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Letter Opinion

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Re: Letter Opinion in *In re Multi-Circuit Episcopal Church Property Litigation* (CL 2007-0248724) Regarding ECUSA/Diocese's Assertion that the CANA Congregations Have Waived the Right to Invoke 57-9

Dear Counsel:

On July 16, 2008, this Court issued an order requesting briefing and oral argument on three distinct questions of law. The Court further stated in that same order that these three questions of law would be resolved prior to the October trial. The parties have now fully briefed the issues, and oral argument on these issues was held on August 11, 2008. The following letter opinion sets forth the Court's decision regarding issue 4C from its July 16, 2008 Order, which is "Whether ECUSA/Diocese may assert at the October trial that the CANA Congregations have contracted away, waived, abandoned or relinquished their right to file a 57-9 petition, a claim that the CANA Congregations argue is untimely and unpled."

The Court today holds that ECUSA/Diocese may not now—long after the first 57-9 petitions were filed, and long after the Court held a five day trial regarding whether or not Va. Code § 57-9(A) had been properly invoked—assert that the CANA Congregations have contracted away, waived, abandoned, or relinquished their right to file their 57-9 petitions. To have their day in Court on this claim, ECUSA/Diocese had to do two things: (1) plead their claim and (2) do so timely. They did neither. After a five-day trial, this Court issued a lengthy opinion finding 57-9 to have been properly invoked. Then, after extensive briefing and oral argument, this Court issued another lengthy opinion finding 57-9 to be constitutional. Now, in effect, ECUSA/Diocese assert that the past year of litigation was unnecessary because CANA never had the right to file 57-9 petitions in the first place. It is too late. While a court has discretion to hear untimely claims and permit late amendments to answers, it should not exercise its discretion in a manner that would severely and unduly prejudice the other side. Put simply, to hear now whether 57-9 could have been invoked at all, after this Court has already determined that it was both properly and constitutionally invoked, would constitute an injustice.

While this Court has a duty to ensure that each party receives a full and fair hearing on all its claims and defenses, it is simultaneously this Court's duty to ensure that no party is treated in a manner that is fundamentally unfair, that all parties are given appropriate and adequate notice of arguments actually pled, and that no party is unduly surprised or prejudiced by lack of notice, or by arguments and defenses that are simply set forth too late.[1]

For the reasons set forth below, ECUSA/Diocese's motion to amend its answers, and to otherwise assert these defenses, is denied.

I. Analysis:

A.) ECUSA/Diocese's Argument that the CANA Congregations Have Waived/Contracted Away Their Right to Ever Invoke Va. Code § 57-9(A) in the First Place is Untimely and Unpled.

ECUSA/Diocese argue that they have in fact pled the affirmative defense of "waiver" all along, ever since the filing of their answers to the original 57-9 petitions, or at least since the filing of their brief in response to the Court's

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[1] See, e.g., Kole v. City of Chesapeake, 247 Va. 51 (1994), in which the Supreme Court of Virginia concluded that the trial court should have allowed "the filing of [an] amended [complaint]," but only after the Supreme Court of Virginia had fully reviewed the record in order to discern whether or not the opposing party would have been subject to prejudice by allowance of the amended complaint. Id. at 57.

August 31, 2007 order.[2] They argue that the issue as to whether the CANA Congregations in fact waived or contracted away their rights to ever invoke 57-9(A) in the first place is a "long-discussed issue,"[3] that was previously "explicitly laid out" at least eleven months ago,[4] that "[a]ll parties understood that the 'waiver' defense was in the case all along,"[5] and that "[i]t would be ironic and bizarre to penalize the Episcopal Church and the Diocese for not including in [their] pleadings a specific term that represents only the Congregations' preferred label for an issue *clearly identified* in the pleadings and numerous filings since."[6]

The Court has carefully considered ECUSA/Diocese's arguments, and reviewed the history of the filings and key events that have occurred since the beginning of this litigation, a summary of which this Court sets forth below. Upon this review, it is clear to this Court that what ECUSA/Diocese earlier pled and asserted was not the contracted away/waiver argument it makes today but the following argument, articulated in various ways, but coming down to this: "[ECUSA/Diocese's] canons are binding as a matter of Virginia church property law, and therefore govern *notwithstanding* § 57-9."[7] *That* issue, however, has already been resolved by this Court in both its April 3, 2008 Opinion on the Applicability of Va. Code § 57-9(A),[8] as well as in this Court's Five Questions

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[2] That order addressed the relationship between the 57-9 petitions and the declaratory judgment actions.

