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 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 this brief pursuant to the Court's directions at the November 12, 2010, hearing. For the reasons stated below, (1) the Congregations have no right to a jury trial; (2) there is no other basis for a jury trial in this case; and (3) even if they were entitled to a jury trial, the Congregations have waived that right. Remaining issues regarding the terms of a scheduling order also are addressed below, in part II.

I. THERE IS NO BASIS FOR CONDUCTING A JURY TRIAL IN THIS CASE.

A. These actions arise in equity, not at law, and therefore the Congregations have no right to a jury trial.

The long settled rule that jury trials are available only for actions at law and not in equity remains in effect in Virginia, as in other jurisdictions, after the effective merger of the courts of law and chancery. *See, e.g.*, K. Sinclair, *Guide to Virginia Law & Equity Reform and Other Landmark Changes* § 8.01 at 194-96 (2006); *James v. Pennsylvania General Ins. Co.*, 349 F.2d 228, 230 (D.C. Cir. 1965).

The Diocese and the Church seek declaratory and injunctive relief, including an

accounting. The Congregations' counterclaims assert a claim of unjust enrichment and seek declaratory relief and imposition of a constructive trust. Each of these claims sounds in equity and thus provides no right to a jury.

Because declaratory judgment actions are neither legal nor equitable in nature *per se*, the question of whether a right to a jury trial inheres in a particular case typically requires an analysis of "whether the action is simply the counterpart of a suit in equity – that is, whether an action in equity could be maintained if declaratory judgment were unavailable – or whether the action is merely an inverted lawsuit." *James v. Pennsylvania General Ins. Co.*, 349 F.2d at 230. *See also, e.g., Fuino v. Morrow*, 427 So.2d 710 (Ala. Civ. App. 1983) ("a party is entitled to a jury trial 'if he would have had such a right in the cause of action for which the declaratory relief may be considered a substitute'" (citation omitted); *Mutual of New York v. Shaya*, 970 F.Supp. 1226, 1226-27 (E.D. Mich. 1997), and authorities cited. *Cf. Angstadt v. Atlantic Mutual Ins. Co.*, 254 Va. 286, 292, 492 S.E.2d 118, 121 (1997) (Va. Code § 8.01-188 "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").

Here, a wealth of precedent dictates the appropriate conclusion: *Every* church property case litigated in Virginia of which the Diocese and the Church are aware has been heard in chancery; *none* has been tried to a jury or in a common law court.[1] As here, these prior cases involved requests for relief resolving disputes over the control of church property. In *Green v.*

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[1] *See Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980); *Norfolk Presbytery v. Bollinger*, 214 Va. 500, 201 S.E.2d 752 (1974); *Baber v. Caldwell*, 207 Va. 694, 152 S.E.2d 23 (1967); *Finley v. Brent*, 87 Va. 103, 12 S.E. 228 (1890); *Boxwell v. Affleck*, 79 Va. 402 (1884); *Hoskinson v. Pusey*, 73 Va. (32 Gratt.) 428 (1879); *Brooke v. Shacklett*, 54 Va. (13 Gratt.) 301 (1856); *Diocese of Sw. Va. of the Protestant Episcopal Church v. Buhrman*, 5 Va. Cir. 497 (Clifton Forge 1977), *pet. refused*, Rec.No. 780347 (Va. June 15, 1978); *Trustees of Cave Rock Brethren Church v. Church of the Brethren*, 1976 Va. Cir. LEXIS 58 (Botetourt Co. June 30, 1976).

Lewis, for example, the plaintiff "sought an injunction against certain members of the church to prevent them from entering or using the premises of Lee Chapel in a manner contrary to the wish of the proper officials of the A.M.E. Zion Church." 221 Va. at 551, 272 S.E.2d at 183. The Court concluded that such injunctive relief was proper, and in doing so determined that a "contractual obligation" existed between the parties and that "the A.M.E. Zion Church does have a proprietary interest in the property of Lee Chapel." 221 Va. at 556, 272 S.E.2d at 186. That is precisely the same relief now sought by the Diocese and the Church.

To determine whether a declaratory judgment suit sounds in law or equity,

> we engage in two different inquiries. First, we compare the case at issue to "18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565, 110 S.Ct. 1339, 1345, 108 L.Ed.2d 519 (1990) .... If the case at issue was unknown in eighteenth century England, we must look to an analogous claim that existed then to guide us in deciding whether the present case is legal or equitable. *Id.* at 565-66, 110 S.Ct. at 1344-45. "Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Id.* at 565, 110 S.Ct. at 1345 .... The second inquiry is more important. *Id.*...

Golden v. Kelsey-Hayes Co., 73 F.3d 648, 659 (6th Cir.1996). *See also Chauffeurs, Teamsters & Helpers*, *supra* (cited in *Golden*), 494 U.S. at 565 (plurality), 574-78 (Brennan, J., concurring).

