In The

Supreme Court of Virginia

RECORD NO. 171098

THE PURE PRESBYTERIAN CHURCH OF WASHINGTON, *et al.*,

***Appellants*,**

v.

THE GRACE OF GOD PRESBYTERIAN CHURCH

Appellee.

BRIEF OF APPELLEE

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INTRODUCTION

In this matter, Samyeol Kim ("Elder Kim") and the former "On Ma Eul" Pure Presbyterian Church[1] (collectively, "Pure Presbyterian") seek an appeal from an Order of the Fairfax County Circuit Court dated May 19, 2017 which found that Pure Presbyterian had merged with Grace of God Presbyterian Church ("Grace of God").

Having unsuccessfully wagered its case at the trial court level on the position that the merger never occurred, Pure Presbyterian has shifted gears on its appeal. Instead, it ignores the merits of the case but rather relies on the fact that the Fairfax County Circuit Court lacked jurisdiction to decide issues of property ownership.

The objections to jurisdiction are ironic considering that the defendants specifically consented to a jury trial (and lost) in the Circuit Court on the issue of "merger" and the disposition of the Church Property. Having lost at Circuit Court, the Pure Presbyterian cannot deny the ability of the Court to actually implement the jury's findings. Nor can it avoid the fact that it has *de facto* abandoned the very property at issue, which has now been transferred to the Trustees of Grace of God.

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[1] The Korean name for the church was On Ma Eul Pure Presbyterian Church. In the record, it is often shortened to "OPPC."

STATEMENT OF FACTS

Grace of God is the successor in part to a Korean-speaking Presbyterian congregation known as "Great Grace Presbyterian Church" ("Great Grace") formerly located at 3330 Holloman Road, Falls Church, Virginia ("the Falls Church Property"). Joint Appendix ("JA") 47, 337. In 2015, Great Grace, operating from the Falls Church Property, had approximately one hundred (100) members presided over by Reverend Dong Uk Choi ("Reverend Choi"). JA 551, 553.

Bankruptcy of Pure Presbyterian

In the fall of 2015, a smaller Korean-speaking Presbyterian congregation, Pure Presbyterian, filed bankruptcy after failing to make payments on a note ("the Note") secured by a First Deed of Trust on its property at 12851 Knight Arch Road in Fairfax ("the Church Property"). *See.* JA 127–32. Great Grace and Reverend Choi soon became aware of Pure Presbyterian's financial struggles. JA 491–92.

In October 2015, Reverend Choi met with Elder Kim of Pure Presbyterian and discussed various options for the two congregations. JA 477. Specifically, the parties discussed whether Great Grace Church could buy the Church Property or, alternatively, merge congregations and

worship together at the Fairfax location. *Id*. That discussion continued over the next several weeks. JA 478.

Both Congregations Agree to Merge

On February 14, 2016, the members of Pure Presbyterian held a meeting to weigh the options. JA 106–07. The congregation voted 25-11 to merge with Great Grace Church. JA 479–80. Two weeks later, Pure Presbyterian sent a memo to Rev. Choi confirming its decision to merge. JA 342–43. Meanwhile, on February 22, 2016, the members of Great Grace Church voted unanimously to merge, i.e. by selling the Falls Church Property and consolidating with Pure Presbyterian in Fairfax. JA 481.

On February 24, 2016, after the congregations had approved in principle, representatives from the two parent denominations met to confirm that there would be no doctrinal obstacles to the churches combining.[2] JA 485–86. The denominations approved the merger. *Id*.

To handle the mechanics of the merger, a "merger committee" was formed in March 2016 with three members from each congregation. JA 349. The merger was then memorialized in a "Merger Agreement" dated April 4, 2016, JA 351, which stated the terms:

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[2] While the congregations were both Korean Presbyterian, they belonged to different Presbyterian denominations based in Korea.

- Pure Presbyterian leaving its denomination and joining the denomination of Great Grace;
- The officers of both churches remaining "as is," while Reverend Choi presided over the joint congregation;
- Great Grace paying off the property debt of Pure Presbyterian;
- The surviving entity being called "Washington Church" and locating at the Church Property

JA 108–09. While the Agreement was never signed, it would be a road map followed by both sides and all designated conditions would be fulfilled.

Joint Services Begin in March 2016

The first issues for the merger were establishing a new home and leadership structure. In March 2016, the congregations began combining for worship. JA 350. At that time, the existing pastor for Pure Presbyterian announced he was departing in light of the merger and the arrival of Pastor Choi as the unified pastor. JA 357-56.