[3] ECUSA/Diocese Opening Br. Pursuant to July 16, 2008 Order [hereinafter "ECUSA/Diocese Opening Br."] at 1.

[4] See ECUSA/Diocese Opening Br. at 3 ("After [the briefing in response to the Court's August 31, 2007 Order], which explicitly laid out [ECUSA's] and the Diocese's belief and intent to litigate (if necessary) whether the Congregations had contracted away or 'waived' the ability to avail themselves of § 57-9(A)'s procedures, the Court on September 14, 2007, conducted a lengthy hearing regarding the scope of the trial to be conducted in November 2007.").

[5] ECUSA/Diocese Opp'n Br. Pursuant to July 16, 2008 Order [hereinafter "ECUSA/Diocese Opp."] at 2.

[6] ECUSA/Diocese Opening Br. at 8 (emphasis added).

[7] CANA Congregations' Responsive Br. Pursuant to the Court's July 16, 2008 Order [hereinafter "CANA Resp."] at 3.

[8] See "Letter Opinion on the Applicability of Va. Code § 57-9(A)," in which the Court then noted that

Letter Opinion.[9] Moreover, "[i]t is almost impossible to reconcile [the Court's] letter opinion on April 3rd and the letter opinion on the [F]ive [Q]uestions with [the] position that the Episcopal Church and the Diocese [are] taking now."[10]

> ECUSA/Diocese argue that "Virginia law confirms that a legally cognizable 'division' affecting property rights, as described in 57-9(A), must be a structural division of the denomination accomplished in accordance with that denomination's own rules and polity," and therefore "without official action of the General Convention, the evidence demonstrates that no such division has occurred." But if this Court were to accept the ECUSA/Diocese's definition of "division," 57-9(A) would never apply to the ECUSA/Diocese, since the record shows that, according to ECUSA's canons, the only "divisions" that are allowed are essentially geographic, and an ECUSA congregation is not allowed to decide which diocese to join. Under applicable caselaw and rules of statutory construction referred to elsewhere in this letter opinion, this Court cannot apply a statute in such a way as to render it meaningless as applied to a particular private party. Perhaps even more significantly, the definition urged by ECUSA/Diocese would make 57-9(A) a nullity, for if division is defined as requiring the consent of the hierarchy, all the hierarchy need do to defeat the invocation of 57-9(A) is refuse to recognize or approve the division. Moreover, if the history of division within churches or religious societies in the United States informs this Court of anything, it is that division is frequently nonconsensual and contested and takes place without the approval or affirmation of the hierarchy. Indeed, were it otherwise, there would be little need for a division statute, for churches would simply approve divisions and amicably divide up their property without intervention from secular institutions of government.

Id. at 80-81.

[9] See "Letter Opinion on the Court's Five Questions," (June 27, 2008), in which the Court states:

> Once the Circuit Court approves the determination of the congregation as to which branch of a church or society such congregation shall belong, the Court's approval under 57-9(A) "shall be conclusive as to the title to and control of any property held in trust for such congregation . . . ." There is nothing ambiguous or elusive in this language. Conclusive means final. In other words, if a trial court finds 57-9(A) to have been properly invoked (as this Court has done), and if a trial court finds 57-9(A) to be constitutional (which this Court does today, except in regard

> to the Contracts Clause issue which is not yet decided), and if the trial court approves the determination of the congregation regarding its majority vote as to its choice of branch, this then becomes a matter decided. In that event, and only as to those churches that filed 57-9(A) petitions, the declaratory judgment actions will have been rendered moot. If, on the other hand, the trial court ultimately rules that the Contracts Clause claim renders 57-9(A) unconstitutional as applied to one or more of the churches that have filed 57-9(A) petitions, the declaratory judgment actions regarding those churches must be heard and decided, because petitioners in that event will not be able to avail themselves of the division statute. In addition, if the Court does not approve the majority vote determination under 57-9(A) as to one or more churches, the declaratory judgment actions regarding those churches must be heard and decided.

