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

BRIEF IN SUPPORT OF MOTION TO STRIKE THE EVIDENCE OF THE FALLS CHURCH CONCERNING THE TWO+ ACRES PARCEL AND ON THE MERITS CONCERNING THE SAME

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The Falls Church ("TFC") claims that its trustees hold title to a parcel consisting of approximately two acres (the "Property") conveyed by "John Trammole of Truro parish in Fairfax County" to "the Vestry of the said parish of Truro in Fairfax County .... and their Successors" by Indenture dated March 20, 1746 (the "Deed"). TEC-Diocese Ex. 64 at 2.[1] John Trammole also executed a one year lease of the same property to the "Vestry of Truro parish" the day before, March 19, 1746 (the "Lease"). TEC-Diocese Ex. 64 at 1.

As the petitioner, TFC has the burden of proof. *E.g.*, *Brooks v. Worthington*, 206 Va. 352, 359, 143 S.E.2d 841, 847 (1965). The Congregations have previously admitted as much. *See* The CANA Congregations' Opening Brief on Voting Issues (filed Sept. 5, 2008) at 1 (citing *Cheshire v. Giles*, 144 Va. 253, 261 (1926), and describing that case as "referencing party who invokes the division statute as bearing the burden of proof").

At the conclusion of all the evidence on October 20, 2008, the Diocese moved to strike TFC's evidence and sought leave to file a post-trial brief in support of that motion, along with a brief on the merits. The Court took the motion under advisement and granted leave. Tr. (Oct. 20, 2008) at 140. This is the Diocese's opening brief, joined by the Episcopal Church, in support of the motion to strike and pursuant to the ordered post-trial briefing schedule.

THE ISSUE

The issue is whether title to the Property is held by TFC's trustees in trust for the TFC congregation, as required by Va. Code § 57-9(A). The TFC trustees are not the "Vestry of Truro parish." Their only possible claim to hold title to the Property is that they are the "successors" to

[1] TEC-Diocese Ex. 64 is agreed transcriptions of TFC Ex. 12 and Exs. K and L to the Stipulation between TFC, the Diocese, and the Episcopal Church Regarding Property Related to TFC's Va. Code § 57-9 Petition (filed Sept. 10, 2008, and admitted as TEC-Diocese Ex. 9).

the "Vestry of Truro parish." If they have not proved that they are the successors to the "Vestry of Truro parish," they have not proved their case and the Court must enter an order so holding.

STANDARD OF REVIEW

The standard of review for a motion to strike at the conclusion of all the evidence is well settled. A trial court must accept as true all evidence favorable to the plaintiff, as well as any reasonable inference a jury might draw therefrom which would sustain the plaintiff's cause of action. *See Austin v. Shoney's Inc.*, 254 Va. 134, 138, 486 S.E.2d 285, 287 (1997); *see also Butler v. Yates*, 222 Va. 550, 553, 281 S.E.2d 905, 906 (1981). The court may grant a motion to strike when the plaintiff has not proven a cause of action against the defendant, or when the trial court "would be compelled to set aside any verdict found for the plaintiff as being without evidence to support it." *Williams v. Vaughn*, 214 Va. 307, 309, 199 S.E.2d 515, 517 (1973).

SUMMARY OF THE EVIDENCE

I. TFC's Case-in-Chief.

A. There is no deed conveying the property from the "Vestry of Truro parish" or their Successors to TFC's trustees.

To effectuate a property conveyance in Virginia, Va. Code § 55-2 requires that there be a deed or a will. *See FDIC v. Hish*, 76 F.3d 620, 623 (4th Cir. 1996) ("In Virginia, like in most states, legal title to property can be conveyed only by deed or will") (citing Va. Code § 55-2). TFC presented no evidence of any will, and the only deed conveying the Property is the Deed. TFC's trustees are not the grantee on the Deed, or the successors to that grantee, the "Vestry of Truro parish." Both of TFC's experts testified that they found no deed for the Property to TFC's trustees. Tr. (Oct. 15, 2008) at 123 (Schrantz), 147 (Blitz). Moreover, TFC produced no evidence (through any other witness or through documents) of any deed to the TFC trustees.

B. Testimony of William E. Deiss

Principally through its witness William E. Deiss, TFC put on evidence concerning the physical characteristics of the Property; its location in relation to other properties as to which the Diocese has stipulated that TFC's trustees hold legal title; improvements to the properties used by TFC; how TFC uses the properties that it uses; utilities to the properties TFC uses; mortgages and easements on the properties TFC uses; maintenance and repair of the properties TFC uses; and the fact that TFC's records reflect that Christ Church, Alexandria has never made any claim to the Property, contributed to or paid for the maintenance or repairs on improvements on the Property, or contributed to TFC fundraising. *See* Tr. (Oct. 15, 2008) at 45-78. As set forth in section III below, however, use does not equal ownership or divest the record owner of title unless adverse possession is shown. TFC has never obtained ownership by adverse possession, has not pled adverse possession in this litigation, and did not put on evidence sufficient to support an adverse possession verdict in TFC's favor.

C. Testimony of Kenneth Schrantz

TFC's main witness on the Fairfax County land records was Kenneth Schrantz, a title examiner in Arlington and Fairfax Counties and the Cities of Fairfax and Falls Church. Tr. (Oct. 15, 2008) at 88. Schrantz examined and testified about various documents in those land records, and we discuss those documents in detail below. After that buildup, TFC's counsel reached the crescendo of his direct examination, posing the ultimate question to Schrantz:

> 7 Q. And everything you find in the land
> 8 records says that the property is owned by the
> 9 trustees of The Falls Church?
> 10 MR. DAVENPORT: Objection. Leading.
> 11 THE COURT: Sustained.

