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**Docket: SUCV2017-0804-BLS 2**

**Date: November 16, 2017**

**Parties: NEWTON PRESBYTERIAN CHURCH and THE PRESBYTERY OF BOSTON  
Plaintiffs vs. GARRETT SMITH, et al.[1] Defendants and NEWTON COVENANT  
CHURCH, Third Party Plaintiff, vs. PRESBYTERIAN CHURCH (USA), Third Party  
Defendant**

**Judge: Janet L. Sanders**

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PARTIAL SUMMARY  
JUDGMENT

This action arises from a dispute over the ownership of property of the Newton Presbyterian Church ("NPC"), a member of the national Presbyterian denomination known as the Presbyterian Church (USA) (the "PCUSA"). In January 2017, a breakaway faction within the NPC led by the individual defendants conducted a vote purporting to effect the departure of NPC from the Presbyterian Church in order to affiliate with a conservative evangelical organization called the Evangelical Covenant Church ("ECC"). Calling themselves the "Newton Covenant

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[1] Carmen Aldinger, Anders Brownworth, Thomas Devol, Harold Jones, Doris Kellom, Kristen Lucken, Roger Mark, Rosalind Picard, Daniel Romaine, Beatrice Yankey and the Newton Covenant Church. Church" ("NCC"), the defendants assumed control over NPC's bank accounts and other property, including the church building located at 75 Vernon Street in Newton.

The Presbytery of Boston is the governing body for all PCUSA member churches in the greater Boston area, including the NPC. Pursuant to PCUSA's Constitution (which includes provisions to deal with schisms within congregations), the Presbytery has determined that the loyal Presbyterian members of the NPC are the "true church" and that the NCC members controlled by the breakaway faction are no longer members of the NPC, with no power to control NPC property. This lawsuit seeks enforcement of this determination together with damages. The matter is now before the Court on plaintiffs' Motion for Partial Summary Judgment on Count I seeking declaratory relief. This Court concludes that the motion must be Allowed, for following reasons.

BACKGROUND

In support of their motion, plaintiffs primarily rely on documents, the authenticity of which is not in question. Those documents together with other undisputed facts reveal the following. [2]

A. The PCUSA Hierarchical Structure

The PCUSA is a Protestant Christian denomination consisting of congregations and a hierarchy of four governing councils that make up "one church." The four governing councils are -- in ascending order--the session, the presbytery, the synod, and the General Assembly. A session, elected by a congregation, governs at the congregational level. A presbytery, made up of clergy and elders from congregations in a specific geographical area, governs the churches in

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[2] Although purporting to dispute most of the facts cited in the Rule 9(A)(b)(5) statement proffered by the plaintiffs, the defendants do not cite to any facts in the summary judgment record nor do they allege any particular facts to show that a genuine dispute indeed exists.

a specific locality. A synod, made up of members of presbyteries within a region, governs the presbyteries in a multi-state region. The General Assembly governs the 16 regional synods at the national level. The acts of each council are subject to review by the next higher council.

A central tenet of the denomination is "connectionalism," with all member congregations and governing councils agreeing to conduct worship in accordance with the PCUSA Constitution (the Constitution). [3] The Constitution consists of the Book of Confessions and the Book of Order, which contains the church governance provisions. See Ex A of Joint Appendix. The Constitution defines the jurisdiction of each council, with powers not mentioned expressly reserved to the presbyteries. A congregation as described in the Constitution "refers to a formally organized community chartered and recognized by a presbytery" and governed by the Constitution. Members of the congregation put themselves under the leadership of the session and the higher councils. A congregation may not hire a new minister or terminate that relationship without its presbytery's approval.

This hierarchical decision-making structure is, as stated in the Constitution, "applicable to all matters pertaining to property." As to ownership of that property, the Constitution contains a Trust Clause, which states:

All property held by or for a congregation, 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 congregation or of a higher council retained for the production of income, is held in trust nevertheless for the use and benefits of the Presbyterian Church (U.S.A.)

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[3] The Constitution states: "The mutual interconnection of the church through its councils is a sign of the unity of the church. Congregations of the Presbyterian Church (U.S.A.) while possessing all the gifts necessary to be the church are nonetheless not sufficient in themselves to be the church. Rather they are called to share with others both within and beyond the congregation the task of bearing witness to the Lordship of Jesus Christ in the world." Ex A of Joint Appendix.

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Ex A of Joint Appendix at G-4-0203. This Trust Clause was in direct response to the Supreme Court's holding in *Jones v. Wolf*, 443 U.S. 595, 603 (1979), discussed *infra*. The PCUSA's predecessor organization, based primarily in the northern United States, added this clause in 1981. After it combined with the Presbyterian denomination based primarily in the southern United States, the General Assembly of the PCUSA approved the clause for inclusion in the PCUSA Constitution.

