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 FALLS CHURCH'S
POST-TRIAL REPLY BRIEF CONCERNING THE 1746 PARCEL

Pursuant to the Court's direction at the October 20, 2008, Hearing, the Falls Church, by its counsel, hereby files this post-trial reply brief concerning the 1746 parcel.

I. The Falls Church's vestry is the successor to the vestry of Truro Parish for purposes of the two-acre parcel conveyed by the 1746 deed.

ECUSA and the Diocese concede (as they must) that, after 1836, TFC "elected its own vestry" and "took over the management of its own affairs." 10/20 Tr. 106 (Bond); Response Br. 6. Moreover, their own expert admitted that TFC's vestry "operated independently" from Christ Church's. 10/20 Tr. 107. Nevertheless, they insist that these post-1824 events do not detract from the allegedly "unrebutted testimony" that Christ Church-Alexandria's vestry succeeded Truro Parish's vestry under the 1746 deed. Br. 5-6. This view ignores both Professor Bond's testimony and the Diocese's own records. It also rests on the erroneous premise that Canon XII, "For the Division of Parishes," was used to create a new type of "church" with a new type of "vestry"—one responsible for managing all affairs of the church except its property.

1. The Church argues that "TFC did *not* become part of the Diocese as a new parish," but only "as a 'separate church.'" Br. 6. But the fact that the 1836 Diocesan Journal described TFC as a "separate and distinct Church from the Parish Church of Fairfax Parish" (TEC-DVA Exh. 75 at 13) does not preclude a finding that TFC was *also* a separate and distinct "parish."

First, Professor Bond testified that "you could not have two vestries in the same parish." 10/20 Tr. 107:15-108:3. By his own standard, therefore, when TFC was given its own vestry, it necessarily became a "distinct parish." Indeed, the ECUSA-Diocese position would require the Court to conclude that *two* vestries governed TFC after 1836: one "über"-vestry with title to the property and the ability to appoint trustees (Christ Church-Alexandria's vestry), and one "unter"-vestry with responsibility to turn out the lights (TFC's vestry). But there is no evidence that Christ Church-Alexandria did *anything*, before or after 1836, to assert ownership of the property.

Second, whether or not Professor Bond admitted that TFC became a "distinct parish" in 1836, that is the unavoidable conclusion in light of Canon XII, "For the Division of Parishes,"

pursuant to which TFC was admitted to the Diocese. TEC-DVA Exh. 116 at 12-13; TEC-DVA Exh. 75 at 13. ECUSA and the Diocese avoid quoting Canon XII, which states that "it may be for the interest of the Church, and for the convenience and quiet of the people, to permit the division of some of the Parishes." ECUSA-DVA Exh. 116 at 12-13. Canon XII permits an "application for a division of a Parish" when certain requirements, such as electing a vestry, are met. *Id.* at 13. Qualified applicants are "received as a distinct *Parish*." *Id.* (emphasis added).

Third, Professor Bond acknowledged that "once St. Paul elected its own vestry, it was fully independent of Christ Church" and "had full control and ownership of its property." *See* 10/20 Tr. 102:17-103:9. In light of his admission that the TFC vestry "operated independently" and "[t]ook over the management of its own affairs" (Tr. 106-07), his position that TFC did not (like St. Paul's) have full ownership of *its* property is not credible, particularly absent any documentation to support the distinction he attempted to draw between St. Paul's and TFC.[1]

2. ECUSA and the Diocese also say that TFC cannot be a "successor" to the vestry of Fairfax (or Truro) Parish because it "did not become part of the Diocese as a continuation, successor, or member of Fairfax parish," but "as a new institution." Br. 6. n.5. But this would mean that Fairfax Parish never became the "successor" of Truro Parish either. Prior to 1765, Fairfax Parish did not exist: it was a new institution, and nothing in the act that created it describes it as a "successor" of Truro Parish. TEC-DVA Exh. 66. The reason that the Fairfax Parish vestry was viewed as Truro Parish's successor, of course, is that it took over the Truro Parish vestry's

