

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY

CALVARY EPISCOPAL CHURCH,  
PITTSBURGH, PENNSYLVANIA, a  
Pennsylvania Nonprofit Church, et al.

CIVIL DIVISION

No. GD-03-020941

Plaintiffs,

v.

THE RIGHT REVEREND ROBERT  
WILLIAM DUNCAN, Bishop of The  
Episcopal Diocese of Pittsburgh, et al.,

Defendants,

and

THE EPISCOPAL CHURCH, an  
unincorporated association, by THE  
RIGHT REVEREND JOHN C.  
BUCHANAN, as Trustee *Ad Litem*,  
  
Plaintiff-in-Intervention.

**DEFENDANTS' POST-HEARING BRIEF  
IN OPPOSITION TO THE MOVING  
PARTIES' CLAIM THAT THE DIOCESE  
VIOLATED THE STIPULATION AND  
ORDER BY CONTINUING TO HOLD  
ITS PROPERTY AFTER VALIDLY  
WITHDRAWING FROM THE  
EPISCOPAL CHURCH**

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## I. INTRODUCTION

The issue before the Court is whether the Diocese violated the written agreement between the parties by continuing to hold its property after validly withdrawing from The Episcopal Church (“TEC”). This is the only issue before the Court. Whether or not the agreement would be violated in the absence of valid withdrawal is irrelevant to the issue that the parties agreed to submit to the Court. Plaintiffs and those allied with Plaintiffs (“Plaintiffs” or “the Moving Parties”) have the burden of proof to establish that the agreement expressly contemplated withdrawal by the Diocese and that the agreement requires the Diocese to transfer its property to another entity after withdrawal. *East Texas Motor Freight Diamond Div. v. Lloyd*, 484 A.2d 797, 801 (Pa. Super. Ct. 1984) (“The burden of proof in a contract action is upon the party alleging breach or default”) (citation omitted).

Focusing upon the actual words chosen by the parties, as is required by Pennsylvania law, it is clear and unambiguous that valid withdrawal is not included in the agreement:

a) The written agreement between the parties contains no reference to withdrawal of “the Episcopal Diocese of Pittsburgh of the Episcopal Church of the United States of America” from “the Episcopal Church of the United States of America”; and

b) The words of this agreement show that the parties knew how to refer to withdrawal. The written agreement between the parties contains three references to withdrawal from an organization by other entities – but no reference to withdrawal by the Diocese from TEC.

That resolves the issue before the Court.

Moreover, the “interpretation” offered by the Moving Parties – that the Diocese must “transfer” (forfeit) its property to another entity after valid withdrawal – contradicts the actual

words of the agreement. The written agreement between the parties requires the Diocese to “continue” to hold and administer its property. “Continue” is defined in the dictionary as “uninterrupted.” The use of the words “continue” and to “[hold]” property is inconsistent with any duty of the Diocese to transfer property.

Plaintiffs only response to these clear and unambiguous words of the agreement is to rely on the “definition” of Diocese contained in the agreement. The Moving Parties argue that this definition imposes an obligation on the Diocese that prohibits the Diocese from continuing to hold and administer Diocesan property after withdrawing from TEC. The Moving Parties would have this Court rule that the definition of the term “Diocese” in the agreement requires that if the Diocese withdraws from TEC, it must thereafter transfer all Diocesan property to a diocese affiliated with TEC. In simple terms, the Court would have to interpret the agreement as requiring the transfer of Diocesan property from one diocese to another diocese. The agreement contains no reference to any such transfer, nor does it contemplate the existence of two separate dioceses.

Moreover, Plaintiffs agreed to assume the validity of withdrawal. Using both the “definition” and this agreement, that means that the parties agreed that “the Episcopal Diocese of Pittsburgh of the Episcopal Church of the United States of America” validly withdrew from “the Episcopal Church of the United States of America” – in other words, that the Pittsburgh TEC diocese withdrew from TEC. In their Pre-Hearing Brief (p. 11), the Moving Parties admit that any Pittsburgh TEC diocese created after the withdrawal of the original TEC diocese had to be a new TEC diocese. This is simply a matter of common sense. Prior to withdrawal, there was only one Pittsburgh TEC diocese. That Diocese withdrew from TEC. If there is to be another TEC diocese, it must be created after the withdrawal of the original TEC Diocese. It is

absolutely clear that the written agreement between the parties contains no reference to the creation of another TEC diocese. Even the parol/extrinsic evidence submitted by the Moving Parties confirms that the parties never contemplated the creation of another TEC Diocese.

The problems for Plaintiffs are increased by the intervention of those who claim to speak for TEC. TEC is now a Moving Party.<sup>1</sup> According to the TEC Complaint, a new TEC diocese can only be created by action of the TEC General Convention. (*See* TEC Complaint, ¶ 26) (May 27, 2009 Transcript (“May Transcript”), pp. 141-142). There is no evidence that this has occurred, and the record is closed. Yet, according to Plaintiffs’ “interpretation” of Paragraph 1, the entity to which the property is to be immediately transferred must be a “constituent part of The Episcopal Church.” (Moving Parties Pre-Hearing Brief, p. 11).

Paragraph 1 of the agreement contains eight lines of text. The Moving Parties have now submitted 118 requested Findings of Fact; presented three hours of testimony and introduced 58 exhibits in an effort to re-interpret this paragraph. However, there is not one word of explanation as to how the agreement applies when the “Episcopal Diocese of Pittsburgh of the Episcopal Church of the United States of America” withdraws from TEC and a new TEC diocese is created. In fact, the Moving Parties now refuse to accept the fact they agreed to assume - valid withdrawal from TEC. Their Brief refers to an “attempted” withdrawal (pp. 7, 13) by a “group” (p. 4) that only resulted in a “purported” withdrawal (pp. 3, 4, 5, 6, 7, 14, 15). Moreover, the Moving Parties now rely on “evidence” that the Court had ruled was irrelevant and not part of these proceedings: the structure of TEC, canon law of TEC, and TEC’s claim to property.

