

SANDS ANDERSON
MARKS & MILLER 
A PROFESSIONAL CORPORATION

George O. Peterson
Attorney

gpeterson@sandsanderson.com

RICHMOND • BLACKSBURG • FREDERICKSBURG
MCLEAN • RESEARCH TRIANGLE

WWW.SANDSANDERSON.COM

1497 Chain Bridge Road, Suite 202
McLean, Virginia 22101
Main: (703) 893-3600
Fax: (703) 893-8484

April 24, 2008

VIA HAND-DELIVERY

Fairfax County Circuit Court
ATTENTION: Robin Brooks
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

RE: *Multi-Circuit Episcopal Church Property Litigation*, (Circuit Court of Fairfax County, CL-2007-0248724);

In re: Truro Church; (Circuit Court of Fairfax County; CL 2006-15792);

In re: Church of the Apostles; (Circuit Court of Fairfax County; CL 2006-15793);

In re: Church of the Word, Gainesville; (Circuit Court of Prince William County; CL73464) (Circuit Court of Fairfax County; CL 2007-11514);

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Epiphany, Herndon (Circuit Court of Fairfax County; CL 2007-1235);

The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church (Circuit Court of Fairfax County; CL 2007-1236);

The Protestant Episcopal Church in the Diocese of Virginia v. Christ the Redeemer Church (Circuit Court of Fairfax County; CL 2007-1237);

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The Episcopal Church v. Truro Church et al. (Circuit Court of Fairfax County; CL 2007-1625);

In re: Church at the Falls, The Falls Church; (Circuit Court of Fairfax County; CL 2007-5249);

The Protestant Episcopal Church in the Diocese of Virginia v. The Church at The Falls – The Falls Church (Circuit Court of Arlington County Case No. 07-125)(Circuit Court of Fairfax County; CL 2007-5250);

The Protestant Episcopal Church in the Dioceses of Virginia v. Potomac Falls Church (Circuit Court of Loudoun County Case No. 44149)(Circuit Court of Fairfax County; CL 2007-5362);

In re: Church of Our Savior at Oatlands; (Circuit Court of Fairfax County; CL 2007-5363);

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In re: St. Margaret's Church; (Circuit Court of Fairfax County; CL 2007-5685);

In re: St. Paul's Church, Haymarket; (Circuit Court of Fairfax County; CL 2007-5686);

The Protestant Episcopal Church in the Diocese of Virginia v. St. Stephen's Church (Circuit Court of Northumberland County Case No. CL 07-16)(Circuit Court of Fairfax County; CL 2007-5902); and

In re: St. Stephen's Church; (Circuit Court of Fairfax County; CL 2007-5903).

Letter to Clerk of the Court
April 24, 2008
Page 3

Dear Ms. Brooks:

I am enclosing for filing in the above-styled case an original, The CANA Congregations' Response to Supplemental/Reply Brief in Support of Renewed Motion for Leave to Proceed With Discovery and Scheduling in the Declaratory Judgment Actions, plus twenty-one (21) copies of a one-page covers sheet to be placed in the file for the above-styled cases.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

SANDS ANDERSON MARKS & MILLER, PC



George O. Peterson

cc: Seana C. Cranston, Law Clerk to the Honorable Randy I. Bellows (via hand-delivery)
Bradfute W. Davenport, Jr., Esquire
Heather H. Anderson, Esquire
Gordon A. Coffee, Esquire
Steffen N. Johnson, Esquire
Mary A. McReynolds, Esquire
James A. Johnson, Esquire
E. Andrew Boucher, Esquire
Scott T. Ward, Esquire
R. Hunter Manson, Esquire
James E. Carr, Esquire
Edward H. Grove, III, Esquire
William E. Thro, Esquire

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

In re:)
Multi-Circuit Episcopal Church) **Civil Case Numbers:**
Litigation) CL 2007-248724,
) CL 2006-15792,
) CL 2006-15793,
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) CL 2007-1236,
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) CL 2007-5686,
) CL 2007-5902,
) CL 2007-5903, and
) CL 2007-11514

**THE CANA CONGREGATIONS' RESPONSE TO SUPPLEMENTAL/REPLY BRIEF
IN SUPPORT OF RENEWED MOTION FOR LEAVE TO PROCEED WITH
DISCOVERY AND SCHEDULING IN THE DECLARATORY JUDGMENT ACTIONS**

