IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

The Right Reverend Charles G. vonRosenberg, Individually and in his capacity as Provisional Bishop of the Protestant Episcopal Church in the Diocese of South Carolina, Plaintiff, v. The Right Reverend Mark J. Lawrence and John Does numbers 1-10, being fictitious defendants whose names presently are unknown to Plaintiff and will be added by amendment when ascertained. Defendants.	**CIVIL ACTION NUMBER: 2:13-cv-00587-CWH** **MOTION TO DISMISS OR IN THE ALTERNATIVE TO ABSTAIN OR STAY PROCEEDINGS**

The undersigned counsel for the Defendant, Mark J. Lawrence, respectfully move this Court for a dismissal of this action or in the alternative for the Court to abstain from exercising jurisdiction and/or for a stay of these proceedings pursuant to the provisions of Rule 12(b)(1) and 12(b)(6), Federal Rules of Civil Procedure, the Anti-Injunction Act (28 U.S.C. § 2283), the federal declaratory judgment, *Younger* and *Colorado River* abstention doctrines. In support of their Motion, the Defendant incorporates herein his Memorandum in Support.

March 28, 2013

-signature to follow-

Respectfully submitted,

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I. Introduction[1]

This action was filed on March 5, 2013. Three months before its filing, an action was brought in the Circuit Court of South Carolina seeking a resolution, *inter alia*, of the central question in this federal court action: under the law of South Carolina, who controls The Protestant Episcopal Church in the Diocese of South Carolina, a South Carolina non-profit corporation?

A. The South Carolina State Court Action[2]:

On January 4, 2013, The Protestant Episcopal Church in the Diocese of South Carolina ("Diocese"), The Trustees of The Protestant Episcopal Church in South Carolina, a South Carolina Corporate Body ("Trustees") and 16 other South Carolina non-profit corporations filed suit against The Episcopal Church ("TEC") in Dorchester County, South Carolina.[3] A First Amended Complaint was subsequently filed on January 22, 2013 adding an additional 17 South Carolina non-profit corporations as Plaintiffs to the lawsuit. The Diocese and the Trustees also filed a motion for a Temporary Restraining Order.[4]

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[1] "As a general rule, a 12(b)(1) motion cannot be converted into a motion for summary judgment under Rule 56." *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987). "[A] court may resort to material outside the pleadings in passing on a motion under Rule 12(b)(1)" *Mims v. Kemp*, 516 F.2d 21, 23 (4th Cir. 1975); *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In considering motions to dismiss including those under Rule 12(b)(6), courts may consider "documents incorporated in the complaint by reference, and matters of which a court may take judicial notice" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Federal courts may take judicial notice of state court proceedings: "we note that the most frequent use of judicial notice of ascertainable facts is in noticing the content of court records." *Colonial Penn Ins. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); *Accord Katyle v. Penn. Nat. Gaming, Inc.,* 637 F.3d 462, 466 (4th Cir. 2011), *cert denied*. 132 S.Ct. 115 (U.S. 2011).

[2] *The Protestant Episcopal Church in the Diocese of South Carolina, et al. v. The Episcopal Church (a/k/a. The Protestant Episcopal Church in the United States of America) and The Episcopal Church in South Carolina*, South Carolina Court of Common Pleas, First Judicial Circuit Court, Case No. 2013-CP-18-00013, filed January 4, 2013. Exhibit 1. Service was accomplished on TEC by personal service on Tom Tisdale on January 4, 2013, personal service on two agents of TEC on January 7, 2013 and service by mail on Katherine Jefferts Schori and Kurt Barnes, Treasurer on January 7, 2013. Exhibit 2.

[3] The case was designated complex and assigned to Judge Goodstein on January 29, 2013. Exhibit 3.

[4] Exhibit 4.

A Temporary Restraining Order ("TRO") was issued by Circuit Court Judge Diane S. Goodstein at 5:11PM on January 23, 2013 conditioned upon the posting of a $50,000 bond.[5] A cash bond was posted at that time and is still being held by the Dorchester County Clerk of Court. Judge Goodstein set a hearing for February 1, 2013 at 9AM to determine whether an injunction should be issued. However, the hearing was not held because on January 31, 2013, TEC consented to the entry of a preliminary injunction which was then issued by the Court and filed at 5:29PM. [6]

The Restraining Order and the Preliminary Injunction provide that:

> No individual, organization, association or entity, whether incorporated or not, may use, assume, or adopt in any way, directly or indirectly, the registered names and the seal or mark of The Protestant Episcopal Church in the Diocese of South Carolina as are set out below or any names or seal that may be perceived to be those names and seal or mark.
>
> The registered marks that are subject to this order are: the seal of the Diocese of South Carolina as described in its registration with the South Carolina Secretary of State; the name "The Protestant Episcopal Church in the Diocese of South Carolina", as registered with the South Carolina Secretary of State; the name "The Diocese of South Carolina", as registered with the South Carolina Secretary of State; and the name "The Episcopal Diocese of South Carolina," as registered with the South Carolina Secretary of State. Again, this seal and these names are those registered by this Plaintiff corporation with the South Carolina Secretary of State.
>
> The following persons employed by, or serving as the officers or directors of the Diocese of South Carolina or of the Trustees are not subject to this order:

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[5] Service of the First Amended Complaint and the Temporary Restraining Order was made on TEC on January 31, 2013. Exhibit 5. Other individuals or representatives of these entities who are "in active concert with or participating with" TEC (Rule 65(d), South Carolina Rules of Civil Procedure) were also personally served: George Hawkins, January 24, 2013; Virginia Wilder, January 24, 2013; Callie Walpole, January 24, 2013; Lonnie Hamilton, III, January 24, 2013; James E. Taylor, January 24, 2013; Erin Hoyle, January 24, 2013; Barbara Mann, January 25, 2013; Melinda Luka, January 24, 2013; **Charles vonRosenberg,** January 24, 2013; John Buchanan, January 24, 2013; Steve Skardon, January 24, 2013; Michael Wright, January 24, 2013. Exhibit 6.

[6] Service of the Preliminary Injunction was then made personally on **Charles vonRosenberg** and Melinda Lucka on January 31, 2013 and on Michael Wright on February 1, 2013. Exhibit 7. South Carolina courts use the terms preliminary or temporary interchangeably to describe the injunctive relief permitted by Rule 65, South Carolina Rules of Civil Procedure. *See, e.g., AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 674 S.E.2d 505 (2009).

> • **Diocese of South Carolina:** Mark J. Lawrence, Chief Operating Officer; James B. Lewis, Registered Agent; John Wallace, Treasurer; Nancy J. Armstrong, Assistant Treasurer; Joy Hunter, Director of Communications; Paul C. Fuener, President and Director; John M. Barr, III, Director; J. ReidBoylston, III, Director; Ann Hester Willis, Director and Secretary; Julian Jeffords, III, Director; William G. Lyles, III, Director; Ed Mitman, Director; Andrew O'Dell, Director; Elizabeth Pennewill, Director; Suzanne Schwank, Director; Gregory A. Snyder, Director; A. Kenneth Weldon, Director;
> • **Trustees**: Mark J. Lawrence, President; Craige Borrett, Trustee and Secretary; Jeffrey Miller, Trustee; Robert Horn, Trustee; Robert Kilgo, Trustee; Robert Kunes, Trustee; Glynn Watson,Trustee; and Ivan Anderson, Trustee.

Exhibit 8, at 6-7.

The Injunction concluded by stating:

> "Any party may move this Court upon written notice served at least fourteen days before the time specified for a hearing, unless the parties consent to a shortened period, for an Order modifying or dissolving this temporary injunction. This temporary injunction will remain in effect until further Order of the Court."

Id. at 7.

On January 26, 2013, two days after vonRosenberg, the federal Plaintiff, was served with the TRO, a convention was held at which the Presiding Bishop of TEC installed vonRosenberg as the Bishop of the "Episcopal Church in South Carolina" ("ECSC").[7]

On February 19, 2013, the now 33 Plaintiffs filed a motion to amend their complaint to add three additional South Carolina non-profit corporations as Plaintiffs and to add The Episcopal Church in South Carolina ("ECSC") as a Defendant.[8] TEC consented to the amendment and Judge Goodstein signed an Order allowing it on February 28, 2013.[9] Exhibit 11.

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[7] Plaintiff Rosenberg has alleged that this was a convention of the "Diocese." Yet five days after this convention, the "Diocese" obtained the Injunction consented to by TEC, which he is attacking in this action. The ECSC has now admitted that he is its agent. Exhibit 9.

