

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

HUDSON PRESBYTERIAN CHURCH)	CASE NO. 2006 09 6162
)	
Plaintiff)	JUDGE SPICER
)	MAGISTRATE SHOEMAKER
vs.)	
)	
EASTMINSTER PRESBYTERY)	<u>HUDSON PRESBYTERIAN CHURCH'S</u>
)	<u>REPLY BRIEF IN SUPPORT OF</u>
Defendant)	<u>SUMMARY JUDGMENT IN ITS FAVOR</u>
)	<u>AND IN OPPOSITION TO</u>
)	<u>EASTMINSTER PRESBYTERY'S</u>
)	<u>MOTION FOR SUMMARY JUDGMENT</u>
)	

I. OVERVIEW OF REPLY¹

All of the documents relevant to the resolution of this case clearly establish that Hudson Presbyterian Church owns its property, and has always had the right to disaffiliate from the denomination while retaining its property. The deeds to the property show clear ownership vested solely in Hudson Presbyterian Church's name. The deeds have no reverter clauses, nor do they have any references to a trust. There is no express written trust existing between Hudson Presbyterian Church and Eastminster Presbytery or PC(USA). If there was one, it would have been produced. The original Articles of Corporation clearly state the voluntary nature of the association between HPC and the denomination. The Amended Articles of Incorporation (which are perfectly valid, adopted by the directors consistent with Ohio law, and ratified by the congregation) further state the voluntary nature of the relationship between the particular church and the denomination. The By-

¹Hudson is replying separately to the OAG's brief.

Laws state the voluntary nature of the relationship and the right of property ownership. The mortgages between the parties expressly acknowledge the right of disaffiliation and departure from the denomination with Hudson Presbyterian retaining the property.

The position being taken by Eastminster is preposterous. For the denomination to enter into financial transactions which provide for HPC's departure with property on the one hand, and then declare that no such right exists, or in the alternative claim that the denomination may declare that those seeking to depart do not own title to the property by virtue of their desire to depart is nothing more than self-serving circular reasoning to try and circumvent HPC's right to leave with its property intact.

Another bizarre inconsistency is that Eastminster says that HPC is not HPC. Of course it is. HPC is a legal entity, recognized at law. The legal entity is governed by its duly elected Session members², who act as the legal entity's directors. The directors, acting on behalf of the corporation, have the legal capacity to sue and be sued, and to defend the entity against claims and to seek declarations at law precisely as is being done here. What Eastminster is really saying is that if you disagree with it, it declares that you are a non-entity. This argument makes no legal sense.

A fundamental flaw in Eastminster's argument is that it tries to infuse a schism where there is none. HPC is not a "church divided" as Eastminster suggests. There is no internal power struggle with competing factions vying for control of the church. Rather, a unified Session made a recommendation regarding the status of the church's voluntary affiliation to the congregation which then voted by a super-majority in support of Session's recommendations. The Session was unanimously elected before the vote to disaffiliate, and unanimously re-elected after the vote to disaffiliate. The same pastor in the pulpit before disaffiliation was called to remain in the pulpit by a

²Elected *unanimously* by the congregation.

vote of 98% of the congregation after the vote to disaffiliate. There simply is no schism or power struggle within HPC.

There is no question of who constitutes HPC's controlling body, its Session. Yet Eastminster would have this Court hold that after a lawful vote to disaffiliate, Eastminster has the right to declare that the Session is not the Session, and arbitrarily appoint people who will tow its party line. That is not a schism, but an attempted putsch by an outside party.

A disaffected minority which does not challenge the authority of the Session or the congregation to act cannot be said to constitute a schism, particularly in a democratic-based system which recognizes majority rule. Barring unanimity, there will always be minorities. The mere existence of a minority does not amount to a schism. Were that to be the case, majority rule would mean nothing.

Likewise, a congregation's exercise of its right to vote on disaffiliation cannot constitute a "schism" when it has the right to hold the vote. (Even Eastminster, through General Presbyter Dan Schomer, recognizes the right to vote on disaffiliation for the congregation). The terms of HPC's Articles of Incorporation, By-Laws, and even the denomination's own constitution contemplate the congregation's right to vote on affiliation. It would be a hollow right indeed if mere consideration brought penalty.

Next, as already briefed at length, the claimed "trust" does not meet Ohio trust law requirements to be considered an express trust. Eastminster, as the party claiming the trust, bears the burden of establishing any express trust by clear and convincing evidence. As the deeds, articles, by-laws, and mortgages all point *against* a trust, reasonable minds can only conclude that there is not clear and convincing evidence of an express trust, and therefore the claim must fail as a matter of law.

Likewise, the legal elements necessary to impose a constructive trust are not present either. There is no evidence of acquisition of property by fraud, duress, duplicity, or any other wrongful means. The intent is to *keep* the property titled in the ownership entity which acquired it: Hudson Presbyterian. The congregation which owns the property lawfully voted to change affiliation. In trying to make out a case for a constructive trust, Eastminster misstates its financial contributions and ignores the nearly \$1 Million expansion funded entirely by the congregation, and totally ignores the more than \$5 Million in the HPC's independent operating expenses.

Finally, most of Eastminster's argument is predicated upon the proposition that the PC(USA) is a hierarchical denomination and it urges the Court to defer to PC(USA) on this matter. There are three problems with Eastminster's "Hierarchical Deference" approach. (1) It goes against Ohio legal precedence which follows the "neutral principles" approach. (2) It misapplies the concept of hierarchical deference, which *only* applies to ecclesiastical issues, and not to property issues. Where ecclesiastical and property issues intermingle, courts are directed to make decisions in a manner which avoids ecclesiology. (3) PC(USA) is not really hierarchical. The problem with that position is that the denomination itself, time and time again, denies that it is hierarchical. Moreover, the facts showing the relationship between HPC and the denomination clearly indicate that there is not a hierarchical relationship between the two, as that term has been described in case law.

In order to accept Eastminster Presbytery's position, the Court must set aside and/or disregard:

- HPC's Amended Articles of Incorporation.
- The *voluntary* nature of the relationship from the original Articles of Incorporation.
- The By-Laws adopted by the congregation by a 98% margin.
- The deeds.

- Trust formalities.
- The mortgage language.
- The vote to disaffiliate.
- The unanimous election and re-election of the church's Session.
- The 98% re-election (call) of Pastor Bogue as pastor, *after* the vote to disaffiliate.
- Remove the trustees of the on-going corporation, replacing them with undesigned persons from a third-party with no corporate standing.
- Ignore the right of a non-profit corporation to voluntarily associate.
- Rely upon an arbitrary or capricious ecclesiastical pronouncement made *after litigation* commenced for the express purpose of affecting litigation.
- Ignore PC(USA)'s own pronouncements that it is *not hierarchical*.
- Ignore the PC(USA)'s own recognition that local churches can and do leave the denomination.

The simple and straightforward means of resolving this dispute is to look to the documents typical for property and trust law determinations without delving into potential constitutional “gray areas” of ecclesiology, polity, or religious purpose. Yet either way, the facts and law support HPC's right to retain its property after disaffiliation.

As this case is being submitted on the briefs, (a) we apologize for the length of the briefs and appreciate the Court's attention, and do believe the detailed replies and factual descriptions are essential; (b) must necessarily respond to the claims in detail.