The CANA Congregations, The Falls Church, Truro Church, Church of Our Saviour at Oatlands, Church of the Apostles, Church of the Epiphany, Church of the Word, St. Margaret's Church, Christ the Redeemer Church, St. Stephen's Church, Potomac Falls Church, and St. Paul's Church (hereafter collectively the "CANA Congregations") by their counsel, hereby file this Response to Supplemental/Reply Brief in Support of Renewed Motion for Leave to Proceed with Discovery and Scheduling in the Declaratory Judgment Actions:

1. The Protestant Episcopal Church in the United States of America (“ECUSA”) and the Diocese of Virginia (“Diocese”) (collectively, the “ECUSA/Diocese”) lead off their reply brief with the assertion that the CANA Congregations “have simply assumed a matter on which the statute requires proof and that is to be adjudicated in the declaratory judgment actions,” namely “property ownership.” Supp. Br. 2. Noting that § 57-9 applies to “property held in trust for [the] congregation,” they say that this “was not among the issues scheduled for adjudication in the § 57-9(A) trial” and that the CANA Congregations have simply alleged but not proven that the property at issue is held by trustees for the benefit of those congregations.¹

2. The purpose of the November § 57-9 hearing was to determine the *applicability* of § 57-9, excluding the validity of the CANA Congregations’ votes. Yet one searches the ECUSA/Diocese “scope” briefs and their response to this Court’s August 31, 2007, Order in vain for any suggestion that this was a disputed issue requiring resolution even if the CANA Congregations prevailed in the November hearing. It is too late to raise such objections now. But in any event, a review of the deeds to the CANA Congregations’ properties that ECUSA/Diocese put before the Court pursuant to the Court’s Order granting the CANA Congregations’ Motion Craving Oyer confirm that they vest title in trustees for the individual congregations, and not for

¹ It should also be noted in regard to the Church of Our Saviour at Oatlands that in a Stipulation of Facts filed in this case on October 23, 2007, and introduced into evidence as tab 17 of CANA trial Exhibit 300, ECUSA and Diocese admitted that along with other attached documents, the document #3 attached to the Stipulation was a “true and correct copy of the authentic original document”. Document #3 is the original March 26, 1875 deed by which the grantors, George and Kate Carter conveyed the property used by the Church of Our Saviour at Oatlands to trustees for that Congregation. The further documents attached to this Stipulation, and additional documents appearing in the binder collectively identified as CANA Exhibit 300, reflect the legal determination agreed to by the Chancellor and Secretary of the Diocese of Virginia in 1973 that “the Oatlands property is presently owned by the trustees or substitute trustees of ‘Church of Our Saviour worshipping at Oatlands Chapel’”, and not by trustees on behalf of the Dioceses or ECUSA. See documents #18 through #24 attached to the same Stipulation of Facts appearing as tab 17 of CANA trial Exhibit 300).

the benefit of ECUSA or the Diocese. See Praecipe Indexing Documents Filed Pursuant to Order on Motion Craving Oyer and documents filed with the Court, attached as Exhibit 1.² That, of course, is why ECUSA and the Diocese seek to transfer title from the CANA Congregations' current trustees (Diocese Compl. ¶ 31(d)), and why they conceded at the Motion Craving Oyer hearing that "there are no formal trust documents" creating a property interest in their favor—that it is "other documents," namely "[t]he constitutions and canons of the church[,] [that] refer to trust rights." Tr. 24 (June 8, 2007). Indeed, Virginia law expressly *forbade* conveyance of property to trustees for religious denominations or dioceses when most if not all of the subject-properties were acquired.³ And, of course, pursuant to Virginia Code § 57-10, title to the personal property follows the language of those deeds.

3. As set forth in the CANA Congregations' Opposition to the Renewed Motion for Leave to Proceed with Discovery and Scheduling in the Declaratory Judgment Actions, the con-

² It should be noted that at ¶¶2, 7-9 in the Division Statute Petitions filed by the CANA Congregations: (1) it is alleged that each such congregation owns real property held by trustees solely for the benefit of the congregation; and (2) the property so owned is described in detail. Now, however, the deeds that establish this allegation are in the record.

ECUSA/Diocese has previously suggested that those deeds would need authentication. See Motion to Strike or for Protective Order as to Expert Witness Designation of Church of Our Savior at Oatlands and Proposed *De Bene Esse* Deposition of The Honorable Jean Harrison Clements filed on October 5, 2007; ¶ 7. "... While authentication of documents relating to title may be relevant in other phases of this litigation, authentication is an issue which the parties may be able to stipulate to..." ECUSA/Diocese can hardly challenge the authenticity of the very deeds they put before the Court. But even if ECUSA/Diocese refused to stipulate to the authenticity of the deeds it would be an exceedingly low bar for the CANA Congregations to prove authenticity under Virginia Code § 8.01-389.

