No. 11-1139

IN THE

Supreme Court of the United States

RONALD S. GAUSS ET AL., *Petitioners,*

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Connecticut

BRIEF IN OPPOSITION OF RESPONDENTS THE EPISCOPAL CHURCH ET AL.

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INTRODUCTION

Petitioners ask this Court to grant their petition in order to consider whether the Supreme Court of Connecticut violated the First Amendment by allegedly concluding that it was "bound" under *Jones v. Wolf*, 443 U.S. 595 (1979), to enforce The Episcopal Church's rules requiring that local church property be held in trust for the larger church. But the Connecticut court did not base its decision on constitutional law. Rather, it decided as a matter of state law that written promises made by the local church to obey The Episcopal Church's rules were enforceable, and that as a result the local church's property was held in trust for the larger church. That state law determination complied with *Jones*, which permits courts to examine "neutral principles" to ascertain "the intentions of the parties" as to "whether there [is] any basis for a trust in favor of the general church." *Id.* at 600, 603. Accordingly, the Connecticut court's decision rests on an independent and adequate state law ground, and the petition for a writ of certiorari should be denied.

There are additional reasons for denying the petition. Contrary to Petitioners' assertion, there is no conflict among the states' highest courts. In every case they cite where courts have found (1) promises by the local church to obey the rules of the general church, and (2) general church rules requiring that local church property be held in trust for the general church, the courts have enforced those rules. On the other hand, in the cases where either of those two elements has been missing, the courts have declined to impose trust obligations on local church property. State courts thus are reaching consistent (and

sensible) conclusions based on the specific facts of these cases. Such circumstances do not merit this Court's intervention.

Finally, there is no uncertainty in the law as it has been applied to Episcopal Church property cases. Of the twenty-nine cases involving local Episcopal Church property that have been decided across the United States since *Jones* was issued, all but two have held that local property is held in trust for the larger Church. Each of these has involved promises by the local church to obey general church rules, which require that such property be held in trust. The two that came out differently made no mention of local church promises and in any event have been regarded as outliers by numerous other courts that have subsequently declined to follow them. There is no need for the Court to attempt to provide greater certainty in this area of the law.

COUNTERSTATEMENT OF THE CASE

The case below was decided on summary judgment. Pet. at 2a. The Supreme Court of Connecticut based its decision on the following undisputed facts set forth by the trial court:

1. The Episcopal Church Adopts Rules that Are Binding on Its Local Churches.

The Episcopal Church (the "General Church") is a religious denomination with a representative government composed of three tiers: the Church's General Convention at the topmost tier; regional "dioceses" at the middle tier; and local churches, or "parishes," at the bottom tier. Pet. at 44a–45a

("[E]ach parish in the Diocese elects one lay delegate to the Annual Convention of the Diocese, which, in turn, elects * * * delegates to the General Convention").[1] The General Convention adopts legislation that is binding on all local Episcopal churches. Pet. at 45a.

2. The Local Church Here Promised To Obey The Episcopal Church's Rules.

In 1875, the Episcopal Diocese of Connecticut (the "Diocese") organized a mission congregation called "Bishop Seabury Church." Pet. at 5a. In 1956, certain members of the congregation sought to become a full-fledged parish in the Diocese and the General Church "in a manner conforming with" the Diocese's rules. *Id.* The local group "sent its official written request for permission to form as a parish" to the Bishop of the Diocese, who directed the group to furnish documents required by Diocesan rules. *Id.* The local church members submitted the required documents, including a document stating that they "'do hereby form ourselves and our successors into an [e]cclesiastical [s]ociety under the [c]onstitution and [l]aws of [the State of Connecticut] and *under the [c]onstitution and [c]anons of the Protestant*

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[1] Petitioners' suggestion that the General Church's rules should not be enforced because they are "unilateral," Pet. at 1, 8, 12 & 29, overlooks these undisputed facts showing that The Episcopal Church has a classic representative form of government. Thus, the Supreme Court of Connecticut held that "the fact that the Parish may not be directly represented at the General Convention has no bearing on whether [a General Church property canon] applies * * *." Pet. at 45a.

Episcopal Church in the Diocese of Connecticut, for the purpose of supporting the [w]orship of Almighty God according to the [d]octrine, [d]iscipline and [l]iturgy of said [c]hurch in these United States * * *"".[2] Pet. at 30a–31a (brackets in original). Then, as now, the Diocese's rules in turn expressly incorporated the rules of the General Church, as required by General Church rules. Pet. at 31a. The Diocese then formed Bishop Seabury Church as a parish and conveyed to it by quitclaim deed the property on which the church buildings then stood. Pet. at 6a.

3. The Episcopal Church's Rules Require That Local Church Property Be Held in Trust for the General Church.

Since well before 1956 when Bishop Seabury Church was formed as an Episcopal parish, the General Church's rules have forbidden parishes from "encumber[ing] or alienat[ing]" property "without the written consent of [the Diocese]." Pet. at 32a (italics omitted). In addition, following this Court's decision in *Jones*, in 1979 the General Church adopted an express trust canon (also known as the "Dennis Canon") providing that all parish property, real and

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[2] The "laws of [the State of Connecticut]" then and now include Connecticut General Statute § 33-265 (providing that all Episcopal churches may hold property "for maintaining religious worship according to the doctrine, discipline and worship of said church") and § 33-266 (providing that "[t]he manner of conducting the parish * * * shall be such as are provided and prescribed by the constitution, canons and regulations of [the] Protestant Episcopal Church in this state.").

personal, is "'held in trust for [the General Church] and the Diocese thereof in which such Parish * * * is located.'" Pet. at 30a. The Connecticut court held that the Dennis Canon "'merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of [the Episcopal Church] in 1789.'" Pet. at 41a (quoting *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 224 Conn. 797, 821–22, 620 A.2d 1280, 1292 (1993) (brackets in original)).[3]

4. The Local Church Has Consistently Complied with The Episcopal Church's Property Rules.

Since its formation as an Episcopal parish, Bishop Seabury Church has consistently complied with the General Church's property rules. "[A]fter

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[3] The Connecticut court's description of the General Church's Dennis Canon as a codification of already-established principles echoes the decisions of other state courts. *See, e.g.*, *In re Church of St. James the Less*, 585 Pa. 428, 451, 888 A.2d 795, 810 (2005) (citing *Trinity-St. Michael's*); *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 105 n.15 (Colo. 1986) (Dennis Canon "did nothing but confirm the relationships existing among [the General Church], the diocese and [the local church]"); *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 83 N.J. 572, 581, 417 A.2d 19, 24 (1980) (Dennis Canon "reflects established customs, practices and usages of [the General Church]").

Those decisions disprove Petitioners' depiction of the rule as "secur[ing] ownership of [all Episcopal parish property] in one fell swoop." Pet. at 29.

the original property was quitclaimed in 1956 to the Parish by the [Diocese], the Parish sought approval from the Diocese *each and every time* it wished to purchase, finance or sell real property in succeeding years." Pet. at 33a. Thus, on at least five separate occasions, both before and after adoption of the Dennis Canon, the local church sought the Diocese's consent before it sold or encumbered its property as required by General Church rules. Pet. at 6a–8a.

Nor is there any evidence that the local church took issue with the Dennis Canon, which was adopted over 30 years ago in 1979, at any time before the present dispute arose in 2007. To the contrary, "[p]arish members have always acted as though the Episcopal Church held a trust interest in the property." Pet. at 32a.

REASONS FOR DENYING THE PETITION

I. The Decision Below Rests on Adequate and Independent State Law Grounds.

Although the Supreme Court of Connecticut considered whether *Jones* might compel it to enforce The Episcopal Church's Dennis Canon, Pet. at 42a–43a, the court ultimately decided to enforce the General Church's property rules because the local church had expressly promised to be bound by the General Church's rules and had historically complied with those rules. The Connecticut court's decision to enforce the local church's promises involved an application of state law principles that in no way conflicts with *Jones*.

A. The Connecticut court based its decision on undisputed facts showing the local church's promise to be bound by the General Church's rules and its consistent compliance with those rules.

Petitioners suggest that the Supreme Court of Connecticut based its conclusion in this case *solely* on the view that it was "bound" under *Jones* to enforce the Church's Dennis Canon without regard to other facts or state law principles. Pet. at 9–11. They are wrong. As the Connecticut court set out clearly, its decision was based not only on the Dennis Canon but also on undisputed facts showing that the local church promised to obey the General Church's rules and that it consistently complied with those rules throughout its history:

> "When the Dennis Canon is considered together with the application submitted by the members of the local congregation in 1956 for admission to the general church as a parish and with other church documents, it is clear that the disputed property in the present case is held in trust for the Episcopal Church and the Diocese. For example, [the founding members of the parish] * * * expressed the following commitment: 'We * * * do hereby form ourselves and our successors into an [e]cclesiastical [s]ociety * * * *under the* [*c*]*onstitution and* [*c*]*anons of the Protestant Episcopal Church in the Diocese of Connecticut* * * *.*' [T]he constitution of the Diocese, which has remained unchanged since 1956, and to which the congregation members committed themselves in applying to become a

parish, provides that '[t]he Diocese * * * *accedes to, recognizes and adopts* the General Constitution of [The Episcopal] Church, and acknowledges its authority accordingly.' * * * Correspondingly, * * * the constitution of the Episcopal Church * * * provides * * * that the duly adopted constitution of any new diocese shall include 'an *unqualified accession to the Constitution and Canons of* [*the Episcopal*] *Church* * * *.'

"Thus, in agreeing in 1956 to abide by the [rules] of the Diocese, members of the congregation also agreed to abide by the [rules] of the Episcopal Church, including the subsequently enacted Dennis Canon. There is no provision in the constitution and canons of the Episcopal Church or the Diocese expressing an intent to the contrary or excusing a parish, either explicitly or implicitly, from complying with amendments or additions to the constitution and canons that might be enacted after a parish is accepted by the Diocese. * * *

"Furthermore, Parish members have always acted as though the Episcopal Church held a trust interest in the property. * * * Thus, after the original property was quitclaimed in 1956 to the Parish by [the Diocese], the Parish sought approval from the Diocese *each and every time* it wished to purchase, finance or sell real property in succeeding years. * * * If Parish members believed that they had sole ownership and control over Parish property and could have entered into real property transactions *without* the approval of

> the Diocese because it had no interest in Parish property, there would have been no reason to seek the Bishop's permission and to conduct such transactions only *after* he granted approval. Accordingly, Parish members acted consistently as though the Diocese and the Episcopal Church held a trust interest in the property both before and after the Dennis Canon was enacted by the General Convention." Pet. at 30a–33a (all alterations in internal quotes in original except "[the Episcopal]" in second internal quote).[4]

This analysis shows that the Connecticut court based its decision on state law principles requiring it to enforce the local church's promises to obey the General Church's rules. Petitioners' contention that the court's decision rested solely on a question of federal constitutional law must be rejected.

B. The Connecticut court's resolution of this dispute by enforcing the local church's promises conforms with the First Amendment.

1. In *Jones*, this Court held that Georgia's "neutral principles of law" method for resolving church property disputes complies with the First

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[4] Petitioners' assertion that "[a]t all times" the local church's members "believed that the [local church] did, and always would, control itself and its property," Pet. at 5, is further contradicted by undisputed evidence cited by the trial court that local church leaders acknowledged that the current church property "*[would] become part of a lasting development by the Episcopal Church in the Diocese of Connecticut.*" Pet. at 74a n.5.

Amendment. 443 U.S. at 604. That method examined four factors to ascertain "the intentions of the parties" as to "whether there [is] any basis for a trust in favor of the general church." *Id.* at 600, 603.

The Supreme Court of Connecticut's decision in this case comports with *Jones*. The Connecticut court adopted the "neutral principles" approach, Pet. App. at 23a–24a, and concluded that the parties intended that local church property be held in trust for the General Church. As we have previously described, the court based its decision on the fact that the local church's documents included an agreement to be bound by the General Church's rules and revealed a consistent compliance with those rules as they governed property. Pet. at 30a–33a. The General Church's rules undisputedly limited the local church's ability to sell or encumber its property and articulated a "trust" in that property in favor of the General Church and its dioceses. Pet. at 29a–30a, 32a. In the light of this undisputed evidence, the court concluded that the General Church's property rules were binding on the local church and therefore that local church property is held in trust for the General Church and the Diocese. Pet. at 30a–33a.

The court rejected Petitioners' arguments that state statutes governing private trusts and property prevented the court from enforcing what Petitioners characterized as "'a denomination's self-serving declaration of trust,'" Pet. at 42a, precisely *because* the local church had agreed to be bound by the General Church's rules. "Parish members agreed to be bound by the constitutions and canons of the

Episcopal Church and the Diocese in 1956 when they affiliated with the Episcopal Church, and, as a result, their interests are in harmony with those of the Episcopal Church and the Diocese." Pet. at 43a. In essence, the court determined that state law principles favoring the enforcement of written promises were the principles that applied.

2. Nothing in *Jones* bars such a conclusion. *Jones* did not require states to apply private trust or property law principles to church property disputes, nor did it mandate that those particular principles must control over other state law principles such as the familiar principle requiring the enforcement of written promises. To the contrary, *Jones* acknowledged that a state court might find "a trust in favor of [a] general church" under "neutral principles" even where the requirements of state property and trust law were not satisfied. In reviewing Georgia's "neutral principles" method, this Court considered the following case in which the Supreme Court of Georgia had earlier applied that method:

> "[I]n *Carnes v. Smith*, 236 Ga. 30, 222 S.E.2d 322, cert. denied, 429 U.S. 868, 97 S.Ct. 180, 50 L.Ed.2d 148 (1976), * * * the court found no basis for a trust in favor of the general church in the deeds, the corporate charter, or the state statutes dealing with implied trusts. The court observed, however, that the constitution of The United Methodist Church, its Book of Discipline, contained an express trust provision in favor of the general church. On this basis, the church property was awarded to the denominational

> church. 236 Ga., at 39, 222 S.E.2d, at 328." *Jones*, 443 U.S. at 600–01.

Accordingly, this Court approved Georgia's "neutral principles" method knowing that Georgia had previously found a trust to exist under that approach even where the trust did not arise under state trust law.

3. Petitioners' claim that the Supreme Court of Connecticut violated the Constitution's Religion Clauses by giving churches more favorable treatment than secular associations, Pet. at 32–33, overlooks the legal principles governing such associations. The governing documents of a secular association are routinely treated by courts—including those in Connecticut—as binding on the association's members and its affiliated units. *See, e.g.*, 7 C.J.S. *Associations* § 14 (2012) ("The constitution, bylaws, and regulations of an association constitute a contract which the courts will enforce both as between the members themselves and as between the association on one side and the individual members on the other * * *."); *Rosen v. Bhd. of Painters, Decorators & Paperhangers of Am.*, 128 Conn. 381, 385, 23 A.2d 153, 155 (1941) ("The terms of the contract between [a member] and the [association] are determined by the constitution and bylaws of the [association] as existing when he became a member and as amended from time to time while he continued as such.") The Connecticut

court's enforcement of promises made in this case does not deviate from that standard.[5]

II. There Is No Conflict Among the States' Highest Courts.

Contrary to Petitioners' claim of a "division" among the states' highest courts, the state court decisions they cite are remarkably consistent with each other and with the decision below. In every case where the court found that (1) the local church made promises to obey the rules of the general church and (2) the general church had rules requiring that local church property remain in the denomination, the court enforced those general church rules. And, in every case where at least one of those two elements was missing, the court did not find in favor of the general church.

1. We have demonstrated above that the Supreme Court of Connecticut based its decision on the presence of both of these elements. As we now

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[5] Even if the Supreme Court of Connecticut were to apply a different standard to disputes involving church property than it would apply if the property of a secular association were at stake, that would not, as Petitioners claim, automatically violate the First Amendment. Petitioners' suggestion that neutrally-applicable laws must always be applied equally to churches as they are to secular associations would negate the Constitution's Religion Clauses. As this Court recently stated, such a suggestion is "remarkable"—and wrong. *Hosanna-Tabor Evangelical Lutheran Church & School v. Equal Emp't Opportunity Comm'n*, 132 S. Ct. 694, 706 (2012).

show, the highest courts of Alaska, Pennsylvania, Georgia, New York, and California did as well.

In *St. Paul Church, Inc. v. Board of Trustees of the Alaska Missionary Conference of the United Methodist Church, Inc.*, 145 P.3d 541, 546 (Alaska 2006), the local church upon its formation signed a "Statement of Intent" promising to "worship and conduct business 'in accordance with The Book of Discipline of The United Methodist Church.'" The Book of Discipline provided that all local church property "'shall be held in trust for The United Methodist Church and subject to the provisions of its Discipline.'" *Id.* at 544. The Supreme Court of Alaska examined "the relationship between [the local church and the general church] as a whole" and concluded, "[g]iven the express trust language of the Discipline and the mutually understood connectional nature of [the general church], the overt acts undertaken by the members of [the local church] to affiliate with [the general church] constitute a manifestation of intent to create a trust in favor of [the general church.]" *Id.* at 553, 554.

In *In re Church of St. James the Less*, 585 Pa. 428, 431, 449–50, 888 A.2d 795, 797, 808–09 (2005), the local church in its charter "acceded to" the rules of the general church (in that case, The Episcopal Church), described the church's purpose as "serv[ing] as a place to worship God '*according to the faith and discipline of the [National Episcopal Church],*'" and barred amendments to the charter without the general church's consent. As in the present case, The Episcopal Church's rules required local church property to be held in trust for the general church

and forbad local churches from encumbering or alienating property without the diocese's consent; the evidence showed that the local church had consistently complied with the latter rule. *Id.* at 432 n.6, 435, 888 A.2d at 798 n.6, 800. The Supreme Court of Pennsylvania concluded that these facts "compel[led] the conclusion that [the local church] intended to, and did, hold its property in trust for the [general church]." *Id.* at 450, 888 A.2d at 809.

In *Rector, Wardens & Vestrymen of Christ Church in Savannah v. Bishop of the Episcopal Diocese of Georgia, Inc.*, 290 Ga. 95, 718 S.E.2d 237 (2011),[6] the local church "repeatedly pledged its unequivocal adherence to the discipline of the parent church," including in its corporate charter which stated that the local church "'does hereby acknowledge and accede to * * * the Constitution and Canons of [the general church].'" *Id.* at 105, 110, 718 S.E.2d at 247, 250. Here again, the parent church was The Episcopal Church; the court reviewed the same rules described above limiting local church control over property, including those requiring general church consent to the sale or encumbrance of property and requiring that such property be held in trust for the general church. *Id.* at 108–13, 718 S.E.2d at 249–52. Throughout its 180-year history the local church had "acted consistently with the [general church's] canons regarding its property." *Id.* at 105, 718 S.E.2d at 247. "Having reviewed the governing

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[6] Petitioners note that a petition for certiorari was to be filed in this case. Pet. at 27. Petitioners moved to dismiss that petition under Rule 46.2 on May 4, 2012 (No. 11-1166).

documents of the local church and the general church," the Supreme Court of Georgia said, "we conclude * * * that a trust on [the local church's] property in favor of the [general church] existed well before the dispute erupted." *Id.* at 115, 718 S.E.2d at 253.

Similarly, in *Presbytery of Greater Atlanta, Inc. v. Timberridge Presbyterian Church, Inc.*, 290 Ga. 272, 282, 719 S.E.2d 446, 454 (2011), *pet'n for cert. filed*, No. 11-1101 (U.S. Mar. 6, 2012), the local church's corporate charter "unequivocally submit[ted the local church] and its property to the [general church] as its governing authority," and "preclude[d]" any person "refus[ing] to submit to the government of the [general church] from continuing to function as a member of [the local church corporation]." The general church's governing document provided that all local church property "'is held in trust * * * for the use and benefit of the [general church]"; that local church property no longer being used in affiliation with the general church "'shall be [controlled] by the [general church]'"; and that in the event of a schism in a local church "'the [general church] shall determine if one of the factions is entitled to the property * * *.'" *Id.* at 273, 719 S.E.2d at 448. The Supreme Court of Georgia "simply enforce[d] the intent of the parties as reflected in their own governing documents," concluding that "an implied trust in favor of the [general church] exists on the local church's property * * *." *Id.* at 287, 288, 719 S.E.2d at 458.

In *Episcopal Diocese of Rochester v. Harnish*, 11 N.Y.3d 340, 899 N.E.2d 920 (2008), the local church

promised "'to abide by and conform to'" the general church's rules. *Id.* at 347, 899 N.E.2d at 921. Here again, The Episcopal Church's rules provided that local church property was held in trust for the general church. *Id.* at 348, 899 N.E.2d at 922. The Court of Appeals of New York "conclude[d] that the [general church's trust rules] clearly establish an express trust in favor of [the general church], and that [the local church] agreed to abide by this express trust * * *." *Id.* at 351, 899 N.E.2d at 925 (citation omitted).

Finally, in *Episcopal Church Cases*, 45 Cal. 4th 467, 474, 198 P.3d 66, 71 (2009), *cert. denied*, 130 S. Ct. 179 (2009), the local church "'promise[d] and declare[d]'" that it "'shall be forever held under, and conform to and be bound by'" the authority and rules of the general church and incorporated the general church's rules into its corporate charter. The Episcopal Church's rules requiring general church consent to the sale or encumbrance of local property and requiring that such property be held in trust for the general church were again in evidence. *Id.* at 474–75, 198 P.3d at 71–72. The Supreme Court of California concluded that "[the local church] agreed from the beginning of its existence to be part of a greater denominational church and to be bound by that greater church's governing instruments. Those instruments make clear that a local parish owns local church property in trust for the greater church * * *." *Id.* at 489, 198 P.3d at 81–82. Thus, "when defendants disaffiliated from the Episcopal Church, the local church property reverted to the general church." *Id.* at 493, 198 P.3d at 84.

2. Cases lacking either of the two factual elements have come out the other way. In *All Saints Parish Waccamaw v. Protestant Episcopal Church in the Diocese of South Carolina*, 385 S.C. 428, 685 S.E.2d 163 (2009), the Supreme Court of South Carolina made no mention of promises made by the local church to conform to the rules of the general church. Nor did it discuss The Episcopal Church's rules requiring local churches to secure the consent of the general church before selling or encumbering property. *See id*. In the absence of those facts, the Court concluded that the general church's express trust rule did not "create[] a trust over [local church] property." *Id.* at 449, 685 S.E.2d at 174.

In *Arkansas Presbytery of the Cumberland Presbyterian Church v. Hudson*, 344 Ark. 332, 335–36, 40 S.W.3d 301, 304 (2001), the general church amended its governing documents after the local church acquired its property to require that local church property be held in trust for the general church. There was no evidence of local church promises to be bound by the general church's rules. *Id*. at 341, 40 S.W.3d at 308 ("there is not a local church charter in the record before us"). Accordingly, the Supreme Court of Arkansas held that the local church was not bound by the general church's trust provision. *Id.* at 343–44, 40 S.W.3d at 309–10.

Church of God in Christ, Inc. v. Graham, 54 F.3d 522, 524, 527 (8th Cir. 1995), involved a dispute between a "large religious organization" and "a local congregation that [had] considered itself autonomous from its inception." The local church's founding

pastor "never acknowledged that [the local church] was subject to any regulatory oversight by the [larger organization]," and its articles of incorporation "explicitly declare[d] its independence, stating in part that 'it is expressly understood that this corporation is not bound by or subject to oversight by any other ecclesiastical body.'" *Id.* at 524–25. The larger church's charter required all affiliates to title their property in trust for the larger church. *Id.* at 524. The United States Court of Appeals for the Eighth Circuit, applying Missouri law, declined to find that the local church was bound by that trust provision because there was "no evidence that [the local church] actually acquiesced in [the larger church's] constitution * * *." *Id.* at 526.[7]

Berthiaume v. McCormack, 153 N.H. 239, 891 A.2d 539 (2006), cited at Pet. 15, 18 and 19, is inapposite to Petitioners' Question Presented. In that case, members of a local Roman Catholic Church sued to prevent the Bishop's sale of their church's property, to which the Bishop undisputedly held title. *Id.* at 240–42, 891 A.2d at 541–42. The case therefore did not present the question of whether the local church held its property in trust for the larger church.

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[7] By contrast, in *Smith v. Church of the Good Shepherd*, No. 04CC-000864, J. & Order at 1–2, 5 (Mo. Cir. Ct. Oct. 13, 2004) (Opp. at 55a, 60a), a Missouri trial court enforced The Episcopal Church's express trust rules where the local church had "agreed to be bound" by the general church's rules.

III. There Is No Uncertainty in the Law.

1. Petitioners' complaint that *Jones* has generated "uncertainty," Pet. at 2, 13, 26, 27, 34, ignores the truth about the Episcopal Church property cases: Aside from the present case, in the twenty-eight cases involving disputes over Episcopal parish property resolved by courts since the issuance of *Jones*, twenty-six have been resolved in favor of The Episcopal Church, its dioceses, or loyal local Episcopalians who wish to continue to use church buildings and other assets. See the following decisions (in order by state):

- *Episcopal Church Cases*, 45 Cal. 4th at 493, 198 P.3d at 84 (described above in Part II) (when majority of parishioners "disaffiliated from the Episcopal Church, the local church property reverted to the general church")[8];
- *Huber v. Jackson*, 175 Cal. App. 4th 663, 677, 96 Cal. Rptr. 3d 346, 356 (2009) (parish holds property "in trust for the Episcopal Church and the Los Angeles Diocese, and by disaffiliating from the church defendants and their new parish under another church have no right in the property"), *review denied*, No. S175401, 2009 Cal.

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[8] *Episcopal Church Cases* distinguished and questioned the holding in *Protestant Episcopal Church in the Diocese of Los Angeles v. Barker*, 115 Cal. App. 3d 599, 625-26, 171 Cal. Rptr. 541, 555-56 (1981) (without considering The Episcopal Church's canons, awarding property to three of four disaffiliating parishes). *See Episcopal Church Cases*, 45 Cal. 4th at 490-91, 198 P.3d at 82-83.

