

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' MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR LEAVE TO DEMAND A JURY AND ADDRESSING REMAINING DIS-
PUTES OVER THE PRE-TRIAL ORDER**

COME NOW Truro Church, The Falls Church, Church of the Apostles, Church of the Epiphany, St. Margaret's Church, St. Paul's Church, St. Stephen's Church, Church of the Word, and various Trustees (the "CANA Congregations"),¹ and submit this Memorandum in Support of Their Motion for Leave to Demand a Jury and Addressing Remaining Disputes Over the Pre-Trial Order, and state as follows:

BACKGROUND

In the wake of the divisions in the Episcopal Church ("TEC") and the Diocese of Virginia ("Diocese"), and pursuant to the Protocol for Departing Congregations negotiated by the Special Committee appointed by then-Bishop Peter Lee, each of the CANA Congregations overwhelmingly voted to disaffiliate from TEC and the Diocese. Shortly thereafter, the Congregations filed

¹ Church of Our Savior at Oatlands does not join in this brief and wishes to proceed with a separate trial before this Court.

petitions pursuant to Virginia Code § 57-9(A) requesting the Court's approval of their votes.² Because the plain terms of that provision contemplate that the validity of any congregation's determination to disaffiliate must be "approved by the court," the Congregations did not request that a jury resolve their claims under § 57-9.

In response to the CANA Congregations' § 57-9 petitions, TEC and the Diocese both intervened and filed declaratory judgment actions against the Congregations, which were then consolidated with the § 57-9 petitions pursuant to joint petitions under the Multi-Claimant Litigation Act, Va. Code § 8.01-267.1 *et seq.* Following denial of their demurrers and pleas in bar, the Congregations filed answers to the declaratory judgment actions. The Congregations did not request a jury, however, as they contemplated that resolution of the § 57-9 issue would be "conclusive as to the title and control of any property held in trust"—and would defeat the declaratory judgment claims asserting ownership of the same property.

In January 2009, this Court ruled that the CANA Congregations had satisfied § 57-9(A) and entered judgment in their favor. In June 2010, the Virginia Supreme Court reversed. While affirming that TEC and the Diocese had each experienced a "division," the Court reversed this Court's finding that the Congregations had voted to join a "branch" of those entities within the meaning of the statute. *Protestant Episcopal Church in Diocese of Virginia v. Truro Church*, 694 S.E.2d 555, 566 (2010). The Court remanded the case to this Court, directing it to re-instate

² Section 57-9(A) provides: "If a division has heretofore occurred or shall hereafter occur in a church or religious society, to which any such congregation whose property is held by trustees is attached, the members of such congregation over 18 years of age may, by a vote of a majority of the whole number, determine to which branch of the church or society such congregation shall thereafter belong. Such determination shall be reported to the circuit court of the county or city, wherein the property held in trust for such congregation or the greater part thereof is; and if the determination be approved by the court, it shall be so entered in the court's civil order book, and shall be conclusive as to the title to and control of any property held in trust for such congregation, and be respected and enforced accordingly in all of the courts of the Commonwealth."

TEC's and the Diocese's declaratory judgment suits, as well as the Congregations' counter-claims, and to resolve the case "under principles of real property and contract law." *Id.* at 596.

In light of the Virginia Supreme Court's ruling on § 57-9(A), the CANA Congregations now request a jury trial to resolve TEC's and the Diocese's real property and contract claims as well as the Congregations' own counterclaims. At the status hearing on November 12, 2010, TEC and the Diocese objected to this request on the basis that: (1) the CANA Congregations have no right to a jury on the claims to be tried; and (2) the CANA Congregations' waived any such right under Supreme Court of Virginia Rule 3:21(b). Accordingly, the CANA Congregations now file this Memorandum in Support of the Their Motion for Leave to Demand a Jury.

ARGUMENT

Virginia law embodies a strong preference for jury trials. Article I, § 11 of the Virginia Constitution provides that "trial by jury is preferable to any other, and ought to be held sacred," and Virginia statutory law states that this right "shall be preserved inviolate to the parties." Va. Code § 8.01-336(A). Nowhere is the right to a jury more settled than in "controversies respecting property." Va. Const. art. 1, § 11. Alternatively, the allegation that the CANA Congregations violated plaintiffs' "contract rights" provides an independent basis for a jury trial.