In addition to this Trust Clause, the Constitution limits a congregation's right to sell, encumber, or mortgage its real property without written permission of the presbytery. When a congregation is formally dissolved or becomes extinct, its property "shall be held, used, and applied for such uses, purposes, and trusts as the presbytery may direct, limit and appoint" or it may be "sold or dispose of as the presbytery may direct." In the event of a schism within the congregation, the Constitution sets forth a process for determining which of the factions is entitled to the property, stating that if there is no reconciliation or division into separate congregations, "the presbytery shall determine if one of the factions is entitled to the property because it is identified by the presbytery as the true church within the Presbyterian Church (U.S.A.)." The Constitution expressly states that this determination does not depend on

which faction received the majority vote within the congregation at the time of the schism.

B. The Presbytery of Boston and the NPC

The Presbytery of Boston (the Presbytery) was incorporated in 1888 for the purpose of holding church property in the event that a congregation "shall cease to carry out the purposes for which it was originally created." See Ex. C of Joint Appendix. Ten years later, NPC was incorporated and has continued its membership in the PCUSA and the governing councils ever since. Its

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Articles of Incorporation state that "the purpose for which the corporation is committed is the establishment and maintenance of the public worship of God in accordance with the principles and doctrines of the [PCUSA]." In 1956, NPC adopted corporate Bylaws, which have been amended over the years. See Ex. BB, as adopted October 5, 2008. The Bylaws provide that members of the corporation are those who are "in full communion of the Newton Presbyterian Church." Article 2 of Bylaws, attached as Ex BB of Joint Appendix. "A member of this corporation who shall for any cause cease to be a member in full communion of the Newton Presbyterian Church shall forthwith cease to be a member of this corporation and shall forfeit and lose all claims and rights to the [sic] all the privileges, franchises and property of the corporation." Article 2 of Bylaws, Ex. BB.

NPC has at various times recognized the authority, participated in and benefited from the hierarchical structure of PCUSA. It has submitted its session minutes to the Presbytery for annual review, elected and sent delegates to Presbytery meetings, and paid annual fees. Members of the NPC session, known as "ruling elders," take an oath as required by the Constitution in which each vows to be governed by PCUSA polity and to abide by its principles. Pursuant to its Bylaws, the powers of NPC's Board of Trustees are "subject to the regulations in the Constitution" of the PCUSA.

The NPC has over the year's also demonstrated familiarity with PCUSA policies concerning property. It has received loans from the Presbytery for property-related projects, and in 1986 asked for and received approval from the Presbytery to purchase a home for its pastor. In seeking that approval, the Financial Secretary of the NPC stated: "It is our understanding from the Book of Order, sect. G-8-0501 that both the purchase and the mortgage must have written Presbytery approval before they can be consummated." A similar acknowledgement was

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contained in a filing with the Registry of Deeds related to that purchase. In allowing the Presbytery to host meetings at the church in 1988, the NPC noted "we are basically stewards of facilities which have been given to us for the use of the wider church and community." In 1989, the congregation followed the Presbytery's advice not to convert the church property into an historic building because PCUSA "buildings need to be plastic enough to meet the needs of our mission today and tomorrow." At its September 2015 Fall Congregational Meeting, the session recognized that "PCUSA polity is that NPC holds the building in trust for the Presbytery." Even more recently, at its April 2016 Called Meeting of the Session, the session again recognized that NPC "can't leave with property" of the PCUSA.

C. The Schism

The genesis of the dispute that cause the schism within the Newton congregation stems from a 2011 vote by a majority of the presbyteries approving an amendment to the Constitution allowing LGBT members to be ordained. In 2015, the majority of presbyteries approved another amendment permitting same-sex marriage in PCUSA churches. These two amendments were among the issue that led the NPC session to begin what the governing

documents describe as a "denominational discernment process." That is a process by which congregations can seek dismissal from the PCUSA to another "Reformed" denomination within the Protestant tradition. Under the Constitution, the relationship between a congregation and PCUSA "can be severed only by constitutional action on the part of the presbytery."

In accordance with this constitutional process, the Presbytery of Boston assigned a Response Team to NPC in September of 2015 to discuss next steps, to investigate the conflict within the congregation, and to provide for the Presbytery a final report, including recommendations regarding dismissal. The NPC session originally considered seeking dismissal to the Evangelical

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Covenant Order of Presbyterians (ECO). ECO is a denomination in the Reformed tradition. It then considered dismissal to the more conservative Evangelical Covenant Church (ECC), which does not permit same-sex marriage or ordination of gay men or women. The Response Team informed the session that the Presbytery would be unable to dismiss NPC to the ECC denomination because ECC is not a Reformed denomination as required by Article 13.3 of the PCUSA Constitution.

