CAUSE NO. 141-237105-09

THE EPISCOPAL CHURCH, et al.	§	IN THE DISTRICT COURT OF
	§	
	§	
v.	§	TARRANT COUNTY, TEXAS
	§	
	§	
FRANKLIN SALAZAR, et al.,	§	141ST JUDICIAL DISTRICT

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants move for partial summary judgment on all their claims except the form of affirmative relief (declaratory, injunctive, attorney's fees, etc.), and against all the Plaintiffs' claims. There are no questions of material fact and Defendants are entitled to judgment as a matter of law. Tex. R. Civ. P. 166a.

Summary Judgment Evidence

Defendants motion is based on the pleadings and the affidavits and exhibits filed in the Appendix to this motion. To avoid needless duplication, Defendants also intend to use TEC's Constitution and Canons from 1979, 2006, and 2009 from the Plaintiffs' Appendix.[1] *See* Tex. R. Civ. P. 166a(d).

The Applicable Statutes

The governing statutes in this case are the Texas Non-Profit Corporation Act, Tex. Rev. Civ. Stat. art. 1396–1.01 to 1396—11.02, and the Texas Uniform Unincorporated Nonprofit Association Act, Tex. Rev. Civ. Stat. art. 1396—70.01. Relevant excerpts are included in the Appendix filed with this motion.

The Texas Business Organizations Code does not apply because this suit was filed before January 1, 2010, and because all transactions involved occurred before that date. *See* Tex. Bus. Orgs. Code §§ 402.006, 402.014.

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[1] Plaintiffs' Appendix Ex. 18, pp. A436-A503 (1979); Plaintiffs' Appendix Ex. 36, pp. A615-A802 (2006); Plaintiffs' Appendix Ex. 2 & 3, pp. A120-A358 (2009).

PARTIES

PLAINTIFFS

TEC	Plaintiff The Episcopal Church.
Local TEC	All parties that filed the "Local Episcopal Parties' Motion for Partial Summary Judgment" in this case on October 18, 2010.
Plaintiff Congregations	All parties that filed the "First Amended Original Plea in Intervention of Episcopal Congregations" on November 15, 2010 signed by Frank Hill.
Plaintiffs	TEC, Local TEC, and Plaintiff Congregations, regardless of how such parties are designated in any answers, counterclaims, interventions, or other pleadings.

DEFENDANTS

Defendants	All parties listed below, regardless of how they are designated in any answers, counterclaims, interventions, or other pleadings.
the Diocese	The Episcopal Diocese of Fort Worth.
the Corporation	The Corporation of The Episcopal Diocese of Fort Worth.
Bishop Iker	Bishop Jack Leo Iker.
Trustees	Franklin Salazar, Jo Ann Patton, Walter Virden, III, Rod Barber, Chad Bates, and Bishop Iker.
Standing Committee	Judy Mayo, Julia Smead, the Rev. Christopher Cantrell, the Rev. Timothy Perkins, The Rev. Ryan Reed, and the Rev. Thomas Hightower.
Defendant Congregations	All parties that filed the "First Amended Original Plea in Intervention" as "Intervening Congregations" on November 12, 2010 signed by R. David Weaver.

Specific Grounds For Partial Summary Judgment

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What Texas Courts Can And Cannot Decide.....3

Texas courts generally do not intervene in an association's internal disputes. But they have limited jurisdiction to decide such disputes incident to control of property. This Court cannot decide who should preach or attend conventions, but it can decide which officers are entitled to control church property.

To resolve church property disputes, states can adopt one of two approaches: neutral principles or deference. Texas courts have adopted the neutral-principles approach. This Court must look to the deeds, constitution, articles, by-laws, and state statutes to decide who controls church property.

The Corporation Owns The Property.....7

Plaintiffs concede in their pleadings that the Corporation of the Episcopal Diocese of Fort Worth holds title to the real and personal property in this case.

The Plaintiffs Have No Trust Interest.....7

A trust interest in Texas property can be created only by its owner, not an alleged beneficiary. Neither the Diocese nor the Corporation ever created a trust in favor of TEC, or anyone but local parishes. Under Texas law, TEC could not unilaterally establish a trust over someone else's property.

If a trust includes Texas realty, it must be signed by the owner. There is no signed writing in favor of TEC.

Trusts in Texas are revocable unless they expressly state otherwise. There is no such statement here. Any hypothetical trust interest in TEC was revoked in 1989.

The Defendants Are The Corporation's Trustees.....12

The Texas Non-Profit Corporation Act limits removal and replacement of directors to the methods provided in the corporation's articles and by-laws. The Defendant Trustees have not been removed or replaced according to the Corporation's article and by-laws, so they are its proper Trustees.

Bishop Iker Is The Diocese's Bishop.....15

An association's rules govern officer elections. TEC's own Constitution provides that bishops shall be chosen by rules prescribed by each diocese. The Diocese's Constitution provides for election of a bishop by majority vote at the Annual Convention. Plaintiffs concede Bishop Iker was so elected.

Plaintiffs allege they elected a new bishop at a "special" convention in 2009 called by TEC's Presiding Bishop. But the rules of neither the Diocese nor TEC allow her to call a special convention. TEC's own Constitution prohibits any bishop from acting in an existing diocese absent invitation from a local bishop.

Additionally, the Corporation's articles allow the Trustees to decide who is Bishop for purposes incident to property. This Court must do the same.

Amended Articles Cannot Be Ultra Vires.....**19**

Under the Texas Nonprofit Corporation Act, Plaintiffs have no standing to assert an *ultra vires* claim. Amending a corporation's articles cannot be beyond its substantive power as the articles themselves determine what powers a corporation has. The Corporation's 2006 amendments were unanimously adopted, and nothing in the governing documents of TEC, the Diocese, or the Corporation allows TEC or its minority delegates to veto such changes.

Plaintiffs Have No Standing To Assert The Tort Claims.....**22**

As the court of appeals has barred Plaintiffs' counsel from appearing on behalf of the Diocese and the Corporation, they cannot assert claims belonging to those entities, including conversion, use of trade-names, breach of fiduciary duty, trespass to try title, quiet title, and damages.

INTRODUCTION

In this suit, 36 former members or non-members[2] of The Episcopal Diocese of Fort Worth ask this Court to award them real and personal property valued in millions of dollars — most of which are churches they have never attended or contributed a dime to build. They ask this Court to disregard the deliberate and repeated decisions of a super-majority of the Diocese's validly elected delegates. And they ask this Court to order that the Defendants and the super-majority they represent "vacate and surrender possession" of 84 churches or church properties in and around Fort Worth — with no compensation whatsoever.[3]

The ultimate legal question for the Court is whether the control of two Texas entities — a Texas nonprofit corporation (the Corporation) and a Texas unincorporated association (the Diocese) — should be decided by (1) neutral application of Texas law to their unambiguous governing documents, or (2) divergent opinions about the structure, history, beliefs, and practice of a religious denomination over hundreds of years. Both the Constitution and Texas law require this Court to choose the former.

The law in Texas for more than a century has been that religious groups "have the right to make their own rules … and these rules may be considered as articles of agreement to which all who become members are parties." *Manning v. San Antonio Club*, 63 Tex. 166, 1884 WL 20384 *4 (Tex. 1884).[4] When they establish such rules, neither the parties nor the courts can ignore them:

> When, therefore, persons enter into organizations for purposes of social intercourse or pleasure or amusement, and lay down rules for their government, these must form the measure of their rights in the

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[2] *See* Affidavit of Canon Charles A. Hough, III ("Hough Affidavit"), ¶¶ (11)-(13).

[3] *See* Third Amended Answer to Southern Cone Congregations' Plea in Intervention and Counterclaim Against Southern Cone Congregations ("3rd Amd. Ans. to Interv.") p. 38 (Requested Relief ¶(*l*)) & Exhibit A.

[4] *Accord, Cline v. Ins. Exch. of Houston*, 166 S.W.2d 677, 680-81 (Tex. 1943) ("A voluntary association has the power to enact rules governing the admission of members and prescribing certain qualifications for membership; and such rules will be enforced, unless they are against good morals or violate the laws of the State.").

> premises, and it is vain to appeal to the Bill of Rights against their own agreements.[5]

In this case, the Diocese and Corporation established rules long before this dispute arose — in title deeds, a constitution, articles of incorporation, and by-laws. TEC objected to none of those rules; indeed its own rules expressly authorized them. Under these established rules, the Defendants are entitled to title, control, and use of all the property at issue in this case.

