. 410 (Mass. 1912) cases reviewed the Clause VIII testamentary provisions and deemed "promoting and extending" to be an important purpose of the Clause VIII Trust. The 1993 Order upends this intent, and, since the terms of the trust should be given full realization,[13] the Court is comfortable partially amending that order to the extent it gave priority to church repair. However, in light of the conditions that gave rise to the 1993 Order and the embedded conflict, the Court agrees with the DCT that certain conditions should be in place, namely: (1) any

[13] In addition, the parties to the Stipulation giving rise to the 1993 Order agree to partially amending that order.

distributions for repairs need to be disclosed to, and approved by, the DCT; and (2) the Mother Church may not receive distributions intended to "promote and extend" directly or for its programs, rather, they will be distributed to third parties; and (3) availability of those funds/potential distributions will be published prominently in the *Christian Science Monitor*. The Court notes that the Second Church argues that under this arrangement the embedded conflict will still be present as the Trustees, who are also Directors of the Mother Church, will decide which institutions receive the income from the trust(s) and thus can exclude branch churches it does not favor. The Court, however, cautions the Trustees that should they endeavor to unfairly distribute funds to those entities in their favor or withhold distributions from those they would "punish," they risk violating the specific intent of Mrs. Baker Eddy that distributions be made to "more effectually" promote and extend the Christian Science religion and their fiduciary duty of impartiality. See generally, RSA 564-B:8-803. In order to assist the DCT with monitoring the distributions to third parties in accordance with the agreement between the DCT and the Trustees, and this Order, the Trustees are further **DIRECTED** that they must furnish the DCT, along with the annual audited accounts, a schedule of recipients of Clause VIII distributions and provide affidavit(s), under oath, that these distributees are in fact "third party recipients" and not affiliated with the Mother Church.

The Court now addresses the request that it approve conversion both Trusts to unitrusts under the UPIA, see RSA 564-C:1-106(b), id. at 6-7, reserving powers to distribute principal from the Clause VI Trust "as they may deem best," and adoption of certain provisions of UPMIFA, see RSA chapter 292-A, for the Clause VIII Trust. Id.

RSA 564-C was re-enacted in 2006 to establish a set of rules to, inter alia, assist trustees with the determination of whether receipts or distributions are from "income" or "principal." See generally, Michelle M. Arruda and William F.J. Ardinger, The Policy and Provisions of the Trust Modernization and Competitiveness Act of 2006 N.H. Bar J. Fall 2006. RSA Chapter 564-C enables a trustee to convert a trust to a "unitrust" and seek a total return on investments in the trust in order to foster long term asset growth targeted to the intent of the trust "without violating the duty of impartiality [as set forth in the NHTC] and without running afoul of, and in fact better able to satisfy, the prudent investor rule." Id.; see generally, UNIFORM LAWS COMMISSION, *Uniform Principal and Income Act, Prefatory Note*, 3-4 (Feb. 9, 2009)(discussing tension between "modern investment theory" and "traditional income allocation" approaches to trust asset management).

The UPIA authorizes a trustee, subject to the terms of the trust, to convert a trust to a unitrust provided that certain requirements are met. See RSA 564-C:1-106(a). In addition, a trustee or qualified beneficiary may petition a court to authorize conversion to a unitrust, and directs that: "[t]he court shall approve the conversion or direct the requested conversion if the court concludes that the conversion will enable the trustee to better carry out the intent of the settlor and the purposes of the trust." RSA 564-C:1-106(b)(3).

As discussed infra, the Clause VI Trust was established to assist with "free instruction for indigent, well-educated, worthy Christian Scientists", and multiple courts, including the New Hampshire Supreme Court, have concluded that with respect to the Clause VIII Trust, "[t]he testatrix gave the bulk of her property in trust to be devoted and

used for the purpose of promoting and extending the religion of Christian Science as taught by her." Glover, 76 N.H. at 401. She intended "to create a public trust" supervised by this Court, with the intent of "promoting and extending" her religion "to all parts of the world." Fernald, 77 N.H. at 109. The Massachusetts Supreme Judicial Court observed that Clause VIII "was the founding of a trust of comprehensive scope for the upbuilding of the sect which the testatrix made the object of her bounty." Chase, 99 N.E. at 414. After consideration of the submissions by the DCT, Trustees, and Second Church, the Court agrees with the DCT that an investment plan that properly balances returns for capital appreciation and income, while fostering long term growth of the trust, will enable the Trustees to continue to carry out Mrs. Baker Eddy's century old intent to support the education of Christian Scientists and the broad design to carry out a "most catholic missionary effort, both as to territory, peoples *and times*. . . ." Chase, 99 N.E. at 414. Consequently, the Court **GRANTS Prayer B** of the *Assented-To Motion* seeking court approval of conversion of the Trusts to unitrusts under RSA chapter 564-C.

