

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re Multi-Circuit Episcopal Church	)	Case Nos.: CL 2007-248724,
Litigation:	)	CL 2007-1235,
	)	CL 2007-1236,
	)	CL 2007-1238,
	)	CL 2007-1625,
	)	CL 2007-5250,
	)	CL 2007-5364,
	)	CL 2007-5682,
	)	CL 2007-5683,
	)	CL 2007-5684, and
	)	CL 2007-5902

**THE DIOCESE OF VIRGINIA'S MOTION TO COMPEL
REGARDING COUNTERCLAIMS AND FINANCIAL INFORMATION
AND SUPPORTING MEMORANDUM**

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More than six weeks after being served with discovery, and with pretrial deadlines rapidly approaching, the CANA Congregations have not disclosed the facts and documents upon which their Counterclaims are based, including the information that shows the value of the property they held at the time of the votes and now. As a result, the Diocese is in the dark about the factual basis for millions of dollars in claims. The Congregations also refuse to disclose even limited information regarding expenditures and dispositions of property after the votes. This Court has ruled that the information sought is discoverable in connection with TEC's and the Diocese's accounting claims. In addition, the Congregations' own counterclaims make obtaining such information necessary. The Court should grant this Motion and compel the Congregations to provide the requested information immediately. As the Court anticipated when it allowed the Congregations to amend their counterclaims, without the relief requested herein, depositions, responsive expert designations, and trial-related deadlines are in peril.

BACKGROUND

On December 28, 2010, the Diocese served identical discovery requests on each of the Congregations, seeking primarily (i) the facts and documents upon which their counterclaims were based (Interrogatory 1 and Requests for Production 1-3) and (ii) the values of the properties at the time of the votes and the subsequent dispositions of property that the Congregations contend are properly subtracted from those values (Interrogatory 2 and Requests for Production 1-2, 4). *See, e.g.*, Ex. A. By January 20, 2011, each of the Congregations had served objections and responses. *See* Exs. B1 – B9. All were deficient. Certain Congregations stated that they would supplement within two weeks of filing their amended counterclaims, but they have not done so. Others did not even say that much. On January 25, 2011, the Congregations served expert designations that failed to support their claimed figures. *See* Exs. C1 – C4. By January

27, 2011, all amended counterclaims had been filed. *See, e.g.*, Ex. D. On February 3, 2011, the Diocese wrote to the Congregations seeking supplementation. *See* Ex. E. There has been no supplementation and no response.

ARGUMENT

I. The Congregations have not provided necessary information regarding their counterclaims.

The Congregations seek to recover the “fair market value of the real and personal property” at issue, totaling at least \$108 million dollars according to the eight pleadings that include a specific amount (the Oatlands / COSO pleading does not). Counterclaim Prayers for Relief, ¶ 3 (*e.g.*, Ex. D at 15); *see also id.*, ¶ 2. Yet none of the Congregations’ discovery responses provides the details to support such value claims. *See* Exs. B1 – B9 (responses to Interrogatory 1, the first part of Interrogatory 2, and associated Requests for Production 1-3).

The Congregations’ expert designations also do not support their “fair market value” claims. Only one Congregation (Oatlands) designated a personal property appraiser, but it did not provide either a summary or a copy of any such appraisal. *See* Ex. C1. Although eight Congregations designated real estate appraisers (all but Church of the Word, which made no expert designation at all), only two Congregations (Truro and The Falls Church) have provided either summaries or copies of any such appraisals. *See* Exs. C1 – C4. And the limited numbers provided do not add up. For example, The Falls Church claims over \$14 million in personal property (*compare* Ex. D, its pleading claiming \$40 million, *with* Ex. C2, showing \$25.68 million as the value of real estate), but it has provided no narrative facts or documents to support such a claim. Other examples abound.¹ None of the Congregations has provided information to

¹ St. Paul’s claims personal property worth three times the value of the real property. (Its pleading claims \$6 million, and the highest real estate value in its expert designation is \$1.568 million.)
(footnote continued)

support the amounts claimed in the pleadings.

The Congregations also claim “the costs of acquisition of, maintenance of, repairs to, improvements to, [and] accrual of” the real and personal property at issue. Counterclaim Prayers for Relief, ¶ 3 (*e.g.*, Ex. C at 15); *see also id.*, ¶ 2. Yet none of their discovery responses even quantifies such costs, much less provides factual information or documentation to support them. For example, they have identified no acquisition costs documentation, no maintenance or repair records, and no construction records. (We do not know what costs of “accrual” might mean.)