The Plaintiffs' motions almost completely ignore these rules. Despite their extraordinary volume (1,500 pages including appendices), they include no deeds, no corporate by-laws, and only brief excerpts from the Diocese's Constitution. They rely entirely on conclusory affidavits based on irrelevant documents like church journals from the 19th century and multiple copies of TEC's lengthy Constitution and Canons — most of which say ***nothing*** about church property. This one-sided version of church history and polity is wrong, as will be shown in Defendants' Response to the Plaintiffs' motions. But more importantly, interpreting church history and practice is a religious question this Court is incompetent to decide. *Jones v. Wolf*, 443 U.S. 595, 605 (1979) (declining to conduct "a searching and therefore impermissible inquiry into church polity"). The Plaintiffs invoked this Court's jurisdiction by filing suit; they cannot turn around and demand judgment on grounds the courts cannot entertain.

This case is not a contest about which person or group TEC can recognize as the loyal church. Defendants concede that TEC may recognize whatever affiliates or representatives it chooses according to its own rules. But it cannot take property it did not pay for and has never owned. It cannot remove or appoint directors of a Texas corporation it did not form and has no legal authority to control. It cannot remove or elect the leader of a Texas unincorporated association it did not form and of which it has never been a member.

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[5] *Id.* at *5.

I. WHAT TEXAS COURTS CAN AND CANNOT DECIDE

The Plaintiffs seek declaratory relief on a dozen or more claims in their multifarious pleadings, most of which fall into three categories:

1. **Property issues**: Who holds legal and beneficial title to the property in the Diocese?
2. **Officer issues**: Who are the proper officers of the Diocese and the Corporation?
3. **Affiliation issues**: Can the Diocese and Corporation change their affiliation?

Two principles — one constitutional and one common-law — limit which of these disputes a Texas court can decide. As courts do not address constitutional questions if an issue can be decided on other grounds,[6] the common-law limitation is addressed first.

A. For Associations, Texas Courts Decide Property Issues, Not Member Issues

Texas courts generally have no jurisdiction of disputes regarding membership, governance, or election contests for unincorporated associations.[7] In such cases, judicial review "is severely limited under the common law in Texas."[8] Thus, for example, Texas courts have refused to decide who was the National

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[6] *Sw. Bell Tel., L.P. v. Harris County Toll Road Auth.*, 282 S.W.3d 59, 61 n.2 (Tex. 2009) ("As a rule, we only decide constitutional questions when we cannot resolve issues on nonconstitutional grounds."); *accord*, *Northwest Austin Mun. Utility Dist. No. One v. Holder*, 129 S.Ct. 2504, 2513 (2009) (noting that "the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case").

[7] *Juarez v. Texas Ass'n of Sporting Officials,* 172 S.W.3d 274, 279 (Tex. App.—El Paso 2005, no pet.) ("[T]he matter in controversy before us is precisely the type of internal dispute among members of an association wherein the courts of this state have declined to interfere."); *Dickey v. Club Corp. of Am.*, 12 S.W.3d 172, 176 (Tex. App.—Dallas 2000, pet. denied) ("Traditionally, courts are not disposed to interfere with the internal management of a voluntary association."); *Libhart v. Copeland*, 949 S.W.2d 783, 793 (Tex. App.—Waco 1997, no writ) ("We do not act as a referee for disputes among the members of an association …"); *Harden v. Colonial Country Club*, 634 S.W.2d 56, 50 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.); *Gaines v. Farmer*, 119 S.W. 874, 876-77 (Tex. Civ. App.—Texarkana 1909, writ dism'd).

[8] *Dallas County Med. Soc. v. Ubinas Brache*, 68 S.W.3d 31, 41 (Tex. App.—Dallas 2001, pet. denied); *see also Stevens v. Anatolian Shepherd Dog Club of Am., Inc.*, 231 S.W.3d 71, 74 (Tex. App.—Houston [14th Dist.] 2007, pet denied) ("Courts are not disposed to interfere with the internal management of a voluntary association.").

Grand Master of a fraternal order,[9] or the directors of a Dallas country club.[10] Accordingly, this Court cannot intervene in a dispute about whether a diocese can disaffiliate from TEC (even if that is an easy question, as no TEC rule prohibits disaffiliation and the First Amendment guarantees a right to disassociate).[11]

But there is an exception to non-intervention in disputes involving title to money or property.[12] In *Jones v. Maples*, the court distinguished pure election disputes (no jurisdiction) from disputes about "who were really the officers of an Association as incident to the question of proper custody of money and property of the Association" (jurisdiction). 184 S.W.2d 844, 848 (Tex. App.—Eastland 1944, writ ref'd). The writ was refused in *Jones v. Maples*, so it has the same authority as an opinion by the Texas Supreme Court.[13] Accordingly, this Court has jurisdiction to decide the identity of the Bishop and Trustees ***incident to the question of proper custody of property***, but ***not*** for any other purposes — such as who should attend TEC's national convention or confirm bishops in other dioceses.

The Plaintiffs ignore this distinction, lumping all "identity questions" together in the hope that judicial reluctance to decide who will ***preach*** might bleed over into reluctance to decide who owns ***property***. But Texas courts cannot abstain from deciding who owns property: "The State has an obvious and legitimate

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[9] *Gaines v. Farmer*, 119 S.W. 874, 876 (Tex. Civ. App.—Texarkana 1909, writ dism'd).

[10] *Dallas Athletic Club Prot. Comm. v. Dallas Athletic Club*, 407 S.W.2d 849, 850 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.); *see also Combs v. Tex. State Teachers Ass'n*, 533 S.W.2d 911, 912 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.) (declining jurisdiction of whether association's rules prohibited reconsideration of recently defeated measure).

[11] *See, e.g., Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association therefore plainly presupposes a freedom not to associate."); *N.L.R.B. v. Granite State Joint Bd., Textile Workers Union of Am.*, 409 U.S. 213, (1972) (noting general rule guaranteeing "the right of the individual to join or to resign from associations, as he sees fit").

[12] *Stevens v. Anatolian Shepherd Dog Club of Am., Inc.*, 231 S.W.3d 71, 75 (Tex. App.—Houston [14th Dist.] 2007, pet denied) ("Despite this general rule, courts will interfere in the inner-dealings of a private association if a valuable right or property interest is at stake."); *Owens Ent. Club v. Owens Cmty. Imp. Club*, 466 S.W.2d 70, 72 (Tex. Civ. App.—Eastland 1971, no writ) ("As a general rule, courts will not undertake to direct or control associations in matters of internal policy; however, they will not hesitate, when some valuable or property right is involved, to entertain jurisdiction and afford relief.").

[13] *Hyundai Motor Co. v. Vasquez*, 189 S.W.3d 743, 754 n.52 (Tex. 2006).

interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively." *Jones v. Wolf*, 443 U.S. 595, 602 (1979). Texas courts have no trouble making this kind of distinction. For example, in 2004 the First Court of Appeals construed a church's by-laws to decide who controlled its property, but refused to exercise jurisdiction over who could tend the temple altar.[14] This Court must do the same.

B. For Church Property, Texas Courts Apply Neutral Principles, Not Deference

"[T]he First Amendment prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice." *Jones v. Wolf*, 443 U.S. 595, 602 (1979). But that does not make such disputes nonjusticiable; as noted above, courts have obligation to decide those issues when they can. *Id*. To resolve such disputes without entanglement in doctrinal matters, the United States Supreme Court has approved two approaches as constitutional: (1) neutral principles of law and (2) deference to ecclesiastical authority. *Id.* at 603.

Texas courts have adopted the neutral-principles approach.[15] As the Fort Worth Court of Appeals said in 1999 in *Dean v. Alford*, "courts do have jurisdiction to review matters involving civil, contract, or property rights even though they stem from a church controversy. ***Neutral principles of law must be applied*** to decide such matters …."[16]

Under the "neutral principles" standard, courts decide property disputes by construing property deeds, written constitutions, articles of incorporation, by-

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[14] *Chen v. Tseng*, No. 01-02-01005-CV, 2004 WL 35989, at *6 (Tex. App.—Houston [1st Dist.] Jan. 8, 2004, no pet.)