On March 27, 2016, Easter Sunday, the members of the new church celebrated the "unification" with a formal service. JA 350. From March 2016 forward, Reverend Choi presided over unified services, with leaders from both prior churches listed as "elders." JA 366–67.

After March 2016, the parties consolidated all relevant functions—including Bible studies, Korean schools and administrative personnel—and even held a church-wide retreat. JA 381–85. The only item that was kept

separate was the finances, which was done on the specific advice of Pure Presbyterian's bankruptcy attorney. JA 376–77.

Upon the merger, the church showed a united face to the public. At first, the members used the name "Washington Presbyterian Church" for the consolidated church which was printed on all the church bulletins, along with Reverend Choi's name as "Presiding Minister." JA 350–60. In July of 2016, the elders of the consolidated church, led by Elder Kim, changed the church name to "Grace of God Presbyterian Church" which was printed on every church bulletin until December 2016. JA 61–70, 321–24.

Sale of Falls Church Property

While the churches were merging functions, the elders of the former Great Grace church were laboring to sell their former home so as to satisfy the last clause of the Merger Agreement. JA 344. On March 2, 2016, a week after the denominational approval, Great Grace listed the Falls Church Property for sale. JA 345–46. In listing the Falls Church Property, Great Grace told the agent that it "needed to move quickly" due to the bankruptcy situation. JA 347–48.

In May of 2016, Great Grace agreed to an offer at the price of $2.5 million. JA 373–74. Great Grace "did not negotiate" the price as it was under pressure "from both sides" to close the deal quickly. *Id*. As part of the

transaction, Great Grace included all chairs, tables and church-related property within the old church building, as it no longer had need of these items in light of the merger. JA 271–72.

The fact of the sale contract (and sale price) was made known to the Merger Committee and the consolidated congregation. JA 386–87. In fact, the Falls Church Property sale was publicly announced right after the contract was entered and referenced multiple times in weekly bulletins, up until the sale closing date of October 21, 2016. *Id*.

Upon closing, the sale cleared over $815,000 in equity. JA 135, 389. The former members of Great Grace then obtained a loan from a sister church in the amount of $200,000 as well as adding more than $100,000 in funds from its own members – all with the intention of satisfying the Note and closing the merger. JA 391–92. In October 2016, Grace of God hired under-signed counsel to complete the transaction. *Id*. A few weeks later, the consolidated Church reached a deal with the Note holder to purchase the debt for $1.15 million. JA 147.

Pure Presbyterian Locks Out its Brethren

On November 6, 2016, to the great surprise of Grace of God's leadership, members of the former Pure Presbyterian gave 'formal notice' via email that they intended to sell the Church Property. JA 138–40. Prior to

this time, Pure Presbyterian had indicated no reservations with the merger. Grace of God responded that the Falls Church Property sale had closed, the Note would be satisfied shortly, and it intended to continue worshipping as one congregation. JA 141–42.

On Monday, December 5, 2016, without warning, Elder Kim and former members of Pure Presbyterian locked out the Grace of God leadership from the Church Property and formally repudiated the merger. JA 32–33, 38–39. In response, Grace of God filed the present suit, seeking temporary and permanent injunctive relief, as well as a ruling that the two churches had merged and the Church Property belonged to the new entity.[3] *See* JA 1–39. The suit was later amended to include all persons listed on the Deed for the Church Property. *See* JA 46–83.

As the time of trial, Grace of God had one hundred (100) adult members in its "unified" congregation, including at least three former members of Pure Presbyterian.[4] JA 472.

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[3] The Complaint also contained a "breach of contract" count, which sought damages of $500,000 based upon the fact that the Falls Church Property was sold below market. JA 53–55. That request for monetary relief was later nonsuited although the count itself remained. JA 86–87.

[4] On December 19, 2016, the Circuit Court awarded preliminary injunctive relief to permit Grace of God to continue worshipping at the Church Property. JA 40–42.

Bankruptcy Resolution

In June of 2016, after the merger occurred, Pure Presbyterian filed a proposed Bankruptcy Plan ("the Plan") with the U.S. District Court that *inter alia* required the Note to be satisfied. JA 110–24. The Plan, which was approved on September 21, 2016, specifically disclosed the merger and identified the new church as the most likely source to pay off the debt ("the first source [to pay off the Note] would be from funds provided by another church that choses to merge with the debtor"). JA 118, 125–26.

