

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re:	)	Case Nos.:	CL 2007-248724,
Multi-Circuit Episcopal Church Litigation	)		CL 2006-15792,
	)		CL 2006-15793,
	)		CL 2007-556,
	)		CL 2007-1235,
	)		CL 2007-1236,
	)		CL 2007-1237,
	)		CL 2007-1238,
	)		CL 2007-1625,
	)		CL 2007-5249,
	)		CL 2007-5250,
	)		CL 2007-5362,
	)		CL 2007-5363,
	)		CL 2007-5364,
	)		CL 2007-5682,
	)		CL 2007-5683,
	)		CL 2007-5684,
	)		CL 2007-5685,
	)		CL 2007-5686,
	)		CL 2007-5902,
	)		CL 2007-5903, and
	)		CL 2007-11514

**SUPPLEMENTAL / REPLY BRIEF IN SUPPORT OF
RENEWED MOTION FOR LEAVE TO PROCEED WITH DISCOVERY AND
SCHEDULING IN THE DECLARATORY JUDGMENT ACTIONS**

Bradfute W. Davenport, Jr. (VSB # 12848)
George A. Somerville (VSB # 22419)
Joshua D. Heslinga (VSB # 73036)
Troutman Sanders LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
Telephone: (804) 697-1200
Facsimile: (804) 697-1339

Mary C. Zinsner (VSB # 31397)
Troutman Sanders LLP
1660 International Drive
Suite 600
McLean, Virginia 22102
Telephone: (703) 734-4334
Facsimile: (703) 734-4340

Counsel for The Protestant Episcopal Church in the Diocese of Virginia

Heather H. Anderson (VSB # 38093)
Adam M. Chud (*pro hac vice*)
Soyong Cho (VSB # 70896)
Goodwin Procter
901 New York Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 346-4000
Facsimile: (202) 346-4444

Counsel for the Episcopal Church

The Diocese of Virginia (“Diocese”) and the Episcopal Church, by counsel, respectfully submit this supplemental / reply brief in support of their renewed motion for leave to proceed with discovery and scheduling in the declaratory judgment actions.

1. The Congregations have argued that the Court’s ruling in their favor on the application of Va. Code § 57-9 is dispositive of the declaratory judgment actions. Their argument is premised on language in § 57-9 which provides that a vote approved by the court is “conclusive as to the title to and control of any property held in trust for such congregation”

2. This Court has not yet made all of the factual findings necessary for approval of a report of a congregational vote under § 57-9(A). Specifically, property ownership remains to be adjudicated. Section 57-9(A) provides that an approved report “shall be conclusive as to the title to and control of any *property held in trust for such congregation*” (emphasis added). The plain text of the statute refers to property ownership in two other places as well. *See* Va. Code § 57-9(A) (“any such congregation *whose property* is held by trustees wherein the property *held in trust for such congregation or the greater part thereof* is ...”) (emphases added). Thus, § 57-9(A) applies only to property in which the congregations hold the beneficial interests.

3. None of the Congregations has proven that it has a beneficial interest in the property at issue, and property ownership was not among the issues scheduled for adjudication in the 57-9 trial.¹ The Congregations have simply assumed a matter on which the statute requires proof and that is to be adjudicated in the declaratory judgment actions.

4. The Congregations’ argument also overlooks Va. Code § 57-15, which must be read

¹ The Congregations’ Petitions alleged that they hold the beneficial interests to the subject properties, and the Diocese’s and the Episcopal Church’s Answers put property ownership at issue. *See, e.g.*, Church of the Apostles’ Petition for Approval (Fairfax No. CL2006 15793, filed Dec. 18, 2006) ¶ 10 (“None of Apostles Church’s deeds grant any of the Property at issue to trustees for TEC or the Diocese”). That allegation was denied. *See* Answer of the Diocese (filed Jan. 30, 2007) ¶ 10; Answer of the Episcopal Church (filed Jan. 31, 2007), ¶ 10.

together with § 57-9. Significant points must be noted with respect to the interplay between those sections:

First, § 57-9 sets forth a voting process; it does not state how courts are to analyze or rule on congregational reports. Reference must be had to § 57-15, which sets forth the procedure for filing a petition by trustees. Moreover, case law interpreting § 57-15 provides substantive matters to be considered when a court is asked to approve such a petition. *See, e.g., Green v. Lewis*, 221 Va. 547, 555, 272 S.E.2d 181, 185-186 (1980) (“*In determining whether the A.M.E. Zion Church has a proprietary interest in the Lee Chapel property, we look to our own statutes, to the language of the deed conveying the property, to the constitution of the general church, and to the dealings between the parties.*”) [Emphasis added.]

