

**IN THE SUPERIOR COURT OF HENRY COUNTY
STATE OF GEORGIA**

TIMBERRIDGE PRESBYTERIAN CHURCH, INC.,)	
)	
Plaintiff,)	
)	
v.)	Civil Action File No.
)	07-CV-4142-M
PRESBYTERY OF GREATER ATLANTA, INC.,)	
)	
Defendant.)	

DEFENDANT’S BRIEF IN SUPPORT OF MOTION TO DISMISS

COMES NOW Presbytery of Greater Atlanta, Inc. (“PGA”), Defendant in the above-styled action, by and through counsel of record, and files this, Defendant’s Brief in Support of Motion to Dismiss and shows the Court the following:

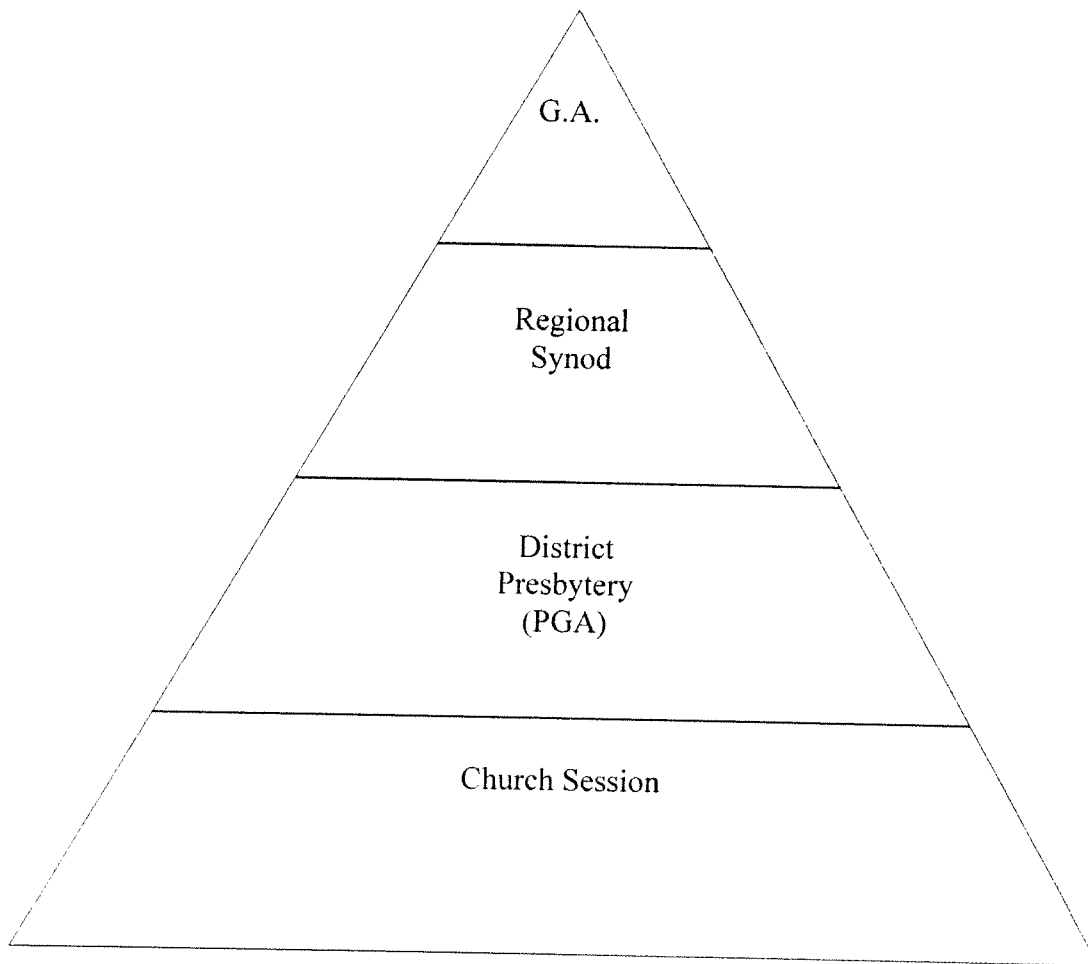
I. STATEMENT OF FACTS

Plaintiff is the corporate incarnation of Timberridge Presbyterian Church. Plaintiff’s registered office and its principal place of business is located in Henry County Georgia. Plaintiff church is a member of the Presbyterian Church (U.S.A.). PGA is a non-profit corporation with its registered and principal office located in Fulton County, Georgia. PGA is a district presbytery of the Presbyterian Church (U.S.A.).

The Presbyterian Church (U.S.A.) came into being in 1983 when the southern branch of the Presbyterian denomination (Presbyterian Church of the United States “PCUS”) and the northern branch of the Presbyterian denomination (The United Presbyterian Church of the United States of America “UPCUSA”) came together in “reunion.” The unified church is called the Presbyterian Church (U.S.A.). The unified

church is, in all ecclesiastical, judicial, legal and other respects the continuing entity of both the PCUS and the UPCUSA.¹

The Presbyterian Church (U.S.A.) is a hierarchical church with the following structure:



The General Assembly (G.A.) is the highest governing body of the denomination. A synod consists of several presbyteries in a geographic region, a presbytery consists of all

¹ Articles of Agreement, Preamble, Book of Order, Appendix B, p. B-1.

churches and ministers within its assigned geographic district, and the session is the governing body of a specific church.

Prior to reunion, which occurred in 1983, Plaintiff was a member of PCUS. In June of 1982, the 122nd General Assembly of the PCUS met in Columbus, Georgia and, in accordance with procedures prescribed in its Constitution, enacted certain amendments to its Constitution (called the Book of Church Order). One amendment added Section 6-3 of the PCUS Constitution, which is a property trust clause, which provided that PCUS churches held their property in trust for the PCUS.²