However, it is unable to likewise to grant the request make the Clause VIII Trust subject to UPMIFA as it is not authorized to do so pursuant to the plain language of the statute. Although adoption of UPMIFA may allow the Trustees more flexibility in managing trust assets to effectuate the same purposes that allow for conversion to unitrusts, the Court may not authorize that request without proper statutory authority. It is well-established that Courts determine the authority granted to it in a statute by analyzing its plain terms. See generally e.g., Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 73 (2015). Courts "interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the

legislature did not see fit to include." Id. (quotations omitted). Here, the investment/distribution provisions of UPMIFA set forth in RSA 292-B:3-:7 apply to an "endowment fund" or "institutional fund." Id. The term "endowment fund" is defined as: "an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis." RSA 292-B:2, II. An "institutional fund," is defined as "a fund held by an institution exclusively for charitable purposes." RSA 292-B:2, V. The notes to an identical provision in the Uniform Act[14] clarify that an institution "includes a trust organized and operated exclusively for charitable purposes, but only if a charity acts as trustee."[15] UNIFORM LAWS COMMISSION, *Uniform Prudent Management of Institutional Funds Act,* §2, comments at 9 (Nov. 8, 2007). The statute expressly does not include a "fund held for an institution by a trustee that is not an institution." RSA 292-B:2, V(b). The notes to the Uniform Act state: "[t]he term institutional fund includes any fund held by an institution for charitable purposes, whether the fund is expendable currently or subject to restrictions. The term does not include a fund held by a trustee that is not an institution." UNIFORM LAWS COMMISSION, *Uniform Prudent Management of Institutional Funds Act,* §2, comments at 9 (Nov. 8, 2007). As such, even if the Clause VIII Trust is converted to a unitrust, the Court was not granted authority by the Legislature to adopt certain provisions of UPMIFA for *this trust.* It must presume that the Legislature did not intend for UPMIFA to apply here as it did not include a testamentary trust with individual trustees as one of the qualifying

[14] The New Hampshire Supreme Court has directed courts to look to the comments of a model act for guidance as to its meaning. See, e.g., Rabbia v. Rocha, 162 N.H. 734, 737-38 (2011).
[15] An "institution" includes "a person, other than an individual, organized and operated exclusively for charitable purposes." RSA 292-B:2, IV(a). A "person" in turn can include a "trust." RSA 292-B:2, VI. However, the notes to the Uniform Law direct that: "the definition of person includes trusts, but only trusts managed by charities can be institutional funds. UPMIFA does not apply to trusts managed by corporate trustees or by individual trustees." UNIFORM LAWS COMMISSION, *Uniform Prudent Management of Institutional Funds Act,* §2, comments at 14 (Nov. 8, 2007).

trusts.[16] Of course, the Legislature "is free, subject to constitutional limitations, to amend the statute," Hogan, 168 N.H. at 74 (quotations omitted), however, this Court cannot, by court order, effectuate the statutory change the DCT and Trustees implicitly request. As such, the Court **DENIES Prayer C** of the *Assented-To Motion.* See Index #281.

D. Motion to Appoint Independent Trustee

In November, 2017, the Second Church filed a *Motion for Appointment of an Independent Trustee*, see Index #303, to which the Trustees and DCT objected, see Index ##306-309, and the Second Church responded. See Index #313. As discussed supra, the Second Church lacks standing to seek appointment of an independent trustee at this time. The Court, however, pauses to make clear that it is not inclined, at this time, to appoint an additional trustee *in the absence of a vacancy* on the current board of trustees, even if standing was conferred.