Paragraph (b) of the Diocese's prayer for relief asks the Court to "affirm the trust, proprietary and contract rights of the Diocese in [parish] property," while paragraphs (c), (d) and (e) ask the Court to restrain and enjoin the defendants from further use and occupancy of such property, to direct and require the trustee defendants to convey and transfer their legal titles to the Bishop of the Diocese, and to direct and require all of the defendants to convey and transfer control of such property to the Bishop of the Diocese, respectively. Paragraphs (1) and (2) of the Church's prayer ask the Court to declare that "each parish's real and personal property is held for the benefit of an Episcopal congregation or entity and must be used for the Church's ministry and mission" and that "defendants may not divert, alienate, or use the parishes' real or personal

property except as provided by and in accordance with the Constitutions and canons of the Episcopal Church and Diocese." Paragraph (3) seeks the same injunctive relief sought by the Diocese. Count I of the Congregations' counterclaims is essentially a mirror of the Diocese's and the Church's requests for declaratory relief, seeking declarations of "sole and exclusive ownership." The prayers for injunctive relief are purely equitable; and the prayers for declaratory relief merely seek declarations of precisely the same rights that were established in *Green* and that will be established here in order to warrant the injunctive relief. The parties' requests for declaratory and injunctive relief, thus, provide no basis for a right to a jury.

Paragraph (f) of the Diocese's prayer and paragraph (3) of the Church's prayer ask for an accounting, which also is an equitable remedy. *See* Va. Code § 8.01-31; *McClung v. Smith*, 870 F.Supp. 1384, 1400 (E.D. Va. 1994) (accounting is a "fundamental equitable remedy" that "has long been available to require trustees or agents to account for their actions in dealing with the funds of beneficiaries or principals") (citing *Bain v. Pulley*, 201 Va. 398, 111 S.E.2d 287 (1959)). Those claims therefore do not entitle the Congregations to a jury.

Finally, Counts II and III of the Congregations' counterclaims allege unjust enrichment and seek imposition of constructive trusts, which also are creatures of the courts of equity, not of the common law. *See, e.g., Po River Water & Sewer Co. v. Indian Acres Club*, 255 Va. 108, 114, 495 S.E.2d 478, 482 (1998) ("To avoid unjust enrichment, equity will effect a 'contract implied in law,' requiring one who accepts and receives the services of another to make reasonable compensation for those services"); *Jones v. Harrison*, 250 Va. 64, 70, 458 S.E.2d 766, 770 (1995) (defendant's "unjust enrichment at the plaintiff's expense was the equitable justification for imposing a constructive trust upon the property in the defendant's hands"). A constructive trust is merely an equitable remedy to avoid unjust enrichment. *See Pair v. Rook*,

195 Va. 196, 213, 77 S.E.2d 395, 404 (1953) (constructive trust "is substantially an appropriate remedy against unjust enrichment, usually after an act of fraud, or breach of confidence or duty"); W. Lile, *Notes of Lectures on Equity Jurisprudence* 71 (1921) ("it is largely through the doctrine of constructive trusts that a court of equity applies its favorite principle that, if possible to prevent it, *one person must not be permitted unjustly to enrich himself at the expense of another*") (emphasis in original).

The Diocese and the Church are seeking equitable relief – an order decreeing their trust, proprietary and contractual interests and restraining further interference with their use of the properties – precisely because they have no adequate remedy at law. These cases are analogous to a suit by a trust beneficiary to compel the trustee to do his duty, particularly but not exclusively to the extent that the Diocese and the Church seek to enforce their trust interests in the property. *None* of the claims (or counterclaims) seeks a legal remedy. There is no claim for damages, for example. There are no tort claims, after the striking of paragraph (a) of the Diocese's prayers for relief.[2] And to the extent that contractual rights are at issue, as in *Green*, the Diocese and the Church seek to compel specific performance of their contract rights (as well as their trust and proprietary rights) in properties held and occupied by the Congregations. Specific performance is, of course, an equitable remedy. *See, e.g., Perel v. Brannan*, 267 Va. 691, 700, 594 S.E.2d 899, 904 (2004) (citing *Bond v. Crawford*, 193 Va. 437, 444, 69 S.E.2d 470, 475 (1952)).

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

Virginia Supreme Court Rule 3:21(b) provides: "Any party may demand a trial by jury

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[2] Paragraph (a) sought declarations that there had been an improper trespass, conversion, alienation and use of real and personal property. That prayer asserted common law tort claims; but the Court struck that prayer, on the Congregations' motion, and no such claims remain.

of any issue triable of right by a jury ... by (1) serving upon other parties a demand therefore [*sic*] in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to the issue, and (2) filing the demand with the trial court." The Congregations filed Answers and Counterclaims to the Diocese's and the Church's Complaints in September 2007. The Diocese and the Church answered the counterclaims on October 9, 2007. Those were the last pleadings directed to any issues presented now. As the Congregations implicitly admitted in their November 8, 2010, Statement of Position, at 2, they did not ask for a jury on October 9, 2007, or within 10 days thereafter – and indeed, not until well over 1000 days thereafter.

Rule 3:21(d) provides that "[a]bsent 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." *See also* Rule 3:22(b): "Except as otherwise provided in this Rule, [1] issues not demanded for trial by jury as provided in Rule 3:21, and [2] issues as to which a right of trial by jury does not exist, *shall* be tried by the court." (Emphasis added.) On both grounds, there should be no trial by jury in these cases.

