

CAUSE NO. 141-237105-09

THE EPISCOPAL DIOCESE OF
FORT WORTH ET AL.,

Plaintiffs,

v.

FRANKLIN SALAZAR ET AL.,

Defendants.

) IN THE DISTRICT COURT OF
)
) TARRANT COUNTY, TEXAS
)
)
)
)
)
)
) 141ST JUDICIAL DISTRICT

**PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT
AND BRIEF IN SUPPORT OF MOTION**

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**MOTION AND BRIEF IN SUPPORT OF MOTION
FOR PARTIAL SUMMARY JUDGMENT**

TO THE HONORABLE JUDGE OF THIS COURT:

NOW COME plaintiffs the Episcopal Diocese of Fort Worth, the Corporation of the Episcopal Diocese of Fort Worth, and The Episcopal Church, and move for partial summary judgment to resolve all claims raised in their First Amended Original Petition, Count One (for declaratory and injunctive relief, including an accounting), and Count Three (for the use of the name and seal of the Diocese and the Diocesan corporation under Texas Business & Comm. Code § 16.29), as follows:

INTRODUCTION

Plaintiff The Episcopal Church is a hierarchical religious denomination consisting of a central governance in the form of its elected “General Convention,” regional subordinate units called “dioceses,” and local congregations usually called “parishes.” *See infra* at p. 9. One of those dioceses is plaintiff the Episcopal Diocese of Fort Worth, which The Episcopal Church established effective January 1, 1983, out of one of its older dioceses, the Episcopal Diocese of Dallas, in order to better carry out The Episcopal Church’s mission and ministry. As a condition of its formation, the new diocese was required to accede to The Episcopal Church’s Constitution and canons. It did so both by resolution of its organizing Convention and in its Constitution, and the Episcopal Diocese of Fort Worth was formed. *Infra* at pp. 17-19.

Later in 1983, following the provisions of the Diocesan Constitution and canons, the Corporation of the Diocese of Fort Worth (the “Diocesan Corporation”) was formed for the purpose of holding title to property acquired “for the use of the [Episcopal] Church in this Diocese, including the real property of all parishes and missions as well as Diocesan Institutions.” The Corporation was required by Canon to operate “in accordance with the

Constitution and Canons of the Diocese,” and it acquired all of its initial property from the Diocese of Dallas pursuant to a Texas court judgment affirming that it had been “duly organized under the Constitution and Canons of the Episcopal Diocese of Fort Worth.” Accordingly, and since its founding, the Diocesan Corporation has functioned as a legal instrument of The Episcopal Church’s Diocese of Fort Worth. *See infra* at pp. 19-22.

In 1994, defendant Jack Leo Iker became the Bishop of the Diocese and, by virtue of his position as Bishop of the Diocese, the Chairman of the Board of Trustees of the Diocesan Corporation after he was elected by the Convention of the Diocese, the leadership of a majority of the other dioceses of The Episcopal Church consented to his ordination as a bishop, he promised in writing to “conform to the Doctrine, Discipline, and Worship of The Episcopal Church,” and he was ordained and consecrated as a Bishop of The Episcopal Church by the Presiding Bishop and other bishops of the Church, all in accordance with the Constitutions and canons of The Episcopal Church and of the Diocese. *See infra* at p. 29. The other individual defendants assumed their respective positions as Trustees of the Diocesan Corporation at various times prior to November 2008 by virtue of their qualification under diocesan canons as “Lay persons in good standing of a parish or mission in the Diocese, or members of the Clergy canonically resident in the Diocese,” and their election to those offices by the Diocesan Convention before they had left The Episcopal Church. *See infra* at pp. 29-30.

On or about November 15, 2008, defendant Iker and his followers, including each of the other individual defendants, left The Episcopal Church and joined another denomination. The Presiding Bishop of The Episcopal Church then declared pursuant to the canons of the Church that defendant Iker was “removed from the Ordained Ministry of [the] Church and released from the obligations of Ministerial offices” in the Church. *See infra* at pp. 30-33.

The plaintiff Episcopal Diocese of Fort Worth has filled the offices left vacant by the departure of the defendants and others from The Episcopal Church, and is in all respects recognized and is acting as The Episcopal Church's Diocese of Fort Worth formed in 1983. The defendants deny any connection to The Episcopal Church or any of its dioceses. Yet, defendants have refused to relinquish title to or control over the Diocese, the Diocesan Corporation, or the real and personal property they hold. *See infra* at pp. 30-37.

This wrongful refusal forced plaintiffs to file this lawsuit. In this motion, plaintiffs now seek summary judgment on their petition for relief in this action, which seeks to recover the property of the Episcopal Diocese of Fort Worth for that continuing entity and for the work of The Episcopal Church in that Diocese pursuant to well-settled Texas law.

SUMMARY JUDGMENT EVIDENCE

The evidence supporting plaintiffs' motion is discussed in detail in the Statement of Facts included below at pp. 9-36, and is set forth in the following materials:

1. First Affidavit of Dr. Robert Bruce Mullin, Professor of Church History at the General Theological Seminary ("Mullin Aff. I") (describing the hierarchical structure of The Episcopal Church and The Episcopal Church's authority over dioceses, bishops, and other officers within the Church).
2. Second Affidavit of Dr. Robert Bruce Mullin ("Mullin Aff. II") (discussing the history of The Episcopal Church in the territory now covered by The Episcopal Diocese of Fort Worth up through the founding of the Episcopal Diocese of Fort Worth effective January 1, 1983).
3. Affidavit of The Rev. Canon Courtland Manning Moore, priest of The Episcopal Church canonically resident in the Episcopal Diocese of Fort Worth (1983 – present); Canon to

the Ordinary and Archdeacon of the Diocese of Dallas (1971-1983); Clerical Deputy from the Episcopal Diocese of Fort Worth to the 76th General Convention of The Episcopal Church in July 2009; and Canon to the Provisional Bishop of the Episcopal Diocese of Fort Worth, The Rt. Rev. Edwin F. Gulick, Jr. (since February 2009 – present) (“Moore Aff.”) (discussing the founding of the Episcopal Diocese of Fort Worth, the creation of the Corporation of the Episcopal Diocese of Fort Worth, actions taken by the Diocese or the Diocesan Bishop since 1983, and the Diocese’s continuing existence and participation as a constituent diocese of The Episcopal Church).

4. Affidavit of Elinor Normand, former Senior Warden of Trinity Episcopal Church, a parish of The Episcopal Church and the Diocese of Fort Worth (attaching corporate bylaws received from the Trustees of the Diocesan Corporation in 2007).

5. Affidavit of The Rt. Rev. Edwin F. Gulick, Jr., provisional Bishop of the Episcopal Diocese of Fort Worth (“Gulick Aff.”) (discussing his own selection to act as the Bishop of the Episcopal Diocese of Fort Worth, the current composition of the Board of Trustees of the Corporation of the Episcopal Diocese of Fort Worth, and The Episcopal Church’s recognition of his Diocese as the continuing Episcopal Diocese of Fort Worth established in 1983).

6. Affidavit of The Rt. Rev. John C. Buchanan, parliamentarian of The Episcopal Church’s House of Bishops and advisor to the Presiding Bishop of The Episcopal Church (“Buchanan Aff.”) (discussing The Episcopal Church’s discipline of defendant Iker and his renunciation of his orders within The Episcopal Church; The Episcopal Church’s recognition of Bishop Gulick as the Bishop of the Episcopal Diocese of Fort Worth and of Bishop Gulick’s Diocese as the continuing Episcopal Diocese of Fort Worth established in 1983; and the

Church's deposition of former Bishop Robert Duncan for attempting to remove the Episcopal Diocese of Pittsburgh from the Church, in violation of the Church's Constitution and canons).

7. Copies of excerpts from various Journals of the Conventions of The Episcopal Church, the Episcopal Diocese of Fort Worth, and the Episcopal Diocese of Dallas, the Constitutions and Canons of The Episcopal Church and the Episcopal Diocese of Fort Worth, and other official documents from the Archives of The Episcopal Church, authenticated by Affidavit of Mark Duffy, archivist and records custodian of The Episcopal Church.

8. Certified copies of the articles of incorporation and other documents on file with the Texas Secretary of State regarding the Corporation of the Episcopal Diocese of Fort Worth as of May 19, 2009.

9. Copies certified by the District Clerk of Dallas County, Texas of certain pleadings, affidavits and judgment entered in Cause No. 84-8573, *Episcopal Diocese of Dallas et al v. Maddox*.

10. Copies certified by the District Clerk of Tarrant County, Texas of certain pleadings, affidavits and other documents on file in Cause No. 153-144833-92, *Corporation of the Episcopal Diocese of Fort Worth, et al v. McCauley, et al*.

11. Copy certified by the Clerk of the United States Court of Appeals for the Fourth Circuit of an amicus brief and attachments on file in Cause No. 01-2377, *Edwards, et al v. Dixon*.

12. Documentary evidence supporting plaintiffs' motion is also attached to the above affidavits, and includes, in addition to the documents specifically described in paragraphs 7-11, copies of official Church documents reflecting the commitments defendant Iker made as a condition of his ordination as a bishop of The Episcopal Church; the certification of his

“abandonment of the communion” of The Episcopal Church by a disciplinary review committee of the Church, and the Presiding Bishop’s acceptance of his renunciation of his orders in 2008; and authenticated copies of publications prepared and/or circulated by defendant Iker concerning his own and his followers’ departure from The Episcopal Church.

GROUNDS FOR SUMMARY JUDGMENT

In brief, in the light of the undisputed facts set forth in the evidence described herein, the grounds for plaintiffs’ motion are as follows:

First: As discussed in detail in Argument Section I, *infra*, plaintiffs are entitled to a declaratory judgment that Bishop Gulick and the leadership of the plaintiff Diocese and their successors are entitled to the use and control of the real and personal property of the Episcopal Diocese of Fort Worth and that Defendants, who have left the Episcopal Church, and their successors are not because:

a) Texas authority establishes that a constituent part of a hierarchical church is comprised of those remaining loyal to the hierarchical denomination. *See infra* Argument Section I.A (discussing cases including *Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (Tex. 1909); *Presbytery of the Covenant v. First Presbyterian Church*, 552 S.W.2d 865, 871 (Tex. Civ. App. – Texarkana 1977, *no writ*); *Church of God in Christ v. Cawthon*, 507 F.2d 599, 602 (5th Cir. 1975)).

b) Texas law of voluntary associations generally confirms that the membership of a local chapter of a national or regional organization cannot alter the chapter’s affiliation or divert its property to another organization. *See infra* Argument Section I.B (discussing authority including *Minor v. St. John’s Union Grand Lodge of Free & Accepted Ancient York Masons*, 130 S.W. 893, (Tex. Civ. App. – Galveston 1910, *writ ref’d*); *Progressive Union of Tex. v. Indep. Union of Colored*

Laborers, 264 S.W.2d 765 (Tex. Civ. App. – Galveston 1954, writ ref'd n.r.e.); 7 C.J.S. *Associations* § 44 (2004); 6 Am. Jur. 2d *Associations & Clubs* § 24 (2008)).

c) The First Amendment requires the courts to defer to a church's own determinations concerning ecclesiastical issues, including the identity of its leaders and constituent parts. See *infra* Argument Section I.C (discussing cases including *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929); *Brown v. Clark*, 116 S.W. 360; *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007); *Presbytery of the Covenant*, 552 S.W.2d 865).

Second: As discussed in detail in Argument Section II, plaintiffs are entitled to a declaratory judgment that the property held by the Diocese is held, and must be used, for the mission of The Episcopal Church because:

a) Members of religious organizations are bound by their organization's rules under both Texas law and constitutional requirements. See *infra* Argument Section II.A (discussing authority including *District Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones*, 138 Tex. 537, 160 S.W.2d 915 (1942); *Stevens v. Anatolian Shepherd Dog Club of Am., Inc.*, 231 S.W.3d 71 (Tex. App. – Houston [14th Dist.] 2007, *pet. denied*); *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 710 S.W.2d 700 (Tex. App. – Dallas 1986, writ ref'd), *cert. denied*, 484 U.S. 823 (1987); *Browning v. Burton*, 273 S.W.2d 131 (Tex. Civ. App. – Austin 1954, writ ref'd n.r.e.); *Green v. Westgate Apostolic Church*, 808 S.W.2d 547 (Tex. App. – Austin 1991, writ denied); *Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc.*, 752 S.W.2d 197 (Tex. App. – Amarillo 1998, *no*

writ); *Presbytery of the Covenant*, 552 S.W.2d 865; *Milivojevich*, 426 U.S. 696; *Kedroff*, 344 U.S. 94; *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009)).

b) Texas law of charitable trusts confirms that property donated to a charitable institution or society is held in trust for that society's purposes. *See infra* Argument Section II.B (discussing authority including *Boyd v. Frost Nat'l Bank*, 145 Tex. 206, 196 S.W.2d 497 (1946); *Blocker v. State*, 718 S.W.2d 409 (Tex. App. – Houston [1st Dist.] 1986, writ ref'd n.r.e.); 4A William F. Fratcher & Austin W. Scott, Jr., *The Law of Trusts*, § 348.1 (4th ed. 1989); *Episcopal Church Cases*, 198 P.3d 66).

c) Texas statutes confirm that religious corporations are subordinate to and controlled by the religious organizations that formed them and hold property for the benefit of and in trust for those organizations. *See infra* Argument Section II.C (discussing Tex. Rev. Civ. Stat. Art. 1396, §§ 2.02(A) (16), 2.14(B), & 3.01(B)).

d) The “neutral principles” analysis approved as constitutional by the U.S. Supreme Court similarly requires that church property disputes be resolved in accordance with denominational rules and polity. *See infra* Argument Section II.D (discussing *Jones v. Wolf*, 443 U.S. 595).

e) The great weight of authority from across the country involving The Episcopal Church makes clear that, regardless of what particular method of analysis is used, property of an Episcopal Church body must remain with the Church in the event of a dispute. *See infra* Argument Section II.F (citing all recent appellate cases involving The Episcopal Church).

Third: As discussed in Argument Section III, diocesan plaintiffs are entitled to summary judgment on their claim under Texas Business & Commercial Code § 16.29 to enjoin defendants' use of the Diocesan trade names and seal because all of the elements of the claim

have been met: (1) the names and mark plaintiff seeks to protect are eligible for protection, (2) plaintiff is the senior user of the names and mark, (3) there is a likelihood of confusion between its names and mark and those of the defendants, and (4) the likelihood of confusion will cause irreparable injury. *See, e.g., Horseshoe Bay Resort Sales Co. v. Lake Lyndon B. Johnson Improvement Corp.*, 53 S.W.3d 799, 806 (Tex. App. – Austin 2001, *pet. denied*); *Am. Century Proprietary Holdings v. Am. Century Cas. Co.*, 295 F. App'x 630, 2008 U.S. App. LEXIS 21045 (5th Cir. 2008).