On June 10, 1983, reunion occurred. PCUS and UPCUSA ceased to exist but their history and existence were carried on by the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is governed by its Constitution. The Constitution of the Presbyterian Church (U.S.A.) is comprised of two books—the Book of Confessions and the Book of Order. Like the former PCUS Constitution, the Book of Order also contains a property trust clause, which provides: “[a]ll property held by or for a particular church, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).”³

² “All property held by or for a particular church, whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of the particular church or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church in the United States.” PCUS Book of Church Order, Section 6-3.

³ Book of Order, Chapter VIII, Section G-8.0201. Note that the Book of Order also contains other property provisions relating to ownership of property when a church ceases to be associated with the Presbyterian Church (U.S.A.) or when there is a schism within a church. Book of Order, Chapter VIII, Section G-8.0301, G-8.0401, G-8.0601.

For a period of eight years after reunion, a church could exercise two options: 1) opt out of only those church property provisions contained in Chapter VIII of the Book of Order to which the church was not subject under its pre-reunion Constitution; or 2) under Article 13 of the Articles of Agreement, petition to be dismissed from the denomination with its property upon a vote by the congregation.⁴

Plaintiff never sought to be dismissed under Article 13 of the Articles of Agreement, but Plaintiff did exercise an opt-out under G-8.0701. G-8.0701 states in pertinent part:

The provisions of this chapter shall apply to all particular churches of the Presbyterian Church (U.S.A) except that any church which was **not subject to a similar provision of the Constitution of the church of which it was a part,** prior to the reunion of the Presbyterian Church in the United States and the United Presbyterian Church in the United States of America to form the Presbyterian Church (U.S.A.), shall be excused from that provision of this chapter if the congregation shall, within a period of eight years following the establishment of the Presbyterian Church (U.S.A.), vote to be exempt from such provision in a regularly called meeting and shall thereafter notify the presbytery of which it is a constituent church of such vote.”
(Emphasis added.)

