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

THE EPISCOPAL CHURCH'S AND THE DIOCESE'S SUPPLEMENTAL BRIEF REGARDING CHRIST THE REDEEMER EPISCOPAL CHURCH PROPERTY

Bradfute W. Davenport, Jr. (VSB # 12848)
William H. Hurd (VSB # 16769)
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)
Elizabeth Billingsley (VSB # 70808)
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 LLP
901 New York Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 346-4000
Facsimile: (202) 346-4444

Counsel for the Episcopal Church

In December 2006, Truro Church filed its § 57-9 Petition, enumerating the real property that was held by the Trustees of Truro Church. *See* Truro's § 57-9(A) Petition at 3 ¶ 7 ("The parcels owned by Trustees of Truro Church are all or portions of the land acquired in the following deeds ..."). The property that is the subject of the two December 2006 deeds by Christ the Redeemer Episcopal Church and of this briefing (the "CtR Episcopal Property") was not on that list. Nor did Truro's pleadings give notice that any other real property might exist. In the 21 months since, Truro has never sought to amend its Petition.

In May of this year, as the Congregations successfully persuaded the Court that § 57-9(A) was constitutional, they emphasized repeatedly the difference between property held by trustees and property held by a corporation. *See* The CANA Congregations' Post-Decision Responsive Brief (filed May 9, 2008) at 4 ("*churches may avoid the application of § 57-9 ... by directing that member congregations legally incorporate and transfer title to the incorporated entity*") (emphasis added); *accord*, *id.* at 2 ("Section 57-9 merely establishes a presumptive rule of majority ownership, and a genuinely hierarchical denomination may avoid this rule by making arrangements, before a dispute erupts, to place title to local church properties ... in corporate form"); *id.* at 7 ("title to the real property of Greek Orthodox and Foursquare churches, among others, is held by corporations. *Because none of this property is held by trustees, § 57-9 is not triggered*") (emphasis added).

Now Truro Church tells this Court that whether property is held by a corporation or held by trustees does not really matter. With respect to the CtR Episcopal Property, Truro says that a deed to its trustees as opposed to the corporation is all "merely clarify[ing] the manner in which the *same* Grantee would hold title to the property." Truro Church's Supplemental Brief on Whether the Christ the Redeemer Episcopal Church's Conveyance of Church Property to Truro

is Subject to Truro's §57-9 Petition (filed Sept. 23, 2008) [hereinafter "Truro Brief"] at 14.

Truro's other arguments, about both civil and canon law, are fundamentally erroneous.

In short, Truro's Brief tells a story whose themes are erroneous legal reasoning and inconsistency. This Court can and should reject Truro's arguments and hold as a matter of law that the CtR Episcopal Property is not subject to Truro's § 57-9 Petition. Doing so would hold Truro to its own pleadings; retain consistency with the interpretation of § 57-9(A) that Truro argued, and the Court accepted, just a few short months ago; and uphold fundamental principles of Virginia law.

I. Factual Background

The basic facts are not in dispute, although Truro offers a gloss on them that omits significant details. Christ the Redeemer Episcopal Church began as a mission of a founding church (Truro Episcopal Church) under the Constitution and Canons of the Diocese. *See* Ex. 1 (list of congregations in the Diocese from the 1994 Annual Council Journal); *accord* Truro Brief at 2-3; *see generally* Ex. 2 (Canon 10, § 8, 2005 Constitution and Canons of the Diocese). Truro was required to and did obtain the consent of the Diocese to start the Christ the Redeemer congregation. *See id.*; Ex. 3 (the official acts of the Diocese's Standing Committee and the minutes of its March 17, 1994, meeting, reflecting the Diocese's consent to establishment of the congregation).