II. THE HIERARCHICAL QUESTION

Eastminster bases its arguments and analysis solely on the proposition that the PC(USA) is hierarchical. As this is incorrect, we address it here.

Generally speaking, there are three categories of religious governmental structures: Congregational, Presbyterian, and Episcopal. In the Congregational form, each local congregation is entirely self-governing and autonomous. It is a “pure democracy.” The Presbyterian form of polity is representative, with authority being exercised by laymen and ministers in a representative capacity. It is, therefore, more “republican” in nature. Episcopal polity exists where power is vested in clerical superiors, such as bishops, and such power is superior in all aspects of church governance.

As it pertains to the Presbyterian form of polity, commentary and case law frequently fail to examine the actual functioning of the polities at play, the relationship between the “ascending judicatories” and the self-imposed limitations of Presbyterian governance, generally. In fact, the U.S. Supreme Court, in drawing a distinction between congregational and hierarchical polities roughly defined “hierarchical polities” as those where congregations are “but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals *with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization*” and “wherein the decisions of discipline, faith, ecclesiastical rule and custom of law of those judicatories must be accepted as final by the entire body.” *Watson v. Jones*, 80 U.S. 679, 13 Wall. 679, 20 L.Ed. 666 (1871). The U.S. Supreme Court suggested additional indicia for assessing hierarchical vs. congregational status in *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976), 426 U.S. 696, looking at the diocese’s own resolution that it was subordinate to the parent, its submission of by-laws and articles for approval to the parent organization, and the diocese’s bishops signing an oath of obedience to the Holy Assembly. None of those criteria are present here. HPC has made no resolution of that nature, and did not/does not need Presbytery approval for Articles and By-Laws. No “oaths of allegiance” are signed by either members or pastors. And, as was briefed at length before, Eastminster does not have control which is “more or less complete” nor does it make decisions of faith or ecclesiastical rule over HPC. The

facts of this case clearly show HPC is not in a “hierarchical” relationship with Eastminster as that category has been judicially developed. This is particularly so with respect to temporal, or secular matters such as property ownership and management.

In *Watson v. Jones*, where the rough grouping of churches into congregational vs. hierarchical categories seems to have begun, the only example of a congregational style church given by the court was a *Presbyterian church*. *Watson*, 80 U.S. 679, 725-726. Intriguingly, the example of the hierarchical style *also* happened to be a Presbyterian church. The clear lesson to be learned from this is that the individual relationship between the church and judicatory needs to be examined if the case is to turn on polity.

Because the relationship between Hudson Presbyterian Church and Eastminster Presbytery is non-hierarchical in form and function, particularly as it relates to property, we are not content to let the proposition go unchallenged, further perpetuating the improper categorization of Presbyterianism as a hierarchical denomination.

The Presbyterian Church in the United States of America is not hierarchical, *and does not classify itself as hierarchical*. The PC(USA)’s legal manual states the “polity is presbyterial - ***as distinguished from hierarchical.***” (Exhibit 41). If it is to be “distinguished from hierarchical” that means it is *not* hierarchical. The Permanent Judicial Commission of the General Assembly of the PC(USA), the denomination’s own and highest ecclesiastical judicatory expressly ruled in 2004 that “a higher governing body’s ‘right of review and control over a lower one’ *must not be understood in hierarchical terms*, but in light of the shared responsibility and power at the heart of Presbyterian order.” Exhibit 53, *A. Kirk Johnston, et al. v. Heartland Presbytery of the Presbyterian Church (USA)* (2004), PJC, Remedial Case 217-2. The PC(USA)’s own court observed:

While the Book of Order refers to a higher governing body’s “right of review and control over a lower one” (G-4.0301F), these concepts must not be understood in hierarchical terms, but in light

of the shared responsibility and power at the heart of Presbyterian Order (G-4.0302).

Id. at p. 7.

The current moderator of the PC(USA), Reverend Joan S. Gray, is the author of a book entitled *Presbyterian Polity for Church Officers*. (Excerpts at Exhibit 48). Her text is utilized as authoritative, and taught in Presbyterian seminars throughout the country. Gray’s authoritative text acknowledges the three basic divisions of church polity, including Congregational, Episcopal and Presbyterian. (*Id.* at p. 3).

As for “Presbyterian Polity,” Gray expressly concedes that there is no hierarchy:

“ . . . There is no hierarchy of Presbyters in the Presbyterian Church; ministers of the Word and Sacrament and elders differ only in the functions they are called to perform. When functioning together in governing bodies, they are equals. We do not have bishops as in the Episcopal system of church government. At meetings of the church governing bodies, *all Presbyters stand in the same footing, and decisions are made by majority vote of the whole body.*”

Id. at pp. 5-6. In addressing the fundamentals of Presbyterian Polity, Gray points out that “therefore, no higher governing body can instruct a congregation to install a particular man or woman in a permanent office against its will.” Yet here, that is precisely what Eastminster wants to do, and would have this court sanction.³

³ Gray is not the only author to emphasize the distinct non-hierarchical nature of the Presbyterian Church. Millard J. Erickson, *An Introducing Christian Doctrine*, Baker, 1992, (Exhibit 49), in a more ecclesiastical light Erickson notes that:

In the Presbyterian system, the authority of Christ is understood and dispensed to individual believers and delegated by them to the elders whom they select and whom thereafter represent them. . . . It is therefore at the level of the elders that divine authority actually functions within the church.

Id. at 343. Elaborating on this in a more functional/secular description, Erickson notes that “the Presbyterian system differs from the Episcopal in that there is only one level of clergy. There is only the teaching elder or pastor. No higher levels, such as bishop, exist. Of course, certain persons are

The General Assembly of the denomination itself has made numerous declarations emphasizing its non-hierarchical nature. In a pronouncement expressly adopted by the 195th General Assembly (1983), the Presbyterian Church (USA), in a paper called “Historic Principles, Conscience and Church Government” made multiple declarations regarding the non-hierarchical nature of the denomination. And, as is particularly important to this case, *the right of a congregation to peaceably withdraw*. In the introduction the paper recognizes that “the polity of Presbyterianism [has a] strong insistence on the rule of the majority and the rights of the minority.” (Exhibit 15, p. 1). Rejecting the concepts of a “high church” the principles of Presbyterianism “make it clear that the Presbyterians claimed the liberty to order their affairs as they thought best, but were determined that others who had different opinions had the same right.” *Id.* at 4. Trying to strike a balance between unfettered individual autonomy and the potential errors of hierarchical oppression, “Presbyterians find the locus of the church neither in the local congregation, as in Congregational Polity, nor in a hierarchy of authoritative individuals, as in Episcopal Polity.” (*Id.* at 5).

