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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
E. Andrew Boucher, Esquire
Scott T. Ward, Esquire
R. Hunter Manson, Esquire
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 Trustees¹ who are named defendants (hereinafter collectively, "Related Individuals")²

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

² 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)).³

³ 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 555.⁴

⁴ 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.

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”).⁵ 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*”⁶—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-

⁵ 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.

⁶ *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.⁷

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,

⁷ 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 § 11-2.⁸ 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.

⁸ 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.⁹ *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-

⁹ 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-

minion over a thing or property, of one who manages and controls.” 221 Va. at 555-56. Considering these factors in turn, however, makes clear that plaintiffs have no claim here.

Concerning ownership and title, the CANA Congregations have already shown that title to the properties at issue is held by their trustees, and plaintiffs acknowledge this in their Complaints. As to “possession” of, “exercis[ing] dominion” over, or “manag[ing] and control[ling]” the subject properties, TEC and the Diocese do not allege that they have *ever* possessed, managed, or controlled the properties at issue. Indeed, the Complaints are based on the opposite premise—that defendants continue to hold possession of, manage, and control the properties just as they have in the past. *E.g.*, Diocese Compl. ¶ 2 (alleging that defendants “retain control of the parish’s property”); *id.* ¶ 3 (alleging that the defendant rectors retain “authority and responsibility” for conducting worship at the parish); *id.* ¶ 31(c) (seeking relief that would “enjoin [defendants] from further use and occupancy of [the] property”). Nor do the Complaints allege any further dominion or control over the properties—such as supply of ministers, organization of the local church’s Sunday School and designating its curricular materials—that the Court in *Green* viewed as consistent with the deed’s conveyance of property to the denomination.

* * * * *

In summary, plaintiffs’ claim is in substance an implied trust claim, and Virginia law does not recognize such claims. But even if plaintiffs’ claim is construed as a contract claim, they have failed to allege the basic elements of a contract or an objectively manifested meeting of the minds concerning these properties. Moreover, plaintiffs’ notion that the contract is based on internal church canons or other documents is foreclosed by the statute of frauds, the vague nature of the canons, and the absence of any allegation that the CANA Congregations would be unjustly enriched by retaining control of the properties. Plaintiffs do not claim to have ever fi-

nanced, possessed, or managed the properties at issue, and the Virginia Supreme Court has never recognized a proprietary interest in a church denomination where the property was not deeded to trustees for the denomination. The demurrers should therefore be granted as to plaintiffs' "trust," "contract," and "proprietary interest" claims.

C. TEC and the Diocese Fail to Set Forth the Requisite Elements of the Torts of Trespass, Conversion or Alienation.

It follows from plaintiffs' failure to allege valid trust, contract, or proprietary interests that their claims for trespass, conversion, alienation and accounting—which are derivative of the alleged canonical rights of TEC and the Diocese—must likewise fail. But these claims suffer from additional flaws that require their dismissal. We analyze them in turn.

1. Trespass

In order to state a claim for trespass, a plaintiff must allege (1) a superior right to the property; (2) that the plaintiff was in possession, either actual or constructive, of the property at the time the trespass occurred; (3) an invasion, no matter how slight, of the plaintiff's legal right in the property; and (4) resulting damages. *See Cooper v. Horn*, 248 Va. 417, 418-23 (1994). Plaintiffs have failed to allege any of these elements.

The CANA Congregations have already demonstrated that plaintiffs can allege no superior right in the properties at issue, and the Complaints certainly contain no basis for the conclusion that plaintiffs have legal title sufficient to support a claim for trespass. *See W. M. Ritter Lumber Co. v. Edwards*, 171 Va. 185, 188 (1938) ("The contention of defendant that the burden is upon the plaintiff to show that he has legal title to the land in controversy, or that his claim of adversary possession under color of title has ripened into a complete title under the statute, is well founded."); *see also* John L. Costello, *Virginia Remedies* § 20-3(b), at 799 (2d Ed.) ("The

plaintiff suing to restrain a trespass in Virginia must show a right in the land superior to that of the defendant.”). This alone requires dismissal of the claim for trespass.

