CAUSE NO. 141-237105-09

THE EPISCOPAL CHURCH, et al.	§	IN THE DISTRICT COURT OF
	§	
VS.	§	TARRANT COUNTY, TEXAS
	§	
FRANKLIN SALAZAR, et al.[1]	§	141ST DISTRICT COURT

LOCAL EPISCOPAL PARTIES' RESPONSE TO DEFENDANTS' MOTION FOR DISCLOSURE OF POTENTIAL CONFLICTS[2]

TO THE HONORABLE COURT:

Defendants' motion is yet another attempt to delay resolving this case on the merits. This time, **Defendants attempt to interrogate a sitting judge about his private family religious information, with absolutely no legal justification, in a motion baselessly hinting at recusal *nineteen months into the case***. This violates Texas's presumption of judicial impartiality and its recusal procedure. Defendants' motion is invalid, dilatory, and should be denied.

Defendants file this eleventh-hour delay motion because they know the Local Episcopal Parties' and The Episcopal Church's summary judgment motions, set for hearing on January 14, 2010, should be granted. Defendants are a breakaway faction that severed ties with The Episcopal Church, pledged allegiance to a church in South America, but continue to call themselves an Episcopal Diocese and take property that The Episcopal Church has acquired for its mission in North Texas since 1838. *Under 100 years of unchanged First Amendment law, only The Episcopal Church can determine the purely religious question of who represents the Episcopal Diocese of Fort Worth; civil courts must accept and apply this determination. And*

[1] The style is being shortened at the request of the Clerk's office. It does not imply that any parties are omitted or dropped from the case.

[2] The Local Episcopal Parties are Rt. Rev. C. Wallis Ohl, Robert Hicks, Floyd McKneely, Shannon Shipp, David Skelton, Whit Smith, Margaret Mieuli, Anne T. Bass, Walt Cabe, the Rev. Christopher Jambor, the Rev. Frederick Barber, the Rev. David Madison, Robert M. Bass, the Rev. James Hazel, Cherie Shipp, the Rev. John Stanley, Dr. Trace Worrell, the Rt. Rev. Edwin F. Gulick, Jr., and Kathleen Wells.

under 100 years of unchanged Texas church property law, only whomever The Episcopal Church recognizes as the Episcopal Diocese of Fort Worth and its constituent organizations have a right to diocesan property. It is undisputed that The Episcopal Church recognizes only the Local Episcopal Parties as the Episcopal Diocese of Fort Worth. **Defendants have no legal basis for their actions, and so they continue to launch these baseless, dilatory motions in a vain attempt to avoid their day of judgment**.

The Local Episcopal Parties respectfully request that the Court deny this motion for any of three reasons: (1) Defendants state no valid legal basis to demand disclosure of information from a sitting judge; (2) Defendants have waited too long to question the Court's ability to hear this case; and (3) the information Defendants seek is irrelevant, as it would not provide grounds to prevent the Court from hearing this case.

I. FACTUAL BACKGROUND

This case has been on file for over nineteen months, since **April 14, 2009**. Promptly after the case was filed, attorney for Plaintiff Local Episcopal Parties, Jon Nelson, disclosed to defense Counsel, Shelby Sharpe, that Frank Hill had represented the Honorable Judge's mother in an earlier matter; a telephonic conference was held, no party requested recusal, and the Court did not recuse itself. Now, on or about **October 8, 2010**, after litigating this case for eighteen months, Defendants filed a novel motion styled "Motion for Disclosure of Potential Conflicts." Defendants did not even act to set this motion for hearing until over a month later, on or about **November 10, 2010**.[3] In their motion, Defendants demand that the sitting Honorable Judge of this Court "fully disclose on the record whether he, his family members, or his court staff":

1. are members of any of the churches, congregations, schools, or other Episcopal entities involved in this suit;

[3] *See* Defendants' Notice of Hearing on Defendants' Motion for Disclosure of Potential Conflicts (filed 11/12/10).