As the Court observed in its Order dated May 4, 2017 at 7 (Index #274), "[w]hile the authority of the probate court to reopen its decrees is undoubted, it will not be exercised except for good cause." Indian Head Nat. Bank v. Theriault, 96 N.H. 23, 27 (1949); see also Merrimack Valley Wood Prod., Inc. v. Near, 152 N.H. 192, 203 (2005)("[T]here can be no question of the inherent power of the Court to review its own proceedings to correct error or prevent injustice"); Adams v. Adams, 51 N.H. 388, 396 (1872)("[a]s a general proposition, courts have power to set aside, vacate, modify, or amend their judgments for good cause shown"). Similarly, "[w]hen asked to reconsider a holding, the question is not whether we would decide the issue differently de novo, but

[16] The Court observes that the Legislature is very experienced in supplementing or amending statutes applicable to trusts. See, e.g., 2017 LAWS Ch. 257 (approximately sixty-eight page piece of legislation revising the New Hampshire trust laws).

whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed." Ford v. New Hampshire Dep't of Transp., 163 N.H. 284, 290 (2012)(quotations and brackets omitted).

In 1949, Judge Lord refused to fill the vacancy created by the death of Josiah E. Fernald, and decreed that the five surviving trustees would constitute the trustees of the Clause VI and Clause VIII Trusts. See *DCT Memorandum in Support of Trustee's Motion to Amend 1993 Order and To Convert Trusts to Unitrusts*, Exh. 2 (Index #281). Since that time, numerous probate courts have granted motions to fill a vacancy with a director of the Mother Church without objection. See, e.g., Index ##32, 41. Additional orders have issued pursuant to stipulations between the DCT and Trustees where the Trustees were alleged to have failed to act impartially. See *DCT Memorandum Concerning Standing of Second Church of Christ, Scientist*, Exhs. 1-2 (Index #252). Although the Second Church has alleged, and the DCT has recognized, that there remains an embedded conflict between the Trustees and the Directors of the Mother Church, the Court notes that recently the DCT has taken affirmative steps to mitigate that conflict. This Court has today, and in previous orders, directed additional protections be put in place to ensure that the Trustees honor their obligations to treat all potential beneficiaries impartially. In addition, the Court has accepted, and reviewed to the extent that they do not seek affirmative relief, *amicus* submissions from the Second Church. As such, it does not, at the present time, find that there is good cause to effectively vacate Judge Lord's 1949 Order by adding a sixth member to the board of Trustees. That said, it will continue to encourage the Second Church to provide the DCT with any information it deems helpful to the DCT in its oversight responsibilities

and, as appropriate, it will continue to consider acceptance of *amicus* submissions. Finally, it notes that nothing in Judge Lord's order requires that future vacancies be filled by Directors of the Mother Church.

E. Accountings

The Trustees submitted independently audited accountings for both the Clause VI and Clause VIII Trusts for the period ending March 30, 2017. See Index ## 292-295. The Second Church filed an objection, see Index #300, seeking, inter alia, additional information concerning the details of certain entries, the independent auditor's work papers, and justification of the Trusts' investment policies. See Index #300.[17] The Trustees responded, see Index #302, alleging that the Second Church lacks standing to object. Id. They also stated that the DCT "reviewed in detail the Trustees' investment policies." Id. The DCT has had the opportunity to review the independently audited statements, and, as discussed supra, has encouraged changes to the management of the Trusts' investments.[18] The Court observes that the DCT has not filed an objection to accountings filed and it has reviewed them.

The Clause VI and Clause VIII Accountings for the period ending March 31, 2017, see Index ##292, 294, are **ALLOWED**. As noted supra, the Second Church lacks standing to object, however, it is encouraged to share its concerns with the DCT after each accounting is filed. The Court encourages the Trustees to share data with the

[17] The Court notes that although the Second Church implicitly seeks re-opening of prior years' accountings, those have been approved without timely objection by the DCT and Second Church. It is disinclined to re-open decades of accountings when either the Second Church could have registered its objections with the DCT, and in the absence of response, likely would have had standing in this Court, or DCT could have objected in a timely fashion. Neither of the acts occurred, and as such, the Court will not re-open those accounts at this time.

[18] The Court also notes that in 2016, significant changes to the management of the Trusts' assets and reporting were made after the DCT's objections were resolved by agreement and further restrictions were instituted by the Court. See Order dated April 4, 2017 at 2-9 (Index #274).

DCT going forward and reminds them of their obligation to submit independently audited statements.