STATEMENT OF FACTS

I. The Structure Of The Episcopal Church

The Episcopal Church is an autonomous religious denomination comprised of worshipping congregations in the United States and several foreign countries. The Church's structure is hierarchical and is composed of three tiers: The general Church, its "dioceses," and its local worshipping congregations, usually "parishes." Mullin Aff. I at ¶ 16. At its highest level, the Church is governed by a "General Convention," composed of a "House of Bishops" and a "House of Deputies." *Id.* at ¶ 17. The General Convention has adopted and from time to time amends the Church's Constitution and canons and its *Book of Common Prayer*, which together govern the spiritual and temporal affairs of all of the Church's constituent parts. *Id.* at ¶ 18.¹

¹ The courts of numerous jurisdictions have uniformly recognized and described the Church's hierarchical structure. *See, e.g., Dixon v. Edwards* 290 F.3d 699, 716 (4th Cir. 2002); *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009); *New v. Kroeger*, 84 Cal. Rptr. 3d 464, 469-71 (Cal. Ct. App. 2008), *ordered published by* 202 P.3d 1089 (Cal. 2009); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 925 (N.Y. 2008); *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1285 (Conn. 1993); *Parish of the Advent v. Protestant Episcopal Diocese of Mass.*, 688 N.E.2d 923, 931 (Mass. 1997); *Episcopal Diocese of Mass. v. DeVine* 797 N.E.2d 916, 923 (Mass. App. Ct. 2003); *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 24 (N.J. 1980); *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. Ct. App. 2003); *Bennison v. Sharp*, 329

Under the Church's canons, the "Presiding Bishop" of the Church is its "Chief Pastor and Primate." Mullin Aff. I at ¶ 20. The Presiding Bishop is elected by the General Convention and is charged with responsibility for leadership in initiating and developing policy and strategy in the Church and speaking for the Church as to the policies, strategies, and programs authorized by the General Convention. *Id.* The Church has an Executive Council comprised of elected bishops, priests, and lay persons which, under the leadership of the Presiding Bishop, manages the fiscal and programmatic affairs of the Church between meetings of the General Convention. *Id.* at ¶ 21.²

The next level of the Church's organization and governance consists of 111 regional, geographically defined, "dioceses," including the Episcopal Diocese of Fort Worth. Mullin Aff. I at ¶ 22. The Church's dioceses are formed and recognized as set forth in the Church's Constitution and canons and through the actions of the Church's General Convention. *Id.* (citing Church Const. Art. V.1, which provides that "a new Diocese may be formed, with the consent of the General Convention and under such conditions as the General Convention shall prescribe by General Canon or Canons").

In order to be formed and accepted into union with the General Convention, Article V.1 of the Church's Constitution requires all dioceses to promise "an unqualified accession to the Constitution and Canons of this Church." Mullin Aff. I at ¶ 23. Church Canon I.10(4) similarly

N.W.2d 466, 472 (Mich. Ct. App. 1982); *Tea v. Protestant Episcopal Church*, 610 P.2d 182, 183 (Nev. 1980); *In re Church of St. James the Less*, 2003 Phila. Ct. Com. Pl. LEXIS 91, at *24 (Pa. Ct. Com. Pl. 2003), *aff'd. in rel. part*, 888 A.2d 795, 810 (Pa. 2005).

² The Church is a member of the Anglican Communion, a worldwide fellowship of 38 autonomous regional churches generally known as "Provinces." Mullin Aff. I at ¶ 30. The historic tradition of the Provinces of the Anglican Communion is that each Province forms its own constituent units and exercises jurisdiction within its own geographic territory, and not within the geographic territory of any other Province. *Id.* at ¶ 33.

affirms that a diocese may not become a constituent part of the Church unless it has “acceded to the Constitution of the General Convention in accordance with Article V, Section 1 of the Constitution.” *Id.*

Each diocese also is governed by its own diocesan Convention. Mullin Aff. I at ¶ 24. The diocesan Conventions adopt, and from time to time amend, diocesan Constitutions and canons that supplement, and may not conflict with, The Episcopal Church’s Constitution and canons. *Id.* at ¶ 25. Consistent with the foregoing commitments and the obligations and provisions discussed below, a diocese of The Episcopal Church may not unilaterally “disaffiliate” from the Church. See generally *id.* at ¶¶ 22-23, 34-149.³

The Episcopal Church’s Constitution and canons, by which all dioceses are bound, govern the ordination, installation, spiritual and temporal duties, discipline, and retirement of the diocesan bishop and any assisting bishops, as well as other clergy and lay leaders within the diocese. Mullin Aff. I at ¶¶ 23, 71, 77-83, 87-90, 100-105, 108, 117-18. For example, pursuant to Church Const. Art. II.1 and Canon I.11(1), the General Convention permits diocesan Conventions to elect their diocesan bishops. *Id.* at ¶ 62 & n. 24. The bishop-elect may not be ordained or consecrated to that office, however, unless the leadership of a majority of the other dioceses of the Church consents. If the required consent is obtained, the bishop-elect may then be ordained bishop by at least three other bishops designated by the Presiding Bishop of The

³ By contrast, the Church’s Canon I.11(3) permits and sets forth the process by which a “Missionary Diocese” of the Church, with the consent of the General Convention, may leave the jurisdiction of the Church. Mullin Aff. I at ¶ 92. A “Missionary Diocese” is a defined geographic area in which, unlike other of the Church’s dioceses, the Bishop is elected by the Church’s House of Bishops under Article VI of the Church’s Constitution and is entrusted with the governance of the diocese. *Id.* at ¶¶ 91-92. The Constitution and canons of the Church do not provide for the release, withdrawal, or transfer of any diocese that is not a Missionary Diocese. *Id.* at ¶ 92.

Episcopal Church pursuant to the Church's procedures. *Id.* at ¶ 26 (citing Const. Art. II.2 and Canon III.11).

Both Article VIII of the Church's Constitution and the Ordination Services for bishops and other clergy in the Church's *Book of Common Prayer* obligate the person to be ordained to subscribe to the following written declaration:

I do believe the Holy Scriptures of the Old and New Testaments to be the Word of God, and to contain all things necessary to salvation; and I *do solemnly engage to conform to the Doctrine, Discipline, and Worship of the Episcopal Church.*
Mullin Aff. I at ¶ 23 (emphasis added).

This is generally known as the "Declaration of Conformity." *Id.* The Ordination Service for a bishop in the Church's *Book of Common Prayer* also requires that an individual being ordained as a bishop promise to "guard the faith, unity, and discipline of the Church" and to "share with [his or her] fellow bishops in the government of the whole Church." *Id.*

Article II.6 of the Church's Constitution and Church Canon III.12(8) provide that a bishop may not resign his or her office and remain a bishop in good standing of the Church without the consent of specified Church authorities. Mullin Aff. I at ¶ 88. Bishops also are subject to discipline and removal by the general Church, as set forth in Title IV of the Church's canons. *Id.* at ¶ 90. Grounds for such discipline or removal include the "abandonment of the communion" of the Church (see Canon IV.9), violation of the Church's or Diocese's Constitutions or canons, or violation of the vows required of a bishop-elect in the Ordination Service for a bishop (see Canon IV.1). *Id.*

The Episcopal Church's Constitution and canons also set forth requirements and conditions for the formation and operation of parishes and other worshipping congregations under the oversight of the dioceses (Mullin Aff. I at ¶ 94) (citing Church Canon I.13), as well as detailed rules and procedures under which dioceses must select, train, ordain, deploy, and

supervise the clergy of parishes and other worshipping congregations (*id.*) (citing Church Const. Arts. VIII, X and Canons I.8, 12, 13; II.3; III.5-12, 15).

Moreover, each diocese must regularly report to the Church concerning its activities and official actions. Thus, Church Canon I.6(5)(a) requires dioceses to forward to the Secretary of the House of Deputies and to the Archives of the Church “immediately upon publication, two copies of the Journals of the Convention of the jurisdiction, together with Episcopal charges, statements, and such other papers as may show the state of the Church in that jurisdiction,” while Canon I.6(4) requires dioceses to file annual reports “in the form authorized by the Executive Council” to that body. Mullin Aff. I at ¶ 95.

The Church’s canons also require dioceses (and parishes) to adopt prescribed business methods for the protection of property, including annual audits by certified public accountants and adequate insurance of all buildings and their contents (Mullin Aff. I at ¶ 106) (citing Church Canon I.7); and set forth numerous requirements for the care, control, use, and disposition of property acquired and used for the Church’s mission. *Id.* at ¶¶ 113-16 (citing Church Canons I.7, II.6, III.9(5)).

Finally, Church Canon I.17(8) requires that “[a]ny person accepting any office of this Church shall well and faithfully perform the duties of that office in accordance with the Constitution and Canons of this Church and of the Diocese in which the office is being exercised.” Mullin Aff. I at ¶ 23.

II. History Of The Episcopal Diocese Of Fort Worth

A. Early History

The Episcopal Church first established its ministry in the geographic territory now covered by the Episcopal Diocese of Fort Worth in the early 19th Century, with the establishment in 1838 of what would be known as its “Missionary District of the Southwest.”

Mullin Aff. II at ¶ 3. In 1849, a portion of the Missionary District of the Southwest petitioned the General Convention for admission as a diocese of the Church, and the Diocese of Texas accordingly was formed and admitted by the General Convention, after it acceded to the Constitution and canons of the Church. *Id.* at ¶ 4. In 1874, the Diocese of Texas petitioned the General Convention to accept cession of portions of its territory, along with all Episcopal congregations and property located therein. The General Convention thereupon formed the Missionary Districts of Northern Texas and West Texas out of the ceded territory. *Id.* at ¶ 5.

In 1878, canons were adopted for the governance of the Missionary District of Northern Texas. Mullin Aff. II at ¶ 6. Canon VIII required the Constitution of a parish of the Missionary District to declare that

[t]his Parish, as a constituent part of the Protestant Episcopal Church in the Missionary District of Northern Texas, expressly accedes to, recognizes and adopts the Constitution, Canons, Doctrines, Discipline and Worship of the Protestant Episcopal Church in the United States of America, and the Constitution and Canons of the Protestant Episcopal Church in this jurisdiction, and acknowledges their authority accordingly.

Canon XXIV required missions to make a similar declaration. *Id.*

In 1895, the General Convention gave permission to the Missionary District of Northern Texas to organize as a diocese of The Episcopal Church by the name of the Diocese of Dallas. Mullin Aff. II at ¶ 7. In accordance with the Church's requirements, the organizing Convention of the Diocese of Dallas held on December 19-20, 1895, adopted a Constitution that, in Article II, stated: "The Church in this Diocese accedes to the Constitution and Canons of the Protestant Episcopal Church in the United States of America, and recognizes the authority of the General Convention of said church." *Id.* The Constitution of the Diocese of Dallas also provided, in Article XXII, that all Diocesan canons had to conform with the Constitution and Canons of The

Episcopal Church: “Canons not inconsistent with this Constitution, or the Constitution and Canons of the General Convention may be adopted” *Id.*

In 1896, the Diocese of Dallas adopted canons. Mullin Aff. II at ¶ 8. Canon XIII required the Constitution of each parish to state:

This Parish, as a constituent part of the Protestant Episcopal Church in the Diocese of Dallas, expressly accedes to, recognizes and adopts the Constitution, Canons, Doctrines, Discipline, and Worship of the Protestant Episcopal Church in the United States of America, and the Constitution and Canons of the Protestant Episcopal Church in this Diocese, and acknowledges their authority accordingly.

Id. Canon XXVI required missions to make similar affirmations. *Id.*

B. Formation of the Episcopal Diocese of Fort Worth

In 1982, the Bishop of the Diocese of Dallas called a special meeting of the Convention of that diocese for the purpose of considering “a resolution to divide the diocese and to request the General Convention ... to ratify this action if approved.” Mullin Aff. II at ¶ 9 (citing Minutes of the Special Convention of the Diocese of Dallas (1982) at p. 1). The resolution approved by the Convention explained that the division of the diocese was contemplated in order to better carry out the mission and ministry of The Episcopal Church:

Whereas, the Bishop believing that the call for creative Episcopal leadership can best be answered by a division of the Diocese and has given his consent to the proposal to divide the Diocese of Dallas into two dioceses in order to provide for effective Episcopal pastoral care and leadership of the clergy and congregations within the geographic area known at present as the Diocese of Dallas, and

Whereas, the Diocese of Dallas is growing and the forecasts predict a continued increase in population which increase will provide unusual opportunities for growth and mission which can best be met by two distinct diocese[s], ...

....

Now, therefore, be it resolved, that

1. The Episcopal Church in the Diocese of Dallas with the approval of the Bishop shall be divided to form a new diocese which until it adopts a name, shall

be referred to as the western diocese and the remainder to be known as the Diocese of Dallas.

Id. (citing Minutes of the Special Convention of the Diocese of Dallas (1982) at pp. 2-3).

The Diocese of Dallas further recognized that the division of the diocese required the action and consent of the General Convention. Thus, the Convention further resolved:

3. The Secretary of the Convention of the Diocese of Dallas is instructed to forward this resolution to the 1982 General Convention for ratification.
4. Upon ratification by the General Convention, the Bishop is requested to take steps to organize the new diocese no later than 1 October 1983.

The Bishop shall appoint a committee ... to recommend an appropriate division of diocesan assets and obligations between the two dioceses.

Mullin Aff. II at ¶ 10 (citing Minutes of the Special Convention of the Diocese of Dallas (1980) at p. 3).

At its meeting in September 1982, the Church's General Convention approved the division, contingent upon its receipt of certification that "all of the appropriate and pertinent provisions of the Constitution and Canons of the General Convention of the Episcopal Church in the USA and the Constitution and Canons of the Diocese of Dallas have been fully complied with." Mullin Aff. II at ¶ 11 (citing Journal of the General Convention of the Protestant Episcopal Church in the United States of America (1982) at p. C169-170).

Upon receipt of the General Convention's assent to its proposal, the Diocese of Dallas proceeded with plans to divide. At the Annual Convention of the Diocese of Dallas held in October 1982, the Bishop explained: "The new diocese will come into being on 1 January 1983, the day on which it will file the necessary documents with the Secretary of the General Convention of the Episcopal Church." Mullin Aff. II at ¶ 12 (citing Journal of the Eighty Seventh Annual Meeting of the Diocese of Dallas (1982) at p. 12). Specifically:

[t]he Primary Convention of the new diocese [would] be held November (13th) in Fort Worth, *in order to fulfill the requirements of the National Constitution and Canons*; namely:

- (a) to name the new diocese
- (b) to organize committees/officers
- (c) *to accede to the National Constitution and Canons*
- (d) to adopt its own Constitution/Canons
- (e) to perfect a budget.

Id. (emphasis added).

The Diocese of Dallas also considered and adopted a resolution to divide the property and funds of the diocese and its congregations in proportion to the congregations comprising each part of the divided diocese and resolved that after the division, it would “give to the western diocese a gift from the operating funds in the amount of One Hundred Thousand Dollars (\$100,000.00), payable in three (3) equal installments for a period of three (3) years.” Mullin Aff. II at ¶ 13 (citing Journal of the Eighty-Seventh Annual Meeting of the Diocese of Dallas (1982) at p. 15).

