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February 2, 2011

BY OVERNIGHT DELIVERY

The Honorable John T. Frey, Clerk
Circuit Court of Fairfax County
Judicial Center
4110 Chain Bridge Road
Fairfax, VA 22030

Re: *In Re: Multi-Circuit Episcopal Church Property Litigation (CL-2007-0248724)*

Dear Mr. Frey,

Enclosed for filing in the above-styled matter are an original of:

1. a Praecipe setting the Motion below for Judge Bellows' civil motions docket on February 18
2. The Diocese's Motion to Compel Regarding Privilege Assertions by Truro Church;
3. a one-page cover sheet pleading for the foregoing;
4. The Diocese's Memorandum in Support of Motion to Compel Regarding Privilege Assertions by Truro Church; and
5. a one-page cover sheet pleading for the foregoing.

ATLANTA • CHICAGO • HONG KONG • LONDON • NEW YORK • NEWARK • NORFOLK •
ORANGE COUNTY • PORTLAND • RALEIGH • RICHMOND • SAN DIEGO • SHANGHAI •
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TROUTMAN SANDERS LLP
Letter to The Honorable John T. Frey, Clerk
February 2, 2011
Page 2 of 2

A copy of the above is being delivered by separate overnight delivery to Judge Bellows' law clerk.

If you have any questions, please let me know.

Sincerely,



Joshua D. Heslinga

Enclosures

cc: All counsel of record in the consolidated litigation (*per certificates of service*)
Ms. Caitlin Fields (*by overnight delivery and e-mail*)

2022104v1

IN RE: MULTI-CIRCUIT EPISCOPAL CHURCH PROPERTY LITIGATION

Civil Action No. CL2007-0248724 (and other consolidated cases)

FRIDAY MOTIONS DAY – PRAECIPE/NOTICE

Moving Party: [X] Plaintiff [] Defendant [] Other

Title of Motion: The Diocese of Virginia's Motion to Compel Regarding Privilege Assertions by Truro Church [X] Attached [] Previously Filed

DATE TO BE HEARD: 2/18/2011 Time Estimate (combined no more than 30 minutes): 30 mins

Time to be Heard: [] 9:00 a.m. with a Judge [] 9:00 a.m. without a Judge [X] 10:00 a.m. (Civil Action Cases) Does this motion require 2 weeks notice? [X] Yes [] No [] 11:30 a.m. (DOMESTIC/Family Law Cases) Does this motion require 2 weeks notice? [] Yes [] No

Case continued from: (Date) continued to: (Date)

Moving party will use Court Call telephonic appearance: [] Yes [X] No

Judge Bellows must hear this motion because (check one reason below):

- [X] The matter is on the docket for presentation of an order reflecting a specific ruling previously made by that Judge.
[X] This Judge has been assigned to this entire case by the Chief Judge; or,
[X] The Judge has advised counsel that all future motions, or this specific motion, should be placed on this Judge's Docket; or,
[] This matter concerns a demurrer filed in a case where that Judge previously granted a demurrer in favor of demurrant.

PRAECIPE by: JOSHUA HESLINGA (counsel for the Diocese) TROUTMAN SANDERS LLP
Printed Attorney Name/ Responding Party Name Firm Name

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CERTIFICATIONS

I certify that I have in good faith conferred or attempted to confer with other affected parties in an effort to resolve the subject of the motion without Court action, pursuant to Rule 4:15(b) of the Rules of the Supreme Court of Virginia; and, I have read, and complied with, each of the Instructions for Moving Party on the reverse side of this form.

[Handwritten signature]
Moving Party/Counsel of Record

CERTIFICATE OF SERVICE

I certify on the 20 day of FEBRUARY, 2011, a true copy of the foregoing Response was [X] mailed and [X] e-mailed to all counsel of record pursuant to the provisions of Rule 4:15(e) of the Rules of the Supreme Court of Virginia and the applicable Scheduling Order.