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<sup>1</sup> *See* Moving Parties Proposed Findings of Fact and Conclusions of Law and Proposed Order (the “Proposed Findings/Conclusions”) (listing TEC as one of the parties submitting the document).

Paragraph 1 does not contemplate valid withdrawal and does not impose a duty to transfer property after withdrawal.

Defendants recognize that the Moving Parties have asserted claims that the withdrawal was invalid, claims that there is no “new” TEC Diocese, and claims that TEC has trust interests in Diocesan property. As previously stated by the Court, the TEC litigation is the proper forum to resolve those claims to Diocesan property.

## **II. STATEMENT OF FACTS WITH RESPECT TO THIS LITIGATION.**

**This Proceeding Arises Out Of A Petition And Supplement Alleging Violation Of A Written Agreement Between The Parties In Settlement Of Private Litigation. This Is Not A Trust Proceeding In Which A Court May Change Or Modify A Trust. The Court Has No Authority To Change Or Modify The Agreement.**

Plaintiffs and Defendants settled the underlying private litigation between the parties by executing a written agreement which was “so ordered” by the Court.<sup>2</sup> Plaintiffs instituted the present litigation by filing a Petition, and later a Supplement to the Petition, alleging that Defendants had violated the written agreement. Now, after the hearing, Plaintiffs and the other Moving Parties apparently recognize that the actual words of the agreement will not support their “interpretation.” Accordingly, the Moving Parties now, for the first time, attempt to convert a Petition alleging breach of a written agreement between the parties into a trust proceeding in which the Moving Parties ask the Court to appoint a “trustee” for a “charitable trust,” alleging that a trust will not fail for want of a trustee. (See Moving Parties Proposed Findings/Conclusions, ¶ 124).

This is not a proceeding to modify the terms of a trust. This is not a proceeding in which the parties have had their “day in Court” over whether Pennsylvania nonprofit law and/or Pennsylvania church property law precludes the Diocese from retaining its property after withdrawal from The Episcopal Church. As previously stated by the Court, those claims are reserved for the proceedings related to the TEC Complaint. As agreed by the parties, this is a proceeding on a Petition in which the Moving Parties have the burden of proof to demonstrate that the Diocese violated the written agreement between the parties by continuing to hold its property after validly withdrawing from TEC.

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<sup>2</sup> “A consent decree is not a legal determination by the court of the matters in controversy but is merely an agreement between the parties - a contract binding the parties thereto to the terms thereof[.]” *Universal Builders Supply, Inc. v. Shaler Highlands Corp.*, 175 A.2d 58, 61 (Pa. 1961) (citation omitted).

Moreover, unlike a trust proceeding, the Court has no authority to change or modify the written agreement between the parties. The Court may not rewrite the language agreed to by the parties. *See, e.g., Diener Brick Co. v. Mastro Masonry Contractor*, 885 A.2d 1034, 1041 (Pa. Super. Ct. 2005); *Universal Builders Supply*, 175 A.2d at 61 (reversing trial court's modification of consent decree); *Cecil Twp. v. Klements*, 821 A.2d 670, 674 (Pa. Commw. Ct. 2003) (reversing trial court's modification of consent decree).

### **III. SUMMARY OF ARGUMENT**

a) The words of the written agreement between the parties clearly and unambiguously show that valid withdrawal is not included in the agreement and that the Diocese did not violate the agreement by continuing to hold its property after validly withdrawing from The Episcopal Church.

b) Accordingly, Pennsylvania law precludes the use of parol/extrinsic evidence to interpret the written agreement between the parties.

c) The Moving Parties' "interpretation" of Paragraph 1 of the written agreement between the parties is that it required the Diocese, after validly withdrawing from The Episcopal Church, to transfer (forfeit) all property owned by the Diocese to an entity that is "a constituent part of The Episcopal Church." Even if parol/extrinsic evidence is potentially admissible (which it is not), such evidence is not admissible to support this "interpretation." Pennsylvania law precludes the admission of parol evidence that adds to, modifies, and contradicts the actual words of the written agreement between the parties.

d) Even if parol/extrinsic evidence was admissible (which it is not), the uncontested parol/extrinsic evidence shows that the Diocese has not violated the agreement. The uncontested evidence shows that the parties did not include the following in the written agreement between the parties: 1) property claims of TEC; 2) valid withdrawal from TEC; and 3) the creation of a new TEC diocese.

e) Acceptance of the "interpretation" offered by the Moving Parties would require the Court to change the terms of the agreement, and Pennsylvania law prohibits the Court from making such changes. Moreover, even with the changes, the revised "agreement" lacks the certainty for an enforceable agreement.

f) The Moving Parties have submitted parol/extrinsic evidence and arguments that rely upon: a) the alleged canon law of TEC; b) the claim that the withdrawal was invalid; and c) the alleged actions and opinions of those who purport to speak for TEC. The parties and the Court previously agreed that such evidence and arguments were not part of this proceeding. Due process of law requires that such evidence and arguments be excluded and disregarded.

#### IV. ARGUMENT

##### **A. The Plain Language Of The Written Agreement Between The Parties Shows That Valid Withdrawal Is Not Included In The Agreement And That The Diocese Did Not Violate The Agreement By Continuing To Hold Its Property After Validly Withdrawing From The Episcopal Church.**

The parties are bound only by the words they chose to have in the signed agreement. Moreover, Paragraph 8 of the agreement makes clear that any claim not set forth in the agreement has been “settled and resolved.”