Christ the Redeemer operated as an Episcopal congregation from 1994 until 2006, acquiring the CtR Episcopal Property along the way. *See, e.g.*, Ex. 4 at 10 (document p.138, the list of congregations in the Diocese as of January 2005). In 2006, Truro says that Christ the Redeemer Episcopal Church decided to "wind up" operations. As part of that process, Christ the

Redeemer apparently decided to convey the CtR Episcopal Property to Truro.[1]

Accordingly, on December 13, 2006, in the middle of Truro's vote to disaffiliate, Christ the Redeemer's trustees entered into a "Quitclaim Deed of Gift," which purported to convey the property *not* to Truro's trustees but to "Truro Church ('Grantee') ... *a church incorporated under the Virginia Nonstock Corporation Act.*" Ex. 5 at 2 (emphasis added); *see also id.* at 1 (the Fairfax County cover sheet identifying the Grantee as "TRURO CHURCH, A VIRGINIA NONSTOCK CORPORATION"). That deed does not name any trustees. It was recorded the following day, December 14, 2006. *Id.*[2]

On December 18, 2006, Truro filed its § 57-9 action.

Then, apparently, someone noticed a problem: the property was not held by Truro's trustees – and thus it was not subject to § 57-9(A).

On December 21, 2006, for ten dollars, Christ the Redeemer's trustees purported to enter into a "Deed of Correction" conveying the same real estate to "TRURO CHURCH by its trustees THOMAS D. YATES, Trustee and WARREN A. THRASHER, Trustee as grantee (the 'Grantee')." Truro Brief Ex. I at 2.

II. Truro's reading of the December 2006 deeds and its reliance upon the December 21, 2006, "Deed of Correction" are improper and ineffective.

The belated "Deed of Correction," and Truro's argument based upon it that the property

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[1] Discovery relevant to Christ the Redeemer's decision and its communications with Truro is ongoing. The deposition of the witness from Christ the Redeemer identified by Truro in regard to this transaction was rescheduled, at Truro's request, for Monday, September 29, 2008. The Rule 4:5(b)(6) deposition of Truro Church in regard to the CtR Episcopal Property has also been scheduled for next week.

[2] Exhibit G to Truro's Brief appears inadvertently to omit the second page of the deed, so the Diocese has attached a complete copy of the deed to this brief as Exhibit 5. The copy attached to this brief as Exhibit 5 is as stipulated by the parties. *See* Stipulation between Truro, the Episcopal Church, and the Diocese (filed September 9, 2008).

was held by trustees and thus subject to § 57-9(A), should be rejected for three reasons.[3]

First, Truro's reading of the deeds contradicts elementary Virginia law regarding the interpretation of deeds and other instruments. The original deed was clear and unambiguous. Truro may not now allege a different "intent of the Grantor" based on evidence outside the deed. *E.g.*, *Pyramid Dev., L.L.C. v. D&J Assocs.*, 262 Va. 750, 754, 553 S.E.2d 725, 728 (2001) ("when the language of a deed is 'clear, unambiguous, and explicit,' a court interpreting it 'should look no further than the four corners of the instrument under review'" to ascertain the donor's intent) (quoting *Langman v. Alumni Ass'n of the Univ. of Va.*, 247 Va. 491, 498-99, 442 S.E.2d 669, 674 (1974)). "Only when the language is ambiguous may a court look to parol evidence, or specifically, to the language employed 'in light of the [surrounding] circumstances ... at the time the deed was executed.'" *Id.* (quoting *Gordon v. Hoy*, 211 Va. 539, 541, 178 S.E.2d 495, 496 (1971)). *Accord*, *Va. Elec. & Power Co. v. N. Va. Reg'l Park Auth.*, 270 Va. 309, 316, 618 S.E.2d 323, 327 (2005) ("Where language is unambiguous, it is inappropriate to resort to extrinsic evidence; an unambiguous document should be given its plain meaning") (quoting *Great Falls Hardware Co. of Reston v. South Lakes Village Center Assocs., L.P.*, 238 Va. 123, 125, 380 S.E.2d 642, 643 (1989)). "[T]he court is not at liberty to search for its meaning beyond the instrument itself.... because the writing is the repository of the final agreement of the parties." *Id.* (quoting *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983)). The Court may not search for an "intent of the Grantor" in evidence outside the four corners of the December 13, 2006, deed.[4]

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[3] Because the Deed of Correction is not a proper deed of correction, whether it "relates back" is immaterial.