Id. at 11.

[10] August 11, 2008 Hr'g Tr. [hereinafter "Hr'g Tr."] at 14:13-16. At the August 11, 2008 hearing, the Court further elaborated upon this point in an exchange with counsel for ECUSA/Diocese:

> [Y]ou say that the CANA Congregations are not surprised at all by this. Well, I'm skeptical of that, because in my orders and in the litigation that has ensued, I certainly was not under the impression that there was a whole other phase to this litigation.
>
> And, you know, I can tell you that, had I been aware that there was a whole other phase to this litigation dealing with waiver, your position that it was only efficient to [try the waiver issue at the end of the litigation] to me, is not at all persuasive.
>
> The idea that—essentially, you're suggesting that the past year of litigation that we have spent since November 2007 and before, the April 3rd opinion I issued, the June 27th five-question opinion I issued, the constitutionality opinion, they all turn out to be a complete waste of time.
>
> And if it is true that, from the beginning, your position was that they waived 57-9, I don't understand why that wouldn't have been tried first. Because, if they waived it, I wouldn't have had to spend two weeks in trial with you all going over the history of divisions and the history of the Episcopal and Methodist and all the various churches that we discussed and their various divisions and the Civil War statutes and constitutionality issues. All that would never have been addressed by this Court.

Hr'g Tr. 15:12-16:17.

The new argument that ECUSA/Diocese are now attempting to assert is "that there is a third component to whether [57-9(A)] applies: Did the CANA Congregations contractually relinquish their rights"[11] to invoke 57-9(A) in the first place? *That* affirmative defense—the contention that the CANA Congregations have given up/waived their right to ever invoke 57-9(A) in the first place—is an entirely different creature from any affirmative defense previously pled or articulated by ECUSA/Diocese, and, coming as it does a year and eight months after the filing of the original 57-9 petitions, is untimely in the extreme.

B.) History of this Litigation

The following timeline of key events in this litigation illuminates the Court's reasons for concluding that ECUSA/Diocese's new waiver argument is untimely and unpled.

1. December 2006: The first 57-9 petitions are filed.

2. January 2007: ECUSA and the Diocese file their answers to the 57-9 petitions, which also contain affirmative defenses.[12] A review of the

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[11] CANA Resp. at 3.

[12] The Diocese's affirmative defenses are as follows:

> 1.) The property held by the trustees for [specific congregation] was acquired and has been maintained for hundreds of years through charitable gifts donated to and by members of a parish of the Episcopal Church. Principles of charitable trust law preclude the current membership of [specific congregation] from diverting that property to another mission of their own choosing.
>
> 2.) Pursuant to the Canons of The Episcopal Church and the Diocese, which are binding on [insert specific congregation], real and personal property held by and for the benefit of churches such as [specific congregation] must be used for the mission and ministry of the Episcopal Church and the Diocese and may not be diverted to any other mission.
>
> 3.) The rules of the Episcopal Church and the Diocese of Virginia, by which [specific congregation] is bound, do not permit [specific congregation] or any other parish to unilaterally "disaffiliate" from the Episcopal Church.

actual language used within these answers and affirmative defenses confirms that they do not contain the contention that the CANA Congregations could not invoke 57-9(A), due to the fact that the CANA Congregations had contractually waived or otherwise given up their rights to ever invoke 57-9(A).

3. January 31, 2007: Diocese files complaints against each of the eight CANA Congregations that had filed 57-9 petitions, as well as against three other CANA Congregations.

4. February 9, 2007: ECUSA files its own separate complaint against the eleven CANA Congregations and their rectors, vestry members, and other leaders.