On or about January 23, 2017, pursuant to the Bankruptcy Plan (and the Merger Agreement), Grace of God entered a Loan Sale Agreement with ACM United, the Note Holder, to buy the debt. JA 147–52. A few weeks later, Grace of God and ACM United closed the sale. R. JA 153–77. Upon purchasing the debt, Grace of God undertook no further collections on the debt, because "we were a merged church." JA 414. Rather, Grace of God's leadership wrote to Elder Kim and the rest of the dissident members and stated that it had bought the Note with the intent to resolve the debt, thereby completing the merger. JA 178.

On February 20, 2017, following Grace of God's purchase of the Note, bankruptcy counsel for Pure Presbyterian filed a motion asking that the Bankruptcy proceeding be dismissed as moot. JA 187–90 (*In re The*

Pure Presbyterian Church of Washington, Case No. 1:15-bk-13848-BKF). In the motion, it alluded to the fact that all claims had been settled. *Id*. In its March 21st response to the Motion, counsel for "the merged entity" Grace of God (i) confirmed its buying the Note and (ii) informed the bankruptcy court of the pending state court case. JA 257–59. The Bankruptcy Court consequently dismissed the case stating that "*[n]othing in this motion to close case and final account, and this order shall be dispositive of any issue pending in the proceeding between the debtor and [Grace of God], currently pending in the Circuit Court of Fairfax County*." JA 260–62.

Following the Note purchase, "debtor" Pure Presbyterian made three purported "mortgage" payments (representing the months of February, March and April of 2017) of $7,451.88 to its "creditor" Grace of God. JA 416–17. None of them were deposited by Grace of God. JA 417–18. All three checks were returned to (and accepted by) Pure Presbyterian under the May 19, 2017 Final Order, which is now being appealed. JA 99–102. No further payments have been made since entry of the Final Order.[5]

On May 1st, the matter was tried in Fairfax County Circuit court. After three days of evidence, the jury returned a verdict of "yes" on the questions

[5] The May 2017 payment, which was due the date of the trial, was never paid. No payment has been made since that date.

of whether (i) the two churches had formed an agreement to merge and (ii) Grace of God f/k/a Great Grace had performed its obligations. *Id*. The Court then entered a Final Order recognizing Grace of God as the merged church and permitting it control of the property, including the right to name Trustees holding title to the property. *Id*. It further confirmed that the Note was extinguished and ordered the payments referenced *infra* returned to Pure Presbyterian. *Id*. Neither the Final Order nor any other pleading referenced any objection by Defendants to the Court's jurisdiction or the relief sought by Grace of God.

Since the Final Order was entered, the Grace of God church has appointed new Trustees with the authorization of the Circuit Court. See Case No. 2017-11542. It has successfully conveyed the Church Property into the names of these new Trustees. Case No. 2017-11830.

Pure Presbyterian has not filed a *supersedeas* bond or taken any action to suspend the effect of the Final Order.[6]

AUTHORITIES AND ARGUMENTS

Grace of God agrees that the applicable standard of review for jurisdictional issues is *de novo*. *See The Country Vintner, Inc. v. Louis*

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[6] As a practical matter, Pure Presbyterian has made no payments on the Note or towards the Church Property since January 2017. In effect, it has abandoned its interest.

Latour, Inc., 272 Va. 402 (2006). However, with respect to any factual findings underpinning the jurisdictional determination, they are "entitled to deference and are binding upon this Court unless those findings are plainly wrong or without evidence to support them." *Hedrick v. Warden of the Sussex I State Prison*, 264 Va. 486, 496 (2002).

I. The Circuit Court of Fairfax County Has Jurisdiction to Apply Neutral Principles of Law to this Dispute

Pure Presbyterian's first argument on appeal is that the trial court lacked competence to decide a religious matter. This is a new argument which was not raised at the trial court level. See JA 88–95.[7] *See* Rule 5:25 of the Supreme Court ("No ruling of the trial court … before which the case was initially heard will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling").

