

**VIRGINIA :**  
**IN THE CIRCUIT COURT FOR FAIRFAX COUNTY**

**In re:** )  
**Multi-Circuit Episcopal Church** ) **Civil Case Numbers:**  
**Litigation** ) CL 2007-248724 and  
 ) CL 2007-1236

**TRURO CHURCH'S OPPOSITION TO MOTION TO COMPEL REGARDING  
PRIVILEGE ASSERTIONS**

COMES NOW Truro Church, by counsel, and files this Opposition to the Motion to Compel Regarding Privilege Assertions by the Protestant Episcopal Church in the Diocese of Virginia ("Diocese") and states as follows:

**I. INTRODUCTION**

As evidenced by the February 10, 2011 letter to the Court from the Diocese's counsel, only a select few documents remain at issue in the Motion to Compel. The Diocese urges this Court to review those documents in camera and overrule the assertion of the attorney-client privilege.

Those documents are:<sup>1</sup>

1. The redacted portion of the March 5, 2002 Building and Ground Committee Meeting Minutes (Truro 010465-68);
2. May 5, 2005 legal report to the Vestry of Truro Church (Truro 009491);
3. A six page document titled "Truro Congregational Vote Preparation Fall 2006" (Truro 011565); and

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<sup>1</sup> The Diocese submits that the redacted Vestry Minutes from 2005, Truro 09552-54, is at issue. As explained to the counsel for the Diocese, the undersigned has been unable to locate the unredacted version at present despite the process that was put in place for the original review and redaction process. Counsel is willing to undertake an additional search for this particular document and will advise the Court and counsel for the Diocese when it is located. Truro Church respectfully requests the Court to defer a ruling with respect to this document until an unredacted version can be located.

4. April 19, 2006 Memo from the Chancellor of Truro Church regarding the Vestry Oath (Truro 011546-47).

For the reasons set forth below, and those in addition which may be urged at the hearing on this matter, Truro Church, respectfully requests this Court to deny the Motion in its entirety.

## II. ARGUMENT

### A. **The April 19, 2006 Memo from the Chancellor of Truro Church regarding the Vestry Oath is Attorney-Client Privileged.**

During the course of the prior litigation, Truro Church made available for copying and inspection a huge volume of documents.<sup>2</sup> Prior to the production, counsel for Truro Church reviewed the vast volume of documents for privilege and redaction. Multiple copies of the April 19, 2006 Memo from the Chancellor of Truro Church (“Vestry Oath Memo”) were removed from production and a privilege log was provided with respect to that document. Unfortunately one copy slipped through. Upon learning of the inadvertent disclosure, counsel for Truro Church promptly invoked the previously entered Clawback Order<sup>3</sup> with respect to the Vestry Oath Memo. The Diocese concedes the provisions of the Clawback Order were followed and returned the Vestry Oath Memo.

While the Clawback Order permits the opposing party to challenge the assertion of the privilege, Truro Church is more than a bit surprised, and frankly disappointed, that the Diocese would nonetheless characterize, or more accurately mischaracterize, the actual contents of the Vestry Oath Memo in the Memorandum in Support of its Motion to Compel. *See* Memorandum in Support of Motion to Compel (“Compel Memo”), p. 4 (using selective quotes from the Vestry

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<sup>2</sup> The Diocese sent a team of attorneys who “spent days reviewing and selecting them for production.” *See* Memorandum in Support of Motion to Compel, p. 1. The undersigned’s recollection is that it was approximately 30 banker’s boxes of documents, but given the passage of time would accept a differing recollection from the counsel for the Diocese.

<sup>3</sup> The clear intent of the Clawback Order was to permit the parties to efficiently produce documents and recapture any privileged documents inadvertently disclosed.

Oath Memo). The undersigned was under the impression that the Clawback Order was intended to have some meaning beyond just the return of the privileged document and that it would prohibit the opposing party from actually disclosing the contents of the document until a more traditional approach to challenging privilege was undertaken.<sup>4</sup> For example, the Diocese could have brought the issue before the Court by requesting additional information regarding the document and urge the Court to make a ruling on that basis without selectively disclosing its contents.