⁴ See Book of Order, Chapter VIII, Section G-8.0701 and Article 13 of the Articles of Agreement, Book of Order, Appendix B, p.B-13-B-15.

The opt out contained in G-8.0701, did not excuse Plaintiff from the property trust clause because Plaintiff was already subject to an almost identical property trust clause under its pre-reunion Constitution. Thus, pursuant to the plain language of G-8.0701, Plaintiff could not opt out of the property trust clause.⁵

Despite the fact that both the pre-reunion PCUS Constitution and the Presbyterian Church (U.S.A.) Constitution contain property trust clauses (*See* Exhibits 3 and 4 of Plaintiff's Complaint), Plaintiff has filed this suit requesting that the Court interpret and construe the denomination's Constitution and that the Court declare that Plaintiff is not subject to the property trust clause. Upon information and belief, Plaintiff seeks the Court's intervention in this matter because it has aligned with an association of churches called the New Wineskins. The New Wineskins take issue with certain perceived doctrinal positions of the Presbyterian Church (U.S.A.) and is offering legal strategy and assistance to churches to help position the churches to leave the denomination and to take the church property with them. Plaintiff desires a judicial determination that it is exempt from the property trust clause before it leaves the denomination so that it may take the church property with it.

Plaintiff's Complaint does not allege a cloud on title, or adverse possession by PGA, or seek to quiet title or make any other title related claim. Indeed, Plaintiff's Complaint clearly and correctly alleges that the deeds to its real property show only Plaintiff as owner of record. (Complaint ¶ 12). Nor is there any allegation by the

⁵ Churches that exercised the opt out provision only opted out of Chapter VIII, Section G-8.0500 (which requires churches to seek a presbytery's permission prior to selling, transferring or encumbering property). Churches exercising the opt out provision could not and did not opt out of G-8.0201 (the property trust clause) or the balance of Chapter VIII. Prior to reunion, neither the PCUS or the UPCUSA Constitutions ever contained provisions whereby a local church could unilaterally leave the denomination with the church property.

Plaintiff that PGA is in possession of or is occupying Plaintiff's property. The chain of title to the property is clear and there is no adverse possession by PGA; thus, Plaintiff does not ask this Court to rule on title to land, it asks this Court to construe the Constitution of the Presbyterian Church (U.S.A.) to determine the validity of a property trust clause, which applies to all church property, whether real, personal, tangible and intangible.

II. ARGUMENT AND CITATION TO AUTHORITY

A. PLAINTIFF'S COMPLAINT IS SUBJECT TO DISMISSAL BECAUSE THIS COURT LACKS SUBJECT MATTER JURISDICTION.

1) No actual controversy exists.

A declaratory judgment may not be granted unless an actual controversy exists between the parties. O.C.G.A. § 9-4-2 (a). In the absence an actual controversy, the trial court lacks jurisdiction to render a decision. Effingham County Bd. of Comm'rs v. Effingham County Industrial Dev. Auth., 2007 WL 1840196, 07 FCDR 2108 (June 28, 2007). "Declaratory judgment will not be rendered based on a possible or probable future contingency." Id. In order for there to exist an actual controversy, there must be interested parties asserting adverse claims on an accrued set of facts. Harrell v. Fulton County, 272 Ga. App. 760, 764 (2005). Plaintiff may not seek an advisory opinion from the Court for actions that it speculates that PGA may take in the future. Harrell, 272 Ga. App. at 764.

In Harrell, the Plaintiffs were seeking a declaratory judgment from the trial court regarding the validity of an amendment to a zoning ordinance. The Court of Appeals found that there was no actual controversy and that the plaintiffs were merely seeking a

declaration for the court “just in case” the defendants attempted to take action under the zoning amendment in the future. Harrell, 272 Ga. App. at 764. Plaintiff in the case at bar is doing the same thing as the Harrell plaintiffs; to wit, Plaintiff is seeking an advisory opinion regarding the validity of a property trust clause so that if they withdraw from the denomination in the future they will have an advisory opinion that they can take the church property with them.