Acknowledging the right of a local congregation for self governance, the denomination states that “conscience is both an individual and corporate matter. *The corporate conscience of the church is expressed through the governing bodies* (Session, Presbytery, Synod, and General Assembly).” (*Id.*, *emph.* added). It emphasizes that “*the collective right of private judgment is as important as the individual right . . . whether individual or corporate, the right of private judgment is a necessary*

elected to administrative posts within the ruling assemblies. They are selected (from below) to preside or supervise, and generally bear a title such as Stated Clerk of the Presbytery. They are not bishops, there being no special ordination to such office. There is no special authority attached to the office. Another leveling measure in the Presbyterian system is a deliberate coordinating of clergy and laity. Both groups are included in all of the various governing assemblies. Neither has special powers or rights which the other does not have.” *Id.* at 344.

one.” (*Id.* at p. 8). Obviously, as it applies here, the corporate conscience of HPC is being expressed through its unified session and congregation, and should not be alienated by Eastminster.⁴

Principle No. 2 of Presbyterianism expressly provides for five specific guarantees: (1) the right to work for change; (2) the right of dissent, protest or appeal; (3) the right of passive concurrence; (4) the right of active concurrence; and (5) *the right of peaceful withdrawal*. (*Id.* at 8).

The PC(USA) itself recognizes that “the freedom to withdraw from a voluntary association preserves the right of private judgment.” (*Id.* at 10). Given the principle that “the collective right of private judgment is as important as the individual right . . . whether individual *or corporate*, the right of private judgment is a necessary one,” it is inconsistent, if not outright contradictory, for Eastminster to assert that HPC, acting as “the corporate conscience of the church” does not have the right of private judgment to withdraw.

In elaborating on Principle No. 7, the PC(USA) cautions that “all church bodies must exercise care not claiming too much authority for themselves. . . . Because of the right to withdraw, the individual conscience cannot be bound by actions of the church.” (*Id.* at 11). In this context “the church” refers to the larger church/denomination. Again, the principle that “conscience is both an individual and a corporate matter” clearly means that the individual church, as the corporate expression of its individual members’ collective consciences, maintains the right to withdraw.

In further exploring the principle of Presbyterianism, the paper concedes that a “simple majority” is the basis for most decisions in a governing body. Significantly, the majoritarian

⁴ “We consider the rights of private judgment . . . as . . . unalienable.” B.O.O. G-1.0301. “No Church governing body ought to pretend to make laws to bind the conscience in virtue of their own authority.” B.O.O. G-1.0307. Therefore Eastminster should not pretend to try and bind the collective corporate conscience of HPC against its will. “The government of this church is representative, and the right of God’s people to elect their officers is inalienable.” G-6.0107. Therefore Eastminster should not be able to alienate HPC’s elected officials - its session.

principle applies for reaffiliation, as well. “A two-thirds majority vote is required in order to amend the Doctrinal Standards, *or to achieve union with another denomination.*” (*Id.* at 13).

An example given near the end of the paper is extremely telling to the current case. In addressing several denominational splits in the 20th Century, the paper provides an example which unequivocally establishes the right of a church to withdraw.

When the church did not permit the ordination of women, ***no church governing body*** had the freedom to conduct such ordinations; even though it may have strongly felt that the church’s practice in this regard was unwise, unscriptural, even heretical. The church’s polity, like its confessions, cannot compel uniformity of opinion as it can of behavior. Presbyterian officers were free to believe in 1920 that women should be eligible for ordination. They were free to work to make the change in the church’s constitution that would permit it. ***They were free to withdraw from the denomination and to form another more to their liking.***

Id. at 15. The freedoms discussed therein apply to the “church governing body” which would include a session of a local church, or a Presbytery itself. The example references ordination. Ordination can only be conducted by groups, not by individuals. For example, Hudson Presbyterian Church conducts its own ordinations of deacons and elders. Thus, the reference to “they” must be to an ordaining body, which would include a session, representative of a local church. For Eastminster to claim otherwise contradicts longstanding church principles. Certainly, if the example cited by the PC(USA) in 1983, relating to the 1920s, was and is valid, then HPC is “free to withdraw from the denomination,” and with others of like mind, “form another more to their liking.”

Therefore, the hierarchical nature of the church claimed by Eastminster in this lawsuit is simply a mischaracterization. The documents clearly establish the right of the individual church in decision making capacities, in functioning, in equality of representation and stature, and ultimately in withdrawal.

Again, in 2000, the PC(USA) issued a paper for discussion with the Catholic Church, formally noting its rejection of hierarchical governance. (Exhibit 6, “The Successor to Peter” paper for discussion from the PC(USA) on December 6-7, 2000.) In a paper presented to the Pope of the Catholic Church for denominational discussions geared at enhancing ecumenical cooperation, the PC(USA) states that “*we generally rejected hierarchy and Episcopacy on the one hand, and pure democracy of Congregationalism on the other. . . . an antipathy to Episcopacy remains in the Presbyterian ethos.*” (*Id.* at p. 7). Thus, even in representing itself to another ecclesiastical body, to wit, the Pope and Catholic Church, the PC(USA) concedes it is non-hierarchical. Its Constitution, its courts, its moderators’ published papers, and PC(USA)’s General Assembly’s adopted statements, in representations to other ecclesiastical entities all indicate that the PC(USA) is not hierarchical.

Therefore, not only are there numerous admissions by the PC(USA) in its own published materials that it is not hierarchical, but applying the facts of this case to the operative definition of “hierarchical” advanced by the U.S. Supreme Court, it is abundantly clear that the relationship between Hudson Presbyterian Church and the Eastminster Presbytery and the denomination is *non-hierarchical*. The U.S. Supreme Court suggests that for a hierarchical church to exist there must be “superior ecclesiastical tribunals with general and ultimate power of control more or less complete . . . over the whole membership of the organization.” *Watson v. Jones*, 80 U.S. 679.

Ohio courts recognize the elements of a hierarchical system as including “extensive and comprehensive control.” In *Shariff v. Rahman* (Cuy. App. 2003), 152 Ohio App.3d 210, 216, the court described a hierarchical system as one where “the congregation is subordinate to a general organization, typically consisting of tribunals or clerics, *which control spiritual policy and makes decisions for the entire membership.*” Neither Eastminster nor PC(USA) control spiritual policy or make business decisions for HPC. This simply is not the way the Presbyterian system functions, nor is it the way in which HPC and Eastminster interacted. In HPC’s Motion for Summary Judgment the

facts establishing the non-hierarchical nature of the relationship are set forth at length. This raises very serious questions about whether the Presbyterian Church is hierarchical, or, at least whether the relationship between Hudson and Eastminster is hierarchical. Certainly, to the extent it may shed light on the question of property control, affiliation, and trusts, the relationship between HPC and Eastminster is non-hierarchical.

Fundamentally, this case may be resolved without deciding the polity of the Presbyterian church. However, to the extent that Eastminster asks this Court to defer to it because of a claimed hierarchical status, that status should not go unchallenged and must be judged on the facts. For resolution of property disputes it is inappropriate to force three types of polity into two classifications. As it pertains to property disputes, the actual factual relationships should be considered on their own merits, and not based on artificial and misleading classifications.

Here, it may readily be held that with regard to business matters there is no “hierarchy.” Eastminster’s appeals to a hierarchical methodology of resolving this case should be rejected.

III. EASTMINSTER’S LEGAL ANALYSIS IS WRONG

Much of Eastminster’s position relies upon a misinterpretation of *Watson v. Jones*, claiming that the court must defer to the denomination. That is an improper and over simplified reading of *Watson*. *Watson* holds that it was constitutionally permissible for a state to defer to a church hierarchy on ecclesiastical matters. *Watson*, of course, cannot now be read in isolation, but must be understood in terms of *Blue Hull* and *Jones v. Wolfe*, more recent U.S. Supreme Court cases holding “neutral principles” as the constitutionally permissible and preferred method for states in deciding church property disputes.