[15] *See Westbrook v. Penley*, 231 S.W.3d 389, 399 (Tex. 2007) (considering whether to expand neutral-principles approach beyond property suits).

[16] *Dean v. Alford*, 994 S.W.2d 392, 395 (Tex. App.—Fort Worth 1999, no pet.) (citations omitted).

laws, and state statutes.[17] Only if construction of these documents turns on religious concepts do the courts defer to an ecclesiastical body.[18]

Throughout this litigation, Plaintiffs have argued that this Court must defer to their wishes as the "ecclesiastical authority" no matter what any deeds, constitutions, or by-laws say. On the merits, their argument is wrong for many reasons, not the least of which is that the ecclesiastical authority in the Episcopalian tradition is the local bishop (the very word "episcopal" means "bishop").[19] But in the end it does not matter whether the church is hierarchical or who is its ecclesiastical authority — because Texas courts apply neutral principles to church property disputes.[20]

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[17] *Jones v. Wolf*, 443 U.S. 595, 602-03 (1979) ("The neutral-principles approach was approved in *Maryland & Va. Churches, supra*, an appeal from a judgment of the Court of Appeals of Maryland settling a local church property dispute on the basis of the language of the deeds, the terms of the local church charters, the state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning the ownership and control of church property.").

[18] *Id*. at 604 ("[T]here may be cases where the deed, the corporate charter, or the constitution of the general church incorporates religious concepts in the provisions relating to the ownership of property. If in such a case the interpretation of the instruments of ownership would require the civil court to resolve a religious controversy, then the court must defer to the resolution of the doctrinal issue by the authoritative ecclesiastical body.").

[19] *See* BLACK'S LAW DICTIONARY 615 (9th ed. 2009) ("episcopacy . . . 1. The office of a bishop"). Movants will address the Plaintiffs' deference theory in more detail in their Response to the Plaintiffs' motions for summary judgment due January 7, 2011.

[20] *See Chen v. Tseng*, No. 01-02-01005-CV, 2004 WL 35989, at *6 (Tex. App.—Houston [1st Dist.] Jan. 8, 2004, no pet.) (construing by-laws of religious nonprofit corporation to determine identity of its valid directors in property-rights case); *Hawkins v. Friendship Missionary Baptist Church*, 69 S.W.3d 756, 759 (Tex. App.—Houston [14th Dist.] 2002, no pet.) (recognizing neutral principles but deferring as church had no governing documents to construe); *Cherry Valley Church of Christ/Clemons v. Foster*, No. 05-00-10798-CV, 2002 WL 10545, at *3 (Tex. App.—Dallas Jan. 4, 2002, no pet.) (not designated for publication) (recognizing neutral principles but deferring as church's articles of incorporation and by-laws provided for selection of officers and directors "according to the custom and practices of the church"); *Libhart v. Copeland*, 949 S.W.2d 783, 793 (Tex. App.—Waco 1997, no writ) (applying neutral principles to determine who was entitled to proceeds from sale of church building); *Presbytery of the Covenant v. First Presbyterian Church of Paris, Inc.*, 552 S.W.2d 865, 870 (Tex. Civ. App.—Texarkana 1977, no writ) (construing church constitution to vest regional presbytery alone with power to dissolve church).

II. THE CORPORATION OWNS THE PROPERTY

Plaintiffs concede that the Corporation holds title to the real and personal property in this case — in both their pleadings,[21] and their motions for summary judgment.[22] They could hardly do otherwise, as the Diocese's Constitution has always included a provision that title to all property of the Diocese "shall be vested in Corporation of the Episcopal Diocese of Fort Worth" (Tab A).[23] They also concede the Fund for the Endowment is held by the Diocese.[24]

Applying neutral-principles of law to these facts, all the property at issue in this case is owned by the Corporation. The Second Court of Appeals has barred counsel for the Plaintiffs' from filing actions on behalf of the Corporation,[25] and that is the law of this case.[26] So as a matter of law, the owner of the property is the Defendant Corporation, not the Plaintiffs.

III. THE PLAINTIFFS HAVE NO TRUST INTEREST

The Plaintiffs seek declaratory relief that all property in the Diocese is subject to a trust benefiting TEC and its minority group. This question is governed by Texas law, as it governs the validity of trusts involving interests in

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[21] Plaintiff The Episcopal Church's Third Amended Original Petition ("TEC 3rd Amd. Pet.") ¶ 44; Individual Plaintiffs' Fifth Amended Original Petition ("Indiv. Pls. 5th Amd. Pet.") ¶ 48; Third Amended Answer and Counterclaims to Southern Cone Corporation's Plea in Intervention and Third-Party Petition ("3rd Amd. Ans. to Corp.") ¶ 59; Third Amended Answer and Counterclaims to Southern Cone Diocese's Plea in Intervention and Third-Party Petition ("3rd Amd. Ans. to Dio.") ¶ 60; Third Amended Answer to Southern Cone Congregations' Plea in Intervention and Counterclaim Against Southern Cone Congregations ("3rd Amd. Ans. to Interv.") ¶ 58.

[22] TEC MSJ p. 33; Local TEC MSJ p. 65.

[23] Hough Affidavit, Ex. 1 (article 13), Ex. 4 (article 14).

[24] Local TEC MSJ p. 65.

[25] *In re Salazar*, 315 S.W.3d 279, 287 (Tex. App.—Fort Worth 2010, no pet.) ("We conditionally grant the writ of mandamus and direct the trial court … to strike the pleadings filed by Mr. Nelson and Ms. Wells on behalf of the Corporation and the Fort Worth Diocese and bar them from appearing in the underlying cause as attorneys of record for those named plaintiffs.").

[26] *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986) ("The 'law of the case' doctrine is defined as that principle under which questions of law decided on appeal to a court of last resort will govern the case throughout its subsequent stages.").

Texas land,[27] and also governs the validity of trusts involving personal property administered by Texas trustees.[28] Under Texas law, the Plaintiffs' trust claim fails as a matter of law on three independent legal grounds.

A. A Trust Must Be Created By The Settlor, Not The Beneficiary

Under Texas law, property can be subjected to a trust only by its owner. Texas Property Code section 112.002 states: "A trust is created only if the settlor manifests an intention to create a trust."[29] Since at least 1943, Texas statutes have required either a declaration, deed, or will from an owner to place property in trust.[30] "Declarations of the purported beneficiary of the trust are not competent to establish the trust." *Best Inv. Co. v. Hernandez*, 479 S.W.2d 759, 763 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.).

The Plaintiffs assert that Canon I.7.4 (the "Dennis Canon") adopted by TEC in 1979 "recognizes" a trust interest in favor of TEC. But TEC never owned any of

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[27] *See Toledo Soc. for Crippled Children v. Hickok*, 261 S.W.2d 692, 694 (Tex. 1953); *Interfirst Bank-Houston, N.A. v. Quintana Petroleum Corp.*, 699 S.W.2d 864, 877 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.) ("[A]s a general rule it is held that the administration of a trust imposed on land is governed by the law of the state where the land is located and must be supervised by the courts of that state."); RESTATEMENT (SECOND) CONFLICT OF LAWS (1971) § 278 ("The validity of a trust of an interest in land is determined by the law that would be applied by the courts of the situs.").

[28] *See* RESTATEMENT (SECOND) CONFLICT OF LAWS (1971) § 270(b), *comment* a ("Of the states having relationships with the trust, much the most important insofar as the validity of the trust is concerned is the state, if any, where the settlor manifested an intention that the trust should be administered…. Contacts which will be considered in determining the state of most significant relationship may include the state where the trust instrument was executed and delivered; the state where the trust assets were then located; the state of the domicil of the settlor at that time; and the state of the domicil of the beneficiaries.").

[29] *See also* TEX. PROP. CODE § 111.004(4); *State v. Rubion*, 308 S.W.2d 4, 10 (Tex. 1957); RESTATEMENT (SECOND) OF TRUSTS § 351 ("A charitable trust is created only if the settlor properly manifests an intention to create a charitable trust.").