Once valid withdrawal is assumed, the Moving Parties cannot dispute that the Diocese continues to properly hold and administer the same property that it held and administered prior to withdrawal unless the agreement specifically precludes the Diocese from holding and administering this property. To make such a showing, the Moving Parties must identify specific terms in the agreement that preclude the Diocese from continuing to hold and administer Diocesan property after withdrawal, as well as specific terms in the agreement that identify what the Diocese must do with Diocesan property after withdrawal. The Moving Parties cannot make this showing because the plain language of the agreement in no way addresses Diocesan withdrawal from TEC:

1. There is no reference in the written agreement between the parties to withdrawal of “the Episcopal Diocese of Pittsburgh of the Episcopal Church of the United States of America” from “the Episcopal Church of the United States of America.”

2. There cannot be an implied reference to valid Diocesan withdrawal since there are three references to withdrawals – but no reference to valid Diocesan withdrawal from TEC. The words of the agreement show that parties knew how to refer to valid withdrawal of an entity from a national organization since the written agreement between the parties specifically refers to the valid withdrawal of an entity from a national organization. Paragraph 3 of the agreement

between the parties refers to a valid withdrawal of a parish church from the Network. (*See* Moving Parties Findings/Conclusions, ¶ 43) (setting forth description of the Network.). The parties know how to refer to withdrawal from TEC since Paragraph 1 refers to parish withdrawal from TEC. Finally, Paragraph 2 refers to parish withdrawal from the Diocese.

Taking all these facts together – from the words of the agreement, it is clear that valid withdrawal of the Diocese from TEC is not included in the agreement. *Commonwealth v. Charles*, 411 A.2d 527, 530 (Pa. Super. Ct. 1979) (applying the maxim of *expressio unius est exclusion alterius* in the context of statutory construction); *Coatesville v. Christiana & C. S. R. Co.*, 159 A. 167, 168 (Pa. 1932) (noting that the maxim applies to contracts). While the Moving Parties argue that the doctrine of *expressio unius est exclusion alterius* is not applicable in this context, they are mistaken. The parties in this case have addressed certain withdrawals and omitted any reference to Diocesan withdrawal. As such, the omission “should be understood as [an] exclusion[. . .].” *Charles*, 411 A.2d at 530. Moreover, the maxim *expressio unius est exclusion alterius* is an “intrinsic aid” which focuses on the plain language that the parties chose. *Id.* No ambiguity is necessary to apply this “application of common sense and logic. . . .” *See id.*

These facts resolve the issue before the Court.

Moreover, the words of the agreement show that there is no duty to transfer property to a new TEC Diocese:

1. The agreement between the parties is clear and unambiguous in that there is no reference to a “new” TEC diocese.
2. The agreement is clear and unambiguous that the use of the property shall “continue.” Paragraph 1 of the agreement requires the Diocese to “continue” to hold and

administer its property. The plain meaning of “continue” is to “maintain without interruption a condition, course, or action.” See Merriam-Webster Online, available at <http://www.merriam-webster.com/dictionary/continue>. The “interpretation” of the Moving Parties (as implying a duty to forfeit/transfer the property after valid withdrawal) would contradict the actual words of the agreement.

This “interpretation” would require the Court to hold that the parties agreed that if, in the future, the Diocese ceased to be affiliated with TEC, it would forfeit its property to an entity that might be created at some unspecified time in the future. Not only does the agreement make no reference to the creation of such a diocese, this construction must be rejected as a matter of law because it would require the Diocese to forfeit its property to this “new diocese.” See *Helme v. Philadelphia Life Ins. Co.*, 61 Pa. 107, 111 (Pa. 1896) (holding that “[f]orfeitures are odious in law, and are enforced only where there is the clearest evidence that that was what was meant by the stipulations of the parties”); accord *Wick v. Bredin*, 42 A. 17, 18 (Pa. 1899) (“Forfeitures are odious to equity; it is seldom it will enforce them even in a clear case, but never in a doubtful one.”).

The Moving Parties’ argument that they are not interpreting the agreement to require a forfeiture “because under the stipulation defendants do not have the right to use and benefit of the property” (Moving Parties Post-Hearing Brief, p. 19) proves the point. They do not argue that the Diocese never had the “right to use and benefit of the property”; rather, they claim that, upon withdrawal, the Diocese no longer had such rights. This is a forfeiture claim. See Merriam Webster Online, available at <http://www.merriam-webster.com/dictionary/forfeiture> (defining forfeiture as “the act of forfeiting: the loss of property or money because of a breach of a legal obligation”).

The “definition” of diocese in the agreement does not create an ambiguity on these issues. An ambiguity exists where the language allows more than one reasonable interpretation. *West Conshohocken Restaurant Assocs. Inc. v. Flanigan*, 737 A.2d 1245, 1248 (Pa. Super. Ct. 1999) (citation omitted) (Under Pennsylvania law, a contract is ambiguous only “when a contract provision is reasonably susceptible to more than one meaning.”).<sup>3</sup>

(1) It is unreasonable to “interpret” the definition of Diocese as a provision relating to valid withdrawal from TEC.

(2) It is unreasonable to “interpret” the definition of Diocese as including an obligation to remain affiliated with TEC when the language of Paragraph 1 addresses the “holding” and “administering” of property, not the relationship between the Diocese and TEC.

(3) It is unreasonable to “interpret” the definition of Diocese as contradicting the duty to “continue” to “hold” property by requiring the Diocese to forfeit its property.

(4) It is unreasonable to “interpret” the definition of Diocese as requiring the Diocese to transfer the property to a second diocese affiliated with TEC when the agreement refers to no such second diocese and no such diocese existed at the time the agreement was executed.

