VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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

THE DIOCESE OF VIRGINIA'S AND THE EPISCOPAL CHURCH'S REPLY MEMORANDUM REGARDING JURY TRIAL AND SCHEDULING ISSUES

The Protestant Episcopal Church in the Diocese of Virginia (the "Diocese") and The Episcopal Church (the "Church") respectfully submit the following reply to the "CANA Congregations' Memorandum in Support of their Motion for Leave to Demand a Jury and Addressing Remaining Disputes Over the Pre-Trial Order" ("Cong. Mem.").

JURY ISSUES

The Court should not empanel a jury in these cases for several distinct and independent reasons: no party has a right to a jury for trial of equitable claims, such as those at issue in these cases; there are no disputed factual issues for trial by jury, only legal questions (including mixed questions involving the application of the law to the facts); a jury trial would be complicated, protracted, confusing and expensive, to the prejudice of all parties and the just resolution of these cases; and the Congregations long ago waived any entitlement to a jury trial that otherwise might obtain, and they have not shown good cause for the Court to relieve them of their default.

We address the waiver issue first, because the Congregations' waiver is so clear that it is unnecessary for the Court to address the other points.

I. The Congregations have waived any right to a trial by jury.

The Congregations deny that they "waived their right to a jury" (Cong. Mem. at 7), but the denial is merely rhetorical. The Rules governing jury trial waivers mean exactly what they say; and the Congregations do not argue otherwise, only that they "had good cause for not requesting a jury until now" (*id.* at 8). Those arguments must be rejected.[1]

The Congregations' Memorandum confirms that their only excuse for failing to make a timely jury demand is their own mistaken expectations regarding the outcome of their § 57-9 actions. *See id.* at 2, 7-9. They made a conscious decision to rely entirely on § 57-9; and now they ask the Court to rescue them from the consequences of their own improvidence. Their view at the time of whether their § 57-9 cases should be tried to a jury is *no* cause for ignoring their obligation to ask for a jury trial of the declaratory judgment actions, including their counterclaims, in a timely fashion.

The Congregations rely primarily on *Painter v. Fred Whitaker Co.*, 235 Va. 631, 634-35, 369 S.E.2d 191 (1988). They acknowledge, however, that "the Court in *Painter* did not apply the 'good cause' standard" of Rule 3:21(d). Cong. Mem. at 8. That is because Rule 3:21(d) did

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[1] The Congregations suggest in a footnote that it is "not clear whether the final pleading has been directed at the issue," because they have not filed a written opposition to plaintiffs' demurrer to their counterclaims, "and the parties are arguably not at 'issue.'" Congregations' Memorandum at 7 n.6. That suggestion is manifestly erroneous. Unlike a pleading that contains factual allegations, such as a complaint, a demurrer simply says that a pleading against which it is interposed is deficient as a matter of law. A written response to a demurrer is neither a required filing nor a pleading (*cf.* Rules 3:8(a), 3:18(a)), merely a brief. And the parties have been at issue since plaintiffs answered the Congregations' counterclaims, on October 9, 2007. *See, e.g., Kesler v. Fentress*, 223 Va. 14, 18, 286 S.E.2d 156, 158 (1982) ("where a defensive response denies an allegation of title, the parties are at issue with respect to title"); *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 6, 82 S.E.2d 588, 591 (1954) ("When the defendant filed its grounds of defense the parties were 'at issue'"); *Goode v. Courtney*, 200 Va. 804, 808, 108 S.E.2d 396, 399 (1959) (parties were at issue when defendant denied material allegations of fact); *Binkley v. Parker*, 190 Va. 380, 387, 57 S.E.2d 106, 109 (1950).

not become effective until January 1, 2006, nearly 18 years after *Painter* was decided; and it undeniably established a more stringent standard than the Court applied in *Painter*. The standard in 1988 was simply the discretion of the Court. *See Painter*, 235 Va. at 634, 369 S.E.2d at 192-93 (citing *Thomas v. Commonwealth*, 218 Va. 553, 556, 238 S.E.2d 834, 836 (1977)). The standard now is whether the waiving party had good cause for failing to serve and file a jury demand as required by Rule 3:21(b).

It is clear, however, that Painter had a far more acceptable excuse for changing his position than the Congregations have here. "Painter had consented to a special jury only because he received erroneous legal advice" from his first attorney. *Id.*, 369 S.E.2d at 193.[2] The Congregations have no similar excuse, only their mis-judgment of the prospects of success under § 57-9. *Painter* also is distinguishable on the ground that the trial court there expressly found that Painter's motion was timely, as the Congregations concede. Cong. Mem. at 9; *see Painter*, 235 Va. at 633, 634, 369 S.E.2d at 192, 193. Under Rule 3:21(b), however, the Congregations' demand for a jury is more than three years past due – and counting.[3]

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[2] Painter's first counsel "mistakenly advised Painter that the jurors would be selected from non-residents of the City of Roanoke. When Painter's counsel discovered that one of the persons Painter wanted as a juror did not reside in the City of Roanoke and ... would be ineligible to serve as a juror, he filed a motion ... to withdraw as counsel and substitute other counsel.... [T]he trial court permitted Painter's original counsel to withdraw and noted the appearance of substitute counsel." 235 Va. at 632-33, 369 S.E.2d at 192.

[3] The Congregations' Memorandum ostensibly is filed in support of a motion that they dangle before the Court but have avoided filing. That is prejudicial in multiple ways. For one, without a motion stating precisely what relief is sought, plaintiffs are forced to aim at a moving target. Are the Congregations asking for a jury trial of all remaining issues, as stated in their November 8 Statement of Position at 2 – even though they now concede that our claims for an accounting are equitable, and they obviously cannot deny that claims for injunctive relief or counterclaims for constructive trusts are equitable as well? Are they seeking an advisory jury (*see* Congregations' Memorandum at 6) or issue out of chancery? We simply do not know.

A second source of prejudice arises from the delay that inevitably results from this coyness. The same is true with respect to the Congregations' statement that they "also need to amend their

(footnote continued)

The Congregations attempt to bootstrap their miscalculation into some sort of good cause for their default by asserting that "[t]he initial phase of these proceedings focused almost entirely on Va. Code § 57-9." Cong. Mem. at 8. That is wrong.

