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June 22, 2007

**VIA HAND-DELIVERY**

Fairfax County Circuit Court  
ATTENTION: Robin Brooks  
4110 Chain Bridge Road  
Fairfax, Virginia 22030-4009

RE: *Multi-Circuit Episcopal Church Property Litigation, Fairfax County  
Circuit Court, CL-2007-0248724*

*The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church  
(Circuit Court of Fairfax County Case No. 2007-1236);*

*The Protestant Episcopal Church in the Diocese of Virginia v. Church of the  
Apostles (Circuit Court of Fairfax County Case No. 2007-1238);*

*The Protestant Episcopal Church in the Diocese of Virginia v. Church of the  
Epiphany, Herndon (Circuit Court of Fairfax County Case No. 2007-1235);*

*The Protestant Episcopal Church in the Diocese of Virginia v. Christ the  
Redeemer Church (Circuit Court of Fairfax County Case NO. 2007-1237);*

*The Protestant Episcopal Church in the Diocese of Virginia v. St. Paul's Church,  
Haymarket (Circuit Court of Prince William County Case No. CL 73466)(Circuit  
Court of Fairfax County Case No. CL 2007-5683);*

*The Protestant Episcopal Church in the Diocese of Virginia v. St. Margaret's  
Church (Circuit Court of Prince William Case No. CL 73465)(Circuit Court of  
Fairfax County Case No. CL 2007-5682);*

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*The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Word* (Circuit Court of Prince William County Case No. CL 73464)(Circuit Court of Fairfax County Case No. CL 2007-5684);

*The Protestant Episcopal Church in the Dioceses of Virginia v. Potomac Falls Church* (Circuit Court of Loudoun County Case No. 44149)(Circuit Court of Fairfax County Case No. CL 2007-5362);

*The Protestant Episcopal Church in the Diocese of Virginia v. Church of Our Saviour at Oatlands* (Circuit Court of Loudoun County Case. No. 44148)(Circuit Court of Fairfax County Case No. CL 2007-5364);

*The Protestant Episcopal Church in the Diocese of Virginia v. The Church at The Falls – The Falls Church* (Circuit Court of Arlington County Case No. 07-125)(Circuit Court of Fairfax County Case No. CL 2007-5250); and

*The Protestant Episcopal Church in the Diocese of Virginia v. St. Stephen's Church* (Circuit Court of Northumberland County Case No. CL 07-16)(Circuit Court of Fairfax County Case No. CL 2007-5902).

*The Episcopal Church v. Truro Church et al.* (Circuit Court of Fairfax County Case No. 2007-1625),

Dear Ms. Brooks:

I am enclosing for filing in the above-styled case an original Memorandum in Support of the Demurrers and Pleas in Bar and one (1) original and twelve (12) copies of a one-page covers sheet to be placed in the file for the above-styled cases.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

SANDS ANDERSON MARKS & MILLER, PC



George O. Peterson

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cc: Maia L. Miller, Law Clerk to the Honorable Randy I. Bellows (via hand-delivery) (with  
non-Virginia Supreme Court authority)  
Bradfute W. Davenport, Jr., Esquire  
Heather H. Anderson, Esquire  
Gordon A. Coffee, Esquire  
Steffen N. Johnson, Esquire  
Mary A. McReynolds, Esquire  
James A. Johnson, Esquire  
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Scott T. Ward, Esquire  
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James E. Carr, Esquire  
Edward H. Grove, III, Esquire

**VIRGINIA:**

**IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

**In re:** )  
**Multi-Circuit Episcopal Church** ) **Civil Case Numbers:**  
**Litigation** ) CL 2007-248724,  
 ) CL 2006-15793,  
 ) CL 2006-15792,  
 ) CL 2007-556,  
 ) CL 2007-1625,  
 ) CL 2007-1235,  
 ) CL 2007-1236,  
 ) CL 2007-1237,  
 ) CL 2007-1238,  
 ) CL 2007-5249,  
 ) CL 2007-5250,  
 ) CL 2007-5363,  
 ) CL 2007-5364,  
 ) CL 2007-5362,  
 ) CL 2007-5686,  
 ) CL 2007-5685,  
 ) CL 2007-5683,  
 ) CL 2007-5682,  
 ) CL 2007-5684,  
 ) CL 2007-5902, and  
 ) CL 2007-5903.