Id. at 121. Rather than rephrase his question, TFC's counsel retreated from inquiring about what

the land records actually say about property ownership. Instead, he asked what they "indicate" about ownership. The rest of his direct examination of Schrantz consists of the following:

> 13 Q. Mr. Schrantz, from your review of the
> 14 land records, tell me who those land records
> 15 *indicate* owns the property?
> 16 A. The land records *indicate* the property
> 17 is owned by the trustees of The Falls Church.
> 18 Q. How do you reconcile that, that there's
> 19 a deed to the Vestry of Truro Parish and their
> 20 successors if everything you see says trustees of
> 21 the Falls Church?
> 22 A. Everything in the records *indicates* that
> 1 the trustees of The Falls Church *claim* to be the
> 2 owners and that *claim* has been consistently
> 3 corroborated by orders of Court and by all of the
> 4 dealings in the land records with other parties,
> 5 including banks, (word) jurisdictions and other
> 6 individual owners.
> 7 Q. What, if anything, have you seen in the
> 8 land records that would *indicate* to you as an
> 9 experienced title examiner who the successors are
> 10 to the trustees of Truro Parish?
> 11 A. Every *indication* would be that the
> 12 trustees of The Falls Church as to this property
> 13 are the successors to Truro, the Vestry of Truro
> 14 Parish.

Id. at 121-22 (emphases added). That is manifestly insufficient; such "indications" and "claims" do not prove title. *See* section IV, *infra*.

D. Testimony of Barbara Blitz, Esq.

TFC also called the general counsel for Commercial Title Group, Inc. located in Vienna, Virginia. The best she could say was that the land records "reflect" the TFC trustees to be the owner of the two acre parcel. *Id.* at 150. She then said that her title insurance company would be willing to issue a title policy insuring that the TFC trustees are the title owner of the Property. *Id.*

E. "Chain of Title" Documents

The documents on which Schrantz relied fall into three categories: (1) court orders,

(2) petitions for the appointment of trustees or to encumber real estate, and (3) recorded instruments carrying out the orders and petitions. None of those documents contains any "successor" language or even suggests or intimates, much less proves, that the TFC trustees are the "successors" to the "Vestry of Truro parish."

1. Resolutions, Petitions, and *Ex Parte* Orders (TFC Exhibits 37, 37A, 38, 52, 53, 54, 56 and 62)

TFC Exhibits 37, 37A, 38, 52, 53, 54 (Exhibits 53 and 54 are the same document), 56 and 62 are merely resolutions, petitions and *ex parte* orders relating to the appointment of trustees to hold real estate pursuant to Code § 57-8 or predecessor statutes. None of those exhibits identifies any particular real estate, including the Property, to which the trustees hold title.

2. Construction Loan Documents (TFC Exhibits 39-44)

TFC Exhibits 39 through 44 relate to construction loans obtained by TFC in 1951 and 1952. In TFC Exhibits 39 and 41, TFC's trustees made the bald allegation that they were the "holders of legal title to that certain lot of land which was conveyed to the Vestry of Truro parish by John Trammole by deed dated March 20, 1746, and of record in Liber B No. 1, page 249 of the land records of Fairfax County, containing two acres of land, more or less." The description of the Deed is accurate, but the allegation that the trustees are holders of legal title by virtue of that Deed is unsupported. The trustees made no effort to trace the chain of title from the Vestry of Truro parish to themselves, and there is nothing in the chain of title to support that assertion.

TFC Exhibits 40 and 42 are *ex parte* orders granting the petitions in TFC Exhibits 39 and 41. They almost certainly were prepared by the same lawyers who represented the TFC trustees and filed the corresponding petitions, and they track the language of the petitions. As discussed *infra*, this Court is not bound by either order, and neither order establishes record ownership.

3. Easement and Encumbrance Documents (TFC Exhibits 45-49, 7-8)

TFC Exhibits 45 through 49 relate to an easement, an encumbrance, and court approvals thereof. Those documents make it crystal clear that such church trustee and property orders are not the product of adjudication designed to test evidence and reach the correct legal conclusion; rather, such *ex parte* orders are entered as a matter of routine, as evidenced by the fact that all of these Exhibits refer to the two acres of land as described in the "Deed dated March 19, 1746, and of record in Liber B, No. 1, page 248." That refers to the one-year Lease, which expired 261 years ago, not the Deed, which is dated March 20, 1746.[2] Schrantz acknowledged this problem on cross-examination. Tr. (Oct. 15, 2008) at 129-33. Fee simple ownership cannot be based on an expired lease.

4. Deeds of Trust by TFC Trustees as Grantors (TFC Exhibits 50, 51, 55 and 55A)

TFC Exhibits, 50, 51 and 55 are Deeds of Trust by which the grantors, TFC's trustees, have conveyed an interest in property to which they did not hold title, at least to the extent that the property descriptions include the two acres.

TFC Exhibit 55A relates to some reciprocal easements, where the parties used the same property description as in TFC Exhibit 55, which erroneously assumes that TFC's trustees hold title to the two acres.

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[2] Schrantz and Blitz tried to dance around the distinction between the Lease and the Deed by referring to the clerk's certificate on page 250 of Liber B, No. 1. Tr. (Oct. 15, 2008) at 130, 136-37, 156-57. The fact that the clerk apparently recorded the two instruments on the same day (August 18, 1747, seventeen months after the dates of the Lease and the Deed) is immaterial. They are two separate instruments, dated on different days, and conveying distinct estates: the Lease conveys a leasehold estate in the Property for one year to the "Vestry of Truro parish"; the Deed conveys fee simple interest to the same grantee and its successors. Neither the Lease nor the Deed conveys the Property to the TFC trustees.

5. 1991 Encumbrance Order (TFC Exhibit 55B)

Exhibit 55B is an Order Granting Leave to Encumber Church Property Pursuant to Code of Virginia § 57-15. The historic church and cemetery, which are located on the Property, are specifically excluded from Exhibit 55B, as Schrantz testified. Tr. (Oct. 15, 2008) at 135.