[Handwritten signature]
Moving Party/Counsel of Record

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re Multi-Circuit Episcopal Church)
Litigation:)
)

Case Nos.: CL 2007-248724,
 CL 2007-1236

**THE DIOCESE’S MOTION TO COMPEL
REGARDING PRIVILEGE ASSERTIONS BY TRURO CHURCH**

For the reasons stated in the Diocese’s Memorandum in Support, filed simultaneously with this Motion, the Diocese respectfully requests that the Court:

I. Order Truro Church (“Truro”) to produce immediately complete and unredacted copies of documents that Truro has not yet produced despite no longer claiming privilege:

- TRURO009497
- TRURO009555-59
- TRURO009569
- TRURO009572-73
- TRURO009574
- TRURO009585,
- TRURO009731-32
- TRURO010368-70
- TRURO010441-44
- TRURO010461-64
- TRURO010465-68
- TRURO010519-21 & -011015-17
- TRURO010996-97
- TRURO011014
- TRURO011021-24
- TRURO011033-35 & 010511-12
- TRURO011051-53
- TRURO011539
- TRURO011551

- TRURO011572
- TRURO011629
- TRURO014086-87;

II. Order production of, or conduct an in camera review and then order production of, Vestry minutes and related materials as to which Truro has neither supported its claims of privilege, nor produced complete, unredacted copies:

- TRURO009244-49
- TRURO009491
- TRURO009492-94
- TRURO009510-12
- TRURO009551
- TRURO009552-54
- TRURO009575
- TRURO009590
- TRURO010355-56
- TRURO010508-10
- TRURO010513-16 & -11025-28
- TRURO010522-26 & -11008-12
- TRURO010896-99
- TRURO010911-13
- TRURO010918-19
- TRURO011018-20
- TRURO011043-46
- TRURO011112
- TRURO011525-27
- TRURO011565;

III. Conduct an in camera review and order the production in whole or in part of an April 19, 2006, memo “clawed back” by Truro under a privilege claim (TRURO011546-47); and Award the Diocese such other relief as may be appropriate and proper.

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

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CERTIFICATE OF SERVICE

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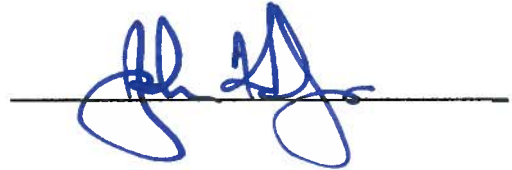
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2021336v1



VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re Multi-Circuit Episcopal Church)
Litigation:)
)

Case Nos.: CL 2007-248724,
 CL 2007-1236

**COVER SHEET FOR THE DIOCESE'S
MOTION TO COMPEL
REGARDING PRIVILEGE ASSERTIONS BY TRURO CHURCH**

This acts as a cover sheet/reference pleading to the complete filing, titled as indicated above, which was sent to be filed in CL-2007-248724 (the omnibus case file) on January 27, 2011. That filing and this reference pleading are filed in the above-listed cases. For the complete filing, please see the omnibus case file, CL 2007-248724.

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

By: _____


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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re Multi-Circuit Episcopal Church)
Litigation:)
)

Case Nos.: CL 2007-248724,
 CL 2007-1236,

**THE DIOCESE'S MEMORANDUM IN SUPPORT OF MOTION TO COMPEL
REGARDING PRIVILEGE ASSERTIONS
BY TRURO CHURCH**

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Counsel for the Protestant Episcopal Church in the Diocese of Virginia (the "Diocese")

PROCEDURAL BACKGROUND

In 2008, the Diocese propounded discovery requests concerning the declaratory judgment actions. In response to the document requests, Truro Church (“Truro”) produced a wide variety of records as they were kept in the ordinary course of business. Counsel for the Diocese spent days reviewing documents and selecting them for production. Truro then produced the selected documents. In Truro’s production, however, it withheld and redacted certain documents on attorney-client privilege grounds. On December 20, 2010, the Diocese wrote to Truro challenging certain privilege assertions and seeking unredacted documents and further information justifying any privilege assertions not withdrawn. *See* Ex. 1. Truro’s counsel made an initial response on January 14, 2011. *See* Ex. 2. Although that letter promised a prompt additional response, there was no further response. A further call with Truro’s counsel on January 28, 2011, did not resolve the matters at issue.

ARGUMENT

The basic elements of attorney-client privilege are well-known. *See, e.g., Walton v. Mid-Atlantic Spine Specialists*, 280 Va. 113, 122, 694 S.E.2d 545, 549 (2010). It is also well-settled that attorney-client privilege “is an exception to the general duty to disclose, is an obstacle to investigation of the truth, and should be strictly construed,” and the person claiming privilege has the burden to prove that the privilege applies in particular instances. *Id.* at 122-23, 549 (quoting and citing *Commonwealth v. Edwards*, 235 Va. 499, 509, 370 S.E.2d 296, 301 (1988)).