In October of 2016, the Presbytery, at the request of some members of the NPC congregation and pursuant to the Constitution, appointed an Administrative Commission to oversee the situation and determine if the congregation was in schism. In early January 2017, the Administrative Commission learned that the NPC session planned to hold a vote to "withdraw" from the PCUSA, affiliate with the ECC and amend NPC's bylaws. The Administrative Commission wrote a letter to the NPC congregation stating that this change of denominational affiliation could be effected only by a vote of the Presbytery. Certain members of the NPC, led by the individual defendants, nevertheless held a putative vote on January 15, 2017 purporting to change NPC's denominational affiliation from the PCUSA to the ECC. A majority of congregation members present voted in favor.

After the vote, the Administrative Commission informed the NPC Session that all who voted to leave PCUSA were no longer members of NPC. It also determined on behalf of the Presbytery that the NPC members who wanted to remain members of the PCUSA constituted the "true church," or the "true" NPC. The Presbytery instructed former NPC members, including the individual defendants, to "refrain from taking any action purporting to affect the ownership, possession, use or status of the church property" or to change NPC's name. The breakaway

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faction has ignored these directions, and has changed signage at the building at 75 Vernon Street to the "Newton Covenant Church" where it conducts religious services. This lawsuit ensued.

#### DISCUSSION

Before turning to the legal arguments made in support of and against the motion, this Court addresses the defendants' assertion that this motion is premature. They note that that this Court (Salinger, J.) limited discovery in this case to the exchange of documents, thus preventing them from taking depositions or conducting third party discovery. They argue that it would be unfair for this Court to decide this case based on affidavits of individuals they have not had a chance to question. The problem with this argument is that the issues raised by the instant motion can (and should) be decided based on documents, which speak for themselves. Although providing the Court with context, the affidavits are unnecessary. Moreover, the defendants fail to identify any genuine fact dispute that would preclude summary judgment. Indeed, even their replies to the Statement of Undisputed Material Facts go no further than the bare assertion that the fact is "disputed." This is simply not enough. This Court therefore turns to the legal issues raised by

this motion.

The courts have adopted two approaches to resolve church property disputes. The first is the "ecclesiastical" approach. Where a church has a hierarchical structure and the dispute is one of internal discipline and governance that is intertwined with religious doctrine, then the court must defer to the decision-making processes of the hierarchical church. See *Par. Of the Advent v. Protestant Episcopal Diocese of Mass.*, [426 Mass. 268](#), 280 (1997). The second is the "neutral principles" approach. If the dispute does not relate to questions of religious doctrine, discipline or authority, then courts apply traditional judicial methods of interpretation to discern the parties' intent, examining key documents and evaluating the parties' behavior. *Jones v. Wolf*, 443 U.S.

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595, 602-603 (1979). The plaintiffs contend that they are entitled to summary judgment under either approach, but with an expressed preference that this Court decides the motion using the ecclesiastical approach. This Court concludes that the question of the right to use and possess NPC property is inextricably intertwined with the question of which individuals hold authority to act on behalf of the church. Applying an ecclesiastical approach, this Court further concludes that plaintiffs are entitled as a matter of law to summary judgment in their favor on Count I of the Complaint.

The instant case is remarkably similar to *Episcopal Diocese of Massachusetts, v. Devine*, 59 Mass.App.Ct. 722 (2003). Driven by disagreement over certain doctrinal matters, leaders of St. Paul's Episcopal Parish in Brockton (St Paul's) took steps to separate from the Diocese of the Protestant Episcopal Church in the United States of America (PECUSA). The Diocese bishop asserted control over the Parish, sought to replace its leaders, and then commenced an action seeking injunctive and declaratory relief when the displaced leaders refused to surrender the church keys. The Appeals Court turned first to the question of subject matter jurisdiction, noting that the First Amendment prohibits civil courts from intervening in disputes concerning religious doctrine or internal organization. "Massachusetts courts traditionally have resolved the question of jurisdiction by examining the structure of the religious organization to determine whether it is hierarchical or congregational, or a combination of both." *Id.* at 726. The Appeals Court reasoned that, if the religious organization is hierarchical in structure, courts presented with an internal church dispute generally are without authority to second guess the determination of the matter by the church's highest ecclesiastical authority. *Id.* That the court must defer to authority does not mean the court is without jurisdiction, however. Quoting *Jones v. Wolf*, 443, U.S. at 602, the Appeals Court noted that the "State has an obvious and legitimate interest in the

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peaceful resolution of property disputes and in providing a civil forum where the ownership of church property can be determined conclusively." *Id.* at 728. Thus, a request by ecclesiastical authorities for civil enforcement of their decision is quite properly within the court's jurisdiction.