6. 1996 Property Exchange Documents (TFC Exhibits 20 and 57-59)

TFC Exhibits 57 through 59 (Exhibits 58 and 59 are the same document) relate to a 1996 property exchange. Paragraph 1 of the Petition (TFC Exhibit 57) simply alleges that "legal title to all real estate owned by [TFC] is vested in the Trustees by virtue of § 57-8 of the Code of Virginia" but does not describe or itemize the real estate. It thus begs the question before the Court. According to paragraph 5 of the Petition, "[a] Plat depicting the configuration of the property of the Church is attached to this Petition as Exhibit 'A' for the Court's convenience. Exhibit 'A' has been annotated to assist the Court in identifying the real property which is the subject matter of this Petition." In a Surveyor's Certificate attached to the Petition, the surveyor certified that the land shown on the plat was "now in the name of the trustees of The Falls Church as recorded in Deed Book B1 at page 249." The reference to Deed Book B1 at page 249 is presumably to the Deed, which is recorded Liber B No. 1, page 249, but is *not* "in the name of the trustees of The Falls Church." The surveyor was wrong. Moreover, the surveyor qualifies his certificate by saying that his certification is "to the best of my knowledge and belief." Furthermore, Schrantz admitted in his direct examination that the property exchange that is the subject matter of these exhibits does not involve the Property. Tr. (Oct. 15, 2008) at 117.

Another attachment to TFC Exhibit 57 is a letter from the Chancellor of the Diocese which says that no authorization from the Diocese is needed to effect the transaction. As Schrantz admitted, the Chancellor's letter says nothing about who owns the Property. Tr. (Oct.

15, 2008) at 134. TFC Exhibit 58 is an Order approving the transaction, but as Schrantz admitted, the Order is silent on the two acres at issue here. Tr. (Oct. 15, 2008) at 134.

The Surveyor's Certificate attached to TFC Exhibit 20 is the same as the certificate attached to TFC Exhibit 57 and suffers from the same flaws.

7. Unrelated Property Conveyance (TFC Exhibit 60)

TFC Exhibit 60 reflects a conveyance of some property from the TFC Trustees and has no bearing on the issue before the Court.

F. Memorandum of *Lis Pendens* (TFC Exhibit 61)

TFC introduced a Memorandum of *Lis Pendens* filed by the Diocese on February 6, 2007. We address it below.

G. TFC's Exhibit 69

TFC's Exhibit 69, admitted in evidence by Order entered October 29, 2008, ostensibly is a petition filed by the Diocese with the Virginia General Assembly in 1845. TFC's purpose in offering that Exhibit is not apparent, and it has no bearing on whether TFC is the successor to the "Vestry of Truro parish" and thus the record owner as required by § 57-9(A). If TFC bases any arguments on that Exhibit, we will respond.

H. Discovery Responses of the Diocese and the Episcopal Church (TFC Exhibits 10 and 11)

TFC introduced some discovery responses of the Diocese and the Episcopal Church. Its purpose in doing so is uncertain. If TFC bases any arguments on them, we will respond.

II. The Diocese's Case-in-Chief

TFC did not present any evidence as to who succeeded the "Vestry of Truro parish" under the Deed. The unrefuted evidence on that issue came from the Diocese's expert witness, Dr. Edward Lawrence Bond, the only historical expert to testify.

Dr. Bond is a tenured full professor of history at Alabama A&M University and a visiting assistant professor of church history at the School of Theology at the University of the South. The particular subject matters on which he focuses as a historian are American religious history, particularly the Church of England in colonial Virginia and the Episcopal Church in Virginia. He obtained a Bachelors Degree from the College of William & Mary with a double major in history and religion, a Master of Arts in divinity from the Divinity School at the University of Chicago and a Ph.D. in American history from Louisiana State University. He has received between seven and ten grants or fellowships relating to American religious history, including the Episcopal Church in Virginia. He has published four books and several articles relating to American religious history. He also wrote part of a history of the Diocese of Virginia that was published in 2007 in connection with the 400th anniversary of Jamestown and thus the Episcopal Church and the Church of England in Virginia. He is editor in chief of the *Anglican and Episcopal History* scholarly journal, and he has been a member of the Executive Board of the Historical Society of the Episcopal Church and a member of the editorial board of the *Virginia Magazine of History and Biography*. He has refereed articles for various scholarly publications and has given public lectures on American religious history. Tr. (Oct. 20, 2008) at 28-36.

Without objection, Dr. Bond was qualified as an expert in American religious history in the 18th and 19th centuries, the history of the Episcopal Church, Virginia religious history in the 18th and 19th centuries, and the history of the Episcopal Church in Virginia in the 18th and 19th centuries. *Id.* at 36. TFC had no expert to rebut Dr. Bond's testimony.

A. Christ Church, Alexandria is the successor to the "Vestry of Truro parish" as a matter of historical fact.

Dr. Bond's opinion is that Truro parish, whose Vestry was the grantee on the Deed, was split into Fairfax parish and Truro parish in 1765 by act of the legislature. *Id.* at 51; TEC

Diocese Ex. 66. When that happened the Property became part of the new Fairfax parish, such that the Vestry of Fairfax parish succeeded the Vestry of Truro parish. *Id.* at 54. The Vestry of Truro parish, before 1765, and the Vestry of Fairfax parish, after 1765, each governed more than one congregation, including The Falls Church. *Id.* at 41-42, 46-47, 49, 63. The Church at Alexandria began before 1765 and became known as Christ Church in Alexandria in 1814. *Id.* at 63, 84. The Vestry of Christ Church, Alexandria succeeded the Vestry of Fairfax parish. *Id.* at 73-74. Furthermore, there is no reason or evidence to conclude that TFC is a successor to the Vestry of Fairfax parish. *Id.* at 128.