(5) Finally, the notion that the description of an entity in an agreement imposes on that entity an obligation to perpetually maintain all characteristics necessary for the description to remain accurate both defies reason and is contrary to law. For example, the description of an individual as a resident of Pittsburgh cannot be converted into an order that the individual may

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<sup>3</sup> A court, however, must not “distort the meaning of the language or resort to a strained contrivance in order to find an ambiguity.” *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 106 (Pa. 1999); *see also* *Steuart v. McChesney*, 444 A.2d 659, 663 (Pa. 1982) (“[I]n holding that an ambiguity is present in an agreement, a court must not rely upon a strained contrivance to establish one; scarcely an agreement could be conceived that might not be unreasonably contrived into the appearance of ambiguity. Thus, the meaning of language cannot be distorted to establish the ambiguity.”). Furthermore, “[t]he mere existence of differing contractual interpretations by contracting parties does not render a contract ambiguous.” *See Krizovensky v. Krizovensky*, 624 A.2d 638, 643 (Pa. Super. Ct. 1993) (citation omitted).

not change his or her residence. Cf. *Alley v. Miramon*, 614 F.2d 1372, 1384 (5th Cir. 1980) (holding that “a change of corporate name does not change the identity of a corporation and has no effect on the corporation’s rights, properties, or liabilities”) (citation omitted); *Abbott Bldg. Corp. v. Federal Sav. & Loan Ins. Corp.*, 739 F. Supp. 532, 537 (D. Nev. 1990) (same).

**B. Since The Language Of The Stipulation Is Clear And Unambiguous, Parol/Extrinsic Evidence Is Not Admissible.**

The parol evidence rule provides that:

Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract. . . and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence.

*Scott v. Bryn Mawr Arms, Inc.*, 312 A.2d 592, 594 (Pa. 1973) (emphasis added) (quotations and internal citations omitted). Moreover, Pennsylvania law forbids any parol/extrinsic evidence where the language is unambiguous. *Robert F. Felte, Inc. v. White*, 302 A.2d 347, 351 (Pa. 1973) (“In a written contract the intent of the parties is the writing itself and when the words are clear and unambiguous the intent is to be determined only from the express language of the agreement.”) (citation omitted); see also, e.g., *Ferrer v. Trustees of the University of Pa.*, 825 A.2d 591, 608 (Pa. 2002) (“Only where a contract’s language is ambiguous may extrinsic or parol evidence be considered to determine the intent of the parties.”); 24 P.L.E., Evidence § 251 (noting that the rule applies to “any judgment of any court, or any other judicial or official proceeding ... or any contract, agreement or undertaking” that “has been reduced to writing”).

Pennsylvania law “requires rigid adherence” to the rule. *Keleher v. La Salle College*, 147 A.2d 835, 839 (Pa. 1959). Moreover, “a contract is not rendered ambiguous by the mere fact that the parties do not agree upon the proper construction.” *Ryan Homes v. Home Indem. Co.*, 647

A.2d 939, 941 (Pa. Super. Ct. 1994) (citation and quotations omitted). A party is not permitted to create an ambiguity by parol evidence. *Berger v. Ackerman*, 439 A.2d 200, 203 (Pa. Super. Ct. 1981) (holding that the trial court “properly barred appellant’s attempt to create an ambiguity by parol evidence”); *accord Fischer & Porter Co. v. Porter*, 72 A.2d 98, 102 (Pa. 1950) (alteration original) (quoting *Dahath Electric Co. v. Suburban Electric Dev. Co.*, 2 A.2d 765, 768 (Pa. 1938)) (holding trial court improperly admitted parol evidence where the party attempted “to create an ambiguity in the contract by parol testimony when no ambiguity [existed] in the writing”).

Moreover, the parol/extrinsic evidence submitted by the Moving Parties shows that there is no ambiguity. The uncontested evidence shows that the parties did not contemplate the creation of a second TEC diocese. (*See* Section D, *infra*). The occurrence of an unanticipated future event is not an ambiguity. *In re: St. Mary Hospital*, 157 B.R. 235, 238, n.8 (E.D. Pa. 1993).

**C. Even If Parol/Extrinsic Evidence Is Potentially Admissible (Which It Is Not), The Evidence Offered By The Moving Parties Is Not Admissible Since The “Interpretation” Of The Moving Parties Adds To, Modifies, And Contradicts The Actual Words Of The Written Agreement Between The Parties.**

The Moving Parties concede that parol/extrinsic evidence is not admissible to support an “interpretation” that “adds to, modifies, contradicts, or conflicts with the written agreement between the parties.” (Moving Parties Pre-Hearing Brief, p. 12) (internal quotation and citation omitted). That is a correct statement of the law. Even where an ambiguity exists, “no extrinsic evidence may be introduced in an attempt actually to alter, amend, add to, or detract from the terms of the contract as written.” *CBS Inc. v. Capital Cities Communications, Inc.*, 448 A.2d 48, 54-55 (Pa. Super. Ct. 1982); *accord Doman v. Brogan*, 592 A.2d 104, 109 (Pa. Super. Ct. 1991) (“Where there exists an uncertainty due to the use of vague or ambiguous language, resort may be had to extrinsic or parol evidence to explain – but not vary – the written word.”).

It is a well established corollary that the “Court will not rewrite the terms of a contract, nor give them meaning that conflicts with that of the language used.” *Diener Brick*, 885 A.2d at 1041 (quoting *Glen-Gery Corp. v. Warfel Constr. Co.*, 734 A.2d 926, 929 (Pa. Super. Ct. 1999)); *see also, e.g., Universal Builders Supply*, 175 A.2d at 61 (reversing trial court’s modification of consent decree); *Cecil Twp.*, 821 A.2d at 674 (reversing trial court’s modification of consent decree); *Meeting House Lane, Ltd v. Melso*, 628 A.2d 854, 857 (Pa. Super. Ct. 1993); *VanKirk v. VanKirk*, 485 A.2d 1194, 1196-97 (Pa. Super. Ct. 1984); *Sentry Safety Control Corp. v. Jaybee Amusement Co.*, 169 A. 419, 422 (Pa. Super. Ct. 1933) (“The parties themselves have made their own contract and the function of the court is to interpret and enforce it as it has been written, and not to write into it terms not contained therein.”).