The language of Plaintiff’s Complaint itself belies Plaintiff’s assertion that an actual controversy exists. Paragraph 44 of the Complaint states that Plaintiff “**intends to discuss** various matters including, but not limited to, the initiation of a local capital improvement fund drive...The financing **may** require that Timberridge grant mortgages and security interests in the local church property to secure repayment thereof.

Timberridge will not be able to **provide acceptable title insurance** on its property until such time as the questions presented are resolved. Moreover, the **underwriting** of any extension of credit is significantly impacted by the status of ownership of local church property.”

Paragraph 44 of the Complaint demonstrates that no actual controversy currently exists. First, the Plaintiff “intends to discuss” a capital improvement fund drive, but does not allege that it has actually discussed, planned or commenced such a drive. Second, Plaintiff engages in pure speculation when it states that “financing **may** require” that Plaintiff grant mortgages in the property. There is no allegation that Plaintiff has even applied for a loan, let alone determined that it will have to pledge property to secure a loan, or that an actual lender has taken exception to title or any other circumstances relating to the hypothetical loan. Third, Plaintiff’s allegation that Timberridge will not be

“able to provide acceptable title insurance,” is also pure speculation. There’s no allegation that a title insurer has refused to issue a title insurance policy on the property, nor is it likely that such would be the case in light of the fact that Plaintiff has clear title to the property (as noted in the Complaint). Finally, with regard to the allegations relating to credit underwriting, since Plaintiff has not even applied for a loan, Plaintiff’s allegation is merely conjecture. Paragraph 45 of the Complaint is also filled with speculation about what may happen in the future.

Similarly, the “retaliatory actions” that Plaintiff refers to in its counts for injunctive relief have not occurred and may or may not occur in the future. Plaintiff has been a member of the Presbyterian denomination for over 100 years. During that time, it has purchased property, raised money, incurred debt or encumbered its property as necessary, without any interference by PGA. The property trust clause has never created a problem for Plaintiff in the past and there is no reason to suspect that it would do so in the future. That being the case, there is only one logical reason for bringing this action, which is that Plaintiff is preparing to leave the denomination and desires a judicial declaration regarding the church property before it leaves. Such a declaration would be nothing more than an advisory opinion since Plaintiff has not withdrawn from the denomination at this point; therefore, Plaintiff’s Complaint fails to set out an actual controversy and this Court does not have jurisdiction over this matter. For that reason, Plaintiff’s Complaint should be dismissed in its entirety.

2) Violation of First Amendment.

The United States Supreme Court has held that the First Amendment to the Constitution of the United States severely circumscribes the role that civil courts may

play in resolving church property disputes. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 449 (1969). The First Amendment commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine. Id. at 449. In response to the United States Supreme Court's decision in the Mary Elizabeth Blue Hull case, Georgia courts adopted a "neutral principles of law" doctrine when deciding church property cases. See Carnes v. Smith, 236 Ga. 30, 37 (1976); Crumbley v. Solomon, 243 Ga. 343, 343 (1979); Jones v. Wolf, 244 Ga. 388, 388 (1979). Under the "neutral principles of law" doctrine, a court will look to state statutes, corporate charters, deeds, and the organizational constitutions of the denomination to resolve the dispute. Crumbley, 243 Ga. at 343. Accordingly, PGA concedes that church property issues may be decided by this Court provided that the Court can do so by relying only on "neutral principles" and not by interpreting church doctrine.

PGA contends that this Court may decide the central issue in this case without wading into questions of church doctrine. A review of the applicable statutes, case law, corporate documents, the Constitution of the Presbyterian Church (U.S.A.) and other governing documents clearly show that Plaintiff is subject to the property trust clause contained in the Constitution of the Presbyterian Church (U.S.A.). However, to the extent that this Court deems it necessary to wade into, interpret or rule on issues that are doctrinal in nature, PGA contends that such action by the Court would violate the First Amendment of the United States Constitution and that the Court lacks the jurisdiction to do so.

