UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

EPISCOPAL DIOCESE OF FORT WORTH	§	
	§	
Plaintiff,	§	
	§	
VS.	§	**NO. 4:10-cv-00700-Y**
	§	
THE RT. REV. JACK LEO IKER	§	
	§	
Defendant.	§	

BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S <u>DECEMBER 16, 2010 EMERGENCY MOTION TO STAY</u>

TO THE HONORABLE UNITED STATES DISTRICT JUDGE:

1. Iker's motion fails to meet *or even state* the requirements for emergency stays. Iker misleadingly cites case law to this Court, using ellipses to omit reference to the controlling rule that he cannot satisfy. Iker ignores that rule's express requirements, including **sworn affidavit evidence** supporting **specific rather than vague** descriptions of necessary facts. Iker provides none of this. His motion is fatally defective. It should be denied.

2. Worse still, Defendant Iker's motion is a transparent attempt to delay partial summary judgment against actions that he cannot defend on the merits. Here, Iker is taking the unlawful position that he represents a religious entity when the highest authorities of that religion say he does not. Iker violates 100 years of unchanging First Amendment law and contradicts his own testimony and pleadings to prior courts. His only option is to delay judgment.

3. But Iker's two grounds for stay prove the real intent of the motion. Iker urges this Court to resolve his faction's Motion to Intervene, while claiming it is too soon to respond to his opposition's partial summary judgment motion. But the motions turn on the same question: which party is the Episcopal Diocese? Calling one motion ripe and the other premature is

unpersuasive.

4. Every day that Iker delays partial summary judgment prolongs his unauthorized use of the Episcopal Diocese's marks and his siphoning of its goodwill. There is no legal basis for Iker's requested delay, and his motion should be denied.

A. Short Background

5. This case involves two factions both claiming to be The Episcopal Diocese of Fort Worth. One, Plaintiff, is recognized by The Episcopal Church. The other, the purported intervener led by Defendant Iker, is not. As a matter of 100 years of unchanged First Amendment law, The Episcopal Church's undisputed recognition of Plaintiff as the true Episcopal Diocese is conclusive; civil courts must defer to and apply this strictly religious determination for civil law purposes as a matter of law.

6. Defendant Iker is an ex-bishop who left The Episcopal Church and joined a church in South America. He calls his breakaway faction "The Episcopal Diocese of Fort Worth" and uses the Episcopal Diocese's two federally-registered service marks to raise money and advertise for his competing church in the same geographic region.

7. The Episcopal Diocese moved for partial summary judgment on December 13, 2010, seeking a permanent injunction against Iker's wrongful use of the Episcopal Diocese's service marks. Both parties have already conceded the marks are valid and there is a likelihood of confusion. The sole issue – which party is the true Episcopal Diocese – can be answered on undisputed facts.

8. On December 16, 2010, Defendant Iker moved for an emergency stay of this partial summary judgment motion on two grounds. But neither ground makes sense. And Iker has failed to meet the procedural and substantive requirements of such motions. His motion for emergency stay should be denied

B. Iker misleadingly cites authority and fails to meet his 56(f) burden.

9. Iker tells this Court: "The Fifth Circuit has repeatedly ruled that a motion such as this one to stay is 'broadly favored and should be liberally granted . . . to safeguard non-moving parties from summary judgment motions that they cannot adequately oppose.'"[1] **What Iker omits, in those ellipses, is a reference to the controlling Federal Rule of Civil Procedure for "motion[s] such as this one," Rule 56(d) [formerly 56(f)] which states that a party seeking a stay of summary judgment must show "by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition."**[2] Iker has not met this burden, either procedurally or substantively. He filed no affidavit or declaration. He cannot show essential facts justifying his opposition, because the requested partial summary judgment is warranted under undisputed facts that Iker has already conceded and cannot contest.

10. Nor does Iker show this Court the sentences that immediately follow the one he cited in *Raby,* which show exactly why his motion fails. For instance, the Fifth Circuit says, immediately after his out-of-context quote above:

> The nonmovant, however, may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts. Rather, a request to stay summary judgment under Rule 56(f) must set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion.[3]

[1] Iker's December 16, 2010 Emergency Motion to Stay at ¶ 9 (citing *Raby v. Livingston*, 600 F.3d 552, 561 (5th Cir. 2010)). Iker styles his request as an emergency stay; whether or not it is more properly characterized as a stay or a continuance, it is governed by Rule 56(f)

[2] FED. R. CIV. P 56(f). Note that the cited cases often refer to this Rule as 56(d), since those cases were published before the revisions to Federal Rules of Civil Procedure. *See* *http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Supreme%20Court%202009/Excerpt-CV.pdf,* as of December 17, 2010.

[3] *Raby*, 600 F.3d at 561 (5th Cir. 2010) (emphasis added) (internal citations and quotations omitted).