LEXIS 9850 (Sept. 17, 2009), *cert. denied*, 130 S. Ct. 1690 (2010) ;

- *New v. Kroeger*, 167 Cal. App. 4th 800, 824, 828, 84 Cal. Rptr. 3d 464, 482, 486 (2008) ("the Episcopal Church impressed a trust on local church property"; "[o]nce the defendants renounced their membership in the Episcopal Church, they could no longer serve as members of the vestry and directors of the Parish corporation");
- *Episcopal Diocese of San Diego v. Rector, Wardens & Vestry of St. Anne's Parish in Oceanside*, No. 37-2007-00068521-CU-MC-CTL, J. at 2 (Cal. Super. Ct. June 4, 2010) (Opp. at 3a) (parish property "is held in trust for The Episcopal Church and The Episcopal Diocese of San Diego");
- *Bishop & Diocese of Colo. v. Mote*, 716 P.2d 85, 108 (Colo. 1986) (enforcing "trust [that] has been imposed upon the [parish's] real and personal property for the use of [The Episcopal Church]");
- *Grace Church & St. Stephen's v. Bishop & Diocese of Colo.*, No. 07 CV 1971, Order at 26 (Colo. Dist. Ct. Mar. 24, 2009) (Opp. at 49a) ("trust [in favor of The Episcopal Church] that has been created through past generations of members of [the parish] prohibits the departing parish members from taking the property with them");
- *Rector, Wardens & Vestrymen of Trinity-St. Michael's Parish, Inc. v. Episcopal Church in the Diocese of Conn.*, 224 Conn. 797, 821–22, 620 A.2d 1280, 1292 (1993) (enforcing "trust relationship that has been implicit * * * between

local parishes and dioceses since the founding of [The Episcopal Church] in 1789");

- *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 290 Ga. at 115, 718 S.E.2d at 253 (described above in Part II) ("a trust on Christ Church's property in favor of the Episcopal Church existed well before the dispute erupted that resulted in this litigation");
- *Episcopal Diocese of Mass. v. DeVine*, 59 Mass. App. Ct. 722, 730, 797 N.E.2d 916, 923 (2003) (parish "holds its property in trust for the Diocese and [The Episcopal Church]");
- *Bennison v. Sharp*, 121 Mich. App. 705, 724, 329 N.W.2d 466, 474 (1982) ("although the majority faction of a local congregation within a hierarchical church may secede, it may not take property with it");
- *Smith v. Church of the Good Shepherd*, No. 04CC-000864, J. & Order at 4–5 (Mo. Cir. Ct. Oct. 13, 2004) (Opp. at 58a–60a) (enforcing The Episcopal Church's property canons);
- *Protestant Episcopal Church in the Diocese of N.J. v. Graves*, 83 N.J. 572, 582, 417 A.2d 19, 25 (1980) ("individual [parishioners] are free to disassociate themselves from [The Episcopal Church] and to affiliate themselves with another religious denomination. * * * The problem lies in [their] efforts to take the church property with them. This they may not do");
- *Episcopal Diocese of Rochester*, 11 N.Y.3d at 351, 899 N.E.2d at 925 (described above in Part II)

(The Episcopal Church's rules "clearly establish an express trust in favor of the Rochester Diocese and the National Church");

- *Tr. of the Diocese of Albany v. Trinity Episcopal Church of Gloversville*, 250 A.D.2d 282, 288, 684 N.Y.S.2d 76, 81 (N.Y. App. Div. 1999) (enforcing "trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the * * * Episcopal Church");
- *Diocese of Cent. N.Y. v. Rector, Church Wardens, & Vestrymen of the Church of the Good Shepherd*, No. 2008-0980, 22 Misc. 3d 1106(A), 880 N.Y.S.2d 223 (N.Y. Sup. Ct. Jan. 8, 2009) (enforcing The Episcopal Church's trust interest in parish property);
- *St. James Church, Elmhurst v. Episcopal Diocese of Long Island*, No. 22564/05, Mem. at 31 (N.Y. Sup. Ct. Mar. 12, 2008) (Opp. at 97a) ("all real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and the Episcopal Diocese of Long Island");
- *Tea v. Protestant Episcopal Church in the Diocese of Nev.*, 96 Nev. 399, 402–03, 610 P.2d 182, 184 (1980) (enforcing "ecclesiastical authority's decision as to identity of" the "loyal" congregation entitled to possess parish property);
- *Daniel v. Wray*, 158 N.C. App. 161, 171, 580 S.E.2d 711, 718 (2003) (The Episcopal Church's rules "precluded the seceding vestry from taking control of the [parish] property");

- *Episcopal Diocese of Ohio v. Anglican Church of the Transfiguration*, No. CV-08-654973, Omnibus Op. & Order at 15–16 (Ohio Ct. C.P. Cuyahoga Cnty. Apr. 15, 2011) (Opp. at 120a–121a) ("the Dennis Canon governs the outcome of this litigation * * *. The real and personal property at issue is impressed with a trust in favor of [The Episcopal Church] and the Episcopal Diocese");
- *In re Church of St. James the Less*, 585 Pa. at 452, 888 A.2d at 810 (described above in Part II) (parish "is bound by the express trust language in [The Episcopal Church's canons] and therefore, its vestry and members are required to use its property for the benefit of the Diocese");
- *Convention of the Protestant Episcopal Church in the Diocese of Tenn. v. Rector, Wardens, & Vestrymen of St. Andrew's Parish*, 2012 WL 1454846, at *20 (Tenn. Ct. App. Apr. 25, 2012) (parish "holds the Property in trust for the Diocese, and the disassociating members of [the parish] are not entitled to claim any ownership interest in the Property");
- *Masterson v. Diocese of Nw. Tex.*, 335 S.W.3d 880, 892 (Tex. App. 2011) ("the church property at issue is subject to possession and control by the [loyal local Episcopalians]"), appeal pending, No. 11-0332 (Sup. Ct. Tex.);
- *St. Francis on the Hill Church v. The Episcopal Church*, No. 2008-4075, Final Summ. J. at 3 (Tex. Dist. Ct. Dec. 17, 2010) (Opp. at 132a) (parish's property "is held and may be used only for the

ministry and work of the [Episcopal] Church and the Diocese");

- *In re Multi-Circuit Church Prop. Litig.*, 2012 WL 1241209, at p. 71 (Va. Cir. Ct. Jan. 10, 2012) ("it is clear—indeed, to this Court, it is overwhelmingly evident—that [The Episcopal Church] and the Diocese have contractual and proprietary interests in the real and personal property of each of these seven churches");
- *Diocese of Sw. Va. of the Protestant Episcopal Church v. Wyckoff*, Op. at 7–8 (Va. Cir. Ct. Nov. 16, 1979) (Opp. at 143a) ("congregational vote [to disaffiliate] did not and could not extinguish [the remaining loyal Episcopal congregation]. * * * Nothing * * * has occurred under neutral principles of law to transfer the title and control of the property in question from the beneficial use of the remaining congregation of the Ascension Episcopal Church, Amherst");
- *Episcopal Diocese of Milwaukee, Inc. v. Ohlgart*, No. 09-CV-00635, Order Granting Mots. For Partial Summ. J. at 2 (Wis. Cir. Ct. Apr. 3, 2012) (Opp. at 147a) ("Defendants had no authority to control, remove, take, or keep the real and personal property of St. Edmund's Episcopal Church, Inc. for uses inconsistent with or in violation of the Canons and Constitutions of the Diocese and Episcopal Church").

These outcomes are not surprising in the light of the fact that nearly every case involved the same critical facts that the Supreme Court of Connecticut found dispositive here. The Episcopal Church's

property rules are the same in each case. Further, because of other General Church rules, local churches typically have given the same kinds of promises of obedience that we see in the present case. *See, e.g.*, *In re Church of St. James the Less*, 585 Pa. at 450–51, 888 A.2d at 809–10 (local church "acceded to" rules of the general church); *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 290 Ga. at 105, 718 S.E.2d at 247 (local church "repeatedly pledged its unequivocal adherence to the discipline of the parent church"); *Episcopal Diocese of Rochester*, 11 N.Y.3d at 347, 899 N.E.2d at 921 (local church promised to "abide by and conform to" general church rules); *Episcopal Church Cases*, 45 Cal. 4th at 474, 198 P.3d at 71 (local church promised to "conform to and be bound by" general church rules).

The two cases that have come out differently made no mention of promises by the local churches to conform to general church rules. *See All Saints Parish Waccamaw*, 385 S.C. 428, 685 S.E.2d 163 (no mention of local church promises); *Bjorkman v. Protestant Episcopal Church in the U.S. of Am. of the Diocese of Lexington*, 759 S.W.2d 583 (Ky. 1988) (same). In addition, as the Supreme Court of Kentucky pointed out in a later case in which it enforced another denomination's trust rule, *Bjorkman* did not even consider the General Church's Dennis Canon. *Cumberland Presbytery of the Synod of the Mid-West of the Cumberland Presbyterian Church v. Branstetter*, 824 S.W.2d 417, 422 (Ky. 1992).

Nor do either of these two cases suggest a trend toward uncertainty in the outcomes of Episcopal parish property cases. *All Saints Waccamaw*, issued in 2009, was the first decision since *Bjorkman* (issued in 1988) to find against The Episcopal Church, one of its dioceses, or loyal local Episcopalians. Since *All Saints Waccamaw*, every case that has resolved a dispute involving Episcopal parish property has held in favor of The Episcopal Church, its dioceses, or loyal local Episcopalians. *See Episcopal Diocese of San Diego*, No. 37-2007-00068521-CU-MC-CTL, Judgment; *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 290 Ga. 95, 718 S.E.2d 237; *Episcopal Diocese of Ohio*, No. CV-08-654973, Omnibus Op. & Order; *Convention of the Protestant Episcopal Church in the Diocese of Tenn.*, 2012 WL 1454846; *Masterson*, 335 S.W.3d 880; *St. Francis on the Hill Church*, No. 2008-4075, Final Summ. J.; *In re Multi-Circuit Church Prop. Litig.*, 2012 WL 1241209; *Episcopal Diocese of Milwaukee, Inc.*, No. 09-CV-00635, Order Granting Mots. For Partial Summ. J.

Several of those cases, including the Supreme Court of Connecticut decision in this case, expressly declined to follow *All Saints Waccamaw*. *See, e.g.*, Pet. at 43a–44a (*All Saints* "distinguishable" because court "specifically relied on South Carolina statutory and common law, including the law on trusts, relating to the formal conveyance of title, and thus gave no weight to the [General Church's canons]. * * * Moreover, the court did not examine documents signed by congregation members when they were seeking to become a parish, which might have indicated whether parish members had agreed to

abide by the constitution and canons of the Episcopal Church."); *Rector, Wardens & Vestrymen of Christ Church in Savannah*, 290 Ga. at 117 & n.18, 718 S.E.2d at 255 & n.18 (*All Saints* decision "is readily distinguishable" and "has not been followed in a church property case by any court outside [South Carolina]"). By any measure, the *All Saints Waccamaw* decision appears to be an outlier that will not be followed.

2. Shortly after *All Saints Waccamaw* was issued by the Supreme Court of South Carolina, this Court denied two petitions seeking certiorari in cases arising in California that involved The Episcopal Church and that raised the same issue that Petitioners pose here.[9] In the light of the fact that

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[9] One of the questions presented in *Episcopal Church* Cases was: "Whether this Court's reference in *Jones* * * * to denominational canons and constitutions as potential sources of neutral principles of property law can be read, consistently with the First Amendment, as trumping other secular laws governing property rights?" Pet. for cert. in *Rector, Wardens & Vestrymen of St. James Parish in Newport Beach v. Protestant Episcopal Church in Diocese of L.A.*, (No. 08-1579) 2009 WL 1817075 (June 24, 2009).

Similarly, one of the questions presented in *Huber* was: "Does dicta in *Jones* * * * that 'the constitution of the general church can be made to recite an express trust in favor of the denominational church' as a means by which 'the parties can ensure, if they so desire' general church control over local church property, give religious denominations a federal constitutional right to self-settle trusts over that property?" Pet. for cert. in *St. Luke's of the Mountains Anglican Church in La Crescenta v. Protestant Episcopal Church in the Diocese of L.A.*, (No. 09-708) 2009 WL 4882619 (Dec. 15, 2009).

All Saints Waccamaw has not persuaded a single other court to find against The Episcopal Church or its affiliate parts and members, the law has become arguably even *more* "certain" since the denial of those petitions.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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May 18, 2012

APPENDIX

Superior Court Of California, County Of San Diego
Central Division
Case No. 37-2007-00068521-CU-MC-CTL

THE EPISCOPAL DIOCESE OF SAN DIEGO, a California nonprofit religious corporation,

Plaintiff,

vs.

THE RECTOR, WARDENS AND VESTRY OF ST. ANNE'S PARISH IN OCEANSIDE, CALIFORNIA, *etc., et al.*,

Defendants.

HOLY TRINITY PARISH OF OCEAN BEACH, CALIFORNIA, a California corporation,

Cross-Complainant,

vs.

THE EPISCOPAL DIOCESE OF SAN DIEGO, *etc., et al.*,

Cross-Defendants.

HOLY TRINITY PARISH OF OCEAN BEACH FOUNDATION, a California corporation,

Intervenor,

vs.

THE EPISCOPAL DIOCESE OF SAN DIEGO, *etc., et al.*,

Defendants-in-Intervention.

THE EPISCOPAL DIOCESE OF SAN DIEGO, a California nonprofit religious corporation,

Cross-complainant-in-Intervention,

v.

HOLY TRINITY PARISH OF OCEAN BEACH FOUNDATION, a California corporation,

Cross-defendant-in-intervention.

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[2] On November 6, 2009 at 10:30 a.m. in Department 73 of the San Diego Superior Court, the Honorable Steven R. Denton, Judge presiding, The Episcopal Church's and The Episcopal Diocese of San Diego's (i) Joint Motion for Summary Judgment or, in the alternative, Summary Adjudication against The Rector, Wardens and Vestry of St. Anne's Parish in Oceanside, California ("St. Anne's Parish") and Holy Trinity Episcopal Parish ("Holy Trinity Parish") and (ii) Joint Motion for Summary Judgment or, in the alternative, Summary Adjudication against Holy Trinity Parish of Ocean Beach Foundation (the "Foundation") came on for regular hearing.

Having considered the motion papers, and the argument of counsel, the Court granted The Episcopal Church's and The Episcopal Diocese of San Diego's Joint Motions for Summary Judgment in their entirety.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

I. All the church records and other property (be that property real, personal, intangible, or mixed) of The Rector, Wardens and Vestry of St. Anne's Parish, Oceanside, California as of January 29, 2006; all the church records and other property (be that property real, personal, intangible, or mixed) of Holy Trinity Parish of Ocean Beach and Holy Trinity Parish of Ocean Beach Foundation as of September 7, 2006, is held in trust for The Episcopal Church and The Episcopal Diocese of San Diego.

II. Each of the Defendants are enjoined from diverting, alienating, or using any parish property owned by The Rector, Wardens and Vestry of St. Anne's Parish, Oceanside, California as of January 29, 2006, and owned by Holy Trinity Parish of Ocean Beach or Holy Trinity Parish of **[3]** Ocean Beach Foundation as of September 7, 2006, except as provided for and in accordance with the Constitutions and Canons of The Episcopal Church and the Episcopal Diocese of San Diego.

III. The Rector, Wardens and Vestry of St. Anne's Parish, Oceanside, California is enjoined to relinquish possession and control of all real, person, intangible, and mixed property owned by that corporation as of January 29, 2006.

IV. Holy Trinity Parish of Ocean Beach and Holy Trinity Parish of Ocean Beach Foundation are enjoined to relinquish control of all real, person, intangible, and mixed property owned by those corporations as of September 7, 2006.

V. Holy Trinity Parish of Ocean Beach and Holy Trinity Parish of Ocean Beach Foundation shall take nothing in this action. The Cross-Complaint of Holy

Trinity Parish of Ocean Beach and the Complaint-in-Intervention of Holy Trinity Parish of Ocean Beach Foundation are dismissed with prejudice.

VI. The Episcopal Diocese of San Diego and The Episcopal Church shall recover their costs of suit against The Rector, Wardens and Vestry of St. Anne's Parrish Oceanside, California, in the amount of _____ and against Holy Trinity Parish of Ocean Beach and Holy Trinity of Ocean Beach Foundation in the amount of $ _____.

Dated: June 4, 2010

/s/ STEVEN R. DENTON
Hon. Steven R. Denton
Judge of the Superior Court

[Approvals as to form omitted]

District Court
El Paso County, CO
[address omitted]
Case Number 07 CV 1971

Plaintiff:

GRACE CHURCH AND ST. STEPHEN'S

v.

Defendant: THE BISHOP AND DIOCESE OF COLORADO

And

Third Party Counterclaimants:

THE DIOCESE OF COLORADO IN THE EPISCOPAL CHURCH, ET. AL.

v.

REV. DONALD ARMSTRONG, ET. AL.

COURT'S ORDER ON PROPERTY ISSUES

The trial of the various property issues in this case was brought before the Court beginning February 10th 2009. The issues were presented for trial to the Court alone, without a jury. The parties presented testimony for approximately 4 1/2 weeks and submitted over 3,000 documents as exhibits. Final arguments were heard on March 11, 2009. Having reviewed all of the evidence and considered the arguments of counsel I hereby issue the following findings of fact, conclusions and Order:

FINDINGS OF FACT:

The Plaintiff Grace Church and St. Stephens is a Colorado nonprofit corporation that has been known as an Episcopal Church parish. It owns a church

facility on North Tejon Street in Colorado Springs as well as a rectory and other real and personal property. The plaintiff is a parish of the Episcopal Church of the United States (ECUSA). ECUSA is a hierarchical religious denomination whose first level of governance below itself includes the Dioceses, one of which is the defendant Diocese of Colorado. The ecclesiastical and administrative head of the Colorado Diocese is the Bishop. The current Bishop of Colorado is the counterclaim defendant Rt. Rev. Robert O'Neill. The counterclaim **[2]** defendant Rev. Donald Armstrong is the current priest or rector of the plaintiff parish.

This law suit is a declaratory judgment action filed by the plaintiff parish seeking an order that it is the owner of all real and personal property that has been used by the parish in Colorado Springs, including the church, the "outbuildings", the land, the rectory and all personal property located in any of those facilities. The defendants ECUSA (sometimes referred to as the "general church") and Diocese of Colorado have counterclaimed, alleging ownership of the same disputed property. Those defendants have further filed individual counterclaims against the Rector Donald Armstrong and the last vestry (board of directors) of the plaintiff corporation, alleging theft, conversion, unjust enrichment, trespass, civil conspiracy, quiet title and accounting. The Plaintiff has amended its claims, alleging tortuous interference. I have bifurcated trial of these matters into two central issues: the quiet title and ownership issues as a court trial beginning on February 10 and a civil liability and damages trial against the individual counterclaim defendants, which is scheduled for jury trial in August, 2009. The plaintiff

sought a jury trial on all issues. Over its objection, I previously concluded that this portion of the case is an equitable action in the nature of quite title. I therefore concluded that property ownership would be resolved by me without a jury.

The dispute in this case arose as a result of a majority of the members of the plaintiff parish becoming disillusioned with doctrinal decisions being made by the national church and the Diocese. The specifics of the doctrinal disputes are not important to the analysis, other than to say that they involved the perception by the local parish that the national church had become too "liberal" and was violating the principles of the traditional Anglican faith. I allowed the parties to present limited testimony regarding the nature of these disputes in order to create a timeline for the dispute. However, the doctrinal issues themselves have been ignored, except to say that the doctrinal disagreement, coupled with other matters, created considerable resentment toward the Diocese and general church in the local parish. That resentment has resulted in a majority of the local members voting to leave the national church and Diocese. The local parish has now aligned itself with the Convocation of Anglicans of North America ("CANA").

The members of the plaintiff parish voted to leave ECUSA on March 26, 2007. The plaintiff asserts that 90% of those who voted agreed to leave. Another faction of the parish remained loyal to the general church and continues to worship as Grace Church and St. Stephens in another location.

Both parties have engaged in some strategic "jockeying" which may add confusion to the record

but which is of little consequence to my decision. The plaintiff parish amended its answer to identify itself as Grace Church & St **[3]** Stephens. The only change is from "and" to an ampersand "&". It has implied that when articles of incorporation were filed in 1973, it did so with a "&" and thus created a new corporation. The so-called loyal parish is holding itself out as the same Grace Church and St. Stephens. They argue that when the majority voted to withdraw, that the Bishop appointed a new vestry and that they are now Grace Church and St Stephens. The lawyer for the Diocese filed articles of "renewal" or "revival" with the Secretary of State in 2007 after this suit was filed. The Diocese asserts that such filing renewed the 1923 corporation and that a 1973 filing had no affect. I will discuss that issue further below. The Diocese appointed a new vestry in 1973 and maintains that it alone has the right to take action on behalf of Grace Church and St Stephens. As a result of these and other strategic actions, the list of parties and their identity has become convoluted. This order will clarify the proper parties going forward and their status.

Complex pleading decisions aside, the dispute in this case is fundamentally a church schism that arose in much the same manner as that found in the *Bishop of Colorado v. Mote*, 716 P.2d 85 (Colo. 1986). All parties recognize that the "neutral principles" analysis outlined in *Mote* must control my decision.

I find the following facts are significant in resolving this dispute:

1. The 1923 parish corporation Grace Church and St. Stephens resulted from the merger of two former Episcopal parishes, St. Stephens's parish

and Grace Church parish. That merger occurred in 1923. Grace Church was originally formed in 1873 by application to the Bishop for membership. In 1874 it filed its certificate of incorporation in the records of El Paso County Colorado. (Def. ex. 17).

2. In 1894, a group of churchmen, who described themselves as "low churchmen" left Grace Church over the objection of the Bishop and moved to the present church location on North Tejon Street, where they established St. Stephen's Church. They filed a certificate of incorporation with El Paso County on March 31, 1894. (Def. Ex. 27). Though it's early history is not particularly clear, St Stephens remained in contact with the Bishop. While they sought approval of the Bishop for construction of their stone building on Tejon Street, they ignored the Bishop's criticism of its design and built it, incurring a substantial debt. Grace Church continued to worship at a separate location, and was considered to be more of a "high church", that is more aligned with Catholic tradition. Members of the "low church" St. Stephens considered themselves more aligned with Protestant ideology.

3. The two churches reunited in 1923 and formed Grace Church and St Stephens. The combined congregation built a larger church on Tejon Street. **[4]** It filed its Certificate of Incorporation on December 21, 1923 (Ex. 28). Debt was incurred to construct the new facility. That debt was paid off in 1929, at which point the church was "consecrated". As part of the consecration

ceremony, the rectors, wardens and vestry of Grace Church and St Stephens signed the "Instrument of Donation" (Def. ex. 30.), the significance of which will be discussed in greater detail below.

4. Dr. Lindsay Patton was rector from approximately 1950 through 1962. During that time, the local parish built a number of mission churches. Dr. Patton exercised considerable control over the mission churches. Rector Patton was still loyal to the Diocese and obtained permission from the Diocese before building mission churches.

5. In 1963, the parish corporation adopted bylaws for its governance. (Ex. 31). Those bylaws refer to adherence to the Canons of the General Church and Diocese.

6. In 1967, the Colorado legislature adopted the Colorado Nonprofit Corporation Act. Becoming effective on January 1, 1968, the Act represented a significant departure from the prior law applicable to nonprofit corporations. The Act permitted existing nonprofit corporations to choose whether to be covered by its new provisions or not by filing a "Statement of Election to Accept" the new Act. The 1923 nonprofit Grace Church and St Stephens did not file a Statement of Election to Accept. The Act had further filing requirements with the Secretary of State, even for corporations that did *not* elect to accept. The parish did not file any of those documents either.

7. Because the parish failed to file the documents required by the new Act, it became "defunct" in 1972. Then in 1973 the parish filed with the Secretary of State "Articles of Incorporation". (Def. ex. 34). They were signed by three parish priests and the vestry of the parish. The articles were filed in the name of Grace Church "&" St Stevens and contained no reference to the Diocese, the canons or the general church. At the bottom of the document is a typed statement indicating that the corporation "had existed since at least 1929". I conclude that for the reasons stated below, the filing of the 1973 document was intended to "revive" or "reinstate" the 1923 corporation and that by substantially complying with the statutory requirements, that it did so.

8. In 1974, within 8 months of creating and recording the "Articles of Incorporation", the parish corporation created new bylaws. (Def. ex. 35) The 1974 bylaws restate what had been adopted in the 1963 bylaws (Def. ex. 31). Chapter 1 of the bylaws acknowledges that Grace Church and St Stephens had been in existence since 1923. The 1974 bylaws provide for **[5]** governance of the parish corporation "subject to the General Canons of the National Church, and the Canons of the Diocese of the State of Colorado".

9. Reviewing the minutes of the vestry leading up to the creation of the 1973 articles and thereafter, there is nothing contained in them to indicate that a new corporation was being formed or that the parish was intent on distancing itself

from the Diocese and general church or changing the way in which it engaged in its business.

10. In 1979, the general church adopted the "Dennis Canon" which purports to create a trust relationship in all parish property in favor of the national church and Diocese. Grace Church and St. Stephens did not formally object to implementation of that canon and the time it was created nor did it take any steps at any time since its creation, until this dispute arose, to alter the canon's purported impact on their ownership and use of property.

11. On October 15, 1987, the current parish rector, Father Armstrong was inducted as rector of Grace Church.

12. At various times between 1973 and 2006, the national church and Colorado Diocese instituted changes in doctrine and personnel that some members of the parish found offensive. In 2003 and again in 2006, the national church appointed individuals as bishops that engendered considerable angst among some members of the local parish. As early as 2003, members begin talking about some form of separation from the national church. Those members believed that the national church was violating the tenets of traditional Anglicanism. In 2003, father Armstrong encouraged the parish to remain loyal to the national church and attempt to make changes from within.

13. Between 2003 and 2006 there were debates within the parish about what the national church was doing. In response however, the vestry

minutes continue to reflect continued recognition and obedience to the Bishop. In 2003, even though Grace Church and St Stephens and other parishes throughout the country had opposed the actions of the General Convention of the national church, vestry minutes of Grace Church and St Stephens reflect that the parish and the other objecting parishes "will remain within ECUSA; they will not leave the church, but will reclaim the church for conservative orthodoxy". (Ex. 234) Again in September 2004, vestry minutes state that "Grace Church has remained within jurisdictional authority of Right Reverend Bishop Robert O'Neill". (Ex. 244). Likewise, in July 2006, vestry minutes confirmed that it was acting "according to the Canons and Constitution of ECUSA" (Ex 253). **[6]**

14. In 2005, Bishop O'Neill became concerned about possible financial problems at the parish. He met with Rev. Armstrong to discuss problems with the clergy pension fund. He further discovered that Grace Church and St. Stephens had procured a $1.8 million dollar loan made by the State Bank of Barclay, without first obtaining permission from the Diocese. In response to being questioned about the loan, Rev. Armstrong assured the Bishop that the loan had been "grandfathered" by the permission given for the loan in 1989 and thus didn't require additional consent. Rev. Armstrong indicated that the loan constituted the third phase of construction that had been previously approved by the Diocese. At some point Bishop O'Neill became concerned about the possibility of financial misconduct at Grace Church and St.

Stephens. Accordingly, the Bishop retained an accountant and had an audit conducted during the summer of 2006.

15. Bishop O'Neill received the results of the audit during 2006. As a result of the audit, the Bishop concluded that Rev. Armstrong had engaged in financial misconduct with parish finances. The Bishop referred the matter to a Diocesan disciplinary hearing. Rev. Armstrong did not participate in the disciplinary hearing. As a result of that hearing, Rev. Armstrong was "inhibited", which meant he was prohibited from conducting further services at the parish, going to the parish or having any contact with the parish members. Rev. Armstrong was further "convicted" of not obtaining prior approval of the Diocese before selling or encumbering parish property on a number of occasions.

16. As a result of the "inhibition" of Father Armstrong, some members of the parish felt that Grace Church and St Stephens was under attack from the Bishop. They concluded that the parish was being punished for being conservative and resisting the decisions of the national church and Diocese. Ultimately, members of the vestry began meeting with Father Armstrong and discussing the possibility of departure from ECUSA.

17. Notice was subsequently sent to members of the parish asking them to vote on the issue of whether the parish should depart from ECUSA. In March 2007 the votes were tabulated. Over 90% of those who voted approved departing from ECUSA. Those that departed maintained the

name of Grace Church and St Stephens and in this suit are asserting that they have the right to keep that name and all real and personal property of the parish. They have affiliated with the Congregation of Anglicans of North America ("CANA").

18. After Bishop O'Neill was notified of the parish action, he "fired" the existing vestry and appointed a new vestry from those parish members who had remained loyal to the Bishop. **[7]**

19. All real and personal property being used by the parish is titled in the name of Grace Church and St Stephens. Over the years, the local parish has made substantial improvements and upgrades to the church facility, all at parish expense. Other than a $500 contribution in the 1800's, the Diocese has never contributed financially to the purchase or maintenance of parish property.

DISCUSSION:

Resolution of these issues is governed by the decision in *Bishop and Diocese of Colorado v. Mote*, 716 P.2d 85 (Colo. 1986) and application of the "neutral principles of law" approach. In *Mote* the Colorado Supreme Court first decided to apply the neutral principles approach to resolve a property dispute between the Episcopal Diocese of Colorado and the parish known as St Mary's Church. There are some striking similarities between the facts found in *Mote* and those that exist in this case. The Defendants have argued that the cases are legally indistinguishable and that my analysis should be

simple. On the contrary, I conclude that until a Colorado Appellate Court decides that canons alone can create a trust, the *Mote* decision requires a much broader analysis.