The Congregations' November 8 Statement of Position says they "will seek amendment of their answers to make a jury trial demand." They have not done so; but even if they had, Rule 3:21(b) provides that "[l]eave to file amended pleadings shall not extend the time for serving and filing a jury demand unless the order granting leave to amend expressly so states." They have not even suggested that they have any good cause for their default, as required by Rule 3:21(d), and it is their burden to allege and prove. The Congregations had eight months to consider the matter before they filed their Answers, and another three weeks before and 10 days after the Diocese answered their counterclaims. They did not want a jury then. Perhaps they thought they

would win under § 57-9, but that is not good cause to relieve them of their default.

The only reason the Congregations even hint at for their change of heart is their expectations regarding § 57-9. *See* the Congregations' November 8 Statement of Position at 2. We encourage the Court to review their Answers and Counterclaims. Except for their repeated denials that the canons have any effect on their § 57-9 Petitions and their admissions that they conducted votes purportedly pursuant to § 57-9, their Answers do not depend on § 57-9. One affirmative defense asserts § 57-9, but the other grounds of defense are independent. The only mention of § 57-9 in their counterclaims is to say that if they have not already won on § 57-9, they should win for other reasons. *See, e.g.*, ¶ 14 of The Falls Church's counterclaim. That the Congregations' § 57-9 defense is now dead neither affects the remainder of their pleadings nor provides a legally cognizable reason to ignore their waiver of trial by jury.[3]

C. This case will not "be rendered doubtful by conflicting evidence."

Va. Code § 8.01-336.E authorizes the use of advisory juries in suits on equitable claims:

> In any suit on an equitable claim, the court may, of its own discretion 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.

Id. There is no basis for an advisory jury under that provision. Simply put, there are no issues of fact in these cases which are suitable for trial by a jury. The question to be decided at trial is whether the Diocese and the Church have trust, contractual, or proprietary interests in properties that are now held and occupied by the Congregations, which cannot be eliminated by the

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[3] In ***criminal*** cases in Virginia, the Constitution, the Code, and the Rules of Court all provide that a defendant may waive a trial by jury only with "the concurrence of the Commonwealth's Attorney and of the court." Va. Constitution, Art. I, § 8. Va. Code § 19.2-257 and Rule 3A:13(b) are slightly different in form but not in substance. Those provisions expressly apply only to criminal cases, and there is no counterpart in the Constitution, Code, or Rules applicable to civil cases. To the contrary, the Court's role in a civil case is to enforce Rule 3:21.

Congregations' unilateral actions. *Green v. Lewis*, 221 Va. 547, 272 S.E.2d 181 (1980); *Norfolk Presbytery*, 214 Va. 500, 201 S.E.2d 752 (1974); Va. Code § 57-7.1. That question must be decided based on state statutes, the language of the deeds conveying the properties, the constitution of the general church, and the dealings between the parties. *Green v. Lewis*, 221 Va. at 555, 272 S.E.2d at 186. None of these factors will require a pure determination of fact: (1) the meaning and legal effect of state statutes is purely a question of law for the Court; (2) the language of the pertinent deeds has been stipulated; (3) the current governing documents of the Church and the Diocese are already in evidence (as are the governing documents of some of the Congregations, prior to secession), and the contents of earlier governing documents will not be disputed; (4) and the evidence of the dealings of the parties is not expected to be in dispute – that is, based on the discovery to date, the Diocese and the Church do not expect there to be any genuine factual disputes.[4] Rather, the dispute here is over what these constellations of facts, for each parish, mean under the law.

That is not a question for a jury to decide. It is either a pure question of law, for the Court, or at best a mixed question of law and fact, which likewise must be decided by the Court. *See, e.g.*, *Andrews v. Browne*, 276 Va. 141, 146, 662 S.E.2d 58, 61 (2008) (whether stock "is a 'security' within the meaning of the Virginia Securities Act is a mixed question of law and fact, which we review de novo"); *UVA Health Services Foundation v. Morris*, 275 Va. 319, 333-34, 657 S.E.2d 512, 518-19 (2008) (whether the Foundation "is eligible for common law charitable immunity from tort liability is a mixed question of law and fact that is reviewed de novo"; reciting test and listing factors "indicative of whether a charitable organization operates in fact

[4] The Diocese and the Church anticipate offering live testimony to describe the historical context and meaning of some matters discussed in their documentary evidence. They do not believe that the accuracy of that testimony will be subject to any genuine factual dispute.

with a charitable purpose"); *Westgate at Williamsburg Condo. Ass'n v. Philip Richardson Co.*, 270 Va. 566, 574, 621 S.E.2d 114, 118 (2005) ("We review questions of law de novo, including those situations where there is a mixed question of law and fact").

