VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

In re:	)	
Multi-Circuit Episcopal Church	)	**Civil Case Numbers:**
Litigation	)	CL 2007-248724,
	)	CL 2007-1625,
	)	CL 2007-1235,
	)	CL 2007-1236,
	)	CL 2007-1238,
	)	CL 2007-5250,
	)	CL 2007-5364,
	)	CL 2007-5683,
	)	CL 2007-5682,
	)	CL 2007-5684, and
	)	CL 2007-5902,

CANA CONGREGATIONS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR LEAVE TO DEMAND A JURY AND ADDRESSING REMAINING DISPUTES OVER THE PRE-TRIAL ORDER

INTRODUCTION

Article I, § 11 of the Virginia Constitution guarantees the right to a jury in all "controversies respecting property." Va. Const. art. 1, § 11. This is just such a case. Yet one searches the opening brief of TEC and the Diocese in vain for any reference to this provision, let alone an explanation why it does not govern. Instead, principally citing cases from other jurisdictions, they attempt to show that their claims are purely equitable or otherwise too complicated for a jury. But these arguments cannot overcome the plain text of the Virginia Constitution.

In addition, TEC and the Diocese acknowledge that *Green v. Lewis* depended on the finding of a "contractual obligation" (Br. 3), the existence of which is quintessentially a *legal* issue. This is especially clear given that *Green* made the full course of "dealings between the parties" a factor in determining whether the denomination has an interest in congregational property. 221 Va. 547, 555 (1980). It is well settled that matters involving the "course of dealings" between the parties are "peculiarly within the province of the jury to determine." *Norfolk & W.R. Co. v. Mills*, 91 Va. 613, 22 S.E. 556, 563 (1895). Moreover, plaintiffs ignore the Virginia Supreme Court's decision in *Marine Development Corp. v. Rodak*, which held that even quasi-contractual unjust enrichment claims—such as those raised by the CANA Congregations' counterclaims—"clearly [involve] a jury question" that the trial court is "correct in submitting . . . to the jury." 225 Va. 137, 141 (1983). Accordingly, whether viewed as a property dispute or a contract dispute, this case is suitable for a jury.

Plaintiffs' suggestion that the CANA Congregations lacked "good cause" for not requesting a jury at an earlier date is unfounded. They fail to acknowledge that Virginia Code § 57-9—which all parties agreed should be addressed first, and which is "conclusive" where satisfied—calls for claims of denominational divisions to be "approved by the court." They also avoid discussing this Court's ruling that denominational trusts are not valid in Virginia, which narrowed

the issues requiring resolution, or the Virginia Supreme Court's direction that this case should now be resolved under ordinary neutral principles "of real property and contract law." *Truro Church*, 694 S.E.2d at 567. Each of these developments confirms that the Congregations had good cause for deferring their request for a jury until after remand.

With respect to the scheduling order, plaintiffs have failed to justify their demands for deviations from established trial practice. For example, they have not shown how bifurcating the trial into two distinct "common" and "individual" phases would achieve efficiency or further any goal other than to allow plaintiffs to control the order of proof for the entire trial. Plaintiffs have not explained why they should enjoy the right to put on their case as they see fit while denying the same right to the CANA Congregations.

Further, plaintiffs have not shown why the Court should direct the CANA Congregations to identify how they intend to use exhibits or witnesses at trial. Nor have they shown the benefit of preliminary exhibit lists, or why exchanging preliminary witness lists ten weeks in advance of trial (rather than twelve weeks) is insufficient. Moreover, any genuine concerns that plaintiffs may have over the Congregations' use of witnesses or exhibits at trial would be alleviated if plaintiffs accepted the Congregations' proposal, under which each side would give 24 hours' notice of the witnesses it intends to call and the exhibits to be used with each witness. Accordingly, the Court should adopt the CANA Congregations' proposed scheduling order.

ARGUMENT

I. At Its Core, This Case Now Involves Property And Contractual Issues Within The CANA Congregations' Constitutional Right To A Jury.