But even assuming, *arguendo*, that plaintiffs had a superior claim to legal title, their trespass claim would still be subject to dismissal. *First*, under Virginia law, “in order to maintain a cause of action for trespass to land, the plaintiff must have had possession of the land, either actual or constructive, at the time the trespass was committed.” *See Cooper*, 248 Va. at 423. TEC and the Diocese, however, unequivocally allege that the CANA Congregations were in possession of the properties at the time of the alleged trespass (and, for that matter, that they always have been). *Second*, TEC and the Diocese do not claim damages against the CANA Congregations or the related individuals for the alleged trespass. *See id.* at 418-23 (damages is an element of a claim for trespass). The failure to plead this element is likewise fatal to their trespass claim. For all these reasons, TEC and the Diocese have failed to state a claim of trespass.

2. Conversion

Plaintiffs have also failed to allege a valid claim for conversion, which Virginia law defines as “the wrongful assumption or exercise of the right of ownership over goods or chattels belonging to another in denial of or inconsistent with the owner’s rights.” *Neurology Services, Inc. v. Fairfax Medical PWH, LLC*, 2005 WL 832160, *8 (Va. Cir. Ct.). To begin with, TEC and the Diocese have not pleaded any facts which would demonstrate their right of ownership in the personal property held by the CANA Congregations. But even more fundamentally, under Virginia law, title to a church’s personal property follows the deeds to its real property. *See Va. Code § 57-10*. And as demonstrated above, title to the CANA Congregations’ real property was

held by trustees for the benefit of the CANA Congregations—not TEC or the Diocese. Thus, plaintiffs’ claim for conversion must fail for the same reasons as the claim for trespass.¹⁰

3. “Alienation”

The Diocese seeks a declaration from this Court that an improper “alienation” has occurred. *See* Diocese Compl. ¶ 31(a). But a review of the Virginia case law reveals no authority recognizing the tort of “alienation.” This supposed claim should therefore be dismissed.

D. The Complaints Should Be Dismissed Because A Declaratory Judgment Action Is an Inappropriate Vehicle For Asserting Tort-Based Causes of Action.

Dismissal is also required because plaintiffs have relied upon an improper vehicle for asserting their tort claims. Both TEC and the Diocese have brought declaratory judgment actions against the CANA Congregations and the Related Individuals. TEC’s Complaint appears largely directed at the issue of title to the CANA Congregations’ properties. As discussed above, however, the Diocese goes further, requesting that this Court enter a declaratory judgment finding that “there *has* been an improper trespass, conversion, alienation and use of the real and personal property” at issue. *See* Diocese Compl. ¶ 31 (a) (emphasis added). This is inappropriate.

Virginia Code § 8.01-191 states that declaratory judgment actions are remedial in nature and liberally construed, and that the purpose of such actions is to:

afford relief from uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor.

Virginia Code § 8.01-184 authorizes circuit courts to “make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed.” A declaratory judgment,

¹⁰ In addition, any action based upon “conversion” typically requires the filing of a suit in trover, which alleges not only a “conversion” but that it is attended by conspiracy to convert or other fraudulent conduct. *Williams & Sons v. Menez*, 141 Va. 370, 377 (1925). Plaintiffs have not filed a suit in trover. Moreover, if (as here), a plaintiff alleges the existing of a controlling contract between the parties, no action is available because the contract is deemed to control. *Id.*

therefore, is a proper vehicle for determining parties' rights when action or inaction by one of the parties might expose them to future liability. *Reisen v. Aetna Life and Cas. Co.*, 225 Va. 327, 335 (1983) ("declaratory judgment is appropriate to 'guide parties in their future conduct in relation to each other, thereby relieving them from the risk of taking undirected action incident to their rights, which action, without direction, would jeopardize their interests'"); *Cupp v. Board of Supr's of Fairfax County*, 227 Va. 580, 592 (1984) (same).

But that is not true here. The Diocese is asserting portions of improperly pleaded tort-based claims (see argument above) against the CANA Congregations and Related Individuals in the form of a declaratory judgment action. The Diocese is asking this Court, in part, to declare that defendants have committed past torts of trespass and conversion.