The Supreme Courts of several states have in the recent past dealt with these same issues and resolved the disputes mostly in favor of the various Dioceses. Indeed, California has essentially foreclosed most future church property disputes within its state by concluding in *In Re the Episcopal Church Cases*, 198 P.3d 66 (Ca. 2009) that "...the general church's canons (referring specifically to the "Dennis Canon"), not instruments of the local church, created the trust." 198 P.3 at 295. In California, adoption by PECUSA of the "Dennis canon" has, for all intents and purposes, ended the inquiry.

The Defendants have argued that my analysis can be as simple as that engaged in by the California Supreme Court. They urge, in addition to other arguments, that since ECUSA has adopted the "Dennis cannon", there is no need for further inquiry. The Plaintiffs argue, on the other hand, that the California and similar New York cases are of no guidance to this court and are wholly distinguishable because of the statutes specifically enacted in those states to deal with the question of whether a property trust has been created within religious organizations.

While I don't necessarily agree that cases from other states are of no guidance, I feel compelled to engage in the broader analysis that seems to be required by *Mote*. The Dennis Canon was enacted after the *Mote* schism arose. The Colorado Court knew that it existed because it was quoted in a

footnote. In **[8]** spite of that knowledge, our Supreme Court did not say that the Dennis Canon would foreclose further inquiry. Rather, the Court noted only that the Dennis canon merely confirmed "the relationships existing between PECUSA the diocese and the parish of St. Mary's". 716 P.2d at 105.

The *Mote* court did not go so far as to say that the Dennis canon, or any other Canon, standing alone, created the trust relationship that was found in *Mote*. Rather, the Court went through a very careful analysis of all documents relating to the real estate, the history of the relationship of the parties, the relevant corporate documents, the Canons and the history of St. Mary's real estate transactions before arriving at it's conclusion that a "unity of purpose...reflecting the intent that property held by the parish would be dedicated to and utilized for the advancement of the work of PECUSA" 716 P.2d at 85.

Nor did the *Mote* court clearly define a minimum standard for determination of whether a trust exists or not. In this case there are several instances wherein parish real property was encumbered or sold without consent or knowledge of the diocese. Those transactions would clearly be contrary to Diocesan canons and were factual circumstances not found in *Mote*. On their surface, the real property transactions put in place without Diocesan consent are arguably contrary to a finding of "*unity of purpose"* and thus would seem to require a more thorough analysis. While "unity of purpose" does not appear to be the minimum standard for finding the existence of a trust, the lack of unity seems under *Mote* to mandate the broader analysis of all

attributes of the relationship and nature of real estate transactions.

Trust and Property Law Considerations:

Relying on *Jones v. Wolf*, the *Mote* court indicated that a court should rely on "established concepts of trust and property law" in determining whether a trust in favor of the "general church" exists. 716 P.2d at 100. The inquiry is not restricted to a search for explicit language of express trust, "Colorado recognizes that the *intent* to create a trust can be inferred from the nature of property transactions, the circumstances surrounding the holding of and transfer of property, the particular documents or language employed, and the conduct of the parties" *Id. at page 100.*

As the plaintiffs have continually urged, the *Mote* court further stated that "While such an inference is not to come easily—'*clear, explicit, definite, unequivocal land unambiguous language or conduct',* establishing the intent to create a trust is required...There is no need to restrict the inquiry...other principles from the common and statutory law of property, contract, corporation or voluntary associations might be the basis for a determination that a general **[9]** church has a right, title or interest in the church property, requiring a more extensive inquiry". *Id. at p 100-101.*

In applying these various principles, the *Mote* court considered the entire history of St. Mary's, starting with the original filing of the articles of incorporation. In our case, Grace Church was organized on October 14, 1873. The minutes that

were signed by 14 formers of the organization contained the following language:

...And we solemnly promise and declare that the said Parish shall forever be held and incorporated under the ecclesiastical authority of the Bishop of Colorado and his successors in office. The Constitution and Canons of the Protestant Episcopal Church in the United States of America[ ] *and the Constitution and Canons of the Missionary jurisdiction of Colorado, the authority of which we do hereby recognize and whose Liturgy, Doctrine, Discipline and Usages we promise at all times for ourselves and successors corporate obedience and conformity.*

The Certificate of Incorporation of "Grace Episcopal Church of Colorado Springs" was recorded with the records of El Paso County on October 14, 1873. It contained language that indicated that ten trustees had been appointed to "manage the temporal offices of said Church" and that the trustees had been "elected according to the Constitution and Canons of the Protestant Episcopal Church to serve until such time as their successors should be elected..."

St Stephens Church was formed on November 31, 1894. The plaintiffs have characterized the church as a "low church", more aligned doctrinally with Protestantism than a "high church" which arguably was more associated with traditional Catholicism. The articles of its incorporation are silent as to the Episcopal Church and Diocese and indicate only that "*the Corporation secures and hereby reserves to itself the right to make and adopt such prudential bylaws as it deems necessary to provide for the election of*

Wardens and Vestrymen and other officers and for the property government and administration in all respects of such church."

The two churches merged in 1923, forming "Grace Church and St. Stephen's". The new church corporation built a large church on North Tejon Street that is one of the subjects of this suit. The Affidavit of Incorporation was filed on December 21, 1923 in the records of El Paso County. It contained the following "purposes" language:

...to administer the temporalities of The Protestant Episcopal Church in the parish...and particularly to acquire, hold, use and enjoy all of the property now held for the members of said Church..., whether the title to the same **[10]** *be held by the parish now known as Grace Church and Parish. ...or by that parish now known as St Stephen's Church and parish or by any other person or persons or corporation acting for or on behalf of the Protestant Episcopal Church in the city of Colorado Springs...*

...the corporation hereby created does expressly accede to all provisions of the constitution and canons adopted by the General Convention of the Protestant Episcopal Church in the United States of America, and to all of the provisions of the Constitution and canons of the Diocese of Colorado.

The parish corporation borrowed to build the church. The loan was repaid by 1929 and was thus eligible for consecration. As part of the consecration ceremony, the Rector, Wardens, and Vestry of Grace Church and St. Stephens signed a document generally referred to as the "Instrument of Donation" that described the signatories as being" *the*

corporation holding title to the realty of the Parish of Grace Church and St Stephens in Colorado Springs as being in possession of a House of Prayer". The document contains the final language:

AND we do moreover hereby relinquish all claim to any right of disposing of the said building, without due consent given by the Ecclesiastical Authority of the Diocese, according to the Canons of the said Diocese, or allowing the use of it in any way inconsistent with the terms and true meaning of this Instrument of Donation, and with the Form of Consecration hereby requested of the Bishop.

The Plaintiff's expert asserts that the Instrument of Donation was purely ceremonial and has no legal significance under Colorado Law. I am not convinced by that assessment. Testimony at trial indicated that the Document of Donation was widely used by the Episcopal Diocese at the time. It was created in large part in response various controversies between Episcopal Dioceses and their parishes throughout the country. As a result of those controversies, the Bishop of the national church feared that real property could be used without the consent of the local Bishop. Accordingly, the Document of Donation was created to assure the Bishop's consent was obtained before property could be sold. I conclude that the document means what it says: that Grace Church gave up any right to "dispose" of the building unless the Bishop first authorized that disposition.

There are substantial similarities between the clauses created by St Mary's in the *Mote* case and those found in the 1923 Grace Church articles and 1929 Instrument of Donation. Clause 1 in St Mary's

articles referring to the "temporalities" of the church is word-for-word the same in the Grace 1923 articles. Clause 2 of the St Mary's articles has a provision that prohibits St Mary's from incurring **"indebtedness which may alienate or encumber church [11] property without the consent...of the Diocese".** That clause does not exist in Grace Church's 1923 articles. On the other hand, Grace Church signed and delivered the 1929 Instrument of Donation in which Grace Church relinquished any right to dispose of the property without consent of the Bishop. In terms of whether a trust relationship has been created, I find little legal distinction between the two clauses.

The *Mote* court concluded that clauses 1 and 2 of the St Mary's articles *"strongly indicate that the local church property was to be held for the benefit of the general church, and they show the extensive nature of the policy direction and property control to be exercised by the general church. There are no provisions in the articles implicitly or explicitly expressing an intent to the contrary". Id. at p 104.* Likewise, in our case the 1923 articles devote the use of the church "temporalities" exclusively for religious and educational functions of the "Episcopal Church in the Parish". The Instrument of Donation clearly relinquishes the right to dispose of the property without Diocesan consent. And like *Mote* there is no language to the contrary expressing any other intent. It is inescapable therefore that since *Mote* controls, that I must also conclude that the combination of 1923 articles and 1929 Instrument of Donation establishes Grace Church's intent that the property was being held for the benefit of the Diocese of Colorado.

Looking to current trust law, the *Restatement of Trusts 3d*, section 22, indicates that in order to create a trust on real property there must be a writing that a) manifests the trust intention, b) reasonably identifies the trust property, c) reasonably identifies the beneficiaries and d) reasonably identifies the purpose of the trust. The 1923 articles of incorporation, 1929 Instrument of Donation and the conclusions reached in *Mote* support the finding that a trust for the benefit of the Diocese had been created. Ignoring in this portion of the analysis the impact of the Episcopal Canons, the trust thus created does not vest title in the Diocese upon the departure of Grace Church and St Stephens from the control of PECUSA. Rather, the trust gives the Diocese the right to first approve any property transfer made by Grace Church and St Stephens.

In August of 1963, the vestry amended the Parish Corporation's bylaws. The amended bylaws acknowledge the continuity between the 1874 corporate entity, the 1923 corporation and Grace Church and St Stephens in 1963. They further indicate that the By-Laws were being amended *"to provide for the proper government of the Church, subject to the General Canons of the National Church, and the Canons of the Diocese of the State of Colorado*."

In 1967, the Colorado legislature adopted the Colorado Nonprofit Corporation Act. Section 7-20-105 of that Act provided that any corporation formed before 1968 had to (1) file annual corporate reports with the Secretary of **[12]** State and designate a registered agent and (2) to file a copy of the" nonprofit corporation's articles, affidavit of

incorporation or other basic corporate charter, by whatever name denominated" with the Secretary of State. Failure to comply would result in the Corporation becoming "defunct". Subsection 8 of that provision further provided that any corporation that became "defunct" for five years was "dissolved by operation of law". In such event, CRS 7-26-120(2) provides as follows:

...after dissolution, title to any corporate property not distributed or disposed of in the dissolution shall remain in the corporation. The majority of the surviving members of the last acting board of directors as named in the files of the secretary of state pertaining to such corporation shall have full power and authority...to hold, convey, and transfer such corporate property, ...Final disposition of such property shall be made by the majority of the surviving directors in the manner provided in section 7-26-103.

Grace Church and St Stephens did not file any documents with the Secretary of State until 1973. Thus, as of January 1st 1972, the nonprofit corporate entity Grace Church and St Stephens became "defunct". On June 13, 1973, Robert Gotchey, the business manager for Grace Church and St Stephens, had the Vestry of the church, the Rector and Wardens sign plaintiff's exhibit GCSS 0003 and then forwarded it for recording with the Colorado Secretary of State. It was recorded on June 25th 1973. It purported to be "Articles of Incorporation" of "Grace Church **&** St Stephens". It contained very little information regarding the entity's purpose, had no mention of the Episcopal Church of the United States or the Diocese and contained none of the

language found in any of the prior articles of incorporation concerning adherence to church canons. At the bottom of the document is the written note that **"Grace Church &. St Stephen's has been incorporated at least since 1929".**

The intent and effect of the 1973 articles was the single most hotly contested issue of the trial. The Plaintiffs argue that it created a new corporation that did not "accede" to the canons of the Episcopal Church and Diocese and that likewise had no limitations regarding the disposition of the real property. The Defendants on the other hand argued that the 1973 articles merely revived or reinstated the 1923 corporation, or at worst, did nothing.

Because of the clear ambiguity created by the language that "Grace Church & St Stephens has been incorporated at least since 1929", I allowed parole evidence regarding the intent of the parties. One former vestry member, Dr. Jones indicated that he felt they were creating a new corporate entity and basically starting over. Father Hewitt, the parish Rector at the time, had no memory of any new corporation being formed. He indicated that no substantial changes to their church business or the manner in which they conducted it was being considered. He clearly indicated that nothing had changed in the **[13]** relationship between the parish and the Diocese. He and most of the other witnesses to the event had no clear memory of what the document meant, other than to say that a "problem" was being addressed by signing the document and that filing it would solve the problem. The document was not prepared by a church lawyer.

I am convinced that the signatories to the document felt they were merely curing a "problem" in the 1923 corporation. The "problem" being "fixed" by the 1973 articles was that the 1923 corporation had become defunct by not filing the information required by Colorado's new nonprofit corporation Act. The parties presented the minutes of vestry meetings that occurred before and after the preparation of the 1973 articles. There is nothing in those minutes that indicate that a new corporation was being formed or even considered. Nor was their any mention of any extraordinary dissatisfaction with the Diocese or a need to create some form of separation from the Episcopal Church and Diocese. In fact, no mention of the 1973 articles is mentioned at all. There is no evidence that any of the signers felt the need to start a new corporation, or if they did, that it would change anything about Grace Church and St. Stephens. On the contrary, in 1974, the Vestry adopted bylaws that were admitted as defense exhibit 35. Like the 1963 bylaws, the 1974 bylaws recited the following:

Grace Church and St. Stephens became a body politic and corporate under date of December 19, 1923, pursuant to the provisions of what is now Article 21 of Chapter 31 of the Colorado Revised Statutes. Such incorporation was accomplished for the purpose, among other things, of merging the Parishes of Grace Church and St. Stephen's in the City of Colorado Springs. Prior to such consolidation, under date of May 27, 1874, the Parish incorporated as "Grace Church at Colorado Springs"…the following By-laws are adopted to provide for the proper government of the Church, ***subject to the General Canons of the National Church, and***

the Canons of the Diocese of the State of Colorado.

While the 1874 and 1923 corporations were clearly mentioned in these 1974 bylaws, there is no mention of a new corporation being formed in 1973. Likewise, there is no evidence that property of the 1923 corporation was transferred to a 1973 corporation or that such a necessity was ever discussed. Without some evidence of transfer, all corporate property would remain owned by the 1923 corporation.

I am convinced that the Vestry, Rector and Wardens in 1973 believed at the time that signing and recording the document would "revive" or "reinstate" the 1923 corporation and keep it from being "defunct". Absolutely nothing to the contrary was presented except the testimony of Dr. Jones. There are no vestry minutes to support a decision to form a new corporation, property transfers into **[14]** the 1973 corporate entity, or behavior that is consistent with the existence of a new, and according to the plaintiffs, more independent corporate entity that had shunned its former attachment and loyalty to PECUSA or the Diocese. Though intent is not usually the determinative factor in deciding whether a new corporate entity was formed, it must be given considerable weight in this case because of what transpired when the '73 articles were prepared and the parish's conduct thereafter. That evidence can only be seen as consistent with the belief that the nonprofit corporation Grace Church and St Stevens had remained active and unchanged.

I find the following evidence further supports this conclusion:

First, it is clear that the Vestry and Rectors were trying to "fix" a corporate problem with their existing 1923 corporation and not create a new entity. The reference at the bottom of the "Articles of Incorporation" to **Grace Church and St Stephens has been incorporated since at least 1929** recognizes the existence of the 1923 corporation and supports the conclusion that the Vestry and Rectors wanted to keep that entity in existence. The minutes of vestry meetings and the use of corporate property thereafter all support the finding that the Parish felt that nothing had changed when the 1973 articles were filed.

Second, the 1923 Corporation was at all times the owner of the real and personal property. When Grace Church and St. Stevens was formed, it took title to all real property owned by the two then existing entities of Grace Church and St. Stevens church. No similar property transfers into 1973 corporation were ever documented. Had the Vestry of Grace Church and St Steven intended that a new corporation was being formed, it would have been a simple matter to quit claim the property into a 1973 corporation and reflect the same in its articles. Absent such a transfer, there is no legal mechanism by which property would have transferred into a new corporation.

The Plaintiff's expert, Mr. Fischer testified that the 1973 articles reflect the creation of a corporation that "replaced" the 1923 corporation and that the new corporation essentially took possession of the church property and then began to deal with it as its own. Thereafter, legal title passed over to the new corporation by adverse possession. There is no

evidence to support that theory. To obtain title by adverse possession, a party must establish that his possession was actual, adverse, hostile, under claim of right, exclusive and uninterrupted. *Smith v. Hayden*, 772 P.2d 47 (Colo. 1979). To merit the presumption, the use must be sufficiently open and obvious to apprise the true owner, in the exercise of reasonable diligence, of an intention to claim adversely. *Hodge v. Terrill*, 228 P.2d 984, 988 (Colo. 1951). **[15]**

When the Vestry filed the 1973 Articles of Incorporation, they did not believe they were creating a new corporation. Therefore, the 1973 "corporation" could not have been using the property in an open manner, hostile to the ownership of the 1923 corporation. It is clear that the Vestry and Rectors felt in 1973 that nothing had changed. The evidence established that Grace Church and St Stevens went about its business in exactly the same manner that it always had. Therefore, vestry member would have no reason to know that the property was being encumbered or alienated out of the 1973 corporation, rather than the 1923 corporation, who still maintained ownership. Thus, there could be no transfer of title by adverse possession.

Likewise, Mr. Fischer opined that transfer from the 1923 corporation to the 1973 corporation occurred as an exception to the Statute of Frauds. CRS 38-10-108. His opinion was that there was "part performance" of a contract that excluded it from coverage of the Statute of Frauds. Absent some actual agreement to transfer the property, however, there could be no part performance under CRS 38-

10-110. *Brown v. Johanson*, 194 P. 943 (Colo. 1920). No evidence was presented to prove that the Vestry of the 1923 corporation had agreed to transfer the property from the 1923 corporation to the 1973 corporation. Therefore, there could be no "part performance" that would take a property transfer out of the Statute of Frauds. Since there is no evidence of a transfer or of any intent to engage in a transfer, there could have been no transfer of corporate property from the 1923 corporation to the 1973 corporation. Thus, any purported transfer of real property is void as a violation of the Statute of Frauds.

Third, even if there had been some form of transfer of property from the 1923 corporation to the 1973 corporation, the property would still be subject to the trust interest created for the benefit of the Diocese. Merely transferring property subject to a trust does not change the nature of the trust. The new trustee would take the property subject to the same conditions as those imposed upon the original trustee. Nor do I find, as the plaintiffs argue, that creating a new corporation would constitute a repudiation of the trust. In order for a trustee to repudiate a trust, the trustee must, by word or action, show an intention to abandon, renounce or refuse to perform under the trust. *First National Bank of Denver v. Rabb Foundation*, 479 P.2d 986 (Colo. App, 1970). Repudiation of a trust must be sufficient to put the beneficiary on notice of the repudiation. 54 ALR 2d 28, cited in *Hodny v. Hoyt*, 243 NW 2d 350 (N.D. 1976). There must be a showing of plain, strong and unequivocal renunciation of the purposes of the trust. 76 Am. Jur. 2d Trusts, p 798.

In light of the fact that Grace Church and St Stephens continued to go about its business in the same manner as before the 1973 Articles were recorded, one cannot conclude that filing those articles renounced the trust **[16]** relationship with the Diocese. Accordingly, for all of the above reasons, I conclude that filing the 1973 articles merely "revived" or "reinstated" the 1923 corporation Grace Church and St Stephens. Therefore, any trust relationship that existed for property held by the 1923 corporation continued past 1973.

Affect of Canon Law:

From the beginning of its existence, and up until the time that this dispute took shape, the nonprofit corporation Grace Church and St Steven has in numerous ways acknowledged that it was bound and governed by Canon law. Its founding articles of incorporation recite its relationship to the constitution and canons of PECUSA and the canons of the Diocese of Colorado. The bylaws adopted during various times throughout its existence all recite that the corporation was bound by Canon law. In 1974 the corporate bylaws stated that that its rules were being adopted to "provide for the proper government of the Church, **subject to the General Canons of the National Church, and the Canons of the Diocese of the State of Colorado."**

Application of Canon law has always been difficult for secular courts. For one thing, it appears to be rare that parish members, including members of the governing Vestry, know anything about the details of Canon law. In fact, Bishop O'Neil testified that no one expects church members to know much about the

Canons. That testimony is consistent with what was testified to by lay members of the parish; all of whom said they knew little or nothing about the canons. Thus, when the parish executes a document that pledges fidelity to canon law, it does so without members of the parish having actual knowledge or understanding of what it is that is being adopted.

For another, canons are essentially created and imposed unilaterally. They appear always to have been adopted at the National Convention. Once they are adopted, they are imposed on all parishes through publication in the Episcopal Book of Canons. Even though the board that recommends changes to canons is made up of representatives from individual parishes, the canons are still ultimately imposed upon individual parishes from the hierarchy of bishops. Application of canon law is based ore upon membership in the Episcopal Church than it is upon adoption through a democratic process where all individual church members participate.

The perceptual legal problem with this procedure is the one argued by these Plaintiffs and those in other schism cases: that under a "neutral principles" analysis, it is difficult to understand how unilaterally imposed canons can create a legal trust relationship. While the canons form the basis for governance within the Episcopal religion, they are usually unknown to all but the clergy and they don't create a trust relationship in the manner one normally comes to expect. **[17]** Unlike the secular "norm", the canons purport to create a trust through a process that is the opposite of most estate situations. That is, the trust is created by the

beneficiary of that trust and is imposed unilaterally on the settlor/trustee.

Having stated those secular reservations, it is clear from *Mote* and *Wolf* that the non-doctrinal sections of the canons are to be given close consideration under neutral principals. The opinions in both cases further support the proposition that the intent element of trust relationship can be established by the contents of canons.

It was the opinion of the plaintiffs' expert, Ms. McReynolds, that in order for a church canon to have legal impact on a property determination, it must either be clearly enunciated in the articles of incorporation or bylaws or be otherwise supported by a state statute that gives legal force to the canon's application to a property dispute. In stating that conclusion, Ms. McReynolds relied upon the decisions rendered by the California and New York Supreme Courts.

I am not convinced that the *Mote* opinion would justify giving such a restricted application to the impact of canon law in a neutral principles analysis. The United States Supreme Court in *Jones v. Wolf*, 443 U.S. 595 (1979) gave what appears to be a simple prescription under "neutral principles" to avoid protracted property litigation with the following language:

At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deed or corporate charter to include a right of reversion or trust in favor of the general church. ***Alternatively, the***

constitution of the general church can be made to recite an express trust in favor of the denominational church. The burden involved in taking such steps is minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is embodied in some legally cognizable form. 443 U.S. at 605

The *Wolf* court did not require that the change to the constitution of the general church be supported by a statute. Nor did they preclude the possibility that such a change to the constitution could stand alone and create a trust. In fact, I found convincing the opinion testimony of the defendants' expert Mr. Chopko that the above language from *Wolf* was added as a response to criticism by the Court's dissenters. The dissenters argued that any change from the traditional "compulsory deference" approach taken by courts following *Watson v. Jones* would impose a considerable burden on existing churches to change their constitution, charter and deeds. The dissent maintained that churches would be required to add language of polity to foundational documents or instruments of **[18]** conveyance and further force the trial courts to decide matters of polity. On the contrary, Mr. Chopko testified that the *Wolf* majority was emphasizing how minimal the intrusion on church business the "neutral principles" approach would be.

Taken in the context in which the above quote was made, it is clear the language must be taken to mean just what it says: that by merely changing the general churches' constitution, an express trust in favor of the general church can thereby be created. The *Wolf* court did not define what it meant when

they indicated that the trust language must be "embodied in some legally cognizable form". I conclude that what they meant was that the language cannot be hidden from church members or so intertwined with ecclesiastical matters as to force a court to be making doctrinal decisions. With that understanding of the definition I conclude that the canons of the Diocese and ECUSA are "legally cognizable". I further conclude that there is no condition precedent to enforcement that the trust created by a change to the constitution be supported by an enabling statute or otherwise contained in foundational documents.

PECUSA adopted Canon 1.7.4 as part of the "Constitution and Canons of the Episcopal Church" In 1979. It is commonly referred to as the "Dennis Canon" and It Is the canon at the heart of this litigation. Testifying on behalf of the Diocese, Mr. Royce stated that he had been on the canons committee following the announcement of the decision in *Jones v. Wolf*. He stated that the Dennis Canon had been proposed by Walter Dennis, in direct response to the *Wolf* decision, as an easy way to simplify property disputes in the future. The Dennis Canon reads as follows:

All real and personal property held by or for the benefit of any Parish, Mission or Congregation is ***held in trust*** *for this Church and the Diocese thereof in which such Parish, Mission or Congregation is located. The existence of this trust shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or*

Congregation remains a part of, and subject to, this Church and its Constitution and Canons.

Further, Canon 1.7.3 provides:

No Vestry, Trustee, or other Body, authorized by Civil or Canon law to hold, manage, or administer real property for any Parish, Mission, Congregation, or Institution, shall ***encumber or alienate*** *the same or any part thereof without the written consent of the Bishop and Standing Committee...*

The California Supreme Court decision in *In re the Episcopal Churches*, supra, has simplified the analysis In their state to looking at the canons alone. **[19]** Unfortunately at the time *Mote* was decided, the Dennis Canon had not yet been adopted. The court acknowledged in foot note 15 of the opinion that the canon had been adopted by PECUSA, but found it inapplicable to the St Mary's case. The *Mote* court did not go so far as to say that the Dennis Canon, standing alone, would create a trust, but merely indicated that the canon "did nothing but confirm the relationships existing among PECUSA, the diocese and the parish of St Mary's" 716 P.2d at 105.

The *Mote* court recited other canons that are applicable in our case as well, including the above quoted Canon 1.7.3. Those other canons applicable in our case include canons 6, 12, 17, 18 and 21. Even with no Dennis Canon to rely upon for a trust, the *Mote* Court concluded that canons 6, 12, 17, 18 and 21 each constitute "another strong example of control over property ceded by the local church to the diocese and is further indicative of the intent of the local and the general church to maintain integrity in the

ownership and use of property at the parish level for PECUSA purposes." 716 P.2d at 107

While the *Mote* court did no[t] go so far as to say that adoption of the Dennis Canon would end the inquiry, it is clear that the Dennis Canon would add additional and considerable weight to the conclusion that a trust for the benefit of PECUSA and the Colorado Diocese had been established. Accordingly, I conclude that the canons impose a much broader trust in favor of the general Episcopal Church, and further they expand the one put in place by the 1923 corporation articles of incorporation and Instrument of Donation.

The canons prohibit Grace and St Stephens from disposing of any real or personal property belonging to it without the consent of the Diocese. The canons further impose an obligation on the parish to first obtain consent of the Diocese before "alienating or encumbering" any parish property. The fact that members of the parish Grace Church and St Stephens had no knowledge of the contents of the canons would apparently be of no import to either the *Wolf* court or the court in *Mote*. Accordingly, I further conclude that it is of no consequence in this case. One must assume that by becoming a member of a corporate nonprofit that has acceded to Episcopal canons, the member is subject to them all, whether they are known to the member or not. The law of "voluntary associations" would support such a conclusion. *See eg. Jorgensen Realty, Inc., v Box*, 701 P.2d 1256, 1257 (Colo. App. 1985).