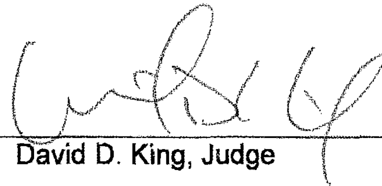
F. <u>Other Rulings</u>

In light of its orders set forth supra, as a matter of housekeeping, the Court **ENTERS** the following additional **ORDERS:**

- The Trustees' *Assented-to Motion for Extension of Time to File an Objection to the Second Church's Motion for Appointment of an Independent Trustee*, see Index #306 is **GRANTED.**
- The Second Church's *Status Report and Request for Time for Discovery*, see Index #288, is **DENIED AS MOOT**.

SO ORDERED

Dated: 3/19/2018



David D. King, Judge

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

7th Circuit - Probate Division - Dover
259 County Farm Road, Suite 203
Dover NH 03820

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

MICHELE E. KENNEY, ESQ
PIERCE ATWOOD LLP
1 NEW HAMPSHIRE AVENUE SUITE 350
PORTSMOUTH NH 03801

Case Name: **Trust of Mary Baker Eddy (Clause VI & VIII)**
Case Number: **317-1910-TU-00001**

On May 03, 2018, Judge David D. King issued orders relative to:

Orders on Motion(s) for Reconsideration
See enclosed copy.

Any Motion for Reconsideration must be filed with this court by May 13, 2018. Any appeals to the Supreme Court must be filed by June 02, 2018.

May 03, 2018

Cheryll-Ann Andrews
Clerk of Court

C: James F. Raymond, ESQ; Thomas J. Donovan, ESQ; Richard D. Judkins, ESQ

THE STATE OF NEW HAMPSHIRE

MERRIMACK COUNTY

TRUST DOCKET
6TH CIRCUIT COURT
PROBATE DIVISION

TRUST OF MARY BAKER EDDY (CLAUSE VI & VIII)

317-1910-TU-00001

ORDERS ON MOTION(S) FOR RECONSIDERATION

Presently before the Court are a number of pleadings filed by the Trustees of the Trust of Mary Baker Eddy (Clause VI), and the Trustees of the Trust of Mary Baker Eddy (Clause VIII)(collectively the "Eddy Trusts" and "Trustees"); the Director of Charitable Trusts, Thomas J. Donovan, Esq. (the "DCT"); and the Second Church of Christ, Scientist, Melbourne (Australia) (the "Second Church") following this Court's March 19, 2018 Order (the "March 19th Order"). See Index #314. They include: (1) the *Trustees' Partially Assented-To Motion for Reconsideration*, see Index #316; the Second Church's *Limited Assent and Motion for Supplemental Relief*, see Index #320; and the Trustee's *Objection to the Limited Assent and Motion for Supplemental Relief;* see Index #321; and (2) the Second Church's *Motion for Limited Reconsideration and Clarification*, see Index #317, and *Objections* filed by the Trustees and DCT. See Index ##318-319.

In order to prevail on their motion(s), the moving party is required to demonstrate to the Court that it "has overlooked or misapprehended" particular points of law or fact.

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Cir. Ct. - Probate Div. R. 59-A (1). For the reasons that follow, the *Trustees' Partially Assented-To Motion for Reconsideration*, see Index #316; is **GRANTED IN PART** and **DENIED IN PART**; and the Second Church's *Motion for Limited Reconsideration and Clarification*, see Index #317, is **DENIED**. In addition, to the extent that the Second Church's responsive *Limited Assent and Motion for Supplemental Relief*, see Index #320, seeks additional affirmative relief, it is **DENIED**.

I. *Trustees' Partially Assented-To Motion for Reconsideration*

The Trustees filed a *Partially Assented-To Motion for Reconsideration*, see Index #316, seeking: (1) clarification that the notices concerning availability of Clause VIII grants be published in the *Christian Science Journal*, not the *Christian Science Monitor* as directed in the Order; and (2) an order striking the Court's Order directing the Trustees to confirm that recipients of Clause VIII Trust distributions are "not affiliated with the Mother Church." See March 19th Order at 29 (Index #314). The Second Church assents in part to the extent that the Trustees seek publication in the Christian Science Journal, but otherwise objects, *and* requests that the Court order the Trustees to "consult with the Director of Charitable Trusts and Second Church" concerning potential distributions to third parties. See *Second Church Limited Assent and Motion for Supplemental Relief* (Index #320).