11. Once again, Iker does none of this. He does not state a single specific fact that would affect the outcome of the issues raised for summary judgment. None exist. Instead, Iker refers only – and vaguely – to having served "subpoenas on the person who filed the application for registration of the marks and the person identifying herself as the Chancellor of Plaintiff who would have been involved in the registration of the marks."[4] Iker never explains what "specified facts" these persons supposedly have that are "essential" to his opposition. He never "set[s] forth a plausible basis" for believing such facts would "influence the outcome of the pending summary judgment motion." Iker's only explanation is the vague, conclusory assertion that "This evidence is relevant to be able to answer the motion for partial summary judgment."[5]

12. Nor does Iker cite for this Court the next sentences from *Raby*, which clearly state:

> If it appears that further discovery will not provide evidence creating a genuine issue of material fact, the district court may grant summary judgment. **This court has long recognized that a [party's] entitlement to discovery prior to a ruling on a motion for summary judgment . . . may be cut off when the record shows that the requested discovery is not likely to produce the facts needed by the plaintiff to withstand a motion for summary judgment.**[6]

Applying similar holdings, this Court was recently affirmed by the Fifth Circuit, which noted:

> [I]t is incumbent upon counsel to properly move, under Rule 56(f), for such discovery . . . . Rule 56(f) may not be invoked by the mere assertion that discovery is incomplete; the opposing party must demonstrate how the requested discovery or time to provide other

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[4] Iker's December 16, 2010 Brief in Support of Emergency Motion to Stay at ¶ 8.

[5] Iker's December 16, 2010 Emergency Motion to Stay at ¶ 9 (citing *Raby*, 600 F.3d at 561).

[6] *Raby*, 600 F.3d at 561 (emphasis added) (internal citations and quotations omitted).

> summary-judgment evidence will enable him to rebut the movant's allegations of no genuine issue of material fact.[7]

Parties that move to stay proceedings "bear[] a heavy burden to show why a stay should be granted . . . ."[8] "To meet this burden, the moving party should show that its motion is supported by 'genuine necessity.'"[9] When deciding whether a party has met this burden, "[a] court should not decide a motion to stay based on a party's speculative concerns."[10]

C. Iker's motion is defective because he fails to submit an affidavit or declaration supporting his contentions.

13. Despite clearly being on notice of Rule 56(f)'s requirements, after citing case law interpreting that rule and omitting reference to the rule from the cited sentence, Iker failed to abide by that rule's requirement for verified proof of his assertions, and for this reason alone his motion should be denied. But even if Iker had filed an affidavit, there is no basis for a stay, as shown below.

D. Iker's "Motion to Intervene" argument similarly fails.

14. Iker also argues that these proceedings, including all discovery, should be stayed pending his breakaway faction's Motions to Intervene.

15. Iker's purported basis for this request is "sound judicial economy."[11] But his request is somewhat perplexing. The Motion to Intervene turns on the same question as the

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[7] *Dreyer v. Yelverton*, 291 Fed.Appx. 571, 577-78 (5th Cir. 2008) (internal citations, quotations and modifications omitted), *aff'g Dreyer v. City of Southlake*, No. 4:06-CV-644-Y, 2007 WL 2458778 (N.D.Tex. Aug. 22, 2007) (Means, J.).

[8] *Sierra Club v. Federal Emergency Management Agency*, No. H-07-0608, 2008 WL 2414333, at *7 (S.D. Tex. June 11, 2008) (Rosenthal, J.) ("'Generally, the moving party bears a heavy burden to show why a stay should be granted absent statutory authorization.'" (quoting *Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co., Inc.*, 761 F.2d 198, 204 n. 6 (5th Cir. 1985)).

[9] *Id.* (quoting *Coastal (Bermuda) Ltd.*, 761 F.2d at 204 n.6).

[10] *Id.* (citing *Provencio v. Vazquez*, No. 07-CV-0069-AWI-TAG, 2007 WL 1614827, at *2-4 (E.D.Cal. June 4, 2007) (recommending that defendant's motion to stay be granted where plaintiff raised only speculative concerns in opposition); *Crosetto v. Heffernan*, No. 88-C-433, 1990 WL 32310, at *2 (N.D.Ill. February 22, 1990) (granting defendant's motion to stay where defendant raised issues based on 'more than mere speculation'")).

[11] Iker's December 16, 2010 Brief in Support of Emergency Motion to Stay at ¶ 10.