[4] Even if the Court were able to embark on an excursion to find such "intent," Truro's Brief offers no hint that it will be found. Instead, Truro's own exhibits further support a finding that

(footnote continued ...)

Second, deeds of correction are allowed in limited circumstances to save defective deeds or correct minor errors or omissions. Deeds of corrections may not be used to change clear and unambiguous deeds or to alter the parties to the deeds. The very authorities that Truro cites make this clear:

In *King v. Norfolk & W. R.R. Co.*, 90 Va. 210, 17 S.E. 868 (1893), the only Virginia Supreme Court authority regarding "deeds of correction," the Court held that an 1852 deed was a valid correction of, and should be read together with, an 1848 deed that had erroneously described the boundaries of the land being conveyed. The Court stated that such corrections were permissible because:

> The deed of June --, 1852, was the necessary supplement of the deed of June 18, 1848, to correct a mistake and to supply an omission in the said deed of June 18, 1848; they embraced the same subject matter, between the same parties, and related only to the same transaction; and the circuit court did not err in holding both of the said deeds valid, and in construing them together.

Id. at 216, 17 S.E. at 870. The 1848 deed on its own was ineffective – it conveyed more land than the grantor owned, and it failed to convey all of the parcel that the grantor owned. *See id.* at 212-13, 214, 17 S.E. at 869, 870 (the June 18, 1848, deed "failed to convey to the State line, and the land conveyed touched the State line only at the point of beginning, and thereby left unconveyed a wedge-shaped, triangular piece of land between the land conveyed and the State line" and "undertook to convey three times as much land as the said James King had the right to

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Christ the Redeemer intended to and did transfer the property to Truro in corporate form. *See* Truro Brief Ex. E at 2 ("Petitioners respectfully request that this Honorable Court ... grant leave for and authorize the Trustees ... to make a gift of and transfer the Property ... *to Truro Church, a church organized as a Virginia nonstick religious corporation*") (emphasis added); Truro Brief Ex. F at 1 ("it is therefore: ORDERED that ... [the] Trustees of Christ the Redeemer Episcopal Church, are hereby authorized to make a gift of and transfer the church property ... *to Truro Church, a church organized as a Virginia nonstock religious corporation* ...") (emphasis added).

convey").[5] The deed in this case fails the *King* test because it is neither an attempt to correct an erroneous property description nor "between the same parties."

Indeed, in *Continental Telephone Co. of Va. v. Commonwealth of Virginia*, 1982 WL 215179 (City of Richmond) (attached as Ex. 6), the Court explained the distinction between correcting a deed and altering a deed. The Court rejected the argument that the prior deed needed correcting:

> In each of the above instances of the usages of a deed of confirmation, its use was necessary to cure some defect or irregularity in the original deed or to give some legality to the original deed[,] and the original and confirming deeds ... there after related back to the original and they were both read together as a complete conveyance.
>
> In the instant case, no defect, irregularity or lack of effectiveness or operativeness existed in the original deeds. The original deeds at the time of recordation were complete and effective on their own and needed nothing further to be done in order to complete them as effective instruments for their intended purpose.

Id. at *4 (summarizing case law and treatises). That second paragraph describes this case as well.

The other cases that Truro cites likewise do not support its position:

Gallups v. Kent, 953 So.2d 393 (Ala. 2006), is another instance where a court *rejected* a deed of correction because it would have altered the deed, not made it effective. The court explained: "The purpose of a correction deed is to confirm the title conveyed by the original

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[5] Likewise, *Anderson v. Edwards*, 37 Va. Cir. 52 (Loudoun Co. 1995), construed a deed as incorporating a plat and an overall subdivision plat because "[t]he deed by which that lot was conveyed gave no description of the parcel conveyed other than the name of the subdivision and the number of the particular lot being sold. Therefore, by itself, the description in the deed was meaningless." *Id.* at 58. *See also* 23 AM. JUR. 2D, *Deeds* § 272 (2002) ("A deed of confirmation may be appropriately utilized in order *to remove doubts as to the operativeness of a prior deed to convey title to the land intended. A mistake in the description of the land conveyed may be corrected by a subsequent deed* executed by the same grantor for the purpose of correcting the description and confirming in the grantee the title to the land intended to have been described in the prior deed...") (emphasis added). Neither authority sanctions an alteration like that attempted here.

deed – typically by correcting an error in the description of the property. A grantor cannot use a correction deed to unilaterally terminate or revoke an interest conveyed by the original deed." *Id.* at 395.