Eastminster’s suggested interpretation of *Watson* has been rejected by the U.S. Supreme Court in *Maryland and Virginia Churches v. Sharpsburg Church*, 396 U.S. 367 (1970). Justice Brennan wrote that:

[S]tates may adopt the approach of *Watson v. Jones*, 13 Wall 679 (1872) and enforce the property decisions made within a church of congregational polity “by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government,” *Id.* at 724, and within a church of hierarchical polity by the highest authority that has ruled on the dispute at issue, *unless “express terms” in the “instrument by which the property is held” condition the property’s “use or control in a specified manner.”*

Id. at 396 U.S. 367, 368-369. Eastminster is claiming that Hudson Presbyterian holds title to the property subject to “express terms” conditioned upon an ecclesiastical determination made by an ecclesiastical entity. The Supreme Court clarified that

‘express terms’ cannot be enforced if enforcement is constitutionally impermissible under *Presbyterian Church [Blue Hull]*. Any language in *Watson, supra*, at 722-723, that may be read to the contrary must be disapproved. Only express conditions that may be affected *without consideration of doctrine* are civilly enforceable.” *Id.*

In clarifying this principle further, the Supreme Court stated that **“provisions in deeds or in a denomination’s constitution for the reversion of local church property to the general church, if conditioned upon a finding of departure from doctrine, could not be civilly enforced.”** *Md. & Va. Churches*, 396 U.S. 367, 370 (emphasis added). Yet that is precisely what Eastminster is asking this court to do - civilly enforce its post-litigation-doctrinal-“true church”-pronouncement on a civil property right.

According to the Supreme Court, states following the *Watson* approach “would have to find another ground for its decision, perhaps the application of general property law, when identification of the relevant church governing body is impossible without immersion in doctrinal issues or extensive inquiry into church polity.” *Id.* at fn. 4. Eastminster would have this Court identify “true church” members (which it has not yet identified) as the proper persons to replace the duly election Session of HPC. This is precisely what the U.S. Supreme Court forbids in *Maryland and Virginia Churches*. In effect, Eastminster is asking this Court to abandon Ohio’s neutral principles approach,

adopt a *Watson* based denominational deference approach, and ignore the U.S. Supreme Court's directives on how *Watson* should be applied, sidestep *Maryland and Virginia Churches* prohibitions, and give credence to the "express terms" which U.S. Supreme Court has held are civilly unenforceable. Thus, Eastminster's position is contrary to Ohio law, and unconstitutional under guidance given from the U.S. Supreme Court. Eastminster's interpretation of *Watson* should therefore be rejected.

A further distinguishing feature between *Watson* as decided by the Supreme Court and as proffered by Eastminster is a basic factual difference. In *Watson* the "schism" was between the local church's congregation and its session. Eighty percent of the *Watson* congregation voted one way, and the session voted the other way. Here, HPC and congregation are in agreement. In *Watson* the congregation sued to have the recalcitrant trustees removed in accordance with their polity (where the congregation elects session). Here, HPC is simply asking for declarations that the unified congregation and session *retain* its duly titled property.

Eastminster would have this court believe that property control is an ecclesiastical issue, founded in doctrine, and for which it alone is suitable to resolve.⁵ In trying to sell this argument, Eastminster relies on *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). (Eastminster's motion at p. 23). *Milivojevich*, however, was not a property case. "This case essentially involves not a church property dispute, but a religious dispute, the resolution of which under our cases is for ecclesiastical and not civil tribunals." *Id.* *Milivojevich* was a dispute over a

⁵The Tammen Affidavit (Exhibit 161) offered by Eastminster is almost identical to the one offered and rejected in the *Ridgebury* case. (Exhibit 121). Moreover, Tammen's Affidavit is self-defeating of Eastminster's argument because he asserts "polity [per the Book of Order] cannot be separated from doctrine because the governance of the church is inherently ecclesiastical in nature." (Exhibit 161, para. 12). Because courts cannot rule on ecclesiology, they cannot consider such documents in ruling in church property disputes.

bishopric's control over a diocese. *Id.* At 426 U.S. 697. Property was but an ancillary issue, and was ultimately determined to remain vested with the named title holders.

You cannot cry “doctrine” and divest the court of jurisdiction. If that were the case, any ecclesiastical entity could usurp the court’s functions by making over-arching declarations that civil, secular and temporal matters are part of the providence of that denomination’s theology. This is essentially what Eastminster is doing here. After litigation commenced, and after the congregation voted to disaffiliate (a right reserved in its Articles of Incorporation and within the denomination’s own Constitution) Eastminster quickly convened and purported to make a “true church” determination in order to try and taint the judicial proceedings by saying that the property issue was really a church matter. This tactical maneuvering is creative, but disingenuous. It should not be permitted to derail the proper findings and determinations of this Court.

As was briefed at length before, Ohio courts follow neutral principles of law, and will consider the normal indicia of property ownership. They will consider church constitutions to the extent they may be read without involving ecclesiology, doctrine, or polity. If they do involve doctrine, etc., they are not to be considered. Therefore, by Eastminster’s own position, the Book of Order should not be considered.

IV. EASTMINSTER’S MISCONCEPTIONS ABOUT THE ARTICLES AND BY-LAWS

A. THE RIGHT OF VOLUNTARY AFFILIATION IS NOT DEPENDENT ON AMENDED ARTICLES

Eastminster seems to think that HPC is basing its right to disaffiliate solely upon the Amended Articles of Incorporation. This is simply incorrect. As briefed at length in HPC’s Motion for Summary Judgment, the association between HPC and the denomination, by its very nature, is voluntary, and always has been voluntary. A particular member church cannot be bound against its conscience. While this principle is not dependent upon particular wording in articles of

incorporation, it certainly was reflected in HPC's original Articles of Incorporation. Among the various purposes of the church as originally defined, the Articles stated that it was "*to voluntarily associate together . . .* submitting to the authority and form of government as set forth in the Constitution (as amended) of the United Presbyterian Church in the United States of America, and under the further authority of Eastminster Presbytery." (Exhibit 4, Article 3, paragraph 2). The only logical reading of this is to give it its plain meaning - submission is voluntary and therefore may be withdrawn.

Again, while evidenced by the original Articles, the right of voluntary association is not dependent upon a definition in the articles of incorporation. It is inherent in the right of a corporation/local church. This is even reflected in the principles of the Constitution of the PC(USA). The Constitution of the PC(USA) provides for particular churches to either vote to depart from the denomination or to request dismissal from the denomination. Pastor Bogue testified that the amendment to the Articles of Incorporation did not fundamentally alter the relationship between HPC and the denomination. It has been voluntary since its inception.

B. THE AMENDED ARTICLES AND BY-LAWS WERE PROPERLY ADOPTED

Eastminster impugns the process by which the Articles of Incorporation and By-Laws were amended, variously calling them "illegal," "sloppily adopted," and "deceptively sold to the congregation."⁶ Eastminster ignores the fact that detailed descriptive comparisons of the proposed changes were provided to the entire congregation. Additionally, multiple Sunday School classes and information sessions were held for the congregation. Questions and answers were taken. And, the By-Laws, particularly, came before the congregation for discussion at two separate congregational

⁶The *ad hominem* attacks against Pastor Bogue and Attorney Norman need not be answered.

meetings. This process was open and deliberative, not deceptive and sloppy. To call it “illegal” is merely inflammatory.