The *trials* to date have been limited to the § 57-9 actions; but "these proceedings" otherwise have fully encompassed the declaratory judgment actions. In its first order in this litigation, a scheduling order entered on May 31, 2007, this Court recognized (§ 6, at 6) that discovery should proceed with respect to both the § 57-9 actions and the declaratory judgment actions. In June 2007, the Congregations filed motions craving oyer, which the Court heard and resolved, and in response to which the Diocese filed documents. The Congregations also filed demurrers and pleas in bar on multiple grounds to the declaratory judgment actions. Very substantial briefing ensued pursuant to the May 31, 2007, scheduling order, and those demurrers and pleas in bar were heard, then resolved by two orders entered August 28, 2007. At that point, the Diocese elected not to amend to add tort claims, and the final pleadings in the declaratory judgment actions were filed in September and October of 2007.[4]

Discovery proceeded apace throughout. In early July 2007, the Congregations served discovery regarding not just the § 57-9 actions but also the declaratory judgment actions, and in October 2007 they spent multiple days reviewing thousands of pages of documents that related to the declaratory judgment actions and had nothing to do with the § 57-9 actions, documents which the Diocese copied and produced. The Church of Our Saviour at Oatlands served and received

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answers to add a Contracts Clause defense, and to add an *ad damnum* clause specifying the amount sought in their counterclaims." *Id.* at 9 n.7. They have not asked for leave to amend, and the delay itself is prejudicial. Further, the suggested amendment "to add an *ad damnum* clause" is merely an attempt to disguise equitable counterclaims in common law clothes.

[4] The vast majority of the filings in 2007-08 were filed in both the 57-9 actions and the declaratory judgment actions, as well as No. CL 2007-248724, the "omnibus" action.

answers to its own extensive declaratory judgment action discovery in October 2007 as well.

After the November 2007 trial in the § 57-9 actions, the Court suspended proceedings in the declaratory judgment actions but invited any party that wished to proceed to file a motion. *See* Nov. 20, 2007, Trial Tr. at 1302-03 (Exhibit 2). The Diocese did so, and – after having ruled that § 57-9 applied – the Court not only granted leave to proceed with discovery and other matters in the declaratory judgment actions but also set a trial that included those actions:

> And, secondly, toward that end, *I believe the October trial ought to resolve any outstanding evidentiary issues. And I say any and all outstanding evidentiary issues*, which would include such issues, depending upon their applicability, as to the vote, any evidentiary aspect of -- remaining aspect of 57-9 .... -- any factual issues related to the contract clause issue *and the declaratory judgment actions to the extent that they still must be resolved....*
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> *[T]he stay on discovery and motions related to both discovery and non-discovery issues on all issues related to this litigation is lifted, and it is lifted immediately.* I see that as the only way that this Court can resolve the case in the reasonably foreseeable future, is to lift discovery. I am persuaded by the representations of the Episcopal Church and the Diocese that if they do not proceed with discovery at this time, they cannot go to trial in October. And I accept those representations....

April 25, 2008, Hr'g Tr. at 98-99, 100 (emphases added) (Exhibit 3). Notwithstanding the Court setting the declaratory judgment actions for trial, the Congregations did not raise the jury issue at all in 2008, either at the April 25 hearing or thereafter.[5]

After the April 25, 2008, hearing, discovery abounded. Both sides served extensive written discovery. Because seven of the Congregations adopted the same manner of production that the Diocese had employed, counsel for the Diocese and the Church spent literally hundreds of person-hours that summer visiting the Congregations' production locations and reviewing

[5] The Diocese filed a Motion on May 16, 2008, for entry of a scheduling order for the October trial. Although the Congregations objected that a scheduling order was premature because it was not yet certain what issues would be tried, their opposition (filed May 23, 2008) never mentioned a jury at all or sought any leave to amend their counterclaims.

documents, which were then produced. Motions to compel were filed by both sides.

This Court's opinions on June 27, 2008, and August 19, 2008, made clear that the October 2008 trial would not include the declaratory judgment actions after all, leading to an agreed suspension of declaratory judgment action discovery in a September 3, 2008, Order. But it is revisionist history at its worst to claim that the parties and counsel were not engaged with and actively litigating the declaratory judgment actions in 2007 and 2008.

The Congregations' purported lack of focus on the declaratory judgment actions shows no good cause for ignoring the declaratory judgment actions. Indeed, as the litigation history clearly shows, the Congregations cannot claim that they ignored the declaratory judgment actions, only that they ignored the issue of asking for a jury.

Allowing the Congregations now to evade the ramifications of their decision to trust entirely in § 57-9 and neglect or ignore their obligations under Rule 3:21 also would be prejudicial. Prejudice would arise from the unavoidable delays and added costs associated with a jury trial. In addition, the Church and the Diocese may have conducted past discovery differently – conducting video depositions, for example – if they had been on notice that a jury trial was expected. (Discovery and depositions in the declaratory judgment actions are not complete, but extensive progress was made in those areas in 2007-08.) And empanelling a jury to hear these cases now would force all parties to rehash portions of the same evidence that they previously introduced at trials in 2007 and 2008, because no jury has heard such evidence and because a jury is not likely to view dry recitations of transcribed testimony in the same manner as evidence presented fresh – problems that easily can be avoided if trial is to the Court.

In short, the Congregations long ago "'frittered away'" any claim of right to a jury trial (Cong. Mem. at 7, quoting *W.S. Forbes & Co. v. Southern Cotton Oil Co.*, 130 Va. 245, 263, 108

S.E. 15, 21 (1921)), by deciding not to demand a jury within the time period mandated by Rule 3:21. They should not be allowed to elude the effects of their own conscious decisions now.

II. The Congregations have no right to a jury trial.

The Congregations concede, as of course they must, that they have no right (constitutional or otherwise) to a jury trial of equitable claims. *See* Cong. Mem. at 5-6 n.5, 6. They argue, however, that these cases are triable by a jury on three distinct grounds. All fail.

The Congregations' first argument is that these cases are "controversies respecting property" and therefore subject to a trial by jury under Art. I, § 11 of the Constitution of Virginia. That argument proves far too much. It is established beyond argument that the constitutional guarantee applies only to cases that were subject to a right to a jury trial when the Constitution was adopted. *E.g.*, *Stanardsville Volunteer Fire Co., Inc. v. Berry*, 229 Va. 578, 583, 331 S.E.2d 466, 469 (1985); *W.S. Forbes*, *supra*, 130 Va. at 263-64, 108 S.E. at 21. That guarantee simply does not apply to cases in chancery, whether they "respec[t] property" or not. *E.g.*, *id.*, 108 S.E. at 21; *Pillow v. Southwest Virginia Improvement Co.*, 92 Va. 144, 149-50, 23 S.E. 32, 33 (1895).