TEC and the Diocese nowhere address the fact that this case is a "controversy respecting property" within the meaning of Article I, § 11 of the Virginia Constitution. Nor do they dispute that claims involving the existence or breach of a contractual obligation are quintessentially legal

claims suitable for a jury. *See* Pl. Br. 3 (acknowledging that *Green* rested on a finding of a "contractual obligation"). Rather, citing the fact that they seek an injunction, an accounting, and what they now call "specific performance"—and the fact that the Congregations assert counterclaims of unjust enrichment and constructive trust—they say that "each of the[] claims [at issue] sounds in equity and thus provides no right to a jury." Br. 2. Plaintiffs are wrong.

At the outset, we note that plaintiffs have not before requested "specific performance"—including in their complaints. *See* Diocese Compl. ¶ 31; TEC Compl. 19. Nor does their opening brief specify what duties they would want the Court to order the CANA Congregations to perform. This is not surprising. The theory of their complaints is that plaintiffs have "property and contractual rights in the real and personal property [at issue], which property must be used to carry out the mission of the Episcopal Church." Diocese Compl. ¶ 13; *accord* TEC Compl. 19 (the property at issue "must be used for the Church's ministry and mission"). But a civil court cannot order a church to use property for any particular religious mission, much less enforce such an order. *See Presbyterian Church v. Hull Church*, 393 U.S. 440, 451 (1969) ("civil courts" may not "engage in the forbidden process of interpreting and weighing church doctrine"). Nor is specific performance "a matter of right. It rests in the sound discretion of the chancellor, exercised on the basis of established principles and the facts in the particular case." *Reutt v. Jordan*, 207 Va. 869, 872-73 (1967).[1]

Plaintiffs' emphasis on equitable remedies also fails on the merits. *First*, the underlying claims at issue lie at the core of the right to a jury. Plaintiffs seek an order divesting the CANA Congregations of possession and transferring title to their properties, and the Virginia Supreme

[1] If the CANA Congregations had been on notice of a claim for specific performance, they likely would have raised additional defenses, such as undue hardship. *See Perel v. Brannan*, 267 Va. 691, 701 (2004).

Court has held that all sorts of similar "controversies respecting property" are appropriately tried to a jury. *See* Opening Br. 4-5 & n.3. Alternatively, even if the Court views this case as raising only issues of "contract law" (*Truro Church*, 694 S.E.2d at 567), that too is a textbook example of a *legal* claim. In fact, the Virginia Supreme Court has gone still further, ruling that claims for unjust enrichment—quasi-contractual claims often thought of as equitable—may be tried to a jury. That is the lesson of *Marine Development Corp. v. Rodak*, which rejected arguments that such claims were wrongly submitted to a jury. As the Court there explained, whether the plaintiff was entitled to recover for "quantum meruit" (unjust enrichment) was "clearly a jury question, and the trial court was correct in submitting the case to the jury." 225 Va. at 141. Plaintiffs acknowledge that the CANA Congregations have asserted counterclaims for unjust enrichment (Br. 4), but ignore *Rodak*—which is fatal to their position.

Second, each type of relief that TEC and the Diocese identify—an injunction, an accounting, and specific performance (Br. 4-5)—depends upon their underlying claims of ownership and breach of a contractual obligation within the meaning of *Green*. We do not dispute, for example, that an injunction or an accounting is an equitable form of relief. Pl. Br. 4. But such relief is not available if plaintiffs cannot first prove the existence of a contractual obligation and breach, or that they are otherwise entitled to title or possession—legal issues on which a jury is available. Similarly, although the CANA Congregations' "constructive trust" counterclaim is equitable in nature, that relief will be available only if the Congregations prevail on their counterclaim for unjust enrichment—again, a claim on which they are entitled to a jury. *Rodak*, 225 Va. at 141.[2]

This Court need not preclude a jury from considering either plaintiffs' or defendants' underlying claims simply because particular types of *ancillary relief* that depend on those claims

[2] Moreover, the CANA Congregations intend to seek leave to amend their answers to add ad damnum clauses to their unjust enrichment claims, further underscoring their right to a jury.

are equitable. Virginia Supreme Court Rule 3:22(e) contemplates a "Trial by Mixed Jury and Non-Jury Claims," stating: "In any case when there are both jury and non-jury issues to be tried, the court shall adopt trial procedures and a sequence of proceedings to assure that all issues properly heard by the jury are decided by it, and applicable factual determinations by the jury shall be used by the judge in resolving the non-jury issues in the case." This Court can therefore reserve to itself any questions that are not suitable for a jury. But to deny a jury on the underlying property and contract claims because some forms of ancillary relief at issue are technically equitable would be to allow the tail to wag the dog.

