

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

In re:)	
Multi-Circuit Episcopal Church	)	Civil Case Numbers:
Litigation	)	CL 2007-248724,
	)	CL 2006-15792,
	)	CL 2006-15793,
	)	CL 2007-556,
	)	CL 2007-1235,
	)	CL 2007-1236,
	)	CL 2007-1237,
	)	CL 2007-1238,
	)	CL 2007-1625,
	)	CL 2007-5249,
	)	CL 2007-5250,
	)	CL 2007-5362,
	)	CL 2007-5682,
	)	CL 2007-5363,
	)	CL 2007-6364,
	)	CL 2007-5683,
	)	CL 2007-5684,
	)	CL 2007-5685,
	)	CL 2007-5686,
	)	CL 2007-5902,
	)	CL 2007-5903, and
	)	CL 2007-11514

**THE CANA CONGREGATIONS' OPPOSITION TO RENEWED MOTION FOR
LEAVE TO PROCEED WITH DISCOVERY AND SCHEDULING IN THE
DECLARATORY JUDGMENT ACTIONS**

The CANA Congregations, The Falls Church, Truro Church, Church of the Apostles, Church of the Epiphany, Church of the Word, St. Margaret's Church, Christ the Redeemer Church, St. Stephen's Church, Potomac Falls Church, and St. Paul's Church (hereafter collectively the "CANA Congregations")¹ by their counsel, hereby file this Opposition to the Protes-

¹ Church of Our Saviour at Otlands is filing a separate Opposition.

tant Episcopal Church in the United States of America (“ECUSA”)² and the Diocese of Virginia’s (“Diocese”) (collectively, the “ECUSA/Diocese”) Renewed Motion for Leave to Proceed with Discovery and Scheduling in the Declaratory Judgment Actions.

² The Court, in its April 3, 2008 Letter Opinion on the Applicability of Va. Code § 57-9(A) (“Letter Opinion”), used the term “ECUSA” to refer to the Protestant Episcopal Church in the United States of America. The CANA Congregations adopt the Court’s terminology.

I. INTRODUCTION

ECUSA/Diocese moved last December to reopen discovery and motions practice in its Declaratory Judgment Actions. The motion was based on three premises: (1) that the Court would be required to adjudicate the common law claims set forth in the Declaratory Judgment Actions regardless of the Court's ruling on the applicability of Va. Code § 57-9; (2) even if the Court found § 57-9 to be both applicable and constitutional under the First Amendment, ECUSA/Diocese's challenge to § 57-9 under the Contracts Clause would still need to be addressed; and (3) the evidence that would be introduced in support of ECUSA/Diocese's Contracts Clause challenge is co-extensive with the "course of dealing" evidence supporting their common law claims, points (1) and (3) of which are disputed. While noting the CANA Congregations' position, the Court nevertheless agreed at a hearing in early January 2008 to schedule a trial commencing October 8, 2008, on the Declaratory Judgment actions filed by ECUSA/Diocese. The Court stayed, however, any activity in the cases, without prejudice to either side later seeking to reopen discovery and motions practice.

II. THE COURT'S RULING ON VIRGINIA CODE § 57-9 MAY MOOT THE COMMONLAW CLAIMS

On April 3, the Court issued its decision on the applicability of § 57-9. The Court agreed that the CANA Congregations established the existence of a "division" within ECUSA, the Diocese, and the Anglican Communion, and their affiliation with "branches" of those organizations within the meaning of § 57-9. The Court did not address ECUSA/Diocese's First Amendment challenges to the statute, preferring instead to give the parties the opportunity to brief the constitutional implications of its ruling on the scope of § 57-9.

The effect of the Court's rulings is to narrow the possible scenarios under which ECUSA/Diocese's common law claims need be reached. Specifically, if (1) the Court rejects

ECUSA/Diocese's First Amendment attack, (2) the Court similarly rejects their Contracts Clause challenge, and (3) the CANA Congregations prove that the votes leading up to the § 57-9 Petitions were valid, then title to the CANA Congregations' real and personal property is conclusively vested in the CANA Congregations. See Virginia Code § 57-9(A) (stating in relevant part "... 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.") (emphasis added). As a result, a ruling in favor of the CANA Congregations on those issues would moot the Declaratory Judgment actions.