B. PLAINTIFF'S COMPLAINT IS SUBJECT TO DISMISSAL BECAUSE VENUE IS IMPROPER IN THIS COURT.

A declaratory judgment is not an equitable action even if injunctive relief is requested in conjunction with the declaratory judgment. Shaw v. Crawford, 207 Ga. 67, 72 (1950). Declaratory judgments are to be filed and served in the same manner as other cases in the superior courts. O.C.G.A. § 9-4-5. Thus, standard venue rules apply to declaratory judgment actions. Under Georgia law, for purposes of proceedings generally, venue against a non-profit corporation lies in the county of the registered office of the corporation. O.C.G.A. § 14-3-510.

PGA's registered and principal offices are located in Fulton County, Georgia. Although Plaintiff failed to allege the exact basis for venue in its Complaint, one may surmise that Plaintiff relies on Article 6, Section 2, Paragraph 2 of the Georgia Constitution, which provides that in cases respecting title to land, venue is proper in the county in which the land is situated; however, this is not a case respecting title to land. Under Georgia law, an action respecting title to land is an action at law, such as ejectment and statutory substitutes, wherein the plaintiff asserts a presently enforceable legal title against possession by the defendant for the purpose of recovering the land. Hopkins v. Baker, 258 Ga. App. 14, 15 (2002); Hayes v. Howell, 251 Ga. 580, 581 (1983); Graham v. Tallent, 235 Ga. 47, 49 (1975).

In the case at bar, PGA is not in possession of the property, nor does Plaintiff allege that PGA is in possession of the property. Because PGA does not possess the property, there can be no action at law to eject PGA or otherwise recover the property. Moreover, Plaintiff's Complaint alleges that Plaintiff's title is clear and shows record title

solely in Plaintiff. Because Plaintiff is not asserting legal title against possession by PGA to recover any real property, under Hopkins, Hayes and Graham, this is not a case respecting title to land and venue is improper in Henry County.

Simply stated, this case is a request by the Plaintiff for the Court to interpret a trust clause contained in the Constitution of the Presbyterian Church (U.S.A.), which applies to real and personal, tangible and intangible property of the church. Because this is not a case respecting title to land as defined by Georgia law, venue is improper in Henry County. Venue is proper in Fulton County and Plaintiff's Complaint should be dismissed or transferred to the proper court.

C. PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AGAINST PGA.

(1) Failure to State a Claim Generally.

Under O.C.G.A. § 9-11-12(b)(6), a complaint should be dismissed when the allegations of the complaint, taken in the light most favorable to the plaintiff, disclose with certainty that the plaintiff would not be entitled to relief under any statement of facts and the movant establishes that the plaintiff can not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of relief. Mooney v. Mooney, 235 Ga. App. 117 (1998).

In the case at bar, on its face, Plaintiff's Complaint forecloses any possibility that Plaintiff could introduce any evidence sufficient to warrant a grant of relief under the Complaint. Exhibit 2 to Plaintiff's Complaint is a copy of Plaintiff's Articles of Incorporation, which state in Article IV that Plaintiff is a member of the Presbyterian Church (U.S.A.). Furthermore, Article IX of the Articles of Incorporation provides that

Plaintiff's Bylaws must not be in conflict with the Book of Order of the Presbyterian Church (U.S.A.). These provisions of Plaintiff's Articles of Incorporation undeniably establish that Plaintiff, since its moment of formation, has been a member of the Presbyterian Church (U.S.A.).