The Appeals Court in *Devine* then turned to whether the PECUSA was hierarchical in structure, and concluded that it was. It noted that PECUSA and its affiliated dioceses and parishes were governed by a national constitution and canons. The Bylaws of St Paul's were subject to that constitution and acknowledged the authority of the PECUSA and the Diocese of which it was a part. The question of who had the right to use and possess the church property was "inextricably intertwined with the question of which individuals hold authority to act on behalf St. Paul's (a question that

essentially depends on the authority of the Diocese and its bishop over the mission or parish)." Id. at 728. Affirming the lower court's decision to award declaratory and injunctive relief to the Diocese, the Appeals Court concluded that such relief was "necessary to enforce the ecclesiastical determination." The same conclusion is compelled here.

The PCUSA is undisputedly a hierarchical church. Indeed, the Supreme Court has recognized it as such. See *Jones*, 443 U.S. at 597- 598. It has a national constitution that defines the powers of the four governing councils. All member congregations and governing councils agree to conduct worship in accordance with the Constitution. Those councils operate on a hierarchical basis: each higher council has the power to review and change the actions of the lower one. At the lowest tier is the session, elected by the congregation of the particular church. A congregation may not make important decisions – like hiring a minister or purchase a home for him or her – without the approval of the regional presbytery. As to NPC in particular, its Articles of Incorporation acknowledge the fact that it operates in accordance with the principles of the PCUSA.

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As to the particular decision at issue, it involves a decision by one faction of the church to break away and affiliate with another group. The Constitution sets forth a specific process for dealing with this event, empowering the Presbytery of Boston to determine the "true church" and thus to decide who is entitled to the church property. The defendants' decision to form a new church is the result of their disagreement with PCUSA's position on same sex marriage and LGBT ordination. The Presbytery's determination is therefore inextricably intertwined with religious doctrine. To set aside that determination would entangle this Court in what is essentially a religious controversy, which is prohibited by the First Amendment. This Court nevertheless has the ability to enforce that determination, given the state's interest in peaceful resolution of disputes even where the litigants are religious institutions.

Although this Court need not consider the alternative "neutral principles" approach, this Court is of the view that even under that approach, the plaintiffs are entitled to a judgment in their favor on Count I. When the Supreme Court first recognized the neutral principles approach as a means to adjudicate church disputes, it provided specific instructions to denominations that sought to ensure that "the faction loyal to the hierarchical church will retain the church property. " *Jones*, 443 U.S. at 606. It instructed such denominations to "recite an express trust in favor of the denominational church" in the "constitution of the general church." That is precisely what the PCUSA did. Pursuant to its Constitution's Trust Clause, all property held by NPC is held in trust for the use and benefit of PCUSA. Other documents support the conclusion that NPC holds its property in trust for the PCUSA. Those documents include the Presbytery of Boston's and NPC's Article of Incorporation. That the deed to 75 Vernon Street does not itself contain similar language is irrelevant. See *Devine*, 59 Mass.App.Ct. At 732. Finally, the individual members of the NPC congregation have over the years acknowledged the

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fact that the NPC must get Presbytery approval before making any decisions with respect to property That understanding was expressed as recently as 2015 and 2016.

Defendants rely on an a 1982 legal memorandum that advised NPC that it retained its property regardless of the Trust Clause in the Constitution but recommended nonetheless that NPC change its Bylaws to reflect its understanding that NPC, not PCUSA, controlled church property. The recommendation was adopted and a provision in the Bylaws was added stating:

"[u]nless subject to a specific trust expressed by the donor, property received and held...by this Corporation is held by it in trust for religious purposes and will be applied, subject to that trust, in accordance with the wishes of the membership. " Article 14 of Bylaws, Ex. BB. This Court is not bound by the legal opinion of a third party, which on its face appears to be wrong in its analysis. Moreover the Bylaw acknowledges that the powers of the Board of Trustees, including the power to control property, are subject to the Constitution. Finally, even without that acknowledgement within the Bylaws, NPC's Article of Incorporation requires it to operate in accordance with the principles and doctrines of the PCUSA. It thus would not have the authority to amend its Bylaws in a way which would conflict with those principles. See Primate and Bishops' Synod of Russian Orthodox Church Outside Russia v. Russian Orthodox Church of the Holy Resurrection, Inc., 35 Mass.App.Ct. 194, 200 (1993). (Where bylaws conflict with articles of organization, the bylaws are subordinate).

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CONCLUSION AND ORDER

For these reasons and for other reasons articulated in the plaintiffs' Memoranda of Law in support, their Motion for Partial Summary Judgment as to Count I of the Complaint is ALLOWED. This matter is scheduled for a Rule 16 Conference December 21, 2017 at 2:00 P.m.

Janet L. Sanders  
Justice of the Superior Court

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