[8] This was the name of the entity that met at the January 26, 2013 convention referenced in Plaintiff's Complaint. *See n. 11 infra.*

[9] The Second Amended Complaint was personally served on Mr. Tisdale, counsel for TEC, the ECSC and on **Charles vonRosenberg**, who was now Chief Operating Officer (and Bishop) of ECSC and Virginia Wilder, who was now a member of the Board of Directors (and Standing Committee) of the ECSC. Exhibit 10. At the time of his service, Mr. Tisdale had been named Chancellor, an Episcopalian term for legal advisor, of the ECSC.

On March 5, 2013, three months after the state court action was filed and over a month after vonRosenberg was twice served with Judge Goodstein's Order enjoining everyone **except** the Defendant Lawrence (and other named officers, directors, employees of the Diocese and the Trustees) from using the Diocese's marks, this federal court action was filed.

Today, March 28, 2013, TEC and the ECSC filed an Answer, Affirmative Defenses, and Counterclaims to the Second Amended Complaint for Declaratory and Injunctive Relief in state court joining all issues including use and control of the names and marks (including Lanham Act claims by TEC) and the control of the Diocese. In their answer, the ECSC admits that Charles vonRosenberg "is an agent of the [Episcopal Church in South Carolina]." Exhibit 9 and 12.

B. Comparison of the Pending State Court Action With This Federal Action.

The state court action in the original, First Amended and Second Amended Complaints asserts causes of action against TEC and the ECSC (the latter only in the Second Amended Complaint) under three South Carolina statutes: §§ 15-53-10 *et. seq.* ("Uniform Declaratory Judgments Act"), §§ 39-15-1105 *et. seq.* ("Trademarks and Service Marks"), and §§ 16-17-310 & 320 ("Improper Use of Names").

The action asks the South Carolina Circuit Court to declare that the ownership of real and personal property (including intellectual) is, in the respective 37 Plaintiffs, that the 37 Plaintiffs are the only South Carolina entities entitled to the use and control of their respective corporate identities, names, emblems, styles, seals and assets, that the only authorized representatives of the 37 respective Plaintiffs are their existing boards, duly elected successors and employees, that the Diocese has withdrawn from TEC, that TEC and the ECSC and those in concert with or under their control:

- may not hold out any other entities as the respective real Plaintiffs;

- do not have the legal capacity to act in the respective Plaintiffs' names;
- have no legal, beneficial or equitable interest in any of the respective Plaintiffs' real or personal (including intellectual);
- have no right or authority to possess, transfer, etc. any of the respective Plaintiffs' real or personal property; and
- may not use in any way the marks of the respective Plaintiffs.

Injunctive relief is also sought against TEC and the ECSC and those controlled by or in concert or participation with them from using Plaintiffs' names, seals, marks and intellectual property, and enjoining their officers, agents, servants, employees, members, attorneys and any person in concert or participation with or under the direction and control from holding themselves out as officers or other leaders of the Plaintiffs.

The vonRosenberg Complaint asserts that he is the authorized representative of the same Diocese.[10] He alleges that he is the Chief Operating Officer of the Diocese and its provisional bishop, that he was elected at a special meeting of the "Diocesan" Convention on January 26, 2013, that he is recognized as the "sole" bishop of the "Diocese" by TEC and that the state court action was not brought by the real diocese or the real Trustees or the real non-profit corporations but by ones who "purport" to be those entities. Exhibit 13. [11]

Plaintiff vonRosenberg asks this court to enjoin the Defendant Lawrence and the unnamed "Does" from using the Diocese's state-registered marks (names and seal) when the

[10] "The Protestant Episcopal Church in the Diocese of South Carolina." This South Carolina corporation is a Plaintiff in the state court action and is represented there by five of the six undersigned counsel.

[11] VonRosenberg's complaint does not apprise the Court that he was elected and installed as the Chief Operating Officer ("provisional bishop") of the ECSC not the Diocese at the January 26, 2013 convention and has since then held himself out as the "Provisional Bishop of The Episcopal Church in South Carolina" rather than of the "Diocese" as he alleges Exhibit 13 ¶ 46. Exhibit 3 to Supplemental Affidavit of Jim Lewis, Exhibit 14; Motion for Contempt, Exhibit 1; Affidavit of Karen Kusko, Exhibit 15.

state court has enjoined everyone **except** the Defendant Lawrence (and other named officers, employees of the Diocese and the Trustees – the "Does"?) from doing the same thing. Plaintiff vonRosenberg's request also is made in spite of TEC's consent to that injunction five days after he allegedly became Bishop of the very Diocese on whose behalf the injunction was issued.

While using a Lanham Act "label" for his infringement claims, his success depends on a single determination: who controls the Diocese, a South Carolina incorporated non-profit (the first named Plaintiff in the state court action). The resolution of this question will resolve every other issue presented by Plaintiff vonRosenberg: who is authorized to use the names and marks of the Diocese, and therefore to assert they have been infringed upon on any basis including the Lanham Act, who legitimately represents it, who is affiliated with it, who may assert on its behalf claims as to its goodwill and reputation and the loss of, or harm to, those elements of its corporate character. However, this question is already before the state court and already been joined by the state court in its issuance of an injunction with the consent of the entity to which vonRosenberg alleges his subordination.

Furthermore, the entities who have a legal interest in the determination of this corporate control issue are before the state court: the Diocese, the Trustees of the Diocese, the 35 non-profit corporations who assert that they are part of the Diocese (as its control has been pled in the state court action), TEC and the ECSC. Plaintiff Charles vonRosenberg is expressly subject to the state court injunction since it is binding not only on the parties and their agents[12] but also "upon those persons in active concert or participation with those who receive actual notice of the

[12] These are their "officers, agents, servants, employees and attorneys…" Rule 65(d), South Carolina Rules of Civil Procedure.

Order by personal service or otherwise." Rule 65(d) South Carolina Rules of Civil Procedure.[13] Moreover, he also is a party to the state proceeding, the outcome of which will bind him, since he is a member in the two unincorporated associations: The Episcopal Church in South Carolina and as a Bishop in The Episcopal Church.[14]

C. Neutral Principles of Civil Law Govern the State and Federal Actions

The 37 Plaintiffs in the state action are all South Carolina non-profit corporations with dates of incorporation as early as 1785 and dates of formation as early as 1681.[15] The formation of a third of the Plaintiffs predates the creation of the United States, The Diocese and The Episcopal Church. Second Amended Complaint, Exhibit 16 at 4 ¶ 6. Every Plaintiff alleges they have withdrawn their association with TEC but continue their association with the Diocese as its corporate control is pled in the state action with Mark Lawrence as the Chief Operating Officer of the Diocese. Every Plaintiff alleges these corporate decisions were made in accordance with authority they possess under the South Carolina corporate law. All of the issues in the State court action are pled solely with respect to the South Carolina civil law.

Plaintiff vonRosenberg's complaint also alleges causes of action that are based on the civil law (Lanham Act and declaratory judgment). However, most of his allegations are heavily weighted on ecclesial concepts (as they are in the Motion for a Preliminary Injunction) that will be used to argue that this court must defer to Plaintiff vonRosenberg's assertions. While the Defendant Lawrence in this action and the 37 Plaintiffs in the state court action disagree with Plaintiff vonRosenberg's ecclesial interpretations, these allegations of ecclesial (versus civil)

[13] Both the TRO and the Injunction were served upon the Plaintiff vonRosenberg (and others) before he commenced this action. *See* notes 5&6, *supra.*

[14] *See* discussion *infra at 18-19.*

[15] See Exhibit 17, Summary of Second Amended Complaint (Exhibit 17) re Plaintiffs' formation and incorporation dates.

corporate control are not relevant to the determination of the issues raised, including this Motion to Dismiss. As stated by Judge Goodstein in the injunction consented to by TEC:

> While this is an action between parties whose business happens to be religious, it nevertheless involves civil law issues concerning corporate control and interest in property. The South Carolina Supreme Court has "explicitly reaffirmed that when resolving church dispute cases, South Carolina courts are to apply the neutral principles of law approach, *All Saints Parish Waccamaw v. Protestant Episcopal Church in Diocese of S.C.,* 385 S.C. 428, 442, 685 S.E.2d 163, 171 (2009).

Injunction, Exhibit 8, incorporating TRO at 4.[16] South Carolina law requires that "where a civil court can completely resolve a church dispute on neutral principles of law, the First Amendment commands it to do so." *All Saints Parish Waccamaw,* 385 S.C. at 445, 685 S.E. 2d at 172.[17] (TEC was a party in the *All* Saints action.); *accord, Jones v. Wolf*, 443 U.S. 595, 604, 99 S.Ct. 3020, 3026 (1979) ("We therefore hold that a State is constitutionally entitled to adopt neutral principles as a means of adjudicating a church property dispute").