First, the Court GRANTS IN PART the Trustee's *Motion for Partial Reconsideration* as it pertains to publication of the availability of Clause VIII funds in the *Christian Science Monitor.* In the Trustees' *Assented to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act,* see Index #281, the Trustees represented to the

Court that in order to address an on-going concern about the embedded conflict arising from their duel role as trustees of the Clause VIII Trust and Directors of the Mother Church, they agreed with the DCT to: (1) seek a court order "amending" Judge Cushing's 1993 Order approving a *Stipulation* between then-DCT William B. Cullimore and the trustees of the Clause VIII Trust directing that income from that trust be used first for repairs on the Mother Church and then to "more effectively promot[e] and extend[] the religion of Christian Science as taught by [Mrs. Baker Eddy]," see id. at 5-6; and (2) "restore the original intent" of the Clause VIII Trust by directing them to distribute trust income to "third party recipients, as chosen by the Trustees in their discretion, and not directly to the Mother Church or to specific programs administered by the Mother Church." Id. at 6. The Court, expressing concern about prior compliance with Court-orders, granted that request, subject to additional safeguards. See March 19th Order at 28-29.

First, the Court in its March 19th Order agreed with the DCT and Trustees that it would be prudent to publish the availability of Clause VIII funds in an appropriate publication. See March 19th Order at 28-29 (Index #314). However, it inadvertently indicated that publication be accomplished through the more commonly known *Christian Science Monitor*, see id. at 29, instead of the *Christian Science Journal* as requested by the Mother Church and assented-to by the DCT. See *Assented to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act* at 6 (Index #281). The Court therefore GRANTS IN PART the *Trustee's Partially Assented-To Motion for Reconsideration* to the extent it

now corrects its error concerning the publication vehicle and makes clear that any agreed-upon notice as to availability of funds be made in the *Christian Science Journal.*[1]

Next, the Court, in its March 29th Order, instituted additional safeguards applicable to distribution of Clause VIII funds to those negotiated by the DCT that it felt were appropriate in light of the recognized embedded conflict. See id. at 28-29. In their *Assented to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*, see Index #281, the Trustees represented to the Court that the DCT had reviewed non-compliance with Court orders by the Trustees. See id. at 1-2. After discussions between the DCT and Trustees after that review, and to specifically to address the DCT's concern about the embedded conflict and "to better reflect the original intent" of the Clause VIII Trust, id. at 1, the Trustees, with assent of the DCT, requested that this Court

> restore the primary purpose of the Clause 8 Trust to permit the disbursement of funds for the promotion and extension of Christian Science, with the further condition that the funds be disbursed to third party recipients, as determined by the Trustees at their discretion, and not directly to the [Mother Church].

Id. at 2. Prayer A of that motion further clarified the scope of the requested restriction so that funds would be distributed only to "third party recipients" and that no distribution from the Clause VIII Trust would be made "to The Mother Church or to specific programs administered by The Mother Church." Id. at 6.

After consideration of the pleadings, the applicable statutes and common law, and the record of the management of the Clause VIII Trust, in particular the existence of

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[1] Although the Second Church suggests in its *Limited Assent and Motion for Supplemental Relief* (Index #320) that the Court order publication in both the Christian Science Monitor and Christian Science Journal, id. at ¶5 (Index #320), that suggestion effectively constitutes a request for additional relief that is not appropriate on reconsideration, see Cir. Ct. – Prob. Div. R. 59-A, and is therefore DENIED.

the embedded conflict and a certain history of lack of compliance on the part of the Trustees with Court orders, this Court accepted the compromise set forth by the DCT and Trustees, but with additional reporting requirements to assist with monitoring compliance by the Trustees. See generally RSA 564-B:2-201(a). Specifically, the Court directed that:

> In order to assist the DCT with monitoring the distributions to third parties in accordance with the agreement between the DCT and the Trustees, and this Order, the Trustees are further **DIRECTED** that they must furnish the DCT, along with the annual audited accounts, a schedule of recipients of Clause VIII distributions *and provide affidavit(s), under oath, that these distributees are in fact "third party recipients" and not affiliated with the Mother Church.*

Id. at 29 (emphasis added). The Trustees seek reconsideration of the Court's use of the terms "affiliated with the Mother Church" asserting that it is "ambiguous and may exclude recipients that otherwise would fall within the class of permitted recipients described in the motion." *Trustee's Partially Assented-To Motion for Reconsideration* ¶8 (Index #281). In particular, they assert that

> branch churches *may* be considered as affiliated with the Mother Church. Although they are independently self-governed, branch churches are formed in accordance with the Manual of the Mother Church and officially recognized by the Mother Church, and they and their members are subject to disciplinary action by the Mother Church."