Second, § 57-9(A) provides that once a vote is taken, “*if the determination be approved by the court, it shall be conclusive ...*” (emphasis added). The requirement that the determination “be approved by the court” necessarily references the mandate in § 57-15 that the court consider evidence of the “wish” of “constituted authorities thereof having jurisdiction in the premises, or of the governing body of any church diocese.” This conclusion is reinforced by the repeated references in § 57-15 to “branch or division” -- clearly a reference back to § 57-9(A). *See* § 57-15 (“The trustees of such a church, diocese ... *or branch or division thereof ...*”) and (“Upon evidence being produced before the court that it is the wish of the congregation, or church or religious denomination or society *or branch or division thereof*, or the constituted authorities thereof having jurisdiction in the premises, or of the governing body of any church diocese ...”). If § 57-15 were not intended to encompass congregational votes taken pursuant to § 57-9(A), there would be no need to reference “branch” or “division.” *See Green v. Lewis*, 221 at 553, 272 S.E.2d at 184 (holding that with respect to a division in a “supercongregational” church, there must be “a showing that the property conveyance is the wish of the constituted

authorities of the general church”) (*quoting Norfolk Presbytery v. Bollinger*, 214 Va. 500, 503, 201 S.E.2d 752, 755 (1974)).

5. The Congregations’ assertions regarding the impact of a ruling in their favor in the 57-9 actions ignore constitutional issues, which include not only the First Amendment issues scheduled for argument on May 28, but also the Diocese’s and the Episcopal Church’s arguments pursuant to the federal and state Contract and Takings Clauses, for which discovery is a necessary predicate to any trial. The Congregations’ trivialization of the Diocese’s and the Episcopal Church’s Contract Clause argument ignores the fact that the Episcopal Church’s general rule with respect to church property came into effect prior to 1867. Thus, while many of the congregations at issue did not form until after 1867, the contract protecting property for the use and benefit of the Episcopal Church has continued essentially unchanged for centuries.

6. Given the evidentiary overlap in § 57-9 and the need in these actions to present evidence to establish the rights and interests of the Episcopal Church and the Diocese, those proceedings must proceed in tandem with the declaratory judgment actions, in which the Episcopal Church and the Diocese seek to prove such rights and interests. In short, this litigation cannot be concluded without resolution of the declaratory judgment actions.

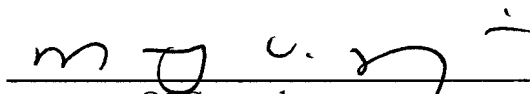
7. Further, discovery is needed on the congregational votes to determine whether voting procedures were proper. It makes sense for all discovery to occur at the same time, *i.e.*, for the voting and declaratory judgment discovery to proceed concurrently in order to move this litigation along as expeditiously as possible. *See* Order (May 31, 2007) (allowing all discovery to proceed concurrently).

8. The Congregations’ Opposition also ignores the fact that this litigation *cannot* end with resolution of the 57-9 actions because two of the eleven congregations (Potomac Falls Church and Christ the Redeemer Church) have not filed 57-9 actions.

9. If discovery were to remain stayed until after the May 28 hearing and a ruling on the issues presented, preparation for the October trial would be severely impaired and perhaps render the trial date a nullity. The Court has previously expressed its desire to avoid prejudice to any party from procedural matters. The Episcopal Church and the Diocese believe that such prejudice is a real danger at this point. The Court is well aware of the difficulties inherent in scheduling anything in this case, even routine motions, given the number of attorneys involved and the Court's busy docket. If trial in the declaratory judgment cases does not proceed in October, it is likely that another trial date could not be secured until Spring 2009, further delaying final resolution of the remaining issues in this litigation, a goal important to the Court and to all parties. If the October trial proceeds, it is realistic to conclude that these cases can be resolved by year end and the church property issues fully and finally adjudicated.

WHEREFORE, for the foregoing reasons, the Diocese and the Episcopal Church respectfully request that the Court grant the renewed motion to proceed and allow discovery, scheduling, and motions practice in the declaratory judgment actions to proceed, in preparation for the October trial.