II. Subject matter jurisdiction is lacking because Plaintiff vonRosenberg lacks standing.

A. When a party lacks standing to sue, his claims must be dismissed.

[16] "Neutral principles" relies exclusively on objective, well-established concepts of civil law. This "approach permits the application of property, corporate and other forms of law to church disputes." *All Saints Parish Waccamaw,* 385 S.C. at 444, 685 S.E. 2d at 172. "Church disputes that are resolved under the neutral principles of law approach do not turn on the single question of whether a church is congregational or hierarchical." *Id.*

[17] The *Erie* doctrine makes it clear that federal courts must apply state laws unless the issue is governed by the federal constitution or an Act of Congress. *Erie v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938). The First Amendment does not require the states to adopt a rule of compulsory deference to religious authority in resolving church property disputes. *Jones v. Wolf*, 433 U.S. 595, 605, 99 S. Ct. 3020, 3026, 61 L. Ed. 775 (1979) ("we cannot agree, however, that the First Amendment requires the states to adopt a rule of compulsory deference to religious authority in resolving church property disputes, even where no issue of doctrinal controversy is involved"). Nor does the Lanham Act govern the issue here since the undisputed owner of the marks is the Diocese and the only dispute is corporate control of the Diocese (corporate control was also an issue in *All Saints Waccamaw*). It is clear in matters relating to corporate control of a South Carolina corporation, the law of South Carolina governs. *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 621, 103 S. Ct. 2591, 2597, 77 L. Ed. 2d 46 (1983); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 479, 97 S. Ct. 1292, 1304, 51 L. Ed. 2d 480 (1977); *Cort v. Ash*, U.S. 66, 84, 95 S. Ct. 2080, 2091, 45 L. Ed. 2d 26 (1975). The same is true with respect to matters relating to real property.

"Standing is a threshold jurisdictional question which ensures that a suit is a case or controversy appropriate for the exercise of the courts' judicial powers under the Constitution of the United States." *Pye v. U.S.*, 269 F.3d 459, 466 (4th Cir. 2001)(citing *Steel Co. v. Citizens for a Better Env.*, 523 U.S. 83, 102 (1998)). Standing to sue is necessary in order for a court to exercise subject matter jurisdiction. *Allen v. Wright,* 468 U.S. 737, 751, 104 S.Ct. 3315, 3324-25, 82 L.Ed.2d 556 (1984).

Lack of standing may be raised by the court, *sua sponte*, or by a party by way of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1).[18]

> There are two critically different ways in which to present a motion to dismiss for lack of subject matter jurisdiction. First, it may be contended that a complaint simply fails to allege facts upon which subject matter jurisdiction can be based. In that event, all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration. Second, it may be contended that the jurisdictional allegations of the complaint were not true. A trial court may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations.

Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982).

B. The burden to establish standing is on the party making the claim.

The party claiming standing bears the burden of establishing it. *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997). In order to meet this burden, the claimant must first allege facts sufficient to support standing on the face of the pleading.[19] However, "[s]ince

[18] In *Dan River, Inc. v. Unitex Ltd.*, the Fourth Circuit stated "whether raised or not, jurisdictional standing is an issue to be considered sua sponte by the court." 624 F.2d 1216, 1223 (4th Cir. 1980); *see also National Licensing Ass'n, LLC. v. Inland Joseph Fruit Co.*, 361 F.Supp.2d 1244 (E.D.Wash. 2004)("[I] t is appropriate to address the question of standing in deciding a motion to dismiss because '[t]he elements of standing are an indispensable part of the plaintiff's case,' and accordingly must be supported at each stage of litigation in the same manner as any other essential element of the case.") (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992)).

[19] In *Kachmar v. Varone*, the court dismissed an individual's claims purportedly made on behalf of a corporation for lack of standing where the individual did not allege in his complaint or attach evidence showing that he was authorized to sue on the corporation's behalf. 55 Fed. Appx. 3, 4 (1st Cir. 2002)(citing *Lujan*, 504 U.S. at

[the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case" the claimant also bears the burden of establishing "each element . . . in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Standing may not be "inferred argumentatively from averments in the pleadings," *Grace v. Am. Cent. Ins. Co*., 109 U.S. 278, 284 (1883), but "must affirmatively appear in the record.' *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

C. A party invoking standing must first establish constitutional standing, and next establish prudential standing. See e.g. Lujan, 504 U.S. at 560.

1. Constitutional standing

> Article III of the United States Constitution limits the judicial power of the federal courts to resolution of actual cases and controversies. United States Constitution Art. III, § 2. *(See Flast v. Cohen)*, 392 U.S. 83, 88 99, S.Ct. 1942, 1949, 20 L. Ed. 2d 947 (1968). In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Art. III . . . To establish constitutional standing, the party invoking federal jurisdiction must establish three elements: First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical'" . . . Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Mylonakis v. M/T Georgios M., (F.Supp. __2d __, 2012 WL 6042 197, *21) (S.D. Tex. Dec. 4, 2012) (quoting *Lujan*, 504 U.S. 555, 560-61)(emphasis added).

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560); *see also Warth v. Seldin,* 422 U.S. 490, 518 (1975)("It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers.")

2. Prudential standing

After establishing constitutional standing to bring suit, a plaintiff must also establish prudential standing. "[P]rudential standing encompasses [1] the general prohibition on a litigant's raising another person's legal rights, [2] the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and [3] the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Warth*, 422 U.S. at 500 (internal quotations omitted).

D. Plaintiff has not alleged sufficient facts nor produced evidence sufficient to support a finding of constitutional or prudential standing.

Plaintiff brings this suit individually and allegedly on behalf of the Protestant Episcopal Church in the Diocese of South Carolina ("Diocese"). He alleges two causes of action under the Lanham Act, which are based on four service marks owned by the Diocese, a South Carolina non profit.

The South Carolina Non Profit Corporation Act, S.C. Code §§ 33-31-101 et seq. ("Non Profit Act") provides certain powers to the non-profit corporation, including the ability to sue. S.C. Code § 33-31-302. In addition, the Non-Profit Act specifically sets forth who has authority to exercise these corporate powers. Initially, this authority sits with the board of directors. S.C. Code § 33-31-801(b). The board, by majority vote at a meeting (S.C. Code § 33-31-824), or by unanimous vote without a meeting (S.C. Code § 33-31-821), can exercise these powers. The Non Profit Act also provides that the board may assign certain duties to officers of the corporation, and that certain officers may be given power to act by way of the corporation's by laws. S.C. Code § 33-31-841. In order to have the power to sue on behalf of the Diocese, vonRosenberg must not only allege, but also show, that he is either (1) an officer of the

corporation who has been granted this specific power by way of the corporation's by laws or by its board of directions, or, (2) that he is a member of the board of directors which has authorized this suit. It is not alleged in the complaint, nor is there any evidence, that any of these necessary procedures were followed. Therefore, pursuant to the Non Profit Act, vonRosenberg does not have the power to sue on behalf of the Diocese, and therefore, to the extent he is suing on behalf of the Diocese, his claims should be dismissed.[20] Furthermore, he is suing for injuries traceable not to Mark Lawrence but to the Circuit Court of South Carolina whose injunction permits Lawrence and others to use the marks. His alleged injuries are the result of "the independent action of some third party not before the court": State Circuit Court Judge Diane Goodstein.