In reaching his conclusions, Dr. Bond relied on numerous historical records from the 18th and 19th centuries and the following facts, among many others:

- After the creation of Fairfax parish in 1765, there were two congregations in Fairfax parish, at the Church at Alexandria and at The Falls Church. *Id.* at 63.
- Following the division of Truro and Fairfax parish in 1765, the Vestry of Fairfax parish decided to build two churches, one at the Falls and one at Alexandria. By 1769 a church had been built at the Falls, and by 1773 a church had been built at Alexandria. *Id.* at 65-66.
- Over time the Church at Alexandria became the stronger church, the Church at the Falls faded away, and there was a period of years when the Church at the Falls did not have a functioning congregation. *Id.* at 65.
- The last time the Vestry of Fairfax parish met at The Falls Church was in 1792. *Id.* at 66.
- By 1796, there were no Episcopal or Anglican services being held at the Falls because there was no congregation there. *Id.* at 66-67. The last mention of The Falls Church in the Fairfax parish vestry minutes was in 1796. *Id.* at 67.
- By 1800, The Falls Church was defunct. No one was attending services, the building fell into

disrepair and there was no Episcopal or Anglican congregation there. *Id.* at 98-99. Indeed, there had been indications for many years that Methodists were taking over at The Falls Church. *See id.* at 66:

> 5 In the 1780s we know from Bishop Thomas Cook
> 6 of the Methodists that he was preaching in the Falls
> 7 Church. We know from George Washington's letters in
> 8 1786, responding to a correspondence saying he does
> 9 not know the religion of the people at Falls Church,
> 10 that perhaps it's a medley, because there's so many
> 11 Methodists and Baptists there. Francis Asbury, in his
> 12 journal, records in 1798 that Methodists are, as late
> 13 as 1798, preaching in the Falls Church.

- By the early 1800s, there was no Episcopal or Anglican congregation at the Falls and the only functioning Episcopal or Anglican congregation in Fairfax parish was Christ Church, Alexandria. *Id.* at 69, 73. Alexandria clergy attempted to get The Falls Church going again but were unsuccessful. *Id.* at 127.
- The Falls Church's own histories acknowledge that there was a period where there was no congregation. *Id.* at 70.
- Bishop Meade, who had been Rector of Fairfax parish between 1811 and 1813, stated in his address to the convention of the Diocese in 1838 that the Falls Church "was deserted as a house of worship by the Episcopal minister about 40 years ago. About that period for the first and, it is believed, for the last time, it was visited by Bishop Madison. Since then, it has been used by any who were disposed to occupy it as a place of worship. The doors and windows being open, itself standing on the common highway, it has been entered at pleasure by travelers on the road and animals of every kind." *Id.* at 70-73; TEC-Diocese Ex. 77 at 16.
- In 1823, TFC petitioned the Diocesan convention for recognition, seeking to seat a lay delegate. That petition was denied because there was already a lay delegate from Fairfax

parish, Edmond Lee, who was from Christ Church, Alexandria. Tr. (Oct. 20, 2008) at 84, 85; TEC-Diocese Ex. 73.

- After years of assistance from Episcopal students or professors at Virginia Theological Seminary, TFC petitioned again in 1836, at which time the convention admitted TFC as a separate and distinct church from the parish church of Fairfax parish, which was Christ Church, Alexandria. Tr. (Oct. 20, 2008) at 88-89, 127-28; TEC-Diocese Ex. 75.
- TFC became a new church and entered the Diocese in 1836 as a new institution. Tr. (Oct. 20, 2008) at 107. TFC did not reenter the Diocese as a member of Fairfax parish. *Id.* at 81.

B. Christ Church, Alexandria also is the successor to the "Vestry of Truro parish" as a matter of law.

Dr. Bond's expert testimony is consistent with the holding of the United States Supreme Court in *Mason v. Muncaster*, 22 U.S. 445 (1824). There, the question was "[w]hether the Vestry of the Episcopal Church of Alexandria, now known by the name of *Christ's Church*, is the regular Vestry in succession of the parish of Fairfax." *Id.* at 454. The holding of the case is "that the Vestry of the Episcopal Church of Alexandria is the regular Vestry in succession to the parish of Fairfax." *Id.* at 456, 469.

The Supreme Court reached its decision in *Mason* after a careful review of facts and evidence. For example, the decision recognizes that local Episcopal entities were often interdependent and under the joint "superintendance and direction" of the parish vestry, *id.* at 456; that Episcopal congregations operated "under the direction and authority of the General Episcopal Church of Virginia" and that vestries were elected according to "the canons of that church, made in conformity with the laws of Virginia, and never repealed," *id.* at 459; that the General Assembly provided that "all religious societies might, according to the rules of their sect, appoint, from time to time, trustees to manage their property" and that the Episcopal Church

subsequently "adopted general regulations on this subject," *id.* at 460; and that "new Episcopal societies are not admitted to be formed within the bounds of existing parishes, without the consent of the proper ecclesiastical authority," *id.* at 464. The opinion also describes how The Falls Church had become defunct, while Christ Church operated continuously. *Id.* at 457 ("Since the year 1800, the Falls Church has fallen into a state of dilapidation and decay, and public worship has not been celebrated there by the Minister of the Episcopal Church, on account of its deserted state; but there has been a regularly inducted Minister at the parish church in Alexandria, where divine services have been constantly performed"); *accord*, *id.* at 459.

TFC has tried to distinguish *Mason v. Muncaster*, on two grounds. First, it points out that Alexandria had become, at the time, a part of the District of Columbia. A review of the Supreme Court's opinion, however, shows that it nevertheless repeatedly discusses and applies *Virginia law*. *See, e.g.*, *id.* at 460-61. Second, TFC notes that the case was directly concerned with the glebe of Fairfax parish. But the Supreme Court's opinion clearly reflects that its conclusion is not limited to a particular piece of property. The Vestry governed the entire parish. *Id.* at 456 ("By the laws of Virginia, passed antecedent to the revolution, each parish was authorized to elect a Vestry of twelve persons, to manage their parochial concerns; and however many distinct Episcopal Churches, or places of public worship, there were within the parish, the same Vestry had the superintendance and direction of them all"); *id.* at 459 (the Vestry's "acts were for the benefit of the whole, and not for the part connected with the Alexandria Church"). The Supreme Court's conclusion applied to all of the property of the parish. *Id.* ("the Vestry of the parish of Fairfax sufficiently represent the whole parish for all the purposes of the original bill, and that both by the former laws of Virginia and the canons of the Episcopal Church, they, in connexion with the Minister, have the care and management of all the temporalities of the parish within the

scope of their authority").