**MEMORANDUM IN SUPPORT OF DEMURRERS AND PLEAS IN BAR**

COME NOW The Falls Church, Truro Church, Church of Our Saviour at Oatlands, Church of the Apostles, Church of the Epiphany, Church of the Word, St. Margaret's Church, Christ the Redeemer Church, St. Stephen's Church, St. Paul's Church, and Potomac Falls Church (hereinafter collectively, the "CANA Congregations") and each of their Rectors, Vestry Members, and Trustees<sup>1</sup> who are named defendants (hereinafter collectively, "Related Individuals")<sup>2</sup>

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<sup>1</sup> The Trustees of The Falls Church are separately represented and have filed a Special Plea.

<sup>2</sup> The Related Individuals number 185 individuals: the 11 rectors who lead the CANA Congregations and the 174 volunteer vestry members and trustees who hold title to the property for the benefit of the CANA Congregations.

and file this joint memorandum in support of their demurrers and pleas in bar to the Complaints filed by The Protestant Episcopal Church in the United States of America (“TEC”) (CL 2007-1625) and The Protestant Episcopal Church in the Diocese of Virginia (“Diocese”) (collectively, “plaintiffs”) (CL 2007-1236; CL 2007-1238; CL 2007-1235; CL 2007-1237; CL 2007-5683; CL 2007-5682; CL 2007-5684; CL 2007-5362; CL 2007-5364; CL 2007-5250; CL 2007-5902; and CL 2007-5903).

## I. INTRODUCTION

Faced with a major division in their ranks and the creation of a rival branch of Anglicanism, TEC and the Diocese brought suit against the CANA Congregations, their rectors, and 174 of their volunteer vestry members and trustees in an effort to seize ownership of the CANA Congregations’ properties. Plaintiffs do not allege that they purchased these properties or contributed to their construction, improvement, or maintenance. They do not claim to have possessed, managed, or controlled the properties, or that a written contract gives them rights therein. Moreover, they concede that, under publicly recorded deeds, title is held by trustees for the CANA Congregations. *E.g.*, Diocese Compl. ¶¶ 5, 31(d). Nonetheless, citing internal church canons (adopted in most instances well after the CANA Congregations’ purchase of their properties), plaintiffs assert that the properties are “held in trust for the Episcopal Church and the Diocese,” and that the defendants have therefore committed “trespass, conversion, and alienation” of title by refusing to turn over the keys. *Id.* ¶¶ 24, 31(a). Plaintiffs seek injunctive relief and an accounting of the properties. *Id.* ¶ 31(c), (f); TEC Compl., Prayer for Relief, ¶¶ 2-3.

At bottom, plaintiffs’ claim boils down to the theory that, by voluntarily affiliating with them, the CANA Congregations somehow granted plaintiffs a “trust” interest in the properties. But plaintiffs cannot point to any trust documents signed by the Congregations. Indeed, they

conceded at the hearing on the Motion Craving Oyer that no written trust agreements exist. By necessity, they must rely on a trust allegedly created by implication.

As the Virginia Supreme Court has squarely held, however, “Virginia has never adopted the implied trust doctrine to resolve church property disputes,” and it has expressly *rejected* the idea that “absent express limitations in the deed, church property is held subject to an implied trust for the general church.” *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 503 (1974). In sum, the heart of plaintiffs’ case is contrary to Virginia law.

Aware of this difficulty, plaintiffs seek to recast their trust claims under the rubrics of “contract” and “proprietary” claims. Diocese Compl., ¶ 31(b); TEC Compl., Prayer for Relief, ¶ 1. But their Complaints do not even allege offer, acceptance, and consideration, let alone a specific writing sufficient to satisfy the statute of frauds. Nor do plaintiffs allege facts (such as unjust enrichment) that might conceivably support recovery under an implied contract theory, or other facts (such as prior possession) that might conceivably support some claim of a “proprietary” interest. (Indeed, their Complaints allege quite the opposite.) Moreover, the lone case in which the Virginia Supreme Court has found a denomination to possess a contractual or proprietary interest in a local congregation’s property is *Green v. Lewis*, 221 Va. 547, 555 (1980), and the Court took pains to emphasize that the denomination there was “the grantee in the deed.” Thus, under the facts alleged here, plaintiffs’ contract and property theories likewise find no support in Virginia law. And once it becomes clear that plaintiffs have not alleged valid “trust, proprietary and contract rights” (Diocese Compl. ¶ 31(b)), it follows that their derivative claims for “trespass, conversion, alienation” and “accounting” must likewise fail (*id.* ¶ 31(a), (f)).<sup>3</sup>

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<sup>3</sup> TEC does not make the same tort-based allegations as the Diocese, but their claims of right to the CANA Congregations’ properties appears largely derivative of the Diocese’s claims, so the allegations will be addressed jointly.