Even if Pure Presbyterian avoids the preclusion of Rule 5:25, it still cannot reverse its position without any legal repercussion, as it is now reversing its own trial strategy. "Judicial estoppel forbids parties from 'assuming successive positions in the course of a suit, or series of suits, in reference to the same fact or state of facts, which are inconsistent with

[7] In its Answer, Pure Presbyterian asserted 12 affirmative defenses (none of which are raised on appeal). None of the defenses cited, even by implication, religious freedom or First Amendment. JA at 88-95.

each other, or mutually contradictory.'" *Lofton Ridge, LLC v. Norfolk S. Ry.*, 268 Va. 377, 380–381 (2004) (quoting *Burch v. Grace Street Bldg. Corp.*, 168 Va. 329, 340 (1937)).

After fully litigating this matter (and losing) under the position that there was "no merger" and the Grace of God members were uninvited trespassers, Pure Presbyterian now comes before this Court asking it to not interfere with an *internal* issue within the Church regarding "this mature contractual dispute." *Cf.* JA 90 at ¶¶ 22, 26–27 ("Defendants deny there was a merger") *with* Brief for the Appellant 10–20. Quite simply, Pure Presbyterian has completely reversed its position.

Regardless, even if the "religious freedom" argument isn't estopped, it is ultimately a red herring as the case was ultimately about (i) whether there was a merger contract and (ii) whether it was performed. The fact a church is the subject of the case cannot nullify neutral legal principles:

> Neither the State Constitution nor the First Amendment deprives church members of their right to resort to the courts for the protection of their property rights or their civil rights. The question is simply whether the court can decide the case by reference to neutral principles of law, without reference to issues of faith and doctrine.

Reid v. Gholson, 229 Va. 179, 188 (1985) (citations omitted). It is undisputed that churches are not immune against breaches of contract actions—after all, were that the case, no party would contract with a

church. *See, e.g. Trustees of Asbury United Methodist Church v. Taylor & Parrish, Inc.*, 249 Va. 144 (1995). *See also General Council on Fin. & Admin. v. Cal. Superior Court*, 439 U.S. 1369, 1373 (1978) ("Such [First Amendment] considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged. As the Court stated in another context: 'Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.'") (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 306 (1940)).

Likewise, there is nothing in the case law of Virginia to suggest that a merger between two churches is exempt from legal scrutiny. That is to say, where two churches enter into a contract, trial courts may resolve an action based on said contract so long as it "can be decided without reference to questions of faith and doctrine." *Reid*, 229 Va. at 187. The same holds true for disputes, like the present case, regarding church property:

> [T]he Supreme Court held that a State is "constitutionally entitled" to adopt neutral principles of law as a means of adjudicating a church property dispute. In addition, the Supreme Court rejected the notion that "the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved."

In re Multi-Circuit Church Prop. Litig., 84 Va. Cir. 105, 125 (2012) (quoting Jones v. Wolf, 443 U.S. 595, 605 (1979).

The *Bowie* case, cited by appellant, illustrates this fundamental rule. When "a case involves a quarrel among church members and/or leaders, a court must determine the likelihood that . . . the court will be confronted with questions of religious governance or doctrine." *Bowie v. Murphy*, 271 Va. 126, 133–34 (2006). In *Bowie*, the plaintiff, a church deacon, brought a defamation suit arising from statements made in a church meeting. *Bowie*, 271 Va. at 135. Notwithstanding the religious context, this Court held that trial courts can "evaluate these statements for their veracity and the impact they had on Bowie's reputation the same as if the statements were made in any other, non-religious context." *Id.* This Court further held that "Bowie pled his defamation claims in such a manner that *the circuit court* . . . *can consider them in isolation, separate and apart from the church governance issue involved* in Bowie's status as a deacon." *Id.* (emphasis added). Thus, "circuit court[s] ha[ve] subject matter jurisdiction over [ ] claims [that] can be decided without addressing issues of faith and doctrine[, as] the circuit court need not become involved with the underlying dispute among the congregation of the church[.]" *Id*.

This Court distinguished the claims in *Bowie* from those in *Jae-Woo Cha v. Korean Presbyterian Church*, where this Court held that civil courts had no jurisdiction over a pastor's wrongful termination suit stemming from internal decisions made by the church's governing body. *See Jae-Woo Cha v. Korean Presbyterian Church*, 262 Va. 404 (2000).[8]

Here, as in *Bowie*, the trial court had subject matter jurisdiction to evaluate the elements of formation and performance of the merger contract the same as if the contract "were made in any other, non-religious context." *Bowie*, 271 Va. at 135. The issues in *Bowie* are directly analogous to the immediate matter, where the Court was asked to consider the issues of the existence and validity of the merger contract, not any ecclesiastical disputes (which were not raised in any event). JA 784. Considering these issues, and these issues only, the jury correctly decided that the parties had indeed entered into an agreement and that Grace of God had performed on it. *Id*. Once that threshold question had been decided, the Court had every right to award relief permitting Grace of God to take back control of the Church Property.