ARGUMENT

I. At most, TFC proved that it has used the Property, not that it owns the Property.

TFC failed to carry its burden of proof. At best, TFC proved that as an Episcopal Church in the Diocese, it has used the Property for many years, with the permission of the Diocese and without objection by Christ Church, Alexandria. None of the petitions, orders or other documents introduced by TFC contains any "successor" language or states (or even suggests, much less proves) that the TFC trustees are the "successors" to the "Vestry of Truro parish." The unrefuted evidence on who succeeded the "Vestry of Truro parish" came from Dr. Bond, and his testimony and conclusions are consistent with the opinion of the United States Supreme Court in *Mason v. Muncaster*, which decides the very succession at issue.

TFC's evidence concerning "use" is irrelevant to ownership, unless TFC had alleged and could prove ownership of the Property by adverse possession. In Virginia, adverse possession is a doctrine that may give rise to "an action" under Va. Code § 8.01-236. TFC's § 57-9(A) petition is not such an action, and TFC has never instituted such an action, here or elsewhere.

Even if TFC had pleaded adverse possession here, moreover, its own evidence failed on at least one of the elements of that cause of action. Settled law requires that there have been continuous hostility during the 15 year period preceding the institution of an action for adverse possession. *Calhoun v. Woods*, 246 Va. 41, 43, 431 S.E.2d 285, 286-87 (1993) ("'To establish title to real property by adverse possession, a claimant must prove actual, hostile, exclusive, visible, and continuous possession, under a claim of right, for the statutory period of 15 years.' The burden is upon the claimant to prove all the foregoing elements by clear and convincing evidence") (citations omitted). "All presumptions ... favor the holder of the legal title." *Id.* at

44, 431 S.E.2d at 287. Hostility means that possession must be "under a claim of right and adverse to the right of the true owner." *E.g.*, *id.*

TFC certainly failed to prove such adverse and hostile possession "by clear and convincing evidence." Indeed, TFC's own witness, Deiss, made it clear in his cross-examination that until the vote to leave the Episcopal Church in December 2006, there was no adversity or hostility. TFC was a local church in the Diocese between 1836 and December 2006 and a constituent part of the Diocese during that time. Its interests were aligned with the Diocese; and its use of property was neither hostile to the Diocese nor hostile to Christ Church, Alexandria during that time. Tr. (Oct. 15, 2008) at 80-81. Until the vote to leave the Episcopal Church in 2006, both TFC and Christ Church, Alexandria were churches in the Diocese and the Episcopal Church. *Id.* at 81. In fact, when TFC needed to incur debt to undertake building projects and borrowed money to do so, it needed and obtained the Diocese's approval to encumber the Property. *Id.* at 82. On redirect, TFC's counsel established that when the Diocese wanted to use the Property, it had to make arrangements with TFC's Vestry, and that the Bishop came once or twice a year for baptisms and confirmation and a building dedication in 1992. *Id.* at 83-84. TFC was "collegially involved with the Bishop," and the Bishop visited at the Vestry's invitation. *Id.* at 84.[4] As the testimony indicates, the relationship between a hierarchical church and one of its constituent congregations simply cannot be described as hostile or adverse.[5]

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[4] Deiss also testified that he remembered one time when former Archbishop George Carey came to TFC for confirmations and baptisms as a substitute for the Bishop of the Diocese. On re-cross, Deiss agreed that that was "in about 2005" and that the Bishop of the Diocese agreed that Archbishop Carey could come in his place. Tr. (Oct. 15, 2008) at 84-85. That testimony does not establish hostility; but even if it did, all it would do would be to push the December 2006 date for the beginning of hostility back to "about 2005." Obviously, there have not been 15 years of hostility, which is what Va. Code § 8.01-236 requires.

Moreover, TFC's use of the Property has been permissive. It petitioned the Diocesan convention for recognition and status as a separate congregation in 1836. It has operated pursuant to the Constitution and Canons of the Diocese since, seeking the required consent for actions (such as encumbrances) related to the real property TFC used, *see* TEC-Diocese Exs. 79, 80, 83, 85, and it has accepted conditions or instructions from the Diocese as to how such encumbrances should be limited. *See* TEC-Diocese Ex. 86 at 2 (the Standing Committee directed that the 1991 encumbrance "is not to encumber the colonial building or the cemetery land adjacent to that property"); Tr. (Oct. 15, 2008) at 135 ("The church building itself and some surrounding grounds are excluded" from the 1991 encumbrance Order); *see also* TFC Ex. 55A at 23. Permission negates adverse possession. *See, e.g.*, *Mary Moody Northen, Inc. v. Bailey*, 244 Va. 118, 122, 418 S.E.2d 882, 885 (1992).

II. Documents recorded among the land records, which "indicate" or "reflect" that the trustees of TFC "claim" title, are insufficient to establish title under Virginia law.

A. TFC's expert witnesses were ineffective at aiding the Court in the determination of who succeeded the Vestry of Truro parish pursuant to the deed.

Schrantz testified as to the "indications" and a "claim" by TFC's trustees, but this is hardly the stuff by which title is established. "Indications" and "claims" do not prove title.

Part of the basis for Schrantz's opinion was his belief that title to the Property must be in the TFC trustees because he figured that the lenders and other parties involved in the transactions reflected in the land records surely had "done their own title work and ensure[d] themselves that the trustees involved are the owners," or "accepted the trustees of The Falls Church as the owners

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[5] Indeed, Deiss testified that "*Obviously* in '92 the Bishop came and dedicated the new sanctuary." Tr. (Oct. 15, 2008) at 83 (emphasis added).

of the property," or included "a sophisticated lender who in [Schrantz's] experience would have taken care to determine that the grantors on the deed of trust were the owners of the property." *E.g.*, Tr. (Oct. 15, 2008) at 113-14, 116. That is nothing more than an "it's gotta be" opinion; it is not evidence of actual ownership. Moreover, it is rank speculation on Schrantz's part that the parties actually involved in the specific transactions he examined actually did any such thing, and in Virginia not even experts are allowed to testify based on speculation. *Blue Ridge Service Corp. of Virginia v. Saxon Shoes, Inc.*, 271 Va. 206, 212, 624 S.E.2d 55, 58 (2006); *Tarmac Mid-Atlantic v. Smiley Block Co.*, 250 Va. 161, 166, 458 S.E.2d 462, 466 (1995). Furthermore, Schrantz acknowledged on cross-examination that sophisticated lenders like the ones he mentioned would typically purchase title insurance in these transactions and that the title insurance would provide protection to the lenders in case it turned out that the grantors did not own the property that they said they owned. Tr. (Oct. 15, 2008) at 135-36.