³ Throughout Virginia's history, and until at least the 1993 amendments to Virginia Code § 57-7.1, church property used for religious purposes could be held by trustees *only* for the benefit of local congregations, not for the benefit of a general church or diocese. *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 506 (1974).

stitutional defenses will be heard on May 28, 2008, and the possibility, if not probability,⁴ that those constitutional defenses will be rejected means that it makes little sense to move forward with the Declaratory Judgment Actions when the common law claims would be rendered moot.

4. Next, ECUSA and the Diocese reiterate their assertion that Virginia Code § 57-15 applies here because § 57-9 requires that the CANA Congregations' votes be "approved by the court," which "necessarily references the mandate in § 57-15 that the court consider evidence of the 'wish' of the 'constituted authorities'" of the denomination. Supp. Br. 2. But this argument was rejected by this Court in its April 3, 2008 Letter Opinion, which recognized the key distinction between § 57-9 and § 57-15:

Norfolk demonstrates a key difference between 57-9 and 57-15: just as 57-9 requires only a majority approval of the congregation in order for the court to determine ownership of property upon a division, 57-15 also originally required *only congregation approval* for a conveyance of property. However, 57-15 was *affirmatively amended* to include the specific words: 'constituted authorities,' and 'governing body of any church diocese.' In contrast, 57-9 contains absolutely no reference to the governing authorities of a church.

See Letter Opinion, page 74 (emphasis original). In short, ECUSA and the Diocese would have this Court substitute "approved by the denomination" for "approved by the court" in § 57-9. But as the Court has recognized, such a reading would "define the term [division] out of existence." *Id.* at 3. And as we have explained, there is simply no support for the assertion that this Court is constitutionally required to consider the wishes of ECUSA/Diocese in granting the CANA Congregations' Virginia Code § 57-9 Petitions.

5. The CANA Congregations neither "ignore" nor "trivialize" ECUSA/Diocese's federal and state Contract Clause claims. Even if ECUSA and the Diocese had a "general rule

⁴ ECUSA and the Diocese have an uphill fight in overcoming the presumption that § 57-9 is constitutional. *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 247 Va. 64, 66 (1994) ("Every statute and ordinance carries a strong presumption of constitutionality.")

with respect to church property” prior to 1867—an assertion that is contradicted by the allegations in their Complaint, *see* CANA Congregations’ Opening Post-Decision Brief 11-13—they cite absolutely no authority for the proposition that their “general rule” has any application to the post-1867 deeds which have been placed before the Court. Moreover, it is ECUSA and the Diocese who ignore the fact that pre-1867 would not have recognized denominational trust interests even if they *had* been stated clearly in church canons. *See* CANA Congregations’ Opening Post-Decision Brief 8-11; *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-30 (1934) (“the laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it”).

6. The notion that the Court cannot resolve the Virginia Code § 57-9 actions because Potomac Falls Church⁵ and Christ the Redeemer Church, which do not own any real property and only modest personal property, have not filed Virginia Code § 57-9 actions, hardly justifies taking the other nine CANA Congregations through substantial, costly, and potentially unnecessary motions practice on ECUSA/Diocese’s Declaratory Judgment Actions, which may well be rendered moot.

7. Finally, ECUSA and the Diocese suggest that deferring most discovery until the constitutional issues are resolved would be unreasonable in light of the October trial date. Supp. Br. 4. This assumes that the constitutional defenses will be sustained, which may not happen. But in any case, it merits emphasis that ECUSA and the Diocese themselves argued that the applicability and the constitutionality of § 57-9 should be decided sequentially, in advance of their

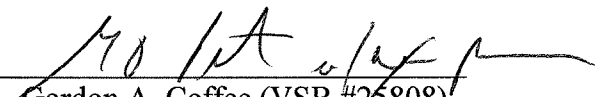
⁵ Most of Potomac Falls Church’s personal property is held by Trustees of The Falls Church. The Falls Church filed a Virginia Code § 57-9 Petition and therefore title to the majority of the Potomac Falls Church’s property will be conclusively decided by the Court.

own declaratory judgment claims.⁶ Now that it appears that § 57-9 may conclusively dispose of this case in a manner contrary to their interests, they want to proceed with broad discovery on claims that may turn out to be moot. But the most efficient course to resolve these actions and bring finality to this litigation is set forth in the CANA Congregations' Opposition to Renewed Motion for Leave to Proceed with Discovery and Scheduling in the Declaratory Judgment Actions—*i.e.*, to use the October 2008 trial dates to resolve any issues related to the CANA Congregations' votes and the limited Contract Clause claim.