I. Documents on which Truro has withdrawn its privilege assertion yet failed to provide complete, unredacted copies.

Truro’s counsel’s initial response withdrew the privilege assertion as to approximately 23 documents and promised to provide unredacted copies of them. Motion at 1 (listing Bates numbers); *see* Ex. 2 ¶ 2. Yet Truro has not done so. It should be required to do so forthwith.

II. Documents on which Truro's initial response was inconclusive.

As to a number of other Vestry minutes and materials (Motion at 2; redacted copies are Ex. 3), Truro "anticipate[d] being able to provide ... additional information" by January 21, 2011 (Ex. 2 ¶ 3). Truro has not done so. And it has never addressed a few documents at all. Truro's privilege assertions remain unsupported and therefore insufficient to carry its burden.¹

- The 1993, 2000, and 2001 minutes do not reflect or suggest the presence of a lawyer or a discussion of legal advice. *See* TRURO010355-56, -009244-49, & -011112.
- In 2003, one of Truro's vestry members was a lawyer, but there is no indication that he was acting in an attorney-client capacity or that the redacted portions contain privileged material. *See* TRURO011045 (6/24/2003, redacting part of a General Convention Strategy section); -010509 (8/10/2003); -010515 & -11027 (9/30/2003, redacting part of a Treasurer/Finance Committee section); -11019 (10/21/2003, redacting part of a report related to a meeting with the Archbishop of Canterbury). In TRURO010526 & -11011-12 (11/25/2003 minutes), Truro has made inconsistent redactions of part of a discussion related to Truro's 2004 Diocesan Pledge, and the broader redaction plainly includes material that is not privileged.
- For certain 2004-06 minutes, a lawyer was present, but there is nothing to suggest that the redactions, including reports from the Rector and Wardens, are proper. *See* TRURO009492-93 (12/28/2004); TRURO009511-12 (3/1/2005, redacting part of minutes and a 9 page report); TRURO011526 (1/24/2006).
- Discussion of privileged material is possible in 2007 minutes, but nothing shows such discussion. *See* TRURO010918-19 (1/7/2007); TRURO010911 (2/27/2007, partially

¹ Truro has not claimed the protection of the work product doctrine, but it is clear that Vestry minutes and related materials, which are "prepared in the ordinary course of business," do not qualify. *E.g., Cintas Corp. No. 2 v. Transcon. Granite, Inc.*, 77 Va. Cir. 234, 238 (Fairfax 2008).

redacting a report from the Rector about an Anglican Communion meeting); TRURO010897 (4/24/2007). When requested, the Diocese produced a detailed privilege log for minutes of 2006 and 2007 meetings of its leadership. *See* Ex. 4. Truro has not done likewise.

- Finally, Truro's response failed to address some documents at all: TRURO009551 (Vestry brief); TRURO009575 (memo); TRURO009552-54 (minutes); TRURO009491 & - 009590 (minutes and a 10 page report); TRURO011565 (nature of document unclear).

The Diocese respectfully requests that the Court order production of these documents, or conduct an in camera review of these documents and then order production of any non-privileged material. The Diocese knows of improper privilege redactions by Truro and cannot rely on unexplained and unsupported privilege assertions. *Compare* Ex. 5, TRURO011033-35 (9/27/2003, redacting this part of a Q&A session during a congregational meeting: "Who owns the Truro Church property? Trustees hold the title of the property in trust for the Diocese. The ECUSA is a hierarchical church. If it goes to court, courts generally lean toward the hierarchy.") (emphasis added) *and* Ex. 6, TRURO010511-12 (unredacted pages) *with* Ex. 7 at 36 (Interrogatory response contending that TEC and the Diocese are not truly hierarchical).

III. Memorandum as to which Truro adheres to its claim of privilege.

Truro's production of documents for inspection included an April 19, 2006, memo written by Truro Chancellor Robert M. Dilling regarding the Vestry oath in the Diocese's Canon 11 (the "Memo," Bates nos. TRURO011546-47). *See generally* Ex. 8 (a copy of the canon); Ex. 9 (May 2006 minutes recording that Truro's Vestry signed the oath).