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

By: 
Of Counsel

Bradfute W. Davenport, Jr. (VSB # 12848)
George A. Somerville (VSB # 22419)
Joshua D. Heslinga (VSB # 73036)
Troutman Sanders LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
Telephone: (804) 697-1200
Facsimile: (804) 697-1339

Mary C. Zinsner (VSB # 31397)
Troutman Sanders LLP
1660 International Drive
Suite 600
McLean, Virginia 22102
Telephone: (703) 734-4334
Facsimile: (703) 734-4340

Counsel for The Protestant Episcopal Church in the Diocese of Virginia

THE EPISCOPAL CHURCH

By: Heather H. Anderson /mcj
Of Counsel

Heather H. Anderson (VSB # 38093)
Adam M. Chud (*pro hac vice*)
Soyong Cho (VSB # 70896)
Goodwin Procter
901 New York Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 346-4000
Facsimile: (202) 346-4444
Counsel for the Episcopal Church

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were sent by electronic mail to all counsel named below and by first-class mail to the lead counsel at each firm (indicated with an asterisk below), on this 22nd day of April, 2008:

* Gordon A. Coffee, Esquire (gcoffee@winston.com)
Gene C. Schaerr, Esquire (gschaerr@winston.com)
Steffen N. Johnson, Esquire (sjohnson@winston.com)
Andrew C. Nichols, Esquire (anichols@winston.com)
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006

*Counsel for Truro Church, Church of the Epiphany,
Church of the Apostles, The Church at The Falls – The Falls Church, and
associated individuals*

* George O. Peterson, Esquire (gpeteron@sandsanderson.com)
J. Jonathan Schraub, Esquire (jjschraub@sandsanderson.com)
Sands Anderson Marks & Miller, P.C.
1497 Chain Bridge Road, Suite 202
McLean, Virginia 22101

Counsel for Truro Church and certain associated individuals

* Mary A. McReynolds, Esquire (mamcreynoldspc@aol.com)
Mary A. McReynolds, P.C.
1050 Connecticut Avenue, N.W., 10th Floor
Washington, D.C. 20036

*Counsel for St. Margaret's Church, St. Paul's Church, Church of the Epiphany,
Church of the Apostles, St. Stephen's Church, and associated individuals*

* E. Andrew Burcher, Esquire (eaburcher@pw.thelandlawyers.com)
Walsh, Colucci, Lubeley, Emrich & Walsh, P.C.
4310 Prince William Parkway, Suite 300
Prince William, Virginia 22192

Counsel for St. Margaret's Church, St. Paul's Church, and Church of the Word

* James E. Carr, Esquire (NorthVaJim@aol.com)
Carr & Carr
44135 Woodridge Parkway, Suite 260
Leesburg, Virginia 20176

Counsel for the Church of Our Saviour at Oatlands and associated individuals

* R. Hunter Manson, Esquire (manson@kaballero.com)
PO Box 539
876 Main Street
Reedville, Virginia 22539
Counsel for St. Stephen's Church and associated individuals

* Scott J. Ward, Esquire (sjw@gg-law.com)
Timothy R. Obitts (tro@gg-law.com)
Robert W. Malone (rwm@gg-law.com)
Gammon & Grange, P.C.
8280 Greensboro Drive
Seventh Floor
McLean, Virginia 22102
Counsel for The Church at The Falls – The Falls Church and certain associated individuals, Christ the Redeemer Church, and Potomac Falls Church

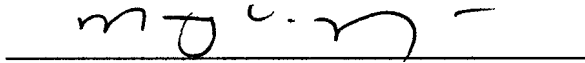
* James A. Johnson, Esquire (jjohnson@semmes.com)
Paul N. Farquharson, Esquire (pfarquharson@semmes.com)
Scott H. Phillips, Esquire (sphillips@semmes.com)
Sarah W. Price, Esquire (sprice@semmes.com)
Semmes Bowen & Semmes, P.C.
250 West Pratt Street
Baltimore, Maryland 21201
Counsel for The Church at The Falls – The Falls Church and certain associated individuals

* Edward H. Grove, III, Esquire (egrove@thebraultfirm.com)
Brault Palmer Grove White & Steinhilber LLP
10533 Main Street
P.O. Box 1010
Fairfax, VA, 22038-1010
Counsel for certain trustees of The Church at The Falls – The Falls Church (Episcopal)

* Robert C. Dunn, Esquire (rdunn@robdunnlaw.com)
LAW OFFICE OF ROBERT C. DUNN
707 Prince Street
P. O. Box 117
Alexandria, Virginia 22313-0117
Counsel for Marjorie Bell, trustee of Church of the Epiphany (Episcopal)

* William E. Thro, Esquire (WThro@oag.state.va.us)
Stephen R. McCullough, Esquire (SMccullough@oag.state.va.us)
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

*Counsel for the Commonwealth of Virginia ex. rel. Robert F. McDonnell, in his
official capacity as Attorney General*

A handwritten signature in black ink, appearing to read "S. R. McCullough", is written above a solid horizontal line.

#360767v1