Dismissal of these claims is also dictated by a well-established limitation on prudential standing: a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499; *see also Elk Grove Unified School Dist. v. Newdow* 542 U.S. 1, 12 (2004)(dismissing case where plaintiff's standing was dependent on the status of his relationship with his daughter which was the subject of a family law dispute in state court). Third-party standing may be appropriate where the party owning the claim is unable to protect its interests, i.e. a minor child. "[A] plaintiff seeking third-party standing in federal court must . . . satisfy the prudential prerequisites of standing by demonstrating a close relation to the injured third party and a hindrance to that

[20] Dismissal of the claims brought by vonRosenberg on behalf of the corporation is also consistent with the common law rule that, generally, a third party is not permitted to sue for a right owned by someone else. In *McAlpine v. Porsche Cars,* the plaintiff brought suit for conversion of an airplane. However, the evidence showed that the airplane was owned by a corporation, not by the plaintiff individually, and as a result, the court dismissed plaintiff's claim for lack of standing. *McAlpine v. Porsche Cars N. Am. Inc*., 428 Fed. Appx. 261, 264-65 (5th Cir. 2010) (upholding dismissal even where plaintiff claimed he was the sole shareholder of the corporation). Similarly, in *Kachmar v. Varone,* the court dismissed plaintiff's claim for lack of standing where plaintiff failed to show any property interest in the liquor license which was at the heart of his claim." *Kachmar v. Varone,* 55 Fed. Appx. 3, 4 (1st Cir. 2002).

party's ability to protect its own interests. *Mid-Hudson Catskill Rural Migrant Ministry, Inc. v. Fine Host Corp*., 418 F.3d 168, 174 (2d Cir. 2005). Where a corporation is capable of suing in its own name, third-party standing is not appropriate:

> Nor was Aries powerless to protect its corporate interests. Pignato had sought and received permission to answer the bankruptcy petition filed against Aries. Thus, he could have requested appointment of a trustee or receiver, or taken a variety of other steps within the confines of Aries' case to have the proper party in interest -- the lessor -- challenge the validity of the lease. He elected not to take that route, but chose instead to make an end run around Aries, and to take action in his own name in the DHI insolvency proceeding. Inasmuch as Aries' legitimate rights, if any, could have been safeguarded and enforced in a proper fashion within its bankruptcy case, there was no necessity to strain to recognize standing on Pignato's part in order to prevent injustice. Appellant's end run carried him well outside the field of play.

In re Dein Host, Inc., 835 F.2d 402, 406-407 (1st Cir. 1987).

Here, there is no allegation or evidence that vonRosenberg is pursuing this suit on behalf of an entity that is incapable of doing so in its own right. In fact, the evidence is to the contrary: the registrant of the marks at issue – the Diocese – has, in fact, initiated an earlier in time proceeding in state court to protect its marks. VonRosenberg had the same status he now alleges (Bishop of the "Diocese") when the Diocese obtained the injunction forbidding the use he now asks this court to sanction.

What remains are vonRosenberg's *individual* claims based on violations of § 1125(a)(1)(A) and § 1125(a)(1)(B) of the Lanham Act. As discussed below, they must also be dismissed for lack of standing.

The first necessary element of constitutional standing is "injury in fact." "Injury in fact" has been defined as "an invasion of a legally protected interest which is (a) concrete and particularized … and (b) actual or imminent …" *Lujan,* 504 U.S. 555, 560. Here, vonRosenberg fails to allege in his Complaint *any injury* that he, personally, has suffered. As such, his

individual claims must be dismissed for lack of constitutional standing. Moreover, as discussed in detail below, vonRosenberg does not have a legally protected interest in the marks at issue.

Another well established limitation on prudential standing is the rule that plaintiff's claims must fall within the zone of interests protected by the law under which he is suing. Section 43(a) of the Lanham Act provides that:

> **(1)** Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which:
>
> **(A)** is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> **(B)** in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by *any person who believes that he or she is or is likely to be damaged by such act.*

15 U.S.C. § 1125(a)(emphasis added).

While the italicized language is admittedly broad and expands standing beyond the registrant, assignee or exclusive licensee of a mark, to establish standing under this section, the plaintiff must show: "a reasonable interest to be protected against the advertiser's false or misleading claims … and a reasonable basis for believing that this interest is likely to be damaged by the false or misleading advertising …" *Ortho Pharm. Corp. v. Cosprophar, Inc*., 32 F.3d 690, 694 (2nd Cir. 1994) (internal quotations and citations omitted).

Furthermore, "it has been held that if the subject of the complaint is a registered trademark, the plaintiff must have some discernible interest in the mark." FEDPROC § 75:490 (citing *Shonac Corp. v. AMKO Intern. Inc.*, 763 F. Supp. 919, 931 (S.D.Ohio 1991)). In *Shonac,* the court held that the plaintiff lacked standing under § 43(a) where it had

> no interest whatsoever in the trademarks which are the subject matter of the instant case … a plaintiff who has no interest in the trade name sought to be protected cannot have standing. This rule is consistent with the reasonable interest test as well as the language of § 43(a). By limiting standing under § 43(a) to plaintiffs who have at least some interest in the name, symbol, product or service for which protection is sought under the Act, the rule … reasonably defines those who may properly be deemed "likely to be damaged." This requirement, or refinement of what "reasonable interest" means, is consistent with broadly construing § 43(a) as a remedial statute. To meet the requirement, the interest asserted would not need to be an exclusive interest, or even necessarily an ownership interest. Thus, the interests of a trustee or the holder of other equitable interests, or even a trade association would meet the requirement. The requirement would not be met, however, where the interest is extremely remote, or, as in the instant case, completely absent. Of course, a plaintiff need not be a trademark owner to assert a claim under § 43(a). At the same time, however, if, as here, the subject matter of a case is a trademark, then the plaintiff *must have some discernible interest in the mark in order to have a reasonable interest and therefore standing to sue under § 43(a).*

Id. (emphasis added).

Here, vonRosenberg, as an individual, does not have a "reasonable" or "discernable" interest in the marks that warrant protection under the Lanham Act. Whatever interest he could conceivably possess would necessarily derive from the marks at issue, which, as set forth above, are owned by the Diocese. In other words, the destiny of vonRosenberg's claims is linked entirely to his alleged position or affiliation with the Diocese, and just as that is unsupported, so are his claims. The interest at issue, proper use of the marks, belongs to the Diocese, as the registered owner of the marks, and potentially those permitted by the Diocese, like Defendant Lawrence, to use the marks. In fact, not only does vonRosenberg not have an interest, of any sort, in the marks, he has been enjoined from using the marks pursuant to the terms of a state court injunction, issued on January 31, 2013, *with the consent of The Episcopal Church.* The injunction identifies 24 people who are authorized to use the marks, and provides that: "No [other] individual, organization, association or entity, whether incorporated or not, may use,

assume, or adopt in any way, directly or indirectly, the registered names and the seal or mark." To argue that one has a protected interest in a mark which he is prohibited from using defies logic and should be dismissed as meritless. Because vonRosenberg has no reasonable or discernable interest in the marks, his Lanham Act claims must be dismissed for lack of standing.

E. Conclusion

In light of the foregoing, vonRosenberg has failed to allege or show facts sufficient to establish constitutional or prudential standing, both of which are required to maintain this suit. As so artfully stated by the First Circuit in *In re Dein Host, Inc.,* 835 F.2d 402, 407, "as surely as strawberries do not grow in the sea, … standing has not taken root in the wilderness of this record. Like a fish out of water or in the wood, [claimant] has no purchase in his own right sufficient to permit him to prosecute this [case]." Therefore, Defendants respectfully request that their 12(b)(1) motion to dismiss be granted for lack of standing.[21]

III. The Anti-Injunction Act, 28 U.S.C. § 2283 requires the dismissal of this action.

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where

[21] The *Rooker-Feldman* doctrine holds that a lower federal district court lacks subject matter jurisdiction to review the final adjudications of any state court. *Safety-Kleen v. Wyche,* 274 F.3d 846, 857 (4th Cir. 2001). Despite its substantial narrowing in 2005, this doctrine still applies in principle to all the facts that are present in this action. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S. Ct. 1517, 1521-22, 161 L. Ed. 2d 454 (2005). vonRosenberg is "challenging the state-court decision," *Davani v. Virginia Dept. of Transp.*, 434 F.3d 712, 718 (4th Cir. 2006) by "*complain[ing] of an injury caused by a state judgment*." *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 87 (2d Cir. 2005) (cited by the Fourth Circuit Court of Appeals with approval in *Davani*, 434 F.3d 712). It cannot be more clear that the injury vonRosenberg complains of is caused by the state judgment than by observing that the remedy for his injury is the exact opposite of the state judgment and that it was only sought after the entry of the state court judgment. Furthermore, under South Carolina law he is a party to the state court proceeding. Finally, vonRosenberg seeks federal court review of a state court order entered before this federal court proceeding commenced. He did not seek a review of the order by Judge Goodstein as the injunction expressly permits. This is a "reviewable" order by the state court even if it is the same court that issued it. Plaintiff, by filing this action with a Lanham Act "label attached," has effectively asked this Court to review the state court injunction. He complains of injury from conduct of Mark Lawrence and the "Does," conduct expressly permitted by the state court order and from which he is excluded. His failure to seek state court review of the existing order (TRO) between the time he alleges he became the "sole representative" of the Diocese (January 26) and the time the injunction was entered (January 31) demonstrates that he now seeks to do what *Rooker-Feldman* forbids: obtain federal court review of a state court order. *Rooker-Feldman* should bar the prosecution of this action in federal court.

necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

28 U.S.C. §2283.

This Act,

> [i]s more than a mere statement of 'a principal of comity'; it represents 'a binding rule on the power of the federal courts' a rule which may not be ignored, even though the state 'proceedings' sought to be stayed 'interfere with a potential federal right…, even when the interference is unmistakably clear' and 'regardless of whether the federal court itself has jurisdiction over the controversy.' It is not to be whittled away by judicial improvisation nor are its exceptions to be 'enlarged by loose statutory construction.