[30] *See* TEX. PROP. CODE § 112.001 ("A trust may be created by: (1) a property owner's declaration that the owner holds the property as trustee for another person; (2) a property owner's inter vivos transfer of the property to another person as trustee for the transferor or a third person; (3) a property owner's testamentary transfer to another person as trustee for a third person …"); *accord*, Act of April 19, 1943, 48th Leg., R.S., ch. 148, § 7, 1943 Tex. Gen. Laws 232, 234 (formerly Tex. Rev. Civ. Stat. art. 7425b-7).

this property. Under Texas law, TEC cannot unilaterally establish a trust over someone else's Texas property.[31]

The Plaintiffs allege that the Diocese agreed to its purported trust by making an unqualified accession to TEC's Constitution and Canons. But they know better. Plaintiffs admit in their pleadings that TEC first began requiring unqualified accessions on January 1, 1983.[32] Yet the Diocese was admitted ***the day before*** — December 31, 1982 (Tab E).[33] Since TEC did not require an unqualified accession in 1982, the Diocese did not make one.

To the contrary, the Diocese's first Constitution and Canons — adopted six weeks ***before*** union with TEC — established a trust ***only*** for the benefit of local parishes and the Diocese, and expressly prohibited any other encumbrances (like a trust in favor of TEC) without the consent of each parish (Tab A).[34] This was no mistake; the delegates to the Diocese's Primary Convention added this qualification by floor amendment to a draft Constitution that did not contain it.[35] This specific qualification prevails over the general accession clause on which Plaintiffs rely, because under Texas legal rules (1) a specific provision controls over a general provision,[36] and (2) courts cannot construe one provision to render another meaningless.[37]

"Accession" is a term from the law of treaties: "Accession is the act whereby a State accepts the offer or the opportunity of becoming a party to a

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[31] *Best Inv. Co*, 479 S.W.2d at 763; *Wise v. Haynes*, 103 S.W.2d 477, 483 (Tex. Civ. App.—Texarkana 1937, no writ).

[32] TEC 3rd Amd. Pet. ¶35 ; Indiv. Pls. 5th Amd. Pet. ¶ 39; 3rd Amd. Ans. to Corp. ¶ 50; 3rd Amd. Ans. to Dio. ¶ 51; 3rd Amd. Ans. to Interv. ¶ 49.

[33] *See* Hough Affidavit, Ex. 7.

[34] *See* Hough Affidavit, Ex. 1 (Article 13); Ex. 2 (Canon § 12.4).

[35] *See* Hough Affidavit, Ex. 3 (p. 21).

[36] *City of The Colony v. North Texas Mun. Water Dist.*, 272 S.W.3d 699, 722 (Tex. App.—Fort Worth 2008, pet. dism'd).

[37] *Grohman v. Kahlig*, 318 S.W.3d 882, 887 (Tex. 2010); *see also Bell v. Low Income Women of Texas*, 95S.W.3d 253, 262 (Tex. 2002) ("Rules of constitutional interpretation dictate that all clauses must be given effect.").

treaty already signed by some other States ...."[38] It is well-settled in international law that a party may "qualify" its accession to a treaty unless such reservations are expressly forbidden,[39] or another party promptly objects.[40]

In the case of TEC, qualified accessions were not expressly forbidden in 1982, and TEC raised no objection to the Diocese's Constitution prohibiting trusts except for local parishes. To the contrary, TEC certified on December 31, 1982 that the minutes of the Primary Convention had been "deposited" with the Secretary of its General Convention, and based thereon the Diocese was "hereby Admitted into Union" (Tab E).[41]

B. A Realty Trust Must Be In Writing And Signed By The Settlor

Under Texas law, a trust involving realty must be in writing and signed by the settlor. Since 1943, the Texas Trust Act and Texas Trust Code have declared invalid any trust involving an interest in realty that does not meet the statute of frauds. *See* TEX. PROP. CODE § 112.004 ("A trust in either real or personal property is enforceable only if there is written evidence of the trust's terms bearing the

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[38] *Avero Belgium Ins. v. American Airlines, Inc.*, 423 F.3d 73, 79 n.7 (2d Cir. 2005) (internal quotations omitted) (quoting Lord McNair, THE LAW OF TREATIES 149 (1961); *see also* BLACK'S LAW DICTIONARY 15 (9th ed. 2009) (defining "accession" as "3. *Int'l law.* A method by which a nation that is not among a treaty's original signatories becomes a party to it."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312, *comment* d (1987) ("'Accession' refers to the action of a state in expressing its consent to be bound by an agreement drafted by other states through a procedure in which the acceding state did not participate, or which for other reasons the acceding state did not sign.").

[39] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 312(1): "(1) A state may enter a reservation to a multilateral international agreement unless (a) reservations are prohibited by the agreement, (b) the agreement provides that only specified reservations not including the reservation in question may be made, or (c) the reservation is incompatible with the object and purpose of the agreement." As the Dennis Canon was not adopted until 1979 and unqualified accessions were not required until 1983, it is hard to argue that either was critical to the object and purpose of the two-hundred-year-old denomination before those dates.

[40] *Id.* § 312(3) ("A reservation established with regard to another party in accordance with Subsection (2)(c) modifies the relevant provisions of the agreement as to the relations between the reserving and accepting state parties but does not modify those provisions for the other parties to the agreement inter se."); *id. comment* e ("[A] reservation is considered to have been accepted by a state unless it raises an objection to it within twelve months after notification of the reservation or by the date when it expressed its consent to be bound, whichever is later.").

[41] *See* Hough Affidavit, Ex. 7. Further, the bishop who presided at the Primary Convention and became the Diocese's first Bishop was a member of TEC's Executive Council. *See* Hough Affidavit, Ex. 8 (pp. 12, 19, 39-40).

signature of the settlor or the settlor's authorized agent….").[42] As the Dennis Canon is not signed by either the Diocese or the Corporation, it is invalid in Texas.

The Plaintiffs also assert that since 1789 "the Church's policy and practice" required property to be held in trust for TEC. But this purported "policy and practice" is not even in writing, much less signed by the Corporation or Diocese. The Plaintiffs oral evidence alleging such a trust is barred by the parol evidence rule: "The missing terms of an express trust may not be established by parol evidence." *Pickelner v. Adler*, 229 S.W.3d 516, 526 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).[43]

C. If There Ever Was A Trust For TEC, It Was Revoked Twenty Years Ago

All trusts in Texas are presumed to be revocable, unless the trust itself expressly says otherwise. Texas Property Code section 112.051(a) states: "A settlor may revoke the trust unless it is irrevocable by the express terms of the instrument creating it or of an instrument modifying it." The rule is different in most other states, as it was in Texas before 1943.[44] But the law in Texas since then has been that "[t]rusts created under Texas law are revocable, unless made

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[42] *See also* Texas Trust Act § 7 (formerly Tex. Rev. Civ. Stat. art. 7425b-7), Act of April 19, 1943, 48th Leg., R.S., ch. 148, § 7, 1943 Tex. Gen. Laws 232, 234 ("Provided, however, that a trust in relation to or consisting of real property shall be invalid, unless created, established, or declared … [b]y a written instrument subscribed by the trustor or by his agent thereunto duly authorized by writing; …").

[43] *See also* RESTATEMENT (SECOND) OF TRUSTS § 38(4) ("If the owner of property by a written instrument declares that he holds the property upon a particular trust, extrinsic evidence, in the absence of fraud, duress, mistake or other ground for reformation or rescission, is not admissible to show that he intended to hold the property upon a different trust or to hold it free of trust."); *id. comment* a ("The parol evidence rule. Under the parol evidence rule, where the manifestation of intention of the settlor is integrated in a writing, that is, where a written instrument is adopted by the settlor as the complete expression of his intention, extrinsic evidence, in the absence of fraud, duress, mistake or other ground for reformation or rescission, is not admissible to contradict or vary it."); *see also id.* § 355 ("The rules stated in § 38, relating to parol evidence, are applicable to charitable trusts.").

[44] *See* Act of April 19, 1943, 48th Leg., R.S., ch. 148, § 7, 1943 Tex. Gen. Laws 232, 234 (formerly Tex. Rev. Civ. Stat. art. 7425b-41) ("Every trust shall be revocable by the trustor during his lifetime, unless expressly made irrevocable by the terms of the instrument creating the same or by a supplement or amendment thereto."); *Monday v. Vance*, 49 S.W. 516, 518 (Tex. 1899); *Citizens Nat. Bank of Breckenridge v. Allen*, 575 S.W.2d 654, 657 (Tex. App.—Eastland 1978, writ ref'd n.r.e.) ("*Fleck* did not involve the application of the Texas Trust Act because the alleged trusts in that case were created before April 19, 1943, the effective date of the act. At that time, trusts in Texas, as is presently true in the majority of states, were considered irrevocable unless an expressed power of revocation was reserved in the terms of the trust.").

specifically irrevocable." *Ayers v. Mitchell*, 167 S.W.3d 924, 930 (Tex. App.—Texarkana 2005, no pet.).