Id. ¶9 (emphasis added). The Trustees proceed to request that this Court "reconsider its order and only restrict distributions as worded in the Motion, to The Mother Church

and to specific programs administered by the Mother Church, but not exclude affiliates." Id. ¶11.[2]

The Court DENIES the *Trustee's Partially Assented-To Motion for Reconsideration* to the extent it requests that the Court remove the terms "not affiliated with the Mother Church" from its Order. Instead, it CLARIFIES the meaning of that phrase as intended to give full realization the meaning of "third party recipient" and ensure that neither the Mother Church nor any of its programs, directly or indirectly, receive Clause VIII funds in accordance with the agreement between the Trustees and DCT. The Court intended the term "affiliated" to have its common meaning, namely, to be controlled by, or share a common governing body with, the Mother Church. See generally BLACK'S LAW DICTIONARY at 69-70 (Tenth Edition 2014). Branch churches, if possessing independent self-governance, would not qualify as an "affiliate" under this common meaning.[3]

II. Second Church's *Motion for Limited Reconsideration and Clarification*

The Second Church has also filed a motion seeking reconsideration of certain court orders. See *Motion for Limited Reconsideration and Clarification* (Index #317). In its motion, the Second Church requests that: (1) this Court reconsider its determination that it lacks standing; and (2) provide clarification of the "on-going relationship between

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[2]The Court observes that the Trustee's requested reconsideration in paragraph 11 does not recognize an important qualification in the original *Assented to Motion to Amend the 1993 Order, Covert Clause 6 & 8 to Unitrusts and Adopt RSA 292-B Uniform Prudent Management of Institutional Funds Act*, see Index #281, namely, that distributions be made to "third party recipients."

[3] Should the Trustees possess any concerns about whether certain distributions might be in violation of the Court's order, they are certainly entitled to petition for instructions from it. *Motion for Limited Reconsideration and Clarification* at (Index #317).

the Director of Charitable Trusts and the Second Church."[4] The Trustees and the DCT have objected. See Index ##318-319.

First, the Second Church seeks reconsideration of this Court's: (1) determination that it lacks standing to request appointment of an independent trustee under the "special interest exception" to the rule that grants the DCT authority to represent potential charitable beneficiaries of a charitable trust, see generally Robert Schalkenbach Foundation v. Lincoln Foundation, Inc., 91 P.3d 1019, 1025-28 (Ariz. Ct. App. 2004); and (2) even assuming requisite standing, refusing to appoint an additional trustee and thus effectively re-open and vacate Judge Lord's 1949 Order that held that it was unnecessary to fill a vacancy created by the death of the last independent trustee. See generally, March 19th Order at 3-4.

The Court, in its March 19th Order, although recognizing that the Second Church lacked standing, directed that even if standing was conferred, it would not, at this time, appoint an additional trustee in the absence of a vacancy. See March 19th Order at 33-35. It noted that while it had the authority to reopen prior probate orders, it did not find good cause to do so at this time. Id. The Second Church contends that Judge Lord's 1949 decree was not a "court order" as the Second Church did not find it docketed in the public record, but rather was a letter sent to the Trustees and attached to a pleading submitted by the DCT. See *Director of Charitable Trusts Memorandum in Support of Trustee's Motion to Amend 1993 Order* Exh. 2 (Index #284). Consequently, it argues

[4] The Second Church asserts that one current trustee has resigned as Director of the Mother Church and thus should be replaced as trustee by an independent trustee. It also appears to complain that the current composition of the Trustees and Directors of the Mother Church is contemptuous of Judge Lord's Order. Both subjects are not properly before this Court in a Motion for Reconsideration and should be raised, in the first instance with the DCT.