2. have attended any of the churches, congregations, schools, or other Episcopal entities involved in this suit; or

3. have indicated a preference for any party or outcome in the case.[4]

As shown below, Defendants (1) have no legal basis for this interrogation; (2) have waived any putative grounds for recusal after nineteen months of litigation; and (3) seek disclosure of information that would not justify recusal even if true. The motion should be denied as improper and untimely.

II. DEFENDANTS STATE NO LEGAL BASIS TO DEMAND DISCLOSURE OF INFORMATION FROM A SITTING JUDGE.

Defendants have stated no valid authority for their demand to interrogate a sitting Judge. As the Austin Court of Appeals noted: "**current rules of civil procedure do not mandate, or even suggest, a 'disclosure' requirement. Such a requirement, for purposes of exploring and probing potential bias, is incongruous with the presumption of impartiality afforded our judiciary**."[5]

As the sole basis for their motion, Defendants cite Texas Rule of Civil Procedure 18b(5). But this rule states only: "The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record."[6] Rule 18b(5) provides no basis for Defendants' purported new discovery mechanism, a hearing to interrogate a sitting Judge. Rule 18a and b authorize motions for recusal, not "motions for disclosure." Defendant has not filed a motion to recuse or met the requirements of a motion to recuse.[7] Because Defendants offer no support for the relief requested, the Court should deny the motion.

---

[4] *See* Defendants' Motion for Disclosure of Potential Conflicts (filed on or about 10/8/10).

[5] *Ex Parte Ellis*, 275 S.W.3d 109, 121 n.6 (Tex. App.—Austin 2008, orig. proceeding) (emphasis added).

[6] TEX. R. CIV. P. 18b(5).

[7] Defendants' motion cannot be construed as a motion to recuse because it fails to meet many of the requirements for such a motion, including verification and specificity. *See* TEX. R. CIV. P. 18a(a) ("The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit.").

III. DEFENDANTS HAVE WAITED TOO LONG TO QUESTION THE HONORABLE JUDGE'S ABILITY TO HEAR THIS CASE.

Texas Rule of Civil Procedure 18a and b govern the disqualification and recusal of judges. Rule 18a provides that a motion to recuse must be filed "[a]t least ten days before the date set for trial or other hearing."[8] Although Defendants' motion is not a motion to recuse, it is brought "[p]ursuant to" the recusal rules[9] and seeks information that Defendants apparently hope to use for a subsequent motion for recusal. Thus, to the extent that Defendants are permitted to bring a so-called "motion for disclosure" at all, it would be subject to the time limitations set forth in Rule 18a. "Rule 18a requires that such a motion be filed at least ten days before the date of the first hearing or trial over which the judge is to preside."[10] Because the first in-court hearing in this cause occurred on or about September 9, 2009 (Defendants' own Rule 12 motion),[11] Defendants have waited well beyond "ten days before the date set for...other hearing."[12]

Additionally, a motion to recuse must be heard by a judge other than the presiding judge in the cause at issue. *See* TEX. R. CIV. P. 18a(c) ("Prior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion.").

[8] TEX. R. CIV. P. 18a(a).

[9] *See* Defendants' Motion for Disclosure of Potential Conflicts ("Pursuant to Rule 18b(5) of the Texas Rules of Civil Procedure, Defendants respectfully request...").

[10] *Beard v. Beard*, 49 S.W.3d 40, 51 (Tex. App.—Waco 2001, pet. denied).

[11] *See* Court's 9/16/09 Order referencing 9/9/09 hearing.