Nothing in the Dennis Canon — or anything else in the charters of the Diocese or TEC — expressly creates an irrevocable trust.[45] Even if the Plaintiffs' alleged trust on Texas property ever existed (which it did not), it was revocable under Texas law at any time. The Diocese expressly revoked any such hypothetical trust in 1989 by amending Canon 18 ("Title To Property"):

> Property held by the Corporation for the use of a Parish, Mission or Diocesan School belongs beneficially to such Parish, Mission or Diocesan School only. ***No adverse claim*** to such beneficial interest by the Corporation, by the Diocese, or ***by The Episcopal Church*** of the United States of America is acknowledged, but rather is ***expressly denied***.[46]

As a matter of law, the Plaintiffs have no beneficial interest in the property at issue in this case.

IV. THE DEFENDANTS ARE THE CORPORATION'S TRUSTEES

A. The Corporation's By-Laws (Not TEC) Determine Its Trustees

Under Texas law and the Corporation's charters, the proper Trustees are determined by the Corporation's by-laws.

The Corporation was incorporated under and is governed by the Texas Non-Profit Corporation Act. *See* TEX. REV. CIV. STAT. Art. 1396–1.01 *et seq*. The Act's provisions are "binding upon any and all corporations subject to the provisions of this Act." *Id*. at 1396-10.02(A). The Act provides that election and removal of directors must comply with a corporation's articles and bylaws:

- "[D]irectors shall be ***elected*** … in the manner and for the terms provided in the articles of incorporation or the by-laws," *id*. at 1396-2.15(B);

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[45] *See* Hough Affidavit, ¶¶ 14, 15, & 17.

[46] Hough Affidavit, Ex. 5 (Canon 18.4); *see also* Hough Affidavit, Ex. 6 (showing adoption in 1989)

- "A director may be ***removed*** from office pursuant to any procedure therefor provided in the articles of incorporation or by-laws," *id*. at 1396-2.15(D);
- "Unless removed in accordance with the provisions of the articles of incorporation or the by-laws, each director shall ***hold office*** for the term for which he is elected," *id*. at 1396-2.15(C); and
- "Unless otherwise provided in the articles of incorporation or the by-laws, any ***vacancy*** occurring in the board of directors shall be filled by the affirmative vote of a majority of the remaining directors," *id*. at 1396-2.16(A).

In this case, the Corporation's directors are called "Trustees," as allowed by the Act. I*d*. at 1396-1.02(A)(7); 1396-2.14(D). Since 1983, the Corporation's articles of incorporation have provided that "[t]he manner of election and the period of time for which the Trustees shall hold office ***shall be fixed by the by-laws*** of the corporation as the same may be adopted and from time to time amended."[47] Thus, to decide who has been elected, removed, or currently holds office as a Trustee, the Court must follow the Corporation's by-laws.

B. The By-Laws Say The Defendants Are The Only Trustees

As a matter of law, the Defendant Trustees are the only Trustees of the Corporation. The Corporation's by-laws provide for election of one Trustee per year at the Diocese's annual convention, and allow removal only by a majority of the Board.[48] By alleging that the Defendant Trustees have violated their duties of office,[49] the Plaintiffs concede that they were properly elected to the Board. The Defendant Trustees have not been removed by majority vote of the Board of Trustees, they are currently the only members of that Board, and are members in good standing of a parish in union with the Diocese.[50]

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[47] Affidavit of Walter Virden, III ("Virden Affidavit"), Ex. 1 (Art./Section 6); Virden Affidavit, Ex. 2 (Art. VI).

[48] *See* Virden Affidavit, Ex. 4 (Art. II, §§ 3, 10); *see also* Hough Affidavit, Ex. 2 (Canon 11, § 11.3).

[49] *See* TEC 3rd Amd. Pet. ¶ 54; Indiv. Pls. 5th Amd. Pet. ¶ 59; 3rd Amd. Ans. to Corp. ¶ 71; 3rd Amd. Ans. to Dio. ¶ 72; 3rd Amd. Ans. to Interv. ¶ 69.

[50] *See* Hough Affidavit, ¶ 10.

The Plaintiffs assert that in 2008 the Trustee positions "became vacant," and an entirely new Board was elected at a "special" convention of the Diocese on February 7, 2009. But Plaintiffs cite nothing in the Corporation's by-laws authorizing removal or replacement in this fashion. Other than general arguments about hierarchy and loyalty, they rely solely on TEC's Canon I.17.8 providing that persons "accepting any office in this Church shall well and faithfully perform the duties of that office in accordance with the Constitution and Canons of this Church and of the Diocese in which the office is being exercised."[51] That single sentence in almost 200 pages of rules governing an unincorporated association in New York says nothing about automatic vacancy, removal, or any other consequence. And even if it did, it would not comply with the Texas Non-Profit Act because it is not in the Corporation's articles or by-laws.

Article 1396-2.15(D) of the Texas Non-Profit Corporation Act limits removal of the directors of a Texas non-profit corporation to "any procedure therefor provided in the articles of incorporation or by-laws." This statute is unambiguous. Vacancies cannot be created by decree from New York, doctrinal differences, or vote by a minority group at a rump convention — because neither the Corporation's articles or by-laws so provide.

There is a compelling reason for this statute: people dealing with a Texas corporation need to know with whom they are dealing. If the corporate directors can only be removed by procedures within the articles and by-laws, outsiders can check the corporate books for corporate authority. But they can never have that assurance if someone in New York can "declare" the offices vacant, or if a minority can hold a "special" meeting and replace all the officers by minority vote.

It does not matter who TEC "recognizes" as trustees, or who has been "loyal" to TEC, or what any of the minority group's "special" conventions have done, because the Corporation's by-laws do not provide for removal or

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[51] Plaintiffs' Appendix Ex. 36, pp. A675-76.

replacement by those means. By state law, unless directors have been removed in accordance with a corporation's articles or by-laws, they have not been removed. Accordingly, the Defendant Trustees are the only Trustees of the Corporation.

V. DEFENDANT IKER IS THE DIOCESE'S BISHOP

A. An Association's Constitution (Not TEC) Governs Control Of Its Property

Under Texas law and the Diocese's Constitution, Bishop Iker is the only bishop of the Diocese.

The Diocese is a Texas unincorporated association. Tex. Rev. Civ. Stat. art. 1396—70.01 § 4. As such, it is "a legal entity separate from its members." *Id*. at § 7(a). Associations are not chartered by the government,[52] but operate according to their own rules, as in cases such as the NFL,[53] the NCAA,[54] many labor unions,[55] and of course many churches.[56]

Under Texas law, an association's constitution, by-laws, or other rules govern its affairs, including the election of its officers.[57] Thus, the person entitled to custody and control of an association's property must be determined by those rules.[58]

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[52] *See Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 169 (Tex. 1992) ("An unincorporated association is a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common enterprise or prosecuting a common objective.").

[53] *See Am. Needle, Inc. v. Nat'l Football League*, 130 S.Ct. 2201, 2204 (2010) (noting that NFL is unincorporated association).

[54] *See National Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 87 (Tex. 1999) (noting that NCAA is an unincorporated association); *Kneeland v. Nat'l Collegiate Athletic Ass'n*, 850 F.2d 224, 226 (5th Cir. 1988) ("The NCAA is governed by a constitution, a set of bylaws, and extensive regulations, to which all members commit.").

[55] *See, e.g., United Ass'n of Journeymen and Apprentices v. Local 334*, 452 U.S. 615, 624 (1981); *Texas Highway Comm'n v. El Paso Bldg. & Const. Trades Council*, 234 S.W.2d 857, 857 (Tex. 1950).

[56] *See, e.g, Cox v. Thee Evergreen Church*, 836 S.W.2d 167, 169 (Tex. 1992); *Tilton v. Marshall*, 925 S.W.2d 672, 688 (Tex. 1996)

[57] *Jones v. Maples*, 184 S.W.2d 844, 848 (Tex. Civ. App.—Eastland 1944, writ ref'd).