As for the Amended Articles of Incorporation, they were properly adopted by the Session, HPC’s directors. HPC has a unicameral board. Its Session is its board of trustees or “directors.” The authority to handle all corporate matters for the church is delegated to Session at the executive body. Filing of corporate documents is a function of Session. Session is also the decision making body for corporate matters, except for those pertaining to the purchase and sale of property, which must be voted upon by the entire congregation. No one can seriously challenge the authority of Session to act on behalf of the church with respect to corporate matters. That is its corporate function.

Eastminster’s general presbyter, Dan Schomer, admitted in his deposition that it is the session of a local church which has ultimate authority as to the governance of that local church (Schomer depo, p. 63). He further acknowledged that the Session of a particular church has the responsibility and power to provide for the management of the church. A local Presbyterian church does not need Presbytery approval of its articles of incorporation. (Schomer depo, pp. 179-180); (Bogue depo, pp. 54-57). A local Presbyterian church does not need Presbytery approval of its by-laws, either. (*Id.*) Each church is responsible for preparing and filing its own articles of incorporation. (*Id.*) A local church is responsible for amending its own by-laws. There is no prescribed or specified set of terms or language which is to be included in any local Presbyterian church’s articles of incorporation or by-laws. (Schomer depo, pp. 179-180). Ultimately, “control of the local church is a function of that local church’s session.” (Schomer depo, p. 57).

Even the PC(USA) Constitution affords the session the authority to manage the corporate affairs of a particular church. “The corporation so formed, *or the individual trustees*, shall have the following powers: to receive, hold, encumber, *manage*, and transfer property, real or personal, for

the church; to accept and execute deeds of title to such property; to hold and defend title of such property;” G-7.0402. Likewise, a congregation may “lodge all administrative responsibility in the session.” G-7.0304. The “government and guidance are the responsibility of the session.” G-4.0104.

Under Ohio Revised Code §1702.01(k) “directors” means the persons vested with the authority to conduct the affairs of the corporation irrespective of the name, such as trustees, by which they are designated. Here, at HPC, the Session is the directors/trustees. It is unquestionably vested with the authority to conduct the affairs of the corporation.

Ohio Revised Code §1702.38 clearly provides for amendments to articles of incorporation. O.R.C. §1702.38(a) provides that: “The articles may be amended from time to time in any respect if the articles as amended set forth all the provisions that are required in, and only those provisions, may properly be in, original articles filed at the time of adopting the amendment. . . .” HPC’s Amended Articles included all the required provisions for original articles.

Section 1702.38(C) pertains to what constitutes attendance at the meeting called for those purposes. As it pertains to members present in person (as was the case in HPC’s amendment meeting), the statute states that

“the voting members present in purpose . . . may adopt an amendment by the affirmative vote of a majority of the voting members present if a quorum is present; or, if the articles or the regulations provide or permit, by the affirmative vote of a greater or lesser proportion or number of the voting members present, and by the affirmative vote of the voting members of any particular class that is required by the articles or the regulations.”

HPC’s Session, its directors, are part of the “class” of elders which manage the corporate affairs of the church. They are the “voting members” for corporate matters. A meeting of session is the vehicle by which such business is conducted. Session is comprised of those elders whom the congregation elects to serve in that capacity. Only the elders are authorized to be session members.

A non-elder cannot vote on corporate matters of the church. That right is reserved specifically for the elders on session. Therefore, in absolute consistency with provisions of O.R.C. §1702.38(c), the articles of incorporation which were amended by an “affirmative vote of the voting members of [the] particular class as required by the articles or the regulations” to take such actions. No HPC member challenges the validity of this process: only Eastminster in an effort to cast doubt on HPC’s process.

The Ohio Revised Code recognizes that directors, acting as directors, may amend articles of incorporation. (See e.g., 1702.38(e)).

Eastminster claims that Hudson Presbyterian’s Amended Articles were adopted “illegally” because it was an act taken by the Session. Eastminster’s position is directly contrary to Ohio law. On the very cover sheet provided by the State of Ohio entitled “Certificate of Amendment by Shareholders or Members” it expressly states that directors may vote upon and affect amendment to non-profit articles of incorporation. In pertinent part, the form states that:

The above named Ohio corporation, does hereby certify that:

A meeting of the shareholders **directors (non-profit amended articles only)**
 members was duly called and held on _____
(Date)

As filled out by HPC it simply and clearly stated:

The above named Ohio corporation, does hereby certify that:

A meeting of the shareholders **directors (non-profit amended articles only)**
 ~~members~~ was duly called and held on January 8, 2006
(Date)

(Exhibit 3; also attached here as Exhibit A, emphasis in original).

HPC’s “Certificate of Amendment” clearly stated that a meeting of the directors was duly called. This was accepted by the Ohio Secretary of State in the ordinary course. If directors are not allowed to meet and amend articles of incorporation for non-profit entities, the Ohio Secretary of State’s form would not expressly state that this was an requirement for non-profits.

Clearly, HPC proceeded in compliance with Ohio laws and procedures in amending its Articles of Incorporation, and therefore the Amended Articles are not improper, let alone “illegal.”

As for Eastminster’s claim that a quorum was not present, the Session minutes for January 8, 2006 clearly show that a quorum was present; 14 of 15 Session members were present. (Session minutes, January 8, 2006; attached hereto as Exhibit A). In challenging the quorum, Eastminster cites to the wrong provision of the By-Laws - paragraph 11 - which defines a quorum for congregational meetings, not Session meetings.⁷

The Amended Articles of Incorporation were approved by Session unanimously.

C. THE CONGREGATION RATIFIED ALL PROVISIONS OF THE AMENDED ARTICLES

Lest there be any doubt as to whether or not the Amended Articles reflect the intent of the congregation, a simple review of the Amended By-Laws resolves the question. The By-Laws were adopted on February 19, 2006 by a congregational vote of 130-3, or 98%. This occurred after extensive discussions spanning several months wherein the congregation’s relationship to the Presbytery was openly discussed, understandings and intentions aired, amendments offered and accepted, and full disclosure to the congregation provided. A detailed description of all changes to the By-Laws were provided to the congregation with not only strikeout/italics format, but comments provided as well. (Exhibit 14) The By-Laws amendments were discussed at not one, but two

⁷The Session quorum requirement is set forth in paragraph 15 of the By-Laws. That provision states:

15. A quorum for the Session shall be as provided in the Form of Government; a quorum for the transaction of business as trustees shall be the same as for Session meetings. Per the Form of Government, B.O.O. G-10.0202 “a quorum of the Session shall be the pastor or other presiding officer and 1/3 of the elders.” (Exhibit 7). Therefore, with 14 of the 15 Session members present, there is no question but that a quorum was present.

congregational meetings, the second of which was expressly called for the sole purpose of discussing the Amended By-Laws.

The Amended By-Laws include **all** of the substantive, operative provisions of the Amended Articles of Incorporation, **and** restate by reference the Amended Articles of Incorporation.