[12] The Episcopal Parties recognize the line of cases taking the position that, in order to be timely, a recusal motion must be filed 10 days before trial or before *any* hearing, not necessarily the first hearing. *See, e.g., Brosseau v. Ranzau*, 911 S.W.2d 890, 893 (Tex. App.—Beaumont 1995, no writ). But the better rule is the one stated in *Beard*, 49 S.W.3d at 51 ("at least ten days before the date of the first hearing or trial over which the judge is to preside"). *Hudson v. Texas Children's Hosp.* applies this same approach for the context of new events triggering recusal (finding the relevant timeframe was "10-days before the *next scheduled hearing*" after "the claimed event that triggers recusal") (emphasis added). 177 S.W.3d 232, 235 (Tex. App.—Houston [1 Dist.] 2005, no pet.). This rule is consistent with the obvious intent of Rule 18a to prevent parties from lying behind the log and springing recusal motions late in the case as a tactic. Similarly, the Texas statute governing objections to assigned judges requires such objections be filed before "the first hearing or trial." GOVT. CODE § 74.053. The inferior *Brosseau* approach leads to the nonsensical outcome that an untimely motion can be rendered timely simply – and illogically – by scheduling an unrelated hearing more than 10 days in the future.

This cause has been pending **for nineteen months**, and Defendants have participated in numerous hearings, including their own mandamus proceeding to the Court of Appeals. Defendants did not raise their current "topics" of inquiry in April 2009, at the telephonic conference on the Frank Hill recusal issue, nor in any of the several hearings to follow. Instead, Defendants allowed this case to proceed for nearly eighteen months before filing their new motion and for nineteen months before even setting and serving a notice of hearing. By failing to raise any question during all of the preceding litigation, Defendants have waived any claim for recusal, are estopped from raising the issue now, and thus have no basis to demand disclosure of information calculated to support such a claim. Under similar circumstances, courts in Texas and beyond have rejected motions for recusal as untimely.[13] Likewise, Defendants' Motion for Disclosure of Potential Conflicts should be denied as untimely.[14]

IV. THE INFORMATION DEFENDANTS SEEK IS IRRELEVANT, AS IT WOULD NOT PROVIDE GROUNDS TO DISQUALIFY THE HONORABLE TRIAL JUDGE FROM HEARING THIS CASE.

Defendants' motion should also be denied because it will not produce information requiring disqualification or recusal. Because courts enjoy a presumption of impartiality, "a

---

[13] *See, e.g., Blackwell v. Humble*, 241 S.W.3d 707, 714-15 (Tex App.—Austin 2007, no pet.) (rejecting as untimely a motion to recuse that "was filed a year after the first hearing in the case and eight months after the decree was signed"); *Beard*, 49 S.W.3d at 51-52 (finding untimely a motion to recuse "made after [the judge] had presided over extensive pre-trial proceedings and had heard the case on its merits"). *See also Singer v. Wadman*, 745 F.2d 606, 608 (10th Cir. 1984) ("In the first place, the motion to disqualify was not, in our view, timely filed. The motion was filed about one year after the complaint was filed and after the appellants had suffered some adverse rulings on interlocutory matters.").

[14] Rule 18a(a) suggests that the timing rules apply to both recusal and disqualification. Although at least one post-Rule 18a case, grounded on pre-Rule 18a authority, suggests that disqualification, as opposed to recusal, can be sought at any time, Defendants here do not raise or seek to inquire into any of the limited constitutional bases for disqualification. *McKenna v. State*, 221 S.W.3d 765, 768 (Tex. App.—Waco 2007, no pet.) (citations omitted); these bases are (a) the judge has served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter; (b) they know that, individually or as a fiduciary, they have an interest in the subject matter in controversy; or (c) either of the parties may be related to them by affinity or consanguinity within the third degree. TEX. R. CIV. P. 18b(1). A disqualifying interest "must be a direct pecuniary or property interest in the subject matter of the litigation." *McKenna*, 221 S.W.3d at 768. In contrast, Defendants insinuate personal bias and partiality, which are putative grounds only for recusal and subject to the time limits of the rule.

party seeking recusal must satisfy a 'high threshold' before a judge must be recused."[15] Although the Texas Rules of Civil Procedure provide that bias or interest in the outcome of a pending action is a ground for disqualification,[16] bias does "not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate."[17]