Given the content of the documents that Schrantz located among the land records, it is no wonder that he could only opine so far as what the documents "indicated." Indeed, the "chain of title" documents located by Schrantz fall into three categories: (1) court orders, (2) petitions for the appointment of trustees or to encumber real estate, and (3) recorded instruments carrying out the orders and petitions. Those documents are inoperative to convey property. There is no deed conveying the Property from the "Vestry of Truro parish" to TFC's trustees, and TFC's trustees are not the successors to the "Vestry of Truro parish," the grantee on the Deed.

In short, Schrantz's testimony is unpersuasive, and TFC has not carried its burden.[6]

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[6] The testimony of TFC's other expert witness, Barbara G. Blitz, added nothing. She relied largely on the work and documents supplied her by Schrantz and by TFC's counsel. The best she could say was that the land records "reflect" the TFC trustees to be the owner of the two acre parcel. Tr. (Oct. 15, 2008) at 150. She then said that her title insurance company would be

(footnote continued)

B. The *ex parte* Orders recorded among the land records are not binding on this Court or non-parties to the transactions.

The finality principle expressed in Rule 1:1 does not apply to the *ex parte* Orders that TFC introduced in evidence. *Nikalson v. Ramsey*, 233 Va. 161, 353 S.E.2d 783 (1987). Rule 1:1 does not apply to a new case involving one or more different parties, even if the later case directly implicates issues in the case in which the final order was entered. *See id.* In *Niklason*, creditors (Ramsey and Boardman) sought to reach property that the debtor received as an inheritance. The creditors' suit was initiated more than 21 days after the probate proceedings and a related fiduciary dispute regarding the inherited property were concluded by final order. The trial court found against the debtor on the debtor's contention that he had disclaimed the inheritance. The debtor appealed the disclaimer issue and "raise[d] a second issue: that the trial court's decision in the instant suit modified the final judgment entered in the fiduciary suit and thus the trial court violated Rule 1:1." 233 Va. at 164, 353 S.E.2d at 784. After quoting Rule 1:1, the Supreme Court of Virginia explained that it simply did not apply:

> *Rule 1:1 does not apply in the situation presented in this appeal.* Ramsey and Boardman had nothing whatever to do with the fiduciary dispute, which concerned the validity of Ellowene's will and the division of her estate. Ramsey and Boardman's claims were against Hugh. *The fact that a second, separate lawsuit with different parties and issues directly impacted upon a previous suit does not mean that Rule 1:1 is implicated. That Rule does not address itself to this situation. It concerns further proceedings within the very suit in which a final judgment has been entered.* Therefore, we reject appellant's argument concerning Rule 1:1.

Id. at 164, 353 S.E.2d at 785 (emphases added).

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willing to issue a title policy insuring that the TFC trustees are the title owner of the Property (although it has not actually done so). *Id.* at 150, 163. Of course it would. That is what title insurance companies do; but recognizing there is a risk that they may be wrong, they collect a premium to cover that risk. And Ms. Blitz testified that the cost of defending the TFC trustees' alleged title in litigation would "likely be excluded" from the policy. *Id.* at 150. That is a pretty tepid vote of confidence by Ms. Blitz in TFC's title.

This litigation (both the § 57-9 action and the declaratory judgment action related to TFC) involves a dispute between the Episcopal Church, the Diocese, and TFC regarding the Property. These are new cases, with new parties, not a continuation of the *ex parte* proceedings in which the orders represented by TFC's Exhibits 40, 42, 46, 49, 53, 54, 56, 58 and 59 were entered. Rule 1:1 therefore does not apply. *Id. Cf. Gulfstream Bldg. Assoc., Inc. v. Britt*, 239 Va. 178, 181-82, 387 S.E.2d 488, 490 (1990) ("A non-party ... may maintain a suit to set aside the allegedly damaging judgment if he has an interest which is jeopardized by enforcement of the judgment and the circumstances support a present grant of relief").

The holding in *Niklason* avoids any constitutional problems with the application of Rule 1:1. If *Niklason* did not apply, however, and if Rule 1:1 were applied to cut off the rights of the Episcopal Church and the Diocese without giving them notice or opportunity to be heard, that would violate due process. Where a party has an interest in the subject of a prior action but was not involved in that case, was never served with process, and had no notice or opportunity to be heard, due process does not permit applying Rule 1:1 to bar that party from ever being able to assert its interest. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371, 377-78 (1971):

> Although "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause," as Mr. Justice Jackson wrote for the Court in *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306 (1950), "there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Id.*, at 313.

See also, e.g., McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) ("Procedural due process guarantees that a person shall have reasonable notice and opportunity to be heard before any binding order can be made affecting the person's rights to liberty or property"); *Commission of Fisheries v. Hampton Roads Oyster Packers and Planters Ass'n*, 109 Va. 565, 585, 64 S.E. 1041, 1048 (1909) (same).

C. *Ex parte* orders do not establish title.

It has long been established that *ex parte* orders appointing church trustees are not operative to establish title or ownership of the property in question. *Allen v. Paul*, 65 Va. 332 (1874), holds that an order appointing church trustees

> does not vest in them the legal title to the property in controversy "for the time being," or for a single instant, unless the congregation which they represent are the owners of it. Only the legal title to the land owned by the congregation is vested in them by the terms of the order. The question, whether the property in controversy is owned by the said congregation, is not touched by the order.