Regardless of the intent behind the Clawback Order the damage is done and Truro Church feels it has no choice but to produce the Vestry Oath Memo for *in camera* inspection. (A copy is being submitted solely to the Court in a sealed envelope). Without further disclosing the contents of the Vestry Oath Memo in a public pleading, it is clear from the wording of the document that persons who were on the Vestry or considering running for the Vestry sought advice from the Chancellor of Truro Church regarding the vestry oath.<sup>5</sup> As evidenced by the balance of the Vestry Oath Memo, the ultimate conclusion as to the effect of the vestry oath is vastly different than that which is suggested by the Diocese. Yet the Diocese, using selective quotes from the Vestry Oath Memo, urges this Court to find waiver of the attorney-client privilege by citing authority ruling on the crime-fraud exception to the attorney-client privilege. *See* Compel Memo, p. 4, citing *Owens-Corning Fiberglass Corp. v. Watson*, 243 Va. 128 (1992).

In *Owens-Corning*, the Court found that the crime-fraud exception required disclosure where in-house counsel received information that directly contradicted sworn answers to

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<sup>4</sup> The Diocese invoked the Clawback Order for a large number of documents that were reviewed by counsel for the CANA Congregations and selected for copying. *See* August 18, 2008 email from the Diocese's counsel, attached as Exhibit 1. Despite the fact that those documents had presumably already been made available for inspection and copying, undersigned counsel complied with the Clawback Order.

<sup>5</sup> The "Chancellor" is the chief legal officer of Truro Church, akin to a general counsel.

interrogatories. The Court characterized it as a “fraud on the court.” *Id.* at 142. At issue was the false statement in answers to interrogatories that Owens-Corning had no information that prolonged exposure to asbestos fibers was known to cause asbestosis when Owen-Corning’s own medical director stated that it was “well-known” that it did. *Id.*

In an apparent effort to draw parallels between the clearly false statement in Owen-Corning’s answers to interrogatories and Truro Church’s responses to discovery requests, the Diocese attaches Truro Church’s Responses to Request for Admissions and Answers to Interrogatories as Exhibit 7. Looking at the responses to the Request for Admissions, it is clear that the Diocese is far overreaching in its attempts to draw parallels between the Vestry Oath Memo and the conduct of Owens-Corning in denying it had any knowledge about asbestos causing asbestosis. A cursory review of Truro Church’s discovery responses clearly shows no contradiction with the Diocese’s characterization of the Vestry Oath Memo. Truro Church simply responded that as a congregation existing since the 1800s it was unable to admit that every Vestry member prior to December 1, 2006 was required to take the oath, yet went on to admit that every vestrymen on the Vestry as of December 9, 2006 took the oath or a similar oath. The Answers to Interrogatories are no different.

Finally, the Diocese suggests that the privilege attaching to the Vestry Oath Memo should be waived because Truro Church cannot identify the “thoughtful persons” who sought the Chancellor’s advice. It should be apparent from the Court’s review of the Vestry Oath Memo the sphere of such persons and it is sufficient to maintain the privilege.

**B. The Three Remaining Documents Are Privileged Without Need For *In Camera* Review.**

Truro Church is mindful of the fact that this Court sitting as the trier of fact in the upcoming trial has the ability to quarantine what it might glean from *in camera* inspection of the

additional documents at issue, but respectfully declines the Diocese's request to submit these documents for *in camera* review. To do so would set a precedence going forward given the Diocese and other parties' voluminous claims of privilege, and invite significant additional requests that this Court review privileged documents *in camera*. Notwithstanding that fact, Truro Church provides the following information for this Court to determine the applicability of the privilege:

1. The redacted portion of the March 5, 2002 Building and Ground Committee Meeting Minutes (Truro 010465-68). The redacted portion reflects legal advice from attorney Sarah Hall regarding zoning and related property acquisition issues.
2. May 5, 2005 legal report to the Vestry of Truro Church (Truro 009491). The document was prepared by attorney Thomas D. Yates reflecting outside legal counsel's advice regarding various issues and potential steps toward departure from the Diocese and The Episcopal Church.
3. A six page document titled "Truro Congregational Vote Preparation Fall 2006" (Truro 011565). The document was prepared by the Chancellor of Truro Church and provides advice with respect to how to conduct the vote to depart from the Diocese and The Episcopal Church.

Truro Church respectfully submits that the above-referenced information is sufficient for the Court to find the attorney-client privilege is maintained without the need for *in camera* inspection.

WHEREFORE, for the foregoing reasons, and those which may be urged upon the hearing of this matter, Truro Church, by counsel, respectfully requests this Court enter an Order denying the Diocese's Motion to Compel and for such further relief as this Court deems just.

Dated February 11, 2011

**TRURO CHURCH**  
**By counsel**

PETERSON SAYLOR, PLC

By: 

George O. Peterson (VSB #44435)

Tania M. L. Saylor (VSB #65904)

4163 Chain Bridge Road

Fairfax, VA 22030

(703) 225-3620 (telephone)

(703) 225-3621 (facsimile)

*Counsel for Truro Church and its Related  
Trustees*

WINSTON & STRAWN, LLP

Gordon A. Coffee (VSB #25808)

Gene C. Schaerr

Steffen N. Johnson

Andrew C. Nichols (VSB #66679)

1700 K Street, N.W.

Washington, DC 20006-3817

(202) 282-5000 (telephone)

(202) 282-5100 (facsimile)

*Counsel for Truro Church and its Related  
Trustees*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 11<sup>th</sup> day of February, 2011 a copy of the foregoing

Opposition to Motion to Compel was sent by electronic mail and first-class mail, postage

prepaid, to:

Bradfute W. Davenport, Jr., Esquire  
George A. Somerville, Esquire  
Joshua D. Heslinga, Esquire  
TROUTMAN SANDERS, LLP  
P.O. Box 1122  
Richmond, VA 23218

Mary C. Zinsner, Esquire  
TROUTMAN SANDERS, LLP  
1660 International Drive, Suite 600  
McLean, VA 22102

Thomas C. Palmer, Esquire  
BRAULT PALMER GROVE  
WHITE & STEINHILBER, LLP  
3554 Chain Bridge Road, Suite 400  
Fairfax, VA 22030

Heather H. Anderson, Esquire  
Heather H. Anderson, P.C.  
P.O. Box 50158  
Arlington, VA 22205

All CANA Counsel

With a copy by electronic mail to:

Caitlin Fields, Esquire  
Law Clerk to the Honorable Randy I. Bellows  
Circuit Court for Fairfax County  
4110 Chain Bridge Road  
Fifth Floor Judges' Chambers  
Fairfax, VA 22030

Soyong Cho, Esquire  
GOODWIN PROCTER, LLP  
901 New York Ave., N.W.  
Washington, D.C. 20001

Robert C. Dunn, Esquire  
Law Office of Robert C. Dunn  
P.O. Box 117  
Alexandria, VA 22313-0117

E. Duncan Getchell, Jr., Esquire  
William E. Thro, Esquire  
Stephen R. McCullough, Esquire  
Office of the Attorney General  
900 East Main Street  
Richmond, Virginia 23219

James E. Carr, Esquire  
Law Offices of Carr & Carr  
44135 Woodbridge Parkway, Suite 260  
Leesburg, Virginia 20176-1244

  
George O. Peterson FOR

## George Peterson

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**From:** Heslinga, Joshua D. [Joshua.Heslinga@troutmansanders.com]  
**Sent:** Monday, August 18, 2008 4:30 PM  
**To:** All Counsel - Episcopal Church Property Litigation  
**Subject:** RE: EDV - August 14 production

**Attachments:** Document.pdf



Document.pdf  
f (49 KB)

Counsel,

In the Diocese's document production this past Thursday, August 14, on the first CD described in the attached letter, there was an inadvertent production of privileged documents -- specifically, the documents Bates numbered EDVP2000-EDVP2066.