Pillow amply illustrates the point. That case was a suit for partition of real property, in equity. The defendants claimed that they were the sole owners of the land and challenged the constitutionality of a statute "which authorize[d] a court of equity in a partition suit to settle all questions of law which may arise in the case" as depriving an adverse claimant of his right to a trial by jury. *Id.* at 148, 23 S.E. at 33.[6] The Court easily dismissed that argument. The constitutional right of trial by jury, it explained, "must be read in the light of the circumstances

[6] The defendants in *Pillow* relied on the same constitutional provision that the Congregations cite here, which appeared at that time as Art. I, § 13 of the Constitution of 1869.

under which it is adopted. Unless the right of trial by jury existed at the time of its adoption ... it could hardly be contended that such a right was to be given by the Constitution, unless it expressly so provided or it was necessarily implied." The statute pre-dated the Constitutions of 1851 and 1869, and the people who adopted the Constitutions were presumed to have done so with knowledge that under the statute "a trial by jury in such cases could only be had when a court of equity in its discretion desired it, and not as a matter of right." *Id.* at 149, 23 S.E. at 33. That disposes of the Congregations' argument that they are constitutionally entitled to a trial by jury in all cases "respecting property," regardless of the distinction between equity and law.[7]

The Congregations' second argument is that plaintiffs' "contract rights" claims are "legal claims within the meaning of the jury trial guarantee." Cong. Mem. at 5. They are mistaken. Contract claims (like declaratory judgment actions) are not inherently either legal or equitable. The issue, as discussed in our opening Memorandum at 3, is whether "'the remedy sought ... is legal or equitable in nature.'" *Golden v. Kelsey-Hayes Co.*, 73 F.3d 648, 659 (6th Cir. 1996) (quoting *Chauffeurs, Teamsters & Helpers v. Terry*, 494 U.S. 558, 565 (1990)). Here, plaintiffs

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[7] The provision for trial by jury "in controversies respecting property" has been in every version of the Constitution of Virginia, including the Constitution of 1851, referenced in *Pillow*, and the Constitution of 1869, in force when it was decided. *See* I A. Howard, *Commentaries on the Constitution of Virginia* 244 (1974).

The cases cited in the Congregations' footnote 3 were all actions at law and therefore do not advance their argument. *Watson v. Alexander*, 1 Va. (1 Wash.) 340, 1794 WL 429, was an action "of covenant for damages." *Id.* at 354, 1794 WL 429 at *12. *Duval v. Bibb*, 7 Va. (3 Call) 362, 1802 WL 675 (1803), was an action in ejectment. In *Stuart's Heirs v. Coalter*, 25 Va. (4 Rand.) 74, 1826 WL 1067, the issue underlying the suit was title and the Court held that equity has no jurisdiction to decide titles to land. (In the present cases, there is no dispute that titles are in the various trustees. The issue is beneficial, *i.e.*, equitable, ownership and whether the trustees should be enjoined to convey title to the Bishop of the Diocese.) *Buntin v. City of Danville*, 93 Va. 200, 24 S.E. 830 (1896), also was an ejectment case, as the Congregations concede, and the issue was title (whether the land had been dedicated to public use). *Litz v. Rowe*, 117 Va. 752, 86 S.E. 155 (1915), likewise was a dispute over title to and boundaries of land. No such dispute is presented here.

are not seeking damages, a legal remedy, but an injunction and specific performance, which are undeniably equitable.

The Congregations' final argument is that "quasi-contractual claims such as unjust enrichment, which the Congregations have alleged in their counterclaims," also are legal in nature. Cong. Mem. at 5, citing *Marine Development Corp. v. Rodak*, 225 Va. 137, 141, 300 S.E.2d 763 (1983). The problems with that argument are numerous. First, it is an entirely new theory in the Congregations' November 24, 2010, Memorandum. Nothing in their counterclaims alleges or even hints at a "quasi-contractual" claim. Second, the usual remedy for "unjust enrichment" is imposition of a constructive trust, as discussed in our opening Memorandum at 4-5, not a "quasi-contract." Third, this is not a case for an unjust enrichment claim; but if it were, that claim would not give rise to a right to a jury. As this Court has held, "unjust enrichment claims lie in equity and stem from an implied contract or an otherwise unenforceable contract. However, where there is a legally enforceable, valid and express contract between the parties, the 'law will not imply a contract in contravention thereof.'" *Arias v. Jokers Wild*, 73 Va. Cir. 281, 301-02 (Fairfax Co. 2007) (quoting *Ellis & Myers Lumber Co. v. Hubbard*, 123 Va. 481, 502, 96 S.E. 754, 760 (1918)). *See also Po River Water & Sewer Co. v. Indian Acres Club*, 255 Va. 108, 114, 495 S.E.2d 478, 482 (1998), quoted in Diocese-Church Mem. at 9 ("contracts implied in law" are creatures of equity). And fourth, *Rodak* does not support their argument at all. *Rodak* was a claim for damages for breach of contract (which was rejected) and alternatively for damages in *quantum meruit*. That opinion does not mention unjust enrichment, and there was "no contention of a quasi contract or contract implied in law." 225 Va. at 143, 300 S.E.2d at 767.

III. Additional reasons for refusing to empanel a jury.

As stated in our opening Memorandum, there are not likely to be any genuine disputes as to facts that are material to any issue presented for decision; the issues will be questions of law or mixed questions of law and fact.[8]

The Congregations suggest that the equitable claims in these cases "may be tried by an advisory jury." Cong. Mem. at 6, citing Va. Code § 8.01-336(E). But they overlook the clear language of the very statute that they quote, which provides that the Court may direct an issue to be tried before an advisory jury either of its own motion or "upon motion of any party, supported by such party's affidavit that the case will be rendered doubtful by conflicting evidence of another party." *Id.* The Congregations have filed neither a motion for an advisory jury nor an affidavit as required by the statute, and we do not believe that in good conscience they would be able to do so. They appear to have chosen instead simply to ask the Court to relieve them from a plight that is entirely of their own making.