that it should not be given the effect of a court order and that this Court's unwillingness to overturn a long standing court order was misplaced.[5]

The Court disagrees. Although the format is unusual for modern court documents, and the then-register of probate did not follow what would be considered present-day clerk-of-court docketing procedures, the Court finds that the 1949 decree at issue was intended to be, and had the force and effect, of a court order. Judge Lord stated:

> Upon consideration of the matter of a vacancy in the trusteeship . . . due to the death of Josiah E. Fernald, you are informed that it is not necessary to fill the vacancy, and that I hereby *authorize and decree* that the five members of the Christian Science Board of Directors who are surviving trustees . . . shall constitute the sole trustees . . however, that being all non-residents of New Hampshire, shall appoint a resident agent for the trusts . . . who shall also be retained as New Hampshire counsel for the trustees.

See *Director of Charitable Trusts Memorandum in Support of Trustee's Motion to Amend 1993 Order* Exh. 2 (Index #284)(emphasis added). Consequently, this Court did not err in applying the well-established "good cause" standard used to determine whether it is prudent to vacate a prior court order.[6]

[5] They presently, for the first time, assert evidentiary objections based upon authentication of Judge Lord' Order and the Court's reliance on it. Despite numerous filings and detailed pleadings submitted by the Second Church concerning the history of the Baker Eddy Trusts, including some with brief references to Judge Lord's decision, the Court cannot find any evidentiary challenge to consideration of it. They do note that it was not docketed, and complain that the DCT did not promptly provide it to them, but they do not take issue with its authenticity or affirmatively contend it is not an order. They presently concede that if it is considered a court order, however, the Court may properly take judicial notice of the Court order. See *Motion for Limited Reconsideration and Clarification* at 3, n. 6 (Index #317); see generally, N.H. R. Ev. 201.

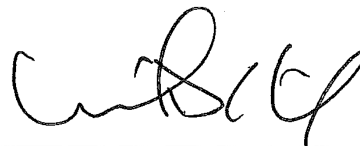
[6] The Court further notes that this analysis was conducted on the stated assumption that even if the Second Church had standing to participate and seek relief in this case it would not have prevailed. It does not possess standing to intervene. As such, the Second Church lacks standing to request that this Court should schedule discovery and/or an evidentiary hearing as to whether there is "good cause" to re-open Judge Lord's order.

Next, the Second Church asserts that the Court did not properly apply the "Blasko Factors" in this matter, see generally, Mary Grace Blasko, Curt S. Crossley, David Lloyd, Standing to Sue in the Charitable Sector, 28 U.S.F.L.Rev. 37 (Fall 1993), claiming that instead of analyzing the extraordinary nature of the remedy sought, see id., the Court should have focused "on the extraordinary nature of the Trustee's acts complained of by the Second Church." *Motion for Limited Reconsideration and Clarification* at 3 (Index #317). The Court has reviewed the March 29th Order and is satisfied that it properly applied the Blasko analysis. See Cir. Ct. - Probate Div. R. 59-A (1).

Finally, the Second Church requests that given this Court's: (1) observation that the DCT represents potential charitable beneficiaries; and (2) encouragement of the Second Church to share information with the DCT, that the Court clarify "the manner in which the Court envisions [a relationship between the DCT and Second Church]." The request is DENIED as it is not the proper subject of a *Motion for Reconsideration.* See Cir. Ct. - Probate Div. R. 59-A (1). In addition, the Court finds it would be inappropriate to provide such direction beyond what has already been suggested and thus declines to do so.

SO ORDERED

Dated: 5/3/2018



David D. King, Judge

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JUDICIAL BRANCH
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7th Circuit - Probate Division - Dover
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http://www.courts.state.nh.us

NOTICE OF DECISION

MICHELE E. KENNEY, ESQ
PIERCE ATWOOD LLP
1 NEW HAMPSHIRE AVENUE SUITE 350
PORTSMOUTH NH 03801

Case Name: **Trust of Mary Baker Eddy (Clause VI & VIII)**
Case Number: **317-1910-TU-00001**

On May 14, 2018, Judge David D. King issued orders relative to:

Motion to Amend Second Church of Christ Scientist's Motion for Limited Reconsideration and Clarification.
Motion is DENIED for reasons set forth in the Objection of the Director of Charitable Trusts. (Index #324)

Any Motion for Reconsideration must be filed with this court by May 27, 2018. Any appeals to the Supreme Court must be filed by June 16, 2018.

