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 REPLY BRIEF REGARDING TWO+ ACRES PARCEL

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The Episcopal Church and the Diocese hereby submit their final post-trial brief in support of their motion to strike the evidence of The Falls Church ("TFC") concerning the approximately two acre parcel (the "Property") and respond to the arguments asserted in TFC's Opposition Brief (filed Nov. 6, 2008). We rely upon our prior briefing to address any arguments not directly responded to in this brief.

I. TFC's argument goes beyond the pleadings and the issue before the Court, and TFC's evidence falls short of carrying its burden.

The issue before the Court is whether the Property is held by the trustees of TFC and thus subject to TFC's § 57-9 Petition. The declaratory judgment action, whose purpose is to determine ownership of the Property and to quiet title thereto, has been stayed. By raising adverse possession and laches in its § 57-9 action, TFC improperly attempts to adjudicate title to the Property without proper pleading and trial of competing ownership claims. *See* TEC-Diocese Responsive Brief at 7 n.7, 10-11. Whether it is asserted as a cause of action or as an affirmative defense, *see* TFC Opposition Brief at 12-13, adverse possession must be both pled and proved. TFC has done neither. Whether TFC has acquired title to the Property by adverse possession is not properly before the Court.

Regardless, the evidence submitted by TFC merely proved a fact not in contention – that it has used the Property for many years – and failed to prove what it needed to prove. TFC has used the Property, but it has done so with the permission of, pursuant to the rules of, and in furtherance of a shared mission with the Episcopal Church and the Diocese. In other words, TFC's use has not been adverse. This case is decidedly unlike the residential property cases cited by TFC, in which one person engages in uses that can only be adverse to an unrelated person with whom there is no common mission and no shared adherence to the contractual rules of a

voluntary association. It was only in December 2006, when TFC voted to disaffiliate and sever all ties with the Episcopal Church and the Diocese, that its use of the Property become adverse (or "hostile") to the Diocese or any other constituent part of the Diocese, including the record owner, Christ Church Alexandria. As stated in our Responsive Brief at 12-15, this is not a case where hostility can be presumed but rather a case where permission and cooperation continued for many decades.[1]

Attempting to address controlling case law on the nature and effect of trustee appointment and other such *ex parte* church property orders, TFC essentially abandons most of its case. It attempts to distinguish and avoid that case law by pointing to just three orders, from the 1950s, which it says "specifically characterized the congregation as owning the 1746 parcel." TFC Opposition at 7. Even if we ignore the fact that the Diocese expressly gave permission for at least one of the encumbrances in the 1950s and presume that TFC's "characteriz[ation]" gloss on those orders is correct, a "characterization" is not an adjudication and it is not a finding of fact. If there is one thing that the October 2008 phase of this litigation has demonstrated, it is that courts entering *ex parte* church property orders are at the mercy of what may be incomplete or even false petitions. This is not a European civil law system, in which the court undertakes its own investigation of the matters brought before it. Our system depends on the adversary process

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[1] TFC argues wrongly (at 14-15) that we are "ignor[ing] the critical distinction between the *legal* and the *layperson's* understanding of 'hostile.'" Rather, TFC continues to misapply adverse possession law. While actual, hostile intent is not required, *all* presumptions favor the legal title holder, *see* TEC-Diocese Responsive Brief at 12; and where possession began with permission or there is good reason for the record owner to assume that use is not adverse, it is a "necessity" that the claimant produce evidence "conveying hostile intent or claim of ownership." TEC-Diocese Responsive Brief at 13 (quoting *Mary Moody Northen, Inc. v. Bailey*, 244 Va. 118, 122-23, 418 S.E.2d 882, 885 (1992)). TFC has produced no such evidence prior to 2006 (or, at the very earliest, "about 2005," *see* Tr. (Oct. 15, 2008) at 84-85).

to produce evidence on which a court may make decisions. The Virginia Supreme Court's case law regarding *ex parte* orders, *e.g.*, *Allen v. Paul*, 65 Va. 332, 343-44 (1874), makes sense precisely because the procedural safeguards of that adjudicatory process are absent when a party seeks such an *ex parte* order. (Not to mention the constitutional dangers that would exist if such *ex parte* orders did affect the property rights of parties who have not been given notice or are not before the court.) The same reasoning applies to *ex parte* orders with "characteriz[ations]."[2]

Finally, TFC is correct when it states that Va. Code § 8.01-389(C), which governs the admissibility of judicial and official records, provides that recitals of any fact in a recorded deed or deed of trust conveying any interest in real property are prima facie evidence of that fact. TFC Opposition Brief at 9. TFC overstates the effect of that statute, however. Prima facie evidence is not conclusive evidence. As discussed in our Opening and Responsive Briefs, we have presented historical evidence showing that the recitals were in error, and TFC did not refute or rebut that evidence. We also have presented authorities, both statutory and judicial, that bar the legal conclusion that TFC now attempts to reach by relying on the recitals.[3]

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[2] TFC appears to misunderstand why we pointed out that TFC Exhibits 45 through 49 refer to the one-year Lease and not to the subsequent conveyance. *See* TFC Opposition Brief at 9. As stated in our Opening Brief at 6, those documents demonstrate that such church trustee and property orders are not the product of adjudication designed to test evidence and reach the correct legal conclusion, but are simply entered as a matter of routine.