[1] The only other evidence that ECUSA and the Diocese cite to support their "church-not-a-parish" theory is the TFC parochial report in the 1837 Diocesan Journal (TEC-DVA Exh. 76 at 26), which they say fails to show "a connection to Fairfax Parish or that a new parish had formed." Br. 6 n.5. But this report's *silence* as to whether TFC was a "parish" provides no support for the ECUSA-Diocese position. Moreover, TFC's parochial report describes "the venerable edifice" that the congregation was then repairing as "*belonging to this congregation.*" TEC-DVA Exh. 76 at 26. No one, including Christ Church-Alexandria, suggested otherwise—which is unsurprising given its disclaimer of responsibility for the property. 10/20 Tr. 99:18-100:4.

duties for purposes of certain property within the new territory. Under the same rationale, after 1836 the elected vestry of TFC became the successor to Truro and Fairfax Parish. *See Black's Law Dictionary* (7th ed. 1999) (a "successor" is "[a] person who succeeds to the office, rights, responsibilities, or place of another; one who replaces or follows another").

3. ECUSA and the Diocese dismiss our analogy between the division of Truro Parish and the Diocese's recognition of TFC under Canon XII as "a distinct parish"—the same phrase that appears in the act creating Fairfax Parish. TEC-DVA Exh. 66. We have acknowledged that the powers of vestries after disestablishment were not identical to those of colonial vestries. Opening Br. 14. On the other hand, while the TFC vestry could not collect taxes, its responsibility for routine operation, maintenance, and governance of the church otherwise paralleled that of the Truro Parish vestry prior to 1765. *See id.* Moreover, if the existence of any modest disparity in powers between pre- and post-1776 vestries were dispositive, that would equally undercut the claim that Christ Church-Alexandria's vestry is the "successor" under the 1746 deed.

4. ECUSA's and the Diocese's discussion of *Mason v. Muncaster*, 22 U.S. 445 (1824), fares no better. They say (at 8) that "nothing in *Mason*" supports our position that the case "concerns only the parish's glebe lands" or that "the vestry of Fairfax Parish had a different successor for purposes of the glebe lands there (the Christ Church-Alexandria vestry) than it had for purposes of the two acre parcel here (the TFC vestry)." But as we have shown (Opp. Br. 5), the Supreme Court in *Mason* determined the successor entity only for "the purposes of the original bill" (22 U.S. at 456), which pertained only to glebes in Alexandria. Moreover, the circuit court's decision in *Mason* (affirmed on appeal) expressly stated that "the [Christ Church-Alexandria] vestry was not responsible" for TFC's property—"*property to which they had no right.*" *Mason v. Muncaster*, 16 F. Cas. 1048, 1050, 1052 (C.C.D.C. 1821) (emphasis added).

ECUSA and the Diocese assert that the Court in *Mason* "was fully aware of The Falls Church and the fact that Fairfax Parish spanned part of Virginia as well as part of the District of Columbia." Br. 9. But that awareness cannot change the Court's jurisdiction, which did not extend to Virginia. Moreover, although the Court was "aware of The Falls Church," its decision was premised on the existence of only one congregation (Christ Church-Alexandria) and vestry (Christ Church-Alexandria's) in the territory of Fairfax Parish. As explained in our opening brief (at 17-18), everything in the opinion suggests that if any other "distinct Episcopal Church" with its own vestry had been formed, it would have had the right to own and control its property. 22 U.S. at 458, 462. Thus, *Mason*'s reasoning confirms that, when TFC became a "separate and distinct church," it became the successor to the vestry of Truro Parish under the 1746 deed.[2]