Motion for Partial Summary Judgment: which party is the true Episcopal Diocese? Under Fifth Circuit law, as shown in Plaintiff's Response to the Iker-faction's Motion to Intervene, Iker's breakaway faction cannot intervene as "the Episcopal Diocese of Fort Worth" unless it can demonstrate capacity and standing to intervene under that name which "the *substantive* law recognizes as belonging to or being owned by the applicant.'"[12] And under the partial summary judgment motion, the parties have both already represented to this Court that the marks are valid and that there is a likelihood of confusion; the only open issue is, again, who is the real Episcopal Diocese? Accordingly, there is absolutely no basis to say that one of these Motions should be addressed before the other, or that one motion should be stayed for the other. The Court can easily deny the Motion to Intervene and grant partial summary judgment now. And, to the extent the Court wishes, under judicial economy, to address these motions in sequence, partial summary judgment is a far sturdier platform on which to decide the threshold issue of identity (as opposed to the Iker-faction's thinly briefed intervention papers).

16. Iker also attempts to justify his stay pending resolution of the Motion to Intervene with the baffling argument that the motion "to intervene seeks relief that, if granted, has the effect of a motion to dismiss the complaint."[13] This proposition fails for numerous reasons. First, there is no motion to dismiss on file. Iker does not explain his cryptic statement that his faction's Motion to Intervene, if granted, would have "the effect" of a motion to dismiss. Second, while Iker contends that "United States district courts customarily grant motions to stay summary proceedings when there is a pending motion to dismiss," that unsupported statement is

[12] *Cajun Elec. Power Co-op., Inc.*, 940 F.2d 117, 119 (5th Cir. 1991) (quoting *New Orleans Public Service, Inc. v. United Gas Pipe Line Co. (NOPSI III)*, 732 F.2d 452, 464 (5th Cir. 1984) (en banc)). *See* Plaintiff's Brief in Opposition to the Motions to Intervene, incorporated as if fully set forth herein.

[13] Iker's December 16, 2010 Brief in Support of Emergency Motion to Stay at ¶ 4.

contradicted by federal authority.[14] Parties are not entitled to stay proceedings merely because they file a motion to dismiss. Instead, the party seeking a stay because of a pending motion to dismiss must convince the court of the merits of its motion to dismiss; in other words, the movant must demonstrate that the plaintiff has failed to state a claim for relief.[15] Here, the opposite is true: each of the Iker-faction's intervention papers made conclusory allegations that were refuted by Plaintiff; the Iker-faction would file a retreating reply that simply raised new, incorrect, unsupported assertions, and so on. Further, a party moving to stay proceedings due to a pending motion to dismiss bears a "burden . . . to show some plainly adequate reason for the order. Courts have insisted on a particular and specific demonstration of fact, as distinguished from conclusory statements, in order to establish good cause ."[16]

17. But Iker has obviously failed to meet these burdens. Iker's intervening "Diocese" is not even a party to this suit at this time, and its filings requesting intervention only state its intent to attempt to dismiss the claims once it becomes a party.[17] Iker has cited no authority for the proposition that an intervening party's complaint-in-intervention can be treated as a motion to dismiss a plaintiff's claims against a defendant that is already in the case. And the mere fact that the intervening "Diocese" *might* file a motion to dismiss if it is allowed to intervene necessarily fails to demonstrate specific facts that establish an adequate reason for staying the

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[14] *See, e.g.*,10A FED. PROC., L. ED. § 26:337 ("Although a pending motion to dismiss is not ordinarily a situation that in and of itself would warrant a stay of discovery, a temporary stay of discovery may be warranted in certain cases.") (citations omitted).

[15] *See, e.g.*, *Twin City Fire Ins. Co. v. Employers Ins. of Wausau*, 124 F.R.D. 652, 653 (D. Nev. 1989) ("To show good cause [to justify a stay of discovery] in the Ninth Circuit, the moving party must show more than an apparently meritorious 12(b)(6) claim: 'A district court may . . . stay discovery when it is convinced that the plaintiff will be unable to state a claim for relief.'" (quoting *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir.1981).

[16] *Twin City Fire Ins. Co.*, 124 F.R.D. at 653 (internal citation omitted).

[17] Additionally, Iker's intervening "Diocese" has only attempted to intervene in this suit as a plaintiff by filing a complaint-in-intervention. However, because its complaint only attempted to assert causes of action under provisions that do not create independent claims for relief – Fed. R. Civ. P. 11 and 28 U.S. 1927 – Iker's intervening "Diocese" is ineligible to intervene under Fed. R. Civ. P. 24(c).

order. The intervening "Diocese's" intent to file a motion to dismiss and its conclusory statement that the Plaintiff did not file its complaint with its authority cannot be a basis for convincing the court that the intervening "Diocese's" motions to intervene establish can convince the court that the Plaintiff has failed to state a claim for relief, particularly in light of Plaintiff's summary judgment proof.