May 17, 2018

Cheryll-Ann Andrews
Clerk of Court

C: James F. Raymond, ESQ; Thomas J. Donovan, ESQ; Stuart Brown,, ESQ; Robert B. Eyre, ESQ; Richard D. Judkins, ESQ; Theodore E. Dinsmoor, ESQ; Russell F. Hilliard, ESQ; Patrick O'Brien Collins, ESQ; Michael P. Courtney, ESQ

THE STATE OF NEW HAMPSHIRE

6th CIRCUIT COURT – PROBATE DIVISION - CON)RD

TRUST DOCKET

IN RE: MARY BAKER EDDY CLAUSE VI AND VIII TRUSTS

317-1910-TU-00001

DIRECTOR OF CHARITABLE TRUSTS' OBJECTION TO SECOND CHURCH'S MOTION TO AMEND MOTION FOR RECONSIDERATION

NOW COMES the Attorney General, Director of Charitable Trusts, and in objection to the Motion to Amend Second Church of Christ Scientist's Motion for Limited Reconsideration, states as follows:

1. By order dated May 3, 2018, this Court denied Second Church's Motion for Limited Reconsideration, so Second Church's Motion to Amend that motion likewise should be denied.

2. Moreover, The Motion to Amend was not filed within ten days of the clerk's written notice of the order, and so is not timely. Probate Division Rule 59-A(1).

3. Second Church's Motion to Amend is focused on activities that took place before this Court in 1996 with respect to setting the size of the probate bond for the Clause VIII trust. Second Church's counsel obliquely raised the question of probate bonds at a hearing on November 3, 2017. See, Transcript attached to Motion, p. 44. It is too late now to present new evidence on this subject.

4. The Court's records reflect that there is a bond currently in place with respect to the Clause VIII Trust.

WHEREFORE, the Director of Charitable Trusts respectfully requests that this Honorable Court:

(A) Deny Second Church's Motion to Amend Motion for Reconsideration; and

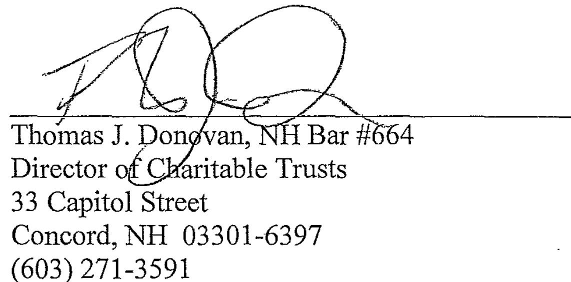
(B) Grant such further relief as may be deemed just and proper.

Respectfully submitted,

ATTORNEY GENERAL,
DIRECTOR OF CHARITABLE TRUSTS

By his attorneys,

GORDON J. MACDONALD
ATTORNEY GENERAL



Date: May 9, 2018

Thomas J. Donovan, NH Bar #664
Director of Charitable Trusts
33 Capitol Street
Concord, NH 03301-6397
(603) 271-3591

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objection was forwarded by electronic and U.S. First Class mail to the following counsel of record:

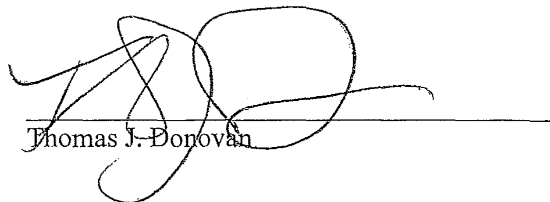
James F. Raymond, Esquire
Michael P. Courtney, Esquire
Upton & Hatfield LLP
PO Box 1090
Concord, NH 03302-1090

Stuart Brown, Esquire
DLA Piper, LLP
1201 North Market Street, Suite 2100
Wilmington, DE 19801

Theodore E. Dinsmoor, Esquire
128 Great Plain Avenue
Wellesley, MA 02482

Robert B. Eyre, Esquire
Foehl & Eyre, PC
27 East Front Street
Media, PA 19063

Michelle E. Kenney, Esquire
Patrick O. Collins, Esquire
Pierce Atwood LLP
One New Hampshire Avenue, Suite 205
Portsmouth, NH 03801



Thomas J. Donovan