The Court should not accept that invitation. Absent any triable disputes of material fact, a jury has no office to fill at all. But even if there were some minor questions of historical fact in dispute, these still would not be appropriate cases for an advisory jury. We have previously adverted to the major risk of jury confusion that would result from the trial of eight different but similar cases to a single jury. Diocese-Church Mem. at 9. That risk would be compounded enormously by the fact that the great majority of the evidence will be documentary. Literally thousands of documents will be offered in evidence against the eight Congregations, and it is

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[8] It is well settled that a jury's sole function is to decide disputed issues of fact. *E.g.*, *Speet v. Bacaj*, 237 Va. 290, 295-96, 377 S.E.2d 397, 400 (1989); *W.S. Forbes*, *supra*, 130 Va. at 260, 263, 108 S.E. at 20, 21. "If there are no controverted facts, the law determines the rights of the parties. There is no need for a jury, and neither the language nor spirit of the Constitution guarantees a jury trial." *Id.*, 108 S.E. at 21.

likely that much of their evidence will be of the same character. The Court will be well-equipped to understand which exhibits are relevant to which Congregation(s), particularly with the benefit of detailed post-trial briefing and time to study and review. A jury, alone in a room with boxes upon boxes of documents, oral closing arguments and instructions, and inherent time pressures would have none of those advantages. An advisory jury trial also would be highly complicated and prolonged by multiple relevancy objections, as counsel for both sides necessarily objected to documents with no application to some of the cases. Introduction of documentary evidence – hopefully by stipulation – can proceed far more quickly and efficiently in a trial to the Court. We also have referred previously to the threat of intrusive *voir dire* regarding personal issues, including questions that likely would tread into a religious thicket – and potentially would lead to objections for cause based on religious beliefs, presenting an entirely new set of unnecessary constitutional issues. *See* Church-Diocese Mem. at 10. Accordingly, any possible value to empanelling a jury whose sole function would be merely to *advise* the Court (*e.g.*, *Nelms v. Nelms*, 236 Va. 281, 290, 374 S.E.2d 4, 9 (1988)) would be vastly outweighed by the many complications that would result.

SCHEDULING ISSUES

I. Trial organization

The Court should accept the Church's and the Diocese's proposal that the trial be organized into a common evidence period followed by short periods to wrap up any congregation-specific evidence.

The Congregations' main objection to such an structure is a misunderstanding of it. The Congregations assert more than once that our proposal would unduly restrict their counterclaim presentation, claiming in particular that they would not be able to present counterclaim evidence

during the common evidence period. Cong. Mem.at 11 ("The Congregations would not be permitted to introduce evidence in support of their counterclaims at this juncture, even if such evidence was 'common' as to all of them"); *id.* at 12 ("the Congregations would be barred from introducing evidence in support of their counterclaims during the common phase, even if such evidence bears on multiple congregations").

Counsel for the Church and the Diocese are unaware of ever having said or implied such a thing. To the extent anything was unclear, that is *not* what we have proposed. *See*, *e.g.*, Nov. 12, 2010 Hr'g Tr. at 18 (counsel for the Diocese referring to three days of common evidence by each side) (Exhibit 4). If the Congregations wish to present common evidence regarding their counterclaims, they can and should do so during the common evidence period. The "typical [trial] structure" (Cong. Mem. at 11) would be followed, and counsel would retain the right to adjust their evidence as the trial progresses as much as is normally possible or allowed. Such a structure merely brings order, which benefits the Court and applies to all parties equally.

Although they recognize that plaintiffs usually are allowed to present their evidence in any order, the Congregations also object to the Church and the Diocese determining the order of the church-specific evidence periods. Whether the trial will be organized into common and church-specific evidence periods is a distinct issue from the order of the church-specific periods. In any event, the Church and the Diocese are not seeking to act by secret fiat. We are willing to consult with the Congregations and attempt in good faith to reach agreement on the "batting order," and we believe that the batting order should be fixed well in advance of trial.

The suggestion that there could be disputes over whether a piece of evidence is common or congregation-specific is a distraction. There should be a structure for the trials that achieves the efficiencies contemplated by the Multiple Claimant Litigation Act (and that benefit all) while

remaining focused on the nine final decisions this Court will have to make. Disputes would actually multiply under the Congregations' undifferentiated approach, because counsel would then be required to lodge objections with respect to the relevancy of evidence to particular cases. The Church's and the Diocese's proposals for organized exhibit lists, exchanged early, would alleviate and promote resolution of any possible disputes over what evidence is applicable in particular cases. Finally, any unresolved disputes over what to present in the common evidence period would be easily-resolved logistical matters.[9]

II. Organization of witness and exhibit lists

The Court should adopt our proposal that any witness or exhibit lists filed on behalf of more than one party must designate to which cases/churches each witness and exhibit relates.

First and foremost, the Congregations' position is a recipe for chaos. Under their system, no party would know what evidence was being presented against it or on whose behalf. The fact-finder would likely be confused. Counsel and the fact-finder would be required, under pressure of the pending trial or deliberations, to examine the voluminous documentary evidence in detail to determine to which case(s)/church(es) each piece of evidence relates. If there were a jury, there would be no record of what evidence was considered and applied to particular cases/churches. In a bench trial, time and resources would be consumed and the transcript muddied with a plethora of relevance objections and rulings. The task of preparing appellate

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[9] The Congregations' citation of our brief (see Congregations' Memorandum at 12 & n.8) to illustrate supposed line-drawing difficulties entirely ignores the context of that statement, which we have explained. We anticipate presenting historical expert testimony, some of which will concern Church and Diocesan history and therefore be generally applicable, and some of which will relate to several of the Congregations in particular. (Five of the churches involved in this litigation began before 1900. Two began in the 1960s and two in the 1980s.) We seek a common sense approach to calling witnesses, and therefore believe any such expert should be called only once. Should the Congregations have similar dilemmas about whether to call a particular witness multiple times, we do not expect to object to any similar, reasonable request.

records for each of the cases/churches would be near hopeless. The Congregations' position is not wise, efficient, or consistent with due process.