Further, any value provided by an advisory jury in these cases would be far outweighed by the significant drawbacks. First, there would be a major risk of jury confusion. It would be difficult at best to frame instructions to a jury embodying the four-factor test of *Green v. Lewis*, and it would be impossible to frame instructions separating the legal issues from any factual issues that remain. Because of the number of Congregations and properties at issue here, the volume of expected evidence, and the likelihood that much of the evidence relating to any one Congregation will be similar in some way to the evidence relating to others, there is a very real risk that jurors would become confused about which evidence applies to which Congregation. Although the Diocese and the Church have attempted generally to ameliorate that complexity, even in a bench trial, in their proposed trial order – by proposing separate mini-trials on the Congregation-specific evidence relating to each Congregation, following an initial hearing on the evidence that is common to all or some Congregations – there is a real concern that even that would not be enough to ensure reasonable clarity to a jury.

Second, the additional cost to the parties that would be required if this case is tried to a jury rather than to the Court would be significant, and in this already protracted litigation such increases are prejudicial. The presentation of evidence – particularly documentary evidence, which will comprise the major part of plaintiffs' cases and perhaps the Congregations' as well – would require far more trial time if a jury were involved than if the evidence is presented to the Court. The discovery that remains to be completed – which, in the Diocese's and the Church's view, is not a large amount – would no doubt expand, as the parties would be more likely to try

to discover any potential facts or testimony that might be prejudicial, even if those facts or testimony are irrelevant to the *Green* factors, because of the chance that a jury might be influenced by them. Such concerns will be greatly reduced if the case is tried to the Court.

Third, prospective jurors would be subject to intrusive *voir dire* regarding personal issues, including questions that likely would tread into a religious thicket. For example, an inquiry into potential biases would likely involve questions regarding religious beliefs; the prospective jurors' own, their families', and their friends' church membership, attendance, adherence and accession to matters of church polity such as tithing, communion, and other worship practices unique to their particular faith; their own sexual orientation and that of members of their families and their friends; their attitudes toward church hierarchies; their receptivity to church leaders engaging in homosexual relationships; their views on political as well as religious matters; their knowledge of scripture and any beliefs with respect to church practices which they believe deviate from scripture; and of course their familiarity with this and other church property cases.

In sum, in the light of the fact that there will likely be no issues of pure fact for a jury to decide, and the very real concern about jury confusion and the additional costs associated with a jury trial, an advisory jury is simply not warranted here.

II. SCHEDULING ISSUES

A copy of the proposed scheduling order is attached as Exhibit 1. The Church, the Diocese, and some of the Congregations do not agree on four scheduling issues.

A. Organizational issues

Resolving this litigation requires nine rulings regarding church property.[5]

[5] The Diocese filed one case for each of the nine parishes, and each parish and its associated

The litigation remains appropriately consolidated. *Green v. Lewis* requires application of two common factors (Virginia statutes and denominational governing documents), there are common themes among other factors (*e.g.*, the meaning of often similar deeds), and there is some common evidence in the Church and the Diocese's case (*e.g.*, regarding the history and polity of the Diocese, the services the Diocese provides to all of its congregations, and events that included all of the subject parishes, such as the Annual Council of the Diocese).

In the end, however, there must be nine decisions. Each decision will be based, to some degree, on evidence that is unique to each Congregation (*e.g.*, letters between individual clergy or wardens and the Diocese; the exact circumstances of each parish's beginning within the Diocese; and actions taken by particular parishes with respect to the property they use). It is important – both for decisions in this Court and for the appellate review that will almost certainly come thereafter – that remaining pretrial and trial proceedings trial be organized in a way appropriate for the remaining litigation.

1. Trial order

The Diocese and the Church believe that the trial should proceed with a period for presentation of evidence common to all or many of the subject parishes, followed by periods for presentation of evidence specific to each particular Congregation.

Organizing the trial in that manner will provide essential clarity. The fact finder will need to distinguish which evidence applies to each decision. Such an organization will better enable that to be done, avoiding the confusion and inappropriate blurring or spilling over that almost inevitably would occur if all evidence were presented in a single block. Equally importantly, a request for further appellate review seems certain. Such review depends on a

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trustees form a distinct group of defendants in the single case filed by the Church.

clear appellate record that enables appellate judges to know and understand which evidence pertains to which Congregation.

Organizing the trial in that manner also will promote efficiency, for both the Court and counsel. Common evidence need be presented only once. Yet an attorney who represents only one Congregation would need to be present not for a full six weeks of trial but for as little as four or five trial days (the estimated three days of the Church's and the Diocese's common evidence, followed by one or two trial days for a particular parish). There also could be more flexibility in trial scheduling, if reserving six contiguous weeks on the Court's calendar is difficult.

Finally, organizing the trial in that manner best serves the purposes of the Multiple Claimant Litigation Act and avoids the problems inherent in the extremes advanced to date by the Congregations. *See* Va. Code § 8.01-267.1 (the Court shall consider: "(i) the nature of the common questions of law or fact; (ii) the convenience of the parties, witnesses and counsel; ... (iv) the efficient utilization of judicial facilities and personnel; (v) the calendar of the courts; ... and (viii) as to joint trials by jury, the likelihood of prejudice or confusion"). Entirely separate trials would ignore common facts and impede convenience and efficiency with duplicative evidentiary presentations. A single mass trial would leave distinct facts disorganized at best, impede convenience and efficiency by increasing demands on all counsel, and create significant risk of confusion (for a jury especially, but also for this Court and appellate judges).