Dated: April 24, 2008

Respectfully submitted,

WINSTON & STRAWN

By: 
Gordon A. Coffee (VSB #25808)

Gene C. Schaerr

Steffen N. Johnson

Andrew C. Nichols (VSB #66679)

1700 K Street, N.W.

Washington, DC 20006-3817

(202) 282-5000 (telephone)

(202) 282-5100 (facsimile)

Counsel for Truro Church and its Related Trustees, The Falls Church, Church of the Apostles, and Church of the Epiphany

⁶ Letter from Heather H. Anderson to Hon. Randy I. Bellows at 2 (May 11, 2007) (“the interpretation and application of § 57-9 is a discrete, key issue that . . . would dispose of the eight 57-9 proceedings filed by the departed congregations, as well as resolve the validity of . . . defendants’ [57-9] defense to the declaratory judgment actions”); *accord* Letter from Bradfute W. Davenport, Jr., to Hon. Randy I. Bellows at 4 (May 11, 2007); *see also* 5/21/07 Tr. 48 (H. Anderson: resolution of “whether there is a division in the Episcopal Church or in the relevant church or religious society” “may very well simplify things a great deal down the road”).

SEMMES, BOWEN & SEMMES, P.C.

By: 

James A. Johnson
Paul N. Farquharson
Scott H. Phillips

250 W. Pratt Street
Baltimore, Maryland 21201
(410) 539-5040 (telephone)
(410) 539-5223 (facsimile)
Counsel for The Falls Church

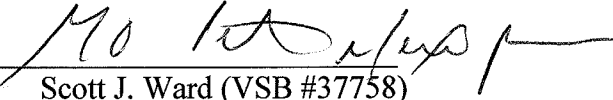
SEMMES, BOWEN & SEMMES, P.C.

By: 

Sarah W. Price (VSB #68555)

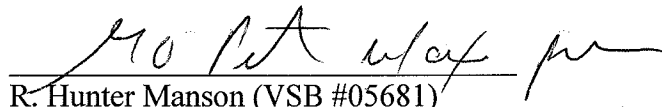
Suite 200
1577 Spring Hill Road
Vienna, Virginia 22182
Baltimore, Maryland 21201
(703) 760-9473 (telephone)
(703) 356-6989 (facsimile)
Counsel for The Falls Church

GAMMON & GRANGE, P.C.

By: 

Scott J. Ward (VSB #37758)
Timothy R. Obitts (VSB #42370)
Robert W. Malone (VSB #65697)

8280 Greensboro Drive, Seventh Floor
McLean, VA 22102
703-761-5000 (telephone)
703-761-5023 (facsimile)
Counsel for Christ the Redeemer Church, Potomac Falls Church, and The Falls Church



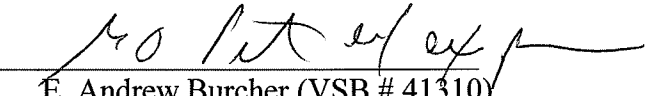
R. Hunter Manson (VSB #05681)
P. O. Box 539
876 Main Street
Reedville, VA 22539
804-453-5600 (telephone)
804-453-7055 (facsimile)
Counsel for St. Stephen's Church

SANDS ANDERSON MARKS & MILLER

By: 

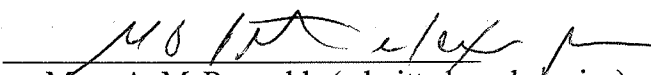
J. Jonathan Schraub (VSB # 17366)
George O. Peterson (VSB # 44435)
Michael T. Marr (VSB # 48536)
Heather A. Jones (VSB #48431)
1497 Chain Bridge Road, Suite 202
McLean, VA 22101
703-893-3600 (telephone)
703-893-8484 (facsimile)
Counsel for Truro Church and its Related Trustees

WALSH, COLLUCCI, LUBELEY,
EMERICK & WALSH, PC

By: 

E. Andrew Burcher (VSB # 41310)
4310 Prince William Parkway, S-300
Prince William, VA 22192
703-680-4664 x 159 (telephone)
703-680-2161 (facsimile)
*Counsel for Church of the Word, St. Margaret's Church,
St. Paul's Church and their Related Trustees*

MARY A. McREYNOLDS, P.C.