The purpose of the declaratory judgment action, however, is to adjudicate prospective rights and *not* to determine past actions which should be brought at law. *Green v. Goodman-Gable-Gould Co., Inc.*, 268 Va. 102 (2004). A declaratory judgment is thus not a proper vehicle for determining a disputed fact that would otherwise give rise to a fully-matured cause of action. *Williams v. Southern Bank of Norfolk*, 203 Va. 657, 662 (1962) ("In common cases where a right has matured or a wrong has been suffered, customary processes of the court, where they are ample and adequate, should be adopted."); *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421 (1970) (stating that "[t]he intent of the declaratory judgment statutes is not to give parties greater rights than those which they previously possessed, but to permit the declaration of those rights before they mature" and finding a declaratory judgment action barred where a legal action had fully matured.). Accordingly, even if the Diocese could properly plead a claim for past trespass, conversion, or alienation, a declaratory judgment action is an inappropriate vehicle for doing so and this portion of the Complaint should be dismissed.

IV. ARGUMENT ON PLEAS IN BAR

A. The Demurrers and Pleas in Bar Should Be Granted as to the Individual Defendants, Who Are Immune from Civil Liability Under Va. Code § 8.01-220.1:1.

Quite apart from plaintiffs' failure to allege a valid cause of action against *any* defendant, Virginia law governing immunity independently bars them from recovering from the Related Individuals. 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 entirely "immune from civil liability for acts taken in their [official] capacities." Indeed, even the liability of compensated non-profit officials is limited to damages not exceeding their annual compensation, Va. Code § 8.01-220.1:1.B, and plaintiffs do not seek damages in any event. Thus, the claims against the individual defendants should be dismissed under Va. Code § 8.01-220.1:1.

1. Overview of the Virginia immunity statute: Va. Code § 8.01-220.1:1

The Virginia legislature has provided complete immunity from civil liability to all directors, trustees, and officers of tax exempt organizations who, like the vestry members here, volunteer their services without pay. Specifically, Va. Code § 8.01-220.1:1(A) states:

A. Directors, partners, members, managers, trustees and officers of organizations exempt from income taxation under section 501(c) or section 528 of the Internal Revenue Code who serve without compensation shall be immune from civil liability for acts taken in their capacities as officers, partners, members, managers, trustees or directors of such organizations.

In a similar vein, the statute limits civil liability for individuals (such as the rectors) who receive pay to the amount of their compensation for the twelve months immediately preceding the complained of actions. Section § 8.01-220.1:1(B) of the Virginia Code provides:

B. In any proceeding against a director, partner, member, manager, trustee or officer of an organization exempt from income taxation under § 501 (c) or § 528 of the Internal Revenue Code who receives compensation, the damages assessed for acts taken in his capacity as an officer, partner, member, manager, trustee or director and arising out of a single transaction, occurrence or course of con-

duct shall not exceed the amount of compensation received by the officer, partner, member, manager, trustee or director during the 12 months immediately preceding the act or omission for which liability was imposed. As used herein “compensation” shall mean payment for services over and above per diem and expenses.

Finally, Part C of Va. Code § 8.01-220.1:1 provides that the foregoing sections do not apply “if the officer, partner, member, manager, trustee or director engaged in willful misconduct or a knowing violation of the criminal law or if liability derives from the operation of a motor vehicle, or from the violation of a fiduciary obligation imposed during the period of declarant control by § 55-79.74.”

As explained below, the immunities provided by Va. Code § 8.01-220.1:1 protect the Related Individuals in this case.

2. The requirements of Va. Code § 8.01-220.1:1 are satisfied.

As alleged in TEC and the Diocese’s Complaints, each of the Related Individuals here serves as a director, officer, or trustee of the CANA Congregations, and TEC and the Diocese have challenged only actions that the Related Individuals have taken in their official capacities. *See, e.g.*, TEC Compl. ¶¶ 9-27; Diocese Compl. ¶¶ 3-5. Each of the CANA Congregations, moreover, is automatically exempt from taxation under § 501(c)(3) of the Internal Revenue Code (IRC) and operates in compliance with the requirements of that section. *See* 26 U.S.C. § 508; Affidavits of representatives of CANA Congregations (contained in Exh. 3) (hereinafter, “Exh. 3 Affs.”) ¶¶ 6, 11-13.¹¹ Finally, with the exception of the rectors (who do receive a salary), the

¹¹ Under the IRC and relevant IRS regulations, certain categories of nonprofit organizations—including “churches” and “conventions or associations of churches”—are exempt from the requirement of filing an application with the IRS to be recognized as tax-exempt public charities under § 501(c)(3). *See generally Tax Guide for Churches and Religious Organizations: Benefits and Responsibilities Under the Federal Tax Law* (Sept. 2003), <http://www.irs.gov/pub/irs-pdf/p1828.pdf>, at 3; William W. Bassett, *Religious Organizations and the Law*, § 4:37 (West 2002). Specifically, 26 U.S.C. § 508(c)(1)(A) provides “Mandatory exceptions” from the filing requirement for “churches, their integrated auxiliaries, and conventions or associations of

Related Individuals here serve without compensation. *See* Exh. 3. Affs. ¶ 7 Plaintiffs' Complaints contain no allegations to the contrary.