In summary, it is undisputed that the only vestry that has governed the two-acre parcel since at least 1836 is that of The Falls Church. It is also undisputed that the TFC vestry has operated with full independence from any other vestry. Whether the TFC vestry immediately succeeded the vestry of Christ Church-Alexandria (which would be odd, given that Christ Church disclaimed responsibility for the property), or the vestry of Fairfax Parish (which had met at TFC regularly until the late 1700s), is of no moment. Only the TFC vestry has assumed the responsibilities of the Truro and Fairfax Parish vestries that preceded it, and only the TFC vestry appointed trustees to hold the two-acre parcel. Accordingly, only the TFC vestry can legitimately

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[2] *Mason* presented no federal issue, and Congress first gave the lower federal courts general federal question jurisdiction in 1875. *See* Act of March 3, 1875, § 1, 18 Stat. 470. But ECUSA and the Diocese misinterpret our observation that the Court in *Mason* was applying "Local Law" to mean that the Supreme Court applied "District of Columbia law." Response Br. 8. Our point was that the Supreme Court was acting in its capacity as the highest appellate court in D.C.—and thus that the decision has no more precedential weight in Virginia than would a D.C. Court of Appeals decision applying Virginia law, which explains why Virginia courts ignored it. *See Selden v. Overseers of the Poor of Loudoun*, 38 Va. (11 Leigh) 127 (Va. 1840) (reaffirming *Turpin v. Locket*, 6 Call 103 (Va. 1804), without citing *Mason* or *Terrett*)).

claim to be the "successor" to Truro Parish under the 1746 deed.[3]

II. Successors for church property can be named by court order rather than by deed.

Unable to attack the legitimacy of the previous orders entered by this Court and judges of Arlington County, ECUSA and the Diocese have taken the position that the orders are legally irrelevant because: (1) under Va. Code § 55-2, real property can only be conveyed by deed; and (2) orders appointing congregational trustees do not convey title to property not owned by the congregation. Br. 1-2. Neither proposition, however, is relevant here.

While real property is conveyed from one unrelated party to another by deed, ECUSA and the Diocese have yet to cite a case stating that, in the case of church property, the successors to the *original* grantees must be designated in a *subsequent* deed. Section § 57-8 contemplates that ownership of such property will transfer from one set of trustees to another by court orders.

Indeed, ECUSA's and the Diocese's own authority underscores that deeds are not necessary for ownership to pass from one successor to another. In *Allen v. Paul*, 65 Va. 332 (1874), a property dispute between two congregations in Petersburg, the original deeds were to trustees of the Petersburg Methodist Episcopal Church and their successors. But while the plaintiffs in *Al-*

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[3] ECUSA and the Diocese suggest that we have taken inconsistent positions in arguing that the actions of the Diocese in 1836 are relevant to who constitutes a "successor" under the 1746 deed, while arguing at an earlier stage that their canons were "unenforceable" and that only deeds could convey property in 19th century Virginia. Br. 4-5 & n.4. There is no inconsistency: we did not argue that a successor could only be named by deed, and the legal significance of the canons depends on whether they are contrary to civil law. Moreover, TFC is not contending here that the canons operated to transfer legal title of the 1746 parcel from Christ Church to TFC. Canon XII instead reflected the recognition of TFC as an autonomous local "parish" or "church" independent of either Christ Church or Fairfax Parish. Having that autonomy, TFC could petition the courts for the appointment of trustees once Virginia codified the rights of local congregations to hold property in 1842. As the Diocese recognized in a later canon, under Virginia law those trustees held the property for the benefit of the local congregation free of any claim by the Diocese or other congregations. *See* TEC-DVA Exh. 119 at 136 (1850 Canon XVII, Respecting the Property of the Church ("[W]hen there are trustees under the act of the legislature, passed Feb. 3rd, 1842, authorized to hold real property shall not be subject to the provisions of this canon."). The TFC trustees thus became the successors under the 1746 deed.

len did not receive title by deed, the Court nonetheless viewed them as the successors of the original grantees. 1874 WL 5587, at *2. The Court accepted the plaintiffs' standing to pursue an unlawful detainer action even though they were identified as trustees of the local Methodist Episcopal Church *South*. 65 Va. at 340-41, 343. In other words, the congregation's change of denominational affiliation did not affect the position of the congregation's trustees as successors under the deeds or undermine their standing to pursue the congregation's rights.[4]

III. ECUSA's and the Diocese cannot avoid the ramifications of their admissions that the trustees of The Falls Church own the two-acre parcel.