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[8] Also *See Hosanna-Tabor Evangelical Lutheran Church & Sch.v. E.E.O.C*, 565 U.S. 171, 190 (2012) (distinguishing between constitutionally permissible government regulation of purely outward physical acts and impermissible government interference with internal church decisions that affect the faith and mission of the church itself).

In citing *Presbyterian Church in United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) (hereinafter "*Blue Hull*"), Appellants miss the larger point that property issues can (and must) be decided without reference to religious doctrine. Brief for Appellant at 12. The Supreme Court in *Blue Hull* stated: "First Amendment Values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. . . . [T]he Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine." *Id*.

In the present case, the controversy brought to the Circuit Court was one of contracts, not of ecclesiastical succession. In their appeal brief, Appellants erroneously claim that the Final Order improperly interfered with church governance by imposing terms of corporate control. Brief for the Appellant at 12–13. That is hyperbole. By authorizing Grace of God to elect new Trustees (so as to formally transfer the Church Property), the Final Order simply articulated the terms of the contract to which the congregation of Pure Presbyterian had previously agreed and the steps necessary to execute that contract. *Cf.* JA 19–20 *with* JA 99–102.

Pure Presbyterian improperly conflates the impact of the Final Order with the verdict of the jury. The instructions to the jury and posture of the case made it abundantly clear that this was not an issue of church governance – that was decided months later when Grace of God elected new Trustees.[9] Rather, it only asked: did a valid contract to merge exist and, if so, did Grace of God perform its obligations under the contract. JA 722–23. The fact that the jury's determination would have an impact on the former parishioners of Pure Presbyterian is irrelevant. *See Reid*, 229 Va. 179 (court had jurisdiction to appoint judicial officer to oversee congregational meeting vis-à-vis terminating the pastor); *Baber v. Caldwell*, 207 Va. 694, 700, 152 S.E.2d 23, 28 (court had jurisdiction to "direct the holding of congregational meeting for the purposes of electing or reelecting Elders and Deacons . . . ."). Rather, "[t]he question is simply whether the court can decide the case by reference to neutral principles of law, without reference to issues of faith and doctrine." *Reid*, 229 Va. at 188 (1985). In the present case, the trial court was instructed upon and relied entirely on neutral principles of law in reaching its decision.

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[9] The jury instructions in this case referenced only neutral principles of contract law. There was no reference to Church bylaws or customs.

II. The Circuit Court Had Jurisdiction Over the Declaratory Judgment Count and the Issues Raised in Bankruptcy

Pure Presbyterian's second argument is that the Court lacks jurisdiction: first, because it could not award declaratory relief in a contract action and, second, because the matter initially arose in bankruptcy. Again, these are issues not raised at the trial court level. See Rule 5:25 of the Rules of the Supreme Court of Virginia. Regardless, this argument represents a misreading of previous judicial orders in this case.

A. There Was a Pending Contract Claim at the Time of Trial and the Court Relied Upon it in Instructing the Jury

In its Brief, Pure Presbyterian erroneously claims that "Grace Presbyterian [sic] nonsuited the entire breach of contract count . . . leaving the declaratory judgment count under Code § 8.01-184 as its only substantive claim." Brief for the Appellant at 16. That is not true.

In fact, the trial court's March 31, 2017 Order ("Nonsuit Order") only removed a request for monetary damages while still asserting a breach of contract. JA 86 ("it is hereby ADJUDGED, ORDERED AND DECREED that the Motion [for Nonsuit] is GRANTED and that **the claim** under Count III **for monetary damages** be, and hereby is, NONSUITED.") (emphasis added). There was no nonsuit of the entire Count III.