Notably, the immunity granted by Part A of Va. Code § 8.01-220.1:1 is not limited to liability for damages: individuals who serve as uncompensated leaders of non-profit entities are "immune *from civil liability* for acts taken in their [official] capacities." (Emphasis added.) Under Virginia law, the term "civil liability" extends to both equitable and monetary relief. *See* Va. R. Civ. P. 3.1 ("There shall be one form of civil case, known as a civil action"; "whether the claims involved arise under legal or equitable causes of action ... the words "action" or "suit" ... shall refer to a civil action, which may include legal and equitable claims"). Moreover, Va. Code § 8.01-220.1:1.A stands in marked contrast to other provisions of Virginia law providing only that certain individuals "shall not be liable for civil damages." *See, e.g.*, Va. Code § 8.01-225.1.

The sole remaining question, then, is whether any of the exceptions to the blanket immunity provided by the statute applies here. As explained below, none of them does.

3. None of the exceptions to Va. Code §8.01-220.1:1 applies in this case.

The main exception to the immunity statute withdraws immunity from those who engage in willful misconduct or a knowing violation of the criminal law. Va. Code § 8.01-220.1:1(C). Plaintiffs, however, have alleged no such misconduct. Nor could they, as the Related Individuals' actions were in accord with Va. Code § 57-9.

The only other arguably relevant exception to the immunity statute is for individuals like the rectors here, who can be sued for money damages up to the amount of their compensation

churches." *Accord* Treas. Reg. § 1.508-1(b)(2); *IRS Publication 1828*; *IRS Publication 4220*. *See also* 26 U.S.C. § 6033(a)(2) (mandatory exemption from filing annual Form 990 returns for "churches, their integrated auxiliaries, and conventions or associations of churches").

during the last twelve months. Va. Code § 8.01-220.1:1(B). Since TEC and the Diocese have not claimed any money damages from the rectors, however, that exception is inapplicable.

It follows that the Demurrers and Pleas in Bar should be granted as to the Related Individuals who serve as vestry members or trustees without compensation.

4. The actions of diocesan officials in authorizing the Protocol for Departing Congregations provides a further basis for granting the plea in bar as to the Related Individuals.

Even in the absence of Va. Code § 57-9, there would be no basis for any claim of willful or criminal misconduct triggering any exception to the immunity statute. As alleged in the CANA Congregations' Reports of Congregational Determination Pursuant to Va. Code §57-9, when it became obvious that many congregations were seriously considering separation from the Episcopal Church and the Diocese, Diocesan Bishop Peter Lee appointed a Special Committee chaired by Diocesan Chancellor Russ Palmore to address the situation. In September 2006, the committee issued a unanimous report that not only acknowledged "the division which may cause some to 'walk apart,'" but also contained a "Protocol for Departing Congregation." Congregation's Reports ¶¶ 44-46.¹² The Bishop later described this Protocol as "a useful way forward" and other Diocesan officials acknowledged the same. *Id.* ¶ 46. A hearing on the plea in bar would show that in late 2006 and early 2007, consistent with the recommended steps outlined in the Protocol, the CANA Congregations conducted their votes on whether to disaffiliate from the denomination and then sought to negotiate an amicable resolution of the parties' differences. Without explanation, however, TEC and the Diocese rejected both the unanimous report of the Special Committee and the Protocol and filed suit against defendants.

¹² The Special Committee's Report/Protocol is attached as Exhibit 14 to the CANA Congregations' Reports. For the Court's convenience, the Report is also attached hereto as Exhibit 2.