5. April 10, 2007: a three-judge panel is appointed by the Supreme Court of Virginia pursuant to Va. Code § 8.01-267.4. That panel issues an order transferring to, and consolidating all of the above proceedings, in the Circuit Court of Fairfax County.

6. May 11, 2007: Counsel for ECUSA and the Diocese each send letters to the Court in response to its request for briefing on case management. Neither of these letters contains an assertion that the Court should consider or address the issue as to whether the CANA Congregations contractually waived their rights to ever invoke 57-9(A) in the first place. Rather, the letters suggest that the application, interpretation, and if necessary, consideration of the constitutionality of Va. Code 57-9(A) are "discrete, key issue[s]" that this Court should resolve as soon as possible.[13]

> 4.) If Va. Code § 57-9 is interpreted in the fashion that [specific congregation] appears to interpret it, then it is in violation of the Constitution of the United States and the Constitution of Virginia.

The Episcopal Church's affirmative defenses are virtually identical to those of the Diocese.

[13] See, e.g., May 11, 2008 Letter from ECUSA:

> We believe that the interpretation and application of § 57-9 is indeed a discrete, key issue that can and should be decided as soon as practicable. The resolution of this issue *would dispose of the eight 57-9 proceedings filed by the departed congregations*, as well as resolve the validity of what we understand to be defendants' principal defense to the declaratory judgment actions, thus clearing the way for additional summary judgment motions on

7. May 21, 2007: Court conducts a pretrial conference regarding case management. ECUSA/Diocese do not now assert that at that conference they contended that a component to be considered in the application and interpretation of 57-9 was whether the CANA Congregations had contractually given up their rights to invoke the statute in the first place.

8. May 31, 2007: Based upon the issues discussed in the May 21, 2007 scheduling conference, this Court issues an order stating that it will hold a November trial for the purpose of addressing the applicability of 57-9 to the instant dispute. That order directs the parties to complete discovery regarding all issues related to this litigation at least 15 days prior to the November 2007 trial. Subsequently, in response to a specific interrogatory that the CANA Congregations served upon ECUSA/Diocese, which requested that ECUSA/Diocese identify "all factual and legal bases for [their] contention that the [CANA] congregations' petitions do not comply with Va. Code § 57-9,"[14] ECUSA/Diocese respond only by contesting the meaning of the various statutory terms utilized in § 57-9(A), and contending that application of § 57-9(A) to this litigation would be unconstitutional.[15] The argument that the CANA Congregations

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other issues that may well limit, or perhaps eliminate, the need for trial.

Id. (emphasis added). Likewise, the May 11, 2008 Letter from the Diocese reads in pertinent part:

> The Diocese believes that the interpretation and application of Va Code § 57-9 is a discrete, key issue, that can be tried separately and should be tried as soon as practicable. This will dispose of the eight section 57-9 proceedings, adjudicate the primary defense to the declaratory judgment actions, and potentially enable the Court to rule on the declaratory judgment actions by summary judgment.

Id.

[14] See CANA Opening Br., Exs. C & D.

[15] The Court notes that ECUSA/Diocese argue that "[a]s early as July 2007, the Congregations served discovery addressing our contractual claims—the same factual issues that underlie the 'waiver' defenses," (ECUSA/Diocese Opp. at 3), and thus ECUSA/Diocese claim that this provides further proof that the CANA Congregations have been on notice of ECUSA/Diocese's waiver theory all along. The Court has carefully reviewed the specific discovery requests that ECUSA/Diocese claim indicate that the CANA Congregations were "on notice of

contractually waived their rights to ever invoke 57-9(A) in the first place is nowhere to be found.