Hartsville Theatres, Inc. v. Fox, 324 F. Supp. 258, 261 (D.S.C. 1971) (Three-Judge District Court: Haynesworth, Simons and Russell, J.J.) (claim dismissed for injunctive and declaratory relief alleging a violation of Plaintiffs First Amendment rights) (footnotes omitted).

The Act is applicable even though the relief sought is a declaratory judgment since "the two-step procedure of serving a declaratory judgment followed by an injunction to support it… would be doing indirectly what could not be done directly." *Hartsville Theatres, Inc.,* 324 F.Supp. at 263;[22] *accord Denny's, Inc. v. Cake*, 364 F3d 521, 528 n. 8 (4th Cir. 2004).[23] The Act applies even though the federal action does not directly seek to enjoin the state court, but is addressed to the parties or seeks to prohibit the results of a state court proceeding. *Imperial Cty, Cal v. Muroz,* 449 U.S. 54, 58 (1980) ("…the Act cannot be evaded by addressing a federal injunction to the parties rather than to the state court."); *Atl. Coast*

[22] The Court added, "the cases are legion that the Declaratory Judgment cannot be used to give relief indirectly that cannot be given directly." *Hartsville Theatres, Inc.,* 324 F.Supp at 263 n.12 (quoting *Rolls-Royce Ltd. Derby, Eng. v. U.S.*, 364 F.2d 415, 419 (Ct. Cl. 1964)).

[23] This "two-step procedure" is precisely what the Plaintiff seeks here. Plaintiff seeks "declaratory and injunctive relief" asking the Court to declare the Defendants' use of the names (as permitted by the state court) to be unauthorized. Exhibit 13, ¶ 1 and Prayer for Relief ¶ 1. The complaint then seeks to enjoin the conduct "declared" unauthorized.

Line R. Co. Brotherhood of Locomotive Engr., 398 U.S. 281, 287 (1970). The Act applies unless the federal court parties are "strangers to the state court proceeding:" *Imperial Cty, Cal,* 449 U.S. at 59-60, that is, one who is neither a party nor in privity with a party to the state court action. *U.S. Steel Corp. Plan for Employee Ins. Benefit v. Musisko,* 885 F. 2d 1170, 1179 (3d. Cir. 1989). Furthermore, what constitutes a "state proceeding" "is to be given a comprehensive meaning." *Hartsville Theatres, Inc.,* 324 F.Supp. at 262 (quoting *Hill v. Martin,* 296 U.S. 393, 403 (1936)). (It "includes all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process.") Finally, "any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atl. Coast Line R. Co.,* 398 U.S. at 297.

Plaintiff vonRosenberg seeks declaratory and injunctive relief. The declaratory judgment and injunction requested, if granted, would preclude Defendant Lawrence (and the "Does") from using the marks of the Diocese, which the State Court injunction says Defendant Lawrence (and certain listed others) alone can use. Plaintiff vonRosenberg is no "stranger" to the state court proceedings. He was personally served with the First Amended Complaint, the Second Amended Complaint, the TRO and the Injunction. *See* notes 5, 6, & 9 *supra*. He alleges to have an express and unique relationship with the Diocese: its Chief Operating Officer and the "sole representative of the Diocese" recognized by TEC. Exhibit 13 ¶ 25, 47 & 48.[24] The Diocese is a party in the state court action. More fundamentally, while Plaintiff vonRosenberg is not personally "named" in the state action, he is a party to those proceedings.

Service of a Complaint upon an unincorporated association makes the unincorporated

[24] The Diocese, a party in the state court action, expressly alleges the opposite.

association **and** its members parties to the action. *Elliott v. Greer Presbyterian Church*, 181 S.C. 84, 186 S.E. 651 (1936); *accord, Crocker v. Barr*, 305 S.C. 406, 409, 409 S.E.2d 368, 370 (1991). Once the association is before the court, the rights of its members will be determined in the state court action. *Graham v. Lloyd's of London,* 296 S.C. 249, 371 S.E. 2d 801 (1988). Neither TEC nor the ECSC are legal entities "separate from the persons who compose [them]." *Graham*, 296 S.C. at 255, 371 S.C. 2d at 804; *Medlin v. Ebenezer Methodist Church,* 132 S.C. 498, 129 S.E. 830 (1925). vonRosenberg became a party when the Complaint was served on the unincorporated association. Judgment in the state court action can now be entered against him *individually*. *Crocker*, 305 S.C. at 409, 409 S.E.2d at 370; *Elliott,* 181 S.C.84, 186 S.E.651.

South Carolina, like many states, has altered the common law by allowing unincorporated associations to be "proceeded against when the name and style of which they are usually known without naming the individual members of the association." S.C. Code of Laws § 15-5-160 (1976). The statute is:

> a convenient procedure by which a Plaintiff can bring the members of an association before the court without naming and serving process upon them individually. Once they are before the court, the liability of the members of the association, if any, is determined by the applicable substantive law.

Graham, 296 S.C. at 255-56, 371 S.E. 2d at 804-05.[25]

As a result, the Anti-Injunction Act applies and this Court must dismiss this action, unless it falls within one of the Act's exceptions.

[25] The principal that an unincorporated association is not a jural person has been applied in federal court to determine that the association's citizenship is determined by the citizenship of its members. *Clephas v. Fagelson, Shonberger, Payne & Arthur* 719 F.2d 92 (4th Cir. 1983) ("The rule enunciated in *Chapman v. Barney*, 129 U.S. 677, 682, 9 S.Ct. 426, 428, 32 L. Ed. 800 (1881) remains the law today."); *Accord Brown v. Protestant Episcopal Church in the United States of America,* 8 F.2d 149, 150 (E.D. La. 1925). A member of an unincorporated association would be bound by a judgment against the unincorporated association. Restatement (Second) of Judgments. §§ 43-61 (1982); *See, e.g., Brooks v. Trustees of Dartmouth College*, 161 N.H. 690 20 A.3d 890, 894-895 (2011).

A. Exceptions

"Unless one of the exceptions governs the order, federal courts are 'absolute[ly] prohibit[ed]' from enjoining a state judicial proceeding." *Venda Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 630 (1977); *Mitchum v. Foster,* 407 U.S. 225, 228-29 (1972); *Denny's Inc. v. Cake,* 36 F2d 521, 528 (4th Cir. 2004). The exceptions are where the injunction (1) is expressly authorized by Act of Congress; (2) is necessary in aid of the federal court's jurisdiction; or (3) is necessary to protect or effectuate the federal court's judgments. These exceptions are to be narrowly applied and may not be "enlarged by loose statutory construction," *Chick Kam Choo v. Exxon Corp.,* 486 U.S. 140, 147 (1988), or "whittled away by judicial improvisation," *Richman Bros.,* 348 U.S. at 514, with doubts "resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atl. Coast Lines,* 398 U.S. at 297. Because none of the exceptions to the Anti-Injunction Act is present in this case, the Anti-Injunction Act bars this action.

1. There is no express statutory authorization.

State and federal courts have concurrent jurisdiction over Lanham Act claims. *Bd. of Regents of U. of Wis. Sys. v. Phoenix Intern. Software, Inc.,* 653 F.3d 448, 4651 (7th Cir. 2011); *Alpharama, Inc. v. Pennfield Oil Co.,* 411 F.3d 934, 938 (8th Cir. 2005); *Aquatherm Indus. Inc. v. Fla. Power & Light Co.,* 84 F.3d 1388, 1394 (11th Cir. 1996). The congressional act which provides express statutory authorization "must have created a specific and uniquely federal right or remedy enforceable in a federal court of equity, which can be given its intended scope *only* by the stay of a state court proceeding." The Lanham Act remedies are not "specific and uniquely federal" as they are enforceable by the state courts and there is no suggestion that the scope of the Act's remedies can be accomplished "only by a stay of a state court proceeding."

State courts have equal powers of enforcement and "the vesting of concurrent jurisdiction would seem to imply a vote of confidence in the integrity and competence of state courts to adjudicate [these] claims." *Casa Marie, Inc. v. Super. Ct. of Puerto Rico for Dist. of Arecibo,* 988 F.2d 252 (1st Cir. 1993) (Anti-Injunction Act applied to dismiss Title VIII claims where state court had concurrent jurisdiction).