Second, our proposal probably helps the Congregations more than it burdens them. In 2008, for example, Truro and The Falls Church filed separate exhibit lists for the portions of the trial that related to each but the Church and the Diocese filed a combined list. If the same practice were followed here, it is the Congregations which would benefit from the provision at issue. If the Congregations intend to submit multiple-party lists without designating the cases or churches to which the witnesses or exhibit relate, however, then that is an attempt to burden counsel for the Church and the Diocese with a time-consuming and virtually impossible task.

Finally, it is absurd to claim that this issue "becomes largely moot" with the Congregations' proposal to give "24-hour" notice of which exhibits will be used with certain witnesses. Cong. Mem. at 15. If the witnesses themselves are not designated for particular cases/churches – something the Congregations object to doing – then it hardly solves the problem to say that the plan is to use a certain set of exhibits with a certain witness.[10]

III. Timing of preliminary witness lists

We have nothing more to say about whether the Court should set the preliminary witness list exchange 84 days before trial (as we proposed), 70 days before trial (as proposed by the Congregations), or something in between. *See* Church-Diocese Mem. at 13-14 & n.6.

IV. Preliminary exhibit lists

The Court should require the parties to exchange preliminary exhibit lists before the close

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[10] "24-hour" notice is a misnomer and is inadequate. In the past, the parties have identified the next day's witnesses after the preceding day. Assuming plans to sleep, eat, etc., that *might* amount to 10 hours of notice. In any event, identifying the order of witnesses and associated exhibits for each does nothing to avoid the confusion and many objections that would result from a lack of differentiation among churches in witness and exhibit lists and the lengthy trial period.

of discovery, as the Church and the Diocese have proposed. The Church of Our Saviour at Oatlands agrees. The other Congregations do not, even if the exchange is pushed back nearly a month, as we have already done by proposing that it occur 56 days before trial (*not* 84 days).

The Congregations argue only that there might be insufficient time to prepare such a list and that the agreement to exchange final lists 28 days before trial is sufficient. *See* Cong. Mem. at 15 & n.9. We disagree with both points.

Regarding the former, our proposed scheduling order would result in an exchange in mid-February, assuming that the trial starts in mid-April.[11] The parties have already had ample time to review their own and opposing parties' documents, and a mid-February exchange would allow two more months after the December 17 hearing.

And the point of the proposed preliminary exhibit list exchange is not merely to prevent trial surprise. Rather, as we briefed, a preliminary exhibit list exchange would facilitate stipulations, promote resolution of authenticity and foundation objections prior to trial, reduce the need for document-related discovery fights, and, importantly, narrow the universe of evidence in such a way that the parties could make good use of discovery time (for example, holding document-related depositions, if necessary). *See* Church-Diocese Mem. at 14-15.

CONCLUSION

The Court should rule that the trial of the declaratory judgment actions will be without a jury and should enter a scheduling order that resolves as discussed above the four scheduling issues where the eight Congregations and the Church and the Diocese have disagreement.

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[11] As the Court may recall, the Congregations' only objection at the November 12, 2010, hearing to our proposal that the trial begin as soon as possible after April 4, 2011, is that one of their counsel has a conflict prior to mid-April. *See* Nov. 12, 2010, Hr'g Tr. at 63-64 (Exhibit 4).

Respectfully submitted,

THE PROTESTANT EPISCOPAL CHURCH
IN THE DIOCESE OF VIRGINIA

By: _____
Of Counsel

Bradfute W. Davenport, Jr. (VSB # 12848)
George A. Somerville (VSB # 22419)
Joshua D. Heslinga (VSB # 73036)
Troutman Sanders LLP
Post Office Box 1122
Richmond, Virginia 23218-1122
Telephone: (804) 697-1200
Facsimile: (804) 697-1339

Mary C. Zinsner (VSB # 31397)
Troutman Sanders LLP
1660 International Drive
Suite 600
McLean, Virginia 22102
Telephone: (703) 734-4334
Facsimile: (703) 734-4340

THE EPISCOPAL CHURCH

By: _____
Of Counsel

Adam Chud (*pro hac vice*)
Soyong Cho (VSB # 70896)
Goodwin Procter
901 New York Avenue, N.W.
Washington, D.C. 20001
Tel: 202-346-4000
Fax: 202-346-4444

Heather H. Anderson (VSB #38093)
Heather H. Anderson, P.C.
P.O. Box 50158
Arlington, VA 22205
Tel: 703-237-5968

Mary E. Kostel (VSB # 36944)
Special Counsel
The Episcopal Church
c/o Goodwin Procter LLP
901 New York Ave., N.W.
Washington, D.C. 20001
Tel: 202-346-4184
Fax: 202-346-4444

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were sent by electronic mail to all counsel named below and by first-class mail to the counsel indicated with an asterisk below, on this 7th day of December, 2010:

* Gordon A. Coffee (gcoffee@winston.com)
Gene C. Schaerr (gschaerr@winston.com)
Steffen N. Johnson (sjohnson@winston.com)
Andrew C. Nichols (anichols@winston.com)
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006
Counsel for Truro Church, Church of the Epiphany, Church of the Apostles, The Church at The Falls – The Falls Church, and associated individuals

* George O. Peterson (gpeterson@petersonsaylor.com)
Tania M. L. Saylor (tsaylor@petersonsaylor.com)
Peterson Saylor, PLC
4163 Chain Bridge Road
Fairfax, VA 22030
Counsel for Truro Church and certain associated individuals

* Mary A. McReynolds (marymcreynolds@mac.com)
Mary A. McReynolds, P.C.
1050 Connecticut Avenue, N.W., 10th Floor
Washington, D.C. 20036
Counsel for St. Margaret's Church, St. Paul's Church, Church of the Epiphany, Church of the Apostles, St. Stephen's Church, and associated individuals

* E. Andrew Burcher (eaburcher@pw.thelandlawyers.com)
Walsh, Colucci, Lubeley, Emrich & Walsh, P.C.
4310 Prince William Parkway, Suite 300
Prince William, Virginia 22192
Counsel for St. Margaret's Church, St. Paul's Church, and Church of the Word

* James E. Carr (NorthVaJim@aol.com)
Carr & Carr
44135 Woodridge Parkway, Suite 260
Leesburg, Virginia 20176
Counsel for the Church of Our Saviour at Oatlands and associated individuals

* R. Hunter Manson (manson@kaballero.com)
PO Box 539
876 Main Street
Reedville, Virginia 22539
Counsel for St. Stephen's Church and associated individuals