Paragraph 1.1 of the Amended By-Laws specifically states:

- 1.1 The Hudson Presbyterian Church (the “Church”), is an incorporated religious organization. The Articles of Incorporation set forth the object and purposes of this particular church, **which purposes are restated by reference in these By-Laws** as an expression of the dictates of conscience which form the basis of our relationships, as we endeavor to live out our lives in subjection to Christ.

A side by side comparison shows the consistency of the provisions ratified by the congregation.

AMENDED ARTICLES OF INCORPORATION	AMENDED BY-LAWS
<p>Article 3, paragraph 3.</p> <p>To voluntarily associate together for divine worship, for Godly living as is agreeable to the Holy Scriptures, for Christian fellowship, and to voluntarily associate with a denomination such as the Presbyterian Church (USA) as may be appropriate to carry out the dictates of conscience and the greater purposes of being His church.</p>	<p>Article 1, paragraph 1.2.</p> <p>The Hudson Presbyterian Church is a particular congregation in the reformed tradition of the Presbyterian church, and in accordance with the dictates of conscience is in voluntary association with the Presbyterian Church (USA), (hereafter “PC(USA)”), its successors or reformed structures, and as such, recognizes that the Constitution (the Book of Order), along with the Book of Confessions, are the guiding and governing documents for the denomination. So long as this relationship shall exist, and so long as these documents are in harmony with Scripture, these documents shall order the business of the church.</p>

<p>[The Confessing Church language] Article 3, paragraph 1.</p> <p>To proclaim the Gospel for the salvation of humankind, standing firm in the Word as a Confessing Church, recognizing, acknowledging and proclaiming:</p> <p>(I) that Jesus Christ alone is Lord of all in the way of salvation;</p> <p>(ii) that Holy Scripture is the triune God’s revealed word, the church’s only infallible rule of faith and life;</p> <p>(iii) that God’s people are called to holiness in all aspects of life. This includes honoring the sanctity of marriage between a man and a woman, the only relationship within which sexual activity is appropriate.</p>	<p>[The Confessing Church language] [Precise same language]</p> <p>1.3 The Hudson Presbyterian Church is a confessing church, recognizing:</p> <p>(I) that Jesus Christ alone is Lord of all in the way of salvation;</p> <p>(ii) that Holy Scripture is the triune God’s revealed word, the church’s only infallible rule of faith and life;</p> <p>(iii) that God’s people are called to holiness in all aspects of life. This includes honoring the sanctity of marriage between a man and a woman, the only relationship within which sexual activity is appropriate.</p>
<p>Article 5.</p> <p>This corporation shall have the power to acquire and hold title to both real and personal property in fee simple, in trust, or otherwise. Any property held in trust, or deemed to be held in trust, shall be in a revocable trust, unless expressly stated otherwise in writing, such powers being expressly reserved by this corporation.</p>	<p>Article 3, Organization.</p> <p>3.3 The Session shall be empowered to act on behalf of the church with respect to business matters, including but not limited to contracting, conveying, encumbering or exchanging property, both real and personal. The Session shall be empowered to hold the property in trust as allowed at law, reserving the right of revocation in all instances. All property held in trust must be held in an express trust.</p>

Eastminster is also incorrect in asserting that the Articles of Incorporation as amended fundamentally altered its relationship with the PC(USA). Towards those ends, Eastminster proffers four points. These will be discussed in turn.

1. Eastminster complains that the Amended Articles of Incorporation changed the name of Hudson Presbyterian Church (USA) to The Hudson Presbyterian Church. The name change had no bearing on the *relationship* with the denomination. Even Eastminster’s General Presbyter Dan

Schomer concedes that the church's name is its own choice. Many churches within the PC(USA) denomination do not include the "PC(USA)" reference. The name change did not "fundamentally alter" HPC's relationship with PC(USA).

2. Eastminster claims that the Amended Articles "changed [the] corporation's purpose from submitting to the authority and form of government of PC(USA)." Eastminster's assertion is not true. The voluntary association and voluntary submitting of HPC to the PC(USA) was found in the original Articles of Incorporation as well. This was, therefore, not a change in the fundamental relationship between the parties. It was voluntary at its commencement, and it was voluntary at its termination.

3. Eastminster contends that the Amended Articles of Incorporation "amend[ed] the by-law provisions so that they do not need to follow the Book of Order requirements." The original Articles of Incorporation also stated that HPC would "adopt by-laws in conformity with the provisions of the Constitution, setting forth its organizational, ecclesiastical, and corporate structure and method of operation." Both the original and amended Articles of Incorporation direct that the corporation may establish by-laws for the governance of the church. Both reference *the local church* (i.e., Hudson Presbyterian Church). At the time of the adoption of the amended Articles of Incorporation, the "original" [they have been amended several times] by-laws were still in effect. Even the amended by-laws "recognize[d] that the Constitution (the Book of Order), along with the Book of Confessions, are the guiding and governing documents for the denomination. So long as this relationship shall exist . . . these documents shall order the business of the church." In fact, there are actually more references to the PC(USA) Book of Order in the amended by-laws than were in the original by-laws. The fundamental structure of the church was not altered by the by-laws or the amended articles, but simply clarified the structure (e.g., the original by-laws did not describe how Session is to be ordered). The amended by-laws state that, "It is the intent of these by-laws to order

the Session in a manner consistent with the guidance set forth in the Book of Order of the PC(USA).”

Moreover, the PC(USA) does not prescribe, nor has it ever prescribed the form of by-laws for an individual church congregation. For Eastminster now to engage in the editing business is overreaching. It must be borne in mind that there is not, nor has there ever been, a requirement that local churches submit either articles of incorporations or by-laws to a Presbytery for approval. Therefore, if Eastminster finds that the language in the amended articles or by-laws supports Hudson’s position, it is not at liberty to alter them.

4. Eastminster complains that the amended articles were an “attempt to alter the express trust property relationship with the PC(USA).” Not true. The original articles of incorporation are silent on property ownership. So are the original by-laws. The amended articles and amended by-laws are consistent with Ohio law on non-profit and religious entity property ownership. If Eastminster argues that the powers set forth in the amended articles of incorporation and by-laws are inconsistent with the relationship between the local church and the Presbytery, defendant would respectfully point to the PC(USA)’s own Book of Order at G-7.0402 which states “the corporation so formed, or the individual trustees, shall have the following powers: to receive, hold, encumber, manage and transfer property, real or personal, for the church; to accept and execute deeds of title to such property; to hold and defend title to such property.” It is beyond understanding how Eastminster can argue against the inclusion of these express powers in HPC’s articles and by-laws. Moreover, to the extent that Chapter 8 of the Book of Order attempts to claim a trust, the trust does not describe with any particularity, and certainly not in any legally cognizable form. It does not state whether the trust is revocable or irrevocable, or who the beneficiary should be. Consequently, HPC empowered its trustees to hold property in trust, reserving the right of revocation, lest there be any confusion.

V. NO EXPRESS TRUST EXISTS

Eastminster argues that its Book of Order imposes an express trust on HPC's property. Motion at 27-28. But Eastminster's argument misstates the law of express trusts.