Id. at 343-44.[7] The order at issue in *Allen v. Paul* was an *ex parte* order entered pursuant to the church property statutes, just as TFC's Exhibits 38, 40, 42, 46, 49, 53, 54, 56, 58 and 59 are. There were no factual findings, adjudications or parties other than the trustees in any of those proceedings. As Schrantz testified, there were no pleadings other than the petitions and orders. There was no indication of service of process or of any real litigating parties. Tr. (Oct. 15, 2008) at 128. The fact that a court entered an order purporting to vest title to a particular property in church trustees, at the request of those trustees, when there was and is no evidence that the trustees actually hold title to that property, is entitled to no weight at all. The *ex parte* orders requested by the TFC trustees did not vest legal title in them "for a single instant."

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[7] In *Davis v. Mayo*, 82 Va. 97 (1886), a case that TFC has relied on at other points in this litigation, the Supreme Court relied on and quoted from *Allen v. Paul*. In *Davis*, an *ex parte* order changing trustees had been entered. The Supreme Court reiterated and explained that "if Mayo and his associates were not authorized to act for the beneficiaries in the deed of January 12th, 1857, *no title to the property conveyed by that deed was acquired by the order of the circuit court*, made on the 18th of February, 1884." 82 Va. at 103-04 (emphasis added). "The circuit court undoubtedly had jurisdiction under the statute, when properly invoked, to change the trustees, but the effect of its order could extend no further than to confer upon the new trustees the legal title to such property only as those whom they represented were entitled to." *Id.* at 104.

D. The Memorandum of *Lis Pendens* does not establish title.

In his opening statement, counsel for TFC suggested that the Memorandum of *Lis Pendens* filed by the Diocese in February 2007 should be considered an admission that TFC was the record owner of the Property. To the extent it is considered an admission, it should be construed not as a binding admission, but as an evidential one of limited probative value.[8]

A judicial admission is a statement of fact made by a party during the course of litigation for the purpose of withdrawing a fact from the realm of dispute.[9] Judicial admissions and their purpose and effect have been succinctly described:

> A judicial admission is usually treated as absolutely binding, but such admissions go to matters of fact which, otherwise, would require evidentiary proof. They serve a highly useful purpose in dispensing with proof of formal matters and of facts about which there is no real dispute. Once made, the subject matter ought not to be reopened in the absence of a showing of exceptional circumstances, but a court, unquestionably, has the right to relieve a party of his judicial admission if it appears that the admitted fact is clearly untrue and that the party was laboring under a mistake when he made the admission.

New Amsterdam Cas. Co. v. Waller, 323 F.2d 20, 24 (4th Cir. 1963); *see also Jones v. Ford Motor Co.*, 263 Va. 237, 254, 559 S.E.2d 592, 600 (2002) (a judicial admission conclusively

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[8] TFC did not object to the Diocese's introduction of evidence (Dr. Bond's testimony and related exhibits) that show that the statement in the Memorandum of *Lis Pendens* was wrong; therefore, TFC waived any argument that the admission in the Memorandum of *Lis Pendens* is binding and dispositive of the issue.

[9] *See, e.g., State Farm Mut. Auto. Ins. Co. v. Haines*, 250 Va. 71, 75-75, 458 S.E.2d 285, 287-88 (1995) (responses to requests for admission pursuant to Va. Sup. Ct. R. 4:11 are binding and conclusively established facts for pending action); *Hall v. Wal-Mart Stores East, LP*, 447 F.Supp. 2d 604, 608 (W.D. Va. 2006) (admission of counsel during trial of a "clear and unambiguous admission of fact ... is binding upon the party"); *Baughman v. Automated Horizons, Inc.*, 61 Va. Cir. 67, 73 n. 6 (Roanoke City 2003) (statements in pleadings can constitute judicial admissions). But not even all statements during the course of litigation constitute judicial admissions. *See, e.g., Northern Ins. Co. v. Baltimore Business Communications, Inc.*, 68 Fed. Appx. 414, 421, 2003 U.S. App. LEXIS 12318, at *17 (4th Cir. 2003) (legal memoranda, unlike pleadings, generally are not binding judicial admissions); *Hecht v. Am. Bankers Ins. Co.*, 2005 U.S. Dist. LEXIS 25883, at *9 (W.D. Va. Oct. 21, 2005) (same).

establishes a fact, which may not be thereafter qualified, explained or rebutted by other evidence).

In contrast, an extra-judicial admission may be admitted as evidence. *Prince v. Commonwealth*, 228 Va. 610, 613, 324 S.E.2d 660, 662 (1985). But extra-judicial admissions by an attorney – such as the February 2007 Memorandum of *Lis Pendens* at issue here, which was signed and filed by the Diocese's counsel – are not binding on his client.

> While the attorney of a party to a litigation has very broad powers in the management of his case, and his admissions generally bind his client in all matters relating to the progress and trial of the cause, yet to have this effect they must be distinct and formal, and made for the purpose of dispensing with the formal proof of some fact at the trial.

Virginia-Carolina Chemical Co. v. Knight, 106 Va. 674, 678, 56 S.E. 725, 727 (1907). In *Virginia-Carolina*, the "admission" at issue was a letter from defendant's trial counsel to the clerk of the court in the case being litigated. The Supreme Court reversed the judgment for several reasons, one of which was the error in permitting the plaintiff to introduce the letter. Here, the Memoranum of *Lis Pendens* was not filed in any litigation and therefore could not have been and was not "made for the purpose of dispensing with the formal proof of some fact at trial," *id.* Rather, it was made to put the world on notice of this pending property litigation, where ownership of the Property is hotly disputed. If it was error to allow the lawyer's letter into evidence in the actual case being litigated in *Virginia-Carolina*, *a fortiori* it would be error to ascribe any binding effect to a statement of the Diocese's lawyer in the Memorandum of *Lis Pendens*, which was (a) not filed in any litigation and (b) not made for the purpose of dispensing with the formal proof of ownership.