The Lanham Act does not provide express authorization to enjoin state proceedings.

2. An injunction is neither "necessary in aid of federal jurisdiction," nor is it "necessary to protect or effectuate its judgments."

A federal court may issue an injunction where it is "necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. "Both exceptions to the general prohibition of § 2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Atl. Coast Line,* 398 U.S. at 295. Neither of these exceptions are applicable. State and federal court jurisdiction of Lanham Act claims is concurrent and even where it is claimed that the state proceeding "unmistakably" interferes with a protected federal right "even a pre-emptive issue, the proper course is to seek resolution of that issue by the state court." *Chick Kam Choo,* 486 U.S. at 149-150; *Atl. Coast Line,* 398 U.S. at 294. An injunction against the state proceeding is not necessary in aid of this court's jurisdiction and there is no federal judgment that is necessary to be protected or effectuated. The state court action is not relitigating issues previously decided by a judgment of a federal court. *Attick v. Valeria Assocs., L.P.,* 835 F.Supp. 103, 115 (S.D.N.Y. 1992) (this " 'relitigation exception' applies only to matters already fully adjudicated, and judgment already entered, by a federal court."); *accord Garcia v. Bauza-Salas,* 862 F.2d

905, 910 (1st Cir. 1988).

The Anti-Injunction Act precludes the form of relief sought by Plaintiff in the present case because the effect of what Plaintiff seeks is to enjoin South Carolina state court proceedings, and none of the statutory exceptions permit the issuance of an injunction. Therefore, Plaintiff's requested relief should be denied, and the Complaint should be dismissed.

IV. The waiver/agreement with respect to litigation regarding the marks requires dismissal

Plaintiffs' action must also be dismissed on the grounds of waiver of the right to dispute questions respecting the control and use of the marks at issue in federal court, and/or agreement to resolve such issues in state court. The state court consent order of injunction is an order, agreed upon, that effectively concludes that: 1) Plaintiffs may not use the marks at issue; 2) any request to lift or dissolve or change the consent order will be made to the state court; and 3) until the ***state court*** dissolves or modifies the consent injunction order, the order stands. This is an agreement by Plaintiffs to litigate any further issues with respect to control and/or use of the marks only in the state court, and/or a waiver by Plaintiffs of the right to seek to litigate such issues in federal court. *Eason v. Eason,* 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009) ("Waiver is a voluntary and intentional abandonment or relinquishment of a known right."). Parties may waive rights to litigate in a certain venue or forum. *See*, *e.g.*, *Landvest Associates v. Owens,* 274 S.C. 334, 263 S.E.2d 646 (1980) (A defendant's right, in a civil action, to have the case heard in his home county is a substantial one, but one which may be waived). A consent order may operate as a waiver. *Richland County v. Lowman*, 307 S.C. 422, 415 S.E.2d 433 (Ct.App. 1992)(consent order of reference constituted waiver of right to jury trial). Finally, a consent order is a form of agreement, and "[i]t is settled ... that parties to a contract may agree in advance

to submit to the jurisdiction of a given court…." *Nat'l Equip. Rental, Ltd. v. Szukhent,* 375 U.S. 311, 315–16, 84 S.Ct. 411, 11 L.Ed.2d 354 (1964). Hence, the Plaintiffs are barred from attempting to litigate any issues regarding the control and use of the marks at issue in federal court. They have agreed, by consent order, to waive their rights to do so. They have instead agreed, by the terms of the consent order, to litigate such issues in the state court, where they are currently bound by the injunction to which they agreed.

V. The court should abstain from exercising jurisdiction to issue a declaratory judgment.

Plaintiff's action is for "declaratory and injunctive relief." Exhibit 13 ¶ 1. He asks this court to "declare that Bishop Lawrence's unauthorized use of the Diocese's marks violates the Lanham Act." *Id.* at 19 Prayer For Relief ¶ 1. Without that declaration, there is no unauthorized use. The balance of his requested relief must flow from an unauthorized use declaration.

A federal district court has discretion whether to exercise its jurisdiction to consider declaratory relief or abstain. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288, 115 S. Ct. 2137, 2137 132 L. Ed. 2d 214 (1995) (Discretion is conferred on the courts "rather than an absolute right upon the litigant"); *Brillhart v. Excess Inc. Co.,* 316 U.S. 491, 62 S. Ct. 1173, 86 L. Ed. 1620 (1942); *United Capitol Ins. Co. v. Kapiloff,* 155 F.3d 488, 493 (4th Cir. 1998) ("district courts have great latitude in determining whether to assert jurisdiction over declaratory judgment actions"). Where "a parallel or related proceeding is pending in state court" district courts have "wide discretion" to decline jurisdiction. *New Wellington Fir. Corp. v. Flagship Develop. Corp.,* 416 F.3d 290, 297 (4th Cir. 2005); *Centennial Life Ins. Co. v. Poston,* 88 F.3d 255, 257 (4th Cir. 1996). The district court should determine whether the controversy "can better be settled in the proceeding pending in state court," *Wilton,* 515 U.S. at 282, 115 S. Ct. at 2137, by weighing

principles of "federalism, efficiency and comity that traditionally inform a federal court's discretionary decision whether to abstain from exercising jurisdiction over state law claims in the face of parallel litigation in the state courts." *Nautilus Ins. Co. v. Winchester Homes, Inc.,* 15 F.3d 371, 376 (4th Cir. 1994).

The Fourth Circuit has articulated four factors to assist a district court in balancing the federal and state interests:

> (1) whether the state has a strong interest in having the issues decided in its courts; (2) whether the state courts could resolve the issues more efficiently than the federal courts; (3) whether the presence of "overlapping issues of fact or law" might create unnecessary "entanglement" between the state and federal courts; and (4) whether the federal action is mere "procedural fencing," in the sense that the action is merely the product of forum-shopping.

Kapiloff, 155 F.3d at 493-94 (4th Cir. 1998); *see also Harleysville Mutual Inc. v. Cambridge Building Corp.*, 2006 WL 2038302 (D.S.C. 2006).

South Carolina has a strong interest in having the issue decided by its courts. This case requires the determination of issues involving two residents of South Carolina, vonRosenberg and Lawrence.[26] The marks over which this dispute arises are owned by a South Carolina Corporation and are registered in South Carolina. The incipient issue is corporate control of a South Carolina corporation, a state interest strongly recognized by federal courts. *See n. 17 supra.* Furthermore, South Carolina has a strong interest in preventing collateral attacks on the integrity of its judicial system. *Harper v. Pub. Serv. Comm'n of W.VA.*, 396 F.3d 348, 352 (4th Cir. 2005) (Attacks on "state court judgments cut to the state's ability to operate its own judicial system…"). Finally, South Carolina has a strong interest (specifically recognized in the context

[26] If the "Does" are the 27 other named persons permitted by the state court to use the Diocese's marks, they are all residents of South Carolina.

of a dispute like this by the United States Supreme Court in *Jones v. Wolf*) in applying South Carolina's choice as to how church disputes must be resolved: if the issue is capable of being resolved using neutral principles of law, it must be resolved that way without regard to whether a church is hierarchical or congregational and without any deference to church authorities. *All Saints Parish Waccamaw,* 385 S.C. at 444, 685 S.E. 2d at 171-72.

Secondly, there is greater efficiency in the state court's resolution of the issue of corporate control. The state action was first filed, has all the parties (corporations and unincorporated associations and their members) before it who have an interest in the corporate control of the Diocese: the Diocese, the Trustees, 35 other church corporations, The Episcopal Church and The Episcopal Church in South Carolina. VonRosenberg is also a party as a member of these associations. With the exception of The Episcopal Church, all are South Carolina corporations or unincorporated associations and 15 of the 35 church corporations were incorporated by the South Carolina legislature. Additionally, the state court action has not been dormant. The State court has issued three orders, a Temporary Restraining Order, a Temporary Injunction and a Consent Order allowing the amendment of Plaintiff's Complaint. Discovery requests have been served on the Defendants and there are pending two unresolved motions: a Motion for Partial Summary Judgment on the issue of corporate control of the Diocese and a Motion to hold TEC and the ECSC in contempt for violation of the injunction. Exhibit 19 & 20. Greater efficiency is also found in the fact both cases turn on the application of South Carolina law: internal corporate control, real property, unincorporated associations and the application of South Carolina's method for resolving church disputes.