It is no answer to say that none of the Virginia church property cases cited by plaintiffs has been tried to a jury. Pl. Br. 2 n.1. None of those decisions addresses whether such cases *may* be tried to a jury, let alone holds that they may not. It may just be that no party in those cases requested a jury. That would not be surprising, given that all of plaintiffs' cases except *Norfolk Presbytery v. Bollinger*, 214 Va. 500 (1974), and *Green v. Lewis*, 221 Va. 547 (1980), pre-date those decisions and their adoption of an analysis based on "'neutral principles of law, developed for use in all property disputes.'" *Norfolk Presbytery*, 214 Va. at 504; *Green*, 221 Va. at 555. Under that analysis, churches in Virginia are now entitled to a jury to the same extent as other parties, whether the case involves a "controversy respecting property" (Va. Const. art. I, § 11) or claims concerning the existence and breach of a contract (*Green* and *Norfolk Presbytery*).

Further, *Green* was the first Virginia church property case to cite "the dealings between the parties" as a factor in determining whether the denomination has a "proprietary interest" in congregational property. 211 Va. at 555. The nature of any such course of dealings is especially suited to being resolved by a jury. As the Virginia Supreme Court explained in *Norfolk & W.R. Co. v. Mills*, issues involving "the whole course of dealings between the parties, and their rela-

tions to each other" are "matters peculiarly within the province of the jury to determine." 22 S.E. at 563. Several other binding decisions are to the same effect.[3] Plaintiffs say that "the Diocese and the Church do not expect there to be any genuine factual disputes" over "the dealings of the parties." Br. 8. We are not so sanguine, but this Court need not accept plaintiffs' assurances on such a critical issue. The jury is entitled to determine the facts and the weight to be given the evidence on each *Green* factor, particularly given the Virginia Supreme Court's view that course-of-dealing questions are "peculiarly within the province of the jury to determine." *Mills*, 22 S.E. at 563; *see also Buchanan*, 97 S.E. at 342 ("the weight of the testimony [is] for the consideration of the jury, under the circumstances of the particular case").

In sum, whether this case is viewed as a "controversy respecting property," a controversy involving contractual issues relating to "the dealings between the parties," or a controversy involving a quasi-contractual, unjust enrichment claims, the Congregations are entitled to a jury.

II. Plaintiffs' Parade Of Jury Horribles Is Both An Irrelevant Appeal To Policy Concerns And Otherwise Unfounded.

Lacking any convincing argument for departing from binding Virginia law, TEC and the Diocese cite a hodgepodge of alleged "drawbacks" to juries. Br. 9-10. These policy points are not only irrelevant in light of the Virginia Constitution, but also unpersuasive.

---

[3] *See Buchanan v. Higginbotham*, 123 Va. 662, 97 S.E. 340, 343 (1918) (holding, in suit to collect on alleged debt, that "[the nature of the] course of dealing between the parties is for the jury to determine"); *Miller & Co. v. Lyons*, 113 Va. 275, 74 S.E. 194, 201-02 (1912) (reviewing jury instructions on the question whether a party waived its contractual rights "by express agreement or by a course of dealing between the parties," and holding that the instructions at issue "fully and fairly submitted the question to the jury"); *Goldstein v. Old Dominion Peanut Corp.*, 177 Va. 716, 722 (1941) (affirming a jury verdict finding that the defendant, "by the course of dealings between [the parties], and by admissions and assurances, oral and written, waived compliance with the strict terms of the contract [at issue]"); *Cocoa Prods. Co. v. Duche*, 156 Va. 86, 97-98 (1931) (holding that "course of dealing" evidence was sufficient to justify submitting contractual question to jury); *Richmond Leather Mfg. Co. v. Fawcett*, 130 Va. 484, 107 S.E. 800, 809 (1921) (reversing a jury verdict for trial court's failure to instruct the jury that course of dealing could have effected a waiver of contractual rights).