[58] *See, e.g,* TEX. PROP. CODE § 204.004(c) (providing that board of homeowners associations "must be elected or appointed in accordance with … the association's articles of incorporation or bylaws"); *Jones*, 184 S.W.2d at 848 (holding officers were those "duly elected" under cemetery association's constitution and by-laws).

The Diocese's Constitution provides that the Bishop is to be chosen by majority vote of the clergy and laity at the Diocese's Convention.[59] The Diocese's Canons require selection of a large nominating committee at least four months before the convention, which then reviews the candidates and proposes at least three nominees.[60] The Diocese's Convention is not limited to those three nominees; it can select anyone it chooses.[61] There is no other procedure in the Diocese's Constitution or Canons for selecting a Bishop.

Furthermore, TEC's own Constitution defers to the Diocese's rules for selecting a Bishop: "In every Diocese the Bishop . . . shall be chosen agreeably to ***rules prescribed by the Convention of that Diocese***" (Tab C).[62] There is no mechanism allowing the Presiding Bishop to select a diocese's bishop. So by TEC's own charter, the ***only way*** the Diocese's bishop can be selected is by the rules stated in the Diocese's Constitution and Canons.

B. The Constitution Says Bishop Iker Is The Only Bishop

The Plaintiffs admit that Bishop Iker was elected as Bishop of the Diocese in 1992.[63] Since that time, no other person has been selected as Bishop according to the Diocese's Constitution.[64]

The Plaintiffs' allege that they elected a new bishop at a "special" convention in February 2009 called by TEC's Presiding Bishop, Katharine Jefferts Schori. But no outside bishop, not even the Presiding Bishop, has authority to call

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[59] *See* Hough Affidavit, Ex. 1 (Art. 16); Hough Affidavit, Ex. 4 (Art. 17).

[60] *See* Hough Affidavit, Ex. 2 (Canons 2.1-2.6); Hough Affidavit, Ex. 5 (Canons 40.1-40.6).

[61] *See* Hough Affidavit, Ex. 2 (Canons 2.8-2.9); Hough Affidavit, Ex. 5 (Canons 40.7-40.8).

[62] Plaintiffs' Appendix Ex. 18, p. A440 (1979 TEC Const. Art. II, § 1); Plaintiffs' Appendix Ex. 36, p. A623 (2006 TEC Const. Art. II, § 1); Plaintiffs' Appendix Ex. 2, pp. A128 (2009 TEC Const. Art. II, § 1).

[63] TEC 3rd Amd. Pet. ¶ 47 ; Indiv. Pls. 5th Amd. Pet. ¶ 51; 3rd Amd. Ans. to Corp. ¶ 62; 3rd Amd. Ans. to Dio. ¶ 63; 3rd Amd. Ans. to Interv. ¶ 61.

[64] *See* Hough Affidavit, ¶ 8.

such a convention. The Diocese's Constitution authorizes only the local bishop or the local standing committee to call special meetings of the Diocese:

> The Bishop, or a majority of all members of the Standing Committee, may call a special meeting of the Convention upon thirty (30) days notice thereof. When there is no Bishop, the Standing Committee shall have power to call a special meeting of the Convention, giving thirty (30) days notice thereof.

(Tab B).[65] Neither the Bishop of the Diocese (Bishop Iker) nor the Standing Committee called the special meeting in February 2009,[66] and the Plaintiffs do not assert otherwise. Nothing in the Diocese's Constitution or Canons allows the Presiding Bishop in New York to call a special convention in Fort Worth, no matter what their religious differences may be.

TEC's own Constitution recognizes the same restrictions. It expressly prohibits ***all*** bishops (including the Presiding Bishop) from performing "episcopal acts" in an existing diocese except by invitation of the local bishop (Tab D).[67] Indeed, the Presiding Bishop cannot even call a special convention for the national association on her own authority.[68] Nor can a "provisional bishop" be appointed from New York to rig around the local Diocese's exclusive right to call special

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[65] Hough Affidavit, Ex. 1 (Art. 4); Hough Affidavit, Ex. 4 (Art. 4).

[66] *See* Hough Affidavit, ¶ 9.

[67] *See* Plaintiffs' Appendix Ex. 18, p. A440 (1979 TEC Const. Art. II, § 3); Plaintiffs' Appendix Ex. 36, p. A623 (2006 TEC Const. Art. II, § 3 ("A Bishop shall confine the exercise of such office to the Diocese in which elected, unless requested to perform episcopal acts in another Diocese by the Ecclesiastical Authority thereof . . . ."); *see also* Plaintiffs' Appendix Ex. 36, p. A727 (2006 TEC Canon III.12, § 3(e)) ("No Bishop shall perform episcopal acts or officiate by preaching, ministering the Sacraments, or holding any public service in a Diocese other than that in which the Bishop is canonically resident, without permission or a license to perform occasional public services from the Ecclesiastical Authority of the Diocese in which the Bishop desires to officiate or perform episcopal acts.").

[68] *See* Plaintiffs' Appendix Ex. 36, p. A641 (2006 TEC Canon I.1.3(a) ("The right of calling special meetings of the General Convention shall be vested in the Bishops. The Presiding Bishop shall issue the summons for such meetings, designating the time and place thereof, with the consent, or on the requisition, of a majority of the Bishops, expressed to the Presiding Bishop in writing.").

meetings; TEC's own rules do not allow for a provisional bishop except by an act of the Diocese's convention.[69]

The difficulty for the Plaintiffs is that only a local bishop can call a diocesan convention, and only a diocesan convention can elect a local bishop. There is no way for a minority group like the Plaintiffs to break this circle — they possess neither chicken nor egg. That of course is not an accident; the rules of both the Diocese and TEC guarantee that no one except the local diocese can select the local bishop. Accordingly, there is no evidence that the individual Plaintiffs are Trustees of the Corporation.

C. The Trustees Say Bishop Iker Is The Only Bishop

Furthermore, for purposes of property ownership and control, the Corporation's articles of incorporation and by-laws both provide that any dispute about who sits on the Board of Trustees as Bishop must be decided by the Board of Trustees itself:

> In the event of a dispute or challenge regarding the identity of the Bishop of the body now known as the Episcopal Diocese of Fort Worth, the Elected Trustees … shall have the sole authority to determine the identity of the Bishop for purposes of the Corporation's Articles of Incorporation, as amended from time to time, and these Bylaws.[70]

As the Diocese and Corporation established internal rules for deciding this dispute, the courts of this state cannot interfere.[71] As the Trustees have not

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[69] *See* Plaintiffs' Appendix Ex. 36, p. A733 (TEC Canon III.13.1) ("A Diocese without a Bishop may, by an act of its Convention, and in consultation with the Presiding Bishop, be placed under the provisional charge and authority of a Bishop of another Diocese or of a resigned Bishop, who shall by that act be authorized to exercise all the duties and offices of the Bishop of the Diocese until a Bishop is elected and ordained for that Diocese or until the act of the Convention is revoked." (emphasis added)).

[70] Virden Affidavit, Ex. 2 (Art. VI); Virden Affidavit, Ex. 4 (Art. II, § 2)

[71] *Juarez v. Texas Ass'n of Sporting Officials*, 172 S.W.3d 274, 279 (Tex. App.—El Paso 2005, no pet.) ("The constitution and bylaws of TASO govern membership in the organization and provide for a procedure whereby complaints against a member are addressed.… Appellant's complaints clearly seek judicial intervention because he is unhappy with the outcome of the initial review of the charges and complaints filed against him. We think it is the right of a private, non-profit organization to manage, within legal limits, its own affairs without interference from the courts.").

declared any of the Plaintiffs as Bishop of the Diocese, for purposes of deciding custody of property this Court must do the same.

VI. AMENDED ARTICLES CANNOT BE ULTRA VIRES

A. Plaintiffs Have No Standing To Assert An Ultra Vires Claim

Plaintiffs assert that the 2006 amendments to the Corporation's Articles were "ultra vires and void." But they have no standing under Texas law to raise an ultra vires claim. By statute, ultra vires acts can be challenged in Texas only in one of three ways:

1. by a member seeking to enjoin the action,
2. by a derivative claim by a member, or
3. by the Attorney General.

See Tex. Rev. Civ. Stat. art. 1396-2.03(B). None of the Plaintiffs are "members" of the Corporation, as the Corporation has no members.[72] None of the Plaintiffs have asserted a derivative claim. And the Attorney General is not a party.