Whatever the outcome of the litigation, a plea-in-bar hearing would demonstrate that the individual defendants acted in good faith and in reliance on representations of Diocesan officials in conducting their votes and the like. This presents yet another reason why plaintiffs should not be allowed to proceed against the individual defendants.¹³

* * * * *

In the end, TEC and the Diocese have sought no relief that could not be fully realized through orders against the CANA Congregations—orders that the Related Individuals, as agents thereof, would be bound to follow. Thus, the only conceivable reason for suing the Related Individuals here is intimidation—intimidation that runs afoul of Virginia’s policy of encouraging individuals to serve as leaders of charitable entities such as the Congregations. In short, Virginia statutory law does not countenance suit against the Related Individuals in these circumstances.

B. Even If Plaintiffs Had Alleged a Valid Trust Claim, the CANA Congregations’ Voluntary Disaffiliation from TEC, Incorporation, and Adoption of Governing Documents that Do Not Recognize TEC’s Authority, Revoked Any Such Trust.

Plaintiffs’ assertion of a trust-based interest in the subject properties does not state a cognizable claim under Virginia law. But even assuming, *arguendo*, that Virginia recognized implied trusts, any such trusts would have been revoked by the CANA Congregations’ disaffiliation from plaintiffs, and (in the case of most of the Congregations) by incorporation and adoption of governing documents that do not recognize any property interest or authority in TEC.

Plaintiffs expressly allege that the CANA Congregations have incorporated, severed ties with the denomination, and declared that they do not recognize the authority of either TEC or the Diocese (which in any event was always subject to civil law). *See* TEC Compl. ¶¶ 2, 64; Dio-

¹³ Setting aside issues of immunity, plaintiffs have provided no consistent reason for including both past and present vestry members as defendants in this lawsuit.

cese Compl. ¶ 2, 22, 25-26. Moreover, Virginia law provides that the assets of a charitable corporation are held in trust for the purposes established by the corporation's governing documents, and the governing documents of the CANA Congregations do not recognize TEC or the Diocese to have any interest in the properties at issue. *See* Va. Code § 2.2-507.1 ("The assets of a charitable corporation incorporated in or doing any business in Virginia shall be deemed to be held in trust for the public for such purposes as are established by the governing documents of such charitable corporation, the gift or bequest made to such charitable corporation, or other applicable law"); Exh. 3 Affs. ¶¶ 4-5. Thus, a hearing on the plea in bar would show that any trust interest that plaintiffs might have claimed in the properties has been revoked, as several courts have recognized. *E.g.*, *Protestant Episcopal Church in Diocese of Los Angeles v. Barker*, 115 Cal.App.3d 599, 621 (2d Dist. 1981), *California-Nevada Conf. of United Methodist Church v. St. Luke's United Methodist Church*, 121 Cal. App. 4th 754 (5th Dist. 2004); *From the Heart Ministries, Inc. v. African Methodist Episcopal Zion Church*, 803 A.2d 548 (Md. 2002).¹⁴

In *Barker*, for example, four congregations disaffiliated from the Episcopal Diocese of Los Angeles, whose canons provided that parish property was to be conveyed to the Diocese on dissolution of the parish. Although the congregations' corporate articles stated that the constitution, canons, and discipline of the diocese and ECUSA would always form part of its bylaws and articles (*id.* at 607-09), with one exception the court nonetheless found that the congregations

¹⁴ Under Va. Code § 2.2-507.1, the Attorney General of Virginia has authority to act to protect the public with respect to assets of charitable corporations, including by seeking judicial relief. The Virginia courts have not resolved the question whether the Attorney General is a necessary party in suits involving disposition of charitable corporations' assets. *See Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity*, 266 Va. 455, 464 (2003) ("we express no position whether the Attorney General is a necessary party in suits of this nature"). Thus, we recommend that the Court invite the Attorney General to express his views on the meaning of § 2.2-507.1, to ensure that all necessary parties are before the Court and judgment is conclusive.

owned their property under neutral principles of law.¹⁵ Noting that the congregations held title and that their articles did not speak to disposition of property upon dissolution, the court stated:

Plaintiffs-respondents interpret these general provisions in the articles of incorporation as a kind of open ended agreement by the local churches to accept in advance any and all rules and regulations which might thereafter be put in effect by the general church. We do not believe such an interpretation accords with real property law, with contract law, with corporate law, or with trust law. Such declarations of affiliation and loyalty are nothing more than expressions of present intention. We think such declarations no more restrictive of future amendments to the articles of incorporation than would be similar statements in an automobile dealer's articles that it would always distribute General Motors products and always be bound by General Motors rules and policies, or statements in a political club's articles that it would forever support the Democratic Party and be forever bound by the latter's rules and platform. A subsequent switch of affiliation by the dealer to Ford, or by the political club to the Republican Party, would, under neutral principles of law, furnish no basis for a claim of express trust by the superseded automobile manufacturer to possession of the dealer's showroom and repair shop or a claim by the deserted political party to possession of the political club's meeting premises and bank account. As in matrimony, always and forever do not preclude a change in heart and do not create an express trust in another's property. Under neutral principles of law no express trust was created by the articles of incorporation[.].

Id. at 622-23. Although the court did not speak in terms of "revocability," in substance it held that any expression of intent to operate as an Episcopal congregation was revocable.

St. Luke's, which involved a Methodist congregation, reached a similar conclusion but on the express ground that denominational trusts may be revocable. The Methodist Book of Discipline provides that "titles to all properties held ... by a local church ... shall be held in trust for the United Methodist Church and subject to the provisions of its Discipline," specifies language to be used in congregations' deeds, and states that "the absence of a trust clause ... in deeds and conveyances previously executed shall in no way exclude a local church ... from or relieve it of its connectional responsibilities to the United Methodist Church." 121 Cal.App.4th at 758. The

¹⁵ One of the four congregations in *Barker* incorporated under a statutory provision that rendered it merely a "subordinate body of a national body" and had corporate articles providing that its property would revert to the diocese on incorporation. *Id.* at 624-25. The court held that the Diocese was entitled to the property of that congregation.

corporate articles of the congregation in *St. Luke's* provided that the church was established to operate "according to the articles, rules, usage, discipline of the Methodist Denomination." *Id.*

The court expressly noted the extraordinary nature of a denomination's claim that *the alleged beneficiary* could assert a trust interest in a congregation-settlor's property: "We know of no principle of trust law stating that a trust can be created by the declaration of a nonowner that the owner holds the property as trustee for the nonowner." *Id.* at 769. The idea that "the general church (or "superior religious body") can do this by so providing in the general church's 'governing instruments' ... would appear to be sharply at odds with other general principles of trust law. A trust can be created by a 'declaration by the owner of property that the owner holds the property as trustee.'" *Id.* (citations omitted). But even where there is a valid trust, "a local church's creation of a trust interest in favor of the general church, including a trust interest created by the local church's agreement to a general church's rule calling for the local church to hold property in trust for the general church, may be revoked by the local church unless the local church has expressly declared that trust to be irrevocable." *Id.* at 757. *See also From the Heart Ministries, Inc.*, 803 A.2d at 566, 571 (noting that "[t]he creation of a trust depends upon the intention of the settler" and holding that "as circumstances and situations change, a trust may be revoked," particularly where the denomination's constitution does not "indicate[] that the trust thus created is irrevocable nor that it addresses the situation in which, as occurred here, the local church terminates the affiliation").

As these cases confirm, the notion that a denomination, acting as beneficiary, can unilaterally assert a trust interest in a congregation's property is dubious and unknown to the trust law. But even assuming trusts may thus be created, they may certainly be revoked by disaffiliation and adoption of corporate articles that do not recognize denominational authority. *See Va. Code*

§ 2.2-507.1. Indeed, given that Virginia has never recognized implied trusts in the first place, this case presents an *a fortiori* case for application of trust law principles that permit revocation.

C. Va. Code § 57-9 Supersedes Plaintiffs' Common Law Claims.

Plaintiffs' claims against defendants are further barred by the Congregations' determinations, by majority vote under Va. Code § 57-9, to disaffiliate from TEC and join another branch of the Anglican Communion. The meaning of § 57-9 will be discussed at length in the CANA Congregations' briefs concerning the scope of the November § 57-9 hearing. We note here, however, that whether or not plaintiffs' common law claims would otherwise have merit, § 57-9 is "conclusive" of title in cases involving a "division" within a broader "church or religious society." This Court's approval of the Congregations' petitions will therefore supersede all of plaintiffs' common law claims. In none of the cases that plaintiffs might rely on, moreover, have the courts addressed application of *Part A* of that statute. *See supra* n.5.