Finally, a separate and independent reason requires dismissal of all of the uncompensated vestry and trustee defendants: Absent willful or criminal misconduct not alleged here, Va. Code § 8.01-220.1:1.A provides that uncompensated directors and officers of tax exempt organizations are fully “immune from civil liability for acts taken in their [official] capacities.” The CANA Congregations are automatically tax-exempt by virtue of their status as churches, and with the exception of the rectors all of the Related Individuals volunteer their services without pay. Accordingly, the claims against these defendants should be dismissed under Va. Code § 8.01-220.1:1 regardless of the Court’s disposition of plaintiffs’ substantive claims.

## **II. FACTUAL BACKGROUND**

### **A. The Division Within TEC And The Diocese And The Events That Led To This Litigation**

These consolidated cases arise out of a tragic division within the Anglican Communion, TEC, and the Diocese, resulting from actions of TEC’s leadership at its 2003 General Convention. In January 2004, the Diocese established a Reconciliation Commission to address the “profound differences” caused by these actions. *See* Congregations’ § 57-9 Reports (hereinafter, “Reports”) ¶ 41. In January 2005, the Commission issued a report acknowledging the “severe division in our Diocese” and concluding: “[W]e cannot avoid the difficult question: ‘Can we continue to live together?’ We understand from some of those among us that the answer may ultimately be ‘No,’ and that in this case there must be provision for an amicable divorce.” *Id.* ¶ 42.

In late 2005, in response to the Reconciliation Commission Report, Peter Lee, Bishop of the Diocese, formed a Special Committee chaired by Russell Palmore, Chancellor of the Diocese, to address how parishes might disaffiliate. *Id.* ¶ 44. After months of deliberations, in September 2006 the Special Committee issued a unanimous report that included a “Protocol for Departing Congregation” (“Protocol”). Citing “the division which may cause some to ‘walk

apart,” the Protocol provided, among other things, for congregations to hold vestry and congregational votes on whether to sever ties with TEC and the Diocese. *Id.* ¶¶ 45-46. Bishop Lee and other Diocese officials lauded the Protocol as a “useful way forward.” *Id.* ¶ 46.

The CANA Congregations followed the Protocol and ultimately voted by large majorities to separate from plaintiffs and join the Convocation of Anglicans in North America (CANA), also part of the Anglican Communion (through the Church of Nigeria). *See Reports passim.* In compliance with Va. Code § 57-9, which recognizes the right of congregations to retain their property when separating from a divided denomination, eight of the CANA Congregations reported their votes in their local circuit courts. *See id.* Although the Protocol called for property negotiations, and although Bishop Lee initially appointed a Commission to that end, the Diocese opted to reverse course, cut off negotiations, and institute the present litigation, which TEC then joined (filing a separate lawsuit of its own). The proceedings under § 57-9 and plaintiffs’ declaratory judgment actions have since been consolidated in this Court.

#### **B. The Deeds To The Properties At Issue**

Under Virginia law, the deeds to church property are critical to resolution of issues concerning ownership. *Norfolk Presbytery*, 214 Va. at 505. Moreover, courts look to the four corners of the deeds to interpret the grantor’s intentions. *Auerbach v. County of Hanover*, 252 Va. 410, 414 (1996) (“To ascertain the intent of the grantors, the deed is to be examined as a whole and effect given to all of its terms and provisions not inconsistent with some principle of law or rule of property.”). And at the time when many of the subject properties were acquired, Virginia law expressly *forbade* conveyance of property to trustees for religious denominations or dioceses. *See infra* n.4.



The deeds at issue here were the subject of defendants' Motion Craving Oyer, and by Order dated June 8, 2007, that motion was granted. TEC and the Diocese were compelled to attach, among other things, the deeds to the CANA Congregations' real property. Those deeds are now properly before the Court and may be considered for the purposes of this demurrer. To the extent those deeds contradict or do not support plaintiffs' factual allegations, the Court may properly ignore those allegations in ruling on the demurrer. *See Ward's Equipment, Inc. v. New Holland North America, Inc.*, 254 Va. 379, 382-83 (1997) (reviewing lease on demurrer) ("When a demurrant's motion craving oyer has been granted, the court in ruling on the demurrer may properly consider the facts alleged as amplified by any written agreement added to the record on the motion" and "may ignore a party's factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings" (citations omitted)).

