CAUSE NO. 141-252083-11

THE EPISCOPAL CHURCH, et al.	)	IN THE DISTRICT COURT OF
	)	
VS.	)	TARRANT COUNTY, TEXAS
	)	
FRANKLIN SALAZAR, et al.	)	141ST DISTRICT COURT

PLAINTIFFS' AMENDED MOTION TO TENDER ORDERS

TO THE HONORABLE COURT:

On May 19, 2011, the Court invited the parties to negotiate an agreed supersedeas order. The parties were not able to reach agreement, and Plaintiffs' Motion to Tender Orders has been reset for hearing on October 20, 2011. Plaintiffs would respectfully show as follows:

1. Attached is a revised proposed Order on Supersedeas. This proposed Order addresses all of the arguments made in this Motion as well as all of the arguments previously made to the Court on supersedeas and injunctive issues in Defendants' Motion to Set Supersedeas (filed April 25, 2011), the Local Episcopal Parties' Motion to Continue Hearing on Supersedeas and for Additional Protection (filed April 25, 2011 and granted in part on April 28, 2011), the Local Episcopal Parties' Motion to Tender Orders (filed June 24, 2011), Defendants' Reply [sic] to Motion to Tender Orders (filed July 8, 2011), Plaintiffs' Reply in Support of Their Motion to Tender Orders (filed July 19, 2011), and Defendants' Motion to Sign Supersedeas Order and For Temporary Injunction [sic] Relief (filed October 13, 2011).

2. In the revised Order, Plaintiffs have made the proposed post-judgment injunctions more specific to ensure that no more property is transferred, encumbered, or dissipated.

3. The revised Order also limits certain of Defendant Congregations' reporting obligations to the 15 (of 48) Defendant Congregations wrongly holding the most of Plaintiffs' property contrary to law. Defendants' reporting obligations do not require Defendants to create

new documents but only to provide existing documentation to show their compliance with the injunctive relief.

4. Defendants allege a right to spend Plaintiffs' money to sue Plaintiffs. As the U.S. Supreme Court held, the right to counsel "does not go beyond the individual's right to spend his own money."[1] Defendants may not pay lawyers with "money [that], though in [their] possession, is not rightfully [theirs]."[2] A party has no right "to spend another person's money for services rendered by an attorney, even if those funds are the only way that that defendant will be able to retain the attorney of his choice."[3] Nor should licensed attorneys accept such funds.[4]

5. Notably, the Supreme Court made these determinations in the criminal context, where the right to counsel is heightened.[5] And it so held regarding disputed property in the post-indictment, *pre-trial* phase, *before guilt or property ownership had been finally determined on the merits*. Here, where the Court has already issued a final judgment determining Plaintiffs' ownership rights – and where Defendants are wrongfully holding property in violation of 100 years of settled law – Defendants have no legal basis to spend Plaintiffs' money to litigate against Plaintiffs.

6. The obvious equity of this position is even greater here, where Defendants tell the Court they are "judgment proof" and that attempts to recover damages are "wasting time."[6]

7. Plaintiffs are entitled as a matter of law to their requested minimum bond of $950,000 plus meaningful injunctions. Defendants reported separate annual revenue of $10,500,000 at the congregational level alone in 2009. The minimum requested bond would

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[1] *Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 626 (1989) (internal quotation marks omitted).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] As the Seventh Circuit explained, "[i]t would be anomalous to hold that a civil litigant has any superior right to counsel than one who stands accused of a crime." *See SEC v. Cherif*, 933 F.2d 403, 417 (7th Cir. 1991).
[6] February 8, 2011 Hearing Transcript at 13.

constitute less than 3% of this annual revenue over the course of appeal. Separately, Defendants offered no evidence as to why the new and substantial real property added within the Defendant Diocese since the schism is unavailable to support a bond. The attached chart, "Defendants Fail to Carry their Burden of Proof and Misstate the Record," details the numerous reasons why Plaintiffs are entitled to their minimum requested bond as a matter of law. (See Exhibit A, incorporated by reference herein).

8. **Every Texas Court** to consider an ex-Episcopal breakaway case has imposed both a substantial bond or cash deposit plus meaningful injunctions. *And those cases lacked the sworn admissions of dissipation, transfer, and fraud documented here.*

9. Defendants did not even attempt to meet their statutory burden to support a claim of "substantial economic harm" with actual evidence for each claimant. Sixty-one of 62 Defendants (including those with the $10,500,000 income) presented no evidence at all. And the "evidence" provided for the remaining Defendant – a discredited, self-serving, conclusory affidavit contradicted by the affiant's own testimony – does not come close to the evidence ***rejected*** by Courts of Appeals in supersedeas cases.

10. Defendants' appeal is an exercise in delay. The loyal Episcopalians are entitled to their property under "deference" *or* "neutral principles" – as courts around the nation have consistently reaffirmed *as recently as this week.*[7] The loyal Episcopalians are about to spend their *fourth* Christmas locked out of their own churches, in violation of well-settled law. They should at least have the comfort of knowing that there will be no more fraudulent transfers to Louisiana banks; no more shell companies like Jude Funding created by *named Defendants* on the day of transaction to place *$3.5 million liens* on Church property *during litigation*; no more

[7] *Episcopal Church in Diocese of Connecticut v. Gauss*, --- A.3d ----, 2011 WL 4537269 (Conn. October 11, 2011) (NO. 18718) (attached as Ex. C).

unexplained dissipation of hundreds of thousands of dollars while Defendants admit their ordinary course is to break even. Enough is enough.

11. Only a real bond and specific injunctions will stop this conduct. $950,000 or more is reasonable and far below what Plaintiffs are entitled to by law. Any reduction based on Defendants' legally and factually insufficient evidence would be an abuse of discretion. The injunctions are specifically and carefully tailored to prevent more of the exact conduct to which Defendants have admitted to under oath.[8]

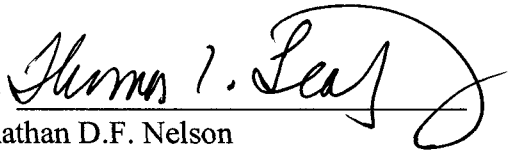
12. Plaintiffs incorporate and reurge their arguments and authorities contained in the Local Episcopal Parties' Motion to Continue Hearing on Supersedeas and for Additional Protection (filed April 25, 2011 and granted in part on April 28, 2011), the Local Episcopal Parties' Motion to Tender Orders (filed June 24, 2011), Plaintiffs' Reply in Support of Their Motion to Tender Orders (filed July 19, 2011), and the attached proposed Order On Defendants' Motion To Set Supersedeas Bond And The Local Episcopal Parties' Motion For Additional Protection (attached hereto as Ex. B).

PRAYER

This Court should set a real bond of at least $950,000 and impose real post-judgment injunctions. And if Defendants will not post that bond, they are free to appeal while the property returns to its rightful owners, as recognized by nearly every court in the nation to consider the issue. Plaintiffs respectfully request that the Court sign and enter the attached proposed Order.

[8] All evidence cited in the attached proposed Order is from the supersedeas record made at the May 19, 2011 supersedeas hearing.

Respectfully submitted,

By: 

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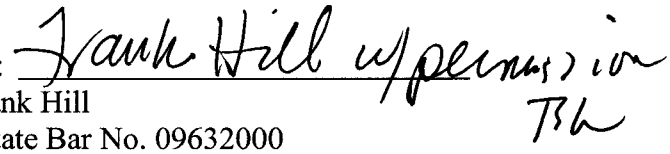
By: 

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This is to certify that a true and correct copy of the foregoing Amended Motion to Tender Orders has been sent this 13th day of October, 2011, by facsimile and/or email pdf, to:

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EXHIBIT A

Defendants Fail to Carry their Burden of Proof and Misstate the Record

Examples

Defendants Say	**The Record**
No bond because accounts are frozen	Only 6 of 18 accounts frozen at Diocesan level[I] Frozen accounts contribute **less than 5%** of annual Defendant Diocesan operating expenditures[II] No evidence of any accounts frozen for any of the other 61 Defendants
No testimony "that would justify a supersedeas bond at a minimum of $950,000"	$100,000,000.00 in property at risk[III] Defendants bear burden for any reduction of bond of this amount by showing substantial economic harm[IV] Must offer proof regarding all Defendants[V] No evidence from Defendants on 61 of 62 Defendants[VI] No sufficient evidence on remaining 1 Defendant: just one biased affidavit[VII] that is conclusory[VIII] and admittedly used wrong definition of substantial economic harm[IX] and no analysis of required factors[X] No evidence from Defendants that revenue sources will change in future; their burden.[XI] **The truth:** $10,500,000 annual revenue for Defendant Congregations.[XII] No evidence why bond equivalent to **< 3% of revenue** during appeal = substantial economic harm[XIII] Plaintiffs bear no burden yet provided church accounting expert who testified from 39 years experience that Defendants could secure at least

	a $5,000,000 letter of credit based on congregation size and revenue history without recourse to real property;[xiv] letters of credit routinely secure supersedeas obligations[xv] A single Individual Defendant was able to finance a $3.5 million line of credit during litigation; Defendants provided no evidence on any of the 12 Individual Defendants[xvi] Multiple church buildings within Defendant Diocese that are post-separation property not subject to the judgment; Defendants presented no evidence these buildings were otherwise encumbered or congregations would not use them to secure bond for their own Diocese[xvii]
No evidence Defendants will act improperly toward Church property	**Transferring money out of state to avoid legal remedies** Q. So you thought that that money would be harder for a court to reach out of state? A. That is not what I said, but that was the thought of the Diocese, not of me, but of the Diocese, that was the decision that was made.[xviii] Q. Why didn't you tell the Court about the Louisiana bank account? A. Because at the time, it did not enter my mind. I forgot.[xix] Q. Why wasn't [the Louisiana account] listed on the books? A. I don't have an answer to that. It just wasn't. Q. Did you prepare these books? A. Yes.[xx] Q. …And in response to receiving this letter from a lawyer questioning the ownership of the accounts, your -- the [Defendant] Diocese's response was to transfer that money out of state? A. Not immediately, no, sir, but after thought and discussion, that was what the Diocese decided to do.[xxi]

	Encumbering Church property with a $3.5 million lien during litigation to a single-purpose entity created on day of transaction by named Defendant Chad Bates Q. In your history as the director of business and finance for the Diocese, how many $3.5 million liens has the Diocese taken out on church property? A. How many? Q. Uh-huh. A. Other than this, none.[xxii] Q. Did you put it on the books? A. The -- no, sir, it is -- it's not on the books.[xxiii] **Telling Court that the disputed bank accounts "haven't gone down, they've gone up" based on only 6 of 18 Diocesan accounts.** Q. You would want to see all of the accounts, wouldn't you? A. Sure. Q. So why did you only show the Court six accounts? A. Those were what I was asked to produce. These are -- this is what I was asked to produce at the time. Q. Okay. Who asked you to produce that? A. I was asked by the attorneys to produce that.[xxiv] **More than $500,000 is missing from operating accounts of the Diocese despite Defendants' testimony that "the funds in these accounts generally roll over monthly as new contributions replace withdrawals."** Q. [] So you have told the court in your affidavit under oath that money comes in, money comes out in the operating accounts and it about rolls over, breaks even? A. Pretty much, yes, sir.[xxv] Q. [W]e wouldn't expect hundreds of thousands of dollars to disappear from operating accounts,

	would we? A. I would not, no, sir. Q. Okay. We could call that dissipation, couldn't we? A. Yes, sir.[xxvi] Q. . . . So operating accounts . . . [have] a total of **$547,030.13 gone** between October 31st, 2008 and February 28th, 2011 from these 12 accounts; is that correct? A. That's what it adds to, yes, sir.[xxvii] Q. [W]e established there was over half a million dollars missing from bank accounts, correct? A. Yes, sir.[xxviii]

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[i] *See, e.g.*, Defendants' Motion to Set Supersedeas at $0 Ex. D (Turnage Aff. at Ex. B); May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 58:21-59:11.