D. Plaintiffs' Claims Against Christ the Redeemer Church and Affiliated Defendants Are Barred Because Christ the Redeemer Church Has Never Been Affiliated with Plaintiffs In Any Way.

Finally, plaintiffs' Complaints against Christ the Redeemer Church ("CTRC"), its rector Rev. Mark Sholander, and individually named members or former members of CTRC's vestry are barred because CTRC, its rector, and vestry members have never been affiliated with the Diocese or TEC in any of the ways alleged in the Complaints, and do not own the property that is the target of plaintiffs' claims. *See* Sholander Aff. *passim*; FitzSimmons Aff. *passim* (Exh. 4). For similar reasons, there is no justiciable controversy as to any of these defendants. In addition, the Complaints' allegations against Rev. Sholander are contradicted by the exhibits relied upon by the Complaints to support those allegations. *Compare, e.g.,* Diocese Compl. ¶¶ 25-26 and TEC Compl. ¶ 64 (allegations regarding Rev. Sholander (citing Diocese Compl. Exh. 1-2)) with Diocese Compl. Exh. 1-2 (no reference to Rev. Sholander).

WHEREFORE, defendants, by counsel, respectfully request that this Honorable Court sustain their Demurrers and grant their Pleas in Bar for the foregoing reasons and those that may be urged upon the hearing of this matter, and grant such additional relief as this Court may deem just.

Respectfully submitted,

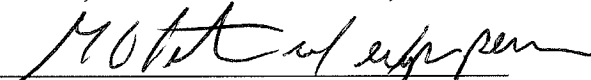
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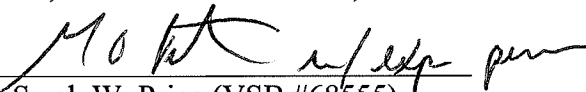
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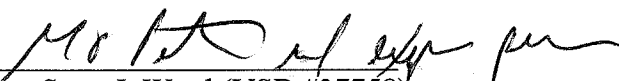
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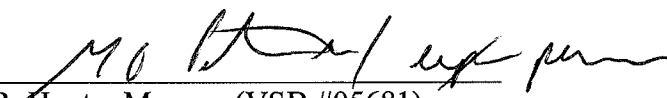
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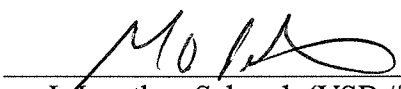
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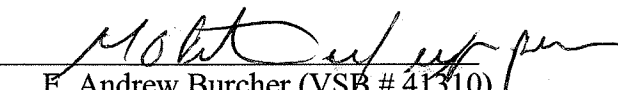
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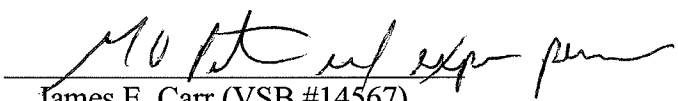
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of June, 2007 a copy of the foregoing Memorandum in Support of their Demurrers and Pleas in Bar, was sent by electronic mail and first-class mail, postage prepaid, to:

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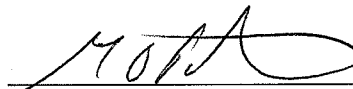
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With a courtesy copy by electronic mail and hand-delivered to:

Maia L. Miller, Esquire
Law Clerk to the Honorable Randy I. Bellows
4110 Chain Bridge Road
Fifth Floor Judges' Chambers
Fairfax, VA 22030



George O. Peterson

EXHIBIT 1

1. The Falls Church

Deed dated March 19, 1746 from John Trammole to the **Vestry of Truro Parrish**, recorded among the land records of Fairfax County, Virginia in Liber B, No. 1 at page 248.

Deed dated March 20, 1746 from John Trammole to the **Vestry of Truro Parrish**, recorded among the land records of Fairfax County, Virginia in Liber B, No. 1 at page 249.

Deed dated December 16, 1852 from Nathan Thompson to A. C. Brent, et als, **Trustees of the Episcopal Church known and designated as the "Falls Church"**, recorded among the land records of Fairfax County, Virginia in Liber S, No. 3 at page 379.