2. Organized witness and exhibit lists

For nearly all of the same reasons outlined above, the Church and the Diocese believe it important that any pretrial witness or exhibit list designate in some manner to which cases/ parishes each of the listed witnesses and exhibits relate. The Church of Our Saviour at Oatlands agrees. That the other Congregations do not is disturbing.

Failure to so designate witnesses and exhibits is a recipe for confusion that would be extremely prejudicial to the Court and to other litigants. Counsel should not be forced to spend the last weeks before trial poring through each exhibit and deposition trying to determine to what the planned evidence relates. Indeed, the Church and the Diocese believe that parties have a procedural right to know what evidence will be used in particular cases. The Court likewise should not be forced to confront a single, undifferentiated mass of at least several hundred exhibits as it makes decisions at trial. And the fact finder (particularly if it is a jury) should not need to sort through thousands of pages of documents before it can even begin to understand what evidence relates to particular parishes.

Moreover, designation of what parishes each witness and exhibit relates would facilitate resolution prior to trial of objections to evidence by clearly identifying which parties need to agree regarding particular documents or testimony.

Finally, such designation need not be at all onerous or complicated. Designation could be achieved simply by headings within a single document, for example.

B. Pretrial cooperation and efficiency issues

1. Witness list timing

The parties have not been able to agree on when a preliminary witness list should be served. The Church and the Diocese proposed 90 days prior to trial. The Church of Our Saviour at Oatlands agreed, but the other eight Congregations proposed 70. The Church and the Diocese then made their current proposal of 84 days, which the other eight Congregations rejected. Given the numerous schedules to coordinate (among counsel, parties, and witnesses), the other demands that all persons involved undoubtedly have on their time, and the speed with which time flies when in discovery and preparing for trial, the Church and the Diocese believe

preliminary witness lists should be exchanged as soon as possible.[6]

2. Preliminary exhibit list

The Church and the Diocese have proposed that the parties exchange a preliminary exhibit list 56 days prior to trial. The Church of Our Saviour at Oatlands agrees. The other eight Congregations do not.

Just like the preliminary witness list exchange, a preliminary exhibit list would serve to narrow the potentially vast universe of potential evidence, enabling parties to better prepare for trial and make use of discovery time. For example, parties would have ample time for depositions to lay the foundation for particular documents, if really necessary.

Exchanging a preliminary exhibit list would provide a significant advantage in pretrial time and focus – facilitating stipulations and early resolution of technical objections. Factual disputes are unlikely, and much of the evidence should be stipulated. As a practical matter, however, without sufficient time to do so, pretrial demands and schedules may interfere with stipulations and resolutions of objections.

Finally, the Church and the Diocese understand that at least some of the Congregations remain dissatisfied with the extensive document productions and fulsome written discovery responses made to date. What those counsel or parties appear to want is the type of pretrial roadmap that an exhibit list provides. As we will brief in discovery motions practice, if necessary, we do not believe such demands are well-grounded in the rules governing discovery or accurately portray the extensive discovery efforts to date. Nonetheless, we are prepared to provide preliminary exhibit lists – <u>if such efforts extend both ways</u>.

There are better uses of the time of counsel and the parties than fights over document

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[6] We have offered to and remain willing to split the difference, compromising on 77 days.

organization or interrogatory response wording. The parties and this Court have clear direction as to the law that governs the remaining cases. *See Protestant Episcopal Church in the Diocese of Virginia v. Truro Church*, 280 Va. 6, 29, 694 S.E.2d 555, 567-68 (2010). All relevant documents have been made available, and all or nearly all have been copied and produced. Counsel have had months (indeed, years) more time than necessary to review them. Literally hundreds of requests for admission and interrogatories have been answered. It is time to move to trial of these cases. A preliminary exhibit list would promote the cooperative and productive use of pretrial time and would substantially advance the ultimate resolution of these cases at trial.

CONCLUSION

There are no issues triable by a jury in these consolidated cases, there is no basis for empanelling an advisory jury, attempting to try these cases to a jury would cause enormous confusion and other major difficulties, the Congregations long ago waived any possible right to a jury trial, and there is no good cause to excuse their waiver now. With respect to the remaining issues, we believe that our position will best promote clarity, cooperation, and efficiency.