The CANA Congregations have not previously asserted their right to a jury trial, because they had "good cause" for not doing so. *See* Va. S. Ct. Rule 3:21(d). The proceedings to date have focused on whether the Congregations satisfied Virginia Code § 57-9, which calls for "the court" to approve the division petitions at issue. Had the Virginia Supreme Court affirmed this Court's ruling that § 57-9 was satisfied, that ruling would have been "conclusive as to the title and control of any property held in trust." But it did not, and now that the Virginia Supreme Court has reversed this Court's judgment, it is appropriate for the Congregations to ask that the remaining issues in this suit—which must be resolved "under principles of real property and con-

tract law” (694 S.E.2d at 596)—be heard by a jury. The Congregations asserted their right to a jury at the first opportunity after the remand. This Court would have authority to order a jury trial on any issues that it deemed suitable for a jury even if the Congregations lacked good cause for making the request now. Va. Code § 8.01-336(C); Va. Code § 8.01-267.6. Accordingly, we urge the Court to grant the Congregations leave to request a jury at this time.

We develop the foregoing points in Parts I-III, below. In Part IV, we address the issue of the order in which the issues and evidence should be presented at trial and the remaining disputes over the proposed scheduling order.

I. The Issues Raised in the Declaratory Judgment Actions of TEC and the Diocese, and the CANA Congregations’ Counterclaims, are Triable to a Jury.

At the outset, there can be no question that the principal issues in this case may properly be resolved by a jury. Cases involving “real property and contract law” (*Truro Church*, 694 S.E.2d at 566) fall squarely within the core of the constitutional right to a jury.

Most importantly, the Virginia Constitution provides “[t]hat in *controversies respecting property*, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred.” Va. Const. art. I, § 11 (emphasis added). Some 200 years of Virginia case law support reading this provision to cover all manner of property disputes.³ Here, TEC and the Diocese allege a live “controversy,” and they seek an order that “direct[s] and require[s] the Trustee

³ *E.g.*, *Watson v. Alexander*, 1794 WL 429, *13 (Va. 1794) (issues related to conveyance of land and rents owed); *Duval v. Bibb*, 1802 WL 675, *3 (Va. 1803) (adverse possession); *Stuart’s Heirs v. Coalter*, 1826 WL 1067, *5 (Va. 1826) (boundary disputes); *Buntin v. City of Danville*, 24 S.E. 830, 833 (Va. 1896) (ejectment); *Litz v. Rowe*, 86 S.E. 155, 157 (Va. 1915) (suits to remove cloud on title); *see also* Middleditch & Sinclair, *Virginia Civil Procedure* § 13.4(C) n.61 (“Under the common law, actions to recover possession of real property were actions at law. Parties are entitled to a jury trial of the issue of title to the property in such actions.”).

defendants to convey and transfer title to [the] property to the Bishop of the Diocese.”⁴ Thus, this is a “controvers[y] respecting property” that, if a party so chooses, must be tried to a jury.

Plaintiffs’ allegation that defendants violated their “contract rights” (e.g., Diocese Compl. ¶ 31) provides an independent basis for trying this case to a jury. *See Truro Church*, 694 S.E.2d at 596 (directing that this case be resolved under principles of “real property *and contract law*” (emphasis added)); *Green v. Lewis*, 221 Va. 547, 555 (1980) (to establish a “proprietary interest,” the denomination bears “the burden of proving a violation by the trustees of either ‘the express language of the deeds or a contractual obligation to the general church’”). Not only are contract claims legal claims within the meaning of the jury trial guarantee, but so are quasi-contractual claims such as unjust enrichment, which the Congregations have alleged in their counterclaims. *E.g., Marine Development Corp. v. Rodak*, 225 Va. 137, 141 (1983). Quite apart from the fact that this is a “controversy respecting property” under Article 11 of the Virginia Constitution, therefore, the Congregations have a right to a jury trial.

The fact that TEC and the Diocese filed these suits as declaratory judgment actions does not change the analysis. Virginia’s Declaratory Judgment Act provides: “When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.” Va. Code 8.01-188;⁵ *cf. Bethel Inv. Co. v. City of Hampton*, 272 Va. 765, 769 (2006) (“The Virginia Constitu-

⁴ *E.g., Protestant Episcopal Church in the Diocese of Virginia v. Truro Church*, Circuit Court of Fairfax County, CL 2007-1236 (“Diocese Complaint”) ¶ 31(d) (filed Jan. 31, 2007); *id.* ¶ 31 (requesting an affirmation of the Diocese’s alleged “trust, property and contract rights”); *see also The Episcopal Church v. Truro Church*, Circuit Court of Fairfax County, CL 2007-1625 (“TEC Complaint”) (seeking various relief concerning the “real and personal property” at issue).