* Scott J. Ward (sjw@gg-law.com)
Timothy R. Obitts (tro@gg-law.com)
Dawn W. Sikorski (dws@gg-law.com)
Gammon & Grange, P.C.
8280 Greensboro Drive, Seventh Floor
McLean, Virginia 22102

* James A. Johnson (jjohnson@semmes.com)
Paul N. Farquharson (pfarquharson@semmes.com)
Scott H. Phillips (sphillips@semmes.com)
Semmes Bowen & Semmes, P.C.
25 South Charles Street, Suite 1400
Baltimore, Maryland 21201
Counsel for The Church at The Falls – The Falls Church and certain associated individuals

* Thomas C. Palmer, Jr. (tpalmer@thebraultfirm.com)
Brault Palmer Grove White & Steinhilber LLP
3554 Chain Bridge Road, Suite 400
Fairfax, VA 22030
Counsel for certain trustees of The Church at The Falls – The Falls Church (Episcopal)

* Robert C. Dunn (rdunn@robdunnlaw.com)
LAW OFFICE OF ROBERT C. DUNN
707 Prince Street
P. O. Box 117
Alexandria, Virginia 22313-0117
Counsel for Marjorie Bell, trustee of Church of the Epiphany (Episcopal)

* E. Duncan Getchell (DGetchell@oag.state.va.us)
Stephen R. McCullough (SMcCullough@oag.state.va.us)
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Counsel for the Commonwealth of Virginia ex rel. Kenneth T. Cuccinelli, in his official capacity as Attorney General

EXHIBIT 2

V I R G I N I A :

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

----------X

IN RE: : Consolidated

: Cases:

MULTI-CHURCH EPISCOPAL : CL 2007-248724,

CHURCH LITIGATION : et al.

----------X

TRANSCRIPT OF DAY 5 OF TRIAL

FAIRFAX COUNTY CIRCUIT COURT

4110 Chain Bridge Road

Courtroom 5E

Fairfax, Virginia 22030

Tuesday, November 20, 2007

10:00 a.m.

BEFORE: The Honorable Randy I. Bellows

Job No.: 1-114262

Pages 1087 - 1304

Reported by: Ellen L. Ford, RPR

of what's been said about -- it all may be academic depending on how you rule.

THE COURT: Okay. Well, I raised this issue, which I regret, actually, but I raised it. And it's clear to me that I put a number of people on the spot who weren't prepared to address this issue today.

The way we're going to proceed on this is, if either party wishes to proceed with any action in the declaratory judgment action, whether it's demurrers, summary judgment, discovery, paper discovery, depositions, then we need to -- you need to file a motion to proceed with discovery.

And until then, I'm suspending -- I'm going to suspend anything in the declaratory judgment action, but I'm giving either party leave to file a motion to proceed with all or limited proceedings in the declaratory judgment action.

So in other words, Ms. McReynolds is making a point that she wants to consult with her colleagues. I think that's entirely reasonable. As I said, I brought this up sua sponte, so it wasn't like you expected it. You're going to be addressing this,

and I think the parties have to have an opportunity to consider what the issues are and what their position ought to be.

So Mr. Davenport, if you want to proceed with any of the things you discussed, then set on one of my -- just set it on a Friday docket. It can be done on a regular Friday docket, a motion to proceed with whatever you want to proceed with in the declaratory judgment action, and I will hear that on a Friday whenever you're ready.

And until -- and anybody else can do that, as well. And until then, further proceedings in the declaratory judgment action are suspended.

Will that work for you Mr. Davenport?

MR. DAVENPORT: Yes, sir.

THE COURT: You, Mr. Coffee, and everybody else?

MR. COFFEE: That's fine, your Honor.

MR. CARR: Yes, your Honor.

MS. McREYNOLDS: Yes, your Honor.

THE COURT: That's fine. Matter is concluded. (Proceedings concluded at 3:45 p.m.)

CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Ellen L. Ford, the officer before whom the foregoing proceedings were taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 1st day of December, 2007.

My commission expires:
September 30, 2011

_____

Notary Public in and for the
Commonwealth of Virginia
Notary Registration No.: 7124300

EXHIBIT 3

V I R G I N I A :

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

- - - - - - - - - - - - - - - - - - x

IN RE: :

MULTI-CIRCUIT EPISCOPAL : CASE NO. CL 2007-0248724

CHURCH PROPERTY LITIGATION :

- - - - - - - - - - - - - - - - - - x

Fairfax, Virginia

Friday, April 25, 2008

The above-entitled matter came on for hearing before The Honorable Randy I. Bellows, Judge in and for the Circuit Court of Fairfax County, Virginia, 4110 Chain Bridge Road, Courtroom 4G, Fairfax, Virginia, beginning at approximately 2:35 p.m., before Maureen S. Bennie,

Verbatim Court Reporter, when were present on behalf of

the respective parties:

APPEARANCES:

On behalf of The Protestant Episcopal Church in the Diocese of Virginia:

BRADFUTE W. DAVENPORT, JR., ESQUIRE

JOSHUA D. HESLINGA, ESQUIRE
TROUTMAN SANDERS, LLP
1001 Haxall Point
Richmond, Virginia 23219
(804) 697-1200

and

MARY C. ZINSNER, ESQUIRE
TROUTMAN SANDERS, LLP
1660 International Drive

Suite 600
McLean, Virginia 22102
(703) 734-4363

On behalf of The Episcopal Church:

ADAM M. CHUD, ESQUIRE
HEATHER H. ANDERSON, ESQUIRE
SOYONG CHO, ESQUIRE
GOODWIN PROCTER
901 New York Avenue, N.W.