By: 
Mary A. McReynolds (admitted pro hac vice)

1050 Connecticut Avenue, N.W.

Tenth Floor

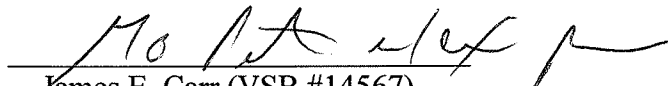
Washington, D.C. 20036

(202) 426-1770 (telephone)

(202) 772-2358 (facsimile)

Counsel for Church of the Apostles, Church of the Epiphany, Herndon, St. Margaret's Church, St. Paul's Church, Haymarket, and St. Stephen's Church, and their Related Trustees

CARR & CARR

By: 
James E. Carr (VSB #14567)

44135 Woodbridge Parkway

Suite 260

Leesburg, VA 20176

703-777-9150 (telephone)

703-726-0125 (facsimile)

Counsel for Church of Our Saviour at Oatlands and its Related Trustees

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April, 2008 a copy of the foregoing Response to Supplemental/Reply Brief in Support of Renewed Motion for Leave to Proceed with Discovery and Scheduling in the Declaratory Judgment Actions was sent by electronic mail and first-class mail, postage prepaid, to:

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

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

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

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

Edward H. Grove, III, Esquire
BRAULT PALMER GROVE
WHITE & STEINHILBER, LLP
10533 Main Street
Fairfax, VA 22030

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

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

Seana C. Cranston
Law Clerk to the Honorable Randy I. Bellows
4110 Chain Bridge Road
Fifth Floor Judges' Chambers
Fairfax, VA 22030



George O. Peterson

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

In re:)	
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THE CANA CONGREGATIONS' RESPONSE TO SUPPLEMENTAL/REPLY BRIEF IN SUPPORT OF RENEWED MOTION FOR LEAVE TO PROCEED WITH DISCOVERY AND SCHEDULING IN THE DECLARATORY JUDGMENT ACTIONS

This acts as a one-page cover sheet reference pleading to the complete The CANA Congregations' Response to Supplemental/Reply Brief in Support of Renewed Motion for Leave to Proceed With Discovery and Scheduling in the Declaratory Judgment Actions filed in CL 2007-248724 (the omnibus case file), on April 24, 2008. The Response of Petitioners, The CANA Congregations' Response to Supplemental/Reply Brief in Support of Renewed Motion for Leave to Proceed With Discovery and Scheduling in the Declaratory Judgment Actions and this corresponding one-page reference pleading applies to the Omnibus case number: CL 2007 – 248724

and the following cases:

1. *In re: Truro Church*; (Circuit Court of Fairfax County; CL 2006-15792);
2. *In re: Church of the Apostles*; (Circuit Court of Fairfax County; CL 2006-15793)
3. *In re: Church of the Word, Gainesville*; (Circuit Court of Prince William County; CL73464) (Circuit Court of Fairfax County; CL 2007-11514);
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11. *The Protestant Episcopal Church in the Dioceses of Virginia v. Potomac Falls Church* (Circuit Court of Loudoun County Case No. 44149)(Circuit Court of Fairfax County; CL 2007-5362);
12. *In re: Church of Our Savior at Oatlands*; (Circuit Court of Fairfax County; CL 2007-5363);
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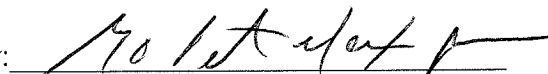
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21. *In re: St. Stephen's Church*; (Circuit Court of Fairfax County; CL 2007-5903).

For the complete The CANA Congregations' Response to Supplemental/Reply Brief in Support of Renewed Motion for Leave to Proceed With Discovery and Scheduling in the Declaratory Judgment Actions, please see the omnibus case file, CL 2007 – 248724.

Dated: April 24, 2008

Respectfully submitted,

WINSTON & STRAWN

By: 

Gordon A. Coffee (VSB #25808)

Gene C. Schaerr

Steffen N. Johnson

Andrew C. Nichols (VSB #66679)

1700 K Street, N.W.


Washington, DC 20006-3817

(202) 282-5000 (telephone)

(202) 282-5100 (facsimile)

Counsel for Truro Church and its Related Trustees, The Falls Church, Church of the Apostles, and Church of the Epiphany

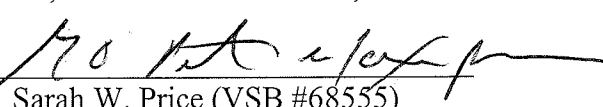
SEMMES, BOWEN & SEMMES, P.C.