⁵ This section has not been construed to provide a right to a binding jury trial versus an advisory jury trial, but it is nonetheless clear that a party to a declaratory judgment action is entitled to a

tion guarantees that a jury will resolve disputed facts”). A jury may decide issues in a declaratory judgment action to the same extent that it can otherwise decide them.

This is not to say that any and all claims may be tried to a jury. But even if some portion of TEC’s and the Diocese’s case is equitable in nature, Virginia Supreme Court Rule 3:22(e) recognizes that a jury may decide the legal issues in a case while reserving the equitable ones for the Court. *See* Rule 3:22(e) (“Trial by Mixed Jury and Non-Jury Claims. 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.”). In our view, plaintiffs’ only equitable claim is their claim for an accounting. But they will have no right to an accounting unless they first prevail on their property and contract-based claims. Plaintiffs’ accounting claim is dependent upon their principal claims, and an ancillary claim for equitable relief cannot be the basis for depriving the Congregations of the right to a trial by jury. Moreover, even the equitable claims may be tried by an advisory jury. Va. Code § 8.01-336(E) (“Suit on equitable claim.—In any suit on an equitable claim, the court may, 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, direct an issue to be tried before an advisory jury.”).

Finally, if there were any question as to whether the CANA Congregations are entitled to a jury in these circumstances, Virginia law would require resolving that doubt in favor of a jury.

binding jury determination if the declaration touches upon a legal versus equitable claim. *See Angstadt v. Atlantic Mut. Ins. Co.*, 254 Va. 286, 291 (1997) (“We also find no merit in the defendants’ argument that they were entitled to a binding jury verdict under Code § 8.01-188. That section addresses only the form in which an issue of fact may be submitted to a jury, and does not provide a party in a declaratory judgment suit a separate right to a binding jury verdict.”)

As the Virginia Supreme Court declared as early as 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.” *Watson v. Alexander*, 1794 WL 429, *13 (Va. 1794); accord *W.S. Forbes & Co. v. Southern Cotton Oil Co.*, 108 S.E. 15, 21 (Va. 1921) (“The constitutional provision [for a jury trial] is not to be frittered away”). Here, the Virginia Constitution and the settled nature of contractual claims both warrant trying this case to a jury.

II. The CANA Congregations Have Good Cause for Not Having Asserted the Right to a Jury at an Earlier Stage of the Proceedings.

TEC and the Diocese area also wrong in asserting that the CANA Congregations waived their right to a jury by not requesting one within ten days of the final pleading directed to the issue. Va. S. Ct. Rule 3:21(b). Even assuming that the last relevant pleading has been filed,⁶ this Court has discretion to permit the Congregations to request a jury under Rule 3:21(d), which states: “Absent leave of court for good cause shown, the failure of a party to serve and file a demand as required by this rule constitutes a waiver by the party of trial by jury.” Although Rule 3:21(d) does not define “good cause,” the Virginia Supreme Court has held that the term means only a “[I]legally sufficient ground or reason.” *Bidwell v. McSorley*, 194 Va. 135, 140 (1952) (citing *Black’s Law Dictionary* (3d ed.)). This standard must necessarily be flexible given the nature of the constitutional right to a jury.

While it predates the current version of Rule 3:21, the Virginia Supreme Court’s decision in *Painter v. Fred Whitaker Co.*, 235 Va. 631, 634-635 (1988), is instructive. There, a party had

⁶ It is not clear whether the final pleading has been directed at the issue given that TEC’s and the Diocese’s Demurrer to the CANA Congregations’ Counterclaims have yet to be heard. Since TEC and the Diocese never set their Demurrers for a hearing, the CANA Congregations’ written opposition to the Demurrer has never been filed and the parties are arguably not at “issue.”

consented to a special three-person jury pursuant to Virginia Code § 8.01-359(D). That subsection permits both sides to a civil controversy to waive a regular jury and try the matter before an individual selected by the plaintiff, an individual selected by the defendant, and a third person chosen by the plaintiff's and defendant's designees. Thirty days before trial, however, one of the parties changed his mind and requested that a regular jury hear the matter. The trial court denied that request, finding that a three-person jury under § 8.01-359(D) would be more appropriate to hear the facts of the case. The Virginia Supreme Court reversed.