In this case, the Moving Parties' "interpretation" adds to, modifies, and contradicts the words of the agreement:

a) The "interpretation" offered by the Moving Parties adds to the actual words since, inter alia, it introduces a second or new TEC diocese and adds the alleged trust interest of TEC in Diocesan property.<sup>4</sup>

b) The "interpretation" offered by the Moving Parties modifies the actual words since, inter alia, it converts a definition of the status of the Diocese at the time the agreement was entered into a requirement that the Diocese maintain that status or forfeit its property.

c) The "interpretation" offered by the Moving Parties contradicts the actual words since, inter alia, it changes the word "continue" to "forfeit and transfer" and replaces the duty to hold property with the duty to transfer/forfeit property.

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<sup>4</sup> There is no reference in the written agreement between the parties to any alleged property or trust interest of TEC in any property. Moreover, the Court previously assured counsel for Defendants that any claim of TEC to the property would be adjudicated in the litigation instituted by TEC and that the alleged canon law of TEC was irrelevant to this proceeding. (*See* Section F, *infra*). Plaintiffs admit that the agreement did not confer any rights upon TEC. (May Transcript, pp. 140-141).

**D. Even If Parol/Extrinsic Evidence Is Admissible (Which It Is Not), The Uncontested Parol/Extrinsic Evidence Establishes That The Written Agreement Did Not Address: (a) Diocesan Withdrawal From TEC; (b) Any Purported Property Claims Of TEC; Or (c) The Creation Of A New TEC Diocese.**

The parol/extrinsic evidence clearly shows that:

- a) The parties initially attempted to deal with the issues of what would happen to Diocesan property in the event of Diocese withdrawal from TEC and initially attempted to deal with the alleged claims of TEC to the property. The evidence shows that those subjects appeared in early drafts of the agreement but not in subsequent drafts – or in the final agreement;
- b) The evidence shows that the parties never contemplated valid withdrawal from TEC; and
- c) The evidence shows that the parties never contemplated the creation of a second or new TEC Diocese.

**Summary of the Evidence**

- 1. Counsel for Calvary testified that he was aware of a possible withdrawal of the Diocese prior to signing the agreement because he had read a newspaper article referring to possible action by the convention of the Diocese to effect “a withdrawal from the Episcopal Church USA.” (May Transcript, p. 89) (discussing Moving Parties Exhibit 22).
- 2. The parties exchanged two drafts of the agreement that explicitly referred to valid Diocesan withdrawal from TEC and the alleged property claims of TEC.
  - a) Moving Parties’ Exhibit 4 is a proposal that Mr. Otto sent to Mr. DeForest before discussing that proposal with his client. (May Transcript, pp. 21-27).
  - b) Mr. Otto then sent a second draft to Mr. DeForest that explicitly referred to Diocesan withdrawal and to alleged property claims of TEC. (Defendants Exhibit 2).

3. All subsequent drafts of the agreement (and the final version) did not contain any reference to valid withdrawal by the Diocese and did not contain any reference to any alleged TEC property claims.

4. On October 16, 2005, the Pittsburgh Post Gazette published an article stating the reporter's opinion as to the written agreement between the parties. (Moving Parties Exhibit 16).

5. In response, on October 21, 2005, the Diocese published a statement setting forth its understanding of that agreement. (Defendants Exhibit 4).

6. With respect to Paragraph 1 of the Stipulation, the Diocese stated:

Paragraph #1: Simply states that the diocese will continue to act as it always has toward common property of the Diocese. Contrary to the assertion in some reports, paragraph #1 does not deal with any claim ECUSA might have in common property of the Diocese. (Defendants Exhibit 4) (emphasis added).

7. The Moving Parties never objected to this Diocesan statement regarding the meaning of Paragraph 1.

8. Both Ms. Koscelnik and Mr. DeForest testified that at the time the agreement was negotiated, they did not believe that valid withdrawal from TEC was possible. Moreover, no one ever considered the possibility of a second TEC Diocese.

Ms. Koscelnik testified as follows:

Q. ....My question is: Was there any discussion at this meeting that if the defined Diocese validly withdrew from the Episcopal Church, as to the mechanics to create another Episcopal Church Diocese in Pittsburgh to take over the property?

A. Well, there is no creating another Episcopal Diocese. ***Parties might withdraw from the Diocese but the Diocese would still be there.*** (May Transcript, p. 104) (emphasis added).

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Q. All right. And then is it a fair statement that there never was a discussion about what would happen if there stopped being an Episcopal Diocese of Pittsburgh of the Episcopal Church?

A. ***There was never a discussion that there would stop being an Episcopal Diocese of the Episcopal Church of the United States of America.*** (May Transcript, pp. 105-106) (emphasis added).

Similarly, Mr. DeForest testified:

A. Well, I never considered that there would be a new Diocese if that is your question, so, no. ***At the time I always felt there would be a Diocese of the Episcopal Church of the United States of America.*** So if you are asking me when I proposed this language did I think that the Diocese that stayed part of the Episcopal Church of the United States of America was a new Diocese but it didn't matter to me what I thought. (May Transcript, p. 93) (emphasis added).

As recognized by the Moving Parties in their Pre-Hearing Brief, if “the Episcopal Diocese of Pittsburgh of the Episcopal Church of the United States of America” withdraws from “the Episcopal Church of the United States of America,” a new TEC diocese must be created. But the parol/extrinsic evidence shows that the parties never contemplated or dealt with that fact.

Moreover, not only does the written agreement not contain any reference to Diocesan withdrawal or any reference to TEC property claims – the parol/extrinsic evidence shows the parties initially attempted to deal with these subjects, but both subjects disappeared from all subsequent drafts.