Respectfully submitted,

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2002095

EXHIBIT 1

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

In re Multi-Circuit Episcopal Church Property 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

ORDER

This Order shall apply to the following cases:

Omnibus case: CL 2007-248724;

The Episcopal Church v. Truro Church, et al.: CL 2007-1625;

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Epiphany, Herndon, et al.: CL 2007-1235;

The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church, et al.: CL 2007-1236;

The Protestant Episcopal Church in the Diocese of Virginia v. Church of the Apostles, et al: CL 2007-1238;

The Protestant Episcopal Church in the Diocese of Virginia v. The Church at the Falls - The Falls Church, et al.: CL 2007-5250;

The Protestant Episcopal Church in the Diocese of Virginia v. Church of Our Savior at Oatlands, et al.: CL 2007-5364;

The Protestant Episcopal Church in the Diocese of Virginia v. St. Margaret's Church, et al.: CL 2007-5682;

The Protestant Episcopal Church in the Diocese of Virginia v. St. Paul's Church, Haymarket, et al.: CL 2007-5683;

The Protestant Episcopal Church in the Diocese of Virginia v. v. Church of the Word, et al.: CL 2007-5684; and

The Protestant Episcopal Church in the Diocese of Virginia, et al. v. St. Stephen's Church, et al.: CL 2007-5902.

For good cause shown, the Court orders the following:

1. Service of Pleadings & Other Papers to Be Served

   All service of pleadings and other papers required to be served per Va. Sup. Ct. R. 1:12 in this matter shall be effected by (i) mailing a copy of the pleading, filing, etc. via first class mail to the designated lead counsel at each firm of record, and (ii) sending an electronic correspondence ("e-mail") to all counsel of record with an attachment of the particular pleading, filing, etc. With respect to large and/or lengthy pleadings and exhibits or other papers, counsel shall use their best efforts to effect service by e-mail, including (if necessary) sending such pleadings and/or exhibits in multiple e-mails such that no attachment to an e-mail exceeds 10 megabytes in size. If a document cannot be e-mailed, the party serving such document shall notify opposing counsel by e-mail of such fact and send the document by overnight delivery to lead counsel on the opposing side.

2. Electronic Correspondence ("e-mail")

   All counsel of record who have not previously provided the Court a current e-mail address are ordered promptly to do so. E-mail addresses may be sent to the Court's law clerk, Ms. Caitlin Fields, at Caitlin.Fields@fairfaxcounty.gov. All counsel of record should be included in all electronic correspondence with Ms. Fields if it pertains to this matter.

3. Filing Procedures

   (a) All filings, motions, briefs, memoranda, etc. should be filed with the Clerk of Court, attention [Mr/Ms.]_____. When a pleading or other filing pertains to more than one case, counsel are required to file only one complete copy of such pleading, filing, etc. The copy should list all appropriate case numbers which to which it applies. This complete filing will be filed in the omnibus case file.

   Counsel also shall file the appropriate number of copies of a coversheet reference pleading corresponding to the number of cases to which the filing relates, not including the omnibus case file, which will be filed in each other case file to which the complete filing corresponds. For example, if a brief is filed in three individual cases, the original brief shall be filed in the omnibus case file, CL 2007-248724, and counsel shall provide three copies of a coversheet, which shall make reference to the pleading filed in the omnibus case file and shall include the following information from that pleading: its full title / name, the complete case style and case numbers listed on it, and the date of the filing. Coversheets need not and shall not contain their own certificates of service, and counsel shall use their best efforts to ensure that coversheets are no more than one page in length.

   Counsel shall also send courtesy copies of all filings to the Court's law clerk, Ms. Fields. Unless the Court requests otherwise, a courtesy copy must be

delivered to her attention in Circuit Court Chambers and shall also be e-mailed to Ms. Fields's attention at the e-mail address above.

(b) The text of all filings, including all footnotes, must be in at least twelve (12) point type font. The margins of all filings must be standard one inch margins.

(c) The style of each filing should include the omnibus style and corresponding case number and the case numbers of each individual case to which the filing relates. All filings should indicate the party or parties on whose behalf the filing is made at the beginning of the filing.

(d) The parties shall adhere to the page limitations set forth in the Fairfax County Circuit Court manual absent leave from the Court. The Court may direct, or a party may request, extended briefing on particular issues, with page limitations set at that time. If any party believes it needs more than five (5) pages to brief any particular motion or issue, or additional pages beyond another limit set by the Court, it shall seek leave for such extended briefing through a letter of request filed with the clerk and copied to Ms. Fields, to which the Court will respond in due course.

(e) Each party may file its own motions, memoranda/briefs, pleadings, and/or other papers, or it may choose to adopt the position articulated in another party's filing. When a party chooses to adopt a position advanced in another party's filing, this may be reflected either by (i) submitting a separate filing with the Court stating that the particular party chooses to adopt another party's position, or (ii) including a reference in the adopted filing stating which parties are adopting such filing or position. Motions, memoranda/briefs, pleadings, and/or other papers adopted by other parties should include a reference at the beginning of the document that lists the parties who are adopting the filing. At the end of the filing, the attorney who is submitting the filing should include his or her signature block and signature. The adopting parties' signature block should also be included at the end of the filing. The adopting attorneys may do one of the following to satisfy the signature requirement and to preserve rights and objections: (i) sign the filing in their appropriate signature block (the Court will accept faxed or scanned signatures, if necessary), or (ii) give permission to the submitting attorney required to sign the filing to also sign the filing on the adopting attorney's behalf.

4. Attendance At Hearings

Should a party desire to file a written response or memorandum, but not participate at a hearing, the party may file its memorandum and not attend the hearing.