Plaintiffs allege that their interest in the CANA Congregations' properties is premised in part upon the deeds to those properties. A review of the deeds, however, demonstrates that they vest title in trustees for the benefit of the individual congregations, and not for the benefit of TEC or the Diocese. Moreover, to the extent that plaintiffs rely on an assertion of "trust"-based interests in the subject properties, it merits emphasis that the deeds *expressly* identify trustees and beneficiaries—and, as explained in Part III.A, *infra*, Virginia law does not support the notion that there can be a *separate* trust interest in properties where the deeds themselves identify the trustees and beneficiaries.

As shown in Exhibit 1, which sets forth the short-style text of the deeds for the real properties subject to this lawsuit, nothing in the deeds' text expresses any intention by the grantors to convey property to anyone other than the trustees who hold title for the benefit of the congregations. Thus, plaintiffs' claim of interest or right in the properties cannot be premised upon the

deeds. Nor, for that matter, have plaintiffs contributed to the purchase, maintenance, or improvement of the properties.

### III. ARGUMENT ON DEMURRERS

The CANA Congregations and Related Individuals have demurred to the Complaints of the TEC and the Diocese. The purpose of demurrer is to test the sufficiency of factual allegations to determine whether the pleading states a cause of action. *Fun v. Va. Military Inst.*, 245 Va. 249, 252 (1993). A demurrer “admits the truth of all material facts that are properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from the alleged facts.” *Delk v. Columbia/HCA Healthcare Corp.*, 259 Va. 125, 129 (2000). However, the Court “may ignore a party’s factual allegations contradicted by the terms of authentic, unambiguous documents that properly are a part of the pleadings.” *Ward’s Equipment, Inc. v. New Holland North America, Inc.*, 254 Va. 379, 382-83 (1997); *see also Pulte Home Corp. v. Parex, Inc.*, 265 Va. 518, 523 (2003) (affirming trial court’s sustaining demurrer based on party’s “naked allegation” of an express warranty when the party could not produce a copy of the warranty after a motion craving oyer was granted).

Here, TEC and the Diocese have failed to set forth a cause of action against the CANA Congregations and Related Individuals. The basis for the demurrers are: (A) Plaintiffs have failed to allege a valid trust claim to the CANA Congregations’ property, because Virginia law does not recognize implied trusts in congregational property; (B) Plaintiffs have failed to allege the elements of a valid contract or proprietary interest in the CANA Congregations’ property; (C) Plaintiffs have not satisfied the elements of the torts of trespass and conversion, and the tort of “alienation” is not recognized in Virginia; and (D) A declaratory judgment action is an inappropriate vehicle for asserting tort-based causes of action.

**A. Plaintiffs Cannot Proceed on a Trust-based Theory Because Virginia Law Does Not Recognize Implied Denominational Trusts In Congregational Property.**

The heart of plaintiffs' Complaint is the notion that the properties at issue are "held in trust for the Episcopal Church and the Diocese"—and no one else. Diocese Compl. ¶ 24; *accord id.* ¶ 31(b) (seeking affirmation of "trust" rights); TEC Compl. ¶ 48, prayer for relief. Plaintiffs do not allege an interest based on a written trust instrument, and they have attached no such instrument to their Complaints. Rather, they seek to *transfer* title from the current trustees (Diocese Compl. ¶ 31(d)), and they conceded at the Motion Craving Oyer hearing that "there are no formal trust documents." Tr. 24 (June 8, 2007). Their asserted interest is thus based solely on the concept of an *implied* trust. *See id.* (asserting that "other documents evidence trust rights," and that "[t]he constitutions and canons of the church refer to trust rights"). As explained below, however, Virginia does not recognize such interests.