9. August 17, 2007: The parties file briefs regarding their view as to what the scope of the November trial should be. The main thrust of ECUSA/Diocese's brief addressing the scope is found in the following excerpt from their August 17th brief:

> We expect that the principal disputed issues to be decided at or in connection with the November 19, 2007, hearing will be: (1) Is the Anglican Communion a 'church or religious society' for purposes of § 57-9(A); (2) does the disaffiliation of a majority of the

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ECUSA/Diocese's waiver theory," but the Court does not find that any of these discovery requests provide any such definitive proof. For example, ECUSA/Diocese cite the following requests for admission, among others, as examples of such "discovery," none of which in the Court's opinion indicate that the CANA Congregations were on notice of any such "waiver" theory:

> 10. Falls Church real property is currently titled in the names of Trustees for Falls Church.
> 11. Falls Church personal property was purchased by Falls Church.
> 12. You have never purchased or contributed to the purchase of Falls Church real property.
> 13. You have never purchased or contributed to the purchase of the Falls Church personal property.
> 14. You have never had possession of Falls Church real property.
> . . . .
> 20. You have never paid for or contributed to the cost of the maintenance of Falls Church real property.
> 21. You have never paid for or contributed to the cost of the maintenance of Falls Church personal property.
> . . . .
> 26. You have never accepted liability as a land owner for any personal injury on Falls Church real property.
> 27. You have never accepted liability upon any monetary obligation of Falls Church.
> . . . .
> 44. At all relevant times, Falls Church has had the responsibility of hiring, supervising and paying the employees who operate at Falls Church.

ECUSA/Diocese Opp. at Ex. 3 ("Defendant, The Falls Church's First Individual Request for Admissions Directed to The Episcopal Church and to the Protestent [sic] Episcopal Church in the Diocese of Virginia").

members of one or more congregations of a hierarchical church constitute a 'division' for purposes of § 57-9(A); and (3) have the petitioner congregations joined a 'branch' of the Episcopal Church or the Diocese within the meaning of § 57-9?[16]

Again, the waiver argument is nowhere to be found.

10. August 31, 2007: This Court issues an order requesting that the parties address certain questions regarding the relationship of the 57-9 petitions to the declaratory judgment actions. ECUSA/Diocese assert that the following excerpt from their brief responding to that August 31, 2007 order, which was filed on September 10, 2007, clearly sets forth a "waiver" theory in "unmistakable terms:"[17]

> The churches cannot obtain a final judgment in their favor in the 57-9 actions without succeeding in each of two steps. First, the Court must find that the requirements of the statute are satisfied . . . . Second, the Court must find both that the congregations may utilize these statutory provisions of section 57-9, in view of other statutory requirements and the congregations' other legal obligations and commitments, *and* that application of the statute does not violate any constitutional mandates or prohibitions. As the Virginia Supreme Court has made clear, both of these latter issues are inextricably tied to the Diocese's and the Episcopal Church's affirmative claims in the Declaratory Judgment actions . . . . These issues (if it were necessary to reach them) thus should be tried simultaneously with the Declaratory Judgment actions . . . .
>
> . . . .
>
> The Church and the Diocese will submit evidence that the congregations and their leaders are bound by the Church's and the Diocese's Constitutions and Canons and that those documents, the deeds to the property, and the course of dealings between the parties establishes their trust, contractual and proprietary interests in the property at issue . . . . [T]he congregations and their leaders have legally bound themselves to an alternative

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[16] ECUSA/Diocese Mem. Regarding Scope of § 57-9 and Application of Va. Code § 57-9 to these Cases at 13.

[17] ECUSA/Diocese Opp. at 5.

> structure and rules that preclude a congregation from controlling the disposition of property through a majority vote . . . . [18]

A corresponding footnote to the above excerpt cites various cases that supposedly establish that "generally speaking, parties may privately order their affairs in a manner that supersedes otherwise-applicable statutory provisions."[19] Though ECUSA/Diocese assert that the above-quoted excerpt and corresponding footnote from one brief set forth the waiver theory to the parties and to this Court in "unmistakable terms," "[b]riefs . . . are not pleadings."[20] And in fact, this Court agrees with the CANA Congregations that "[the above-quoted sentence and footnote were] legally insufficient to preserve the defense," since "[i]ncluding one sentence buried in hundreds of pages of briefs submitted before trial does not equate to raising a defense via a formal amendment to an answer."[21]