Washington, D.C. 20001
(202) 346-4000

On behalf of Truro Church, The Falls Church and various individual defendants associated with these churches:

GORDON A. COFFEE, ESQUIRE
WINSTON & STRAWN, LLP
1700 K Street, N.W.
Washington, D.C. 20006

(202) 282-5000

On behalf of Church of the Apostles, Church of the Epiphany, St. Margaret's Church, St. Paul's Church, Haymarket, St. Stephen's Church, their clergy, vestry and trustees:

MARY A. McREYNOLDS, ESQUIRE
MARY A. McREYNOLDS, P.C.
1050 Connecticut Avenue, N.W.
Tenth Floor
Washington, D.C. 20036
(202) 429-1770

On behalf of Christ the Redeemer Church and all of its associated individual defendants, Potomac Falls Church and The Reverend Jack Grubbs and The Falls Church:

SCOTT J. WARD, ESQUIRE
GAMMON & GRANGE, P.C.
8280 Greensboro Drive
Seventh Floor
McLean, Virginia 22102

(703) 761-5000

On behalf of Church of the Word, St. Margaret's Church and St. Paul's Church, Haymarket:

E. ANDREW BURCHER, ESQUIRE

WALSH, COLUCCI, LUBELEY, EMRICH
& WALSH, P.C.
4310 Prince William Parkway
Suite 300

Woodbridge, Virginia 22192

(703) 680-4664

On behalf of The Falls Church, its Rector (John W. Yates) and some of the former and current members of its vestry (Henry D. Barratt, Jr., Anne Cregger, Don Dusenberry, Larry Medley, Anne Waidman, David Gustafson, Ken Hagerty, Carol Jackson, Roger Turner, Tom Wilson, John Walter, Gail Thompson, Elizabeth Law, Ken Brown and Carlton Howard):

JAMES A. JOHNSON, ESQUIRE
SEMMES, BOWEN & SEMMES

250 West Pratt Street
Baltimore, Maryland 21201
(410) 576-4712

and

SARAH W. PRICE, ESQUIRE
SEMMES, BOWEN & SEMMES
1577 Spring Hill Road
Suite 200
Vienna, Virginia 22182

(703) 288-2529

On behalf of Church of Our Saviour at Oatlands:

JAMES E. CARR, ESQUIRE
LAW OFFICES OF CARR & CARR
44135 Woodridge Parkway
Suite 260
Leesburg, Virginia 20176
(703) 777-9150

On behalf of Trustees of The Falls Church - William W. Goodrich, Jr., Harrison Hutson and Steven Skancke:

THOMAS C. PALMER, JR., ESQUIRE
BRAULT, PALMER, GROVE, WHITE
& STEINHILBER, LLP
10533 Main Street
Fairfax, Virginia 22030
(703) 273-6400

On behalf of Truro Church, Rt. Reverend Martyn Minns, Jim Oakes, Jim Wilkinson, Mary Ailes, Bill Barto, Cynthia Brosnan, Stanton Brunner, Dan Dearborn, Beth Dorman, Paul Julienne, June Leeuwrik, Dan Malabonga, Kevin Marshall, Jim Moulton, Mary Springmann, Katrina Wagner, Ernie Wakeham, Megan Walnut, Garth Wilson, Warrant Thrasher and Thomas D. Yates:

GEORGE O. PETERSON, ESQUIRE
HEATHER AUSTIN JONES, ESQUIRE

SANDS, ANDERSON, MARKS & MILLER, P.C.
1497 Chain Bridge Road
Suite 202
McLean, Virginia 22102
(703) 893-3600

MR. COFFEE: Yes.

THE COURT: Okay. Let's just save it, because I am going to give you a decision on this, and then I can get to that.

THE COURT: All right. Here's my decision. I premise my decision by saying again that if at all possible, it is my aspiration to resolve this litigation in its entirety this year. I believe that these are matters of such importance and consequence that if it is possible to resolve it in an orderly manner this year, then that's what I aspire to do. I may not be able to achieve that, it depends on the various turns that this litigation is going to take, but it is certainly my aspiration.

And, secondly, toward that end, I believe the October trial ought to resolve any outstanding evidentiary issues. And I say any and all outstanding evidentiary issues, which would include such issues, depending upon their applicability, as to the vote, any evidentiary aspect of -- remaining aspect of 57-9 which I think will be addressed sooner than that in some legal resolutions. In other words -- I don't want to be obscure here -- TEC

is asserting that there are aspects of 57-9 that are evidentiary, such as whether the property is held in trust for the congregations. I don't know -- I think I will first address that issue as a legal matter, and then we will know what factual issues have to be resolved, but the -- any factual issues related to the contract clause issue and the declaratory judgment actions to the extent that they still must be resolved.

Now, my next point is that the October trial can be organized, it seems to me, in a way that minimizes litigating matters that don't need to be resolved. In other words -- and we don't need to do this today, but at some point, I think we will need to meet to talk about the organization of the October trial. Just as one hypothetical, I can imagine a scenario where the Court upholds 57-9 against the constitutional challenge, excepting the contract clause issue, and the first issue that would be resolved at the trial would be the vote and maybe the contract clause issue, although it's also possible that will have been resolved beforehand through some other litigation. I'm not ruling out the possibility of setting some additional trial time prior to October or

after October. That's still a possibility. But it is my aspiration, in addition to resolving the declaratory judgment action in October, to address any other issue that remains outstanding so that subsequent to the October trial, I can give the parties a final decision.

Now, that brings me to the issue that you are here for today, which is discovery, and I've got several things to say about that. The first thing I'm going to say is that the stay on discovery and motions related to both discovery and non-discovery issues on all issues related to this litigation is lifted, and it is lifted immediately. I see that as the only way that this Court can resolve the case in the reasonably foreseeable future, is to lift discovery. I am persuaded by the representations of the Episcopal Church and the Diocese that if they do not proceed with discovery at this time, they cannot go to trial in October. And I accept those representations, and on that basis, I am lifting discovery because, otherwise, I do not see how this case can be resolved in the reasonably foreseeable future.

Let me say -- and I took the time to pull out the Rules of the Supreme Court, 4:1(c), which deals with

protective orders. And it says, in part, upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county or city where the deposition is to be taken -- and here is the reason I am citing this to you -- may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. And then it sets out a variety of different powers that the Court has.

That's very broad authority this Court has, and much of what I've heard from the CANA congregations today is that their concerns fit into the category of oppression or undue burden or expense. And I invite them as the discovery proceeds to seek protective orders as they believe appropriate, and I will rule on them. I may rule for them, I may rule against them. I, obviously, can't judge that. But our rules do provide for addressing their

concerns.