Property Transactions Inconsistent with Terms of Trust:

The central theme of the plaintiff Grace Church and St Stephen's assertion that it owns all parish property is that the parish was historically independent of the Diocese, that it made its own decisions on virtually all issues and most importantly, that it didn't require the approval of the Diocese before it **[20]** encumbered or sold parish property. Thus, it argues alternatively that either no trust exists, or in the alternative, if a trust was found to exist, that in the words of Mr. Fischer, "the trust was revocable and it *has* been revoked".

The *Mote* decision mandates review of property transactions and the context in which they occurred to determine whether they are inconsistent with the existence of a trust relationship. The Court stated that *"an exercise of* ***unbridled control*** *over church property by the local church corporation would conflict with several provisions in the PECUSA and diocesan canons". P105*. While neither defining "unbridled control" nor indicating what impact a finding of something more than *no* control but less than "*unbridled*" might have on the analysis, it seems to be left to common sense and a totality of the circumstances determination.

Indeed, the history of property sales and encumbrances by Grace Church and St Stephens is anything but consistent as it relates to abiding by canon law. Prior to 1975, the parish complied with the requirement to first obtain Diocesan approval before selling or encumbering property. After 1975, the parish sought permission to borrow and encumber on some occasions, but did not in others.

The parish bought and sold rectories on at least three occasions without permission of the Diocese. The parish sold Thunderbird Ranch in 1992 without permission, even though they sought and obtained permission to encumber(and perhaps to sell) the property on a prior occasion. On each occasion that they encumbered a "mission church", the parish first obtained consent of the Diocese.

Each party has submitted a summary of transactions and indications in each instance where consent was obtained or not. There is some factual disagreement in one or two of the instances. Exact resolution of that dispute is not necessary however. What is critical is that I don't find these transactions, whether approved or not, indicate "any intent to defy or disobey the Diocese" as the *Mote* court stated when it examined similar issues in the St Mary's case. 716 P.2d at 106.

I reach that conclusion because I find that members of the vestry, not knowing what the canons dictate, would not have known of any obligation to seek Diocesan approval. Virtually all lay persons who testified in this case, whether for the plaintiff or defendants, indicated that they didn't know the particulars of canon law. The Bishop testified that the members were not expected to know and understand the canons. Since no approval mandate was contained in the articles of incorporation or bylaws, I conclude that parish members would have no way of knowing about the canon requirements. Unless, that is, they were informed by a member of the clergy that permission was needed. It is of little surprise then that the members of the vestry would not seek Diocesan approval before selling or

encumbering property. Moreover, in **[21]** each of those instances where Diocesan approval was not obtained, the Bishop indicated that the Diocese had no knowledge of the transaction. Thus, it cannot be successfully urged that the Bishop knowingly waived the benefit of the trust relationship.

If members of the vestry knew of the canon obligation to obtain Diocesan approval and were defying the Bishop, one would expect to find some reference to that defiance in some parish record. In each of the real estate transactions where permission was not obtained, there are no records to indicate that the vestry had decided that Diocesan consent was required. In fact there are no parish records indicating *any* discussion of consent, whether it was obtained or not.

There was one critical instance in which Diocesan approval was obtained that adds weight to my conclusion that vestry members just didn't know. That instance came about when the parish borrowed $1.25 million in 1989–1992 to make renovations to the church building. Seeking permission from the Diocese would certainly be in conformity with the requirements of the canons. In addition to being in conformity with canon requirements, the act of requesting consent from the Diocese would also be contrary to the plaintiff's assertion that the parish had no obligation to obtain consent to sell or encumber property. It is also important to the outcome of my analysis because it involves a situation in which the question of how the parties mutually intended that control over the parishes' most significant real estate, the church, would be exercised. One can reasonably conclude from this

instance alone that both parties understood that the parish would not encumber the church without Diocesan consent.

Rev. Armstrong testified that he did not initially obtain approval for the loan, because he didn't feel he needed permission from the Diocese. However, he was contacted by members of the Diocesan staff who indicated that it was required. He said that after receiving the call, he agreed to seek approval by having the parish apply for it. When he went to the senior warden, "Unk" McWilliams to have McWilliams sign a request for approval, he was angrily chastised by the warden. According to Rev. Armstrong, Mr. McWilliams criticized Rev. Armstrong for agreeing to seek approval. According to Rev. Armstrong, Mr. McWilliams indicated that the parish didn't need Diocesan approval before the parish improved or sold parish property because it was owned and controlled in all respects by the parish. He further stated that the construction was well under way anyway and that the Diocese failed to follow up with later oversight envisioned in the grant of approval.

I conclude that Rev. Armstrong's testimony regarding this incident is unconvincing. First, it is contrary to the testimony given by others that Mr. McWilliams was devoted to the Episcopal Church and Diocese and would always **[22]** follow the dictates of that hierarchy. Second, Mr. McWilliams has passed away and cannot speak for himself. Third, it is clearly self-serving and surrounds an instance which is critical in examination of who has ultimate control and ownership of the property. Fourth, if Grace and St Stephens parish was truly

independent and felt that there was no obligation to obtain Diocesan approval for major encumbrances, it logically would have rejected the request for approval and been open about it. If Mr. McWilliams felt the Diocese had no right to expect the local parish would seek approval what better time would there have been to assert that independence than when the parishes' biggest asset is at issue? Mr. McWilliams was a bank trust officer who understood the legal significance of providing such consent. It would be logically inconsistent for a knowledgeable businessman and banker to believe the Diocese had no right to approve parish financing and yet to seek it none-the-less.

Obtaining consent for such an encumbrance, no matter what the circumstances, was an admission by Rev. Armstrong that he knew that consent was required at the time. Further, Rev. Armstrong's answers given in 1988 to written parish questions are also consistent with his knowledge that the Diocese controlled parish property. In response to those written questions, Rev. Armstrong informed the parish that the Diocese basically owned all of the parish property.

Last, Bishop O'Neil testified that he had confronted Rev Armstrong in 2005 about an encumbrance on the church that had been obtained without Diocesan consent. Rather than tell the Bishop that permission was not required, Rev. Armstrong told the Bishop that the encumbrance was part of the loan that had been approved by the Diocese in 1989. That was not true, but that is not the point. It demonstrates that Father Armstrong

was aware of the canon obligation to obtain consent when selling or encumbering parish property.

The Diocese later accused Rev. Armstrong of not disclosing or seeking permission of the Diocese for a number of sales and encumbrances for Grace Church and St Stephens property.

Based upon a review of the testimony and various real estate transactions, I conclude that the vestry of Grace Church and St Stephens did know of the canon obligation to first seek approval before "alienating or encumbering" property. Likewise, the vestry undoubtedly knew little or nothing of the Dennis canon by which all parish property had been set aside in trust to the Diocese. Thus, I conclude that the parish real estate transactions were not an act of defiance or an indication of independence from the Diocese. Rather, the vestry apparently sought permission when a member of the clergy told them they needed it, but otherwise did not. The transactional history may demonstrate **[23]** Rev. Armstrong's defiance of the Bishop and canon law, but not defiance from the parish.

Even if the parish sold or encumbered parish property with knowledge that such conduct violated the canons, that defiance would not be enough to renounce the trust relationship. In order to repudiate a trust, the act of repudiation must be sufficient to put the beneficiary on notice of the repudiation. 54 ALR 2d 28 and *Hodny v. Hoyt*, *supra*. At a minimum, the Bishop would have to be made aware that the parish was violating the obligation to obtain consent. On the contrary, Bishop O'Neill indicated he was unaware of the unapproved real estate transactions. On the other hand, if "Unk" McWilliams had

answered the Diocese's demand in 1988 that the parish submit a request for approval with "no, we don't need your consent", that could be viewed as a clear renunciation of the Diocese's belief that it had the right to approve of all real estate loans and sales.

Therefore, I conclude that the parish real estate transactions that went forward without Diocesan consent do not constitute renunciation of the trust for the benefit of the Diocese, nor do they constitute proof of any intent contrary to maintenance of a trust relationship.

Church History Consistent with Trust Relationship:

The *Mote* court recited the history of the relationship between St Mary's and the Diocese as additional evidence of the intent to devote all parish property to the ultimate control of the Bishop. In our case the plaintiffs have asserted that Grace Church and St Stephens was an independent parish that resisted control of the Bishop and treated parish property as its own, not subject to Bishop over sight. The totality of the evidence presented does not support that argument.

The 1873 foundational document recites that the original members pledge that they were "constitutionally attached to the Doctrine, Disciplines, and worship of the Protestant Episcopal Church in the United States and being earnestly desirous of establishing its authority..." They "promised" that the parish would "forever be held and incorporated under the ecclesiastical authority of the Bishop of Colorado and his successors". They further promised corporate obedience and conformity

to the Constitutions and Canons of the Church, nationally and in the jurisdiction of Colorado.

In the 1923 articles of incorporation, the two churches Grace and St Stephens were united. As indicated in quotes above, the 1923 corporate church pledged loyalty and obedience to the national church and the Bishop of Colorado. It again recited its duty to obey the canons of the general church. As indicated above, the preparation and recording of the "1973 articles of incorporation" merely revived or reinstated the then-defunct 1923 nonprofit corporation Grace **[24]** Church and St Stephens. The 1974 and 1975 bylaws renew the pledge contained in the 1963 bylaws to be governed by the Constitution and Canons of the general church.

Historical documents of the church and evidence presented at trial are replete with examples of parish involvement in the activities of the Diocese. The Rector or Co-Rector attended the Annual Convocation, Council, or Convention of the Diocese of Colorado 87 times since its founding, including at least 14 times since 1973. The Parish sent delegates to the Annual Convocation, Council, or Convention of the Diocese of Colorado 94 times since its founding, including at least 25 times since 1973. Grace Church and St Stephens sent delegates to the Conventions of the Diocese almost every year from 1872 through at least 2006. Parish delegates went to the General Convention on 28 occasions. **Grace Church and St Stephens hosted Annual Conventions of the Episcopal Church during 1941, 1953, 1974 and 1994.** Members of the parish have joined Diocesan boards, have served on numerous Diocesan committees and held governing positions in the

Diocese and national church. (See Woodward Affidavit and Summary, Def. ex. 5 and Bishop O'Neil Summary).

There is evidence that Bishops frequently visited the local parish. On each occasion that a new Rector was installed, the Bishop would preside over the formal ceremony of installation. When Father Armstrong was installed as the Rector, the Bishop presided over that installation before the entire congregation. Adherence to canon law was pledged during the installation. The Bishops made numerous visits to the local parish to oversee the running of the parish and to visit the various Rectors.

The parish pledged financial support to the Diocese. It appears that the parish has given money to the Diocese during each year of its existence.

When the various doctrinal disputes arose during Father Armstrong's tenure, there were various parish discussions about what the appropriate parish response should be. Separation from the national church was one of the alternatives discussed. In 2003 Father Armstrong urged the parish to "remain within ECUSA; they will not leave the church but will reclaim the church for conservative orthodoxy". (Ex. 234). Later he wrote to members, indicating that "I am bound to uphold these positions by the Constitution and Canons of our Church". (Ex. 238.) Those statements are clearly inconsistent with the assertion of parish independence of the Diocese.

The defendants called past rectors and church members to describe the conduct of the local parish and its relationship to the Diocese. Father Hewitt and Father Burton served as clergy during the 70's

and 80's. They indicated that Grace Church and St Stephens had a close relationship with the national church **[25]** and Diocese; one that was no different than any other parish in which they had previously served. They saw no indication of defiance of the Bishop or of the local parish having any notable independence from the Diocese. Professor Timothy Fuller testified that he was a past vestry member and that he was never aware of the parish asserting any independence from the Diocese until the disputes in 2006 came to a crisis point. I find the testimony of these three witnesses most convincing as an indication of the loyalty of the parish to the Diocese until the disputes arose.

From the time of its formation, Grace Church and St Stephens has always held itself out as an Episcopal church and part of the greater national church and Diocese of Colorado. That statement of attachment can be found in its corporate documents, minutes of meetings, signage, letterhead and announcements. None of the evidence presented would support that it was independent of the ECUSA or the Diocese of Colorado. Nor is there any significant factual support for the plaintiff's assertion that the parish was a member of the general church and loyal to it in matters of faith, but not in temporal matters. Absent proof that the parish exercised "unbridled control" over their real property, or that the corporate and real property records reserved ultimate ownership and control over the property, no such partial membership can be found.

Before the dispute in this case came to a head in the time frame of 2005–2006, the history of Grace

Church and St Stephens parish, is not substantially different than the history of the relationship between St Mary's and the Diocese in *Mote*. The Grace Church and St. Stephens parish has a 135 year relationship with the Diocese. It participated vigorously in all Diocesan activities. I find convincing the testimony of those witnesses that said the local parish had the same relationship with the national church and Diocese as all other Episcopal parishes. Doctrinal disagreements do not constitute independence or open defiance. Therefore I conclude that the history of the parish Grace Church and St Stephens supports that it was not independent of the Diocese but was as much involved as any other parish.

The history of Grace Church and St. Stephens is consistent with the founding documents, the Instrument of Donation and the canons that all parish property was held in trust for the benefit of the Diocese and general church.

Summary:

When property disputes arise out of church schisms, the courts must apply law that has been uniquely crafted to analyze the disposition of that property. In this case, I have closely considered the Plaintiff's evidence, indicating that the parish is the record owner of all parish property; that the parish has constructed substantial improvements, maintained and kept that **[26]** property in good repair at its own expense without any financial assistance from the Diocese for approximately 135 years; that the parish has contributed approximately $770,000 to the Diocese over the years and that the parish has contributed loyalty, effort and assistance

to the Diocese as long as the parish has been in existence. But the *Wolf* and *Mote* cases mandate that I look at the entire history of the relationship to determine whether the members of Grace Church and St. Stevens have demonstrated a "clear, explicit, definite, unequivocal and unambiguous" intent to give over control, and in certain circumstances, ownership of parish property. Indeed, the disposition of this parish property has been determined not by what has occurred in the parish and diocese in the last ten years, but what has been shown to be the general desires of all parish members since the time of the creation of this nonprofit church corporation.

I find and conclude that, like *Mote*, the founding documents, various bylaws, relevant canons of the general church and consistent parish loyalty to the Diocese over most of its 135 year existence demonstrate a **unity of purpose** on the part of the parish and of the general church that reflects the intent that all property held by the parish would be dedicated to and utilized for the advancement of the work of ECUSA. While freedom of religion recognizes the right of any faction within a church to leave that church whenever they choose, the trust that has been created through past generations of members of Grace Church and St. Stephens prohibits the departing parish members from taking the property with them.

I further conclude that appointment of rector, warden and vestry is a matter within the exclusive dominion of the Bishop. Accordingly, I must give deference to those appointments, except that as it relates to the use of the property in this dispute, that deference is accorded as of the date of this order.

ORDER:

1. Based upon the above analysis, I hereby order that the Defendants' request that title to all property owned or held under claim of ownership by the parish Grace Church and St. Stephens be quieted be granted. I hereby **order** that title and ownership of all said property is vested in the Episcopal Church of the United State and the Diocese of the State of Colorado. This order is effective as of today's date. I further **order** that the Bishop's appointment of new parties to govern the affairs of the parish Grace Church and St Stephens, as it relates to control of parish property, is likewise effective as of today's date.

2. The real property affected by this order is described in **Attachment 1** to this ORDER. **[27]**

3. The disputed property includes all personal property of the Episcopal parish, Grace and St. Stephens's Episcopal Church, and of its parish corporation as of March 25, 2007 including, without limitation, all bank, savings and loan, credit union, brokerage, and other financial accounts as of that date.

4. The disputed property includes the website and domain name, http://www.graceandststephens.org and the employer identification number 84-0404258.

5. The disputed property also includes the common law trade names: Grace Episcopal Church, Grace Church, St. Stephen's Church, Grace and St. Stephen's Episcopal Church, and Grace and St. Stephen's Episcopal Parish and the versions of those names using an ampersand instead of "and".

6. The filing of the Articles of Incorporation in 1973 reinstated the 1923 nonprofit corporation effective June 23, 1973.

7. The plaintiffs shall immediately cease all use and relinquish all possession, control, and dominion over the disputed property. The Court shall issue a Writ of Restitution.

8. The plaintiffs shall within 30 days provide the defendants with all books, records, copies of checks, statements, invoices and another documents belonging to or affecting the parish.

SO ORDERED, THIS 24th DAY OF MARCH, 2009.

/s/ Larry E. Schwartz
LARRY E. SCHWARTZ
District Court Judge

Individual Counterclaim Defendants:

There remain counter claims against individuals who formerly served as vestry, wardens and rectors of the parish. This quiet title order means that trial of those matters can conceivably go forward. However, in an effort to streamline the process before it becomes too involved, I suggest the parties discuss disposition of the remaining claims. **[28]**

My concerns regarding the remaining claims are as follows: Claims of trespass, theft, conspiracy and the like all revolve around the notion that the offending party had no authority to use the property of another. For instance, to prove civil trespass, the Bishop would have to prove 1. property ownership by the Bishop and 2. intentional trespass. Permission or consent is an affirmative defense. Having now heard

five weeks of testimony and reviewed in excess of 3,000 documents I am at somewhat of a loss to understand how those claims can be maintained. The parish held legal title to all of the property subject to the Bishop's "equitable" claim of trust. The counterclaim defendants represented the majority of the parish and had a reasonable basis to conclude that they had the absolute right to use the property. That reasonable belief extended up until I entered this order to the contrary.

It[i]s clear that most of the documents relied upon by the defendants in their successful bid for quiet title were discovered only during the course of this litigation. The Instrument of Donation was apparently discovered well after the case was filed. The Bishop admitted that parish members are not expected to know what the canons say. In other words, members of the parish would have little or no reason to know that they didn't have legal authority to remain on the parish property.

I suggest the parties have serious discussion about resolution of the remaining claims. If they cannot be resolved they may file such motions as they deem necessary.

Done this 24[th] day of March 2009

/s/ Larry E. Schwartz
LARRY E. SCHWARTZ
District Court Judge

cc:

counsel of record **[29]**

ATTACHMENT 1 TO PROPERTY ORDER:

Real Property Subject to Order:

a. Lots 1,2 and N. 50 Feet Lot 3, Block, 22 Add. 1 to City of Colorado Springs, known commonly as 631 N. Tejon Street, Colorado Springs, CO 80903;

b. S. Half of Lot 2, known commonly as 631 N. Tejon Street, Colorado Springs, CO 80903;

c. N. Half of Lot 3, known commonly as 631 N. Tejon Street, Colorado Springs, CO 80903

d. S. 50 Feet of Lot 3 and N. 10 Feet of Lot 4, Block 22, Add. 1 to the City of Colorado Springs, known commonly as 631 N. Tejon Street, Colorado Springs, CO 80903;

e. W. 115 Feet of S. 90 Feet of Lot 4, Block 22, Add 1, to the City of Colorado Springs, known commonly as 601 N. Tejon Street, Colorado Springs, CO 80903;

f. W. 50 Feet of Lot 8, Block 22, Add. 1 to City of Colorado Springs, known commonly as 117 E. Monument Street, Colorado Springs, CO 80903; and

g. Lot 10 Skyway Northwest No.3 Filing No.4, known commonly as 3025 Electra Drive, Colorado Springs, CO, 80906.

In the Circuit Court of St. Louis County
21st Judicial Circuit
Case No. 04CC-000864

GEORGE WAYNE SMITH, BISHOP OF THE DIOCESE OF MISSOURI OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA, et al.,

Plaintiffs,

vs.

THE CHURCH OF THE GOOD SHEPHERD, et al.,

Defendants.

JUDGMENT AND ORDER

Plaintiffs brought this action for equitable relief, declaratory judgment and damages seeking a permanent injunction removing defendants from the control and use of the property of Good Shepherd Parish. Plaintiffs also sought damages for wrongful possession, their costs and attorneys' fees. Defendants claim ownership of the real property and tangible and intangible personalty free of any claim by plaintiffs. At the request of defendants, The Protestant Episcopal Church in the United States of America (PECUSA) was joined as a necessary party as the petition stated the property was held in trust for PECUSA. All parties filed Motions for Summary Judgment, Responses and Replies. The Court having read the motions, memorandums and exhibits enters the following order and judgment.

FINDINGS OF FACTS

The Church of the Good Shepard was incorporated in 1958 under Chapter 352 as a voluntary religious association. Pursuant to the Articles of Association filed with the St. Louis County Circuit Court at the time, the corporate name was "The Church of the Good Shepard, a Parish of the Protestant Episcopal Church in the United States of America in Union with the Diocese of Missouri".[1] Article 3 of the document acknowledged the Parish's allegiance to PECUSA and the Diocese of Missouri, agreed to be bound by "the Canons, Doctrines, Discipline **[2]** and Form of Worship of that Church", and acknowledged the authority of PECUSA and the Dioceses.

The real property purchased by the Parish was titled in its corporate name. Part of the funds to purchase the property came from PECUSA. The Parish fully participated in the polity of both the Diocese of Missouri and PECUSA. This hierarchical governing structure is composed of three tiers: the parish is governed by the vestry which consists of the rector and a group of lay members elected by the parish at their annual meeting. Each parish belongs to a regional body or a diocese which is governed by an annual Convention or Council made up of the diocesan bishop or other bishops elected by the Convention or Council, rectors and other clergy and

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[1] Defendants claim the same the same name but now distinguish themselves as also known as "The Anglican Church of the Good Shepherd". The Court uses the term Parish to refer to the original Church of the Good Shepherd.

lay delegates elected by parish members or vestries. Each diocese enacts a Constitution and canons to supplement the national Church's Constitution and canons. All of the dioceses make up the national church. Governance at the national level is by the General Convention which adopts and maintains a national Constitution and canons. The General Convention and the Constitution and canons have formal authority over the affairs of the dioceses and parishes. Each tier is bound by, and may not take any actions in conflict with the decisions of a higher tier.

The Parish annually elected its vestry and wardens. It filed an annual status report with the national church and paid its annual assessment to the Diocese. The Parish sent delegates to the Diocese's and PECUSA's annual conventions. The Parish considered itself part of the Diocese and PECUSA since its inception.

During the 2003 American Episcopal Genera1 Convention, the delegates voted to elect and ordain an openly gay Bishop. The Convention also adopted a resolution authorizing the solemnization of same-sex civil unions. Several weeks after the General Convention, defendants held a Vestry Meeting at which the Vestry voted to send a resolution denouncing the actions taken by the General Convention.

From August through November of 2003 the parties met in an attempt to resolve their differences. During this period, defendants obtained the services of legal counsel and used Parish funds to pay a retainer of $3,500.00. Defendants met on February 2, 2004 to authorize the amendment of the

Articles of Association to disaffiliate itself from the national Church. Members of the Parish were not notified of the proposed amendments until after a petition to amend had been filed in the Circuit Court and approved. The petition purports to amend the April 2, 1958 decree. In fact, that decree was vacated because of a procedural error and another **[3]** decree was entered on May 20, 1958 and recorded. The Parish was operating under the May 20, 1958 decree.

The Artic1es of Association, as stated, incorporated the Constitution and Canons of the Episcopal Church. Canon IV.6 sets out the procedure each Parish must follow to amend its by-laws. Any amendment must be submitted in advance and approved by the Diocesan Standing Committee. The Canon further states "no bylaws or amendments shall become effective until the foregoing procedures have been complied with in full". Defendants admit they did not follow this procedure as they never submitted the amendment to the Standing Committee for review or approval.

The proposed amendment changed the legal name of the Parish to The Anglican Church of the Good Shepherd. It also removed the language of affiliation and allegiance with PECUSA or the Diocese of Missouri. Under the amendment the Parish became an independent Anglican Church. The amendment was submitted to a vote of Parish members after its approval by the Court. By majority vote it was approved.

Plaintiffs did not know of the amendment until February 24, 2004. A letter was sent to parishioners setting out the Diocese's position on the actions

taken by defendants. Bishop Smith and the Standing Committee took the additional action of inhibiting Rev. Mr. Walter from performing his duties as an ordained priest of the national church. A similar notice was sent to the Wardens and Vestry removing them from office.

In a letter dated March 1, 2004 defendants notified the Diocese of their withdrawal from the national church and their affiliation with the Anglican Mission in America. Defendants claim the real and personal property of the Parish. Plaintiffs seek an injunction to prevent the removal of any of the property.

CONCLUSIONS OF LAW

Clearly, the underlying dispute is based on theological or ecclesiastical differences, however, the parties recognize the civil courts can only decide which organization owns the property. In *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465 (Mo. 1984) the Supreme Court adopted the "neutral principles of law" approach set out in *Jones v. Wolf*, 443 U.S. 595, 99S. Ct. 3020, 61 L.Ed.2d 775 (1979) as the exclusive method for the resolution of **[4]** church property disputes. This approach recognizes the State's interest in the peaceful resolution of property disputes but prohibits a resolution on the basis of religious doctrine. It requires a civil court to apply its own statutes and well established concepts of trust and property law rather than religious doctrine.

When the Parish chose to incorporate itself under Chapter 352 as a voluntary religious association it subjected itself to the jurisdiction of

civil courts. Articles of Association were filed with the circuit court and approved. Section 352.110 RSMo requires every corporation created under this chapter to make bylaws for its government. As stated above, the Parish complied with the requirements of the statutes and voluntarily entered into the articles of association with the Dioceses and PECUSA.

Corporate articles and bylaws are to be construed according to the general rules governing contracts. *Boatmen's First Nat. Bank of West Plains v. Southern Missouri Dist. Council of the Assemblies of God*, 806 S.W.2d 706, 713 (Mo. App. S.D. 1991) The bylaws in the present case set out a clear procedure to be followed prior to amending the articles of association. The adopted bylaws are not inconsistent with State law or conflict with their own articles of association. Defendants do not attack the validity of the original organizational documents but instead, assert the articles and bylaws were properly amended allowing for the disaffiliation of the Parish from the Dioceses of Missouri and PECUSA. This argument fails for two reasons. Defendants are bound by their bylaws and must follow the procedure it sets out. Defendants concede they did not follow the procedure set out for amending the bylaws. Additionally, defendants failed to amend the proper Articles of Association. As noted, the April 2, 1958 decree had been vacated and was void. The Court lacked the jurisdiction to amend a void judgment. Rule 74.06(b)(4)

Defendants also argue the failure to properly amend the articles of association is inconsequential since the majority of the membership approved the action. However, the vote of the membership cannot

approve the amendment since there is no provision for amendments to be made by majority vote. The membership is also bound by their organization documents. *Episcopal Diocese of Mass. V. DeVine*, 797 N.E.2d. 916 (Mass. App. Ct. 2003)

The Canons and constitution of both the Dioceses and PECUSA prohibit the transfer or encumbrance of property without the approval of the Bishop and Standing Committee. The Articles of Association states the real property was to be held for the purposes and to the use of those who are in communion with and under the authority of the Protestant Episcopal Church. **[5]** Defendants clearly no longer consider themselves in communion and under the authority of the Dioceses or PECUSA. Further, defendants no longer have an official capacity with the Dioceses or PECUSA and thus lack the authority to transfer the property.

Plaintiffs claim a beneficial interest in the property based on the Canons and constitution of the Dioceses and the national church. In 1979, PECUSA enacted Canons 1.7(4) and (5) in response to the Supreme Court's decision in *Jones*, to codify the policy of parish ownership subject to a beneficial interest of the national church and dioceses. These Canons were adopted at a national convention pursuant to PECUSA's procedure to amend its canons. The Dennis Canon, as these sections became known, was properly incorporated into the bylaws of the Parish. Pursuant to the Dennis Canon a trust relationship was established in the national Church. Plaintiffs continue to exercise control over the property unless they relinquish this right or the Articles of Association are properly amended to

disaffiliate. See *Bishop and Diocese of Colorado*, 716 P.2d 85, 104 & 108 (Colo. 1986)

Plaintiffs also claim damages as the result of the actions taken by defendants and ask for attorneys fees. The Court fails to find defendants acted maliciously but does find Parish funds were used to pay the retainer of their counsel. The $3,500.00 is to be returned to the Parish.