In addition, the Court finds that this one sentence and footnote from a brief filed on September 10, 2007 are anything but a clear and unequivocal assertion that the CANA Congregations had contracted away, waived, or otherwise abandoned their right to ever invoke 57-9(A) in the first place. This Court agrees with CANA's assertion that

> [t]he sentence to which ECUSA and the Diocese point did not speak of the CANA Congregations having agreed *not to invoke* section 57-9 in the event of a division. Rather, it twice referenced the CANA Congregations and their leaders being "legally bound" by ECUSA's and the Diocese's constitutions and canons. This was simply a reiteration of what the answers claimed—that the constitution and canons did not allow individual congregations to disaffiliate, and that to hold otherwise would violate ECUSA's and the Diocese's constitutional rights—issues that the Court has addressed in its prior opinions on the applicability and constitutionality of § 57-9.

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[18] ECUSA/Diocese Opp. at 5 (emphases omitted).

[19] ECUSA/Diocese Opp. at 5 (citing The Diocese of Virginia's and The Episcopal Church's Response to August 31, 2007 Order of the Court (filed Sept. 10, 2007) at 8 n.5).

[20] International Longshoremen's Ass'n v. Va. Intern. Terminals, Inc., 904 F. Supp. 500, 504 (E.D. Va. 1995).

[21] CANA Resp. at 4.

> Of course, if the issue had actually been framed as whether ECUSA's and the Diocese's constitution and canons contained a waiver of the congregations' rights under § 57-9 should a division occur, that issue could have been addressed long ago.

CANA Resp. Br. at 5 (citation omitted).

11. November 13-20, 2007: The Court conducts a five-day trial on the meaning and applicability of Va. Code § 57-9(A). Extensive post-trial briefing follows by all parties.

12. April 3, 2008: This Court issues an 83-page letter opinion, concluding that "the CANA Congregations have properly invoked 57-9(A)." In a corresponding order, the Court requests further briefing upon the relevant constitutional issues, as well as oral argument upon the specific Free Exercise and Establishment Clause issues involved. In fact, in that order, the Court goes so far as to invite the parties to raise any additional constitutional issues that have not yet been raised in the litigation. ECUSA/Diocese respond by alleging Equal Protection and Takings Clause violations.

13. May 28, 2008: The Court conducts a full-day hearing on the Free Exercise Clause and Establishment Clause issues.

14. June 27, 2008: The Court issues a 49-page decision rejecting ECUSA/Diocese's Free Exercise, Establishment Clause, Equal Protection Clause, and Takings Clause challenges. On that same day, the Court issues a 14- page decision addressing five statutory issues relevant to the interpretation of 57-9(A).

It is a full eighteen months since the filing of the first § 57-9 petitions in December of 2006, and a full nine months since this Court and the parties conducted a trial on the applicability of Va. Code § 57-9(A). It is far too late for ECUSA and the Diocese to put forth a new and untimely pled affirmative defense of waiver.

ECUSA/Diocese assert that by denying them the right to raise this issue at this late date, the Court would be granting "summary judgment" against them. But this misstates the issue. The issue is not whether this Court should grant a motion for summary judgment against ECUSA/Diocese. Rather, the issue is whether ECUSA/Diocese should be allowed to litigate a new affirmative defense that asserts that a statute may not be invoked at all, long after that statute has been meticulously dissected at trial and in voluminous briefs, and long after the Court has determined that the statute was properly invoked. The answer to that question is "No." And, to the extent ECUSA/Diocese claim that the issue is not new but, rather, an old issue

previously pled and asserted, the Court rejects that claim. What ECUSA/Diocese now assert is not an issue which can be characterized as mere gloss or a slight variation on a theme or a splinter on the main body of wood. It is no less than a third front, comparable in scope to whether 57-9 was properly invoked, and comparable in scope to 57-9's constitutionality. The notion that it could have been overlooked in litigation this zealously prosecuted and this seriously addressed is, to put it mildly, unpersuasive. In short, the affirmative defense of waiver was not pled, and, by failing to do so, the defense of waiver has itself been waived.[22]

C.) ECUSA/Diocese's Motion for Leave to Amend to Clarify Defenses in Answers to § 57-9 Petitions is Denied.