The Bishop of Dallas called the “Primary Convention of the Episcopal Diocese of Fort Worth” on November 13, 1982. Moore Aff. at ¶ 8 (citing Proceedings of the Primary Convention of the Episcopal Diocese of Fort Worth (1982) at p. 11); Mullin Aff. II at ¶ 14 (same). The Convention was attended by clergy and lay delegates from each of the 30 Episcopal parishes and 24 Episcopal missions of the Diocese of Dallas that the new diocese was to receive. *Id.* (citing Proceedings of the Primary Convention of the Episcopal Diocese of Fort Worth (1982) at pp. 1-9; Journal of the Eighty Seventh Annual Meeting of the Diocese of Dallas (1982) at p. 18); Moore Aff. at ¶ 8 (same). In his address to the Convention, the Bishop recited that one of

the purposes of this meeting was to “affirm [their] desire as a New Diocese to come into union with the other dioceses within the Episcopal Church in the United States of America by accession to the National Constitution and Canons.” *Id.* at 8; Mullin Aff. at ¶ 14.

Accordingly, at that meeting, and in accordance with the requirements of The Episcopal Church’s Constitution, the delegates unanimously concurred in and signed a resolution confirming their unqualified accession to the Constitution and canons of The Episcopal Church:

WHEREAS, the Primary Convention of the Diocese of Fort Worth, meeting at All Saints Episcopal Day School, in Fort Worth, Tarrant County, Texas, on Saturday, 13 November 1982, pursuant to approval of the 67th General Convention of The Episcopal Church, does hereby fully subscribe to and accede to the Constitution and Canons of The Episcopal Church, and

IN SO DOING, we unanimously hereunto set our hand this 13th day of November in the year of our lord, One Thousand Nine Hundred Eighty-two; and the Secretary of Convention is hereby instructed to promptly inform the Secretary of General Convention by copy of this Resolution with all signatures, in accordance with Canon I.9(4) of General Convention; and with copies of the Constitution and Canons of the Diocese of Fort Worth adopted this day.

Mullin Aff. II at ¶ 14 (citing Proceedings of the Primary Convention of the Episcopal Diocese of Fort Worth (1982) at pp. 25-32); Moore Aff. at ¶ 8 (same).

The Convention further adopted a Constitution for the Diocese that affirmed that “[t]his Constitution shall commence and be in full force and effect on January 1, 1983.” Moore Aff. at ¶ 9 (citing Constitution and Canons of the Episcopal Diocese of Fort Worth (1982) at p. 18); Mullin Aff. II at ¶ 15.⁴ Article I of the Constitution, “Authority of the General Convention,” restated the Diocese’s accession to The Episcopal Church’s Constitution and canons and explicitly acknowledged the authority of the General Convention: “The Church in this Diocese accedes to the Constitution and Canons of the Episcopal Church in the United States of America,

⁴ Each of the Constitutional or canonical provisions discussed herein, in Sections II.B & C, *infra*, continued to be included in the Episcopal Diocese of Fort Worth’s Constitution and canons at all relevant times. *See* Moore Aff. at ¶¶ 31, 34.

and recognizes the authority of the General Convention of said Church.” *Id.*; Moore Aff. at ¶ 9. Article 18 stated that any canons passed must be consistent with the Constitution and canons of the Episcopal Church: “Canons not inconsistent with this Constitution, or the Constitution and Canons of the General Convention, may be adopted.” *Id.* Canon 22 of the new Diocese similarly required every new parish to “promise to abide by and conform to the Constitution and Canons of the General Convention and of the Diocese of Fort Worth.” *Id.*

C. Canons Governing the Formation and Function of the Diocesan Corporation and the Holding of Property

Article 13 of the Diocese’s first Constitution (now Article 14) provided that title to all real estate acquired

for the use of the Church in this Diocese, including the real property of all parishes and missions as well as Diocesan Institutions, shall be held subject to control of the Church in the Episcopal Diocese of Fort Worth acting by and through a corporation known as ‘Corporation of the Episcopal Diocese of Fort Worth.’ All such property as well as all property hereafter acquired for the use of the Church and the Diocese, including parishes and missions, shall be vested in Corporation of the Episcopal Diocese of Fort Worth.

Moore Aff. at ¶ 10 (emphasis added).⁵ Article 13 further provided that the Diocesan Corporation was to hold title to “other property belonging to the Diocese, as such,” including trust and endowment accounts. *Id.* at ¶ 11. Diocesan Canon 12.1 (now Canon 18.1) further specified that property held by the Diocesan Corporation “may only be conveyed or encumbered with the approval of the Board of Trustees and in accordance with the Constitution and Canons of the Episcopal Diocese of Fort Worth.” *Id.* Diocesan Canon 25 (now Canon 30) provided that “[t]he dedicated and consecrated Churches and Chapels of the several Parishes and Missions of the

⁵ Canon 11, “Corporation of the Episcopal Diocese of Fort Worth,” provided that the entity would also be known as the “Diocesan Corporation.” Moore Aff. at ¶ 10.

Diocese may be opened only for the services, rites and ceremonies, or other purposes, either authorized or approved by this Church, and for no other use.” *Id.*

In keeping with the Diocesan Corporation’s purpose, the Diocesan canons tied the administration and governance of the Corporation to the ecclesiastical authority and leadership of The Episcopal Church and its Diocese of Fort Worth. Diocesan Canon 11 (now Canon 17) provided that the

management of [the Diocesan Corporation’s] affairs shall be conducted and administered by a Board of Trustees of five (5) elected members, all of whom are either Lay persons in good standing of a parish or mission in the Diocese, or members of the Clergy canonically resident in the Diocese, in addition to the Bishop of the Diocese who shall serve as Chairman of the Board or may designate the President or other officer of the corporation to serve as such.

Moore Aff. at ¶ 12. The canon further specified that the Trustees’ duties were to be conducted “in accordance with [the Corporation’s] charter and by-laws and in accordance with the Constitution and Canons of the Diocese,” which included its accession to the Constitution and canons of The Episcopal Church. *Id.*

Article 15 of the Diocese’s Constitution (now Article 16) similarly provided:

There shall be a Fund for the Endowment of the Episcopate which shall be managed and controlled by a Board of Trustees consisting of not less than five (5), of whom only two (2) may be Clergy, and not more than nine (9) members of the Church in this Diocese who shall be nominated by the Bishop and elected by the Convention at the Annual Meeting. *Id.* at ¶ 13.

In February 1983, the Diocesan Corporation, which is the corporate plaintiff in this action, was formed in accordance with these constitutional and canonical requirements. Moore Aff. at ¶ 14 (citing Articles of Incorporation of the Corporation of the Episcopal Diocese of Fort Worth (1983)).

D. Diocesan Corporation's Acquisition of Its Property from the Diocese of Dallas

On August 15, 1984, the Diocese of Fort Worth and the Diocesan Corporation joined with the Diocese of Dallas and its corporation to petition the District Court of Dallas County, Texas, for a division of the property held by the Diocese of Dallas. The Diocese of Fort Worth and the Diocesan Corporation represented to the court that the Diocese was a “duly constituted religious organization, organized pursuant to the Constitution and Canons of the Protestant Episcopal Church in the United States of America,” and that the Diocesan Corporation was “a Texas nonprofit corporation, duly organized under the Constitution and Canons of the Episcopal Diocese of Fort Worth.” Moore Aff. at ¶ 16 (citing *The Episcopal Diocese of Dallas v. Mattox*, No. 84-8573 (95th District Court Dallas County) (“1984 Petition”) at p. 2). The Diocese and the Diocesan Corporation further represented that pursuant to Article 13 of the Constitution adopted by the Diocese, “title to all real property acquired for the use of the Church in the Diocese shall be vested in [the Diocesan Corporation],” and that “[p]ursuant to such provision the Diocese of Fort Worth has caused [the Diocesan Corporation] to be organized.” *Id.* (citing 1984 Petition at p. 5). The petition was supported by the affidavit of the first Bishop of the Episcopal Diocese of Fort Worth, formerly the Bishop of the Diocese of Dallas, who swore to these facts. *Id.* (citing Affidavit in Support of 1984 Petition (A. Donald Davies) at ¶¶ 3-4, 11). The Diocese and the Diocesan Corporation accordingly sought a declaration that the Diocesan Corporation “shall henceforth own and control, pursuant to the Constitution and Canons of the Episcopal Diocese of Fort Worth,” all real property held by the Diocese of Dallas in the 23 Texas counties that comprised the area of the Diocese of Fort Worth, as well as substantial personal property held by or for the Diocese of Dallas. *Id.* (citing 1984 Petition at pp. 13-14).

On August 22, 1984, the District Court of Dallas County issued a declaratory judgment approving the transfer of substantial assets of the Diocese of Dallas to the plaintiffs Diocesan Corporation and Diocese of Fort Worth. Moore Aff. at ¶ 17 (citing Judgment in *The Episcopal Diocese of Dallas v. Mattox*). The court noted that “Plaintiff, The Episcopal Diocese of Fort Worth ... is a duly constituted religious organization, organized pursuant to the Constitution and Canons of the Protestant Episcopal Church in the United States of America,” and that “Plaintiff, Corporation of the Episcopal Diocese of Fort Worth ... is a Texas non-profit corporation, duly organized under the Constitution and Canons of the Episcopal Diocese of Fort Worth.” *Id.*

E. The Episcopal Diocese of Fort Worth’s Trade Names and Seal

Since its inception as a constituent, subordinate part of The Episcopal Church, the “Episcopal Diocese of Fort Worth” has been known by that name. Moore Aff. at ¶¶ 8, 15. Since its inception, the Diocese has established for its own use, and has used, the corporation named “Corporation of the Episcopal Diocese of Fort Worth.” *Id.* at ¶ 10.

In 1983, the Diocese also established, and has consistently identified itself with, a distinctive seal. Moore Aff. at ¶ 15 (citing Excerpt from a 1983 Diocesan newsletter entitled “Diocesan Seal Rich in Heritage,” which includes a drawing of the seal; *The Episcopal Church Annual* (1984) at p. 144 (displaying seal of the Diocese in section concerning the Diocese of Fort Worth); Diocesan Journals for 1990, 2001-2006 (cover pages displaying the seal of the Diocese)). Until the current dispute arose, the names “Episcopal Diocese of Fort Worth,” “Corporation of the Episcopal Diocese of Fort Worth,” and this seal were used exclusively by the Episcopal Diocese of Fort Worth, the constituent part of The Episcopal Church, and not by any other entity. *Id.* at ¶ 15.

III. The Subordinate Status Of The Fort Worth Diocese And Its Bishops Within The Episcopal Church

The subordinate status of the Episcopal Diocese of Fort Worth and its bishops within the Church has been reaffirmed and recognized in numerous ways throughout the Diocese's history. As shown above, as a condition of the Diocese's formation, the Diocesan Convention unanimously promised and declared its accession to the Constitution and canons of The Episcopal Church and acknowledged the authority of its General Convention, both by resolution and, separately, by incorporating that language into Article I of the Diocesan Constitution. *See* pp. 17-19, *supra*. The Diocese's status as a constituent part of The Episcopal Church, "duly constituted ... [and] organized pursuant to the Constitution and Canons of the Protestant Episcopal Church in the United States of America," was judicially admitted in affidavits and pleadings filed in the District Court for Dallas County, Texas, to establish the right obtain title to substantial property formerly held by another of The Episcopal Church's subordinate parts, the Diocese of Dallas. *See* pp. 21-22, *supra*.

In addition to these formal commitments and representations made at the Diocese's inception:

- Every bishop of the Diocese, including defendant Iker, has taken office only with the consent of the leadership of a majority of the Church's other dioceses. Buchanan Aff. at ¶ 4.
- As a condition of each bishop's ordination and installation in office, every bishop of the Diocese, including defendant Iker, has executed the "Declaration of Conformity" discussed above. Buchanan Aff. at ¶ 5.
- At the ordination of each bishop ordained after adoption of The Episcopal Church's 1979 Prayer Book, including defendant Iker, as required by the Ordination Service for a bishop

in The Episcopal Church's Prayer Book, the bishop-elect promised to "guard the faith, unity, and discipline of the Church" and to "share with [his] fellow bishops in the government of the whole Church." Buchanan Aff. at ¶ 6.

- In 1989, the Diocesan Convention adopted an amended Constitution that again included the provisions acceding to The Episcopal Church's Constitution, canons, and authority and describing Diocesan property as property "acquired for the use of the Church in this Diocese." Moore Aff. at ¶ 18 (citing Proceedings of the Seventh Annual Convention of the Episcopal Diocese of Fort Worth (Oct. 6-7, 1989) at p. 21 and App. B at pp. 45, 57).
- In litigation brought by the Diocesan Corporation in 1994 seeking to recover local church property for the Diocese and the loyal Episcopal minority of The Church of the Holy Apostles, a parish in the Diocese, the Diocesan Corporation presented in support of its motion for summary judgment an affidavit from a priest serving as a "Canon," or assistant, on then-Bishop Iker's staff, which declared on behalf of the Diocese that the Constitution of the Diocese states in part:

Article 1, AUTHORITY OF GENERAL CONVENTION, states, 'The Church in this Diocese accedes to the Constitution and Canons of The Episcopal Church, and recognizes the authority of the General Convention of said Church.'

Moore Aff. at ¶ 19 (citing Affidavit of the Reverend Canon Billie Boyd in *Corporation of the Episcopal Diocese of Fort Worth v. McCauley*, No. 153-144833-92 (153rd Dist. Ct., Tarrant County, Texas). "Therefore," the Diocesan witness explained,

each Parish within The Episcopal Diocese of Fort Worth has acknowledged that they are governed by and recognize the authority of the General Convention and the Constitution and Canons of The Episcopal Church in the United States of America.

Id.

- In that same litigation, the Diocesan Corporation also filed in support of its motion for summary judgment an affidavit from the Rev. Canon Charles A. Hough, III, another Canon on then-Bishop Iker's staff. The affidavit confirmed the Diocese's view that the rules of The Episcopal Church, including the Church's property rules, are applicable in the Diocese, as the affidavit quoted from and attached a copy of the Church's express trust canon, Canon I.6(4) (now I.7(4)).⁶ Moore Aff. at ¶ 20 (citing Affidavit of the Reverend Canon Charles A. Hough, III, in *Corporation of the Episcopal Diocese of Fort Worth v. McCauley*, No. 153-144833-92 (153rd Dist. Ct., Tarrant County, Texas)).
- In 1995, in his address as diocesan bishop to the Diocesan Convention, defendant Iker commended the clergy and lay members of the Diocese's mission congregations, "[f]or you have worked so hard, and you have given so generously over the years to support the presence of the Episcopal Church in small town and rural settings." Moore Aff. at ¶ 21 (citing Journal of the Thirteenth Annual Meeting of the Diocese of Fort Worth (Nov. 3-4, 1995) ("1995 Diocesan Journal") at 14) (emphasis added).
- At the same meeting of the Diocesan Convention, in the context of a discussion of a proposed new diocesan canon regarding clergy discipline, defendant Iker explained that the wording of the proposed canon was dictated by The Episcopal Church: "This is the wording of the National Canons of the Episcopal Church.... So in effect, we don't have any way of changing it." Moore Aff. at ¶ 22 (citing 1995 Diocesan Journal at p. 60).