First, plaintiffs say that using jurors would create "a major risk of jury confusion," that "it would be impossible to frame instructions," and that "jurors would become confused about which evidence applies to which Congregation." Br. 9. But jurors routinely decide cases involving multiple defendants, document-intensive evidence, and even the need to apportion liability. Fairfax jurors are more than intelligent enough to digest deeds and other issues involving real property. Certainly this case is no more complex or document-intensive than other property or contract disputes that such jurors are called on to resolve.[4] Moreover, proper jury instructions can be framed in light of both Virginia's model instructions on contract law and the Virginia Supreme Court's guidance in *Norfolk Presbytery* and *Green*. In short, "[t]he worth of our jury system is constantly and properly extolled," and this Court should "reject[]" any "argument ... [that] tacitly assumes that juries are too stupid to see the drift of evidence." *United States v. Johnson*, 319 U.S. 503, 519 (1943); *see also id.* at 519-20 ("we ought not be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and in the appropriate submission of evidence [to a jury] within the general framework of familiar exclusionary rules").

Second, TEC and the Diocese assert that empanelling a jury would entail "additional cost to the parties." Br. 9. This is doubtful. Even assuming that a jury trial took slightly longer or resulted in slightly broader discovery (points we do not concede), any additional costs would be more than offset by the fact that—as the Court itself noted at the November 12 hearing—trying the case to a jury would require far less briefing. But in any event, plaintiffs' policy argument cannot justify depriving a party of its constitutional right to a jury.

---

[4] *E.g.*, *Upper Occoquan Sewage Auth. v. Blake Constr. Co.*, 275 Va. 41, 48 (2008); *Blake Constr. Co. v. Upper Occoquan Sewage Auth.*, 266 Va. 564, 568-70 (2003); *Upper Occoquan Sewage Auth. v. Blake Constr. Co.*, 266 Va. 582, 584-87 (2003).

Third, citing a host of hypothetical inquiries into jurors' religious and other beliefs, plaintiffs raise the specter of "intrusive voir dire." Br. 10. But the Court can easily take steps—like those it took in the last phase concerning testimony and motions in limine—to ensure that voir dire questioning remains properly limited. Pl. Br. 10. Moreover, plaintiffs' argument is hard to square with the fact that the case must be decided—as they have long insisted—under "neutral principles of law." *Green*, 221 Va. at 555. The jury will not be called upon to decide religious or social questions, but rather to determine ownership by applying ordinary "principles of real property and contract law." *Truro Church*, 694 S.E.2d at 567. Some modest inquiry into prospective jurors' backgrounds may be appropriate, but there is no reason to fear that such questioning will become a "witch hunt" or intrude into a forbidden "religious thicket."

Notably, the U.S. Supreme Court's decision in *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969), arose from a jury trial. The Court there was careful to emphasize that "church property litigation" may not be allowed to "turn on the resolution by civil courts of controversies over religious doctrine and practice." *Id.* at 449.[5] But in the very same paragraph, the Court held that "there are neutral principles of law, developed for use in all property disputes, which can be applied without 'establishing' churches to which property is awarded." *Id.* The Court did not begin to suggest that juries had no business applying such principles. Allowing a jury to apply them here would therefore be wholly appropriate.

III. The CANA Congregations Had Good Cause For Deferring Their Jury Request Until Now.

Unable to show that this case is not appropriate for a jury, TEC and the Diocese resort to

[5] *See* Letter Op. on the Constitutionality of Va. Code § 57-9(A) 14 ("the *Hull Church* Court held that it violates the First Amendment when courts decide church property disputes based upon the courts' or juries' own opinion as to whether the church in question has substantially departed 'from the tenets of faith and practice existing at the time of the local churches' affiliation.'").

the assertion that the CANA Congregations lack "good cause" for not having invoked their right to a jury sooner. Va. Sup. Ct. Rule 3:21(d). Pl. Br. 7-9. This argument too is unconvincing.

First, plaintiffs give insufficient consideration to the fact that Virginia Code § 57-9, the principal focus of this litigation to date, raised distinctive issues such as whether a denominational "division" had occurred. Such issues are not as well suited to resolution by a jury as are ordinary property and contract claims, and the statute specifically calls for § 57-9 claims to be "approved by the court." Further, the statute applies only to property "held in trust for the congregation," raising equitable and statutory issues not present under the *Green-Norfolk Presbytery* framework.