[ii] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 148:7-13 (reporting approximately $1,800,000 to $2,000,000 in annual operating expenditures); Defendants' Motion to Set Supersedeas at $0 Ex. B (Parrott Aff. 2) at 2 (reporting only $89,000 in annual operating expenditures from frozen accounts).

[iii] Defendants' Statement of Jurisdiction filed with the Texas Supreme Court on June 1, 2011; *see also* May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 151:13-23; 152:16-153:2 (confirming insured value of tangible personal Subject Property of $10,618,390); *id.* at Tab B (SC 4051-4056) (listing total insured value of real and personal Subject Property as $95,017,205); May 19, 2011 Hearing Transcript Ex. 2 (Muzyka Report) (stipulated to as equivalent to live testimony in the hearing transcript by Defendants at 15:7-12; 40:19-41:7) and Plaintiffs' Response to Motion to Set Supersedeas at p.13 and n.47 (demonstrating that fair market rental value of just 5 of over 50 subject real properties would range between $1,154,010 and $5,665,140 using the range of average appellate durations).

[iv] *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 910 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

[v] *G.M. Houser, Inc. v. Rodgers*, 204 S.W.3d 836, 840 (Tex. App.—Dallas 2006, no pet.) (citations omitted); *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. App.—Austin 1983, no writ); *Valerio v. Laughlin*, 307 S.W.2d 352, 353 (Tex. App.—San Antonio 1957, orig. proceeding).

[vi] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 30:21-31:18; 35:17-23; 107:16-108:25;

[vii] *See, e.g., id.* at 30:21-31:18.

[viii] *See, e.g., id.* at 67:4-16; 74:5-12; 111:23-112:5; 124:16-23; 128:17-129:2; 129:11-16; 131:11-22; 132:11-18; 168:3-12; 170:1-5.

[ix] *See, e.g., id.* at 132:23-133:2.

[x] *See, e.g., id.* at 30:21-31:18.

[x] *See, e.g., id.* at 67:4-16; 74:5-12; 111:23-112:5; 124:16-23; 128:17-129:2; 129:11-16; 131:11-22; 132:11-18; 168:3-12; 170:1-5; *cf. Ramco Oil & Gas, Ltd.*, 171 S.W.3d at 917; *LMC Complete Automotive, Inc. v. Burke*, 229 S.W.3d 469, 487 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

[x] *See, e.g., id.* at 67:4-16; 74:5-12; 111:23-112:5; 124:16-23; 128:17-129:2; 129:11-16; 131:11-22; 132:11-18; 168:3-12; 170:1-5; *cf. Ramco Oil & Gas, Ltd.*, 171 S.W.3d at 917; *LMC Complete Automotive, Inc. v. Burke*, 229 S.W.3d 469, 487 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

[xi] *LMC Complete Automotive, Inc. v. Burke*, 229 S.W.3d 469, 481-82 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

[xii] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 127:22-24 and Tab L.
[xiii] *See* Plaintiffs' Response to Motion to Set Supersedeas at $0, at 13-14 (expected duration of appeal is 37 months using conservative estimate of assigning equal probability to direct and normal appeal).
[xiv] *See, e.g.*, May 19, 2011 Hearing Transcript beginning at 42.
[xv] *See, e.g.*, *Lesikar v. Rappeport*, 104 S.W.3d 310, 315 (Tex. App.—Texarkana 2003, pet. denied); *In re Marriage of Reinauer*, No. 07-99-0348-CV, 2000 WL 377837, at *1 (Tex. App. –Amarillo Apr. 10, 2000, pet. denied); *In re Cantu*, 961 S.W.2d 482, 488 (Tex. App.—Corpus Christi 1997, orig. proceeding); *Employers Mut. Cas. Co. v. Tascosa Nat'l Bank*, 767 S.W.2d 279, 284 (Tex. App.—Amarillo 1989, writ denied).
[xvi] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 78:25-79:14; 132:14-22; 223:1-17; Defendants' Motion to Set Supersedeas at $0 Ex. A (Parrott Aff.) at 2; Supplemental Appendix in Support of Local Episcopal Parties' and Local Episcopal Congregations' Supplemental Motion for Partial Summary Judgment, filed March 31, 2011 in Cause No. 141-237105-09, as Ex. AA-1 (A1438-1454).
[xvii] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 168:7-19.
[xviii] Parrott Dep. at 93:18-22.
[xix] Parrott Dep. at 88:3-6.
[xx] Parrott Dep. at 98:3-7.
[xxi] Parrott Dep. at 93:6-12.
[xxii] Parrott Dep. at 80:6-80:11.
[xxiii] Parrott Dep. at 83:13-15.
[xxiv] Parrott Dep. at 50:19-51:3.
[xxv] Parrott Dep. at 54:14-18.
[xxvi] Parrott Dep. at 55:5-15.
[xxvii] Parrott Dep. at 63:12-64:4 (emphasis added).
[xxviii] Parrott Dep. at 84:13-16.

EXHIBIT B

CAUSE NO. 141-252083-11

THE EPISCOPAL CHURCH, et al.	)	IN THE DISTRICT COURT OF
	)	
VS.	)	TARRANT COUNTY, TEXAS
	)	
FRANKLIN SALAZAR, et al.	)	141ST DISTRICT COURT

ORDER ON DEFENDANTS' MOTION TO SET SUPERSEDEAS BOND AND THE LOCAL EPISCOPAL PARTIES' MOTION FOR ADDITIONAL PROTECTION

Came on for consideration Defendants' Motion to Set Supersedeas (filed April 25, 2011), the Local Episcopal Parties' Motion to Continue Hearing on Supersedeas and for Additional Protection (filed April 25, 2011 and granted in part on April 28, 2011), the Local Episcopal Parties' Motion to Tender Orders (filed June 24, 2011), Defendants' Reply [sic] to Motion to Tender Orders (filed July 8, 2011), Plaintiffs' Reply in Support of Their Motion to Tender Orders (filed July 19, 2011), Defendants' Motion to Sign Supersedeas Order and For Temporary Injunction [sic] Relief (filed October 13, 2011), and Plaintiffs' Amended Motion to Tender Orders (filed October 13, 2011). The Court held its evidentiary hearing on Defendants' Motion to Set Supersedeas and on the Local Episcopal Parties' Motion for Additional Protections on May 19, 2011. The Court heard argument on the Local Episcopal Parties' Amended Motion to Tender Orders and Defendants' Motion to Sign Supersedeas Order and For Temporary Injunction [sic] Relief on October 20, 2011. Collectively, the foregoing are referred to as "Post-Judgment and Supersedeas Proceedings." Having considered the pleadings, evidence, motions, responses and replies, governing law, and arguments, stipulations, and representations of counsel, the Court orders as follows:

The Court makes the following findings regarding the supersedeas bond:

1. The fair market rental value of the real property made the subject of this lawsuit and the fair market value of the personal property made the subject of this lawsuit (collectively, "Subject Property") exceeds $_____.[1]

2. Defendants must prove any claim of likelihood of substantial economic harm for each Defendant.[2] Defendants did not present any evidence of substantial economic harm for 61 of 62 Defendants.[3] For the remaining one Defendant, the insufficient evidence was a conclusory and discredited affidavit[4] from Defendants' congregant and employee[5] who, upon deposition, admitted to (i) using an invalid definition of "substantial economic harm";[6] (ii) failing to consider the relevant factors under the case law;[7] (iii) claiming any bond above $0 was likely to cause "substantial economic harm" without any written analysis or calculation[8] and without contacting a single surety, lender, contributor, parent

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[1] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 151:13-23; 152:16-153:2 (confirming insured value of tangible personal Subject Property of $10,618,390); *id.* at Tab B (SC 4051-4056) (listing insured value of real and personal Subject Property as $95,017,205); May 19, 2011 Hearing Transcript Ex. 2 (Muzyka Report) (stipulated to as equivalent to live testimony in the hearing transcript by Defendants at 15:7-12; 40:19-41:7) and Plaintiffs' Response to Motion to Set Supersedeas at p.13 and n.47 (demonstrating that fair market rental value of just 5 of over 50 subject real properties would range between $1,154,010 and $5,665,140 using the range of average appellate durations); *see also* Defendants' Statement of Jurisdiction filed with the Texas Supreme Court on June 1, 2011, representing that the case involves "over $100 million in property."

[2] *G.M. Houser, Inc. v. Rodgers*, 204 S.W.3d 836, 840 (Tex. App.—Dallas 2006, no pet.) (citations omitted) ("In setting the amount of supersedeas security pending appeal, the trial court is required to consider the separate financial condition of each judgment debtor"); *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 910 (Tex. App.—Houston [14th Dist.] 2005, no pet.); *Fortune v. McElhenney*, 645 S.W.2d 934, 935 (Tex. App.—Austin 1983, no writ); *Valerio v. Laughlin*, 307 S.W.2d 352, 353 (Tex. App.—San Antonio 1957, orig. proceeding) ("Even if the bond filed by [County Commissioner] Ramos had been a legal one, it would not inure to the benefit of the other defendants who made no attempt to file a supersedeas bond")..