**E. The Court May Not Rewrite The Written Agreement Of The Parties, And Acceptance Of The Moving Parties' "Interpretation" Would Require The Court To Rewrite The Agreement. Even If The Agreement Is "Rewritten," It Would Lack The Essential Terms Required For An Agreement.**

The Moving Parties "interpretation" requires the Court to change the plain language of the written agreement (for example, to change "continue" and "hold" to forfeit and transfer). However, it is well established that the "Court will not rewrite the terms of a contract, nor give them meaning that conflicts with that of the language used." *Diener Brick*, 885 A.2d at 1041 (quoting *Glen-Gery Corp.*, 734 A.2d at 929); *see also, e.g., Universal Builders Supply*, 175 A.2d at 61 (reversing trial court's modification of consent decree); *Cecil Twp.*, 821 A.2d at 674 (reversing trial court's modification of consent decree); *Meeting House Lane*, 628 A.2d at 857 ; *VanKirk*, 485 A.2d at 1196-97 ; *Sentry Safety*, 169 A. at 422 ("The parties themselves have made their own contract and the function of the court is to interpret and enforce it as it has been written, and not to write into it terms not contained therein").

However, even with the changes proposed by the Moving Parties, the "revised agreement" does not contain all the essential terms required for a contract. *Cf. CBS Inc.*, 448 A.2d at 57-58 . Multiple essential terms remain unclear:

1. When does the duty of the Diocese to transfer its property arise? When Rev. Simons objects to the vote at the Diocesan convention? (October 4, 2008). When the Presiding Bishop "recognizes" Rev. Simons? (October 9, 2008/Moving Parties Exhibit 34). When Rev. Simons "reorganizes" the Standing Committee? (October 10, 2008/Moving Parties Exhibit 34). When Mr. Roman writes his letter? (October 10, 2008/Moving Parties Exhibit 34). When the "Executive Council passes its resolution? (October 20-23, 2008/Moving Parties Exhibit 35). When the new diocese holds its convention? (December 13, 2008). When (and if) the new diocese is "recognized" by the General Convention of TEC?

2. Even accepting Plaintiffs' "interpretation" of the Agreement, there has to be some intervening time between the alleged violation (valid withdrawal) and the duty to transfer the property. Certainly, not even Plaintiffs would suggest that the agreement provides for transfer of the property to Rev. Simons.

3. What are the Defendants' duties with respect to the property during this interim period? Both Plaintiffs (Moving Parties Exhibit 18, ¶ 23(a)(1)) and TEC (TEC Complaint, p. 16) seek an "accounting" from the individual Defendants. If the individual Defendants use Diocesan property to pay salaries, etc. during this interim period, do they incur personal liability? Do they violate their fiduciary duty to the Diocese if they fail to pay salaries, etc.?

4. According to "TEC" (which has now become one of the "Moving Parties"), a new TEC Diocese cannot exist until action by General Convention. (TEC Complaint, ¶ 26); (May Transcript, pp. 141-142). According to the Moving Parties, the TEC Diocese must be a "constituent part of The Episcopal Church." (Moving Parties Pre-Hearing Brief, p. 11). Accordingly, there is still no TEC Diocese to which the property can be transferred. What does the agreement provide with respect to the property?

5. To whom does the "trustee" report? What are the duties of the trustee?

The fact that the agreement is entirely silent regarding these issues serves to demonstrate that no obligation to transfer the property exists and the parties never contemplated such a situation when the agreement was executed.

- F. The Parol/Extrinsic Evidence And Arguments Submitted By The Moving Parties Based on: a) Claims Of Invalid Withdrawal; b) Claims Relating To The Canon Law Of TEC; And c) Claims Relating To The Opinions And Actions Of Those Purporting To Speak For TEC Are Not Part Of This Proceeding. Due Process of Law, The Prior Statements Of The Court, And The Agreement Of The Parties Require That Such Evidence And Arguments Be Excluded And Disregarded.**

**FACTUAL BACKGROUND**

At the hearing held on April 17, 2009, counsel for Defendants proposed that the parties agree to a hearing in which all parties assumed that the Diocese had validly withdrawn from TEC.

Counsel explained that advantage of such a procedure:

MR. LEWIS: First, you don't need the opinion of Bishop Buchanan [the alleged trustee ad litem of TEC] supposedly on behalf of The Episcopal Church that the diocese couldn't withdraw from The Episcopal Church.

You don't have to consider the complicated argument that the officers of the diocese lost their office because they violated the TEC constitution by voting for withdrawal.

You don't have to argue about what is the diocese referred to in the stipulation. And you don't have to worry about all this stuff about Robert Duncan and his followers leaving The Episcopal Church.

The narrow issue before Your Honor would be if the diocese validly withdrew from The Episcopal Church, does that violate the stipulation?

(April 17, 2009 Transcript (the "April Transcript"), p. 16).

Counsel also made clear that if the proposal was not acceptable, the Defendants were entitled to their day in Court on the issue of validity:

MR. LEWIS: But if that's not acceptable, then we're certainly – we certainly have to have our day in court on the issue of validity.

(April Transcript, p. 17).

At the same hearing, when the issue of the TEC Petition to Intervene was being considered, counsel for Defendants repeated this due process point, and the Court agreed that Defendants would be entitled to their day in Court:

MR. LEWIS: And, therefore, I understand that Your Honor is not going to say you have to have an evidentiary hearing to let them come into the case. But I just want to make the record absolutely clear, because what they're going to try and do – because they've tried to do it in other cases – is they come in; and they say, "I am authorized to speak for The Episcopal Church. The Episcopal Church has decided that a diocese can't withdraw. And you, the Court, can't second guess that, because we're The Episcopal Church."

And that's what they're going to try and do. And all I want to do is preserve my objection to them going down that road; and in that sense I'll withdraw my objection to the petition so long as the record is clear that I haven't conceded that that is a proper way to proceed.