The *Gallups* court relied on *Kirkpatrick v. Ault*, 280 P.2d 637 (Kan. 1955). In *Kirkpatrick*, as in this case, a party claimed that the original deed reflected a mistake in the identity of the grantee and attempted to use a correction deed. The Supreme Court of Kansas' opinion *rejecting* that attempt also identifies two fatal flaws in Truro's argument:

> "Where there is no fraud and the rights of third persons have not intervened, and equity could have reformed the deed, it may be amended by a subsequent instrument so as to effectuate the intention of the parties.... *As against third persons an alleged defective deed can be cured only by a bill in equity, and not by a confirmation assuming to relate back to the original deed.... Where the grantor has divested himself of title, although by mistake he has not conveyed the title in the way in which he intended, he cannot b[y] a subsequent conveyance correct his mistake, there being no title remaining in him to convey.*"

Kirkpatrick, 280 P.2d at 641 (quoting 26 C.J.S. Deeds § 31) (emphasis added). In this case, Truro improperly attempts to employ a deed of correction against third parties – the Episcopal Church and the Diocese – and it also attempts to rely on a subsequent conveyance by the grantors after the grantors had divested themselves of title.

Truro can point to *no* "defect, irregularity or lack of effectiveness or operativeness" in the December 13, 2006, deed (Ex. 5). That deed clearly and unambiguously conveyed the property to the specified grantee in corporate form.

The only argument Truro has managed to come up with for why the December 13, 2006, deed was ineffective is an outright misreading of its own corporate documents. Contrary to Truro's assertion, its By-Laws do *not* mandate that all of Truro's property must be held by trustees. Rather, they simply state that the trustees shall hold whatever property the corporation (through its vestry) wants them to hold: "Three Trustees appointed by the Vestry shall hold in

trust for the Corporation/Church such property as shall from time to time be determined by the Vestry." Truro Brief Ex. H at CONG000575, § 9.9.

In fact, Truro's argument that the Corporation cannot hold real property in its own name (*e.g.*, Truro Brief at 5) finds no support in either Truro's Articles of Incorporation or the By-Laws. Truro's Articles, which Truro neglected to provide to the Court and which would override the By-Laws in the event of any conflict between the two, empower the corporation both generally and specifically to hold property in corporate form. *See* Ex. 7 at 1 [CONG000561], Art. 3(D) ("the Corporation may do any and all lawful acts that may be necessary or useful for the furtherance of the purposes"); *id.* at 2 [CONG000562], Art. 5 ("The Corporation may receive property by gift, devise or bequest ...").

Third, Truro's arguments that the Court may simply blur the distinction between property held in corporate form and property held by trustees fundamentally distorts § 57-9(A), as interpreted by this Court at Truro's urging. *See* p.1 *supra*.[6] The ability of churches to "escape" the application of § 57-9(A) by titling property in the name of a corporation, as distinct from in the name of trustees, was a significant fact that, in Truro's and the Court's view, saved § 57-9(A) from unconstitutionality. Truro cannot now argue that § 57-9(A) includes property held in