Citing the Virginia Constitution and the legislature's intent to preserve the constitutional right to trial by jury, the Court held that a party to a civil action was permitted to withdraw his consent to a three-person jury and demand a regular jury when the motion is seasonably made, is not made for the purpose of delay, and would not unreasonably delay the trial. *Id.* at 634-635 (applying the same standards as a criminal defendant's ability to revoke a waiver of a criminal trial as stated in *Thomas v. Commonwealth*, 218 Va. 553, 556 (1977)). Although the Court in *Painter* did not apply the "good cause" standard, it is telling that the Court noted that, unlike the criminal defendant in *Thomas*—who assigned no reason to his revocation of a waiver of a jury other than changing his mind—the party in *Painter* actually provided a justification for withdrawing his consent to a three-person jury. *Id.* at 634.

Here, the CANA Congregations had good cause for not requesting a jury until now. The initial phase of these proceedings focused almost entirely on Virginia Code § 57-9, which, had it been deemed satisfied by the Virginia Supreme Court, would have been "conclusive as to the title and control of any property held in trust." That statute calls for "the court" to "approve" any congregation's claim to have satisfied the statute—*i.e.*, whether there has been a denominational "division," whether the congregation voted to join a proper "branch" of the divided denomina-

tion, and so on. In addition, whereas some of TEC's and the Diocese's claims assert that denominational canons establish overriding "trust" interests in the properties at issue (e.g., Diocese Complaint ¶ 31(d)), this Court has recognized that denominational trusts are not valid in Virginia, thus narrowing the issues before the Court. Letter Opinion on the Court's Five Questions Op., pp. 12-13. Going forward, therefore, the case will turn on whether TEC and the Diocese can establish an interest in the Congregations' properties not under any trust theory (an equitable theory), but under ordinary neutral principles "of real property and contract law." *Truro Church*, 694 S.E.2d at 596. As we have shown, the latter issues lie at the core of the right to a jury trial.

The CANA Congregations did not delay in requesting a jury once the nature of the remaining issues became clear. Indeed, they requested a jury at the first opportunity after remand, and they will formally amend their answers if deemed necessary.⁷ TEC and the Diocese can therefore assert no possible claim of prejudice. *Cf. Painter*, 235 Va. at 634-635 (noting that the party "moved for a regular jury more than 30 days prior to trial," and that "the trial court expressly found that the motion was timely made and that, if granted, [the opposing party] would not be prejudiced"). Especially given Virginia's strong protection of the right to trial by jury, the change in legal framework effected by the Virginia Supreme Court's decision constitutes a legally sufficient reason for requesting a jury now. Accordingly, the Court should grant the CANA Congregations' Motion for Leave to Demand a Jury.

III. Even if the CANA Congregations Could Not Show Good Cause for Declining to Request a Jury at the Outset of the Proceedings, the Court Would Have Express Authority to Direct that the Case be Tried to a Jury.

Finally, the preference for trial by jury is so ingrained in the laws of Virginia that this

⁷ The Congregations also need to amend their answers to add a Contracts Clause defense, and to add an *ad damnum* clause specifying the amount sought in their counterclaims. Neither addition would prejudice TEC or the Diocese.

Court may order all suitable issues be tried to a jury even apart from whether the CANA Congregations had “good cause” for not asserting their right to a jury trial at the outset of the proceedings. Indeed, this Court recognized as much at the November 12, 2010 status hearing.

At least two statutes confirm the Court’s authority to order that a matter be tried to a jury even when no party has requested one. First, Virginia Code § 8.01-336(C) 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.” Second, the Multiple Claimant Litigation Act provides: “In any combined action under this chapter, the court, on motion of any party, may order separate or bifurcated trials of any one or more claims, cross-claims, counterclaims, third-party claims, or separate issues, always preserving the right of trial by jury.” Va. Code § 8.01-267.6. The same provision goes on to state that, “[a]dditionally, the court may submit special interrogatories to the jury to resolve specific issues of fact.” *Id.* Accordingly, if the Court should find that the CANA Congregations lacked good cause for not requesting a jury at an earlier stage of the proceedings, the Congregations respectfully request that the Court exercise its discretion to order a jury trial pursuant to these sections.

IV. The Court Should Decline to Enter the Scheduling Order Proposed by TEC and the Diocese.

Finally, the Court should reject the scheduling order proposed by TEC and the Diocese and instead adopt the order attached hereto. The parties have conferred on several occasions, by email and telephone, concerning a joint scheduling order. After considerable effort, the parties have reached agreement on most of the terms of the proposed order. However, an impasse remains on several issues.