[3] TFC attempts to broaden the definition of record ownership by comparison to eminent domain, asserting that there is no difference in context and quoting part of Va. Code § 25.1-100. *See* TFC Opposition Brief at 8-9. This context obviously is quite different from eminent domain; but in any event, the definition does not achieve what TFC wants, even in an eminent domain context. The sentence that TFC quoted *in part* states that "'Owner' means any *person who owns property*, *provided* that the person's ownership of the property is of record in the land records of the clerk's office of the circuit court of the county or city where the property is located." Va. Code § 25.1-100 (emphasis added). That definition nowhere broadens what it means to be the record owner to include tax records or *ex parte* orders, and the clause requiring ownership to be

(footnote continued)

II. TFC's attempts to demonstrate inconsistency are meritless.

TFC claims, inaccurately, that the Episcopal Church and the Diocese changed their position as to the ownership of the Property after the decisions rendered on April 3, June 27, and August 19, 2008. TFC Opposition Brief at 2-3 n.1, 12. The Episcopal Church and the Diocese have steadfastly denied that the current Trustees of TFC own or hold legal title to any properties currently possessed by TFC. *See* Diocese's Answer to TFC's 57-9 Petition, ¶ 2; Episcopal Church's Answer to TFC's 57-9 Petition, ¶ 2 (explaining that TFC held title as an *Episcopal* entity and "subject to the Constitutions and Canons of the Episcopal Church and the Diocese"). Moreover, TFC's history of the case is demonstrably wrong. Issues involving title to property were not before the Court until the October 2008 trial. *See* Order (October 26, 2007) (ordering that title evidence not be introduced at the November 2007 trial); Order (July 16, 2008) ¶ 4(B) (identifying the issue ultimately tried in October 2008). And our position was briefed in detail as early as May 9, 2008. *See, e.g.*, The Episcopal Church's and The Diocese's Brief in Opposition to the Supplemental Briefs of the Congregations and the Church of Our Saviour at Oatlands (filed May 9, 2008) at 7-9 (in which we specifically provided a preview of the historical facts to which Dr. Bond ultimately testified, and in which we cited and relied on *Mason v. Muncaster* for the proposition that the Christ Church, Alexandria vestry was and is the successor to the entity named in the Deed). The May 9 brief was filed months before it was known exactly what issues would be tried in October 2008 and obviously well in advance of the Court's Letter Opinions over the summer.

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of record actually indicates that a legal conveyance must appear in the land records (and not the contrary, as TFC implies).

TFC claims that our "reading of § 55-2 cannot be reconciled with [our] assertion that Christ Church-Alexandria is the successor under the 1746 deed," because no recorded deed conveys the property to Christ Church's vestry. TFC Opposition Brief at 2. TFC misunderstands both the argument and the Deed. The original conveyance was to "the Vestry of the said parish of Truro in Fairfax County .... and their Successors." The vestry of Christ Church Alexandria *is* the successor to "the Vestry of the said parish of Truro in Fairfax County," as Dr. Bond's testimony established from historical facts and as the United States Supreme Court held in *Mason v. Muncaster*, 22 U.S. (9 Wheat.) 445 (1824). There is no need for "a deed formally transferring ownership to the Truro Parish vestry's 'successor,'" TFC Opposition Brief at 2, because the successors were grantees on the 1746 Deed. And we have never argued that such a deed is required. We have merely pointed out that the Property is not subject to TFC's § 57-9 Petition because TFC has no deed to its trustees *and* has failed to prove that it is the legal successor to the entity named in the Deed.[4]

TFC asserts that the purpose of TFC Exhibit 69 is "to refute any contention that ECUSA was a possible successor under the 1746 deed." TFC Opposition Brief at 10 n.3. The Episcopal Church does not contend that it is the legal title holder. Therefore, TFC Exhibit 69 is utterly irrelevant. As set forth in the Episcopal Church's July 2008 answers to interrogatories – which

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[4] TFC also attempts to avoid § 55-2 by referring to several ejectment and boundary line cases. *See* TFC Opposition at 4. TFC neglects to acknowledge the limited nature of the issue before the Court and its own failure to bring any kind of action to quiet title to insure that the requirements of § 57-9(A) were met when TFC filed its § 57-9 action. It is inappropriate for TFC now to raise other, unpled claims in this § 57-9 action. *See* TEC-Diocese Responsive Brief at 7 n.7, 10-11.

TFC now attaches to its Opposition but failed to introduce into evidence[5] – we contend simply that the Episcopal Church has succeeded to the denominational interest embodied in the 1746 Deed. TFC continues to disregard the difference between a denomination possessing trust, contractual, or proprietary rights and interests in property, on the one hand, and a denomination being the entity that holds legal title under the operative deed on the other.