Since the filing of TFC's § 57-9 petition, ECUSA and the Diocese have admitted at least six times that title to the 1746 parcel is held by TFC's trustees. They held fast to that view until this summer, when the Court rejected their claim to beneficial ownership. At a minimum, "[t]he admission of a party during the course of a judicial proceeding, relevant to an issue, is of the highest evidential value." *West v. Anderson*, 186 Va. 554, 564 (1947). But as they note, admissions in "responses to requests for admissions" or "pleadings" are "binding." Opening Br. 21 n.9.

1. *The Diocese's Lis Pendens*. The Diocese dismisses the admission in its lis pendens filing on the ground that we have mischaracterized the filing as a "action." Br. 2. But however the filing is *labeled*, it reflects the Diocese's considered position as to who owned the property. That position was informed by a lengthy relationship with TFC, was supported by a sworn affidavit of the Diocese's counsel, and precisely described the two-acre parcel and its "Record

[4] ECUSA and the Diocese cite *Allen* for a different proposition—namely, that court appointment of trustees does not convey title to specific parcels. Br. 1. But the order at issue there did not specifically identify the property, much less characterize the congregation as its owner. By contrast, the orders issued by this Court do contain such characterizations. *See* TFC Ex. 40 (referencing TFC's desire to encumber "four certain tracts of land belonging to the said church" including the 1746 parcel); TFC Ex. 46 (referring to "the land acquired by said Church by deeds recorded in Liber B, No. 1., page 248"). Moreover, those orders were lodged in the land records—providing notice to the world—and went unchallenged for more than 50 years.

Owner" as "Trustees of The Falls Church (Episcopal)." TFC Exh. 61. It should be binding.

2. *ECUSA's response to TFC's request for admission and ECUSA's Answer to TFC's § 57-9 Petition.* ECUSA acknowledges that it *twice* "'admi[tted] and aver[red] that trustees for The Falls Church hold legal title to the real property currently possessed by The Falls Church." Br. 4 n.2. ECUSA says it "offered an explanation that plainly limits the admission: that TFC held title as an Episcopal entity and 'subject to the Constitutions and Canons of the Episcopal Church and the Diocese.'" *Id.* But as the Court has recognized, the Church's canons are subject to § 57-9. And in any event, the canons do not purport to affect who holds *legal title*—they purport only to make ECUSA and the Diocese beneficial owners of congregational property—which is what the admissions address. These admissions too, therefore, are binding.

3. *The Diocese's response to TFC's request for admission.* In response to TFC's request for an admission that "Falls Church real property is currently titled in the names of Trustees for Falls Church" (TFC Exh. 9 at 3), the Diocese stated in part: "The deeds grant the subject property to trustees for the Falls Church" (TFC Exh. 10 at 5). Now, however, the Diocese says this is "not binding" because it began its response with the word "Denied" and "[t]he placement of the explanation does not and cannot transform a denial into an admission." Br. 4 & n.3.

While the *placement* of the explanation may be irrelevant, it does not mitigate the legal impact of the statement. Indeed, a specific admission is *more* compelling when joined with a general denial. Va. S. Ct. Rule 4:11(a) ("when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder.").[5]

[5] The Diocese also states that the "explanation" of its denial "has since been proven incorrect (and later discovery responses provide supplemental information)." Br. 4. But whether the explanation is "incorrect" is contested, and the Diocese has never supplemented its response.