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[6] It is also inconsistent with Virginia corporate law generally. It is axiomatic that a corporation has a legal existence separate and distinct from its creators and shareholders or members. *E.g.*, *Dana v. 313 Freemason, A Condo. Ass'n*, 266 Va. 491, 499, 587 S.E.2d 548, 553 (2003) ("'The proposition is elementary that a corporation is a legal entity separate and distinct from the stockholders or members who compose it.' The whole corporate concept would be meaningless if such were not the case") (quoting *Cheatle v. Rudd's Swimming Pool Supply Co., Inc.*, 234 Va. 207, 212, 360 S.E.2d 828, 831 (1987)). *Accord*, *Barnett v. Kite*, 271 Va. 65, 70, 624 S.E.2d 52, 55 (2006). Truro offers no explanation for why the Court should ignore the corporation's separate existence and conclude that the deeds are "between the same parties." Of course, one cannot use the corporate form to evade the rules and polity of the denomination. *See, e.g.*, Va. Code § 57-16.1.

corporate form. It is the Congregations who urged at the constitutional hearing that one cannot have the sweet without the bitter. *See* Ex. 8 (May 28, 2008, Hr'g Tr. at 72, 109 [Mr. Johnson]).

III. Even if the December 21, 2006, deed were a proper "deed of correction," both December 2006 deeds are invalid because they are inconsistent with § 57-15.

Ultimately, the fate of the Deed of Correction does not matter. Even if it were a proper Deed of Correction, both December 2006 deeds are invalid.

After giving an extended, and irrelevant, history of Va. Code § 57-15, Truro acknowledges, as it must, that "the Virginia Supreme Court has interpreted the language of this statute to require a showing that a church property transfer 'is the wish of the duly constituted church authorities having jurisdiction in the premises.'" Truro Brief at 8 (quoting *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 502, 201 S.E.2d 752, 754 (1974)). The Virginia Supreme Court has explained that "[i]n the case of a super-congregational church, ... Code § 57-15 requires a showing that the property conveyance is the wish of the constituted authorities of the general church." *Norfolk Presbytery*, 214 Va. at 503, 201 S.E.2d at 755; *accord*, *Green v. Lewis*, 221 Va. 547, 553, 272 S.E.2d 181, 184 (1980).[7]

Truro attempts to avoid this requirement of Virginia law by citing Diocesan Canons 15, § 2, and 10, § 8, and arguing that Christ the Redeemer alone was the "duly constituted church authorities" because the Constitutions and Canons of the Episcopal Church and the Diocese did not require approval of any authority above the congregational level in this instance. Canon law

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[7] This Court has determined that for property within its scope, § 57-9(A) supersedes this requirement of Virginia law; but as shown herein, the CtR Episcopal Property was not held by trustees and therefore is not subject to § 57-9(A) under even the Congregations' reading of the statute. Furthermore, neither of the December 2006 deeds involve transfers by virtue of § 57-9(A), but reflect an ordinary effort to transfer property from one party to another, without reference to any "division," "branch," or congregational vote on those subjects.

directly contradicts Truro's current position, for three reasons.

First, Truro's reading of Diocesan Canon 15, § 2 is incorrect. Although Truro rightly points out that the first sentence requires Diocesan approval for the alienation of only consecrated property, Truro fails to notice that the first sentence explicitly applies only to congregations that have "Church" status under Diocesan Canon 10, § 1. Ex. 2 at document p.27 (2005 Constitution and Canons of the Diocese). The second sentence of Canon 15, § 2 applies to "Missions," like Christ the Redeemer, and it provides that "No part of the real property of a Mission under Supervision shall be alienated without the further consent of the Bishop." *Id.*[8]

Second, the Diocesan canons provide that the Executive Board of the Diocese is the duly constituted church authority whenever a congregation ceases to use and thus abandons real property, as Truro admits that Christ the Redeemer Episcopal was doing. *See* Diocesan Canon 15, § 3 (empowering the Executive Board to declare property abandoned and "take charge and custody thereof" "whenever any property, real or personal, formerly owned or used by any congregation of the Episcopal Church in the Diocese of Virginia ... has ceased to be so occupied

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[8] The entities now known as "Missions" were once referred to as "Churches under Supervision." *Compare* Canons 10 and 15 in the 2005 Canons (Ex. 2) *with* Canons 10 and 15 in the 1986 Constitution and Canons of the Diocese (Ex. 9). Both terms apply to any congregation not able to meet the requirements for "Church" status under Canon 10, § 1.