As to the third factor, unnecessary entanglement because of over-lapping issues of fact [and] law, the issues of corporate control and the right to use the marks of the Diocese are

already before the state court and the subject of two state court orders. This central question is identical in both federal and state court. Obviously, entanglement is clearly presented.

Finally, the facts strongly support the fourth factor, whether the federal suit is "procedural fencing." *See also, Great Am. Ins. Co. v. Gross,* 468 F.3d 199, 212 (4th Cir. 2006) (procedural fencing is when "a party has raced to a federal forum in an effort to get certain issues that are already pending before the state courts resolved first in a more favorable forum").

It is hard to imagine a greater example of "procedural fencing" than is present here. The Plaintiff and those closely aligned with him, TEC and the other members of what is now called the ECSC began use of the Diocese's marks as early as November 2012, in newspapers, on websites, in email communications and otherwise. The Diocese continued to use the marks that it registered with the South Carolina Secretary of State in 2010. VonRosenberg, TEC or any of the other persons who believe Mark Lawrence's use was unauthorized could have filed suit in federal court. They did not. After the Diocese and the other state court Plaintiffs filed suit in state court and before any injunction was issued, vonRosenberg and any other injured party could have filed suit in federal court. They did not. After vonRosenberg was personally served with the TRO and after he was named Bishop of the ECSC (or as he alleges in this court, became the "sole representative" of the Diocese), he could have asked the state court not to enter a preliminary injunction. He did not. Rather he brought this suit in federal court based on a claim of control over the Diocese that is directly at odds with both the state court Order and TEC's consent to that Order. "Such conduct is the sort of forum shopping against which abstention seeks to guard." *Riley v. Dozier Internet Law, PC*, 371 Fed.Appx. 399, 403 (4th Cir. 2010).[27]

[27] In *Riley*, Dozier Internet Law ("DIL"), the co-defendant in the federal action, has sued Riley, the federal plaintiff, in Virginia state court 29 days before the federal court action was convened. The state court action alleged that Riley was infringing on DIL's trademarks that had been registered in Virginia. Riley's federal court action asked

All of these factors strongly favor this court's dismissal of the Plaintiff's request for declaratory relief.

VI. The court should abstain from exercising jurisdiction.

A. The Younger Abstention Doctrine applies.

The Supreme Court has recognized several doctrines under which a federal court must abstain from hearing a case over which it would otherwise have jurisdiction. In *Younger v. Harris*, 401 U.S. 37 (1971), the United States Supreme Court established that abstention is mandated in the criminal context if a State's interest in the proceedings are so important that the exercise of federal judicial power would disregard the comity between the States and the Federal government. In a subsequent opinion, *Pennzoil Co. v. Texaco. Inc.*, 481 U.S. 1 (1987), *Younger* was extended to civil actions. *Younger* "is fully applicable to noncriminal judicial proceedings when important state interests are involved," *Martin Marietta Corp. v. Md. Comm'n on Human Relations*, 38 F.3d 1392, 1396 (4th Cir. 1994) (citing *Middlesex County Ethics Comm. v. Garden St. Bar Assn,* 457 U.S. 423, 432, 102 S.Ct. 2515, 2521, 73 L.Ed.2d 116 (1982).[28]

Younger abstention is appropriate when: (1) there is an ongoing state judicial proceeding, (2) that implicates important state interests, and (3) there is an adequate opportunity to present

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the court to declare that he had not infringed and asked for injunctive relief against claims of infringement. The district court abstained, relying on the Younger Abstention doctrine and Riley appealed that order. The federal circuit affirmed the abstention. In applying the *Kapiloff* factors, the court found: (1) that Virginia's strong interest in "adjudicating claims involving a state-registered trademark is both clear and compelling;" (2) there was greater efficiency for the state court to resolve the matter: "the first suit should have priority" and efforts would be duplicated resulting in piecemeal litigation if the federal court did not dismiss; (3) that there would be unnecessary entanglement because of the overlapping legal and factual issues surrounding the claims of infringement and lack thereof; and (4) that Riley's federal suit "appears to be more procedural fencing": Riley "did not want to be in state court so Riley brought his own suit in federal court, requesting a declaration that he was not liable to DIL in state court."

[28] "*Younger* serves as an exception to the traditional rule that federal courts should exercise jurisdiction conferred on them by statute." *Martin Marietta*, 38 F.3d at 1396; *See Colorado River Water Conservation Dist. v. U.S.,* 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976).

the federal claims in the state proceeding." *Employers Res. Mgmt. Co., Inc. v. Shannon*, 65 F.3d 1126, 1134 (4th Cir. 1995) (citing *Middlesex,* 457 U.S. 432).[29]

There is an on-going state judicial action commenced three months before the filing of this action. That action not only implicates important state interests but it also implicates many more important state interests than the intellectual property rights present in this action. Additionally, the present suit also implicates another important State interest. It is a challenge to an injunction rendered by one of South Carolina's Circuit Courts. This attack on "state court judgments cuts to the state's ability to operate its own judicial system, a vital interest for *Younger* purposes." *Harper v. Pub. Serv. Comm'n of W.VA.*, 396 F.3d 348, 352 (4th Cir. 2005); *see, e.g., Pennzoil,* 481 U.S. at 12-13, 107 S.Ct. 1519. There is no question that there is an adequate opportunity to present any federal claims in the state proceeding.[30] The issue of corporate control is squarely presented by the Complaint and the injunction in the state proceeding to which vonRosenberg is a party.

There has been no "substantial progress" in this case, as the parties have not moved beyond the pleading stage.

B. The Colorado River Abstention Doctrine applies.

"Generally, as between state and federal courts, the rule is that 'the pendency of an action

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[29] "Abstention will not be required unless the "state court proceedings [have been] initiated 'before any proceedings of substance on the merits have taken place in the federal court.' " *Hawaii Housing Authority,* 467 U.S. at 238, 104 S.Ct. at 2328 (quoting *Hicks v. Miranda,* 422 U.S. 332, 349, 95 S.Ct. 2281, 2292, 45 L.Ed.2d 223 (1975)). "The doctrine also recognizes that state courts are fully competent to decide issues of federal constitutional law." *Martin Marietta*, 38 F.3d at 1396 (citing *Lynch v. Snepp,* 472 F.2d 769, 774 (4th Cir.1973), *cert. denied,* 415 U.S. 983, 94 S.Ct. 1576, 39 L.Ed.2d 880 (1974)).

[30] "But it should never be forgotten that the Constitution literally calls state judges by name (there were no federal judges) and puts upon them the obligation to apply the supreme Law of the Land. U.S.Const. art. VI. Because of the costs involved, in terms of both time and money, the divisive effect of unnecessary friction between coordinate courts, and the clear obligation of state courts to decide questions arising under the Constitution, U.S.Const. art. VI; *Erdmann v. Stevens*, 458 F.2d 1205, 1211 (2d Cir. 1972), there is a presumption against federal interference. *See* The Supreme Court, 1970 Term, 85 Harv.L.Rev. 3, 303 (1971)." *Lynch v. Snepp*, 472 F.2d 769, 774 (4th Cir. 1973)

in the state court is no bar to proceedings concerning the same matter in the [f]ederal court having jurisdiction.'" *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).[31] Nevertheless, there are times when a federal court should abstain from hearing a case based upon "principles [that] rest on considerations of 'wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.'" *Id*. (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)). These "circumstances, though exceptional, do nevertheless exist." *Id*. at 818.

Under *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800 (1976), a federal court is to evaluate six factors to determine whether "exceptional circumstances" exist warranting a stay based on wise administration of judicial resources:

> (1) whether the subject matter of the litigation involves property where the first court may assume *in rem* jurisdiction to the exclusion of others; (2) whether the federal forum is an inconvenient one; (3) the desirability of avoiding piecemeal litigation; (4) the relevant order in which the courts obtained jurisdiction and the progress achieved in each action; (5) whether state law or federal law provides the rule of decision on the merits; and (6) the adequacy of the state proceeding to protect the parties' rights.

Great Am. Ins. Co. v. Gross, 468 F.3d 199, 207-08 (4th Cir. 2006). The Supreme Court has "declined to prescribe a hard and fast rule" for determining whether *Colorado River* abstention is appropriate. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983); *Gannett Co., Inc. v. Clark Const. Group, Inc.*, 286 F.3d 737, 744 (4th Cir. 2002). *Colorado River* abstention is available where there are "parallel" state and federal proceedings.[32] "This factor, as

[31] This rule "stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Id*. (citations omitted).

