

FROM: WINSTON & STRAWN LLP

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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JOHN T. FREY
CLERK, CIRCUIT COURT
FAIRFAX, VA

**THE PROTESTANT EPISCOPAL
CHURCH IN THE DIOCESE OF
VIRGINIA,**

Plaintiff,

v.

TRURO CHURCH, et al.,

Defendants.

Civ. No. 2007-1236

DEMURRER
PLEA IN BAR
& MOTION CRAVING OYER

Defendants Truro Church, its Rector (the Rt. Rev. Martyn Minns), and members of its vestry (James Oakes and Mary Springmann) hereby demur to the complaint of plaintiff, The Protestant Episcopal Church in the Diocese of Virginia ("the Diocese"). As Defendants outline below, and will explain in a later memorandum of points and authorities to be filed after the panel appointed by the Virginia Supreme Court rules on the issue of consolidation, *In re: Truro Church et al. v. Episcopal Diocese of Virginia et al.* (Va. S. Ct. ____) (no docket number assigned), and a hearing has been set, the Diocese's complaint fails to state a cause of action for the following reasons.

**GROUNDS OF DEMURRER FOR
 TRURO CHURCH, THE VESTRY, AND THE RECTOR**

1. The complaint fails to state a cause of action against Truro Church, the Rector, and the vestry. Although the complaint purports to state "causes of action" (p. 10), it does not identify the specific nature of those causes of action. The complaint alludes to trust, proprietary,

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and contract rights in Truro Church's property (Compl. ¶ 31). Even under notice pleading principles, however, each of the elements of each cause of action must be enumerated, and each defendant must be notified as to which allegations establish each element. The Diocese's complaint does not meet these rudimentary requirements.

2. Nor can the requisite elements of any of the various possible claims be cobbled together from the allegations of the complaint. As to its claim of trust interests, the Diocese has not identified any trust instrument that gives it rights in the property. Even if it could do so, the Diocese cannot base any claim to Truro Church's property on an assertion of trust-based rights, because Virginia law does not recognize denominational trusts (express or implied) in congregational property. 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, Va. Code § 2.2-507.1, and the governing documents of Truro Church do not recognize the Diocese to have any trust-based or other interest in the congregational property.¹

3. Similarly, the Diocese fails to state a claim of contract-based rights in the property at issue. The complaint fails to allege any of the elements of a contract, such as offer, acceptance, and consideration.

4. The Diocese also fails to state a claim for proprietary rights in Truro Church's property. The complaint alleges no basis for proprietary rights, such as a conveyance of title.

¹ 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*, 587 S.E.2d 701, 706 (Va. 2003) ("we express no position whether the Attorney General is a necessary party in suits of this nature"). Accordingly, we recommend that the Court invite the Attorney General to express his views on the meaning of § 2.2-507.1, and on the proper interpretation and validity of Va. Code § 57-9, the constitutionality of which the Diocese has challenged (in its intervention papers in *In re: Truro Church*, Civ. No. 2006-15792 (Fairfax County Cir. Ct.)). See also Complaint ¶ 12 (asserting that Va. Code § 57-9 does not apply).

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5. The Diocese also has not stated a claim for trespass, conversion, alienation, or accounting. These claims are derivative of the Diocese's claims of ownership, and thus suffer from the same defects identified above. Moreover, the Diocese: (1) fails to state a claim for trespass because it does not allege its rightful possession of the property at issue; (2) fails to state a claim for conversion because it does not allege its entitlement to immediate possession of the property at issue, nor a clear, definite, undisputed, and obvious interest in that property; (3) fails to state a claim for alienation because Virginia does not appear to recognize a tort of alienation; and (4) fails to state a claim for an accounting because that claim is derivative of the Diocese's contention that it has a trust-based interest in property at issue.

6. Lastly, the Diocese's claim for relief is in the guise of a declaratory judgment action, which is an inappropriate form of relief under the facts pleaded. Without conceding that the facts pleaded support any causes of action, to the extent that the Diocese asserts any cognizable claims they are for breach of contract, breach of trust, trespass, conversion, alienation, and accounting. Such claims, if factually supportable, must be brought through an appropriate legal action that establishes the Diocese's entitlement to possession of the property.

GROUND OF DEMURRER FOR MEMBERS OF THE VESTRY

7. The Diocese's complaint also fails to state a cause of action against the vestry, because the complaint does not allege that the vestry members are compensated for their vestry service or that they engaged in willful or criminal misconduct. Absent such allegations, the vestry members are immune from civil liability. Va. Code § 8.01-220.1:1.A. Moreover, Virginia law prohibits subjecting a corporate director to liability simply by virtue of her office, and the Diocese nowhere alleges specific conduct by any named vestry member that would allow the court to overcome that prohibition.

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GROUNDS OF DEMURRER FOR RECTOR MINNS

8. As to the Rt. Rev. Minns, the Diocese's complaint must also be dismissed to the extent that the Diocese may seek monetary damages that exceed the amount of the Rt. Rev. Minns's annual salary. The complaint does not allege that the Rt. Rev. Minns engaged in willful or criminal misconduct. Absent such allegations, he is statutorily immune from civil liability in excess of the amount of his salary over the last twelve months. Va. Code § 8.01-220.1:1.B.

9. Further, as noted, Virginia law prohibits subjecting a corporate director to liability simply by virtue of her office, but the complaint alleges no specific conduct by the Rt. Rev. Minns that would allow the court to overcome that prohibition. The complaint must be dismissed on this ground, as well.

CONCLUSION

For the foregoing reasons, which will be explained in a memorandum of points and authorities filed after the panel appointed by the Virginia Supreme Court rules on the issue of consolidation and a hearing has been set, Defendants request that their demurrer be sustained, that the Diocese's complaint be dismissed with prejudice, and that Defendants be awarded such other equitable relief as is appropriate.