⁶ Church Canon I.7(4) provides in part, "All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located." Buchanan Aff., Ex. 1 at p. 40.

- Defendant Iker further explained at that meeting that the concept of ordination to the ministry within and by The Episcopal Church relates specifically to The Episcopal Church, and not any other denomination. Thus, when an Episcopal priest decides to

leave the ministry of the Episcopal Church, that, indeed, is a very important decision and one that has affect.... [I]t's a voluntary renunciation, but as far as this church is concerned, he is thereby 'deprived of the rights to exercise the gifts and spiritual authority as a Minister of God's Word and Sacraments conferred in Ordination' in this church.

Moore Aff. at ¶ 23 (citing 1995 Diocesan Journal at p. 61).

- In 2000, the Diocesan Committee on Constitution and Canons withdrew from consideration a proposed amendment to Article 2 of the Diocesan Constitution on the ground that "it appeared to be in contradiction of Canon I.13, section 1 of the National Canons." Moore Aff. at ¶ 25 (citing Journal of the Eighteenth Annual Meeting of the Diocese of Fort Worth (Nov. 10-11, 2000) at Section 9).
- In an *amicus* brief filed in 2002 in the United States Court of Appeals for the Fourth Circuit, in a case involving another Episcopal diocese, defendant Iker, through counsel, stated:

An episcopal bishop is elected by the laity and clergy of a diocese and must be approved by the House of Bishops and the Standing Committees of the Episcopal Church before being seated as a bishop of the Church [citing Title III, Canon 22 of The Episcopal Church]. Although given great deference as a leader in much the same way as the President of the United States is given deference, neither the President nor an Episcopal bishop acts independently of the checks and balances of the legal system of which they are a part. *A bishop must adhere to the constitution and canons of the Church* or be subject to discipline.

Moore Aff. at ¶ 26 (citing 4th Circuit Brief at p. 4) (emphasis added).⁷

⁷ The disciplinary proceedings referred to are contained in Title IV of the Church's canons, and are described as "represent[ing] determinations by this Church of who shall serve as Members of the Clergy of this Church and further represent the polity and order of this hierarchical Church." See Buchanan Aff., Ex. 1 at p. 161 (Canon IV.14(1)).

- In that brief, defendant Iker also stated:

[The Episcopal Church] has a national body that leads the overall church through its General Conventions, with the first national convention in 1789, and the most recent in 2000.... Among other things, the General Convention is the body which alters and revises the Canons of the Church. Below that are the various dioceses which are generally geographical in nature. The national church is governed by the Constitution and Canons of [The Episcopal Church], as Revised by the Convention of 2000. *The dioceses have canons that cannot be inconsistent with national canons.*

Moore Aff. at ¶ 26 (citing 4th Circuit Brief at pp. 10-11) (emphasis added).

- Defendant Iker also stated that to allow individual diocesan bishops “absolute freedom” to determine whether an individual was “duly qualified” to serve as a priest would “render [The Episcopal Church] a loose association of independent regional church bodies.” Moore Aff. at ¶ 26 (citing Fourth Circuit Brief at pp. 10-11). Accordingly, he stated, “[t]here must be some national standard” that would limit the bishop’s exercise of discretion. *Id.*
- At a special meeting of the Diocesan Convention held on September 27, 2003, which had been called in response to the Church’s consent to the ordination of an openly-gay man as the Bishop of the Episcopal Diocese of New Hampshire, the Convention passed resolutions expressing disagreement with the ordination, but nevertheless passed a resolution declaring and affirming:

The Church in the Episcopal Diocese of Fort Worth is a constituent part of the Protestant Episcopal Church in the United States of America, acceding to and recognizing the Constitution and Canons of the Episcopal Church, and is thereby a constituent member of the Anglican Communion

Moore Aff. at ¶ 27 (citing Journal of the 2003 special meeting of the Convention at pp. 21-22). At that special meeting, defendant Iker in his address to the Convention stated:

First, we are here today as faithful Episcopalians, who love our Church and love our Lord.... We are catholic evangelicals and evangelical

catholics, whose joy and privilege it is ‘to work, pray and give for the spread of the kingdom of God’ as loyal members of the Episcopal Church.

Id.

- At the Annual Meeting of the Diocesan Convention on November 8, 2003, defendant Iker stated that, while sympathetic to “faithful members of the Episcopal Church ... who now feel compelled by actions of General Convention and the Diocese of New Hampshire to join other faith communities,” he was at the same time “acutely aware of the responsibilities of [his] vows as a bishop ‘to guard the faith, unity and discipline of the Church.’” Moore Aff. at ¶ 28 (citing excerpts from the Journal of the Episcopal Diocese of Fort Worth (2003) at p. 3).
- The Diocese has consistently sent representatives to meetings of both houses of the Church’s General Convention, including to its most recent meetings in 2006 and 2009. Buchanan Aff. at ¶ 13.
- The Diocese and the clergy of the Diocese, including defendant Iker, have participated in and accepted the valuable benefits of the Church Pension Fund, reserved solely for clergy and institutions of the Church, as required by the Church’s canons. Buchanan Aff. at ¶ 14.

IV. The Current Dispute

In recent years, The Episcopal Church has experienced an internal debate over various theological issues, including those related to human sexuality. Actions taken by the Church in this regard have prompted vocal opposition from a small minority of the Church’s clergy and

laity, and some former clergy and lay members have left the Church and sought to retain local parish property for their own use.⁸ Among those persons are the defendants in this case.

All of the Constitutional and canonical provisions discussed above, see *supra* Sections II.B & C, were retained, and remained part of the Diocesan Constitution and canons at all relevant times. See Moore Aff. at ¶¶ 31, 34.⁹ Moreover, defendant Jack Leo Iker became the Bishop of the Diocese and, thus, the Chairman of the Board of Trustees of the Diocesan Corporation, in 1994, after he was elected by the Convention of the Diocese, the leadership of a majority of the other dioceses of The Episcopal Church consented to his ordination as a bishop, he promised in writing to “conform to the Doctrine, Discipline, and Worship of The Episcopal Church,” and he was ordained and consecrated as a Bishop of The Episcopal Church by the Presiding Bishop and other bishops of the Church, all in accordance with the Constitutions and canons of The Episcopal Church and of the Diocese. See Buchanan Aff. at ¶¶ 4-6 and Exs. 1-3 thereto; Moore Aff. at ¶ 29. The other individual defendants assumed their respective positions as Trustees of the Diocesan Corporation and of the Fund for the Endowment of the Episcopate at various times prior to November 15, 2008, by virtue of their qualification under diocesan canons as “Lay persons in good standing of a parish or mission in the Diocese, or members of the Clergy

⁸ See, e.g., *Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920 (N.Y. 2008); *New v. Kroeger*, 84 Cal. Rptr. 3d 464 (2008), *ordered published* by 202 P.3d 1089 (Cal. 2009).

⁹ In 1997, in the wake of a decision of The Episcopal Church’s Ecclesiastical Court for the Trial of a Bishop to dismiss disciplinary charges against a bishop of another Episcopal diocese for his ordination of a gay priest, the Diocesan Convention purported to amend Article I of the Diocesan Constitution, “Authority of General Convention” to reaffirm that “The Church in this Diocese accedes to the Constitution and Canons of The Episcopal Church, and recognizes the authority of the General Convention of said Church,” but disclaim the effect in the Diocese of any “action of General Convention which is contrary to Holy Scripture and the Apostolic Teaching of the Church.” Moore Aff. at ¶ 24 (citing Journal of the Fifteenth Annual Meeting of the Diocese of Fort Worth (Nov. 7-8, 1997) at unnumbered pages 15-17, 22 and App. B; Journal of the Fourteenth Annual Meeting of the Diocese of Fort Worth (Nov. 8-9, 1996) at pp. 22-23, 27).

canonically resident in the Diocese,” and their election to those offices by the Diocesan Convention. Moore Aff. at ¶ 29.

On or about September 5, 2006, however, the individual defendants caused to be filed with the Texas Secretary of State “Amended and Restated Articles of Incorporation of [the] Corporation of the Episcopal Diocese of Fort Worth,” which purported to delete provisions describing the property authorized to be held by the Diocesan Corporation as property “acquired for the use of the Episcopal Diocese of Fort Worth as well as the real property of all parishes, missions and diocesan institutions”; delete provisions stating that the aforesaid property “shall be administered in accordance with the Constitution and Canons of the Episcopal Diocese of Fort Worth”; and insert provisions purporting to give the Trustees of the Diocesan Corporation the “sole authority to determine the identity and authority of the Bishop [of the Episcopal Diocese of Fort Worth]” in the event of a dispute or challenge regarding the identity of the Bishop, and “the sole authority to appoint, as provided in the Bylaws of the Corporation a Chairman of the Board” in the event the Diocese is without a Bishop. Moore Aff. at ¶ 30 (citing Articles IV(1), IV(2), and VI of 2006 Articles). The individual defendants purported to amend the Diocesan Corporation’s bylaws to similar effect. See Normand Aff. at ¶ 4.

In September 2008, defendant Iker published or circulated various written statements urging the congregations and members of the Diocese to separate from The Episcopal Church and “realign” with the Anglican Province of the Southern Cone. Moore Aff. at ¶¶ 32-33 (citing Sept. 8, 2008 report, and Sept. 2008 public statement entitled “10 Reasons Why Now Is the Time to Realign”). At the 2008 meeting of the Diocesan Convention on November 14-15, 2008, defendant Iker again urged the Convention to vote in favor of certain proposed amendments to the Diocesan Constitution and canons and to follow him out of the Church. *Id.* at ¶ 35.

Accordingly, a majority of the members of the Convention voted in favor of a resolution to become part of the Anglican Church of the Southern Cone, and also voted to eliminate the accession clause contained in Article I of the Constitution and replace it with a new Article I titled “Anglican Identity.” *Id.*¹⁰

On November 16, 2008, defendant Iker released and directed clergy in the Diocese to distribute a written public statement entitled “As We Realign,” espousing his position that he and the clergy and laity under his authority no longer had any connection with The Episcopal Church. Moore Aff. at ¶ 36 (citing Nov. 16, 2008 statement); Buchanan Aff. at ¶ 9. The notice stated:

By voting to change our diocesan Constitution and Canons, we have withdrawn from the General Convention, dissociating ourselves from ... The Episcopal Church. We have realigned with another Province of the Anglican Communion.... Our Bishop, clergy, and congregations have been received into the fellowship of the Anglican Province of the Southern Cone.

Moore Aff. at ¶ 36; Buchanan Aff. at ¶ 9, Ex. 6.

Since at least November 15, 2008, defendant Iker has been acting as the Bishop of a Diocese of the Southern Cone (defendant “Southern Cone Diocese”); the former members of the Diocesan Standing Committee have been acting as the Standing Committee of the Southern Cone Diocese; and the former Trustees of the Diocesan Corporation and the Fund for the Endowment of the Episcopate, defendants Salazar, Patton, Virden, Barber, Bates, and Iker, have

¹⁰ As purportedly amended, Article I stated:

The Episcopal Diocese of Fort Worth is a constituent member of the Anglican Communion, a Fellowship within the One, Holy, Catholic, and Apostolic Church, consisting of those duly constituted Dioceses, Provinces and regional churches in communion with the See of Canterbury, upholding and propagating the historic Faith and Order as set forth in the Old and New Testaments and expressed in the Book of Common Prayer.

Moore Aff. at ¶ 35.

been exercising control over the Corporation and assets of the Diocese on behalf of and as an instrument of the Southern Cone Diocese. Gulick Aff. at ¶ 13. All defendants have refused to relinquish control of the Diocesan Corporation or the Diocese's real or personal property, and have continued to use the distinctive seal and trade names of the Episcopal Diocese of Fort Worth. *Id.* at ¶¶ 14-16.

Canon III.12(7) (a) of The Episcopal Church provides:

If any Bishop of this Church ... shall declare, in writing, to the Presiding Bishop a renunciation of the ordained Ministry of this Church, and a desire to be removed therefrom, it shall be the duty of the Presiding Bishop to record the declaration and request so made.... [W]ith the advice and consent of a majority of the members of the Advisory Council the Presiding Bishop may pronounce that such renunciation is accepted, and that the Bishop is released from the obligations of all Ministerial offices, and is deprived of the right to exercise the gifts and spiritual authority as a Minister of God's Word and Sacraments conferred in Ordinations.

Buchanan Aff. at ¶ 8.

On December 5, 2008, following defendant Iker's written statement on November 16, 2008, that he no longer had any connection with the Church, and with the advice and consent of a majority of the members of her Advisory Council, the Presiding Bishop of the Church declared that defendant Iker had voluntarily renounced his ordained ministry in the Church and that he was "therefore, removed from the Ordained Ministry of [the] Church and released from the obligations of Ministerial offices" in the Church. Buchanan Aff. at ¶ 9. Defendant Iker thereby ceased to be a bishop of the Church or the Diocese.¹¹ Upon the Presiding Bishop's action, defendant Iker's positions as Bishop of The Episcopal Church's Diocese of Fort Worth and Chair

¹¹ Separately, on November 20, 2008, a disciplinary Review Committee of The Episcopal Church certified that defendant Iker had "abandoned the Communion" of the Church within the meaning of the Church's disciplinary canons, and, on November 21, 2008, the Presiding Bishop inhibited defendant Iker and ordered that he "cease all 'episcopal, ministerial, and canonical acts, except as relate to the administration of the temporal affairs of the Diocese of Fort Worth.'" Buchanan Aff. at ¶ 7.

of the Board of Trustees of the Diocesan Corporation also necessarily terminated, under the express terms of the Church's and the Diocese's canons. See Buchanan Aff. Ex. 9 (Church Canon III.12(7)(a)), Moore Aff. Ex. 32 (Diocesan Canon 17).

Episcopal Church Canon III.13(1) provides that

[a] Diocese without a Bishop may, by an act of its Convention, and in consultation with the Presiding Bishop, be placed under the provisional charge and authority of a Bishop of another diocese or of a resigned Bishop, who shall by that act be authorized to exercise all the duties and offices of the Bishop of the Diocese....

Buchanan Aff. at ¶ 10.

On February 7, 2009, and in furtherance of her canonical duties, the Presiding Bishop called to order a special meeting of the Convention of The Episcopal Church's Diocese of Fort Worth at which the Diocese, in consultation with the Presiding Bishop, elected the Rt. Rev. Edwin F. Gulick, Jr. "to exercise all the duties and offices of the Bishop of the Diocese." Moore Aff. at ¶ 37; Gulick Aff. at ¶ 3. Bishop Gulick thus began serving as the Bishop of the Episcopal Diocese of Fort Worth and the Chair of the Board of the Diocesan Corporation. Moore Aff. at ¶¶ 37, 39; Gulick Aff. at ¶ 3.