[3] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 33:20-35:2; 35:13-23; 107:16-108:25.

[4] Defendants' Motion to Set Supersedeas at $0 Ex. B (Second Parrott Aff.) at 2; *see also* May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 109:10-12; 110:10-13.

[5] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 30:21-31:18.

[6] *See, e.g.*, *id.* at 132:23-133:2.

[7] *See, e.g.*, *id.* at 67:4-16; 74:5-12; 111:23-112:5; 124:16-23; 128:17-129:2; 129:11-16; 131:11-22; 132:11-18; 168:3-12; 170:1-5; *cf. Ramco Oil & Gas, Ltd.*, 171 S.W.3d at 917; *LMC Complete Automotive, Inc. v. Burke*, 229 S.W.3d 469, 487 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

[8] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 111:23-112:5 and 67:17-22.

organization, or any other historic source of funding about a bond;[9] and (iv) lacking personal knowledge of key claims,[10] making misleading statements,[11] and omitting key facts known to her[12] in her sworn statements to the Court.[13]

3. Plaintiffs have requested a minimum bond of $950,000 plus post-judgment injunctions.[14] Defendants received roughly $10,500,000 in new annual revenue at the congregational level alone in 2009, while this litigation was ongoing.[15] Plaintiffs' minimum requested bond of $950,000 is equivalent to less than 3% of this annual revenue during the expected course of the appeal.[16] Defendants presented no evidence that this $10,500,000 annual revenue is expected to change, which is their burden.[17] In addition, Defendant Diocese testified that it has several new churches with separate real and personal property holdings not subject to the litigation or judgment; Defendants presented no evidence that this

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[9] *See, e.g., id.* at 67:4-16; 74:5-12.; 115:20-116:1; 124:16-23; 128:17-129:2; 129:11-16; 131:11-22; 132:11-18; 168:3-12; 170:1-5.

[10] *See, e.g., id.* at 181:16-21; 120:2-12; 122:21-23; 129:11-16; 129:25-131:22; 91:15-92:9; 115:20-118:1; *see* Plaintiffs' Motion to Strike Parrott Affidavits ("Motion to Strike") (line-by-line comparison of affidavit and deposition statements), as well as the March 31, 2011 Hearing Transcript at 33:1-11 (THE COURT: "I have read what you pointed out and the inconsistencies, and I think I can weigh the credibility of the affidavit based upon what you pointed out and the inconsistencies of her deposition and the affidavit. And so to that extent, I mean, I would rather save the Court's time [and admit affidavit evidence], and while I'm going to deny your motion to strike the affidavit, I appreciate what you wrote in your motion, and I will take that into account with regards to what she said, and give it the credit it should be given.").

[11] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 58:11-19; 50:19-51:3; 189:15-25; 197:8-20; 55:5-14; 207:8-20; *cf.* Motion to Strike.

[12] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 88:3-6; 50:19-51:3; 87:21-89:19; *cf.* Motion to Strike.

[13] To the extent relevant, Defendants also tendered an affidavit from Sue Turnage stating that Frost Bank had frozen a minority of Diocesan accounts in light of this litigation. Under Defendants' testimony, the funds in frozen accounts contribute less than 5% of Defendants' annual diocesan-level operating expenditures. *See, e.g.*, Defendants' Motion to Set Supersedeas at $0 Ex. D (Turnage Aff. at Ex. B); May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 148:7-13 (reporting approximately $1,800,000 to $2,000,000 in annual operating expenditures); Defendants' Motion to Set Supersedeas at $0 Ex. B (Parrott Aff. 2) at 2 (reporting only $89,000 in annual operating expenditures from frozen accounts).

[14] *See* Motion to Tender Orders, filed June 24, 2011.

[15] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 127:22-24 and Tab L .

[16] *See* Plaintiffs' Response to Motion to Set Supersedeas at $0, at 13-14 (expected duration of appeal is 37 months using conservative estimate of assigning equal probability to direct and normal appeal).

[17] *LMC Complete Automotive, Inc. v. Burke*, 229 S.W.3d 469, 481-82 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

property is unavailable to support a bond.[18] In addition, a single Individual Defendant was able to finance a $3.5 million line of credit to Defendants during litigation, an amount over three times the requested minimum bond amount. Defendants provided no evidence regarding any of these 12 Individual Defendants.[19]

4. While Plaintiffs bear no burden of proof, they presented the testimony of William Shamburger, an accountant with 39 years experience including 35 years with non-profit and church finances, who, in consultation with bankers with church finance experience and a surety, testified that Defendants could secure a letter of credit based on their size and revenue to support a supersedeas bond in excess of $5 million without recourse to any real property;[20] such letters of credit routinely secure supersedeas obligations.[21] Defendants did not present any contrary expert evidence.[22]

5. Because (1) Texas Rule of Appellate Procedure 24.2(a)(2) requires that the "amount of security **must be at least**"[23] the value of the personal property interest on the date the court rendered judgment and the fair market rental value or revenue of the real property; (2) Defendants bear the burden to prove any

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[18] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 168:7-19.
[19] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 78:25-79:14; 132:14-22; 223:1-17; Defendants' Motion to Set Supersedeas at $0 Ex. A (Parrott Aff.) at 2; Supplemental Appendix in Support of Local Episcopal Parties' and Local Episcopal Congregations' Supplemental Motion for Partial Summary Judgment, filed March 31, 2011 in Cause No. 141-237105-09, as Ex. AA-1 (A1438-1454).
[20] *See, e.g.*, May 19, 2011 Hearing Transcript beginning at 42.
[21] *See, e.g.*, *Lesikar v. Rappeport*, 104 S.W.3d 310, 315 (Tex. App.—Texarkana 2003, pet. denied); *In re Marriage of Reinauer*, No. 07-99-0348-CV, 2000 WL 377837, at *1 (Tex. App.—Amarillo Apr. 10, 2000, pet. denied); *In re Cantu*, 961 S.W.2d 482, 488 (Tex. App.—Corpus Christi 1997, orig. proceeding); *Employers Mut. Cas. Co. v. Tascosa Nat'l Bank*, 767 S.W.2d 279, 284 (Tex. App.—Amarillo 1989, writ denied).
[22] *See, e.g.*, n. 9 *supra.*
[23] Emphasis added.

reduction for substantial economic harm with competent evidence;[24] and (3) Plaintiffs have requested a bond below the amount required by statute and below the amount attainable by Defendants without causing any substantial economic harm, and taking into account all pertinent findings and the applicable law, Defendants should be ordered to post a supersedeas bond or to make a cash deposit of $_____, on or before _____, 2011.

The Court makes the following findings regarding post-judgment injunctions:

6. During this litigation, Defendants have transferred funds out of state in order to try to avoid this Court's jurisdiction,[25] have dissipated over $500,000 in property made the subject of this lawsuit,[26] have signed oil and gas leases covering some of this property,[27] have incurred new debts, including one to Jude Funding, Inc.,[28] that purport to be secured by some of the Subject Property,[29] and have represented to the Court through counsel that they are "all judgment proof" and that attempting to recover damages for such harms is "wasting time."[30] Based on the applicable law, including Texas Rule of Appellate Procedure 24.1(e) and 24.2(d),

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[24] *Ramco Oil & Gas, Ltd.*, 171 S.W.3d at 917; *LMC Complete Automotive, Inc.*, 229 S.W.3d at 487.
[25] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 93:18-22.
[26] *See, e.g., id.* at 63:12-64:4 and 84:13-16.
[27] *See, e.g., id.* at 160:11-18; 161:1-13; 162:9-13; 235:18-21; 236:20-23; and 237:1-7.
[28] *See, e.g.*, Defendants' Motion to Set Supersedeas at $0 Ex. A (Parrott Aff.) at 2.
[29] Throughout this Order, "Subject Property" is defined as all real and personal property, including without limitation funds, cash, securities, depository and investment accounts, other accounts, assets held by trusts or foundations, records, and oil, gas, coal, and other mineral interests, that is not currently held by Plaintiffs and that was held as of November 14, 2008 by or for the Episcopal Diocese of Fort Worth, the Corporation of the Episcopal Diocese of Fort Worth, the Fund for the Endowment of the Episcopate of the Episcopal Diocese of Fort Worth, any of the congregations, parishes, or missions of the Episcopal Diocese of Fort Worth, or any other constituent entity of the Episcopal Diocese of Fort Worth, as well as any real and personal property obtained with, by, through, or as a result of Subject Property, such as interest on, income from, royalties and lease bonuses from, or assets purchased with Subject Property, and including any Subject Property transferred to new accounts or new banks, commingled with other assets, or otherwise transferred or recharacterized.
[30] February 8, 2011 Hearing Transcript at 13 (MR. BRISTER: "[I]f we lose, we are wasting time because our clients are all judgment proof. So [Plaintiffs] can get a million dollars [in damages], and who are they going to collect that from.").

the Court finds that additional protection or security in the form of post-judgment injunctions against all of the Defendants is necessary and appropriate.

7. Based on Defendants' acts of dissipation, transfer, and encumbrance[31] and inaccurate or misleading statements regarding same,[32] the Court finds that it is necessary for Defendants to meet the reporting obligations set forth below to ensure compliance with the injunctions in this Order. The Court notes, *inter alia*, the testimony of Defendant Dioceses' Director of Business and Finance:

> Q. So you thought that that money would be harder for a court to reach out of state?
> A. That is not what I said, but that was the thought of the [Defendant] Diocese, not of me, but of the [Defendant] Diocese, that was the decision that was made.[33]
>
> Q. Why didn't you tell the Court about the Louisiana bank account?
> A. Because at the time, it did not enter my mind. I forgot.[34]
>
> Q. Why wasn't [the Louisiana account] listed on the books?
> A. I don't have an answer to that. It just wasn't.
> Q. Did you prepare these books?
> A. Yes.[35]
>
> Q. [] And in response to receiving this letter from a lawyer questioning the ownership of the accounts, your -- the [Defendant] Diocese's response was to transfer that money out of state?
> A. Not immediately, no, sir, but after thought and discussion, that was what the Diocese decided to do.[36]

The Court makes the following findings regarding post-judgment injunctions and normal course of business:

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[31] *See* Local Episcopal Parties' Response to Defendants' Motion to Set Supersedeas, filed May 17, 2011, at pp. 3-7.
[32] *See, e.g.*, Defendants' contradictions, omissions, and misstatements set forth in the Motion to Strike.
[33] May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 93:18-22.
[34] May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 88:3-6.
[35] May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 98:3-7.
[36] May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 93:6-12.