IT IS THEREFORE ORDERED AND ADJUDGED that Summary Judgment be award to plaintiffs on their motion. The amended Articles of Association and February 9, 2004 decree are vacated and held for naught. A permanent injunction is entered ordering defendants to vacate the premises and restore plaintiffs to its full use and enjoyment. Defendants must cease and desist from conducting any business of or acting on behalf of the Parish. It is further ordered, defendants must repay $3,500.00 to plaintiffs. Court costs are taxed against the defendants.

SO ORDERED:

/s/ Mary B. Schroeder
Judge

CC: Attorneys of Record

[NEW YORK] SUPREME COURT

QUEENS COUNTY

IA PART 17

INDEX NO. 22564/05

DATED: MARCH 12, 2008

ST. JAMES CHURCH, ELMHURST

against

EPISCOPAL DIOCESE OF LONG ISLAND, et al.

and

CARLO J. SAAVEDRA, et al.

MEMORANDUM

In this action for declaratory judgment, and for injunctive relief, defendants Episcopal Diocese of Long Island, Trustees of the Estate Belonging to the Diocese of Long Island, sued herein as Trustees of the Estate Belonging to the Diocese of Long Island, Inc., and the Right Reverend Orris G. Walker, Jr. seek an order granting summary judgment dismissing the complaint and granting summary judgment on their counterclaims and seek a declaration to the effect that all real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and the Episcopal Diocese of Long Island, and that these defendants' interest in the proceeds of the sale of such property are superior to any interests that the plaintiff and individual additional defendants may have in said property and setting down for trial on the issue of damages resulting from the plaintiff's wrongful

possession of said property. Defendant Domestic and Foreign Missionary Society of the Protestant Episcopal Church **[2]** in the Unites States of America separately moves for an order granting summary judgment dismissing the complaint and granting summary judgment on its counterclaims and declaring that the vestry and/or membership of St. James Church, Elmhurst may not unilaterally alter the status of St. James Church as a parish of the Episcopal Church and Diocese of Long Island; that the real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and the Diocese of Long Island; that the additional defendants to the counterclaim may not divert, alienate or use the real and personal property of St. James Church, Elmhurst except as provided by the Constitutions and canons of the Episcopal Church and the Diocese of Long Island; to enjoin the additional defendants from diverting, alienating or using the real or personal property of St. James Church, Elmhurst except as provided by the Constitutions and canons of the Episcopal Church and the Diocese of Long Island; and directing that possession and control of the property held by St. James Church, Elmhurst be given to the parish's current priest-on-charge, the Rev. William DeCharme, for use in furtherance of the parish's ministry and mission pursuant to the Constitutions and canons of the Episcopal Church and the Diocese of Long Island. Plaintiff St. James Church, Elmhurst and the additional counterclaim defendants Carlo J. Saavedra, Lorraine King and Does 1-11 cross-move for an order granting summary judgment in their favor, declaring that it holds unencumbered legal title to all property it presently

holds and that the defendants have no right, interest or claim to said property; enjoining defendants from asserting any claim in or interest in any property that St. James now owns, holds or might acquire; and granting its claim to quiet title to any and all real property titled in its name, and dismissing the defendants' counterclaims. **[3]**

This action was commenced on October 18, 2005, and arises out of a property dispute in Elmhurst, New York between a local parish, St. James Church, Elmhurst (St. James) on one side, and the diocese and a national church on the other. All of the defendants have served their answers and interposed counterclaims, and plaintiff and the additional defendants have served their replies to the counterclaims.

Defendant Diocese of Long Island (Diocese), is an unincorporated association that was formed in 1871, when Richmond County, Queens County and other counties on Long Island were carved out of Episcopal Diocese of New York. Defendant, the Right Reverend Orris G. Walker, Jr., is the Bishop of the Diocese of Long Island. Defendant Trustees of the Estate Belonging to the Diocese of Long Island (Trustees) was incorporated in 1871 under a special New York law for the express purpose of holding title to real and personal property for the Diocese of Long Island (Diocese). Defendant Domestic and Foreign Missionary Society (DFMS) is a New York not-for-profit corporation, which is empowered, among other things, to hold title to real and personal property for the use of the Episcopal Church.

Additional defendants Carlo J. Saavedra and Lorraine King named in the counterclaims are wardens and vestry members of the plaintiff church.

Historical Background

St. James parish was first established in New Town (now Elmhurst, Queens, New York), in 1704, under the authority of the Church of England. However, it was not until 1761 that a corporate charter was granted to St. James parish by the colonial Lt. Governor of New York on behalf of King George III, which described the church as "forever hereafter a Body Corporate and Politic in Deed Fact and Name and **[4]** by the Name and Stile (sic) of the Inhabitants of New Town in Queens County in Communion of the Church of England and by law established...". The charter gave said church, which became known as St. James, the authority to buy, hold and sell real and personal property.

After the Revolutionary War, members of the clergy, church officers and parishioners could no longer offer an oath of loyalty to the English Crown. Therefore, in 1785 the Protestant Episcopal Church in the United States of America, (Episcopal Church), was organized with the purpose, among other things, of retaining the theological doctrine and form of worship of the Church of England. The Episcopal Church adopted a Constitution in 1789, and its governing body, the General Convention, has adopted and amended said Constitution, as well as Canons, for the governance of the church. The Episcopal Church is a member of the Anglican Communion, a group of churches that have their roots in the discipline, doctrine and worship of the Church of England's Book of Common Prayer. The

Diocese, a member of the national Episcopal Church, is governed by the Annual Conventions or Councils and has adopted its own Diocesan Canons.

St. James, along with Grace Church in Jamaica and St. George's Church in Flushing, as former members of the Church of England and as members of the Episcopal Church, petitioned the New York State Legislature to permit these churches to exist in corporate form "in communion of the Protestant Episcopal Church in New York." On March 12, 1793, the New York State Legislature enacted Chapter 60 of the Laws of New York, entitled "An Act to alter the Stile (sic) of the respective Religious Corporations therein mentioned," which provided in pertinent part that:

> "...whereas the corporation of St. James's Church in the town of Newtown, in **[5]** Queens county, by letters patent under the great seal of the late colony, now State of New York, bearing date the ninth day of September, one thousand seven hundred and sixty-one, were enabled to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, by the name of, The inhabitants of the township of Newtown in Queen's county in communion with the Church of England, by law established. And be it further enacted That the said corporation of St. James church in the town of Newtown, in Queen's county shall and may, from and after the passing of this act, take and use the name of, The Rector and Inhabitants of the town of Newtown, in Queens county in communion of the Protestant Episcopal church, in the State of New-York; and by the said several and respective

names shall be capable, severally and respectively, to sue and be sued, plead and be impleaded, answer and be answered unto, defend and be defended, in as full and ample manner, to all intents and purposes, as they were severally enabled to do, in and by the said several and respective letters patent herein before recited; and that all bonds, all bills, grants, contracts, deeds and conveyances, made to or by said corporations, between the dates of the said several letters patent and the passing of this act wherein they are named or mentioned by the stiles (sic) and names of their several letters patents, or any or either of them, or by any other name or names, shall be good, valid and effectual in law, in like manner as they would have been if the names or stiles of the said several and respective corporations, or any of them, had been named in manner as herein directed in such bonds, bills, grants, contracts, deeds and conveyances; any law usage or custom, to the contrary thereof, in any wise notwithstanding."

St. James' Real Property

On September 6, 1951, the Supreme Court, Queens County issued an order pursuant to Religious Corporations Law § 12(2), approving the sale of certain real property located in Queens County to a third party by the Rector, Wardens and Vestrymen of St. James' Church, Elmhurst, New York (Protestant Episcopal Church), a religious corporation." Said order stated that the sale of the property had been consented to by the Bishop of Long Island, the Standing Committee of the Protestant Episcopal Church of Long Island, and by a resolution of the

Rector, Wardens, Vestrymen, who constituted the trustees of the church. The Church's Rector, in his petition, listed the following properties which St. James would continue to hold title to **[6]** after the sale was completed: a church building at the corner of Corona Avenue and Broadway (Block 1582, Lot 9SE); the parish house at the corner of Broadway and St. James Avenue (Block 1582, Lot 9SE); a cemetery (Block 1582, Lot 20); the parish hall at the corner of Broadway and Maurice Avenue(51st Avenue)(Block 1549, Lot 1SW); and the rectory at 46-19 88th Street (Block 1584, Lot 7).

The Diocese and Trustee records, and documents supplied by the plaintiff establish that these five parcels were acquired as follows: Jacob Ogden, pursuant to a deed dated September 28, 1761, conveyed real property to the "Inhabitants of Town of New Town in Queens County in Communion of the Church of England"; on April 19, 1773, an unidentified grantor conveyed real property to the "people or society of ye Church of England"; John J. Moore, pursuant to a deed dated May 1, 1864, conveyed real property to "the Rector and Inhabitants of the Town of Newtown in Queens County in Communion of the Protestant Episcopal Church of the State of New York"; and Kate Louise Fineout, pursuant to a deed dated May 24, 1934, conveyed real property to the "Rector, Wardens and Vestrymen of St. James Protestant Episcopal Church of Elmhurst, Long Island, New York."

The original church was built in 1736, on the property that is the subject of the 1773 deed, and is presently used as the parish hall. The cemetery is still owned by St. James Church. A successor church

edifice, located at the corner of Corona Avenue and Broadway, was constructed and dedicated in 1849, and was destroyed by a fire in 1975. The present church edifice was constructed on said property. At the time the 1849 church was consecrated as an Episcopal church, St. James' representatives signed an Instrument of Donation in which they pledged that the building would be used **[7]** solely for the purposes of conducting religious services "according to the provisions of the Protestant Episcopal Church in the United States of America" and further pledged that the property would not be put to any use inconsistent with the Instrument of Donation.

In 1964, an action was commenced in Supreme Court, New York County, by "The Rector, Wardens, Vestrymen of St. James Parish of Elmhurst, Diocese of Long Island." The petition therein stated that the religious corporation was incorporated in 1934 and that a certificate of incorporation was filed in the Office of the Clerk of the County of Queens on April 29, 1937. The petition stated that the religious corporation was the same church as "The Rector, Wardens, Vestrymen of St. James Church in the Town of Newtown, County of Queens, State of New York," and that title to the real property in question, known as 56 Reade Street, in New York County had been acquired by deed on April 18, 1810, that The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York was the owner of a reversionary interest in the property who had agreed, as regards the reversionary interest, to execute a quitclaim deed upon condition that the proceeds of the sale be held in trust for the benefit of Trinity Church. The petition further stated that the "proceeds of sale would be placed with the trustee of

the estate belonging to Diocese of Long Island for the benefit of St. James Parish of Elmhurst upon condition, however, that the principal shall revert to Trinity Church in the event said St. James Parish shall cease to be an Episcopal Church." The petition also stated that the sale of the premises had been approved by the Bishop of Long Island and the Standing Committee of the Diocese of Long Island, and by the Rector, Wardens, and Vestrymen of the Church, in compliance with Religious Corporations Law § 12. **[8]**

At issue here is the following real property: the current church building constructed in the 1970s, at the corner of Corona Avenue and Broadway (Block 1582, Lot 9SE); the parish house at the corner of Broadway and St. James Avenue (Block 1582, Lot 9SE); a cemetery (Block 1582, Lot 20); and the original church, constructed in 1763 and presently used as the parish hall, at the corner of Broadway and Maurice Avenue (51st Avenue) (Block 1549, Lot 1SW). The real property improved by the rectory, known as 46-19 88th Street (Block 1584, Lot 7), was sold to a third party in September 2000. The net proceeds of that sale currently held by the plaintiff is also at issue here, as well as all personal property held by St. James.

The Present Controversy

In a letter dated December 18, 1987 the Diocesan Bishop formally approved the appointment of Father William Galer as the Rector of St. James, and he assumed his duties on January 1, 1988. In a letter dated March 15, 1991, Father Galer informed Bishop Walker that at a vestry meeting it was decided that St. James would discontinue paying its Diocesan

assessment as long as the Bishop maintained his "publically affirmed openness regarding the blessing of some (sic) sex relationships and gay unions." In 1992, St. James, however, agreed to pay the Diocesan assessment in full.

In September 2000, St. James, without notice to Bishop Walker, or the Standing Committee of the Diocese, and without obtaining the consent of the court, sold the real property which was improved by the rectory to a third party, and a new building was subsequently erected on that site. The net proceeds of the sale, after deducting brokerage expenses and title company charges were $396,679.25, and are currently **[9]** held by St. James in a segregated account at a financial institution, pursuant to a stipulation entered into by the parties. The Bishop, the Diocese, the Trustees, and DFMS apparently were unaware of the sale of the said real property until after the commencement of this action.

In a letter dated March 31, 2005, wardens and vestry members Carlo Saavedra and Lorraine King stated that on behalf of the Vestry and the people of St. James Church, at a special parish meeting the members of St. James had "voted overwhelmingly to approve a resolution to disassociate from the Diocese and the Episcopal Church in the United States of America (ECUSA) and to affiliate with the Anglican Church of America, which is part of the Traditional Anglican Communion." The letter's authors further stated that "[w]e have sought counsel, and have been advised that our claim to ownership of our real and real and personal property is strong, canonical provisions purporting to establish a trust over that property notwithstanding." The resolution adopted

at said parish meeting provided, among other things, "that the name of the church be changed effective April 1, 2005 to St. James Anglican Church."

Bishop Walker, in a letter dated April 22, 2005, advised the St. James parishioners, as follows: "You should know that all property in the Episcopal Church is held in trust for the ministry and the mission of this church. As bishop I am not in the position to give the assets of this church away. You should further know that when there is a proposal for the sale of Episcopal Church property, there are several authorities that must agree on the purpose of the sale and its effect on the ministry and mission of the church." The Bishop stated that while individuals were free to associate with any church that they chose, they are not entitled to take property that is held in **[10]** trust, and requested that the parishioners respond to a questionnaire so that he could determine how many members of the parish wished to remain members of the Episcopal Church. He also stated that he was appointing a priest-in-charge to provide pastoral oversight as of May 1, 2005.

Bishop Walker, in letter addressed to Mr. Saavedra and dated May 9, 2005, stated in part that:

> "I reject entirely your right to withdraw St. James Episcopal Church from this Diocese or to remove it from my jurisdiction. While I am sure that your position is genuinely felt, and while I do not deny your right individually to worship as you choose, I do deny your right to take St. James Episcopal Church with you[]…. As Diocesan Bishop, I have an obligation to all of people of this Diocese and of the National Church

to resist your efforts to remove St. James Parish from the Episcopal Church."

On April 25, 2007 the Diocesan Council passed a resolution declaring St. James parish an "extinct" parish, pursuant to the Diocesan Canons and Religious Corporations Law § 16, as the parish had failed for two years "to maintain religious services according to the discipline, customs and usage of the Episcopal Church" and ceased for two years to have a sufficient number of persons qualified to elect and serve as wardens and members of its vestry.

Defendants Bishop Walker, the Diocese, Trustees' Motion

Defendants Diocese and the Right Reverend Walker now move for an order dismissing the complaint and granting summary judgment (1) on its first counterclaim declaring (a) that the vestry and/or membership of St. James Church, Elmhurst may not unilaterally alter the status of St. James Church, Elmhurst as a parish of the Episcopal Church and the Diocese of Long Island; (b) that the real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church **[11]** and Diocese of Long Island; (c) that the additional defendants Saavedra and King may not divert, alienate or use the real and personal property of St. James Church, Elmhurst except as provided by the Constitution and Canons of the Episcopal Church and Diocese; (d) that the defendants are entitled to the sums presently held by the plaintiff arising out of the September 2000 sale of the rectory; (2) on the second counterclaim granting possession and control of the property held by St. James Church, Elmhurst to the parish's current priest-in-charge, the Rev.

William DeCharme for furtherance of parish's ministry and mission and enjoining the additional defendants from exercising any possession and control over that property; and (3) setting the matter down for a trial on the issue of damages arising out of the plaintiff's wrongful possession of said property.

Defendants assert that when New York' status changed from that of a British colony to a sovereign state, St. James Church became subject to New York's statutory law, and upon its adoption in 1909, the Religious Corporations Law. Defendants assert that the 1761 royal charter is an anachronistic document, as the Church of England no longer has any presence in this country, and that a specific statute was enacted by the state legislature in 1793 which incorporated the plaintiff and two other royal chartered Church of England parishes. It is further asserted that as the Religious Corporations Law § 2-a provides that it applies, among other things, to "every corporation formed under any other statue or special act of this state which would, if it were to be formed currently under the laws of this state, be formed under this chapter," and as St. James was reincorporated in 1793 under a New York state statute or special law, and as it is a Protestant Episcopal Parish that would now be incorporated under **[12]** Article 3 of the Religious Corporations Law, that statute is applicable to plaintiff.

Defendants further assert that until the September 2000 sale of the rectory property, St. James' rectors, vestrymen and parishioners recognized that the provisions of the Religious Corporations Law governed their actions concerning corporate actions. In support of this claim, defendants have submitted

the 1951 and 1964 petitions by the then rector, which sought the court's permission for the sale of certain real property, in which it was specifically acknowledged that the sale was being made pursuant to Religious Corporations Law § 12, and that the petitioner's corporate name had been changed to "The Rector, Wardens and Vestrymen of St. James' Church, Elmhurst, New York." In addition, defendants have submitted certificates filed with the Queens County Clerk in 1941 and 1951, to increase the number of vestrymen, pursuant to the Not-For-Profit Corporation Law § 104 and Religious Corporations Law § 2-b(1)(d).

Defendants assert that the Trustees and the Diocese are trust beneficiaries of the real and personal property held in the name of the plaintiff. In support of this claim, defendants rely upon the affidavits of Dr. Robert Bruce Mullin, the Rev. Dr. J. Robert Wright, and Robert Fardella, as well as a series of cases involving property disputes between the Episcopal Church and a local parish, which almost uniformly held in favor of the Episcopal Church, and found that even absent express statutory language, the real and personal property acquired by local parish corporations has always been acquired for the ultimate purposes of the Episcopal Church, and that the enactment of the Dennis Cannons in 1979 codified a trust relationship that had existed between the local parishes and their dioceses throughout the history of the Episcopal Church.[1]

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[1] (*See Trustees of the Diocese of Albany v Trinity Episcopal Church of Gloversville*, 250 AD2d 282 [1999]; *Episcopal Diocese*

Defendants assert that once Mr. Saavedra and Ms. King advised Bishop Walker on March 30, 2005 that the vestry and "people of St. James Elmhurst" that they had voted to "disassociate" from the Diocese an the Episcopal Church, their association and communion with the Episcopal Church ended, and were no longer eligible to hold the corporate offices of wardens and vestry members in St. James Church, as St. James was incorporated in 1793 only for those "in communion of the Protestant-Episcopal Church, in the State of New York". It is, therefore, asserted that Mr. Saavedra and Ms. King no longer meet the definition of a Protestant Episcopal Church vestry member, as set forth in Religious Corporations Law § 43, and Canon I.14.1 of the National Canons of the Protestant Episcopal Church.

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of Rochester v Harnish, 2006 NY Misc LEXIS 9190 [2006], *affd* 43 AD3d 1406 [2007], *motion to renew denied* 17 Misc 3d 1105A [2007]; *cf. Board of Managers of the Diocesan Missionary and Church Extension Society v Church of the Holy Comforter*, 164 Misc 2d 661 [1993]; *see also The Rector, Wardens and Vestrymen of Trinity-St. Michael's Parish, Inc. v The Episcopal Church in the Diocese of Connecticut*, 224 Conn 797 [1993]; *Matter of Church of St. James the Less*, 585 Pa 428 [2005]; *Protestant Episcopal Church in the Diocese of New Jersey v Graves*, 83 NJ 572 [1980]; *Episcopal Diocese of Massachusetts v DeVine*, 59 Mass App Ct 722 [2003]; *Bishop & Diocese of Colorado v Mote*, 716 P2d 85 [Colo 1986], *cert den* 479 US 826 [1986]; *Tea v Protestant Episcopal Church in the Diocese of Nevada*, 610 P2d 182 [Nev 1980]; *Daniel v Wray*, 580 SE2d 711 [NC 2003]; *Bennison v Sharp*, 329 NW2d 466 [Mich 1982]; *Church Cases*, 2007 Cal App LEXIS 1041 [2007]; *cf. Protestant Episcopal Church in Diocese of Los Angeles v Barker*, 171 Cal Rptr 541 [1981], *cert den* 454 US 864 [1981]; *Bjorkman v The Protestant Episcopal Church*, 759 SW2d 583 [Ky 1988]).

Defendants further assert that plaintiff's current effort to devote St. James' real and personal property to the use of a religious association not in communion with the Episcopal Church, is an ultra vires use of that property, and is inconsistent with St. James' corporate purposes. It is asserted that for over 250 years, generations of parishioners worshiped at and raised money for the corporate plaintiff, which as the colonial charter and later state statute recognized was organized for "the express purpose of the administration of the property and temporalities," dedicated by the parishioners to the denomination to which the parish was expressly "connected." It is asserted that the colonial charter demonstrates that the parish was "connected" to the Church of England and that the post War of Independence statute demonstrates that the parish was "connected" to the Episcopal Church. In both instances the corporation consisted of the New Town Rector and "Inhabitants" who were members of these denominations. Defendants assert that while the parishioners are free to disassociate **[14]** from St. James and the Episcopal Church, and are free to associate with other denominations, they have no right to transfer the real and personal property of St. James to another church not affiliated with the Episcopal Church.

Finally defendants assert that is an "extinct" church, St. James is subject to Religious Corporations Law § 16, which authorizes the Diocese and the Episcopal Church to take possession of and manage its real and personal property.

Defendant DMFS's Motion

Defendant DMFS separately moves for an order granting summary judgment dismissing the complaint and granting summary judgment (1) on its first counterclaim (a) declaring that the vestry and/or membership of St. James Church, Elmhurst may not unilaterally alter the status of St. James Church as a parish of the Episcopal Church and Diocese of Long Island; (b) that the real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and the Diocese of Long Island; (c) that the additional defendants to the counterclaim may not divert, alienate or use the real and personal property of St. James Church, Elmhurst except as provided by the Constitutions and canons of the Episcopal Church and the Diocese of Long Island; and (2) on its second counterclaim to enjoin the additional defendants from diverting, alienating or using the real or personal property of St. James Church, Elmhurst except as provided by the Constitutions and canons of the Episcopal Church and the Diocese of Long Island; and ordering that the possession and control of the property held by St. James Church, Elmhurst be given to the parish's current priest-on-charge, the Rev. William DeCharme, for use in furtherance of the parish's ministry and mission pursuant to the Constitutions and canons of the Episcopal Church **[15]** and the Diocese of Long Island.

Defendant DFMS relies upon the church's Constitution and Canons and the affidavit Dr. Robert Bruce Mullin, and asserts that the Episcopal Church is a hierarchical religious denomination and that the Episcopal Church's and the Diocese's

Canons are enforceable and preclude a majority of the current members of a local congregation from diverting property donated to further the mission of the Church to another purpose. It is further asserted that St. James has been a subordinate, constituent part of the Episcopal Church and its diocese since the church's founding, and has repeatedly and consistently acceded to the Episcopal Church and the Diocese's doctrines and discipline, including their Constitutions and Canons, and is bound by them. DFMS, in reliance upon the deeds to St. James' real property, the legislation of 1793, the applicable provisions of the Religious Corporations Law, and the applicable Canons of the Episcopal Church and the Diocese concerning church property, asserts that it holds St. James real and personal property in trust. Finally, DFMS asserts that New York law governing voluntary associations require that the Constitution and Canons of the Episcopal Church and the Diocese be enforced against St. James and the additional defendants.

Plaintiff St. James' Cross Motion

Plaintiff St. James cross-moves in opposition and seeks an order dismissing the counterclaims and granting summary judgment (1) on its first cause of action for declaratory judgment to the effect that it holds unencumbered legal title to all property it presently holds and that the defendants have no right, interest or claim to said property; (2) on its second cause of action for a permanent injunction, enjoining defendants from asserting any claim in or interest in any property that St. James now owns, holds or might acquire; and (3) on its third cause of

action to quiet title to any and all real property titled in its name.

Plaintiff St. James Church, Elmhurst states in its complaint that it is a corporation formed by a royal charter issued by King George III, and that it was never reincorporated although its corporate existence was ratified by an act of the state legislature after the Revolutionary War. Plaintiff states that on March 30, 2005, its vestry members and congregants expressly disaffiliated with the Diocese and the Episcopal Church. Plaintiff asserts that the Religious Corporations Law is inapplicable here, and that even if it were to apply, this is insufficient to establish a trust over St. James' real and personal property. Plaintiff next asserts that it was free to withdraw from the Episcopal Church and the Diocese, and to claim ownership of the real and personal property, unless it had voluntarily ceded its property to the Episcopal Church and the Diocese. Plaintiff asserts that it never ceded its real and personal property to the Episcopal Church and Diocese; that the funds used to acquire the real property which is improved by the church came from sources other than the Episcopal Church and the Diocese which were not then in existence; that there is no evidence that these defendants made any contribution, financial or otherwise, to the construction or maintenance of a new church building erected in 1849, or to the present church building, erected in 1978; that St. James currently holds title to three parcels of real property, and none of these deeds contain any language which restricts the use of the property; and that there is no evidence that St. James ever consented to the imposition of a trust, whether implied or express, over any of its real

or personal property, or that it **[17]** conveyed an interest in said property to the Episcopal Church or the Diocese. Plaintiff, in support of its claims that the Episcopal Church is not a hierarchical church and that the Dennis Canons do not represent a codification of pre-existing Episcopal Church policy with regard to property ownership, rely upon an affidavit from the Reverend Charles Nalls. Plaintiff further asserts that parish churches are independent entities and, therefore, are free to withdraw from the national church and its diocese, if they so desire, and to depart with its real and personal property, and asserts that St. James, as a corporate entity, rather than as individual parishioners, took the decision to withdraw from the Episcopal Church and Diocese. It is asserted that as the Episcopal Church and the Diocese are both unincorporated associations, plaintiff was free, as a matter of law, to terminate its membership in those associations. Finally, plaintiff asserts that the Diocese's declaration the St. James is an extinct parish, some two years after the March 30, 2005 withdrawal, is of no force and effect, as the Diocese is an unincorporated association and lacks the authority to make such a declaration.

Legal Analysis

It is well settled that the court may decide a property dispute between a local church and a national church (*see Presbyterian Church in U.S. v Mary Elizabeth Blue Hull Mem. Presbyt. Church*, 393 US 440, 449 [1969]; *North Central New York Annual Conference v Felker*, 28 AD3d 1130 [2006]; *see also Jones v Wolf*, 443 US 595, 602-604 [1979]; *First Presbyt. Church of Schenectady v United Presbyt. Church in U.S.*, 62 NY2d 110, 120 [1984], *rearg*

denied 63 NY2d 676 [1984], *cert denied* 469 US 1037 [1984]; *The Episcopal Diocese of Rochester v Harnish*, 17 Misc 3d 1105A [2006], *affirmed* 43 AD3d 1406 [2007]). States are free to adopt any approach to resolving **[18]** church property disputes "so long as it involves no consideration of doctrinal matters" (*Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville*, 250 AD2d 282, 285 [1999], citing *Jones v Wolf*, *supra*, at 602).