PLEA IN BAR

Defendants also hereby file this plea in bar in response to the complaint of plaintiff, The Protestant Episcopal Church in the Diocese of Virginia ("the Diocese"). As Defendants outline below, and will explain in a later memorandum of points and authorities to be filed after the panel appointed by the Virginia Supreme Court rules on the issue of consolidation, *In re: Truro Church et al. v. Episcopal Diocese of Virginia et al.* (Va. S. Ct. ____) (no docket number

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assigned), and a hearing has been set, the Diocese's complaint is barred for the following reasons.

**GROUND OF PLEA IN BAR FOR
TRURO CHURCH, THE VESTRY, AND THE RECTOR**

1. The Diocese's complaint against Truro Church is barred to the extent that it alleges a trust-based interest in the property. Even if Virginia law recognized denominational trust interests in congregational property (and it does not, as discussed in Truro Church's demurrer), any such trust was revoked by Truro Church's incorporation and adoption of governing documents that do not recognize any property interest (or authority) by the Diocese, Va. Code § 2.2-507.1, and by Truro Church's determination, by a substantial majority vote, to disaffiliate from the Diocese.

2. The Diocese's complaint against Truro Church is barred by Truro Church's determination by majority vote, in accordance with Va. Code § 57-9, to join a different branch of the Anglican Communion. This Court's ultimate approval of that determination will supersede any common law rights that the Diocese has asserted in its complaint and will confirm that title to the property remains in Truro Church.

GROUND OF PLEA IN BAR FOR MEMBERS OF THE VESTRY

3. The Diocese's complaint is further barred because it does not allege that vestry members are compensated for their vestry service or engaged in willful or criminal misconduct. The Diocese cannot allege that the vestry members engaged in willful or criminal misconduct, as they relied in good faith on provisions of the Virginia Code, including Va. Code § 57-9, and on the representations of the Bishop and other officials of the Diocese, both of which recognize the right of a congregation to hold a vote to disaffiliate from the Diocese. Accordingly, the vestry members are statutorily immune from civil liability. Va. Code § 8.01-220.1:1.

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4. Moreover, Virginia law prohibits subjecting a corporate director to liability simply by virtue of her office, and the Diocese nowhere alleges specific conduct by any named vestry member that would allow the court to overcome that prohibition. For this reason, the Diocese's complaint against the vestry members is barred.

5. The Diocese's complaint against the members of Truro Church's vestry is also barred because there is no actual controversy between the members of the vestry and the Diocese. The Diocese's complaint seeks only injunctive relief against the vestry members, prohibiting any use of Truro Church's property by the vestry and requiring them to transfer control of that property to the Diocese. Use and control of the property can be obtained, however, by a court order addressed solely to Truro Church as a corporation. As directors of the corporation, the vestry members would be bound by any judgment of this Court to the extent that it might order the corporation to transfer control of the subject property to the Diocese. Moreover, none of the vestry members individually has the legal authority to control the corporation. Therefore, all the relief sought by the Diocese may be gained by an order directed to the corporation, and the complaint against the vestry is barred.

GROUND OF PLEA IN BAR FOR RECTOR MINNS

6. The Diocese's complaint against the Rector of Truro Church, the Rt. Rev. Martyn Minns, is barred because there is no actual controversy between the Rt. Rev. Minns and the Diocese. The Diocese's complaint seeks only injunctive relief against the Rector, prohibiting any use of Truro Church's property by the Rector and requiring him to transfer control of that property to the Diocese. Use and control of the property can be obtained, however, by a court order addressed solely to Truro Church as a corporation. As a director and/or officer of the corporation, the Rector would be bound by any judgment of this Court to the extent that it might

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order the corporation to transfer control of the subject property to the Diocese. Therefore, all the relief sought by the Diocese may be gained by an order directed to the corporation, and the complaint against the Rt. Rev. Minns is barred.

7. The Diocese's complaint is further barred because the Rt. Rev. Minns relied in good faith on provisions of the Virginia Code, including Va. Code § 57-9, and on representations of the Bishop and other officials of the Diocese, both of which recognize the right of a congregation to hold a vote to disaffiliate from the Diocese.

8. The Diocese's complaint is also barred to the extent that the Diocese may seek monetary damages that exceed the amount of the Rt. Rev. Minns's annual salary. The Rt. Rev. Minns has engaged in no willful or criminal misconduct. Therefore, he is statutorily immune from civil liability in excess of the amount of his salary over the last twelve months. Va. Code § 8.01-220.1:1.B.

CONCLUSION

For the foregoing reasons, and for reasons that will be explained in a memorandum of points and authorities filed after the panel appointed by the Virginia Supreme Court rules on the issue of consolidation, and a hearing has been set, Defendants request that their Plea in Bar be sustained, that the Diocese's complaint be dismissed with prejudice, and that they be awarded such other equitable relief as is appropriate.

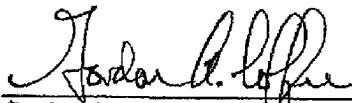
MOTION CRAVING OYER

Finally, Defendants hereby crave oyer and respectfully request that the Court compel the Diocese to attach to its Complaint all documents upon which the Diocese purports to base its alleged trust, contract, and proprietary claims, and to specify the claim(s) that each document allegedly supports.

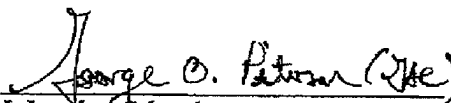
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Demurrer, Plea in Bar, and Motion Craving Oyer was sent by facsimile and first class mail, postage prepaid, on this 12th day of March 2007, to:

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