8. Defendant Diocese's Director of Business and Finance testified that Defendants define their normal or ordinary course of business as "ordinary operating costs ... as defined by our budget."[37] Accordingly, based on the uncontested evidence including Defendants' own definition, **"normal course of business"** is defined in this Order as:

> "Annual expenditures not more than 5% over the amounts, respectively, and in the categories, respectively, reflected:
>
> - for Defendant Diocese, in its 2011 Budget, as originally adopted, in evidence as SC3916-3919;[38] and
>
> - for all other Defendants, in the budgets actually adopted by Defendants, respectively, prior to 2011 for the year ending 12-31-2011, which budgets the Specific Congregations[39] shall tender to Plaintiffs subject to this Order and are incorporated herein by reference;
>
> provided that Defendants may come before the Court to seek modification of this definition upon a showing that increased expenditures are reasonably necessary under Texas Rule of Appellate Procedure 24.3(a)(2) or 24.2(d)."

9. Defendants' Director of Business and Finance testified that the litigation expenses and fees of this case are not part of Defendants' normal course of business.[40] In 2009, 2010, and 2011, Defendants paid $1,139,268.59 of their $1,348,207.06 in legal expenses, or 85%, through separate funds[41] that "are not assets of the

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[37] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 171:21-172:23.
[38] *See* May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep. Tab B) at SC3916-3919.
[39] "Specific Congregations" are the following specific Defendant Congregations: St. Andrew's (Fort Worth), St. John's (Fort Worth), St. Vincent's Cathedral (Bedford), All Saints (Weatherford), Good Shepherd (Wichita Falls), St. Alban (Arlington), Saint Peter and Saint Paul (Arlington), St. Mark (Arlington), Church of the Holy Comforter (Cleburne), Good Shepherd (Granbury), St. Stephen (Hurst), St. Barnabas (Fort Worth), St. Laurence (Fort Worth), St. Anne (Fort Worth), and St. Luke (Mineral Wells).
[40] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 148:14-22; 150:3-5; and 171:21-172:23.
[40] Defendants' Motion to Set Supersedeas Ex. B (Second Parrott Aff.) at 2 and Motion at p. 2.
[41] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep. Tab B) at SC3866; 3980; 3985; 3991; 3995; *see also* Parrott Dep. at 171:21-172:23.

Diocese or Diocesan Corporation."[42] In addition, for each budget since this dispute began until final judgment (2009, 2010, and 2011), Defendants excluded litigation costs of this case, including attorneys' fees, from their budget, designating no diocesan assets to this litigation.[43] Defendants also distinguished litigation costs in this case from their normal course of business in multiple representations to the Court.[44] Defendants presented no evidence that they cannot continue this historic trend, consistent over the entirety of this dispute.[45]

10. Separately, as a matter of law, Defendants have no right "to spend another person's money for services rendered by an attorney," because Plaintiffs' assets, "though in [Defendants'] possession, [are] not rightfully [Defendants']," and because the right to retain counsel "does not go beyond the individual's right to spend his own money."[46] The United States Supreme Court so held in a criminal case, where the right to counsel is heightened.[47] The Court made these determinations against the use of disputed property to pay the defendant's attorneys in the post-indictment, pre-trial phase, before guilt or property ownership had been finally determined on the merits. Here, this Court has

[42] *See, e.g.*, Defendants' Motion to Set Supersedeas at $0 Ex. B (Second Parrott Aff.) at 2; *see also* Motion at p. 2.
[43] *See, e.g.*, *id.* at 148:14-22, 150:3-5, and 171:21-172:23; *id.* at Tab B (SC3903-3919).
[44] *See, e.g.*, Defendants' Motion to Set Supersedeas at $0 at 3 ("To date, Defendants have paid litigation costs mostly from extraordinary gifts and contributions"); at 5 (discussing "current operating expenses, much less the extraordinary expenses of this litigation and appeal"); 1-2 ("no expenditures have been made by Defendants other than in the ordinary course of business and in defense of this lawsuit").
[45] This showing is part of Defendants' burden. *See, e.g.*, *LMC Complete Automotive, Inc.*, 229 S.W.3d at 487 (affirming supersedeas finding against judgment debtor LMC where "the record contains no evidence that LMC would be unable to meet its future financial obligations").
[46] *Caplin & Drysdale, Chartered v. U.S.*, 491 U.S. 617, 626 (1989) (examining Sixth Amendment right to counsel in criminal context; *cf. SEC v. Cherif*, 933 F.2d 403, 417 (7th Cir. 1991) ("It would be anomalous to hold that a civil litigant has any superior right to counsel than one who stands accused of a crime.")).
[47] *Id.*

already issued a final judgment determining that the property in question is Plaintiffs' and not Defendants' as a matter of law.[48]

11. Based on these findings, on the supersedeas record, including Defendants' definition, testimony, representations, and financial documents, and on the applicable law, the Court finds that spending Subject Property on the litigation costs and expenses of this dispute, including attorney's fees, is not within Defendants' normal course of business, and Defendants are not entitled, as a matter of law, to spend property adjudged to be Plaintiffs' on legal fees and expenses to litigate against Plaintiffs.

12. During Defendants' normal course of business over the past 3 years since this dispute began, Defendants have represented to the Court that the accounts containing Subject Property have gone up, not down.[49] Defendants also made this representation specifically concerning Defendant Congregations' accounts.[50] The Court accordingly finds that maintaining the Subject Accounts at or above November 15, 2008 balances is consistent with Defendants' normal course of business.

13. Defendants have testified that in the normal course of business, current operations are traditionally funded almost exclusively through new revenue, which is

[48] *Caplin & Drysdale, Chartered*, 491 U.S. at 626 (1989)..

[49] *See, e.g.*, March 31, 2011 Hearing Transcript at 30 (MR. SHARPE: "[T]he accounts [have] got a bigger value today than they did at the time of separation. They haven't gone down, they've gone up."); *id.* at 8 (MR. BRISTER: "We've given them the bank statements of what's there and what was there in November '08, so they know all that. And they can see that we haven't done that for two and a half years, almost three years now.").

[50] At the March 31, 2011 Hearing on Defendants' Motion to Sever and Stay, Plaintiffs asked the Court to postpone any severance and stay by 30 days to allow the Plaintiffs to schedule the Defendant Congregations' bank accounts for protection during appeal. March 31, 2011 Hearing Transcript at 13 ("I think we can get this wrapped up in 30 days or so, assuming that we can get a list of **the parish accounts** so we can schedule those **just like we've scheduled** the real property in **the diocesan level** financial account.") (emphasis added). In response, opposing this request for a 30 day delay to schedule parish property and arguing that immediate severance and stay would not harm Plaintiffs, Defendants told the Court: "And, by the way, the accounts that they're talking about, they've got a bigger value today than they did at the time of separation. They haven't gone down, they've gone up." *Id.* at 30.

roughly equivalent to expenses.[51] The Court accordingly finds that funding operations almost exclusively through current revenue and not through dissipation of previously-held assets (here, Subject Property) is Defendants' normal course of business.

IT IS THEREFORE ORDERED that, on or before _____, 2011, Defendants[52] shall post a supersedeas bond or make a cash deposit in the amount of $_____.

IT IS FURTHER ORDERED that, during the appeal in this case or until further order of the Court, while Defendants are in possession of Subject Property, all Defendants:

a. **SHALL NOT** use, transfer, dissipate, encumber, convey, destroy, conceal, or dispose of any Subject Property other than in the normal course of business and in accordance with the terms of this Order;

b. **SHALL** keep Subject Property fully insured and maintain in force and good standing property and casualty insurance at least at the coverage levels effective in 2010, to be confirmed by providing Plaintiffs with current coverage documentation within 15 days of the date of this order and within 15 days after future receipt hereafter, and shall timely pay any and all applicable taxes, including income and payroll taxes, arising from any activities conducted by Defendants purportedly in the name of the Diocese or its constituent entities;

c. **SHALL** notify the parties and, after hearing, obtain leave of Court or written agreement of the Local Episcopal Parties before using, transferring, dissipating,

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[51] *See, e.g.*, May 19, 2011 Hearing Transcript Ex. 1 (Parrott Dep.) at 54:6-55:15 and at Tab B (SC3903-3919); Defendants' Motion to Set Supersedeas at $0 Ex. B (Second Parrott Aff.) at 1.

[52] Throughout this Order, "Defendants" includes all parties defined as Defendants in Defendants' December 23, 2010 Motion for Partial Summary Judgment (see page titled "Parties") including all Defendant Congregations, as well as the Defendant appearing as All Saints' Episcopal Church (Fort Worth) or All Saints' Church (or any other permutation) and any other party in this case affiliated with Defendant Iker and/or the Southern Cone.

encumbering, or conveying any Subject Property for attorney's fees or other litigation expenses;

d. **SHALL** keep Subject Property in good repair, normal wear and tear excepted, observe all applicable zoning and code ordinances, and keep current all indebtedness secured or allegedly secured by any Subject Property, confirmed by quarterly report to Plaintiffs;

e. **SHALL** maintain their normal course of business of funding operations and expenses almost exclusively through new revenue and receipts and not through use of Subject Property; after entry of this Order, if Defendants believe they must depart from this normal course of business due to materially changed circumstances, they may seek modification of this Order with prior notice to Plaintiffs and a hearing to first obtain leave of Court; but Defendants shall not, directly or indirectly, favor using Subject Property over new revenue in departure from their normal course of business, such as by encouraging other Defendants or contributors to reduce or redirect contributions;

f. **SHALL** maintain the balances of all accounts of any character or kind, including without limitation depository, investment, trust, foundation, and other accounts, that contain Subject Property and are held or controlled by or for Defendant Diocese, Corporation, or Specific Congregations, at or above the account balances of November 15, 2008 plus any post-11/15/2008 interest, income, or increased market value attributable to those pre-11/15/2008 funds; if for any reason Defendant Diocese, Corporation, or the Specific Congregations desire to withdraw funds from said accounts so that an account will fall below those levels, they must first notify the parties and after a hearing demonstrating why such withdrawals are necessary in the

normal course of business, obtain leave of Court or written agreement of the Local Episcopal Parties to make such withdrawals; if it turns out the Defendants' repeated representations to the Court and Plaintiffs that accounts are higher now than before November 15, 2008 are not true, then the Court will consider appropriate remedies for Plaintiffs, such as lifting the stay in the severed cause, so that Plaintiffs may protect what remains of those accounts, or awarding sanctions against Defendants in favor of Plaintiffs;

g. **SHALL** provide to Plaintiffs, through their counsel, true and correct copies of the following documents sufficient to demonstrate Defendants' compliance with this Order:[53]