"New York has adopted the neutral principles of law analysis, crafted by the United States Supreme Court, for use in resolving church property disputes" (*Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville*, *supra*, at 285-286, citing *First Presbyt. Church of Schenectady v United Presbyt. Church in U.S.*, *supra*, at 120–121; *see also Park Slope Jewish Ctr. v Congregation B'nai Jacob*, 90 NY2d 517, 521 [1997]). "Under this analysis, courts should focus on the language of the deeds, the terms of the local church charter, 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." (*Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville*, *supra*, at 286, quoting *First Presbyt. Church of Schenectady v United Presbyt. Church in U.S.*, *supra*, at 122; *see also Park Slope Jewish Ctr. v Congregation B'nai Jacob*, *supra*, at 521–522). "The court must determine from them whether there is any basis for a trust or similar restriction in favor of the general church, taking special care to scrutinize the documents in purely secular terms and not to rely on religious precepts in determining whether they indicate that the parties have intended to create a

trust or restriction" (*First Presbyt. Church of Schenectady v United Presbyt. Church in U.S.*, *supra*, at 122).

"Courts, however, should also take special care not to become involved in internal religious disputes or implicate secular interests in matters of purely ecclesiastical or religious concerns such as church governance or polity" (*Trustees of* **[19]** *Diocese of Albany v Trinity Episcopal Church of Gloversville*, *supra*, at 286; *see Presbyterian Church v Hull Church*, *supra*, at 449; *Archdiocese of Ethiopian Orthodox Church v Yesehaq*, 232 AD2d 332, 333 [1996]; *Upstate NY Synod of Evangelical Lutheran Church v Christ Evangelical Lutheran Church*, 185 AD2d 693, 694 [1992]).

Whether the affairs of an incorporated church are controlled by the church itself or by a national organization depends on how the religious corporation is organized (*St. Matthew Church of Christ v Creech*, 196 Misc 2d 843, 851 [2003]). New York State recognizes two classes of organization which determine religious corporations' control over their affairs: congregational and hierarchical (*see New York Dist. of Assemblies of God v Calvary Assembly of God*, 64 AD2d 311, 313 [1978]). A hierarchical religious society is one which was organized "as a body" in conjunction with other churches of the same religion and which is directed by "'a common ruling convocation or ecclesiastic head'" (*id.* quoting *Kedroff v St. Nicholas Cathedral*, 344 US 94, 110 [1952]). Congregationally organized religious societies, however, are "independent," self-governing organizations controlled "'by a majority of its members or by other such local organism as it

may have instituted for the purpose of ecclesiastical government'" (*id.* [citation omitted]). To determine the organization of a church, a court must examine any constitution or regulations of the corporation as well as "the history of the relationship between the...church and its alleged overseer in the scheme of the protestant hierarchy" (*id.* at 313). Here, it is undisputed that St. James does not have its own constitution or canons, separate and apart from those of the Episcopal Church and the Diocese. The court has examined the affidavits and documentary evidence submitted by the parties, and finds defendants' claims regarding the hierarchical nature **[20]** of the Episcopal Church to be persuasive. The court, thus, finds that the Episcopal Church has a hierarchical form of church government in which local parishes are subject to the constitution, canons, rules and decisions of their dioceses which, in turn, are presided over by a bishop who receives advice and counsel from a diocesan standing committee (*see also Watson v Jones*, 80 US 679 [1872]; *Trustees of the Diocese of Albany v Trinity Episcopal Church of Gloversville*, 250 AD2d 282 [1999]; *Rector of Church of Holy Trinity v Melish*, 4 AD2d 256, 261 [1957], *affd* 3 NY2d 476 [1957]; *The Episcopal Diocese of Rochester v Harnish*, 17 Misc 3d 1105A [2006], *affd* 841 NYS2d 817 [2007]). However, it is settled law that "even though members of a local [church] belong to a hierarchical church, they may withdraw from the church and claim title to real and personal property [held in the name of the local church], provided that they have not previously ceded the property to the denominational church" (*First Presbyt. Church v United Presbyt. Church*, *supra*, at 120; *see The Episcopal Diocese of Rochester v*

Harnish, supra; *Board of Mgrs. of Diocesan Missionary & Church Extension Socy. v Church of Holy Comforter*, 164 Misc 2d 661, 665 [1993]).

The Neutral Principal of Law Analysis

A. The relevant deeds and other documents

Defendants are unable to point to any language on the face of the deeds, or other documents pertaining to the four parcels of land at issue here, which indicates that St. James or its predecessors acquired the property with the intention to hold it in trust for defendants (*see Trustees of the Diocese of Albany, et al., Respondents v Trinity Episcopal Church of Gloversville*, 250 AD2d 282 [1999]; *Board of Mgrs. of Diocesan Missionary & Church Extension Socy. v Church of Holy Comforter*, *supra*, at **[21]** 666). Moreover, none of the deeds involved includes a trust restriction or forfeiture clause in favor of the plaintiffs (*see First Presbyt. Church v United Presbyt. Church*, *supra*, at 122).

It is undisputed that at the time the 1849 church was consecrated as an Episcopal church on the property that was conveyed in 1761, St. James' representatives signed an Instrument of Donation in which they pledged that the building would be used solely for the purposes of conducting religious services "according to the provisions of the Protestant Episcopal Church in the United States of America" and further pledged that the property would not be put to any use inconsistent with the Instrument of Donation. The 1849 church was destroyed by a fire in 1979 and the present church edifice stands on the same property. Therefore, although ownership of this property was not

specifically ceded to the Episcopal Church or the Diocese, the use of this property as Anglican Church is clearly inconsistent with the Instrument of Donation.

In the 1964 proceeding, the petition stated that the petitioner "The Rector, Wardens, Vestrymen of St. James Parish of Elmhurst, Diocese of Long Island" was a religious corporation that was incorporated in 1934, and that a certificate of incorporation was filed in the Office of the Clerk of the County of Queens on April 29, 1937. The petition stated that the religious corporation was the same church as "The Rector, Wardens, Vestrymen of St. James Church in the Town of Newtown, County of Queens, State of New York," and that title to the real property in question, known as 56 Reade Street, in New York County, had been acquired by deed on April 18, 1810 and that The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New **[22]** York was the owner of a reversionary interest in the property. The petition recited that as regards the reversionary interest, Trinity Church had agreed to execute a quitclaim deed upon condition that the proceeds of the sale be held in trust for the benefit of Trinity Church. The petition further stated that the "proceeds of sale would be placed with the trustee of the estate belonging to Diocese of Long Island for the benefit of St. James Parish of Elmhurst upon condition, however, that the principal shall revert to Trinity Church in the event said St. James Parish shall cease to be an Episcopal Church." Clearly, as St. James ceded these funds, held in trust to the Diocese, plaintiff has no claim to said funds.

B. The Royal Charter and St. James's Incorporation

The royal charter of 1761 expressly acknowledges that the church that later became known as St. James was affiliated with the Church of England, and authorized said "Church of England" to buy, hold and sell real and personal property. Contrary to plaintiff's claims, St. James' corporate existence pursuant to the royal charter has not been continuous, as its affiliation with the Church of England ended at the conclusion of the Revolutionary War, or shortly thereafter. Following the formation of the national Episcopal Church, St. James was expressly reincorporated, "in communion with the Protestant Episcopal Church," pursuant to a special act of the New York State legislature in 1793. The court further notes that both the 1951 and 1964 petitions for the sale of real property recite that the religious corporation known as "The Rector, Wardens and Vestry of St. James' Parish of Elmhurst, Diocese of Long Island" had changed its corporate name, or was incorporated in 1934, and that the certificate of a name change or incorporation was filed in the Office of the Clerk of the County of **[23]** Queens on April 29, 1937. However, there is nothing in the 1793 act of reincorporation which indicates how the church's property is to be owned.

Religious Corporations Law § 2-a provides that the statute applies, among other things, to "every corporation formed under any other statute or special act of this state which would, if it were to be formed currently under the laws of this state, be formed under this chapter." Accordingly, as St. James was reincorporated in 1793 under a special

act, or statute, of the legislature, and thereafter existed as a Protestant Episcopal Parish which would currently be incorporated under Article 3 of the Religious Corporations Law, the provisions of the Religious Corporations Law are applicable to St. James.

C. St. James' relationship with the Diocese

Additional defendant Carlo Saavedra asserts in his affidavit that St. James ceased being part of the polity of the Episcopal Church and Diocese as early as 1991, when it ceased paying an annual assessment. This claim, however, is refuted by the defendants' documentary evidence which establishes that St. James paid the full amount of the diocesan assessment in 1992; that St. James sent the Spring 1993 confirmation class offering to the Diocese; that on November 21, 1995, St. James' vestry agreed to remit half of an undisclosed sum to the Diocese; that St. James submitted parochial reports to the Diocese in 2000 and 2003; that St. James remained current in its payment to a medical trust maintained by the Diocese, which provides health benefits for parish clergy and employees, through at least July 2004; and that in September 2004 Father Galer and Bishop Walker exchanged letters regarding an Eucharist Minister license for one of St. James' parishioners. In addition, Father Galer, **[24]** at his deposition, stated that prior to March 2005, St. James parish was in communion with the Episcopal Church. The court, therefore, finds that up until the events of March 30, 2005, St. James remained an integral part of the Episcopal Church and the Diocese (*see generally Board of Mgrs. of Diocesan*

Missionary & Church Extension Socy. v Church of Holy Comforter, *supra*, at 667).

D. Statutes Governing the Holding of Church Property

Article II of the Religious Corporations Law, entitled "General Provisions" applies to all religious denominations, including the Protestant Episcopal Church. Although certain provisions contained in Article II relate to church property, they are silent on the issue of whether the local church's property is held in trust for the national church or a diocese (*see* Religious Corporations Law §§ 5 and 12).

Religious Corporations Law § 12(2) requires approval by the bishop and standing committee of the diocese to which the local parish belongs before the trustees of a local Protestant Episcopal Church parish can sell, mortgage or lease its real property. It is undisputed that in 1951 and 1964, the rector, wardens and vestry members, obtained the permission of the Bishop, the Standing Committee and the court, prior to selling its real property, in conformity with Religious Corporations Law § 12(2), and that prior to the sale of real property in September 2000, plaintiff did not inform the Diocese, the Standing Committee, Bishop Walker or the court of said sale. The evidence presented does not establish that at the time of the September 2000 conveyance, St. James, its wardens and vestry members deliberately failed to comply with the provisions of Religious Corporations Law § 12(2). Rather, the evidence establishes that Father Galer and Ms. King were unaware of the provisions of Religious **[25]** Corporations Law § 12(2), and were also unaware of the fact that St. James had

previously acted in compliance with this section in 1951 and 1964.

Article III of the Religious Corporations Law, entitled "Protestant Episcopal Parishes or Churches" applies only to Protestant Episcopal Churches. Section 42-a of Article III, enacted in 1991, sets forth the powers of the corporate trustees and vestry in administering the temporalities and real and personal property that belong to the corporation. It also acknowledges a trust relationship between the local church and the Diocese and National Church. It states:

> "Notwithstanding and in addition to the provisions of section five of this chapter, and subject always to the trust in which all real and personal property is held for the Protestant Episcopal Church and the Diocese thereof in which the parish, mission or congregation is located, the vestry or trustees of any incorporated Protestant Episcopal parish or church, the trustees of every incorporated governing body of the Protestant Episcopal Church and each diocese are authorized to administer the temporalities and property, real and personal, belonging to the corporation, for the support and maintenance of the corporation and, provided it is in accordance with the discipline, rules and usages of the Protestant Episcopal Church and with the provisions of law relating thereto, for the support and maintenance of other religious, charitable, benevolent or educational objects whether or not conducted by the corporation or in connection with it or with the Protestant Episcopal Church."

Section 42-a, however, does not conclusively establish the ownership of property as between the local church and its diocese and national church, and the remaining sections of Article III are silent on this matter.

E. The Episcopal Church's Constitution and Canons Regarding Church Property

In examining the constitution of the Episcopal Church concerning the ownership and control of church property, a "court may look only to provisions relating to property and it must interpret them in a secular light" (*First Presbyt. Church v United Presbyt. Church*, *supra*, at 122). Significantly, Title I, Canon 7 of the National Canons of **[26]** the Protestant Episcopal Church, commonly known as the Dennis Canons, was amended in 1979 to reflect an express trust provision as follows:

> "Sec. 4—All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.
>
> Sec. 5—The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but

> no such action shall be necessary for the existence and validity of the trust."

Dr. Robert Bruce Mullin, a historian and professor at the General Theological Seminary in New York City, (an accredited seminary of the Episcopal Church), and Rev. Dr. J. Robert Wright, a historian, Episcopal priest and professor at the General Theological Seminary in New York City each state in sworn affidavits, the Dennis Canons were adopted by the General Convention in 1979 in response to the U.S. Supreme Court's decision in *Jones v Wolf* (443 US 595 [1979]), [("which held that the constitution of a hierarchical church can be crafted to recite an express trust in its favor concerning the ownership and control of local church property"); *Trustees of Diocese of Albany v Trinity Episcopal Church of Gloversville*, *supra*, at 285], that the essential purpose of the Dennis Canons was to impress an express trust in favor of the national Protestant Episcopal Church and the dioceses of which each local parish is a member. Both Dr. Mullin and Rev. Wright state that the intent and purpose of adopting this amendment to the Canons was to affirm and make clear existing canonical church law and not to effect a change in said law. In support of this claim, Dr. Mullin and Rev. Wright cite several other national Canons that pre-date the Dennis Canons, which **[27]** govern a parish's use of property for the mission of the Episcopal Church, including Canon I.14(2) which provides that vestry members are to "be agents and legal representatives of the Parish in all matters concerning its corporate property and the relations of the Parish to its Clergy"; Canon III.9(5)(a)(2), adopted in 1904, which grants the parish's rector the right to use and control parish

building and furnishings in the aid of his or her ministry; Canon II.6 (sections 2 and 3 adopted in 1868, section 1 added in 1871) which provides that no parish may encumber, alienate or destroy any consecrated real property, without the consent of the leadership of the diocese, and further provides that such consecrated property must be "secured for ownership and use" by a parish or congregation "affiliated with the Episcopal Church and subject to its Constitution and Canons"; and Canon I.7 which similarly prohibits the encumbrance or alienation of all other (non-consecrated) parish property without the consent of the Bishop and Standing Committee of the Diocese (adopted in 1940 and modified in 1941).

Robert Fardella, the Chancellor of the Diocese, states in his affidavit that after the adoption of the Dennis Cannons, the Diocese confirmed the trust declared in the Dennis Canons, and enacted Title V, Canon 3, Section IV, which provides that: "All real and personal property held by or for the benefit of any Parish, Mission, or Congregation is held in trust for the Church and this Diocese. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission, or Congregation otherwise existing over such property so long as the particular Parish, Mission, or Congregation remains a part of, and subject, to the Church, this Diocese, and their respective Constitution and Canons."

Plaintiff, in opposition, has submitted the affidavit of the Reverend Charles **[28]** H. Nalls, an Anglican priest, military chaplain, and a member of the Standing Committee of the Diocese of the Eastern United States, Anglican Church of America.

Reverend Nalls, a former member of the Protestant Episcopal Church, is also an attorney, but is not admitted to practice in New York State. Reverend Nalls rejects the defendants' claim that the Episcopal Church is a hierarchical church and argues that the Dennis Canons was a departure from, or at the very least an effort by one party within the Church to impose its will on all others. [] He opines that until the attempted revisions represented in the Dennis Canons, church property was owned at the parish level and held solely for the benefit and mission of the parish church, free of any purported trust interest of the national church or the respective dioceses. He further opines that St. James is an independent corporate entity, that it is free to end its affiliation with the Episcopal Church and that its property continues to belong to the parish and its members.

The court notes that in the 26 years following the adoption of the Dennis Canons and the corresponding amendment of the Diocesan Canons, St. James raised no objections to these Canons, until after the March 30, 2005 schism. The court finds that although Reverend Nalls' discussion of the predecessors of the Episcopal Church and the circumstances of the adoption of the Dennis Canons may be of historical interest, his claims regarding the Dennis Canons and the relationships between the Episcopal Church, its dioceses and parishes, including parish churches, are not persuasive. Notably, as regards the Canons of the Episcopal Church relating to property, plaintiff and Reverend Nalls rely heavily upon a 1954 edition of a commentary on the Canons, without providing the

actual text, including later revisions, which pertain **[29]** to the Dennis Canons.

Although the express trust provision was absent from the national canons at the time St. James acquired the subject real property, the court in *Trustees of the Diocese of Albany v Trinity Episcopal Church of Gloversville* (*supra*, at 288), determined that the "retroactive application of such trust provisions would not,....extinguish the real property rights of every local church or parish throughout New York, so long as a court finds that the trust provisions were declaratory of existing church policy." The evidence presented here "supports the conclusion that the 'Dennis Canon' amendment expressly codifies a trust relationship which has implicitly existed between the local parishes and their dioceses throughout the history of the Protestant Episcopal Church" (*The Episcopal Diocese of Rochester v Harnish*, *supra*, quoting *Trustees of the Diocese of Albany v Trinity Episcopal Church of Gloversville*, *id.* at 288). The court further finds that there is sufficient evidence of an intent to create an implied trust to hold church property for the benefit of the Episcopal Church and Diocese, based on the St. James' actions, in conformity with the tenets and canons of the Episcopal Church, and on the National Church's establishment of an express trust by way of the Dennis Canons (*id.* at 289-290). Accordingly, defendants have established that the real and personal property at issue here that is currently held by the plaintiff St. James, is held for the benefit of the Diocese and Episcopal Church.

The Effect of the March 30, 2005 Declaration

Plaintiff claims that as the Episcopal Church and the Diocese are unincorporated associations, it is free to withdraw from these associations, affiliate with another religious denomination, and retain the subject real and personal. Plaintiff, in **[30]** support of this claim, relies upon *Communications Workers v N.L.R.B.*, (215 F2d 835, 838 [1954]), in which the court held that a union member has a right to resign from a union, although the union constitution and bylaws may impose reasonable sanctions and limitations on this right. Such reliance is misplaced, as St. James was not incorporated by its individual members, and is not merely a voluntary member of an unincorporated association. Rather, St. James was incorporated by statute for the express purposes of being "in communion of the Protestant Episcopal Church, in the State of New York." This act of incorporation, as well as St. James' conduct and interaction with the Diocese and Episcopal Church until March 30, 2005, establishes the parish's membership in the Protestant Episcopal Church and its acceptance of the hierarchical church's principles and policies including its Constitution, Canons, and Diocesan Canons. Absent a statutory amendment, the vestry members of St. James lack the authority to affiliate St. James Church, Elmhurst with any religious body, other than the Protestant Episcopal Church.

Although the individual members of St. James, including its vestry members, are free to disassociate themselves from St. James and the Protestant Episcopal Church and to affiliate with another religious denomination, they can neither remove St.

James from the parish and Diocese, nor appropriate, nor take St. James' real and personal property with them. Mr. Saavedra and Ms. King, upon announcing their disaffiliation with the Episcopal Church, automatically terminated their eligibility to hold offices as Wardens and Vestry Members of St. James, and, therefore, lack authority to act on behalf of St. James and may not challenge, on behalf of St. James, defendants' assertion of control over the subject property (*see* Religious Corporations Law § 43). **[31]**

Conclusion

The parties' requests for summary judgment on their respective cause of action and counterclaims for declaratory judgment are granted to the extent that it is the declaration of the court that St. James Church, Elmhurst, is an Episcopal church and a parish of the Diocese, and that the vestry and membership of St. James may not unilaterally alter the status of St. James as an Episcopal church and parish of the Diocese; that all real and personal property held by St. James Church, Elmhurst is held in trust for the Episcopal Church and the Episcopal Diocese of Long Island, and that these defendants' interest in the proceeds of the sale of such property, including the net proceeds of the September 2000 sale of the real property improved by the rectory, are superior to any interests that the plaintiff and individual additional defendants may have in said property. The court further declares that the individual defendants Carlo Saavedra and Lorraine King may not divert, alienate or use the real and personal property of St. James Church, Elmhurst,

except as provided by the Constitutions and Canons of the Episcopal Church and the Diocese.

Further, it is the declaration of the court that defendants Trustees and Diocese are entitled to the payment of the sums presently held by the plaintiff in an account or accounts, arising out the September 2000 sale of the real property improved by the rectory. Plaintiffs are directed to turn over all said sums to these defendants within 20 days of notice of entry and service of the order to be entered hereon.

Defendants Diocese and Trustees' request for summary judgment on their second counterclaim for a permanent injunction, and defendant DFMS' request for summary judgment on its second counterclaim for a permanent injunction is granted to **[32]** the extent that plaintiff and the additional defendants Mr. Saavedra and Ms. King are enjoined from the continued use, control and diversion of said real and personal property for purposes other than the mission of the Episcopal Church and the Diocese. Furthermore, as the additional defendants are no longer affiliated with the Episcopal Church, they may not serve as wardens, junior wardens or vestry members of St. James, Elmhurst, and are directed to turn over the control and possession of property held by St. James to the priest-in-charge, the Reverend William DeCharme, for use in furtherance of the parish's ministry and mission pursuant to the Constitution and Canons of the Episcopal Church and the Diocese, upon service of the order to be entered hereon with notice of entry.

Defendants Diocese and Trustees' request for summary judgment on their third counterclaim for trespass and to set the matter down for a trial as to

damages is denied, and this counterclaim is dismissed. Trespass is an intentional entry onto the land of another without justification or permission (*see Long Is. Gynecological Servs. v Murphy*, 298 AD2d 504 [2002]). "Liability for civil trespass requires the factfinder to consider whether the person, without justification or permission, either intentionally entered upon another's property, or, if entry was permitted, that the person refused 'to leave after permission to remain ha[d] been withdrawn'" (298 AD2d 504, 504 [2002], quoting *Rager v McCloskey*, 305 NY 75, 79 [1953]). It is well settled that "[t]he essence of trespass is the invasion of a person's interest in the exclusive possession of the land," (*Zimmerman v Carmack*, 292 AD2d 601, 602 [2002]). Here, St. James is in possession of the real property on behalf of the Diocese and Episcopal Church, or worship and other related uses by its parishioners. Since the parishioners all have access to the **[33]** church and the other real property utilized by the church, possession can hardly be characterized as exclusive. The fact that the individual defendants and others have affiliated with the Anglican Church and wish to worship according to that discipline, does not constitute a trespass on the real property. Accordingly, due to the ambiguities surrounding the ownership and control of St. James and its property, defendants are unable to establish that plaintiff and the individual defendants are trespassers.

Defendants Diocese and Trustees' request for summary judgment on their fourth counterclaim to take possession and manage St. James' real and personal property, pursuant to the provisions of Religious Corporations Law § 16 is denied, and this

counterclaim is dismissed. Religious Corporations Law § 16 only authorizes incorporated governing bodies to declare a church or parish over which it has ecclesiastical control extinct. Although the Diocese may declare St. James parish to be extinct pursuant to its Diocesan Canons, the provisions of Religious Corporations Law § 16 are inapplicable as it is undisputed that the Diocese is an unincorporated association and not an incorporated governing body.

Settle order.

J.S.C.

In the Court of Common Pleas
Cuyahoga County, Ohio
Case No. CV-08-654973

THE EPISCOPAL DIOCESE OF OHIO, et al.,

Plaintiffs,

v.

THE ANGLICAN CHURCH OF THE TRANSFIGURATION, et al.,

Defendants.

OMNIBUS OPINION AND ORDER

I. INTRODUCTION

It is tempting to conflate a litigation file's size with its complexity. This case presents that enticement. Nevertheless, despite the sheer volume of submissions from the parties – dozens of pages of cross-motions for summary judgment and supplemental authority, and thousands of pages of appendices – this case is straightforward. For the reasons discussed below, the Court finds and concludes that Plaintiffs are entitled to partial summary judgment, and Defendants must therefore "surrender the church keys."[1] The church property in question is held in trust for the benefit of Plaintiffs Episcopal Diocese of Ohio and The Protestant Episcopal Church in the United States of America.

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[1] *Episcopal Diocese of Massachusetts v. Devine*, 59 Mass. App. Ct. 722, 723, 797 N.E.2d 916, 918 (Mass. 2003).

II. PROCEDURAL HISTORY

This case centers on a church property dispute. The within litigation was initiated March 26, 2008, by Plaintiffs Episcopal Diocese of Ohio (the "Episcopal Diocese" or the "Diocese"), Trustees of the Diocese of Ohio ("Ohio Trustees"), The Parish of the Church of the **[2]** Transfiguration ("Transfiguration"), St. Barnabas Protestant Episcopal Church ("St. Barnabas"), The Episcopal Church of the Holy Spirit ("Holy Spirit"), St. Anne's in the Fields Episcopal Church ("St. Anne's"), and St. Luke's Episcopal Church ("St. Luke's"). Intervening Plaintiff The Protestant Episcopal Church in the United States of America (the "Episcopal Church" or the "ECUSA") later joined the roster of plaintiffs and filed its own complaint. The Defendants consist of seceding members of the above-referenced parishes, as well as the new church entities formed through amendments to the parishes' articles of incorporation.

Plaintiffs have moved for partial summary judgment on the claims in their complaints, as well as on critical counts of Defendants' counterclaims. Defendants have likewise filed cross-motions for summary judgment. The seven pending cross-motions for partial summary judgment are:

1. Plaintiffs' and the Episcopal Church's Motion for Partial Summary Judgment;
2. Defendant Attorney General of Ohio's Motion for Partial Summary Judgment;[2]

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[2] The Attorney General is charged by common law and the Charitable Trust Act, O.R.C. § 109.23 et seq., with the

3. Defendant St. Barnabas Anglican Church's Motion for Partial Summary Judgment;
4. Defendant Church of the Holy Spirit's Motion for Partial Summary Judgment;
5. Defendant St Anne's in the Fields Anglican Church's Motion for Partial Summary Judgment;
6. Defendant St Luke's Anglican Church's Motion for Partial Summary Judgment; and
7. Defendant The Anglican Church of the Transfiguration's Motion for Summary Judgment **[3]**

Despite the *partial* nature of the motions for summary judgment, the collection of over 20 exemplary briefs presents a winner-take-all proposition: The subject property belongs either to Plaintiffs or to the various Defendants.

III. FACTUAL AND LEGAL BACKGROUND

A. The ECUSA, The Diocese Of Ohio, And The Five Parishes

The applicable legal framework is determined, in part, by whether the Episcopal Church is hierarchical or congregational. "A hierarchal or connectional church is one in which a local church is a subordinate member of a general church which has complete control over the entire membership of the general church." *African Methodist Episcopal Church, Inc. v. St. Johns African Methodist*

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enforcement of charitable trusts, and has appeared in this case to protect the interests of charitable beneficiaries.

Episcopal Church of Uhrichsville, Ohio, 2009 WL 795264, 2009-Ohio-1394, ¶ 36 (Ohio App. 5th Dist. 2009) (citing *Tibbs v. Kendrick*, 93 Ohio App.3d 35, 637 N.E.2d 39 (Ohio App. 8th Dist. 1994)).[3]

If a church is hierarchical, the First Amendment requires courts to "defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones v. Wolf*, 443 U.S. 595, 602 (1979). Critically, once "[h]aving found a hierarchical relationship," courts are likewise "authorize[d] to look beyond deeds and articles of incorporation to church constitutions and similar documents." *Southern Ohio State Exec. Offices of Church of God v. Fairborn Church of God*, 61 Ohio App.3d 526, 538, 573 N.E.2d 172, 180 (Ohio App. 2nd Dist. 1989). The *Fairborn* court further noted that while Ohio case law "restricts an Ohio court employing neutral principles of law in a property dispute case to those **[4]** documents that reflect the 'ordinary indicia of property rights[,]' those indicia may be present in *constitutional documents of the general denominational church*." *Id*. (internal citations omitted) (emphasis added). Furthermore, "[t]hough Ohio law does not support the theory of implied trust, underlying documents may show the existence of an express or constructive trust, or similar interest, which are recognized in Ohio." *Id*.