THE COURT: And there is nothing in the papers that indicate that – they have not pleaded that. They have not argued that. You anticipate that.

MR. LEWIS: It's in the complaint, Your Honor. It's in the complaint in intervention that we can't withdraw, and they talk about the First Amendment and all that stuff. That is what is going to happen.

THE COURT: But if I grant the intervention and the pleadings then come forward, you have the right to –

MR. LEWIS: There will be a massive response. There will be a ton of paper

THE COURT: You'll answer, and you'll be able to refute it. You're not conceding the point by allowing counsel, who's come here all this way from Washington, to intervene.

(April Transcript, pp. 26-28).

Later in the hearing, counsel for Defendants repeated the due process point:

MR. LEWIS: Well, what we had said is that we're entitled to our day in court on validity; and so let's put that aside. Let's assume validity, and let's have a short trial on the stipulation.

(April Transcript, p. 39).

In particular, counsel for Defendants stated that no "invalidity" evidence should be permitted at the subsequent hearing. In response, the Court stated that such evidence would not be permitted:

MR. LEWIS: ....All I'm saying is if we have this short hearing, we are entitled to argue, based on our assumption of validity. And if the Court agrees that if there was a valid withdrawal, that there is no violation of the stipulation, that the stuff about invalidity doesn't matter at that point. That's all I'm asking, Your Honor. I'm not asking them to give anything up. But I don't want to enter a hearing and they offer invalidity evidence.

THE COURT: There will be none, because whether it's regardless of whether it's presumed that it was valid, there would be testimony as to the validity. And testimony as to canon law would be irrelevant and would not be admissible. (Emphasis added).

(April Transcript, pp. 40-41).

It was clearly understood that the claims of TEC, including the alleged invalidity of withdrawal, were reserved for the proceedings initiated by TEC:

MR. FLETCHER: Your Honor, we would like to say for the record that what we've just agreed to is to address Mr. Deforest's argument first, that if even if there is a valid withdrawal, the stipulation has been violated.... [W]e would also like to be clear on the record that if we prevail at that hearing, all we've done is resolved Mr. DeForest's argument with respect to the stipulation.

And we will continue with the litigation, as Ms. Kostel has promised to file on all of these issues with respect to withdrawal, validity of withdrawal, what happens to diocese property, parish property and so forth.

(April Transcript, pp. 48-49).

In violation of this agreement regarding the scope of the May 27 hearing, the Moving Parties submitted parol/extrinsic evidence and arguments that rely upon: a) the alleged canon law of TEC; b) the claim that the withdrawal was invalid; and c) the alleged actions and opinions of those who purport to speak for TEC. The parties' agreement, as well as the principle of due process, dictate that these arguments and evidence not be considered.

#### "Evidence" Introduced At The May Hearing

At the May hearing, the Moving Parties were permitted to introduce Exhibit 34 into evidence. That document is a letter dated October 10, 2008 from Mr. Roman to Robert Devlin, Esquire, the Chancellor of the Diocese. Obviously, if the Diocese validly withdrew from TEC, those voting for the resolution, such as the Chancellor of the Diocese, did not lose their offices by voting for a valid resolution. The letter, however, asserted that the Diocese did not withdraw from TEC. Instead, it claims that the Diocese never left TEC and that everyone voting for withdrawal forfeited their offices in the Diocese – in other words, it makes the same invalidity claim that is in the TEC Complaint. Indeed, the letter does not even refer to Mr. Devlin as the Chancellor of the Diocese. Relying on the TEC theory that all officers of the Diocese lost their offices by voting for invalid withdrawal, the letter refers to Mr. Devlin as attorney for a "group."

The letter asserts the claim that since it was "the group" that left TEC and not the Diocese, the Presiding Bishop of TEC had the authority and exercised that "authority" to "recognize" certain individuals as the "Ecclesiastical Authority" of "the Diocese"; *i.e.* the Diocese that tried to withdraw. In other words it makes the exact claim that the Court had

assured counsel for Defendants would be adjudicated in the proceeding related to the TEC Complaint.

Included as an attachment to that letter is a letter from Rev. James Simons. That letter adopts the “TEC” claim that all officers voting for invalid withdrawal lost their offices because of their votes. Rev. Simons thus claimed that he became the only member of the Standing Committee of the Diocese that tried to (but did not) withdraw from TEC.<sup>5</sup>

The admission of this document into evidence was contrary to the agreement of the parties and the statements of the Court made at the April hearing.

Moving Parties’ Exhibits 35-37 also should not have been admitted. Exhibit 35 is a resolution of the “Executive Council” of TEC approving the “recognition” of Rev. Simons by the Presiding Bishop. It proceeds upon the claim that “some members” of the Diocese (but not the Diocese) have left TEC. Exhibit 36 is a letter from the Secretary of the House of Bishops referring to the efforts to “rebuild the Diocese of Pittsburgh”; *i.e.* the Diocese that attempted to (but did not) withdraw from TEC. Exhibit 37 is a letter from the President of the House of Deputies stating that deputies from the Diocese that attempted to withdraw (but did not withdraw) will be seated at the General Convention of TEC.

At the hearing, the Court initially agreed with the objection of counsel for Defendants:

MR. LEWIS: Your Honor, I can deal with Exhibit 34, 35, 36 and 37. I not only object on relevancy grounds but on the grounds that introducing these documents is completely contrary to the assumption that I thought we had clearly agreed to do. I understand that it’s very difficult for the people on the other side of the room to refer to us other than the Southern Comb [sic] Group or Mr. Robert Duncan and his followers, but we did agree to agree

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<sup>5</sup> When Defendants are given their day in Court on validity, Defendants will challenge the so-called “recognition.” See Defendants Exhibit 9.

that the Episcopal Diocese of Pittsburgh validly withdrew from the Episcopal Church. These are letters from the Presiding Bishop of the Episcopal Church saying you didn't validly withdraw and, therefore, Mr. Roman's group is the real Diocese and letters from the house of deputies of the Episcopal Church to Mr. Roman's group saying you are the true Diocese, they didn't withdraw. I thought that at least we had agreed on that.