- within 15 days of the date of this Order, true and complete copies of the last account statements received before November 15, 2008 showing the balances of all accounts, including bank, investment, and trust accounts, held or controlled by or for the Diocese, Corporation, or pre-schism congregations corresponding to the Specific Congregations, respectively ("Accounts");

- within 15 days of the date of this Order, and, on a continuing basis, within 15 days of opening any new account hereafter, copies of the minutes, resolutions and other documentation provided by or for any of the Defendants to a depository or investment institution to open a new account since 11/14/08 (said new accounts to be thereafter included in "Accounts");

- on a monthly basis within 15 days after future receipt hereafter, true and complete copies of all account statements of all Accounts held or controlled by or for Defendants Diocese, Corporation, or Specific Congregations (with reasonable redactions if desired by Defendants to conceal the identity of donors, if applicable);

- for all other Defendant Congregations, the Parish Annual Parochial Reports for 2008, 2009, and 2010 within 15 days of the date of this order

[53] These documents are the type generally received or prepared in the normal course of business of Episcopal Dioceses and their constituent congregations and are not unduly burdensome in light of Defendants' conduct in this matter. Defendants shall not modify their pre-judgment practices in an attempt to avoid the obligations of this Order.

and, annually thereafter, within 15 days of their receipt by Defendant Diocese; and

- within 15 days of preparation, (1) the monthly financial statements prepared by or for the Finance Committee and the Executive Council of Defendant Diocese, the Board of Directors of Camp Crucis, the Defendant Corporation, and the Specific Congregations, respectively; (2) the annual 12/31 or year-end financial statements for each of the Defendant Diocese and Defendant Congregations, respectively; and (3) each Diocesan Annual Audit report from the auditors, and each Parish Annual Audit or Vestry/Committee Financial Review or other report of any such audit committee for each of the Defendant Congregations within 15 days following their receipt by the Diocese;

h. **SHALL** notify the parties and after hearing obtain leave of Court or written agreement of the Local Episcopal Parties before increasing the balance of indebtedness on the $3.5 million line of credit from Jude Funding, Inc. or on any other debt allegedly secured by Subject Property or before incurring any new indebtedness allegedly secured by Subject Property; and further provided that this provision does not constitute an admission by Plaintiffs that any purported lien on Subject Property is valid, nor do Plaintiffs waive any rights regarding same including pending claims to declare such transactions void;

i. **SHALL** jointly with Plaintiffs instruct all trustees of trusts, foundations, and other entities that are holding Subject Property not to make further distributions without prior consent of both Plaintiffs and Defendants or by leave of Court; and

j. **SHALL** notify the Court and Plaintiffs immediately of any significant change in Defendants' circumstances, sale or transfer of any Subject Property, or unfreezing of frozen accounts.

Plaintiffs and Defendants may come before the Court to seek modification of any term of this Order upon a showing that such modification is reasonably necessary under Texas Rule of Appellate Procedure 24, including under 24.2(d). Any party may come before the Court to seek

modification of the Order pursuant to Rule 24, including 24.3(a)(2). This order is for supersedeas purposes only. Nothing in this order waives, releases, or otherwise limits any present or future claims or defenses of any party.

IT IS FURTHER ORDERED that any relief requested in the Post-Judgment and Supersedeas Proceedings that was not specifically granted in this Order is hereby **DENIED**.

IT IS SO ORDERED.

Signed this ___ day of October, 2011.

_____

JUDGE PRESIDING

EXHIBIT C

--- A.3d ----, 302 Conn. 386, 2011 WL 4537269 (Conn.)
(Cite as: 2011 WL 4537269 (Conn.))

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Only the Westlaw citation is currently available.

Supreme Court of Connecticut.
The **EPISCOPAL CHURCH** IN the **DIOCESE** OF **CONNECTICUT** et al.
v.
Ronald S. **GAUSS** et al.

No. 18718.
Argued Feb. 9, 2011.
Decided Oct. 11, 2011.

Background: Church brought action against members of local parish that had voted to leave church and affiliate with a different ecclesiastical society, alleging breach of trust for the wrongful failure to relinquish to church all of the real and personal property of the parish. Unincorporated voluntary association sought to intervene in the action to protect its alleged ownership interest in the property. The Superior Court, Judicial District of Waterbury, denied petition to intervene. Association appealed.

Holding: The Supreme Court, Zarella, J., held that association failed to overcome presumption that its interests would be adequately represented by members of local parish.

Affirmed.

West Headnotes

[1] Parties 287 ⇐38

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k38 k. In General. Most Cited Cases
Intervention as of right provides a legal right to be a party to the proceeding that may not be properly denied by the exercise of judicial discretion.

[2] Parties 287 ⇐38

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k38 k. In General. Most Cited Cases
To be entitled to intervene as of right, the motion to intervene must be timely, the moving party must have a direct and substantial interest in the subject matter of the litigation, the moving party's interest must be impaired by disposition of the litigation without that party's involvement, and the moving party's interest must not be represented adequately by any other party to the litigation.

[3] Parties 287 ⇐44

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k44 k. Application and Proceedings Thereon. Most Cited Cases
For purposes of judging the satisfaction of the conditions for intervention, the court looks to the pleadings, that is, to the motion to intervene and to the proposed complaint or defense in intervention, and accepts the allegations in those pleadings as true.

[4] Parties 287 ⇐44

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k44 k. Application and Proceedings Thereon. Most Cited Cases
The question on a petition to intervene is whether a well-pleaded defense or claim is asserted; its merits are not to be determined.

[5] Parties 287 ⇐44

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k44 k. Application and Proceedings Thereon. Most Cited Cases

The defense or claim is assumed to be true on a motion to intervene, at least in the absence of sham, frivolity, and other similar objections.

[6] Parties 287 ⇐44

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k44 k. Application and Proceedings Thereon. Most Cited Cases

Neither testimony nor other evidence is required to justify intervention, and a prospective intervenor must allege sufficient facts, through the submitted motion and pleadings, if any, in order to make a showing of his or her right to intervene.

[7] Parties 287 ⇐40(2)

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k40 Persons Entitled to Intervene
287k40(2) k. Interest in Subject of Action in General. Most Cited Cases

Upon petition to intervene, the inquiry is whether the claims contained in the motion, if true, establish that the prospective intervenor has a direct and immediate interest that will be affected by the judgment.

[8] Appeal and Error 30 ⇐840(4)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k838 Questions Considered
30k840 Review of Specific Questions and Particular Decisions
30k840(4) k. Review of Questions of Pleading and Practice. Most Cited Cases

The trial court's decision on a motion for intervention as of right is subject to plenary review.

[9] Parties 287 ⇐41

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k41 k. Grounds. Most Cited Cases

Parties 287 ⇐44

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k44 k. Application and Proceedings Thereon. Most Cited Cases

Unincorporated voluntary association failed to overcome presumption of adequate representation, and thus was not entitled to intervene to protect its alleged ownership interest in property at issue in action brought by church against members of local parish that had voted to leave church and affiliate with a different ecclesiastical society, alleging breach of trust for the wrongful failure to relinquish to church all of the real and personal property of the parish; identities of the association members and the local parish members were overlapping, they had the same ultimate objective of precluding church from establishing possession and control of property, and there was no showing of an adversity of interest, collusion, or nonfeasance by local parish.

[10] Parties 287 ⇐41

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k41 k. Grounds. Most Cited Cases

Parties 287 ⇐44

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k44 k. Application and Proceedings Thereon. Most Cited Cases

To overcome the presumption of adequate representation, the applicant for intervention must show adversity of interest, collusion, or nonfeas-

ance on the part of the existing party.

[11] Parties 287 ⇐41

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k41 k. Grounds. Most Cited Cases

Parties 287 ⇐44

287 Parties
287IV New Parties and Change of Parties
287k37 Intervention
287k44 k. Application and Proceedings Thereon. Most Cited Cases

In determining prospective intervenor's entitlement to intervention, trial court properly considered the totality of the parties' positions, as expressed in their pleadings, to determine whether prospective intervenor's interests could be adequately represented by any other party to the litigation.

James H. Howard, with whom was Howard M. Wood III, for the appellant (prospective intervenor Bishop Seabury Church).

Alan Robert Baker, with whom were Michelle M. Seery and, on the brief, David Booth Beers, and Mary E. Kostel, pro hac vice, for the appellees (plaintiffs).

ROGERS, C.J., and NORCOTT, PALMER, ZARELLA, McLACHLAN and EVELEIGH, Js.

ZARELLA, J.

***1** This is the first of two appeals arising from a property dispute between members of a local parish and the church with which they were affiliated. The plaintiffs, The Episcopal Church in the Diocese of Connecticut (Diocese), the Reverend Canon David Cannon,[FN1] Bishop Seabury Church [FN2] (Parish), and The Protestant Episcopal Church in the United States of America (Episcopal Church), [FN3] brought this action against the defendants, Ronald S. Gauss [FN4] and twelve present or former officers or vestry members of the Parish who hold themselves out as continuing to serve in that capacity,[FN5] alleging breach of trust for the wrongful failure to relinquish to the plaintiffs all of the real and personal property of the Parish following a decision by a majority of the voting members of the Parish, including the defendants, to withdraw from the Diocese and to affiliate the Parish with the Convocation of Anglicans of North America (CANA), an ecclesiastical society that is not part of the Episcopal Church or the Diocese. The plaintiffs sought a declaration that the disputed property was held in trust for the Episcopal Church and the Diocese and an order enjoining the defendants and all those acting in concert with them or at their direction from their continued use of, or assertion of any rights to, the property. Thereafter, an unincorporated voluntary association describing itself as "Bishop Seabury Church" or, alternatively, as Bishop Seabury Memorial Church or Bishop Seabury Episcopal Church (association), attempted unsuccessfully to intervene in the action to protect its alleged ownership interest in the property. The association now appeals to this court, claiming that the trial court improperly denied its motion to intervene and its request for an evidentiary hearing. The plaintiffs respond that the trial court properly denied the association's motion and request. We agree with the plaintiffs and, accordingly, affirm the decision of the trial court.