In arguing that an express trust exists, Eastminster relies solely on language from *Jones v. Wolf* (1979), 443 U.S. 595, 606, which, in dicta, suggests means by which a denomination might create a valid trust. *Jones v. Wolf* posited that "the constitution of the general church [could] be made to recite an express trust in favor of the denominational church." But it went on to state that any such trust would need to be in a "legally cognizable form." *Id.* at 443 U.S. 595, 606. A self-declaration of trust relating to property which the declarant does not own, and which designates the "settlor" as the beneficiary is not a "legally cognizable form." Nowhere did the court in *Jones v. Wolf* hold that any vague, general self-declaration would constitute a proper trust.

Another failing of PC(USA)'s claimed trust is that it did not follow the suggestions of *Jones v. Wolf* in designating parties. The whole idea behind the suggestion that a general church could place a trust clause in its constitution was to assist the courts in avoiding entanglement with ecclesiastical determinations, yet that is precisely what PC(USA)'s constitution does. The "creation" of the trust is dependent upon a vague principle of ecclesiastical compliance and connectionalism. That does not avoid problems, but rather invites them.

Assuming *arguendo* that the "express trust" in the Book of Order properly identifies the parties to an express trust, it has no power to do so. As discussed in HPC's motion for summary judgment, formation of a trust requires transfer of the trust *res* from the settlor(s) to the trustee(s). "In creating the trust, there must be ... an actual conveyance or transfer of property." *First Nat'l Bank of Middletown v. Gregory* (1983), 13 Ohio App. 3d 161, 163, 468 N.E.2d 739, 741 (citing cases). Here, HPC's property was first procured by the local church, in its own name, and was never transferred to the PC(USA) or any other trustee.

One sentence in the Book of Order is not sufficiently clear to create an express trust under Ohio law. Not only would Ohio trust law formalities need to be disregarded, but the nebulous and secondary/contingent provisions of the Book of Order would somehow need to take precedence over the more specific subsequent clear and direct contracts between the parties. In no way can this have been the court's intent in *Jones v. Wolf*.

Supplemental Authority: In three separate 2007 decisions out of Mississippi, three separate chancery (trial) courts all ruled in favor of the local church on property issues in declaratory judgment suits, declining to construe G-8.0100 *et seq.* as creating a trust in favor of the Presbyteries. *First Presbyterian Church of Vicksburg v. Presbytery of Mississippi*, Case No. 2007-001GN, Chancery Court of Warren County, Mississippi (Ex. D); *First Presbyterian Church of Pascagoula v. Presbytery of Mississippi*, Case No. 2007-0275-RP, Jackson County (Ex. E); *J.J. White Memorial Presbyterian Church of McComb*, Case No. 2006-644, Pike County, Mississippi (Ex. F).

Likewise, in Louisiana, in a case decided November 6, 2006, the court entered a Stipulated Final Judgment declaring all property and assets of First Presbyterian of Baton Rouge were "held and owned for the sole and exclusive use and benefit of The First Presbyterian Church of the City of Baton Rouge which holds all property titled in its name in full, complete and unfettered ownership, all in accordance with the laws of the State of Louisiana, plaintiff's recorded deeds and plaintiff's recorded articles of incorporation, and that neither the Presbytery of South Louisiana, nor any person, entity, administrative unit, agency, commission, committee, or governing body acting on behalf of the Presbytery of South Louisiana . . . has any right, title or interest in or to the property, whether in trust or otherwise, nor any right to determine or control . . . the use or ownership of the property." *The First Presbyterian Church of the City of Baton Rouge v. The Presbytery of South Louisiana*, Nov. 6, 2006, Case No. 547025, Parish of East Baton Rouge, Louisiana (Ex. G).

Therefore, not only has Chapter 8 specifically been rejected, but the principle of a denominational self declaration of trust interests has consistently been rejected by courts across the country.

VI. NO CONSTRUCTIVE TRUST EXISTS (Nor is there any basis in law or Equity to Impose One)

There are legal and factual problems with Eastminster's request for a constructive trust. The facts will be addressed first, (even though the even under Eastminster's characterizations they do not provide a basis for the creation of a constructive trust).

A. More Facts

In its effort to persuade the court to impose a constructive trust Eastminster overstates its financial contributions to HPC's building construction and historical operations. In order to ensure the record reflects reality, the following clarifications are made:⁸

⁸ An addendum to Exhibit 116, offered by HPC must also be made to clarify the record, and modify a factual assertion made at page 12 of HPC's Motion, based on newly discovered material.

Of the two charitable annuities to which HPC is a Charitable Beneficiary, the Gift and Endowment fund was established by HPC for HPC. In investigating the facts for this case, HPC requested from the Presbyterian Foundation the "Endowment Agreement" which were provided and appended as Exhibit 116, "Terms of Endowment." The materials provided from the Foundation included only Article I, the Terms of Endowment, which indicate "unrestricted use." There are no forfeiture clauses or restrictions in the Terms of Endowment. Consequently, in HPC's Brief in Support of Motion for Summary Judgment, the statement was made that "there are no restriction or forfeiture clauses contained therein, and no qualifications restricting the fund to Hudson Presbyterian Church only so long as it is a member of any particular denomination." (HPC Motion for Summary Judgment, p. 12) HPC has since been able to obtain a complete copy of the Permanent Fund Agreement, which includes the Terms of Endowment as appended at Exhibit 116, in addition to two other sections, "II. Definition" and "III. Statement of Agreement." Those are supplemented herein, attached hereto. (Exhibit B). To correct any unintentional misrepresentation, HPC notes that the Statement of Agreement does in fact provide a contingency in the event any "Charitable Beneficiary which is a member church as of the date hereof ceases to be a part of the Presbyterian Church (USA)." In such case, "then said percentage share of the Net Income shall be administered by the Foundation for purposes which parallel, to the extent possible, the original intent of the donor." (*Id.*) HPC, as the donor, clearly intended to benefit itself. As HPC remains an ongoing entity, although no longer "a member church" of the PC(USA), the purpose which most closely parallels the intent of the donor would logically be continued support of itself. To the extent necessary, HPC will address this issue with The Foundation.

HPC conducted a major building expansion project in 1994 which approximately doubled the size of the church. Eastminster failed to mention the building expansion in its Motion. The cost of the expansion was \$912,906. The entirety of the expansion was funded through the active members of the church, without any gifts or grants from Eastminster or PC(USA). (Rastetter Affidavit II, Exhibit C). In addition to the expansion, since 1999 Hudson Presbyterian has invested in an organ \$104,855, grand piano \$29,000, and new pews for the sanctuary \$31,353. All of this has been funded by Hudson Presbyterian without participation from Eastminster or PC(USA). *Id.*

Eastminster improperly credits itself with the value of the \$83,000 in donations from area presbyterian churches in reaching its total amount of contributions. While Eastminster assisted in some of the solicitations to those churches, the primary solicitation letters were from Hudson Presbyterian. Moreover, these are actually third party voluntary donations, and should not accrue to the “ledger” of Eastminster. Accurately counting Eastminster’s contributions, the total is \$137,000 towards construction, not the \$220,000 claimed by Cramer in her affidavit. *Id.*