At its special meeting on February 7, 2009, the Diocesan Convention also recognized and declared that numerous leadership positions within the Diocese were vacant, including members of the Standing Committee, Executive Council, and the Board of Trustees of the Diocesan Corporation. Gulick Aff. at ¶ 4; Moore Aff. at ¶ 38. Acting pursuant to Article II.9 of the 2006 version of the Diocesan Corporation's bylaws and Diocesan Canon 17, and with the advice of the Convention, Bishop Gulick, as Chairman of the Board of the Corporation, then appointed five clergy and laity of the Diocese to serve as Trustees of the Diocesan Corporation. Gulick Aff. at ¶ 5; Moore Aff. at ¶ 39.

The Convention elected members of the Standing Committee of the Diocese, as well as Deputies to the forthcoming meeting of the Church's General Convention in July 2009. Gulick Aff. at ¶ 4; Moore Aff. at ¶ 38. Vacant seats on the Executive Council were filled either by the Convention on February 7, 2009, or shortly after the meeting of the Convention by various Diocesan entities entitled under the canons of the Diocese to fill particular seats on the Executive Council. Gulick Aff. at ¶ 4; Moore Aff. at ¶ 38. Finally, the Diocesan Convention passed a resolution recognizing and declaring that the 2008 purported amendment to the Diocesan Constitution to eliminate the accession clause, as well as certain other constitutional and canonical amendments, were *ultra vires* and void. Gulick Aff. at ¶ 6; Moore Aff. at ¶ 40.

At a meeting held on April 4, 2009, Bishop Gulick and the other trustees of the Diocesan Corporation passed a resolution recognizing and declaring that the 2006 purported amendments to the Diocesan Corporation's Articles and bylaws were *ultra vires* and void, and approved "Amended and Restated Articles of Incorporation," which include the original provisions linking the Diocesan Corporation with the Episcopal Diocese of Fort Worth and which accurately identify the current Trustees of the Corporation as the person currently serving as Bishop of the Episcopal Diocese of Fort Worth and the other trustees recognized and approved by that body. Gulick Aff. at ¶ 9 (citing Amended and Restated Articles). These Amended and Restated Articles were filed with the Texas Secretary of State on April 14, 2009. *Id.*

On April 21, 2009, defendant Iker caused to be filed with the Secretary of State a purported amendment to those articles, still claiming that he and the other individual defendants are the current trustees of the Diocesan Corporation. Gulick Aff. at ¶ 10.

Since February 7, 2009, Bishop Gulick and the other leaders of the diocese described above have been recognized and are functioning as the persons and bodies with authority to

govern the continuing Episcopal Diocese of Fort Worth. The February 7, 2009, special meeting of the Convention of the Diocese was called to order by the Presiding Bishop of The Episcopal Church (Gulick Aff. at ¶ 3; Moore Aff. at ¶ 37); Bishop Gulick and his Standing Committee have been asked to give their canonical consents to the ordination of new bishops who have been elected by other dioceses of the Church since February 7, 2009 (Gulick Aff. at ¶ 7; Buchanan Aff. at ¶ 11); the Diocese's annual report that Episcopal Church Canon I.6 requires each diocese to file has been accepted by The Episcopal Church's Executive Council (Gulick Aff. at ¶ 7; Buchanan Aff. at ¶ 11); the *Episcopal Church Annual* for 2009, a publication listing the Church's clergy, dioceses, parishes and missions based on data provided by the Church's General Convention Office, includes the Diocese of Fort Worth formed in 1983 as a constituent diocese and identifies Bishop Gulick as the provisional Bishop of the Diocese (Gulick Aff. at ¶ 7; Buchanan Aff. at ¶ 11); and Bishop Gulick and the Deputies elected on February 7, 2009, were invited to, and participated as, representatives of the Episcopal Diocese of Fort Worth at The Episcopal Church's meeting of the General Convention in July, 2009. Gulick Aff. at ¶ 7; Moore Aff. at ¶ 38; Buchanan Aff. at ¶ 11. Finally, at its July, 2009, meeting, the General Convention adopted a resolution which explicitly commended Episcopalians in the Diocese of Fort Worth and three other dioceses "for their unflagging efforts to continue to live as witnesses to the mission of The Episcopal Church during recent difficult times as they reorganize their continuing dioceses," and further resolved that "the leadership in each of those four continuing dioceses be commended for their similar efforts, including in particular the Rt. Rev. Edwin F. Gulick, Provisional Bishop of the Diocese of Fort Worth . . . and especially the strong lay leadership of each diocese;" and that "the deputations from those four continuing dioceses be

extended a special welcome to this 76th General Convention of The Episcopal Church.” Gulick Aff. at ¶ 7; Buchanan Aff. at ¶ 12.¹²

Thus, The Episcopal Church recognizes Bishop Gulick as the person serving as Bishop and the Ecclesiastical Authority of its Diocese of Fort Worth (Gulick Aff. at ¶ 7, Buchanan Aff. at ¶ 11), and Bishop Gulick and the other Trustees selected on February 7, 2009, are recognized by The Episcopal Church’s Diocese of Fort Worth as those individuals authorized and entitled to control and manage the assets “acquired for the use of the Church in this Diocese” and held by the Diocesan Corporation, subject to the Constitutions and canons of The Episcopal Church and the Diocese of Fort Worth. Gulick Aff. at ¶ 8.

The Diocesan Corporation holds title to substantial real and personal property of the Diocese acquired by it as an instrument and constituent part of the Church, pursuant to the declaratory judgment described above (*supra* at pp. 21-22), and subsequently. Gulick Aff. at ¶ 11. Other property, including operating accounts of the Diocese and the Fund for the Endowment of the Episcopate, is to be and historically has been held and controlled by the Episcopal Diocese of Fort Worth and its officers directly. *Id.* at ¶ 12. Since November, 2008, defendant Iker and the other defendants have exercised exclusive control over substantially all such property, even though they no longer have any connection with the Episcopal Diocese of Fort Worth, and even though the plaintiff Diocese and the Diocesan Corporation have demanded

¹² This recognition by the Church of the continuing Diocese of Fort Worth is consistent with other actions by the Church recognizing that a diocese may not leave the Church. For example, in December 2007, under the Constitution and canons of The Episcopal Church, the Rt. Rev. Robert Duncan, Bishop of the Episcopal Diocese of Pittsburgh, was determined by a disciplinary Review Committee of the Church to have abandoned the Communion of the Church within the meaning of Church Canon IV.9 by an open renunciation of the Doctrine, Discipline, or Worship of the Church in attempting to remove the Diocese of Pittsburgh from the Church in contradiction to the Church’s Constitution and canons. In September 2008, the Presiding Bishop of the Church, with the consent of the House of Bishops, deposed Bishop Duncan from the ordained ministry of the Church pursuant to Church Canon IV.9, and he thereby ceased being a bishop of the Church or the Diocese of Pittsburgh. See Buchanan Aff. at ¶ 15.

that control over such property be returned to them for their use in support of the mission of The Episcopal Church and its Diocese of Fort Worth. *Id.* at ¶¶ 14-16.

ARGUMENT

Summary judgment should be granted when the pleadings and evidence “show that, except as to the amount of damages, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” Tex. R. Civ. P. 166a(c); *see also, e.g., Hasty v. Keller HCP Partners, L.P.*, 260 S.W.3d 666, 668-69 (Tex. App. - Dallas 2008, *no pet.*). This motion presents such a situation.

I. Plaintiffs Are Entitled To Summary Judgment On Their Claim For Declaratory Relief Regarding The Identity Of The Diocesan Leadership And Corporate Trustees Holding Title To Diocesan Property.

Plaintiffs’ first cause of action seeks a declaratory judgment that Bishop Gulick and other leaders of the Episcopal Diocese of Fort Worth recognized by the Church and the Diocese are the current authorities and representatives of the Diocese entitled to use and control the real and personal property of the Diocese. Plaintiffs’ first cause of action also seeks a declaration that the Bishop and the other Trustees recognized by the Diocese and the Church are the current Trustees of the Diocesan Corporation.

The Episcopal Church is entitled to summary judgment on its first cause of action because there are no material facts in dispute. Well-settled Texas law establishes that in the event of a dispute among its members, a constituent part of a hierarchical church consists of those individuals remaining loyal to the hierarchical church body. *See, e.g., Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909); cases discussed *infra* at pp. 39-41.

The Episcopal Church is hierarchical as a matter of law. *See supra* pp. 9-13 (setting forth The Episcopal Church’s structure as established by the Church’s Constitution and canons and described in the first Affidavit of Robert Bruce Mullin, who also concludes that the structure

described is unquestionably characterized as hierarchical.) As the most recent judicial decision involving a property dispute within The Episcopal Church states, rejecting the defendants' effort to challenge that characterization and granting summary adjudication in the Church's favor, "it is beyond dispute that the Episcopal Church is a hierarchical church. . . . [A] review of the Constitution and Canons of the Church indicates that it is indeed hierarchical" "as a matter of law." *Diocese of San Joaquin v. Schofield*, No. 08 CECG 01425 Order on Plaintiffs' Motion For Summary Adjudication (filed July 21, 2009) at pp. 5-6 (Cal. Super. Ct., County of Fresno) (attached hereto at Tab A). *See also, e.g.*, cases cited in footnote 1, *supra* (uniformly holding or noting that the Church is hierarchical). There are no decisions to the contrary.

There can also be no dispute that the Diocese under the ecclesiastical authority of Bishop Gulick, not defendant Iker's group, is recognized by The Episcopal Church as its Episcopal Diocese of Fort Worth formed in 1983, or that defendant Iker and his followers expressly deny any connection to The Episcopal Church. *See supra* at pp. 30-37. In any event, as discussed below, the qualification and identity of a church's clergy, leaders, members, and constituent parts are core ecclesiastical issues as to which the civil courts may not, consistent with the First Amendment, second-guess the church itself.

Accordingly, as a matter of law, the continuing Diocese holding title to the Diocesan property consists of those individuals recognized by and remaining part of The Episcopal Church, subject to its Constitution and canons and the ecclesiastical authority of its Bishop. Similarly, Bishop Gulick and the other "Lay persons in good standing of a parish or mission in the Diocese, or members of the Clergy canonically resident in the Diocese" selected pursuant to Diocesan Canon 17 at the February 7, 2009, meeting of the Diocesan Convention are the current Trustees of the Diocesan Corporation.

A. Texas Authority Establishes That a Constituent Part of a Hierarchical Church is Comprised of Those Remaining Loyal to the Hierarchical Denomination.

In the event of a dispute within a constituent part of a hierarchical church, the continuing entity holding title to property under Texas law is represented by those individuals remaining loyal to and recognized by the general church. Since at least 1909, the Texas Supreme Court has followed this approach to resolving disputes within hierarchical religious denominations.

In *Brown v. Clark*, the Court considered a dispute between two factions of a local church that arose after the hierarchical church of which the local church was a constituent part merged with another denomination. *Id.* at 361-62. A faction of the local church opposed this union and sued to establish ownership and take possession of the local church property. *Id.* The Court of Appeals held in favor of the faction opposing the merger, but the Supreme Court reversed.

Reviewing the Court of Appeals decision, the Supreme Court held that “the church to which the deed was made still owns the property, and that whatever body is identified as being the church to which the deed was made must still hold the title.” *Id.* at 364-65. Because the local church “was but a member of and under the control of the larger [denomination],” it “was by the union” of the two denominations “incorporated into the [newly merged denomination].” *Id.* at 365. Accordingly, the local church property properly belonged to that congregation that remained loyal to the merged, general church. *Id.*

Since 1909, numerous Texas courts have repeatedly and unanimously applied the *Brown* approach to decide cases such as the one now before the Court, involving a dispute within a constituent part of a hierarchical church. In *Presbytery of the Covenant v. First Presbyterian Church*, 552 S.W.2d 865 (Tex. Civ. App. – Texarkana 1977, *no writ*), for example, the Court of Appeals made clear that individuals who withdraw from a hierarchical church cannot “by their unilateral action ... dissolve ... an integral part of” the general church. *Id.* at 871. Rather, when

“[t]hose persons constituting the loyal faction ... have been recognized by [the general church] as the duly existing local congregation[,]” they constitute the continuing entity “entitled to possession and control of the property.” *Id.* It was of no import whether a majority of the congregation voted to withdraw from the general church, or even that the vote was unanimous, because

unanimous or not, the members of a church organization which is hierarchical as to church government cannot dissolve a local church in contravention of the governing rules or edicts of the mother church, and then re-establish themselves as an independent church or one associated with a schismatic group and take the church property with them.

Id. at 871-72. In short, the Court held,

[w]hen a division occurs in a local church affiliated with a hierarchical religious body, and a dispute arises between rival groups as to the ownership or control of the local church property, *the fundamental question as to which faction is entitled to the property is answered by determining which of the factions is the representative and successor to the church as it existed prior to the division, and that is determined by which of the two factions adheres to or is sanctioned by the appropriate governing body of the organization. It is a simple question of identity.* [Citation] In making such a determination, the civil court exercises no role in determining ecclesiastical questions. It merely settles a dispute as to identity, which in turn necessarily settles a dispute involving property rights.

Id. at 871 (emphasis added).

Similarly, in *Norton v. Green*, 304 S.W.2d 420 (Tex. Civ. App. – Waco 1957, *writ ref’d n.r.e.*), a majority of a congregation of a hierarchical church voted to withdraw from the general church and declare themselves independent. The general church’s governing body recognized the remaining loyal congregation as the continuing local church, but the withdrawing group refused to relinquish control of the church property. *Id.* at 421. Ruling in favor of the loyal minority, the Court of Appeals reaffirmed:

the answer to this question is that where there has been a division in a congregation, those members who renounced their allegiance to the church lose

any rights in the property involved, and the property and the use thereof belong to the members which remain loyal to the church. It is a question of identity.

Id.

Numerous other cases have applied the same analysis to similar effect. *See also, e.g., Church of God in Christ v. Cawthon*, 507 F.2d 599, 602 (5th Cir. 1975) (applying Texas law and holding that the withdrawing faction of local church could not “exercise acts of possessory control over the local church property [or] interfer[e] with local church property and with the conduct of services therein by the local faction loyal to the national church”); *Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 552 (Tex. App. – Austin 1991, *writ denied*) (“Where a congregation of a hierarchical church has split, ... the property belongs to the members who remain loyal to the church.”); *Templo Ebenezer, Inc. v. Evangelical Assemblies, Inc.*, 752 S.W.2d 197, 198 (Tex. App. – Amarillo 1988, *no writ*) (in the case of a hierarchical church, “only members loyal to [the hierarchical church] may possess the church property”); *Schismatic & Purported Casa Linda Presbyterian Church in Am. v. Grace Union Presbytery, Inc.*, 70 S.W.2d 700, 706-07 (Tex. App. – Dallas 1986, *writ ref’d n.r.e.*) (because “state law requires deference to the Presbytery’s identity of ... the loyal group, as the representative of the local church,” the loyal faction was “entitled to possession and use of all church property”), *cert. denied*, 484 U.S. 823 (1987); *Browning v. Burton*, 273 S.W.2d 131, 136 (Tex. Civ. App. – Austin 1954, *writ ref’d n.r.e.*) (the withdrawing group “by their withdrawal could not destroy the identity of the local church and could not take the properties of that church with them into an independent organization”).