No court can ignore a Texas statute limiting standing. As the Plaintiffs have no standing, this claim must be dismissed.

B. Amendments To Articles Of Incorporation Cannot Be Ultra Vires

Aside from the standing problem, this claim fails anyway. A claim that amendments are ultra vires does not turn on whether the amendments were right or wrong,[73] or whether the Plaintiffs claim that a moral duty required something

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[72] *See* Virden Affidavit, ¶ 7; *see also* Tex. Rev. Civ. Stat. Art. 1396-2.08(A) ("A corporation … may have no members.").

[73] *See City of Corpus Christi v. Gregg*, 289 S.W.2d 746, 751-52 (Tex. 1956) ("Since the City had the power to make an oil and gas lease on its lands, as we have above pointed out, the act of the City in this instance was not ultra vires and absolutely void.").

else.[74] To be ultra vires, the amendments must be "beyond the scope of power allowed or granted by a corporate charter or by law."[75]

But amending the articles ***cannot*** be beyond a corporation's power because the articles themselves determine what powers a corporation has. While by-laws cannot be amended in a way that violates the articles of incorporation, *see* Tex. Rev. Civ. Stat. Art. 1396-2.09(B), there is no such limitation on amendments to the articles of incorporation. *Id*. at 1396-4.01(A) ("A corporation may amend its articles of incorporation from time to time, in any and as many respects as may be desired"). The articles of incorporation state the corporation's purposes, *id*. at 1396-2.01(A), and the directors have "all powers necessary or appropriate" to effect those purposes. *Id*. at 1396-2.02(15) Thus, the ***substance*** of amendments to articles cannot be ultra vires because the amendment itself makes the new provisions *intra vires* ("within the power"). If the rule were otherwise, corporations could never change their articles of incorporation, as every change would be ultra vires according to the previous version.

Of course, if the articles of a nonprofit corporation specifically provide that amendments must be adopted by the members rather than the directors, then the directors would have no power to amend them and the amendments would be *procedurally* ultra vires. *Id*. at 1396-4.02(A)(3). But if a nonprofit has no members (as here), and no restrictions on the board's power to adopt amendments (as here),[76] amendments to articles of incorporation cannot be ultra vires.[77]

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[74] *Mitchell v. LaFlamme*, 60 S.W.3d 123, 128 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (holding homeowners association's failure to maintain common areas were not ultra vires acts).

[75] BLACK'S LAW DICTIONARY 1662 (9th ed. 2009); *see Whitten v. Republic Nat. Bank of Dallas*, 397 S.W.2d 415, 417 (Tex. 1965).

[76] Virden Affidavit, ¶¶ 7-8.

[77] Tex. Rev. Stat. art. 1396-4.02(A)(2) ("Amendments to the articles of incorporation may be made in the following manner …. Where there are no members, … an amendment shall be adopted at a meeting of the board of directors upon receiving the vote of a majority of the directors in office.").

C. The Corporation's Articles Were Validly Amended

Under the Texas Non-Profit Corporation Act, the Trustees had the power to amend the articles of incorporation by majority vote.[78] The 2006 amendment to the Corporation's articles was unanimously adopted.[79] As a matter of law, the amendments were not ultra vires.

The Plaintiffs appear to argue that TEC has the power to limit or disregard amendments to the Corporation's articles and by-laws. Based on what? They point to nothing in the governing documents of TEC, the Diocese, or the Corporation that allows TEC to do so. Once again, the Plaintiffs rely solely on "deference" — that those charters mean nothing if the Presiding Bishop decides contrariwise. That obviously violates the neutral-principles approach.

In the end, the Plaintiffs' ultra vires claim is a red herring,[80] as none of the 2006 amendments make any difference in this case. Those amendments did not change who held title to property (see part II). They did not change how Trustees were elected or removed (see part IV). They did not change how the Bishop was chosen or who could call a special meeting (see part V). They did expressly recognize the Board's ability to resolve disputes about the proper bishop, but that does not matter here as no one else has been elected bishop according to the Diocese's Constitution, so no real dispute exists. Because the 2006 amendments do not affect title or control of property, this Court should not intervene in a dispute about whether an association's amendments to its charters were proper.

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78 *Id*.

79 Virden Affidavit, ¶ 6 & Ex. 3.

80 *See* BLACK'S LAW DICTIONARY 1391 (9th ed. 2009) (defining "red herring" as "[a]n irrelevant legal or factual issue, usu. intended to distract or mislead.").

VII. PLAINTIFFS HAVE NO STANDING TO ASSERT THE TORT CLAIMS

A. Plaintiffs Cannot Sue For Entities They Don't Represent

The Second Court of Appeals ordered this Court "to strike the pleadings filed by [Plaintiffs' counsel] on behalf of the Corporation and the Fort Worth Diocese," and "to bar them from appearing in the underlying cause as attorneys of record for those named plaintiffs." *In re Salazar*, 315 S.W.3d 279, 287 (Tex. App.—Fort Worth 2010, no pet.). That is the law that governs this case. *See Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986). But the Plaintiffs have done their best to avoid it.

The Local TEC Plaintiffs did so by asserting several claims that as a matter of law belong solely to the Diocese or the Corporation. They purported to assert them in a representative capacity for those entities. But a corporation cannot appear by any representative other than an attorney. *Kunstoplast of Am., Inc. v. Formosa Plastics Corp., USA*, 937 S.W.2d 455, 456 (Tex. 1996). Similarly, a voluntary association is "a legal entity separate from its members for the purposes of determining and enforcing rights." TEX. REV. CIV. STAT. Art. 1396—70.01, § 7(a). As a matter of law, neither the Local TEC Plaintiffs nor their counsel can assert claims on behalf of parties they do not represent.

The Plaintiffs have not alleged derivative claims on behalf of the Diocese or Corporation. Nor can they do so now, as they are no longer members of either. As already noted, the Corporation has no members.[81] The Diocese's "members" are those with the right to participate in its convention.[82] All of the Local TEC Plaintiffs have dissociated themselves from membership in the Diocese, and no

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[81] *See* Virden Affidavit, ¶ 7.

[82] *See* Tex. Rev. Stat. art. 1396—70.01, § 2(1) ("'Member' means a person who, under the rules or practices of a nonprofit association, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policy of the nonprofit association.").

longer attend its annual convention.[83] Accordingly, they can no longer claim to be "members."

A motion for summary judgment is a proper vehicle for raising the Plaintiffs' lack of standing to assert these claims. *See, e.g., Frymire Eng'g Co., Inc. v. Jomar Int'l, Ltd.*, 259 S.W.3d 140, 146 (Tex. 2008).[84] And "the appellate court's judgment must be enforced." TEX. R. APP. P. 51.1(b); *Edgewood Indep. School Dist. v. Kirby*, 804 S.W.2d 491, 494 (Tex. 1991). Thus, Defendants are entitled to judgment as a matter of law on these claims.

B. Plaintiffs Cannot Sue For Conversion Of Property They Don't Own

The Plaintiffs allege that the Corporation "holds title to substantial real and personal property of the Diocese" that the Defendants have allegedly converted.[85] But if the Diocese or the Corporation holds title to the property, only they can sue for its conversion. *See Chu v. Hong*, 249 S.W.3d 441, 444 (Tex. 2008). Plaintiffs' counsel cannot bring a claim for conversion of property that belongs to entities they do not represent.

C. Plaintiffs Cannot Sue For Trade-Names Of Entities They Don't Represent

The Local TEC Plaintiffs assert that the Diocese and the Diocesan Corporation have been using the names "Episcopal Diocese of Fort Worth" and "The Corporation of the Episcopal Diocese of Fort Worth" since 1983 and that movants and Intervenors have been using those names wrongfully. But if the names belong to the Diocese and the Corporation as alleged, only they can sue for misuse. *See Express One Int'l, Inc. v. Steinbeck*, 53 S.W.3d 895, 899 (Tex.

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[83] Hough Affidavit, ¶¶ 11-13; see also Hough Affidavit, Ex 2 (Art. 2) & Ex. 4 (Art. 2) (both defining "members" of the Diocesan Convention as (1) the Bishop, (2) priests canonically resident in the Diocese, and (3) lay delegates chosen by parishes in union with the Convention).