The Virginia Supreme Court has repeatedly held that Virginia does not recognize implied trusts in favor of church denominations. The leading case is *Norfolk Presbytery*, wherein the Court expressly rejected the idea that "absent express limitations in the deed, church property is held subject to an implied trust for the general church." 214 Va. at 503. As the Court put it: "Virginia has never adopted the implied trust doctrine to resolve church property disputes." *Id.*

The Court in *Norfolk Presbytery* acknowledged that other States have followed *Watson v. Jones*, 80 U.S. (13 Wall) 679 (1871), a pre-*Erie* federal common law decision holding "that those who unite themselves with a hierarchical church do so with an implied consent to its government and take title to local church property subject to an implied trust for the general church." 214 Va. at 504. But the Court rejected such analysis as a matter of Virginia law, stating that "[w]e are not bound by the rule of *Watson*[,] ... for that case rested on federal law" and "did not hold that the implied trust doctrine was the only constitutional rule for resolving church property

disputes.” *Id.* To the contrary, the Court noted that “[t]he First Amendment requires only that such disputes be adjudicated according to ‘neutral principles of law, developed for use in all property disputes,’ and which do not involve inquiry into religious faith or doctrine.” *Id.* (citation omitted). The Court has repeatedly reaffirmed its holdings that implied denominational trusts are invalid in Virginia. *See Reid v. Gholson*, 229 Va. 179, 187 n.11 (1985) (Virginia has a “strong tradition” of “refus[ing] to adopt the ‘implied trust’ theory in favor of hierarchical churches” and “refus[ing] to apply the traditional chancery doctrine of judicial *cy-pres*, in favor of religious trusts for indefinite beneficiaries”); *Green*, 221 Va. at 555.<sup>4</sup>

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<sup>4</sup> Throughout Virginia’s history, and until at least the 1993 amendments to Virginia Code § 57-7.1, church property used for religious purposes could be held by trustees *only* for the benefit of local congregations, not for the benefit of a general church or diocese. *E.g.*, *Norfolk Presbytery*, 214 Va. at 506; *Brooke v. Shacklett*, 1856 WL 3495, at \*6 (Va. 1856) (interpreting “religious congregation” in predecessor to Va. Code § 57-7.1 to refer to local congregations, and holding that a deed that conveyed property in trust for “a house or place of worship for the use of the members of the Methodist Episcopal Church in the United States, according to the rules and discipline . . . adopted . . . at their general conferences” was a grant to the local congregation); *Hoskinson v Pusey*, 1879 WL 5418, at \*3 (1879) (“[T]he conveyance is not for the use of the Methodist Episcopal Church in a general sense. Such a conveyance in this state would be void. But it is a conveyance for the use of a particular congregation of that church, in the limited and local sense of the term—that is, for the members, as such, of the congregation of the Methodist Episcopal Church, who, from their residence at or near the place of public worship, may be expected, to use it for that purpose”); *Moore v. Perkins*, 169 Va. 175, 179-80 (1937) (invalidating attempt to convey by deed property to be held in trust for Methodist Episcopal Church South and stating that “church,” “religious society,” and “religious congregation” are terms that “apply to the local congregation, and not to the church at large in its denominational sense”; holding that “[n]o dedication of property to religious uses, which does not respect these rights of the local society or religious congregation, no deed which does not design such enjoyment of the uses of the property conveyed, by the local society or congregation, can be placed within the influence of the statutes”); *Maguire v. Lloyd*, 193 Va. 138, 144 (Va. 1951) (holding that an earlier version of § 57-7, which addressed conveyances of property to benefit a “church or religious organization,” validated a gift to “the First Church of Christ, Scientist, of Lynchburg, Virginia,” as a gift to a “local church”).

Over time, Virginia has expanded the types of property that may be held in *express* trust for the benefit of a denomination, while adhering to the rule that implied trusts are invalid. *See Norfolk Presbytery*, 214 Va. at 506-07 (noting that in 1962 the legislature expanded the scope of § 57-7.1 to include property conveyed for the benefit of a “church diocese” for certain residential purposes, but “has not gone beyond this . . . to validate trusts for a general hierarchical church”);

In sum, plaintiffs seek to recover based on a claim that they have an implied trust interest not reflected in the written deeds of conveyance at issue. Indeed, plaintiffs cite no express trust agreement and concede that none exists. Virginia law, however, does not recognize plaintiffs' implied trusts claims, and the demurrers should therefore be granted.

**B. Plaintiffs Have Not Alleged a Valid Contract or Proprietary Interest in the CANA Congregations' Properties.**

Aware that Virginia law does not countenance the theory that they have a "trust-based" interest in the properties at issue, plaintiffs resort to the claim that they have some other undefined "interest" in those properties. Diocese Compl. ¶ 31; TEC Compl. ¶¶ 68-69. Again citing only church canons, the Diocese asserts "contract" or "proprietary" interests in the properties, while TEC, by contrast, does not even bother to specify what "interest" it asserts. *Id.* Review of the canons reveals that, in substance, these claims are merely trust claims by another name. *See* TEC Compl. ¶ 48 (citing canon language asserting that property "is held in trust for The Episcopal Church and the Diocese of Virginia"); Diocese Compl. ¶ 17 (same). But even taking the allegations at face value, plaintiffs have failed to state a claim under neutral principles of law for either breach of contract or interference with some other "proprietary" interest.