Indeed, counsel for Pure Presbyterian operated at trial under this common-sense interpretation of the Nonsuit Order, which was the contract claim remained. JA 659 ("This case isn't just about any old contract. This case is about a contract that affects title to real estate."). Counsel for Grace of God also assumed the contract claim remained. JA 537 ("Well, we nonsuited the damages claim in Count 3. We didn't nonsuit the whole claim."). Finally, and most importantly, the Court arrived at the same conclusion vis-à-vis the Nonsuit Order. JA 279 ("I guess the first question I wanted to have counsel address is whether we still need to have a jury in light of the fact that I noticed that the nonsuit – that the **damages claim** was nonsuited.") (emphasis added). At trial, nobody suggested that the entire contract claim had been nonsuited. It hadn't.

It is well settled that plaintiffs have an absolute right to nonsuit a "claim" as well as a cause of action. Va. Code § 8.01-380(A). In the present case, Grace of God filed a breach of contract count seeking injunctive relief, i.e. "an Order declaring that the parties entered into a valid merger agreement [and] that the Defendant has failed to abide by the material terms of the merger agreement . . . ." JA 54 at ¶ 2. Grace of God's nonsuit with respect to its monetary claim does not *ipso facto* negate its request to enforce the parties' agreement. Indeed, the jury instructions submitted –

without objection – demonstrate this, as they contained all relevant jury instructions for finding breach of contract.[10]

Assuming *arguendo* that this Court finds the Nonsuit Order nullified the entire breach of contract claim, the trial court still had authority to enter a declaratory judgment. Virginia Code § 8.01-184 provides that:

> In cases of actual controversy, circuit courts within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed . . . . Controversies involving the interpretation of deeds, wills, and other instruments of writing, statutes, municipal ordinances and other governmental regulations, may be so determined[.]

The declaratory judgment statutes are remedial in nature and "are to be 'liberally interpreted and administered with a view to making the courts more serviceable to the people.'" *Board of Supervisors v. Southland Corp.*, 224 Va. 514, 521 (1982) (quoting Va. Code § 8.01-191).

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[10] These instructions were read to the Jury and therefore preserved for the record. JA 715. *See also* JA 653–84. The jury instructions—specifically Jury Instructions three through sixteen and nineteen—encompassed the following model instructions on Contracts verbatim: 45.000 (Issues and Burden of Proof); 45.010 (Definition of Contract); 45.020 (Offer); 45.030 (Acceptance); 45.040 (Consideration); 45.070 (Communication of Acceptance); 45.080 (Acceptance Must Match Offer); 45.090 (Meeting of Minds); 45.110 (Withdrawing an Offer); 45.170 (Contract Must Be Complete and Reasonable Certain); 45.190 (Intent); 45.305 (Ordinary Meaning of Words); 45.310 (Construction Against Drafter); and 45.330 (Practical Construction by the Parties). The Jury Instructions likewise contained instructions for the Statute of Frauds defense as well as the exception to the Statute of Frauds. JA 722–23.

Pure Presbyterian posits that the trial verdict violates "the rule against using declaratory judgment jurisdiction to determine disputed factual issues rather than to declare defined rights." Brief for the Appellant at 17. In the present case, however, the jury did determine disputed factual issues about whether the merger occurred and whether it was performed. *Cf.* JA 336–52 and JA 476–86 (Grace of God's account) *with* JA 544–52 (Pure Presbyterian's account).

The case law cited by Pure Presbyterian to support its point is not helpful. In *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Supervisors*, 285 Va. 87 (2013), a company complained against governmental agencies for statutory violations vis-à-vis public project proposals. This Court vacated the circuit court's opinion because the plaintiff used declaratory judgment to create rights that it did not possess by statute or contract. *Id*., 285 Va. at 101–02.

In the present case, the parties can and did seek declaratory relief once the underlying contract is established. *See* Va. Code 8.01-184; *Liberty Mutual Ins. Co. v. Bishop*, 211 Va. 414, 421, 177 S.E.2d 519, 524 (1970) (declaratory judgment is appropriate to "guide parties [to a contract] in their future conduct in relation to each other . . . .").

The Appellant's cited case of *Green v. Goodman-Gable-Gould Co*., 268 Va. 102 (2004) is also inapposite. The plaintiff in *Green* was using declaratory judgment to litigate a breach of contract claim. *Id*., 268 Va. at 109–10. There was no challenge to the validity of the underlying contract or its terms. *Id*. In the present case, Grace of God had to determine the validity of the Merger Agreement. JA 92 at ¶¶ 50–53. In sum, the use of declaratory relief was based upon existing contractual rights.

Finally, assuming *arguendo* that this Court believes the trial court relied upon declaratory judgment instead of contract law, its decision to do so is harmless error. In Virginia:

> When it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be arrested or reversed: . . . For any other defect, imperfection, or omission in the record, or for any error committed on the trial.