[32] Parallel: Substantially the same parties litigating substantially the same issues in different forums. *New Beckley Min. Corp. v. Int'l Union, United Mine Workers of Am.*, 946 F.2d 1072, 1073 (4th Cir. 1991); *Sto Corp. v. Lancaster*

with the other *Colorado River* factors, is to be applied in a pragmatic, flexible manner with a view to the realities of the case at hand." *Moses H. Cone Mem'l. Hosp.,* 460 U.S. at 21.

C. Parallel Proceedings

The state court proceeding and this federal proceeding are parallel. In one form or another, the parties in this lawsuit consist of the same individual faction members involved in the state suit. The federal lawsuit may appear to be a straightforward trademark-infringement and false advertising action under the Lanham Act, the substance of the lawsuit seeks the federal court to declare who controls the South Carolina non-profit corporation who owns the marks, which is the same lawsuit that is pending in state court. Both lawsuits seek a determination of who constitutes the corporation and who is entitled to the corporation property. Even the ownership of the specific marks at issue in this case is before the state court. Even with the federal cause of action, the proceedings in this case can accurately be characterized as parallel to the state court action because the proceedings involve "substantially the same parties" litigating "substantially the same issues." Whether the proceedings are parallel is not about determining how close to being identical are the parties and issues. *See Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc.,* 962 F.2d 698, 700 (7th Cir. 1992); *AAR Int'l, Inc. v. Nimelias Enterprises* 962 F.3d 510, 518 (7th Cir. 2001) ("the mere presence of additional parties or issues in one of the cases will not necessarily preclude a finding that they are parallel.") Otherwise, "only litigants bereft of imagination would ever face the possibility of an unwanted abstention order, as virtually all cases could be framed to include additional issues or parties." *Ambrosia Coal v.*

Homes, Inc., 11 F. App'x 182, 187 (4th Cir. 2001) ("the parties only need to be substantially the same for the *Colorado River* abstention doctrine to apply").

Hector Carlos Pages Morales, 368 F.3d 1320, 1329-30 (11th Cir. 2004).[33] "The question is not whether the suits are formally symmetrical, but whether there is a 'substantial likelihood' that the foreign litigation 'will dispose of all claims presented in the federal case.' " *AAR Int'l. Inc. v. Nimelias Entrs. S.A.*, 250 F.3d 510, 518 (7th Cir. 2001) (quoting *Day v. Union Mines Inc.,* 862 F.2d 652, 656 (7th Cir. 1988).

D. Colorado River Factors

Since the federal proceedings are parallel to the state proceedings, the Court must evaluate whether, in light of the *Colorado River* factors, the court should "dismiss the case if 'the determinative issues will unfailingly be resolved within the parameters of the state-court litigation ... as no further action by the district court is anticipated.' " *Sto Corp. v. Lancaster Homes, Inc*., 11 F. App'x 182, 189 (4th Cir. 2001) (quoting *Cox v. Planning Dist. I Community Mental Health & Mental Retardation Servs. Bd.,* 669 F.2d 940, 943 (4th Cir. 1982)). "However, if the federal case has a chance of continuing even after the resolution of the state case, a stay pending the resolution of the state suit is the appropriate disposition in federal court." *Id*.; *see Kelser v. Anne Arundel County Dep't of Soc. Servs.,* 679 F.2d 1092, 1094 (4th Cir.1982).

With the exception of the "inconvenience" factor[34], all of the *Colorado River* factors weigh in favor of dismissing the case. The first factor is whether the subject matter of the litigation involves property where the first court may assume in rem jurisdiction to the exclusion of others. The property sought is real, personal, and intellectual property located in South Carolina held by a South Carolina non-profit corporation. This factor weighs in favor of the

[33] *See Interstate Material Corp. v. City of Chicago,* 847 F.2d 1285, 1288 (7th Cir. 1988) ("The addition of the federal defendants in the federal suit by itself does not destroy the parallel nature of the case. If it did, parties could avoid the doctrine of *Colorado River* by the simple expedient of naming additional parties.").

[34] The "inconvenience" factor does not way in favor of a stay in this case because the federal and state courts are both located in Charleston area.

application of *Colorado River* abstention, as the parallel state court litigation in South Carolina also puts South Carolina residents' property at issue and such jurisdiction may be assumed to the exclusion of all other courts.

The third factor is the desirability of avoiding piecemeal litigation. Obviously, this case is itself piecemeal litigation. A ruling by this Court regarding the identity and control of the South Carolina non-profit corporation and the ownership of the marks would inevitably affect the disposition of the property before the state court. Further, an injunction by this court on the relief the Plaintiff has sought would prevent the use of the marks by the persons so empowered under the state court's temporary injunction. Such a ruling would result in "piecemeal" adjudication concerning the corporation's property since the Court's ruling would not dispose of the remaining property held by the corporation.

South Carolina law, not federal law, provides the rule of decision on the identity and ownership issues. *See Jones*, 443 U.S. at 601 ("The State has an obvious and legitimate interest in the peaceful resolution of property disputes, and in providing a civil forum where the ownership of church property can be determined conclusively."). Only after these preliminary issues are determined can the Court reach the Lanham Act questions. Given the applicability of state law, the state court is more than adequately equipped to protect the rights of Plaintiff vonRosenberg, as the party invoking federal jurisdiction.

The state court action was filed on January 4, 2013. Three orders, including a consent temporary injunction and an order permitting the filing of a second amended complaint adding an additional defendant have been entered by that court. All pleadings and orders have been served on the state court defendants and those in active concert or participation with the defendants, including Plaintiff vonRosenberg. The state court defendants have now answered

and counterclaimed against all of the plaintiffs and have added counterclaim defendants. The plaintiffs and the defendants have served Discovery. The posture of the state court case favors abstention here.

Colorado River abstention is appropriate. Judicial economy and a desire to avoid claim splitting, combined with a complete lack of federal connection to the control issues in this case, weigh heavily in favor of abstention. Defendant accordingly respectfully requests the Court dismiss the case pursuant to this abstention doctrine.

VII. Alternatively, this court should stay this action pending the state court's resolution of the issue of corporate control.

In a similar legal dispute arising out of the withdrawal of a diocese from TEC, the District Court for the Northern District of Texas found *Colorado River* abstention was the appropriate method for dealing with a lawsuit asserting Lanham Act claims where there already was a parallel state court case. *Episcopal Diocese of Fort Worth v. The Rt. Rev. Jack Leo Iker*, 4:10-CV-700-Y (N.D. Tex. January 6, 2011) ("Fort Worth"). Exhibit 21 (Order Staying Proceedings).

The central issue in Fort Worth was the right to control the Diocese's property including its seal and service marks. *Id.* at 2. A state court action was initially brought by the TEC faction in the name of the Diocese. The trial court barred the attorneys from the TEC faction from representing the Diocese because the attorneys could not establish their authority to do so under Texas law. The Court of Appeals then granted a writ of mandamus not only barring the attorneys but also directing the trial court to strike the pleadings filed by those attorneys. Thereafter, an amended complaint was filed in the state court action with individuals from the TEC faction as Plaintiffs. The attorneys for the TEC faction then filed an action in federal court,

again in the name of the Diocese, claiming ownership of the Diocese's service marks and alleging that the Bishop of the non-TEC faction was liable under the Lanham Act for trademark infringement and dilution. The action sought declaratory and injunctive relief, as well as damages and attorneys' fees. *Id.* at 5. The non-TEC faction then sought to intervene, also in the name of the Diocese, alleging lack of authorization to sue, malicious prosecution and abuse of process for filing the federal suit in light of the state ruling and seeking Rule 11 sanctions and attorneys' fees.

The federal court found that there were parallel proceedings:

> While in form the instant lawsuit may appear to be a straight forward trademark infringement and dilution action under the Lanham Act, it is in substance, the same lawsuit as the one pending in state court, both actions seek a determination of who constitutes the true Diocese and Corporation and who is entitled to the church property.

Id. at 8-9.

The federal court further found that the state court had assumed jurisdiction over the Diocese's property and that a federal ruling on ownership would "result in 'piecemeal' adjudications concerning the Diocese's property because the Court's ruling would not dispose of the remaining property held by the Corporation for the benefit of the Diocese." *Id.* at 10. The district court finally found that state law provided the rule of decision on identity and ownership, making, the Lanham Act issues secondary to this resolution. Therefore, the state court was better suited to decide. *Id.* at 11. The district court stayed the federal action "pending the state court's determination as to the true identity of the Diocese and Corporation and the proper disposition of the Diocese's property."

It is respectfully submitted that this action should be dismissed or that in the alternative that it should be stayed.

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