The following facts are relevant to our resolution of this appeal. The plaintiffs filed their complaint on May 20, 2008. One of the plaintiffs is "Bishop Seabury Church," that is, the Parish. On July 11, 2008, the defendants filed a motion to dismiss the complaint on the ground that the Parish was not an authorized plaintiff. The defendants argued, inter alia, that the Parish did not have standing because (1) the real Bishop Seabury Church is an entity, or association, separate and distinct from any of the entities or persons identified as plaintiffs in the complaint, (2) the vast majority of its members are not parties to this action, (3) it existed as

an independent entity before becoming a parish, (4) it retained its independence after becoming a parish, and (5) it never authorized the present action. In their argument in support of the motion, the defendants similarly contended that the Parish had "co-opt[ed] the identity of Bishop Seabury Church," which, they claimed, was an independent entity governed by its own bylaws that never had authorized the present action. On February 4, 2009, the trial court determined that the Parish had standing and denied the motion to dismiss.

***2** On April 9, 2009, the defendants filed a motion to strike the complaint, arguing that the plaintiffs had failed to join an indispensable party, namely, "the voluntary association known as Bishop Seabury Church Society, an association of approximately 290 members located [in the town of Groton]." The defendants specifically argued that the complaint included allegations against, and that the plaintiffs sought to wrest control from, a society or congregation composed of lay members in possession and control of the property who were "acting in concert" with the defendants and that, because those members were not parties to the present action, they were not receiving "due process" sufficient to bind them to any future court decree. (Internal quotation marks omitted.)

On June 11, 2009, the trial court denied the motion to strike. The court explained that it had taken the allegations in the complaint as true, as it had done when considering the defendants' motion to dismiss, and that the defendants' claim that there was a "Bishop Seabury Church Society" separate and distinct from the Parish was in conflict with the allegations in the complaint. The court observed that the defendants had pointed to no evidence that any other association had been formed by the alleged 280 members of the Bishop Seabury Church Society, and that the members of this society were not indispensable parties because there was nothing in the record indicating that they had a legal interest in the property or that the court could not resolve all of the disputed matters concerning the property without their participation.

On July 1, 2009, the defendants filed an answer, fifteen special defenses and a counterclaim. In their answer, the defendants denied any "characterization of the property as belonging to an entity other than the entities identified in the deeds...." In their counterclaim directed against the Episcopal Church, the defendants alleged that they were "the vestry of Bishop Seabury Church" and that, "[i]n [their] capacity as members of the [Bishop Seabury] Church Society identified in the deeds attached to the plaintiffs' [c]omplaint, they [did] not believe that the Diocese or [t]he Episcopal Church [could] unilaterally control the real [property] occupied by the [Church] Society...."

That same day, the association, represented by the same attorneys who were representing the defendants in the pending litigation, sought to intervene in the action as of right or, in the alternative, permissively, under General Statutes § 52–107 and Practice Book § 9–18.[FN6] The association described itself as a religious association that had existed since the 1870s, consisting of approximately 700 individuals, of whom approximately 280 were voting members, and that it was moving to intervene to "defend its title to the property...." The association specifically alleged that the entity identified by the plaintiffs as "Bishop Seabury Church" was not the entity identified in the deeds to the property but was a fictional entity created for the purpose of participating in the present litigation. The association also alleged that no current party to the litigation had title to the property in its name and that, because the association was the record owner of the property, it was an indispensable party. Furthermore, because the association was in possession and control of the property but was not currently under the court's jurisdiction, the association and its members could not be bound by any court orders connected with the litigation. Claiming that the case, as currently framed, could not resolve any issues involving title, possession or control of the property, the association requested permission

to intervene as the entity identified in the deeds to the property so that it could assert a counterclaim for the purpose of quieting title and pursuing damages against the plaintiffs. A resolution that had been adopted the previous day by the elected officers of "Bishop Seabury Church Society" containing similar allegations was attached to the motion as "[e]xhibit A" [FN7] and was authenticated by the affidavit of Kathy Tallardy in her capacity as "[s]ecretary" of "Bishop Seabury Church," the same Kathy Tallardy named as one of the defendants by the plaintiffs in the action. Also attached to the motion, as "[e]xhibit B," was a copy of the association's most recent bylaws, dated January 20, 2008, reflecting its decision to become a parish under CANA and its self-described independence.

***3** The plaintiffs opposed the motion to intervene on several grounds, including that the Parish was not a fictional entity created for the purpose of the litigation but had long existed as a subordinate unit of the Episcopal Church and, in that capacity, held title to the disputed property.

At the hearing on the motion, the attorney for the association, James H. Howard, introduced himself as representing the defendants as well as the association. Howard distinguished the defendants from the association by noting that the defendants had not asserted a claim of title because they were not identified individually in the deeds to the property, whereas the association was claiming title to the property as "Bishop Seabury Church," which was named in the deeds and thus was a necessary party. Howard explained that, because the plaintiffs were seeking possession of the property and there were hundreds of association members, but only thirteen defendants, it was "appropriate to have the people who are actually in possession" be involved in the litigation. In other words, simply issuing an order relating to twelve or thirteen individuals would not resolve the dispute. Howard further argued that the plaintiffs' claim of an implied trust could not be adequately litigated without consideration of the association's claim of record title to the property. He concluded with a request for an evidentiary hearing on the motion to explore these issues more fully. The plaintiffs' attorney responded that there was no dispute regarding title because there was only one entity that held title to the property, namely, the Parish, and that the issue came down to what entity had possession and the right to hold and control the assets of the Parish.

On October 13, 2009, the trial court denied the association's motion to intervene and request for an evidentiary hearing. The court first concluded that the issues raised by the association appeared to have been fully and fairly raised in the pleadings in light of the defendants' position that the Parish was a fictional entity without title or any right to possession of the property. The court further concluded that the association was not seeking to intervene to assert a claim against the defendants or to defend against the claims of the plaintiffs but to assert a counterclaim against the plaintiffs and to "defend its title." (Internal quotation marks omitted.) According to the court, that purpose did not make the association a necessary party to the action, and, therefore, upon consideration of the parties' positions, the court was not inclined to allow permissive intervention. The court denied the request for an evidentiary hearing without further explanation. The association appealed from the trial court's decision to the Appellate Court on October 29, 2009.

On November 12, 2009, the defendants filed a "motion for continuance due to automatic stay." The defendants sought to stay further proceedings on the parties' respective motions for summary judgment and motions to strike the affidavits of their expert witnesses, which previously had been filed and were scheduled for argument.[FN8] The defendants contended that the association's appeal triggered an automatic stay pursuant to Practice Book § 61–11(a) [FN9] and that any court orders during the period of the automatic stay would be vacated if the stay was not granted. The plaintiffs opposed the motion on the ground that Practice

Book § 61–11(a) did not apply to a nonparty's appeal from the denial of a motion to intervene. The trial court nonetheless denied the defendants' motion in an oral ruling on November 16, 2009, and the Appellate Court denied the defendants' motion for review of that ruling on February 3, 2010.

***4** Proceedings continued on the summary judgment motions without participation by the association. The plaintiffs argued that there was no genuine issue of material fact as to whether the Parish was a subordinate unit within the hierarchy of the Episcopal Church, whether the property was held by the Parish in trust for the mission of the Episcopal Church and the Diocese and whether the property should have been relinquished when members of the Parish chose to affiliate with a different religious organization. The defendants responded that a genuine issue of fact existed with respect to all of the plaintiffs' claims and submitted as exhibits the same documents that the association had attached to its motion to intervene. In the defendants' motion for summary judgment, they reiterated the arguments asserted in their first and second special defenses, namely, that the plaintiffs' claims failed as a matter of law because the court was without the authority to adjudicate matters of church polity and because the claims were barred by the Marketable Title Act, General Statutes § 47–33b et seq. The defendants also made many of the same arguments that the association had made in its motion to intervene. These arguments included that the Diocese could not divest the local church of property in which it had record title and that the property was not held in trust for any other entity.

On March 15, 2010, the trial court rejected the defendants' special defenses, granted the plaintiffs' motion for summary judgment as to their complaint and the defendants' counterclaim, denied the defendants' motion for summary judgment and concluded that the Parish property was held in trust for the Episcopal Church and the Diocese. In addressing the defendants' second special defense, the court determined that the Marketable Title Act was inapplicable as a matter of law because "[w]hether a parish holds record title ... is not dispositive of whether a trust agreement exists." (Internal quotation marks omitted.) The court further noted that "[t]he plaintiffs do not seek to change the record title to the subject property but, rather, seek to obtain declaratory and injunctive relief regarding their right to possess this property premised on the relationship between the Parish ... the Episcopal Church and [the] Diocese." The court also granted the plaintiffs injunctive relief, ordering the defendants to turn over possession, custody and control of the disputed property to the plaintiffs immediately, prohibiting the defendants from the continued use of and assertion of any rights to the property, ordering the defendants and all others acting under their control or direction not to interfere with the plaintiffs' right to immediate possession, custody and control of the property, and prohibiting the defendants and all others acting under their control or direction from wasting, selling, transferring, conveying or encumbering the property. The court also granted the plaintiffs permission to move for an order of accounting within sixty days. The court then rendered judgment for the plaintiffs in accordance with its decision on the motions.

***5** On June 18, 2010, the defendants appealed from the trial court's judgment to the Appellate Court. On December 1, 2010, the defendants' appeal and the association's appeal from the denial of the motion to intervene were transferred to this court pursuant to General Statutes § 51–199(c) and Practice Book § 65–1. The appeals were consolidated for the purpose of creating a single record and for oral argument but not for purposes of briefing. With this factual background in mind, we proceed to consider the association's appeal.

[1] The association claims that the trial court improperly denied its motion to intervene as of right [FN10] because the motion was timely filed, the association has a direct and substantial interest in the litigation, its interest would be impaired by disposition of the litigation without its involvement

and its interest was not adequately represented by any other party to the litigation. The plaintiffs respond that the motion fails on all four grounds and that the trial court properly denied the motion. We agree with the plaintiffs that the trial court properly denied the motion.[FN11]

[2] We begin with the governing legal principles. In moving to intervene as of right, the intervenor must satisfy four requirements. See, e.g., *Kerrigan v. Commissioner of Public Health,* 279 Conn. 447, 456–57, 904 A.2d 137 (2006). The motion to intervene must be timely, the moving party must have a direct and substantial interest in the subject matter of the litigation, the moving party's interest must be impaired by disposition of the litigation without that party's involvement and the moving party's interest must not be represented adequately by any other party to the litigation. Id. If any one of these four requirements is not satisfied, intervention will not be granted. Id., at 456, 458–59, 904 A.2d 137 (referring to "four element, conjunctive inquiry" and concluding that trial court properly denied intervention as of right because intervenor failed to establish direct and substantial interest in subject matter of litigation); see also *Rosado v. Bridge port Roman Catholic Diocesan Corp.,* 60 Conn.App. 134, 146, 148, 758 A.2d 916 (2000) (referring to fact that "test for intervention as of right is conjunctive" and that, if any one of four requirements is not met, motion to intervene must be denied).