Plaintiffs correctly note that § 57-9 was only one of the CANA Congregations' defenses (Br. 7), but avoid mentioning their agreement that § 57-9's applicability should be resolved before the Court addressed the substance of plaintiffs' declaratory judgment claims. Letter Op. Regarding ECUSA/Diocese's Assertion that the CANA Congregations' Have Waived the Right to Invoke 57-9 9 & n.13 (Aug. 19, 2008) (citing plaintiffs' letters to the Court indicating "that the application, interpretation, and if necessary, consideration of the constitutionality of Va. Code 57-9(A) are 'discrete, key issue[s]' that this Court should resolve as soon as possible"). Moreover, had § 57-9 been deemed satisfied, that provision would have been "conclusive as to the title to and control of any property held in trust for [the] congregation." Va. Code § 57-9.

Second, plaintiffs ignore the fact that this case has narrowed considerably since the filing of the initial pleadings. Most importantly, this Court has recognized that denominational trusts are not valid in Virginia (Five Questions Op. 12-13), which leaves plaintiffs with claims of only a "contract" or proprietary" interest—legal rather than equitable claims. *See* Diocese Compl. ¶ 31(d). This was confirmed by the Virginia Supreme Court's decision that the case now turns

on whether TEC and the Diocese can establish an interest in defendants' properties under ordinary principles "of real property and contract law." *Truro Church*, 694 S.E.2d at 567. As we have shown, the latter issues lie at the core of the right to a jury trial.

Plaintiffs nowhere discuss *Painter v. Fred Whitaker Co.*, 235 Va. 631 (1988), which held that a party to a civil action may demand a jury when the motion is seasonably made, is not made for the purpose of delay, and would not unreasonably delay the trial. *Id.* at 634-35. Although *Painter* predates the current version of Rule 3:21, that rule states that "[t]he right of trial by jury as declared by the Constitution of Virginia, or as given by an applicable statute or other authority, *is unchanged by these rules*, and shall be implemented as established law provides." Va. Sup. Ct. Rule 3:21(a) (emphasis added). *Painter* thus remains binding, and the standard it sets forth is easily satisfied here. The CANA Congregations requested a jury at the first opportunity after the nature of the remaining issues became clear. Plaintiffs complain that much time has passed since these suits began (Br. 6), but trial remains months away and plaintiffs cannot claim prejudice—especially given their agreement that the applicability of § 57-9 should be resolved first and the fact that this round of proceedings involves distinct issues.[6]

If there were any doubt that the CANA Congregations had "good cause" for delaying their request for a jury until now (and there is not), the Virginia Constitution would require resolving it in favor of a jury. *Watson v. Alexander*, 1794 WL 429, *13 (Va. 1794) ("[t]he constitution declares, 'that the trial by jury is preferable to all others, and ought to be held sacred,'" and "this mode of trial is never to be taken away by implication, or without positive words in an Act of Assembly"); *W.S. Forbes & Co. v. Southern Cotton Oil Co.*, 108 S.E. 15, 21 (Va. 1921)

[6] Plaintiffs criticize the CANA Congregations for not having sought to formally amend their answers to demand a jury. Br. 6. This exalts form over substance. The whole point of this round of briefing is to help the Court decide whether to grant the Congregations leave to demand a jury.

("The constitutional provision [for a jury trial] is not to be frittered away"). Indeed, this Court retains authority to order that the case be tried to a jury even absent "good cause" for a delayed jury request. Opening Br. 9-10; Va. Code § 8.01-336(C); Va. Code § 8.01-267.6.

According to plaintiffs, the Court may direct that a case be tried to a jury where a party declines to assert that right only "[i]n *criminal* cases"; "the Court's role in a civil case is to enforce Rule 3:21." Br. 7 & n.3; *see id.* As noted, however, the first sentence of Rule 3:21(A) provides that "[t]he right of trial by jury as declared by the Constitution of Virginia, or as given by an applicable statute or other authority, is unchanged by these rules." Moreover, Virginia Code § 8.01-336(C), which plaintiffs fail to cite, provides: "*Notwithstanding any provision in this Code to the contrary*, in any action asserting a claim at law in which there has been no demand for trial by jury by any party, *a circuit court may on its own motion direct one or more issues, including an issue of damages, to be tried by a jury.*" (Emphasis added.) Similarly, in cases under the Multiple Claimant Litigation Act, Virginia Code § 8.01-267.6 provides that, even absent a motion of a party, "the court may submit special interrogatories to the jury to resolve specific issues of fact." As these provisions confirm, the Court has power in civil cases to order that a case be tried to a jury. Accordingly, if the Court should find that Rule 3:21(d) is not satisfied, the CANA Congregations respectfully request that the Court exercise its discretion to order a jury trial for all of the foregoing reasons.