Thus, under Texas law, in the event of a dispute within a hierarchical denomination, the continuing church body entitled to the use and control of the church property is that group loyal to and recognized by the general church.

B. Texas Law of Voluntary Associations Confirms That the Membership of a Local Chapter of a General Organization Cannot Alter the Chapter's Character.

The cases just cited are entirely consistent with Texas law applicable to secular voluntary associations, which similarly holds that the majority of the current membership of a local chapter of a national association may not unilaterally alter the national affiliation of the local chapter or divert its property to some other association.

Minor v. St. John's Union Grand Lodge of Free & Accepted Ancient York Masons, 130 S.W. 893 (Tex. Civ. App. – Galveston 1910, *writ ref'd*), is illustrative. In that case, a majority of the members of a local lodge attempted to withdraw from a parent organization (the Grand Lodge), form another, similar organization, and transfer the lodge's property to that other organization. The court held that this would be improper. The local lodge

is not an independent organization existing solely for the benefit of its members, but ... it is a part and parcel of a larger organization known as the Grand Lodge organized for specific purposes, which purposes are to be accomplished by and through such subordinate bodies as the local lodge in this case. The local lodge came into being by virtue of the power conferred upon its members to organize themselves into a subordinate lodge.... When the property was conveyed to the trustees of [the local lodge] it was for the use and benefit of this body in carrying out the purposes of its organization under the jurisdiction and authority of the Grand Lodge from which it received the warrant for its existence. It was not in the power of the members of this lodge to destroy the old organization and form a new one entirely foreign to the original lodge, and thereby pass the title of this property to this new organization. A majority of them, no matter how large, could just as well have dissolved [the local lodge] and formed themselves into a business association of any kind thus devoting the property to purely business purposes. The action of the members in forming [the new local lodge] was not simply to change the name ..., but its necessary result, if carried out, was to destroy the old lodge, and, without any authority from the original parent body, to create a new one. The court finds that [the local lodge] has never ceased to exist; that enough members thereof to constitute a lodge under the laws of the governing body, have always remained, and still remain, preserving their allegiance to the Grand Lodge, and through it, the life of the subordinate lodge, and that appellees are the true and lawful successors, under the laws of the order, of the original trustees of [the local lodge] to whom the property was conveyed. This being true, they are entitled to hold the property for the use of this lodge.

Id. at 896-97 (citing *Brown v. Clark*, 116 S.W. 360). See also *Progressive Union of Tex. v. Indep. Union of Colored Laborers*, 264 S.W.2d 765, 768 (Tex. Civ. App. - Galveston 1954, writ *ref'd n.r.e.*) (“It is well settled that when a person ceases to be a member of a voluntary association, his interest in its funds and property ceases and the remaining members become jointly entitled thereto, and this rule applies where a number of members secede in a body and although they constitute a majority and organize a new association.”); 7 C.J.S. *Associations* § 44 (2004) (“[M]embers who withdraw ... lose their rights to associate property, title to which stays in the members remaining in the association.”); 6 Am. Jur. 2d *Associations & Clubs* § 24 (2008) (“a member who abandons the association thereby renounces any interest in the property, and those who remain and succeed such member are entitled to his or her interest”); *Norton*, 304 S.W.2d at 425 (relying on 36 Tex. Jur. *Religion & Religious Societies* § 20 (1935), which describes the application to church property disputes of voluntary association law, wherein “[t]hose who adhere to the acknowledged organization are entitled to the use of property”).

C. The First Amendment Requires the Courts to Defer to a Church’s Determinations Concerning the Identity of its Leaders and Constituent Parts.

The precedent discussed above is also consistent with the requirements of the First Amendment to the Constitution, under which the civil courts may not interfere in a church’s internal organization and governance, including particularly its organization or recognition of its own clergy, leaders, members, and constituent parts. Precedent from Texas and across the country confirms this basic principle.

1. Civil Courts May Not Second-Guess a Church’s Resolution of Ecclesiastical Issues.

In *Watson v. Jones*, 80 U.S. 679 (1871), the United States Supreme Court first held that a hierarchical denomination’s determination of ecclesiastical issues relevant to pending civil litigation would be dispositive for purposes of that litigation: “whenever the questions of

discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.” *Id.* at 727. The Supreme Court has reaffirmed these principles numerous times over the past 130 years. *See, e.g., Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929).

Texas precedent is unequivocally consistent with the Supreme Court’s pronouncements in this area. In *Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909), discussed above, the Texas Supreme Court affirmed this point as it considered a church property dispute that had arisen as a result of a general church’s decision to merge with another denomination. *Id.* at 363. The dissident faction argued that they were the continuing congregation entitled to local church property because “no such union could be properly entered into” by the general church’s governing body, its General Assembly. The Court refused to second guess the General Assembly’s decisions. *Id.* at 363-64. Instead, relying on *Watson v. Jones*, the Court stated that courts must accept the decisions of the general church on such questions of internal governance as “final” and “binding.” *Id.* at 363-64. The Court found that the question of whether the union was invalid or whether the rules of the other denomination conflicted with those of the hierarchical church was “exclusively for the consideration of the General Assembly” and thus “beyond the power of this court to revise.” *Id.* at 364; *see also Westbrook v. Penley*, 231 S.W.3d 389, 397 (Tex. 2007) (“It is a core tenet of First Amendment jurisprudence that, in resolving civil claims, courts must be careful not to intrude upon internal matters of church governance.”);

Presbytery of the Covenant, 552 S.W.2d at 872 (permitting “the jury or court to inquire into the correctness of [a hierarchical church’s interpretation of its rules] and overturn [that interpretation] would constitute an impermissible intrusion upon the power of a religious organization ‘to decide for themselves, free from state interference, matters of church government’”) (quoting *Kedroff*, 344 U.S. at 116).

2. The Existence and Identity of a Church’s Clergy, Leaders, Members and Constituent Parts Are Core Ecclesiastical Issues.

That the existence and identity of a church’s clergy, leaders, members, or constituent parts are core ecclesiastical issues at the heart of this First Amendment protection is beyond dispute. In *Gonzalez*, for example, the plaintiff sought an order that he was entitled to a chaplaincy and its associated income pursuant to the unambiguous terms of a civil will. 280 U.S. at 10-11. The Roman Catholic Church, however, determined that the plaintiff was not eligible to hold the chaplaincy under that church’s rules and regulations. *Id.* The Supreme Court held that the church’s determination was conclusive in the civil litigation:

Because the appointment is a canonical act, it is the function of the church authorities to determine what the essential qualifications of a chaplain are and whether the candidate possesses them.... [T]he decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest made them so by contract or otherwise.

Id. at 16.

Similarly, in *Kedroff*, the plaintiffs challenged a New York statute that required local congregations of the Russian Orthodox Church to “be governed by the ecclesiastical body and hierarchy of the American metropolitan district” of that church, not by the Soviet-based hierarchy. 344 U.S. at 97-99. The Supreme Court held that the statute was unconstitutional because “[i]t prohibits in this country the free exercise of religion.” *Id.* at 107. The Court explained that there is a “freedom for religious organizations, an independence from secular

control or manipulation – in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” *Id.* at 116.

The Supreme Court reaffirmed these views in *Milivojevich*, which involved a dispute arising out of a general church’s decision to defrock a sitting bishop and divide his former diocese into three. 426 U.S. at 703-06. The bishop of the original, undivided diocese refused to recognize this decision, and filed suit “to have himself declared the true Diocesan Bishop,” entitled to control of the property at issue. *Id.* at 706-07. The general church, in turn, sought “declaratory relief that [the original bishop] had been removed as Bishop of the Diocese and that the Diocese had been properly reorganized into three Dioceses.” *Id.* at 707.

The Illinois courts ruled that the denomination had not properly acted under its own rules when it purported to depose the original bishop and divide his diocese, but the Supreme Court reversed, reasoning that “*questions of church discipline and the composition of the church hierarchy are at the core of ecclesiastical concern*” *Id.* at 717 (emphasis added). When such issues are implicated, “civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity.” *Id.* at 713.

The courts of Texas and numerous other jurisdictions have ruled similarly. As the Texas Court of Appeals recently affirmed in *Lacy v. Bassett*, 132 S.W.3d 119, 123 (Tex. App. – Houston [14th Dist.] 2004, *no pet.*), under the First Amendment,

civil courts may not intrude into the church’s governance of religious or ecclesiastical matters, such as theological controversy, church discipline, ecclesiastical government, or the conformity of members to standards of morality. [Citation] In addition, courts should not involve themselves in matters relating to the hiring, firing, discipline, or administration of clergy. [Citation] The relationships between an organized church and its ministers are considered a church’s ‘lifeblood’ and matters involving those relationships are recognized as ‘of prime ecclesiastical concern.’ [Citation omitted]

See also, e.g., Casa Linda, 70 S.W.2d at 707 (Texas law “requires deference to [a hierarchical

church's] identity of ... the loyal group, as the representatives of the local church"); *New v. Kroeger*, 84 Cal. Rptr. 3d 464, 485 (Cal. Ct. App. 2008) (courts are required to defer to diocese's determination concerning the qualifications and identity of individuals entitled to serve as leaders of an Episcopal parish), *ordered published by* 202 P.3d 1089 (Cal. 2009); *Episcopal Diocese of Mass v. DeVine*, 797 N.E.2d 916, 921-22 (Mass. App. Ct. 2003) (where dispute involved "question of which individuals hold authority to act on behalf of [the church] ..., we consider the matter to be inappropriate for determination by application of neutral principles of law"); *St. Mary of Egypt Orthodox Church, Inc. v. Townsend*, 532 S.E.2d 731, 736 (Ga. Ct. App. 2000) (trial court had erred in determining whether dissident group were "members in good standing with the power to participate in the affairs of the [church] corporation"); *Metro. Philip v. Steiger*, 98 Cal. Rptr. 2d 605, 609 (Cal. Ct. App. 2000) ("[C]ivil courts are 'ill-equipped' to resolve disputes over which faction represents the 'true' church."); *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 24-25 (N.J. 1980) ([t]he "individual defendants have disaffiliated themselves from The Protestant Episcopal Church and thereby automatically terminated their eligibility to hold office as Wardens and Vestrymen of [the parish]."); *Church of God of Madison v. Noel*, 318 S.E.2d 920, 924 (W. Va. 1984) (where "the proper church authorities had already determined who were the proper trustees of the Church of God of Madison, the civil courts were bound to abide by that decision).

A trial court in California has recently applied this bedrock principle to another case involving another diocese of The Episcopal Church whose leaders also sought to take the diocese out of The Episcopal Church and into the Anglican Province of the Southern Cone, and accordingly held that "since the Episcopal Church has seen fit to recognize [Bishop] Lamb as the new Bishop of the diocese of San Joaquin, we must do so as well." *Diocese of San Joaquin v.*

Schofield, No. 08 CECG 01425, Order on Plaintiffs' Motion for Summary Adjudication at p. 10 (attached hereto at Tab A). The court lacked authority to "look into the propriety of the election and deposition of church officers according to church regulations and rules," because "[a]s the Episcopal Church has seen fit to recognize Lamb as the true Bishop of the Diocese of San Joaquin, this court is without the power to countermand that decision." *Id.* at pp. 12-13. The court thus held that Bishop Lamb, and not the prior bishop who had attempted to lead his diocese out of The Episcopal Church and had begun functioning as a bishop of another denomination, was the individual entitled to control of the corporation and other legal entities holding title to diocesan property. *Id.* at pp. 10-13.

In short, binding precedent from both Texas and the United States Supreme Court, consistent with authority from numerous other jurisdictions across the country, requires the civil courts to respect a hierarchical church's determination of ecclesiastical issues, specifically including the existence and identity of its clergy, leaders, members, and constituent parts.

D. Under This Authority, Defendants Are Not Part of The Episcopal Diocese of Fort Worth and May Not Act As Trustees of the Diocesan Corporation.

As the above authority makes clear, in Texas, a constituent part of a hierarchical church is comprised of those individuals remaining part of The Episcopal Church. It is undisputed that the defendants have left The Episcopal Church and are now worshipping in association with a different denomination, the Anglican Province of the Southern Cone. *See supra* at pp. 30-32. It is also undisputed that a portion of the Diocese's former membership has remained in The Episcopal Church; has elected a Bishop who is recognized by The Episcopal Church as the Bishop of its Diocese of Fort Worth; and continues to represent and operate the Diocese as a constituent, subordinate part of The Episcopal Church. *See supra* at pp. 33-36. Under well-settled Texas authority, it is these individuals, and not the defendants and others who have left

The Episcopal Church, who now constitute the Diocese and whose leaders are entitled to possession and control of the property of the Diocese.

Nor, under the above authority, are defendants entitled to serve or hold themselves out as Trustees of the Diocesan Corporation. The Diocesan Corporation was formed in 1983, pursuant to the express direction and provisions of the Diocese's Constitution and canons, to hold title to property acquired "for the use of the Church in this Diocese." *See supra* pp. 19-20. It acquired all of its initial property from the Diocese of Dallas, pursuant to a declaratory judgment that relied upon the fact that the Corporation was "duly organized under the Constitution and Canons of the Episcopal Diocese of Fort Worth." *See supra* pp. 21-22. In keeping with the Diocesan Corporation's purpose, the Diocesan canons have at all times specified that the

management of [the Diocesan Corporation's] affairs shall be conducted and administered by a Board of Trustees of five (5) elected members, all of whom are either Lay persons in good standing of a parish or mission in the Diocese, or members of the Clergy canonically resident in the Diocese, in addition to the Bishop of the Diocese who shall serve as Chairman of the Board or may designate the President or other officer of the corporation to serve as such. *See supra* at pp. 20.

The relevant canon further specifies that the Trustees' duties are to be conducted "in accordance with [the Corporation's] charter and by-laws and in accordance with the Constitution and Canons of the Diocese," including its unqualified accession to the Constitution and canons of The Episcopal Church. *Id.*

As just noted, there is no dispute that the defendants have left The Episcopal Church and are worshipping in association with another denomination. *See supra* pp. 30-32. There is also no dispute that Bishop Gulick is now recognized by The Episcopal Church as the Bishop of the Diocese, that he has appointed five other individuals to serve as the remaining trustees of the Diocesan Corporation, or that Bishop Gulick, the Diocese, and The Episcopal Church recognize

these individuals, and not the defendants, as the qualified “Lay persons in good standing of a parish or mission in the Diocese, or members of the Clergy canonically resident in the Diocese” entitled under Diocesan Canon 17 to serve as the Trustees of the Diocesan Corporation. See *supra* pp. 33-36. Any effort to dispute the identity or qualification of these individuals would have to fail, moreover. As shown above, the identity and qualification of a Bishop of The Episcopal Church, its lay members in good standing, or its clergy canonically resident in the Diocese, are core ecclesiastical issues into which the Court may not interfere.