Given this possibility, if not probability,³ it makes little sense to move forward with the Declaratory Judgment Actions. Those actions as currently framed by ECUSA/Diocese's complaint and the CANA Congregations' affirmative defenses and counterclaims will entail substantial, costly and potentially unnecessary motions practice. For example, ECUSA/Diocese announced at the January hearing their intent to brief and have a hearing on their demurrer to the CANA Congregations' counterclaim. More recently, they discussed the filing of dispositive motions on their Declaratory Judgment Actions.

It makes even less sense to proceed with discovery in the Declaratory Judgment actions. In particular, ECUSA/Diocese's "course of dealing" claim could require the CANA Congregations to respond to discovery on every facet of their relationship with ECUSA/Diocese from the beginning of their existence through the present. Disputes on how extensively the CANA Congregations would have to search their archives for documents deemed by ECUSA/Diocese to be

³ ECUSA and the Diocese have an uphill fight in overcoming the presumption that § 57-9 is constitutional. *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 247 Va. 64, 66 (1994) ("Every statute and ordinance carries a strong presumption of constitutionality.")

relevant to “course of dealing” could lead to a significant level of pre-trial discovery motions and an attendant drain on the Court’s time.

III. ECUSA/DIOCESE’S CONTRACT CLAUSE CLAIM DOES NOT JUSTIFY THE DISCOVERY THEY SEEK.

ECUSA/Diocese have alleged that § 57-9 infringes their contractual rights in violation of U.S. Const. Art. I, § 10 (“No State shall ... pass any ... Law impairing the Obligation of Contracts”) and Va. Const. Art. I, § 11 (The General Assembly “shall not pass any law impairing the obligation of contracts”). As the Court noted in its April 3, 2008 Letter Opinion, ECUSA/Diocese also have asserted that the factual matters raised by ECUSA/Diocese’s Contract Clause defense are co-extensive with their Declaratory Judgment actions. ECUSA/Diocese have pointed to this alleged overlap as justification for wide-sweeping discovery in the Declaratory Judgment actions.

ECUSA/Diocese have overstated the extent of overlap between the Contracts Clause inquiry and their common law claims. As will be explained more fully in the CANA Congregations’ April 23, 2008 brief, a Contracts Clause defense can only apply to an obligation or contract that was created or entered into prior to the enactment of the statute in question. *See Weaver v. Graham*, 450 U.S. 24, 29-30 (1981) (“Evaluating whether a right has vested is important for claims under the Contracts or Due Process Clauses, **which solely protect pre-existing entitlements**”); *Fairfax Hosp. Ass’n v. Sines*, 1989 WL 641952, 2 (Va. App. 1989) (“A fundamental tenet of federal contract clause jurisprudence is **that legislation may not impair already existing private contracts.**” (*citing Tidal Oil v. Flannagan*, 263 U.S. 444, 451 (1924))) (emphasis added).⁴ Conversely, any alleged contractual or proprietary rights created after the statute

⁴ The Virginia Supreme Court has interpreted the Virginia Contracts Clause similarly to the United States Supreme Court’s interpretation of the federal Contracts Clause. *Working*

was enacted are deemed to incorporate the terms of the statute. *See Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 429-30 (1934) (“the laws which subsist at the time and place of the making of a contract . . . enter into and form a part of it”). Accordingly, ECUSA/Diocese could only assert a contract-based right in the CANA Congregations’ property that could conceivably be deemed an impairment of an existing contract if such property were held prior to 1867 – the year § 57-9 was originally enacted.