[3][4][5][6][7][8] "For purposes of judging the satisfaction of [the] conditions [for intervention] we look to the pleadings, that is, to the motion ... to intervene and to the proposed complaint or defense in intervention, and ... we accept the allegations in those pleadings as true. The question on a petition to intervene is whether a well-pleaded defense or claim is asserted. Its merits are not to be determined. The defense or claim is assumed to be true on [a] motion to intervene, at least in the absence of sham, frivolity, and other similar objections.... Thus, neither testimony nor other evidence is required to justify intervention, and [a prospective] intervenor must allege sufficient facts, through the submitted motion and pleadings, if any, in order to make a showing of his or her right to intervene. The inquiry is whether the claims contained in the motion, if true, establish that the [prospective] intervenor has a direct and immediate interest that will be affected by the judgment." (Citation omitted; internal quotation marks omitted.) *Kerrigan v. Commissioner of Public Health,* supra, 279 Conn. at 457, 904 A.2d 137. The trial court's decision on a motion for intervention as of right is subject to our plenary review.[FN12] Id ., at 454, 904 A.2d 137.

***6** [9] Mindful of these principles, we conclude that the trial court properly denied the motion to intervene because the stated interests of the association were adequately represented by the defendants. Thus, we need not consider whether the remaining three requirements for intervention as of right were satisfied. See, e.g., *BNY Western Trust v. Roman,* 295 Conn. 194, 207 n. 11, 990 A.2d 853 (2010) ("[b]ecause the applicable test for intervention as of right is conjunctive ... and [the prospective intervenor] has failed to satisfy [one of the requirements to establish intervention as of right], we need not consider whether [it] has satisfied the remaining three [requirements]" [citation omitted]).

[10] With respect to the requirement of adequate representation, we have explained that "[t]he most significant factor in assessing the adequacy of representation is how the interests of the absentees compare with the interests of the present parties; the weight of the would-be intervenors' burden varies accordingly. If, for instance, the interests are identical [FN13] or there is a party charged by law with representing a proposed intervenor's interest, a presumption of adequate representation arises that the would-be intervenor can overcome only through a compelling showing of why this representation is not adequate.... At the other end of the spectrum, a presumption of inadequacy arises when an absentee must rely on his opponent or one whose interests are adverse to his." (Citation omitted.) *Rosado v.*

Bridgeport Roman Catholic Diocesan Corp., supra, 60 Conn.App. at 148–49, 758 A.2d 916, citing *Edwards v. Houston,* 78 F.3d 983, 1005 (5th Cir.1996) . Thus, to overcome the presumption of adequate representation, "the applicant for intervention must show adversity of interest, collusion, or nonfeasance on the part of the existing party...." *Edwards v. Houston,* supra, at 1005.

In the present case, the trial court, in denying the motion to intervene, stated that "the issues raised by the [association] appear to be fully and fairly raised ... by the present pleadings based on the defendants' position that the [Parish] is a fictional entity without title or any right to possession [of the property in question]. Moreover, the [association] does not seek to intervene in order to assert a claim against the defendants." We agree with the trial court and further conclude that there is a presumption of adequate representation because the record demonstrates that the identities of the association members and the defendants are overlapping and that they have the same ultimate objective.

With respect to the issue of identity, it is clear that the defendants are members of the self-described "association" that moved to intervene in the pending litigation because the motion states that the defendants are association members.[FN14] Moreover, the resolution establishing the association was adopted by the "elected officers and vestry" of the Parish on behalf of its approximately 700 individual and 280 voting members, and it is undisputed that all of the defendants are present or former officers or vestry members of the Parish. In addition, the resolution attached to the motion to intervene is signed by Tallardy as secretary of "Bishop Sea-bury Church," the same person who is a defendant in the action. Finally, the defendants in their counterclaim, like the association in its motion, described themselves as members of the entity identified in the deeds to the property. Accordingly, there is no question that the defendants and the association share an identity of interests that gives rise to a presumption that the association is adequately represented by the defendants merely on the basis that they are present or former officers or vestry members of the Parish.

***7** The pleadings also indicate that the defendants and the association share the same stated objectives.[FN15] The association, which claimed to be the record owner of the property, an indispensable party, and an entity separate and apart from the Parish, moved to intervene in the action to defend its purported title to the property and to pursue a counterclaim against the plaintiffs. For all intents and purposes, however, the association's underlying objective in defending its purported title was to retain possession and control of the property and to preclude the plaintiffs or any other entity from being granted possession and control. This is evident from language in the motion to intervene repeatedly referring to the fact that the association was in possession and control of the property, that the Parish was not in possession and control of the property, and that, without the association's participation in the case, the trial court would be unable to resolve issues related to title, possession or control of the property.[FN16] See *Dixon v. Edwards,* 290 F.3d 699, 713 (4th Cir.2002) (noting in similar action that injunction at issue "does not concern property ownership ... but only the rights of access and control over the Parish property—that is, the question of who is in charge, not who owns the land").

The defendants have articulated the same objective. From the outset of this litigation, the defendants have made allegations almost identical to those of the association by claiming that the Parish was not the entity identified in the deeds to the property, that "Bishop Seabury Church" was an indispensable party and that the plaintiffs did not have an implied trust interest in the property. Specifically, the defendants alleged in their motion to dismiss and in their memorandum of law in support thereof that the Parish did not have standing because the real "Bishop Seabury Church" was an independent entity separate and distinct from the Parish and had not authorized initiation of the litiga-

tion. The defendants further alleged in their motion to strike and supporting memorandum of law that "Bishop Seabury Church Society," as distinguished from the Parish, was an indispensable party because the plaintiffs were seeking to wrest possession and control of the property from "Bishop Seabury Church Society," which was not represented in the litigation and thus could not be bound by any future orders of the court. In their answer to the plaintiffs' complaint, the defendants also denied any "characterization of the property as belonging to an entity other than the entities identified in the deeds," and, in their counterclaim directed against the Episcopal Church, they alleged that they represented "the vestry of Bishop Seabury Church" and, "[i]n [their] capacity *as members of the [Bishop Seabury] Church Society identified in the deeds attached to the plaintiffs' [c]omplaint,* they [did] not believe that the Diocese or [t]he Episcopal Church [could] unilaterally control the real [property] occupied by the [Church] Society...." (Emphasis added.) Thereafter, the defendants sought an automatic stay of the proceedings during the association's appeal of the trial court's ruling on the motion to intervene, an action that clearly was intended to benefit the association. Lastly, in documentation filed in connection with their motion for summary judgment, the defendants argued, inter alia, that the Diocese could not divest "Bishop Seabury Church" of property in which it had record title and that the property was not held in trust for the plaintiffs or any other en- tity.

***8** In light of the fact that the association and the defendants have the same ultimate objective of retaining possession and control of the property and of precluding the plaintiffs from establishing possession and control, there is a presumption of adequate representation that the association can overcome only by showing an adversity of interest, collusion or nonfeasance by the defendants. *Edwards v. Houston,* supra, 78 F.3d at 1005. We conclude that the association has failed to meet this burden.

The association argues that the defendants cannot adequately represent its interests because the association is the only entity that can (1) seek to quiet title in its name, (2) prove the entitlement of its officers and vestry members to hold their respective seats, (3) invoke the Marketable Title Act as a defense to the plaintiffs' implied trust claim, and (4) pursue an alternative claim against the plaintiffs under the ejectment statute, General Statutes § 47–30. We conclude that none of these arguments suggests an adversity of interest, collusion or nonfeasance by the defendants.

The association first argues that, because the defendants do not, and cannot, claim to have record title in their names, the association is the only entity that can seek to quiet title to the property. This argument is apparently based on a belief that the association may retain possession and control of the property if the court determines that it holds record title. In *Rector, Wardens & Vestrymen of Trinity–St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Connecticut,* 224 Conn. 797,224 Conn. 797, 620 A.2d 1280 (1993), however, we stated that "[w]hether a parish holds record title ... is not dispositive of whether a trust agreement exists." Id ., at 819–20 n. 21, 620 A.2d 1280; see also *Dixon v. Edwards,* supra, 290 F.3d at 713 (injunction at issue did "not concern property ownership ... but only the rights of access and control over the Parish property—that is, the question of who is in charge, not who owns the land"). Accordingly, the question of who holds title to the property is irrelevant in this context. Moreover, to the extent the association's underlying objective in seeking to quiet title is to retain possession and control of the property, the defendants have aggressively pursued this objective throughout the litigation. For example, as previously explained, the defendants effectively alleged in their answer and counterclaim that the Parish was not the entity identified in the deeds to the property and thus had no right to possession or control. An objective reading of all of the pleadings therefore indicates that the defendants have consistently represented the interests of the association on the issue of who holds title to the prop-

erty.

The association next argues that the defendants cannot adequately represent its interest in proving the entitlement of its officers and vestry members to hold their respective seats. The record indicates, however, that the defendants have vociferously represented the association's interests from the outset of the litigation, and the association provides no explanation, beyond its conclusory statement that it is not adequately represented, as to why the defendants, as members of the association, are not well qualified to represent this interest.

***9** The association further argues that, because the trial court determined that the defendants could not invoke the Marketable Title Act (act) as a defense to the plaintiffs' implied trust claim, the association, which, it claims, has held title to the property in its name since 1966, is the only entity that can raise such a defense. We first observe that the association made no reference to the act in its motion to intervene, and the trial court did not rule on the applicability of the act until more than nine months later, as part of its decision on the parties' motions for summary judgment. Accordingly, the court could not have considered this argument when it denied the motion to intervene. Furthermore, the argument is premised on a faulty understanding of the trial court's decision. The trial court concluded that the act was "inapplicable" because the recording of the trust interest was "not a prerequisite to establishing the existence of an implied trust" and because the plaintiffs did "not seek to change the record title to the subject property but, rather, [sought] declaratory and injunctive relief regarding their right to possess [the] property premised on the relationship between the Parish ... the Episcopal Church and [the] Diocese." The trial court's conclusion thus did not rest on the defendants' status as individuals but on general considerations relating to the plaintiffs' claims, which would not have changed if the association had raised the same defense.