Under this heightened standard, Defendants would not prevail on a motion to recuse even if the Honorable Judge were in some way affiliated with the Episcopal Church, the subject of Defendants' first two demands for disclosure. Such an affiliation would not rise to the level of "wrongful or inappropriate" as required by Texas and federal courts for recusal. Courts reject the proposition that a judge's religious affiliation or membership in a church is a valid ground for recusal.[18] Texas Rule of Civil Procedure 18 itself states that even holding "an office in an educational, religious, charitable, fraternal, or civic organization is not a 'financial interest'" warranting recusal. The Dallas Court of Appeals affirmed denial of recusal where the Judge was a member of, and donor to, a university athletic booster society where the university was a party to the case involving the school's athletic program.[19] As another court noted: "Besides being offensive, the Motion was meritless. A Judge's personal religious beliefs have no bearing on the recusal standard."[20] And another court observed: "courts have consistently held that membership

---

[15] *Ex Parte Ellis*, 275 S.W.3d at 116-17 (citing *Liteky v. United States*, 510 U.S. 540, 558 (1994) (Kennedy, J., concurring); *Abdygapparova v. State*, 243 S.W.3d 191, 198 (Tex. App.—San Antonio 2007, pet. ref'd)).

[16] TEX. R. CIV. P. 18b(2)(a), (b).

[17] *Ex Parte Ellis*, 275 S.W.3d at 117 (citing *Liteky*, 510 U.S. at 550).

[18] *See Bryce v. Episcopal Church in the Diocese of Colo.*, 289 F.3d 648, 659 (10th Cir. 2002) ("Plaintiffs assert that Judge Brimmer's membership in an Episcopal church alone creates an appearance of bias. But courts have consistently held that membership in a church does not create sufficient appearance of bias to require recusal."); *see also U.S. v. Nelson*, 2010 WL 2629742, *3 (E.D.N.Y. 2010) (denying recusal of Orthodox Jewish judge in case involving Orthodox Jewish victim of religious discrimination).

[19] *A.H. Belo Corp. v. Southern Methodist University*, 734 S.W.2d 720 (Tex. App.—Dallas 1987, writ denied).

[20] *Sabatier v. Suntrust Bank*, 2009 WL 2430892, *2 (S.D. Fla. 2009) (rejecting recusal based on Judge's membership in Catholic Church and the Federalist Society).

in a church does not create sufficient appearance of bias to require recusal."[21] Because affiliation with The Episcopal Church would be insufficient to mandate recusal, Defendants' motion seeks irrelevant information. Accordingly, the motion should be denied.

Defendants' third demand for disclosure also seeks irrelevant information, as any extrajudicial indication of a preference for a party or outcome would not, in itself, require recusal. "The law is well settled that neither the constitution nor the statutes make the expression or holding of an opinion a ground for disqualifying a judge."[22] On the contrary, "[i]t is presumed that a judge can and will divest himself of any previous conceptions, and that he will base his judgment, not on what he originally supposed but rather upon the facts as they are developed at the trial."[23] For instance, a judge who had previously expressed a preference for the death penalty was not disqualified from presiding over a capital murder case.[24] Similarly, any expression of a preference in this case would not be sufficient to require recusal because it is presumed that the Honorable Judge will base his judgment not on any prior statements but on the facts developed at trial.[25]

V. CONCLUSION AND PRAYER

Because Defendants state no valid legal basis for interrogating or forcing disclosure from a sitting Judge in a hearing, Defendants' motion is without authority. Because Defendants allowed this case to proceed for nineteen months, the motion is untimely. Because Defendants

---

[21] *Bryce*, 289 F.3d at 659.

[22] *Lombardino v. Firemen's & Policeman's Civil Serv. Comm'n of the City of San Antonio*, 310 S.W.2d 651, 654 (Tex. Civ. App.—San Antonio 1958, writ ref'd n.r.e.).