E. The Purported 2006 Amendments to the Diocesan Corporation’s Articles Do Not Change This Result.

Defendants may argue that they are entitled to serve as Trustees of the Diocesan Corporation notwithstanding their departure from The Episcopal Church because in 2006, they purported to amend the Diocesan Corporation’s articles and bylaws to provide that any dispute over the identity of the Diocesan Bishop is to be resolved by them, and otherwise to eliminate express references to The Episcopal Church. Any such arguments are baseless, however. The six trustees of the Diocesan Corporation cannot arrogate to themselves the authority to determine the qualification, identification, or discipline of a Bishop of The Episcopal Church. This is a matter comprehensively governed by The Episcopal Church itself. See *supra* pp. 11-12. Moreover, the defendants were bound by their oaths to “conform to the Doctrine, Discipline, and Worship of [the Episcopal] Church,” and/or by Canon I.17(8)’s requirement that they as fiduciaries will “well and faithfully perform the duties of their office in accordance with the Constitution and Canons” of the Church and the Diocese. See *supra* pp. 12-13, 29. The Corporation, similarly, was bound by Diocesan Canon 17 to operate in accordance with the Church’s and the Diocese’s rules, and the Diocese itself had committed as a condition of its formation to accede to the Constitution, canons, and authority of The Episcopal Church. See

supra pp. 18-20. And at all relevant times the Diocesan canons have provided that “[t]he Board of Trustees shall have the power and authority to conduct the affairs of said Corporation in accordance with ... the Constitution and Canons of the Diocese from time to time adopted.” See Moore Aff. at Ex. 10 (1982 Canons, at Canon 11.2), Ex. 32 (2008 Canons, at Canon 17.2), and ¶¶ 31, 34.

The purported amendments to the Corporate Articles were thus *ultra vires* and void, and in any event could not serve to sever the Corporation or its property from The Episcopal Church as a matter of law. See, e.g., *Diocese of San Joaquin v. Schofield*, No. 08CECG 01425, Order on Plaintiffs’ Motion for Summary Adjudication at pp. 8-9, 14-15 (holding that similar efforts to amend the Constitution and corporate articles of the Episcopal Church’s Diocese of San Joaquin were *ultra vires* and void). See also, e.g., *Norton v. Green*, 304 S.W.2d 420, 423-24 (Tex. Civ. App. – Waco 1957, writ *ref’d n.r.e.*) (rejecting argument that the incorporation of the local church meant “that a majority of the corporation could secede from” the hierarchical church under general principles of corporations law, because the general church’s governing documents required that the local church’s corporate “Charter and By-laws must always be in accord with the standards of the [general] Church”); Tex. Rev. Civ. Stat. Ann. art. 1396, § 2.02(A)(16) (Vernon 2003) (“Any religious ... institution organized under the laws of this State may acquire, own, hold, mortgage, and dispose of and invest its funds in real and personal property *for the use and benefit and under the discretion of, and in trust for* any convention, conference or association ... with which it is affiliated, or which elects its board of directors, or which controls it, *in furtherance of the purposes of the member institution.*”) (emphasis added); *Gray v. Saint Matthews Cathedral Endowment Fund, Inc.*, 544 S.W.2d 488, 489 (Tex. Civ. App. - Texarkana 1976, writ *ref’d n.r.e.*) (The Episcopal Church’s “Canon Law also authorizes the Vestry to

organize a corporation, *as an adjunct or instrumentality of the parish*, to use in connection with the administration of the parish and its funds and properties”) (emphasis added); *Green v. Westgate Apostolic Church*, 808 S.W.2d 547, 552 (Tex. App. – Austin 1991, *writ denied*) (“In a conflict between the general procedures outlined in the Texas Non-Profit Corporation Act and the specific procedures contained in the church bylaws, [civil courts] must defer to the church bylaws.”); *Wheelock v. First Presbyterian Church of L.A.*, 51 P. 841, 843 (Cal. 1897) (“[I]ncorporation is only permitted as a convenience to assist in the conduct of the temporalities of the Church. Notwithstanding incorporation the ecclesiastical body is still all important.... A religious corporation’s ... function and object is to stand in the capacity of an agent holding the title to the property, with power to manage and control the same in accordance with the interest of the spiritual ends of the church.”); *New v. Kroeger*, 84 Cal. Rptr. 3d at 479 (“[R]eligious corporations are, in their basic sense, different from ordinary corporations.”); *see also* Moore Aff. at ¶¶ 16-17 (District Court of Dallas County, Texas transferred property from the Diocese of Dallas to the Diocesan Corporation only after affirming that the Corporation had been duly formed under the Constitution and canons of the Diocese).

For the reasons stated above, plaintiffs are entitled to summary judgment on their first cause of action, which seeks a declaration that those individuals who remain loyal to The Episcopal Church and have been elected or appointed to leadership positions along with Bishop Gulick, and not the defendants, constitute the continuing Episcopal Diocese of Fort Worth and serve as the current Trustees of the Diocesan Corporation. As such, they are entitled to possession and control of the property of the Diocese, including that held by the Diocesan Corporation.

II. **Plaintiffs Are Entitled To Summary Judgment On Their Claim For A Declaration That The Property Of The Diocese Must Be Used For The Mission Of The Episcopal Church.**

In addition to their claim for relief concerning the identity of the Diocese and its corporate Trustees, plaintiffs' first cause of action seeks a declaratory judgment that the property held by the Diocese is held, and must be used, for the mission of The Episcopal Church and not otherwise. Plaintiffs are also entitled to this judgment as a matter of law.

There is no dispute that the Episcopal Diocese of Fort Worth was formed out of the Episcopal Diocese of Dallas, pursuant to the action of The Episcopal Church's General Convention. *See supra* pp. 15-17. There is no dispute that as a condition of its formation, the Diocese was required to accede and did accede to The Episcopal Church's Constitution and canons. *See supra* pp. 18-19. There is no dispute that provisions of that Constitution and those canons govern the selection, recognition, and discipline of the Diocese's Bishop, required him and all clergy as a condition of their ordinations to commit in writing to conform to the "Doctrine, Discipline, and Worship" of The Episcopal Church, and require all persons accepting any office within the Church to "well and faithfully perform the duties of the office in accordance with the Constitution and Canons of [the Episcopal] Church and the Diocese." *See supra* pp. 12-13. It is further undisputed that the Church interprets its rules as prohibiting a Diocese from leaving the Church, and that the Church has deposed a former Bishop because he violated those rules by attempting to remove a Diocese from the Church. *See supra* at p. 36 n.12. Finally, there is no dispute that upon its formation, the Diocese received all of its initial property from the Diocese of Dallas, pursuant to a declaratory judgment which affirmed that it had been duly formed under the Church's Constitution and canons, or that the Diocesan canons have always described its property as that "of the Church in this Diocese." *See supra* pp. 21-22.

Under these circumstances, as we now show, (1) Texas law applicable to voluntary associations, (2) Texas law applicable to charitable trusts, (3) relevant provisions of the Texas Non-Profit Corporation Code, and (4) the specific “neutral principles” analysis approved by the United States Supreme Court for use in Church property disputes, confirm that the property held by the Diocese must be held and used for the mission of The Episcopal Church. This result is further consistent with the overwhelming weight of authority involving property disputes within The Episcopal Church, as well as basic consideration of equity. Defendants may not retain for their own use in association with some other denomination property that was given and has been maintained by past generations of Episcopalians for that Church’s work and ministry.

A. Members of Religious Organizations are Bound by Organizational Rules Under Both Texas Law and Constitutional Requirements.

Texas courts have embraced the sensible principle that an association’s own rules are binding upon that association’s members, and should be applied where applicable to resolve disputes among them. Thus, Texas law governing voluntary associations holds that the rules of a voluntary association constitute a binding contract between an association and its members. *See, e.g., Dist. Grand Lodge No. 25 Grand United Order of Odd Fellows v. Jones*, 138 Tex. 537, 545, 549, 160 S.W.2d 915 (1942) (“*Order of Odd Fellows*”) (a voluntary association’s internal rules are “part and parcel of the contract the [members] made for themselves when they became members”); *see also Stevens v. Anatolian Shepherd Dog Club of Am., Inc.*, 231 S.W.3d 71, 74 (Tex. App. – Houston [14th Dist.] 2007, *pet. denied*) (“A member, by becoming such, subjects himself to his organization’s power to administer, as well as its power to make, its rules.”).

Texas courts also generally defer to voluntary associations’ interpretation of their own rules. *Order of Odd Fellows*, 138 Tex. at 548 (“It is generally held that the constitution and by-laws of a voluntary association, whether incorporated or not, are controlling as to its internal

management.”); *Stevens*, 231 S.W.3d at 74 (“Courts are not disposed to interfere with the internal management of a voluntary association.”); *Juarez v. Tex. Ass’n of Sporting Officials El Paso Chapter*, 172 S.W.3d 274, 279 (Tex. App. – El Paso 2005, *no pet.*) (“The courts will not interfere with the internal management of a voluntary association so long as the governing bodies of such association do not substitute legislation for interpretation, and do not act totally unreasonably or contravene public policy or the laws in such interpretation and administration.”); *Burge v. Am. Quarter Horse Ass’n*, 782 S.W.2d 353, 354-55 (Tex. App. – Amarillo 1990, *no writ*) (a voluntary association “has the right to manage, within the legal limits, its own affairs without interference from the courts”).

Such deference is necessary in order to respect and preserve the autonomy of such organizations. As the Court of Appeals has explained,

[t]he policy of non-intervention in the affairs of private associations ... is a well-established and a wise and necessary policy. Without such policy, organizations ... simply could not function. If the courts were to interfere every time some member, or group of members, had a grievance, real or imagined, the non-profit, private organization would be fraught with frustration at every turn and would founder in the waters of impotence and debility.... [A]n association is free to establish rules of conduct and procedures that apply to membership within the organization. Constant interference by the courts would lead to a virtual inability to function with no independence of purpose.

Juarez, 172 S.W.3d at 279; *see also Stevens*, 231 S.W.3d at 76 (noting “the traditional rule of allowing associations the greatest possible autonomy”).

Religious organizations are no exception to these rules. Texas courts have long recognized “that persons who unite themselves to a hierarchical church organization do so with an ‘implied consent’ that intra church disputes ... will be decided by the” church’s own rules and judicatories. *Casa Linda*, 710 S.W.2d at 703 (citation omitted). As the Court of Appeals has explained, “members of the local church ... united ... with [a hierarchical church] ... thereby

consented to its laws, and their rights and obligations are to be determined by the laws of that church.” *Browning*, 273 S.W.2d at 134; *see also Green*, 808 S.W.2d at 551 (Texas law “imputes to members ‘implied consent’ to the governing bylaws of their church”); *Templo Ebenezer*, 752 S.W.2d at 198 (“[W]here a local congregation is a subordinate member of some higher ecclesiastical tribunal that controls the entire membership[,] ... [t]he local congregation is bound by the constitution and rules of the parent body.”); *Presbytery of the Covenant*, 552 S.W.2d at 871-72 (“the members of a church organization which is hierarchical as to church government cannot dissolve a local church in contravention of the governing rules or edicts of the mother church”).

Indeed, in the case of churches, the First Amendment *requires* the courts to respect the association’s own internal rules in order to ensure that churches are able to govern themselves, free from state interference. *See, e.g., Milivojevich*, 426 U.S. at 709-10; *Kedroff*, 344 U.S. at 116 (religious organizations have a constitutional right “to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”); *Episcopal Church Cases*, 198 P.3d at 82 (“Respect for the First Amendment free exercise rights of persons to enter into a religious association of their choice ... requires civil courts to give effect to the provisions and agreement of that religious association.”). The policy of deference to voluntary associations is heightened in the case of religious organizations, because “[m]embership in a church creates a different relationship from that which exists in other voluntary societies formed for business, social, literary, or charitable purposes. Church relationship stands upon a different and higher plane” *Minton v. Leavell*, 297 S.W. 615, 621-22 (Tex. App. – Galveston 1927, *writ ref’d*).

B. Texas Charitable Trust Law Confirms that Property Donated To a Constituent Part of a Hierarchical Church Must Be Used For That Church.

Texas courts have also long recognized the basic principle that “[a] gift to a charitable institution or society will be presumed to be a charitable gift, though no purpose is named, and such institution or society will be presumed to hold such gifts in trust for those charitable purposes for which it exists.” *Boyd v. Frost Nat’l Bank*, 145 Tex. 206, 220, 196 S.W.2d 497 (1946) (quoting *De Camp v. Dobbins*, 29 N.J. Eq. 36, 50 (1878)). Accordingly, when a charitable association receives a gift, that property is imposed with a charitable trust “and the association would be wholly unauthorized to devote it otherwise than to charity only.” *Boyd*, 145 Tex. at 219.

In general, “[p]roperty transferred unconditionally to a [charitable] corporation ... is ... subject to implicit charitable ... limitations defined by the donee’s organizational purpose” *Blocker v. State*, 718 S.W.2d 409, 415 (Tex. App. - Houston [1st Dist.] 1986, writ ref’d n.r.e.) (italics omitted); 4A William F. Fratcher & Austin W. Scott, Jr., *The Law of Trusts* § 348.1 (4th ed. 1989). There is no suggestion in the case law that such trusts are presumed to be transferable to some other charitable or corporate purpose by the corporation’s current members or leadership. To the contrary, to protect the expectations of generations of individual donors, the law requires that property donated to a particular church – like any charity – be used for that charity’s mission. *See also, e.g., Episcopal Church Cases*, 198 P.3d 66, 84 (Cal. 2009) (“The only [donor] intent a secular court can effectively discern is that expressed in legally cognizable documents. In this case, those documents show that the local church agreed and intended to be part of a larger entity and to be bound by the rules and governing documents of that greater entity.”); *In re Metro. Baptist Church of Richmond, Inc.*, 121 Cal. Rptr. 899, 903 (Cal. Ct. App. 1975) (“[T]rust property of a nonprofit religious or charitable corporation [should] be not

diverted from its declared purpose,” and may only be used “to carry out the objects for which the [corporation] was created.”) (citation omitted).

C. The Texas Non-Profit Corporation Act Recognizes That Church Property is Held in Trust for the Underlying Religious Organization.

Texas statutes similarly confirm that religious corporations are subordinate to and controlled by the religious organizations that formed them and hold property for the benefit of and in trust for those organizations.

The Non-Profit Corporations Act provides that subordinate parts of a hierarchical church “may incorporate under this Act with the consent of a majority of its members, who shall authorize the incorporators to execute the articles of incorporation.” Tex. Rev. Civ. Stat. Ann. Art. 1396, § 3.01(B). When the constituent entity incorporates, the Act provides that the incorporated entity will hold property for the benefit of the general church:

Any religious ... institution organized under the laws of this State may acquire, own, hold, mortgage, and dispose of and invest its funds in real and personal property for the use and benefit and under the discretion of, and in trust for any convention, conference or association ... which elects its board of directors, or which controls it, in furtherance of the purposes of the member institution.

§ 2.02(A)(16) (emphasis added). Likewise, “[b]oards of directors of religious ... institutions may be affiliated with, *elected and controlled by a convention*, conference or association organized under the laws of the State ... whose membership is composed of representatives, delegates, or messengers from any church or other religious association.” § 2.14(B) (emphasis added).