5. Trial Dates

[The parties disagree about what the scheduling order should say about trial order / evidence presentation. Their respective positions will be detailed in the briefs being filed pursuant to the Court's direction at the hearing on November 12, 2010.]

The Court reserves the following dates for trial of the above cases: _____.

The "Trial Start Date," as used in this Order, is the first date of trial of the above cases, regardless of what evidence may be presented on that date or to what church/congregation such evidence may pertain.

6. Prior Trial Evidence

No party shall be required to re-authenticate any document previously admitted into evidence.

Any party which intends to rely on evidence which has previously been admitted in this matter must file and serve a specific designation of such evidence on counsel for all parties to the trial to which such evidence will be applied, no later than twenty-eight (28) days before the Trial Start Date. Objections to such evidence must be served no later than twenty-one (21) days before the Trial Start Date, including relevance objections, or such objections shall be waived.

7. Dispositive motions

All dispositive motions shall be presented to the Court for hearing as far in advance of the trial date as practical and must be filed no later than forty-five (45) days before the Trial Start Date.

8. Discovery

Discovery concerning all issues related to this litigation may resume immediately upon entry of this Order. The parties shall complete discovery by forty (40) days before the Trial Start Date and shall complete depositions by thirty (30) days before the Trial Start Date. "Complete" means that all interrogatories, requests for production of documents, requests for admissions, and other discovery requests must be served sufficiently in advance of trial to allow a timely response by at least forty (40) days before the Trial Start Date. Depositions taken in lieu of live testimony at trial shall be completed no later than twenty (20) days before the Trial Start Date. Depositions may be taken after the specified time period by agreement of counsel of record or for good cause shown, provided, however, that the taking of a deposition after the deadline established herein shall not provide a basis for continuance of the trial date or the scheduling of motions inconsistent with the normal procedures of the Court.

The fact that a person was deposed previously in this litigation shall not excuse such person from being deposed a second time in connection with the remaining actions.

Counsel shall make all reasonable efforts to consolidate depositions and thereby to avoid burden and inconvenience to party and third-party witnesses. This paragraph does not preclude any party or recipient of a subpoena from objecting to a particular deposition and seeking relief from this Court regarding such deposition.

Joint discovery requests are encouraged whenever practicable. All discovery must clearly indicate on its face the party or parties to whom the discovery request is made. If discovery is directed at more than one party, each party has an obligation to respond to the discovery request, in accordance with the Rules of the Supreme Court of Virginia. Should parties serve separate but substantively identical discovery requests, the responding party or parties may respond jointly, but such responses must specifically and clearly identify all discovery being responded to and the party or parties responding.

While the individual defendants have not been and will continue not to be served with discovery, the CANA Congregations will continue to seek, obtain, and produce from the persons identified in Exhibits A&B of the Stipulated Order entered August 28, 2007, such materials as may be responsive to the discovery served on the congregations. This paragraph does not preclude either depositions of individual defendants, clergy, or vestry members, or the service of subpoenas duces tecum on individual defendants, clergy, or vestry members. This paragraph also does not preclude parties, individual defendants, clergy, or vestry members from objecting to and/or seeking relief from this Court regarding any particular discovery requests or subpoenas.

If discovery requests are made or have been made in connection with particular cases, responses to those discovery requests and documents or materials produced in response to those discovery requests may be used in any of the proceedings before this Court, to the extent that the responses, documents, or materials meet the requirements of law with respect to evidence. Any party's responses to requests for admissions may continue to be used in any case involving that party. Depositions and other discovery previously taken in these consolidated actions may be used in the remaining actions.

With respect to discovery requests served prior to the Court's suspension of discovery in its September 3, 2008, Order, if the propounding party contends that the responding party's responses are inadequate or seeks responses to requests for which responses have not been served, the propounding party shall serve a notice of such inadequacy on the responding party. Such notice shall identify the discovery for which further response is sought, state the reasons such responses are inadequate, and request further response. Unless otherwise agreed, the responding party shall have 21 days from the date of service of such notice to respond further. ***[The Church of Our Saviour at Oatlands opposes this paragraph.]***

The parties have a duty to supplement timely and amend discovery responses, per Va. Sup. Ct. R. 4:1(e).

No provision of this Order supersedes the Rules of Supreme Court of Virginia governing discovery.

9. Designation of Experts

Plaintiffs and counterclaimants shall identify expert witnesses on or before 91 days before the Trial Start Date. Opposing experts shall be identified on or before 60 days before the Trial Start Date. Experts or opinions responsive to new matters raised in the opposing parties' identification of experts shall be designated no later than 45 days before the Trial Start Date. All information discoverable under Rule 4:1(b)(4)(A)(1) of the Rules of Supreme Court of Virginia shall be provided, or the expert will not ordinarily be permitted to express any non-disclosed opinions at trial. The foregoing deadlines shall not relieve a party of the obligation to respond to discovery requests within the time periods set forth in the Rules of Supreme Court of Virginia, including, in particular, the duty to supplement or amend prior responses pursuant to Rule 4:1(e).