Furthermore, statements of law, which include the ownership issue contested here, likewise are not binding admissions. *Gudnason v. Life Ins. Co.*, 231 Va. 197, 204-05, 343 S.E.2d

54, 58-59 (1986)

Here, the statement made in the Memorandum of *Lis Pendens* is *at best* merely an evidential admission. A notice of *lis pendens* is not a judicial admission because it is not made in litigation. A memorandum of mechanic's lien and its supporting affidavit is a judicial act, *Donohoe Constr. Co., Inc. v. Mount Vernon Assoc.*, 235 Va. 531, 537-39, 369 S.E.2d 857, 860-61 (1988), but a notice of *lis pendens* is not. "[A] notice of *lis pendens* can easily be viewed as an extrajudicial publication involving merely a private act, and not involving any function of the court, thus falling outside the scope of ... judicial proceedings." *Warren v. Bank of Marion*, 618 F. Supp. 317, 325 (W.D. Va. 1985) (holding that a *lis pendens* enjoys a qualified, but not absolute, privilege – unlike a pleading, which is absolutely privileged, *see Donohoe*, 235 Va. at 537-38, 369 S.E.2d at 860-61). The distinction between a *lis pendens* and mechanic's lien documents is reinforced by the Virginia Supreme Court's subsequent explanation of its holding in *Donohoe*: "because filing the mechanic's lien affidavit to perfect the lien is a prerequisite to filing suit to enforce the lien, the filing of the lien and the suit to enforce the lien were inseparable.... Therefore, because the filing of the memorandum of lien affidavit and the suit to enforce the lien constituted a single judicial proceeding, the contents of the affidavit were entitled to an absolute privilege." *Lockheed Info. Mgmt. Sys. Co., Inc. v. Maximus, Inc.*, 259 Va. 92, 102, 524 S.E.2d 420, 425 (2000), citing *Donohoe*, 235 Va. at 539, 369 S.E.2d at 861. *See Donohoe*, 235 Va. at 539, 369 S.E.2d at 861: "For a claimant to obtain the remedy provided by [the mechanic's lien] statute, he must *perfect* his lien and, thereafter, sue to *enforce* it. *The two proceedings are inseparable*." (Final emphasis added.)

A *lis pendens*, on the other hand, is neither inseparable from nor required as a pre-condition to filing suit – or at any time whatever. It serves the limited, remedial purpose of

placing the world on notice that a lawsuit affecting title to a particular piece of real property is pending in a court. It is never required by law. Indeed, at common law, any purchaser *pendente lite* took the property subject to any judgment or decree that might be rendered against the grantor, whether the purchaser had notice of the suit or not. *Vicars v. Sayler*, 111 Va. 307, 309-10, 68 S.E. 988, 989 (1910); 12A Mich. Jur. *Lis Pendens* § 3. The *lis pendens* statute, Va. Code § 8.01-268, limits the reach of the common law rule by providing that "[n]o lis pendens or attachment shall bind or affect a subsequent bona fide purchaser of real or personal estate for valuable consideration and without actual notice of such lis pendens or attachment, until and except from the time a memorandum" describing the action and the property is recorded in the land records and "indexed as required by law." *Id.*, subsection A. *See Vicars v. Sayler*, 111 Va. at 308-10, 68 S.E. at 988-89, describing "the old law the mischief intended to be remedied and the remedy," *id.* at 309, 68 S.E. at 989. The recording of a memorandum of *lis pendens* in the land records, in short, is no part of a judicial proceeding. Therefore it is not a judicial act or a judicial admission.

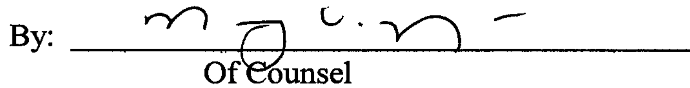
The Memorandum of *Lis Pendens* also is not a judicial admission because it did not dispense with any factual disputes. The statement made in the *Lis Pendens* was not made for the purpose of withdrawing the fact of ownership from the realm of dispute; indeed, it shows precisely the opposite: that ownership of the Property is disputed. The Memorandum of *Lis Pendens* was filed among the land records for the limited purpose of placing third parties on notice of the pending litigation; it does not establish ownership of the Property. *See Green Hill Corp. v. Kim*, 842 F.2d 742, 744 (4th Cir. 1988) (a *lis pendens* "neither creates nor enforces a lien ... [it] served merely as 'notice of the pendency of the suit to any one interested and a warning that he should examine the proceedings therein to ascertain whether the title to the

property was affected or not by such proceedings") (quoting *Harris v. Lipson*, 167 Va. 365, 189 S.E. 349 (1937)). *See also Bray v. Landergren*, 161 Va. 699, 713, 172 S.E. 252, 256-57 (1934) ("A *lis pendens* is not a seizure. It is restrictive only and but serves to warn others that rights which they may acquire will be subject to any valid judgment entered"). Moreover, the Memorandum of *Lis Pendens* is of the same *ex parte* nature as all other documents upon which TFC relies, and it reflects the same title work assumptions and errors that TFC's witnesses made and which are discussed in detail in this brief. It does not reflect any considered or thorough analysis of the facts and the law relating to who the actual owner of the Property is. It should be disregarded for purposes of determining ownership.

CONCLUSION

TFC failed to prove that the Property is held by TFC's trustees in trust for the TFC congregation, as § 57-9(A) requires. The operative and only conveyance of the Property is the Deed, which is to the "Vestry of Truro parish," not TFC. Nor is TFC the successor to the grantee "Vestry of Truro parish." The only historical expert to testify, whose qualifications were unchallenged, explained and opined, based on many historical facts and sources, that the Vestry of Christ Church, Alexandria, not TFC, was the successor to the "Vestry of Truro parish." The U.S. Supreme Court has held likewise. Under clear statutory and case law, TFC's evidence (use, *ex parte* petitions and orders, and recorded instruments of encumbrance and easement) fails to establish ownership. The Court therefore must conclude that the Property is not subject to TFC's § 57-9(A) petition.

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

By: 
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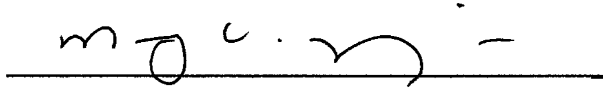

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