By: 

James A. Johnson
Paul N. Farquharson
Scott H. Phillips

250 W. Pratt Street
Baltimore, Maryland 21201
(410) 539-5040 (telephone)
(410) 539-5223 (facsimile)
Counsel for The Falls Church

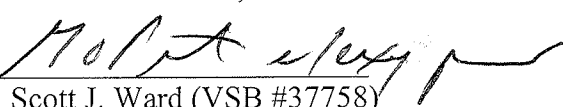
SEMMES, BOWEN & SEMMES, P.C.

By: 

Sarah W. Price (VSB #68555)


Suite 200
1577 Spring Hill Road
Vienna, Virginia 22182
Baltimore, Maryland 21201
(703) 760-9473 (telephone)
(703) 356-6989 (facsimile)
Counsel for The Falls Church

GAMMON & GRANGE, P.C.

By: 

Scott J. Ward (VSB #37758)
Timothy R. Obitts (VSB #42370)
Robert W. Malone (VSB #65697)

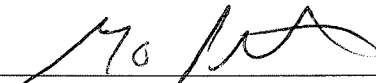
8280 Greensboro Drive, Seventh Floor
McLean, VA 22102
703-761-5000 (telephone)
703-761-5023 (facsimile)
Counsel for Christ the Redeemer Church, Potomac Falls Church, and The Falls Church

By: 

R. Hunter Manson (VSB #05681)

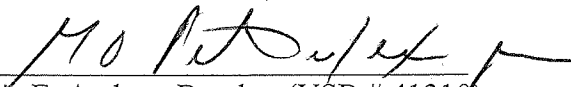
P. O. Box 539
876 Main Street
Reedville, VA 22539
804-453-5600 (telephone)
804-453-7055 (facsimile)
Counsel for St. Stephen's Church

SANDS ANDERSON MARKS & MILLER

By: 
J. Jonathan Schraub (VSB # 17366)
George O. Peterson (VSB # 44435)
Michael T. Marr (VSB # 48536)
Heather A. Jones (VSB #48431)

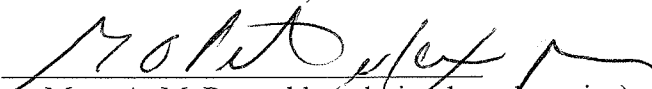
1497 Chain Bridge Road, Suite 202
McLean, VA 22101
703-893-3600 (telephone)
703-893-8484 (facsimile)
Counsel for Truro Church and its Related Trustees

WALSH, COLLUCCI, LUBELEY,
EMERICK & WALSH, PC

By: 
E. Andrew Burcher (VSB # 41310)

4310 Prince William Parkway, S-300
Prince William, VA 22192
703-680-4664 x 159(telephone)
703-680-2161 (facsimile)
*Counsel for Church of the Word, St. Margaret's Church,
St. Paul's Church and their Related Trustees*

MARY A. McREYNOLDS, P.C.

By: 
Mary A. McReynolds (admitted pro hac vice)

1050 Connecticut Avenue, N.W.
Tenth Floor
Washington, D.C. 20036
(202) 426-1770 (telephone)
(202) 772-2358 (facsimile)
*Counsel for Church of the Apostles, Church of the Epiph-
any, Herndon, St. Margaret's Church, St. Paul's Church,
Haymarket, and St. Stephen's Church, and their Related
Trustees*

CARR & CARR

By: 
James E. Carr (VSB #14567)

44135 Woodbridge Parkway

Suite 260

Leesburg, VA 20176

703-777-9150 (telephone)

703-726-0125 (facsimile)

*Counsel for Church of Our Saviour at Oatlands and its
Related Trustees*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of April, 2008 a copy of the foregoing one-page Cover Sheet for The CANA Congregations' Response to Supplemental/Reply Brief in Support of Renewed Motion for Leave to Proceed With Discovery and Scheduling in the Declaratory Judgment Actions, was sent by electronic mail and first-class mail, postage prepaid, to:

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

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

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

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

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

The Honorable Robert F. McDonnell, Attorney General of Virginia
William E. Thro, State Solicitor General
Stephen R. McCullough, Deputy State Solicitor General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

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

Seana C. Cranston
Law Clerk to the Honorable Randy I. Bellows
4110 Chain Bridge Road
Fifth Floor Judges' Chambers
Fairfax, VA 22030



Counsel for the CANA Congregations