Next: By Wednesday noon, next Wednesday, both parties are to file with the Court by e-mail and then just file in the Clerk's office sometime that day -- but by e-mail by noon to the Court, to Ms. Cranston and to the parties, of course, a list of all legal issues that either party believe can be resolved as a matter of law, in other words, without any fact finding or further evidence. And by Friday noon, two days later, all the parties can respond to the other parties' assertion of whether legal issues can be resolved without further fact finding. And then this Court will issue an order promptly after that, listing the issues that the Court will resolve as a matter of law and giving the parties a briefing schedule and setting the matter for a hearing, for argument, the idea being that many of the issues that we have talked about today are legal or have a discrete legal component. And it will advance this litigation materially, I believe, if I can resolve those issues as a matter of law, and I am prepared to devote the time to do it on parallel with our constitutional litigation. So that's how we will proceed.

So with that said, Mr. Davenport, on your

motion, is there anything further I need to say?

MR. DAVENPORT: No, sir.

THE COURT: Okay. Mr. Coffee or anybody else, is there anything more they believe I need to say, address today on that issue?

MR. COFFEE: Not that I can think of, Your Honor.

THE COURT: Okay. Now, Mr. Coffee, you said you had a scheduling matter you wanted to bring to the Court's attention?

MR. COFFEE: Yes, Your Honor. Pursuant to the Court's -- the schedule, I believe, set in the Court's April 3rd order, the CANA congregation has filed a brief on the constitutional implications of your April 3rd ruling, basically a post-ruling constitutional brief. The Diocese and the Episcopal Church each filed briefs, separate briefs, mind you. In addition, an amicus brief has been filed by the Methodists.

We have a response to all three briefs due next week, and I have approached the Episcopal Church and --

THE COURT: I haven't ruled on the Methodist Church filing yet. I haven't ruled as to whether -- when

CERTIFICATE OF REPORTER

I, Maureen S. Bennie, the court reporter who was duly sworn to well and truly report the foregoing proceedings, do hereby certify that they are true and correct to the best of my knowledge and ability; and that I have no interest in said proceedings, financial or otherwise, nor through relationship with any of the parties in interest or their counsel.

_____

Maureen S. Bennie

Verbatim Court Reporter

EXHIBIT 4

V I R G I N I A:

IN THE SUPERIOR COURT OF FAIRFAX COUNTY

IN RE MULTI-CIRCUIT EPISCOPAL CHURCH LITIGATION:	Case Nos.:	CL2007-248724, CL2007-1235, CL2007-1236, CL2007-1238, CL2007-1625, CL2007-5250, CL2007-5364, CL2007-5682, CL2007-5683, CL2007-5684, CL2007-5902

Fairfax, Virginia
Friday, November 12, 2010

The hearing in the above-captioned matter was held pursuant to notice at the Fairfax Circuit Court, 4110 Chain Bridge Road, Fairfax, Virginia, before Mary S. McCarty, RMR, RDR, of Capital Reporting Company, a Notary Public in and for Virginia, commencing at 2:00 p.m., before the HONORABLE Randy I. Bellows.

COUNSEL FOR THE EPISCOPAL DIOCESE OF VIRGINIA:

MR. HESLINGA: We would expect our side of the common evidence to be able to be done in approximately three days, Your Honor. And I obviously can't speak for the other side, but what we had kind of batted around was perhaps there would be six days of common evidence, three for each side, and then two days per congregation for any congregation-specific evidence. We think that makes --

THE COURT: Two days per side or two days total?

MR. HESLINGA: Two days total, per congregation.

THE COURT: So --

MR. HESLINGA: And that assumes -- I'm sorry, Your Honor. That assumes some degree of cooperation.

THE COURT: What you're looking at is the possibility of 24 trial days?

MR. HESLINGA: Yes. And I -- that may be overly generous, but we'd rather err on that side than insufficient. And we think that that makes the

issue and for any scheduling issues in the event that I don't get a separate trial?

THE COURT: You get five for the separate trial issue and you get five for the scheduling issue.

MR. CARR: That's what I need to know. Thank you.

THE COURT: Mr. Heslinga gets five each as well.

MR. CARR: Okay. So each is five each.

THE COURT: So, theoretically, on November 24th I'll get three briefs. Well, I'll get six briefs. No, I'll get one, two, three, from Mr. Heslinga, and then I'll get two, five -- and then -- right? Well, one for all the congregations and one for Mr. Carr.

A SPEAKER: Two.

THE COURT: Two from Carr and two from you. Four.

MR. PETERSON: One from us.

MS. McREYNOLDS: Just one from us.

THE COURT: Okay. I'm reminded that the

Court is closed half a day on the 24th so any file has to be in by noon. And, as in the past, all filings should be emailed to my law clerk. Personally, if you email it to my law clerk before noon, I don't have a problem with you filing it the next business day as long as all the parties have the brief by noon and I have the brief by noon. I'm not going to consider it untimely if we have it by noon and you file it on Monday because the court is closed for half a day.

Now, the -- Mr. Heslinga said that he -- that they were looking for a trial date any time April 4th and beyond, preferably April 4th, I think. What's the view of the CANA congregation? Yeah.

MR. COFFEE: Mr. Peterson wants to explain his conflict with that date.

MR. PETERSON: I'm in trial in Montgomery County Circuit in Maryland starting April 4th. It should go two weeks but after that I'm free. That's my only conflict.

THE COURT: Okay.

MR. PETERSON: I apologize. I do have

conflicts prior to that day, but as far as April 4th, I wouldn't be able to do that.

MR. BURCHER: And, Your Honor, if we're going to address -- Andrew Burcher. If we're going to address conflicts, I do have the first two weeks of June that I have a conflict. But I think we can work around that depending on where we end up playing out.

THE COURT: Yeah. I think -- I think we would need probably to work around that because what I'm going to try to do, assuming that I get permission from the chief judge to do so, is to set the trial as close to April 4th as possible, but I won't set it during that first two weeks because of Mr. Peterson's conflict. Do you think you can work with that, Mr. Burcher?

MR. BURCHER: Yes, if it's -- any time in May, I'm good.

THE COURT: All right. All right. Now, what this means, based on our revision, is the January 21st hearing is off. There won't be a January 21st hearing. The scheduling plan is off

CERTIFICATE OF NOTARY PUBLIC

I, MARY S. McCARTY, the officer before whom the foregoing hearing was taken, do hereby certify that the testimony appearing in the foregoing hearing was taken by me in stenotype and thereafter reduced to typewriting by me; that said transcription is a true record of the proceedings; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

MARY S. McCARTY
Notary Public in and for the
Commonwealth of Virginia

My commission expires:
November 30, 2014
Notary Registration No.: 7315842