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To: Pension Board  
Orthodox Church In America Pension Plan

From: Joseph Semo 

Subject: Inquiry Regarding the Security of Pension Assets

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This memorandum responds to the questions presented to me a few weeks. Specifically, I was asked three questions, as follows:

- 1- Can someone from the OCA administration---including the Hierarch and/or the Holy Synod of Bishops, the Metropolitan Council or the Pension Board itself--request (or demand) borrowing, using or advancing cash via a promissory note or some other legal document to take monies from the Pension Plan to be used to pay for OCA administrative expenses and other Church related expenses?
- 2- If the OCA declares bankruptcy, can a lien be placed on the Pension Plan and can creditors be paid for OCA expenses from Pension Plan monies?
- 3- Please state for the record---in written form---the present legal position of the OCA Pension Plan as it relates to US Government regulations for pension plans. Are we covered---and do we fully participate---under specific government legislation guidelines; or do we only follow and adhere to legal prescriptions while not actually belonging to the legal system itself?

I will address each in turn.

**1- Can someone from the OCA administration---including the Hierarchy and/or the Holy Synod of Bishops, the Metropolitan Council or the Pension Board itself---request (or demand) borrowing, using or advancing cash via a promissory note or some other legal document to take monies from the Pension Plan to be used to pay for OCA administrative expenses and other Church related expenses?**

No. I believe that the governing documents preclude such application of the Trust assets and that the Trustees would have a duty to resist any such effort.

As we have from time-to-time discussed, pursuant to the plan document and the trust document, the Pension Plan is administered by the Pension Board, while the assets are held for investment by the Trustees.

Plan Article 8 provides that the “funds of the Plan shall be held by the Trustees ... for use in providing the benefits of the Plan and paying expenses not paid directly by the Church....Except as otherwise herein provided, no part of the corpus or income of the funds of the Plan shall be used for, or diverted to, purposes other than for the exclusive benefit of Members and other persons entitled to benefits under the Plan, prior to the satisfaction of all liabilities with respect to them....” Similar language is found in the Trust Agreement.

Accordingly, Plan Article 8 would preclude using Plan assets to pay for OCA administrative expenses and other Church related expenses, as such payments would not be for the “exclusive benefit of Members.” However, the text of Plan Article 8 could be read to leave open the question of whether a loan could be made to the OCA. While Plan Article 8 may not expressly foreclose such creditor transactions with the Church, the Trust Agreement appears to do so. Section 15A of the Trust Agreement provides:

The Fund shall never inure to the benefit of the Church and shall be held for the exclusive purposes of providing benefits to the Members or their beneficiaries under the Plan and for the purpose of defraying reasonable expenses of administering the Plan except as otherwise provided in Section 16 [addressing surplus funds after plan termination] of this Agreement and below in Subsection B [addressing the return of contributions made by mistake of fact].

**2- If the OCA declares bankruptcy, can a lien be placed on the Pension Plan and can creditors be paid for OCA expenses from Pension Plan monies?**

A creditor of the OCA could not obtain any interest greater than the interest retained by the OCA. Under the terms of the Plan and Trust, the OCA has a right to any surplus assets after all benefits have been satisfied. As a result, the OCA has no asset until the Plan is terminated and all benefits are fully distributed.

While the foregoing responds to your question, if there was a reorganization of the OCA's finances in a bankruptcy proceeding, it is unlikely that the Plan would be required to terminate. However, in the event that a decision was made to terminate the Pension Plan, all participants would receive an annuity with no less than the same benefits, rights, and features offered by the Plan to the extent funded. This is discussed more fully below.<sup>1</sup>

**3- Please state for the record---in written form---the present legal position of the OCA Pension Plan as it relates to US Government regulations for pension plans. Are we covered---and do we fully participate---under specific government legislation guidelines; or do we only follow and adhere to legal prescriptions while not actually belonging to the legal system itself?**

The Pension Plan is not covered by the insurance program created under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA").

Because the Pension Plan is not covered by Title IV, in the event the OCA filed for bankruptcy and terminated the Plan (which I suspect would be unlikely, as a liquidating bankruptcy for the OCA would seem very unlikely for a number of reasons), the Plan's termination clause would be followed. It provides:

The Pension Board shall determine on the basis of actuarial valuation the share of the funds of the Plan allocable to each Member and Beneficiary in the following order:

First, each Member, retired Member and former Member shall be entitled to a share equal to the reserve computed to be required for his contributions, including voluntary contributions, made to the Plan;

Second, each retired Member or his Beneficiary in receipt of a Pension, and each Member not yet retired who has reached his Normal Retirement Date shall be entitled to a share equal to the reserve computed to be required for his benefit credits;

Third, each Member who is not eligible for normal retirement, but who has completed five (5) years of Participation Service, and each former Member who is eligible for a vested benefit but has not reached age 65 shall be entitled to a share equal to the reserve computed to be required for his benefit credits; and

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<sup>1</sup> While the Plan has been funded well on an ongoing basis, I do not believe that we have had the Plan valued on a termination basis. I would be surprised if there was any probability that the OCA could recover excess monies arising after termination of the Plan.

Fourth, each other Member shall be entitled to a share equal to the reserve computed to be required for his benefit credits; provided that if the funds are insufficient to provide in full for the shares under paragraph First, each share thereunder shall be reduced pro rata; and if the funds are insufficient to provide in full for the shares under paragraphs Second, Third or Fourth after provision for all shares under previous paragraphs, each share under such paragraph Second, Third or Fourth shall be reduced pro rata.

Under these rules, those closest to retirement are best protected.

With respect to your broader question, the Pension Plan is a non-electing church plan, exempt from the labor provisions of ERISA and many of the tax provisions as well.<sup>2</sup> With respect to ongoing administration, in their general operation the Pension Board and the Trustees have followed the legal prescriptions applicable to plans covered by ERISA as guidelines for “best practices.” Accordingly, the Pension Board and the Trustees have endorsed the fiduciary rules of ERISA including principles of diversification of investments and avoiding party-in-interest transactions.

Please let me know if a fuller discussion of any of the foregoing is desired. In sum, I believe the assets of the Pension Plan are not at risk for liabilities of the OCA.

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<sup>2</sup> Among the tax provisions that do apply are those of Internal Revenue Code (“Code”) section 4975 which impose a tax on prohibited transactions. Without giving a scholarly discourse on this, a transaction between the Plan and the OCA as the employer whose employee are covered by the Plan, would be subject to these taxes. The tax would fall upon the OCA, as the “disqualified person” within the meaning of the Code.