The Act itself thus recognizes that religious corporations are subordinate to, and hold property in trust for, the religious organizations that formed them.

D. The “Neutral Principles” Analysis Approved in *Jones v. Wolf* Similarly Requires That Church Property Disputes Be Resolved in Accordance with Denominational Rules and Polity.

As shown in Section I above, Texas courts have consistently treated church property disputes like the one at bar, involving a dispute among the members of a general church’s constituent part, as a “question of identity,” and have held that those individuals remaining loyal to the greater, general church in fact represent the continuing local church body entitled to use and control that local church’s property. *See supra* at pp. 39-41. When the specific claim raised is that the property itself is impressed with a restriction on its permissible use, however, the United States Supreme Court has approved as Constitutional an alternative method of analysis, which it referred to as the “neutral principles” approach. Thus, in *Jones v. Wolf*, 443 U.S. 595 (1979), the Court held that the states could resolve such church property disputes by reviewing (1) the deeds to the disputed property, (2) the governing documents of the local church body, (3) the governing documents and rules of the general church body, and (4) any applicable state statutes, to see if the disputed property is impressed with a trust or similar restriction in the general church’s favor. *Id.* at 600.

The Court cautioned that the First Amendment’s Free Exercise guarantee “requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization,” *id.* at 602, and explained that the neutral principles analysis meets that constitutional imperative because it “shares the peculiar genius of private-law systems in general – flexibility in ordering private rights and obligations to reflect the intentions of the parties.” *Id.* at 603. Thus,

[t]hrough appropriate reversionary clauses and trust provision, religious societies can specify what is to happen to church property in the event of a particular contingency, or what religious body will determine the ownership in the event of a schism or doctrinal controversy. In this manner, a religious organization can

ensure that a dispute over the ownership of church property will be resolved in accord with the desires of the members. *Id.* at 603-604.

See also id. at 606 (“The neutral principles approach cannot be said to ‘inhibit’ the free exercise of religion,” because “[a]t any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property.”).

Like the principles of Texas law applicable to voluntary associations and charitable trusts generally, then, the “neutral principles” analysis approved in *Jones v. Wolf* similarly requires that the polity and internal rules of a religious organization be respected and enforced.

E. Under This Authority, Property of the Episcopal Diocese of Fort Worth Is Held For The Mission of The Episcopal Church.

Each of the bodies of law just discussed confirms, from its own perspective, the basic principle that charitable donations to a constituent part of a particular denomination, subject to explicit rules describing or restricting the use of the property for that denomination, in fact will continue to be protected and used for that denomination. Under that principle, and under each of these bodies of law, property held by the Episcopal Diocese of Fort Worth is protected and must be used for the mission and ministry of The Episcopal Church.

The rules of The Episcopal Church and the Diocese make clear that Diocesan property is held for the Church’s work and mission, and cannot be diverted to another denomination. Since its formation, the Constitution of the Episcopal Diocese of Fort Worth has explicitly described the property it holds as that acquired “for the use of the Church in this Diocese, including the real property of all parishes and missions, as well as Diocesan institutions.” *See supra* at p. 19.

Diocesan Canon 18.1 further specifies that property held by the Diocesan Corporation “may only be conveyed or encumbered with the approval of the Board of Trustees and in accordance with the Constitution and Canons of the Episcopal Diocese of Fort Worth.” *Id.* Diocesan Canon 30 provides that “The dedicated and consecrated Churches and Chapels of the several Parishes and

Missions of the Diocese may be opened only for the services, rites and ceremonies, or other purposes, either authorized or approved by this Church, and for no other.” *Id.* To the extent that the Diocese holds title to property that is used by individual parishes or mission congregations within the Diocese, moreover, that property is also explicitly subject to numerous Episcopal Church canons, including Canon I.7(4), which provides: “All property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located.” *See Mullin Aff. I* at ¶ 116.¹³

Other rules explicitly preclude the individuals in control of the Diocese, the Diocesan Corporation, or the property at issue from taking any action to divert that property for purposes other than the Church’s mission. Diocesan Canon 17 specifies that the Trustees of the Corporation holding title to such property must conduct their duties “in accordance with [the Corporation’s] charter and by-laws and in accordance with the Constitution and Canons of the Diocese.” As noted, the Diocesan Constitution itself accedes to the Constitution and canons of The Episcopal Church. *See supra* at pp. 18-19; *Moore Aff.* at ¶ 34. Moreover, the governance of the Corporation holding title to most such property is to be vested in individuals meeting ecclesiastical criteria and subject to discipline of The Episcopal Church. Thus, these individuals must be “Lay persons in good standing of a parish or mission in the Diocese, or members of the Clergy canonically resident in the Diocese, in addition to the Bishop of the Diocese.” *See supra* at p. 20. Any clergy, including the Diocesan Bishop, are bound to “conform to the Doctrine, Discipline, and Worship of this Church,” and may be disciplined, including being removed from the ordained ministry and from clerical office, for violating the provisions of the Church’s or their Diocese’s Constitution or canons. *See supra* at p. 12. Finally, Canon I.17(8) applies to

¹³ Other canons similarly restrict the use and control of such property and protect it for the Church’s mission. *See Mullin Aff. I* at ¶¶ 113-15.

“any person accepting any office in this Church” and requires them to “well and faithfully perform the duties of their office in accordance with the Constitution and Canons” of the Church and the Diocese. *See supra* at p. 13.

The Church’s and the Diocese’s rules thus make clear that Diocesan property in fact is that “acquired for the use of the Church,” and that Diocesan leaders are not authorized or empowered to divert it to any other purpose.

As shown above, these rules are binding on The Episcopal Church’s constituent parts, specifically the Diocese, and are conclusive of this dispute under Texas law applicable to voluntary associations (*see supra* Section II.A), under the requirements of the First Amendment (*see id.*), and under the “neutral principles” analysis approved in *Jones v. Wolf* (*see supra* Section II.D).¹⁴ Texas law applicable to charitable trusts further confirms that the property held by the Diocese – acquired as a result of charitable donations to a subordinate part of The Episcopal Church, and indeed as a result of a judicial order that expressly relied upon the Diocese’s and its Corporation’s Episcopal status – must continue to be used in accordance with “the donee’s

¹⁴ Effective restrictions on property held by a constituent part of a hierarchical church need only be stated in one of the categories of evidence reviewed under the “neutral principles” analysis. *See, e.g., Jones v. Wolf*, 443 U.S. at 600-601 (discussing application and effect of approach under review, under which local church was permitted to divert property only if *none* of the four factors contained any restriction on such property); *Episcopal Diocese of Rochester v. Harnish*, 899 N.E.2d 920, 923-25 (N.Y. 2008) (enforcing restriction on local church property under “neutral principles” based on Episcopal Church canons alone). In this case, however, all four factors tend to support the plaintiffs’ claim under a “neutral principles” analysis. All of the property was donated or deeded to “The Episcopal Diocese of Fort Worth” or the “Corporation of the Episcopal Diocese of Fort Worth,” much of it pursuant to a Texas court order that explicitly relied upon the Diocese’s status as constituent parts of The Episcopal Church and the Corporation’s status as a valid instrument of the Diocese. *See supra* pp. 21-22. The Diocese’s Constitution expressly accedes to the Constitution and canons of The Episcopal Church and recognizes the authority of its General Convention. The Corporation’s Articles, as required by the Diocesan canons, also expressly tie the Corporation and its property to the Diocese, a subordinate, constituent part of The Episcopal Church. Finally, as discussed above, Texas statutes further establish that religious corporations hold their property for the benefit of the religious associations they were formed to serve.

organizational purpose”: to carry out the mission and ministry of The Episcopal Church. *Blocker v. State*, 718 S.W.2d 409, 415 (Tex. App. - Houston [1st Dist.] 1986, *writ ref’d n.r.e.*) (emphasis omitted); *see also supra* Section II.B. Finally, and similarly, the Texas statutes governing non-profit religious corporations confirm that property held by the Diocesan Corporation is held “in trust for any convention, conference or association ... which elects its board of directors, or which controls it, in furtherance of the purposes of the member institution.” *See supra* Section II.C. Accordingly, and as a matter of law, plaintiffs are entitled to a declaration that the property of the Diocese is held and must be used for the mission of The Episcopal Church.

F. The Great Weight of Authority from Across the Country Confirms That Property Held By Constituent Parts of The Episcopal Church Must Remain With The Church in the Event of a Dispute.

The great weight of authority from across the country makes clear that, regardless of what particular method of analysis is used, property of an Episcopal Church body must remain with the Church in the event of a dispute. The only decision thus far involving a diocese, rather than an individual congregation, of The Episcopal Church has recently so concluded, holding that as the diocese had been required to accede to the Constitution of The Episcopal Church as a condition of its formation and had so acceded, it lacked authority to revoke its accession or “disaffiliate” from the Church. *Diocese of San Joaquin v. Schofield*, No. 08CECG 01425, Order on Plaintiffs’ Motion for Summary Adjudication at pp. 7-9. For this reason, and because in any event the proper leadership of the continuing diocese was an ecclesiastical matter on which the Court could not second guess the Church itself, the court held that the Bishop recognized by the Church as the bishop of its diocese was in fact the individual entitled to control of the corporation and legal entities holding title to diocesan property. *Id.* at pp. 10-13.

Numerous cases involving individual parishes of The Episcopal Church reach similar conclusions. *See Episcopal Church Cases*, 198 P.3d 66 (Cal. 2009); *Episcopal Diocese of*

Rochester v. Harnish, 899 N.E.2d 920 (N.Y. 2008); *In re Church of St. James the Less*, 888 A.2d 795, 810 (Pa. 2005); *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 620 A.2d 1280, 1292 (Conn. 1993); *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 108 (Colo. 1986) (*en banc*) (upholding the Church's trust interest based on canons pre-dating I.7(4)); *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 610 P.2d 182, 184 (Nev. 1980) (finding "no indication in our statutes or in the relevant documents of church government that a majority of a local congregation could withdraw from the denomination and retain control of property held in the name of the local church corporation"); *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 417 A.2d 19, 25 (N.J. 1980) ("The individual defendants are free to disassociate themselves from [the parish and the Church] and to affiliate themselves with another religious denomination The problem lies in defendants' efforts to take the church property with them. This they may not do."); *Daniel v. Wray*, 580 S.E.2d 711, 718 (N.C. Ct. App. 2003); *Episcopal Diocese of Mass. v. DeVine*, 797 N.E.2d 916, 923 (Mass. App. Ct. 2003); *Trustees of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 684 N.Y.S.2d 76, 81 (App. Div. 1999); *Bennison v. Sharp*, 329 N.W.2d 466, 474-75 (Mich. Ct. App. 1982) (same). These holdings presage and further confirm the correctness of the court's holding in *Diocese of San Joaquin*: To hold that Episcopal *parish* property must remain with The Episcopal Church in the event of a dispute, but that property held by the dioceses that form and supervise those parishes need not, would be nonsensical. Indeed, as noted above, much of the property that the Diocese of Fort Worth holds *is* property held for the use of the Church's local congregations.

The conclusion dictated in this case by all of the authority discussed in Sections II.A-D above is thus fully consistent with authority specifically involving property disputes within The Episcopal Church.

III. The Diocesan Plaintiffs Are Entitled To Summary Judgment On Their Claim Under Code § 16.29.

Texas Business and Commercial Code § 16.29 provides:

A person may bring an action to enjoin an act likely to injure a business reputation or to dilute the distinctive quality of ... a mark or trade name valid at common law, regardless of whether there is competition between the parties or confusion as to the source of goods or services.

A claim under § 16.29 requires the plaintiff to show: “(1) the name [or mark] it seeks to protect is eligible for protection; (2) it is the senior user of the name [or mark], (3) there is a likelihood of confusion between its [name or] mark and that of the other user; and (4) ... the likelihood of confusion will cause irreparable injury.” *See, e.g., Horseshoe Bay Resort Sales Co. v. Lake Lyndon B. Johnson Improvement Corp.*, 53 S.W.3d 799, 806 (Tex. App. – Austin 2001, *pet. denied*). Names or marks are “eligible for protection” if they “identify and distinguish the plaintiff’s goods or services from those of others.” *Id.*

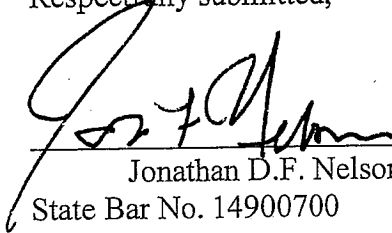
In this case, it is undisputed that “the Episcopal Diocese of Fort Worth” and “the Corporation of the Episcopal Diocese of Fort Worth” are the names that were selected and have been used by The Episcopal Church’s Diocese of Fort Worth since that entity was created in 1983. *See supra* at p. 22. It is also undisputed that the Diocese, shortly after its creation, developed and adopted a distinctive shield, which it has used since 1983 as the symbol of the Diocese. *Id.* These names and symbols have uniquely identified the Episcopal Diocese, and distinguished them from any other religious or secular organization. Since November 2008, the defendants have been using these very same names and symbols to represent a constituent part of a different denomination. *See supra* at p. 32. This continued usage is obviously likely to dilute

the distinctiveness of the Diocese's names and mark, and to cause confusion regarding the true affiliation or identity of the entity using those names and marks in a manner for which there is no adequate remedy at law. *See, e.g., Am. Century Proprietary Holdings, Inc. v. Am. Century Cas. Co.*, 295 F. App'x. 630, 638 (5th Cir. 2008) (affirming summary judgment on claims under § 16.29). Accordingly, the Diocesan plaintiffs are entitled to summary judgment on their third cause of action, brought under § 16.29.

CONCLUSION

For the reasons set forth above, plaintiffs' motion for summary judgment should be granted, and the Court should, *inter alia*, declare that plaintiff Diocese is the continuing Episcopal Diocese of Fort Worth; order defendants to turn over all property of the Diocese or the Diocesan Corporation to the plaintiff Diocese; and order defendants to provide an accounting of all property of the Diocese or Diocesan Corporation.

Respectfully submitted,



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Dated: September 3, 2009

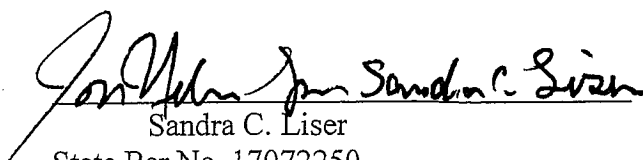
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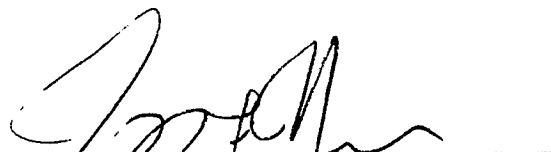
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Certificate of Service

This is to certify that a true and correct copy of the foregoing Plaintiffs' Motion for Partial Summary Judgment and Brief in Support of Motion has been sent this 3rd day of September, 2009, by hand delivery to:

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