IV. Adverse possession and laches apply here both procedurally and substantively.

A. TFC has title to the 1746 parcel by adverse possession.

ECUSA and the Diocese now say "TFC knew that § 57-9(A) required that its trustees hold a valid title" for 141 years and should have filed an "adverse possession action." Br. 10-11. What TFC did not know, however, was that title would be contested. As shown above, ECUSA and the Diocese repeatedly admitted that TFC held title and never amended their discovery responses to say anything else.

Moreover, as the party in possession whose ownership was reflected in court orders and the land records, TFC did not need to file an adverse possession suit. It was only when ECUSA and the Diocese began attacking the legitimacy of the orders confirming title that it became appropriate to advance an alternate theory. Even then, one searches the Church's briefs and discovery responses in vain for any suggestion that Va. Code § 55-2 required a conveyance directly to TFC's trustees. Section 55-2 was first discussed in the Church's opening statement on October 15, 2008. TFC cannot be faulted for raising an appropriate defense to a belated claim.

On the merits, the Church is mistaken in asserting that TFC has not established the requisite "hostility" because TFC was a "constituent part" of the Diocese and supposedly entered the land in 1836 with "permission." Br. 12, 13. First, whether TFC's possession was hostile to the *Diocese* is irrelevant, since the Diocese has disclaimed title. TFC Opp. Br. 13-14. Second, the Court has ruled that the Diocese could not own property in pre-1867 Virginia, and the evidence

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ECUSA and the Diocese now disclaim the admissions in their own complaints on the ground that they are "*not* pleadings in TFC's § 57-9 action" and "are explicitly 'on information and belief.'" Br. 3. The actions have been consolidated, however, and the phrase "on information and belief" appears to qualify whether the TFC trustees "*continue* to hold legal title" to the property at issue, not whether they held title as of the votes. ECUSA Compl. ¶ 23 (emphasis added); Diocese Compl. ¶ 5 (emphasis added). In any event, by the time of the filing of the Diocese's lis pendens, ECUSA's answer to the §57-9 petition, and both parties' responses to TFC's requests for admission, neither party had such qualms.

here confirms that it could not "hold[] property of the smallest amount." TFC Exh. 69. The Diocese does not explain how it granted permission to occupy a parcel it could not own.[6]

As to Christ Church-Alexandria, ECUSA and the Diocese offer no reply to our evidence that TFC's vestry had to grant Christ Church-Alexandria permission to use the property, and that Christ Church never used it. TFC Opp. Br. 15. That is unsurprising, since Professor Bond's admitted that Christ Church-Alexandria disclaimed responsibility for the property. 10/20 Tr. 100. In sum, TFC has established hostility, and no other element of adverse possession is disputed.[7]

B. The Christ Church-Alexandria claim is barred by laches.

For 184 years, Christ Church-Alexandria has done nothing to assert rights in the two-acre parcel. Indeed, it disclaimed responsibility for that property. Meantime, TFC has renovated and added on to the property, such that all of TFC's buildings are now one integrated unit. TFC has encumbered the parcel, granted easements over it, and consolidated it with other land—with the courts' permission at every step. The orders approving these actions have been recorded in the land records, providing notice to the world. If there is ever a case for applying laches, this is it.

ECUSA and the Diocese say that "laches ordinarily cannot be set up as a bar to legal title to land" (Br. 14). But even if TFC lacked title (and it does not), this is hardly an "ordinary" case. If delays of 13 years (*Puckett*) and 52 years (*Camp Manufacturing*) were sufficient, a 184-year delay is more than enough. They also say that, because "equity follows the law," then "if a legal demand is not barred by [the] statute [of limitations], neither is it barred in equity." Br. 14. But

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[6] This, among other things, distinguishes the property owner in *Mary Moody Northern*, 244 Va. 118 (1992), which unquestionably held title.