THE COURT: I thought so. This is what my notes indicate. These are also attached – I believe I saw these attached to your brief; at least some of them.

(May Transcript, pp. 114-115).

Counsel for Defendants repeated the due process objection on several occasions:

MR. LEWIS: It's more than that, Your Honor. I pointed out at our hearing last month that if we have a hearing on the validity of withdrawal, you can't just come in with a piece of papers signed by somebody saying that she is the Presiding Bishop and say my opinion is this or you can't come in with a complaint signed by Bishop Buchanan saying I speak for the Episcopal Church. We challenged all that. Your Honor preserved all that. I said let's simplify this. Let's not worry about the piece of paper saying you are the true Diocese. Let's reserve it for another day. This is the same stuff they are trying to get in now.

(May Transcript, p. 119).

MR. LEWIS: I made clear to Your Honor at the April hearing, if we are going to get into that rather than a piece of paper signed by Gregory Staub or Right Reverend Price or Reverend James P. Simons, we would be entitled to several days of trial and authority of those people to make the statement and we were putting that aside.

(May Transcript, p. 127).

MR. LEWIS: The rabbit goes in the hat. First they come in and say I am the Episcopal Church and people accept that, and then they say since I am the Episcopal Church, you can't challenge what I say. What I have tried to make here – and apparently what haven't – is that we are entitled to our day in Court as to whether those people

sitting at the end of the table really represent the Episcopal Church and whether Bishop Buchanan is giving us anything [other than] his opinion. Until they prove that, Ms. Kostel can't come in and say shut down the proceedings, we are in the Episcopal Church.

(May Transcript, pp. 143-144).

### **Post-Hearing Briefs and Requests for Findings of Fact and Conclusions of Law**

As counsel for Defendants predicted would happen, counsel purportedly representing TEC has filed a Post-Hearing Brief which asserts the alleged authority of the Presiding Bishop of TEC and claims that Defendants have no right to challenge “The Church’s” assertions. Until Defendants receive their day in Court, that Brief can only be considered as the opinions of Bishop Buchanan and Ms. Kostel.<sup>6</sup>

The Moving Parties, in their Requests for Findings of Fact and Conclusions of Law, expand their violations of their agreement to assume validity and also seek to deny Defendants their day in Court on validity, on the issue of who can speak for TEC, and on the validity and binding nature of any statement made on behalf of TEC.

For example:

1. The Moving Parties make numerous Requests for Findings of Fact based upon alleged provisions of canon law. (*See* Moving Parties Proposed Findings/Conclusions, ¶¶17-19, 24, 79, 81, 83, 100-102, 105-110).

2. The Moving Parties’ proposed Conclusions of Law refer to alleged provisions of canon law. (*See id.* at ¶¶ 119, 120, 123).

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<sup>6</sup> For example, the arguments in that Brief as to the alleged lack of standing of Defendants and as to the alleged property interests on TEC can only be considered when and if Defendants’ challenge to the “standing” of Bishop Buchanan and Ms. Kostel are resolved in the TEC litigation adversely to Defendants.

3. There is extensive reliance on Moving Parties' Exhibit 34. (*See id.* at ¶¶ 103, 105).

4. Reference is made to the canon law of TEC and as to the alleged authority of the Presiding Bishop, the Executive Council of TEC, the President of the House of Deputies, and the House of Bishops. (*See id.* at ¶¶ 105-110).

5. Reference is made to the "highest authorities in The Episcopal Church" (*See id.* at ¶ 126).

Similarly, in their Post-Hearing Brief, the Moving Parties rely upon those Requests and Conclusions. (Moving Parties Post-Hearing Brief, p. 5). Indeed, the Moving Parties now take the position that Defendants have no right to contest TEC's claim that the Diocese of Pittsburgh continued to exist as a TEC Diocese because withdrawal was not permitted. (*See id.* at pp. 16-17).

### **ARGUMENT**

As stated by the United States Court of Appeals for the Third Circuit in *Luxliner P.L. Export Company v. RDI / Luxliner Inc.*, 13 F.3d 69, 72 (3d Cir. 1993):

Before a party may be deprived of a property interest, due process requires, at a minimum, notice and opportunity to be heard. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 332-33, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011 (1980). The adversarial process "assumes that a factfinder will give the parties an adequate opportunity to be heard; if it does not, it cannot find facts reliability." *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 854 (3d Cir. 1990). *See also Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 338 (5th Cir. 1982) (right to a full and fair opportunity to litigate an issue is protected by the due process clause).

Here, it was absolutely clear that the Court assured Defendants' counsel repeatedly that the issues of validity and the authority of those claiming to speak for the TEC were not part of the issues to be decided in the May hearing. The Court stated that canon law would not be considered. Moreover, all parties affirmatively agreed to a hearing where validity of withdrawal was assumed. Due process, fundamental fairness, and the agreement of the parties require that this evidence and arguments be excluded and disregarded.

V. **CONCLUSION**

Defendants respectfully request that the Court enter an Order stating that the Diocese did not violate the Stipulation and Order by continuing to hold its property after withdrawing from The Episcopal Church, assuming that such withdrawal was valid.

Respectfully submitted,

Dated: July 10, 2009

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 10th day of July, 2009, a true and correct copy of the foregoing Defendants' Post-Hearing Brief in Opposition to the Moving Parties' Claim that the Diocese Violated the Stipulation and Order by Continuing to Hold its Property After Validly Withdrawing from the Episcopal Church was served via first class United States mail, postage prepaid, upon the following:

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