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*see also* Va. Code § 57-16 (expressly permitting, since 1942, placing title to hierarchical church property in the name of the bishop). But even in adopting the most recent changes in § 57-7.1, in 1993, the legislature provided "[t]hat this act is declaratory of existing law." Acts 1993, c. 370. Thus, the act did not overrule the substantial Virginia precedent holding that trusts for the benefit of a denomination are generally invalid. *See Horner v. Department of Mental Health*, 268 Va. 187, 193 (2004) (language "such as the words 'declaratory of existing law,' indicates that the General Assembly enacted the amendment as a clarification of existing law" (citation omitted)). Moreover, even if the statute changed the law prospectively, the act would not apply retroactively to deeds that pre-date the amendments. *See Berner v. Mills*, 265 Va. 408, 414 (2003) ("the phrase 'declaratory of existing law' is not a statement of retroactive intent").

**1. Plaintiffs bear a heavy burden to establish any “proprietary” interest under neutral principles of law.**

Notwithstanding the settled Virginia rule barring denominational trusts in congregational property, *Norfolk Presbytery* permits a hierarchical church to establish a “proprietary” interest in a formerly affiliated congregation’s property under certain limited circumstances. 214 Va. at 503. The Court in *Norfolk Presbytery* did not fully define “proprietary” interest. It indicated, however, that a hierarchical church may have “contractual rights in church property held by trustees of a local congregation,” and it emphasized that the assertion of any such interests should be judged according to “neutral principles of law, developed for use in all property disputes.” 214 Va. at 504. The Court thus directed that the lower courts, in assessing such claims, should “consider[] the statutes of Virginia, the express language in the deeds and the provisions of the constitution of the general church.” 214 Va. at 505.

Moreover, in light of Virginia statutory law and the illegality of implied trusts, the Court explained that “[the denomination] has the burden of proving that the [t]rustees of [the CANA Congregation] have violated either the express language of the deeds or a contractual obligation of the general church.” 214 Va. at 507 (emphasis added). The Court provided some further guidance in *Green*, in which it stated that a “proprietary right is a right customarily associated with ownership, title, and possession,” “an interest or a right of one who exercises dominion over a thing or property, of one who manages and controls,” and ultimately found that standard met where the deed granted the property to trustees for the denomination. 221 Va. at 555.

Whatever theory it asserts, however, the denomination may invoke § 57-15 only if it first establishes *some* valid proprietary interest in the property at issue. *See Norfolk Presbytery*, 214 Va. at 513 (“If ... the Presbytery is unable to establish a proprietary interest in the property, it

will have no standing to object to the property transfer”).<sup>5</sup> This plaintiffs have failed to do, and accordingly they have failed to state a claim.

**2. Plaintiffs have not alleged a valid claim for breach of contract.**

To the extent that plaintiffs wish to assert a claim for breach of contract, they have failed to do so under neutral principles of law. *First*, they have not identified *any* specific contract that establishes their alleged interest in the properties at issue. Indeed, plaintiffs have not alleged facts that would constitute offer, acceptance, or consideration, or other facts that objectively manifest a “meeting of the minds” concerning the conveyance of specific property interests to them. *See Brooks & Co. General Contractors, Inc. v. Randy Robinson Contracting, Inc.*, 257 Va. 240, 245 (1999). These are the most basic elements of a contract claim, even setting aside the question of breach, and plaintiffs’ failure to allege them is fatal.