[23] *Id.*

[24] *Chastain v. State*, 667 S.W.2d 791, 796 (Tex. App.—Houston [14th Dist.] 1983, pet. ref'd).

[25] Defendants have given no explanation about how the information they seek about the Honorable Judge's family members or staff could justify recusal, nor can they.

do not seek information that could require recusal, the motion is also irrelevant. For any and all of these reasons, Defendants' Motion for Disclosure of Potential Conflicts should be denied.

The Local Episcopal Parties pray that this Court DENY Defendants' Motion for Disclosure of Potential Conflicts and grant such other and further relief, including costs, to which the Local Episcopal Parties are justly entitled.

Respectfully submitted,

Jonathan D. F. Nelson
State Bar No: 14900700
JONATHAN D. F. NELSON, P.C.
1400 West Abram Street
Arlington, Texas 76013
Telephone: 817.261.2222
Facsimile : 817.274.9724

Kathleen Wells
State Bar No. 02317300
EPISCOPAL DIOCESE OF FORT WORTH
3550 Southwest Loop 820
Fort Worth, Texas 76133
Telephone: 817.332.2580
Telecopier: 817.332.4740

William D. Sims, Jr.
State Bar No. 18429500
Thomas S. Leatherbury
State Bar No. 12095275
VINSON & ELKINS L.L.P.
2001 Ross Avenue, Suite 3700
Dallas, Texas 75201-2975
Telephone: 214.220.7792
Facsimile: 214.999.7792

Attorneys for Plaintiff Local Episcopal Parties

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF TARRANT §

Before me, the undersigned Notary Public, on this day personally appeared **JONATHAN D.F. NELSON**, who, after being duly sworn, stated under oath that the factual statements contained in the foregoing and attached Response to Defendants' Motion for Disclosure of Potential Conflicts are within his personal knowledge and are true and correct.

Jonathan D.F. Nelson

Subscribed and sworn to me on this 2 day of December, 2010.

Notary Public of the State of Texas

My commission expires: _____

KAREN A. FTAK
Notary Public
STATE OF TEXAS
My Comm. Exp. 09/30/2012

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Response to Defendants' Motion for Disclosure of Potential Conflicts has been sent this 2 day of December, 2010, by U.S. Mail and e-mail to:

J. Shelby Sharpe, Esq.
Sharpe Tillman & Melton
6100 Western Place, Suite 1000
Fort Worth, TX 76107

R. David Weaver, Esq.
The Weaver Law Firm
1521 N. Cooper Street, Suite 710
Arlington, TX 76011

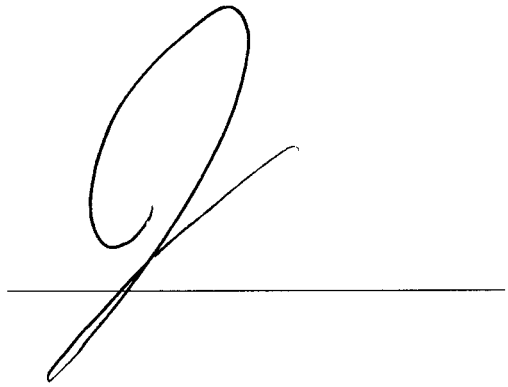
David Booth Beers, Esq.
Adam Chud
Goodwin Procter, LLP
901 New York Avenue, N.W.
Washington, D.C. 20001

Sandra Liser, Esq.
Naman Howell Smith & Lee, LLP
Fort Worth Club Building
306 West 7th Street, Suite 405
Fort Worth, TX 76102

Scott A. Brister, Esq.
Andrews Kurth L.L.P.
111 Congress Avenue, Suite 1700
Austin, TX 78701

Kendall M. Gray, Esq.
Andrew Kurth L.L.P.
600 Travis, Suite 4200
Houston, TX 77002

Mary E. Kostel, Esq.
Special Counsel for Property Litigation
The Episcopal Church
Suite 309
110 Maryland Avenue, N.E.
Washington, D.C. 20002



US 660453v1