Furthermore, Plaintiff admitted in its Complaint that prior to reunion it was a member of the PCUS. Exhibit 4 is a copy of the pre-reunion PCUS Book of Church Order which contains a property trust clause⁶, to which Plaintiff was subject prior to reunion. After reunion, Plaintiff was subject to the property trust clause of the Presbyterian Church (U.S.A.), a copy of which is attached to Plaintiff's Complaint as Exhibit 3. Plaintiff's Complaint itself confirms that Plaintiff was subject to a property trust clause both under the PCUS Constitution and under the Constitution of the Presbyterian Church (U.S.A.).⁷

Under the Constitutions of both the PCUS and the Presbyterian Church (U.S.A.), Plaintiff had the opportunity to participate in, and in fact did participate in, the amendment of or adoption of the respective Constitutions as provided for in the governing documents. Moreover, if Plaintiff opposed the actions taken, Plaintiff could have, at any time in the eight year period after reunion, requested to withdraw from the denomination and take the church property with it.⁸ Plaintiff failed to do so and remained a member of the Presbyterian Church (U.S.A.).

⁶ PCUS Book of Church Order, Section 6-3.

⁷ In response to the overwhelming evidence of the existence of the trust clause, Plaintiff's Complaint offers no specific legal theory as to why the trust clause is not applicable to Plaintiff. The Complaint merely makes summary allegations that the trust clause is not applicable to it ostensibly because it believes it did not have adequate input through the representative form of government set out in the governing Constitution.

⁸ Article 13 of the Articles of Agreement, Book of Order, p. B-13-B-15.

Given that in its Complaint Plaintiff itself admits that the trust clauses existed, before and after reunion, there is no set of facts that Plaintiff can state to circumvent the fact that Plaintiff was subject to a property trust clause prior to reunion and that Plaintiff was subject to a property trust clause after reunion and may not leave the denomination and take church property with it. For that reason, Plaintiff's Complaint should be dismissed.

(2) Waiver and Laches.

Plaintiff failed to withdraw from the denomination with its property within the window of time for withdrawal; therefore, Plaintiff has waived its right to challenge the trust clause. Plaintiff could, for a period of 8 years from the date of reunion,⁹ request to be dismissed from the denomination and take the church property with it.¹⁰ Plaintiff made no such request, as is evidenced by its continued membership in the Presbyterian Church (U.S.A.). A quarter of a century after it first became subject to a property trust clause, Plaintiff is now seeking a judicial declaration of the validity of a provision of the Constitution of the Presbyterian Church (U.S.A.). Under any standard, the failure to assert a right for a quarter of a century constitutes a waiver of Plaintiff's right to challenge the property trust clause.

Normally the question of waiver is a matter for the jury, but where the facts and circumstances essential to the waiver issue are clearly established, waiver becomes a question of law. St. Mary's Hosp., Inc. v. Cohen, 216 Ga. App. 761, 763 (1995). If one has an obligation to speak, silence can be construed as a waiver. Id. at 762-763. In the case at bar, the Articles of Agreement imposed an affirmative duty upon churches to file

⁹ The eight year deadline expired on June 10, 1991.

¹⁰ See Articles of Agreement, Article 13, Section 13.4, Book of Order, p. B-13-B-15.

a petition to withdraw from the domination within eight years of reunion if they wanted to leave and take the church property with them. Plaintiff's failure to do so constitutes a legal waiver of its right to challenge the trust clause twenty five years later. For that reason, Plaintiff's Complaint must be dismissed.

Plaintiff's failure to act not only subjects it to a waiver defense, as discussed above, but also subjects it to the defense of laches to the extent that Plaintiff has alleged any equitable cause of action.¹¹ Laches is an equitable defense. Hadaway v. Hadaway, 192 Ga. 265, 270 (1941). There is no absolute rule as to what constitutes laches; each case is to be determined according to its own circumstances. Id. at 270. Laches is not a mere matter of time, but also an inquiry into inequity. Id. at 270.