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[3] "A congregational polity, on the other hand, exists when 'a religious . . . congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to a higher authority." *Tibbs*, *supra* (quoting *State ex rel. Morrow v. Hill*, 51 Ohio St.2d 74, 76, 364 N.E.2d 1156, 1158 (1977)).

Plaintiffs, aided by a heavy load of internal church documents and relevant case law, have conclusively established that the Episcopal Church is hierarchical in nature. *See*, *e.g.*, *Episcopal Diocese of Massachusetts v. Devine*, 59 Mass. App. Ct. 722, 727, 797 N.E.2d 916, 921 (Mass. 2003) ("the Episcopal Church is hierarchical"); *Protestant Episcopal Church in Diocese of New Jersey v. Graves*, 83 N.J. 572, 575, 417 A.2d 19, 21 (N.J. 1980) (same); *Daniel v. Wray*, 158 N.C.App. 161, 163, 580 S.E.2d 711, 714 (N.C. App. 2003) ("The Protestant Episcopal Church in the United States of America . . . is a hierarchical or connectional church"). In *Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc.*, 305 Ga.App. 87, 699 S.E.2d 45 (Ga. App. 2010), the court painstakingly justified its conclusion that the ECUSA is hierarchical:

> Here, careful consideration of the National Episcopal Church's structure and history persuades us that the National Episcopal Church is hierarchical. The church organization has three tiers: (1) the National Episcopal Church, (2) geographically-defined dioceses that belong to, are subordinate to, and are under the jurisdiction of the National Episcopal Church, and (3) local parishes that belong to, are subordinate to, and are under the jurisdiction of the National Episcopal Church and the individual diocese in which the parish is located. At the present time, the National Episcopal Church is comprised of 111 dioceses and thousands of individual churches, each of which must be affiliated with a diocese. The National Episcopal Church is governed by a general convention composed of

> bishops and deputies. The dioceses are governed by bishops and an annual convention. Each parish is governed by a vestry, which is akin to a board of directors. The vestry of each church sends delegates to its diocesan convention, and each diocese sends delegates to the general convention. There are governing documents at each level of the church. The National Episcopal Church has a constitution and canons, which are similar to bylaws. The dioceses also have **[5]** constitutions and canons, but these are subordinate to the governing documents of the National Episcopal Church. The individual parishes are controlled by the terms of their charters and bylaws, which are in turn subordinate to the terms of their charters and bylaws, which are in turn subordinate to the constitutions and canons of both the diocese and the National Episcopal Church. In addition, the dioceses and parishes are subject to the doctrine, discipline, and worship of the National Episcopal Church generally.

Id., 699 S.E.2d at 48.

Defendants' argument to the contrary consists of footnotes in various briefs remarking that "Defendants do not concede in any way that the ECUSA is a hierarchical church." *See*, *e.g.*, The Anglican Church of the Transfiguration's Combined Brief in Opposition to Motion for Summary Judgment of Plaintiff, Intervening Plaintiff, and the Ohio Attorney General at 4 n.14.[4] The footnote cites,

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[4] *See also* Brief of Church of The Holy Spirit, St. Anne's In The Fields Anglican Church, St. Barnabas Anglican Church,

but does not discuss, the affidavit of one Mary McReynolds.[5]

Plaintiffs correctly note that in the summary judgment context, a party's mere statement that it does not concede a disputed point is arguably tantamount to doing precisely that. Once Plaintiffs demonstrated the lack of any fact issue regarding the Episcopal Church's hierarchical structure, it was Defendants' burden to present competent, admissible evidence to the contrary. Their one-sentence reference to an affidavit is not sufficient, particularly where Defendants have not produced a single court decision supporting their position on this issue. This Court finds and concludes that the Episcopal Church is hierarchical. **[6]**

Crucially, however, Plaintiffs' evidence regarding the hierarchical structure of the ECUSA, and the place the relevant parishes occupied in that hierarchy, goes much further. Plaintiffs contend, and Defendants have not disputed, that congregations wishing to become parishes of the

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and St. Luke's Anglican Church in Opposition to Plaintiffs' and the Episcopal Church's Motion for Partial Summary Judgment at 2 n.4.

[5] McReynolds' affidavit spans 128 paragraphs over the course of 63 pages, not counting exhibits. Defendants nevertheless neglect to offer any meaningful narrative development of her testimony in their various briefs, including testimony regarding whether the ECUSA is hierarchical. This might be taken as evidencing some lack of faith in McReynolds' claim that the Episcopal Church is not hierarchical. The "mere existence of a scintilla of evidence in support of the [parties'] position will be insufficient" to escape summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 252 (1986).

Episcopal Diocese of Ohio must, inter alia, pledge "conformity to the Constitution and Canons of The Episcopal Church and the Diocese of Ohio" and to "the doctrine, discipline, and worship of the National Constitution, the National Canons, and [the Diocesan] canons." Plaintiffs' Appendix 4 (Affidavit of the Rt. Rev. Mark Hollingsworth at ¶ 8).

Accordingly, Plaintiffs have submitted copious evidence of the five parishes' pledged and actual submission to the governance of the Episcopal Church. The unrefuted evidence shows that St. Barnabas, for example, promised in 1948 to conform to the church's doctrine and discipline, as well as the Constitution and Canons of both the General Convention and the Ohio Diocese. Its 1948 articles of incorporation laid out its purpose as, *inter alia*, worship according to the ECUSA's doctrine and discipline. When it petitioned in 1950 for status as a parish, St. Barnabas again submitted the above-referenced articles of incorporation. Later, St. Barnabas sought Diocese permission before alienating or encumbering real property. Six years after the General Convention adopted the 1979 Trust Canon (discussed below at page 9, and also known as the "Dennis Canon"), and again in 1993, St. Barnabas adopted by-laws stating, among other things, that it "adopted the Constitution and Canons of the Protestant Episcopal Church in the Diocese of Ohio." Pltf. Apx. 13 (Hollingsworth Aff. at ¶ 35).

Likewise, in 1966, St. Luke's was created as a mission after individuals filed a petition that promised conformity to church doctrines, discipline, liturgy, rites, and usages, along with accession to the governing church's constitutions and canons. St.

Luke's articles of incorporation declared its purpose as worship "according to the doctrine, discipline and worship **[7]** of the Protestant Episcopal Church; also to acquire the land and build and operate a Protestant Episcopal Church thereon." Pltf. Apx. 19 (Hollingsworth Aff. at ¶ 52). When St. Luke's sought parish status in 1974, its petition stated its purpose as including worshipping in accordance with church doctrine, and further promised "conformity to the Constitution and Canons of the General Convention and the Diocese of Ohio." Pltf. Apx. 20 (Hollingsworth Aff. at ¶ 56). On several occasions, St. Luke's sought diocesan permission before alienating real property. On at least one occasion, a land purchase brought the 1979 Trust Canon into play: In 1996, St. Luke's asked permission from the Diocese to purchase certain land in Fairlawn, Ohio. The Bishop consented, but only after informing St. Luke's rector that "it is important that the Vestry understands that the parish is governed by [the Church's 1979 Trust Canon]." Pltf. Apx. 24 (Hollingsworth Aff. at ¶ 72).

The Diocese established Holy Spirit as a mission in 1984, after passage of the Dennis Canon. The Diocese purchased real property in 1985 for construction of a church, and it is unrebutted that the Diocese currently holds title to the property. The church grounds were later declared "affiliated with the [the Episcopal Church] and subject to its Constitution and Canons." Pltf. Apx. 32 (Hollingsworth Aff. at ¶ 92). Like the other parishes above, Holy Spirit's articles of incorporation stated its purpose as worshipping according to Episcopal Church doctrine, and pledged "conformity to the Constitution and Canons of the General Convention

and the Diocese of Ohio." Pltf. Apx. 32-33 (Hollingsworth Aff. at ¶ 93). *See also* Pltf. Apx. 33 (Hollingsworth Aff. at ¶ 94) (virtually identical covenants upon admission as a parish) and Pltf. Apx. 36-37 (Hollingsworth Aff. at ¶ 107) (by-laws promising conformance to Constitution and Canons of Ohio Diocese and restating requirement that parish seek Diocesan consent before encumbering or alienating property). **[8]**

Transfiguration, formed in 1990 via the merger of two parishes, similarly stated that its purpose was to worship in the tradition of the Protestant Episcopal Church, and likewise promised "conformity to the Constitution and Canons of the General Convention and the Diocese of Ohio." Pltf. Apx. 45 (Hollingsworth Aff. at ¶ 131). Its articles of incorporation reference compliance with "the rules and discipline of the Protestant Episcopal Church of America." Pltf. Apx. 44 (Hollingsworth Aff. at ¶ 129). There is no dispute that Transfiguration sought Diocesan consent before alienating certain real property.

Finally, St. Anne's 1904 petition for mission status promised conformity with Church doctrines, liturgy, and the like, and further covenanted "conformity to the Constitution and Canons of the General Convention and the Diocese of Ohio." Pltf. Apx. 53 (Hollingsworth Aff. at ¶ 155). The year 1957 brought a location change for St. Anne's, which indisputably sought Diocesan permission for the move. St. Anne's 1958 articles of incorporation followed the same pattern as the parishes above, namely, they provided that St. Anne's purpose was to worship according to the doctrine and other

traditions of the ECUSA, "and in conformity with the Constitution and Canons of the General Convention and the Diocese of Ohio." Pltf. Apx. 55 (Hollingsworth Aff. at ¶ 161). In 1997, St. Anne's petitioned for parish status. Once again, this petition pledged conformance to Church doctrine and adherence to the "Constitution and Canons of the General Convention and the Diocese of Ohio." Pltf. Apx. 56 (Hollingsworth Aff. at ¶ 167). The petition also remarked: "We do further represent that said parish shall hold all of its property as a trustee for the Episcopal Church and the Diocese of Ohio." Pltf. Apx. 56 (Hollingsworth Aff. at ¶ 167).

B. Control Of Church Property

Plaintiffs have submitted uncontested evidence regarding the ECUSA and Diocesan canons – stretching back to 1868 – that govern the handling of parish property. For example, **[9]** ECUSA Canons II.6(2) and I.7(3) prohibit alienation or encumbrance of real property, "consecrated" or otherwise, without Diocesan consent. Certain Diocesan canons contain similar prohibitions. Additional canons entitle the parish rector to control property subject, e.g., to church canons and the Bishop's directives. Still others require parishes to maintain insurance. Diocesan Canon II.7.3, which was adopted in 1900, provides that the Convention may declare a parish "extinct" due to its failure to abide by Church "doctrine, discipline, and worship," and that upon such declaration, "title to all the property [of the parish] shall at once vest in the Trustees of the Diocese." Pltf. Apx. 6 (Hollingsworth Aff. at ¶ 13). Plaintiffs point out, and Defendants do not contest,

that these canons were adopted before the five parishes at issue were formed.

Most crucial, however, is the ECUSA's 1979 Trust Canon, adopted by the General Convention as Canon I.7(4)-(5), and also known as the "Dennis Canon." It reads, in pertinent part, as follows:

> Sec. 4 All real and personal property held by or for the benefit of any Parish, Mission or Congregation is held in trust for this Church and the Diocese thereof in which Parish, Mission or Congregation is located. The existence of this trust, however, shall in no way limit the power and authority of the Parish, Mission or Congregation otherwise existing over such property so long as the particular Parish, Mission or Congregation remains a part of, and subject to, this Church and its Constitution and Canons.
>
> Sec. 5 The several Dioceses may, at their election, further confirm the trust declared under the foregoing Section 4 by appropriate action, but no such action shall be necessary for the existence and validity of the trust.

See Episcopal Diocese of Rochester v. Harnish, 11 N.Y.3d 340, 352 n.5 (2008). As discussed in more detail below, there is no question that the ECUSA enacted the Dennis Canon in response to the Supreme Court's landmark opinion in *Jones*, *supra*.[6]

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[6] The Diocese enacted an analogous provision, Diocesan Canon II.1.1, in 1999. In relevant part, it states that parishes "hold title to all real and other property in their care and custody in trust for the Diocese." Pltf. Apx. 5 (Hollingsworth Aff. at ¶ 12).

Furthermore, Plaintiffs note that (a) the **[10]** Dennis Canon was enacted before the formation of three of the five parishes at issue in this litigation; (b) the remaining two parishes participated in its passage through democratic processes; and (c) none of the 5 parishes objected to the 1979 Trust Canon until the current dispute.

C. The Disaffiliation

In late 2005 and early 2006, Defendants purported to terminate their affiliation with the Episcopal Diocese and the ECUSA, without the benefit of following canonical processes, and most decidedly without the consent of the ECUSA or the Episcopal Diocese. It is undisputed that the Bishop declared the five parishes "imperiled" and authorized Parish Trustees to assume control of parish property. It is likewise undisputed that pursuant to Diocesan Canon II.6, said Trustees deeded each property to the Diocese. Despite these actions, Defendants have thereafter claimed ownership and control of real and personal parish property to the exclusion of the ECUSA and the Episcopal Diocese.

IV. ANALYSIS

A. Summary Judgment Standard

In order to withstand a motion for summary judgment, a party is required to establish, through competent, admissible evidence, the existence of genuine issues of material fact. Ohio R. Civ. P. 56(E). "Pursuant to Civ. R. 56, summary judgment is appropriate when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that

conclusion is adverse to the non-moving party, said party being entitled to have the evidence construed most strongly in his favor." *Zivich v. Mentor Soccer Club. Inc.*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 201, 1998-Ohio-389 (1998). Once the moving party satisfies its burden, the burden shifts to the non-moving party, which "may not rest on mere allegations of denials of the party's pleading," but **[11]** instead must, "by affidavit or as otherwise provided in this rule ... set forth specific facts showing that there is a genuine issue for trial." Ohio R. Civ. P. 56(E); *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264, 273-274, 1996-Ohio-107 (1996).

B. The Neutral Principles Analysis

While the First Amendment prohibits civil courts from intruding into religious matters involving doctrine, polity, and practice, courts are nevertheless empowered to decide property disputes that have no relationship to religious doctrine. In an effort to avoid unconstitutional religious entanglements, the U.S. Supreme Court, in *Jones*, *supra*, "definitively approved the neutral principles approach" for the purpose of resolving church property disputes. *In re Episcopal Church Cases*, 45 Cal.4th 467, 481, 198 P.3d 66, 76, 87 Cal.Rptr.3d 275, 287 (Cal. 2009). The Supreme Court explained the advantages of this method:

> The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It

> thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.

Jones, *supra*, 443 U.S. at 603. Ohio and other jurisdictions have since adopted the neutral principles approach.

As discussed above, Courts draw a distinction between so-called "hierarchical" churches on the one hand and "congregational" churches on the other. In *Jones*, *supra*, the Supreme Court plainly stated that courts must defer to a hierarchical church's determinations on issues of religious doctrine and polity: "[T]he [First] Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones*, *supra*, 443 U.S. at 602. A court applying the neutral principles analysis to a church property dispute may examine "the language of the deeds, the terms of the local church **[12]** 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*." *Jones*, *supra*, 443 U.S. at 603 (emphasis added).

As stated above, Ohio subscribes to the neutral principles analysis. *See*, *e.g.*, *African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church of Uhrichsville, Ohio*, 2009 WL 795264, 2009-Ohio-1394 (Ohio App. 5th Dist. 2009). Indeed, Ohio courts have relied on the neutral principles analysis since well before *Jones*. *See Serbian Orthodox Church Congregation of St. Demetrius of Akron v. Kelemen*, 21 Ohio St.2d 154, 157-159, 256 N.E.2d 212, 215-216 (1970). Plaintiffs

also correctly point out that Ohio courts have long held that application of the neutral principles analysis may lead to considering a hierarchical church's constitution and canons. *Matz v. Salem Church*, 1986 WL 10932 (Ohio App. 4th Dist. 1986); *Fostoria Bible Holiness Church, Inc. v. The Calvary Wesleyan Church*, 1977 WL 199328 (Ohio App. 3rd Dist. 1977).

Plaintiffs have established, and the weight of authority is clear, that the ECUSA is a hierarchical church. The dispositive question then becomes whether the ECUSA and/or the Diocese have effectively created a trust such that, upon the disaffiliation of the five parishes, the property in dispute reverted to ownership by the mother church. At the center of the legal battle is this passage from *Jones*, particularly the final six words:

> Under the neutral-principles approach, the outcome of a church property dispute is not foreordained. At any time before the dispute erupts, the parties can ensure, if they so desire, that the faction loyal to the hierarchical church will retain the church property. They can modify the deeds or the corporate charter to include a right of reversion or trust in favor of the general church. *Alternatively, the constitution of the general church can be made to recite an express trust in favor of the denominational church*. The burden involved in taking such steps will be minimal. And the civil courts will be bound to give effect to the result indicated by the parties, provided it is *embodied in some legally cognizable form*. **[13]**

Jones, 443 U.S. at 606 (emphasis added). Plaintiffs argue that the Dennis Canon (along with certain canons of the local Diocese), when considered in light of each parish's unequivocally-stated intent to submit to the governance of the general church, creates exactly the type of enforceable express trust contemplated by the U.S. Supreme Court. Indeed, it could not be more plain than that *Jones* invited churches to incorporate such trust language into their constitutions precisely to ward off property disputes like the one before this Court.

Defendants view *Jones* differently. In essence, they contend that by requiring something "embodied in some legally cognizable form," *id*., the *Jones* Court contemplated an express trust only where the trust is established in the same manner as any commonplace secular trust, using "objective, well-established concepts of trust and property law familiar to lawyers and judges." *Id*., 443 U.S. at 604. According to Defendants' view, for an express trust to exist in the present case, it must have been created in the same fashion, for example, as a trust regarding a coffee shop. Defendants would thus argue that because the mere amendment of a church constitution bears little resemblance to the trust and property principles "familiar to lawyers and judges" in Ohio, it cannot effect an express trust.

Plaintiffs' argument, however, is the sounder of the two, and has been adopted by appellate courts (including courts of last resort) across the country. This Court joins the majority of those jurisdictions holding that on almost precisely identical facts, the Court must examine and give effect to the hierarchical church's internal governing documents,

and must accordingly find that the parishes hold property subject to an express trust in favor of the ECUSA and its local Diocese.

This Court agrees with the multiple tribunals that have applied the neutral principles analysis and held the Dennis Canon "dispositive." *See, e.g.*, *Episcopal Diocese of Rochester v.* **[14]** *Harnish*, 11 N.Y.3d 340, 352 (2008). The *Harnish* court's succinct analysis is both persuasive and, as explained below, consistent with additional appellate authority:

> The remaining factor for consideration under neutral principles, however, requires that we look to "the constitution of the general church concerning the ownership and control of church property." It is this factor that we find dispositive. We conclude that the Dennis Canons clearly establish an express trust in favor of the Rochester Diocese and the National Church and that All Saints agreed to abide by this express trust either upon incorporation in 1927 or upon recognition as a parish in spiritual union with the Rochester Diocese in 1947. We therefore need not consider the existence of an implied trust. In agreeing to abide by all 'canonical and legal enactments,' it is unlikely that the parties intended that the local parish could reserve a veto over every future change in the canons. We find it significant, moreover, that All Saints never objected to the applicability or attempted to remove itself from the reach of the Dennis Canons in the more than 20 years since the National Church adopted the express trust provision.

Id. at 352 (internal citations omitted).

As noted above, a multitude of appellate tribunals have likewise given effect to the Dennis Canon. *See Masterson v. Diocese of Northwest Texas*, 2011 WL 1005382 (Texas Ct. App. March 16, 2011) (parish agreed to be bound by Episcopal Church's governing documents, and "[t]hese governing documents make clear that church property is held in trust for the Episcopal Church and may be subject to Good Shepherd's authority only so long as Good Shepherd remains a part of and subject to the Episcopal Church and its Constitution and Canons"); *Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc.*, 305 Ga.App. 87, 96, 699 S.E.2d 45, 52 (Ga. App. 2010) (Dennis Canon was promulgated in response to *Jones*, and "courts across the country have recognized that the Dennis Canon effectuates an express trust regarding parish property"); *In re Episcopal Church Cases*, 45 Cal.4th 467, 490, 198 P.3d 66, 87 Cal.Rptr.3d 275 (Cal. 2009) (enforcing express trust based on Dennis Canon); *Rector, Wardens and Vestrymen of Trinity-Saint Michael's Parish, Inc. v. Episcopal Church in Diocese of Connecticut*, 224 Conn. 797, 821-823, 620 A.2d 1280 (Conn. 1993) (same); *Protestant Episcopal Church in Diocese of New Jersey v. Graves*, 83 N.J. 572, **[15]** 581-582, 417 A.2d 19 (N.J. 1980) (Dennis Canon functions as express trust provision); *Daniel v. Wray*, 158 N.C.App. 161, 171, 580 S.E.2d 711 (N.C. App. 2003) (same); *In re Church Of St. James The Less*, 585 Pa. 428, 452, 888 A.2d 795 (Pa. 2005) (enforcing express trust based on Dennis Canon).[7]

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[7] *See also African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church of Uhrichsville,*

Notably, in *African Methodist Episcopal Church, Inc. v. St. Johns African Methodist Episcopal Church of Uhrichsville, Ohio*, 2009 WL 795264, 2009-Ohio-1394 (Ohio App. 5th Dist. 2009), the court quoted the *Jones* language regarding the "legally cognizable form" requirement, followed that up with a rather general summary regarding Ohio trust law, *id*. at ¶¶ 39-42, and then promptly proceeded to consider *church documents* analogous to the Dennis Cannon. The court ultimately held that "[i]t is the act of affiliation with AMEC that creates the transfer of property from St. Johns AME. Because St. Johns AME is both the settlor and trustee, no additional transfer was necessary to create the express trust." *Id*. at ¶ 61.[8]

For the reasons expressed in *Harnish* and its sister courts across the nation, this Court finds and concludes that the Dennis Canon governs the outcome of this litigation. Indeed, as reflected above, St. Barnabas and St. Luke's did not take issue with the applicability of the Dennis Canon for more than

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Ohio, 2009 WL 795264, 2009-Ohio-1394 (Ohio App. 5th Dist. 2009) (finding that *Jones* sanctioned use of express trust in church constitution as means of securing property ownership, and enforcing express trust provision in church *Doctrine and Discipline*).

[8] *See also In re Episcopal Church Cases,* 45 Cal.4th 467, 493, 198 P.3d 66, 84, 87 Cal.Rptr.3d 275, 297 (Cal. 2009) ("The only intent a secular court can effectively discern is that expressed in legally cognizable documents. In this case, those documents show that the local church agreed and intended to be part of a larger entity and to be bound by the rules and governing documents of that greater entity.")

twenty years after its enactment.[9] The remaining three **[16]** congregations – Holy Spirit, Transfiguration, and St. Anne's – applied for admission as parishes *after* the enactment of the Dennis Canon, and pledged to be bound by this and all other ECUSA and Diocesan canons. St. Anne's pledge actually included an express statement that it would hold all of its property as a trustee for the ECUSA and the Diocese.

Like the Court of Appeals of New York in *Harnish*, this Court finds the existence of an express trust dispositive of this matter. The real and personal property at issue is impressed with a trust in favor of the ECUSA and the Episcopal Diocese.[10] There is no need to consider the alternative existence of a constructive trust, any other form of implied

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[9] To the extent Defendants now argue that the Dennis Canon was improperly adopted, *see*, *e.g.*, St Barnabas Anglican Church's Motion for Partial Summary Judgment at 13 n.5, the Court must step aside to avoid unconstitutionally entangling itself in a religious dispute. "[T]he First Amendment to the United States Constitution precludes this Court from questioning the validity of the process by which the church legislates." *Rector, Wardens and Vestrymen of Christ Church in Savannah v. Bishop of Episcopal Diocese of Georgia, Inc.*, 305 Ga.App. 87, 97, 699 S.E.2d 45, 53 (Ga. App. 2010) (citing *Jones*, *supra*, 443 U.S. at 602); see also *Episcopal Church Cases*, 45 Cal.4th 467, 492, 198 P.3d 66, 84, 87 Cal.Rptr.3d 275, 296.

[10] It also appears clear that "the Dennis Canon ... merely codified in explicit terms a trust relationship that has been implicit in the relationship between local parishes and dioceses since the founding of PECUSA in 1789." *Rector, Wardens and Vestrymen of Trinity-Saint Michael's Parish, Inc. v. Episcopal Church in Diocese of Connecticut*, 224 Conn. 797, 821, 620 A.2d 1280, 1292 (Conn. 1993). This conclusion, however, is not required to support the Court's ultimate holding.

trust, or a charitable trust. *See e.g.*, *Harnish*, *supra*, 11 N.Y.3d at 352.

C. Collateral Estoppel

In one of many submissions of supplemental authority, Defendants argue that *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of South Carolina*, 385 S.C. 428, 685 S.E.2d 163 (S.C. 2009) has collateral estoppel effect with respect to application of the Dennis Canon. The ECUSA was a party in the *Waccamaw* case, where the court found the Dennis Canon ineffective to create an express trust. The *Waccamaw* court held, in pertinent part: **[17]**

> [W]e hold that neither the 2000 Notice nor the Dennis Canon has any legal effect on title to the All Saints congregation's property. ... It is an axiomatic principle of law that a person or entity must hold title to property in order to declare that it is held in trust for the benefit of another or transfer legal title to one person for the benefit of another. The Diocese did not, at the time it recorded the 2000 Notice, have any interest in the congregation's property. Therefore, the recordation of the 2000 Notice could not have created a trust over the property.

Id., 685 S.E.2d at 174.[11] Defendants therefore argue that *Waccamaw* collaterally estops the ECUSA – and

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[11] This holding appears to be in tension with *Jones*, which plainly contemplates the creation of express trusts through amendments to church canons. Moreover, there is an argument that *Waccamaw's* interpretation of *Jones* is logically flawed. Specifically, if the diocese or general church already had title to the property in question, there would be no need for a trust, as

the local Diocese – from arguing to the contrary. The Court finds Defendants' arguments unpersuasive for several reasons.

The Ohio Supreme Court has defined the elements of collateral estoppel – or issue preclusion – as follows:

> (1) The party against whom estoppel is sought was a party or in privity with a party to the prior action; (2) there was a final judgment on the merits in the previous case after full and fair opportunity to litigate the issue; (3) the issue must have been admitted or actually tried and decided and must be necessary to the final judgment; and (4) the issue must have been identical to the issue involved in the prior suit.

Monahan v. Eagle Picher Industries, Inc., 21 Ohio App.3d 179, 486 N.E.2d 1165, syllabus ¶ 1 (Ohio App. 1st Dist. 1984). While the doctrine technically requires mutuality of the parties, Ohio courts have long recognized exceptions. As one court summarized:

> Ohio law has taken a broad and imprecise interpretation of the mutuality exception. Issue preclusion takes effect *unless the party lacked a full and fair opportunity to litigate or the circumstances justify relitigation*. Hicks v. De La Cruz (1977), 52 Ohio St.2d 71, 74, 369 N.E.2d 776. Interpreting its own ruling in *Hicks*, the Ohio Supreme Court stated, " * * * this court has not, * * * abandoned the mutuality rule, but has

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the property would already be sufficiently protected. *See Green v. Campbell* (NO. 09-986), Petition for Writ of Certiorari at 20.

> only shown that it is willing to relax the rule where justice would reasonably require it." *Goodson*, 2 Ohio St.3d at 199, 443 N.E.2d 978. **[18]**

Young v. Gorski, 2004 WL 540944, 2004-Ohio-1325 at ¶ 9 (Ohio App. 6th Dist. 2004) (emphasis added). See also *id*. at ¶ 13 ("Ohio law has adopted an equitable interpretation with its exceptions to mutuality. Issue preclusion takes effect unless (1) the party lacked a full and fair opportunity to litigate or (2) the circumstances or justice requires relitigation."); *Marc Glassman, Inc. v. Fagan*, 2006 WL 3028419, 2006-Ohio-5577 at ¶ 9 (Ohio App. 8th Dist. 2006).