To the extent that TEC and the Diocese are asserting that their constitutions or canons somehow amount to a contract, those documents contain at most a *unilateral* assertion of some (trust-based) interest in the CANA Congregations’ properties. Even assuming that a *canon*-based interest is relevant—*Norfolk Presbytery* and *Green* reference only the general church’s “*constitution*”<sup>6</sup>—there is no allegation that the CANA Congregations signed the canons at issue or expressly assented to their application to specific property. Such documents are therefore in-

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<sup>5</sup> This analysis, of course, assumes that the case is not governed by Va. Code § 57-9(A), which is “conclusive” of the issue of title and supersedes any common law rights that a denomination might otherwise assert in disaffiliating congregations’ property. In none of the Virginia cases has a group of congregations that separated from their denomination and affiliated with a new branch invoked Va. Code § 57-9(A). *See Reid v. Gholson*, 229 Va. 179 (1985) (involving subpart B of § 57-9); *Baber v. Caldwell*, 207 Va. 694 (1967) (same); Br. of Appellee in *Green*, Va. No. 781388 (not citing § 57-9); Appellee’s Br. in *Norfolk Presbytery*, Va. No. 8241, at 14 (stating that “§ 57-9 is not involved in this case”). That is not surprising, as the cases did not involve any broader division and the individual congregations in *Norfolk Presbytery* and *Green* voted to become “independent.” *See Green*, 221 Va. at 550; *Norfolk Presbytery*, 214 Va. at 501.

<sup>6</sup> *Norfolk Presbytery*, 214 Va. at 505; *Green*, 221 Va. at 555.

sufficient to establish a contract under Virginia law, *see Brooks*, 257 Va. at 245 (holding that receipt of an unsigned form contract, combined with controverted verbal assurances of intention to sign, does not constitute an objective manifestation of agreement), and application of different standards of contract formation would contravene *Norfolk Presbytery*'s admonition that "the language of the deeds and the constitution of the general church should be considered *in the application of neutral principles of law*." 214 Va. at 507 (emphasis added). Moreover, as is evident from the deeds, in many instances the canons that plaintiffs rely on post-date by decades (or more) the CANA Congregations' affiliations with the Diocese or TEC.

The absence of allegations that the CANA Congregations specifically signed over the properties at issue distinguishes this case from *Diocese of Southwestern Va. of Protestant Episcopal Church v. Burhman*, 1977 WL 191134 (Va. Cir. Ct.), an unreported circuit court decision on which plaintiffs rely. There, as a condition of parish status quite apart from recognition of any canons, "[i]n ... writing the members did 'solemnly engage and stipulate that all real estate consecrated as a church or chapel, of which the said Parish is or may become possessed, shall be secured against alienation from the Protestant Episcopal Church in the Diocese of Southwestern Virginia, unless such alienation is in conformity with its Canons.'" *Id.* at \*2. Moreover, the defendants committed in writing that "the 'Parish shall forever be held under the Ecclesiastical Authority of the Diocese.'" *Id.* at \*2. For these reasons, among others, *Buhrman* is inapposite.<sup>7</sup>

*Second*, insofar as plaintiffs assert a contractual interest in real property, any such contract must be in writing to satisfy the statute of frauds. Under Virginia law, "[u]nless a promise,

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<sup>7</sup> TEC and the Diocese make much of the fact that the Virginia Supreme Court denied a petition for appeal in *Buhrman*. *See* Rec. No. 780347 (Va. June 15, 1978). But as this Court held in *MacArthur v. University of Virginia Health Services Foundation*, 2006 WL 3775932, \*3 (Va. Cir. Ct. 2006), a denial of review has no precedential value unless the basis for the denial is discernible from the "four corners" of the Order. The Virginia Supreme Court's denial of review in *Buhrman* contained no such language.



contract, agreement, representation, assurance, or ratification, or some memorandum or note thereof, is in writing and signed by the party to be charged or his agent, no action shall be brought in any of the following cases: ... 6. Upon any contract for the sale of real estate, or for the lease thereof for more than a year.” Va. Code § 11-2.<sup>8</sup> Although the statute speaks of a contract for “sale . . . or . . . lease,” this Court has made clear that neither is strictly required for the statute to apply. *Maier v. Hendrix*, 36 Va. Cir. 283, 284 (1995) (Fairfax) (“Under well-settled Virginia case law, a verbal agreement to become interested in and to share the profits from lands already owned by one of the parties at the time the agreement is formed is ... required by the statute of frauds to be in writing” (citations omitted)). Thus, the CANA Congregations’ alleged conveyance to plaintiffs of “an interest in real estate” (*id.*) falls within the statute of frauds.