[7] The Church appears to suggest that TFC cannot establish adverse possession because it failed to show "valid title" "by deed" under § 57-9. Br. 10-11. But "valid title" is not a prerequisite to establishing adverse possession. *Marion Investment Company v. Virginia Lincoln Furniture Corp.*, 171 Va. 170, 183 (1938) (it is "immaterial" "whether an adversary possession under a claim of title be under a good or a bad, a legal or an equitable title").

this is exactly backwards: Courts will not apply laches *before* determining that a claim is barred by the statute of limitations, but that does not mean that laches will not kick in if the statute does not apply. If it did, *Puckett* would have come out the other way, because a 13-year delay could not have satisfied the statute. As the Court there put it, "[t]he rights of the parties depend, not on the technicalities of title, but on the application of basic principles of equity." 195 Va. at 929.

Finally, ECUSA and the Diocese assert that there was no "adversity" between TFC and Christ Church because those churches "were part of the same ecclesiastical structure." Br. 15. They attempt to distinguish *Puckett*, but Christ Church-Alexandria and TFC stood in much the same position as the two churches there: Christ Church could not use TFC's property without permission (Tr. 83:6-84:19 (Deiss)). Indeed, TFC has a stronger argument than the defending church in *Puckett*, because the two churches there had entered a contract with each other for sale of the property, which one church later sought to undo. TFC and Christ Church never had any contract; they were legal strangers. If Christ Church could assert ownership of TFC here, each congregation in the Diocese would have to get every other congregation's permission before selling its property. That is plainly untenable.

Christ Church's silence for 184 years while this Court and the courts of Arlington County declared that TFC's trustees own the 1746 parcel establishes Christ Church's "acquiescence in [TFC's] adverse claim." *Camp Mfg.*, 129 Va. at 373. Laches therefore applies. *Cf. Klackner v. Willis*, 15 Va. Cir. 67, 71 (Spottsylvania 1988) (declining to apply laches where the party "has not improved . . . the land" and "has not possessed the land openly and notoriously").[8]

[8] Nor is this using laches "as a sword." Br. 14. Now presented with a new legal theory of relief, TFC has validly raised laches "as a shield, an equitable defense." *Klackner*, 15 Va. Cir. at 71.

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Respectfully submitted,

WINSTON & STRAWN

By: /s/ Gordon A. Coffee

Gordon A. Coffee (VSB #25808)
Gene C. Schaerr
Steffen N. Johnson
Andrew C. Nichols (VSB #66679)
1700 K Street, N.W.
Washington, DC 20006-3817
(202) 282-5000 (telephone)
(202) 282-5100 (facsimile)

SEMMES, BOWEN & SEMMES, P.C.

By: /s/ James A. Johnson

James A. Johnson
Paul N. Farquharson
Scott H. Phillips
25 South Charles Street
Suite 1400
Baltimore, Maryland 21201
(410) 539-5040 (telephone)
(410) 539-5223 (facsimile

GAMMON & GRANGE, P.C.

By: /s/ Scott J. Ward

Scott J. Ward (VSB #37758)
Timothy R. Obitts (VSB #42370)
Dawn W. Sikorski (VSB #77315)
8280 Greensboro Drive, Seventh Floor
McLean, VA 22102
703-761-5000 (telephone)
703-761-5023 (facsimile)

Counsel for The Falls Church

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of November, 2008, a copy of the foregoing The Falls Church's Post-Trial Reply Brief Concerning the 1746 Parcel was delivered by first class mail and sent by electronic mail, to:

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

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

Edward H. Grove, III, Esquire
BRAULT PALMER GROVE
WHITE & STEINHILBER, LLP
3554 Chain Bridge Road, Suite 400
Fairfax, VA 22030

Heather H. Anderson, Esquire
Adam M. Chud, Esquire
Soyong Cho, Esquire
GOODWIN PROCTER, LLP
901 New York Ave., N.W.
Washington, D.C. 20001

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

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

With a courtesy copy by electronic mail and hand-delivered to:

Sara G. Silverman
Law Clerk to the Honorable Randy I. Bellows
4110 Chain Bridge Road
Fifth Floor Judges' Chambers
Fairfax, VA 22030