In doing the math, it is clear that Eastminster did not fund “approximately 71%” of the cost of church construction, and therefore the representation of Eastminster at page 12 of its motion is incorrect. Eastminster improperly counts \$275,000 in financial loans as crediting to its contribution. The loans were repaid with interest by Hudson Presbyterian Church. Removing the loans from the “71%”, the percentage drops to 31%; backing out the area churches’ donations, the percentage drops to 19%. Factoring in the expansion in 1994, the percentage drops further to 8.5%. *Id.*

Eastminster incorrectly takes issue with the “loan” of funds from restricted funds to general operating expenses during the first quarter of this calendar year. Moving funds between accounts is

HPC respectfully points out that even PC(USA) Foundation documents such as this support the right of PC(USA) churches to cease being member churches, contrary to Eastminster’s contention.

strictly an accounting practice and has been done many times in the past by Hudson Presbyterian. (For example, in 1991, 1994, and 2002). Additionally, it is not unusual for monies to move between the General and Restricted accounts because Restricted accounts may only draw three checks per month; therefore virtually all expenditures are processed through the General Fund checking account. Eastminster incorrectly claims the funds have been “disposed of.” This is wrong, as the funds have not been “disposed of” but transferred, and duly noted as a liability on the financial statements. *Id.*

Hudson Presbyterian is not really operating at a loss, as alleged by Eastminster, since disaffiliation. First, expenses are relatively evenly spaced throughout the year, but income tends to be sporadic, with a proportionately higher amount of contributions coming at the years end. This is a trend common to most non-profit entities. As for HPC, from the years 2002 through 2006, for example, an average of 20% of all Tithes and Offerings were received in the months of November and December. (2002 - 19.6%, 2003 - 18.4%, 2004 - 20.9%, 2005 - 22.8%, and 2006 - 19.8% [which was after the vote to disaffiliate]). Given that HPC can reasonably expect income to increase later in the year, it is fiscally sound that it use funds available internally without interest, as opposed to refinancing or tapping into a line of credit. Secondly a significant number of people have informed HPC’s Treasurer that they are holding back a portion of, and in some cases their entire tithes pending the outcome of this litigation. They have specifically stated that they desire to donate to the local “HPC” church only, and not forfeit it to the PC(USA). *Id.* In addition, a group of members (none of which are on session) started a trust distinctly separate and apart from the PC(USA) to make contributions for Hudson Presbyterian church going forward, as it exists outside of the PC(USA). Additional funds (exceeding the amount of the loans from the restricted funds) have been set aside separately by members for support of the local church only, pending the outcome of this litigation, again, not wanting to fund a PC(USA) entity. To put it bluntly, a substantial

number of people have quit giving to PC(USA) but not Hudson Presbyterian. HPC remains a financially sound and thriving entity. *Id.*

The Library Fund which the Wise's established and donated in honor of their deceased son was not restricted to use in a PC(USA) church. The only restrictions on the fund are for use as a children's library. Others donated to the Library Fund, as well, and have not expressed any restrictions on use as a PC(USA) church only. *Id.*

A significant number of members of the church who voted against disaffiliation still worship and contribute to HPC since disaffiliation. *Id.* A notable portion of those persons have indicated that they will stay with the congregation, regardless of affiliation, even though they voted against disaffiliation last November.

B. Legal Problems with Eastminster's Argument for a Constructive Trust

Eastminster next argues that, in the absence of an express trust, HPC's property should be subject to a constructive trust, based on its allegation that "a substantial portion of the cost of the real estate and the improvements were funded by PC(USA)'s governing and constituent bodies..." Motion at 30. However, the mere allegation of a substantial contribution, without more, is legally insufficient to impose a constructive trust. If Eastminster's argument were adopted and made Ohio law, anyone who supports a cause or project by way of financial contribution would be entitled to a constructive trust once they became displeased with the cause. Imagine the effect this would have on political campaigns, let alone other charities.

This Court should reject Eastminster's preposterous theory, and instead follow Ohio law. Ohio law is clear that a constructive trust can only be imposed where the beneficiary proves, by clear and convincing evidence, that the trustee's property was obtained by fraud, duress, or other wrongful means. *Estate of Cowling v. Estate of Cowling* (2006), 109 Ohio St. 3d 276, 280-281, 847 N.E.2d 405, 411. However, Eastminster does not allege any fraud or duress by HPC in obtaining funds from

Eastminster. Instead, Eastminster alleges that HPC used to be a member church of the PC(USA), and now seeks its independence. Nothing in Eastminster's allegations, much less the evidence in the record, demonstrates fraud, duress, or other wrongful conduct by HPC. Accordingly, there is no basis to impose a constructive trust.⁹

Additionally, Eastminster's request for a constructive trust must fail for a second reason: causation. Eastminster does not argue that HPC defrauded Eastminster over twenty years ago, when forming the church and soliciting its donations; instead, Eastminster alleges that HPC began seeking disaffiliation long after HPC was formed and Eastminster's gracious donations were spent. Motion at 18-19, 31. Because Ohio law is clear that a constructive trust can only be imposed where property is acquired by fraud or wrongful conduct, and Eastminster has presented no evidence that HPC wrongfully obtained property from the PC(USA) in 1981-1987, before HPC began financially supporting Eastminster, this Court cannot impose a constructive trust on property HPC has acquired since that time.

Further, even if this Court is somehow inclined to impose a constructive trust on HPC (although there is no evidence of lies, deceit, or other misconduct in the record), any such trust is limited to the actual property that was "wrongfully" obtained by HPC. A constructive trust cannot be imposed after a change in form of the wrongfully obtained property.

A constructive trust is an equitable remedy that must be imposed on particular assets, not on a value. For example, if a party is inequitably deprived of 100 shares of stock that are valued at \$ 10,000, a constructive trust should be imposed over 100 shares of stock, not \$ 10,000. The value of the stock may decrease to \$ 9,000 through no fault of the present possessor. In that instance, it would be inequitable to impose a constructive trust for a higher dollar amount than the stock's new value. Similarly, should the stock rise, the beneficiary of a constructive trust should not be deprived of that increase in value.

⁹To the extent that any such evidence might exist, it is contested, and should not be the basis for a summary judgment ruling in Eastminster's favor by this Court. If this Court suspects fraud, duress, or misconduct by HPC, a trial on the merits should be held.

Estate of Cowling v. Estate of Cowling (2006), 109 Ohio St. 3d 276, 282, 847 N.E.2d 405, 412.

Accordingly, if this Court finds that funds were given to HPC because of fraud, duress, or other wrongful conduct, a constructive trust can only be imposed to the extent of the donations wrongfully obtained. There is no authority in Ohio's law of constructive trusts for the proposition apparently advanced by Eastminster, that its donation of ~\$400,000 twenty years ago entitles it to a constructive trust on more than \$3,000,000 in real property today. Instead, if this Court finds wrongful conduct by HPC, any constructive trust remedy should be limited to a refund of whichever donations this Court finds were wrongfully obtained.

Of course, no funds or property were wrongfully obtained.

VII. CONCLUSION

For all of the reasons set forth in HPC's Motion for Summary Judgment, this Reply, and HPC's Separate Reply to the OAG's Response, Hudson Presbyterian Church is entitled to judgment in its favor as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was sent by ordinary U.S. Mail, postage prepaid, this 14th day of May, 2007 to:

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