The Diocese hereby asserts the clawback order, entered October 18, 2007, with respect to the aforementioned Bates range.

Pursuant to the clawback order, please delete immediately any copies of those documents that you may have made (aside from the copy on the CD). We will re-produce the CD without that range of documents. When you receive the replacement CD, you should return the original to my attention. You will receive a supplemental privilege log for that range of documents.

Thank you, and please let me know if you have any questions.

Joshua Heslinga  
Troutman Sanders LLP  
1001 Haxall Point (23219)  
P.O. Box 1122 (23218-1122)  
Richmond, Virginia  
(804) 697-1283 [phone]  
(804) 698-5156 [direct fax]  
joshua.heslinga@troutmansanders.com

-----Original Message-----

**From:** Heslinga, Joshua D.  
**Sent:** Thursday, August 14, 2008 4:36 PM  
**To:** All Counsel - Episcopal Church Property Litigation  
**Subject:** EDV - August 14 production

Please see attached.

Joshua Heslinga  
Troutman Sanders LLP  
1001 Haxall Point (23219)  
P.O. Box 1122 (23218-1122)  
Richmond, Virginia  
(804) 697-1283 [phone]  
(804) 698-5156 [direct fax]  
joshua.heslinga@troutmansanders.com





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# TROUTMAN SANDERS LLP

A T T O R N E Y S   A T   L A W  
A LIMITED LIABILITY PARTNERSHIP

TROUTMAN SANDERS BUILDING  
1001 HAXALL POINT  
RICHMOND, VIRGINIA 23219  
www.troutmansanders.com  
TELEPHONE: 804-697-1200  
FACSIMILE: 804-697-1339

MAILING ADDRESS  
P.O. BOX 1122  
RICHMOND, VIRGINIA 23218-1122

Joshua D. Heslinga  
joshua.heslinga@troutmansanders.com

Direct Dial: 804-697-1283  
Direct Fax: 804-698-5156

August 14, 2008

**BY ELECTRONIC MAIL AND  
INCLUDED WITH THE PRODUCTION**

TO: Counsel for the CANA Congregations

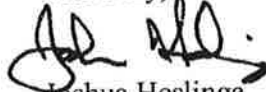
Enclosed with this letter, please find the following:

- A CD containing certain documents responsive to discovery by Truro and The Falls Church, together with letters inadvertently omitted from the LEM application production on May 2, 2008. This CD covers the Bates range EDV0030716 – 31061 and includes the Nov. 30, 2006, letter from the Rt. Rev. Peter James Lee to Mr. William Harding; two reports from 1949-50; certain deeds and land records related to The Falls Church; the 2005 parochial reports; and documents regarding All Saints Dale City.

- A CD containing additional files requested from the Mayo House by George Peterson, covering the Bates range EDV0031062 – 39748. As indicated in previous electronic correspondence, the Northern Virginia files requested were not able to be included in this production, but we are working to produce them. My technical people inform me that the load file included on the CD will allow you to determine the range of documents stored within a file folder (of course, you can also look for the scans of the file folders in the documents) and that you can open the load file in Summation, Concordance, or in any standard text editor.

- The Diocese's privilege log for documents dated through December 18, 2006, covering claims of privilege made in productions up to Bates number EDV0030715. Also included on the first CD are certain documents (with an EDVP Bates number prefix) which were pulled for further privilege review initially but for which the Diocese has not asserted privilege.

Sincerely,



Joshua Heslinga

1758545.1

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RICHMOND • SHANGHAI • TYSONS CORNER • VIRGINIA BEACH • WASHINGTON, D.C.