The alleged conveyance does not, however, *satisfy* the statute of frauds. “It is generally recognized that the memorandum, in order to satisfy the statute of frauds, must contain: (1) the name of each party to the contract, (2) a description of the land to be conveyed, and (3) the essential terms and conditions.” *Adams v. Doughtie*, 63 Va. Cir. 505, 530 (Va. Cir. 2003) (citing, *inter alia*, *Reynolds v. Dixon*, 187 Va. 101, 108 (1948)). The Denomination’s canon-based contractual claim meets none of these requirements. The canons do not name the specific parties to the contracts, provide a “definite and certain” description of the properties (*Reynolds*, 187 Va. at 109), or state the essential terms and conditions of the contracts. Instead, the canons merely assert an interest between *unnamed* parties, for *non-specified* property, under *undefined* terms and conditions. Thus, even if the canons otherwise satisfied the requirements for a contract (and they do not), they would fail under the statute of frauds.

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<sup>8</sup> The statute of fraud also applies to “any agreement that is not to be performed within a year,” Va. Code 11-2(8), which would likewise apply to a contract that required a congregation to convey its property to an affiliated denomination upon disaffiliation at an unspecified date.

*Third*, TEC and the Diocese may not rely on an “implied contract” theory to support their claim of a contractual right in the CANA Congregations’ properties. Even apart from the statute of frauds, the Court in *Norfolk Presbytery* rejected the notion of “implied consent to [hierarchical church] government” embodied in cases such as *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). *See* 214 Va. at 504. But even assuming that plaintiffs could proceed under an implied contract theory, they have failed to allege the elements of such a claim.

Under Virginia law, an implied contract rests on equitable principles and will be implied only (1) in the absence of an express contract and (2) when one party would be unjustly enriched. *See Kern v. Freed Co., Inc.*, 224 Va. 678, 680-681 (1983) (“However, this implied or quasi-contract is based on equitable principles. It rests ‘upon the doctrine that a man shall not be allowed to enrich himself unjustly at the expense of another.’”). Here, however, it is undisputed that there *are* express contracts governing ownership of the properties—the deeds. And even if the deeds did not exist, plaintiffs have pleaded no facts to support the notion that the CANA Congregations have unjustly benefited from plaintiffs’ contributions to their properties. They do not claim to have funded the purchase of the properties at issue, to have donated them to the CANA Congregations, or to have constructed, maintained, or improved the buildings thereon. That is not surprising: title in the properties is vested in the trustees for the CANA Congregations, and some of the properties pre-date the Diocese and TEC, to say nothing of the canons.<sup>9</sup> *See Southern Biscuit Co. v. Lloyd*, 174 Va. 299, 311 (1940) (“It has been well settled by repeated decisions of this court that an express contract defining the rights of the parties necessar-

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<sup>9</sup> This factor too distinguishes this case from *Buhrman*, where the congregation had been a “mission” of TEC until just three years before its disaffiliation, and where “The Episcopal Church and the Diocese ... made substantial financial contributions to it.” 1977 WL 191134, at \*\*1-2.

ily precludes the existence of an implied contract of a different nature containing the same subject matter”).

*Green v. Lewis* is not to the contrary. The Court there looked at the course of dealing between the parties only after concluding that the property at issue was titled in the name of trustees for the national church, not trustees for the local congregation. See *id.* at 553 (“The grantors conveyed the property to “Trustees of the A.M.E. Church of Zion.””); *id.* at 555 (“Here the A.M.E. Zion Church is the grantee in the deed, the property having been conveyed to trustees of that church to establish an A.M.E. Zion Church thereon”). Only in these circumstances could the Court reasonably conclude that “[t]he contractual obligation which the A.M.E. Zion Church assumed *has its genesis in the 1875 deed,*” and that “[t]he addition of a trust clause to the deed would have provided the A.M.E. Zion Church with no additional or further interest in the Lee Chapel property. It was already held by the trustees for [A.M.E. Zion Church] and no other.” *Id.* at 554. Here, by contrast, the deeds at issue grant property to trustees for the individual CANA Congregations, and the Complaints acknowledge as much. *E.g.*, TEC Compl. ¶¶ 20-26; Diocese Compl. ¶ 5. Indeed, that is why plaintiffs must ask the Court to “require the Trustee defendants to convey and transfer legal title of [the] property to the Bishop of the Diocese.” Diocese Compl. ¶ 31(d). In sum, whatever role implied contract analysis might have had in *Green*, there is no basis for such analysis here.

**3. Plaintiffs have not alleged any other valid “proprietary” interest in the CANA Congregations’ properties.**

Finally, plaintiffs have alleged no facts that would support recovery under any other theory of “proprietary” interest. *Green* indicated that a “proprietary right is a right customarily associated with ownership, title, and possession,” “an interest or a right of one who exercises do-