Counsel for the Diocese selected the Memo for production and, because it relates to the vestry oath (a significant part of the rules of the Diocese and of the dealings between the parties), made extensive notes on it. Truro's counsel invoked this Court's privilege "clawback" order,

however, and has persisted in asserting attorney-client privilege over the Memo. *See* Ex. 10 (August 2008 e-mails asserting privilege). *See generally* Ex. 11 (Oct. 18, 2007, Order). As a result, the Diocese does not have a copy of the Memo for the Court to review. Pursuant to the clawback order, the Diocese does not contend that making the Memo available for inspection was waiver. The Diocese submits, however, that Truro may not contradict the Memo while withholding it, and the Diocese challenges Truro's claim of privilege.

First, disclosure is required because Truro's assertions in this case contradict the Memo. When asked to admit that its vestry members were required to take the oath, Truro denied that Request. Ex. 7 at 3. Truro also has stated in interrogatory answers that "the Constitution and Canons of the Diocese and of [TEC] were not binding" – *i.e.* that they did not "require" anything. Ex. 7 at 15. Yet Dilling admitted that Canon 11 "requires" the oath and that one cannot be a Vestry member without taking the oath. Truro denies that its clergy functioned under the authority of the Bishop. Ex. 7 at 5. Yet Dilling stated that there is no "substantive difference" between the vestry and clergy oaths, and he admitted that the oath means that Vestry members are "under the authority of the Bishop" and "respecting that authority is a condition to" remaining Vestry members. In *Owens-Corning Fiberglas Corp. v. Watson*, 243 Va. 128, 141-42, 413 S.E.2d 630, 638-39 (1992), the Court affirmed a ruling requiring production where interrogatory answers contradicted a memo to in-house counsel that was otherwise covered by attorney-client privilege. Here too, Truro's assertions contrary to the Memo justify disclosure.

Second, even after repeated requests, Truro has never produced information sufficient to "assess the applicability of the privilege." Rule 4:1(b)(6)). If Truro cannot identify the "Thoughtful persons" whose inquiry prompted the Memo and show that they were persons who could seek and obtain legal advice on behalf of Truro, and if Truro cannot identify the recipients

of the Memo and show that they were persons who could receive and review legal advice to Truro, then Truro has not carried its privilege burden. *See, e.g., p.1, supra; Neuberger*, 230 F.R.D. at 409-10 (a party must “specifically and factually support his claim of privilege...”).

Nor has there been any showing that the content of the Memo merits non-disclosure. The Memo comes from a lawyer, but that is not enough.² The Memo does not refer to church property or to any type of litigation or liability. The Memo relates no client confidences and is not based on facts provided by a client. At best, the Memo contains abstract advice, which is not what the privilege exists to protect. *See In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 338 & n.3 (4th Cir. 2005) (the privilege “applies only to ‘confidential disclosures by a client to an attorney made in order to obtain legal assistance.’”); 1 T. Spahn, *The Attorney-Client Privilege* § 4.907(A), at 178 (2007) (Ex. 12). In light of the Memo’s content, the harm of disclosure does not outweigh the harm to this litigation. *See, e.g., Rush v. Sunrise Senior Living*, 2008 Va. Cir. LEXIS 12 at 10 (Fairfax Feb. 12, 2008) (for any privilege to defeat disclosure, “The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.”). The Diocese asks that the Court review the Memo in camera and order its production, in whole or in part.

² *See, e.g., Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 230 F.R.D. 398, 422 (D. Md. 2005) (“communications are not privileged ‘merely because one of the parties is an attorney...’”); *id.* at 409-10 (“Where business and legal advice are intertwined, the legal advice must predominate for the communication to be protected.”); *Henson v. Wyeth Labs.*, 118 F.R.D. 584, 587 (W.D. Va. 1987) (“the attorney ... must be acting as an attorney and not simply as a business advisor” and “the client’s confidential communication ‘must be for the primary purpose of soliciting legal, rather than business, advice.’”) (citations omitted); *Inta-Roto, Inc. v. Aluminum Co.*, 11 Va. Cir. 499, 501 (Henrico County 1980).

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

By:  _____
Of Counsel

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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 and by first-class mail to the counsel indicated with an asterisk below, on this 2nd day of February, 2010:

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VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re Multi-Circuit Episcopal Church)	Case Nos.: CL 2007-248724,
Litigation:)	CL 2007-1236
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**COVER SHEET FOR THE DIOCESE'S
MEMORANDUM IN SUPPORT OF MOTION TO COMPEL
REGARDING PRIVILEGE ASSERTIONS BY TRURO CHURCH**

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Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

By:  _____
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