IV. Scheduling Issues

A. TEC and the Diocese Have Not Justified a Fragmented Trial.

All parties other than Oatlands agree that continued consolidation is appropriate. Pl. Br. 11. Yet TEC and the Diocese essentially want to de-consolidate much of the trial by segmenting it into two phases, with both sides presenting "evidence common to all or many of the subject parishes," followed by a series of mini-trials specific to individual congregations. *Id.* TEC and

the Diocese say this approach will "provide essential clarity" and enable the fact finder to "distinguish which evidence applies to each decision." *Id.* In their view, a "single mass trial would leave distinct facts disorganized at best." *Id.* at 12.

Absent from plaintiffs' brief are any tangible examples of how segmentation of the trial would promote "efficiency" or, conversely, how a single mass trial would promote chaos or otherwise prejudice plaintiffs. Not surprisingly, their brief nowhere discusses the mechanics of their proposal or the practical difficulties that those mechanics would create for the Court and the CANA Congregations. For example, plaintiffs neither (1) provide any functional test for distinguishing "common" from congregation-specific evidence, nor (2) address whether evidence in support of the Congregations' counterclaims would be introduced during the "common" phase, the individual-congregation phase, or at the very end.

In short, TEC and the Diocese have not shown how deviating from normal trial practice and forcing the CANA Congregations to put on their evidence out of turn—and in the sequence directed by plaintiffs—will benefit anyone other than TEC and Diocese. The most that they can bring themselves to say is that adopting their proposal would spare counsel for individual congregations from having to attend the entire trial. Br. 12. But counsel for the Congregations would prefer to make such judgments for themselves. Moreover, they believe that adhering to the traditional mode of trial practice, under which they would put on their case-in-chief in the manner they see fit, would best minimize the cost of trial to the Congregations.

B. Other Disputed Issues

1. Identifying the CANA Congregations to which the exhibits "relate"

Continuing their effort to rework established trial practice, TEC and the Diocese demand that the CANA Congregations identify the specific congregations to which their witnesses and exhibits "relate." Br. 12-13. The justification offered for this advance designation is that plain-

tiffs otherwise might have to "spend the last weeks before trial poring over each exhibit and deposition trying to determine" how the Congregations will use such evidence. Br. 13. But counsel face that task in every trial, and plaintiffs have not explained why this case should be any different—or even how forcing the Congregations to identify the congregations to which specific exhibits or witnesses "relate" will substantially lessen the task.

Plaintiffs nowhere discuss, much less justify, the burden that the CANA Congregations will face in having to guess in advance of trial which exhibits will ultimately "relate" to which congregation at trial. As we noted in our opening brief, the focus of the trial may well change by the time the CANA Congregations get to their case-in-chief. For example, St. Stephens may decide that it wants to use an Epiphany exhibit to provide a useful comparison, but under plaintiffs' approach St. Stephens might be barred from doing so because it failed to anticipate that need two months in advance of trial.

Plaintiffs make much of the fact that Oatlands has agreed to the identification requirement. But it is easy for Oatlands to agree because its exhibits and witnesses relate to one congregation—Oatlands. By contrast, the CANA Congregations face a greater hurdle because there are a number of exhibits that might be used by more than one congregation. Moreover, by the time they get to their case-in-chief, individual congregations may have jettisoned use of some documents in favor of others. Plaintiffs are trying to strip the Congregations of the flexibility they need to adapt their case to the evidence that plaintiffs ultimately introduce in their case.

Setting aside the unorthodox nature of plaintiffs' demand, it would become largely moot if TEC and the Diocese accepted the Congregations' proposal for each side to give 24 hours' notice of the exhibits that will be used with specific witnesses. Such notice should spare plaintiffs any surprises and allow them more than adequate time to prepare an effective cross-examination.