18. The speciousness of Iker's "Motion to Intervene equals Motion to Dismiss" argument is reinforced by the inapposite cases he has attempted to cite in support of his motion to stay. Even if there *were* a motion to dismiss on file, which there is not, the cases still would not help Iker. First, he cites *Moore v. Potter*,[18] in which the district court struck a plaintiff's motion for summary judgment because the court had previously issued a stay of all discovery pending the resolution of the defendant's motion to dismiss. However, that case involved a motion to dismiss by a *defendant*, not an *intervenor seeking to become a plaintiff*. Further, in that case the plaintiff had not filed its motion for summary judgment until after the court had already stayed all discovery. But in this case, the Plaintiff has not sought any discovery because it has demonstrated its ability to prevail as a matter of law on the infringement liability claim without the need for discovery in its motion for partial summary judgment.[19] Second, Iker cites *Gilmer v. Colorado Institute of Art*,[20] to support his contention that courts routinely stay summary proceedings pending the resolution of a motion to dismiss. But in that case, the plaintiff did not even file a motion for summary judgment. The district court did stay discovery

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[18] 141 Fed.Appx. 803, 808 (11th Cir. 2005).

[19] *Moore v. Potter* cites *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1367 (11th Cir. 1997) for the proposition that "Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should . . . be resolved before discovery begins. Such a dispute always presents a purely legal question; there are no issues of fact because the allegations contained in the pleading are presumed to be true." 141 Fed.Appx. at 807. However, the Plaintiff has not sought any discovery regarding its motion for partial summary judgment as it also "presents a purely legal question."

[20] 12 Fed. Appx. 892, 893 (10th Cir. 2001).

pending the resolution of a motion to dismiss, but the court issued the stay based on significant evidence that the plaintiff's claims were based on forged evidence.[21] Thus, *Gilmer* is of little relevance here, where 100 years of authority in Plaintiff's partial summary judgment motion demonstrates an absolute absence of anything other than good faith on Plaintiff's part. Here, it is Defendant Iker who has yet to make a single substantive argument in defense of actions that contradict clear law and his own prior sworn court testimony.

19. In short, both of Iker's stated grounds for requesting a stay are unpersuasive at best. Both of his two stated grounds rely on mere speculation, and neither of them comes close to establishing that Iker's need for a stay is supported with genuine necessity.

E. Iker's stay threatens to substantially prejudice Plaintiff.

20. As if the procedural defects and substantive baselessness of Iker's stay motion were not enough, it also comes at significant prejudice to Plaintiff. Every passing day, Iker continues to misuse Plaintiff's marks with no support at law. He continues to drain Plaintiff's goodwill and confuse churchgoers as to the origin of his religious views. Iker is dissipating Plaintiff's assets – here, its goodwill built over nearly thirty years in its name and seal – by his daily unauthorized use.[22] Iker's wrongful, continuing dissipation of assets will substantially prejudice Plaintiff and weighs against a stay. Iker's baseless stay should again be denied.

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[21] *Gilmer v. Colorado Institute of Art*, 12 Fed. Appx. 892, 893-894 (10th Cir. 2001) (in a case where the defendant claimed that the plaintiff had forged a threatening letter from the defendant, the court stayed discovery "[b]ased on Swanson's denial of making the threat, the expert's opinion that it was a forgery, and other evidence, defendants moved to dismiss Gilmer's claims for proffering fraudulent evidence, and to stay the proceedings pending resolution of the motion. The district court granted the stay and later held a two-day hearing at which a number of witnesses testified, including Swanson (by videotaped deposition) and Gilmer, handwriting experts for both sides, and police officers and others involved with the criminal charge against Swanson.").

[22] *See Whitney Nat. Bank v. Air Ambulance ex rel. B & C Flight Management, Inc.*, No. H-04-2220, at *3-4 (S.D. Tex. 2007) ("Normally, "[i]n evaluating the plaintiff's burden resulting from the stay, courts may insist that the plaintiff establish more prejudice than simply a delay in his right to expeditiously pursue his claim." 'The threat of the dissipation of assets during a stay has been recognized as a substantial burden for plaintiffs.' Given the nature of Whitney Bank's claim-fraudulent transfer of assets-Whitney Bank has more than a general interest in expeditious proceedings.") (internal citations omitted).

F. Conclusion and Prayer

21. For all these reasons, Iker's Motion for Emergency Stay is procedurally defective, substantively inadequate, causes significant prejudice, and should be denied. Plaintiff the Episcopal Diocese of Fort Worth respectfully moves that this Court DENY Defendant Iker's December 16, 2010 "Emergency Motion of Defendant to Stay Plaintiff's Motion for Partial Summary Judgment and All Other Proceedings Pending a Ruling on Motion to Intervene of The Episcopal Diocese of Fort Worth" and grant all further and other relief to which it may be justly entitled.

Dated: December 17, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2010, I electronically filed Plaintiff The Episcopal Diocese of Fort Worth's Brief in Support of Response to Defendant's December 16, 2010 Emergency Motion to Stay with the clerk of the court for the United States District Court, Northern District of Texas, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to those attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

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