ECUSA/Diocese's position, as this Court understands it, is that it need not be granted leave to amend its affirmative defenses because the matter at hand has already properly been pled. In the event, however, that this Court were to find that it has not pled this matter already—as the Court so finds today—ECUSA/Diocese assert that a motion to amend should be granted. Even if one puts aside the inconsistency of these positions, the relief sought by ECUSA/Diocese ought not, and will not, be granted.

The standard to be applied by a trial court in deciding whether to grant a motion for leave to amend has been previously articulated in full in this Court's May 12, 2008 Letter Opinion regarding ECUSA/Diocese's motion for leave to amend answers to 57-9 Petitions to add the defense that the application of § 57-9(A) in this litigation violates Va. Code § 57-2.02. That standard is as follows:

Rule 1:8 of the Rules of the Supreme Court of Virginia states:

> No amendments shall be made to any pleading after it is filed save by leave of court. Leave to amend shall be liberally granted in furtherance of the ends of justice.

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[22] See CANA Opening Br. at 2 (citing Virginia Civil Benchbook for Judges and Lawyers I-72-72 (2007-2008 ed.)). ECUSA/Diocese concede that the Virginia Civil Benchbook for Judges and Lawyers cuts against them, agreeing that the Benchbook "lists 21 affirmative defenses under an introductory paragraph stating the proposition that '[a]ffirmative defenses may be waived unless pleaded.'" ECUSA/Diocese Opening Br. at 9 n. 5. ECUSA/Diocese then complain that "[i]n contrast to many other parts of the *Benchbook*, no authority whatever is cited for that proposition." Id. That is likely due to the fact that the authors of the Benchbook simply assumed that a specific citation was not needed for the proposition that an affirmative defense must be sufficiently pled so as to put all opposing parties, as well as the Court, on notice as to what is actually being pled.

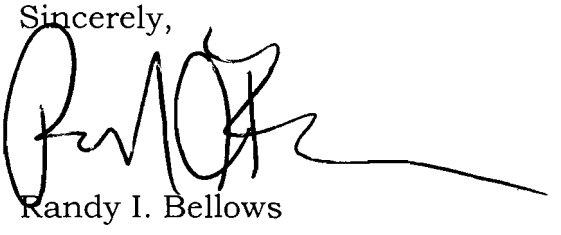
> In granting leave to amend the court may make such provision for notice thereof and opportunity to make response as the court may deem reasonable and proper.

Va. Sup. Ct. Rule 1:8 (2008).

Amendments to pleadings "are not a matter of right, but a trial court's decision refusing leave to amend after a showing of good cause is, *in ordinary circumstances*, an abuse of discretion." Ford Motor Co. v. Benitez, 273 Va. 242, 251 (2007) (citing Mortarino v. Consultant Eng'g Servs., 251 Va. 289, 295-96, (1996)) (emphasis added). A court's primary consideration in deciding whether to allow an amendment is whether the opposing party will be prejudiced by allowing the amendment. See, e.g., Kole v. City of Chesapeake, 247 Va. 51, 57 (1994) ("In the present case, nothing in the record suggests that the City would have been prejudiced by allowance of the amended bill of complaint. We conclude, therefore, that the trial court abused its discretion in failing to allow the filing of the amended bill.").

The current situation before this Court presents a classic scenario in which an opposing party—in this case, the CANA Congregations—would be severely prejudiced were this Court to now grant ECUSA/Diocese's present Motion for Leave to Amend. The Court need say no more than to simply refer all parties to the timeline outlined above in § B of this letter opinion, which provides abundant evidence that the CANA Congregations would otherwise be severely prejudiced if this amendment were permitted. ECUSA/Diocese's Motion for Leave to Amend to Clarify Defenses in Answers to § 57-9 Petitions is denied.

Sincerely,



Randy I. Bellows