2. Tentative Exhibit and Witness Lists

Evidently hoping to fend off challenges to their discovery responses, TEC and the Diocese demand that the parties exchange tentative lists of exhibits 84 days prior to trial. Br. 14-15. The CANA Congregations fail to see the linkage to discovery issues. Any potential deficiencies in plaintiffs' discovery responses would not be cured by a tentative exhibit list. Moreover, the Congregations continue to question the usefulness of any list they would generate. First, they do not expect to have a reliably accurate sense of their case-in-chief that far in advance of trial. Second, they are concerned that if they failed to include an exhibit in their tentative list, plaintiffs would seek the exclusion of the exhibit. Thus, the Congregations by necessity would be forced to make the list overly expansive, thereby defeating its purpose.

The last scheduling issue concerns when to exchange tentative witness lists. The parties have agreed on exchanging such lists, but disagree on how far in advance of trial the exchange should take place (84 days versus 70 days). The Congregations continue to believe that 70 days offers more than enough time for both sides to take any necessary depositions and otherwise to prepare for trial.

For all these reasons, the CANA Congregations urge the Court to adopt their version of the proposed pre-trial order.

Dated: December 7, 2010

Respectfully submitted,

GAMMON & GRANGE, P.C.

By: _____
Scott J. Ward (VSB #37758)
Timothy R. Obitts (VSB #42370)
Dawn Sikorski (VSB #77315)
8280 Greensboro Drive
Seventh Floor
McLean, VA 22102
(703) 761-5000 (telephone)

Counsel for The Falls Church

SEMMES, BOWEN & SEMMES PC

By: _____
James A. Johnson
Paul N. Farquharson
Scott H. Phillips
25 South Charles Street
Suite 2400
Baltimore, MD 21201
(410) 539-5040 (telephone)
(410) 539-5223 (facsimile)

Counsel for The Falls Church

Respectfully submitted,

WINSTON & STRAWN, LLP

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

PETERSON SAYLOR, PLC

By: _____
George O. Peterson (VSB #44435)
Tania M. L. Saylor (VSB #65904)
4163 Chain Bridge Road
Fairfax, VA 22030
(703) 225-3620 (telephone)
(703) 225-3621(facsimile)

Counsel for Truro Church and its Related Trustees

MARY A. McREYNOLDS, P.C.

By: _____
Mary A. McReynolds
(admitted pro hac vice)
1050 Connecticut Avenue, N.W.
Tenth Floor
Washington, DC 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

WALSH, COLLUCCI, LUBELEY, EMERICK & WALSH, P.C.

By: _____
E. Andrew Burcher (VSB #41310)
4310 Prince William Parkway, S-300
Prince William, VA 22912
(703) 680-4664 x 159 (telephone)
(703) 680-2161 (facsimile)

Counsel for Church of the Word, St. Margaret's Church, and St. Paul's Church and their Related Trustees

R. Hunter Manson, Esq.

By: _____
R. Hunter Manson (VSB #03681)
P. O. Box 539
876 Main Street
Reedville, VA 22539
(804) 453-5600 (telephone)
(804) 453-7055 (facsimile)

Counsel for St. Stephen's Church

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of December, 2010, a copy of the foregoing brief 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

Thomas C. Palmer, Esquire
BRAULT PALMER GROVE
WHITE & STEINHILBER, LLP
3554 Chain Bridge Road, Suite 400
Fairfax, VA 22030

Heather H. Anderson, Esquire
Heather H. Anderson, P.C.
P.O. Box 50158
Arlington, VA 22205

Soyong Cho, Esquire
GOODWIN PROCTER, LLP
901 New York Ave., N.W.
Washington, D.C. 20001

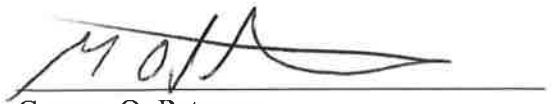
Robert C. Dunn, Esquire
Law Office of Robert C. Dunn
P.O. Box 117
Alexandria, VA 22313-0117

E. Duncan Getchell, Jr., Esquire
William E. Thro, Esquire
Stephen R. McCullough, Esquire
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

James E. Carr, Esquire
Law Offices of Carr & Carr
44135 Woodbridge Parkway, Suite 260
Leesburg, Virginia 20176-1244

With a copy by electronic mail and hand-delivery to:

Caitlin Fields, Esquire
Law Clerk to the Honorable Randy I. Bellows
Circuit Court for Fairfax County
4110 Chain Bridge Road
Fifth Floor Judges' Chambers
Fairfax, VA 22030



George O. Peterson