Va. Code Ann. § 8.01-678. "[I]n order to constitute reversible error the ruling of the trial court must be material and prejudicial to the interests of the party complaining of it." *Taylor v. Turner*, 205 Va. 828, 831 (1965).

Unlike in *Green*, the jury was fully instructed as to the specific findings it needed to find a breach of contract. JA 715–23. *See* n. 8, *infra*. The jury then returned a verdict which complied with those instructions. JA 783–85. Any jurisdictional issues arising from the "basis" of the Final Order

were neither material nor prejudicial to Pure Presbyterian. It had already lost. Forcing the parties to relitigate the same facts under a theory of breach of contract would be a waste of judicial resources.

B. The Bankruptcy Court Had Ceded Subject Matter Jurisdiction with Respect to the Merger Issues

The companion argument from Pure Presbyterian is that the Circuit Court lacked jurisdiction, at least at the outset, to adjudicate these matters, as there was a pending bankruptcy case. Again, that argument ignores both the law and the scope of the orders at issue.

"The bankruptcy court's authority *following confirmation of a plan* is defined in 11 U.S.C. § 1142." *Goodman v. Phillip R. Curtis Enterprises, Inc. (In re Goodman)*, 809 F.2d 228, 232 (4th Cir. 1987) (emphasis added). The language of 11 U.S.C. § 1142 "limits the authority of the court to matters concerning the implementation or execution of a confirmed plan." *Id*. This limit of authority has been interpreted as a limit of jurisdiction—i.e. bankruptcy courts only have the jurisdiction the plan specifically retains. *Id*. *See In re Walker*, 198 B.R. 476, 481 (Bankr. E.D. Va. 1996); *Poplar Run Five Ltd. Partnership v. Virginia Electric & Power Co.*, 192 B.R. 848, 859 (Bankr. E.D. Va. 1995); *In re A.H. Robins Co., Inc.*, 182 B.R. 128, 133 (Bankr. E.D. Va. 1995).

On September 21, 2016, the bankruptcy court for the Eastern District of Virginia ("Bankruptcy Court") approved the "Plan of Reorganization" filed by Pure Presbyterian (the "Plan"). JA 125–26. Article IX of this Plan specifically "retain[ed] jurisdiction of these case [sic]" for an enumerated list of purposes.[11] JA 121. Nothing in this retention of jurisdiction references the Church Property, the merger, or the enforcement of a merger agreement. Therefore, as jurisdiction had been released by the Bankruptcy

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[11] Specifically, those purposes are as follows:

a) To determine any objections to the allowance of Claims, any controversy as to the classification of Claims or any controversy regarding the subordination of any Claim;
b) To determine and fix all Claims arising from the rejection of any executory contracts or leases;
c) To determine and fix all costs and expenses of administration of the Reorganization Cases, including fees of professional persons;
d) To hear and determine any pending applications or adversary proceedings or contested matters, including proceedings, to recover preferences and fraudulent conveyances;
e) To liquidate any Disputed Claims;
f) To enforce the provisions of the Plan, including to hear and determine any plan for further reorganization;
g) To correct any defect, cure any omission or reconcile any inconsistency in the Plan or in the order of the Bankruptcy Court confirming this Plan as may be necessary to carry out the purpose and intent of this Plan; and
h) To determine such other matters as may be provided for the in the Confirmation Order or as may be authorized under the provisions of the Code.

JA 121

Court on the merger issue, it was both necessary and appropriate for the state trial court to assume it.

Certainly that was the opinion of the Bankruptcy Court, as its final decree in March 2017 states that: "Nothing in this motion to close case and final account, and this order shall be dispositive of any issue pending in the proceeding between the debtor and [Grace of God], currently pending in the Circuit Court of Fairfax County, Virginia (Case No. CL 2016-16945)." JA 260–61. Indeed, Pure Presbyterian's Petition concedes that the Bankruptcy Court "retained in rem jurisdiction over the property for all purposes, **other than for effecting a merger or sale**." Brief for the Appellant at 23 (emphasis added). In other words, Pure Presbyterian admits that the Bankruptcy Court had ceded jurisdiction over the Church Property *with respect to a merger* – the very issue decided by the jury. Therefore, the Circuit Court of Fairfax County had proper jurisdiction pursuant to 11 U.S.C. §§ 1141(b), 1142 and Virginia Code § 17.1-513 at the filing of this matter—which occurred later than the confirmation of the Plan.[12]