In this case, Plaintiff was well aware of the reunion of the PCUS and the UPCUSA to form the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) engages in a representative government model and the minutes of the February 8, 1983 meeting of PGA indicate that Plaintiff's pastor was present at that meeting and also that a delegate of Plaintiff was present at that meeting. It was at the February 3, 1983 meeting of PGA that all of the pastors and church delegates had their opportunity to vote at the presbytery level on whether they supported reunion.¹² Monty Nelson, former pastor of Timberridge Presbyterian Church, was present at that meeting as well as Timberridge delegate Charles McCartha. The vote in favor reunion was 235 for and 54 against.

¹¹ As discussed above, a declaratory judgment is not per se equitable and an incidental request of injunctive relief will not convert a declaratory action into an equitable action; however, in the event that the Court deems any portion of Plaintiff's claims as equitable, laches bars the claims.

¹² A copy of the minutes are attached hereto as Exhibit "A."

Plaintiff was fully aware of reunion and cannot nearly 25 years later take issue with the property trust provision of the Constitution of Presbyterian Church (U.S.A.). Such a claim is subject to dismissal on the grounds of waiver or laches.

(3) Estoppel.

Plaintiff is estopped from asserting a challenge to the property trust clause. In Crumbley, 243 Ga. 343 (1979), the Georgia Supreme Court recognized an estoppel defense in a church property case. The facts of Crumbley are substantially similar to the facts in the case at bar except that in Crumbley the local church had already withdrawn from the greater church. In that case, the trustees of the general church brought an action against a local church that had voted to withdraw from the general church, in order to establish the right of the general church to control the church property. The Georgia Supreme Court found that a trust existed for the benefit of the general church. The Supreme Court expressly stated that the local church had participated in the process for the establishment of the trust rule, did not contest its validity for 30 years, remained a member of the greater church and accepted the benefits flowing from that membership, and were, therefore, estopped from denying the existence of the trust. Crumbley, 243 Ga. at 345.

The same facts apply to the case at bar. Plaintiff has been a member of the Presbyterian Church (U.S.A.) for almost a quarter of a century. It has participated in the governance processes of the church during that time, has made its membership contributions to the greater church, and it has been subject to the Constitution of the Presbyterian Church (U.S.A.) for that entire time. It has benefited from its association with the denomination. Moreover, Plaintiff also had the opportunity to participate in the

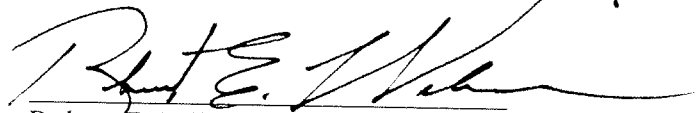
General Assembly meeting in which the former PCUS Constitution was amended to add the property trust clause. Plaintiff, because of its membership and participation in the denomination for well over a hundred years and in the Presbyterian Church (U.S.A.) since reunion, is estopped from asserting a challenge to the property trust clause.

III. CONCLUSION

For all of the foregoing reasons, PGA asks that the Court dismiss Plaintiff's Complaint in its entirety with prejudice.

Respectfully submitted, this 14th day of September, 2007.

WILSON, MORTON & DOWNS, LLC



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Plaintiff,)
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v.)
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PRESBYTERY OF GREATER)
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Civil Action File No.
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CERTIFICATE OF SERVICE

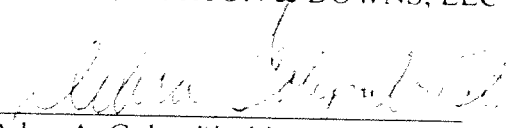
This is to certify that I have this date served upon counsel for Plaintiff a true and copy of the within and foregoing **DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO DISMISS** via first class mail, with sufficient postage affixed thereto, and in an envelope properly addressed to:

Michael C. Kendall, Esq.
Maureen E. Murphy, Esq.
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Robert E. Talley, Esq.
Laura French, Esq.
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This 11 day of September, 2007.

WILSON, MORTON & DOWNS, LLC


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