10. Exhibit and Witness Lists

Counsel of record shall exchange _____ (__) days before the Trial Start Date lists specifically identifying the fact witnesses that they may call for trial. The list of witnesses shall include a brief summary of the subject matter of the expected testimony and/or nature of the testimony, and such witnesses shall be made available for deposition prior to the discovery cutoff. ***[The parties disagree on the timing of this provision. TEC and the Diocese have proposed 84 days. The CANA Congregations, other than the Church of Our Saviour at Oatlands, have proposed 70 days.]***

Counsel of record shall exchange fifty-six (56) days before the Trial Start Date lists specifically identifying each exhibit that may be offered at trial. ***[The parties' respective positions on this provision will be detailed in the briefs being filed pursuant to the Court's direction at the hearing on November 12, 2010.]***

Counsel of record shall exchange twenty-eight (28) days before the Trial Start Date a final list of witnesses to be called at trial, a final list specifically identifying each exhibit to be introduced at trial, and copies of all listed exhibits. If filed on behalf of more than one Congregation, final lists of witnesses and exhibits shall clearly indicate (with headings or otherwise) to which congregations each of the listed witnesses and exhibits relate. ***[The parties' respective positions on the second sentence of this paragraph will be detailed in the briefs being filed pursuant to the Court's direction at the hearing on November 12, 2010.]***

The final lists of exhibits and witnesses shall be filed with the Clerk of the Court simultaneously therewith but the exhibits shall not then be filed. Any exhibit or witness not so identified and filed will not be received in evidence, except in rebuttal or for impeachment or unless the admission of such exhibit or testimony of the witness would cause no surprise or prejudice to the opposing party and the failure to

list the exhibit or witness was through inadvertence. Any objections to exhibits or witnesses shall state the legal reasons therefor except on relevancy grounds, and shall be filed with the Clerk of the Court and a copy delivered to opposing counsel at least twenty-one (21) days before the Trial Start Date or the objections will be deemed waived absent leave of court for good cause shown.

11. Pretrial Conference and Motions in Limine

Pursuant to Rule 1:19, there shall be a final pre-trial conference on _____.

Motions *in limine* or other pretrial motions shall be filed no later than fourteen (14) days before the Trial Start Date. Oppositions to such motions must be filed within seven (7) days after such motions are filed. Such motions *in limine* or other pretrial motions may be heard at dates scheduled by the Court upon application of the parties or may be decided at trial, as the Court sees fit, or may be decided without a hearing with the consent of all parties interested in such motions.

12. Good Faith Efforts to Resolve Motions and Stipulations

Stipulations of fact previously entered into by two or more parties remain binding on those parties and may be introduced in evidence if they have not previously been introduced.

The Court appreciates counsel's prior efforts to enter into stipulations, which were generally successful, and strongly encourages counsel for all parties to reach stipulations that streamline the presentation of evidence and/or narrow the issues to be decided. In particular, the Court is mindful that, although evidence regarding the "dealings between the parties" may be extensive (particularly for churches whose history dates back more than 100 years), in many instances the parties will dispute not the actual historical facts or documents but their relevance or legal significance. Accordingly, and in the interests of judicial economy, the parties are encouraged to streamline the presentation of evidence through stipulations.

13. Witness Subpoenas

Subpoenas should be served at least ten (10) days before the Trial Start Date.

14. Continuances

Continuances will only be granted by the Court for good cause shown.

15. Deposition Transcripts to be Used at Trial:

(a) The parties shall exchange deposition designations no later than twenty-one (21) days before the Trial Start Date. Any objections to such designations shall be served no later than fourteen (14) days before the Trial Start Date.

(b) Deposition testimony responsive to new matters raised in an opposing party's deposition designation shall be designated no later than fourteen (14) days before the Trial Start Date with objections thereto being served ten (10) days before the Trial Start Date.

16. The Commonwealth of Virginia's position in this litigation

The Commonwealth moved to intervene "for the limited purpose of defending the constitutionality of Va. Code 57-9(A)," and the Court granted the Commonwealth's motion "solely for its requested purpose." Letter Opinion (July 16, 2008) at 1 & n.1. That purpose has been fulfilled. The Commonwealth wishes to remain a party to this litigation solely for the purpose of defending the constitutionality of any other state statute, if some other statute's constitutionality is challenged. Accordingly, the Commonwealth shall remain a party to this litigation for that limited purpose. The Commonwealth need not file any pleadings, and it is not required to respond to motions or other filings regarding any other issues. The Commonwealth shall not propound or be required to respond to discovery requests, except as all parties may agree or the Court shall further order. This order is without prejudice to TEC's and the Diocese's previously stated position that the Commonwealth should be allowed to participate only as an *amicus curiae*.

17. Waiver or Modification of Terms of Order

Upon motion, the time limits and prohibitions contained in this in this order may be waived or modified by leave of Court for good cause shown.

Entered this ___ day of _____, 2010.

_____
Randy I. Bellows,
Circuit Court Judge

Endorsement of this Order by counsel of record for the parties is waived in the discretion of the Court pursuant to Rule 1:13 of the Rules of the Supreme Court of Virginia.

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