At present, the Diocese faces the tasks of deposing witnesses, making decisions on responsive experts (with a February 24 deadline), and otherwise defending large counterclaims without even basic information about the basis of those claims. This is a fundamentally unfair and untenable position. *Cf.* January 21, 2011, Hearing Trans. at 60 (“[I]n granting this request [to amend the counterclaims], I understand it may present issues down the road. And I'm giving you permission to come back ... to me at a later point ... with additional requests that are designed to avoid prejudice associated with granting this amendment. So it may be in response to discovery that you need to do that ...and I'm telling you you can do that.”) (Ex. F).

Moreover, having put the value of their property at issue in their counterclaims (and presumably having claimed numbers in their pleadings that are well grounded in fact), the Congregations cannot now complain about providing complete information on value.

II. The Congregations refuse to provide necessary, limited information regarding expenditures and dispositions of personal property.

Our declaratory judgment actions seek relinquishment and an accounting of the property that the Congregations held at the time of the vote. *See, e.g.*, Ex. G at 12 (Prayer for Relief ¶ f).

million.) St. Stephen’s claims personal property worth twice the real property. (Its pleading claims \$3.6 million; the highest real estate value in its expert designation is \$1.23 million.)

As this Court has recognized, some discovery related to the accounting is necessary if a final order is to be entered without substantial delay to conduct another phase of the case. *See* May 30, 2008, Hearing Trans. at 40-41 (Ex. H). If discovery does not occur now, then a second phase of discovery and trial will be required to sort through accounting matters before a final order can be entered. Such delay is unnecessary and unwarranted and would be highly prejudicial to the Diocese and to the existing Episcopal congregations that continue to be dispossessed.

As a way to cut to the chase and minimize discovery, and cognizant of the Court's prior guidance on such discovery, the Diocese asked the Congregations to identify and document the dispositions of personal property after the vote that they contend were proper and should be subtracted from the amounts held at the time of the vote and to explain why they so contend. *See* Ex. A (Interrogatory 2 & Requests for Production 1-2, 4). The Congregations have objected and refused to respond. As they did in 2008, they contend that the Diocese is not entitled to any information on dispositions of property after the vote until the Diocese prevails on the merits.

That objection runs contrary to this Court's prior ruling, after argument regarding what discovery was permissible in connection with the accounting claims. *See* May 30, 2008, Hearing Trans. at 43-44 ("The guidance that you should take away from this is that ... just because you call it accounting doesn't mean it's not going to get discovered. I can tell you, for example, what assets you had at the time of the vote, whether those assets have been encumbered since the vote and whether any of those assets have been disposed of are three things I definitely am telling you you are going to have to produce.") (Ex. H); *see generally id.* at 22-31, 34-35, 37-45.

That objection also ignores the fact that the Congregations' counterclaims have put subsequent dispositions at issue by claiming the value of personal property held at the time of the vote. Suppose a Congregation had one bank account at the time of the vote, which held

\$100,000.00, and has spent \$75,000.00 for its own purposes since then. That Congregation obviously would not be entitled to recover from the Diocese what the Congregation has spent for its own purposes, even assuming it prevails on its counterclaim.²

Similarly, the Congregations' objections that discovery on value and dispositions of personal property is "overly broad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence" because it "would literally require an exhaustive catalogue and valuation of every item of personal property, regardless of size, value or reasonable ability to quantify" are meritless, if not frivolous. *E.g.*, Ex. B1 at 4. The Congregations cannot claim the value of personal property while simultaneously objecting that providing information to support a valuation of such personal property is too difficult or unreasonable.

By claiming the value of the personal property at the time of the vote, the Congregations have necessarily required discovery regarding the value of their personal property at the time of the vote and transfers, expenditures, or other dispositions of personal property since that time. They should be ordered to provide that information without further delay.³

CONCLUSION

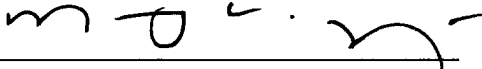
The Court should hold a hearing as soon as possible and enter an order compelling the Congregations to provide complete responses to Interrogatories 1 and 2, and associated Requests for Production 1-4, within one week thereafter. The Court also should award costs, including attorneys' fees, pursuant to Rule 4:12(a)(4) and grant such other relief as may be appropriate.

² The same is true for tangible personal property too. Suppose a Congregation had computer equipment worth \$4,000.00 at the time of the vote. If the Congregation has discarded that computer equipment as obsolete / valueless, the Congregation obviously cannot recover its value from the Diocese on a counterclaim.

³ The Congregations also objected to providing value and financial information "without restriction of public dissemination of that information, or other use outside this litigation." *E.g.*, Ex. B1 at 3, 4. The parties will soon present a protective order that resolves this concern.

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were sent by electronic mail to all counsel named below on this 11th day of February, 2011, and that a paper copy will be mailed if requested:

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A handwritten signature in black ink, appearing to read 'm e. kostel', is written above a horizontal line.