Deed dated October 1, 1918 from Harry C. Birge and Jeanne E. Birge, his wife, to Charles A. Stewart, Jonas T. Unverzagt and Harry A. Fellows, and their successors in office, **Trustees for the Falls Church Episcopal Church**, recorded among the land records of Fairfax County, Virginia in Liber L, No. 8 at page 593.

Deed dated October 29, 1953 from Grover H. Dodd and Nettie F. Dodd, his wife, to H.J. Spelman, Lawrence W. Harrison, and Albert H. Lester, **Trustees of The Falls Church**, recorded among the land records of Fairfax County, Virginia in Deed Book 1128 at page 38.

Deed dated February 27, 1956 from Anna Lee Shotwell, widow, to H. J. Spelman, Albert H. Lester and Lawrence W. Harrison, **Trustees of The Falls Church**, recorded among the land records of Fairfax County, Virginia in Deed Book 1418 at page 28.

Deed dated September 15, 1956 from Nellie Coleman Kadlec to H. J. Spelman, Albert H. Lester and Lawrence W. Harrison, **Trustees of The Falls Church**, recorded among the land records of Fairfax County, Virginia in Deed Book 1484 at page 385.

Deed dated August 30, 1963 from Lester A. Gorham and Josephine E. Gorham, his wife, to H. J. Spelman, L. W. Harrison and Albert H. Lester, Jr., **Trustees of The Falls Church (Episcopal)**, recorded among the land records of Fairfax County, Virginia in Deed Book 2340 at page 205.

Deed dated December 15, 1986 from Independence Square Limited Partnership, a Virginia limited partnership, to **The Trustees of The Falls Church (Episcopal)**, recorded among the land records of Fairfax County, Virginia in Deed Book 6576 at page 77.

Deed dated October 31, 1996 from Ray Sims Company, a Virginia corporation, to **The Trustees of The Falls Church (Episcopal)**, recorded among the land records of Arlington County, Virginia in Deed Book 2810 at page 2092.

Deed dated January 3, 2000 from Christian Joseph Kerge and Sonia Diez Kerge, his wife, to Harrison D. Hutson, William W. Goodrich, Jr. and Steven L. Skancke, **Trustees of The Falls Church (Episcopal)**, recorded among the land records of Arlington County, Virginia in Deed Book 3034 at page 1081.

2. Truro Church

Deed dated December 3, 1874 from William S. Ramsey to H. C. Fairfax, O. W. Huwitt, Joseph Cooper and Thomas Moore, **Trustees for Zion Protestant Episcopal Church**,¹ and their successors in office, recorded among the land records of Fairfax County, Virginia in Deed Book R-4 at page 341, conveying one-half acre by metes and bounds description near Fairfax Court House on which the Zion Church is located.

Deed dated December 1, 1882 from Samuel Simpson to O. W. Hunt, James M. Love and Joseph Cooper, **Trustees of Zion Protestant Episcopal Church**, recorded among the land records of Fairfax County, Virginia in Deed Book B-5 at page 560, conveying a parcel described by metes and bounds near Fairfax Court House on which the Zion Church is located.

Deed dated May 19, 1952 from Lyman B. Kirkpatrick, Jr. and Jeanne C. Kirkpatrick, his wife, to Charles Pickett, F. D. Richardson and Thomas P. Chapman, Jr., **Surviving Trustees of Truro Episcopal Church**, recorded among the land records of Fairfax County, Virginia in Deed Book 978 at page 125.

Deed dated July 3, 1956 from E. A. Prichard, Trustee, to Charles Pickett, Thomas P. Chapman, Jr., James Keith, John W. Rust and R. J. Lillard, **Trustees for Truro Episcopal Church**, recorded among the land records of Fairfax County, Virginia in Deed Book 1473 at page 294.

Deed dated January 4, 1982 from LeRoy Eakin, Jr. and Ruth P. Eakin, his wife, to James Keith, E. A. Prichard and A. Hugo Blankingship, **Trustees for Truro Episcopal Church**, recorded among the land records of Fairfax County, Virginia in Deed Book 5632 at page 163.

Deed dated March 2, 1992 from Ann H. Van Dyck, also known of record as Ann Harman Van Dyck, to James Keith, Gordon Klooster and E. A. Prichard, **Trustees for Truro Episcopal Church**, recorded among the land records of Fairfax County, Virginia in Deed Book 8041 at page 1697.

¹ Zion Church is the previous name of Truro Church.