A. The Fragmented Trial Sought by the Diocese and TEC would be Unfair and Unworkable.

The principal dispute involves the demand of TEC and the Diocese for what essentially is a fragmented trial. As the Court is aware, the typical structure for cases involving both claims and counterclaims is as follows: (1) The plaintiff presents its case in chief on its claims; (2) the defendant presents its defense to those claims and its case in chief on its counterclaim; (3) the plaintiff presents its rebuttal on its claims and its defense to the counterclaims; and (4) the defendant presents its rebuttal on its counterclaims. TEC and the Diocese ask this Court to jettison the normal trial structure in favor of a fragmented structure that would unfairly prejudice the Congregations and virtually guarantee duplication of evidence and witnesses. Under their proposal, TEC and the Diocese would put on evidence that they view as “common” to all of the CANA Congregations. The Congregations would then be obligated to put on responsive “common” evidence, after which TEC and the Diocese would presumably put on rebuttal evidence. 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.

After the conclusion of the “common evidence” phase, TEC and the Diocese propose that there would be a series of mini-trials, specific to each CANA Congregation. TEC and the Diocese would put on evidence as to a particular congregation, with that congregation then introducing responsive evidence and evidence in support of its counterclaims. Presumably, TEC and the Diocese would then present their defense/rebuttal, followed by the Congregation’s rebuttal. TEC and the Diocese would then put on their case concerning a second congregation, with that congregation mounting its case-in-chief immediately thereafter, followed by rebuttals, and so on. Under their proposed order, TEC and the Diocese would decide the order in which the mini-trials

would take place. *See* Proposed Order at 4 (case shall proceed “in a trial order to be determined by the Diocese and TEC”).

Not surprisingly, TEC and the Diocese have not attempted to justify this process on the basis of efficiency or fairness. Instead, they claim that their preference for a certain trial order “should be accommodated to the maximum extent possible, given that plaintiffs normally may present their evidence in the order they see fit.” Nov. 8 Filing at 2.

The CANA Congregations agree that TEC and the Diocese should be allowed to put on their case as they see fit. Thus, if TEC and the Diocese wish to begin by emphasizing what they view as “common” evidence, and then turn to Congregation-specific evidence, that is their prerogative. But the Congregations should enjoy the same right to manage the presentation of their case-in-chief. TEC and the Diocese have offered no reason to deviate from longstanding trial practice in this respect, and doing so here would tilt the playing field in their favor.

Not only would the CANA Congregations be forced to put on their “common” evidence first—and the line between “common” and “congregation-specific” evidence is by no means clear⁸—they would also be obligated to address congregation-specific evidence in the order selected by TEC and the Diocese. Further, 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. In short, the CANA Congregations would have to fragment their case-in-chief into pieces, and tailor their evidence to fit a script written by TEC and the Diocese.

Setting aside the unfairness of the CANA Congregations having no control over how or when they present their defenses and counterclaims, the fragmented trial process sought by TEC

⁸ According to the definition of “common evidence” set forth in the Diocese’s November 8 filing, “[s]ome of that evidence may apply only to one of the Congregations,” and other evidence may be “applicable to one or more but fewer than all of the Congregations.” Nov. 8 Filing at 2.

and the Diocese would not save any trial time or result in any efficiency. Bifurcation of a trial is ordinarily ordered where one set of issues is distinct from a second set of issues and the jury's verdict on the first may moot the need to reach the second. The classic example is bifurcating the liability and damages phases of a breach of contract or negligence action. In that situation, liability can be resolved independently of damages; and if the jury finds for the defendant on liability, there is no need to hear evidence regarding the plaintiff's damages.

In this case, however, bifurcation would not be a means of sparing the jury the need to hear potentially irrelevant evidence. The jury will hear the same evidence regardless of the order in which it is presented. Moreover, the fragmentation sought by TEC and the Diocese would not streamline the presentation of evidence. To the contrary, forcing the CANA Congregations to put on their common evidence at one juncture, then their congregation-specific evidence at another, and to delay introducing evidence in support of their counterclaims until the mini-trials, could only lead to juror confusion and unfair disruption of the Congregations' effort to present their case-in-chief in a cohesive fashion. In addition, plaintiffs' proposal would lead to duplication of witnesses—once to address “common evidence” and again to address “congregation-specific evidence.” That proposal would further deprive the Congregations of the normal right of defendants to adjust their case to address the evidence submitted by the plaintiffs.