The emphasized language in *Young*, *supra*, sets the stage in the present case. First, the Court finds and concludes that no matter the role of the ECUSA in the *Waccamaw* litigation, the Episcopal Diocese of Ohio was not in privity with any litigants in that case. Second, the Court finds collateral estoppel inappropriate due to the fact that the *Waccamaw* decision expressly turned on South Carolina trust principles rather than Ohio law. Third, it is inappropriate to grant the *Waccamaw* case collateral estoppel effect because it is contrary to the heavy weight of authority.

1. <u>The Privity Issue</u>

Even if the ECUSA is collaterally estopped from relying on the Dennis Canon for the creation of an express trust, the question remains whether the Episcopal Diocese of Ohio – which played no role in the South Carolina *Waccamaw* litigation – is likewise estopped. Defendants claim that the local

Diocese is "obviously" in privity with the national church for collateral estoppel purposes. The Court disagrees.

"For a non-party to be considered in privity to a party in the first proceeding, the rights of the party in the pending action must have been presented and adjudicated in the first proceeding, or the non-party must have controlled or participated in the litigation in the first proceeding." *Naff v. Standard Oil Co.*, 527 F.Supp. 160, 164 (S.D. Ohio 1981) (citing 1B Moore's Federal Practice P 0.411(1) (2d ed. 1980)). See also *Cleveland v. Hogan*, 92 Ohio Misc.2d 34, 42, 699 N.E.2d 1020, 1025 (Ohio Mun. 1998) (same). The Eighth District Court of **[19]** Appeals has likewise commented: "The main legal thread which runs throughout the determination of the applicability of res judicata, inclusive of the adjunct principle of collateral estoppel, is the necessity of a fair opportunity to fully litigate and to be 'heard' in the due process sense." *Johnson v. City of Cleveland*, 1988 WL 3749, 3 (Ohio App. 8th Dist. 1988). *See also Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 198, 443 N.E.2d 978, 983 ("collateral estoppel can only be applied against parties who have had a prior 'full and fair' opportunity to litigate their claims"); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 339 (5th Cir. 1982) (discussing relationships "sufficiently close" to justify preclusion, and indicating that the "rationale ... is obviously that in these instances the nonparty has in effect had his day in court").

There is no question that the Episcopal Diocese of Ohio was not a party to the *Waccamaw* litigation. Furthermore, Defendants have come forward with no

evidence that the Episcopal Diocese of Ohio was in any position to control, direct, or otherwise influence the *Waccamaw* litigation, much less that it actually did so. The record reflects a complete absence of the type of privity required for collateral estoppel purposes. The Episcopal Diocese of Ohio has not had its day in Court. Thus, the *Waccamaw* litigation has absolutely no preclusive effect on the claims asserted by the Diocese. As a result, even if the Court were to find that *Waccamaw* had preclusive effect vis-à-vis the ECUSA, the practical outcome of this litigation would not change – the Court would find that a trust exists in favor of the Episcopal Diocese of Ohio. Even that alternative finding, however, is unnecessary for the reasons discussed below.

2. <u>The Applicable Law issue</u>

More fundamentally, the *Waccamaw* court's decision regarding the effect of the Dennis Canon explicitly turned on South Carolina trust law. Throughout their briefs, Defendants have often urged this Court to keep in mind that this case must be decided by applying Ohio law, **[20]** including its law of trusts. Having found what appears to be the only recent appellate-level decision in the country to reject the proposition that the Dennis Canon created a valid express trust, Defendants may not ignore the fact that it explicitly flowed from the application of a different state's trust law. For this distinct reason, the Court rejects Defendants' collateral estoppel argument in its entirety.

3. <u>The Weight of Authority</u>

"The dangers of issue preclusion are as apparent as its virtues. The central danger lies in the simple but devastating fact that

> *the first litigated determination of an issue may be wrong."*
>
> — 18 Wright, Miller & Cooper, Federal Practice & Procedure 142, Section 4416[12]

It is impossible for this Court to accept that despite prevailing on the Dennis Canon issue in New York, Texas, Georgia, California, Connecticut, New Jersey, North Carolina, and Pennsylvania, a single negative decision ends the ECUSA's winning streak for all time, and in all jurisdictions that have yet to address the issue. This is especially true here, where the *Waccamaw* opinion utterly ignored the weight of authority. As the Second Circuit phrased it: "Although collateral estoppel jurisprudence generally places termination of litigation ahead of a correct result, there are some circumstances that so undermine confidence in the validity of an original determination as to render application of the doctrine impermissibly 'unfair' to a defendant." *S.E.C. v. Monarch Funding Corp*., 192 F.3d 295, 304 (2d Cir. 1999).

Indeed, cases discussing the offensive use of collateral estoppel are instructive in this instance. Courts have held that the "inconsistency of opinions" presents "the exact instance where it would be unfair for the trial court to allow the use of offensive collateral estoppel." **[21]** *Erbeck v. U.S.*, 533 F.Supp. 444, 447 (S.D. Ohio 1982). The court continued: "A decision by one court, therefore, should not bind this Court's determination of the issue, *particularly*

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[12] See also *Goodson v. McDonough Power Equipment, Inc.*, 2 Ohio St.3d 193, 443 N.E.2d 978, 986 n.14 (1983) (quoting same).

when, as in this case the decision plaintiffs rely upon is against the weight of authority." *Id*. (emphasis added). See also *Pacific Great Lakes Corp. v. Bessemer & Lake Erie R.R.*, 130 Ohio App.3d 477, 720 N.E.2d 551 (Ohio App. 8th Dist. 1998) (inconsistency of opinions can provide valid basis for rejecting offensive nonmutual collateral estoppel).

While the present case involves the application of *defensive* rather than offensive nonmutual collateral estoppel, the simple fact remains that *Waccamaw* is against the weight of authority regarding the enforceability of the Dennis Canon. This Ohio Court finds it would be unfair to Plaintiffs to give preclusive effect to a South Carolina decision, applying South Carolina law, in a manner that conflicts with the overwhelming weight of authority.

V. CONCLUSION

For all the foregoing reasons, the Court finds and concludes that Plaintiffs are entitled to partial summary judgment, that Defendants are not, and that the church property at issue, real and personal, is impressed with a trust in favor of the ECUSA and the Episcopal Diocese. Specifically:

1. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to IV of Plaintiffs' Complaint and on Counts I to V of ECUSA's Complaint;

2. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to IV and VI of Defendant Church of the Holy Spirit's amended counterclaims;

3. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA

on Counts I to III of Defendant St. Anne's in the Fields Anglican Church's amended counterclaims;

4. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to III of Defendant St. Barnabas Anglican Church's amended counterclaims; **[22]**

5. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to III of Defendant St. Luke's Anglican Church's amended counterclaims; and

6. The Court grants summary judgment to Plaintiffs and to Intervening Plaintiff ECUSA on Counts I to V of Defendant The Anglican Church of the Transfiguration's counterclaims.

/s/ Deena Calabrese
Judge Deena R. Calabrese

Date: 4-15-11

In the District Court of El Paso County, Texas
210th Judicial District
Cause No. 2008-4075

ST. FRANCIS ON THE HILL CHURCH,
a Texas non-profit Corporation,
Formerly known as ST. FRANCIS ON THE
HILL EPISCOPAL CHURCH,

Plaintiff,

v.

THE EPISCOPAL CHURCH, a Non-Profit
Unincorporated Association, THE DIOCESE OF
THE RIO GRANDE, a Non-Profit
Unincorporated Association, and THE TRUSTEES
OF PROPERTY OF THE EPISCOPAL CHURCH,
DIOCESE OF THE RIO GRANDE, IN TEXAS,
A Texas Non-Profit Corporation,

Defendants.

FINAL SUMMARY JUDGMENT

The Court, having considered the pleadings, the parties' cross-motions for summary judgment and the responses thereto, the evidence on file, and the argument of counsel, denies Plaintiffs' Motion for Summary Judgment, grants Defendants' Motions for Summary Judgment, and renders Judgment for the Defendants.

The Court hereby issues a Declaratory Judgment, pursuant to Texas Civil Practices and Remedies Code §37.001:

1. that The Episcopal Church is a hierarchical church as a matter of law and that Plaintiff, prior to

October 28, 2008 was a mission and later a parish member of said Church. Because the Episcopal Church is such, the Court follows the long-established Texas precedent governing hierarchical church property disputes, **[2]** which holds that in the event of a dispute among its members, a constituent part of a hierarchical church consists of those individuals remaining loyal to the hierarchical church body. *See, e.g., Brown v. Clark*, 102 Tex. 323, 116 S.W. 360 (1909); *Presbytery of the Covenant v. First Presbyterian Church*, 552 S.W.2d 865 (Tex. Civ. App.-Texarkana 1977, *no writ*). Under the law articulated by the Texas courts, those are the individuals who remain entitled to the use and control of the church property. *ld*. Plaintiff's arguments based on the Texas Corporations Code and trust law do not alter the result dictated by the Texas precedent specifically governing church property disputes;

2. that even if the Court applied neutral principles of law to resolve this church property dispute, the neutral principles considerations favor Defendants, because (a) the deeds provide that the property is to be held by "St. Francis on the Hill Episcopal Church"; (b) prior to plaintiff's attempt to leave the Church and the Diocese, the incorporated parish was known as "St. Francis on the Hill Episcopal Church," and the bylaws of the corporation acceded to the rules of the Church and the Diocese; (c) the Church's and the Diocese's longstanding canons provide that parish property is held in trust for the Church and the Diocese and confirm the interest of the Church and the Diocese in seeing to it that property held by Episcopal parishes be used solely for the mission of the Church and the Diocese;

d) the Diocese's canons further set forth when, how and why a member parish may be allowed to incorporate; and (e) the Texas Non-Profit Corporations Act permits subordinate parts of hierarchical churches to incorporate, but such **[3]** corporations remain subject to the rules of the religious organizations that formed them and hold property for the benefit of and in trust for those organizations;

3. that the vestry and/or membership of Plaintiff may not unilaterally alter the status of St. Francis on the Hill Episcopal Church as a parish of the Church and the Diocese;

4. that the real and personal property held by St. Francis on the Hill Episcopal Church is held and may be used only for the ministry and work of the Church and the Diocese and may not be diverted, alienated, or used except as provided by the Constitution and canons of the Church and the Diocese;

5. that St. Francis on the Hill Episcopal Church is represented by those of its members who have remained part of The Episcopal Church, under the leadership of the clergy recognized by the Church and the Diocese;

6. that Plaintiff is enjoined from diverting, alienating, or using the real or personal property of St. Francis on the Hill Episcopal Church except as provided by the Constitution and canons of the Church and the Diocese; and

7. that possession and control of the property held by St. Francis on the Hill Episcopal Church is awarded to the continuing Episcopal congregation for

use in furtherance of the parish/mission's ministry and mission pursuant to the Constitution and canons of the Church and the Diocese.

Based on the above, it is therefore ORDERED, ADJUDGED, AND DECREED:

1. that Plaintiff's motion for summary judgment is DENIED;

2. that Defendants' motions for summary judgment are GRANTED; **[4]**

3. that within thirty (30) days of the signing of this judgment, Plaintiff shall relinquish control of all real and personal property of St. Francis on the Hill Episcopal Church and deliver said property to the Vestry/Bishop's Committee of St. Francis on the Hill Episcopal Church or the appropriate Diocesan agency;

4. that execution shall issue for this judgment;

5. that within sixty (60) days of the signing of this judgment, Plaintiff shall render an accounting to the Vestry/Bishop's Committee of St. Francis on the Hill Episcopal Church of the disposition of all property of St. Francis on the Hill Episcopal Church since October 20, 2008;

6. that within sixty (30) days of the signing of this judgment, Plaintiff shall permit members of the Diocesan archive access to the records of St. Francis on the Hill Episcopal Church for the purpose of obtaining copies of all documents related to St. Francis, the Diocese and/or the Episcopal Church;

7. that this judgment is final, disposes of all claims of the parties, and is appealable;

and

8. that all other relief not expressly granted herein is denied.

SIGNED this 16[th] day of December, 2010.

/s/ Gonzalo Garcia
Gonzalo Garcia, Judge
210th Judicial District Court

Virginia:
In the Circuit Court of Amherst County

THE DIOCESE OF SOUTHWESTERN VIRGINIA OF THE PROTESTANT EPISCOPAL CHURCH IN THE UNITED STATES OF AMERICA

BENJAMIN D. SMITH AND S. CABELL BURKS, Wardens of Ascension Episcopal Church, Amherst, Virginia, on behalf of said church

and

WILLIAM HUDSON AND W. R. CASH, Wardens of St. Mark's Episcopal Church, Clifford, Virginia, on behalf of said church

Complainants

v.

J. B. WYCKOFF

WILLIAM E. SANDIDGE

WILLIAM N. MAYS

JOHN A. PEDLAR

EDGAR J. T. PERROW

WALTER T. BAIN

Respondents

This cause is before the Court on a chancery bill filed on September 14, 1978, by the Diocese of Southwestern Virginia of the Protestant Episcopal Church in the United States of America and various officers and members of the congregation of Ascension Episcopal Church, Amherst, Virginia, and St. Mark's Episcopal Church, Clifford, Virginia,

seeking determination of title of certain real and personal church property currently held by the primary respondents who are the trustees of these churches. Respondents by answer filed on October 6, 1978, and amended answer and cross-bill filed June 7, 1979, deny the allegations of the bill and in the affirmative allege on behalf of a newly formed Anglican Catholic Church that they are the true beneficiaries of the property in dispute. In the interim, a demurrer, a second demurrer and amended second demurrer were filed and **[2]** after hearing were overruled. On October 10, 1978, the newly formed Diocese of the Mid-Atlantic States of the Anglican Catholic Church filed a motion to intervene and later an amended motion to intervene on December 13, 1978, which were subsequently denied on February 28, 1979. A motion to dismiss one of the complainants was filed on March 20, 1979, which was denied on May 31, 1979.

The cause was finally matured for hearing and evidence was taken ore tenus on August 7, 8, 9, 1979, and September 25, 1979. Briefs by all parties have now been filed and considered by the Court.

The following facts have been determined by the Court. The real property in question was conveyed by deeds dated respectively in 1847 and 1860 and properly recorded in the Clerk's office of the Circuit Court of Amherst County. By 1847 deed Elijah Fletcher, et ux, conveyed to Henry S. Davies, et al, "1 rood and 4½_____, more or less," in said deed more particularly described, "on which preparations are now being made to erect a new brick church for the use and benefit of the Protestant Episcopal Church," the conveyance being "upon this special

trust and this special confidence, however, that they the said (grantees) and the survivor of them and the heirs and assigns of them and the survivor of them shall and will forever have and hold the said piece or parcel of land with all the improvements and appurtenances thereunto belonging for the use and benefit of the Protestant Episcopal Church as they the said (grantees) and the survivor of them and the heirs and assigns of them and the survivor of them shall deem most likely to promote the interest of the said church. . . ." By the 1860 deed Sidney Fletcher, Executor of E. Fletcher, dec'd. conveyed unto Henry S. Davies, et al., a "parcel of land adjoining the Episcopal Church lot at Amherst Court House, containing about ¼ of an acre" and described by reference to a prior deed, "To have and to hold the said lot or piece of land to the only use of the parties of the second part for the same use and for **[3]** the same purposes and upon the same conditions and upon the same trusts as are more particularly set out and contained in a deed from Elijah Fletcher to the said parties of the second part as are set out and contained in this deed to them dated the _____ day of _____, 1847, and recorded in the Clerk's office of Amherst County Court. . . ." In time the church was completed on this property and was continuously used by the congregation for Protestant Episcopal Church services for over one hundred years. Geographic boundry and name changes have occurred over these years in the Diocese, however, the congregation of Ascension Episcopal Church, Amherst has remained loyal to the Ecclesiastical Authority and the constitution and commons of the now Diocese of Southwestern Virginia of the Protestant Episcopal Church (hereinafter Diocese of

Southwestern Virginia), one of the complainants in this case. In May of 1978, the local rector prompted by his genuine and sincere theological differences with the national Episcopal Church advised the congregation of his intentions to join the newly forming Anglican Catholic Church. Subsequently, after notice to the members of the congregation, a meeting of the congregation was called to vote on the resolution of the vestry, which is the governing body of the local church. This resolution called for the congregation to renounce allegiance to the Diocese of Southwestern Virginia and to become a part of the Diocese of Mid-Atlantic States of the Anglican Catholic Church. This meeting resulted in a vote of 59 to 44 in favor of affiliation with the Anglican Catholic Church. The meeting was conducted pursuant to the requirements of Common 14 of the Diocese of Southwestern Virginia which provides for the election of vestry members. Among those present and voting were some that were under eighteen years of age. Virginia Code Section 57-9 was not specifically relied upon in conducting the vote. At the time of this meeting, there were a minimum of 150 communicants in the congregation.

The parties have agreed and stipulated that the title to **[4]** personal property in question, which includes various items of tangible property and certain funds on deposit in checking and savings accounts in two local banks, shall be determined and controlled in accordance with a determination of title to the real property in question. It is further stipulated that St. Mark's Complainants are entitled to 25% of the rectory fund in question. Finally, it is stipulated that the Protestant Episcopal Church is a supercongregational or hierarchical church.

This Court is required based on these facts to determine the title to the real property in question immediately prior to the congregational vote in May of 1978 and thereafter the effect of that vote on the title.

It is well settled under the law of this Commonwealth that trusts created by language in deeds purporting to convey property to named individual trustees for indefinite beneficiaries are invalid. Furthermore, such trusts expressed or implied for general hierarchical churches are invalid. *Norfolk Presbytery* v. *Grace Covenant Church*, 214 Va. 500 (1974). Our Virginia Supreme Court in the 1856 case of *Brooks* v. *Shacklett*, 13 Gratt. 301, established that language in deeds such as these in question create a conveyance of the property for the use of the local congregation. It is abundantly clear, therefore, that title to the property in question immediately prior to the May, 1978 congregational vote of the Ascension Episcopal Church, Amherst was in the duly appointed trustees for the benefit of that congregation. The whole thrust of the respondents' evidence in this case does not seriously contest this beneficial use in the local congregation but rests rather on other gounds to be addressed later.

The determination of the effect of the May, 1978 congregational vote then remains to be resolved. It is obvious and uncontested that members of the congregation had the right to withdraw from the Episcopal Church and to transfer their **[5]** allegiance to any other church. It is also obvious that in so doing even a majority could not thereby require the minority to transfer their allegiance or be put out of

existence as a church entity. Logic and common sense then dictate that the vote in question resulted in a divided congregation some of whom remained loyal to and constituted the Ascension Episcopal Church, Amherst. The remaining group became aligned with the Anglican Catholic Church. The result, nevertheless, is that the protestant congregation of Ascension Episcopal Church, Amherst while perhaps reduced in number still existed as it had prior to the vote. The trustees are required to hold the property in question for the benefit of one local congregation and not more than one. It is for this reason that the respondents argue that the Court is without jurisdiction because to decide which congregation would necessarily involve a civil court in a decision of religious doctrine which is prohibited by State and Federal constitutions providing for a separation of church and state. In the alternative, they argue that the Anglican Catholic Church is the true Episcopal Church as it existed at the time of the 1847 and 1860 deeds.

It is well settled in the *Norfolk Presbytery* v. *Grace Covenant Church* case, supra, "that it is proper to resolve a dispute over church property by considering the statutes of Virginia, the express language in the deeds, and the previsions of the constitution of the general church." Civil courts are limited to the application of neutral principles of law in this consideration and are prohibited from using religious doctrine and practices as a basis for resolving church property disputes. The recent case of *Jones* v. *Wolf* (cite not available) decided by the U.S. Supreme Court in July of 1979 does not change but rather affirms this approach as one valid means of resolving church property disputes. Under this

decision, states which undoubtedly have a legitimate interest in settling property disputes are free to use several approaches to these disputes **[6]** under applicable state law so long as they meet federal constitutional muster. Using this neutral principles dictate, this Court has found no provision of the constitution or canons of the general church or the diocese which permit a vote of even the majority of the local congregation to alienate the real property of the church without the written consent of the Bishop acting with the advice and consent of the Standing Committee of the Diocese. In fact, Canon 21 expressly prohibits such alienation. Furthermore, Canon 14 was used as a guideline and this canon by its express language concerns the election of vestry members and is in no way concerned with the alienation of church property and consequently could not have accomplished such a result.

Virginia Code Section 57-9 provides for a method to determine title to and control of any church property held for a congregation attached to a hierarchical church, such as the Protestant Episcopal Church, when a division has occurred in such a church. This section expressly provides that the communicants, pewholders and pewowners of such congregation over eighteen year of age (emphasis added) may, by a vote of a majority of the whole number (emphasis added) determine to which branch of the church such congregation shall belong and if that determination is approved by the appropriate Circuit Court, it shall be conclusive as to the title and control of the church property. It would not be required that this statute be expressly relied upon at the congregational meeting in May, 1978, if it in fact were applicable to and complied with in this case.

This statute may well not be applicable for the constitutional infirmatives of applying it to the deeds in question which predate the passage of the statute. Such a determination need not be reached here. The facts show that the statute was not followed by allowing those under eighteen years of age to vote and, furthermore, a majority of the whole number of the congregation would have required at least seventy-**[7]**six affirmative votes rather than the fifty-nine actually voting in favor of transferring allegiance. While this Court was not satisfied a division had occurred as contemplated by this statute such a determination was not necessary for the foregoing reasons. The net result, therefore, based on the constitution and canons of the church and the state statutes is that the effect of the congregational vote in May, 1978 on the title to the real property in question was that title remained exactly where it was prior to the vote, that is, in the trustees for the benefit of the local protestant Episcopal congregation.

The respondents then claim that those who have transferred allegiance to the Anglican Catholic Church are in fact the local episcopal congregation as contemplated by the language of the two deeds in question and urge this Court on the basis of religious doctrine and principles to so hold. This court has not questioned the sincerity and deep religious convictions and beliefs of the parties represented before it in this case nor has it sat in judgment of those religious convictions and beliefs. The complainants and in deed the respondents have ably argued and it is clearly and properly the law that neither this nor any other civil court can decide church property disputes based on religious doctrine

and principles however sincerely they may be followed by the litigants. Based on neutral principles of law, however, this dispute can and must be decided. The result of the May, 1978 congregational vote did not and could not extinquish that part of the Protestant Episcopal congregation known as Ascension Episcopal Church, Amherst remaining loyal to the Diocese of Southwestern Virginia and the National Episcopal Church. The vote may well have indicated that fifty-nine members of that congregation transferred their allegiance to the Anglican Catholic Church which is unquestionably a separate entity. Nothing, however, has occurred under neutral principles of law to transfer the title **[8]** and control of the property in question from the beneficial use of the remaining congregation of the Ascension Episcopal Church, Amherst as represented by the complainants herein.

For these reasons, the primary prayer of the complainants will be granted and the present trustees will be directed and required to hold the property in question for the sole use and benefit of the congregation of Ascension Episcopal Church, Amherst as a unit of the Episcopal Church subject to the canonical authority of the Diocese of Southwestern Virginia. Respondent Pedlar and respondent former officers will be enjoined from further use and occupancy of the property. The personal property will be held accordingly with twenty-five person of the rectory fund being held for St. Mark's Episcopal Church in accordance with the stipulation of the parties.

Counsel for the complainants is directed to prepare a decree in accord with this opinion and upon endorsement to present the same for entry.

Date: November 16, 1979

/s/ Lawrence L. Koontz, Jr.
Lawrence L. Koontz, Jr.
Judge Designate

State of Wisconsin
Circuit Court
Waukesha County
Case No. 09-CV-00635

THE EPISCOPAL DIOCESE OF MILWAUKEE, INC.

Plaintiff,

and

THE EPISCOPAL CHURCH,

Plaintiff-In-Intervention,

v.

MARSHA OHLGART, *ET AL.*,

Defendants,

ORDER GRANTING MOTIONS FOR PARTIAL SUMMARY JUDGMENT OF THE EPISCOPAL DIOCESE OF MILWAUKEE, INC. AND EPISCOPAL CHURCH AND DENYING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

Having considered the documents in the record, the undisputed facts, the written submissions of the parties, the oral arguments presented on 12/15/11, and the applicable law, the Court concludes and holds as follows:

1. In deciding this church property dispute, this Court follows the neutral principles of law approach set forth in *Jones v. Wolf*, 443 U.S. 595 (1979) and *Wisconsin Conference Bd. of Tr. of United Methodist*

Church, Inc. v. Culver, 2001 WI 55, 243 Wis.2d 394, 627 N.W.2d 469.

2. There are no material issues of fact in dispute that prevent the Court from granting the motions for partial summary judgment of The Episcopal Diocese of Milwaukee, Inc. ("Diocese") and Episcopal Church.

3. The Episcopal Church is a hierarchical church.

4. The Diocese is a constituent part of, and diocese within, the Episcopal Church.

5. St. Edmund's Episcopal Church, Inc. in Elm Grove is a constituent part of, and parish within, the Diocese and Episcopal Church. **[2]**

6. St. Edmund's Episcopal Church, Inc. voluntarily chose to become a part of the Diocese and Episcopal Church and, by doing so, became bound by their rules and usages, including, but not limited to, the Canons and Constitutions of the Diocese and Episcopal Church.

7. Accordingly, any attempts by the officers or agents of St. Edmund's Episcopal Church, Inc. to remove the corporation from the Diocese or the Episcopal Church were invalid, beyond their authority, and *ultra vires*.

8. Defendants also had no authority or lawful ability to amend the constitution of St. Edmund's Episcopal Church, Inc. in a manner that violated or abrogated the Canons and Constitutions of the Diocese and Episcopal Church and its Doctrine, Discipline, and Worship.

9. The attempted change of the name of St. Edmund's Episcopal Church, Inc. to St. Edmund's Anglican Church, Inc. is a nullity and, at all times

material, St. Edmund's Episcopal Church, Inc. has continued to exist although not associated or affiliated in any way with St. Edmund's Anglican Church, Inc.

10. Defendants had no authority to control, remove, take, or keep the real and personal property of St. Edmund's Episcopal Church, Inc. for uses inconsistent with or in violation of the Canons and Constitutions of the Diocese and Episcopal Church and its Doctrine, Discipline, and Worship. **[3]**

Consequently, the Court orders as follows:

A. The Diocese and Episcopal Church's motions for partial summary judgment that were filed with the Court on or about March 24 and 25, 2010, respectively, are granted for the reasons set forth herein and included in the record.

B. Defendants' motion for summary judgment that was filed with the Court on or about March 31, 2010, is denied.

C. Defendants shall provide the Plaintiffs with an accounting of all assets and property of St. Edmund's Episcopal Church, Inc. within their possession, custody, or control.

D. Defendants shall provide any and all real and personal property of St. Edmund's Episcopal Church, Inc. to the Diocese.

E. Defendants shall vacate and relinquish control over the property of St. Edmund's Episcopal Church, Inc.

F. Defendants are enjoined from holding themselves out as representatives of St. Edmund's Episcopal Church, Inc.

G. St. Edmund's Anglican Church, Inc. shall not claim or assert in any manner whatsoever to be the successor to St. Edmund's Episcopal Church, Inc. or to have evolved or emerged from St. Edmund's Episcopal Church, Inc.

Dated this 2[nd] day of April, 2012.

BY THE COURT

/s/ J. Mac Davis
Hon. J. Mac Davis
Waukesha County Circuit Court, Branch 7