[84] *Accord, South Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306 (Tex. 2007); Williams v. Lara, 52 S.W.3d 171, 183 (Tex. 2001); *Roskey v. Tex. Health Facilities Comm'n*, 639 S.W.2d 302, 303 (Tex. 1982).

[85] *See* TEC 3rd Amd. Pet. ¶ 44 ; Indiv. Pls. 5th Amd. Pet. ¶ 48; 3rd Amd. Ans. to Corp. ¶ 59; 3rd Amd. Ans. to Dio. ¶ 60; 3rd Amd. Ans. to Interv. ¶ 58.

App.—Dallas 2001, no pet.). Plaintiffs' counsel cannot bring a claim for use of trade names belonging to entities they do not represent.

D. Plaintiffs Cannot Sue For Fiduciary Duties To Entities They Don't Represent

The Local TEC Plaintiffs assert that the individual Defendants "owe fiduciary duties to the Diocese, its Diocesan Corporation, and Church" which they have breached. Again, any breach of duty owed to the Diocese or the Corporation would have to be brought by or on behalf of those entities. *See* TEX. REV. CIV. STAT. Art. 1396–2.28; Art. 1396–70.01, § 7(a). Plaintiffs' counsel cannot bring a claim on behalf of entities they do not represent.

E. Plaintiffs Cannot Sue For Trespass/Quiet Title Of Property They Don't Own

The Local TEC Plaintiffs plead that title to all real estate at issue here is held by the Corporation. Trespass-to-try-title and quiet-title claims must be brought by the entity that owns title. *See Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004) (trespass to try title); *In re Slusser*, 136 S.W.3d 245, 248 (Tex. App.—San Antonio 2004, no pet.) (quiet title). Plaintiffs' counsel cannot assert title claims they admit belong to the Corporation.

F. Plaintiffs Cannot Sue For Damages To Entities They Don't Represent

The Plaintiffs plead for unspecified damages. For the reasons just stated, they are not entitled to assert damages for conversion, trade-name use, breach of fiduciary duty, or title actions because those actions belong to the Diocese and the Corporation and cannot be asserted by the Plaintiffs. And as any such damages would belong to the Diocese and the Corporation, the Plaintiffs have no standing to collect them. *See Mitchell v. LaFlamme*, 60 S.W.3d 123, 129 (Tex. App. — Houston [14th Dist] 2000, no pet.) (holding damages to non-profit corporation belong to corporation, not individual members); *see also Myer v. Cuevas*, 119 SW3d 830, 835 (Tex. App.—San Antonio 2003, no pet.) (holding individual member had no standing to bring suit for claim belonging to condominium association). The Plaintiffs' only remaining claims are for declaratory and injunctive relief, which by

their nature are not damage actions. As a matter of law, Plaintiffs are not entitled to damages.

Conclusion

For the reasons set forth above, the Defendants' Motion for Partial Summary Judgment be granted.

Respectfully submitted,

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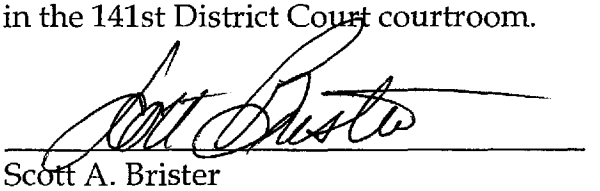
ATTORNEYS FOR DEFENDANTS THE EPISCOPAL DIOCESE OF FORT WORTH, ET AL.

NOTICE OF HEARING

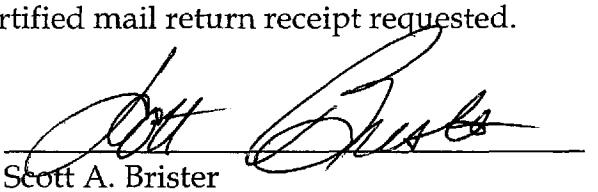
The foregoing Defendants' Motion for Partial Summary Judgment is set for hearing on January 14, 2011, at 9:00 a.m. in the 141st District Court courtroom.



Scott A. Brister

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2010, a true and correct copy of the foregoing Defendants' Motion for Partial Summary Judgment was forwarded to all counsel of record via certified mail return receipt requested.



Scott A. Brister

CONSTITUTION OF THE EPISCOPAL DIOCESE OF FORT WORTH [1982]

[Appears unchanged as ARTICLE 14 in 2006 Constitution]

ARTICLE 13

TITLE TO CHURCH PROPERTY

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

The Corporation of the Episcopal Diocese of Fort Worth shall hold real property acquired for the use of a particular parish or mission in trust for the use and benefit of such parish or mission. The income from such property shall belong to such parish or mission. which will be responsible for expenses attributable thereto. . Upon dissolution of such parish or mission, property held in trust for it shall revert to said Corporation for the use and benefit of the Diocese, as such.

All other property belonging to the Diocese, as such, shall be held in the name of the corporation known as "Corporation of the Episcopal Diocese of Fort Worth," and no conveyance or encumbrance of any kind shall be valid unless executed by such corporation and as may otherwise be provided by the Canons of the Diocese.

TAB B

CONSTITUTION OF THE
EPISCOPAL DIOCESE OF FORT WORTH

ARTICLE 4 [1982]

SPECIAL MEETINGS OF CONVENTION

[redacted], may call a special meeting of the Convention upon thirty days' notice thereof.

When there is no Bishop, the Standing Committee shall have power to call a special meeting of the Convention, giving thirty days' notice thereof. At any special meeting of the Convention, the business to be transacted shall be specified in the call, and no business shall be transacted except that so specified.

ARTICLE 4 [2006]

SPECIAL MEETINGS OF CONVENTION

[redacted], may call a special meeting of the Convention upon thirty (30) days notice thereof.

When there is no Bishop, the Standing Committee shall have power to call a special meeting of the Convention, giving thirty (30) days notice thereof.

At any special meeting of the Convention, the only business to be transacted shall be specified in the call.

TAB C

CONSTITUTION OF THE EPISCOPAL CHURCH

ARTICLE II [1979]

Sec. 1. In every Diocese the Bishop or the Bishop Coadjutor shall be chosen agreeably to [redacted]. Bishops of Missionary Dioceses shall be chosen in accordance with the Canons of the General Convention.

ARTICLE II [2006]

Sec. 1. In every Diocese the Bishop or the Bishop Coadjutor shall be chosen agreeably to [redacted], *provided* that the retirement date of the Bishop Diocesan shall not be more than thirty-six months after the consecration of the Bishop Coadjutor. Bishops of Missionary Dioceses shall be chosen in accordance with the Canons of the General Convention.

ARTICLE II [2010]

Sec. 1. In every Diocese the Bishop or the Bishop Coadjutor shall be chosen agreeably to [redacted], *provided* that the retirement date of the Bishop Diocesan shall not be more than thirty-six months after the consecration of the Bishop Coadjutor. Bishops of Missionary Dioceses shall be chosen in accordance with the Canons of the General Convention.

TAB D

CONSTITUTION OF THE EPISCOPAL CHURCH

ARTICLE II [2006]

Sec. 3. [redacted], unless requested to perform episcopal acts in another Diocese by the Ecclesiastical Authority thereof, or unless authorized by the House of Bishops, or by the Presiding Bishop by its direction, to act temporarily in case of need within any territory not yet organized into Dioceses of this Church..

CANONS OF THE EPISCOPAL CHURCH

TITLE III, CANON 12 [2006]

(e) [redacted] or officiate by preaching, ministering the Sacraments, or holding any public service [redacted], without permission or a license to perform occasional public services from the Ecclesiastical Authority of the Diocese in which the Bishop desires to officiate or perform episcopal acts.

Tab E

The General Convention of The Episcopal Church

THIS IS TO CERTIFY

that the

D I O C E S E O F F O R T W O R T H

having complied with the provisions of Article V and Title I, Canon 9, Section 4 of the Constitution and Canons for the Government of

THE EPISCOPAL CHURCH

and having deposited with me, as Secretary of The General Convention, a certified copy of the minutes of the Primary Convention of the Diocese held in All Saints Episcopal Day School, Fort Worth, Texas, November 13, 1982

is hereby Admitted into Union

with

The General Convention

of

THE EPISCOPAL CHURCH

pursuant to a Resolution adopted by The General Convention September 11, 1982

[redacted] of December [redacted]

Secretary of The General Convention

815 Second Avenue, New York, N.Y. 10017 (212) 490-2840