The proposal advanced by TEC and the Diocese would also lead to disputes over whether evidence properly is characterized as “common” or congregation-specific. For example, a congregation may wish to put on evidence in a mini-trial that TEC and the Diocese contend should have been introduced during the common phase of the trial. Or TEC and the Diocese may object that a witness that the Congregations put on the stand during the common phase really belongs in a congregation-specific mini-trial. Such disputes can be avoided altogether if the Court adheres

to traditional trial practice, allowing TEC and the Diocese to present their entire case, followed by the Congregations' presentation of theirs.

The only rationale offered by TEC and the Diocese for fragmenting the trial, other than to accommodate their personal preference, is the suggestion during the November 12 hearing that it would enable them to know which witnesses for the Congregation they will likely encounter during each day of trial. Of course, every party in a complex, multi-issue trial must deal with this problem. But to alleviate any concerns on this score, the CANA Congregations are willing to give TEC and the Diocese 24 hours notice of the witnesses they intend to call in their case-in-chief, assuming there is reciprocity in the arrangement. Further, the Congregations are willing to advise TEC and the Diocese at the same time of the exhibits they intend to use with each witness, again on the condition of reciprocity.

For all these reasons, the trial should not be artificially bifurcated into "common" and congregation-specific phases.

B. Other Disputed Issues

In another deviation from ordinary trial practice, TEC and the Diocese want the CANA Congregations to identify the specific congregations to which their witnesses and exhibits "relate." The Congregations thus would be obligated to identify, for example, a Truro witness or a St. Paul's exhibit. The Congregations object to the unorthodox process of having to make, and to being bound by, such designations.

First, designating what evidence "relates to" a particular congregation may unfairly limit the CANA Congregations' ability to compare and contrast their situations. For example, if a witness from St. Paul's refers to a St. Margaret's exhibit, TEC and the Diocese may object on the theory that St. Paul's failed to identify the exhibit as "relating to" it. Second, the Congregations may well change their use of an exhibit or the scope of a witness's testimony in response to

plaintiffs' case-in-chief. Third, this issue becomes largely moot if TEC and the Diocese accept the Congregations' proposal for each side to give advance notice of the exhibits that will be used with specific witnesses.

The parties also cannot agree on tentative exhibit lists. TEC and the Diocese want the parties to exchange tentative lists of exhibits 84 days prior to trial. The CANA Congregations do not believe that they can provide a meaningful list that far in advance.⁹ The parties have agreed on a final list to be exchanged 28 days prior to trial—nearly two weeks earlier than the 15-day advance notice required by the standard Fairfax County Circuit Court pre-trial order. That, plus the offer extended above to give notice of which exhibits will be used with a particular witness, should provide both sides with adequate protection against any unfair trial surprises.

Finally, the parties cannot agree on when they will exchange tentative witness lists. TEC and the Diocese again want 84 days prior to trial; the CANA Congregations have offered to provide such a list 70 days before trial.¹⁰ The Congregations fear that the further from trial they are, the less reliable their list will be. Moreover, under the Congregations' proposal, TEC and the Diocese will have 40 days in which to depose individuals identified on the Congregations' tentative witness list. That is more than ample time to complete all necessary depositions.

For all these reasons, the Court should adopt the CANA Congregations' proposed pre-trial order.

⁹ TEC and the Diocese request trial "as soon as possible after April 4, 2011." Nov. 8 Filing at 1. If trial is scheduled on that basis, it could be as soon as 108 days after the December 17, 2010 hearing on the schedule. Under TEC's and the Diocese's proposal, therefore, the parties would exchange exhibit lists a mere 24 days after the hearing, leaving insufficient time for document discovery before presenting the list.

¹⁰ Even the 70-day provision could leave the parties with only 38 days to decide on a tentative witness list.


Dated: November 24, 2010

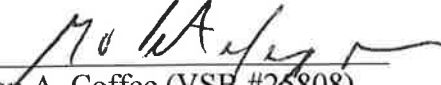
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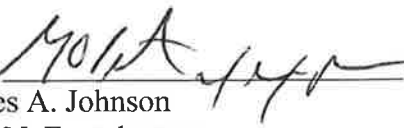
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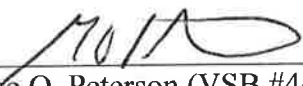
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