The association's final argument is that the defendants could not provide adequate representation in the event that the association brings a future claim that, if the plaintiffs prevent the association from retaining possession of the property, it would be entitled to compensation pursuant to § 47–30, [FN17] the ejectment statute. We decline to review this argument because the association failed to raise it in its motion to intervene. As we previously noted, in "judging the satisfaction of [the] conditions [for intervention] we look to the pleadings, that is, to the motion ... to intervene and to the proposed complaint or defense in intervention, and ... we accept the allegations in those pleadings as true." (Internal quotation marks omitted.) *Kerrigan v. Commissioner of Public Health,* supra, 279 Conn. at 457, 904 A.2d 137. Having examined the pleadings, we conclude that the association made no allegations of this nature in its motion to intervene. Moreover, even if the association had raised this argument in its motion, it is irrelevant because the plaintiffs have not brought an ejectment action, and there are no grounds for considering any argument premised on such an action. Thus, the argument fails to demonstrate the required adversity of interest, collusion or nonfeasance on the part of the defendants. *Edwards v. Houston,* supra, 78 F.3d at 1005. For all of the foregoing reasons, the association has not overcome the presumption that its interests are being adequately represented by the defendants, and we conclude that the trial court properly denied the association's motion to intervene.

***10** [11] The association also claims that the trial court improperly denied its request for an evidentiary hearing so that it could prove its right to possession of the property and its right to intervene. It further claims that, instead of taking the association's allegations as true, as the court was required to do, the court stated that it had considered the "totality of the [movant's] and the parties' positions...." The association thus claims that it was deprived of the opportunity to prove its allegations that, among other things, the property is not held in trust for the plaintiffs or any other entity and that the Parish is not the real "Bishop Seabury Church."

The plaintiffs respond that the association "inaccurately characterizes the trial court's decision and improperly conflates the court's consideration of the 'totality of the parties' positions' with the unrelated concept of the 'merits' of the [association's] allegations." We conclude that the trial court properly denied the association's request for an evidentiary hearing.

We repeatedly have stated in this opinion that, in "judging the satisfaction of [the] conditions [for intervention] we look to the pleadings, that is, to the motion ... to intervene and to the proposed complaint or defense in intervention, and ... we accept the allegations in those pleadings as true." (Internal quotation marks omitted.) *Kerrigan v. Commissioner of Public Health,* supra, 279 Conn. at 457, 904 A.2d 137. The trial court's analysis, however, was not complete after it considered the allegations in the motion to intervene and took them as true. It also was required to consider whether the association's interests were adequately represented by another party to the litigation. See id., at 456–57, 904 A.2d 137. In making this determination, the trial court examined all of the pleadings in order to reach a decision as to whether the defendants could adequately represent the interests of the association. Accordingly, the trial court's conclusions that "[t]he issues raised by the [association] appear to be fully and fairly raised in this case by the present pleadings based on the defendants' position that the [Parish] is a fictional entity without title or any right to possession" and that the association did "not seek to intervene in order to assert a claim against the defendants" were entirely proper. In other words, the court correctly considered the "totality" of the parties' positions, as expressed in their pleadings, to determine whether the association's interests could be adequately represented by the defendants.[FN18]

Finally, insofar as the association claims that an evidentiary hearing was required so that it could have the opportunity to prove its claims on their merits, the trial court's conclusion that the association's interests were adequately represented by the defendants rendered such a hearing unnecessary. Accordingly, we conclude that the trial court properly denied the association's request for an evidentiary hearing.

***11** The decision of the trial court is affirmed.

In this opinion the other justices concurred.

FN1. Reverend Cannon was appointed "[p]riest in [c]harge" of Bishop Seabury Church by the Bishop of the Diocese of Connecticut on February 29, 2008.

FN2. Bishop Seabury Church is a parish of the Diocese.

FN3. The Episcopal Church joined this action as a plaintiff by way of a motion to intervene filed on June 6, 2008, which was granted on June 24, 2008.

FN4. Reverend Gauss served as an active, ordained priest of the Episcopal Church and as rector of the Parish prior to his retirement on December 1, 2007.

FN5. The twelve present or former officers or vestry members are Richard Vanderslice, Arthur H. Hayward, Jr., Stanley Price, Deborah Gaudette, Kathy Tallardy, Barbara Stiles, Marion Ostaszewski, Shelley Steendam, Amy Ganolli, Debra Salomonson, James Conover and Everett Munro. Former Attorney General Richard Blumenthal also was named as a defendant because of his "interest in the protection of any gifts, legacies or devises intended for public or charitable purposes"; General Statutes § 3–125; and he appeared in the case, but neither he nor his successor has participated in the litigation to date. In the interest of simplicity, we refer to the twelve officers or vestry members and Gauss collectively as the defendants throughout this opinion.

FN6. In *BNY Western Trust v. Roman,* 295 Conn. 194, 203–204, 990 A.2d 853 (2010), we stated that " General Statutes §§ 52–102 and 52–107 govern the intervention of nonparties to an action and provide for both permissive intervention and intervention as a matter of right."

General Statutes § 52–107 provides: "The court may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the court may direct that such other parties be brought in. If a person not a party has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party."

Practice Book § 9–18 provides in relevant part: "The judicial authority may determine the controversy as between the parties before it, if it can do so without prejudice to the rights of others; but, if a complete determination cannot be had without the presence of other parties, the judicial authority may direct that they be brought in. If a person not a party has an interest or title which the judgment will affect, the judicial authority, on its motion, shall direct that person to be made a party...."

FN7. Apparently, in response to the trial court's decision denying the defendants' motion to strike, in which it stated that there was no evidence in the record that any association had been formed with a legal interest in the property separate from that of the Parish, the defendants, among others, unanimously resolved on June 30, 2009, as "the elected officers and vestry of ... Bishop Seabury Church Society" that "Bishop Seabury Church" was a "religious association" established in the 1870s. The resolution further stated that the association, which consisted of 700 individuals and approximately 280 voting members or adult communicants, was in possession and control of the "[c]hurch building and property," was not currently under the jurisdiction of the court or a party to the ongoing litigation and, because it was the owner, did not intend to relinquish possession and control of the property. The resolution also declared that record title was in the name of the association, there always has been, and there continues to be, only one religious association known as "Bishop Seabury Church," the property was not held in trust for any other entity, including the plaintiffs in the pending litigation, the entity identified in the litigation as the plaintiff "Bishop Seabury Church" was not Bishop Seabury Church, neither the members nor officers of "Bishop Seabury Church" had authorized any other person or entity to pursue a claim on its behalf as a plaintiff, and the entity identified by the plaintiffs as "Bishop Seabury Church Parish" was not the entity identified in the deeds to the property.

FN8. The plaintiffs filed their motion for summary judgment on July 31, 2009. The defendants filed their motion for summary judgment on October 15, 2009.

FN9. Practice Book § 61–11(a) provides in relevant part: "Except where otherwise provided by statute or other law, proceedings to enforce or carry out the judgment or order shall be automatically stayed until the time to take an appeal has expired. If an appeal is filed, such proceedings shall be stayed until the final determination of the cause...."

FN10. "Intervention as of right provides a legal right to be a party to the proceeding

that may not be properly denied by the exercise of judicial discretion." *BNY Western Trust v. Roman,* 295 Conn. 194, 204 n. 8, 990 A.2d 853 (2010).

FN11. We note that, although the association requested permissive intervention and intervention as of right pursuant to General Statutes § 52–107 and Practice Book § 9-18, the only claim that the association raises on appeal is that the trial court improperly denied its request to intervene as of right. Accordingly, we do not consider whether the trial court improperly denied the motion insofar as the association was seeking permissive intervention. See, e.g., *Rector, Wardens & Vestrymen of Trinity–St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Connecticut,* 224 Conn. 797, 808 n. 12, 620 A.2d 1280 (1993) (issue not briefed is deemed to be waived).

We also note that the trial court referred only to permissive intervention in stating in its decision on the motion to intervene that it was "not inclined" to allow intervention. We nonetheless conclude that the trial court's decision provided a sufficient basis for the association's claim on appeal because, despite the court's omission of any explicit reference to intervention as of right, its order denying the "foregoing motion to intervene by [the association]" implicitly refers to intervention as of right as well as permissive intervention because both were presented by the association as alternative grounds for the granting of the motion by virtue of its reference to § 52–107 and Practice Book § 9–18, and the plaintiffs do not claim on appeal that the trial court did not address the association's request for intervention as of right.

FN12. In *BNY Western Trust v. Roman,* 295 Conn. 194, 207–208 n. 12, 990 A.2d 853 (2010), we observed that the court in *Kerrigan* had determined that plenary review should be applied to three of the four prongs of the test for intervention but that *Kerrigan* had left open the question of which standard of review should apply to the timeliness prong because that element was not at issue in *Kerrigan.* We then stated in *BNY Western Trust* that, although we were not required in that case to determine the applicable standard of review regarding the merits of the trial court's decision on timeliness, that prong was central to the final judgment question, and, therefore, plenary review should be applied to the timeliness prong "for purposes of the threshold jurisdictional inquiry." Id. Because, as in *Kerrigan,* we do not reach the element of timeliness in the present case, we also refrain from addressing the appropriate standard of review regarding the timeliness prong.

FN13. In *Edwards v. Houston,* 78 F.3d 983 (5th Cir.1996), the Fifth Circuit Court of *Appeals* explained that this presumption arises "when the would-be intervenor has the same ultimate objective as a party to the lawsuit." Id., at 1005.

FN14. The association specifically alleged in its motion to intervene: "The [a]ssociation and its members (other than those named as defendants) are not bound by any orders of [the trial] [c]ourt."

FN15. The fact that some of the defendants may no longer hold elected positions in the Parish does not change the fact that their pleadings reflect the same interests expressed by the association.

FN16. The association must attack the status of the Parish because it may not oth-

erwise claim possession and control of the property on behalf of its members, whose interests they claim are not represented by the Parish.

FN17. General Statutes § 47–30 provides in relevant part: "Final judgment shall not be rendered, in any action to recover the possession of land, against any defendant who has, in good faith, believing his title to the land in question absolute, made improvements on the land before the commencement of the action, or whose grantors or ancestors have made the improvements, until the court has ascertained the present value of the improvements and the amount reasonably due the plaintiff from the defendant for the use and occupation of the land...."

FN18. The plaintiffs note that the trial court referred to the "totality" of the parties' positions immediately before concluding that it was "not inclined to allow permissive intervention," and, accordingly, the court's use of that term had nothing to do with its decision regarding intervention as of right. We take the broader view, however, because we construe the decision as applying to both types of intervention.

Conn.,2011.
Episcopal Church in Diocese of Connecticut v. Gauss
--- A.3d ----, 302 Conn. 386, 2011 WL 4537269 (Conn.)

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