The second sentence of Canon 15, § 2 has always applied to all "Missions." As the 1986 Canons show, Ex. 9 at document pp.18-19, 26, the term "Churches under Supervision" was used to refer both to congregations started by the Diocese (Canon 10, § 6) and those started by local Episcopal churches with the consent of the Diocese (Canon 10, § 8). The Diocese later changed the term "Churches under Supervision" to "Missions," but in making the terminology change in the second sentence of Canon 15, § 2 – the word "Mission" was substituted only for the word "Churches" and not for the entire term "Churches under Supervision," as it should have been.

Rather than give the Diocese notice of their actions and determine what needed to be done under the Canons, Christ the Redeemer, like the congregation in *Norfolk Presbytery*, unilaterally attempted to transfer the property to a corporation outside the authority and control of the Episcopal Church and the Diocese. This it could not do, under either canon or civil law.

or used by such congregation"); Truro Brief at 3 ("Christ the Redeemer Episcopal Church voted to authorize its vestry to 'wind-up' its operations and dissolve the church"). Thus, under canon law, the CtR Episcopal Property would have passed into the control of the Diocese upon the dissolution of Christ the Redeemer.

Third, under Episcopal Church Canons I.7 and Diocesan Canon 15, congregations may not simply give away property to entities that are outside of or reject the authority of the Episcopal Church and the Diocese. By December 13, 2006, those restrictions prohibited a transfer from Christ the Redeemer to Truro.[9]

CONCLUSION

Because both deeds are in the record through the parties' property stipulation, this Court can and should rule as a matter of law that the December 21, 2006, deed is not a proper "deed of correction." Such a ruling would be dispositive of whether the CtR Episcopal Property is subject to Truro's § 57-9 Petition because the property would then not be held by trustees for Truro.

Any other outcome requires a trial. Before the Court could rule that both December 2006 deeds are invalid, a short evidentiary hearing would be required to present the basic facts about Christ the Redeemer Episcopal Church's creation and operation as a congregation within the Episcopal Church and the Diocese. Before the Court could rule that the CtR Episcopal Property is subject to Truro's § 57-9 Petition, a somewhat longer evidentiary hearing would be required, at which Truro would be required to prove that the December 13, 2006, Deed did not correctly reflect the intent of the Grantor, Christ the Redeemer Episcopal Church.

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[9] The vote at Truro was effectively over on December 10, 2006, a majority of those whom Truro deemed eligible having voted in favor of disaffiliation on that date. *See* Ex. 10 (summary of the vote at Truro by date, from Truro's own voting records).

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

By: _____
Of Counsel

Bradfute W. Davenport, Jr. (VSB # 12848)
William H. Hurd (VSB # 16769)
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)
Elizabeth Billingsley (VSB # 70808)
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: _____
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

1770041.2

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 a asterisk below), on this 25th day of September, 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 (gpeterson@sandsanderson.com)
J. Jonathan Schraub, Esquire (jjschraub@sandsanderson.com)
Heather A. Jones, Esquire (hjones@sandsanderson.com)
Tania M.L. Saylor, Esquire (tsaylor@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 (marymcreynolds@mac.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

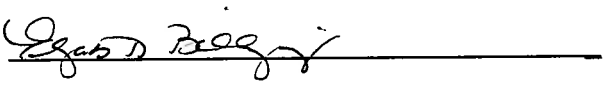
* Scott J. Ward, Esquire (sjw@gg-law.com)
Timothy R. Obitts (tro@gg-law.com)
Robert W. Malone (rwm@gg-law.com)
Gammon & Grange, P.C.
8280 Greensboro Drive
Seventh Floor
McLean, Virginia 22102
Counsel for The Church at The Falls – The Falls Church and certain associated individuals, Christ the Redeemer 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)
Semmes Bowen & Semmes, P.C.
Suite 1400
25 South Charles 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
3554 Chain Bridge Road
Suite 400
Fairfax, VA 22030
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)

* Stephen R. McCullough, Esquire (SMccullough@oag.state.va.us)
William E. Thro, Esquire (WThro@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



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