ECUSA/Diocese have produced the deeds to the various Congregations’ real properties upon an Order granting oyer. *See Praecept Indexing Documents Filed Pursuant to Order on Motion Craving Oyer*, attached as Exhibit 1. Of the eight CANA Congregations holding real property, only one – The Falls Church – has deeds transferring property prior to 1867 and two of those deeds pre-date the founding of ECUSA and the Diocese. None of the other CANA Congregations holds real property that was conveyed before 1867. Accordingly, the Contracts Clause defense could **not** conceivably apply to ten of eleven CANA Congregations. ECUSA/Diocese thus have no basis to argue that their Declaratory Judgment actions against all 11 CANA Congregations are co-extensive with their constitutional challenge to § 57-9. From an evidentiary perspective, the scope of the latter is far narrower than the former. Indeed, the only issue germane to the Contracts Clause defense is whether ECUSA/Diocese had a proprietary right in properties that was reflected in pre-1867 deed language. This issue, moreover, must be analyzed in light of pre-1867 law, which was not favorable to religious denominations.⁵

Waterman’s Ass’n of Virginia, Inc. v. Seafood Harvesters, Inc., 227 Va. 101, 109 (1984) (“The Virginia contract clause has been interpreted by this Court in a manner similar to the treatment of the federal clause by the United States Supreme Court”).

⁵ The relevant focus is the deed language. ECUSA/Diocese cannot rely on notions of express or implied trust, given the extant prohibition in 1867 on trusts in favor of religious denominations. *See Finley v. Brent*, 87 Va. 103 (1890) (reaffirming prohibition on denomination trusts,

IV. THE COURT SHOULD USE THE OCTOBER TRIAL TIME TO RESOLVE THE CONTRACTS CLAUSE DEFENSE AND ANY DISPUTE OVER THE § 57-9 VOTES.

Given the limited scope of the evidence needed to resolve ECUSA/Diocese's Contracts Clause challenge on properties conveyed to the CANA Congregations prior to 1867, trial on that issue should take only a day or so. Because the Court has set aside three weeks for trial, the CANA Congregations respectfully suggest that the most efficient course of action is to use the remaining trial time to adjudicate any challenges by ECUSA/Diocese to the votes taken by each of the CANA Congregations that have invoked § 57-9. This course would allow the Court (presuming it upholds the constitutionality of §57-9) to resolve all remaining issues in this case in an orderly fashion. The Court similarly should allow discovery to reopen, but only on the discrete issues of ECUSA/Diocese's pre-1867 Contract Clause claim and the congregational votes conducted in December 2006 and January 2007.

V. CONCLUSION


The most efficient course for resolving this litigation is for this Court to hear evidence on the CANA Congregations' votes pursuant to Virginia Code § 57-9 and the limited issues related to ECUSA/Diocese's Contracts Clause defense. Rather than opening up discovery and motions practice related to ECUSA/Diocese's Declaratory Judgment Actions, which may be moot, the Court ought to limit discovery on the issues related to the votes and the Contracts Clause defense (limited to the three deeds of The Falls Church that pre-date 1867). In sum, there is far less justification today, than there was in January, for permitting ECUSA/Diocese to proceed with the broad discovery they seek.

but also recognizing that pre-1867 deed language gave minority in congregation vested property rights that § 57-9 could not impair).

Dated: April 18, 2008

Respectfully submitted,

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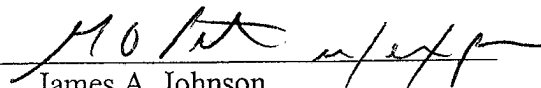
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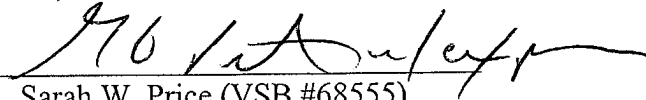
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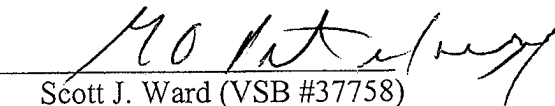
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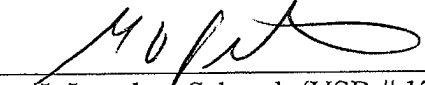
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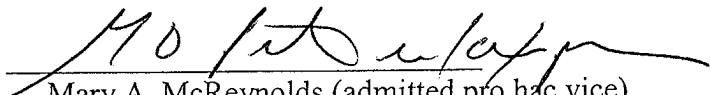
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of April, 2008 a copy of the foregoing Memorandum in Opposition to the Protestant Episcopal Church in the United States of America and the Diocese of Virginia Renewed Motion for Leave to Proceed with Discovery and Scheduling in the Declaratory Judgment Actions was sent by electronic mail and first-class mail, postage prepaid, to:

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