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[12] It is telling that the Bankruptcy Court made no objection to Grace of God's state court lawsuit, of which it was well apprised. JA 257–61. Nor did Pure Presbyterian's bankruptcy counsel attempt to forestall the state lawsuit or file an objection, even after the preliminary injunction was issued in December 2016. Finally, Pure Presbyterian never raised any specific jurisdictional objection either in its Answer, at trial, or on the Final Order. While this omission is not necessarily a bar to raising the jurisdictional

Quite simply, the parties and the respective courts always anticipated that the state court would decide the issue of merger – and submitted that very issue to the jury to decide.

III. Pure Presbyterian Has Abandoned Any Ownership Rights in the Church Property

The Final Order required Grace of God to refund any monies it was owing to its fellow church members, i.e. the former members of Pure Presbyterian. JA 100. It has done so and those funds have been accepted the appellants. Since that date (May 19, 2017), Appellants have not posted a *supersedeas* bond. "[A]n appeal does not operate as a *supersedeas*." *Seal v. Puckett*, 159 Va. 297, 300 (1932). "[T]he appeal is not effectual to arrest the proceedings on the decree. Nor is the appellee bound to notice it. He may go on and execute his decree and take no notice of the appeal." *Id*. at 302 (quoting *Williamson v. Gayle*, 45 Va. 180, 183 (1847)). Nor, since that date, have Appellants paid any type of "mortgage" to Grace of God, which indisputably bought their debt in March 2017. In effect, they have abandoned any interest in the Church Property.

Accordingly, Grace of God has transferred title in the Church Property to its elders; a procedure anticipated by the Final Order and now recorded

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issue on appeal, it's also conclusive evidence that all parties considered the "merger" issue to be reserved for the state court.

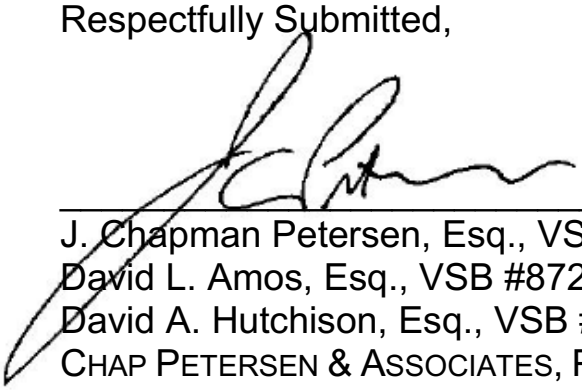
in the land records of Fairfax County. JA 267–73. Those new Trustees are not parties to the current appeal or any companion lawsuit. Therefore, any action by this Court to "remand" this case would be a futile effort to restore *ex ante* a situation that cannot be restored.

CONCLUSION

The above considered, this Court should deny the Appeal.

Respectfully Submitted,

Date: April 9, 2018



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CERTIFICATE

The undersigned hereby certifies that the foregoing Brief of Appellee complies with Rule 5:26 and further certifies as follows:

On this 9th day of April, 2018, three copies of the foregoing Brief of Appellee were hand delivered to the Clerk's Office of the Supreme Court of Virginia for filing, and an electronic copy was filed, via VACES. On this same day, one electronic copy of the foregoing Brief of Appellee was sent, via e-mail, to counsel for Appellant, below. This Brief consists of 6,115 words.

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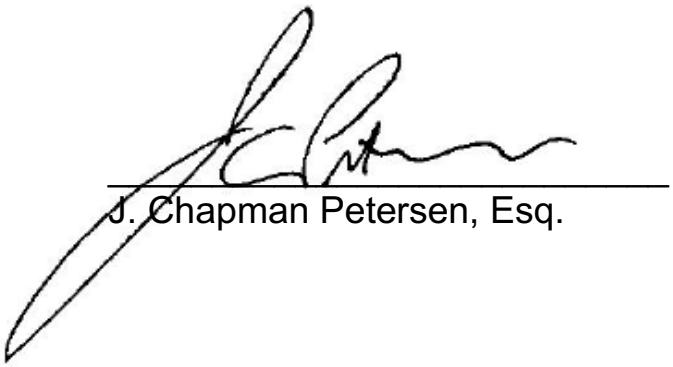

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