TFC continues to press its unsupported claim that a memorandum of *lis pendens* is a "pleading," not a mere notice. *See* TFC Opposition at 11-12. TFC ignores the cases about such memoranda, *see* TEC-Diocese Opening Brief at 23-25, preferring to list several features that somehow supposedly elevate the memorandum to binding status. Those features are present because that is what statutes require. Va. Code § 8.01-268 dictates where memoranda of *lis pendens* must be filed and requires that a memorandum contain the title of the separate, pending action and a description of the property. The memorandum's references to "plaintiff" or "defendant" are with respect to the separate declaratory judgment action, as TFC itself notes but fails to comprehend. *See* TFC Ex. 61; TFC Opposition at 11 (the memorandum "referenced the Diocese's declaratory judgment action"). The "sworn, notarized affidavit" to which TFC refers is the notarization required to record any land record. *See, e.g.*, Va. Code § 55-106.

III. TFC advances arguments that are entirely unconstrained by the facts and the law.

TFC avers (at 1) that Fairfax and Arlington County judges "have examined the facts and determined that TFC's duly appointed trustees are the owners of the two-acre parcel." That is rank speculation at best. TFC has presented absolutely *no evidence* that any of those judges

[5] TFC rested at trial without introducing the July 2008 answers to interrogatories that TFC has now attached to its Opposition as "Exhibit A." They are not in evidence, and it is improper for TFC to rely on them now.

conducted either an adversarial hearing or an inquisitorial investigation.[6]

TFC's Opposition continues its complete distortion of both the U.S. Supreme Court and lower court opinions in *Mason v. Muncaster*. We have already discussed those decisions in depth in our Opening Brief (at 12-13) and Responsive Brief (at 8-10). We note only the following additional comments. TFC's continued advocacy of its frivolous "Local Law" assertions about the Supreme Court decision shows that TFC has failed to devote even the minimal research effort and time needed to debunk those assertions. *See* TEC-Diocese Responsive Brief at 8. Regarding the lower court opinion, TFC takes selected language completely out of context. The lower court held that the vestry was not responsible for maintaining a church building where there was no congregation to use it. *See* TEC-Diocese Responsive Brief at 10. With respect to the "property to which they had no right" comment, TFC misreads it entirely. As with the rest of that paragraph, that language recites only the "hypothesis of the complainant's counsel," the view that the litigant opposing the Christ Church wardens took of Christ Church's actions and rights, not the court's opinion. 16 Fed. Cas. at 1051-52. It is argument, not a finding or holding. Both the lower court and Supreme Court opinions roundly rejected that argument, finding that the Christ Church vestry was the successor to the Fairfax Parish vestry – without qualification and with respect to all of the property of the Church within that parish. *See* TEC-Diocese Responsive Brief at 8-10.

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[6] *See also* TFC Opposition Brief at 6 ("one cannot presume that the courts signed the orders without examining the assertion of legal title by the TFC Trustees"). To the contrary, one can so presume, because courts do not conduct the equivalent of quiet title proceedings every time an *ex parte* petition is filed. Notably, TFC is the party with the burden of proof in this case; and it is asking the Court to "presume," in the absence of any supporting evidence whatever, that the courts *did* "examin[e] the assertion of legal title by the TFC Trustees."

TFC also suggests (at 3) that Va. Code § 55-2 does not even apply to church property, despite there being no qualification in the statute or case law that would restrict the applicability of the statute in the manner suggested by TFC. TFC also asserts that there is nothing in Va. Code §§ 57-8, 57-7.1, 57-16 and 57-16.1 that "indicates that ownership is contingent on adherence to § 55-2," TFC Opposition Brief at 3. That makes far too much of the mere absence of a cross-reference. It fails to show any inconsistency between Title 57 Chapter 2 and § 55-2. It also overlooks § 57-17, which explicitly provides a mechanism for quieting title to church property held in a variant of adverse possession and where there is no deed of record.[7] The clear import of that statute is a policy preference for recorded deeds for church property in Virginia, consistent with all other applicable law. The only way that TFC would have satisfied § 55-2 is if it had proved that it was the successor to the Vestry of Truro Parish under the 1746 deed. For the reasons stated in our Opening and Responsive Brief, TFC has failed its burden of proof and the motion to strike must be granted.

CONCLUSION

TFC has not satisfied its burden of proving that its trustees held legal title to the Property at the time of the vote to disaffiliate such that § 57-9 applies. There is no conveyance to its trustees, and TFC is not the successor to the entity named in the Deed – as shown both by the unrebutted historical evidence and by the decision of the United States Supreme Court in *Mason v. Muncaster*. TFC's use evidence cannot be transmuted into record ownership, and that use

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[7] Because there is a deed of record for the Property, § 57-17 is inapplicable here. St. Paul's' situation, where an early 1800s deed was lost, illustrates the principle. *See* Ex. B to Stipulation Between St. Paul's Church and the Diocese and the Episcopal Church Regarding Property Subject to § 57-9 Petition (dated Sept. 9, 2008) (a 1993 deed pursuant to § 57-17). TFC has never attempted to quiet title pursuant to the provisions of § 57-17.

evidence would not suffice to establish adverse possession even if TFC had brought and pled such a claim properly (which it has never done). Because TFC has failed to carry its burden of proof, the Court should hold that the Property is not subject to TFC's § 57-9 Petition.

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